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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB07

March 24, 2021

VIA EMAIL

Kathy Hughes
Kathhughes925@gmail.com

RE: FOIA Petition Regarding the Delaware State Police

Dear Ms. Hughes:

We write in response to your correspondence 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 by denying access to the requested record.

BACKGROUND

You submitted a FOIA request to DSP on December 29, 2020, seeking “all information contained in [the criminal] complaint” filed against you.¹ DSP responded on January 22, 2021, stating that the request was denied because police reports are part of an investigatory file compiled for the purpose of criminal law enforcement; criminal history and arrest records are non-public records under 29 *Del. C.* § 10002(1)(4); and the records you requested are also exempt as intelligence files compiled for law enforcement purposes, the disclosure of which would constitute an endangerment to the local or state welfare and security. Finally, the response noted that DSP may give a victim an initial incident report, known as the victim’s copy, as provided by 11 *Del. C.* § 9410(3) via a request to the DSP, but not through the FOIA request process. This Petition followed.

¹ Petition.

The Petition challenges DSP’s denial of your request for the complaint that was made against you to the DSP. You allege that you spoke with a detective about this matter and were told that the complaint against you was found to be without merit. You assert that you “were advised that [the] Complaint . . . is a matter of public record.”² Moreover, you argue that the cited exemptions are not applicable, as denying access to this complaint does not “address the inherent right of any individual to know the basis of charges made against them” and that “[t]his is especially important in this environment where anyone can file charges or make allegations that are false.”³ Finally, you allege that it is “especially suspect” when a complaint may be politically motivated.⁴

On March 3, 2021, DSP’s counsel replied to your Petition (“Response”), asserting that the police report and criminal complaint are excepted from the definition of a public record under the investigatory files exemption and that criminal history and arrest records are exempt pursuant to 29 *Del. C.* § 10002(1)(6), as 11 *Del. C.* ch. 85 exempts these records from disclosure.

DISCUSSION

FOIA mandates that a public body provide citizens with access to its public records for inspection and copying.⁵ However, under 29 *Del. C.* § 10002(1)(3), investigatory files compiled for the purpose of civil or criminal law enforcement are considered exempt from the definition of “public records.” A public body has the burden to justify its denial of access to the records requested.⁶ The complaint in this case triggered a DSP detective’s criminal investigation. As recently affirmed in Attorney General Opinion No. 21-IB06, we are bound to follow the established precedent when considering whether a criminal complaint is exempt under FOIA.⁷ The records of criminal investigations are “categorically excluded from the scope of FOIA.”⁸ In *News-Journal Co. v. Billingsley*, the Court of Chancery specifically concluded that a complaint

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ 29 *Del. C.* § 10003(a).

⁶ 29 *Del. C.* § 10005(c).

⁷ *Del. Op. Att’y Gen.* 21-IB06 (Mar. 8, 2021).

⁸ *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).

letter in an investigatory file was exempt under FOIA.⁹ The Court 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 DSP properly invoked the investigatory files exemption to deny access to the complaint you requested.

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

⁹ 1980 WL 3043, at *3 (Del. Ch. Nov. 20, 1980).

¹⁰ *Id.*; 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).