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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB20

May 22, 2024

VIA EMAIL

Joshua Morgan, Sr.
jamsr1978@gmail.com

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

Dear Mr. Morgan:

We write regarding your correspondence alleging that the Division of the Delaware State Police (“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 July 7, 2023, you submitted a FOIA request to the DSP for records related to an incident in January 2023, including video footage from the body camera, dash camera, and helicopter camera and communications between the police officer and dispatch. The DSP acknowledged receipt of your request via an email dated August 10, 2023, stating your request had been sent for legal review. You filed this Petition in April 2024, providing a copy of your request and the DSP’s acknowledgement of receipt, which you allege denies the requested information for your case.

The DSP, through its legal counsel, replied to the Petition and provided the affidavit of its FOIA Coordinator, who attests that she served as the FOIA Coordinator during the relevant time. The DSP provided a copy of its response to your request dated August 10, 2023, which denied access to these records pursuant to 29 *Del. C.* § 10002(o)(3) and 29 *Del. C.* § 10002(o)(6). The FOIA Coordinator states under oath that on August 10, 2023, she “caused [this] response to the

FOIA request to be mailed.”¹ In addition, the DSP argues that responsive records to this request are exempt from FOIA, as the records and footage related to an incident with a police officer are part of the DSP’s investigatory files compiled for law enforcement purposes.

DISCUSSION

The public body has the burden of proof to justify its denial of access to records.² In certain circumstances, a sworn affidavit may be required to meet that burden.³ In this case, the Petition cites to the DSP’s acknowledgement of the request, arguing that you were denied access to the information. To prove that it did in fact respond, the DSP provided a copy of the response letter and a sworn statement from its FOIA Coordinator that this letter was mailed on August 10, 2023.⁴ As such, we find that the DSP did not violate FOIA by failing to respond.

In addition, the DSP asserts that it appropriately invoked the investigatory files exemption in Section 10002(o)(3), 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.” We agree and find no violation in this regard. The DSP’s denial of these records under the investigatory files exemption is proper, as these records involve a law enforcement encounter precipitating a police investigation and are exempt on their face.⁵

¹ Response.

² 29 *Del. C.* § 10005(c).

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

⁴ *Id.* at 1010-11 (“Thus, the University is asking this Court to determine that it has met its burden of proof, fully resolving the dispute, based solely on these factual representations. But the resolution of a legal action must rest on competent, reliable evidence. And the Court has held that when an attorney seeks to establish facts based on personal knowledge, those facts must be asserted under oath. A statement made under oath, like a sworn affidavit, will ensure that the court’s determination regarding the public body’s satisfaction of the burden of proof is based on competent evidence.”).

⁵ *Del. Op. Att’y Gen.* 24-IB11, 2024 WL 1132324, at *2 (Feb. 23, 2024) (“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).”).

CONCLUSION

Accordingly, 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
Dorey L. Cole, Deputy Attorney General