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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB06

March 8, 2021

VIA EMAIL

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 files exemption for the City Fire Marshal Office’s investigatory records.

BACKGROUND

On August 10, 2020 you requested “any reports, including technical reports, interview transcripts or summaries and investigative summaries, related to the investigation of the fire at Bancroft Mills on Nov. 9, 2016.”¹ The City responded on December 10, 2020, providing some responsive records but denying the remaining investigatory records: “[b]ecause the statute of limitations has not run for any potential criminal prosecution to commence, all other records

¹ Petition.

responsive to your request are not considered public records as defined by 29 Del. C. § 10002(1)(3).”² This Petition followed.

The Petition challenges the denial of these records under the investigatory files exemption in 29 Del. C. § 10002(1)(3), which exempts “investigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files, pretrial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue.” You assert that the City’s production included no interview transcripts, summaries, or investigative reports regarding the fire. However, the production included a letter from an inspector to the Deputy Chief of the Fire Prevention Division dated September 1, 2020 with the subject line, “Investigative Conclusion,” that indicated on that date, the incident is considered to be “UNDETERMINED/CLOSED, unless further evidence and information is presented or discovered.”³ As the investigation is closed, you contend that the investigatory files exemption should not apply, especially as the exemption references “pending” investigations. Further, you argue that the point of the exemption is to not compromise ongoing investigations, and in this case, there is no pending investigation to compromise. You assert that the public has a right to review the investigative work into “the burning of a Wilmington landmark and one of the more expensive fire investigations in the department’s recent history.”⁴ You argue this public interest outweighs any “stale and illegitimate invocation of the investigatory exemption.”⁵ Finally, you note that the reference to the criminal statute of limitations in the City’s response is inapposite to the analysis of the investigatory files exemption.

The City’s counsel provided a response on the City’s behalf on February 8, 2021 (“Response”). The City argues that it properly invoked the investigatory files exemption for its investigation file. The City states that the City’s Fire Marshal investigators are certified law enforcement officers who have the authority to investigate the causes and circumstances of any fire or explosion in the City. As of the date of its Response, the City asserts the cause of the fire remains undetermined and the investigation therefore remains open, because the statute of limitations for felony arson has not passed and the investigator reserved the right to revise the findings in the event new information is found. As such, the City argues that the disclosure of the investigatory records you requested, such as the interview notes, photographs, and other records, would likely compromise the investigation and are exempt under 29 Del. C. § 10002(1)(3).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

DISCUSSION

FOIA requires a public body to make its public records available to citizens for inspection and copying, but certain records are excluded from the definition of “public record.”⁶ Under 29 Del. C. § 10002(1)(3), investigatory files compiled for the purposes of civil or criminal law enforcement are considered exempt. The public body has the burden of proof to justify its denial of access to records.⁷ Consistent with our practice, we accept the City attorney’s representations that the City’s Fire Marshal investigators are law enforcement officers charged with investigating fires and explosions in the City and that these investigators compiled this requested information as a part of an investigatory file for criminal law enforcement purposes.⁸

We are bound to follow the established precedent in these circumstances. The records of criminal investigations are “categorically excluded from the scope of FOIA.”⁹ Despite the passage of several years since the incident, the criminal investigation in this case is not fully closed, as the investigator could not determine the cause of the fire and stated that the investigative conclusion may be revised in light of new evidence. In *News-Journal Co. v. Billingsley*, the Court of Chancery determined that the investigatory files exemption attaches as soon as a public body is made aware of a potential issue and the exemption survives after the investigation is completed.¹⁰ Accordingly, we determine that the City has properly invoked the investigatory files exemption to deny access to the requested records.

CONCLUSION

For the reasons set forth above, we determine that the City did not violate FOIA by asserting the investigatory files exemption for the records you requested.

⁶ 29 Del. C. §§ 10002, 10003.

⁷ 29 Del. C. § 10005(c).

⁸ *Judicial Watch, Inc. v. Del. Dep’t of Justice*, 2021 WL 22550, at *5 (Del. Super. Jan. 4, 2021) (accepting the representations of the public body’s attorney to meet the public body’s burden of proof under FOIA).

⁹ *Gannett Co. v. Del. Crim. Justice Info. Sys.*, 768 A.2d 508, 515 (Del. Super. 1999) *aff’d* 765 A.2d 951 (Del. 2000) (citing *Nasir v. Oberly*, 1985 WL 189324, at *1 (Del. Super. Dec. 5, 1985)); *see also Atamian v. Bahar*, 2002 WL 264533, at *1 (Del. Super. Feb. 22, 2002).

¹⁰ 1980 WL 3043, at *3 (Del. Ch. Nov. 20, 1980); *see also Del. Op. Att’y Gen.* 17-IB47, 2017 WL 4652343, at *1 (Sept. 22, 2017); *Del. Op. Att’y Gen.* 05-IB16, 2005 WL 2334345, at *2 (Jun. 22, 2005); *Del. Op. Att’y Gen.* 98-IB13, 1998 WL 910199, at *1 (Dec. 8, 1998).

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: John D. Hawley, Assistant City Solicitor, City of Wilmington (via email)