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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB20

April 23, 2018

VIA EMAIL

Randall Chase
rchase@ap.org

RE: FOIA Correspondence Regarding the Delaware Department of Correction

Dear Mr. Chase:

I write in response to your correspondence alleging that the Delaware Department of Correction (the "DOC") violated the public records provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§10001-10007 ("FOIA") in connection with your December 20, 2017 request for records. Specifically, you allege that the DOC violated FOIA by denying your request for the names and titles of DOC administrators assigned take-home vehicles and by providing you with an itemized written cost estimate that fails to comport with 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"). Based upon the record, it is my determination that DOC violated FOIA by denying your request for the names and titles of DOC administrators who have been assigned take-home vehicles, but may legally protect additional information which identifies the actual physical description of these vehicles in light of legitimate privacy concerns. The DOC did not violate FOIA with respect to the itemized written cost estimate.

On December 20, 2017, you sent the following FOIA request to DOC:

[A]ll records, in any form, regarding the Department of Correction's efforts to purchase or lease vehicles for DOC staff and administrators from Jan. 1, 2017 to the present. The records I am seeking include, but are not limited to, emails and all other correspondence with the Delaware Office of Management and Budget; internal DOC emails and other internal correspondence regarding vehicle placement and acquisition; invoices, purchase orders, vouchers, account ledgers, lease agreements and sale

agreements; request from DOC employees for state-provided vehicles; and the names and titles of DOC administrators who have been assigned or requested take-home vehicles provided by the state.

On January 19, Ms. Bennett forwarded you an email that she had received from a DTI representative and informed you that your email records request was ready. Ms. Bennett indicated that the cost would be \$152.00 as indicated in the DTI email. The DTI email stated that the \$152 cost reflected an estimated four hours of DTI staff time, at a rate of \$38 per hour, to configure search strings, conduct the search, scrub results to ensure that no unintended content is included, compile search results, and commit search results to media. The DTI email also included information regarding where to send payment. On February 8, 2018, you requested an explanation as to why it would take DTI four hours to retrieve emails responsive to what you characterized as a narrowly-defined category of records. You also requested a status update on the non-email records that you had requested. That same day, Ms. Bennett forwarded your February 8 email to a DTI representative for a response and the representative explained that “there is a multiple step procedure (parts that are manual) to get the requested keywords for all DOC users.” Ms. Bennett forwarded the response to you immediately after receipt thereof.

On February 12, you expressed disagreement with the DTI estimate, stating that it “seems grossly excessive.” You compared the estimate to a lesser unrelated estimate that you had received from DTI in connection with another FOIA request. You indicated that you would be happy to provide a list of search terms in order to reduce the amount of time. On February 16 and 20, you sent a follow-up email requesting a response to your February 12 email. On February 20, Ms. Bennett replied that she was awaiting additional information and would have a response to you soon.

On March 6, Ms. Bennett provided a partial response to your request. In her response, Ms. Bennett explained:

[T]ake home vehicles are necessary for DOC senior leadership to implement the Commissioner’s interactive leadership strategy, ensure essential operations are maintained statewide, and provide emergency response. DOC leadership is on call 24/7, and nearly two-thirds of our senior team work outside of normal business hours. It’s critical for wardens, chiefs, and other leaders to be visible, engaged, accessible, and approachable regardless of the shift.

Ms. Bennett then stated: “To maintain the safety of our staff, we will not be disclosing the names of the administrators who were provided a vehicle.” Ms. Bennett nonetheless provided certain information regarding the number of vehicles that the DOC had leased and a breakdown of the number and general type of vehicle within each of the DOC’s bureaus. Ms. Bennett attached a spreadsheet to her email which identified the following information regarding each of the vehicles leased by DOC: department, manufacturer, model, year, whether the vehicle is a take-home vehicle, location, who the vehicle is assigned to, and the monthly lease rate. However, the model,

location, and assignees' names were redacted. Ms. Bennett cited 29 *Del. C.* § 10002(l)(17)(a)(2) as the basis for the redactions and specifically claimed that the redacted information constitutes "surveillance techniques, alarm or security systems or technologies."¹ With respect to your concerns regarding the cost estimate, Ms. Bennett stated:

In response to your February 12, 2018 proposal to reduce the amount of time DTI needs from 4 hours, as currently estimated, to one hour, DOC respectfully requests that you could perhaps narrow the focus of this request and submit a list of specific search terms, like you had also suggested in that email and we could ask DTI to conduct a new search based on those terms that would perhaps take less time to complete.

On March 9, you sent an email to Ms. Bennett asking her to confirm that the DOC had no additional records, aside from emails and the spreadsheet, responsive to your request. You then challenged the DOC's invocation of 29 *Del. C.* § 10002(l)(17)(a)(2) as to the names of DOC employees assigned take-home vehicles and requested that the DOC reconsider its position.² Finally, you provided 19 search terms for DTI to utilize in order to reduce the amount of time DTI required to process your request. On or about March 14, Ms. Bennett provided your proposed search terms to DTI. On March 19, DTI sent a revised cost estimate to DTI, again estimating the total cost at \$152.

On March 20, Ms. Bennett emphasized the safety concerns with releasing the names and titles of DOC employees who have been assigned take-home vehicles. She stated: "While it is appropriate for members of the public to know what resources a state agency purchases with taxpayer dollars, knowing what make and model vehicle a particular state employee drives to his or her home exposes that employee to unnecessary security risks." Ms. Bennett provided an "extreme example" of a Colorado DOC executive who was murdered at his home in 2013 by a parolee. Ms. Bennett also notified you that your email request was ready at a cost of \$152.00. She included as an attachment the March 19 email from DTI, which contained instructions regarding payment. On March 23, you requested clarification that the cost estimate remained the same even though you provided a specific set of search terms. On March 26, Ms. Bennett replied: "Yes, that is correct."

In your Petition, you allege that the DOC violated FOIA by denying your request for the names and titles of DOC employees who have been assigned take-home vehicles. You maintain that you are not seeking records related to surveillance techniques, alarm or security systems or technologies. Rather, you state that you are "seeking only the names and titles of DOC employees who have been assigned take home vehicles." You challenge the DOC's representation that disclosing such information presents a security risk over and above any potential risk DOC

¹ As this determination is limited to the issues identified in your Petition, I do not address whether the DOC's redaction of vehicle model or location amounted to a FOIA violation.

² While your request used the term "administrators," the record suggests that both you and the DOC understood your request to include all DOC employees.

employees might face simply by virtue of their employment with DOC. You also allege that the cost estimate of \$152 to process your request for certain email records violates FOIA. You argue that the amount of time required for DTI to process your request and, in turn, the fee estimate, should have been reduced once you provided specific search terms.

In its April 11, 2018 response to your Petition, the DOC argues that the information at issue is exempted from FOIA pursuant to 29 *Del. C.* § 10002(l)(17)(a)(2) because disclosure “could endanger the life or physical safety of an individual.” The DOC also cites to this Office’s prior opinion, *Del. Op. Att’y Gen.* 17-IB32,³ for the proposition that the information is also exempted pursuant to 29 *Del. C.* § 10002(l)(6) and common law privacy. Finally, the DOC maintains that the written cost estimate complies with 29 *Del. C.* § 10003(m)(2).

In your April 11, 2018 reply, you note FOIA’s presumption of openness. Among other things, you also cite to this Office’s prior opinion, *Del. Op. Att’y Gen.* 06-IB14,⁴ for the proposition that the use of government-owned vehicles is a form of compensation. You request that this Office “order DOC to immediately provide the records [you are] seeking.”

Under the circumstances, it is my determination that FOIA requires more than DOC provided to you. By denying your request for the names and titles of DOC administrators who have been assigned take-home vehicles, the public was prevented from obtaining information about the compensation of state employees. To be clear, I am sensitive to the legitimate and real safety concerns raised by the DOC. The correctional environment is replete with known and unknown threats to correctional staff. Correctional officials have every right to express concern over those threats. It is therefore quite reasonable and entirely understandable that they would attempt to protect their employees from such threats. But the public also has the right to know how government employees are compensated. An employee’s use of government-owned vehicles qualifies as a fringe benefit, which is a form of noncash compensation to the employee.⁵ FOIA requires that public bodies disclose such information.⁶

³ 2017 WL 3426272, at *4 (July 25, 2017) (concluding that vehicle tag numbers of private citizens who have been cited for parking violations are exempted from FOIA pursuant to 29 *Del. C.* § 10002(l)(6)).

⁴ 2006 WL 2355968 (July 12, 2006) (concluding that interest-free loans from a Town to its employees is a form of compensation and, as such, the identities of those individuals to whom such loans are granted are subject to disclosure under FOIA).

⁵ See *Quick Reference Guide for Public Employers*, IRS Publication 5138 (2-2014). Our reference to the definition of compensation relates only to our analysis under FOIA. Nothing herein, constitutes a conclusion of fact or law as to whether any particular use of a vehicle constitutes a taxable event.

⁶ See, e.g., *Gannett Co. v. Colonial School Dist.*, 1983 WL 473048, at *1 (Del. Super. Aug. 19, 1983) (“Although some might feel that the amount of their salary is personal, it is generally recognized that the public has a legitimate interest in knowing the salaries of persons who are paid with public funds and public employees have no right of privacy in this information.”); *Att’y Gen.*

The identity of state employees who are assigned take-home vehicles does not fall within any of the existing FOIA exemptions. As such, and in the absence of an applicable FOIA exemption, the identities of those employees who have been assigned take-home vehicles are subject to disclosure under FOIA. DOC's reliance on 29 *Del. C.* § 10002(l)(17)(a) appears to be misplaced. Importantly, and perhaps contrary to reasonable expectations, that provision does not broadly exempt any records which, if copied or inspected, "could endanger the life or physical safety of an individual." Rather, the exemption is limited to "[t]he following records," which are specifically enumerated thereafter. Although the DOC has argued that the employee's identities constitute "surveillance techniques, alarm or security systems or technologies," the DOC has failed to demonstrate how. DOC has not sustained its burden to show that any of the individuals' assigned take-home vehicles are used for surveillance or demonstrate how these vehicles -or their assignment to specific employees- constitutes "alarm or security systems or technologies."

That conclusion does not end the analysis in this matter. After due consideration of the safety issues raised by DOC, DOC's specialized knowledge⁷ of correctional practices and threat assessments, I have determined that records which specifically identify the actual physical description of a DOC employee's take-home vehicle may be legitimately withheld, albeit under a different exemption. Specifically, I conclude that disclosure of the specific description of such vehicles would likely constitute an invasion of personal privacy and is therefore exempted pursuant to 29 *Del. C.* § 10002(l)(6).⁸ We have previously noted, "Delaware common law . . . recognizes a right of personal privacy – or the 'right to be let alone'"⁹ Of course, "[w]hen legitimate privacy rights are implicated under FOIA, we must balance those rights against the competing need for access to information to further FOIA's primary goals – government transparency and

Op. 12-IIB10, 2012 WL 3535600, at *3 (July 27, 2012) ("[B]ecause the compensation records of Wilmington police officers are public records in the custody of the City and because no exemptions from disclosure apply, the City's refusal to disclose those records to the requestor violates FOIA."); *Del. Op. Att'y Gen.* 06-IB14 (2006 WL 2355968) (loans to employees a form of compensation that must be disclosed).

⁷ See *Stevenson v. Carroll*, 2011 WL 6842955, at *11 (D. Del. Dec. 29, 2011) (citing *Bell v. Wolfish*, 441 U.S. 520, 521 (1979)) ("Prison officials must be 'accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'").

⁸ See *Brown v. Federal Bureau of Investigation*, 873 F.Supp.2d 388, 403 (D.D.C. 2012) (concluding that the work phone numbers of FBI special agents were exempt from disclosure under the federal personal privacy exemption); *Del. Op. Att'y Gen.* 17-IB32, 2017 WL 3426272, at *3 (concluding that disclosure of vehicle tag information of vehicles that have received parking citations "could lead to the easy identification of the vehicles' owner, which this Office has previously stated is protected by the common law right of privacy").

⁹ *Del. Op. Att'y Gen.* 13-IB06, 2013 WL 6593033, at *4 (Nov. 20, 2013) (citing *Barbieri v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963)).

accountability.”¹⁰ Here, there is legitimate concern that disclosing specific details regarding the type of vehicle a DOC has been assigned could lead to the discovery of the employee’s home address. Beyond the fact that an employee is assigned a take-home vehicle and the public expenditures relating to that vehicle, I am not persuaded that disclosure of additional identifying details would shed any light on the activities of government. While I recognize that the common law right of privacy is not absolute, it is my determination that the legitimate privacy interests of the DOC employees at issue here significantly outweighs any public interest the precise identification of take-home vehicles assigned to correctional employees. Accordingly, it is my determination that FOIA requires DOC to provide you the names and positions of DOC employees assigned take-home vehicles in response to your December 20, 2017 request. To the extent DOC is in possession of the costs to the State associated with these vehicles, that information should be provided as well. Beyond those data elements, DOC may legally protect additional information which identifies the actual physical description of these vehicles. I recommend that the DOC provide this information to you within five business days of this determination.

Notwithstanding the foregoing, it is my determination that the DOC did not violate FOIA with respect to the itemized written cost estimate. Based upon the record, the DOC has provided an itemized written cost estimate as required by 29 *Del. C.* § 10003(i)(2) and I see no evidence to suggest that the estimate does not reflect the charges expected to be incurred by DTI in retrieving the request records.

Very truly yours,



Aaron R. Goldstein
Chief Deputy Attorney General

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

¹⁰ *Del. Op. Att’y Gen.* 13-IB06, 2013 WL 6593033, at *4 (citing *Del. Op. Att’y Gen.* 13-IB03, 2013 WL 4239232 (July 12, 2013)).