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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB14

February 28, 2025

VIA EMAIL

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

Dear Mr. O’Byrne:

We write in response to your correspondence alleging that the Delaware State Police, Department of Safety and Homeland Security (“DSP”) violated Delaware’s 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 of whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we determine that the DSP did not violate FOIA by denying access to the requested records.

BACKGROUND

On January 9, 2025, you submitted a FOIA request for “any photos and videos including body camera and dashboard camera footage of all responding officers” from a vehicle accident that occurred on July 22, 2023. The request further noted you have been retained to represent a party involved in this accident, and you are seeking the records for use in a lawsuit. The DSP denied this request, citing three FOIA exemptions: 29 *Del. C.* § 10002(o)(3), 29 *Del. C.* § 10002(o)(4), and 29 *Del. C.* § 10002(o)(9). This Petition followed.

In the Petition, you argue that the cited exemptions do not apply, and these types of records, body camera footage, dashboard footage, and photographs, are “routinely accessible to the

public.”¹ You contend that Section 10002(o)(3), which exempts criminal investigatory files, does not apply, because this request is not for an internal police report or confidential records, but rather “objective documentation of an incident that already resulted in citations,” and disclosing the requested video footage and photographs would not interfere with any law enforcement activities, as no investigation is pending.² You argue that Section 10002(o)(4) is similarly inapposite, because this exemption concerns criminal files, the disclosure of which would constitute an invasion of personal privacy, and the requested records do not contain private or confidential criminal records; they are of public interactions between officers and civilians. Finally, you contend that Section 10002(o)(9) is not controlling, as it is intended to protect attorney work product prepared for litigation, and these photographs and video footage were created in the ordinary course of law enforcement activity, not for the purpose of litigation.

On February 7, 2025, the DSP, through its legal counsel, replied to the Petition (“Response”). The Response included the affidavit of the Community Relations Officer, who attests that the request “seeks photographs and video in the possession of DSP that pertain to an automobile accident that occurred on July 22, 2023,” which resulted in several violations under Delaware Code, and these citations are the subject of a pending case in the Justice of the Peace Court. The DSP argues that the records pertaining to traffic and criminal incidents, including video footage taken by law enforcement, fall under the exemption for investigatory files. The DSP points out that although the incident that is the subject of the request is not closed, the investigatory files exemption still applies to closed investigations. In addition, the DSP maintains that as the requested records pertain to an ongoing criminal traffic matter with the State, the DSP also properly objected to the request based on the litigation exception. Finally, the DSP asserts that the providing footage of a pending criminal traffic matter would run afoul of Section 10002(o)(4), which prohibits the disclosure of criminal files.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.³ The public body has the burden of proof to justify its denial of access to records.⁴ In certain circumstances, a sworn affidavit may be required to meet that burden.⁵

¹ Petition.

² *Id.*

³ 29 *Del. C.* § 10003(a).

⁴ 29 *Del. C.* § 10005(c).

⁵ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

In its response to this request, the DSP invoked 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.” The sworn statements indicate that this law enforcement investigation arose from an automobile accident. The DSP’s denial of these photographs and video footage under the investigatory files exemption is proper, as these records involve a law enforcement encounter precipitating a police investigation.⁶ Whether the investigation is closed is immaterial to this analysis.⁷

Section 10002(o)(4) is also applicable here to the extent you seek these records from the criminal prosecution files. This exemption, in part, states as follows:

Criminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy. Any person may, upon proof of identity, obtain a copy of the person’s personal criminal record. All other criminal records and files are closed to public scrutiny.⁸

This exemption does not require a public body to release the records in a criminal prosecution file, and the Petition’s assertion that this disclosure does not constitute an invasion of personal privacy is not germane to the analysis. “While any person may obtain a copy of his/her criminal record, subject only to an agency’s authority to withhold certain information contained in the criminal record, ‘criminal files’ are closed; there is no exception in the statute.”⁹ Hence, Section 10002(o)(4) permits withholding these records that are in the criminal file.

Finally, the Petition claims that these records are not subject to the pending litigation exemption, as they were created for law enforcement purposes and the pending litigation exemption is intended to exempt attorney work product. However, the scope of the pending litigation exemption is not so narrow. Under FOIA, “records pertaining to pending or potential litigation which are not records of any court” are excluded from the definition of “public record.”¹⁰

⁶ *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).”).

⁷ The investigatory files exemption continues to apply after an investigation is closed. *News-Journal Co. v. Billingsley*, 1980 WL 3043, at *2-3 (Del. Ch. Nov. 20, 1980) (determining that the investigatory files exemption attaches as soon as a public body is made aware of a potential issue and the exemption survives after the investigation is completed).

⁸ 29 *Del. C.* § 10002(o)(4).

⁹ *Del. Op. Att’y Gen.* 10-IB13, 2010 WL 4154565, at *1 (Oct. 8, 2010) (citation omitted).

¹⁰ 29 *Del. C.* § 10002(o)(9).


“[W]hen parties to litigation against a public body seek information relating to the litigation, they are not doing so to advance ‘the public’s right to know,’ but rather to advance their own personal stake in the litigation.”¹¹ “Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the court’s rules of procedure.”¹² “And the legislature has made it clear that the Act is not intended to supplant, nor even to augment, the courts’ rules of discovery.”¹³

To determine if the pending litigation exemption applies, we must consider whether litigation is pending and whether the records that the requesting party seeks pertain to that pending litigation.¹⁴ In this case, the DSP satisfied both prongs. The affidavit of the Community Relations Officer makes clear that litigation is pending, and the requested photographs and footage pertain to the pending litigation. As such, we also find that these records are also exempt under Section 10002(o)(9).

CONCLUSION

For the foregoing reasons, we conclude that the DSP did not violate FOIA by denying access to the requested records.

Very truly yours,



Daniel Logan
Chief Deputy Attorney General

cc: Joseph C. Handlon, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

¹¹ *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016) (citation omitted).

¹² *Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003) (citation omitted).

¹³ *Office of the Pub. Defender v. Del. State Police*, 2003 WL 1769758, at *3 (Del. Super. Mar. 31, 2003).

¹⁴ *Del. Op. Att’y Gen.* 21-IB02, 2021 WL 559557, at *2 (Jan. 21, 2021) (“[W]e believe that the application of this exemption should be limited to determining whether litigation is pending and whether the records that the requesting party seeks pertain to that pending litigation.”); *see also Del. Op. Att’y Gen.* 21-IB20, 2021 WL 4351857, at *2-3 (Sept. 14, 2021).