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Office of the Attorney General of the State of Delaware

Attorney General Opinion No. 26-IB37

June 30, 2026

Via Email

Dr. Amy Roe
amywroe@gmail.com

RE: FOIA Petition Regarding the City of Newark

Dear Dr. Roe:

We write in response to your correspondence alleging that the City of Newark 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 City violated FOIA by failing to meet its burden to demonstrate the requested executive session minutes may be properly withheld.

Background

On April 20, 2026, you submitted a FOIA request to the City of Newark, seeking "the executive session minutes from [C]ity [C]ouncil in 2013 and 2014 that pertain to The Data Centers LLC."¹ On May 11, 2026, the City denied access to these records, stating that the attorney-client privilege still applies to those matters discussed in these executive sessions and the disclosure of the minutes and other attorney-client communications would defeat the lawful purpose of the executive sessions. The City asserts that "[a]ll the executive sessions held regarding The Data Centers, LLC (between 2013 and 2014) consisted of attorney-client privileged communications."² This Petition followed.

¹ Petition.

² *Id.*

The Petition alleges that FOIA requires minutes to be made available for public inspection, and executive session minutes may only be withheld from disclosure “so long as public disclosure would defeat the lawful purpose for the executive session, but no longer.”³ You point out that the City does not have any pending or potential litigation related to these minutes, and the statute of limitations has passed for any possible litigation. You allege that there is no legitimate reason to continue to withhold the executive session minutes in perpetuity, simply because of the attorney-client privilege.

On June 9, 2026, the City, through its legal counsel, responded to this Petition (“Response”), arguing the City’s response to this request was proper. The City states that the City held eleven executive sessions for the purpose of receiving legal advice from City attorneys regarding a proposed data center. These agendas list the purposes for these sessions as pending or potential litigation and the discussion of the content of documents excluded from the definition of “public record.” The City Solicitor provided an affidavit stating that he reviewed these minutes and affirms they are clearly protected and privileged attorney-client communications. The City states that only the client, the City, can waive the attorney-client privilege, and to date there has been no such waiver. The City argues that this privilege does not expire after the litigation is resolved, and this privilege can be perpetual. The City contends that these protections extend to executive sessions conducted under 29 *Del. C.* § 10004(b)(4) and that Delaware authorities have repeatedly confirmed that privileged attorney client privilege communications and work product discussed during executive sessions are exempt from disclosure. Thus, the City asserts that FOIA preserves the confidentiality of legal advice and executive session litigation strategy, attorney memoranda, and attorney work product unless the government knowingly waives those protections. Here, the City maintains that releasing the minutes would defeat the lawful purpose of those executive sessions.

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.”⁴ The public body has the burden of proof to demonstrate with compliance with the FOIA statute.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶

³ *Id.*

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

⁵ 29 *Del. C.* § 10005(c).

⁶ *Judicial Watch, Inc.*, 267 A.3d at 1008-1012.

FOIA provides that a public body's meetings must be open to the public, with limited exceptions.⁷ A public body may meet in executive session for certain purposes, including "[s]trategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body" and "[d]iscussion of the content of documents, excluded from the definition of "public record" in § 10002 of this title where such discussion may disclose the contents of such documents."⁸ Additionally, Delaware's FOIA requires public bodies to "maintain minutes of all meetings, including executive sessions" and to "make such minutes available for public inspection and copying as a public record."⁹ "Such minutes or portions thereof, and any public records pertaining to executive sessions conducted . . . may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose of the executive session, but no longer."¹⁰

Section 10004(b)(4) does not permit a public body to enter into executive session solely because it will be receiving legal advice; this exception sets a higher bar – requiring the public body to show that the attorney's legal advice relates to collective bargaining or pending or potential litigation and that an open session would have an adverse effect on the bargaining or litigation position of the public body.¹¹ This Office has previously decided that an executive session for the purpose of discussing an attorney-client memorandum cannot be used to avoid these limitations on this exception and discuss any matter of legal advice in executive session.¹² Thus, in order for the City to withhold the requested executive session minutes, it would have to demonstrate that releasing these minutes would defeat the lawful purpose of these 2013-2014 executive sessions. The City's sworn statements addressing the attorney-client privilege do not adequately demonstrate the requirements of Section 10004(b)(4), nor show how the release of these minutes

⁷ 29 Del. C. § 10004.

⁸ 29 Del. C. § 10004(b)(4), (6).

⁹ 29 Del. C. § 10004(f).

¹⁰ *Id.*

¹¹ *Chemical Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *10-12 (Del. Ch. May 19, 1994); *see also Del. Op. Att'y Gen.* 05-IB28, 2005 WL 3991286, at *4 (Sept. 7, 2005) (finding that "FOIA is a statutory public waiver of any possible [attorney-client] privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute" and a public body is not permitted to "hold any executive session to receive legal advice about *any* issue or matter under discussion so long at it had not yet taken a stand or reached a conclusion about the issue") (citation omitted).

¹² *See Del. Op. Att'y Gen.* 19-IB07, 2019 WL 1511362, at *2 (Feb. 15, 2019) ("We believe that the same view of attorney-client privilege applies here, and the City may not circumvent the requirements of 29 Del. C. § 10004(b)(4) by discussing legal advice in the context of an attorney-client privileged memorandum under 29 Del. C. § 10004(b)(6). Any executive session involving legal advice must meet the 29 Del. C. § 10004(b)(4) requirements.").

would defeat this lawful purpose. As such, we must find that the City violated FOIA by failing to meet its burden in this case and recommend that, within the timeframes of Section 10003, the City review the requested minutes and supplement its response with any additional records or information, as appropriate under FOIA.

Conclusion

For the reasons set forth above, we conclude that the City violated FOIA by failing to meet its burden to demonstrate the requested executive session minutes may be properly withheld.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Paul E. Bilodeau, City Solicitor