



CITY SOLICITOR'S OFFICE
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July 15, 2026

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RE: Attorney General Opinion No. 26-IB37, dated June 30, 2026 FOIA Petition Regarding the City of Newark Request for Reconsideration

Dear Ms. Cole:

The City of Newark respectfully requests, for the reasons outlined below, that the Office of the Attorney General reconsider the decision reached in Attorney General Opinion No. 26-IB37 (hereafter the "Opinion").

The complaint filed by Dr. Roe on June 1, 2026 (the "Complaint") stems from a FOIA request made by Dr. Roe on April 20, 2026 seeking executive session minutes. On May 11, 2026, the City provided Dr. Roe with a reasoned and legally supported basis for denying her FOIA request advising that, among other things, the contents of the minutes were subject to the attorney-client privilege and, as such, that disclosure of the minutes (and its attorney-client protected contents) would defeat the lawful purpose of the executive sessions under 29 *Del. C.* §10004(f). Dr. Roe challenged this denial by asking the AG's Office to decide only "if the City of Newark improperly denied my FOIA request for *executive session minutes*." Complaint (emphasis added).

The complaint does not challenge the propriety of the executive sessions themselves and, given that the sessions in question occurred over 12 years ago, any such challenge is time-barred. *See e.g., Del. Op. Att'y Gen.* 02-IB10, 2002 WL 970061, at *1 (Apr. 24, 2002) ("*Wade*") ("As a general rule, for fairness and practical reasons, we do not investigate events that occurred more than six months before we received the complaint."). The City, therefore, did not have any burden to justify its decision(s) to meet in executive session. 29 *Del. C.* § 10005(c). Notwithstanding the foregoing, the entirety of the Opinion is based upon the City's alleged burden to "adequately demonstrate the requirements of Section 10004(b)(4)" were met. Opinion p. 3. The City carried no such burden under 29 *Del. C.* § 10005(c) to establish the basis or the legitimacy of the reasons for entering any of the executive sessions relating to the minutes requested. The underlying executive sessions are not subject to challenge, and their validity is undisputed. Moreover, any challenge to the propriety of the executive sessions is time barred by the statute of limitation and laches.

Accordingly, the question of whether the requirements of 29 Del. C. §10004(b)(4) (and/or 29 Del. C. § 10004(b)(6)) were met over a dozen years ago are wholly irrelevant to any decision regarding the City's denial of the FOIA request, Dr. Roe's Complaint or the City's Response. Yet, the Opinion relies solely upon cases involving the propriety of entering executive session to receive legal advice and/or to discuss attorney-client privileged documents.¹ None of these cases support the conclusion that minutes for a *properly convened* executive session at which: (1) attorney-client privileged communications took place; and/or (2) attorney-client privileged documents were discussed; and (3) the minutes of session contain recorded statements of such privileged and confidential discussions, must be released to the public simply because the threat of current litigation has passed.

To the contrary, in each of the cited cases, the direction to release executive session minutes followed a finding that the executive session itself was improper. In *Chemical Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *10-12 (Del. Ch. May 19, 1994), the Court ordered the release of tape recorded minutes of an improperly convened executive session. In *Del. Op. Att'y Gen.* 19-IB07, 2019 WL 1511362, at *2 (Feb. 15, 2019) ("*Spelman*"), the AG's Office stated that "[i]t continues to be our view that FOIA imposes certain qualifications on the scope of attorney-client privilege arising in the public meeting context." However, this conclusion was reached *only* in the context of whether the executive session was properly held. *Spelman* provides no support for extending this conclusion to a factual scenario involving attorney-privileged communications that took place during an executive session convened for a proper purpose and which resulted in the written documentation of these privileged communications in the minutes of such session.

The AG's Office did not even discuss or reach any decision regarding the continuing attorney-privilege of information contained in any executive session minutes in *Del. Op. Att'y Gen.* 05-IB28, 2005 WL 3991286 (Sept. 7, 2005) ("*McGonegal*"). Yet, *McGonegal* is cited by the AG's Office for the proposition that "FOIA is a statutory public waiver of any possible attorney-client privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute". Opinion, n. 11.

In the case upon which the statement relies, the public body stipulated that it went into executive session for an improper purpose. *Dist. Att'y for the Plymouth Dist. v. Bd. of Selectmen of Middleborough*, 481 N.E.2d 1128, 1131 (Mass. 1985). Based upon that fact, the Court concluded "when a town discusses a topic with an attorney that they acknowledge should be public under the open meeting law, the attorney-client privilege is waived." See *Kay v. Town of Concord*, 257 N.E.3d 64, 75 (Mass. App. Ct. 2025). *Middleborough* has since been heavily distinguished and limited by the Massachusetts courts. See *Suffolk Const. v. Cap. Asset Mgmt.*, 870 N.E.2d 33, 45 n.20 (Mass. 2007) (discussing in great detail that attorney-client privilege is not extinguished under Massachusetts FOIA laws); *Kay*, 257 N.E.3d at 70 (explaining that *Middleborough* is limited to the specific facts of that case, does not stand for the proposition that the attorney-client privilege is blanketly waived and that "government entities may also assert the attorney-client privilege, despite the tension with the principle of government transparency embodied by the Massachusetts public records law.").² The *McGonegal* decision, therefore, stands on the slender reed of *Middleborough* which is inapplicable to the facts of this matter and is on troubled footing under Massachusetts law.

In sum, the Opinion's findings are based on case law that is wholly inapplicable, distinguishable and/or

¹ While we dispute the reasoning and validity of those decisions, we will not raise that dispute here because the validity of the executive sessions are not at issue in this matter.

² Notably, the *Kay* court also recognized that the Massachusetts Attorney General consistently takes the position that "it does not have the authority to pierce the attorney-client privilege." *Kay*, 257 N.E.3d at 76, n. 10.

misapplied to the facts presented by the Complaint and the Response. Consequently, the Opinion glosses over the actual question presented by the Complaint; namely, whether the City was justified in withholding the minutes of these properly convened executive sessions under 29 *Del. C.* §10002(o) and 10004(f) and containing attorney client privileged advice. Indeed, the Opinion contains a singular reference to Section 10004(f) stating only that “[t]he City’s sworn statements addressing the attorney-client privilege do not adequately demonstrate the requirements of Section 10004(b)(4), nor show how the release of these minutes would defeat this lawful purpose.” Opinion, 3-4. The Opinion therefore presumes, without any explanation, discussion or cited authority, that once the threat of litigation passes, the City must automatically disclose all related executive session minutes. This City respectfully submits that no such presumption or mandate exists.

Under FOIA, “the burden of proof shall be on the custodian of records to justify the denial of access to records.” 29 *Del. C.* § 10005(c). The AG’s Office has previously determined that, to meet this burden, the public body must “articulate[] reasonable and legitimate reasons why public disclosure of the executive session minutes at this time would defeat any lawful purposes for those executive sessions.” *Del. Op. Atty. Gen.* 05-IB26, 2005 WL 3991284, *4 (Aug. 29, 2005) (“*Bruette*”); see also *Del. Op. Att’y Gen.* 01-IB03, 2001 WL 1593103, *2 (Feb. 16, 2001), (“*Shetzler*”) (stating that deference is provided when a public body has “articulated reasonable and legitimate reasons why it exercised its discretion not to make [executive session minutes] available.”); *Del. Op. Atty. Gen.* 98-IB14, 1998 WL 910200, *4 (Dec. 17, 1998) (“*Turner*”) (“FOIA does not prescribe any procedures by which a public body determines whether disclosure of the minutes would ‘no longer defeat the purpose’ of the executive session. Since the decision is discretionary, a public body could, as long as the need for protection of the records exists, follow a uniform rule of not disclosing the minutes of executive session under any circumstances.”). The Opinion, therefore, is at odds with the prior decisions of the AG’s Office which recognize that the decision regarding disclosure under 29 *Del. C.* § 10004(f) is discretionary rather than mandatory upon the occurrence (or non-occurrence) of a specific event.

Here, the City’s initial denial of Dr. Roe’s FOIA request along with its Response each provided a well-reasoned and legally supported basis for its determination that disclosure of the contents of the executive session minutes would defeat the legal purpose and, as such, neither 29 *Del. C.* §10002(o) and/or § 10004(f) require their disclosure. The Opinion does not provide any reasoned basis for disturbing the City’s discretion and/or otherwise setting aside the City’s determination of privilege.

Further, the AG’s Office has previously recognized that the mere fact that the legal purpose for which an executive session was conveyed under 29 *Del. C.* § 10004(b) has concluded is not a *per se* ground for disclosure of the executive session minutes. In *Shetzler*, executive session minutes pertaining to a collective bargaining agreement were sought from a school district once the negotiations had concluded. The school district refused to release the minutes stating that “when collective bargaining negotiations are being addressed, strategies, including long term strategies and philosophies of the District regarding negotiations, are frequently included. Thus, to disclose those summaries, both while negotiations are continuing and during periods of time between negotiations, would unfairly disadvantage and adversely affect the District.” 2001 WL 1593103, at*2. Under those facts, the AG’s Office found the school district’s explanation reasonable and declined to “second-guess the School District’s discretionary decision absent a showing of bad faith or disparate treatment.” *Id.*

Much like *Shetzler*, the legal advice given to the City by its counsel extends far beyond issues, concerns and strategies relating to a singular cause of action or claim. For example, among other things, the executive session minutes reflect the advice of counsel regarding the interpretation of statutes, provisions of the City’s code and charter, obligations under contracts that still are being performed, all of which still exist separately and apart from the litigation. These concerns are not rendered moot simply because the

threat of litigation has dissipated. Disclosure of these attorney-client privileged communications would place the City at risk of future litigation and/or adversely impact the City's strategy and position in future litigation. It would also create the surely unintended consequence of allowing a litigant to dismiss a lawsuit, obtain privileged information relating to the City's legal strategy and advice of its counsel, and then recommence the lawsuit. This cannot be the result envisioned by the AG's Office; yet, it is precisely one of the many consequences the Opinion would create.

Delaware courts consistently recognize that the privilege exists to promote "full and frank communication" between attorneys and their clients and therefore must be protected rigorously. *Zirn v. VLI Corp.*, 621 A.2d 773, 781-82 (Del. 1993). The same protections apply to attorney work product prepared in anticipation of litigation, particularly materials reflecting counsel's legal theories, impressions, strategy, and mental processes. See *JPMorgan Chase & Co. v. Am. Century Companies, Inc.*, 2013 WL 1668393, at *3 (Del. Ch. Apr. 18, 2013) (recognizing broad Delaware protection for opinion work product prepared "because of litigation"). Delaware's FOIA statute likewise excludes from the definition of "public record" materials protected by attorney-client privilege and attorney work product. 29 Del. C. § 10002(o)(6). Accordingly, privileged legal advice, litigation strategy, attorney memoranda, and attorney work product do not become public merely because they are discussed by a governmental entity or maintained within government files.

In *Chemical Industry*, even though Vice Chancellor Jacobs ordered release of the tape recordings of the improperly convened executive session, the tapes were directed to be produced only after redacting "those portions that specifically concern the Board's litigation strategies." *Chem. Indus.*, 1994 WL 274295, at *13. Here, by contrast, the Opinion mandates disclosure of litigation strategy and attorney client privileged advice on a variety of potential litigation matters. In *Del. Op. Att'y Gen.* 97-IB14, 1997 WL 606471, at * (July 29, 1997) ("*Elliott*"), the AG's Office ordered disclosure of executive session minutes for a meeting properly conveyed under 29 Del. C. §10004(b) only after an in-camera review of the minutes to determine if disclosure would reveal any details regarding advice received from counsel. Indeed, in *Elliott*, the AG's Office accurately noted that "FOIA 'neither says that the subjects discussed must be summarized nor attempts to define how specific such a summary should be.'" *Id.* at *5 (quoting *Common Cause of Del. v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 1995 WL 733401, *4 (Del. Ch. Dec. 5, 1995)). Notwithstanding the foregoing, the AG's Office has also recognized that "'[t]here is a practical reason' to keep more detailed minutes of [an] executive session in the event there is litigation and the purpose of the executive session is challenged." *Id.* at *5 (quoting *Common Cause*, 1995 WL 733401, at *4).

Here, the AG's Office summarily rejected the City Solicitor's affidavit regarding the contents of the executive session minutes which validated the City's position on non-disclosure without undertaking any independent review of the minutes. See *Del. Op. Att'y Gen.* 02-IB17, 2002WL 310321224, at *5 (Aug. 6, 2002) ("*Wilson*") ("In the course of our investigations, we sometimes ask to review executive session minutes *in camera* with strict assurances of confidentiality.") At the very least, as already articulated by the City in its Response, the content of the minutes should have been considered because the minutes contain exclusively attorney client privileged discussions. As such, those portions of the minutes that reflect such communications are not public documents under 29 Del. C. § 10002(o), as the minutes are documents protected from disclosure under common law (i.e., the attorney-client privilege). Nothing in 29 Del. C. § 10004(f) requires disclosure of these privileged communications simply because they are set forth in executive session minutes.

The Opinion here would put the City in the untenable position of choosing between risking waiver of its attorney-client privilege simply by taking detailed and accurate notes of the advice provided by the attorney during executive session, or recording virtually nothing in the minutes at the risk of not being

able to validate the reason for the executive session in the first place. This cannot be the logical result. The Opinion effectively creates a bright-line rule that all executive session minutes to be publicly disclosed once litigation is complete (or the threat of litigation has passed). This is contrary to the very language of 29 Del. C. § 10004(f) as well as the prior opinions of the AG's Office which place the decision of disclosure within the discretion of the public body. The Opinion inappropriately takes this discretion away from the public body.

Moreover, the Opinion creates an exceptionally dangerous precedent that is contrary to Delaware law. As already discussed above, the issue raised by the Complaint is the disclosure of minutes of *properly convened executive sessions* during which attorney-client privileged communications took place and are recorded in the minutes requested. Without the benefit of any applicable case law, guardrails, exceptions or other protections, the Opinion effectively concludes that – even if the executive session was lawful, any attorney-client privileged communications taking place during these sessions automatically lose their privilege once the underlying litigation (or threat of litigation) passes. This conflicts with Delaware law which provides that the attorney-client privilege and duty of confidentiality do not terminate merely because the underlying litigation or representation has concluded.

Delaware courts have described the attorney client privilege as “sacrosanct.” *In re Kent Cnty. Adequate Pub. Facilities Ordinances Litig.*, 2008 WL 1851790, at *5 n.25 (Del. Ch. Apr. 18, 2008). The attorney-client privilege is established law in Delaware, “not by statute but by application of common law principles.” *Texaco, Inc. v. Phoenix Steel Corp.*, 264 A.2d 523, 524 (Del. Ch. 1970). As such, communications and documents governed by such privilege are not public records. 29 Del. C. § 10002(o)(6).³ This common law privilege does not end simply because the litigation ends. *See Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 160–61 (Del. Ch. 2013) (explaining that attorney-client privilege belongs to the client and continues unless waived or transferred by operation of law, thereby recognizing that the privilege survives the end of the underlying representation or transaction); *see also State ex rel. State Highway Dep't v. 62.96247 Acres of Land, More or Less, in New Castle Hundred, New Castle Cnty.*, 193 A.2d 799, 814 (Del. Super. 1963) (holding that “the privilege continues even after the end of the litigation or other occasion for legal advice and even after the death of the client”) (quotation omitted); *Hyde Park Venture Partners Fund III, L.P. v. FairXchange, LLC*, 292 A.3d 178, 202-203 (Del. Ch. 2023) (recognizing that attorney-client privilege is determined at the time of the communication, not at the time disclosure is sought). This tenant is also reflected in the Delaware Rules of Professional Conduct. *See* Del. R. Prof. Conduct 1.9(c)(2) (providing that a lawyer who has formerly represented a client shall not thereafter reveal information relating to the representation); *id.* at Rule 1.6 comment 20 (“The duty of confidentiality continues after the client-lawyer relationship has terminated.”).

The City is willing to, if requested by your office, provide the requested executive session minutes to Dr. Roe with all attorney-client privileged communications redacted from such production. If that is done, almost all of what is in minutes will end up being redacted. But we will provide heavily redacted minutes within ten (10) days of such a request from your office. The City, however, will not waive its continuing attorney-client privilege with respect to non-public legal advice.

Based on the foregoing, the City trusts that the AG Office's will reconsider the decision reached in its prior

³ The City submits that, under the facts presented here, the legal purpose for consideration under 29 Del. C. § 10004(f) is that established by 29 Del. C. § 10002(o)(6) – that attorney-client privileged communications are not public records subject to disclosure; not the underlying threat of litigation to which the communications relate. As discussed herein, the attorney-client privilege is perpetual until waived by the client and, therefore, the legal purpose for the executive session does not end simply because the litigation has ended.

Opinion. However, in the event reconsideration is not afforded and the AG's Office continues to require the City to disclose attorney-client privileged communications recorded in executive session minutes, the City will not comply and invites the AG's Office to commence litigation in order to compel compliance so that this important matter regarding a fundamental protection of law may be decided by the Delaware courts.

Sincerely,



Paul E. Bilodeau
City Solicitor

PEB

C: Dr. Amy Roe (via email amywroe@gmail.com)
Mayor and Council
Tom Coleman, City Manager
Tara Schiano, FOIA Coordinator