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

**Attorney General Opinion No. 22-IB18**

**May 9, 2022**

**VIA EMAIL**

Will Lowrey, Counsel  
Animal Outlook  
[wlowrey@animaloutlook.org](mailto:wlowrey@animaloutlook.org)

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

Dear Mr. Lowrey:

We write in response to your correspondence submitted on behalf of your client, Animal Outlook, alleging that the Delaware Department of Agriculture (“DDA”) 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 the DDA violated FOIA by failing to meet its burden of proof to justify its denial of access to the first and second items of your request.

**BACKGROUND**

On March 1, 2022, you sent a request to the DDA for “records related to the depopulation of animals subsequent to the February 2022 identification of avian influenza in a commercial chicken flock in New Castle County, Delaware,” specifically seeking:

1. Any records related to the method, procedures, and protocol for the depopulation
2. Any records related to the approval of the methods, procedures, and protocol for the depopulation

3. Any photographs or videos related to the depopulation, whether taken before or after the actual event[.]<sup>1</sup>

The DDA denied your request in its entirety, asserting that no responsive records exist for the third item and the remaining records are not public pursuant to 29 *Del. C.* § 10002(o)(6) exempting records statutorily precluded from disclosure, including but not limited to, records under the federal Privacy Act, and 29 *Del. C.* § 10002(o)(17) exempting records implicating certain security concerns.

This Petition followed, alleging that the DDA violated FOIA by denying access to the records requested in the first and second items.<sup>2</sup> You contend that the Privacy Act does not cover the requested records because this Act only covers federal, not state, agencies and the type of records you seek are not covered by the definition of “record” under the Privacy Act. Even if this Act applies, you contend that the records still must be disclosed because federal case precedent establishes that to qualify for nondisclosure, both an exemption under the Privacy Act and an exemption under the federal FOIA statute must apply to the requested records. Further, to the extent the DDA believes that certain names, such as employee names, should be redacted for privacy concerns, you argue that the records should still be produced with any appropriate redactions. With respect to the security records exemption, you allege that you are not seeking any records that fall under this exemption, such as records related to law enforcement technique documentation, personal files, other blueprints, IT infrastructure, or other security information that could endanger a life. Finally, you state that when you submitted this identical request to other jurisdictions, states with similar provisions have provided responsive records.

On April 19, 2022, the DDA, through its counsel, replied to your Petition (“Response”) and included the affidavit of the Chief of Community Relations, who serves as the FOIA coordinator. In its Response, the DDA withdraws its assertion of the security records exemption, as the basis for its concerns are mooted by completion of the depopulation process, but the DDA argues that the requested records are not subject to disclosure under other exemptions. The DDA asserts 29 *Del. C.* § 10002(o)(6) applies to the requested records, as these records are exempted from disclosure by statute. The DDA states that it invoked the Privacy Act in response to this request, because the U.S. Department of Agriculture (“USDA”) jointly prepared these records and advised the DDA that it typically asserts the Privacy Act in response to similar requests. The DDA further contends that veterinary advice is privileged under Delaware law; 24 *Del. C.* § 3316 provides that a licensed veterinarian will be subject to discipline for willfully violating any privileged communication, and the accompanying regulation, 24 *Del. Admin. C.* § 3300-4.1 states that “veterinarians must protect the personal privacy of patients and clients by not willfully revealing communications regarding the diagnosis and treatment of an animal.” The DDA then invokes a new rationale - the investigatory files exemption which exempts “investigatory files

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<sup>1</sup> Petition.

<sup>2</sup> The Petition does not challenge the DDA’s response to the third item of the request. The references to your “request” for purposes of this Opinion’s discussion is limited to the first and second items of the request.

compiled for civil or criminal law-enforcement purposes.”<sup>3</sup> The DDA claims that the investigatory files exemption applies to these records; both USDA staff and the State Veterinarian and Deputy State Veterinarian assist with investigating and minimizing the spread of the avian influenza. The DDA Chief of Community Relations attests that “[f]arm owners may be indemnified by the USDA for the value of their losses if they were not found to be negligent in addressing the outbreak and minimizing spread.”<sup>4</sup> She further attests that State veterinarians provide advice to the farm owners regarding the method to depopulate, which is reflected in the Appraisal and Indemnity Request Form, completed jointly by the State veterinarian and the USDA or state case manager, and premises owner, and details the depopulation method and the operational reasons for selecting the method. The DDA Chief of Community Relations also attests that Incident Action Plans are also prepared for affected premises, are signed off by State veterinarians, and “sometimes include veterinary advice specific to depopulation methods.”<sup>5</sup> According to the DDA, both the Appraisal and Indemnity Request Forms and Incident Action Plans are part of the civil investigatory files used by the USDA to determine the farm owners’ negligence and whether indemnification is appropriate. Finally, the DDA contends that the Appraisal and Indemnity Request Form that is responsive to this request is a draft document, subject to the working draft exception, until signed by the USDA. The DDA Chief of Community Relations attested that the USDA has not yet signed this document.

## 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>6</sup> When a public body denies access to records, the public body has the burden of proof to justify its denial.<sup>7</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>8</sup>

The DDA Chief of Community Relations attests that she reviewed the DDA’s files for responsive records and found two types of documents containing the requested information: 1) the USDA Appraisal and Indemnity Request Forms; and 2) the Incident Action Plans.<sup>9</sup> The DDA contends that any veterinarian communications regarding the diagnosis or treatment of an animal

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

<sup>4</sup> Response.

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

<sup>6</sup> See 29 *Del. C.* §§ 10002, 10003(a).

<sup>7</sup> 29 *Del. C.* § 10005(c).

<sup>8</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>9</sup> Response.

in these records was properly withheld under the statutory privilege for veterinary advice.<sup>10</sup> Delaware law recognizes that veterinarians have a duty to maintain the confidentiality of privileged communications, stating veterinarians will be subject to discipline for “willfully violat[ing] any privileged communication.”<sup>11</sup> This concept of “privileged communications” is further defined in the accompanying regulation, stating “[v]eterinarians must protect the personal privacy of patients and clients by not willfully revealing privileged communications regarding the diagnosis and treatment of an animal.”<sup>12</sup> Three exceptions to the privileged communications allow for the sharing of veterinary medical information regarding the diagnosis and treatment of an animal: 1) when required by law, subpoena, or court order or when it becomes necessary to protect the health and welfare of other individuals or animals; 2) between veterinarians or facilities for the purpose of diagnosis or treatment of animals; and 3) between veterinarians and peace officers, humane society officers, or animal control officers who are acting to protect the welfare of individuals or animals.<sup>13</sup> In its Response, the DDA asserts that the State veterinarians and USDA officials work with the farm owners to diagnose, and advise regarding treatment for avian influenza. However, the DDA fails to specifically address the applicability of the full scope of this privilege, including the three exceptions, to the requested records. Thus, we determine that the DDA has not sufficiently supported its denial of access to the requested records under Section 10002(o)(6) to meet its burden.

Section 10002(o)(3) exempts “investigatory files compiled for civil or criminal law-enforcement purposes.” According to the DDA, the USDA staff and State veterinarians assist with investigating and minimizing further spread of the avian influenza, and farm owners may be indemnified by the USDA for the value of their losses if the investigation reveals they were not negligent in addressing the outbreak and minimizing the spread. The DDA alleges that the Appraisal and Indemnity Request Form and Incident Plan both are part of the investigatory file determining whether indemnification is appropriate. However, the DDA does not explain how the purpose of this investigation entails “civil or criminal law-enforcement.” Accordingly, we find that the DDA failed to meet its burden of demonstrating that the investigatory files exemption applies here.

The DDA acknowledges that a responsive Appraisal and Indemnity Request Form exists but as it is unsigned by the USDA, the DDA contends that this form qualifies as a draft that is not producible under FOIA. This Office has previously determined that the working draft exception applies to draft documents that a public body is still revising prior to presentation to a public

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<sup>10</sup> The Chief of Community Relations attests that Incident Action Plans sometimes contain privileged veterinary advice specific to depopulation methods.

<sup>11</sup> 24 *Del. C.* § 3316.

<sup>12</sup> 24 *Del. Admin. C.* § 3300-4.1.

<sup>13</sup> *Id.*

body.<sup>14</sup> The DDA has not indicated whether this form meets this standard, so we cannot determine that this exception applies to the Appraisal and Indemnity Form in the DDA's possession.

In sum, we find that the DDA violated FOIA by failing to satisfy its burden of demonstrating the denial of access to the requested records is justified under FOIA. As such, we recommend that the DDA review its records and supplement its response to your request in accordance with this Opinion with the responsive records, subject to any redactions otherwise appropriate under FOIA, within the timeframes provided for a response in Section 10003(h).<sup>15</sup>

### CONCLUSION

Based on the foregoing, we conclude that the DDA violated FOIA by failing to meet its burden of proof to justify its denial of access to the records requested in the first and second items of your request.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Adria B. Martinelli, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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<sup>14</sup> *Del. Op. Att’y Gen.* 21-IB15, 2021 WL 3160273, at \*6 (July 2, 2021) (“We believe that the courts in Delaware would not define a ‘public record’ under FOIA to include a working draft which the author is still revising prior to presentation to a public body,” and “. . . premature disclosure of draft contracts under negotiation also could compromise the public body’s (and the public’s) competitive position in those negotiations.”) (citation omitted).

<sup>15</sup> *See id.* at \*7 (“We recommend [the public body] review its records in accordance with this Opinion and provide a supplemental response to you in accordance with the timeframes permitted in Section 10003(h). This response is recommended to include . . . any responsive records, . . . subject to any redactions otherwise appropriate under FOIA.”).