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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB53

October 10, 2017

VIA U.S. MAIL & EMAIL

Vincenzo J. Macrino
5432 Lake Road
Newfield, NJ 08344
thewidowsson33@comcast.net

Re: September 21, 2017 FOIA Correspondence Regarding the Delaware Department of Correction

Dear Mr. Macrino:

I write in response to your correspondence, received on September 21, 2017, alleging that the Delaware Department of Correction (“DOC”) violated the public records provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). Specifically, you allege that DOC violated FOIA by denying your September 15, 2017 request for records.¹ 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”).² For the reasons set forth below, it is my determination that DOC did not violate FOIA.

On or about September 12, 2017, you sent the following FOIA request to DOC via U.S. Mail, which was received by DOC on September 15, 2017: “Under the **Delaware Freedom of Information Act § 10001 et seq.**, I am requesting an opportunity to obtain copies of my pre-employment background investigation including but not limited to interviews and statements from

¹ The record demonstrates that your request, dated September 12, 2017, was sent via U.S. Mail and received by the DOC on September 15, 2017.

² 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).

my previous employers and employees or representatives of my previous employees [sic] specifically the Sea Isle City Police Department, and PSEG Nuclear LLC and G4S, the report of investigating officer including the reason or reasons I was not selected for employment with the Delaware State Department of Corrections [sic].” On September 19, 2017, DOC denied your request on the basis that the records “investigatory files” and were therefore exempted from public disclosure pursuant to 29 *Del. C.* § 10002(1)(3).

In its September 27, 2017 response to your Petition, the DOC notes that 11 *Del. C.* § 6506(b) requires it to obtain an applicant’s entire criminal history prior to making an employment decision on any applicant. DOC maintains that “[m]aterials related to the investigation of an applicant for employment that the Delaware Code requires the DOC to conduct, satisfy the plain meaning of ‘investigatory files’ that 29 *Del. C.* § 10002(1)(3) excludes from FOIA’s definition of public records.”

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., pretrial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue.”⁴ FOIA also exempts “[a]ny records specifically exempted from public disclosure by statute or common law”⁵ and “[c]riminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy.”⁶ Finally, FOIA 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.”⁷

³ 29 *Del. C.* § 10002(1).

⁴ 29 *Del. C.* § 10002(1)(3) (emphasis added).


⁵ 29 *Del. C.* § 10002(1)(6).

⁶ 29 *Del. C.* § 10002(1)(4). While this provision allows an individual to obtain his or her own criminal record upon proof of identity, Delaware law prohibits the dissemination of such information by any person or agency other than the State Bureau of Identification. *See* 11 *Del. C.* § 8513(d). Similarly, persons and agencies with access to the Delaware Criminal Justice Information System (“DELJIS”) must comply with Chapters 85 and 86 of Title 11 of the Delaware Code, and subchapter III, subpar K of Chapter 5 of Title 11. Indeed, any employee – including employees of the DOC – who knowingly or recklessly disseminates DELJIS information may be punished according to Chapter 42 of Title 11 of the Delaware Code.

⁷ 29 *Del. C.* § 10002(1)(1).

Here, the DOC is statutorily required to obtain the criminal history record of any applicant for employment with the DOC.⁸ Under the circumstances, it is my determination that the requested information, to the extent it exists, constitutes an investigatory file compiled for civil law-enforcement purposes.⁹ As such, it is my determination that the DOC did not violate FOIA by denying your request.¹⁰ Indeed, to the extent you are entitled to any or all of the information that DOC obtained during the course of its investigation, your right of access thereto is not governed by FOIA.

Very truly yours,


LaKresha S. Roberts
Chief Deputy Attorney General

cc: Gregory E. Smith, Deputy Attorney General (via email)
Michelle E. Whalen, Deputy Attorney General (via email)

⁸ See 11 *Del. C.* § 6506(b).

⁹ I do not interpret the itemized list of exempted items in Section 10002(1)(3) to be exhaustive. See *City of Dover v. Int'l Tel. and Tel. Corp.*, 514 A.2d 1086, 1089-90 (Del. Super. 1986) (“The listing in the statute [following the words ‘shall include’] is exemplary, not exhaustive.”) (citing *Gage v. City of Wilmington*, 293 A.2d 555 (Del. 1972)).

¹⁰ Having determined that the requested information is exempted from FOIA pursuant to 29 *Del. C.* § 10002(1)(3), I need not determine whether, or to what extent, the information would also be exempted pursuant to 29 *Del. C.* § 10002(1)(1), (4), or (6).