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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB19

July 12, 2017

VIA EMAIL AND U.S. MAIL

Michael Dworiak, Editor-in-Chief
Delaware Police News
4023 Kennett Pike, #58434
Wilmington, DE 19807
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Re: November 16, 2015 FOIA Petition Concerning Request for Records from the City of Wilmington

Dear Mr. Dworiak:

We write in response to your November 16, 2015 petition (the "Petition") seeking a determination of whether the City of Wilmington (the "City") violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"), by failing to provide access to certain records. Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the City to submit a written response to your Petition. We received the City's response ("Response") on December 11, 2015. We have reviewed the Petition and the Response and as set forth more fully below, we have determined that the City violated FOIA by failing to provide the records that you requested. To remediate this violation, we ask that the City provide you the records within ten days of the date of this letter.

I. BACKGROUND

On July 16, 2015, you submitted a FOIA request to the City (the "Request") for the following: "(1) Copies of firearms qualification records of all sworn members of the Wilmington Fire Department (marshals or any other position that carries a firearm in the cour[se] of their duties) for the years 2013 and 2014."

On August 7, 2015, you submitted a follow-up email to the City regarding your Request. On August 10, 2015, Assistant City Solicitor Tara M. DiRocco responded that the City "need[ed] additional time to respond" and would likely respond "in the next week or so." Ms. DiRocco

provided the City's response by email on August 20, 2015 denying your Request on the bases that "Firearms qualifications records are exempt from public disclosure because they are part of the employees' personnel file pursuant to 29 *Del. C.* § 10002(1)(1)" and that the "Delaware Council on Police Training releases records only upon submission of an authorization and release signed by the officer."

On August 20, 2015, you asked the City to reconsider its denial, citing *Del. Op. Att'y Gen.* 09-IB01 in support of your position that the requested firearms qualification records are "public records" because they are training records and not personnel records. You also noted that the requested records were maintained by the Wilmington Fire Department, not the Council on Police Training, and that "all other agencies in the state ... have released these records" in response to similar requests.

On August 21, 2015, the City agreed to reconsider your Request. The City reaffirmed its denial of your request on September 17, 2015, stating that "firearms qualification records are not subject to FOIA because they are part of the employees' personnel files" and are distinguishable from the "training records of the Delaware State Fire School" deemed public records in *Del. Op. Att'y Gen.* 09-IB01, which did not address whether the Delaware State Fire School training records were part of the personnel file because no question of personal privacy was at issue. The City further noted that "[m]embers of the [City Fire Marshall's Office] are deemed law-enforcement officers under the [Law-Enforcement Officers' Bill of Rights]" and argued that "release of the requested records would constitute an invasion of privacy and could be deemed a violation of the Law-Enforcement Officers' Bill of Rights," which "exempts personnel files of law-enforcement officers from disclosure. 11 *Del. C.* §§ 9200, *et seq.*"

On September 18, 2015, you responded to the City that firearms qualification records are not part of a personnel file. In support, you cited Title 19, Delaware Code, Section 731, which defines a "personnel file" as containing "any application for employment, wage or salary information, notices of commendations, warning or discipline, authorization for a deduction or withholding of pay, fringe benefit information, leave records, employment history with the employer, including salary information, job title, dates of change, retirement record, attendance records, performance evaluations and medical records," but not training records. You further noted that the "training records being requested are not maintained by the City's Human Resource Department or Fire Marshall Office... [but] are maintained separate and apart [from] any personnel file of those employees required to carry firearms."

On November 6, 2015, the City again reaffirmed its denial, noting that the City "maintains its position that the firearms qualification records of the members of Wilmington's Fire Marshal's Office are exempt under FOIA for the same reasons that the firearms qualification records of the Wilmington Police Department would be exempt."

We received your Petition on November 17, 2015 and the City's Response on December 11, 2015. We requested additional information from the City on January 15, 2016, which the City provided on January 19, 2016. The City supplemented its Response on May 19, 2016 ("Supplemental Response").

II. SUMMARY OF ARGUMENTS

In your Petition, you allege that the City violated FOIA by denying your Request. Specifically, you allege: “the City is relying on the Law Enforcement Officers’ Bill of Rights [LEOBOR] in classifying firearms qualification records as a ‘personnel file’ and therefore exempt under FOIA.”

In its Response, the City maintains that Fire Marshal’s Office (“FMO”) members “historically have been afforded the rights and protections of the [LEOBOR],” which would prohibit the City from disclosing their personnel records. The City notes that, in order to carry out their investigatory duties, FMO members must graduate from the Wilmington Police Department Academy and are thus “deemed ‘police officer[s] who [are] sworn member[s] of ... the Wilmington City Police Department.’” The City argues that because “FMOs fall under LEOBOR, it must be determined whether the firearms qualification records constitute personnel records, and if they are personnel records, the City cannot disclose them.” The City acknowledges that the firearms qualifications records are “training records of the Wilmington Police Department” and are maintained at the Wilmington Police Department’s firearms range office, describing the records at issue as a list of “the names of the officers, the dates of the qualifications, and the actual scores.” The City also appears to implicitly acknowledge that the firearms qualifications records are not kept in each FMO member’s personnel file, arguing instead that the information at issue is “part and parcel” of the FMO member’s “collective personnel records,” which includes any information, such as the failure of a qualification test, that could result in transfer or reassignment.

The City’s Supplemental Response included a copy of an April 21, 2016 determination letter issued by this office’s Office of Civil Rights and Public Trust to Michael A. Brown, Wilmington City Council Member at Large, regarding an unrelated matter analyzing a criminal statute. The April 21, 2016 letter stated that, pursuant to Title 11, Delaware Code, Section 8401(5), the definition of “police officer” includes “municipal fire marshals who are graduates of a Delaware Police Academy which is accredited/authorized by the Council on Police Training.”¹ As such, the letter provided, a “Wilmington Fire Marshal was not precluded by law from stating that he was a police officer.”²

III. APPLICABLE LAW

Pursuant to Title 29, Delaware Code, Section 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.”

Delaware’s FOIA defines “public record” as “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such

¹ Letter from Allison E. Reardon to Michael A. Brown, Sr. (April 21, 2016).

² *Id.*

information is stored, recorded or reproduced,” unless the requested information meets one of the specifically-enumerated substantive exceptions to this definition.³ Among those items exempt from the definition of “public record” is “[a]ny personnel, medical or pupil 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.”⁴ Also exempt are “[a]ny records specifically exempted from public disclosure by statute or common law.”⁵

If a public body’s response to a FOIA request is challenged, the burden of proof rests upon the custodian of records to justify a denial of access to records.⁶

IV. DISCUSSION

The City Violated FOIA by Denying You Access to Public Records

We first consider whether FMO firearms qualification records are exempt from disclosure pursuant to Title 29, Delaware Code, Section 10002(l)(1), which exempts “[a]ny personnel, medical or pupil 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.” This office has previously adopted a definition of “personnel file” for FOIA purposes as “a file containing information that would, under ordinary circumstances, be used in deciding whether an individual should be promoted, demoted, given a raise, transferred, reassigned, dismissed, or subject to such other traditional personnel actions,” in part because this definition is consistent with other Delaware law.⁷

Even assuming *arguendo* that these records could be considered part of a personnel file,⁸ they do not meet the second prong of Section 10002(l)(1) in that the disclosure of the firearms qualification records at issue would not violate the personal privacy of the FMOs. It has long been acknowledged that Delaware recognizes that the right to privacy is limited to those instances in which “the public has ‘no legitimate concern’ in [the] matters” at issue.⁹ For example, opinions of this office have determined that (1) the names, job classifications, salaries, of public employees, including police officers, are not exempt from disclosure;¹⁰ (2) simply placing a document in a “personnel file” does not allow the agency to “claim[] an exemption [from disclosure] based on

³ *Id.* at §§ 10002(l); 10003(d)(1).

⁴ *Id.* at § 10002(l)(1).

⁵ *Id.* at § 10002(l)(6).

⁶ 29 *Del. C.* § 10005(c).

⁷ *Del. Op. Att’y Gen.* 02-IB24 (Oct. 1, 2002).

⁸ While we need not address this issue here, we note our belief that a court would likely conclude that these materials are not the type of personnel records within the scope of Section 10002(l)(1).

⁹ *Del. Op. Att’y Gen.* 10-IB09 (Sept. 2, 2010).

¹⁰ *Del. Op. Att’y Gen.* 12-IIB10 (July 27, 2012).

the document's location, rather than its content;"¹¹ and (3) as noted above, "Delaware State Fire School training records are public records to which the public has a right of access."¹²

An opinion of this office held that the names of law enforcement officers assigned to the Wilmington Mayor's security detail, as well as those who applied to be part of the security detail but were not accepted, could be withheld as a violation of those officers' privacy rights. This was based upon the underlying concept that "law enforcement personnel have substantial privacy interests in protecting their identities."¹³ Such concerns are not present in this instance because the identities of the members of the City Fire Marshal's office are publicized on the City's own website.¹⁴

Having concluded that the FMO firearms qualification records are not exempt from disclosure pursuant to Title 29, Delaware Code, Section 10002(l)(1), we next consider whether they are otherwise "specifically exempted from public disclosure by statute or common law"¹⁵ as a result of Delaware's LEOBOR. As this office has previously noted, Delaware's LEOBOR is intended to provide certain rights and privileges to police officers, but is limited in its applicability to "law-enforcement disciplinary proceedings throughout the State, conducted by the law-enforcement agencies specified in § 9200(b)."¹⁶ Section 9200(b) provides a list of agencies, the officers of which are protected under LEOBOR, which notably includes the Wilmington City Police Department, but not the Wilmington Fire Marshal's office.¹⁷ It further provides that "no law-enforcement officer not a member of 1 of the [enumerated] agencies shall be covered by [the LEOBOR]."¹⁸ We conclude that LEOBOR does not apply to members of the Wilmington Fire Marshal's office per its plain language. Accordingly, it cannot provide a statutory or common law basis to withhold the requested public records in the instant matter.

¹¹ *Del. Op. Att'y Gen.* 02-IB24.

¹² *Del. Op. Att'y Gen.* 09-IB01 (Feb. 5, 2009).

¹³ *Del. Op. Att'y Gen.* 13-IB03 (July 12, 2013).

¹⁴ <https://www.wilmingtonde.gov/government/public-safety/fire-marshal-s-office/staff-directory> (last visited July 7, 2017).

¹⁵ *Id.* at § 10002(l)(6).

¹⁶ 11 *Del. C.* § 9209.

¹⁷ *Id.*

¹⁸ *Id.*

V. **CONCLUSION**

We determine that the City has not met its burden of proof to justify its denial of the Request for the records at issue. We direct the City to provide the information responsive to the Request within 10 calendar days of the date of this determination. Either party may appeal this determination to the Superior Court of the State of Delaware.

Very truly yours,



Jennifer R. Noel
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: Tara M. DiRocco, Assistant City Solicitor
Aaron Goldstein, State Solicitor
Jennifer Noel, Deputy Attorney General
Michelle Whalen, Deputy Attorney General