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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB13

April 20, 2022

VIA EMAIL

Daniel P. Hagelberg
Hudson, Castle & Inkell, LCC
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RE: FOIA Petition Regarding the City of Wilmington

Dear Mr. Hagelberg:

We write in response to your correspondence alleging that the City of Wilmington violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in regard to 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 more fully herein, we conclude that the City appropriately denied access to the requested records under 29 *Del. C.* § 10002(o)(3) and (o)(6).

BACKGROUND

On March 11, 2022, you made a FOIA request to the City’s Department of Police for “[a]ll police reports for officer involved car accidents for officers under the supervision of [two specified senior officers], between October 1, 2021 and November 15, 2021.”¹ The City denied your request, stating that under 29 *Del. C.* § 10002(o)(4), criminal files and records are not deemed public records. In addition, the City states that “the discovery process should be followed for any future requests.”

¹ Petition.

This Petition followed, alleging that the City improperly denied your request. You contend that “we are not in active litigation with the Wilmington Police Department, so there is no discovery process.”² Additionally, you argue that police reports are not considered criminal files protected by FOIA.

The City’s counsel provided a response on March 25, 2022 (“Response”). Although the City concedes that its initial response misstated the applicable rationale, it asserts that these requested records are not public pursuant to 29 *Del. C.* § 10002(o)(6), which exempts records that are specifically precluded from disclosure by statute and 29 *Del. C.* § 10002(o)(3), which exempts “investigatory files compiled for civil or criminal law-enforcement purposes.” The City alleges that pursuant to its policy, when an officer is involved in a car accident in a City vehicle, the officer must complete a uniform traffic collision report, and if the officer was on duty during the accident, the supervisor also must ensure that the uniform collision report is completed and reported appropriately. The City states that these reports are statutorily exempt from FOIA pursuant to 21 *Del. C.* § 313(b). In addition, the City states that the requested records are also exempt pursuant to the Law Enforcement Officers’ Bill of Rights, because under 11 *Del. C.* § 9200(c)(12), all the records compiled as a result of an investigation which could lead to disciplinary action against an officer subject to the provisions of a contractual disciplinary grievance procedure are confidential. Even if such statutes were not applicable, the City contends that 29 *Del. C.* § 10002(o)(3) exempts these police reports from disclosure. Finally, the City points out that individuals or their legal representatives may be able to access their own uniform collision reports and provided instructions for making such a request to the City.

DISCUSSION

Under FOIA, a public body carries the burden of proof to justify denying a request for records.³ In certain circumstances, a sworn affidavit may be required to meet that burden.⁴ Here, you seek all police reports for accidents involving certain officers within a designated timeframe. Although the City acknowledges that the criminal files and records exemption cited in the initial response is not applicable, we must consider whether these requested records are public records under FOIA, as the City’s denial of access to the records must be authorized by FOIA.⁵

² Petition.

³ 29 *Del. C.* § 10005(c).

⁴ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁵ *Del. Op. Atty. Gen.* 20-IB30, 2020 WL 7663559 (Dec. 7, 2020) (“A public body is not required to cite to a specific exemption, but the denial of access to the records must be authorized by FOIA.”); *Del. Op. Atty. Gen.* 19-IB44, 2019 WL 4538330, n. 19 (Aug. 12, 2019) (“We note that DSP asserted the investigatory exemption for police report information for the first time in its Response to your Petition, and we respectfully caution DSP to give due consideration to reasons asserted in any future denials.”); *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, n. 37 (Mar. 10, 2017) (“While, in this instance, we have determined that DNREC’s denial of your request was

Pursuant to 29 *Del. C.* § 10002(o)(6), any records that are specifically exempt from disclosure by statute are excluded from the definition of “public record” under FOIA. Delaware Code requires drivers to report three types of collisions to the police agency with jurisdiction over the accident: a collision resulting in injury or death; those occurring on a public highway and resulting in property damage more than \$2,000; and collisions involving a driver who is impaired by drugs or alcohol. The police then are required to investigate and complete a State of Delaware Uniform Traffic Collision Report, on the form provided by Delaware Department of Safety and Homeland Security (“DSHS”), for “all reported collisions involving an impaired driver, apparent property damage to the extent of \$2,000 or more or personal injury or death to a person, when such collisions occur within that agency’s jurisdiction.”⁶ The forms of these reports include “sufficiently detailed information about the cause, conditions then existing, and the persons and vehicles involved in a highway accident.”⁷ As noted by the Court of Chancery in *Jacobs v. City of Wilmington*, the accident reporting requirements in Title 21, Chapters 3 and 42, work in tandem and create “in essence, . . . the State’s informational repository for roadway safety.”⁸ Pursuant to 21 *Del. C.* § 313(b), accident reports, subject to the above-referenced thresholds, are required to be reported to DSHS and the Department of Transportation and “are solely for the information of the [Departments], and are not a public record under the Freedom of Information Act, Chapter 100 of Title 29.” In addition, DSHS may require drivers to submit supplemental reports, which also “shall not be open to public inspection.”⁹

The City’s policy requirements are broader than the scope of the statute’s mandate. Pursuant to the provided City policy, a uniform collision report must be completed for all accidents involving a City vehicle. However, consistent with *Jacobs*, even the uniform collision reports that do not meet the statutory thresholds are considered confidential.¹⁰ In *Jacobs*, the Court reviewed the City’s practice in 2002 of submitting every collision report, including “non-mandatory” reports to the relevant State department at the time, and determined that such non-mandatory uniform

indeed authorized by FOIA, we nevertheless caution DNREC to give careful consideration to the reason(s) provided, pursuant to 29 *Del. C.* § 10003(h)(2), for any FOIA denial.”).

⁶ 21 *Del. C.* § 4203(d).

⁷ 21 *Del. C.* § 313(a).

⁸ 2002 WL 27817, at *4 (Del. Ch. Jan. 3, 2002).

⁹ 21 *Del. C.* § 4203(e).

¹⁰ *Jacobs*, 2002 WL 27817, at *5 (“Instead, [the General Assembly] intended to protect the confidentiality of all Reports generated at the instance of citizens acting in accordance with their statutory reporting duties. I therefore find that because the Non-Mandatory Reports are specifically exempted by the statutory scheme described in Chapters 42 and 3 of Title 21 of the Delaware Code, they are not public records under FOIA per 29 *Del. C.* § 10002(d)(6). The City thus has no duty to disclose the Non-Mandatory Reports to [the requesting party].”).

collision reports submitted by citizens were subject to the same confidentiality as the required reports.¹¹ Thus, we determine that the City’s denial of access to the responsive uniform collision reports, whether or not the reports are mandated by statute, was appropriate under FOIA.

The uniform collision reports also fall within the exemption at 29 *Del. C.* § 10002(o)(3), which exempts “[i]nvestigatory 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.” The Delaware Code requires the City Police Department to investigate collisions and complete the uniform collision reports, as described above. The City Police Department’s policy requirements are broader than the scope of the statute’s mandate. Pursuant to the provided City policy, all accidents involving a City vehicle require an investigation, including a uniform collision report, to be completed. In addition, the City’s policy specifically states that the requisite uniform collision reports, along with the supplemental information, would be “used to establish culpability, or to objectively indicate the events of the accident where appropriate, pending criminal action or charges under Title 21.”¹² As a law enforcement agency, the City Police Department’s records related to the uniform collision report constitute investigatory records compiled for the purposes of potential civil or criminal law enforcement action.¹³ Accordingly, the police reports you requested are exempt pursuant to 29 *Del. C.* § 10002(o)(3), and the City appropriately denied your request.¹⁴ Nevertheless, the City is cautioned to give due consideration to the reasons that it cites in future responses to requests.

¹¹ The former “Department of Public Safety” was the relevant department at the time of the *Jacobs* case.

¹² Response, Ex. A.

¹³ *Del. Op. Att’y Gen.* 01-IB04, 2001 WL 1593104, at *2 (Feb. 27, 2001) (“These [State of Delaware Uniform Traffic Collision Reports] are investigative files used for civil or criminal law enforcement purposes. In particular, the reports are used in the investigation and criminal prosecution of drunk driving cases, and in administrative proceedings by the Division of Motor Vehicles to suspend or revoke driver’s licenses.”).

¹⁴ The City’s policy indicates that accidents involving City vehicles or employees also require submission of “Department Information reports” and other information related to the accident. Such records are not construed to be within the scope of your March 11, 2022 request for police reports.

CONCLUSION

For the reasons set forth above, we find that the City appropriately denied access to the requested records under 29 *Del. C.* § 10002(o)(3) and (6).

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
Deputy State Solicitor

cc: Robert M. Goff, Jr., City Solicitor
John D. Hawley, Assistant City Solicitor