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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB30

December 7, 2020

VIA EMAIL

Amy McFalls
Mcfalls0720@gmail.com

RE: FOIA Petition Regarding New Castle County

Dear Ms. McFalls:

We write in response to your correspondence alleging that the Division of Police of New Castle County (“County”) 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 set forth below, we determine that the County has not violated FOIA as alleged.

BACKGROUND

You submitted a records request to the County on September 24, 2020 for a copy of an arrest warrant served by a County police officer. The County denied the request, stating “our Office is not bound by the FOIA,” and “also any reports requests by defendants need to have a subpoena for such records.”¹ This Petition followed, alleging that these reasons for denial were improper. The County’s counsel responded on its behalf on November 16, 2020 (“Response”). Noting that the request was misdirected to the Department of Public Safety instead of the FOIA Coordinator for the Division of Police, the County submitted an affidavit of the Division of Police FOIA Coordinator, asserting that the request would have been denied by the Division of Police

¹ Petition.

because the County does not possess or have custody or control over executed arrest warrants. Instead, the FOIA Coordinator states the arrest warrants are maintained by Delaware courts.

DISCUSSION

The County is a public body subject to FOIA,² and as a public body, the County must provide a reason when it denies access to public records.³ A public body is not required to cite to a specific exemption, but the denial of access to the records must be authorized by FOIA.⁴ In this case, the County provided an affidavit with its Response that this request was appropriately denied because no responsive records exist. Consistent with this Office's practice, we accept this sworn representation.⁵ However, we note that the County asserted this reason for the first time in its Response to your Petition and caution the County to give careful consideration to the reasons asserted in its denials in the future.⁶

CONCLUSION

Based on the foregoing, we determine that the County has not violated FOIA, as the County denied access to the record for a reason authorized by FOIA.

² 29 *Del. C.* § 10002(h).

³ 29 *Del. C.* § 10003(h)(2) (“If the public body denies a request in whole or in part, the public body’s response shall indicate the reasons for the denial.”).

⁴ *Del. Op. Att’y Gen.* 15-IB14, 2015 WL 9701645, at *3 (Dec. 29, 2015).

⁵ *Del. Op. Att’y Gen.* 19-IB60, 2019 WL 6047163, at *2 (Oct. 28, 2019) (“In accordance with this Office's practice, we accept these representations, including the FOIA Coordinator's sworn statement made under penalty of perjury, and find no FOIA violation with respect to DNREC's cost estimate.”); *Del. Op. Att’y Gen.* 17-IB03, 2017 WL 955568, at *4 (Feb. 15, 2017) (concluding that the public body adequately supported its contention with a sworn affidavit).

⁶ *Del. Op. Att’y Gen.* 19-IB44, 2019 WL 4538330, n. 19 (Aug. 12, 2019) (“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, n. 37 (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.”).

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved by:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Jordan J. Perry, Assistant County Attorney