



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
CRIMINAL DIVISION (302) 577-8500
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400
FAMILY DIVISION (302) 577-8400
FRAUD DIVISION (302) 577-8600
FAX (302) 577-2610

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB29

October 10, 2023

VIA EMAIL

Melissa Steele
Cape Gazette
melissasteel@capegazette.com

RE: FOIA Petition Regarding the Delaware Department of Safety and Homeland Security

Dear Ms. Steele:

We write regarding your correspondence alleging that 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 the DSHS did not violate FOIA by denying access to these requested records.

BACKGROUND

On August 22, 2023, you submitted a FOIA request to the DSHS about teens who were arrested in connection with a car theft in New Castle County. You sought “investigative documents with interviews of the [teens] that explain their motivation.”¹ After your request was sent for legal review on September 12, 2023, the DSHS denied this request that same day, stating that “police reports and investigatory files compiled for civil or criminal law-enforcement purposes . . . are exempt from FOIA pursuant to 29 *Del. C.* § 10002(o)(3), 29 *Del. C.* § 10002(o)(6) and 11 *Del. C.* Ch. 85 and 86.”² This Petition followed.

¹ Petition.

² *Id.*

In the Petition, you allege that the request should be granted, because you disagree with DSHS's interpretation of the law. You argue fulfilling your FOIA request is a matter of significant public interest. Further, you assert that you are not seeking identification of these teens, merely more information about why these teens stole cars. You believe this information should be available to you without the need for a FOIA request.

The DSHS, through its legal counsel, replied to the Petition. The DSHS maintains that the investigative information you seek is categorically exempt from FOIA, and records that fall under one of the exemptions to FOIA are not public records and are not required to be disclosed. The DSHS states that the Court of Chancery determined that the investigatory files exemption attaches when the public body is made aware of a potential issue and the exemption survives after the investigation is completed. As police reports and investigatory files are exempt from FOIA, the DSHS argues that its response to this request was appropriate.

DISCUSSION

The public body has the burden of proof to justify its denial of access to records.³ In certain circumstances, a sworn affidavit may be required to meet that burden.⁴ However, when a request is clear on its face that the records sought are not subject to FOIA, to meet its burden, a public body need not state under oath the efforts, and results of those efforts, to determine whether there are responsive records.⁵ In this case, the request sought from the DSHS "investigative documents" compiled in connection with the teens' arrests. FOIA 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 We determine that it is clear on the face of this request that the records you seek are exempt from FOIA under the investigatory files exemption and are not required to be disclosed.⁷

³ 29 Del. C. § 10005(c).

⁴ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁵ *Id.* at 1012 ("Thus, we hold that unless 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 29 Del. C. § 10002(o)(3).

⁷ *See also Nasir v. Oberly*, 1985 WL 189324, at *1 (Del. Super. Dec. 5, 1985) (determining that "statements of witnesses and other documents . . . as a result of a criminal investigation into a robbery and an assault that resulted in petitioner's indictment, conviction and incarceration" were exempt).

CONCLUSION

For the foregoing reasons, we determine that the DSHS did not violate FOIA by denying access to the requested records.

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