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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB41

August 24, 2017

VIA U.S. MAIL & EMAIL

Ms. Mary Lou Fieni
151 Roseview Drive
West Grove, PA 19390
jrfieni@yahoo.com

RE: August 14, 2017 FOIA Correspondence Regarding the Division of Professional Regulation

Dear Ms. Fieni:

I write in response to your correspondence, received on August 14, 2017, alleging that the Delaware Division of Professional Regulation ("DPR") violated the public records provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§10001-10007 ("FOIA").¹ I treat each correspondence as a petition for a determination pursuant to 29 *Del. C.* §10005 regarding whether a violation of FOIA has occurred or is about to occur ("Petition"). For the reasons set forth below, it is my determination that DPR did not violate FOIA.

In 2014, you submitted a complaint with the DPR against Dr. John Townsend III in connection with a workers' compensation claim. DPR investigated the complaint and recommended that the complaint be closed without discipline. In February 2015, the Delaware Board of Medical Licensure and Discipline accepted DPR's recommendation and closed the complaint without discipline. You subsequently filed suit in the United States District Court for the District of Delaware against the DPR and Dr. Townsend.² On October 28, 2016, the court granted DPR's motion to dismiss for failure to state a claim.

¹ The remainder of your correspondence is outside the scope of FOIA and, as such, is not addressed herein.

² See generally *Fieni v. Townsend et al.*, Civ. No. 16-113-SLR.

On June 8, 2017, you sent a request to the Secretary of State for documents sent by Dr. Townsend regarding a defense medical examination related to a work related incident/injury occurring in 2008. On June 9, 2017, the Delaware Department of State's FOIA Coordinator sent your request to DPR, a division within the Department of State. On June 9, 2017, DPR denied your request on the basis that "investigative records are exempt from disclosure under FOIA pursuant to 29 Del. C. 10002(l)(3)." DPR also noted that Delaware's FOIA only requires public bodies to comply with requests from citizens of the State of Delaware.

In its response to your Petition, DPR states that you are a resident of West Grove, Pennsylvania and, as such, DPR "is under no obligation to answer [you]r request for records pursuant to Delaware's FOIA." I agree. Indeed, this Office has previously determined that "Delaware's FOIA does not prohibit a public body from denying a FOIA request on the basis that the requesting party is not a Delaware citizen."³

In the alternative, DPR argues that the records are exempted from FOIA's definition of "public record" pursuant to 29 *Del. C.* § 10002(l)(3), which exempts "[i]nvestigatory files compiled for civil or criminal law-enforcement purposes." I agree. Even if I assume that you are a citizen of Delaware,⁴ any responsive records in DPR's possession, custody or control are exempted pursuant to Section 10002(l)(3).⁵

³ *Del. Op. Att'y Gen.* 17-IB14, 2017 WL 3426252, at *1 (July 6, 2017) (citing *Del. Op. Att'y Gen.* 16-IB20, 2016 WL 5888776, at *1 (Sept. 30, 2016)); *see also Del. Op. Att'y Gen.* 16-IB20, 2016 WL 5888776, at *1 (Sept. 30, 2016) ("Our determination is that public bodies are only *required* to comply with FOIA when the requesting party is a citizen of the State of Delaware. In all other cases, public bodies *may, and are encouraged to*, fulfill FOIA requests. Because compliance with Delaware's FOIA is mandatory only with respect to citizens of the State of Delaware, we conclude that [the Office of the Delaware State Banking Commissioner] did not violate FOIA when it denied your ... request for records on the basis that you are not a Delaware citizen.").

⁴ While I have decided to issue a determination here as a courtesy, I feel compelled to note that you appear to lack standing to avail yourself to the enforcement provisions contained in 29 *Del. C.* § 10005, including the petition process set forth in Section 10005(e).

⁵ *See Atamian v. Bahar*, 2002 WL 264533 (Del. Super. 2002), *aff'd* 886 A.2d 1277 (Del. 2005) (TABLE) ("The Freedom of Information Act exempts from disclosure investigative files compiled for civil or criminal law-enforcement purposes. Because investigations by the Division [of Professional Regulation] can result in prosecution by the Department of Justice, the exemption would apply . . . to any request by Plaintiff under the Freedom of Information Act."). Having determined that 29 *Del. C.* § 10002(l)(3) applies, I need not consider DPR's alternative argument that the records are also exempted pursuant to 29 *Del. C.* § 10002(l)(6).

Based upon the foregoing, it is my determination that DPR did not violate FOIA by denying your June 8, 2017 FOIA request. To the extent that records responsive to your request indeed exist, any entitlement that you may have to such records has no basis in Delaware's FOIA.

Very truly yours,

A handwritten signature in cursive script, appearing to read "LS Roberts", written in dark ink.

LaKresha S. Roberts

Chief Deputy Attorney General

cc: Patricia A. Davis, Deputy Attorney General (via email)