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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB47

September 22, 2017

VIA U.S. MAIL & EMAIL

Richard K. Kahn
978 Marl Pit Road
Middletown, DE 19709
rich@ezanga.com

**Re: September 18, 2017 FOIA Correspondence Concerning the Delaware
Department of Transportation**

Dear Mr. Kahn:

I write in response to your correspondence, received in its entirety on September 18, 2017,¹ alleging that the Delaware Department of Transportation (“DelDOT”) violated the public records provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§10001-10007 (“FOIA”). I treat your 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”). Specifically, you allege that DelDOT violated FOIA by denying your July 28, 2017 request for records. For the reasons set forth below, it is my determination that DelDOT did not violate FOIA as alleged.

On July 28, 2017, you sent the following FOIA request to DelDOT: “A complaint was filed regarding our mailbox . . . and I would like the name, and any relevant information such as their address, of the individual(s) that filed this complaint.” On August 16, 2017, DelDOT denied your request on the basis that “complaints that are investigated by DelDOT are not considered public records under section 10002(1)(3) of FOIA, because they are ‘investigatory files compiled

¹ Your initial correspondence was dated September 15, 2017 and supplemented per our request on September 18, 2017. As the supplemental information is critical to our evaluation of your FOIA allegation, we deem the correspondence to have been received on September 18, 2017.

for civil or criminal law-enforcement purposes.” DelDOT also cited to the Delaware Court of Chancery’s opinion in *News-Journal Co. v. Billingsley*² for the proposition that “[e]ven after the investigation is closed, the complaints and the file must remain confidential.” I agree.

Delaware’s FOIA defines “public record” is 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”³ However, among the information that FOIA exempts from the definition of “public records” are “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files.”⁴ Delaware courts have made clear that, for purposes of FOIA, the investigatory exemption attaches as soon as an agency is first made aware of a potential issue and survives the conclusion of any resulting investigation.⁵

Here, you have specifically requested information regarding the individual(s) who submitted a complaint to DelDOT regarding your mailbox. To the extent that any responsive records exist, they would constitute “investigatory files compiled for civil or criminal law-enforcement purposes” and, as such, are not “public records” subject to disclosure under FOIA. Therefore, it is my determination that DelDOT did not violate FOIA in denying your request.

Very truly yours,


LaKresha S. Roberts
Chief Deputy Attorney General

cc: Annie Cordo, Deputy Attorney General (via email)
Michelle E. Whalen, Deputy Attorney General (via email)

² 1980 WL 3043 (Del. Ch. Nov. 20, 1980).

³ 29 *Del. C.* § 10002(1).

⁴ 29 *Del. C.* § 10002(1)(3).

⁵ See *Billingsley*, 1980 WL 3043, at *3 (concluding that both a document and a formal complaint which led to an investigation by the Delaware Association of Professional Engineers were exempted from FOIA pursuant to the investigatory file exemption); see also *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, at *3 (Mar. 10, 2017) (records relating to a possible violation of an order issued by the Secretary of the Department of Natural Resources and Environmental Control exempted from FOIA’s definition of public record).