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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB24

April 29, 2019

VIA EMAIL

Christina Jedra
cjedra@gannet.com

RE: FOIA Petition Regarding the Delaware Department of State

Dear Ms. Jedra:

We write in response to your correspondence on March 18, 2019 alleging that the Delaware Department of State (the "Department") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"), by refusing to produce, and not permitting you to copy, a video depicting the collapse and last moments of a Delaware inmate.¹ For the reasons set forth below, we determine that the Department violated FOIA and recommend that the Department either produce a copy, if possible, or make the video available for copying on your personal computer.

BACKGROUND

The Video

At the heart of this dispute is a 58-minute video, without sound, taken on the morning of April 10, 2016 by a camera in the chow hall of the work release building at Sussex Community Corrections Center ("SCCC").² A few minutes into the video, an inmate can be seen stumbling and bumping into other inmates and eventually falling to the floor.³ Several correctional officers

¹ We have treated your correspondence as a petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred.

² See *Aff. of Shauna Slaughter*, ¶ 4 (cited as "*Aff.*" at ____).

³ See *id.*

are present.⁴ Several minutes later, a nurse arrives and assesses the inmate's pulse and respiration.⁵ Though not clear from the video, the inmate was at that point unresponsive, had lost bladder control, had a white substance draining from his mouth and was making gurgling sounds.⁶ The video reveals that the nurse, an employee of the medical provider for the Delaware Department of Correction (the "DDOC"), does not take the inmate's blood pressure.⁷ Nor does she use a pulse oximeter or visualize his pupils, both of which would have indicated whether the inmate had suffered a cardiac event.⁸ The video then shows the nurse leaving the inmate's side, having rendered no medical treatment.⁹ The nurse returns but leaves the inmate's side several times.¹⁰ At no time does the nurse take blood pressure, use a pulse oximeter, or check the inmate's pupils.¹¹ The nurse reappears for the last time and, with the assistance of a correctional officer, begins to perform CPR on the inmate.¹² The nurse and correctional officer are seen performing CPR until paramedics arrive.¹³ The paramedics take over the inmate's care and attach a chest compression machine.¹⁴ The inmate remains unresponsive and is transported out of view (to the hospital) at the end of the video.¹⁵ The inmate was pronounced dead a short while later.¹⁶

⁴ *See id.*

⁵ *See* Delaware Board of Nursing Order, dated February 9, 2018, in Case No. 11-46-16 (cited as "Order" at ____), p.1. A copy of the Order and the hearing officer's findings and recommendations, dated November 3, 2017 (cited as "Report at ____"), are publicly available at: <https://dpronline.delaware.gov/mylicense%20weblookup/Search.aspx>.

⁶ *See id.*

⁷ *See id.*

⁸ *See id.*

⁹ *See id.* at p. 2.

¹⁰ *See* Aff. at ¶ 4.

¹¹ *See* Order at p. 2.

¹² *See* Aff. at ¶ 4.

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See* Order at p. 2.

The Disciplinary Proceedings

The Department's Division of Professional Regulation ("DPR") received a nursing complaint based on the events that transpired on the morning of April 10, 2016.¹⁷ It appears that, in the course of investigating the complaint, DPR obtained from the DDOC a read-only copy of the video. DPR ultimately referred the matter to this Office for administrative prosecution. This Office subsequently filed a formal professional licensure complaint with the Delaware Board of Nursing (the "Board").

The Board referred the matter to a hearing officer, who convened a public hearing on September 25, 2017.¹⁸ The Deputy Attorney General who prosecuted the matter called the nurse and the nurse's supervisors as witnesses and introduced various exhibits into evidence, including the video.¹⁹ The Deputy Attorney General played the video for all present.²⁰ The nurse's attorney then called three correctional officers who witnessed the events on April 10, 2016.²¹

The hearing officer made detailed findings based on the testimony, the video and other evidence.²² The hearing officer's findings paint a very clear picture of what transpired on the morning of April 10, 2016, including detailed descriptions of events that occurred on and off camera.²³ The hearing officer concluded that the nurse's initial deficient assessment of the inmate and her failure to remain with an extremely precarious and likely deteriorating patient violated applicable Board regulations.²⁴ The hearing officer observed that the nurse should have conducted a full initial assessment, continued to monitor the inmate's deteriorating condition and ordered a prompt call for emergency medical services.²⁵ The hearing officer recommended that the nurse's license be placed on probation for a period of one year.²⁶

¹⁷ See Report at p. 5.

¹⁸ See *id.* at p. 1.

¹⁹ See *id.* at pp. 2-16.

²⁰ See *id.* at p. 7.

²¹ See *id.* at pp. 16-20.

²² See *id.* at pp. 29-39.

²³ See *id.* at pp. 29-39, 47.

²⁴ See *id.* at pp. 44-49.

²⁵ See *id.* at p. 45.

²⁶ See *id.* at p. 52.

On January 10, 2018, the Board considered the hearing officer's findings and conclusions. The Board substantially agreed with the hearing officer and concluded that the nurse's actions on the morning of April 10, 2016 "clearly failed to comply with the legal and acceptable standards of nursing and were incompetent."²⁷ The Board was particularly disturbed by the nurse's failure to take the inmate's blood pressure and her decision to leave the inmate's side on multiple occasions while he was in clear distress.²⁸ The Board voted to increase the discipline to a one-year suspension, stayed immediately for a period of probation of one year, and ordered the nurse to complete 12 hours of continuing education.²⁹

The FOIA Requests and Petition Process

In February and March 2019, you submitted a number of FOIA requests to the Department seeking all of the materials that were submitted into evidence at the disciplinary hearing.³⁰ On March 5, 2019, the Department provided you with copies of all of the paper exhibits and explained that it was unable to copy the video.³¹ The Department indicated that you would be able to view the video at DPR's offices in Dover.³² The next day, you visited DPR's offices.³³ You asked to watch the video on your personal computer because it has a program that would have enabled you to capture a copy of the video.³⁴ DPR denied that request and permitted you to watch the video on a DPR computer.³⁵ DPR also denied your request to record the playback using your cellphone.³⁶ On March 14, 2019, DPR officially denied your request for a copy of the video but apparently indicated a willingness to produce it as long as the video could be copied and edited to blur facial images.³⁷

²⁷ Order at p. 4.

²⁸ *See id.*

²⁹ *See id.* at 4-5.

³⁰ *See* Letter, dated March 21, 2019, from Deputy Attorney General Patricia Davis to Kim Siegel (cited "Resp. at ___"), at p. 2.

³¹ *See* Email from Christina Jedra to Kim Siegel at 10:04 a.m. on March 18, 2019 (cited as "Pet. at ___"), at p. 1.

³² *See id.* at pp. 1-2.

³³ *See id.* at p. 2.

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

On March 18, 2019, you lodged the instant petition with this Office. The Department responded on March 21, 2019. On April 4, 2019, this Office notified the parties that the petition presents complex questions of law and requires us to strike a balance between personal privacy interests and the public's interest in observing the operation of government.³⁸ We observed that the parties' submissions do not indicate whether the immediate family members of the deceased are aware of the possibility that the video would be made public and asked the parties to supplement the record.³⁹

On April 10, 2019, in response to your follow up inquiry, we clarified that the family's consent to disclosure could be evidenced adequately by correspondence from a surviving spouse, an adult child, a parent, or a sibling indicating that (a) the signer (i) consulted with or attempted to consult with other close family members and (ii) has authority to speak on behalf of the family, and (b) immediate family members unanimously consent to the disclosure of the video.⁴⁰

On April 25, 2019, you forwarded us an email you received from the deceased's brother, speaking on behalf of himself, as well as the deceased's father, stepmother and two daughters, indicating that the family desires the video to be released publicly to further transparency and accountability.⁴¹ The email indicates that the deceased's mother and son "are aware of this record request and have chosen not to participate in this process."⁴² We received no further response from the Department.

THE PARTIES' ARGUMENTS

You argue that the Department violated FOIA by denying your request to copy the video, either through the use of software on your personal computer or via the camera on your mobile phone.⁴³ You note that the video was played in a public hearing and was subsequently played for you in response to the FOIA requests.⁴⁴ You maintain that the Department "acknowledged the video is a public record" and therefore "must allow it to be copied."⁴⁵ In support, you cite

³⁸ See Email from Kim Siegel to Deputy Attorney General Patricia Davis and Christina Jedra at 9:10 a.m. on April 4, 2019.

³⁹ See *id.*

⁴⁰ See Email from Kim Siegel to Deputy Attorney General Patricia Davis and Christina Jedra at 3:57 p.m. on April 10, 2019.

⁴¹ See Email from Christina Jedra to Kim Siegel at 1:38 p.m. on April 25, 2019.

⁴² *Id.*

⁴³ See Pet. at p. 2.

⁴⁴ See *id.*

Section 10003, which expressly states that “[a]ll *public records* shall be open to inspection *and copying* during regular business hours by the custodian of the records for the appropriate public body.”⁴⁶ You assert that “[t]he idea that a public record can be viewed but not copied is directly contrary to Delaware’s FOIA.”⁴⁷

In response, the Department argues that “FOIA does not require the production of an unredacted copy of th[e] video.”⁴⁸ The Department maintains that, before permitting you to copy the video, it is permitted to blur the face of the decedent under Section 10002(1)(6), which provides an exemption for “records specifically exempted from public disclosure by . . . common law.”⁴⁹ The Department points to a common law right of privacy that permits family members of a deceased person to limit public exploitation of death images.⁵⁰ The Department also argues that it is permitted and required to redact the faces of other inmates who appear in the video.⁵¹ The Department suggests those images are exempt under Section 10002(1)(4) because they constitute “identifiable criminal record information,” the disclosure of which would violate the inmates’ personal privacy.⁵² The Department asserts that it is incapable of redacting the video because of the restrictions placed on the copy it received from the DDOC.⁵³

By way of reply, you question the Department’s asserted inability to produce the video in redacted form.⁵⁴ While acknowledging that the Department may be unable to “burn a copy,” you argue that the Department should be able to copy the video in redactable form using screen capturing software - software that you assert is readily available.⁵⁵

⁴⁵ *Id.*

⁴⁶ *Id.* (citing 29 Del. C. § 10003 (emphasis added)).

⁴⁷ *Id.*

⁴⁸ Resp. at p. 8.

⁴⁹ 29 Del. C. § 10002(1)(6).

⁵⁰ Resp. at p. 5-7.

⁵¹ *See id.* at p. 4.

⁵² *Id.*

⁵³ *See id.* at p. 7.

⁵⁴ *See* Email from Christina Jedra to Deputy Attorney General Jason Staib at 3:30 PM on March 22, 2019 (cited “Reply at ___”).

⁵⁵ *See id.*

DISCUSSION

The parties' arguments raise legal and factual questions as to whether and to what extent a public body may justify its refusal to produce or permit the copying of an otherwise public record based on an asserted inability to redact imbedded information that is entitled to protection under an applicable FOIA exemption.⁵⁶ We need not resolve those questions, however, as we determine that the privacy rights the Department invokes are not entitled to protection under Sections 10002(l)(6) and 10002(l)(4).

Privacy Rights of Surviving Family Members

We have on numerous occasions determined that information and documents *may* be exempt under Section 10002(l)(6) if disclosure would violate privacy rights recognized under Delaware common law.⁵⁷ Traditionally, in assessing privacy rights in the context of FOIA, we first assess whether the individual asserting such rights has a cognizable cause of action for invasion of privacy under Delaware common law. If so, we must weigh the individual's privacy rights against the competing need for access to information to further FOIA's primary goals - namely, government transparency and accountability.⁵⁸

⁵⁶ See *Mingo v. U.S. Dep't of Justice*, 793 F. Supp. 2d 447, 455 (D.D.C. 2011) (holding that Bureau of Prisons properly withheld entire videos containing the images of more than 50 inmates involved in an altercation where the agency provided two declarations attesting to the fact that it lacked the technical capability to redact the videos).

⁵⁷ See, e.g., *Del. Op. Att'y Gen.* 18-IB34, 2018 WL 3947262, *3 (July 20, 2018) (determining that records pertaining to unsuccessful applicants for Deputy Insurance Commissioner are exempt under § 10002(l)(6) where disclosure would violate applicants' personal privacy); *Del. Op. Att'y Gen.* 18-IB20, 2018 WL 2266971, *4 (Apr. 23, 2018) ("[T]he 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."); *Del. Op. Att'y Gen.* 17-IB32, 2017 WL 3426272, *3 (July 25, 2017) (determining that vehicle tag information maintained in vendor data base is exempt under § 10002(l)(6) where disclosure would violate car owner's personal privacy); *Del. Op. Att'y Gen.* 17-IB13, 2017 WL 3426251, *2 (July 6, 2017) ("[A]s a general rule, the names and addresses of the holders of business licenses are exempt from disclosure by a common law right of privacy."); *Del. Op. Att'y Gen.* 13-IB07, *2 (Nov. 21, 2013) (noting that § 10002(l)(6) "recognizes and preserves in the context of FOIA statutory and common law privacy and non-disclosure protections"); *Del. Op. Att'y Gen.* 13-IB06, *4 (Nov. 20, 2013) (determining that county's refusal to release 911 emergency health call was appropriate to protect personal privacy rights).

⁵⁸ See *Del. Op. Att'y Gen.* 18-IB20, *4 (citing *Del. Op. Att'y Gen.* 13-IB03, 2013 WL 4239232, *3 (July 12, 2013)).

In Delaware, as under the common law generally, privacy rights expire upon death and are no longer enforceable.⁵⁹ Delaware courts have not recognized a common law relational cause of action for invasion of privacy, and the overwhelming weight of authority holds that such claims cannot be brought by surviving family members.⁶⁰ Thus, under the common law as it presently exists in Delaware, and in most other jurisdictions, the surviving family members in this case would not have a viable claim for invasion of privacy based on the disclosure of the video.

The Department adverts to a line of cases decided under the federal Freedom of Information Act (the "Federal Act"). In addressing the disclosure of sensitive death-scene imagery under the Federal Act, federal courts long ago recognized that surviving family members, based on their own privacy interests, have the right to bring actions to prevent disclosures that would cause unwarranted anguish.⁶¹ This body of federal case law culminated in and was ultimately solidified by the United State Supreme Court's decision in *Nat'l Archives & Records Admin. v. Favish*.⁶²

In *Favish*, the U.S. Supreme Court ruled that the death-scene photographs of Deputy White House Counsel Vincent Foster, who committed suicide by shooting himself with a revolver, could be withheld from the public under Exemption 7(C) of the Federal Act on the basis of survivors' privacy rights.⁶³ The decision involved the interpretation of a federal statute -

⁵⁹ See *Lawson v. Meconi*, 2005 WL 1323123, *5-7 (Del. Ch. May 27, 2005), *rev'd on other grounds*, 897 A.2d 740 (Del. 2006); Restatement (Second) of Torts § 652I, cmt. b (1977) ("In the absence of statute, the action for the invasion of privacy cannot be maintained after the death of the individual whose privacy is invaded."). But see *Catsouras v. Dep't of California Highway Patrol*, 104 Cal. Rptr. 3d 352, 361-366 (2010) (finding privacy interests of family members of deceased had viable cause of action against state troopers who sent death scene photographs of deceased to strangers).

⁶⁰ See *Lawson v. Meconi*, 2005 WL 1323123, at *5.

⁶¹ See, e.g., *Katz v. National Archives & Records Admin.*, 862 F. Supp. 476, 483-485 (D.D.C.1994) (observing that the Kennedy family has privacy interest in x-rays and photographs taken during the President's autopsy, limited, however, to preventing public disclosure that would cause clearly unwarranted anguish or grief); *New York Times Co. v. Nat'l Aeronautics & Space Admin.*, 782 F. Supp. 628, 631 (D.D.C. 1991) (holding that families of the astronauts who died in the Space Shuttle Challenger disaster had enforceable privacy interests in tape-recorded voice communications that may be invoked to protect against disclosures that would cause additional anguish).

⁶² 541 U.S. 157 (2004).

⁶³ Exemption 7(C) applies to records or information compiled for law enforcement purposes if production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). We note that Delaware's corollary exemption covers all

specifically, Exemption 7(C) - but was grounded in cultural traditions and a century-old common law privilege permitting surviving family members “to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.”⁶⁴ The U.S. Supreme Court noted that its decision would “ensure[] that the privacy interests of surviving family members would allow the Government to deny these gruesome requests in appropriate cases.”⁶⁵ The concept of survivors’ rights, now fully enshrined in the Federal Act, appears to have been favorably received by those jurisdictions that have addressed the issue in the context of public access disputes under state law.⁶⁶ The existence of survivors’ rights in this jurisdiction remains an open question.⁶⁷

We need not decide whether Delaware courts ultimately would recognize the concept of survivors’ rights under FOIA because, here, the surviving family members either consent to the public disclosure of the video, or have elected not to take affirmative action to halt its release. Under the circumstances, we do not believe that the Department can invoke survivors’ rights to justify its refusal to release the video.

Privacy Rights of Other Inmates

The Department argues that the images of the other inmates constitute “identifiable criminal record information” that is entitled to protection under Section 10002(1)(4). That statute exempts “[c]riminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy.”⁶⁸ We are not convinced that this exemption applies.

“[i]nvestigatory files compiled for civil or criminal law-enforcement,” regardless of the existence of personal privacy rights. *See* 29 *Del. C.* § 10002(1)(3).

⁶⁴ 541 U.S. at 168-169 (citing *Schuyler v. Curtis*, 42 N.E. 22, 25 (1895)).

⁶⁵ *Id.* at 170.

⁶⁶ *See Blethen Maine Newspapers, Inc. v. State*, 871 A.2d 523, 540 (Me. 2005) (citing *Favish* and agreeing that “family-related privacy expectations” may be enforceable under Maine statute exempting investigative information where disclosure would constitute an unwarranted invasion of personal privacy); *The Providence Journal Co. v. Town of W. Warwick*, 2004 WL 1770102, at *3 (R.I. Super. July 22, 2004) (citing *Favish* and holding under Rhode Island Access to Public Records Act that 911 and telephone calls from family members of victims are entitled to protection to avoid a highly intrusive interference with the legitimate privacy interests).

⁶⁷ We note that the Delaware Supreme Court has cited *Favish* favorably, albeit in dicta. *See Lawson v. Meconi*, 897 A.2d 740, 747-748 (Del. 2006). The dicta in *Lawson* does appear to suggest that survivors’ rights would be recognized under FOIA. *See id.* (“[F]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”).

⁶⁸ 29 *Del. C.* § 10002(1)(4).

Section 10002(l)(4), on its face, applies only to information and documents contained in criminal files and criminal records. The Department has submitted no facts suggesting that the video previously was or now is part of a criminal file or record within the meaning of Section 10002(l)(4). The record reflects only that the video is an exhibit in the nurse's public disciplinary proceedings. Nor has the Department provided us with any authority to support its assertion that a video that has been previously aired publicly is entitled to protection under 10002(l)(4).

We do not believe the other inmates would have cognizable claims under Delaware common law.⁶⁹ The Delaware Supreme Court has delineated four types of invasion of privacy claims: (1) intrusion on plaintiff's physical solitude, (2) publication of private matters violating the ordinary senses, (3) putting plaintiff in a false position in the public eye, and (4) appropriation of some element of plaintiff's personality for commercial use.⁷⁰ Only the second variety - publication of private matters - is conceivably applicable here. Under the common law, however, there is no liability for publication of private matters where the defendant merely gives further publicity to information about the plaintiff that is already public.⁷¹

The video shows the other inmates present in the SCCC work release chow hall during the incident.⁷² The video, at most, reveals that the inmates were at some point convicted of crimes and sentenced to periods of incarceration. The video does not reveal any sensitive arrest information, or even the specific crimes for which the inmates were serving time. The mere fact that the inmates were convicted of crimes and sentenced to prison is public information. The inmates were adjudged guilty and sentenced in open court proceedings, and their sentencing orders presumably remain open to public inspection and copying under applicable court rules.⁷³

We do not think Section 10002(l)(4) applies to the circumstances presented here. Accordingly, the Department was not justified in denying your requests based on the privacy rights of other inmates.

⁶⁹ Cf. *Mingo*, 793 F. Supp. 2d at 453 (holding that Bureau of Prisons properly withheld entire videos containing the images of more than 50 inmates involved in an altercation where disclosure could reasonably be expected to constitute an "unwarranted invasion of personal privacy" within the meaning of Federal FOIA exemption).

⁷⁰ *Barker v. Huang*, 610 A.2d 1341, 1349 (Del.1992).

⁷¹ Restatement (Second) of Torts § 652D, cmt. b (1977).

⁷² We also note that the video footage in question was shot in a chow hall and thus does not appear to involve "private matters."

⁷³ See, e.g., Superior Court Administrative Directive No. 2000-5 - Policy on Public Access to Superior Court Judicial Records, §§ F, IV.1.

CONCLUSION

For the forgoing reasons, we determine that the Department violated FOIA.⁷⁴ The public has a legitimate interest in the quality of healthcare being provided at Delaware correctional institutions. The disclosure of the video may help to advance that interest and further transparency and accountability. We recommend that the Department either produce a copy, if possible, or make the video available for copying on your personal computer.

Very truly yours,

A handwritten signature in black ink, appearing to be 'A. Goldstein', written over a horizontal line.

Aaron R. Goldstein
Chief Deputy Attorney General

cc: Patricia A. Davis, Deputy Attorney General
Jason Staib, Deputy Attorney General

⁷⁴ Because the Department faced unsettled law and did not know the position of the decedent's family members, we specifically find that it acted in good faith to protect privacy rights.