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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB27

July 12, 2024

VIA EMAIL

Casey Hall
95caseyhall@gmail.com

RE: FOIA Petition Regarding the Delaware Department of Natural Resources and Environmental Control

Dear Casey Hall:

We write regarding your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) 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 DNREC did not violate FOIA by denying access to the requested records.

BACKGROUND

On May 28 2024, you submitted a request to DNREC for “all body cam footage and dispatch/[r]adio recordings” from a certain DNREC Fish and Wildlife officer “for the following date 5/25/2024 from time 1530-1800” and any written reports in that timeframe regarding the ticket number assigned to this incident. You also sought a copy of the body camera footage of this officer’s partner that you noted was on the vessel at this time. DNREC denied access to these requested records under 29 *Del. C.* § 10002(o)(3), which exempts “investigatory 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” and 29 *Del. C.* § 10002(o)(9) for “any records pertaining to pending or potential litigation which are not records of any court.” In addition, DNREC asserted 29 *Del. C.* § 10002(o)(6), which exempts any records that are statutorily excluded from public disclosure,

because the records are exempt from disclosure based on 1 Del. Admin. C. § 801-26.16. This Petition followed, requesting review of DNREC’s denial of this request.

DNREC, through its legal counsel, replied to this Petition (“Response”), arguing that its response was proper. DNREC states that this request is for records related to an incident in which a DNREC Fish and Wildlife officer issued a citation. DNREC contends that these investigatory records are exempt under Section 10002(o)(3), as the DNREC officers are law enforcement officers with police powers similar to other law enforcement agencies, such as the Delaware State Police.

DISCUSSION

The public body has the burden of proof to justify its denial of access to records.¹ In certain circumstances, a sworn affidavit may be required to meet that burden.² However, when a request is clear on its face that the records sought are not subject to FOIA, a public body need not state under oath its efforts to determine whether there are responsive records to meet its burden.³ In this case, DNREC contends that the requested records are exempt from disclosure pursuant to 29 *Del. C.* § 10002(o)(3). Section 10002(o)(3) pertains to “investigatory files compiled for civil or criminal law-enforcement purposes.” DNREC’s law enforcement officers must “see to the enforcement of all laws, regulations, rules, permits, licenses, orders, and program requirements of” DNREC and “have police powers similar to those of constables, peace officers, and other police officers when enforcing the laws, regulations, rules, permits, licenses, orders, and program requirements of” DNREC.⁴ This request is for records arising from an incident in which these law enforcement officers responded, necessitating an investigation; these investigatory records are exempt on their face.⁵ We find that no violation occurred, as DNREC appropriately denied access to these records pursuant to the investigatory files exemption.

¹ 29 *Del. C.* § 10005(c).

² *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

³ *Id.* at 1012 (“Thus, we hold that unless 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 there are responsive records and the results of those efforts.”).

⁴ 29 *Del. C.* § 8003A.

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 [Delaware State Police] 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 DNREC did not violate FOIA by denying access to the requested records.

Very truly yours,

A handwritten signature in black ink, appearing to read "DL", is written over a horizontal line.

Daniel Logan
Chief Deputy Attorney General

cc: Devera B. Scott, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General