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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB36

July 5, 2019

VIA EMAIL

Sarah Gamard, Reporter
The News Journal
Sgamard@delawareonline.com

RE: FOIA Petition Regarding the Delaware Auditor of Accounts

Dear Ms. Gamard:

We write in response to your correspondence alleging that the Delaware Auditor of Accounts (“AOA”) 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. As discussed below, we find no basis to conclude that AOA violated FOIA as alleged.

BACKGROUND

You sent AOA a FOIA request on May 15, 2019, requesting “[a]ny and all requests for investigations and audits that the auditor has received since taking office in January 2019. This includes but is not limited to the date of the request, the person or entity that made the request, and the full request.”¹

After advising of the need for additional time to complete the request, AOA responded on June 14, 2019 by providing a redacted spreadsheet excluding the names of the complainants, what agency was involved, and the why the complaint was filed. AOA stated that the redactions were made pursuant to 29 *Del. C.* § 10002(1)(3), which exempts records related to “investigatory files compiled for civil or criminal law-enforcement purposes.” This Petition followed, in which you

¹ Petition.

allege that the redactions are improper because “the auditor’s office does not have law enforcement powers.”²

On June 21, 2019, AOA’s counsel replied to your Petition by letter (“Response”), asserting that AOA properly redacted the records. AOA explains that the record produced is an internal log known as the “Hotline Log” which tracks all emails, phone calls, and written correspondence to AOA alleging fraud, waste, or abuse of State funds.³ AOA contends that 29 *Del. C.* § 10002(1)(3) includes agencies that enforce the law, and in accordance with its enabling statute in 29 *Del. C.* ch. 29, AOA has the responsibility to “assess compliance with State laws, regulations, and internal policies and controls with respect to the receipt and expenditure of State funds, and, through the issuance of a report, the identification of any ‘illegal practices’ involving those funds.”⁴ Ultimately, AOA’s investigation of these complaints may result in the issuance of a public report, referral to another State agency, or referral and possible collaboration with an appropriate state or federal law enforcement authority.

AOA also argues that the general acceptable auditing principles and practices that AOA is required to follow mandate that agencies adopt procedures to ensure basic information is maintained as confidential. AOA redacted the information regarding closed investigations, as AOA contends the investigatory information remains confidential after the termination of the investigation.⁵ AOA notes the chilling effect that the disclosure of this information would have on its ability to encourage citizens’ willingness to report instances of fraud, waste, and abuse. Finally, AOA argues that the common law right of privacy also protects the redacted information from disclosure, and reporting citizens are assured that their information will remain private when making a report to AOA.

DISCUSSION

Your Petition alleges that AOA does not have law enforcement powers, and thus, you contend its records cannot be considered investigatory files under 29 *Del. C.* § 10002(1)(3). However, the applicable standard in 29 *Del. C.* § 10002(1)(3) is whether those investigatory files are compiled for the purpose of civil or criminal law enforcement. AOA accepts citizen complaints about waste, fraud, and abuse related to State funds. AOA acknowledges that it is not a State law enforcement agency but it “plays an integral role in the law enforcement process, because, at its core, every audit, review, investigation, and inspection performed by AOA concerns the proper

² *Id.*

³ Response.

⁴ *Id.*

⁵ We agree that the termination of an investigation does not convert these files into public records. *See Del. Op. Att’y Gen.* 15-IB13, 2015 WL 9701644, at *2 (Dec. 29, 2015).

use of State funds, and is thus investigatory in nature.”⁶ AOA’s investigations and assessments regarding these complaints may lead to a report, referral to another State agency or collaboration with law enforcement authorities to address violations.

On this basis, we conclude that these investigatory files are “compiled for civil or criminal law-enforcement purposes.”⁷ As the initial complaints are considered part of the investigatory files, we believe that AOA has sufficiently explained its reasons for making the redactions pursuant to 29 *Del. C.* § 10002(1)(3).⁸ Because we find AOA’s assertion of this exemption is appropriate, we need not address the remaining arguments.

CONCLUSION

For the reasons set forth above, we find that AOA did not violate FOIA as alleged in the Petition.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Frank N. Broujos, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁶ Response.

⁷ 29 *Del. C.* § 10002(1)(3).

⁸ See *News-Journal Co. v. Billingsley*, 1980 WL 3043, at *346 (Del. Ch. Nov. 20, 1980) (finding that the investigatory file exemption continues to apply after the investigation is closed and noting “[i]f the disclosure of the investigatory files of the Delaware Association of Professional Engineers were allowed, there would be a chilling effect upon those who might bring pertinent information to the attention of the Association.”); *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, at *3 (Mar. 10, 2017) (“By the very terms of your request, which asks for communications relating to a possible violation of a DNREC secretary’s order, the request seeks documents relating to an investigation [and] Delaware courts have made clear that, for purposes of FOIA, the investigatory exemption attaches as soon as an agency is first made aware of a potential issue.”); *Del. Op. Att’y Gen.* 09-IB06, 2009 WL 1805911, at *1 (June 9, 2009) (“A public body that enforces the law has the right pursuant to [29 *Del. C.* § 10002(1)(3)] to withhold from the public letters of complaint about violations of the law. . . . [and] this chilling effect would occur whether the public body chose to investigate the complaint or ignore it.”).