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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB26

May 28, 2019

VIA EMAIL

Ms. Darya Marchenkova
Darya.marchenkova@typemediacenter.org

RE: FOIA Petition Regarding the Delaware Department of Correction

Dear Ms. Marchenkova:

We write in response to your correspondence alleging that the Delaware Department of Correction (“DOC”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your request for records. 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. Because DOC is statutorily prohibited from disclosing the requested records, we determine that DOC has not violated FOIA as alleged.

BACKGROUND

On May 1, 2019, you sent a records request to DOC for “digital records containing - but not limited to - the following information for all inmates who are incarcerated under pre-trial detention in Delaware Department of Correction facilities on the date you receive this request.”¹ The specific information requested included “inmate name, booking date, charge(s), bond amount, inmate date of birth, inmate gender, inmate race, Immigrations and Customs Enforcement hold, US Marshal hold, and facility name.”² You also requested the “data from Howard R. Young

¹ Petition.

² *Id.*

Correctional Institution and all other facilities in your jurisdiction that confine people awaiting trial.”³

DOC denied the request for three reasons: 1) 29 *Del. C.* § 10002(1)(3) excludes from the definition of public records any investigatory files compiled for civil or criminal law-enforcement purposes; 2) 11 *Del. C.* § 4322(a) does not permit the DOC to disclose supervision history and all other case records obtained in the discharge of their official duty other than to designated entities which include the Board of Parole, the Board of Pardons, the Attorney General and the Deputies Attorney General; and 3) 29 *Del. C.* § 10002(1)(9) excludes from public records “any records pertaining to pending or potential litigation which are not records of the court.”⁴ DOC specifically noted that “[b]oth civil and criminal investigations are pending at the present time.”⁵ After receipt of the denial, you filed this Petition.

Your Petition argues that your request is not for investigatory files and “has nothing to do with supervision history or records obtained in the discharge of official duty.”⁶ Further, you allege that your request is not for “any records pertaining to pending or potential litigation which are not records of the court.”⁷

On May 14, 2019, DOC provided its response to the Petition through counsel (“Response”). DOC argues that your FOIA request was appropriately denied pursuant to 29 *Del. C.* § 10002(1)(6) because this information is prohibited from disclosure by 11 *Del. C.* § 8513(d) and 11 *Del. C.* § 4322(a). Additionally, DOC contends that because you do not appear to be a citizen of this State, you are not entitled to compel a government agency to produce documents under Delaware’s FOIA statute.

In your Reply, you first assert that your request does not pertain to the supervision history of DOC employees. Instead, you request a “spreadsheet of all inmates held in DOC facilities and awaiting trial on the day that the department processes the request.”⁸ Additionally, you allege that your request only relates to the charges for confined inmates awaiting trial and you offer “to modify [the] request to receive the records without a column that includes the inmates’ charges.”⁹ Finally,

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Reply.

⁹ *Id.*

you note that as a journalist, you seek the information for the public interest and to contribute to the public's understanding of the criminal justice system.

DISCUSSION

You requested digital records containing certain information about inmates in pretrial detention. Pursuant to 29 *Del. C.* § 10002(1)(6), records specifically exempted from public disclosure by statute or common law shall not be considered “public records.” DOC cites to 11 *Del. C.* § 4322(a) which prohibits the DOC’s disclosure of supervision history and case records obtained by DOC members or employees in their official capacity, unless such disclosure is made to certain designated entities or as directed by an order of a court or the Board of Pardons. The record does not reflect that you have obtained a qualifying order requiring DOC to produce records or that you otherwise represent one of the statutorily-referenced entities.

Also, DOC cites to 11 *Del. C.* § 8513(d) as a second statute prohibiting disclosure of the requested information. This statute governs the dissemination of criminal history record information collected by the State Bureau of Information.¹⁰ Any person or agency, other than the State Bureau of Identification, is prohibited from disclosing criminal history record information, which includes “information collected by state or federal criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations or other formal criminal charges and any disposition arising therefrom, sentencing, correctional supervision and release.”¹¹ Your request includes information that qualifies as criminal history record information.

Accordingly, DOC’s disclosure of the requested records is prohibited by 11 *Del. C.* § 4322 and 11 *Del. C.* § 8513 based on the record before us. Therefore, we find that DOC did not violate FOIA in denying your request, and we need not address DOC’s remaining assertion.¹²

¹⁰ 11 *Del. C.* § 8501 (designating “the State Bureau of Identification as the central state repository for criminal history record information”).

¹¹ 11 *Del. C.* §§ 8502 & 8513.

¹² While we have decided to issue a determination regarding the merits of your claim, we feel compelled to note that as a non-citizen of Delaware, you may lack standing to avail yourself of the enforcement provisions contained in 29 *Del. C.* § 10005, including the petition process set forth in Section 10005(e).

CONCLUSION

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

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Gregory E. Smith, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General