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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB61

November 5, 2019

VIA EMAIL

Mr. Xerxes Wilson
The News Journal
xwilson@delawareonline.com

RE: FOIA Petition Regarding the Delaware Department of Safety and Homeland Security

Dear Mr. Wilson:

We write in response to your correspondence alleging that the Delaware Department of Safety and Homeland Security (“DSHS”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). 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 more fully herein, we determine that DSHS violated FOIA by improperly denying your request for records.

BACKGROUND

On May 30, 2019, you submitted two requests for records to DSHS; the first stated as follows:

I request access to documents detailing the annual pay from the Office of Highway Safety to former Newport Police Chief Michael Capriglione, including the amount paid, the funding source and the amount of hours he billed. I request data for each year going back to 2000. I also request access to documents detailing the annual

pay to all city of Newport police officers, including the amount paid, the program and funding source and the amount of hours billed dating back to 2000. . . .¹

Your second request submitted that day sought records “detailing the annual dollar allocation from the Office of Highway Safety to each Delaware police department participating in programs administered by the office.”² On September 6, 2019, DSHS responded to your first request denying it in full pursuant to three exemptions: 1) the investigatory files compiled for purposes of criminal or civil law enforcement under 29 *Del. C.* § 10002(1)(3); 2) criminal history and arrest records under 29 *Del. C.* § 10002(1)(4); and 3) records pertaining to pending or potential litigation which are not records of any court under 29 *Del. C.* § 10002(1)(9). The letter stated your request was considered closed. DSHS responded a few weeks later to your second FOIA request by providing a cost estimate to fulfill it, totaling \$7,100.80. This Petition followed, solely challenging the denial of your first request regarding Newport police records.

In the Petition, you state that the purpose of your Petition is “to ask for a determination as to whether the rejection [of your FOIA request] was lawful.”³ You argue that the financial records are compiled as a part of the Office of Highway Safety’s routine operations. Acknowledging that the Police Chief was recently involved in a misdemeanor case, you note that this case “had nothing to do with” your request about his compensation, and you are not aware of any other pending or potential litigation regarding Newport police compensation.⁴

DSHS replied to your Petition by letter dated October 16, 2019 (“Response”).⁵ DSHS asserts that it denied your first request in part, as it only asserted the three above-referenced exemptions for the portion of your first request for the Police Chief’s records. DSHS contends that it responded to the second portion of your first request regarding all Newport officers by providing a cost estimate on September 20, 2019 to your second request for all police agencies, because the second request for certain records of all police agencies encompassed the City of Newport’s records as well. DSHS states your second request for the financial records of all police agencies is burdensome, requiring the review of hard copy records of 42 police agencies with over 2,100 officers eligible to participate in over thirty programs each year. DSHS states that this information is not kept in a database or other electronic format.

¹ Response.

² *Id.*

³ Petition.

⁴ *Id.*

⁵ We do not address DSHS’s argument that its response was timely, as the Petition does not raise this allegation.

DISCUSSION

DSHS has the burden of justifying its denial of access to records.⁶ The Petition challenges DSHS's denial of only one of the May 30, 2019 requests: the first request regarding Newport police records ("documents detailing the annual pay from the Office of Highway Safety to former Newport Police Chief Michael Capriglione, including the amount paid, the funding source and the amount of hours he billed . . . [and] documents detailing the annual pay to all city of Newport police officers, including the amount paid, the program and funding source and the amount of hours billed dating back to 2000").⁷ DSHS argues that it did not deny your request for Newport police records in full and that the cost estimate provided in response to your other request serves as a response to your request for Newport police records. However, the factual record does not support this. The September 6, 2019 response letter clearly restates the full language of your first request for Newport police records and asserts that your request is denied based upon three exemptions. That letter specifically states: "[t]he Department of Safety and Homeland Security considers this request closed."⁸ The September 20, 2019 cost estimate provided to you in response to your second request is marked as "FOIA Xerxes Wilson DE Online #2," which is consistent with the subject line of other DSHS correspondence attached to the Response regarding the second FOIA request for the records of all police agencies.⁹ Accordingly, we do not view DSHS's September 20, 2019 cost estimate as responsive to your first request that is the subject of this Petition, and our review in this matter is confined to determining whether DSHS properly denied the first request for Newport police records for the reasons stated in its September 6, 2019 letter. For the following reasons, we determine it did not.

DSHS asserts in its Response that three exemptions apply to the records you requested: 1) the investigatory files compiled for purposes of law enforcement under 29 *Del. C.* § 10002(1)(3); 2) criminal history and arrest records under 29 *Del. C.* § 10002(1)(4); and 3) records pertaining to pending or potential litigation which are not records of any court under 29 *Del. C.* § 10002(1)(9). First, DSHS states that the records regarding the Police Chief are part of an investigatory file.¹⁰ The request seeks records of how the Office of Highway Safety has spent public funds. In variety of contexts, Delaware courts and Attorney General opinions have emphasized the significant public interest in the expenditure of public funds, often pointing to FOIA's core purpose of

⁶ 29 *Del. C.* § 10005(c).

⁷ Petition.

⁸ Response, Ex. B.

⁹ Response, Ex. A, C.

¹⁰ DSHS's Response does not provide the relevant factual background of its asserted investigation, such as identifying the investigating agency, the underlying investigation, or how the requested records may relate to this investigation.

monitoring government activity and ensuring accountability.¹¹ On this factual record, we do not believe that the records showing DSHS's expenditure of public funds related to Newport police can be considered exempt as part of an investigatory file.¹² As such, we find that DSHS improperly denied your request for records under Section 10002(1)(3).

DSHS next contends in its Response that "to the extent the requested records pertain to criminal history and arrest records or pending or potential litigation, they may also be exempt pursuant to 29 *Del. C.* § 10002(1)(4) and 29 *Del. C.* § 10002(1)(9), respectfully."¹³ DSHS does not provide any factual assertions upon which we can make the determination that either exemption applies here. On the basis of this record, we find that DSHS has not carried its burden of justifying the denial of records sought in your first FOIA request. We recommend that DSHS provide a response specific to that first request in compliance with FOIA within fifteen business days.

¹¹ See, e.g., *State v. Camden-Wyoming Sewer and Water Authority*, 2012 WL 5431035, at *4 (Del. Super. Nov. 7, 2012) (noting Delaware authority supporting that the salaries paid by public funds must be disclosed); *Gannett Co., Inc. v. Christian*, 1983 WL 473048, at *1 (Del. Super. Aug. 19, 1983) ("Although some might feel that the amount of their salary is personal, it is generally recognized that the public has a legitimate interest in knowing the salaries of persons who are paid with public funds and public employees have no right of privacy in this information."); *Del. Op. Att'y Gen.* 18-IB22, 2018 WL 2266973, at *2 (May 1, 2018) ("This Office has previously determined that, as a general matter, records reflecting the expenditure of public funds for outside or private legal counsel are public records under FOIA."); *Del. Op. Att'y Gen.* 06-IB11, 2006 WL 1779489, at *5 (May 31, 2006) (in determining that the personnel file exemption does not cover attendance records and timesheets, stating "[j]ust as the public has the right to know the salary paid to public employees, the public also has a right to know when their public employees are and are not performing the duties for which they are paid"); *Del. Op. Att'y Gen.* 05-IB23, 2005 WL 3991282, at *4 (Aug. 15, 2005) (describing the expenditure of public funds as "a core governmental function, the scrutiny of which is assured by FOIA"); *Del. Op. Att'y Gen.* 03-IB21, 2003 WL 22669566, at *2 (Oct. 6, 2003) ("The routine information contained in an insurance contract – premiums, scope of coverage, deductibles – relate to the expenditure of public funds, a core FOIA function. The public has a right to know whether claims against the County's public officials may be settled 'with public funds or with insurance proceeds generated by publicly financed insurance premiums.'") (citations omitted).

¹² We do not foreclose the possibility that unique circumstances may dictate a different result. However, we determine that no such circumstances have been alleged here.

¹³ Response.

CONCLUSION

As such, we determine that DSHS violated FOIA by improperly denying your request. We recommend that DSHS provide a response in compliance with FOIA within fifteen business days.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

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