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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB23

June 25, 2024

VIA EMAIL

Hayley J. Reese
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RE: FOIA Petition Regarding the Delaware Department of State

Dear Ms. Reese:

We write regarding your correspondence alleging that the Delaware Department of State 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 Department did not violate FOIA by denying access to the requested records pursuant to 29 *Del. C.* § 10002(o)(6).

BACKGROUND

The Department of State conducts a voluntary disclosure program, in which an entity may enroll voluntarily or, after the Department’s research of nonpublic information, be invited by the Department to enroll.¹ The Department’s invitation gives two options: enrollment in the voluntary disclosure program or an unclaimed property examination conducted by the Department of Finance.²

¹ 12 *Del. C.* § 1173; Response.

² *Id.*

On April 5, 2024, you submitted a FOIA request for the following records:

1. All notifications by the Delaware Secretary of State referring and/or relating to the opportunity, authority, ability, and/or eligibility for individuals and entities to enter into an unclaimed property voluntary disclosure agreement from January 1, 2023 through and including the date of this request;
2. All signed unclaimed property voluntary disclosure agreements received by the Delaware Secretary of State from January 1, 2023 through and including the date of this request; and
3. A list of all individuals and entities, together with contact names and addresses, to whom the Delaware Secretary of State intends to send notifications referring and/or relating to the opportunity to enter into an unclaimed property voluntary disclosure agreement and/or an invitation to participate in the unclaimed property voluntary disclosure program from the date of this request through and including December 31, 2024.³

In response, the Department denied access to these requested records under 29 *Del. C.* § 10002(o)(6), which exempts “any records specifically exempted from public disclosure by statute or common law.” The Department relied on 12 *Del. C.* §§ 1130 et seq., 1173, 1174 and 1189 for its denial. This Petition followed.

The Petition alleges that this denial was inappropriate under FOIA. You contend that 12 *Del. C.* § 1173 does not refer to FOIA or codify these documents as confidential or exempt from disclosure; instead, this section merely authorizes the Secretary of the Department to enter into unclaimed property voluntary disclosure agreements. You argue that Section 1174 is inapplicable to your requests, as it applies to records obtained by the Secretary “in the course of” a voluntary disclosure under Section 1173.⁴ As the first and third items in your request predate participation in a voluntary disclosure program, you claim that these records are not obtained in the course of a voluntary disclosure, and the second item does not seek records obtained by the Secretary in the course of a voluntary disclosure, only copies of the agreement evidencing consent to the program. You maintain that the requested records do not fall within the class of documents protected by Section 1174, and that the fact that Section 1174(3) and (4) allow disclosures to entities outside of the State of Delaware is counter to the Department’s assertion of the documents’ confidentiality. Sharing these documents outside the State, you allege, would violate any protections under Section 1189 and “give rise to concerns of waiver, estoppel, equal protection under the law, and a violation of 12 *Del. C.* § 1189.”⁵ You assert that Section 1189 does not grant confidentiality to these requested documents, as the request does not seek information concerning the amount of the

³ Petition, Ex. 1.

⁴ *Id.*, p. 2.

⁵ *Id.*

unclaimed property or the owner of the unclaimed property. Additionally, you argue that the Department's reliance on Section 10002(o)(6) is without merit, as you have demonstrated the underlying sections are inapplicable and the Department failed to articulate another basis under this exemption for withholding the records. Finally, you speculate that the documents may be otherwise publicly disseminated through unofficial channels or in response to FOIA requests, further undermining the Department's confidentiality claims.

The Department, through its legal counsel, replied to this Petition ("Response") and included the affidavit of the Department's Administrator for the voluntary disclosure of abandoned or unclaimed property. The Department contends that its response was proper. The Department asserts that due to the sensitive nature of Delaware legal entities' corporate and financial data, information compiled in connection with the voluntary disclosure program and the Department of Finance's examination process is strictly confidential and exempt under FOIA. The Department states that the requested records are confidential pursuant to the identified statutes. The Department states that in the Petition, a key term is excluded from the statement of Section 1174, clarifying that this section applies to records, including work papers, compiled by the Secretary "in the course of conducting . . . a voluntary disclosure under § 1173 of this title."⁶ The Department asserts that it uses nonpublic information to research potential enrollees and sends a document resulting in enrollment in either the voluntary disclosure program or the Department of Finance's examination and thus, is conducting a voluntary disclosure under Section 1173 within the meaning of Section 1174. As Section 1173(b) authorizes the Department to request participation in the program, the work papers compiled to identify enrollees are necessary components to conduct a Section 1173(b) voluntary disclosure.

The Department alleges that this request seeks these records for personal or commercial purposes, which is not consistent with FOIA's objectives. The Department asserts that Section 1189 makes it unlawful for the Department to disclose any supporting documentation related to any voluntary disclosure agreement, meaning it cannot lawfully provide responsive records to these requests. The Department states that Section 1174's permissions for disclosure to another jurisdiction are limited to disclosures with the holder's consent pursuant to Section 1174(3) and when the other jurisdictions maintain confidentiality in Section 1174(4). According to the Department's affidavit, the requested records have not been disclosed to another jurisdiction, nor have they been publicly disseminated.

DISCUSSION

The public body has the burden of proof to justify its denial of access to records.⁷ In certain circumstances, a sworn affidavit may be required to meet that burden.⁸ In this case, the Department contends that the requested records are exempt from disclosure by statute pursuant to

⁶ Response, p. 4.

⁷ 29 *Del. C.* § 10005(c).

⁸ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

29 Del. C. § 10002(o)(6). Section 1174 declares the following records are not “public records” under FOIA:

All of the following apply to records obtained and records, including work papers, compiled by the State Escheator or the Secretary of State in the course of conducting an examination under § 1171 of this title or a voluntary disclosure under § 1173 of this title: (1) The records are subject to the confidentiality and security provisions of § 1189 of this title and are not a “public record” under Chapter 100 of Title 29.

Records obtained and records, including work papers, compiled by the Secretary in the course of conducting a voluntary disclosure under Section 1173 are not public records. This request seeks notifications by the Secretary relating to the opportunity, authority, or eligibility to enter the voluntary disclosure program, signed voluntary disclosure agreements received by the Secretary, and the list of companies and individuals, with contact information, to whom the Secretary intends to send notifications regarding the opportunity or an invitation to participate in the program. These records are part of conducting the voluntary disclosure. Based on these statutory provisions and the Department’s Response, we determine that the requested records are within the scope of Section 1174 and are statutorily exempt from disclosure under FOIA pursuant to 29 Del. C. § 10002(o)(6). Thus, we find no violation of FOIA occurred.

CONCLUSION

Accordingly, we determine that the Department 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: Laura L. Gerard, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General