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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB34

July 20, 2018

VIA US MAIL

Mr. Peter Kostyshyn
James T. Vaughn Correctional Center
SBI# [REDACTED]
1181 Paddock Road
Smyrna, Delaware 19977

RE: FOIA Petition Regarding the Delaware Department of Insurance

Dear Mr. Kostyshyn:

We write in response to your correspondence received on July 2, 2018, alleging that the Delaware Department of Insurance (“DOI”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”).¹ We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. You allege that DOI has violated FOIA by not providing records in response to your June 18, 2018 request for various documents regarding the hiring process and selection of Deputy Insurance Commissioner Tanisha Merced. For the reasons set forth below, we conclude that the FOIA requires DOI under the specific facts of this case to provide a properly redacted copy of the Deputy Commissioner’s resume. We conclude that DOI has complied with FOIA with respect to all other aspects of your Petition.

PROCEDURAL BACKGROUND

On June 18, 2018, DOI received your FOIA records request which stated the following:

“This is a request for all public records, financial disclosures, date of employment, title, duties, background checks on Tanisha Merced, pursuant to 29 Del.C. Ch. 100, DE FOIA, including resumes, references, education, and any Delaware, City of Wilmington, New Castle County licenses,, permits from year 2008 to present, including a time stamped copy of this FOIA Request returned to each noted below, and including records of

¹ Chief Deputy Attorney General Aaron Goldstein is conflicted from consideration of this matter, and the Deputy State Solicitor has been appointed to handle this Petition.

interviewed applicants for this position, and resulting contract. Any records claiming confidentiality, we ask be blocked out and specifically explained, including all filings with DE Public Integrity Com'n."²

The DOI FOIA Coordinator responded to your request on June 19, 2018 informing you that your request was denied since the requested documents are exempt from FOIA pursuant to 29 *Del. C.* § 10002(1)(1), which exempts “personnel, medical, or pupil files, the disclosure of which would constitute an invasion of personal privacy, under this legislation or any State or federal law as it relates to personal privacy.”³

On July 2, 2018, our Office received your Petition, in which you appeal the denial of your FOIA request, stating that the information requested is not “confidential.”⁴ Additionally, you requested a time-stamped copy of your Petition, questioned whether the DOI FOIA Coordinator was inappropriately giving legal advice, and requested the “opinions in effect on DE FOIA interpretation.”⁵ Pursuant to our routine procedures, we invited DOI to provide a response to your Petition. In a letter dated July 11, 2018 (“Response”), DOI separately addressed each category of documents requested and the other arguments made in your Petition.

DISCUSSION

One of FOIA’s primary purposes is to grant citizens access to public records.⁶ However, not all public records are permitted to be disclosed. FOIA exempts several types of records from the definition of “public record,” including personnel files “the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy” and records “specifically exempted from public disclosure by statute or common law.”⁷

² See DOI Response. The Response includes a time-stamped copy of your FOIA request.

³ See Petition, Exhibit A.

⁴ See Petition.

⁵ See Petition. To the extent that any portion of your Petition is requesting this Office to consider matters outside of FOIA or is intended to serve a different purpose, please be advised that this Office’s role in the FOIA Petition process is to consider alleged FOIA violations, and this Opinion will solely address those matters. As a courtesy, please note that the following website posts the Attorney General FOIA Opinions: <https://opinions.attorneygeneral.delaware.gov/>.

⁶ 29 *Del. C.* § 10001.

⁷ 29 *Del. C.* § 10002(1)(1), (6).

Additionally, “FOIA does not require a public body to produce public records that do not exist.”⁸ Therefore, the “nonexistence of a record is a defense for the failure to produce or allow access to a record.”⁹ In determining whether this defense applies, we accept a public body’s representations regarding whether records exist for purposes of FOIA.¹⁰ FOIA does not require a public body to create a new document in response to a records request.¹¹ Each of DOI’s proposed exemption or reason for nondisclosure is considered below.

1. No responsive records

Deputy Attorney General Kathleen Makowski represented that DOI does not have responsive records for the following requests: 1) financial disclosures; 2) Delaware, City of Wilmington, and New Castle County licenses and permits from 2008 to the present; or 3) a resulting employment contract.¹² Accordingly, we accept these representations as true and find that DOI’s failure to provide these records does not violate FOIA.¹³

2. Publicly available records

Several requested records are also publicly available. In its Response, DOI identified specific citations to websites and the *Delaware Code* for the following requests: 1) date of employment; 2) title; and 3) duties of Deputy Commissioner Merced. These responses are sufficient under FOIA.¹⁴

⁸ *Del. Op. Att’y Gen.* 06-IB10, 2006 WL 1779491, at *2 (May 4, 2006); (quoting *Del. Op. Att’y Gen.* 05-IB19, 2005 WL 2334347, at *5 (Aug. 1, 2005) (quoting *Del. Op. Att’y Gen.* 96-IB28, 1996 WL 517455, at *2 (Aug. 8, 1996)).

⁹ *Id.*

¹⁰ *See Del. Op. Att’y Gen.* 15-IB14, 2015 WL 9701645, at *3 (Dec. 29, 2015); *citing Del. Op. Att’y Gen.* 07-IB21, 2007 WL 4733804, at *2 (Oct. 22, 2007) (quoting *Del. Op. Att’y Gen.* 05-IB19, 2005 WL 2334347, at *5 (Aug. 1, 2005)) (“It has been our historical practice to accept such representations from an attorney for the custodian of public records to determine that such documents do not exist for purposes of FOIA.”).

¹¹ *Del. Op. Att’y Gen.* 02-IB18, 2002 WL 32100328, at *3 (Aug. 19, 2002) (“[u]nder FOIA, a public body is not required to create a document that does not exist.”).

¹² *See* DOI Response at 2-3.

¹³ *See Del. Op. Att’y Gen.* 05-IB19, 2005 WL 2334347, at *5 (Aug. 1, 2005).

¹⁴ *See Del. Op. Att’y Gen.* 16-IB22, 2016 WL 6684919, at *2 (Oct. 24, 2016) (determining that the State Election Commission did not violate FOIA by identifying a publicly available website as the source for the petitioner’s requested documents).

3. *Records exempt pursuant to 29 Del. C. § § 10002(l)(1)*

With respect to your requests for the background check, resume, references, and education of Deputy Commissioner Merced, DOI cited to the exemption of personnel file documents, “the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy.”¹⁵ In *Grimaldi v. New Castle County*, the court determined that this exemption does not apply to the resume of a successful applicant for a government job.¹⁶ The court weighed the public interest against the individual’s privacy interest and found that it was not an invasion of personal privacy to disclose the successful applicant’s resume.¹⁷ Here, the Deputy Commissioner has significant portions of her employment history and education publicly available online, and thus, the privacy interest is further diminished.¹⁸ Therefore, in these circumstances, we find that releasing the Deputy Commissioner’s resume, with appropriate redactions, would not constitute an invasion of privacy under FOIA’s personnel file exemption, and DOI should provide access to the resume in accordance with this Opinion.¹⁹

¹⁵ 29 Del. C. § 10002(l)(1). Application of this exemption requires examination of two lines of inquiry. First, records must be determined to be part of a personnel file. *Del. Op. Att’y Gen.* 13-IB03, 2013 WL 4239232, at *2-3 (July 12, 2013). A “personnel file” has been previously defined by this Office as “a file containing information that would, under ordinary circumstances, be used in deciding whether an individual should be promoted, demoted, given a raise, transferred, reassigned, dismissed, or subject to such other traditional personnel actions.”¹⁵ *Del. Op. Att’y Gen.* 02-IB24, 2002 WL 31867898, at *1 (Oct. 1, 2002). If the document meets this definition, the second inquiry requires a weighing of the public’s interest in disclosure against the individual’s right to privacy. *Del. Op. Att’y Gen.* 13-IB03, 2013 WL 4239232, at *3 (July 12, 2013) (“Similarly, in the context of FOIA, 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.”).

¹⁶ *Grimaldi v. New Castle County*, 2016 WL 4411329, at *9 (Del. Super. Aug. 18, 2016).

¹⁷ *Id.*

¹⁸ A general internet search of the Deputy Commissioner’s name and the State of Delaware revealed an online professional profile. In addition, DOI published an announcement. See “Delaware News” <https://news.delaware.gov/2018/05/07/delaware-department-insurance-welcomes-new-deputy-commissioner-tanisha-merced-esquire/> (last visited on July 18, 2018).

¹⁹ In *Grimaldi*, the court ultimately withheld the disclosure of the resume under the pending or potential litigation exemption under FOIA. 2016 WL 4411329, at *9-10. No other Delaware cases or Attorney General Opinions have since opined how *Grimaldi* will specifically apply to resumes and other personnel records of public employees. Although *Grimaldi* supports disclosure of the resume in these specific circumstances, we do not interpret this decision to create a bright line rule for the release of all public employee resumes in unredacted form. Resumes can vary significantly in the type, level, and amount of information provided, and another FOIA exemption may preclude disclosure. For example, personal identifying information may be redacted. See,

DOI appropriately denied your requests for the background checks and references in the Deputy Commissioner's personnel file. Unlike the resume information, this personnel information has not been voluntarily disclosed. DOI affirmatively stated that the remaining records were part of the Deputy Commissioner's personnel file, and these documents may be used to make traditional personnel decisions.²⁰ Both the employee and the person providing the information have strong privacy interests in the information provided during an employment evaluation, and although the public may have a minimal interest in reviewing references and employment background checks, we find a strong privacy interest exists and decline to extend the scope of existing authority to require release of such records.²¹

4. *Records exempt pursuant to 29 Del. C. § 10002(1)(6)*

The records of interviewed applicants are not subject to disclosure under FOIA. Records subject to common law privacy are exempt pursuant to 29 *Del. C.* § 10002(1)(6). This exemption applies to all unsuccessful applicants for a position, and DOI's denial of your request for such records was proper.²²

CONCLUSION

Thus, it is our determination that FOIA requires under the specific facts of this case that DOI provide you with a properly redacted copy of Deputy Commissioner Merced's resume and DOI should do so within ten (10) business days of this decision. The remaining allegations in your Petition are without merit for the reasons set forth above.

Very truly yours,

/s/ Ilona Kirshon
Deputy State Solicitor

e.g., Del. Op. Att'y Gen. 06-IB17, 2006 WL 2630107, at *7 (Aug. 21, 2006). In addition, a detailed description of a duty or project may be a trade secret, confidential commercial information, a security risk, or other exemption under FOIA, especially in certain industries. Before production, DOI should appropriately redact all information that is exempt pursuant to FOIA.

²⁰ See Footnote 15 *supra*.

²¹ This Office has previously determined that names, job classifications, salaries, time sheets, attendance records, and non-salary, total compensation of an employee are not exempt under FOIA. *Del. Op. Att'y Gen.* 12-IIB10, 2012 WL 3535600, at *2 (July 27, 2012). *Grimaldi* also did not specifically determine whether FOIA's personnel file exemption applies to references and employment background checks. *Grimaldi*, 2016 WL 4411329, at *9.

²² See *Del. Op. Att'y Gen.* 10-IB17, 2010 WL 5186152, *2 (Dec. 15, 2010) (quoting *Del. Op. Att'y Gen.* 05-IB20, 2005 WL 2334348, at *2 (July 25, 2005) ("This office has extended the right of privacy to 'records relating to the job qualifications of applicants for public employment.'").

cc: Kathleen Makowski, Deputy Attorney General
Dorey Cole, Deputy Attorney General