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Attorney General Opinion No. 16-IB09

April 7, 2016

VIA EMAIL

Michael Dworiak
MuckRock News
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Boston, MA 02205-5819
michael@delawarepolicenews.org

Re: FOIA Complaint Concerning the City of New Castle

Dear Mr. Dworiak:

On May 13, 2015 and May 29, 2015, the Delaware Department of Justice (“DOJ”) received your email complaints requesting our determination pursuant to the Freedom of Information Act, 29 *Del. C. Ch. 100* (“FOIA”), of whether the City of New Castle violated the FOIA public records requirements regarding fees levied in order for the City to fulfill your request. We treat your emails as a petition for a determination of whether a violation of FOIA has occurred or is about to occur. 29 *Del. C. §10005(e)*. Our determination is set forth herein.

FACTUAL BACKGROUND¹

On March 20, 2015, Mr. Dworiak requested: “[a] [c]omplete copy of the (1) Policies and Procedures manual (aka Standard Operating Procedures) for the City of New Castle Police Department; and (2) a complete copy of the City of New Castle Personnel Manual.” Mr. Dworiak asked that the fees be waived, but if they could not be waived, that he be informed of the cost. The request was reiterated on April 10, 2015 and April 20, 2015. On April 20, 2015 the City of New Castle, through City Solicitor Daniel Losco, provided the personnel manual but denied the police procedures manual stating that it was not a public record under 29 *Del. C. § 10002(l)(17)(a)(2)*².

¹ The Factual Background Section of this Opinion refers to your communications as made by “Mr. Dworiak” for ease of future reference by third parties.

² “Building plans, blueprints, schematic drawings, diagrams, operational manuals or other records of mass transit facilities, bridges, tunnels, emergency response facilities or structures, buildings where hazardous materials are used

On April 22, 2015, Mr. Dworiak disputed this denial to Mr. Losco. On May 4, 2015, Mr. Dworiak reiterated his dispute. On May 4, 2015, Mr. Losco sent a letter to Mr. Dworiak advising him that the police procedures manual would be released after review and redactions performed by a police Lieutenant. Mr. Losco informed Mr. Dworiak that fees would be about \$1,548.00 (40 hours of work multiplied by \$38.70, the hourly pay of a Lieutenant).

Following this notification, Mr. Dworiak requested the table of contents for the manual in order to refine the scope of the request. The table of contents was forwarded on May 6, 2015. On May 7, 2015, Mr. Dworiak requested specific sections of the manual and noted that “[a]ll of the identified policies in this email narrowing the scope of the FOIA request are ‘administrative’ in nature and do not pertain to confidential law enforcement techniques or investigative procedures.”

On May 7, 2015, Mr. Losco responded:

I have your response below but cannot necessarily agree with your assessment that all requested sections are “administrative”. I do not know the content of these Sections and you clearly do not either. This will still require internal review. I will pass your modified request on to the appropriate Police Dept. personnel and will request a modified estimate of time and expense associated with complying with your modified request.

On May 7, 2015, Mr. Dworiak responded:

It is my position that the City's attempt to charge fees to review these policies to determine if they are exempt is a direct violation of 10003(m)(2) which states that “administrative fees shall not include any cost associated with the public body's legal review of whether any portion of the requested records is exempt from FOIA”.

On May 11, 2015, Mr. Losco wrote to Mr. Dworiak and reiterated his position that there was no legal review and that:

The review time involved relates to police personnel reviewing the requested materials for information that is not a “public record” and thus not subject to production. I reiterate that neither you nor I have seen this police manual and so cannot accurately say whether or not some of the information requested is protected. For your modified request, the estimated cost of review is \$412.00, payable in advance.

On May 11, 2015, Mr. Dworiak informed Mr. Losco that he viewed the charging of these fees as a denial and would be appealing to the Attorney General's Office.

systems, structural elements, surveillance techniques, alarm or security systems or technologies, operational and transportation plans or protocols, or personnel deployments. Records that disclose the substances being used or stored on a given piece of property are public records; however, records which disclose the specific location on that property of the substances being used or stored may be disclosed only if the chief administrative officer of the agency from which the record is requested determines that disclosure will not jeopardize the security of any structure owned by the State or any of its political subdivisions, or will not facilitate the planning of a terrorist attack, or will not endanger the life or physical safety of an individual.”

ALLEGED VIOLATIONS

The Petition alleges that the City violated FOIA by assessing fees for legal review of the police procedures manual.

THE CITY'S RESPONSE TO THE ALLEGATIONS

The City, through Mr. Losco, responded to Mr. Dworiak's allegations on June 23, 2015. Mr. Losco argues that the fees presented to Mr. Dworiak represent administrative, not legal fees. In his response, Mr. Losco noted that "[o]nce police personnel had assembled the responsive materials that do not present undue safety or security risks to City police officers and the residents of New Castle, the materials would then be presented to me as City Solicitor to evaluate whether legal grounds exist within the FOIA law or common law why any such materials should not be produced. No fee was quoted for my legal review."

RELEVANT STATUTE

Delaware's FOIA statute contains provisions that permit public bodies to charge administrative fees in certain contexts.

Administrative fees shall be levied for requests requiring more than 1 hour of staff time to process. Charges for administrative fees may include staff time associated with processing FOIA requests, including, without limitation: identifying records; monitoring file reviews; and generating computer records (electronic or print-outs). Administrative fees shall not include any cost associated with the public body's legal review of whether any portion of the requested records is exempt from FOIA. The public body shall make every effort to ensure that administrative fees are minimized, and may only assess such charges as shall be reasonable required to process FOIA requests. In connection therewith, the public body shall minimize the use of nonadministrative personnel in processing FOIA requests, to the extent possible.

29 Del. C. § 10003(m)(2).

LEGAL ANALYSIS

The City did not violate FOIA when it charged fees to review the requested records.

Delaware's FOIA statute must be construed in favor of disclosure. *29 Del. C. § 10001*. The General Assembly recognized that a public body could deter a citizen from seeking records under FOIA by imposing high administrative fees. To minimize this risk, the statute states that the public body "shall make every effort to ensure that administrative fees are minimized, and may only assess such charges as shall be reasonably required to process FOIA requests." *Id.* Additionally, the General Assembly exempted legal fees from the fees that could be forwarded along to the citizen-requestor. *Id.*

The issue in this case is whether the review performed by the City of New Castle Police Department should be considered legal review. This is an issue of first impression in the State of Delaware. Delaware's FOIA statute does not differentiate between review done by a lawyer to determine whether records are exempt, and review done by other individuals. The code simply refers to a "public body's legal review." Looking to other state's FOIA statutes, as well as the federal statute, does little to illuminate the legislature's intended meaning of the term "legal review." The federal FOIA statute allows fees for "the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section." 5 U.S.C.A. 552(a)(4)(A)(iv). Most state laws only allow fees for direct costs, such as retrieving and copying. *See, e.g.*, Va. Code Ann. § 2.2-3704.

As many public bodies, especially smaller entities, may not have attorneys, this substantive review may not always be done by attorneys. This office recently held that "[d]etermining whether a record may or must be withheld based upon an exemption listed in FOIA or upon any other applicable provision of law constitutes legal review." *Del. Op. Att'y Gen.* 15-IB03.

Additionally, in the Department of Justice's FOIA Manual, this office noted:

"Public bodies may not charge fees associated with the 'legal review' of records to determine whether any of FOIA's listed exemptions, or any other exemptions, apply. The statute does not limit "legal review" to reviews conducted by an attorney. This is an important note for public bodies that do not routinely rely on counsel to determine whether any of the FOIA exemptions apply. Where any person reviewing records conducts an independent legal analysis, it may be deemed to be a legal review."

Delaware Freedom of Information Act: Policy Manual for FOIA Coordinators³, at 6 (July 1, 2015).

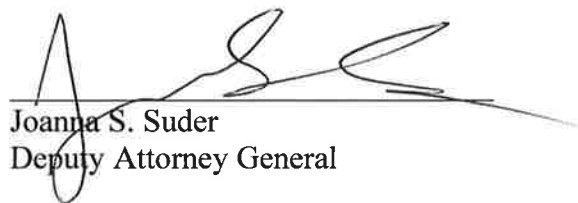
In this case, however, the Lieutenant would not be conducting a legal review but would instead be conducting an administrative review to identify those portions of the manual, the disclosure of which may present a safety risk to the members of the City of New Castle Police Department or the general public. The City of New Castle Police Department is the only entity capable of reviewing its own policies and procedures to determine if their release "would reveal vulnerability assessments, specific tactics, specific emergency procedures or specific security procedures." 29 *Del. C.* § 10002(l)(17)(a)(1). The City was not conducting a legal review to determine if exemptions apply, but instead was conducting a review to determine which records, if released, presented a safety risk that could result in harm to its officers and the public. Mr. Losco, as the City's attorney, would not be able to make this legal determination absent a prior, independent application of the Lieutenant's non-legal specialized expertise, knowledge, training, and skill as a law enforcement officer. The Lieutenant's review may inform Mr. Losco's legal review and his ultimate decision to apply 29 *Del. C.* § 10002(l)(17)(a)(1) with respect to a particular portion of the policies and procedures you have requested, but it does not constitute legal review in and of itself.

³ Available at http://attorneygeneral.delaware.gov/documents/FOIA_Manual_10-30-15.pdf.

CONCLUSION

We conclude that the aforementioned charge did not violate FOIA. However, we must point out that the fee charged shall be based on the hourly rate of the lowest-paid employee capable of doing the work. 29 Del. C. § 10003(m)(2). If an employee at a rank lower than that of Lieutenant is capable of doing the work required, then the fees must be charged at that rate, regardless of which individual does the actual work. Additionally, we believe that the City's review of its own police manual should not be a time consuming task. As set forth herein, the City presently estimates it will take nearly 11 hours to complete this review; that seems quite high. To that end, the City is directed to provide the requesting party an appropriately detailed accounting of the actual time expended for the review. Should the actual time necessary to review these materials be less than estimated, the City shall timely and appropriately refund the unexpended amount of pre-paid administrative fees to Mr. Dworiak.

Very truly yours,


Joanna S. Suder
Deputy Attorney General

Approved: 

Aaron Goldstein
State Solicitor

cc: Daniel Losco, Esq., City Solicitor, City of New Castle (via email)