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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 22-IB16**

**April 29, 2022**

**VIA EMAIL**

Xerxes Wilson  
[xwilson@delawareonline.com](mailto:xwilson@delawareonline.com)

**RE: FOIA Petition Regarding the Delaware Department of Correction**

Dear Mr. Wilson:

We write in response to your correspondence alleging that the Delaware Department of Correction (“DOC”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence dated March 28, 2022, 1:15 pm (“First Petition”) and March 28, 2022, 1:14 pm (“Second Petition”) as petitions for determinations pursuant to 29 *Del. C.* § 10005 regarding whether violations of FOIA have occurred or are about to occur in connection with your requests. As discussed more fully herein, we determine that DOC did not violate FOIA as alleged in your petitions.

**BACKGROUND**

On February 24, 2022, you submitted a FOIA request to DOC asking to “review data that tracks use of force incidents by type, location and employee since Jan. 1, 2015” contained within the Delaware Automated Correctional System.<sup>1</sup> You also requested access to “any reports generated by the Bureau of Prisons or the Office of the Commissioner relating to use of force in Delaware’s Level 5 facilities since Jan. 1, 2017.”<sup>2</sup> DOC denied your request in its entirety citing

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<sup>1</sup> First Petition.

<sup>2</sup> *Id.*

to FOIA’s exemptions to the definition of public record for: 1) records specifically exempted by statute, in this case 11 *Del. C.* § 4322; and 2) investigatory files.

That same day, you submitted a second FOIA request to DOC asking for “[a]ny procedures, directives or policy that govern the retention of video footage inside Delaware’s Level 5 facilities;” and “[a]ny procedures, directives or policy that governs employee access to video surveillance footage inside Delaware’s Level 5 facilities.”<sup>3</sup> DOC responded that it had no responsive documents.

On March 28, 2022, you filed the First Petition addressing your first FOIA request to DOC made in February 2022. In the First Petition, you allege that 11 *Del. C.* § 4322 was inapplicable to your data request because that specific section deals with “Probation and Parole Services,” and because you did not ask for the names of offenders, you argue “the data cannot be construed to be an [offender’s] ‘supervision history’ or a case record”<sup>4</sup> and to the extent the records you request are an offender’s supervision history or case record, as contemplated by Section 4322, specific offender names may be redacted and the records provided to you despite the language of Section 4322. You also argue that the investigatory exemption is inapplicable because you “don’t believe a dataset derived from paperwork that the department requires its officers to submit upon using force can be construed as an investigatory file.”<sup>5</sup> Further, you believe the data “marks an occurrence and makes no findings as to whether the use of force was justified or should result in departmental or criminal sanction for either the officer or offender.”<sup>6</sup> Finally, if the requested reports do contain closed investigations, then you argue it is in the public interest to disclose the reports.

DOC responded to the First Petition by asserting that the requested records are exempt from disclosure under 11 *Del. C.* § 4322(a) which provides that “all . . . case records obtained in the discharge of official duty by any member or employee of the Department shall be privileged.” And further, that while data may not be contemplated in the term “investigatory file,” the reports “generated by the Bureau of Prisons of the Office of the Commissioner do implicate the DOC’s own investigations into use of force at both the micro and macro levels and therefore satisfy 29 *Del. C.* § 10002(o)(3).”<sup>7</sup> Finally, DOC asserts that these records are exempt under 29 *Del. C.* § 10002(o)(9) as “records pertaining to pending or potential litigation” because the records you requested are the subject of a pending lawsuit involving DOC employees.<sup>8</sup>

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<sup>3</sup> Second Petition.

<sup>4</sup> First Petition.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Response to First Petition.

<sup>8</sup> *See, e.g., Davis v. Neal*, C.A. No. 21-1773-MN (D. Del.).

Also on March 28, 2022, you filed the Second Petition addressing your second FOIA request to DOC. In the Second Petition, you argue that “[you] find it hard to believe that no documents exist governing the use of and access to video footage captured within the state’s prisons.”<sup>9</sup> DOC responded to your Second Petition, attaching an executed affidavit from DOC’s Chief of its Bureau of Prisons, Shane Troxler. Chief Troxler identified a directive dated August 8, 2017 from former Bureau Chief Steve Wesley requiring the retention of video from handheld cameras during planned use of force incidents for a period of 180 days. DOC attached a copy of this directive with its response to the Second Petition. Chief Troxler further attested that he was familiar with the policies of DOC and the Bureau of Prisons and there are no additional responsive documents.

## DISCUSSION

FOIA mandates that a public body provide citizens with reasonable access to public records for inspection and copying, but certain records and information are excluded from the definition of “public record.”<sup>10</sup> If a public body denies a FOIA request, the public body carries the burden of proof to justify the denial of access to its records.<sup>11</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>12</sup>

### *The First Petition*

First, DOC argues that the data and reports you requested are statutorily exempt from disclosure. FOIA excludes from the definition of public record documents that are exempt from public disclosure by statute or common law.<sup>13</sup> 11 *Del. C.* § 4322(a) prohibits the disclosure both directly and indirectly of “supervision history and all other case records obtained in the discharge of official duty by any member or employee of [DOC].” DOC argues that the data requested is part of inmates’ supervision history. We have found that a data request for inmate names, booking dates, charges, bond amounts, dates of birth, and other items was exempt from disclosure under 11 *Del. C.* § 4322 as a case record or supervision history.<sup>14</sup> Conversely, we have found that 11 *Del. C.* § 4322(a) does not cover DOC’s communications with lethal injection drug suppliers.<sup>15</sup>

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<sup>9</sup> Second Petition.

<sup>10</sup> 29 *Del. C.* §§ 10002, 10003(a).

<sup>11</sup> 29 *Del. C.* § 10005(c).

<sup>12</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>13</sup> 29 *Del. C.* § 10002(o)(6).

<sup>14</sup> *Del. Op. Att’y Gen.* 19-IB26, 2019 WL 4538312, at \*2 (May 28, 2019).

<sup>15</sup> *Del. Op. Att’y Gen.* 13-IB07, 2013 WL 6593038, at \*2 (Nov. 21, 2013).

DOC has failed to explain how the requested data regarding “use of force incidents by type, location and employee” would be contained in an inmate’s case record, and therefore, we determine that DOC failed to meet its burden with regard to this exception.

Second, DOC argues that reports generated by the Bureau of Prisons of the Office of the Commissioner on use of force are exempt under FOIA’s exemption for investigatory files stating only that the reports implicate investigations on both the micro and macro levels. FOIA excludes from the definition of public record “investigatory files compiled for civil or criminal law-enforcement purposes.”<sup>16</sup> The investigatory files exemption “has been broadly and properly interpreted to apply to a wide variety of criminal and civil investigative files.”<sup>17</sup> DOC argues that the requested reports implicate “DOC’s own investigations into use of force at both the micro and macro levels.”<sup>18</sup> It is DOC’s burden to justify the denial of documents, and we find on this record, that DOC has not met its burden in justifying the denial of documents under the investigatory files exemption.

Finally, DOC argues that the records you seek pertain to pending litigation which are exempt from the definition of “public record.”<sup>19</sup> To determine if this exemption applies, we must consider the following two factors: 1) whether litigation is pending; and 2) whether the records that the requesting party seeks pertain to that pending litigation.<sup>20</sup> DOC’s counsel represents that a lawsuit is pending in federal district court against various DOC employees (*Davis v. Neal*, C.A. No. 21-1773-MN (D. Del.)) and cites to the press release that the ACLU of Delaware, which represents the plaintiffs in the suit, issued referring to your reporting on the issue of excessive use of force and abuse in Delaware’s prisons in conjunction with the lawsuit. Based on this record, we find that this first prong is met. For the second prong, we must determine whether the requested records pertain to this litigation. These requests for data on the use of force and reports on the use of force generated by the Bureau of Prisons or the Office of the Commissioner in Delaware’s Level 5 facilities clearly pertain to the pending litigation described herein. Based on the foregoing, we determine that the requested records are exempt under 29 *Del. C.* § 10002(o)(9).

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<sup>16</sup> 29 *Del. C.* § 10002(o)(3).

<sup>17</sup> *Del. Op. Att’y Gen.* 21-IB19, 2021 WL 4202795, at \*2 (Aug. 18, 2021); *see also Del. Op. Att’y Gen.* 17-IB21, 2017 WL 3426261, at \*1 (July 13, 2017).

<sup>18</sup> Response to First Petition.

<sup>19</sup> 29 *Del. C.* § 10002(o)(9).

<sup>20</sup> *Del. Op. Att’y Gen.* 21-IB02, 2021 WL 559557, at \*2 (Jan. 21, 2021) (“[W]e believe that the application of this exemption should be limited to determining whether litigation is pending and whether the records that the requesting party seeks pertain to that pending litigation.”); *see also Del. Op. Att’y Gen.* 21-IB20, 2021 WL 4351857, at \*2-3 (Sept. 14, 2021).

We note that DOC asserted the pending litigation exemption for the first time in its Response to your Petition, and we respectfully caution DOC to give due consideration to the reasons asserted in any future denials.

*The Second Petition*

The Second Petition involved your second FOIA request seeking documents governing the use of and access to video footage captured within the prison system. DOC responded to your Second Petition, providing you with a directive dated August 8, 2017, and an affidavit from its Chief of the Bureau of Prisons, attesting that there are no further responsive documents. FOIA does not require a public body to provide records which do not exist.<sup>21</sup> This Office accepts DOC's sworn statement that no additional responsive documents exist and therefore on this record, we find that DOC has not violated FOIA in relation to your Second Petition.

**CONCLUSION**

For the reasons set forth above, we conclude that DOC did not violate FOIA in relation to either the First or the Second Petition.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Gregory E. Smith, Deputy Attorney General

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<sup>21</sup> *Del. Op. Att'y Gen.* 19-IB49, 2019 WL 5208245, at \*3 (Sept. 9, 2019); *Del. Op. Att'y Gen.* 06-IB10, 2006 WL 1779491, at \*2 (May 4, 2006); *Del. Op. Att'y Gen.* 05-IB19, 2005 WL 2334347, at \*5 (Aug. 1, 2005); *Del. Op. Att'y Gen.* 96-IB28, 1996 WL 517455, at \*2 (Aug. 8, 1996).