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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB01

January 23, 2019

VIA EMAIL

Christopher M. Coggins, Esq.
Coggins Law, LLC
1007 N. Orange St., 4th Floor
Wilmington, Delaware 19801

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

Dear Mr. Coggins:

We write in response to your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“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 with regard to your records requests. For the reasons set forth below, we conclude that DNREC has not violated FOIA as alleged.

BACKGROUND

You submitted this Petition on behalf of your clients, Joseph and Margaret Booth (the “Booths”). The Booths¹ own a property on which a dry cleaning business was conducted, and this property is the subject of an environmental enforcement action by DNREC. On October 17, 2018, you sent DNREC a records request for the following documents:

All correspondence, documents, notes, reports, surveys, test results, and records regarding/about/concerning/related to/discussing/mentioning (i) Chung K. Chong; (ii) Toni Cleaners or Toni Dry Cleaners; (iii) Loretta M. Vogelsong or Loretta

¹ The Reply states that the Booths are the sole shareholders of Thoro-Clean, Inc. who is also a party in *Garvin v. Booth*.

Vogelsong; (iv) Antionett Synczyszyn, Antoinette Synczyszyn, or Toni Synczyszyn; and (v) 1606 Kirkwood Highway in Wilmington, Delaware 19808.²

On November 8, 2018, DNREC denied the request pursuant to 29 *Del. C.* § 10002(1)(9), which exempts records pertaining to pending or potential litigation which are not records of any court.

On behalf of the Booths, you filed a Petition with this Office challenging the denial of the FOIA request and alleging that DNREC improperly withheld records responsive to the requests. Primarily, you argued that litigation involving the Toni Cleaners site was dismissed with prejudice in February 2018, and thus, the pending or potential litigation exemption does not apply. To remedy DNREC's FOIA violation, you requested a determination that DNREC's failure to provide the requested records violated 29 *Del. C.* § 10003 and is unlawful; an order for DNREC to provide the records; an award of attorney's fees and costs; and all other appropriate relief.³

On January 7, 2019, DNREC submitted a letter ("Response") through its counsel, identifying two pending actions involving the Booths as the basis for DNREC's assertion of the pending or potential litigation exemption: *Garvin v. Booth* in Superior Court and an appeal to the Superior Court of an Environmental Appeals Board decision. DNREC alleged that the two Superior Court cases involving the parties concern the same subject matter as the Toni Cleaners case: dry cleaning waste. Although DNREC acknowledged the Toni Cleaners' litigation has been resolved, it argued that the information may be used in the pending cases. DNREC attached a copy of a Motion to Dismiss filed by the Booths in *Garvin v. Booth* which stated: "[f]ull briefing is necessary to develop the points above and because DNREC has never sued seeking the relief it has here according to the Booths' research in responding to the Complaint."⁴ You state that the *Garvin v. Booth* case is in the pleading stage and discovery is pending. DNREC asserted that the Petitioner is circumventing the discovery process and the Superior Court, is the proper authority to determine whether the request for documents related to the litigation are appropriate.

By letter dated January 10, 2019 ("Reply"), you made multiple arguments to support your contention that the denial of records was inappropriate. You alleged several facts in DNREC's Response are false, including the assigned judge to the *Garvin v. Booth* case, that a Motion to Dismiss is pending, and that your clients seek to rely on actions taken in the Toni Cleaners case in the pending litigation. You noted that the Motion to Dismiss was withdrawn, but even if it was not withdrawn, your clients would not have had adequate time to use the requested information in the motion or otherwise in the litigation. You stated the purpose of your request was to allow you to perform research for your client for the dispute with DNREC as required by the Delaware Lawyers' Rules of Professional Conduct. In DNREC's denial letter, you objected that DNREC

² Petition.

³ This Office may determine whether a FOIA violation has occurred but does not have the authority to issue injunctive orders or award attorneys' fees and costs. *See* 29 *Del. C.* § 10005.

⁴ Response, Ex. C.

failed to specify the cases on which the exemption was based, did not ask you the purpose in making the request, and did not know you represented the Booths; as such, you argued DNREC based its denial on conjecture. Also, you asserted that litigation must be “against a public body” and because DNREC sued your clients and not vice versa, the pending or potential litigation exemption does not apply.

In addition, you also noted that requested information about Toni Cleaners is not relevant to your clients’ dry cleaning site, which is the subject matter of the pending litigation. Toni Cleaners is not located near your client’s dry cleaning site and could not impact their site. You also stated that the pending litigation involves two legal issues: 1) innocent landowner defense; and 2) whether the Secretary’s Order is valid and enforceable. Neither of these specific legal issues were involved in the Toni Cleaners site. Finally, you argued that the Toni Cleaners site information cannot possibly be relevant to the pending litigation, unless DNREC has not applied its laws uniformly. For these reasons, you asked this Office to find that DNREC violated FOIA by denying the records request.

DISCUSSION

DNREC cited the pending or potential litigation exemption in 29 *Del. C.* § 10002(l)(9) to deny access to the requested documents. Any records pertaining to pending or potential litigation which are not records of any court are exempted from the definition of public record.⁵ This Office has acknowledged that the purpose of this exemption is to 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.”⁶ “[W]hen parties to litigation against a public body seek information relating to the litigation, they are not doing so to advance ‘the public’s right to know,’ but rather to advance their own personal stake in the litigation.”⁷ Indeed, the exemption applies where litigators or litigants are seeking information that might help them in court.⁸ For the exemption to apply, “there must be a sufficient nexus between the records requested under FOIA and the subject matter of the litigation.”⁹ While the requesting party’s motives are generally irrelevant to a FOIA analysis, “this is not so when the requesting party seeks information from a public body to advance that party’s private interest in litigation.”¹⁰

⁵ 29 *Del. C.* § 10002(l)(9).

⁶ *Mell v. New Castle County*, 835 A.2d 141, 147 (Del. Super. 2003).

⁷ *Grimaldi v. New Castle County*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016).

⁸ *Office of the Public Defender v. Delaware State Police*, 2003 WL 1769758, at *2-3 (Del. Super. Mar. 31, 2003).

⁹ *Del. Op. Att’y Gen.* 03-IB21, 2003 WL 22669566, at *2 (Oct. 6, 2003).

¹⁰ *American Civil Liberties Union of Delaware v. Danberg*, 2007 WL 901592, at *4 (Del. Super. Mar. 15, 2007) (citing *Mell*, 835 A.2d at 147).

Here, DNREC and the Booths are involved in two Superior Court cases. In *Garvin v. Booth*, DNREC sued the Booths for environmental issues at their dry cleaning site on *October 11, 2018*. Mr. Coggins filed a records request to DNREC on *October 17, 2018*. The short time interval between the filing of litigation and the FOIA request suggests that the request was motivated by the litigation.¹¹ The Booths then filed a Motion to Dismiss dated November 1, 2018. Although it was later withdrawn, the motion clearly indicates that uniform enforcement, hence other similar DNREC enforcement actions, may be relevant to your clients' defense of this litigation. Certainly, this Office cannot definitively ascertain your future litigation positions, but the pending litigation standard does not require us to do so. Based on the information available to us, the evidence demonstrates that the requested records pertain to the subject matter of the litigation.¹²

Your stated purpose for the request is to evaluate the potential outcomes of your clients' dispute with DNREC.¹³ We note that the scope of the request was significantly broader and several publicly available documents regarding the outcomes of the Toni Cleaners action were attached to your Petition.¹⁴ More importantly, even an indirect litigation purpose that "would serve only to make those lawyers better advocates for their clients" is considered an advancement of a litigant's

¹¹ The timing of the request is also relevant to determine whether there is a nexus between the requested documents and subject matter of the litigation. For example, this Office previously considered the timing where the attorney made a FOIA request and about a week later, filed three administrative appeals related to the request. *See Del. Op. Att'y Gen.* 03-IB10, 2003 WL 22931612, at *5 (May 6, 2003) ("We determine that there is a sufficient nexus based both on the timing of your FOIA request and the nature of the documents requested.").

¹² Your Reply also acknowledged that the Toni Cleaners documents, if they show inconsistencies in the law's application, may prejudice DNREC. Reply, p. 15 ("Information regarding Toni Cleaners is not relevant to the litigation between the Booths and DNREC. Nor is there any way the information sought would prejudice DNREC unless DNREC has failed to apply the law uniformly.").

¹³ *See Reply.*

¹⁴ *See Petition; Response.*

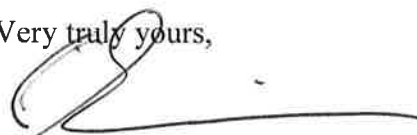
purposes and not advancing the public's right to know.¹⁵ We similarly conclude that the purpose of this request is to aid your clients' position in the aforementioned litigation.¹⁶

Considering the totality of these circumstances, we find that DNREC has sufficiently demonstrated that the requested records pertain to the pending litigation and therefore, DNREC appropriately withheld the documents pursuant to the pending litigation exemption in 29 *Del. C.* § 10002(1)(9).

CONCLUSION

Thus, it is our determination that DNREC has not violated FOIA as alleged.

Very truly yours,



Aaron Goldstein
Chief Deputy Attorney General

Cc: Ralph K. Durstein, III, Deputy Attorney General
Dorey Cole, Deputy Attorney General

¹⁵ *Office of the Public Defender*, 2003 WL 1769758, at *2 (in concluding that pending or potential litigation exemption was appropriately applied, stating “[t]here is no reason why the Public Defender needs the State Police materials except to the extent that they might help the office’s clients directly in court...[o]r, they could be indirectly helpful as training materials for assistant public defenders.”).

¹⁶ *See Del. Op. Att’y Gen.* 17-IB24, 2017 WL 3426242, at *2 (July 14, 2017) (“What is well-settled, however, is the Delaware courts’ strong opposition to allowing litigants to use FOIA as a means to advance their existing litigation position.”).