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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB17

March 6, 2025

VIA EMAIL

Samuel Smith
samuelsmithjr@hotmail.com

RE: FOIA Petition Regarding the City of Newark

Dear Mr. Smith:

We write in response to your correspondence, alleging that the City of Newark violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA"). We treat this 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. As discussed more fully herein, we determine that the City did not violate FOIA by denying access to the requested records.

BACKGROUND

On January 8, 2025, you submitted a FOIA request to the City's Police Department for body camera footage of your interaction with police officers and the 911 call audio related to this incident. The City denied your request the following day, citing the investigatory files exemption in 29 *Del. C.* § 10002(o)(3). On January 28, 2025, you submitted a revised request seeking only the body camera footage. This request was also denied under the same rationale. This Petition followed.

The Petition alleges that the records requested pertain only to you and the officers, not to any third party, and the investigatory files exemption does not apply because you believe "there originally wasn't a crime committed nor was there an investigation."¹

¹ Petition.

The City, through its legal counsel, replied to the Petition and enclosed the affidavit of the Public Safety Answering Point and Newark Police Records Manager (“Response”), who attests that the Response is true and correct to the best of his knowledge. The City states that the police officers responded to a call regarding suspicious activity, and this led to the interaction with the officers. As the requested body camera footage and audio for the call constitute investigatory files on their face, the City asserts that these records are exempt under the Section 10002(o)(3).

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 FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁴ However, under Section 10002(o)(3), FOIA exempts from disclosure “[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.”⁵

The City’s Response was submitted under oath and demonstrates that the requested records are part of the law enforcement investigation arising from the call and interactions with the City’s police officers. “Delaware courts have made clear that, for purposes of FOIA, the investigatory exemption attaches as soon as an agency is first made aware of a potential issue.”⁶ As such, we find no violation occurred in denying access to the requested records under Section 10002(o)(3).⁷

² 29 *Del. C.* § 10005(c).

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

⁴ 29 *Del. C.* § 10003(a).

⁵ 29 *Del. C.* § 10002(o)(3).

⁶ *Del. Op. Att’y Gen.* 17-IB05, 2017 WL 1317847, at *3 (Mar. 10, 2017) (citing *News-Journal Co. v. Billingsley*, 1980 WL 3043, at *3 (Del. Ch. Nov. 20, 1980)).

⁷ *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

For the reasons set forth above, we conclude that the City did not violate FOIA by denying access to the requested records.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Paul E. Bilodeau, City Solicitor