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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB36

September 30, 2022

VIA EMAIL

Esteban Parra
Delaware Online/The News Journal
Eparra@wilmington.gannett.com

**RE: FOIA Petition Regarding the Division of Forensic Science, Delaware
Department of Safety and Homeland Security**

Dear Mr. Parra:

We write regarding your correspondence submitted alleging that the Division of Forensic Science (“DFS”) of the Delaware Department of Safety and Homeland Security (“DSHS”) 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 DFS did not violate FOIA by denying access to the requested records, as the records you seek are exempt from disclosure under FOIA.

BACKGROUND

On August 30, 2022, you submitted a request to DSHS seeking the date of death of a deceased gunshot victim. Your request noted that while the homicide occurred in the City of Wilmington’s jurisdiction, the City staff referred you to DFS for the date and time of death. DSHS, through DFS, denied your request later that day, asserting that the responsive records are exempt from disclosure under 29 *Del. C.* § 10002(o)(3), which exempts investigatory files compiled for civil or criminal law enforcement purposes. This Petition followed.

The Petition alleges that DFS improperly denied this request, because other law enforcement agencies, like the Delaware State Police, routinely provide this information to the public, and this case, which is under the City’s jurisdiction to investigate, “is a high-profile homicide and one of great interest to the public.”¹ Furthermore, the Petition argues that the City’s referral of your request to DFS means that the City police wanted DFS to release this information.

DSHS, through its counsel, responded on September 12, 2022 to the Petition on behalf of DFS (“Response”). DFS states that the information you seek is derived from the post-mortem report and death certificate. DFS asserts that the post-mortem report is exempt from disclosure under 29 *Del. C.* § 10002(o)(3) and the death certificate is statutorily protected from disclosure. As you are a journalist, DSHS states that you do not qualify for one of the statutory exceptions to release this information based on your relationship to the decedent. In addition, DFS argues that the fact that other law enforcement agencies previously released information about a crime is not determinative in this matter, because that statutory provision allowing law enforcement agencies to release this information does not apply to DFS. In sum, DFS contends that there is no law requiring disclosure of this information, and the denial of FOIA your request was proper.

DISCUSSION

The public body carries the burden of proof to justify its denial of access to records.² In certain circumstances, a sworn affidavit may be required to meet that burden.³ FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying.⁴ However, “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes” and “records specifically exempted from public disclosure by statute or common law” are exempt from the definition of “public record.”⁵ As a preliminary matter, the Petition’s arguments that other police agencies routinely release this information or that the City intended for DFS to release this decedent’s date of death are inapposite here.⁶

¹ Petition.

² 29 *Del. C.* § 10005(c).

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

⁴ 29 *Del. C.* § 10003(a).

⁵ 29 *Del. C.* § 10002(o)(6).

⁶ As DFS is the subject of this Petition and submitted this Response, we do not assess any unrelated party’s basis to potentially release the date of death. However, we note that DFS’s Response also points to an exception in the Delaware Code that permits the arresting law enforcement agency to release “arrest data that is reasonably contemporaneous to the event for which an individual is currently involved in the criminal justice system.” 11 *Del. C.* § 8502(4)(b).

In this instance, you have asked DFS for the date of death of a decedent shot in Wilmington. DFS maintains that its records containing that information are not public records under FOIA.⁷ This post-mortem report, including the time of death, is exempt from disclosure under FOIA pursuant to the investigatory file exemption.⁸ Under 29 *Del. C.* § 10002(o)(6), FOIA also exempts those records that are statutorily protected from disclosure. By statute, death certificates are not subject to disclosure, with certain limited exceptions.⁹ As the Petition does not allege a factual basis for any of the exceptions, the death certificate responsive to this request is also exempt from disclosure by statute.¹⁰

⁷ FOIA is intended to provide access to public records. 29 *Del. C.* § 10001. A public body is not required to answer questions set forth in a request. *See, e.g., Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, at *3 (Mar. 10, 2017); *Del. Op. Att’y Gen.* 00-IB08, 2000 WL 1092967, at *2 (May 24, 2000).

⁸ *Del. Op. Att’y Gen.* 15-IB13, 2015 WL 9701644, at *2 (Dec. 29, 2015); *Del. Op. Att’y Gen.* 05-IB16, 2005 WL 2334345, at *4 (Jun. 22, 2005) (“Post-mortem reports ‘are a compilation of facts about the scene where the body was located and its condition’ and are ‘used to aid in the determination of the cause of death,’ and ‘may become part of the files of the prosecutor and the police.’ . . . Such a report ‘is, in itself, an investigation’ and its confidentiality ‘is essential to its effective use in further investigation by law enforcement personnel.’”) (internal citations omitted); *see also Lawson v. Meconi*, 897 A.2d 740, 745 (Del. 2006) (citing Attorney General Opinion No. 05-IB16 with approval and stating that investigatory files are not public information and thus, “any information gathered during the course of an investigation is not public information”).

⁹ 16 *Del. C.* § 3110 (“Disclosure of records”); 16 *Del. Admin. C.* § 4205 (prohibiting release of death certificates before forty years after the date of the death, except in specific instances, such as request by the next of kin and a documented need to establish a legal right or claim).

¹⁰ We note that DFS asserted Section 10002(o)(6) as a basis for denying access to the death certificate for the first time in its Response to your Petition, and we respectfully caution DFS to give due consideration to the reasons asserted in any future denials of requests. *See, e.g., Del. Op. Atty. Gen.* 22-IB16, 2022 WL 1547876, at *3 (Apr. 29, 2022); *Del. Op. Atty. Gen.* 20-IB30, 2020 WL 7663559, at *1 (Dec. 7, 2020); *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 (“While, in this instance, we have determined that DNREC’s denial of your request was 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.”).

CONCLUSION

For the foregoing reasons, we determine that DFS did not violate FOIA by denying access to the requested records, as they are exempt from disclosure under FOIA.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Lisa M. Morris, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General