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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB16

April 8, 2020

VIA EMAIL

Esteban Parra
The News Journal
EPARRA@wilmington.gannett.com

RE: FOIA Petition Regarding the Delaware State Police

Dear Mr. Parra:

We write in response to your correspondence on behalf of The News Journal 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 DSP did not violate FOIA as alleged.

BACKGROUND

You submitted a FOIA request to DSP on January 24, 2020, seeking “the number of bullets and/or bullet casing submitted by each police department for review/testing by the firearms/ballistics examiners for the last five years (2019-2014).”¹ The request also sought “the caliber of bullet and any additional information on the gun used.”² DSP responded on February 12, 2020, stating that any reports would be exempt from FOIA as investigatory files under 29 *Del. C.* § 10002(1)(3) and that FOIA does not require a public body to create a document that does not already exist. This Petition followed.

¹ Petition.

² *Id.*

In your Petition, you allege that you have not requested the investigatory file; instead, you have asked “for numbers of specific items collected by civil servants and that were then reviewed by agents of the Delaware Division of State Police,” which you view as similar to police agencies releasing the number of people injured by gunfire in shootings.³ You assert that there must be an existing record because you have received information pertaining to the number of casings collected by the Wilmington Police Department last year and your understanding is that those casings were reviewed by DSP’s ballistics and firearms agents.

On March 19, 2020, DSP’s counsel replied to your Petition (“Response”), asserting that the information you seek is exempt from the definition of a public record under the investigatory files exemption and DSP possesses no existing responsive records. DSP states that the bullets and casing information are contained in criminal investigatory files, and these files, including the specific information you seek, are exempt from FOIA. DSP contends that police agencies’ release of the number of people injured in a shooting does not waive the applicability of the investigatory exemption here, and this comparison is not relevant, as the injury information allegedly released does not match the information in this request. Similarly, DSP argues that whether information exists regarding the Wilmington Police Department’s casings in the last year is not relevant to this analysis, as “this response does not address the issue of whether DSP has an existing document responsive to the FOIA request.”⁴ Finally, DSP’s counsel emphasizes that there are no existing records to provide, stating that “DSP does not have existing records containing the information sought in [your] FOIA request,” nor does DSP “maintain” a separate existing record responsive to your request.⁵

DISCUSSION

FOIA mandates that a public body provide citizens with reasonable access to its public records.⁶ The record sought here is a compilation of information derived from criminal investigations – the number of bullets or bullet casings submitted by each Delaware police department to DSP for review or testing within the last five years, in addition to certain other descriptions. FOIA does not mandate that a public body manually compile information from separate files to create a new record in response to a request.⁷ Thus, our inquiry is limited to whether DSP maintains an existing record, in any format, with this compiled information. DSP’s

³ *Id.*

⁴ Response.

⁵ *Id.*

⁶ 29 *Del. C.* § 10003(a).

⁷ *See Del. Op. Atty. Gen.* 17-IB02, 2017 WL 955566, at *6 (Feb. 8, 2017) (“This Office has further stated that ‘FOIA does not require a public body to compile the requested data from other public records that may exist.’”) (quoting *Del. Op. Att’y Gen.* 04-IB14, 2004 WL 1547683, at *2 (Jun. 28, 2004)).

counsel represents that no such record exists. Based on this representation, we find that DSP did not violate FOIA in denying access to this record.⁸

CONCLUSION

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

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Joseph C. Handlon, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁸ See, e.g., *Del. Op. Atty. Gen.* 19-IB27, 2019 WL 4538313, at *2 (May 29, 2019); *Del. Op. Atty. Gen.* 15-IB14, 2015 WL 9701645, at *3 (Dec. 29, 2015); *Del. Op. Atty. Gen.* 07-IB11, 2007 WL 4732794, at *2 (May 10, 2007); *Del. Op. Atty. Gen.* 05-IB19, 2005 WL 2334347, at *5 (Aug. 1, 2005).