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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB05

February 3, 2023

VIA EMAIL

Christiane Marchio
christiane_marchio@yahoo.com

RE: FOIA Petition Regarding the Delaware Department of Health and Social Services

Dear Christiane Marchio:

We write regarding your correspondence alleging that the Delaware Department of Health and Social Services ("DHSS") 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 the DHSS did not violate FOIA by denying access to the report you seek.

BACKGROUND

On December 14, 2022, you filed a FOIA request with the DHSS seeking the "full report" regarding a specific animal welfare complaint.¹ The DHSS's FOIA coordinator followed up with questions to clarify the nature of your request, and you responded that you were seeking an animal welfare report made by a certain individual. On January 6, 2023, the DHSS responded, denying access to the report because it is not a public record and stating that the requested information must be sought through a subpoena.² This Petition followed, in which you challenge the denial of access

¹ Petition.

² *Id.*

to this report and allege that the responding officer informed you that you could receive a copy of this report through FOIA.

The DHSS's counsel responded to the Petition on its behalf ("Response") and included an affidavit from the FOIA coordinator. The FOIA coordinator attests that the record that responds to this request is a LEISS report that identifies the suspect and individuals who filed the complaint. As this initial crime report is the basis for the investigatory file, the DHSS claims this report you seek is exempt pursuant to 29 *Del. C.* § 10002(o)(3). The DHSS's counsel also states that victims and witnesses who contact Delaware Animal Services are assured that their information will be protected by the division, and the release of such information would have a chilling effect on the public's willingness to contact the division for animal cruelty and control issues. After such an investigation is closed, the DHSS asserts that the investigatory records continue to be confidential.

DISCUSSION

FOIA requires a public body to provide citizens with reasonable access to public records in accordance with the statute.³ In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.⁴ In certain circumstances, an affidavit may be required to meet that burden.⁵

In this case, the DHSS asserts that the investigatory files exemption in Section 10002(o)(3) applies to the requested report, 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."⁶ The animal welfare officers are involved in law enforcement,⁷ and the LEISS report is the

³ 29 *Del. C.* § 10003.

⁴ 29 *Del. C.* § 10005(c).

⁵ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021) ("[U]nless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.").

⁶ We note that the DHSS asserted this reason for the first time in its Response to your Petition and respectfully caution the DHSS to give due consideration to the reasons asserted in its denials in the future. *See, e.g., Del. Op. Att'y Gen.* 22-IB16, 2022 WL 1547876, at *3 (Apr. 29, 2022); *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 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.").

⁷ 11 *Del. C.* § 8502(11); 16 *Del. C.* § 3031F.

complaint that identifies the suspect and complainant and triggers the investigation.⁸ The investigatory files exemption continues to apply after an investigation is closed.⁹ Thus, this requested report is exempt from disclosure pursuant to 29 *Del. C.* § 10002(o)(3).¹⁰

CONCLUSION

For the foregoing reasons, we determine that in these circumstances, the DHSS did not violate FOIA by denying you access to the requested report.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Joanna S. Suder, Deputy Attorney General
Gabriela Kejner, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁸ Response, Aff. of the DHSS FOIA coordinator.

⁹ *News-Journal Co. v. Billingsley*, 1980 WL 3043, at *2-3 (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, 2005 WL 2334345, at *2 (Jun. 22, 2005); *Del. Op. Att’y Gen.* 98-IB13, 1998 WL 910199, at *1 (Dec. 8, 1998).

¹⁰ While we have decided to issue a determination here as a courtesy, we feel compelled to note that as a noncitizen, you lack standing to avail yourself of the provisions contained in Section 10005, including the petition process set forth in Section 10005(e).