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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB12

February 26, 2024

VIA EMAIL

Erin Frederick
efrederick679@gmail.com

RE: FOIA Petition Regarding the Delaware State Police

Dear Ms. Frederick:

We write regarding your correspondence alleging that the Division of Delaware State Police, 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 February 28, 2023, Detective Harris of DSP Troop 6 requested that a vehicle be towed in connection with an investigation of a bank robbery. The vehicle was a 2017 Dodge Durango (“Durango”). The vehicle was picked up at 4:45 p.m. on West Avenue, 17.9 feet from New Castle Avenue on State Route 9, 0.78 miles from the City of New Castle, Delaware. The vehicle was subsequently released on March 7, 2023.¹

Between July 12, 2023 and January 12, 2024, you submitted three FOIA requests to the DSP seeking numerous documents related to the events surrounding the towing of the Durango. The DSP denied access to these requests, stating that the records were exempt pursuant to 29 *Del. C.* § 10002(o)(9). This Petition followed on January 29, 2024.

¹ Troop 6 Delaware State Police Tow Slip, attached to an email sent from Petitioner to DSP dated October 4, 2023.

Your first FOIA request was submitted by email on July 12, 2023 seeking “Delaware state police code of conduct, code of ethics/ethical code for Delaware state police officers, policy and procedure manual for state of Delaware police.” On August 21, 2023 the DSP FOIA coordinator responded, asking you to narrow your request as DSP has numerous policies and procedures. You responded by email on August 23, 2023 stating:

Hi Christina,

I’m looking for a general policies and procedures related to ethics/code of conduct. There are other specifics that I am looking for and can request separately if needed, these include:

1. DSP’s policies/procedures related to execution of arrest/search warrants, including policy/procedure on the return of property slips/copy of warrants, rights of individuals to receive a copy of the warrant and/or affidavit, and policy/procedures regarding vehicle searches and seizure, and use of vehicle inventory searches.
2. DSP’s policies and procedures related to chain of evidence protocols and timelines with sending evidence out for testing.
3. DSP’s policies and procedures regarding use of ALPRs (automatic license plate readers) and ALPR systems (specifically related to what they can enter into the system regarding an individual/vehicle and what they can use to justify a traffic stop and seizure of a vehicle.)
4. DSP’s policies/procedures regarding use of motor vehicle recordings (i.e., are they mandated to turn them on for traffic stops, interviewing victims/witnesses, etc.)
5. DSP’s policies/procedures for use of body cams (i.e., are they mandated to turn them on for traffic stops, interviewing victims/witnesses, etc.)
6. DSP’s policies/procedures regarding a deception (i.e., lying about seizing and keeping my vehicle in their possession for 9 days)
7. Requests for affidavits for warrants to search my property (they should be unsealed, and I wasn’t sure if I request them from DSP or the courts, so I can provide specific complaint and case numbers if needed.)
8. Requests for a traffic stop report for my vehicle. (I can prove ownership of vehicle, et.)

I know this is a lot, but I tried to be as specific as possible for you. If you need me to request these separately, please let me know and I will do so.

After reviewing your August 23, 2023 email, DSP confirmed that you had some connection to a pending criminal case related to a bank robbery in early 2023. Accordingly, on September 8, 2023, DSP denied your request under 29 *Del. C.* § 10002(o)(9).

Your second FOIA request was submitted on October 6, 2023. The language in the request is identical to the language in the email you sent to DSP on August 23, 2023, which had previously been denied. A series of emails were then exchanged between you and the DSP FOIA coordinator over the next few months. Ultimately, DSP sent an email to you on January 12, 2024 advising that

your second FOIA request was being denied because it was identical the first FOIA request. DSP attached a copy of the letter dated September 8, 2023 denying your first FOIA request.

Your third FOIA request was submitted on January 12, 2024. You requested everything you had requested on your two previous FOIA requests, and also the “most recent/updated copy of Delaware State Police Rules and Regulations manual/handbook.” On January 24, 2024, you received a denial of your third FOIA request from the DSP citing 29 *Del. C.* § 10002(o)(9), the pending or potential litigation exemption.

In this Petition, you argue that the pending or potential litigation exemption does not apply and note “that, I, nor anyone I know has pending litigation against DSP or an associated party. Also, I, nor anyone I know has intentions of suing DSP or an associated party on the basis of DSP employees violating the policies I requested.” You also allege that the disclosure statement at the bottom of the FOIA coordinator’s email “references rule #10 of the DSP Rules and Regulations.”

The DSP, through its legal counsel, replied to your Petition on February 7, 2024. The DSP contends that its responses were appropriate, as the requests seek records related to pending or potential litigation pursuant to 29 *Del. C.* § 10002(o)(9). The DSP asserts that to the extent that you were entitled to any records in connection with those cases, you had the ability to seek them during trial through the applicable rules of criminal procedure.

The DSP asserts that pursuant to 29 *Del. C.* § 10005(b), citizens have 60 days to submit a petition to this Office. The deadline for filing a petition of the September 8, 2023 denial of the August 23, 2023 FOIA request was November 7, 2023. Thus, the DSP asserts this Petition is untimely.

DISCUSSION

FOIA requires a public body to provide citizens with reasonable access to public records in accordance with the statute.² In any action brought under Section 10005, the public body has the burden of proof to justify its denial of access to records.³ Here, the DSP asserts that the pending or potential litigation exemption in Section 10002(o)(9) applies, which exempts “records pertaining to pending or potential litigation which are not records of any court.”

A “public record” is “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.”⁴ Section 10002(o)(9) exempts from the definition of public record “[a]ny

² 29 *Del. C.* § 10003.

³ 29 *Del. C.* § 10005(c).

⁴ 29 *Del. C.* § 10002(o).

records pertaining to pending or potential litigation which are not records of any court.” The purpose of this exception is to avoid having FOIA used to circumvent the discovery rules governing pending litigation. “Delaware courts have held that FOIA requests for pending or potential litigation turns on the status of the requestor as a litigant and the requestor’s purpose of seeking to circumvent the civil discovery rules.”⁵ The Superior Court extended this exception to the denial of a criminal defendant’s FOIA request seeking DSP records under the pending litigation exception.⁶ As this Office observed, when ‘litigants seek records under FOIA to advance their litigation, Delaware courts have rejected this practice, stating that these litigants are not doing so to advance the public’s right to know, but to advance their own personal stake in the litigation, and they will ‘not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.’”⁷ All three of your FOIA requests were properly denied for this reason.

This FOIA petition raised questions regarding FOIA deadlines for responses to requests being missed and FOIA’s requirement of timely updates to requestors when responses are expected to take in excess of the fifteen days contemplated by the statute. We caution the DSP to assert its rationale for denying the requests in its responses to the requesting party in its initial communication, and not wait for a petition. We strongly advise DSP to respond to FOIA requests promptly and to communicate with all requestors in a timely fashion, consistent with the requirements of FOIA.

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
John E. Tarburton, Deputy Attorney General

⁵ *Del. Op. Att’y Gen.* 06-IB09, 2006 WL 1779490, at *6 (Apr. 25, 2006) (citing *Mell v. New Castle Cnty.*, 835 A.2d 141 (Del. Super 2003)).

⁶ *Koyste v. Del. State Police*, 2001 WL 1198950 (Del. Super Sept 18, 2001) (noting that Plaintiff was attempting a “circuitous route around the normal discovery rules.”); *see also Del. Op. Att’y Gen.* 03-IB21, 2003 WL 22669566, at *2 (Oct. 6, 2003) (citing *Koyste* with approval and upholding denial of FOIA under the (o)(9) exception).

⁷ *Del. Op. Att’y Gen.* 03-IB21, 2003 WL 22669566, at *2 (Oct. 6, 2003).