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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion 18-IB45

October 4, 2018

VIA EMAIL

Craig O'Donnell, Dover Post
c/o craigodonnell@doverpost.com

RE: FOIA Petition Regarding the Town of Dewey Beach

Dear Mr. O'Donnell:

We write in response to your correspondence alleging that the Town of Dewey Beach ("Town") 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. Because the requested record is part of an investigatory file, we find that the Town has not violated FOIA as alleged.

BACKGROUND

On August 22, 2018, you requested the surveillance video of a confrontation between two individuals in the parking lot of Dewey Beach Town Hall. You allege that this confrontation between a private citizen and Town committee chairman arose out of the citizen's removal of a document from a public meeting. According to your Petition, the Town denied your request on the basis that the video was exempted from the definition of "public record" in the FOIA statute, because the video is part of an investigatory file.

You then sent a Petition to this Office, alleging that the video was improperly withheld due to: 1) the significant public interest in the video; 2) the closing of the investigation related to the incident in the video; 3) unequal media access to the video by the Town's counsel who is also a reporter and who you assumed viewed the video; and 4) the previous release of other videos in

investigative files in Delaware.¹ By letter dated September 25, 2018 from Town counsel (“Response”), the Town denied any violation of FOIA, asserting that the video is part of an investigatory file for criminal enforcement by the Criminal Division of the Delaware Department of Justice and stating that the investigation has not closed. Trial is scheduled for October 2018. Town counsel further stated that he has not viewed the video, and upon conclusion of the case, the video may then be released per state and federal precedent in Delaware.

DISCUSSION

One of FOIA’s primary purposes is to grant citizens access to public records.² However, FOIA exempts several types of records from the definition of “public record,” including “investigatory files compiled for civil or criminal law-enforcement purposes.”³ Here, the Town has indicated that the requested video is part of an investigatory file with a criminal case currently pending.⁴ These circumstances fall squarely within the exemption,⁵ and thus, we find that the Town’s denial of your request did not violate FOIA as alleged.⁶

CONCLUSION

These circumstances fall squarely within the exemption. Under the law, the issues of public interest, whether Town counsel may have viewed this record, and whether similar public records

¹ Specifically, the Petition mentions a case in which a federal judge decided an arrest video was not confidential and the police agency thereafter released the video. However, the issue of whether certain investigatory records may become available through the criminal court proceeding is not a question under FOIA. Further, another police agency’s release, without more, does not affect the analysis here, as FOIA does not preclude a public body from voluntarily releasing a record that would otherwise be considered a public record under the statute. *See Del. Op. Att’y Gen.* 09-IB06, 2009 WL 1805911, at *2 (June 9, 2009) (citing favorably to a public body’s right to voluntarily waive a FOIA exemption).

² 29 *Del. C.* § 10001.

³ 29 *Del. C.* § 10002(1)(3).

⁴ Response.

⁵ *See News Journal Co. v. Billingsley*, 1980 WL 3043, at *2-3 (Del. Ch. Nov. 20, 1980) (finding that documents related to a Delaware Association of Professional Engineers investigation were appropriately withheld as part of an investigatory file); *Del. Op. Att’y Gen.* 17-IB23, 2017 WL 3426263, at *8 (July 14, 2017) (concluding that medical records associated with an on-going criminal case were exempt as investigatory files); *Del. Op. Att’y Gen.* 04-IB20, 2004 WL 2951950, at *2 (Nov. 16, 2004) (determining that an accident report was not a “public record” under FOIA as it was part of an investigatory file).

⁶ In the Response, Town counsel affirmed that he has not viewed the video. However, even if counsel had viewed it, we do not find this fact probative in determining whether the video is a “public record.”

have been released by other public bodies do not have bearing on whether this exemption has been properly applied. Thus, we find that the Town's denial of your request did not violate FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Allison E. Reardon

Allison E. Reardon
State Solicitor

cc: John F. Brady, Esq. (via email)