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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB32

July 25, 2017

VIA EMAIL

Courtney French, Esq.
cofrench@gannett.com

RE: March 22, 2017 FOIA Petition Regarding the City of Wilmington

Dear Mr. French:

We write in response to your correspondence, received on March 22, 2017, alleging that the City of Wilmington (the "City") violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") in connection with your client's October 17, 2016 request for records.¹ Specifically, you allege that the City violated FOIA by denying you access to the following parking ticket data: license number, state, vehicle make, vehicle color, officer name, officer badge number, and the date the ticket was paid.² We treat your correspondence as a petition ("Petition") for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. We invited the City to submit a written response to the Petition. We received the City's response, inclusive of affidavits, on April 13, 2017 ("Response Letter"). We have reviewed your Petition and the City's Response Letter. As set forth more fully below, it is our determination that the City did not violate FOIA by, as you allege, denying you access to vehicle license numbers or officer names. The City did violate FOIA, however, by failing to provide you the following information: state, vehicle make, vehicle color, officer badge number, and date ticket was paid.

¹ Our March 23, 2017 letters to the parties incorrectly stated that the correspondence alleged that the City violated FOIA's open meetings provisions.

² We presume that by "license number," the parties are referring to license/registration plate information affixed to the exterior of the vehicle.

RELEVANT FACTS

On October 17, 2016, your client, a News Journal reporter, submitted a FOIA request to the City for a spreadsheet containing specific fields of data related to parking tickets.³ Specifically, she requested the following information: “date, time, license number, state, vehicle make, vehicle color, meter number, location (i.e. address), violation code, violation description, officer name, officer badge number, ticket amount, and the date the ticket was paid (if it was).”⁴ In a letter dated November 3, 2016, the City’s legal counsel denied the request in full pursuant to 29 *Del. C.* § 10002(l)(6) and, more specifically, the common law right of privacy.⁵ The City cited this Office’s March 4, 1997 opinion, *Del. Op. Att’y Gen.* 97-IB05, in support of its argument.⁶ The City also suggested that some responsive records may relate to pending or potential litigation and, as a result, would be exempted from FOIA’s definition of “public record.”⁷ On December 19, 2016, you sent an email to the City’s legal counsel requesting that the City reconsider its wholesale denial of your request.⁸ On January 17, 2017, the City’s legal counsel requested additional time to review the matter with the incoming administration.⁹ On February 13, 2017, the City agreed to release all but the following information: license number, state, vehicle make, vehicle color, meter number, officer name, officer badge number, and the date the ticket was paid.¹⁰

SUMMARY OF ARGUMENTS

In your Petition, you allege that the City violated FOIA by denying your request for the following information: license number, state, vehicle make, vehicle color, officer name, officer badge number, and the date the ticket was paid. You dispute the City’s position that the information is otherwise exempt from FOIA’s definition of “public record.” You also dispute the City’s position that it would need to create a record to provide the requested information. You maintain that the City’s contract with its parking ticket database vendor, a copy of which you

³ Email from Christina Jedra to Sanjay Bhatnagar dated October 17, 2016.

⁴ *Id.*

⁵ Letter from Sanjay Bhatnagar to Christina Jedra dated November 3, 2016.

⁶ *Id.*

⁷ *See id.*

⁸ Email from Courtney French to Sanjay Bhatnagar dated December 19, 2016.

⁹ Email from Sanjay Bhatnagar to Courtney French dated January 17, 2017.

¹⁰ *See* Petition at ¶ 3.

attached to your Petition, “clearly shows that the City has access to a database that is exportable in Excel format that contains the data [your client] request.”¹¹

In its Response Letter, the City notes that it has already provided you with the following information for the years 2014-2016: ticket number, date of issuance, time of issuance, location, violation code, violation description and fine amount.¹² As an initial matter, the City argues that this Office should focus on the substance of the request. The City maintains that the request is for the functional equivalent of parking tickets themselves, which this Office opined in the aforementioned 1997 opinion were exempted from FOIA under the common law right of privacy.¹³

The City next argues that, in order to provide the requested report, the City would be required to create a record that does not exist.¹⁴ The City states: “[I]n order to create the requested report, *which includes the officer name*, the operator would have to manually update the customized report to include this data field.”¹⁵ The City included an affidavit from the Program Manager in charge of managing the City’s parking citation contract. In her affidavit, the Program Manager stated that the database does not store the officers’ names.¹⁶ The Program Manager also stated that, in order to create a customized report that contains the requested fields, exclusive of the officers’ names, she would “select all the fields requested for a specific time period and export the report to excel.”¹⁷ She stated that this would take approximately two hours.¹⁸ However, in order to create a report that includes the officers’ names, she would need to manually add the names.¹⁹

Finally, the City argues that the vehicle tag information (license number) and the officers’ names are specifically protected by the common law right of privacy, which the City maintains is

¹¹ Email from Courtney French to OpenGovernment@state.de.us dated March 22, 2017.

¹² Response Letter at 1. The City also indicated that it inadvertently failed to provide the meter number information and would supplement its response accordingly. *Id.* at n.1. As such, we need not determine whether this information is a “public record” here. Of course, if the City has not provided such information, you are free to submit a new petition.

¹³ *Id.* at 2.

¹⁴ *Id.* at 3.

¹⁵ *Id.*

¹⁶ Allison Aff. at ¶ 6.

¹⁷ *Id.*

¹⁸ *Id.* at ¶ 8.

¹⁹ *Id.* at ¶ 9.

not outweighed by any public interest therein.²⁰ The City argued that vehicle tag information could be used to identify the names and addresses of the individuals receiving the tickets.²¹ The City included an affidavit from its Parking Services Supervisor, who stated that she “believe[s] that license plate numbers can be used to easily obtain information that could identify the owner of the vehicle subject to the citation.”²² She stated that this information could be obtained from law enforcement databases, the Department of Motor Vehicle’s vehicle registration system, and private internet databases.²³ In addition, she stated that some vanity tags contain information could easily identify the vehicle’s owner.²⁴ The City also argues that that disclosure of the parking enforcement officers’ names would present a safety risk to those individuals.²⁵ The City does not appear to argue that the remaining information (state, vehicle make, vehicle color, officer name, officer badge number, and the date the ticket was paid) is *per se* exempt from FOIA’s definition of “public record.”

DISCUSSION

As an initial matter, we need not determine whether the officers’ names are public records, as the record demonstrates that the City would need to create a record that does not already exist by manually inputting new information into an existing database in order to provide this information.²⁶ “FOIA does not require a public body to create records that do not exist.”²⁷ Nor does FOIA require a public body – or, in this case, a third-party vendor acting on a public body’s behalf – to engage in extensive computer programming in order to respond to a FOIA request.²⁸

²⁰ Response Letter at 4.

²¹ *Id.*

²² Wooden Aff. at ¶ 4.

²³ *Id.* at ¶¶ 5-7.

²⁴ *Id.* ¶ 8.

²⁵ See Response Letter at 4; see also Wooten Aff. at ¶¶ 9-15.

²⁶ See Allison Aff. at ¶¶

²⁷ See *Del. Op. Att’y Gen.* 15-IB02, 2015 WL 3919061, at *2 (June 17, 2015) (citing *Del. Op. Att’y Gen.* 06-IB17, 2006 WL 2630107, at *4 (Aug. 21, 2006)).

²⁸ See *Del. Op. Att’y Gen.* 17-IB11, 2017 WL 2917926 (June 16, 2017) (“The law is clear . . . that FOIA does not require a public body – or, in this case, a third-party vendor acting on a public body’s behalf – to engage in . . . extensive computer programming (i.e., ‘write script’), thereby creating a record that does not already exist.”); *Del. Op. Att’y Gen.* 07-IB19, 2007 WL 4732802, at *4 (Aug. 28, 2007) (“As for the . . . information you . . . requested, our Office is satisfied that to provide you with such information would require extensive computer programming to create a new public record which FOIA does not require.”).

Here, the record demonstrates that, in order to provide this information, the City's vendor would have to manually input this information into the database.²⁹ Under the circumstances, we believe this to be akin to creating a record that does not already exist. As such, it is our determination that the City did not violate FOIA by failing to provide officer names in response to your request.³⁰

Next, we conclude that the vehicle tag information (license number) that you have requested would be exempted pursuant to 29 *Del. C.* § 10002(1)(6) and, more specifically, the common law right of privacy. Specifically, this information could lead to the easy identification of the vehicles' owner, which this Office has previously stated is protected by the common law right of privacy.³¹ While we recognize that you have argued that the public interest outweighs any privacy interest in this information, we respectfully disagree. As such, it is our determination that the City did not violate FOIA by denying your request for vehicle tag information.

Finally, we see no basis to conclude – and the City does not appear to suggest – that the remaining data fields (vehicle make, model, color, and parking regulation enforcement officer badge number) are not “public records” under FOIA. Nor are we persuaded by the City's argument that it would need to create a new record in order to provide this information. Each request for database records under FOIA must be assessed on its specific facts to determine whether the request is asking the public body to create a new record, and those assessments may become more difficult over time as technology evolves. Here, the Program Manager's affidavit suggests that the information can easily be exported to Microsoft Excel.³² In this instance, we do not view the mere exportation of existing data to a Microsoft Excel spreadsheet as the creation of a new record. This is consistent with previous determinations that a public body was not required to produce data in a new format that would make the data easier to search but would require substantial reprogramming.³³ Similarly, public bodies are not required to create compilation documents or

²⁹ See Allison Aff. ¶¶ 6, 9.

³⁰ As the officers' badge numbers do not reveal the identity of the officers, we do not address the question of whether those individuals' names – whom we understand to include parking regulation enforcement officers and, in some cases, police officers – would be exempt pursuant to 29 *Del. C.* §§ 10002(1)(1), (6) or (17).

³¹ See *Del. Op. Att'y Gen.* 97-IB05, 1997 WL 111296, at *2 (Mar. 4, 1997). While you have not specifically requested the Vehicle Identification Number (VIN), we note that the City has represented that this information is included in a parking ticket only when a vehicle has no license plate. To the extent this information would be responsive to the October 17, 2016 request, we believe it would similarly be exempted from FOIA's definition of “public record” pursuant to 29 *Del. C.* § 10002(1)(6) and, more specifically, the common law right of privacy.

³² Allison Aff. at ¶ 6 (“I would select all the fields requested for a specific time period and export the report to excel.”).

³³ *Del. Op. Att'y Gen.* 06-IB17, 2006 WL 2630107, at *4.

files through searches of the public body's data,³⁴ or produce data in a manner that would require the public body to write new computer programming or script.³⁵ Those examples all involved the creation of new records and were not proper requests under FOIA. The instant matter is different and requires a different result. While we recognize that this task may take the Program Manager "about two hours" to complete,³⁶ we do not believe that a simple data export by way of selecting fields of otherwise public information amounts "creating a new public record" as contemplated by our prior opinions. We also note that FOIA permits the City to collect fees, including administrative fees, in connection with a FOIA request.³⁷ As such, under the circumstances, it is our determination that the City violated FOIA by failing to provide you with the following information in response to your request: vehicle make, model, color, and parking regulation enforcement officer badge number. We therefore recommend that the City provide this information or an itemized written cost estimate pursuant to 29 *Del. C.* §§ 10003(m)(2) and (5), within fifteen (15) business days of this determination.

CONCLUSION

Based on the foregoing, it is our determination that the City did not violate FOIA by, as you allege, denying you access to vehicle license numbers or officer names. The City did violate FOIA, however, by failing to provide you the following information: state, vehicle make, vehicle color, officer badge number, and date ticket was paid. We recommend that the City provide this information, or an itemized written cost estimate pursuant to 29 *Del. C.* §§ 10003(m)(2) and (5), within fifteen (15) business days of this determination.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (via email)
Luke Mette, City Solicitor (via email)

³⁴ *Del. Op. Att'y Gen.* 04-IB14, 2004 WL 1547683-at *2 (June 28, 2004).

³⁵ *Del. Op. Att'y Gen.* 17-IB11, 2017 WL 2917926.

³⁶ Allison Aff. at ¶ 8.

³⁷ *See generally* 29 *Del. C.* § 10003(m). We caution, however, that administrative fees must "be billed at the current hourly pay grade (prorated for quarter hour increments) of the lowest-paid employee capable of performing the service." 29 *Del. C.* § 10003(m)(2).