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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB62

November 6, 2019

VIA EMAIL

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

RE: FOIA Petition Regarding the City of Wilmington

Dear Mr. Wilson:

We write in response to your correspondence alleging that the City of Wilmington (“City”) 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 the City did not violate FOIA by asserting the investigatory file exemption for certain ShotSpotter records after April 2017, but it is recommended that the City review its records and provide a supplemental response in accordance with this Opinion.

BACKGROUND

The City’s police department utilizes an automated gunfire detection system known as ShotSpotter. On August 16, 2019, you requested “access to review any records which list ShotSpotter activations, including time and location, responded to by Wilmington Police dating back to February 1, 2017” from the Wilmington Police Department.¹ The City responded on August 28, 2019 that such records “constitute intelligence files compiled for law-enforcement purposes, and contain information that [is] considered to be investigatory files related to ongoing

¹ Petition.

criminal investigations, both of which are exempt from disclosure under Delaware State Code, Title 29 § 10002(1)(3) and (1)(5).”² This Petition followed.

The Petition challenges the City’s denial of your request, asserting that the City interprets the exemptions too broadly. You argue that the disclosure of a list of where gunfire occurred would not “cause risk to public safety,” and because the data is automatically generated, you assert it would not discourage reporting.³ You contend that the question of where and when gunfire occurs is not investigatory because police may not investigate each occurrence and the occurrences precede any investigation. You state that details of where and when gunfire occurred is often publicized by police and the knowledge that it occurred can be gained from a police scanner or someone’s observation of the event. Finally, you note the City previously provided this information to you in February 2017.

The City responds that it applied the exemptions appropriately and that a previous production of the data has no bearing on whether it must do so now. The City explains that it began incorporating the data generated by ShotSpotter into its “investigative, intelligence-led policing model” in April 2017 and previously “the data was not integrated into [the City’s] methods of investigating crime and developing intelligence to prevent crime.”⁴ The City provided a sworn affidavit of the police department’s Inspector of Operations, asserting that every activation of ShotSpotter now initiates a new investigation and requires an investigative report. The City further states that such data is part of its intelligence files and releasing it would interfere with or prohibit some criminal investigations and cause potential danger to victims, witnesses, or community members.

DISCUSSION

FOIA requires a public body to make its public records available for inspection and copying, but certain records are excluded from the definition of “public record.”⁵ Under 29 *Del. C.* § 10002(1)(3), investigatory files compiled for the purposes of civil or criminal law enforcement are considered exempt. Here, the City’s counsel explains that beginning in April 2017, every instance of gunfire recorded in ShotSpotter initiates a new criminal investigation. That representation is bolstered by the Inspector’s affidavit, sworn under penalty of perjury. This investigatory file exemption attaches as soon as the City is made aware of a potential issue prompting its investigation.⁶ Thus, we conclude that the City appropriately asserted that the

² *Id.*

³ *Id.*

⁴ Response, Affidavit of Inspector of Operations Cecilia Ashe.

⁵ 29 *Del. C.* §§ 10002, 10003.

⁶ *See 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

requested records after April 2017 are exempt from the definition of “public record” pursuant to Section 10002(1)(3).⁷ However, the City is recommended to provide a supplemental response for requested records prior to April 2017.

We make this determination with one caveat. You assert that the City possesses records responsive to your request that are already public. Specifically, the Petition states that the City “often publicize[s] such individual sets of such data at the outset of an investigation.”⁸ These publications with the data sets appear responsive to your request, and any such publications are not being treated as confidential investigatory file materials; accordingly, we recommend these publications be provided to you. The City is encouraged to assist you in identifying and locating these specific records.

CONCLUSION

For the reasons set forth above, we determine that the City did not violate FOIA by asserting the investigatory file exemption for the requested records after April 2017, but it is recommended that the City review its records and provide a supplemental response.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Marlane A. White, Senior Assistant City Solicitor, City of Wilmington (via email)

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.”).

⁷ As the investigatory file exemption justifies this denial, we need not address the City’s second asserted justification under 29 Del. C. § 10002(1)(5).

⁸ Petition.