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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 19-IB44**

**August 12, 2019**

**VIA EMAIL**

Mr. Craig O'Donnell  
Dover Post  
[craig.odonnell@doverpost.com](mailto:craig.odonnell@doverpost.com)

**RE: FOIA Petition Regarding the Delaware State Police**

Dear Mr. O'Donnell:

We write in response to your correspondence alleging that the Delaware State Police ("DSP") 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 that DSP did not violate FOIA as alleged.

**BACKGROUND**

You sent DSP a request on June 25, 2019 seeking "the raw data for traffic stops made for ten (10) years ending 1/1/2017" and asking that, if collected, DSP provide "officer race information and officer ID#" in addition to the data fields of "agencyID, assignment, stopdate, location, sector, vehstate, vehplate, vehmake, vehmodel, vehsearch, opoInstate, opdob, oprace, opsex, opeo, reason, reasonmore, searchmore, arrestactivity, cleardate, offnotes, quickstop and GUID."<sup>1</sup> On July 19, 2019, DSP responded that traffic statistical reports are released every year and available on its website but the records you requested are exempt from FOIA pursuant to previous opinions of this Office holding that public bodies are not required to create new records, "... compile ... requested data from other public records that may exist, convert data into a new format, create programming, or conduct a database search using requested search criteria."<sup>2</sup> DSP

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<sup>1</sup> Petition.

<sup>2</sup> *Id.*

further asserts that the information you seek is contained in “actual accident reports” which are statutorily exempt under 21 *Del. C.* § 313 and 29 *Del. C.* § 10002(1)(3).<sup>3</sup>

This Petition followed, in which you allege DSP’s denial violates FOIA because “a subset, or ‘report’ generated or exported from an extant database is NOT ‘a new record,’” your “request did not ask for specially compiled data, reprogramming, or searching using requested search criteria, but a machine-readable copy of the database contents,” and “[a] database is not, in fact, the underlying original reports or data,” which DSP claimed were exempt.<sup>4</sup> You further allege that DSP violated FOIA by referring you to its website for statistical reports that you assert cannot be found using the menus on the website and “thus as a practical matter they are not available.”<sup>5</sup> You contend that by “not forwarding a copy of these reports in response to the request and referring to a website where they are not available,” DSP violated FOIA.<sup>6</sup>

On July 26, 2019, DSP’s counsel replied to your Petition by letter (“Response”). DSP states that the requested information for certain raw data “would be derived from police reports and/or accident reports,” and as those reports are exempt under FOIA, DSP properly denied this request. DSP states police reports are not public records under 29 *Del. C.* § 10002(1)(3) and that the raw data requested, even if pertaining to a closed investigation, would still be subject to the investigatory file exemption. Also, DSP indicates that such data could “pertain to pending or potential litigation” and thus also be exempt under 29 *Del. C.* § 10002(1)(9).<sup>7</sup> DSP states that because 21 *Del. C.* § 313(b) mandates that accident reports “shall not be open to public inspection,” and this Section of the Code “does not distinguish between the accident reports and the data contained within those accident reports,” the release of such information is prohibited and the information is thus exempt from FOIA under 29 *Del. C.* § 10002(1)(6), which exempts “[a]ny records specifically exempted from public disclosure by statute or common law.”<sup>8</sup>

In addition, DSP asserts that to fulfill your request, it would need to access a database, “select certain fields and criteria, and run a new report based on [the] specific requested parameters,” which constitutes the creation of a new record not required by FOIA.<sup>9</sup> DSP denies

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Response.

<sup>8</sup> *Id.* DSP also provided clarification that this statute has been recently amended by the General Assembly.

<sup>9</sup> *Id.*

that your request seeks to have data exported to an Excel spreadsheet, which this Office has previously held may not constitute the creation of a new record under FOIA.<sup>10</sup>

Finally, DSP asserts that you made a FOIA request for the 2017 and 2018 traffic statistical reports on July 22, 2019, and DSP's permissible timeframe to respond had not yet expired when you filed your petition. Nonetheless, DSP states that it has no responsive documents because DSP did not create traffic statistical reports for 2017 and 2018.<sup>11</sup>

## DISCUSSION

FOIA requires a public body to make its public records available for inspection and copying,<sup>12</sup> but certain records are excluded from the definition of "public record."<sup>13</sup> Under 29 *Del. C.* § 10002(1)(3), investigatory files compiled for the purposes of civil or criminal law enforcement are considered exempt. Here, DSP's counsel represents that all data you requested is derived from records exempt as investigatory file records, including police reports and accident reports.<sup>14</sup> Transferring the information from these reports into a digital format does not eliminate the exemption for such information.<sup>15</sup>

Additionally, DSP cites to 21 *Del. C.* § 313 as additional support that the traffic stop data in accident reports is also exempt from public disclosure.<sup>16</sup> In its current version, this statute

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<sup>10</sup> *Del. Op. Att'y Gen.* 17-IB32, 2017 WL 3426272, at \*3 (July 25, 2017).

<sup>11</sup> In your Petition, you allege DSP violated FOIA by failing to send you the 2017 and 2018 traffic statistical reports in its response to your June 25, 2019 FOIA request. However, you made a FOIA request for these two reports to DSP's FOIA Coordinator on July 22, 2019, a few hours after this Petition was submitted. Thus, although we do not believe that this allegation has been properly raised for purposes of this Petition, DSP's counsel informed you in its Response that the 2017 and 2018 traffic statistical reports have not been created and therefore do not exist.

<sup>12</sup> 29 *Del. C.* § 10003(a).

<sup>13</sup> 29 *Del. C.* §§ 10002(1)(1) – (19).

<sup>14</sup> Response; *see also Del. Op. Att'y Gen.* 17-IB59, 2017 WL 6348853, \*FN 12 (Nov. 20, 2017) (accepting the representations of public body's counsel).

<sup>15</sup> *See Lawson v. Meconi*, 897 A.2d 740, 745 (Del. 2006) (citing Attorney General Opinion 05-IB16 with approval and stating: "Investigatory files are not public information. *A fortiori*, any information gathered during the course of an investigation is not public information."); *Del. Op. Att'y Gen.* 19-IB22 (April 26, 2019) ("These exemptions are not eliminated by simply transferring the report information into the CARS database.").

<sup>16</sup> 29 *Del. C.* § 10002(1)(6) (excluding records "specifically exempted from public disclosure by statute or common law").

explicitly states that “[a]ccident reports and crash data under this section are not public records under the Freedom of Information Act, Chapter 100 of Title 29.”<sup>17</sup> Thus, this traffic stop information incorporated into police reports or accident reports for purposes of civil and criminal law enforcement is exempt.<sup>18</sup>

### **CONCLUSION**

For the reasons set forth above, we find that DSP did not violate FOIA as alleged in the Petition.<sup>19</sup>

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Lisa M. Morris, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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<sup>17</sup> 21 *Del. C.* § 313(d).

<sup>18</sup> See, e.g., *Del. Op. Att’y Gen.* 19-IB22 (Apr. 26, 2019) (“In addition, accident reports are considered ‘investigatory files’ exempt from disclosure under 29 *Del. C.* § 10002(l)(3).”); *Del. Op. Att’y Gen.* 15-IB13, 2015 WL 9701644, at \*2 (Dec. 29, 2015) (finding a post-mortem report to be covered by the investigatory file exemption); *Del. Op. Att’y Gen.* 04-IB20, 2004 WL 2951950, at \*2 (Nov. 16, 2004) (determining accident reports are investigative files used for civil or criminal law enforcement purposes).

<sup>19</sup> We note that DSP asserted the investigatory exemption for police report information for the first time in its Response to your Petition, and we respectfully caution DSP to give due consideration to reasons asserted in any future denials. *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, at \*FN37 (Mar. 10, 2017) (“While, in this instance, we have determined that DNREC’s denial of your request was indeed authorized by FOIA, we nevertheless caution DNREC to give careful consideration to the reason(s) provided, pursuant to 29 *Del. C.* § 10003(h)(2), for any FOIA denial.”).