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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB52

December 20, 2024

VIA EMAIL

Dwayne Bensing, Legal Director
American Civil Liberties Union of Delaware
dbensing@aclu-de.org

RE: FOIA Petition Regarding the Delaware Department of Correction

Dear Director Bensing:

We write regarding your correspondence, submitted on behalf of the American Civil Liberties Union of Delaware (“ACLU”) alleging that the Delaware Department of Correction (“DOC”) 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 DOC did not violate FOIA by denying access to the requested information.

BACKGROUND

On September 19, 2024, you submitted the following request to the DOC on behalf of the ACLU:

1. The number of people currently incarcerated within DOC Level V facilities aged 76 and older as of September 19, 2024.
2. For each person identified in request line 1, please provide their name, Delaware State Bureau of Identification number, and date of incarceration.

3. The number of people currently incarcerated within DOC Level V facilities aged 71-75 as of September 19, 2024.
4. For each person identified in request line 3, please provide their name, Delaware State Bureau of Identification number, and date of incarceration.
5. The number of people currently incarcerated within DOC Level V facilities aged 66-70 as of September 19, 2024.
6. For each person identified in request line 5, please provide their name, Delaware State Bureau of Identification number, and date of incarceration.
7. The number of people currently incarcerated within DOC Level V facilities aged 61-65 as of September 19, 2024.
8. For each person identified in request line 7, please provide their name, Delaware State Bureau of Identification number, and date of incarceration.¹

The DOC responded on October 11, 2024 by providing the total number of incarcerated people within the specified age ranges, for items 1, 3, 5, and 7; the remainder of the items were denied because the DOC “does not provide personal identification information to parties outside of the department.”² The ACLU followed up, asking for the DOC to meet its burden under 29 *Del. C.* § 10005(c) to justify denying the names, State Bureau Identification (“SBI”) numbers, and dates of incarceration. The DOC responded, specifying that the requested personal information is exempt from discovery and not considered public records under Section 10002(o)(4) and (6). In addition, the DOC cited 11 *Del. C.* § 4322(a), 11 *Del. C.* § 8501, and 11 *Del. C.* § 8513, as prohibiting disclosure of this information. This Petition followed.

In the Petition, you argue that the DOC’s response is improper. First, you contend that Section 10002(o)(4) which exempts “criminal files and records, the disclosure of which would constitute an invasion of personal privacy” only applies to the record or history of a person’s contacts with the criminal justice system, which you believe does not include the names, SBI numbers and incarceration dates.³ With respect to 11 *Del. C.* § 4322(a), you allege that the protected categories in that provision, which include the presentence report, pre-parole report, supervision history, and all other cases records obtained in the discharge of official duty by any

¹ Petition.

² *Id.*

³ *Id.*

member or employee of the DOC, do not apply to the information you seek.⁴ Further, you allege that 11 *Del. C.* § 8513 is also inapplicable, as this provision prohibits the dissemination of criminal history record information, and you do not agree that the requested information fits within the definition of “criminal history record information.”

The DOC, through its legal counsel, replied to your Petition and attached the affidavit of its Chief of Planning. The Chief attests to her familiarity with the DOC’s electronic database and states that when a person is incarcerated, that person’s record in the DOC system is populated with information from the courts, the Delaware Criminal Justice Information System, and the person’s intake interview. The DOC argues that the exemption for criminal records and files in Section 10002(o)(4) applies, and limiting the definition of “criminal record” to criminal history is overly narrow; further, if a criminal record excludes the names, SBI numbers, and incarceration dates, such criminal history would have no utility. The DOC asserts that the requested information invades inmates’ privacy, because release of this information will intrude on the inmate’s physical solitude and expose inmates to unsolicited mail and communications. The DOC notes that you did not assert the need for the personally identifying information. Additionally, the DOC contends that consistent with Attorney General Opinion No. 19-IB26, 11 *Del. C.* § 4322(a) protects this information about inmates from disclosure. The DOC also asserts that 11 *Del. C.* § 8502 states that “criminal history record information” includes identifiable descriptors, and these requests for the inmate names, SBI numbers, and incarceration dates, are such descriptors and not disclosable under Section 8513(d).

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁵ The public body has the burden of proof to justify its denial of access to records.⁶ In certain circumstances, a sworn affidavit may be required to meet that burden.⁷

In this case, the ACLU seeks information about the inmates housed at Level V facilities, specifically their name, SBI numbers, and incarceration dates. Pursuant to 29 *Del. C.* § 10002(o)(6), records specifically exempted from public disclosure by statute or common law are not considered “public records.” To support denying the request under Section 10002(o)(6), the DOC invokes 11 *Del. C.* § 4322(a), which states, in part, as follows:

⁴ *Id.*

⁵ 29 *Del. C.* § 10003(a).

⁶ 29 *Del. C.* § 10005(c).

⁷ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

The presentence report (other than a presentence report prepared for the Superior Court or the Court of Common Pleas), the preparole report, the supervision history and all other case records obtained in the discharge of official duty by any member or employee of the Department shall be privileged and shall not be disclosed directly or indirectly to anyone other than the courts as defined in § 4302 of this title, the Board of Parole, the Board of Pardons, the Attorney General and the Deputies Attorney General or others entitled by this chapter to receive such information; except that the court or Board of Pardons may, in its discretion, permit the inspection of the report or parts thereof by the offender or the offender's attorney or other persons who in the judgment of the court or Board of Pardons have a proper interest therein, whenever the best interest of the State or welfare of a particular defendant or person makes such action desirable or helpful.⁸

The DOC's Chief of Planning attests that the DOC's electronic database is populated by records of the courts, Delaware Criminal Justice Information System, and the inmate's intake interview, and "the information is validated and exchanged and either becomes the offender's criminal record or enhances the criminal record stored and maintained by the State Bureau of Identification."⁹ Section 4322(a) prohibits the DOC's disclosure of supervision history and case records obtained by the DOC members or employees in their official capacity, unless such disclosure meets one of the designated exceptions. We determine that this statute covering supervision history and case records applies to this inmate information sought here.¹⁰ As you have not made any assertions or provided a basis to conclude that any of Section 4322(a)'s exclusions apply to this matter, we find that the requested information was appropriately withheld pursuant to this statute.

Additionally, the DOC relies on 11 *Del. C.* § 8513(d), which governs the dissemination of criminal history record information collected by the State Bureau of Identification. With limited exceptions for law enforcement, this provision mandates that any person or agency, other than the State Bureau of Identification, is prohibited from disclosing "criminal history record information," which includes "information collected by state or federal criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations or other formal criminal charges and any disposition arising therefrom, sentencing, correctional supervision and release."¹¹ Inmate names, SBI numbers, and incarceration dates qualify as identifiable descriptors and information under the definition of criminal history record

⁸ 11 *Del. C.* § 4322(a).

⁹ Response, Aff. of the DOC Chief of Planning dated Nov. 26, 2024.

¹⁰ *See Del. Op. Att'y Gen.* 19-IB26, 2019 WL 4538312, at *2 (May 28, 2019).

¹¹ 11 *Del. C.* §§ 8502(4), 8513(d).

information. As such, we find that the DOC sufficiently demonstrated its basis for denying access to the requested information.

CONCLUSION

For the foregoing reasons, we determine that the DOC did not violate FOIA as alleged in responding to your request.

Very truly yours,



Daniel Logan
Chief Deputy Attorney General

cc: Michael H. Tipton, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General