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Office of the Attorney General of the State of Delaware

Attorney General Opinion No. 26-IB24

May 20, 2026

Via Email

Stephanie McGinnis
bibbo27@icloud.com

RE: FOIA Petition Regarding the City of Rehoboth Beach

Dear Ms. McGinnis:

We write in response to your correspondence, submitted on behalf of Robert McGinnis, alleging that the City of Rehoboth Beach 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 did not violate FOIA by denying access to the requested records. Additionally, the remaining claims in the Petition regarding the timeliness and adequacy of the City's response to the request do not constitute violations of FOIA.

Background

On February 9, 2026, you submitted, on behalf of Robert McGinnis, a FOIA request seeking (1) communications between the City Manager, Assistant City Manager, ADA Coordinator, City Solicitor, and/or Building & Licensing regarding a certain Rehoboth property and the property's council from October 1, 2025 to present, including communications regarding you or Robert McGinnis; (2) all "internal logs, approval notes, and communications regarding the issuance of the building permit for [the property] on December 23, 2025," including any directives from the City Manager's office to expedite or approve said permit notwithstanding the absence of an approved State Fire Marshal ("SFM") site plan and the required ADA mitigation plan; (3) any "records, assessments, or internal discussions by the City Manager, ADA Coordinator or Solicitor regarding the blockade of the ADA-required ramp and elevator at [building], including any proposed 'non-compliant' alternative spaces offered to residents"; and (4) records related to the stop work order issued by the City's Building and Licensing division on December 31, 2025, and

“any subsequent communications regarding the resumption of work or the 1/6/26 SFMO approval and lifting of this order.”¹

On March 25, 2026, the City denied access to the requested records. The City stated that FOIA does not authorize requests to be submitted on behalf of another person, because FOIA only gives access to public records to a citizen, and only a citizen denied access to records may petition for review or bring a suit regarding a denied request. The City also invoked the potential litigation exemption, stating that because of your statements in the request and related correspondence, the City has determined that litigation is reasonably foreseeable, and the requested documents relate to the subject matter of the potential litigation. Thus, the City denied access to records in their entirety. This Petition followed.

In the Petition, you argue that the City’s denial is inappropriate. You contend that the City failed to conduct a record-by-record justification or explain how each record is exempt. You allege that the assertion of the potential litigation exemption is overbroad because the mere possibility of litigation does not justify withholding all responsive records. You further argue that the City improperly failed to provide a detailed factual explanation, affidavit, or index of withheld records to support its claim of exemption. You believe that the City improperly failed to segregate and produce non-exempt records.

On April 29, 2026, the City, through its legal counsel, responded to this Petition (“Response”). The City asserts that its response was appropriate. The City first reiterates its argument that the request lacked a proper requesting party, because FOIA does not permit requests by proxy.

Further, even if the request was properly submitted, the City argues that it appropriately determined the potential litigation exemption applied to the requested records. The Response provided a copy of the attachment to another request from you, stating that a list of City staff is “on formal notice of a civil rights violation under Delaware H.B. 48 and ADA Title II, FHA.”² The notice also stated: “CASE PENDING: DE COURT OF CHANCERY” and stated that this vehicle is the subject of a pending ADA discrimination complaint and an Emergency Civil Action filed in the Delaware Court of Chancery.³ The Response also included your January 27, 2026 email entitled “Formal Notice of Systemic ADA Non-Compliance, Illegal Tow, & Direct Personal Injury; Immediate Legal & Media Action Forthcoming.”⁴ The email, sent to City representatives, in addition to other parties, stated that this communication serves a “formal and urgent pre-litigation notice regarding the ongoing and egregious ADA non-compliance, the illegal vehicle

¹ Petition.

² Response.

³ *Id.*

⁴ *Id.*

tow on December 29, 2025 [at] 10:30 AM and the direct personal injury sustained.”⁵ You state that the City and other party were put on notice that they are “being formally held liable not only for gross negligence and systemic ADA non-compliance but also for all resultant physical harm, emotional distress, and financial damages incurred” and you will “immediately proceed with [c]omprehensive legal action against all responsible parties in local, state, and federal courts.”⁶ The City asserts that your FOIA request concerns the same records that are the subject of these threatened proceedings and thus, access was properly denied.

In addition, to address the claim of an untimely response, the City submitted the affidavit of its FOIA coordinator, attesting that the February 9, 2026 request was not submitted through the designated FOIA portal and the email was transmitted to other City officials, but not to him. The coordinator states under oath that he did not receive the request until March 23, 2026 when you filed a petition with this Office, but the coordinator responded to this request two days later.

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.”⁷ FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁸ The public body has the burden of proof to justify its denial of access to records.⁹ In certain circumstances, a sworn affidavit may be required to meet that burden.¹⁰

The Petition first alleges that the City’s response was untimely. However, the City has provided a response to the February 9, 2026 request; thus, the Petition’s claim regarding timeliness is moot.¹¹ In addition, we note that a public body is not required to produce with its response a

⁵ *Id.*

⁶ *Id.*

⁷ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

⁸ 29 Del. C. § 10003(a).

⁹ 29 Del. C. § 10005(c).

¹⁰ *Judicial Watch, Inc.*, 267 A.3d at 1008-1012.

¹¹ See, e.g., *Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, at *2 (Jun. 7, 2018); *Del. Op. Att’y Gen.* 17-IB35, 2017 WL 3426275, n. 3 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., Inc.*, 1998 WL 474159, at *2 (Del. Ch. July 27, 1998)).

detailed factual justification or a log of each record, or part of a record, denied.¹² As we find below the records were appropriately withheld under the potential litigation exemption, we need not address the City's initial claim regarding the propriety of the requesting party.

The City claims that the requested items are exempt from disclosure pursuant to the potential litigation exemption. Section 10002(o)(9) exempts "records pertaining to pending or potential litigation which are not records of any court."¹³ To apply the potential litigation 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."¹⁴ "When determining whether litigation is 'likely or reasonably foreseeable,' the public body should look for objective signs that litigation is coming."¹⁵ 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."¹⁶ 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, the email provided with the Response clearly indicates that potential litigation against the City involving ADA compliance is likely and reasonably foreseeable. There is a clear nexus between this potential litigation and the records sought pertaining to you and Robert McGinnis, the building permit process, and the ADA issues related to this Rehoboth property. As we find this exemption applies to the full request, we find that the City did not violate FOIA by not producing the requested records.

¹² 29 *Del. C.* § 10003(h)(2) (requiring a public body to state the reasons for denial, but not requiring a public body to produce an index or other compilation regarding the denied records); *Del. Op. Att'y Gen.* 25-IB06, 2025 WL 503941, at *2 (Jan. 21, 2025) ("As a public body does not have an obligation to meet its burden by providing an affidavit with its response to a FOIA request, we find that the Division did not violate FOIA in this regard.").

¹³ 29 *Del. C.* § 10002(o)(9).

¹⁴ *ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007).

¹⁵ *Id.*

¹⁶ *Id.*

Conclusion

For the reasons set forth above, we conclude the City did not violate FOIA by denying access to the requested records. Additionally, the remaining claims in the Petition regarding the timeliness and adequacy of the City's response to the request do not constitute violations of FOIA.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Lisa Borin Ogden, City Solicitor