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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB33

July 17, 2018

VIA US MAIL

Mr. Charles B. Sanders
James T. Vaughn Correctional Center
SBI# [REDACTED]
1181 Paddock Road
Smyrna, Delaware 19977

RE: FOIA Petition Regarding the Delaware Department of Justice

Dear Mr. Sanders:

We write in response to your correspondence received on July 5, 2018, alleging that the Delaware Department of Justice ("DDOJ") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. You allege that the DDOJ violated FOIA by not providing records in response to your request for the policies and procedures that the Attorney General implements or mandates for all police agencies regarding culpatory and exculpatory evidence. For the reasons set forth below, we conclude that the DDOJ did not violate FOIA by denying your records request pursuant to 29 *Del. C.* § 10002(1)(6).

PROCEDURAL BACKGROUND

You sent the DDOJ a FOIA request dated May 22, 2018 stating the following:

The Policy and Procedures the Attorney General implements or Mandates in requiring all police agencies with-in the State of Delaware to Fully disclose any and all evidence, exculpatory and culpatory or culpable to the Attorney General office when that Police agency had received an Complaint, investigated and their investigation ended with an arrest placing the Attorney General's office of weighing the gathered exculpatory and culpatory evidence for possible prosecution. I am requesting the present day version and the 1994 version the Attorney General put in place that Mandated all police agencies to turn over all evidence exculpatory and culpatory to allow the Attorney General office to fully explore the true

culpability of the arrested person and reviewing the possibility of downgrading or upgrading the charges against the arrested person. I am requesting the Policy to see if the Delaware Attorney General has established a Policy to be in compliance with the due Process Provision of the 14 Amendment to the U.S Const and Del. Const art. I. sec 7. [emphasis in original].¹

The DDOJ FOIA Coordinator responded to your request on June 22, 2018 informing you that the DDOJ did not have any records responsive to your request for culpatory evidence policies and that the exculpatory evidence policies are not “public records” since they are attorney work product.

On July 5, 2018, our Office received your Petition contesting the DDOJ’s assertion of the attorney work product exemption for the exculpatory evidence policy. You argue that since the DDOJ is required to follow the law regarding the production of exculpatory evidence, the DDOJ policies and procedures to meet this legal obligation could not fall under the attorney work product privilege. The DDOJ responded on July 13, 2018 (“Response”), arguing that the DDOJ’s policies and procedures governing exculpatory evidence are prepared in anticipation of litigation and are properly classified as attorney work product.

DISCUSSION

We find that the DDOJ appropriately asserted the attorney work product privilege for its exculpatory evidence policies. FOIA allows access to “public records,” but any records “specifically exempted from public disclosure by statute or common law” are not considered a “public record” under the FOIA statute.² The attorney work product privilege is recognized under 29 *Del. C.* § 10002(1)(6).³ The DDOJ’s counsel represented that the policies and procedures are documents prepared by DDOJ attorneys in anticipation of litigation.⁴ Thus, those policies and procedures do not constitute “public records” under FOIA.⁵

¹ See Petition (quoted in original format).

² 29 *Del. C.* § 10002(1)(6).

³ *Del. Op. Att’y Gen.* 17-IB56, 2017 WL 5256816, at *1 (Oct. 12, 2017) (“We have previously determined that the attorney work-product doctrine applies to FOIA’s public records requirements.”). See also *Del. Op. Att’y Gen.* 02-IB24, 2002 WL 31867898, at *3 (Oct. 1, 2002).

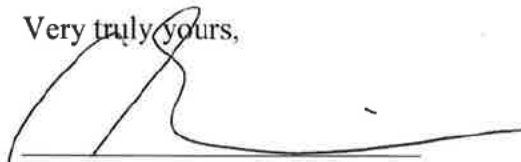
⁴ See DDOJ Response.

⁵ See, e.g., *Nat’l Assoc. of Criminal Def. Lawyers v. Exec. for U. S. Attorneys, et. al.*, 75 F. Supp. 3d 552, 561 (D.C.C. Ct. 2014) (recognizing that the attorney work product privilege applies to internal manuals for criminal prosecution); *Del. Op. Att’y Gen.* 17-IB56, 2017 WL 5256816, at *2 (Oct. 12, 2017) (upon review of the parties’ submissions, applying the attorney work product privilege to documents prepared in contemplation of litigation).

CONCLUSION

For the reasons discussed above, it is our determination that the DDOJ policy and procedures regarding exculpatory evidence are not "public records," and therefore, the DDOJ did not violate FOIA in denying your records request on this basis.

Very truly yours,



Chief Deputy Attorney General

cc: Zoe Plerhoples, Deputy Attorney General
Dorey Cole, Deputy Attorney General