



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. 18-IB50

October 12, 2018

VIA EMAIL

Casey H. Nelson
Alistair Capital Management, LLC
100 Crescent Court, Suite 575
Dallas, TX 75201
cnelson@alistaircapital.com

RE: FOIA Petition Regarding the Delaware Department of Insurance

Dear Mr. Nelson:

We write in response to your correspondence 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 denying records in response to your records requests. For the reasons set forth below, we conclude that DOI has not violated FOIA as alleged.

BACKGROUND

On September 11, 2018 and September 14, 2018, you sent DOI five records requests for various documents from five different hearing dockets, including but not limited to, hearing reports, orders, and records, in addition to the transcript of the AmTrust Financial Services (“AmTrust”) hearing. DOI’s FOIA Coordinator responded to your request on September 21, 2018 stating your request was denied since you were not a citizen of the State of Delaware.

You sent a Petition to this Office challenging this denial and alleging several inadequacies in the DOI’s hearing involving AmTrust. In denying your request, you alleged DOI acted in bad faith and “the Department is actively obstructing someone attempting to help the Department

¹ Chief Deputy Attorney General Aaron Goldstein has designated Deputy Attorney General Michelle Whalen to act in his stead for purposes of this Petition.

protect policyholders from a massive, on-going fraud.”² Further, you alleged that since your firm, Alistair Capital Management, LLC (“ACM”), was formed and remains registered in Delaware, ACM is a Delaware citizen under the FOIA statute. Additionally, you argued that 29 *Del. C.* § 10112 requires DOI to provide records to you. Finally, you posited that DOI’s regulatory scope over businesses across the country creates an exception under FOIA law, which requires DOI to produce records to all U.S. citizens.

On October 1, 2018, DOI submitted a letter in response to your Petition (“Response”). DOI noted that it is uncontested that you are a resident of Texas, and also asserted that your limited liability company is not a citizen of Delaware entitled to request records under FOIA. Further, DOI argued that 29 *Del. C.* § 10112 is inapplicable to this FOIA Petition, and your argument as to the unique circumstances is misplaced in the context of FOIA and misunderstands state insurance regulation.

By letter dated the same day (“Reply”), you countered DOI’s arguments. First, you asserted that DOI’s denial of records was made in bad faith, especially in regard to the transcript for the AmTrust hearing. Second, you stated that you “concede that neither I, nor ACM are Delaware citizens.”³ Third, you revisited the argument about 29 *Del. C.* § 10112 to clarify that you meant to “highlight the absurdity of denying my [FOIA] request,” but stated again that you wished this Office to direct compliance with 29 *Del. C.* § 10112.⁴ Finally, in support of your contention that DOI should respond to FOIA requests from all U.S. citizens, you distinguished the DOI’s circumstances from those in the *McBurney v. Young*⁵ case, which affirmed that a citizens-only FOIA statute does not violate the Privileges and Immunities Clause or the dormant Commerce Clause of the U.S. Constitution. You also maintained that precluding non-citizens from requesting records for publicly-traded companies improperly interfered with interstate securities markets.

By email dated October 5, 2018, you provided an Addendum to your Reply in which you pointed to a previous order issued by then-Insurance Commissioner Matthew Denn stating in part: “this Department has placed an appropriate emphasis on the public’s right to examine, comment upon and inspect non-confidential information in the possession of the Department.”⁶ You contended that this language supports that DOI has a special obligation under FOIA to provide documents to the public at large and not only Delaware citizens.

² Petition.

³ Reply, p. 1.

⁴ *Id.* at 2.

⁵ 569 U.S. 221 (2013).

⁶ Addendum.

DISCUSSION

One of FOIA's primary purposes is to grant citizens access to public records.⁷ Specifically, the statute provides that "public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body" and that "[r]easonable access to and reasonable facilities for copying of these records shall not be denied to any citizen."⁸ In Attorney General Opinion 16-IB20 and subsequent opinions, this Office accepted the reasoning of the *McBurney* case to conclude that the Delaware's FOIA statute is applicable to Delaware citizens only.⁹

As discussed above, your Reply refined the Petition into three primary arguments:¹⁰ 1) DOI denied your record requests in bad faith; 2) the records must be produced pursuant to 29 *Del. C.* § 10112; and 3) the unique circumstances here require this Office to distinguish the *McBurney* case and this Office's precedent and find that DOI must produce records to all U.S. citizens under the FOIA statute. Each argument is separately addressed below.

Denial of Records in Bad Faith

Although you also referred to objections to DOI's actions in a separate matter outside of the FOIA context, the bad faith claim is primarily based upon the fact that you spoke at the hearing. You believe that the denial of your request for a transcript of a hearing in which you made comments is absurd. However, except for the statutory exemptions, FOIA does not distinguish treatment for any category of "public records" and does not contain an exception for transcripts requested by speakers recorded in the transcript. Instead, DOI set forth a well-supported basis for the denial of records, as further discussed herein. We find that this factual record does not support a finding of bad faith.

Records Pursuant to 29 Del. C. § 10112

In your Reply, you requested that this Office direct DOI's counsel to comply with your "lawful Section 10112 request," which is in reference to a separate chapter of Delaware Code.

⁷ 29 *Del. C.* § 10001.

⁸ 29 *Del. C.* § 10003(a).

⁹ See e.g., *Del. Op. Att'y Gen.* 18-IB18, 2018 WL 2267112, at *1 (April 6, 2018); *Del. Op. Att'y Gen.* 17-IB14, 2017 WL 3426252, at *1 (July 6, 2017); *Del. Op. Att'y Gen.* 16-IB20, 2016 WL 5888776, at *1 (Sept. 30, 2016) (determining that public bodies are "only *required* to comply with FOIA when the requesting party is a citizen of the State of Delaware" and noting that "[i]n all other cases, public bodies *may, and are encouraged to* fulfill" otherwise proper FOIA requests) (emphasis in original).

¹⁰ The Reply stated that the fourth issue regarding your and ACM's citizenship is conceded. Thus, that argument is not addressed herein.

You submitted a Petition to this Office pursuant to 29 *Del. C.* § 10005. We have no authority under FOIA to direct DOI with regard to this Office's interpretation of any other Delaware statute.¹¹

Unique Circumstances of DOI

Finally, you alleged that DOI has a unique position in Delaware because DOI is charged with oversight of companies that operate across the country. Due to this expansive regulatory scope, you argued that DOI must respond to FOIA records requests from all U.S. citizens. In support of this argument, you cited to Attorney General Denn's aforementioned statements in support of transparency. You also argued that *McBurney* was based upon the creation of a market for records through a FOIA program but DOI has created a country-wide market for its documents. Further, you asserted that the refusal to produce records for companies with publicly-traded securities would interfere with interstate markets. However, none of these factors bear on the FOIA analysis here, and you pointed to nothing within the FOIA statute in support of your argument. This Office has clearly adopted and affirmed that Delaware's FOIA statute only requires production of records to Delaware citizens,¹² and we decline to adopt a new exception to Delaware's FOIA statute with no basis in the statute itself. Therefore, we find that DOI did not violate FOIA in its reliance on *McBurney* and other legal authority to deny your records requests.

CONCLUSION

Based on the foregoing, we conclude that DOI has not violated FOIA as alleged.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

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

¹¹ See 29 *Del. C.* §§ 10001-10007; *Del. Op. Att'y Gen.* 15-IB06, 2015 WL 5014135, at *10 (Aug. 19, 2015) (concluding that FOIA does not authorize this Office to police a public body with respect to its compliance with its charter or any other applicable law).

¹² See *supra* note 9.