



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB06

March 29, 2022

VIA EMAIL

Loreto P. Rufo
Rufo Associates, PA
lrufolaw.com

RE: FOIA Petition Regarding the Delaware Department of Health and Social Services

Dear Mr. Rufo:

We write in response to your correspondence alleging that the Delaware Department of Health and Social Services (“DHSS”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with regard to your records request. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, it is our determination that DHSS has not violated FOIA by denying access to the requested records.

BACKGROUND

After an incident at a long-term care facility and tragic death of your family member, you sent a FOIA request to DHSS on February 7, 2022 seeking the following records:

All records, including all notes, all forms, all medical treatment records, all investigative materials, all reports, including but not limited to investigative reports and conclusions resulting therefrom, all correspondence, all photographs, [diagrams,] drawings or similar depictive materials, all recorded conversations, and all other materials of any form which refer to, relate to, consider, or in any way deal with the incident at the [long-term care facility] in New Castle County, State of

Delaware on December 25, 2021 wherein the [resident], was allegedly assaulted and fell . . . leading to her being transported to [the] Wilmington Hospital.¹

DHSS denied your request on February 17, 2022, explaining that its Division of Health Care Quality (“DHCQ”) is a statutorily-created peer review committee that is charged with investigating complaints of abuse, neglect, mistreatment and financial exploitation of residents of long-term care facilities. Because your request sought internal DHCQ investigations and investigative reports, DHSS stated that the documents are not public records pursuant to 29 *Del. C.* § 10002(o)(1), (3), and (6). DHSS also denied the request because such records are protected as peer review records under Delaware statute and case law and are subject to a qualified governmental privilege, and the investigatory records are protected from disclosure under 24 *Del. C.* § 1768 and 29 *Del. C.* § 7971. Further, DHSS noted that outside the FOIA process, an investigatory summary may be provided to the next of kin or administrator of your family member’s estate and provided the contact information to initiate this request. This Petition followed.

The Petition asserts this denial is improper. You state that you made a request for these records to DHSS and DHCQ; after making this FOIA request, you were told to send a request for the investigative summary to DHCQ but that did not yield the records you are seeking, only a short, redacted report. DHCQ’s Director spoke at the Joint Finance Committee, and you assert that she mentioned that “families seeking information about investigations conducted by the agency are entitled to information pursuant to FOIA.”² You allege that DHSS is refusing to provide the most basic information. You state you are seeking two categories of records: 1) all reports and communications by and between DHSS and the facility in which your family member was assaulted by another resident, specifically including all findings, results, deficiency notices, and plans of correction; and 2) all materials used by DHSS in reaching its conclusions about the incident, including medical records, interview materials, photographic evidence, and other materials. If DHSS continues to refuse access to such materials that it was supposed to gather in investigating this incident, you request a list of all existing responsive records and an itemized list as to each item why you are not entitled to it.³

DHSS, through its legal counsel, replied to the Petition on March 8, 2022 (“Response”). DHSS asserts that the requested records are exempt pursuant to 29 *Del. C.* § 10002(o)(1), (3), and (6) and the peer review privilege. Outside of the FOIA process, DHSS states that DHCQ provided you with a copy of two redacted incident reports from March and December 2021. DHSS asserts that DHCQ initiated an investigation of the December 25, 2021 incident at the long-term care facility in response to a complaint submitted to DHCQ by facility staff. The matter was reported pursuant to 16 *Del. C.* § 1132(a), which provides that the staff must report whether a patient has been abused or mistreated. In investigating a reported incident, DHSS states that the DHCQ’s Investigation Section focuses on the individuals involved and not the facility itself, although the

¹ Petition.

² *Id.*

³ A public body is not required to provide an index as to each record, or part of the record, denied. 29 *Del. C.* § 10003(h)(2).

investigators can also gather information that may be used by DHCQ's Licensing and Certification Section in determining whether the facility may be at fault under applicable laws and regulations. After gathering evidence and concluding the investigation, DHCQ will make a finding that an incident is unsubstantiated, verified, or substantiated and determine if referral to law enforcement is appropriate. DHSS cites 29 *Del. C.* § 10002(o)(1) as a basis for denying access to these records, precluding disclosure of any medical files, the disclosure of which constitutes an invasion of personal privacy. In addition, DHSS contends that the communications between DHCQ and the facility revealing any findings, conclusions, or results of the investigation are protected pursuant to 29 *Del. C.* § 10002(o)(3). In addition, DHSS asserts that the records are statutorily exempt under 29 *Del. C.* § 10002(o)(6), as 16 *Del. C.* § 1134(d)(19)(c) states "[r]ecords maintained for investigations conducted under this section are not public records under Chapter 100 of Title 29 and the Department may only release information to persons who have a legitimate public safety need for the information and the information must be used only for the purpose for which it is released under a user agreement with the Department."⁴ In regard to your claim that DHCQ's testimony indicated families could receive investigative documents through FOIA, DHSS asserts that DHCQ Director's statements to the General Assembly noted that deficiency reports are public records once a plan of correction has been submitted to the facility, but DHSS states that this incident did not result in a deficiency report or plan of correction submitted by the facility. DHSS also points out that the long-term care facility can share many of the documents that you requested to give you a better understanding of the incident. Finally, DHSS contends that the records are protected from release under the peer review privilege, as DHCQ is a statutorily-created peer review committee.

DISCUSSION

FOIA allows Delaware citizens the opportunity to observe and monitor its public officials to further the accountability of government to Delaware citizens.⁵ Consistent with this purpose, FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying, but certain records and information are excluded from the definition of "public record."⁶ In the event a request for records is denied, the public body carries the burden of proof to justify the denial of access to its records.⁷

⁴ Response, p. 3.

⁵ 29 *Del. C.* § 10001.

⁶ See 29 *Del. C.* §§ 10002, 10003(a).

⁷ 29 *Del. C.* § 10005(c).

The investigatory files exemption excludes from disclosure “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes.”⁸ The exemption applies to complaints that trigger the investigation, and the exemption continues to apply even after the investigation is closed.⁹ Your request seeks all DHSS’s records related to the incident at the long-term care facility involving your family member. As evidenced by the incident report included in the Response, the reporting of this incident triggered an investigative process by DHCQ regarding possible acts of abuse or mistreatment. The statutes providing for an investigation after an incident are contained in Title 16, Chapter 11. The term “investigation” is specifically defined as “the collection of evidence in response to an allegation of abuse, neglect, mistreatment, financial exploitation, or medication diversion of a patient or resident to determine if that patient or resident has been abused, neglected, mistreated, or financially exploited or has been the victim of medication diversion.”¹⁰ Section 1132 requires the staff or service provider with reasonable cause to believe such abuse or mistreatment is taking place to make a report to DHSS. Upon receipt of this report, Section 1134 mandates that DHSS determine whether an investigation should be initiated, and when appropriate, conduct an investigation and refer matters to the appropriate law enforcement agency for potential prosecution, including criminal charges. As such, these records arising from this incident report fall within the purview of the exemption for “investigatory files compiled for civil or criminal law-enforcement purposes” under 29 *Del. C.* § 10002(o)(3).¹¹

Moreover, records that are statutorily precluded from disclosure are also exempt under FOIA pursuant to 29 *Del. C.* § 10002(o)(6). DHSS points to 16 *Del. C.* § 1134(d)(19)(c), which states “[r]ecords maintained for investigations conducted under this section are not public records under Chapter 100 of Title 29 and the Department may only release information to persons who have a legitimate public safety need for the information and the information must be used only for the purpose for which it is released under a user agreement with the Department.” Thus, DHCQ’s investigative records compiled for this incident in relation to its investigation of any acts of abuse or mistreatment are also exempt from disclosure in accordance with 29 *Del. C.* § 10002(o)(6).

⁸ 29 *Del. C.* §10002(o)(3).

⁹ *News-Journal Co. v. Billingsley*, 1980 WL 3043, at *3 (Del. Ch. Nov. 20, 1980) (determining 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.); *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).

¹⁰ 16 *Del. C.* § 1131(8).

¹¹ Although DHSS notes that DHCQ’s Licensing and Certification Section may review these already-compiled investigatory files for its investigative purposes, that review does not nullify the applicability of the investigatory files exemption to these records when review is requested by a citizen through FOIA.

CONCLUSION

As set forth above, it is our determination that DHSS has not violated FOIA by denying access to the requested records.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Lauren E. Maguire, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General