



**MATTHEW P. DENN**  
ATTORNEY GENERAL

**DEPARTMENT OF JUSTICE**  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX: (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX: (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX: (302) 577-6499

**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 17-IB13**

**July 6, 2017**

**VIA EMAIL**

Nicholas Georgalis  
ngeorgalis@wowway.com

**RE: September 26, 2016 FOIA Correspondence Regarding the Delaware Association of Professional Engineers**

Dear Mr. Georgalis:

The Delaware Department of Justice (“DOJ”) received your correspondence, dated September 26, 2016, seeking a determination as to whether the Delaware Association of Professional Engineers (“DAPE”) violated the public records provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10006 (“FOIA”). I treat your correspondence as a petition for a determination pursuant to 29 *Del. C.* § 10005 (“Petition”).<sup>1</sup> Pursuant to our routine process in responding to petitions for determination under FOIA, we invited DAPE to submit a written response to the Petition. We received DAPE’s response to the Petition (“Response Letter”) on October 3, 2016. I have reviewed the Petition and the Response Letter. For the reasons set forth below, I conclude that DAPE did not violate FOIA as alleged in the Petition.

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<sup>1</sup> As noted by the United States Supreme Court in *McBurney v. Young*, 133 S.Ct. 1709 (2013), Delaware’s FOIA is a citizens-only statute. As such, and as this Office has previously noted, the protections afforded by Delaware’s FOIA are guaranteed only to Delaware citizens. *See Del. Op. Att’y Gen.* 16-IB20, 2016 WL 588776, at \*1 (Sept. 30, 2016), (“Because compliance with Delaware’s FOIA is mandatory only with respect to citizens of the State of Delaware, we conclude that [Office of the Delaware State Banking Commissioner] did not violate FOIA when it denied your July 23, 2015 request for records on the basis that you are not a Delaware citizen.”). Here, you have said nothing to contradict DAPE’s assertion that you are a resident of the State of Ohio. As such, while I have decided to issue a determination regarding the merits of your claim, I feel compelled to note that you may lack standing to avail yourself to the enforcement provisions contained in 29 *Del. C.* § 10005, including the petition process set forth in Section 10005(e).

## RELEVANT FACTS

On August 30, 2016, you submitted a FOIA request to DAPE for a list of registered professional engineers.<sup>2</sup> Specifically, you requested their first name, middle name, last name, suffix name, State, zip code, email address, status, and PE number.<sup>3</sup> You also requested that the file be provided “as an electronic text file in comma delimited format attached to an email response” to an email address that you provided.<sup>4</sup> That same day, DAPE’s Executive Director responded by referring you to the roster available on DAPE’s website.<sup>5</sup> Moments later, you responded that the list did not contain email addresses.<sup>6</sup> You cited *29 Del. C. § 10003(i)*, which concerns requests for email records, and stated that “email addresses are Public Records and must be disclosed upon request.”<sup>7</sup> DAPE’s Executive Director replied: “Email addresses are not public records.”<sup>8</sup> You again responded by citing to *29 Del. C. § 10003(i)*.<sup>9</sup>

## SUMMARY OF THE ARGUMENTS

In your Petition, you argued that DAPE violated FOIA by failing to provide you with the email addresses of registered professional engineers and by failing to provide you information in the requested format.<sup>10</sup>

In its Response Letter, DAPE argued that it was not required to comply with your FOIA request in the first instance because you are a resident of Ohio.<sup>11</sup> DAPE also noted that it “does not have the information in the format [you] demanded”<sup>12</sup> and FOIA does not require it to create records that do not

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<sup>2</sup> Petition at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Email from P. Abshagen to N. Georgalis dated August 30, 2016 (3:05 PM).

<sup>6</sup> Email from N. Georgalis to P. Abshagen dated August 30, 2016 (3:24 PM).

<sup>7</sup> *Id.*

<sup>8</sup> Petition at 2.

<sup>9</sup> Email from N. Georgalis to P. Abshagen dated August 30, 2016 (3:49 PM).

<sup>10</sup> Petition at 1.

<sup>11</sup> Response Letter at 1-2.

<sup>12</sup> *Id.* at 3.

exist, provide records in a specific format, or develop a program in order to comply with a FOIA request.<sup>13</sup> Finally, DAPE argued that the information is exempted from FOIA pursuant to 29 Del. C. § 10002(1)(6) and, more specifically, the common law right of privacy.<sup>14</sup>

### RELEVANT STATUTES

Pursuant to 29 Del. C. § 10003(a):

All public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body. Reasonable access to and reasonable facilities for copying of these records shall not be denied to any citizen.

FOIA defines a “public record” as “information of any kind, owned, made, used, retained, received, produced, drafted or otherwise compiled or collected, by any public body, relating in any way to public business or in any way of public interest, or in any way related to public purposes.”<sup>15</sup> Certain information, however, is exempt from this definition. For example, 29 Del. C. § 10002(1)(6) exempts “[a]ny records specifically exempted from public disclosure by statute or common law.”

### DISCUSSION

#### DAPE Did Not Violate FOIA by Denying Your Request for Email Addresses of Registered Professional Engineers

The Delaware Supreme Court has recognized a common law right of privacy.<sup>16</sup> However, this right is not absolute.<sup>17</sup> Rather, it is “qualified by the circumstances and also by the rights of others.”<sup>18</sup> In the FOIA context specifically, “we have determined that legitimate privacy claims under Delaware common law must be balanced against the competing need for access to information to further the accountability of government.”<sup>19</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 4.

<sup>15</sup> 29 Del. C. §10002(1).

<sup>16</sup> *See Barberi v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963).

<sup>17</sup> *Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 714 (Del. Super. 1967).

<sup>18</sup> *Id.*

<sup>19</sup> *Del. Op. Att’y Gen.* 13-IB03, 2013 WL 4239232, at \*3 (July 12, 2013) (citing *Del. Op. Att’y Gen.* 10-IB09, 2010 WL 3708657 (Sept. 2, 2010)).

In *Del. Op. Att’y Gen. 96-IB33*,<sup>20</sup> this Office recognized that “[i]n certain situations, the balance between a private right of informational privacy may be outweighed by the public interest in disclosure.”<sup>21</sup> We stated, however, that the balance would weigh in favor of disclosure “only if disclosure will contribute significantly to public understanding of the operations or activities of government, as opposed to the commercial interest of the requestor.”<sup>22</sup> Finding it “difficult to conceive of a situation in which the reason for requesting the names and addresses of business license holders would be for any purpose other than the commercial interest of the requestor,” we concluded that, “as a general rule, the names and addresses of the holders of business licenses are exempt from disclosure by a common law right of privacy.”<sup>23</sup>

Here, DAPE does not dispute that the right of privacy may be outweighed by the public interest in disclosure.<sup>24</sup> Rather, DAPE argues that your request is a clear attempt to further your private commercial interest and in no way contributes to the public understanding of the activities of the government.<sup>25</sup> DAPE notes that you are a developer and instructor of training courses, which you make available to professional engineers for a fee, and argues that you are using FOIA to obtain the email addresses of private citizens who meet the target audience of your product for sale.<sup>26</sup> As such, DAPE argues, your request “does not seek information pertaining to the operation of the Delaware Association of Professional Engineers or any other public body.”<sup>27</sup> Under these circumstances, DAPE contends, “the balance of equity weighs against requiring disclosure of e-mail addresses of private citizens who happen to be licensed by a Delaware public body.”<sup>28</sup> I agree.

Of course, I recognize that DAPE has already published the names and addresses of registered professional engineers. However, the fact that DAPE has chosen to publish this information has little bearing on the analysis of whether that information is a public record subject to FOIA. Indeed, the registered professional engineers have a clear privacy interest in avoiding public disclosure of their email addresses. Moreover, I am not persuaded that releasing this information would shed any light on the

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<sup>20</sup> 1996 WL 751553 (Dec. 11, 1996).

<sup>21</sup> *Id.* at \*1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Response Letter at 4.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.*

activities of the government or further any public interest.<sup>29</sup> Under these circumstances, and without regard to the apparent commercial purpose behind your request,<sup>30</sup> I conclude that the balance here weighs against disclosure of the email addresses of private citizens licensed by DAPE. That information is therefore exempted from FOIA's definition of "public record" pursuant to 29 *Del. C.* § 10002(l)(6) and, more specifically, the common law right of privacy. As the information is not a "public record," DAPE did not violate FOIA by denying your request for the email addresses of registered professional engineers, as alleged in your Petition.<sup>31</sup>

#### DAPE Did Not Violate FOIA by Failing to Provide Records in the Specific Format Requested

Specifically, you asked for each registered professional engineer's first name, middle name, last name, suffix name, State, zip code, email address, status, and PE number in a comma-delimited format. DAPE asserts that this "is a popular format for transferring data from one application to another."<sup>32</sup> Moreover, DAPE maintains that it "does not have the information in the format [you] demanded."<sup>33</sup>

This Office has previously noted that FOIA does not require a public body "to convert its electronic database from a relational database into CVS (comma separated) files," as that "would amount to the creation of a new public record."<sup>34</sup> As DAPE does not maintain the information in a comma-delimited format and is not required by FOIA to create a new public record in order to respond to a FOIA request, I

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<sup>29</sup> See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (holding that the applicability of FOIA will "turn on the nature of the requested document and its relationship to the basic purpose of [FOIA] to open agency action to the light of public scrutiny, rather than on the particular purpose for which the document is being requested").

<sup>30</sup> I note that DAPE argues that here, as in *Del. Op. Att'y Gen.* 96-IB33, your "FOIA request is a clear attempt to further the requestor's private commercial interests." Response Letter at 4. However, as the Delaware Superior Court has warned, "[g]enerally, the motives of the party requesting information from a 'public body' are not relevant to the determination of whether that party is entitled to access public records under FOIA." See *ACLU of Del. v. Danberg*, 2007 WL 901592, at \*3 (Del. Super. March 15, 2007). Moreover, this Office has warned that "[t]o inquire into a requestor's purpose would turn FOIA into a battleground for disputes" and "frustrate the state's purpose of 'easy access to public records.'" *Del. Op. Att'y Gen.* 06-IB09, 2006 WL 1779490, at \*5 (Apr. 25, 2006) (citing 29 *Del. C.* § 10001). As such, for purposes of this determination, I have given no weight to DAPE's argument regarding your purpose in seeking this information.

<sup>31</sup> I note that, in your email correspondence with DAPE's Executive Director, you cited to 29 *Del. C.* § 10003(i)(1) for the proposition that DAPE must provide you with the requested email addresses. However, you appear to have misinterpreted that provision, as it applies to the email records of public bodies and not, as you suggest, to the email addresses of private individuals.

<sup>32</sup> Response Letter at 2-3.

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Del. Op. Att'y Gen.* 06-IB17, 2006 WL 2630107, at \*7 (Aug. 21, 2006).

conclude that DAPE was not required to provide the information in that format per your request. As such, DAPE did not violate FOIA by directing you to a public webpage containing all public records responsive to your request.<sup>35</sup>

### CONCLUSION

As set forth above, email addresses of Delaware's registered professional engineers are protected by the common law right of privacy, as the individuals' privacy interest in that information is not outweighed by any competing public interest. Moreover, FOIA does not require a public body to convert existing information into a particular format, thereby creating a new public record, in order to respond to a FOIA request. As such, it is my determination that DAPE did not violate FOIA as alleged in the Petition. Your request that this Office file suit on your behalf is therefore denied.

Very truly yours,



Lakresha S. Roberts  
Chief Deputy Attorney General

cc: Catherine T. Hickey, Deputy Attorney General (via email)  
Patricia Davis, Deputy Attorney General (via email)  
Michelle E. Whalen, Deputy Attorney General (via email)

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<sup>35</sup> See *Del. Op. Att'y Gen.* 16-IB22, 2016 WL 6684919, at \*2 (Oct. 24, 2016) (finding no FOIA violation where public body directed requesting party to public webpage containing all responsive public records).