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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion 17-IB56**

**October 12, 2017**

**VIA U.S. MAIL & EMAIL**

Brandon L. Dunning  
Fraternal Order of Police  
6 Corbit Sharp Drive  
Townsend, DE 19731  
[Brandondunning5852@gmail.com](mailto:Brandondunning5852@gmail.com)

**Re: September 18, 2017 FOIA Correspondence Concerning the Town of Smyrna**

Dear Mr. Dunning:

We write in response to your petition ("Petition"), received on September 25, 2017, alleging that the Town of Smyrna (the "Town") violated the public records provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§10001-10007 ("FOIA"). We invited the Town to submit a written response to the Petition, and we received the Town's response ("Response") on September 28, 2017. We received your Reply ("Reply") on October 2, 2017. For the reasons set forth below, it is our determination that the Town did not violate FOIA as alleged.

**RELEVANT FACTS**

On or about July 18, 2016, the Fraternal Order of Police, Lodge No. 22, ("FOP") via letter<sup>1</sup>, informed the Town that it no longer had confidence in Chief Norman Wood, ("Chief Wood") the Smyrna Chief of Police. Delaware Attorney General's ("AG") office received the No Confidence Letter and the AG's Office of Civil Rights and Public Trust ("OCRPT") determined that there was insufficient evidence to levy a criminal prosecution against Chief Wood. However, OCRPT recommended that the Town Mayor and Council scrutinize the allegations against Chief Wood.

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<sup>1</sup> According to the parties, on or about July 18, 2016 the FOP met with and provided the Town with the No Confidence Letter.

As a result, on June 19, 2017, and acting on legal advice from legal counsel, the Town voted to hire Protocol Security Partners (“PSP”) to further investigate the allegations in connection with FOP’s No Confidence Letter. On August 28, 2017, you sent the following FOIA request to the Town for “any and all records, reports, emails, meeting minutes or expenses related to the investigation conducted by Protocol Security Partners.”<sup>2</sup>

You received a copy of PSP’s invoice, but the Town denied your request for the report (“Report”) prepared by PSP. The Town withheld the Report on the basis that it was not a “public record” subject to disclosure under FOIA. In support of its decision, the Town stated, “any records/reports involving the investigation of Protocol Security Partners are also protected under attorney-client privilege and not subject to disclosure under FOIA.”

### **RELEVANT STATUTE**

Delaware’s FOIA defines “public record” 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 . . . .”<sup>3</sup> However, FOIA exempts “records specifically exempted from public disclosure by statute or common law.”<sup>4</sup> We have previously determined that the attorney work-product doctrine applies to FOIA’s public records requirements.<sup>5</sup> We have determined that the Report that was prepared under the auspices of their legal counsel is exempt from disclosure under FOIA for this reason.<sup>6</sup>

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<sup>2</sup> See Petitioner’s August 28, 2017 FOIA request directed to the Town.

<sup>3</sup> 29 *Del. C.* § 10002(l).

<sup>4</sup> 29 *Del. C.* § 10002(l)(6).

<sup>5</sup> *Op. Att’y Gen.* 02-IB16, 2002 WL 31031225 (July 30, 2002).

<sup>6</sup> The attorney work-product doctrine protects documents and other memoranda prepared by an attorney in contemplation of litigation. See *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1977). It is commonly accepted that lawyers’ work (or lawyer-directed work) can fairly be characterized as attorney-work product. See e.g., *AM Gen. Holdings LLC v. Renco Grp., Inc.*, 2013 WL 1668627, at \*2 (Del. Ch. Apr. 18, 2013); *Diversified Indus. v. Meredith*, 572 F.2d 596, 603 (8th Cir. 1977) (work product is not limited to information or documents prepared or assembled by and attorney); *Shacket v. United States*, 339 F. Supp. 2d 1092, 1096 (the work product privilege extends to representatives of a party).

## DISCUSSION

The Town, based upon the advice of their legal counsel, procured PSP to conduct the investigation into FOP's allegations.<sup>7</sup> Protocol Security Partners conducted the investigation<sup>8</sup> concerning the allegations against Chief Wood and sent the Report to the Town's legal counsel.<sup>9</sup> The Town's legal counsel reviewed the Report and prepared a legal memorandum based upon the content of the Report.<sup>10</sup> On September 15, 2017, the Town's legal counsel sent the Mayor a memorandum, identified as "Attorney-Client / Privileged Communication / Attorney Work Product," which included the Report as an attachment.<sup>11</sup> To the best of the Mayor's knowledge, neither he nor the Council members communicated with PSP regarding the findings contained in the Report. Nor were Council members privy to the Report before September 15, 2017.<sup>12</sup> Protocol Security Partners worked with the Town's legal counsel in the preparation and delivery of the Report to the Town. Based upon the sworn statements and the parties' submissions, in our evaluation of the circumstances incident to the creation and delivery of the Report, we find the

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<sup>7</sup> See Letter to Petitioner dated September 19, 2017.

<sup>8</sup> We also note, but do not here determine, that the Report may also be exempt under the "investigatory file" exemption. "Investigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files" are exempt under FOIA. *See 29 Del. C. § 10002(1)(3)*). Here, the FOP alleged Chief Wood engaged in "potential misconduct, including possible criminal acts" *See* Letter to Petitioner dated September 25, 2017. The Town conducted the investigation due to concerns brought forth by FOP and the OCRPT (a state law enforcement agency) recommendation that the "legitimate concerns" raised in their investigation be scrutinized by the Town and Mayor.

<sup>9</sup> The Town did not request our *in camera* review of the legal memorandum or the Report and we have not reviewed its content, however the attorney work-product doctrine has applied in instances when there is an investigation "based upon a suspicion of specific wrongdoing" and it is an attempt to gather evidence to potentially build a case against the wrongdoer. *See Feshbach v. SEC*, 5 F. Supp. 2d, 783(N.D. Cal 1997). Moreover, witness statements have been afforded exemption under the attorney work-product privilege as well. *See Hickman*, 329 U.S. 495 (1974).

<sup>10</sup> *See* Embert Aff. at ¶¶ 2-3; Frattarelli, Esq Aff. at ¶¶ 1-3( Peter Frattarelli, Esquire, an attorney from Archer and Greiner, P.C., participated in the legal memorandum, reviewed the Report, and represented the Town in connection with allegations raised by the FOP's No Confidence Letter.)

<sup>11</sup> *Id.*

<sup>12</sup> Mr. Frattarelli's affidavit states the Town retained Archer & Greiner P.C. to represent it in legal matters, including the investigation into the allegations raised by the FOP. Archer & Greiner P.C. provided the Report as part of the legal memorandum provided to the Mayor on September 15, 2017.

Town has met their burden to establish that the Report is exempted from public disclosure under the attorney work-product doctrine pursuant to 29 *Del. C.* § 10002(1)(6).<sup>13</sup>

### CONCLUSION

For the foregoing reasons, it is our determination that the Report is not a “public record.” As such, the Town did not violate FOIA by denying you access thereto in response to your FOIA request.<sup>14</sup>

Very truly yours,

  
Kenisha J. Ringgold  
Deputy Attorney General

Approved:   
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Aaron R. Goldstein  
State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (via email)  
Michelle E. Whalen, Deputy Attorney General (via email)  
D. Barret Edwards IV, Esq. (via email)

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<sup>13</sup> Though a potential litigant may be entitled to the records through the civil discovery process, this does not render the Report a “public record” subject to disclosure under FOIA. *Del Op. Att’y Gen.* 17-IB23, 2017 WL 34262263 (July 14, 2017).

<sup>14</sup> In its September 28, 2017 Reply, the Town expanded its bases for denial by citing to statutory and common law right to privacy, and personnel file exemptions. *See* Letter to Petitioner dated September 19, 2017. Though Delaware recognizes a common law right to privacy, we make no determination whether the common law right to privacy would exempt the Report from disclosure. *See Barbieri v. News-Journal Co.*, 189 A.2d 773, 774 (1963). Under the circumstances, we need not determine whether, or to what extent, these exemptions apply. *See* 19 *Del. C.* § 730, and 29 *Del. C.* § 100022(1)(1). Similarly, the Town has not specifically alleged and we do not analyze if the Report would be exempted pursuant to 29 *Del. C.* 10002(1)(9) as “[r]ecords relating to pending or potential litigation which are not records of any court.”