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

**Attorney General Opinion No. 18-IB48**

**October 8, 2018**

**VIA EMAIL**

Ms. Jennifer Kye, Staff Attorney  
Community Legal Aid Society, Inc.  
[Jkye@declasi.org](mailto:Jkye@declasi.org)

**RE: FOIA Petition Regarding the Delaware State Police ("DSP")**

Dear Ms. Kye:

We write in response to your correspondence on behalf of Community Legal Aid Society, Inc. ("CLASI") alleging that the Delaware State Police ("DSP") violated the public records provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* §10005 regarding whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that DSP did not violate FOIA by declining to provide complaints regarding DSP's law-enforcement officers. However, regarding the records produced in separate litigation, we find that insufficient information has been provided to determine whether a FOIA violation has occurred. Thus, CLASI is recommended to make a new records request including any additional information in its possession that may assist DSP in its response, and DSP is recommended to respond within the statutory timeframes of FOIA.

**BACKGROUND**

On March 1, 2018, CLASI sent a records request to DSP for six categories of documents related to DSP and its interactions with people with disabilities, including but not limited to, DSP policies and guidelines, training documents, and documents reflecting complaints against DSP or its employees. On April 27, 2018, DSP provided a response, which included several responsive documents and cited to the Law Enforcement Officers' Bill of Rights ("LEOBOR") as an exemption precluding production of other documents. On June 25, 2018, Mr. Richard Morse of CLASI sent a second request to DSP, alleging that LEOBOR does not exempt DSP as an agency,

that LEOBOR does not exempt documents available by FOIA request, and that he recalled other documents responsive to the request that were produced under a protective order in separate litigation but not provided to CLASI here. DSP responded to this second request on July 18, 2018 by enclosing two complaints filed against DSP and again denying access to complaints against officers under 11 *Del. C.* § 9200(c)(12) and 29 *Del. C.* § 10002(1)(6). Finally, DSP referred you to the litigating Deputy Attorney General (“DAG”) regarding the other potentially responsive documents from previous litigation under a protective order. After correspondence with this litigating DAG, Mr. Morse corresponded again with DSP about the documents under the protective order. DSP replied that it provided the responsive documents which are public and affirmed that it has no additional responsive documents. Again, the response noted that LEOBOR exempted certain documents from production and other complaints against DSP may be available through the courts.

CLASI then filed a Petition with this Office. CLASI’s two primary arguments were that the DSP improperly withheld documents subject to the protective order in the previous litigation and that LEOBOR did not preclude disclosing complaints against DSP officers nor the records of civilian employees. For its first argument, CLASI pointed to previous opinions where this Office found that confidentiality agreements may not be used to circumvent FOIA requirements. Second, CLASI asserted that LEOBOR did not prohibit disclosure of complaints against law-enforcement officers, since those documents were the cause of, not result of, an investigation and further, LEOBOR does not apply to civilian employees.

By letter dated September 24, 2018 (“Response”), DSP stated that LEOBOR applies to all complaints against DSP sworn personnel, and “as to civilian or non-sworn personnel not covered under LEOBOR,” no responsive documents exist. Further, DSP distinguished CLASI’s cited precedent, since those opinions related to the public expenditure of funds and here the responsive documents were subject to the provisions of a Confidentiality Stipulation and Order (“Order”) in discovery. The Response included a copy of the Order. Finally, DSP argued that CLASI’s requests along with Mr. Morse’s insistence on receiving discovery documents subject to a protective order in a previous litigation, indicated that CLASI seeks these documents for potential litigation against DSP.

In CLASI’s letter of September 27, 2018 (“Reply”), CLASI first clarified that its request had not sought all documents subject to the Order but Mr. Morse believed, due to his recollection of previous litigation, that the production of responsive documents was incomplete. Mr. Morse did not provide a specific description of the responsive public records he alleged to have been exchanged in the prior litigation. CLASI again asserted that the Order is not an appropriate basis to withhold the requested documents and that Mr. Morse’s identity or position, as the requesting party, was irrelevant to the disclosure of the documents. CLASI further indicated that DSP has sufficient information to search for the requested records, and CLASI does not wish to provide additional specifics since DSP may only search for those records and neglect a fuller search. With respect to the pending or potential litigation exemption, CLASI argued that DSP has not adequately demonstrated objective signs that litigation is coming or is reasonably foreseeable. Finally, CLASI contended that a complaint is not the result of an investigation and is therefore not appropriately withheld under LEOBOR.

## DISCUSSION

We address two primary legal questions:<sup>1</sup> 1) whether DSP violated FOIA by refusing to provide the complaints against DSP law-enforcement officers<sup>2</sup> under LEOBOR; and 2) whether the documents that Mr. Morse recalls from separate litigation, but has not specifically identified, must be produced to CLASI, despite the records potentially being the subject of a confidentiality order issued by a federal judge.

Regarding the first issue, we find that the scope of LEOBOR is broader than CLASI suggests. LEOBOR states that “all records compiled as a result of any investigation subject to the provisions of this chapter and/or a contractual disciplinary grievance procedure shall be and remain confidential and shall not be released to the public.”<sup>3</sup> In a second provision, LEOBOR states that “no law-enforcement agency shall be required to disclose in any civil proceeding, ... any: (1) personnel file or (2) internal affairs investigatory file compiled in connection with a law-enforcement officer under investigation or subjected to questioning for any reason which could lead to disciplinary action, demotion or dismissal.”<sup>4</sup> As recognized in LEOBOR and Delaware case law, there is “a strong public policy” which “weighs heavily in favor of providing ‘confidential’ status to information demanded from police personnel files” and “clear and important public policy in favor of maintaining the confidentiality of police sources of information and methods of law enforcement.”<sup>5</sup> Disclosing these complaints may create a chilling effect on those who may bring information to DSP.<sup>6</sup>

For these policy reasons and in accordance with the statute’s plain meaning, we disagree with CLASI’s argument that a complaint is not a “record compiled as a result of an investigation” under LEOBOR.<sup>7</sup> A plain reading of the statute supports that the initiating complaint is within the

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<sup>1</sup> A third issue in the Petition was addressed in DSP’s Response, which specifically stated that they have no responsive records for the DSP civilian employees.

<sup>2</sup> “Law-enforcement officer” is a defined term in LEOBOR, and this Opinion uses this term in accordance therewith. 11 *Del. C.* § 9200(b).

<sup>3</sup> 11 *Del. C.* § 9200(c)(12).

<sup>4</sup> 11 *Del. C.* § 9200(d).

<sup>5</sup> *Reyes. v. Freeberry*, 2005 WL 3560724, at \*6 (D. Del. Dec. 29, 2005).

<sup>6</sup> See *News Journal Co. v. Billingsley*, 1980 WL 3043, at \*2-3 (Del. Ch. Nov. 20, 1980) (finding that documents related to a Delaware Association of Professional Engineers investigation were appropriately withheld as part of an investigative file and noting the release of complaints would result in “few individuals [coming] forth to embroil themselves in controversy or possible recrimination by notifying the Agency of something which might justify investigation.”).

<sup>7</sup> Similarly, FOIA exempts “investigatory files compiled for civil or criminal law-enforcement purposes” from the definition of “public record.” 29 *Del. C.* § 10002(1)(3).

compilation of the investigatory records. Thus, we adopt DSP's interpretation of LEOBOR as including complaints in the investigatory records which must remain confidential and find that DSP has not violated FOIA by declining to produce complaints against DSP "law-enforcement officers."<sup>8</sup>

Second, we consider CLASI's request for documents potentially covered by a Confidentiality Stipulation and Order in previous litigation. DSP provided a copy of the Order.<sup>9</sup> CLASI, in defense of its position that such documents should be released, has cited to precedent stating that parties' confidentiality agreements cannot override FOIA.<sup>10</sup> However, the circumstances here differ. DSP has produced a court order issued in the course of litigation. Records under a court order of confidentiality may be withheld under 29 *Del. C.* § 10002(1)(6).<sup>11</sup> Thus, we determine that any documents in this case subject to an applicable and effective court order are not required to be disclosed without further court action.<sup>12</sup>

The inquiry does not end there, however. This Office is tasked with determining whether a FOIA violation has occurred, but we do not have adequate information to determine whether additional responsive documents exist in accordance with Mr. Morse's recollection, and to the extent any additional documents exist, whether the Confidentiality Stipulation and Order or another exemption under FOIA may apply to those documents. The parties' submissions make clear that DSP is not aware of the specific documents that Mr. Morse remembers, and this Office also cannot discern the nature of those records from the parties' submissions.

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Complaints are considered part of the investigatory file and exempt from disclosure under this FOIA exemption. *See e.g., News Journal Co. v. Billingsley*, 1980 WL 3043, at \*2-3 (Del. Ch. Nov. 20, 1980) (concluding that both a formal complaint and document which led to an investigation by the Delaware Association of Professional Engineers were exempted from FOIA pursuant to the investigatory file exemption); *Del. Op. Att'y Gen.* 17-IB47, 2017 WL 4652343, at \*1 (Sept. 22, 2017) (finding that a complaint was part of the investigatory file exemption under FOIA).

<sup>8</sup> *See* 11 *Del. C.* § 9200.

<sup>9</sup> CLASI has not disputed the existence of this Order, as provided by DSP, but instead, CLASI has argued that the Order is not an appropriate basis to withhold documents since the litigation has been resolved. DSP argued that it is unaware of the specific documents CLASI seeks, but "any documents provided in discovery in the ... litigation are sealed and cannot be used in any other capacity." CLASI countered in its Reply that the Order does not affect its rights under FOIA to the documents and DSP's designations of confidentiality do not serve as a basis to avoid FOIA.

<sup>10</sup> Petition, p. 3.

<sup>11</sup> *Del. Op. Att'y Gen.* 11-IB06, 2011 WL 2741858, at \*1-2 (June 22, 2011) (determining that Superior Court records placed under seal by court order are not public records under FOIA and noting that to require otherwise would cause the public body to commit contempt of court).

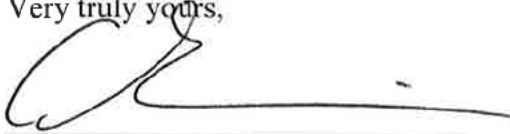
<sup>12</sup> *Id.*; 29 *Del. C.* § 10002(1)(6).

With these principles in mind, we therefore recommend that CLASI send a new records request including any available information to assist DSP in identifying potentially responsive records<sup>13</sup> and that DSP provide a response to CLASI's new request within the permissible timeframes of FOIA.<sup>14</sup>

### CONCLUSION

For the reasons set forth above, we find that DSP did not violate FOIA by declining to provide complaints regarding DSP law-enforcement officers. However, for the litigation documents it is seeking, we recommend that CLASI submit a new request for records in accordance with this Opinion and DSP respond within the permissible timeframes under FOIA.

Very truly yours,



Aaron R. Goldstein  
Chief Deputy Attorney General

cc: Rae M. Mims, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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<sup>13</sup> We do not find CLASI's argument persuasive that providing additional information about the requested documents would prompt DSP to undertake only a limited search. There is no reason to assume that DSP will not undertake a search in accordance with the terms of CLASI's request as FOIA requires. In fact, FOIA allows public bodies to ask requestors to provide additional information known to them when making requests. 29 *Del. C.* § 10003(f). As a general matter, we encourage open communication between public bodies and requestors to ease the process of locating and receiving responsive documents.

<sup>14</sup> The status of this matter necessarily leaves open the question of whether additional responsive documents exist which are appropriate for disclosure to CLASI. Therefore, we do not address the arguments regarding the potential or pending litigation exemption at this time. DSP may assert appropriate exemptions in its response to the new records request, and CLASI may challenge a denial of any records that it deems improper in accordance with the FOIA statute.