

June 22, 2005

Civil Division-Kent County (739-7641)

Mr. Randall Chase
The Associated Press
P.O. Box 94
Dover, DE 19903

Re: **Freedom of Information Act Complaint
Against City of Rehoboth Beach**

Dear Mr. Chase:

Our Office received your letter dated May 20, 2005 alleging that the City of Rehoboth Beach ("the City") violated the public records requirements of the Freedom of Information Act, 29 Del. C. Ch. 100 ("FOIA"), by denying you access to "copies of the post-mortem records on Duane L. Lawson that were provided to [the City's police department] by the Department of Health and Social Services and/or state medical examiner's office."

By letter dated May 24, 2004, we asked the City to respond to your complaint by June 6, 2005. The City Solicitor expressed concern about taking a position on the legal issues raised by your complaint because the City is a defendant in pending litigation brought by Mr. Lawson's widow, and the Chancery Court has enjoined the City from releasing any post-mortem reports to the public. *See Lisa A. Lawson et al. v. Vincent Meconi et al.*, ORDER, C.A. No. 1183-N (Del. Ch.,

Apr. 29, 2005)
(Lamb, V.C.) (“*Lawson*”). the public. See *Lisa A. Lawson et al. v. Vincent Meconi et al.*, ORDER, C.A. No. 1183-N (Del. Ch., Apr. 29, 2005) (Lamb, V.C.) (“*Lawson*”). We then agreed that a written response from the City was not necessary because the facts are not in dispute, and we can make the required determination under FOIA based on our independent legal research.

The Chancery Court denied Mrs. Lawson’s motion for a preliminary injunction because “the common law right of privacy does not survive the death of its holder” and therefore “Mrs. Lawson does not have a statutory or common law right to protect the confidentiality of the autopsy report.” *Lawson*, May 27, 2005 Mem. Op. at 16-17. The Chancery Court did not address the issue raised in your FOIA complaint because “[a]ll parties to this suit agree that the Autopsy Information is exempt under the Delaware FOIA. As this issue is not in dispute, the court expressly makes no findings and rulings on this issue.” *Id.* at 9 n.17.

Relevant Statutes

FOIA requires that “[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body.” 29 *Del. C.* §10003(a).

FOIA exempts from disclosure “[i]nvestigatory files compiled for civil or criminal law-

enforcement purposes including pending investigative files and presentence investigations and child custody and adoption files where there is no criminal complaint at issue.” 29 Del. C. §10002(g)(3).¹

Legal Authority

A. Investigative File Exemption

1. Delaware Case Law

Delaware’s FOIA exempts from the definition of a “public record” any “[i]nvestigatory files compiled for civil or law enforcement purposes.” This exemption covers documents compiled by the State Fire Marshal when investigating the cause of a fire, *Williams v. Alexander*, C.A. No. 98C-05-036, 1999 WL 743082 (Del. Super., June 29, 1999) (Quillen, J.), and complaint files of the Division of Professional Regulation, *Atamian v. Bahar*, C.A. No. 01C-03-031, 2002 WL 264533 (Del. Super., Feb. 22, 2002) (Ridgely, Pres. J.). “The State’s interest in protecting any investigative records it has is to further the effective enforcement of the [laws]. If permitted, discovery of such records may discourage some complainants from bringing pertinent information to the [State’s] attention. Protection of the material encourages full and frank disclosure of information to the [State].” *Bahar*, 2002 WL 264533, at p.2.

In *News-Journal Co. v. Billingsley*, No. 5774, 1980 WL 3043 (Del. Ch., Nov. 20, 1980)

¹ FOIA also exempts from disclosure “[a]ny medical . . . file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy.” 29 Del. C. §10002(g)(1). In *Att’y Gen. Op. 79-IO33* (July 23, 1979), we determined that some information in an autopsy report might be covered by the medical file exemption, but only to the extent that disclosure constituted “an ‘invasion of relational right to privacy’ should such a cause of action be recognized by the Delaware courts.” Since then, the Chancery Court has held “that a claim for invasion of privacy cannot be brought by a decedent’s

(Hartnett, V.C.), the newspaper sued for access to the complaint that prompted the Council of the Delaware Association of Professional Engineers to investigate one of its registrants for alleged misconduct. After investigating, the Council decided not to take any disciplinary action. Even though the case was closed, the Chancery Court held that the investigative file exemption under Delaware's FOIA continued to apply. "If disclosure of the investigatory files of the Delaware Association of Professional Engineers were allowed, there would be a chilling effect upon those who might bring pertinent information to the attention of the Association. Its ability to investigate would be crippled, and accordingly, its ability to maintain the qualifications of registered engineers would be impaired." 1980 WL 3043, at p.3.

Unlike some other exemptions under FOIA, the application of the investigative file exemption does not depend on whether disclosure "would constitute an invasion of personal privacy." *Compare with 29 Del. C. §10002(g)(1)* (personnel, medical or pupil files); *§10002(g)(4)* (criminal records). "[D]ocuments relating to criminal investigations" are "categorically excluded from the scope of FOIA." *Gannett Co. v. Delaware Criminal Justice Information System*, 768 A.2d 508, 515 (Del. Super. 1999) (Alford, J.), *aff'd*, 765 A.2d 951 (2000) (citing *Nasir v. Oberly*, C.A. No. 84C-AU-56, 1985 WL 189324, at p.1 (Del. Super., Dec. 5, 1985) (Bifferato, J.)).

2. Court Decisions In Other States

The courts in other states have held that post-mortem reports required by statute to be prepared by a coroner or medical examiner are exempt from the state public records laws as investigative files.

In *Heltzel v. Thomas*, 516 N.E.2d 103 (Ind. App. 1987), a reporter requested access to all of the county coroner's files, claiming they were not exempt as investigatory records because the coroner investigates deaths and not crimes. Under Indiana law, "[a] county coroner is notified whenever a person has died from violence or casualty, or when in apparent good health. A coroner also investigates deaths whenever a body is found, or when a person dies under apparently unusual, unnatural or suspicious circumstances." 516 N.E.2d at 105. The Indiana Court of Appeals held that post-mortem reports prepared by the county coroner were exempt from disclosure as investigatory records.

The records sought by [the reporter] are a compilation of facts about the scene where the body was located and its condition. It contains a narrative of the coroner's observations, which may also include the impressions of law enforcement personnel present who are required to assist the coroner . . . This investigative report is used to aid in the determination of the cause of death, and it often becomes part of the files of the prosecutor and the police.

Id.

In *State ex rel. Dayton Newspapers, Inc. v. Rauch*, 465 N.E.2d 458 (Ohio 1984) (per curiam), a newspaper sued to compel disclosure of the autopsy reports of two homicide victims. The county coroner argued that the autopsy reports were exempt from disclosure under the state public records law as confidential law enforcement records because they "contain information relating to the type of wounds, how they were inflicted, etc. which aid law enforcement personnel in conducting their investigation." 465 N.E.2d at 459. The Ohio Supreme Court agreed that the autopsy reports were exempt from disclosure "as specific investigatory work product . . . The autopsy is, in itself, an investigation" *Id.* "We recognize that the confidentiality of the contents of an autopsy report is

essential to its effective use in further investigation by law enforcement personnel.” 465 N.E.2d at 459.

In *The News-Press and Gazette Co. v. Cathcart*, 974 S.W.2d 576 (Mo. App, 1998), a newspaper sued the county medical examiner to compel disclosure of an autopsy report. The Missouri Court of Appeals held that “[w]hile the medical examiner’s statute does not place any restrictions on the use or availability of autopsy reports, the investigative reports exception of the Sunshine Law exempted from disclosure the autopsy report.” 974 S.W.2d at 579.

For purposes of the investigative report exception to the Sunshine Law, a medical examiner is a law enforcement agency. [The medical examiner statute] requires that a medical examiner be notified when any person dies within the county as a result of violence or homicide. Upon receipt of notification, a medical examiner shall take charge of the dead body and fully investigate the essential facts concerning the medical causes of death. . . . [The statute] provides that all law enforcement officers shall cooperate fully with the department of medical examiner. Finally, a medical examiner shall promptly deliver to the prosecuting attorney copies of all records relating to every death in which further investigation may be deemed advisable. Given these duties, a medical examiner is a law enforcement agency for purposes of the investigative reports exception of the Sunshine Law.

Id. at 579-80.

3. Delaware Medical Examiner Statute

Chapter 47 of Title 29 of the *Delaware Code* establishes the public office of Chief Medical Examiner. Under circumstances prescribed by statute (*e.g.*, death by violence or in an unusual or suspicious manner), “it shall be the duty of the person having knowledge of such death . . . immediately to notify the Chief Medical Examiner . . . who in turn shall notify the Attorney General

of the known facts concerning the time, place, manner and circumstances of such death.” 29 *Del. C.* § 4706(a). The statute makes it a criminal offense for any person to: (i) “willfully neglect or refuse to report such death”; or (ii) “refuse to make available prior medical or other information pertinent to the death investigation”; or (iii) without prior approval by the office of the Chief Medical Examiner, to “willfully touch, remove or disturb the clothing or any article upon or near the body.” *Id.*

“Immediately upon receipt of such notification, the Medical Examiner shall take charge of the dead body.” 29 *Del. C.* § 4706(b). “The Medical Examiner shall fully investigate the essential facts concerning the medical causes of death and may take the names and addresses of as many witnesses as may be practicable to obtain and shall reduce such facts as the Medical Examiner may deem necessary to writing and file the same in the office of the Chief Medical Examiner.” *Id.* § 4706(c).

“Where the cause of death shall have been established within a reasonable medical certainty by a Medical Examiner, the Medical Examiner shall prepare a written report and file it in the office of the Chief Medical Examiner within 30 days of an investigation of such death.” 29 *Del. C.* § 4707. “The Chief Medical Examiner shall deliver to the Attorney General copies of all records relating to every death in which, in the judgment of the investigating Medical Examiner, further investigation may be deemed advisable.” *Id.* § 4710(b).

In addition, “[u]pon written request the next of kin of the deceased shall receive a copy of the post-mortem examination report, the autopsy report and the laboratory reports, unless there shall be a criminal prosecution pending in which case no such reports shall be released until the criminal prosecution shall have been finally concluded.” 29 *Del. C.* § 4707(e).

On February 15, 2005, the Rehoboth Beach Police Department notified a medical examiner of Mr. Lawson's death and requested an autopsy as part of the ongoing investigation of the cause of death by the Police Department and the State Fire Marshal. An investigator from the Chief Medical Examiner's office drove to the scene in Rehoboth to transport the body to Nanticoke Memorial Hospital in Seaford. The medical examination resulted in a file consisting of an autopsy report; toxicology report; medical investigator's report; final death report; photographs; and certificate of death. The original or copies of all of those documents were sent to the Medical Examiner's office in Wilmington and to the Attorney General. A copy of the autopsy report was sent to the Rehoboth Beach Police Department and the State Fire Marshal.

We determine that post-mortem reports prepared by the office of the Chief Medical Examiner pursuant to statute are investigative files that are exempt from the definition of a public record under FOIA.² The reports "are a compilation of facts about the scene where the body was located and its condition" and are "used to aid in the determination of the cause of death" and "may become part of the files of the prosecutor and the police." *Heltzel*, 516 N.E.2d at 105. Such a report "is, in itself, an investigation" and its confidentiality "is essential to its effective use in further investigation by law enforcement personnel." *Rauch*, 465 N.E.2d at 459.

² We do not believe that FOIA's investigative file exemption covers certificates of death. Death certificates (which may be prepared by a medical examiner, private doctor, or a licensed funeral director) are not compiled as part of a public body's law enforcement investigative function, but rather to record a statistic with the Office of Vital Statistics. *See* 16 *Del. C.* Chapter 31. Death certificates, however, may be exempt from disclosure under another FOIA exemption, 29 *Del. C.* §10002(g)(6) (records specifically exempted by other statute). *See* 16 *Del. C.* §3110(a), (f) ("records and files of the Office of Vital Statistics shall be considered confidential matter and shall not be open to inspection" and shall not become public records" until "40 years have elapsed after the date of death").

The reports do not lose their exempt status when the office of the Chief Medical Examiner shares them with other law enforcement agencies. *See City of Riviera Beach v. Barfield*, 642 SO.2d 1135, 1136 (Fla. App. 1994) (“investigative records maintain their exempt status under the Florida Public Records Act when the records are shared with another criminal justice agency”). Indeed, it is implicit in the medical examiner statute that examiners will “share information with other officials” including the “police in the course of an investigation.” *Lawson*, May 27, 2005 Mem. Op. at 8.

Nor do post-mortem reports lose their exempt status as an investigative file after a case is closed.³ When a criminal investigation is concluded, the statute permits the release of reports to the next of kin, *see 29 Del. C. § 4707(e)*, but the statute specifically omits any reference that the reports then become available to the general public. Delaware's investigative file exemption continues even after the investigation is concluded for sound public policy reasons: to encourage citizens to bring “pertinent information” to the attention of law enforcement authorities and to encourage “full and frank disclosure.” *Bahar*, 2002 WL 264533, at p.2.⁴

The courts in other states have also held that the investigative file exemption under the public records laws continues even “where no criminal prosecution has been or will be undertaken, and

³ In *Att’y Gen. Op. 79-IO33* (July 23, 1979), we suggested that FOIA’s investigative file exemption might not apply after a criminal investigation was concluded, but that was before the courts held that the exemption continues after a criminal case is closed.

⁴ In 2002, the General Assembly amended FOIA to exempt disclosure of “[a]ny photographs, video recordings or audio recordings of a post-mortem examination in the possession of the office of the Chief Medical Examiner.” *29 Del. C. § 10002(g)(13)*. We have reviewed the tapes of the legislative debates. Some of the testimony strongly supports our legal conclusion in this opinion that post-mortem reports are investigative files compiled for law enforcement purposes under FOIA, while other testimony might support a contrary position. We believe the stronger argument is that the 2002 amendment to FOIA did not restrict the scope of the investigative file exemption as it applies to post-mortem reports prepared by the office of the Chief Medical Examiner.

where the [criminal] investigation is complete.” *Gannett Pacific Corp. v. North Carolina State Bureau of Identification*, 595 S.E.2d 162, 165 (N.C. App. 2004).

“It is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public.”

News and Observer Publishing Co. v. State ex rel. Starling, 322 S.E.2d 133, 138 (N.C. 1984) (quoting *Aspin v. Department of Defense*, 491 F.2d 24, 30 (D.C. Cir. 1973)).

Like the North Carolina Public Records Act, Delaware's FOIA “does not distinguish between active and inactive or closed investigations.” *McCormick v. Hanson Aggregates Southeast, Inc.*, 596 S.E.2d 431, 436 (N.C. App. 2004). “Considering the many underlying purposes for the criminal investigation exception – protecting investigative techniques, informant identities, and reputations of persons investigated but not charged, and encouraging citizens to volunteer information – closing an investigation should have no effect on the status of the records of that investigation.” 596 S.E.2d at 436.

These public policy concerns are particularly important in the context of the Chief Medical Examiner, who depends on the cooperation of private doctors, funeral directors, and police officers to notify a medical examiner immediately (who, in turn, must notify the Attorney General) to investigate the cause of death in a timely fashion to determine whether a crime may have been committed.

B. Standing To Assert The Investigative
File Exemption Under FOIA.

We have previously determined that under FOIA there may be multiple custodians of a public record. *See Att’y Gen. Op.* 04-IB04 (Feb. 5, 2004) (FOIA’s broad definition of a “public record” contemplates “that more than one public body may retain or receive the same document, and that the same document may be reproduced and stored in the files of various public bodies. Each one of those public bodies may be a custodian for purposes of FOIA.”).

We have not had previous occasion, however, to determine which of several custodians of the same record is the proper public body to assert an exemption from disclosure under FOIA. FOIA requires a citizen to make a request for records to the “appropriate” custodian. We believe the term “appropriate” means the public body that originated the record. If a citizen directs a request to another public body that did not originate – but merely received a copy of – that public record, then we believe that FOIA requires the other custodian to refer the FOIA request to the originating agency for processing.⁵

We follow the lead of the federal courts in applying the federal FOIA where more than one government agency has copies of the same documents. In *British Airports Authority v. Civil Aeronautics Board*, 531 F. Supp. 408 (D.D.C. 1982), British airlines sued under the federal FOIA to compel the CAB to disclose documents relating to airport user fees. Included in the CAB’s files

⁵ Not every record in the possession of a public body is written or generated by that body, but may be received from a private party for regulatory or business reasons (for example, a bid proposal for a state contract). In that context, by “originating agency” we mean the public body that first received the record in the normal course of business (for state contracts, the public body that issued the request for proposal).

were copies of documents received from the State Department relating to the negotiation of a bilateral air transport agreement between the United States and Great Britain. The CAB referred that portion of the airlines' FOIA request to the State Department because it raised concerns about confidential diplomatic relations.

The federal district court endorsed the written policy of the Attorney General on referring FOIA requests to the originating agency. "Where a record is requested which is of concern to more than one agency, the request should be referred to the agency whose interest in the record is paramount." 531 F. Supp. at 418 (quoting U.S. Department of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967)).

[T]he practice is entirely consistent with the ultimate goal of the FOIA: to assure, as expeditiously as possible, the citizenry's access to non-exempt federal agency records. The agency that generated the documents is in the best position to determine swiftly and efficiently the propriety of disclosure. Duplication of that effort by an agency that has little or no interest in, or knowledge of, the requested documents, but that simply has possession of informational copies, would serve no purposes other than to delay a decision on the request and waste already scarce agency resources.

531 F. Supp. at 418.

In *McGehee v. Central Intelligence Agency*, 697 F.2d 1095 (D.C. Cir. 1983), the federal appeals court laid down guidelines for referring requests under the federal FOIA to the originating agency. The agency receiving the request must "immediately (i) inform the requestor of the situation, (ii) notify the originating agency and, (iii) if necessary, forward to the latter copies of the relevant documents. To minimize the burden on the requester, the notification and referral would be accorded the status of a FOIA request; the person seeking information would thereby be relieved of

the duty to submit a separate demand to the originating agency.” 697 F.2d at 1111. This process will “mitigate the two most serious hardships associated with extant automatic referral systems: the inconvenience to requesters of being compelled to assert their rights in two or more independent administrative fora and the long delays resulting from the superimposition of two or more processing sequences.” *Id.* We believe that these are appropriate guidelines for public bodies to follow in Delaware when there is more than one custodian of the information requested.

To respond to a FOIA request, the Chief Medical Examiner is the “appropriate” custodian of reports or other files compiled by that office to respond to a FOIA request. If a person makes a FOIA request for a post-mortem report to a police department investigating a death, then the police department must immediately refer the FOIA request to the Chief Medical Examiner, and at the same time notify the requestor of the referral. The time limits for responding to FOIA requests will then start to run. *See Att’y Gen. Op.* 03-IB13 (June 2, 2003) (under FOIA, a public body should normally respond to a request for access to public records within ten days of receipt unless there are exceptional circumstances).⁶

Conclusion

For the foregoing reasons, we determine that the Lawson post-mortem reports (with the exception of the death certificate, which may be exempt from disclosure by separate statute) are

⁶ We note that implementation of these new procedures will not unduly delay the processing of your FOIA complaint. On April 29, 2005, the Chancery Court temporarily restrained the City of Rehoboth Beach police department from releasing any post-mortem report concerning Mr. Lawson’s death. On May 27, 2005, the Chancery Court declined to issue a preliminary injunction, but on June 1, 2005 stayed its decision for ten days to allow Mrs. Lawson time to perfect an interlocutory appeal to the Supreme Court. On June 10, 2005, the Court extended the stay for

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exempt from disclosure under FOIA as part of an investigative file compiled for law enforcement purposes. Under FOIA, the City should immediately refer your FOIA request to the originating agency, the office of the Chief Medical Examiner, and notify you in writing of the referral.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Malcolm S. Cobin, Esquire
State Solicitor

cc: The Honorable M. Jane Brady
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another twenty days.

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