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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB22

April 26, 2019

VIA EMAIL

Ms. Jeanne Kuang

jkuang@delawareonline.com

RE: FOIA Petition Regarding the Delaware Department of Transportation

Dear Ms. Kuang:

We write regarding your correspondence alleging that the Delaware Department of Transportation (“DelDOT”) 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. For the reasons set forth below, we find that DelDOT appropriately denied your records request.

BACKGROUND

On March 13, 2019, you submitted a records request to DelDOT for the following documents:

[R]ecords of reported crashes in the calendar years 2016, 2017, and 2018 that are logged in DelDOT’s Crash Analysis Reporting System (CARS). For each crash I am requesting the following fields: date, geographical location (latitude and longitude), cause or summary of crash (examples of entries in this field should be “Primary Contributing Circumstance: Disregard Traffic Signal” or “Driver Action: Ran Red Light”), and any narrative information attached, with victim information anonymized.¹

¹ Petition.

DelDOT denied your request for four reasons: 1) the data you requested is owned by the Delaware Department of Safety and Homeland Security (“DSHS”); 2) FOIA does not require DelDOT to convert data in a new format, create programming, or conduct a database search to comply with this FOIA request; 3) the data is exempt pursuant to 29 *Del. C.* § 10002(l)(3) as “investigatory files compiled for civil or criminal law-enforcement purposes;” and 4) accident reports are not public records pursuant to 21 *Del. C.* § 321. This Petition followed.

The Petition challenges DelDOT’s denial on all four bases, alleging that DelDOT is the appropriate custodian as it has retained and compiled the requested data; the request does not require the creation of a new record, as only a specified part of the database is requested to be extracted; the request is not for the contents of specific investigatory files but instead for “anonymized contents of a computer system;” and even if investigatory files are exempt, it is not “reasonable or lawful for aggregate data about the number and kinds of crashes that occur in Delaware to be exempt. . . .”² Finally, you offer to remove the request for narrative information if that renders the request acceptable and note that DelDOT has made this information available to news outlets in the past, attaching several past news articles.

DelDOT’s counsel responded on April 12, 2019 (“Response”). First, DelDOT argues that the requested information is exempt for two reasons: 1) as investigatory files under 29 *Del. C.* § 10002(l)(3); and 2) pursuant to 21 *Del. C.* § 313 which states that DSHS shall prepare reports and tabulate and analyze reports showing the number, cause, and location of highway accidents that “shall not be open to public inspection.”³ Second, DelDOT argues that extracting a portion of the database and returning results based on specific parameters qualifies as a database query, which FOIA does not require in response to a records request. Third, DelDOT notes that despite any past provision of these records,⁴ it has not waived the applicable FOIA exemptions for these records. Fourth, DelDOT asserts that DSHS is the proper custodian, as DSHS receives the data from local law enforcement. The CARS database is populated with this data feed controlled by DELJIS. DelDOT cannot enter, remove, or modify data. DelDOT contends that merely having access to the data does not transform DelDOT into the custodian of this data.

Your Reply dated April 17, 2019 makes three additional points. First, you acknowledge that individual accident reports are exempt under FOIA, but you argue CARS data is a separate and unique record for purposes of FOIA, which is under DelDOT possession and custody. Second, you reiterate that your request does not require a database search, analogizing the request to a FOIA request requiring an email search. Finally, you note that DelDOT may instead give you a copy of the entire CARS database which would include the fields and years you’ve requested, redacted as DelDOT wishes.

² *Id.*

³ Response.

⁴ *Id.* at FN 2 (asserting that previous releases of crash data were done pursuant to 2 *Del. Admin. C.* § 2306, which was repealed in January 2019).

DISCUSSION

FOIA exempts certain records from the definition of “public records.”⁵ Under 29 *Del. C.* § 10002(l)(6), records exempted from public disclosure by statute or common law are not “public records.” In this instance, you requested specific fields of the CARS database populated by data that DSHS collects from local law enforcement accident reports under 21 *Del. C.* § 313. This statute requires DSHS to “tabulate and analyze such reports and publish annually, or at more frequent intervals *statistical information* based thereon as to the number, cause and location of highway accidents,” noting that these reports “shall not be open to public inspection.”⁶ The data you have requested is therefore not subject to public disclosure.⁷ In addition, accident reports are considered “investigatory files” exempt from disclosure under 29 *Del. C.* § 10002(l)(3).⁸ These exemptions are not eliminated by simply transferring the report information into the CARS database.

In summary, we believe that 21 *Del. C.* § 313 does not permit the data you requested be disclosed for public inspection, and accordingly, we determine that DelDOT appropriately withheld the records pursuant to 29 *Del. C.* § 10002(l)(6). Furthermore, this data is exempt as part of an investigatory file under 29 *Del. C.* § 10002(l)(3). As such, we need not address the remaining arguments in the Petition.

⁵ 29 *Del. C.* § 10002.

⁶ 21 *Del. C.* § 313 (emphasis added).

⁷ See also *Jacobs v. City of Wilmington*, 2002 WL 27817, at *3-5 (Del. Ch. Jan. 3, 2002) (concluding that City of Wilmington’s reports produced under 21 *Del. C.* § 313, even those that do not meet the statutory monetary threshold, are exempt from FOIA and noting that that the State Department of Public Safety is the “State’s informational repository for roadway safety” and “the requirements pertaining to a driver’s statutory responsibilities contain an important promise of confidentiality”).

⁸ *Del. Op. Att’y Gen.* 04-IB20, 2004 WL 2951950, at *2 (Nov. 16, 2004) (“The County is correct that the accident report you requested is exempt from disclosure under FOIA as an investigative file.”); *Del. Op. Att’y Gen.* 01-IB04, 2001 WL 1593104, at *2 (Feb. 27, 2001) (“These traffic reports are investigative files used for civil or criminal law enforcement purposes.”).

CONCLUSION

For the reasons set forth above, we conclude that DelDOT has not violated FOIA in denying your records request.

Very truly yours,

/s/ Allison E. Reardon

Allison E. Reardon
State Solicitor⁹

cc: Ann C. Cordo, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁹ The Chief Deputy Attorney General designated the State Solicitor to issue this Opinion.