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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB60

November 21, 2017

VIA EMAIL

Mr. Craig O'Donnell
craig.odonnell@doverpost.com

Re: November 1, 2017 FOIA Correspondence Concerning the Delaware Department of Transportation

Dear Mr. O'Donnell:

I write in response to your correspondence, received on November 1, 2017, 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 redacting certain information from records produced in response to your October 16, 2017 request for records. We invited DelDOT to submit a response to your Petition and received DelDOT's response ("Response Letter") on November 6, 2017. For the reasons set forth below, it is my determination that DelDOT did not violate FOIA as alleged.

FACTS

On October 16, 2017, you requested electronic copies of all email received by the email address dotpr@deldot.gov for the period October 10-12 originating with the Road Condition Report web form. On October 24, 2017, a DelDOT representative provided responsive records, but indicated that they had been redacted pursuant to 29 *Del. C.* § 10002(1)(3) and/or 29 *Del. C.* §10002(1)(6) "based on the right of privacy of the individuals submitted the complaints/requests to DelDOT and the investigative nature of the complaints/requests." That same day, you responded by citing to *Del. Op. Att'y Gen.* 10-IB09, wherein this Office determined that the names and addresses of individuals who made public comments regarding a DelDOT study were public.

On October 30, 2017, another DelDOT representative responded that it did not believe the opinion was relevant. He stated that DelDOT considers each request submitted regarding road conditions as a potential civil investigation and cited to *Del. Op. Att’y Gen. 99-IB14* for the proposition that the names of potential witnesses in civil investigations are exempt from FOIA. He stated that releasing their names “could potentially have a chilling effect on enforcement.”

DISCUSSION

In your Petition, you note that the web portal contains at least 19 categories under the heading “Road Condition Report.”¹ You state that you “find it hard to imagine a civil investigation spurred by a complaint about Construction Project, Dead Animal, Travel/Tourist Information, Streetlight” and state that “no category seems like a candidate for investigatory action.”² You also state that DelDOT has revealed that it received more than 4,500 complaints over a six-month period, or 9,000 per year, and express doubt that DelDOT conducts that many investigations.³ You state that DelDOT has failed to identify any instance in which Road Condition Reports have been used in a civil investigation.⁴ While you express doubt regarding whether DelDOT has the authority to conduct a civil investigation, you argue that complainant information may be redacted only for those records relating to a specific investigation.⁵

In its Response Letter, DelDOT acknowledges that the common law right of privacy is not absolute, but argues that disclosure of the complainants’ information would not contribute significantly to public understanding of the operations or activities of the government.⁶ DelDOT also argues that “if residents knew their identifying information could be disclosed pursuant to FOIA, participation in the process would be discouraged.”⁷ DelDOT notes that the Report a Road Condition reports are not submitted in a public forum, cannot be submitted without the name,

¹ Petition at 2.

² *Id.*

³ *Id.* In its Response Letter, DelDOT clarified that this estimate was incorrect, as it included the original submission and internal emails related to that submission. Response Letter at 4. DelDOT provided a revised estimate of 360 issues reported in a six-month timeframe, or approximately 720 per year. *Id.*

⁴ Petition at 2.

⁵ *Id.*

⁶ Response Letter at 2.

⁷ *Id.*

address, and contact lines filled out, and do not contain “any notice to citizens that at the time they submit their issue that their name and address could be subject to disclosure pursuant to FOIA.”⁸

DelDOT next argues that the redacted information was properly withheld pursuant to 29 *Del. C.* §10002(1)(3). DelDOT notes that, per 17 *Del. C.* § 131(a), all public roads, including the right-of-way, are under “the absolute care, management, and control of the Department [of Transportation].” DelDOT maintains that Section 10002(1)(3) allows DelDOT to maintain the confidentiality of its files, including complainants’ identifying information, upon receipt of a complaint.⁹ DelDOT cites to *Del. Op. Att’y Gen.* 17-IB47 (Sept. 22, 2017), wherein this Office determined that the name and address of an individual who submitted a complaint regarding a non-conforming mailbox to DelDOT is exempted pursuant to Section 10002(1)(3).¹⁰ DelDOT acknowledges that not every complaint submitted to DelDOT results in a civil investigation, but argues that “[i]t is not a determination that can be made by determining which category of the Report a Road Condition form may result in civil investigations, as many citizens do not submit items under the proper category.”¹¹ DelDOT maintains that the civil investigative file exemption should apply to every complaint submitted through the Report a Road Condition portal, regardless of whether the complaint results in a civil investigation.¹² DelDOT also argues that revealing complaining citizens’ names and addresses would have a chilling effect on citizen reporting, which is often DelDOT’s first notice of potential violations. I agree. Under the circumstances, I am satisfied that the information was properly redacted pursuant to 29 *Del. C.* §10002(1)(3).¹³

⁸ *Id.* at 3.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² *Id.*

¹³ This determination does not address whether or to what extent DelDOT would have been permitted to withhold the records in their entirety, as those facts are not before me. Having determined that DelDOT was permitted to redact the information pursuant to 29 *Del. C.* § 10002(1)(3), I need not determine whether the information would also be exempted pursuant to 29 *Del. C.* § 10002(1)(6) and the common law right of privacy.

CONCLUSION

For the reasons set forth above, it is my determination that DelDOT did not violate FOIA as alleged.

Very truly yours,



LaKresha S. Roberts
Chief Deputy Attorney General

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