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## Office of the Attorney General of the State of Delaware

### Attorney General Opinion No. 26-IB19

May 1, 2026

#### **Via Email**

LaKisha Heath  
[lakisha.a.heath@gmail.com](mailto:lakisha.a.heath@gmail.com)

**RE: FOIA Petition Regarding New Castle County**

Dear Ms. Heath:

We write in response to your correspondence, alleging that New Castle County violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA"). We treat this correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 of whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that the County did not violate FOIA by withholding access to the requested records.

#### **Background**

On March 10, 2026, you submitted a FOIA request to New Castle County, seeking copies of all public records related to a sewage backup and flooding incident that occurred on your property. You state the request includes any records referencing certain construction companies and any affiliated contractors, subcontractors, engineers, consultants, or project managers working on behalf of these entities or the County. Your request specified the scope of requested records, which included, but was not limited to, eighteen categories of records. The request also provided a list of keywords to use for searches, where applicable, including the name of your subdivision, "sewer backup," "sewage overflow," and other terms.<sup>1</sup>

The County denied this request in its entirety, citing 29 *Del. C.* § 10002(o)(9), the exemption for records pertaining to pending or potential litigation. The County noted that you had

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<sup>1</sup> Petition.

previously communicated that you had directed your counsel to start legal action against the County regarding this incident at your property. This Petition followed.

In the Petition, you point out that no litigation is pending, and any statement of intent to file litigation was over four months ago and no litigation was filed, which is not sufficient to invoke Section 10002(o)(9). You contend that any prior threat of litigation was not directed at the County, but exclusively at the County's contractor, and the County cannot invoke this potential litigation exemption if you have a dispute aimed at a third party. Additionally, you allege that the exemption was applied in an overbroad and improper manner because the County failed to review records individually and disclose all nonexempt, reasonably segregable portions. You argue that the records you seek reflect the County's governmental functions, which are the type of records FOIA intended to make transparent. Finally, you contend that Section 10002(o)(9) was merely intended to shield attorney work product and active litigation strategy; it was not meant to protect "routine public infrastructure records from a displaced homeowner seeking answers."<sup>2</sup> The Petition then listed nine categories of the requested records believed to be improperly denied, including the related incident records, and contracts between the County and the affiliated construction entities regarding any sewer, stormwater, drainage, or construction projects.

On April 14, 2026, the County, through its legal counsel, responded to your Petition. The County maintains that its denial of access to these records is appropriate under FOIA. The County asserts that these circumstances meet the two-part test for applying the potential litigation exemption set forth in case law. The County points out that the first part of the test requiring a showing that litigation is reasonably foreseeable or likely is satisfied, as you sent a formal notice of your complaint to the County and others on September 5, 2025. You later followed up with an October 22, 2025 email, which was directed to the County, among others, stating you "gave [your] lawyer the green light to file suit since [the recipients] refuse to respond."<sup>3</sup> The second part of the test requires that the requested documents have a clear nexus to the subject matter of the litigation, which the County asserts was met because all requested records relate to the incident on your property and to the County's relationship with the contractor doing the work at the time of the incident. In support of this, the County attached copies of the referenced 2025 emails and the affidavit of the Public Works General Manager who received them. The County also enclosed the affidavit of the Sewer Operations Manager, who attested that this County contractor was performing cleaning and inspection work in your neighborhood; you informed the County of the backup and damage; the County performed a courtesy clean-up; and the County instructed the contractor to contact you. In addition, the County enclosed a copy of its Risk Management's October 30, 2025 response to your property damage claim, which advised that your claim was denied and noted the two-year statute of limitations for filing an action to recover damages.

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<sup>2</sup> *Id.*

<sup>3</sup> Response.

## Discussion

Delaware's FOIA law "was enacted to ensure governmental accountability by providing Delaware's citizens access to open meetings and meeting records of governmental or public bodies, as well as access to the public records of those entities."<sup>4</sup> FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.<sup>5</sup> The public body has the burden of proof to justify its denial of access to records.<sup>6</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>7</sup>

The County asserts that the requested materials are exempt under the potential litigation exemption. Section 10002(o)(9) exempts "records pertaining to pending or potential litigation which are not records of any court."<sup>8</sup> To apply this exemption, the Superior Court of Delaware adopted a two-prong test: "(1) litigation must be likely or reasonably foreseeable; and (2) there must be a 'clear nexus' between the requested documents and the subject matter of the litigation."<sup>9</sup> "When determining whether litigation is 'likely or reasonably foreseeable,' the public body should look for objective signs that litigation is coming."<sup>10</sup> These signs may include a "written demand letter in which a claim is asserted, or action is demanded, [which] may give rise to a proper inference that litigation will soon follow."<sup>11</sup> Other indicators may include prior litigation between the parties, proof of ongoing litigation with similar claims, or retention of legal counsel with respect to the claim at issue and expression of an intent to sue. These are examples of potential signs, but whatever indicator is used, a public body must be able to point to a realistic and tangible threat of litigation with reference to objective factors.

In this case, we determine the first prong of this potential litigation exemption test is met, as objective factors signaled that litigation was likely or reasonably foreseeable. Specifically, you filed a formal notice of claim related to this incident and later expressly indicated that you had an attorney and litigation would be initiated. Both communications were addressed to the County, in addition to other parties. The second prong is also satisfied, as the request itself – seeking all County records relating to the sewage incident at your property on that date, to include eighteen

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<sup>4</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

<sup>5</sup> 29 Del. C. § 10003(a).

<sup>6</sup> 29 Del. C. § 10005(c).

<sup>7</sup> *Judicial Watch, Inc.*, 267 A.3d at 1008-1012.

<sup>8</sup> 29 Del. C. § 10002(o)(9).

<sup>9</sup> *ACLU v. Danberg*, 2007 WL 901592, at \*4 (Del. Super. Mar. 15, 2007).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

specified categories of such records – has a clear nexus to the relevant subject matter of this potential litigation. As such, we determine that the County appropriately applied the potential litigation exemption to this request.

**Conclusion**

Based on the foregoing, we conclude that the County did not violate FOIA by withholding access to the requested records.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: Iran J. Garcia Domenech, Assistant County Attorney