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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB11

February 23, 2024

VIA EMAIL

Isabel Hughes
ihughes@delawareonline.com

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

Dear Ms. Hughes:

We write regarding your correspondence alleging that the Division of Delaware State Police of the Department of Safety and Homeland Security (“DSP”) 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 find that the DSP did not violate FOIA by denying access to the requested records.

BACKGROUND

On January 19, 2024, you submitted a request to the DSP seeking “the date and type (i.e., domestic disturbance, welfare check, alarm activation etc) of the DSP calls for service/response to: 44 N. Pennewell Drive, Wilmington, DE 19809 between 2018 and 2023.” On January 23, 2024, DSP denied this request pursuant to 29 *Del. C.* §§ 10002(o)(3) (exempting investigatory files compiled for criminal law enforcement purposes from FOIA), 10002(o)(6) (exempting records privileged under statute or common law), and 11 *Del. C.* Chapters 85 (relating to criminal justice information) and 86 (relating to CJIS). This Petition followed.

In this Petition, you argue that the denial is conclusory and fails to specify how the requested records are either police reports or investigatory in nature. You further argue, specifically, that the number and nature of calls are not investigatory in nature but rather are kept in the ordinary course of business and would be admissible in court proceedings. You also point

out that Wilmington Police and New Castle County Police have been responsive to recent requests for similar information but note that neither of these requests was made pursuant to FOIA. You argue that given the inconsistency in agency responses, the state should err on the side of transparency and produce the requested records.

The DSP, through its legal counsel, replied to your Petition on February 5, 2024. The DSP contends that its response was appropriate because a call for police service to respond to a residence initiates a police investigation. The DSP further asserts that disclosure of calls for service at a residence would violate individuals' legitimate expectation of privacy. Lastly, the DSP asserts that other police agency's actions are irrelevant because FOIA does not preclude a public body from voluntarily waiving a FOIA exemption.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.¹ In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.² As an initial matter, this office has previously determined that other agencies' actions are irrelevant to determining whether a violation of FOIA has occurred.³

The DSP asserts that the investigatory files exemption in Section 10002(o)(3) applies, which exempts from the definition of public records “[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.” “Delaware courts have made clear that, for purposes of FOIA, the investigatory exemption attaches as soon as an agency is first made aware of a potential issue.”⁴ The investigatory files exemption is not limited to pending investigations and continues to apply after an investigation is closed.⁵ This request seeks information regarding the date and type of calls for service to the DSP from a particular residence, which on its face, would initiate police investigation. Thus, the requested records are exempt from disclosure pursuant to 29 *Del. C.* § 10002(o)(3).

¹ 29 *Del. C.* § 10003(a).

² 29 *Del. C.* § 10005(c).

³ *Del. Op. Att’y Gen.* 22-IB36, 2022 WL 8067856, at *2 (September 30, 2022).

⁴ *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, at *3 (March 10, 2017).

⁵ *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).

As denial of the FOIA request was appropriate pursuant to the investigatory files exemption, it is unnecessary to evaluate the DSP's other defenses.

CONCLUSION

For the foregoing reasons, we determine that the DSP 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: Joseph C. Handlon, Deputy Attorney General
Kayli H. Spialter, Deputy Attorney General