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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB11

May 12, 2021

VIA EMAIL

Jason M. Schupp
9006 Bush Creek Circle
Frederick, MD 21704
Jason.schupp@betterins.org

RE: FOIA Petition Regarding the Delaware Department of Insurance

Dear Mr. Schupp:

We write in response to your correspondence, alleging that the Delaware Department of Insurance (“Department”) 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 that no violation of FOIA occurred as alleged.

BACKGROUND

On March 26, 2021, you submitted a FOIA request to the Department, signed as a representative of Centers for Better Insurance, LLC of Frederick, Maryland, and seeking “documents representing the license[s] issued to active captive insurance companies domiciled in the State of Delaware.”¹ The Department denied the request because FOIA does not require that public bodies provide records to non-citizens, and you are not a citizen of Delaware. In addition, the Department stated that these licenses are confidential pursuant to 18 *Del. C.* § 6920. You

¹ Petition.

resubmitted this same request under 18 *Del. C.* § 314, which states “[e]xcept where the Commissioner deems the same to be prejudicial to the public interest, the Commissioner shall permit inspection of the papers, records and filings in the Department by persons found to have an identified and proper interest therein.” A few days later, the Department responded, advising you of the ability to file a petition to appeal its decision under the FOIA statute. This Petition followed.

The Petition alleges that the Department’s response to your request was inadequate. The Petition contends that that Department “clearly regards its obligations to allow public inspection pursuant to 18 *Del. C.* § 314 as an expansion of and integral with its obligations under the FOIA statute.”² Thus, you allege the Department’s denial of this request under 18 *Del. C.* § 314 is arbitrary and capricious, as the Department failed to determine whether an interest in the requested records had been identified, whether that interest is proper, and whether the inspection would be prejudicial to the public interest.

On April 22, 2021, the Department’s counsel replied to your Petition (“Response”). The Department argues that the Petition should be denied because you are not a Delaware citizen, citing various records demonstrating your Maryland citizenship and noting that Better Insurance, LLC is a Pennsylvania limited liability company. As a limited liability company, the Department contends that the managing member’s citizenship determines the citizenship of the limited liability company and accordingly, the Department asserts that your request was appropriately denied. In addition, the Department argues that this Office does not have the authority to address 18 *Del. C.* § 314 and that the FOIA statute supersedes 18 *Del. C.* § 314 because it is a later-enacted statute covering the entire field that 18 *Del. C.* § 314 occupies.

On April 22, 2021, you submitted correspondence conceding that you are a citizen of Maryland and the Centers for Better Insurance, LLC is organized under the laws of Maryland. You argue that the Department seeks to merge its obligations under FOIA and 18 *Del. C.* § 314 to impermissibly restrict its obligation to disclose records under 18 *Del. C.* § 314 to “citizens,” as provided by FOIA, instead of to “persons” as provided by 18 *Del. C.* § 314. Moreover, you contend that the Department’s arguments fail because the Department also acknowledged in its Response that this Office does not have the authority to make determinations about a statute other than FOIA.

DISCUSSION

Consistent with *McBurney v. Young*,³ our Office interprets Delaware’s FOIA statute to apply to Delaware citizens only, thereby permitting a public body to deny a FOIA request solely

² *Id.*

³ 569 U.S. 221 (2013) (determining that Virginia’s citizens-only FOIA statute does not violate the Privileges and Immunities Clause or the dormant Commerce Clause of the U.S. Constitution).

because it is submitted by a non-citizen of Delaware.⁴ The factual record indicates that you are not a citizen of the State of Delaware. In accordance with this Office's established precedent, we determine that the Department did not violate FOIA in denying your request. As this Office's authority is limited to determining whether a violation of FOIA occurred, the remaining issue related to the Department's obligations under 18 *Del. C.* § 314 is not addressed in this Opinion.⁵

CONCLUSION

For the reasons set forth above, we find that the Department did not violate FOIA as alleged in the Petition.⁶

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Kathleen P. Makowski, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁴ See, e.g., *Del. Op. Att'y Gen.* 19-IB66, 2019 WL 6839917, at *1 (Nov. 26, 2019); *Del. Op. Att'y Gen.* 18-IB54, 2018 WL 6591819, at *2 (Dec. 5, 2018); *Del. Op. Att'y Gen.* 18-IB50, 2018 WL 6015765, at *2 (Oct. 12, 2018); *Del. Op. Att'y Gen.* 18-IB18, 2018 WL 2267112, at *1 (Apr. 6, 2018); *Del. Op. Att'y Gen.* 17-IB14, 2017 WL 3426252, at *1 (July 6, 2017); *Del. Op. Att'y Gen.* 16-IB20, 2016 WL 5888776, at *2-6 (Sept. 30, 2016).

⁵ 29 *Del. C.* § 10005(e); see e.g., *Del. Op. Att'y Gen.* 18-IB50, 2018 WL 6015765, at *2 (Oct. 12, 2018) (finding that this Office has “no authority under FOIA to direct [the public body] with regard to this Office's interpretation of any other Delaware statute”); *Del. Op. Atty. Gen.* 96-IB28, 1996 WL 517455, at *2 (Aug. 8, 1996) (“To the extent you allege that Sussex County has not complied with the requirements of 9 *Del. C.* § 6921, that matter is beyond the jurisdiction of this office and is not addressed here”).

⁶ While we have decided to issue a determination regarding the merits of your claim, we feel compelled to note that you may lack standing to avail yourself of the enforcement provisions contained in 29 *Del. C.* § 10005, including the petition process set forth in Section 10005(e).