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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB43

November 18, 2022

VIA EMAIL

Richard Gabler Funke
Mintzer Sarowitz Zeris Ledva & Meyers LLP
gfunke@defensecounsel.com

RE: FOIA Petition Regarding the City of Wilmington

Dear Mr. Funke:

We write in response to your correspondence on behalf of your client, Progressive Northern Insurance Company, alleging that the City of Wilmington violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") in connection with your requests for body camera footage and city surveillance footage. We treat this 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 determine that the City appropriately withheld the requested body camera footage, as it is exempt pursuant to the investigatory files exemption. However, we find that the City failed to meet its burden of proof to justify its denial of access to the city surveillance footage.

BACKGROUND

On August 4 and 5, 2022, you submitted two requests on your client's behalf to the City, seeking the body camera footage and city watch surveillance footage of a motor vehicle accident that occurred in the City. A City police officer's report noted that unidentified witnesses to the accident spoke to two canine officers at the accident scene. As your client intends to file litigation about potential insurance fraud in connection with the accident, you claim that all three officers' body camera footage is necessary to identify those witnesses. In addition, the city surveillance footage would allow you to determine if the driver was alone in her vehicle before the accident.

In the Petition, you assert that the City’s counsel verbally declined your request on September 8, 2022, as the footage is part of the police investigative materials. You state that you sought to resolve this matter with the City amicably through a discovery agreement. However, the City stated that it had viewed the videos, and there was nothing to report. When you asked again for a copy of the footage, the City offered to allow you to view the videos in the City law office. Because you wanted copies, you refused this offer. This Petition followed.

In the Petition, you argue that it “cannot logically be said that *all* body camera and surveillance footage is compiled for pending investigations, pretrial and presentence investigations, and child custody and adoption files.”¹ You contend that the investigatory files exemption cannot apply, as you believe no investigation was pending at the time you filed your requests. Additionally, you argue that restricting access to this footage would impede the justice system, as it may be the only means of determining the validity of the insurance claims submitted to your client.

The City’s counsel replied to the Petition on October 26, 2022 (“Response”). The City states that its Police FOIA Coordinator responded to the requests in writing and provided copies of the emails. The City notes that it has not received a subpoena nor has a court action been commenced against the City. The City states that it issued a uniform collision report and civil and criminal infractions to both drivers. The City argues that body camera footage is an audiovisual record of the officer’s investigation into the cause of the accident and any contributing factors, which means it is part of the investigatory file compiled for civil or criminal law enforcement. The City attached a copy of its body camera policy, which prohibits viewing of any body camera footage, other than for official law enforcement purposes. The policy also states that officers are to activate their cameras when exercising official police powers or when they believe they are likely to exercise their police powers; the footage is a tool to document events, actions and conditions between police and the public and is used to enhance the quality of police investigations and increase transparency. The City notes that this Office has found uniform collision reports, fire marshal records, automated gunfire detection systems, and criminal complaints and reports to be subject to the investigatory files exemption, and the City contends that the body camera footage is no different. The City points out that the investigatory files exemption attaches upon the public body becoming aware of a potential issue and survives the termination of the investigation. In addition, the City maintains that your request appears to be an improper use of FOIA to obtain records for anticipated litigation. Finally, the request for the footage is barred by the Victims’ Bill of Rights, which prohibits the City from disclosing the identity of non-law enforcement witnesses.

DISCUSSION

Under FOIA, “public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body,” and “[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.”²

¹ Petition (emphasis in original).

² 29 *Del. C.* § 10003(a).

However, “investigatory 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” are exempt from the definition of “public record.”³ In addition, “records pertaining to pending or potential litigation which are not records of any court” are exempt from disclosure.⁴ The public body carries the burden of proof to justify its denial of access to records.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ As a preliminary matter, we determine that the City’s invocation of the potential litigation exemption is not appropriate in this instance, because the records are not sought from the public body, or a related party, who is the subject of the potential lawsuit.⁷

The City contends that the body camera footage is exempt under the investigatory files exemption. We agree. The City police force is a law enforcement agency that uses the body camera footage for purposes of its law enforcement duties. The City policy states that the cameras are to be activated while exercising official police powers, or whenever an officer believes they are likely to exercise their police powers. According to the policy, the recordings are intended to “improve the quality and reliability of investigations and increase transparency.”⁸ Hence, the footage documents the officer’s investigation and interactions at a scene and is compiled for purposes of criminal or civil law enforcement. The investigatory files exemption attaches at the public body’s initial notice of a potential issue.⁹ Accordingly, we find that the body camera footage is exempt pursuant to the investigatory files exemption.

³ 29 Del. C. § 10002(o)(3).

⁴ 29 Del. C. § 10002(o)(9).

⁵ 29 Del. C. § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁷ *Del. Op. Att’y Gen.* 18-IB10, 2018 WL 1405826, at *5 (Feb. 20, 2018) (“Addressing the second issue first, we believe that the ‘potential litigation’ exemption can only be reconciled with the broader language of the FOIA statute if it is limited to potential litigation against the government agency from which the documents in question are sought, or some closely affiliated person or entity. To interpret the statute otherwise would prevent citizens from conducting basic investigations that might be necessary to them later gaining access to the courts to remedy some legal wrong committed by a party wholly unrelated to the government entity in question - even if the documents sought in the course of those investigations would otherwise be public documents freely available to any other citizen seeking them.”).

⁸ Response, Ex. B.

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,

With respect to the surveillance footage, the City's Response presents no arguments to justify its denial of this footage under the investigatory files exemption. As the City has not met its burden of proof for withholding this footage, we determine that the City violated FOIA by refusing access to this footage. However, as the release of surveillance footage possibly implicates other rights or concerns, we recommend that the City produce this footage, to the extent compliant with any other applicable exemptions or laws.

CONCLUSION

For the reasons set forth above, we conclude that that the City did not violate FOIA by refusing access to the body camera footage pursuant to the investigatory files exemption. However, we find that the City failed to meet its burden of proof to justify its denial of access to the city surveillance footage.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: John D. Hawley, Assistant City Solicitor

2005 WL 2334345, at *2 (Jun. 22, 2005); *Del. Op. Att'y Gen.* 98-IB13, 1998 WL 910199, at *1 (Dec. 8, 1998).