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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB01

January 28, 2022

VIA EMAIL

Ken Grant
ken.grant7@gmail.com

RE: FOIA Petition Regarding the Delaware Department of Transportation

Dear Mr. Grant:

We write regarding your correspondence alleging that the Delaware Department of Transportation (“DelDOT”) violated the Delaware 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. For the reasons set forth below, we find that DelDOT violated FOIA by denying your first request seeking all Division of Motor Vehicle Forms 215 (“MV215 forms”) within the designated timeframe. However, we determine that DelDOT sufficiently supported its denial of your second request.

BACKGROUND

You submitted three requests to DelDOT through its online portal seeking records related to applications for salvage certificates without title. You submitted your first request to DelDOT on November 15, 2021:

[R]ecords of all “APPLICATION FOR SALVAGE CERTIFICATE WITHOUT TITLE” - State of Delaware Form 215 filed with the State of Delaware between January 1, 2019 and October 31, 2021[.] As long as the records include the person

or entity filing the form, the date filed and the VIN number of the vehicle, we should be good. Electronic version preferred[.]¹

DelDOT denied your request on November 30, 2021, asserting that the requested information is exempt from public disclosure pursuant to 21 *Del. C.* § 305, which limits the release of personal information by the DMV. FOIA exempts any records exempted from disclosure by statute under 29 *Del. C.* § 10002(o)(6). DelDOT stated that Section 305 of Title 21 specifically provides that “...the Division of Motor Vehicles and any officer, employee or contractor thereof or any other person shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the Division in connection with a motor vehicle record.”² DelDOT denied access to the salvage records asserting they contain “personal information obtained in connection with a motor vehicle record.”³ However, DelDOT stated this information may be available through another avenue, by using the MV703 form.

That same day, you inquired whether DelDOT could produce the names of the business entities that filed this form and the number of forms that have been filed. DelDOT responded promptly, reiterating that the information you requested, including the names of any business entities, is exempt under 21 *Del. C.* § 305. DelDOT asserted that this information is “personal information (business entity names) obtained in connection with a motor vehicle record.”⁴ You then asked for “the number of forms that have been filed – no names, no businesses, just the number of forms.”⁵

On December 1, 2021, you submitted your second FOIA request for the “number of State of Delaware Form 215 filed with the State of Delaware between January 1, 2019 and October 31, 2021 - broken down by month would be nice, but not required.”⁶ DelDOT responded the next day, denying this FOIA request and the inquiry in your November 30th email. DelDOT stated “DelDOT does not track the total number of submitted [MV215 forms] in a readily accessible format that can be accessed without writing a program or creating a new document.”⁷

On December 20, 2021, you submitted your third request through the portal seeking the following:

¹ Response, Ex. 1.

² *Id.*, Ex. 2.

³ *Id.*

⁴ *Id.*, Ex. 4.

⁵ *Id.*, Ex. 5.

⁶ *Id.*, Ex. 8.

⁷ *Id.*, Ex. 9.

Records of all “APPLICATION FOR SALVAGE CERTIFICATE WITHOUT TITLE” - State of Delaware Form 215 filed with the State of Delaware between January 1, 2019 and November 3[0], 2021. To be in compliance with 21 *Del. C.* § 305, I am requesting all vehicle identification information to be redacted. Ideally, this information could be provided as an excel document with the vehicle identification information deleted - another option would be to provide copies of the forms with the vehicle identification information redacted. I am happy to explore other possibilities as well.⁸

DelDOT responded on December 27, 2021. Noting you have been denied on two previous occasions, DelDOT again denied access, claiming the records are exempt and stating that future requests seeking the same information with modifications or additions will not change the response. DelDOT relied on 21 *Del. C.* § 305 to deny this request again. DelDOT asserts that it “cannot provide you with the information you requested under FOIA as it contains personal information obtained in connection with a motor vehicle record.”⁹ In addition, DelDOT notes that “[e]ven if the above language did not apply, DelDOT is unable to produce the records you requested as DelDOT does not track the total number of submitted [MV215 forms] in a readily accessible format that can be accessed without writing a program or creating a new document.”¹⁰ DelDOT states that FOIA does not require an agency to create a document or program that does not already exist. The response also again noted that the information may be available through using the MV703 form. This Petition followed.

This Petition argues that the denial of access to any records was improper. You explain that when a salvage company wants to take ownership of a vehicle without title, it must first file the MV215 form entitled “Application for salvage certificate without a title.” Despite amending your request several times to try to obtain some information about the quantity of vehicles being claimed for salvage without a title, you were unable to obtain any information. You allege that the public has the right to at least review some basic numbers related to the quantity of vehicles that are being salvaged without a title, but DelDOT is not permitting such a review.

DelDOT, through its counsel, responded on January 10, 2022 to the Petition (“Response”). DelDOT first contends that the MV215 forms are exempt from FOIA because 21 *Del. C.* § 305 precludes disclosure. DelDOT alleges these forms contain personal information that was obtained in connection with a motor vehicle record and therefore cannot be produced. DelDOT points to its overall statutory structure that limits access to motor vehicle records except for specified circumstances permitting disclosure and requires a \$25.00 record fee when disclosure is made. DelDOT argues that its position is consistent with a Court of Chancery decision finding that when the legislature has enacted statutory requirements protecting records from disclosure except specified limited purposes for which disclosure can be made, those records are exempt from FOIA.

⁸ *Id.*, Ex. 10.

⁹ *Id.*, Ex. 11.

¹⁰ *Id.*

With regard to the request for the total number of MV215 forms issued, DelDOT states that it has no obligation to create a document that does not exist and submitted an affidavit from the Deputy Director of the DMV stating that the DMV does not track the MV215 forms that are submitted nor does the DMV track the number of salvage certificates issued. The Deputy Director attests that the only way to gather this salvage certificate information would require DelDOT to write a program to capture the data and generate a report. Finally, DelDOT points to its available process to request motor vehicles records, using its MV703 form, which allows release of personal information for certain designated purposes and notes that you have not availed yourself of this avenue.

DISCUSSION

FOIA requires a public body to provide citizens with reasonable access to public records for inspection and copying in accordance with the statute.¹¹ The public body has the burden of proof to justify its denial of access to any records.¹² A sworn affidavit may be required to meet that burden in certain instances.¹³

Under 29 *Del. C.* § 10002(o)(6), FOIA exempts any records precluded from disclosure by common law or statute. DelDOT denied your two requests for the MV215 forms based on 21 *Del. C.* § 305 (“Privacy act governing the release of motor vehicle driving history and license records”). Specifically, DelDOT relies on 21 *Del. C.* § 305(a): “. . . the Division of Motor Vehicles and any officer, employee or contractor thereof or any other person shall not knowingly disclose or otherwise make available to any person or entity personal information about any individual obtained by the Division in connection with a motor vehicle record.” The statute defines personal information as “information that identifies an individual, including an individual’s photograph, Social Security number, driver identification number, name, address, telephone number and medical or disability information, but does not include information on vehicular accidents, driving or equipment-related violations and driver’s license or registration status.”¹⁴ The MV215 form requires information about the applicant and the vehicle for the salvage certificate. Although the form may include personal information, the presence of some limited exempt information on a document does not preclude the entire document from disclosure, and in this case, substantial portions of the form do not qualify as “personal information about any individual.”¹⁵ On this

¹¹ 29 *Del. C.* § 10003.

¹² 29 *Del. C.* § 10005(c).

¹³ *Judicial Watch, Inc. v. Univ. of Del.*, 2021 WL 5816692, at *12 (Del. Dec. 6, 2021).

¹⁴ 21 *Del. C.* § 305(p).

¹⁵ 21 *Del. C.* § 305(a); *see also* 29 *Del. C.* § 10003(h)(1) (“The public body shall 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.”) (emphasis added). The

record, we determine that DelDOT's blanket denial of the first request for the MV215 forms violated FOIA and recommend that DelDOT review its records and supplement its response in accordance with this opinion and the FOIA statute.¹⁶

With respect to your second request for the total number of MV215 forms received in this timeframe, DelDOT denies it has any responsive records. FOIA requires public bodies to provide public records responsive to a request but does not require a public body to create a new record in response to a request.¹⁷ You requested the number of MV215 forms submitted to the DMV from January 1, 2019 to October 31, 2021. The Deputy Director attests in her affidavit that upon receipt of your request for the number of MV215 forms submitted, she "reviewed the information available to [the] DMV and no document exists which tracks or contains that information."¹⁸ The affidavit also demonstrates that the DMV cannot arrive at this total by considering the number of salvage certificates issued without creating a new record. The Deputy Director asserts that the DMV does not "have any way to track or identify the number of MV215 forms that were rejected or denied," and the "DMV does not have a document or otherwise track the number of salvage certificates that were issued," nor can the DMV determine the total salvage certificates issued without creating new programming to make such a report.¹⁹ On this record, we find that DelDOT sufficiently demonstrated it does not have records responsive to your second request.

MV703 forms allow the release of personal information for one of the statutorily designated purposes. Those forms are not appropriate here, because you are not seeking "personal information" as defined by the statute.

¹⁶ Section 10003 permits the assessment of fees in appropriate circumstances.

¹⁷ See, e.g., *Del. Op. Att'y Gen.* 18-IB51, 2018 WL 6591816, at *2 (Nov. 20, 2018) (determining that a response requiring "DTI to undertake programming to 'yield a new dataset'" constitutes the creation of a new record and is not required under FOIA) (citation omitted); *Del. Op. Att'y Gen.* 17-IB11, 2017 WL 2917926, at *1 (Jun. 16, 2017) ("In order to fulfill your request, a third party vendor would be required to engage in computer programming (i.e., 'write script'), thereby creating a record that does not already exist."); *Del. Op. Att'y Gen.* 07-IB19, 2007 WL 4732802, at *4 (Aug. 28, 2007) ("As for the tax billing information you most recently requested, our Office is satisfied that to provide you with such information would require extensive computer programming to create a new public record which FOIA does not require.").

¹⁸ Response, Ex. 6.

¹⁹ *Id.*

CONCLUSION

For the foregoing reasons, we determine that DelDOT violated FOIA by denying your first request for the MV215 forms in their entirety and recommend the steps outlined herein.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: George T. Lees, III, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General