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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 16-IB12**

**June 8, 2016**

**VIA EMAIL AND U.S. MAIL**

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Suite 3701  
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215-369-1188  
[nick@delawariverkeeper.org](mailto:nick@delawariverkeeper.org)

**Re: FOIA Petition Regarding the Department of Natural Resources  
and Environmental Control Dated April 14, 2016**

Dear Mr. Patton:

We have reviewed the April 14, 2016 Petition and the Delaware Department of Natural Resources and Environmental Control's ("DNREC") April 20, 2016 and April 29, 2016 responses (collectively, the "Response"). We find that DNREC's failure to respond to the request for records on or before the February 17, 2016 statutory deadline was a FOIA violation. The appropriate remediation for such a violation would ordinarily be ordering DNREC to provide the required response or provide the requested documents. However, for the reasons set forth in this letter, neither course is appropriate under the circumstances of this case. Thus, we order no remediation for DNREC's FOIA violation.

**I. BACKGROUND**

On Wednesday, January 27, 2016, counsel for Delaware Riverkeeper Network ("DRN") submitted a FOIA request via email to the designated FOIA email addresses for the DNREC Division of Fish and Wildlife and the DNREC Division of Water (the "Request"). Specifically, DRN requested:

- (1) all documents and records ESSA technologies reviewed in evaluating Normandau's Report on Impingement and Entrainment at the Cooling Intake Water Structure at the Delaware City Refinery

April 1998 – March 2000; (2) any documents or records evidencing entrainment and/or impingement of Atlantic sturgeon, Shortnose sturgeon, or any other endangered or threatened species at the Delaware City Refinery (NPDES Permit DE0000256; State Permit No. WPCC 3256D/74), including any communication bearing on this topic; and (3) any studies, reports, documents, and/or records that evaluate or discuss the suitability of Cedar Creek’s habitat for any species of fish, including Atlantic and shortnose sturgeon.

On February 12, 2016, The News Journal reported that DRN had issued “an intent to pursue a lawsuit against Delaware City Refinery owner PBF Energy and possibly [DNREC] alleging violation of federal rules.”<sup>1</sup> According to the article, DRN’s notice claimed that Delaware City Refinery’s “cooling water intake structure is responsible for the death of Atlantic and shortnose sturgeon, two fish species protected under the Endangered Species Act of 1973.”<sup>2</sup> DRN’s Director, Maya van Rossum, is quoted throughout the article.

DRN served DNREC with the notice – a 60-day notice of its intent to sue DNREC Secretary David Small, the Delaware City Refining Company LLC, and PBF Energy Inc. for alleged violations of Section 9 of the Endangered Species Act – on February 16, 2016.<sup>3</sup> Generally speaking, the 60-day notice alleges that DNREC, through its NPDES permitting program, has authorized the Delaware City Refinery to operate a cooling water intake structure that results in the taking of shortnose and Atlantic sturgeon in an affected area, which includes Cedar Creek.<sup>4</sup>

On March 31, 2016, DRN’s counsel sent a follow-up email to DNREC, at the same designated FOIA email addresses, stating:

I have yet to receive a response to my below FOIA request. My records indicate that the below email was read on 1/28/2016 by both the Division of Water and Division of Fish & Wildlife FOIA representatives. Please let me know when I can expect a response to my FOIA request.

On April 4, 2016, DNREC’s FOIA Coordinator responded:

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<sup>1</sup> Jeff Mordock, *Conservation group says PBF refinery kills sturgeon*, February 12, 2016, <http://www.delawareonline.com/story/news/2016/02/11/environmental-group-threatens-refinery-lawsuit/80246694/> (last visited May 11, 2016).

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

<sup>3</sup> Letter from Delaware Riverkeeper Network to David Small, Delaware City Refining Company, LLC, and PBF Energy Inc. (Feb. 11, 2016); *available at* <https://assets.documentcloud.org/documents/2711658/Sturgeonlawsuit.pdf> (last visited May 11, 2016).

<sup>4</sup> *Id.*

I am checking with the Division of Fish & Wildlife and the Division of Water on the status of your request. I show that it was forwarded to them for response, but need to get their feedback . Thank you, and will (sic) be in touch shortly.

On April 14, 2016, DRN filed the Petition with this office, stating: “DNREC has not timely responded to [the FOIA] request.” By letter dated April 20, 2015, and pursuant to our routine process in responding to petitions for determination under FOIA, we invited DNREC to submit a written response to the Petition by no later than April 27, 2016. That same day, counsel for DNREC responded that he would consult with DNREC regarding a response to the Petition, but also stated that the Request would nonetheless “be subject to denial based on 29 *Del. C.* § 10002(1)(9), as it pertains to records pertaining to pending or potential litigation.” The April 20 response also indicated that, on February 16, 2016, DRN served a 60-day notice of intent to sue DNREC and alleged that “[t]he request covers the same subject matter as the threatened lawsuit.”

On April 29, 2016, we sought clarification from DNREC’s counsel regarding whether DNREC intended to submit a more formal response to the Petition. That same day, DNREC’s counsel responded that DNREC agreed with the position stated in counsel’s April 20, 2016 correspondence. The April 29 response also stated: “the agency does not have records apart from those protected by the litigation exemption, and thus will not be providing any documents to the requesting party in response to the FOIA request.” The April 29 response added that “[t]he rules of court would determine whether documents would be produced in response to a discovery request in the litigation.”

## **II. APPLICABLE LAW**

Pursuant to 29 *Del. C.* § 10003(h)(1), a “public body shall respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof, either by providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.” Moreover, “[i]f access cannot be provided within 15 business days, the public body shall cite 1 of the reasons . . . why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.”<sup>5</sup>

Pursuant to 29 *Del. C.* § 10003(a), “[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate body,” and “[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.” “Public record” is defined as “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public

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<sup>5</sup> *Id.*

body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes . . . .”<sup>6</sup> However, among the information that FOIA exempts from the definition of “public records” is “[a]ny records pertaining to pending or potential litigation which are not records of any court.”<sup>7</sup>

### **III. DISCUSSION**

#### DNREC Violated FOIA by Failing to Respond to DRN’s Request for Records Within 15 Business Days

As noted above, a public body is required to respond to a request for records within 15 business days of receipt thereof “either by providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.”<sup>8</sup> DNREC does not appear to challenge DRN’s claims that: (1) DRN submitted the Request on January 27, 2016 or (2) that DNREC failed to respond to the Request on or before February 17, 2016, the 15th business day after DNREC received the Request. We find that DNREC’s failure to comply with the statute violated FOIA.

#### No Remediation Will Be Ordered Because the Requested Records Are Not Public Records

We do not order remediation for DNREC’s FOIA violation because there is none we believe to be appropriate under the circumstances of this case.<sup>9</sup> DNREC did not violate FOIA by failing to provide the documents by February 17, 2016 because, as discussed more fully below, the records requested related to potential litigation and were therefore not “public records.” Rather, DNREC violated FOIA by failing to provide by February 17, 2016 either a decision to withhold and a basis for doing so or a request for additional time. However, because DRN has effectively received DNREC’s response by virtue of its Response to the Petition, it would be meaningless to order DNREC to provide the response required by the statute at this time. Nor would it be appropriate under the circumstances to order DNREC to provide the records as remediation for the FOIA violation, as the records are not “public records” subject to disclosure under FOIA.

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<sup>6</sup> 29 *Del. C.* § 10002(j).

<sup>7</sup> 29 *Del. C.* § 10002(1)(9).

<sup>8</sup> 29 *Del. C.* § 10003(h)(1).

<sup>9</sup> See, e.g., *Del. Op. Att’y Gen.* 15-IB06, 2015 WL 5014135, at \*9 (Aug. 19, 2015) (“[O]ur office has not recommended remediation where the underlying issue leading up to the FOIA complaint is resolved by the parties or other intervening events, or the FOIA violations were harmless and resulted in no prejudice to public rights.”).

As noted above, Delaware’s FOIA exempts from the definition of “public record” “[a]ny records pertaining to pending or potential litigation which are not records of any court.”<sup>10</sup> The purpose of the “pending or potential litigation” exemption is to help maintain a level playing field, as “Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.”<sup>11</sup> As a result, the applicability of the exemption “turns on the identity of the requestor and the purpose of the request.”<sup>12</sup>

Here, because we are aware of no pending litigation between the parties, we consider whether the “potential litigation” exemption applies. Delaware courts have adopted a two-step test to determine whether the “potential litigation” exception justifies a refusal to provide records responsive to a FOIA request.<sup>13</sup> First, “litigation must be likely or reasonably foreseeable.”<sup>14</sup> In addition, “there must be a ‘clear nexus’ between the requested documents and the subject matter of the litigation.”<sup>15</sup> In order to determine whether litigation is “likely or reasonably foreseeable”:

[T]he public body should look for objective signs that litigation is coming. For instance, a written demand letter in which a claim is asserted, or action is demanded, may give rise to a proper inference that litigation will soon follow. Other indicators of “potential litigation” might include “previous or preexisting litigation between the parties or proof of ongoing litigation concerning similar claims or [ ] proof that a party has both retained counsel with respect to the claim at issue and has expressed an intent to sue.” In any event, whatever the indicator, the public body must be able to point to a ‘realistic and tangible threat of litigation ... characterized with reference to objective factors’ before it may avail itself of the “potential litigation” exception to FOIA.<sup>16</sup>

We conclude that litigation between DNREC and DRN was reasonably foreseeable by at least February 12, 2016, the date that DRN publicly acknowledged its intent to sue Delaware City Refinery owner PBF Energy and possibly DNREC for alleged violations of Section 9 of the

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<sup>10</sup> 29 *Del. C.* § 10002(1)(9).

<sup>11</sup> *Del. Op. Att’y Gen.*, 06-IB21, 2006 WL 3313705, at \*1 (Oct. 23, 2006) (citing *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003)).

<sup>12</sup> *Del. Op. Att’y Gen.* 03-IB21, 2003 WL 22669566, at \*3 (Oct. 6, 2003).

<sup>13</sup> See *American Civil Liberties Union of Delaware v. Danberg*, 2007 WL 901592, at \*4 (Del. Super. March 15, 2007).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (internal citations omitted).

Endangered Species Act.<sup>17</sup> Likewise, we conclude that there is a clear nexus between the records requested by DRN and the subject matter of the potential litigation, which would likely involve the sufficiency of the proposed NPDES permit for purposes of federal and State environmental laws. As noted above, the 60-day notice of intent to sue alleges that DNREC, through its NPDES permitting program, has authorized the Delaware City Refinery to operate a cooling water intake structure that results in the taking of shortnose and Atlantic sturgeon in an affected area, which includes Cedar Creek. We are satisfied that each of the items identified in the Request relate to this allegation.

The finding that litigation between DNREC and DRN was reasonably foreseeable by at least February 12, 2016 leads us to two conclusions. The first is that DNREC did not violate FOIA for failing to provide the requested records to DRN. By the time DNREC was required to make a decision or provide a response to DRN, the records were not public records, regardless of DNREC's view.<sup>18</sup>

The second conclusion is that the Delaware Code does not provide the Department of Justice with a clear course of action where – as was the case here – a public body violated FOIA by refusing to respond to a properly filed request in a timely fashion, but would have been justified in declining to provide requested information if it had properly responded. We do not condone the practice. DNREC, of course, is not the only public body that has failed to respond to a FOIA request on a timely basis. The General Assembly may wish to address the absence of a clear remedy for this practice.

#### **IV. CONCLUSION**

Based on the foregoing, we conclude that DNREC violated FOIA by failing to respond to the Request within 15 business days. We find that ordering DNREC to provide a response now is unnecessary and that ordering DNREC to provide the requested records to DRN as remediation for the violation is inappropriate under the circumstances. Accordingly, we decline to order any remediation in connection with DNREC's FOIA violation.

This letter is directed solely to the parties identified herein. It is based on the facts relevant to this matter and, as such, should not be cited as binding precedent by future parties.

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<sup>17</sup> In the alternative, litigation was reasonably foreseeable no later than February 16, 2016, the date upon which DNREC was served with the 60-day notice.

<sup>18</sup> See 29 Del. C. § 10002(l)(9) (indicating that such records “shall not be deemed public”); 29 Del. C. § 10003(d)(1) (noting that all records held by a “[state] agency are ‘public records’ to which the public should have access unless they fall within the scope of enumerated exemptions in § 10002”); 29 Del. C. § 10003(k) (permitting the removal of nonpublic records and noting that “all documents shall be considered public records unless subject to 1 of the exceptions set forth in § 10002”).

Pursuant to 29 *Del. C.* § 10005(b), DRN may file an appeal with the Superior Court of the State of Delaware within 60 days of the date of this decision.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Danielle Gibbs". The signature is written in a cursive style with a large initial "D".

Danielle Gibbs  
Chief Deputy Attorney General

cc: Dirk Durstein, Deputy Attorney General (via email)  
Michelle E. Whalen, Deputy Attorney General (via email)