



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNCIL
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-8499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB10

February 20, 2018

VIA U.S. MAIL AND EMAIL

Vincent D'Anna
34 Scotch Pine Road
Newark, DE 19711
vdanna@aol.com

RE: FOIA Correspondence Regarding the New Castle County Council

Dear Mr. D'Anna:

We write regarding your correspondence alleging that the New Castle County Council ("Council") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur ("Petition"). We invited the Council to submit a written response to the Petition and you to submit a reply thereto. We received the Council's response ("Response Letter") on January 25, 2018 and your reply thereto ("Reply") on January 29, 2018. We have reviewed the Petition, Response Letter, and Reply. We conclude that the Council did not violate FOIA by failing to produce an index of records withheld. Beyond that single finding, the limitations placed upon the Department of Justice's ("DOJ") ability to review claims that specific records are not "public records" because they are subject to the attorney-client privilege or attorney work product doctrine, or because the records are excluded from the definition of public records as "records pertaining to pending litigation," prevent the DOJ from making a finding in this instance as to whether specific requested records are public records. If you wish to obtain the records that the Council has claimed are exempt from FOIA, you will need to initiate an action in a state court of competent jurisdiction.

In the course of rendering this decision, we detail the areas where the combination of the language of the FOIA statute and the Superior Court's interpretation of that statute have made it difficult or impossible for the DOJ to render definitive opinions in certain types of FOIA disputes, in the event that the General Assembly wishes to address issues of this type.

RELEVANT BACKGROUND

On or about December 19, 2017, you sent the following request to the Council:

Any and all correspondence concerning the creation of a position in the New Castle County Auditor's Office for [a former Council employee]. This should include all written and electronic communication to include private email and text pertaining to County Business. If any information is excluded or considered protected, please cite the information and the protections.

On January 5, 2018, the Council denied your request on the basis that “[a]ny documents responsive or potentially responsive to your request are prohibited from production . . . pursuant to 29 *Del. C.* Section 10002(1)(6) [sic] [subject to attorney-client and/or work product privileges], the Delaware Rules of Evidence Rule 408 and/or 501, and 29 *Del. C.* Section 10002(1)(9).”¹

POSITIONS OF THE PARTIES

In your Petition, you allege that the Council violated FOIA by denying your request. Specifically, you argue that your request includes non-privileged information, such as communications from “council to council, council to staff and staff to staff.”² You argue that the attorney-client and work product privileges are inapplicable because your request post-dated a legal settlement.³ You next argue that the Council violated FOIA by failing to identify the information withheld and the specific basis for withholding each item.⁴

In its Response Letter the Council has invoked 29 *Del. C.* § 10002(1)(1) (exempting “[a]ny personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy”), 29 *Del. C.* § 10002(1)(6) (exempting “[a]ny records specifically exempted from public disclosure by statute or common law”), and 29 *Del. C.* § 10002(1)(9) (exempting “[a]ny records relating to pending or potential litigation which are not records of any court”). In its Response Letter, the Council also claimed:

On information and belief, Mr. D’Anna serves as an advisor to the County Council President. Related to this point, Mr. D’Anna has publicly spoken on behalf and in defense of the Council President, including in relation to the very matter for which he currently seeks

¹ Email from Nellie M. Hill to Vince D’Anna dated January 5, 2018. We note, with a few exceptions not relevant to this determination, that FOIA exemptions are permissive rather than mandatory.

² Petition at 2.

³ *Id.* at 3.

⁴ *Id.*

production of correspondence. Accordingly, it is apparent that, based on this relationship, the request for information by Mr. D'Anna is effectively a request for production of information by the Council President.⁵

In your Reply, you argue that “[i]t would seem that the proper response would have been a log of potentially responsive documents and communications listed individually by sender and recipient, date and title from which one could make an educated determination about whether or not privilege applies.”⁶ You allege that you “have reason to believe that their [sic] may have been public wrongdoing in the creation of th[e] job.” You challenge the Council’s representation about the potential for litigation.⁷ You also challenge the Council’s invocation of 29 *Del. C.* § 10002(l)(1) for the first time in its Response Letter, rather than its initial denial.⁸ Finally, you state “I take exception in fact great offense to reckless, baseless unsubstantiated assertion that I’m a stalking horse for Mrs. Hartley-Nagle . . . I’m a resident taxpayer of New Castle County and a citizen of the State of Delaware and that is my standing for this request.”⁹

DISCUSSION

As an initial matter, we conclude that the Council did not violate FOIA by failing to provide an index of records withheld. Indeed, as the Council correctly notes, the FOIA statute specifically provides that “[t]he public body shall *not* be required to provide an index, or any other compilation, as to each record or part of record withheld.”¹⁰ Having made that finding, we turn to the individual exemptions invoked by the Council.

Attorney-Client Privilege and Work Product Exemptions

The Council claims that certain broadly-defined categories of records are exempted from FOIA because they are subject to either the attorney-client privilege or the attorney work product doctrine. We have expressly recognized in the past that the FOIA exemption for “records

⁵ Response Letter at 1 n.1.

⁶ Reply at ¶ 1.

⁷ *Id.* at ¶¶ 5-6.

⁸ *Id.* at ¶ 7.

⁹ *Id.* at ¶ 1.

¹⁰ 29 *Del. C.* § 10003(h)(2) (emphasis added). See also *Flowers v. Office of the Governor*, 167 A.3d 530, 546-48 (Del. Super. 2017) (discussing Section 10003(h)(2)).

specifically exempted from public disclosure by statute or common law” applies to the attorney work product doctrine¹¹ and the attorney-client privilege.¹²

In describing the records for which it is invoking the attorney-client and work product privileges, the Council concedes that some persons other than attorneys and their clients received some of the records in question. This fact alone does not prevent the Council from properly invoking the attorney-client privilege or work product privilege as a basis for declining to produce a record in response to a FOIA request. Although disclosure to third parties can cause waiver of either privilege, Delaware’s court rules and court opinions establish a number of situations when disclosure to third parties does not waive the privileges.¹³ But a determination (a) as to whether a particular record has been disclosed to persons other than an attorney and his or her client, and (b) whether that disclosure constitutes waiver of the relevant privilege, is a fact-specific analysis that cannot be conducted in many cases absent specific information about each record in question.

As noted above, the FOIA statute and the Superior Court case law interpreting that statute make clear that an agency need not produce record-specific information about records withheld on the basis of either attorney-client or the attorney work product doctrine. This is a gap in the FOIA statute that makes it impossible, except in cases where the description of an entire body of records is facially sufficient to determine whether one or both of these privileges apply, for a timely conclusion to be made about the propriety of using the FOIA exemption based on attorney-client privilege or the attorney work product doctrine outside of the initiation of civil litigation by the party seeking the records. The rules of discovery for civil litigation in Delaware courts, and the decisions interpreting those rules, require more detailed information about records that are withheld on the basis of attorney-client privilege or as attorney work product. The FOIA statute allows for such civil litigation, but such litigation can be cost-prohibitive for some persons seeking records.

For purposes of this decision, it is certainly possible that records described by the Council in its response as “Type 1 communications” (communications “among [Legal] Counsel, County Council Members and limited Council employees ... relating to resolution of the aide’s Potential Claims against the Council President, County Council, and others, various related legal issues, the possibility of placing the former aide in a new position, the aide’s qualifications for the position ...”) are not public records because they are protected by either the attorney-client privilege or the attorney work product doctrine. The Council must apply the attorney-client privilege and work product doctrine as they are detailed in Delaware rules and case law in determining which records can and cannot be withheld. To the extent that you wish to challenge those determinations, you will need to file a civil lawsuit in order to do so.

¹¹ *Del. Op. Att’y Gen.* 17-IB56, 2017 WL 5256816 (Oct. 12, 2017).

¹² *Del. Op. Att’y Gen.* 16-IB11, 2016 WL 3462342 (June 6, 2016).

¹³ *See, e.g., Mechel Bluestone, Inc. v. James C. Justice Companies*, 2014 WL 7011195, at *4-5 (Del. Ch. Dec. 12, 2014); *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *2-5 (Del. Ch. Nov. 13, 2002).

Potential Litigation Exemption

Council has also asserted, with respect to all requested records, that those records are exempt from FOIA under the FOIA exclusion that exempts from the definition of “public record” “[a]ny records pertaining to pending or potential litigation which are not records of any court.” As with the Council’s assertion of common law privileges, the circumstances and posture of this matter do not allow DOJ to make a determination as to whether this FOIA exemption applies, and such a determination can only be made by a court after the parties have had an opportunity to engage in limited discovery.

On those occasions when the Superior Court has had cause to interpret the “pending or potential litigation” exemption, the Court has assumed that the exemption applied to litigation targeted at the governmental entity that had received the FOIA request. With respect to pending litigation, the Court has stated that “[t]he pending litigation exception to FOIA addresses a practical reality: when parties to pending litigation *against a public body* seek information *from that public body* relating to the litigation, they are doing so not to advance ‘the public’s right to know,’ but rather to advance their own personal stake in the litigation.”¹⁴

In *American Civil Liberties Union of Delaware v. Danberg*, the Superior Court recognized that the exemption claimed by the Council in this case does not relate to pending litigation, but rather to a claim of potential future litigation. Cases involving potential future litigation are more difficult to analyze. The Court has recognized that “[t]he exception is somewhat more complicated in its application ... when dealing with ‘potential litigation.’”¹⁵ Rather than applying the literal language of the exemption in a vacuum, and exempting any document where the agency holding the document claimed that there was some possibility of future litigation involving the document or its subject matter, the Court instead recognized that doing so would “seriously undermine the purpose” of the broader FOIA statute, given that “[i]n our litigious society, a governmental agency always faces some threat of suit.”¹⁶ Instead of a literal interpretation of the exemption, the Court grafted a detailed and sensible balancing test onto the “potential litigation” language in the FOIA statute, in order to reconcile the application of that section with the expressly stated purpose of FOIA.¹⁷

This dispute invokes both of the challenges described above: it presents a factual question as to whether the documents are being sought for potential litigation against the Council, and it presents another situation where a literal interpretation of the “potential litigation” exemption could seriously undermine the stated purpose of the broader FOIA statute.

Addressing the second issue first, we believe that the “potential litigation” exemption can only be reconciled with the broader language of the FOIA statute if it is limited to potential

¹⁴ *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003) (emphases added).

¹⁵ *ACLU v. Danberg*, 2007 WL 901592, at *3-4 (Del. Super. Mar. 15, 2007).

¹⁶ *Id.* at 4 (quoting *Del. Op. Att’y Gen.* 02-IB12 at 4 (May 21, 2002)).

¹⁷ *Id.*

litigation against the government agency from which the documents in question are sought, or some closely affiliated person or entity.¹⁸ To interpret the statute otherwise would prevent citizens from conducting basic investigations that might be necessary to them later gaining access to the courts to remedy some legal wrong committed by a party wholly unrelated to the government entity in question – even if the documents sought in the course of those investigations would otherwise be public documents freely available to any other citizen seeking them. We do not believe that such an outcome can be reconciled with the FOIA statute’s express admonition that citizens should “have easy access to public records in order that the society remain free and democratic.”¹⁹ Thus, in this case the New Castle County Council can only invoke the potential litigation exemption if the request relates to potential litigation against New Castle County Council or a closely affiliated person or entity.

That determination cannot be made on the present record or through means available to DOJ in a timely fashion under the FOIA statute. Whether the requests in this case relate to potential litigation against New Castle County Council or its affiliates depends upon which party to this dispute is believed. New Castle County Council claims that you are seeking these documents on behalf of the New Castle County Council President, who as indicated above has indicated a clear intent to institute litigation against Council and its affiliates. You deny this allegation. There is no way for our office to determine which party’s rendition is accurate. In *Danberg*, faced with a similar dispute between the parties as to whether documents were being sought for purposes of litigation against the agency from which the documents were being requested, the Superior Court allowed limited discovery to allow a determination as to whether the FOIA claim was being made for the purpose of assisting another person with such potential litigation.²⁰ That is the only tenable approach to this dispute as well: for you to institute civil litigation against New Castle County Council under the FOIA statute, and subject yourself to limited civil discovery to determine if you are seeking the documents in question for the purpose of potential litigation against the Council.²¹

¹⁸ Although we recently allowed for the possibility – in a fact-specific decision that we said should not be cited as precedent – that the *pending* litigation exemption could apply to litigation against entities other than the government entity from which documents were sought, we agree with the *Danberg* court that the potential litigation exemption raises issues that are completely distinct from the pending litigation exemption. The recent case involving the pending litigation exemption focused on the fact that the person seeking the documents was attempting to evade court processes that were available to him to obtain the documents as a result of the pending litigation – an avenue that does not exist when litigation has not yet been filed.

¹⁹ 29 *Del. C.* § 10001.

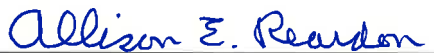
²⁰ *Danberg*, 2007 WL 901592, at *5.

²¹ We will not adopt this approach in every instance where a public body asserts that a person seeking documents is doing so to advance potential litigation against the public body, but the Council’s assertion in this case is clearly not frivolous, and details your efforts to support the efforts of the County Council President in other forums with respect to the same set of facts raised by your FOIA request.

CONCLUSION

Neither the Council's claims of attorney-client and attorney work product privileges, nor the Council's claim that documents otherwise responsive to your request are exempt under FOIA's potential litigation exemption, can be analyzed in a timely fashion by DOJ without the benefit of additional information that is not available under the FOIA statute as currently written. The mechanisms necessary to obtain this additional information are available under the procedural rules of our state courts. Those courts have jurisdiction over FOIA disputes, and are the only bodies that can resolve the current dispute.²²

Sincerely,


Allison E. Reardon, State Solicitor

cc: Michael P. Migliore, Esquire (via email)

²² Because the entirety of this dispute must be resolved in the courts, we do not address the other exemptions claimed by the Council, as those too will be addressed by an appropriate court if the threshold issues described above are addressed.