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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB01

January 14, 2021

VIA EMAIL

Anthony W. Dohring, Esq.
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RE: FOIA Petition Regarding the Delaware Department of Corrections

Dear Mr. Dohring:

We write in response to your correspondence alleging that the Delaware Department of Corrections ("DOC") 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 DOC's denial of access to a correctional facility's surveillance footage and the disciplinary records of an inmate is appropriate under FOIA.

BACKGROUND

On October 1, 2020, you submitted a request to the DOC for seven items related to an inmate's involvement in an assault incident at a correctional facility:

- 1) Any and all video recordings from any electronic recording devices located inside the Key C-Tier building (aka "Key C-Quad") on February 19, 2020 from 12:00 AM to 1:00AM;
- 2) Any and all video recordings from any electronic recording devices located outside of the Key C-Tier building (aka "Key C-Quad") but which faces in the direction of the Key C-Tier building (aka "Key C-Quad") or its entrances/exits, for February 19, 2020 from 12:00 AM to 1:00 AM;

- 3) Any and all video recordings from any electronic recording devices located either outside or inside which capture the entire escort of [the inmate] from the Key C-Tier building to the pretrial building/receiving area on February 19, 2020 from 12:00 AM to 1:00 AM. This would have occurred after the incident involving [the Corporal] and the bathroom toilet stall (Incidents #76908; #76913);
- 4) Any and all electronic recordings from [the inmate's] two (2) disciplinary hearing(s) on 02-25-2020 (Disciplinary Reports #25530; #25529);
- 5) Any and all electronic recordings from [the inmate's] disciplinary hearing on 03-02-2020 (Disciplinary Report #25575);
- 6) Any and all written statements made by [the inmate] relating to the February 19, 2020 incident with [the Corporal] and the broken door glass which directly followed (Incidents #76908; #76913); and
- 7) Any and all written statements made by [the inmate] relating to his three prison disciplinary proceedings referenced in paragraphs 4 and 5, above.¹

On November 12, 2020, the DOC denied your request on the basis of 11 *Del. C.* § 4322 and 29 *Del. C.* § 10002(l)(3), (4), (6), (9), & (17). This Petition followed.

The Petition contends that this denial was improper under FOIA for several reasons. First, you argue this Office should find that the DOC waived its right to withhold records because the DOC's response to your records request was untimely, arriving forty-two calendar days after the submittal of your request. Second, you argue that 11 *Del. C.* § 4322 does not apply to the disciplinary records you seek, because they are not "a pre-sentence report, a pre-parole report, the supervision history, and/or case records obtained in the discharge of official duty by any member or employee of the Department."² You further argue that the Section 4322 applies exclusively to probation and parole records, not records from the DOC. Third, you allege that the records sought are not investigatory file records under 29 *Del. C.* § 10002(l)(3), compiled for criminal law enforcement or for purposes of filing a civil lawsuit against the inmate. Fourth, citing Attorney General Opinion No. 19-IB24, you contend that 29 *Del. C.* § 10002(l)(4) also does not apply, as the DOC has not provided any evidence that such records are part of a criminal file or record under this exemption, even if the subject matter of the video later becomes part of an administrative disciplinary hearing. Fifth, you assert that the DOC's reliance on the pending or potential litigation exemption under 29 *Del. C.* § 10002(l)(9) is inappropriate, as the DOC cannot point to any objective signs that litigation is likely or reasonably foreseeable. Finally, you argue that the exemption based on security concerns should not apply because the areas depicted are either outside or inside the bathroom building, which you contend is open to all inmates, and you further contend these are not secure areas of the institution. You assert that the DOC is attempting to

¹ Petition.

² *Id.*

protect the layout of the facility, but that the layout of the area cannot be confidential, as all released inmates have that knowledge. To demonstrate that facility layout is already publicly available, you attach a photo from Google Earth showing an overhead view of the correctional facility taken in November 2020. You maintain that the security cameras' locations are not confidential because you believe the cameras subject to this request are all visible to the inmates, and you are not seeking video from every camera in the facility or specific surveillance techniques records, which you assert are manuals, schematics, and similar items. To allay any concerns about security, you state your willingness to accept a redacted copy of the requested video, with references to any camera names, numbers, and angles removed.

The DOC, through its counsel, replied to your Petition on December 22, 2020 ("Response"). The DOC sent an acknowledgement of your request on October 14, 2020 but admits it did not further reply to the request until its final response on November 14, 2020. The DOC asserts that disallowing the application of any exemption is inappropriate, as a "delayed response does not erase the public policy reasons behind the statutory exemptions and prohibitions, particularly during an unprecedented global pandemic," in which the Governor issued multiple Declarations of a State of Emergency.³ The DOC also contends that the surveillance videos are protected by 29 Del. C. § 10002(l)(17), specifically the records of "any building or structure operated by the State . . . , the disclosure of which would reveal the building's or structure's life, safety and support systems, surveillance techniques, alarm or security systems or technologies, operational and evacuation plans or protocols, or personnel deployments."⁴ The DOC states the entire institution is a restricted area, and the ability to view a stationary picture from Google Earth is not equivalent to accessing a video. With respect to the disciplinary records, the DOC asserts that 11 Del. C. § 4322 applies, as the "case records" prohibited from disclosure to the general public in 11 Del. C. § 4322 constitute "criminal history record information" which is defined by 11 Del. C. § 8502(4) to include, among other items, "correction supervision."⁵ The DOC further asserts that both 29 Del. C. § 10002(l)(3) and (4) exempt the requested disciplinary records, noting the investigatory file exemption is broad. Finally, the DOC maintains that 29 Del. C. § 10002(l)(9) applies to your entire request because "while the DOC cannot foresee all litigation, a request by a member of the Delaware Bar for video, disciplinary records, and inmate statements all surrounding an incident on a specific day certainly suggests the possibility of litigation."⁶

³ Response.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

DISCUSSION

FOIA requires a public body to respond to a request within fifteen business days or advise of the need for additional time in compliance with the statutory requirements.⁷ The Petition first alleges that the DOC has forfeited its right to deny your request under any exemption because the response to the request was untimely. Although the DOC delayed its response to your request beyond the statutory time period without providing a proper reason and good faith estimate of the additional time required, DOC has since sent the response to your request. Accordingly, we find that the claim for untimeliness is moot.⁸ We caution the DOC to provide timely communications regarding requests in the future. However, failure to comply with FOIA's timeliness requirements does not automatically render non-public documents public, and we must examine the applicable FOIA provisions at issue here.

The Petition alleges that the requests for the surveillance video and disciplinary hearing records were improperly denied. Under FOIA, the DOC carries the burden of justifying a denial of records.⁹ We first address the surveillance videos requested, which includes a series of three

⁷ A public body must “respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof, either by providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.” 29 *Del. C.* § 10003(h). “If access cannot be provided within 15 business days, the public body shall cite [one] of the reasons hereunder why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.” *Id.*

⁸ See, e.g., *Flowers v. Office of the Governor*, 167 A.3d 530, 546 (Del. Super. 2017) (“[T]he Court finds that any claimed violation regarding the Sample E-mails is moot because Appellants already possess them.”); *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *13 (Del. Ch. May 19, 1994) (in response to plaintiffs’ request for a declaration that the Board wrongfully denied them timely access, stating “[b]ecause the documents that are the subject of [plaintiffs’] FOIA requests were turned over to the plaintiffs on August 13, 1993, that claim is moot”); *Del. Op. Att’y Gen.* 19-IB25, 2019 WL 4538311, at *3 (May 10, 2019) (“Based on this record, it is my determination that the allegations in your Petition are now moot, as DOC has completed its final response to your FOIA request.”); *Del. Op. Att’y Gen.* 18-IB30, 2018 WL 3118433, *2 (Jun. 7, 2018) (“Based upon the record, it is my determination that your Petition is now moot, as OGov has completed its response to your FOIA request.”); *Del. Op. Att’y Gen.* 18-IB25, 2018 WL 2994703, *1 (May 15, 2018) (“Based on the facts as presented to this Office, it is our determination that your petition is moot, as the City has provided a response to your April 11 FOIA Request.”); *Del. Op. Att’y Gen.* 17-IB35, 2017 WL 3426275, *1 (July 31, 2017) (citing *The Library, Inc. v. AFG Enter., Inc.*, 1998 WL 474159, at *2 (Del. Ch. July 27, 1998) (citation omitted)) (finding a challenge to the wholesale denial of a request is moot and noting that a matter “is moot when there may have been a justiciable controversy at the time a matter was commenced, but that controversy ceases to exist prior to the arbiter’s determination.”).

⁹ 29 *Del. C.* § 10005(c).

surveillance videos from different angles inside and outside the correctional institution for the same one-hour period. The DOC maintains that its video footage is exempt under 29 *Del. C.* § 10002(l)(17)(a), which excludes any records that disclose a building’s surveillance techniques that jeopardize the security of that structure or individual safety. Section 10002(l)(17) specifically states it protects records “which could jeopardize the security of any structure owned by the State or any of its political subdivisions, or could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual. . . ,” including records of any building or structure operated by the State, the disclosure of which would reveal the building’s surveillance techniques.¹⁰ DOC’s counsel avers that the security of the correctional institution is “of paramount importance to the inmates, security staff, and the citizens of Delaware” and that surveillance videos are integral to maintaining the security of the correctional facility.¹¹

The Supreme Court of New Jersey considered a FOIA request for surveillance video under similar statutory language prohibiting disclosure of “security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein” and “security measures and surveillance techniques which, if disclosed, would create a risk to the safety of persons, property, electronic data or software.”¹² The court determined that security camera footage showing the parking lot of a municipal building was exempt from disclosure by this language, pointing out that “[i]nformation that reveals the capabilities and vulnerabilities of surveillance cameras that are part of a public facility’s security system is precisely the type of information that the exceptions meant to keep confidential in furtherance of public safety.”¹³ The court explained that it “takes no stretch of the imagination to realize that that [release of security camera video] would make it possible for any person to gather the information necessary to dismantle the protection provided by such security systems.”¹⁴

Identical concerns are presented in this instance. Permitting access to surveillance video of correctional facilities can easily allow requesting parties to stitch together a comprehensive view of the security cameras’ angles, timing, coverage, and quality, in addition to the movements of the people therein, jeopardizing the security of the correctional institution and the safety of the inmates, staff, and citizens of Delaware. Section 10002(l)(17) is intended to prohibit such information from disclosure, and we determine that the DOC appropriately denied your request for the security camera footage on this basis.¹⁵

¹⁰ 29 *Del. C.* § 10002(l)(17).

¹¹ Response.

¹² *Gilleran v. Twp. of Bloomfield*, 149 A.3d 800, 807 (N.J. 2016).

¹³ *Id.* at 809.

¹⁴ *Id.* at 810.

¹⁵ Applying this exemption to a FOIA request does not prohibit a litigant from pursuing this evidence through any avenues that may be available through the court system.

The Petition finally alleges that the inmate's disciplinary hearing records are not exempt from FOIA. Under 29 *Del. C.* § 10002(1)(6), any records exempted from public disclosure by statute or common law are excluded from the definition of "public record." The DOC cites to 11 *Del. C.* § 4322(a), which provides, in part: "[t]he presentence report (other than a presentence report prepared for the Superior Court or the Court of Common Pleas), the preparole report, the supervision history and all other case records obtained in the discharge of official duty by any member or employee of the Department shall be privileged and shall not be disclosed directly or indirectly to anyone other than the courts as defined in § 4302 of this title, the Board of Parole, the Board of Pardons, the Attorney General and the Deputies Attorney General or others entitled by this chapter to receive such information;" The DOC contends that the disciplinary records requested are part of the case records the DOC maintains. Consistent with Delaware caselaw on this issue, we agree that the disciplinary hearing records are not subject to disclosure to you under 11 *Del. C.* § 4322(a) and determine that the DOC did not violate FOIA in denying access to these records.¹⁶

CONCLUSION

Based on the foregoing, we determine that the DOC did not violate FOIA by denying access to the requested surveillance footage and the inmate's disciplinary records.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Nicole S. Hartman, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

¹⁶ *Sniadecki v. Watson*, 1997 WL 817872, at *3 (Del. Super. Jun. 3, 1997) (stating that "documents concerning the investigation of [an inmate's] request for a transfer and any disciplinary proceedings against [the inmate] prior to and including the assault on [the] plaintiff" are protected from disclosure pursuant to 11 *Del. C.* § 4322).