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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB43

September 6, 2018

VIA EMAIL

Melony Anderson, Esq.
Balick & Balick, LLC
711 King Street
Wilmington, Delaware 19801
manderson@balick.com

RE: FOIA Petition Regarding the Delaware Division of Revenue

Dear Ms. Anderson:

We write regarding your correspondence alleging that the Delaware Division of Revenue (“DOR”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with respect to your records request. We 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”). Because we have determined that DOR is statutorily prohibited from producing the records you requested, we find that DOR did not violate FOIA as alleged.

BACKGROUND

On June 18, 2018, your firm submitted a request to DOR for “all monthly reports pursuant to the Delaware Alcoholic Beverage Control Commission Rule 401 filed by World Class Wholesale, LLC covering the period of February 2014 to and including January 2017.”¹ DOR denied the request and stated its position that the documents were tax-related and therefore exempt from the definition of “public record” by Title 30, Chapter 5 of the Delaware Code.² In response to the denial, your firm submitted a second request clarifying that you only wished to receive “the amount of alcohol reported sold, and the price it was sold at by the month... in order to determine

¹ Petition.

² *Id.*

a two year volume.”³ This request was again denied since “the requested reports and their details are exempt as a tax record under Title 30.”⁴

You filed a Petition with this Office challenging the denial, asserting that the monthly reports are required by the Delaware Office of the Alcoholic Beverage Control Commission (“ABCC”) administrative regulations and “there is nothing in these reports that refers to taxes or income.” By letter dated August 24, 2018, DOR submitted a letter (“Response”) explaining its denial under 29 *Del. C.* § 10002(1)(6), which exempts any records that are “specifically exempted from public disclosure by statute or common law.” In accordance with 30 *Del. C.* § 368, DOR argued it is prohibited from disclosing any reports required by Title 30 or any information contained in these reports. DOR stated that it is tasked with the assessment and collection of taxes for licensed alcoholic beverage importers, and even though the reports are required by the ABCC regulations, they are still tax reports, which are necessary for DOR to “verify and compute taxes for the particular importer or wholesaler.”⁵

DISCUSSION

“Public records” must be made reasonably available to citizens for inspection and copying unless a statutory exemption applies.⁶ Under 29 *Del. C.* § 10002(1)(6), records exempted from public disclosure by statute or common law are not “public records.” In this instance, 30 *Del. C.* § 368 states that it is unlawful to disclose the “amount of income or *any particulars set forth or disclosed in any report or return required under this Title.*”⁷ DOR is responsible for the “assessment, collection, review and appeal of deficiencies of tax” and any “claims for refund of overpayment of taxes” for alcoholic beverage importers.⁸ The monthly reports you have requested are delineated in Section 400, “Taxation” of the ABCC regulations.⁹ Pursuant to Rule 401 entitled “A Rule Governing Taxes Paid on Wine, Cider, Spirits, and Beer Entering the State of Delaware,” importers submit monthly reports including beverage volume and other information, and DOR uses these monthly reports to verify and compute the applicable taxes based on volume.¹⁰ Simply stated, DOR requires these tax reports to compute alcohol importer taxes which must be assessed

³ *Id.*

⁴ *Id.*

⁵ Response.

⁶ 29 *Del. C.* §§ 10002, 10003.

⁷ 30 *Del. C.* § 368 (emphasis added).

⁸ 4 *Del. C.* § 583.

⁹ 4 Del. Admin. C. §§ 401-2.1.2, 401-3.1.1.

¹⁰ Response; *see also* 4 *Del. C.* § 581; 4 Del. Admin. C. §§ 401-2.1.2, 401-3.1.1.

and collected under Title 30.¹¹ Therefore, based on the language of the ABCC regulation itself and actual function as a necessary element of the State's tax calculation methodology, we find that these requested records constitute reports required under Title 30. Accordingly, we have determined that DOR appropriately withheld the records pursuant to 29 *Del. C.* § 10002(1)(6) and 30 *Del. C.* § 368.¹²

CONCLUSION

For the reasons set forth above, we determine that DOR has not violated FOIA as alleged.

Very truly yours,



Aaron R. Goldstein
Chief Deputy Attorney General

cc: Angeline M. Kogut, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

¹¹ This Office has previously considered what type of document constitutes a "report" under 30 *Del. C.* § 368, and the monthly report described herein fits the definitions adopted in that opinion: "an official or formal statement of facts or proceedings" and "an official document that gives information about a particular subject." *Del. Op. Att'y Gen.* 16-IB04, 2016 WL 1072890, at *2 (Mar. 10, 2016).

¹² *See id.* (finding that an application form necessary to claim a corporate tax exemption under Title 30, is a report "required by Title 30" and thereby appropriately withheld from disclosure under 30 *Del. C.* § 368).