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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB45

August 31, 2017

VIA U.S. MAIL AND EMAIL

Mr. Jordan Warfel
201 Governors Ave
Greenwood, DE 19950
jordanwarfel@gmail.com

RE: August 14, 2017 FOIA Correspondence Regarding the Department of Health and Social Services

Dear Mr. Warfel:

I write in response to your correspondence, received on August 14, 2017, alleging that the Department of Health and Social Services ("DHSS") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). Specifically, you allege that DHSS violated FOIA by denying your July 26, 2017 request in its entirety rather than provide redacted versions of records responsive to your request. I treat your correspondence as a petition for determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur ("Petition"). I have reviewed the record in this matter, to include the Petition, DHSS's August 17, 2017 response, and DHSS's August 25, 2017 supplemental response. For the reasons set forth below, it is my determination that DHSS did not violate FOIA.

By email dated July 26, 2017, you submitted a FOIA request to DHSS for the following:

any communications or documents from Planned Parenthood of Delaware or its representatives to DHSS reporting any adverse events as required by section 4.3 "Report of adverse events" under section 4408 "Facilities that perform invasive medical procedures" under title 16 of the administrative code, beginning from January 1, 2017 till the present.

On August 3, 2017, DHSS denied your request on the basis that the requested information was exempted from FOIA pursuant to 29 *Del. C.* § 10002(l)(1) (exempting "[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") and (6) (exempting "[a]ny records specifically exempted from public disclosure by statute or common law").

DHSS's Office of Health Facilities Licensing and Certification ("OHFLC") promulgated 16 Del. Admin. C. § 4408.¹ Pursuant to 16 Del. Admin. C. § 4408-4.3.1, facilities that perform "invasive medical procedures" are required to report all adverse events to DHSS. The facility must also "conduct an investigation of all adverse events to [DHSS] within forty-eight (48) business hours of the occurrence"² and "forward a complete investigative report to [DHSS] within 30 calendar days of the event."³ According to DHSS's counsel, DHSS receives reports of adverse events through the Division of Long Term Care Residents Protection ("LTCRP").⁴

Title 24, Delaware Code, Section 1768(b) provides that the records of certain "committees and organizations . . . are confidential and may be used by those committees or organizations and the members thereof only in the exercise of the proper functions of the committee or organization." Indeed, "[t]he records and proceedings [of such entities] are not public records and are not available for court subpoena, nor are they subject to discovery."⁵ Among those entities are "peer review committees or organizations whose function is the review of medical records, medical care, and physicians' work, with a view to the quality of care and utilization of hospital or nursing home facilities, home visits, and office visits" Pursuant to 29 Del. C. § 1212(d)(7), LTCRP "shall be recognized as a 'public health authority' and as a 'health oversight agency,' and it shall be recognized in the performance of its functions as a peer review organization or auditor or evaluator with respect to such aspects of healthcare delivery systems or providers." Similarly, OHFLC – which promulgated 16 Del. Admin. C. § 4408 – is a peer review organization.⁶ Although the record is not clear as to why LTCRP, rather than OHFLC, receives the records submitted pursuant to Section 4408, I am satisfied that DHSS receives the records in its capacity as a peer review organization as contemplated by 24 Del. C. § 1768(b). As Section 1768(b) serves as a complete

¹ See <http://regulations.delaware.gov/register/april2013/proposed/16%20DE%20Reg%201033%2004-01-13.pdf> (last visited August 30, 2017) ("The Office of Health Facilities Licensing and Certification, Health Systems Section, Division of Public Health, Department of Health and Social Services, is proposing regulations for medical facilities.").

² *Id.* at § 4408-4.3.2.

³ *Id.* at § 4408-4.3.3.


⁴ Supplemental Response at 1.

⁵ 24 Del. C. § 1768(b).

⁶ See *Office of Chief Medical Examiner v. Dover Behavioral Health Sys.*, 976 A.2d 160, 165 (Del. 2009) (concluding that Office of Health Facilities Licensing and Certification a peer review organization).

bar to access,⁷ it is my determination that DHSS did not violate FOIA by denying your request in its entirety pursuant to 29 Del. C. § 10002(1)(6).⁸

Very truly yours,



LaKresha S. Roberts
Chief Deputy Attorney General

cc: Michelle E. Whalen, Deputy Attorney General (via email)
A. Ann Woolfolk, Deputy Attorney General (via email)

⁷ See *id.* at 167-69 (concluding that report concerning patient's death created at the direction of and provided to the Office of Health Facilities Licensing and Certification not subject to public records request, court-related discovery, court subpoena or administrative subpoena).

⁸ Having determined that the records are exempted pursuant to Section 10002(1)(6), I need not determine whether or to what extent the records are also exempted pursuant to Section 10002(1)(3) (cited in DHSS's supplemental response dated August 26, 2017) or Section 10002(1)(1).