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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB30

November 8, 2023

VIA EMAIL

Randall Chase
Associated Press
rchase@ap.org

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

Dear Mr. Chase:

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.* §§ 10001-10008 (“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 conclude that the DHSS violated FOIA by failing to meet its burden of demonstrating that it appropriately searched for responsive records and by denying access to the employee’s attendance and leave records. It is recommended that the DHSS, after appropriate redactions, disclose the employee’s attendance and leave records. The DHSS did not violate FOIA by denying access to the performance and discipline records under the personnel file exemption or by its assertion of Section 10002(o)(6) without elaboration in its denial letter.

BACKGROUND

On May 8, 2023, you submitted a FOIA request to the DHSS seeking various employment records related to a DHSS employee:

Pursuant to the Freedom of Information Act, 29 Del. Code 100, I am requesting copies from the Department of Health and Social Services of all internal and external emails, texts, faxes, phone logs, memos, contracts, memoranda, faxes, online messages and any and all other correspondence

in any form related to the hiring, employment, supervision, and termination of [a DHSS employee]. The records I am seeking include but are not limited to his employment start, suspension and termination dates, his job titles, his salary and pay information, his weekly work schedules, and his promotion/demotion history. . . .¹

The DHSS initially denied this request, but you then provided names of the employees whose email accounts would be searched and the search terms on May 17, 2023. For this new request, the DHSS provided you a cost estimate associated with the email search by the Delaware Department of Technology and Information (“DTI”), and the DTI confirmed that you paid the fee on June 30, 2023. The DHSS asserted additional time would be needed on two occasions and after you filed an initial petition, provided a response on July 14, 2023 with the responsive, redacted records. This response also denied the request under the exemptions in 29 *Del. C.* § 10002(o)(1) for personnel, medical, or pupil files, the disclosure of which would constitute an invasion of personal privacy, under FOIA or under any State or federal law as it relates to personal privacy and 29 *Del. C.* § 10002(o)(6) for any records specifically exempted from disclosure by statute or common law. That initial petition was closed. However, after reviewing the records provided, you filed this new Petition.

In this Petition, you allege that the DHSS’s search returned 1,376 emails and yet the DHSS only provided redacted pages of what appear to be internal communications and an unsworn assertion that everything else, including hiring documents and all the 1,376 emails, are exempt from disclosure. You allege that the right of privacy is not absolute but should be qualified by the need for access by the circumstances and the rights of others, and under FOIA, you believe privacy rights should be balanced against the need for access to information to further the accountability of government.

The DHSS, through its legal counsel, replied to the Petition, enclosing the affidavit of its FOIA coordinator in support of its response. The DHSS identifies three categories of requested records and notes that although the DTI search returned 1,376 emails, only 278 emails were determined to be responsive to the request. The DHSS states that the first category of records consist of records related to the hiring, employment, supervision, and termination of the employee, including employment start, suspensions and termination dates, job titles, salary and pay information, weekly work schedules, and promotion/demotion history. The DHSS FOIA coordinator attests that on October 13, 2023, the DHSS produced the employee’s weekly work schedule. The DHSS FOIA coordinator swears that the DHSS has no responsive records related to the “(i) employment start; (ii) job titles; (iii) salary and pay information; and (iv) promotion/demotion history.”² The DHSS FOIA coordinator attests that the DHSS has no responsive records for the other two categories of records: 1) records relating to the DHSS’s decision to hire this employee and knowledge obtained through a background check; and 2) records of any contracts, programs, or policies regarding the employment of criminal offenders, referring you to the Delaware Department of Human Resources for those records.

¹ Petition.

² Response, Aff. of the DHSS FOIA Coordinator dated Oct. 13, 2023.

The DHSS also asserts that the records withheld under Section 10002(o)(6) are the attendance and leave records, performance records, and discipline records. The DHSS contends that these records are exempt pursuant to the State of Delaware Employee Merit Rule 16.1, which provides a “master personnel record for each employee” which includes “applications for employment, each Human Resources transaction, attendance and leave records, employee performance review documents, grievance records, . . . and any other records or information considered appropriate” is considered confidential and “[u]nauthorized disclosure of any portion of a State employee’s records shall be grounds for dismissal.”³ The DHSS FOIA coordinator attests that this employee is subject to the Merit System. The DHSS also argues that the employee’s leave and discipline records are protected from disclosure under the Health Care Privacy Act, as the responsive leave and medical records may disclose an employee’s medical condition. In addition, the DHSS’s counsel asserts that the responsive records identified by the DHSS are also exempt under the attorney-client privilege and the common law right of privacy. In support of these statements, the DHSS FOIA coordinator swears that the “responsive leave and discipline records contain information directly relating to [the employee’s] physical or mental health status, condition and treatment, and specific information about [the employee’s] medical condition,” and “certain responsive emails also reflect communications between the DHSS and its counsel seeking and providing legal advice.”⁴

The DHSS also argues that its assertion of the personnel file exemption under Section 10002(o)(1) is appropriate and the attendance and leave, performance, and discipline records are part of the personnel file. These records, the DHSS argues, are subject to privacy considerations “and claims of [the employee] as to the information that would be disclosed through the responsive records outweighs the competing need for access to the information for government accountability and transparency.”⁵

DISCUSSION

The public body bears the burden of proof to justify its denial of access to records and to otherwise demonstrate its compliance with the FOIA statute.⁶ The *Judicial Watch, Inc. v. University of Delaware* case provides that Section 10005(c) “requires a public body to establish facts on the record that justify its denial of a FOIA request.”⁷ “[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

³ Response, p. 3.

⁴ *Id.*, Aff. of the DHSS FOIA Coordinator dated Oct. 13, 2023.

⁵ *Id.*, p. 4.

⁶ 29 *Del. C.* § 10005(c).

⁷ 267 A.3d 996, 1010 (Del. 2021).

there are responsive records and the results of those efforts.”⁸ However, generalized assertions in the affidavit will not meet the burden.⁹ For example, the Superior Court of Delaware determined that an affidavit outlining that legal counsel inquired about several issues, without indicating who was consulted, when the inquiries were made, and what, if any documents, were reviewed, was too generalized to meet this standard. Similarly, we determine that the numerous sworn statements in the FOIA coordinator’s affidavit that the DHSS has “no responsive records” for the employment start date, job titles, salary and pay information, promotion/demotion history, “records related to the decision by [the] DHSS to hire [this employee],” certain information obtained through a background check, and “contracts, agreements, programs, or policies regarding employment of criminal offenders” are insufficient.¹⁰ The FOIA coordinator swears that in any earlier email, she stated that any other responsive records are not public records pursuant to 29 *Del. C.* § 10002(o)(1) and (6).

This affidavit does not provide the basis for the DHSS FOIA coordinator’s personal knowledge to attest to these matters under oath, nor does it provide specific sworn testimony regarding whether the DHSS FOIA coordinator made any efforts, and the results of those efforts, to determine whether there are responsive records. As such, we determine that the DHSS has not met its burden of demonstrating it does not have these responsive records. It is recommended that the DHSS, in compliance with the timeframes set forth in Section 10003, supplement its response to your request to address these issues, and if applicable, provide any additional public records.

The DHSS acknowledges, under oath, that it has the employee’s weekly work schedule, attendance and leave records, performance records, and discipline records. The DHSS FOIA coordinator attests the DHSS provided weekly schedules to you. As the remaining records were used by the DHSS in determining personnel actions to be taken against the employee, the DHSS claims that these records are exempt pursuant to the personnel file exemption. With the exception of the attendance and leave records, we agree.

The personnel file exemption permits nondisclosure of “[a]ny personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy.”¹¹ This Office has determined that a personnel file “has as one of its principal purposes the furnishing of information for making personnel decisions regarding the individual involved.”¹² The personnel file is defined as “a file

⁸ *Id.* at 1012.

⁹ *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at *3 (Jun. 7, 2022) (“The Court finds that the generalized statements in the Affidavit do not meet ‘the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents.’”).

¹⁰ Response, Aff. of the DHSS FOIA Coordinator dated Oct. 13, 2023.

¹¹ 29 *Del. C.* § 10002(o)(1).

¹² *Del. Op. Att’y Gen.* 02-IB24, 2002 WL 31867898, at *2 (Oct. 1, 2002) (citation omitted).

containing information that would, under ordinary circumstances, be used in deciding whether an individual should be promoted, demoted, given a raise, transferred, reassigned, dismissed, or subject to such other traditional personnel actions.”¹³ In this case, we find that the attendance and leave records, performance records, and discipline records all are personnel file records.

To be exempt, the disclosure of such personnel records must also constitute an invasion of personal privacy. This Office has determined that attendance and leave records with the names, dates, and generic descriptors like “vacation,” “sick,” or “personal day” do not constitute an invasion of personal privacy and are not exempt under FOIA.¹⁴ Further, although the specific medical condition, course of treatment, or doctor’s name would be appropriately redacted under the Health Care Privacy Act, an attendance sheet indicating “sick leave” or a “doctor’s appointment” is not protected information.¹⁵ Thus, as the leave and attendance records are, by the FOIA statute, authorized public records, release of these records is consistent with Merit Rule 16. Accordingly, we find that the attendance and leave records are not exempt and are recommended for disclosure, but the specific physical or mental health status, condition and treatment, and specific information about the employee’s medical condition may be redacted, in addition to any other exempt information on these records.¹⁶

The remaining records, consisting of the performance and disciplinary records, fall squarely within the personnel file exemption, as releasing such records would be an invasion of personal privacy. The Delaware Supreme Court has recognized a common law right of privacy, or as it has been described, “the right to be let alone.”¹⁷ However, this right is not absolute.¹⁸ Rather, it is “qualified by the circumstances and also by the rights of others.”¹⁹ In the FOIA context, “we have determined that legitimate privacy claims under Delaware common law must be balanced against the competing need for access to information to further the accountability of

¹³ *Id.*

¹⁴ *Del. Op. Att’y Gen.* 06-IB11, 2006 WL 1779489, at *5-6 (May 31, 2006) (“Just as the public has a right to know the salary paid to public employees, the public also has a right to know when their public employees are and are not performing the duties for which they are paid.”).

¹⁵ *Id.* at *6-7.

¹⁶ Merit Rule 16.1, which penalizes the “unauthorized disclosure” of the master personnel records, including attendance and leave records, does not exempt these records from FOIA. Section 10002(o)(6), which exempts those records that are statutorily or by common law excluded from disclosure, does not authorize the withholding of these leave and attendance records, as the DHSS has not demonstrated that the Merit Rules are statutes or common law.

¹⁷ *Barbieri v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963) (citation omitted).

¹⁸ *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 714 (Del. Super. 1967).

¹⁹ *Id.*

government.”²⁰ “When legitimate privacy rights are implicated under FOIA, we must balance those rights against the competing need for access to information to further FOIA’s primary goals — government transparency and accountability.”²¹ The employee’s privacy interest in keeping job performance and discipline private is significant.²² Balancing the public interest in this employee’s job performance and discipline records against the employee’s privacy interest in such matters, we believe that the balance tips in favor of the employee’s privacy and find that these records are not public records under FOIA.

Finally, the Petition claims that the DHSS’s initial response to the request that did not specify the common law or statute that exempted the records from disclosure constitutes a violation of FOIA. Section 10003 requires the public body’s response to indicate the reasons for the denial.²³ The DHSS cited to the specific language of 29 *Del. C.* § 10002(o)(6) without further elaboration but explained those bases for its denial more specifically in its Response to this Petition. Although we encourage the DHSS to provide more specific grounds, we determine that in these circumstances, the DHSS’s response to the request meets the minimum requirement under FOIA.

CONCLUSION

For the foregoing reasons, we determine that the DHSS violated FOIA by failing to meet its burden of demonstrating that it appropriately searched for responsive records and by denying access to the employee’s attendance and leave records. It is recommended that the DHSS, after appropriate redactions, disclose the employee’s attendance and leave records. The DHSS did not violate FOIA by denying access to the performance and discipline records in its custody under the personnel file exemption or by its assertion of Section 10002(o)(6) without elaboration in its denial letter.

²⁰ *Del. Op. Att’y Gen.* 13-IB03, 2013 WL 4239232, at *3 (July 12, 2013).

²¹ *Del. Op. Atty. Gen.* 13-IB06, 2013 WL 6593033, at *4 (Nov. 20, 2013).

²² *See* 29 *Del. C.* § 10004(b)(9) (permitting executive sessions for “personnel matters in which the names, competency, and abilities of individual employees and students are discussed, unless the employee or student requests that such a meeting be open”); *Del. Op. Att’y Gen.* 02-IB12, 2002 WL 1282812, at *2 (May 21, 2002) (“This limitation ‘reflects the Legislature’s judgment of the appropriate balance between the public interest in open discussion of governmental issues and the rights of individuals, such as state employees, to have their work performance considered in private and to avoid injury to the individual’s reputation.’” (citation omitted)).

²³ 29 *Del. C.* § 10003(h)(2).

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Stephen M. Ferguson, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General