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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB07

February 3, 2025

VIA EMAIL

Jennifer Pawloski
jenpawloski@yahoo.com

RE: FOIA Petition Regarding the Delaware Department of Natural Resources and Environmental Control

Dear Ms. Pawloski:

We write regarding your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) violated the Delaware 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 regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we find that DNREC’s failure to respond to your December 6, 2024 FOIA request is moot as DNREC has responded, DNREC did not violate FOIA by denying your October 22, 2024 FOIA request nor did it violate FOIA by denying your December 6, 2024 FOIA request. We caution DNREC to respond to FOIA requests within the statutory required deadline.

BACKGROUND

You submitted two FOIA requests to the DNREC. The first request, sent October 22, 2024, sought:

Any correspondence, communication, notes, agendas involving Secretary Shawn Garvin, in regards to offshore wind development, US Wind (and its employees such as but not limited to Jeff Grybowski, Mike Dunmeyer, David Wilson), Governor John Carney, the Center for the Inland Bays, members of the Association

of Coastal Towns, James Farm Ecological Preserve from 2016 through October of 2024.

The second request, dated December 6, 2024¹, stated:

Requesting any communications between employees of DNREC and employees or members of their board of directors of the Delaware Center for the Inland Bays between 2017 and the present regarding offshore wind farm development, Indian River, Indian River Bay, Pasture Point Cove, of Beach Cove.

DNREC responded on October 31, 2024 to your first request denying access to the documents pursuant to 29 *Del. C.* § 10002(o)(9) as records pertaining to pending or potential litigation which are not records of any court.

On December 31, 2024, you filed this Petition alleging that DNREC is attempting to conceal FOIA records regarding offshore wind development. You stated that you believe this is an extremely urgent matter as the Delaware Environmental Appeal Board Hearing is scheduled for January 28, 2025 regarding the Delaware Coastal Management Program's review of the Federal Consistency Certification Conditional Concurrence for the Construction and Operations Plan and the USACE Permits/Authorizations for the US Wind Offshore Maryland Project. You claim that DNREC exceeded the fifteen business days and you received no response to your December 6, 2024 FOIA request. You also ask this Office to verify DNREC's denial for your previous FOIA request.

On January 9, 2025, DNREC responded to your second request denying access to the documents pursuant to 29 *Del. C.* § 10002(o)(9) as records pertaining to pending or potential litigation which are not records of any court.

DNREC, through its legal counsel, replied to your Petition and asserts that the claim that it failed to respond to your second FOIA request is moot as it responded on January 9, 2025. DNREC states that the FOIA requests were properly denied pursuant to Delaware's litigation exemption. DNREC argues that the first prong of the litigation exemption—whether litigation is pending—is satisfied by the pending status of two different Delaware Environmental Appeals Board (“EAB”) hearings. DNREC asserts that the second prong of the litigation exemption—whether the records that the requesting party seeks pertain to that pending litigation—is met because the EAB appeals relate to DNREC's review of US Wind's federal and state applications for offshore wind development and your two FOIA requests specifically seek records relating to “offshore wind development [and] US Wind” and “offshore wind farm development,” respectively. DNREC argues that the requested records may be used by DNREC in support of either or both of the pending appeals. DNREC states that there is a clear nexus between your FOIA requests and the pending EAB Appeals and further notes that your Petition identifies this link when

¹ The request was sent on December 5, 2024 at 11:26 PM EST and was received on the following morning December 6, 2024.

you state that you believe this is an extremely urgent matter as the Delaware EAB Hearing is scheduled for January 28, 2025. DNREC explains that the FOIA requests are related to the pending litigation because the FOIA requests occurred shortly before the scheduled hearing in the EAB Appeal and target records related to the offshore wind development. Further, DNREC posits that the timing and nature of your FOIA requests and your characterization that this Petition was “extremely urgent” in light of the pending EAB appeals suggests the purpose of your FOIA requests was to obtain documents to use in the EAB appeals. DNREC notes that Delaware courts have repeatedly not permitted parties to use FOIA to circumvent discovery in litigation.

DISCUSSION

FOIA requires that a public body provide citizens access to its public records for copying and inspection, but FOIA excludes certain records are excluded from the definition of “public records.”² The public body has the burden of proof to justify its denial of access to records.³ In certain circumstances, a sworn affidavit may be required to meet that burden.⁴ In this case, your Petition alleges that the DNREC violated FOIA by failing to respond to your second request within 15 business days and wanted our Office to review your first request as well.

With respect to your second request that was not yet answered when you filed this Petition, DNREC has since responded to that FOIA request. As such, the Petition’s claim that DNREC failed to respond is now moot. We note that public bodies are required to respond within 15 business days after receipt with either access to the requested records, denial to some or all of the records, or advising the requesting party that additional time is needed because the request is for voluminous records, requires legal advice, or the record is in storage or archived.⁵ We caution DNREC to respond to FOIA requests within the required 15 business days.

Turning to the Petition’s request to verify your first FOIA request that was denied under the pending litigation exemption, FOIA excludes from the definition of public records, “records pertaining to pending or potential litigation which are not records of any court.”⁶ The pending litigation exemption requires a two-step analysis; first, whether the litigation is pending and second, whether the records sought by the requesting party pertain to that pending litigation.⁷ This

² 29 Del. C. §§ 10002, 10003.

³ 29 Del. C. § 10005(c).

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

⁵ 29 Del. C. § 10003(h).

⁶ 29 Del. C. § 10002(o)(9).

⁷ *Del. Op. Atty’s Gen.* 24-IB36, 2024 WL 4291960, at *3 (Sept. 17, 2024).

Office has held that “[t]he identify of the requesting party has no bearing on the merits of a FOIA request.”⁸

DNREC and Petitioner note that there are pending Environmental Appeals Board Hearings related to DNREC, US Wind, offshore wind development, and subaqueous lands of the Indian River Bay and adjacent wetlands.⁹ This satisfies the first prong of the pending litigation.¹⁰ Next, this Office must determine if the requested records pertain to that litigation. Your FOIA requests seek communication regarding “offshore wind development, US Wind” and “offshore wind farm development, Indian River, Indian River Bay, Pasture Point Cove, or Beach Cove.” We find that both of your FOIA requests sought records pertaining to that pending litigation. Accordingly, DNREC met its burden to demonstrate that the records were properly withheld under the pending litigation exemption.

CONCLUSION

For the foregoing reasons, we determine that the Petition’s claim regarding DNREC’s failure to respond to your December 6, 2024 request within 15 business days is moot, and we find that DNREC met its burden in denying your other FOIA requests.¹¹

⁸ *Del. Op. Atty’s Gen.* 21-IB02, 2021 WL 559557, at *2 (Jan. 21, 2021). “Under FOIA, a record is public, or it is not.” *State v. Camden-Wyoming Sewer and Water Auth.*, 2012 WL 5431035, at *7 (Del. Super. Nov. 7, 2012) (citation omitted); *but see, e.g., Koyste v. Del State Police*, 2001 WL 1198950, at *2-3 (Del. Super. Sept. 18, 2001) (concluding that the State Police may assert the pending or potential litigation exemption when a federal criminal defendant’s attorney sought records that had been denied in discovery). We note, however, this principle does not apply uniformly. For example, the identity is relevant if the exemption itself explicitly bars certain requesting parties. 29 *Del. C.* § 10002(l)(13) (exempting Department of Corrections records when disclosure is sought by an inmate). *Id.* at *2 n.14.

⁹ DNREC’s response notes that in one specific lawsuit in Delaware Superior Court that was pending at the time of receipt of your FOIA requests, plaintiffs have since filed a Notice of Voluntary Dismissal Without Prejudice.

¹⁰ This Office has continually recognized appeals before the EAB qualifies as pending litigation. *See Del. Op. Atty’s Gen.* 24-IB04, 2024 WL 629391 (Jan. 29, 2024); *Del. Op. Atty’s Gen.* 21-IB20, 2021 WL 4351857, at *2 (Sept. 14, 2021); *Del. Op. Atty’s Gen.* 18-IB52, 2018 WL 6591817 (Nov. 29, 2018).

¹¹ We recognize that this Petition was filed prior to the denial and assertion of the pending litigation exemption of your December 6, 2024 FOIA request; however, due to the overall similarities of your two FOIA requests, the denials and the resulting analysis we believe that addressing the substantive FOIA denial cited by DNREC in this Opinion was prudent.

Very truly yours,

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

Daniel Logan
Chief Deputy Attorney General

cc: Sawyer M. Traver, Deputy Attorney General
Victoria E. Groff, Deputy Attorney General