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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB31

June 4, 2025

VIA EMAIL

Tom Somers, Jr.
tom.somers1@icloud.com

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

Dear Mr. Somers:

We write in response to your correspondence alleging violations of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA"). Your first correspondence alleged that the Delaware Department of Correction ("DOC") violated FOIA by denying two requests for records. Shortly thereafter, you submitted additional correspondence alleging that the Delaware State Police, Department of Safety and Homeland Security ("DSP") also violated FOIA by denying a request for records. We treat this correspondence as a combined 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 DOC and DSP did not violate FOIA, as the requested records are exempt from disclosure under the pending litigation exemption, and neither the additional specificity nor the index you requested were required to be included with the public bodies' responses to the requests.

BACKGROUND

You sent three requests to the DOC and DSP, referring to an encounter you had with law enforcement officers of the DSP and DOC on March 19, 2025. A day after this incident, you submitted the following request to the DOC:

1. Any reports, communications, or dispatch logs related to probation officers responding to this [March 19, 2025] incident.
2. The name and badge number of the probation officer who responded.
3. Any written documentation regarding probation's involvement, including notes about my restitution status, payments, or legal obligations discussed during the encounter.
4. Policies and procedures regarding when probation officers are called to a scene by law enforcement officers.¹

In response, the DOC supplied the name of the probation officer that responded to this incident and stated that the officer notes and the DOC policies are protected under Title 11, Chapter 43, Subchapter II of the Delaware Code and it had no additional information to provide regarding the remaining items in the request.

On April 18, 2025, you submitted a second request to the DOC:

1. Probation Officer Notes, Reports, and Internal Communications - Any and all internal notes, incident reports, memoranda, and emails created by or involving Probation Officer . . . regarding the March 19, 2025 incident. This includes digital or handwritten notes, official or unofficial communications, and internal administrative notations about Tom Somers Jr.
2. Records Retention Policies - Probation Division - All current retention policies or schedules related to probation officer notes, incident documentation, email communications, and administrative reports. These policies should reflect standards in effect as of March 2025.
3. Chain of Custody and Access Logs - Probation Records - Any chain-of-custody records, user access logs, or modification history associated with any files, documents, or digital entries concerning the March 19, 2025 incident and my probation file.
4. Probation FOIA Request Log - A copy of the FOIA request log maintained by the Probation Division from January 1, 2025 to the present, showing the subject, date, response status, and reason for denial (if any) for each FOIA request received.
5. Officer Assignment or Duty Logs - Probation Officer - Any assignment logs or internal rosters showing the duty status, supervision assignment, or schedule of Probation Officer . . . on or around March 19, 2025.
6. Legal Justification for Prior Denials - For each previously denied FOIA request submitted to your agency, please provide the specific exemption(s) under 29 *Del. C.* §10002 or §10003 used to withhold

¹ DOC Response, Ex. A.

the records, including citation, exemption title, and written explanation.

7. Body-Worn Camera Footage Involving Probation Officers - To the extent any probation officers were equipped with or had access to body-worn camera equipment, I hereby request copies of any body-worn camera footage related to the March 19, 2025 incident. This includes any audiovisual recording, regardless of whether it was created by probation officers directly or in collaboration with law enforcement. If your agency does not maintain or operate body-worn cameras, please confirm this in writing.²

By letter dated April 14, 2025 to the DOC, you advised that you “were preparing to file a federal civil rights lawsuit regarding events that occurred during [your] encounter on March 19, 2025, involving [the responding probation officer], during a stop initiated by [an officer] of the Delaware State Police” and requested the DOC’s preservation of evidence.³ The DOC denied access to the records sought in the April 18, 2025 request pursuant to the pending or potential litigation exemption in Section 10002(o)(9).

On April 18, 2025, you submitted the following request to the DSP:

1. Metadata and Audit Logs - Body and Dash Camera Footage - All metadata, access logs, audit trails, and retention records for any body-worn or dash camera footage involving [the DSP officer] or any officer/unit involved in the March 19, 2025, incident. . . .
2. Record Retention Policies - All current retention schedules or policies in effect as of March 2025 regarding the following categories: (a) body-worn and dash camera footage; (b) internal emails and memos; (c) officer report documentation; (d) digital evidence; and (e) radio and dispatch communications.
3. Chain of Custody Documentation - Any and all chain-of-custody or access logs associated with the March 19, 2025 incident, including those for reports, digital recordings, emails, and other records maintained by your agency.
4. FOIA Request Log (Transparency Demand) - A full FOIA request log from January 1, 2025 to the present, identifying the subject of each request, the date received, response issued, and any statutory basis for denial.
5. Officer Duty Logs / Shift Assignment Records - Duty rosters, shift logs, or assignment sheets for all personnel assigned to [relevant barracks or unit] on March 19, 2025 including the [DSP officer] if applicable.

² *Id.*, Ex. C.

³ *Id.*, Ex. D.

6. Legal Justification for Prior Denials - For each previously denied FOIA request, provide the specific exemption(s) under 29 *Del. C.* 10002 or 10003 used to withhold the records, including statutory citation, exemption title, and explanation for application.
7. Re-issued Request for Previously Denied Records - This request reaffirms and formally re-submits the demand for access to the following records, previously denied without justification⁴

This request further states “[t]hese materials are central to a pending federal civil rights claim and are not exempt under 29 *Del. C.* § 10002.”⁵ On April 29, 2025, the DSP denied access to these records under the investigatory files exemption in Section 10002(o)(3) and the pending or potential litigation exemption in Section 10002(o)(9). These Petitions followed.

The DOC Petition alleges that the DOC’s response to the March 20, 2025 request was improper. You believe that these records should be produced as they are in the public interest and “fall squarely within the scope of public interest, particularly given their potential use in litigation concerning civil rights.”⁶ Additionally, you argue that the DOC’s assertion that probation officer notes are categorically exempt “lacks sufficient factual specificity” to meet FOIA.⁷ For the second request, you contend that the DOC’s invocation of the potential litigation exemption is improper, because the public body is required to show a clear connection between the specific documents withheld and a legitimate litigation strategy, and this litigation exemption cannot shield documents related to the actions of state officers during an on-duty encounter in a public setting. The DSP Petition alleges that the DSP should have included an index of withheld records with its response and that the metadata records, timestamp logs, retention policies, and FOIA access logs are not investigatory file records. Additionally, you contend that Section 10002(o)(9) is inapplicable when the public’s strong interest in transparency outweighs any claimed investigatory privilege.

The DOC, through its legal counsel, replied to the DOC Petition (“DOC Response”). The DOC asserts its denials were proper and included a copy of the letter requesting that the DOC preserve evidence as you are preparing to file a federal civil rights lawsuit. The DSP also responded to the Petition through its counsel (“DSP Response”). The DSP provides a copy of the May 7, 2025 complaint against the DSP and DOC filed in the U.S. District Court of Delaware.⁸ The complaint alleges that your civil rights were violated during the March 19, 2025 encounter with the DSP and DOC officers. You also allege that the DSP and DOC failed to respond to your

⁴ DSP Petition. The seventh item repeats a former request for four categories of records substantially similar to the March 20, 2025 request to the DOC.

⁵ *Id.*

⁶ DOC Petition.

⁷ *Id.*

⁸ DSP Response, Ex. B.

FOIA requests in good faith and obstructed your access to records, and you seek court relief for these allegations.

DISCUSSION

FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁹ The public body has the burden of proof to justify its denial of access to records.¹⁰

FOIA's central purpose is to "ensure governmental accountability by providing Delaware's citizens access to open meetings and meeting records of governmental or public bodies, as well as access to the public records of those entities."¹¹ Under FOIA, "records pertaining to pending or potential litigation which are not records of any court" are excluded from the definition of "public record."¹² "[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."¹³ "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."¹⁴ "And the legislature has made it clear that the Act is not intended to supplant, nor even to augment, the courts' rules of discovery."¹⁵

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.¹⁶ In this case, this factual record makes clear that litigation is now pending; the

⁹ 29 Del. C. § 10003(a).

¹⁰ 29 Del. C. § 10005(c).

¹¹ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

¹² 29 Del. C. § 10002(o)(9).

¹³ *Grimaldi v. New Castle Cnty.*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016) (citation omitted).

¹⁴ *Mell v. New Castle Cnty.*, 835 A.2d 141, 147 (Del. Super. 2003) (citation omitted).

¹⁵ *Office of the Pub. Defender v. Del. State Police*, 2003 WL 1769758, at *3 (Del. Super. Mar. 31, 2003).

¹⁶ *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).

requested records relate to that litigation; and these requests are intended to advance your interest in this pending litigation. Accordingly, we find that the requested records are exempt under Section 10002(o)(9).¹⁷

In addition, the Petitions allege that the responses from the public bodies were not sufficiently factually specific and did not include an index. The FOIA statute expressly provides that a public body must provide the reasons for the denial but a “public body shall not be required to provide an index, or any other compilation, as to each record or part of a record denied.”¹⁸ The public bodies in this case provided reasons for denial including statutory citations. We find no violation on these bases.

CONCLUSION

Based on the foregoing, we conclude that the DOC and DSP did not violate FOIA, as the requested records are exempt from disclosure under the pending litigation exemption, and neither the additional specificity nor the index you requested were required to be included with the public bodies’ responses to the requests.

Very truly yours,



Daniel Logan
Chief Deputy Attorney General

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

¹⁷ *Grimaldi*, 2016 WL 4411329, at *9-10 (dismissing the plaintiff’s claim that the public body violated FOIA by denying a pre-litigation request for a resume because this requested resume was exempt from disclosure under the pending litigation exemption); *Del. Op. Att’y Gen.* 16-IB15, 2016 WL 3462346, at *4 (Jun. 10, 2016) (applying the test for pending litigation exemption, instead of the test for potential litigation, when the petitioner filed suit not long after filing the petition with this Office).

¹⁸ 29 *Del. C.* § 10003(h)(2).