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Office of the Attorney General of the State of Delaware

Attorney General Opinion No. 26-IB61

October 14, 2026

Via Email

Maddy Lauria
maddylauriade@gmail.com

Re: FOIA Petition Regarding the Environmental Appeals Board

Dear Maddy Lauria:

We write in response to your correspondence alleging that the Environmental Appeals Board violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA"). We treat your 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. For the reasons set forth below, we determine that the Board violated FOIA by failing to demonstrate that it appropriately withheld the requested records under FOIA.

Background

On August 19, 2026, you submitted a request seeking "all formal responses/motions made by any parties involved in [four identified] appeals pending before the Delaware Environmental Appeals Board."¹ A few days later, the Board denied your request, asserting that the requested records were exempt as records pertaining to pending or potential litigation pursuant to 29 *Del. C.* § 10002(o)(9). The response also provided a link to the Board's website, noting that the publicly available information regarding these appeals is available on that website. This Petition followed.

In the Petition, you argue that the records were improperly withheld, as you are not seeking discovery or investigatory files, and without any docket records, you cannot discern whether an upcoming hearing in one of the appeals will concern the case merits or a motion. You state that

¹ Petition.

all case documents for the appeals are not posted online. You also argue as a matter of policy that the Board, as a quasi-judicial body, should make the case records and arguments available to the public; you point out that Delaware court systems have dockets that you believe are publicly accessible.

The Board, through its legal counsel, replied to the Petition (“Response”). The Board states that Section 10002(o)(9) is clearly applicable here, as both prongs are met on the face of this request. The Board points out that you acknowledge the appeals are pending in the request, and the nature of the documents requested, motions and responses in a pending appeal, pertain to the pending litigation.

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.”² FOIA requires that public records be open to inspection and copying by the custodian of the records for the appropriate public body and citizens be provided reasonable access to and reasonable facilities for the copying of public records.³ The public body has the burden of proof to justify its denial of access to its records.⁴ In some circumstances, a sworn affidavit may be required to meet that burden.⁵

Under FOIA, “records pertaining to pending or potential litigation which are not records of any court” are excluded from the definition of “public record.”⁶ In *American Civil Liberties Union of Delaware v. Delaware Department of Justice*, the Court determined that to show the requested records pertain to pending litigation, the public body must demonstrate that the requesting party is seeking information that relates to the subject matter of the litigation to advance its position and circumvent discovery in the pending litigation.⁷ As you are not a litigant in the pending litigation, the Board cannot meet this standard, and we find that the pending litigation exemption does not apply here. We recommend that within the timeframes of Section 10003, the

² *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

³ 29 Del. C. § 10003(a).

⁴ 29 Del. C. § 10005(c).

⁵ *Judicial Watch, Inc.*, 267 A.3d at 1012.

⁶ 29 Del. C. § 10002(o)(9).

⁷ 2026 WL 1707290, at *3-4 (Del. Super. Jun. 11, 2026), appeal docketed, No. 281, 2026 (Del. July 2, 2026) (“As such, the Court applies the pending litigation test from *Mell v. New Castle County* to determine whether, on the record, the ACLU is seeking information that relates to the subject matter of the litigation to advance its position and circumvent discovery in the *Samuel* litigation.”).

Board review the responsive records and supplement its response with any additional records or information, if appropriate under FOIA.

Conclusion

For the foregoing reasons, we conclude that the Board violated FOIA by failing to demonstrate that it appropriately withheld the requested records under FOIA.

Very truly yours,

A handwritten signature in black ink, appearing to read "Daniel Logan", is written over a horizontal line.

Daniel Logan
Chief Deputy Attorney General

cc: Nicholas D. Picollelli, Jr., Deputy Attorney General
Dorey L. Cole, Deputy Attorney General