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December 5, 2011

Honorable John McMahan
Secretary of Labor
Delaware Department of Labor
4425 North Market Street
Wilmington, Delaware 19802

Re: Freedom of Information Act Request and Appeal of News-Journal Reporter Wade Malcolm

Dear Secretary McMahan:

This letter determines that the refusal of the Department of Labor (“the Department”) to permit inspection of certain records requested by News-Journal reporter Wade Malcolm constitutes a violation of Delaware’s Freedom of Information Act (“FOIA”), 29 Del. C. Chapter 100.

Background.

By letter dated August 24, 2011 Mr. Malcolm sought the opportunity to examine:

- Any and all inspection sheets for the Office of Labor Law Enforcement during this calendar year (2011) and the previous calendar year (2010), including but not limited to, inspections concerning the prevailing wage laws or the contractor fraud laws.
- Any and all citations issued by the Office of Labor Law Enforcement during this calendar year (2011) and the previous calendar year (2010).
- The site visit logs for every inspector in the department during this calendar year (2011) and the previous calendar year (2010).

On September 12, 2011, Mr. Robert Strong, Deputy Principal Assistant to the Secretary of Labor, denied Mr. Malcolm’s request for the following stated reasons:

“[T]he FOIA deems certain records as non-public and thus exempts these records from disclosure:

“Records deemed to be non-public consist of ‘[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files, pre-trial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue . . .’ 29 Del. C. §10002(g)(3).”

“The information you requested from the Department’s Office of Labor Law Enforcement in your three bullets above fall within the definition of an investigative file, which FOIA specifically exempt from the definition of a ‘public record.’ 29 Del. C. §10002(g)(3). Additionally, we note that the Office of Labor Law Enforcement does not employ ‘inspectors’ and that the Office of Labor Law Enforcement does not utilize a document referred to as a ‘site log.’ The Office of Labor Law Enforcement employs Labor Law Officers who perform site visits. The documentation of those site visits are put into investigative files which are deemed non-public thus exempt from FOIA.”

On September 20, 2011 Mr. Malcolm wrote to me and to Judy Oken Hodas, Deputy Attorney General seeking our “assistance in resolving a public document dispute with the Delaware Department of Labor.” We consider this letter to be a “petition” within the meaning of 29 Del. C. §10005(e) for a determination whether the Department’s denial of Mr. Malcolm’s request to examine certain Department records constitutes a violation of Delaware’s FOIA.

On October 5, 2011 State Solicitor Lawrence W. Lewis sought further explanation of the Department’s denial of Mr. Malcolm’s request. By letter dated October 12, 2011, the Department repeated its public record exemption argument and the Department further asserted that this request is time barred because Mr. Malcolm made an essentially similar request last spring and, when that request was denied, Mr. Malcolm did not timely petition the Chief Deputy for a determination of the lawfulness of that denial. Accordingly, the Department asserts that because Mr. Malcolm’s earlier request is time barred, this more recent and similar request is also time barred.

Repeated Requests

We acknowledge that Mr. Malcolm’s recent request appears to repeat a request the Department previously denied. And we agree that a petition to review that earlier denial is time-barred. We appreciate the Department’s concerns about dealing with repeated requests for the same documents but when, as here, we have not previously determined the legality of the previous denials, an administrative review of the current denial is appropriate. Unlike some judicial proceedings and statutes of limitations, FOIA does not appear to limit a review as the Department suggests. Accordingly, we consider the August request, although similar in content to the one denied in April, to be a new request subject to new time limitations.

The Department's position seems unsustainable to us. What if this second request came from a different reporter from the News Journal? What if the first request came from the News Journal, but it lost interest in the issue and the second request came from some other media? It seems untenable to make non-disclosure hinge on the identity of the party making the request: indeed, our view has been that the identity of the requestor is usually irrelevant in a FOIA analysis. The Department's position would create a new exemption under FOIA: information denied to a citizen by an agency would be forever after shielded from access by any other citizen on the basis of the previous denial that was not appealed. We reject the notion of creating new exemptions under FOIA given our view that even the existing ones are to be read narrowly.

FOIA's Presumption Favors Disclosure.

There can be no doubt that the clear intent of FOIA is for transparency in government, whether for the openness of public meetings or for the availability of information held by government agencies. This policy is boldly declared in the opening section of the Act 29 *Del. C.* § 10001 and gives rise to a presumption in favor of disclosure. Accordingly, as this office has previously opined: "Exceptions to public disclosure of records of a public body must be construed narrowly, in order to comply with the policy that the public has 'easy access to public records' and to 'further the accountability of government[.]'" *Att'y Gen. Op. 09-IB01* (February 5, 2009)

The Investigative Files Exemption

The Department's application of the "investigative files" exemption to all records of its inspections and its enforcement of the State's labor laws is, we believe, an overly broad reading of 29 *Del. C.* §10002(g)(3). When this exemption is read in light of the General Assembly's strong policy of transparency and accountability, we think that the legislative intent is not to exempt *all* records of routine inspections and citations, but *only* those records of investigation where disclosure would impede or inhibit the enforcement of law, including the gathering of information from criminal informants or other confidential sources, preparation for litigation or the impairment of rights to privacy, such as those of children in non-criminal adoption and custody proceedings.

Although invited by the State Solicitor to amplify its grounds for refusal, the Department has made no suggestion here that disclosure of the information regarding inspections, citations and site visits will impair or inhibit the enforcement by the Department of the state's labor laws or otherwise impair rights to privacy.

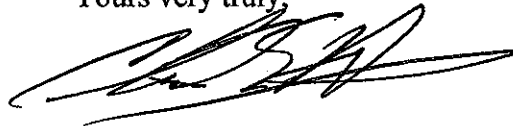
Finally, we think the records Mr. Malcolm seeks to examine are well enough described that the Department may readily determine which of its documents contain those records. The technical facts that the Office of Labor Law Enforcement employs 'Labor Law Officers' and not "inspectors," or that the Office of Labor Law Enforcement does not utilize a document referred

to as a "site log" is no excuse for withholding the records sought. If the Department has records of its inspections concerning prevailing wage enforcement, and publication of those records would not impede enforcement of the prevailing wage law, we see no exemption under FOIA that would shield those records from public disclosure upon proper request.

Accordingly, it is my determination that the documents requested constitute "public records" within the meaning of the Act and that the Department's refusal to permit examination of those records requested by Mr. Malcolm violates the Freedom of Information Act.

If you decide not to comply with Mr. Malcolm's request, you have sixty (60) days from receipt of this letter to appeal this determination to Superior Court. *See* 29 Del. C. § 10005(b).

Yours very truly,



Charles E. Butler
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cc: Robert H. Strong
Deputy Principal Assistant to the Secretary of Labor
Joseph R. Biden, III, Attorney General
Lawrence W. Lewis, State Solicitor