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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 16-IB03

March 4, 2016

VIA EMAIL

Ryan Tack-Hooper, Esq.
American Civil Liberties Union of Delaware
100 West 10th Street
Suite 706
Wilmington, DE 19801
rtackhooper@aclu-de.org

Re: February 17, 2016 FOIA Petition Concerning the Delaware Department of Safety and Homeland Security, Division of State Police

Dear Mr. Tack-Hooper,

We write in response to your letter dated February 17, 2016 (the “February 17 Letter”). That letter is styled a “Petition concerning January 15, 2016 FOIA Production” by the State Police. As discussed more fully below, with one exception, we believe that the February 17 Letter is an impermissible attempt to have this office reconsider Attorney General Opinion 15-IB14, decided by this office on December 29, 2015 (the “December 29 Opinion”).

The February 17 Letter raised one matter that was not contemplated in the December 29 Opinion – the alleged redactions of “shipping information and contacts.” While FOIA does not require this office to exercise “continuing jurisdiction” to police an agency’s actions in response to a FOIA determination, because this issue was not previously addressed, we believe it was acceptable to raise this matter by submitting a new petition. However, it is only as to the issue of these redactions that we deem the February 17 Letter to be a new petition.

The inconsistent redaction of shipping information and contacts highlighted in the February 17 Letter raises the possibility that the material was redacted in error. If it was intentional, the State Police violated FOIA in not stating a basis for the redactions. By this Opinion, we are directing the State Police to review the redactions to determine whether an error was made. The State Police should thereafter promptly provide to you either (i) a new copy of the documents without the redactions, if it is determined that they were erroneous, or (ii) the basis for the redactions, if it is determined that the redactions were intentional.¹ Because this portion of the February 17 Letter is being treated as a new petition, this Opinion is a determination that may be appealed by the State Police.²

As noted above, it is the determination of this office that the remaining issues raised in the February 17 Letter constitute an impermissible request to have this office reconsider the December 29 Opinion. It was apparent from the December 29 Opinion that the State Police had already conducted a search. In accepting representations that the State Police found no responsive documents, this office implicitly accepted the scope of the search. In describing the matters the State Police intended to redact, this office effectively allowed the redactions. Based upon the foregoing, we view the December 29 Opinion as a completed determination supporting the right of either party to appeal the matter to the Superior Court.³ Indeed, Mr. Rudenberg filed a Notice of Appeal in the Superior Court challenging the December 29 Opinion on February 26, 2016. To the extent you believe that the February 17 Letter should have been characterized as a new appeal in its entirety, you are free to argue that this letter is an adverse determination of a “new” petition that is appealable to the Superior Court.⁴

* * *

¹ We ordinarily invite the public body to respond to a FOIA petition before rendering a decision, but because the February 17 letter raises one narrow issue not previously addressed, we have chosen, instead, to decide the matter without requesting a response from the State Police.

² See 29 *Del. C.* § 10005(b) (“[T]he petitioner or public body ... may appeal an adverse decision on the record to the Superior Court within 60 days....”).

³ We acknowledge and apologize for the factual error regarding your client’s request number nine. We incorrectly stated that the State Police had represented that there were no records responsive to that request, and we should have addressed the State Police’s argument that the documents requested are exempt from disclosure as civil or criminal investigative files under 29 *Del. C.* § 10002(1)(3). That matter has now been raised with the Superior Court.

⁴ *Id.* § 10005(b).

This office regularly encourages parties to work together to determine what information may be provided pursuant to FOIA and to clarify the bases of their disputes before they seek relief from this office. Accordingly, with the guidance provided here, we encourage the parties to make contact and attempt to resolve or narrow their disputes.

This determination is directed solely to the parties identified herein. It is based on the facts relevant to this matter. It does not constitute precedent and should not be cited as such by future parties.⁵

Very truly yours,

A handwritten signature in blue ink, appearing to read "Danielle Gibbs", is enclosed in a light blue rectangular box.

Danielle Gibbs
Chief Deputy Attorney General

cc: Rae Mims, Deputy Attorney General (by email)
Michelle Whalen, Deputy Attorney General (by email)

⁵ See Op. Att’y Gen. No. 96-IB25 (July 22, 1996) (“[E]very FOIA complaint is inherently fact-driven, and any recommendation of remedial action can only be decided on a case-by-case basis.”).