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

**Attorney General Opinion No. 16-IB19**

**September 30, 2016**

**VIA EMAIL**

Nicolas Krawitz, Esquire  
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Wilmington, DE 19801  
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**Re: FOIA Petition Dated August 4, 2015**

Dear Mr. Krawitz:

We write in response to the petition of Mr. Chipman L. Flowers, Jr. and The Archives of the Honorable Chip Flowers, Jr. (collectively “Mr. Flowers”), dated August 4, 2015 (“Petition”). In the Petition, Mr. Flowers argues that the Office of the State Treasurer (“OST”) committed multiple violations of the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with its handling of Mr. Flowers’ requests for emails sent from or received at his state email address during his tenure as State Treasurer.

In this determination, we conclude that OST did commit one such violation based on its misunderstanding of the term “legal review” as used in the statute. We prescribe remediation for the violation.

**INTRODUCTION**

Mr. Flowers served as the State Treasurer for the State of Delaware from 2011 to 2015. During that time, Mr. Flowers used a State email address. In 2015, Mr. Flowers asked OST to review every email Mr. Flowers sent from or received in his State email account during his four-year term of service and to provide to him a copy of every email, or portion thereof, that is not

protected by a statutory exemption under FOIA or other Delaware or federal law.<sup>1</sup> After de-duplication, the total number of emails in this set appears to exceed 19,000.<sup>2</sup>

In the Petition, Mr. Flowers explains that the purpose of his requests is to support the “Flowers Papers Project.”<sup>3</sup> Mr. Flowers plans to put his emails and other materials into an online archive that will highlight what Mr. Flowers believes are “significant achievements and contributions during his tenure as State Treasurer.”<sup>4</sup> Mr. Flowers expects the online archive to “provide an unparalleled level of information to the public highlighting the historic policy debates, decisions, and achievements made by Mr. Flowers and his administration during his term in public office.”<sup>5</sup> In fact, this appears to be the primary motivation for Mr. Flowers’ requests, although the Petition also mentions that Mr. Flowers has discussed donating his materials to other institutions for “educational and historic research.”<sup>6</sup>

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<sup>1</sup> Letter from P.C. Collins, Jr. to D. Gibbs dated August 27, 2015 (“[T]he Requestors seek each and every record responsive to the Requests that is not exempt from public disclosure.”).

<sup>2</sup> Response at 10, 13 n. 61; Ex. 30 at 1-2 (Email from F. Broujos to K. Council dated June 9, 2015 (4:28 PM)).

<sup>3</sup> Petition at ¶¶ 8-10.

<sup>4</sup> *Id.* at ¶ 7.

<sup>5</sup> *Id.* at ¶ 8.

<sup>6</sup> Mr. Flowers alleges that “[t]he Archives was established to archive Mr. Flowers’ significant achievements and contributions during his term as State Treasurer” (Petition at ¶ 7), that “[d]ocuments, writings, photographs, correspondence, recordings and materials from his historic campaign and term as State Treasurer would be made available via the Archives’ website on an ongoing basis through the Flowers Papers Project” (Petition at ¶ 8), and that “[i]n connection with these discussions and in furtherance of the work of the Flowers Papers Project, the Requestors sent Flowers FOIA #1 To OST’s FOIA coordinator, Omar Masood, in early January 2015” (Petition at ¶ 10). *Cf.* Petition at ¶ 9 (“Around the same time, Mr. Flowers was also engaged in discussions with institutions to arrange for the donating of his correspondence compiled during his term of office for educational and historic research. These discussions are currently ongoing with at least one highly distinguished educational institution and one government agency.”); Letter from P.C. Collins, Jr. to D. Gibbs dated August 27, 2015 (“[Requestors’] objective is to compile a comprehensive collection of Mr. Flowers’ correspondence to be donated for archival or research purposes.”).

## **I. RELEVANT FACTS**<sup>7</sup>

On January 6, 2015, Mr. Flowers submitted a FOIA request to OST seeking “an electronic copy of all electronic mail correspondence sent by and received by The Honorable Chip Flowers, Jr., Esq. via state email, over the past year” (the “January 6 Request”).<sup>8</sup> Mr. Flowers requested that he be contacted if the cost would be greater than \$500.00.<sup>9</sup> That same day, OST’s FOIA Coordinator sent an email to Mr. Flowers stating: “This e-mail formally acknowledges receipt of your FOIA request. We will file an e-records request with DTI to retrieve the requested records.”<sup>10</sup>

On January 26, 2015, the Delaware Division of Technology and Information (“DTI”) sent OST’s FOIA Coordinator an estimate regarding Mr. Flowers’ January 6 request.<sup>11</sup> Specifically, DTI estimated a cost of \$100 to extract the potentially responsive records, load them to a CD, and deliver the CD to OST.<sup>12</sup> DTI noted that OST would be responsible for any redactions.<sup>13</sup> That same day, OST’s FOIA Coordinator forwarded the email to Mr. Flowers and noted that the check should be sent to DTI.<sup>14</sup> Moments later, Mr. Flowers indicated that he would send the check.<sup>15</sup>

On February 3, 2015, OST’s FOIA Coordinator responded that OST was in receipt of, but had not yet reviewed, approximately 24,000 potentially responsive emails from DTI.<sup>16</sup> OST’s FOIA Coordinator stated that “[g]iven this volume, it will take a significant amount of time to review each of the[ ] emails initially and determine which e-mails or parts of e-mails falls within

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<sup>7</sup> The Petition included 32 exhibits, which consist largely of email chains. We assume the use of chains was intended to reduce the total number of exhibits submitted, but the effect is to make it difficult for a reader to discern which communications we cite. Accordingly, for ease of reference, all citations to Mr. Flowers’ exhibits include parenthetical cross-references to the specific communication cited herein. Additionally, while a particular communication may appear in multiple exhibits, we have cited to the first exhibit in which the communication appears.

<sup>8</sup> Ex. 26 at 2 (Email from C. Flowers to O. Masood dated January 6, 2015 (10:36 AM)).

<sup>9</sup> *Id.*

<sup>10</sup> Ex. 33 at 1 (Email from O. Masood to C. Flowers dated January 6, 2015 (10:54 AM)).

<sup>11</sup> Ex. 34 at 3 (Email from Elayne Starkey to O. Masood and A. Richardson dated January 26, 2015 (10:02 AM)).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3 (Email from O. Masood to C. Flowers dated January 26, 2015 (3:11 PM)).

<sup>15</sup> *Id.* at 2 (Email from C. Flowers to O. Masood dated January 26, 2015 (3:19 PM)).

<sup>16</sup> Ex. 1 at 3 (Email from O. Masood to C. Flowers dated February 3, 2015 (1:05 PM)).

the exemptions under FOIA that warrant exclusion or redaction.”<sup>17</sup> OST’s FOIA Coordinator did not provide an exact estimate, but, as requested, he informed Mr. Flowers that the cost would exceed \$500.00.<sup>18</sup> The FOIA Coordinator asked Mr. Flowers whether he wished to narrow his request to a more specific set of e-mails in order to reduce costs and review time.<sup>19</sup>

Mr. Flowers responded a short time later, suggesting that he did not believe he would receive a high fee estimate and, therefore, did not foresee the need to narrow his request.<sup>20</sup> Mr. Flowers stated: “I am assuming the [Attorney General’s] office will be conducting the legal review, so the internal estimate should not be that much.”<sup>21</sup> Thus, the FOIA Coordinator attempted to explain why he – not a lawyer – would nevertheless have to review every email, which could result in a large fee estimate:

I have to review them as well—which is where the lion’s share of the charge would come from. DTI retrieved all e-mails sent to or by [Chip.Flowers@state.de.us](mailto:Chip.Flowers@state.de.us). There are duplicate e-mails in the 24,000 but I still have to go through each one because sometimes a reply to the original email will be shown under the same subject line. These e-mails were provided in the form of attachments. Just opening the e-mails would take a considerable amount of time (estimate 5-6 seconds just to get the attachment open multiplied by 24,000). We are willing to comply with the request but the cost will go well beyond the \$500 mark simply due to the sheer volume of the original request. We are happy to discuss this with you over the phone.<sup>22</sup>

OST’s response copied Delaware State Treasurer Ken Simpler.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (Email from C. Flowers to O. Masood dated February 3, 2015 (1:20 PM)).

<sup>21</sup> *Id.* This communication hinted at an issue that would eventually become a significant sticking point between the parties; namely, the meaning of the term “legal review” in the context of FOIA. At this time, Mr. Flowers’ understanding of the statute appears to have been that only lawyers conduct “legal review” and he could not be charged for the lawyer’s time to review. The FOIA Coordinator’s response suggests that he agreed with Mr. Flowers that “legal review” meant (at least) “review by a lawyer.”

<sup>22</sup> *Id.* (Email from O. Masood to C. Flowers dated February 3, 2015 (3:13 PM)).

Mr. Flowers' reply indicated a willingness to discuss narrowing his request.<sup>23</sup> He stated: "Good deal. It's probably fine on my end. We can discuss to try to narrow it down. I should have time to call you in the am. Does the morning work for both of you?"<sup>24</sup> Moments later, Treasurer Simpler replied, requesting that Mr. Flowers talk to Mr. Masood to see if they could narrow the scope.<sup>25</sup> He added: "I just wanted you to know that we are trying to be responsive."<sup>26</sup> On February 4, 2015, the date of the scheduled telephone call, Mr. Flowers informed OST that he had decided not to modify his request at that time.<sup>27</sup>

Instead, on February 5, 2015, Mr. Flowers submitted a second FOIA request to OST, seeking a much broader scope of records (the "February 5 Request").<sup>28</sup> Specifically, he sought "[c]opies of all electronic mails sent to and from State Treasurer Chip Flowers from January 2011 – January 10, 2014 (including, [sic] electronic emails put on 'litigation hold' from the Delaware Department of Justice beginning in 2013)."<sup>29</sup> Although he had been informed two days earlier that his smaller request would likely cost more than \$500.00 to fulfill, Mr. Flowers again requested that he be contacted if the cost would be greater than \$500.00.<sup>30</sup>

On February 18, 2015, a DTI representative sent OST an estimate regarding Mr. Flowers' February 5 Request.<sup>31</sup> DTI again estimated a cost of \$100 to extract the potentially responsive records, load them to a CD, and deliver the CD to OST.<sup>32</sup> The correspondence noted that DTI generally retains a user's email for only 12 months, but that more of Mr. Flowers' emails may be available because of a November 2012 litigation hold.<sup>33</sup> That same day, OST's FOIA Coordinator

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<sup>23</sup> *Id.* at 2 (Email from C. Flowers to O. Masood dated February 3, 2015 (3:18 PM)).

<sup>24</sup> *Id.*

<sup>25</sup> Ex. 2 at 1 (Email from K. Simpler to C. Flowers and O. Masood dated February 3, 2015 (3:36 PM)).

<sup>26</sup> *Id.*

<sup>27</sup> Ex. 3 (Email from O. Masood to C. Flowers dated February 18, 2015 (1:24 PM)). We note that this correspondence does not indicate whether Mr. Flowers communicated his decision before, during, or after the telephone call scheduled for February 4, 2015.

<sup>28</sup> Ex. 26 at 3 (Email from C. Flowers to O. Masood dated February 5, 2015 (11:58 AM)).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Ex. 4 at 2 (Email from S. Alexander to A. Richardson dated February 18, 2015 (8:47 AM)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

forwarded the estimate to Mr. Flowers and noted that the \$100 would be in addition to the \$100 charge for the January 6 request.<sup>34</sup> Mr. Flowers copied his Director of Finance and Operations on his response and instructed her to send the \$100 check to DTI.<sup>35</sup>

Also on February 18, 2015, OST's FOIA Coordinator provided Mr. Flowers with an itemized cost estimate for fulfilling the January 6 Request:

According to the Delaware Department of Technology and Information (DTI), there are 23,554 e-mails. At an estimated 2 minutes expended per e-mail for time spent reading, printing and redacting, it would take an estimated 785.13 hours of administrative staff time to complete this request. At a rate of \$13.42 per hour, which is the current hourly pay of the lowest-paid employee capable of performing this service, the cost for administrative fees is \$10,536.44. Using an estimate of 2 pages per e-mail, photocopying would cost \$4,708.80 to copy 47,108 pages. The combined cost is \$15,245.24, exclusive of any fees owed to DTI.<sup>36</sup>

On February 26, 2015 Mr. Flowers expressed his concerns about OST's fee estimate in an email to OST's FOIA Coordinator.<sup>37</sup> Mr. Flowers challenged the idea that anyone would be required to look at all of the emails he requested.<sup>38</sup> He identified several categories of emails that, in his view, should not be reviewed at all or should not be part of the fee estimate.<sup>39</sup> For example, Mr. Flowers argued that any email sent to him by a third party could not be protected by the attorney-client privilege and, therefore, need not be reviewed by anyone before delivery to Mr. Flowers.<sup>40</sup> Likewise, Mr. Flowers stated that any communications that might be protected by the

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<sup>34</sup> *Id.* (Email from O. Masood to C. Flowers dated February 18, 2015 (1:25 PM)).

<sup>35</sup> *Id.* at 1 (Email from C. Flowers to O. Masood dated February 18, 2015 (1:37 PM)). On February 20, 2015, Mr. Flowers' Director of Finance and Operations responded that "[t]he payment of \$200 was mailed this week." *Id.*

<sup>36</sup> Ex. 3 (Email from O. Masood to C. Flowers dated February 18, 2015 (1:24 PM)).

<sup>37</sup> Ex. 5 at 4-5 (Email from C. Flowers to O. Masood dated February 26, 2015 (12:00 PM)).

<sup>38</sup> *Id.* at 5 ("We will resist any Treasury effort to claim that **all emails and documents received and sent by me need** to be reviewed as the definition of the statute limits what could be deemed protected and technology exists to limit the search to those applicable documents."). We note that the subject line of the email states "Email Resent without Typos." In the email, Mr. Flowers stated that a prior email had been sent from his wireless device and that the corrected text had been noted. Based upon the context, we assume that the bolded and underlined words in this email are intended to emphasize those corrections.

<sup>39</sup> *Id.* at 4.

attorney-client privilege would have to be reviewed by OST's counsel, and OST could not charge fees for this "legal review."<sup>41</sup> Finally, Mr. Flowers contended that any emails that had been released by OST in response to any earlier FOIA request or had otherwise been disclosed publicly would not require any review before providing the same emails to Mr. Flowers.<sup>42</sup>

Mr. Flowers then offered his legal opinion as to what documents OST was entitled to review:<sup>43</sup>

It seems from our legal perspective, that the only **emails and documents that the Treasury could argue requiring internal review are those emails and documents that don't meet the criteria above and** where the only recipients have a "state.de.us" extension and were a member of the Treasury or OMB personnel staff and **such communication did not copy an attorney at the Attorney General's Office** (as those documents would be reviewed by the AGs[sic] office) This seems like a small subset of documents and could be modified by a DTI search **to even further narrow the subset to exclude routine Treasury communications that would have no basis for privilege or protection. In short, using simple modified search techniques, we believe that DTI could significantly narrow the field of documents requiring review to determine if a statutory exclusion exists (if such exclusions are even applicable to me as the recipient and sender of the email**

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<sup>40</sup> *Id.* (" . . . As you may know, many of the documents sent and received by me were from third parties and would not be subject to privilege **or protection** by definition and would not need to **be** reviewed.").

<sup>41</sup> *Id.* ("Further, any **emails and** documents relating to legal privilege (where a AG office member was copied) would need to be reviewed by the Attorney General's office for such determination as to whether the privilege was mine (which means the **email and attached document** could be disclosed) or the privilege belonged to the state and no charge would be attributed to me for such review **as there is no charge for legal review by the Attorney General's Office.**").

<sup>42</sup> *Id.* ("Finally, many **emails and** documents have already been reviewed due to prior FOIA requests or were already **disclosed** publicly and therefore no additional review is required and such **emails and** documents should be disclosed immediately." ). We read Mr. Flowers' argument to be that emails released to other parties in response to earlier FOIA requests necessarily constitute "public records" and may not be withheld from a subsequent requesting party. OST did not address this argument, and we express no opinion here.

<sup>43</sup> It is perhaps needless to say that OST's counsel is entitled to conduct its own legal analysis.

**communication—which is a legal question that should be answered at the outset).**<sup>44</sup>

The next day, February 27, 2015, OST’s counsel acknowledged Mr. Flowers’ concern over the high fee estimate and, by email, proposed to Mr. Flowers a “potential path forward that preserves the confidential and privileged nature of some of the documents in question but also enables [Mr. Flowers] to avoid incurring a significant review fee.”<sup>45</sup> Specifically, OST stated that it would allow Mr. Flowers to view emails responsive to the January 6 Request at OST’s offices during business hours, on mutually agreed-upon dates, and to select the emails Mr. Flowers would like OST to review for potential disclosure.<sup>46</sup> OST’s counsel indicated that Mr. Flowers would be the only person authorized to review the emails and that “a fee would still apply for OST to copy, review (for FOIA exemptions other than attorney-client privilege), redact, and produce the emails . . . .”<sup>47</sup>

OST’s counsel also informed Mr. Flowers that OST had requested, but had not yet received, the emails responsive to the February 5 Request.<sup>48</sup> OST’s counsel stated that she anticipated that OST would offer the same review alternative with respect to those emails.<sup>49</sup> She also confirmed that if OST’s alternative review proposal was not acceptable to Mr. Flowers, the February 18 cost estimate continued to remain an option.<sup>50</sup>

Mr. Flowers responded quickly and stated that he was amenable to OST’s proposed path forward, on the condition that he be permitted to bring an assistant or legal representative with him to review the emails.<sup>51</sup> He indicated that legal counsel representing him could assist in the review and render any privilege issue moot, “as such person would be [his] legal representative.”<sup>52</sup> Mr. Flowers also asked that the search be “narrowed” per his earlier request.<sup>53</sup> Specifically, he stated:

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<sup>44</sup> Ex. 5 at 4-5 (Email from C. Flowers to O. Masood dated February 26, 2015 (12:00 PM)).

<sup>45</sup> Ex. 5 at 3-4 (Email from L. Gerard to C. Flowers dated February 27, 2015 (2:31 PM)).

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 4.

<sup>51</sup> *Id.* at 2 (Email from C. Flowers to L. Gerard dated February 27, 2015 (2:47 PM)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* To repeat, Mr. Flowers’ concept of “narrowing” was that certain categories of emails would be provided without any review by OST or its counsel.



“I believe emails from third parties without copying any state.de.us [email address] should automatically (sic) excluded and disclosed electronically, along with prior FOIAs relating to emails concerning the communication between myself and the former Deputy State Treasurer.”<sup>54</sup> Mr. Flowers also reminded OST that he had requested the information in electronic format but stated: “However, let us reduce the universe of documents to save time for everyone.”<sup>55</sup>

The record does not reveal whether the parties had any discussions between February 27, 2015 and March 16, 2015. On March 16, 2015, Mr. Flowers sent an email to OST's counsel requesting a status update.<sup>56</sup> He informed OST that he had appointed separate legal counsel (“FOIA Counsel”), who was copied on the email, “to work on th[e] matter to a complete resolution” and “to work with the Attorney General and the Office of the Attorney General to resolve th[e] matter.”<sup>57</sup>

OST's counsel responded to Mr. Flowers the next day, March 17, 2015.<sup>58</sup> With respect to Mr. Flowers’ earlier “request to narrow the search,” OST’s counsel suggested that any searches intended to limit the data set would be run by DTI, not OST, and that DTI would impose additional charges on Mr. Flowers for each search:

To accomplish a narrowed search, it would be necessary for you to first determine the scope of the search and those terms that are to be included and excluded. Because this would entail a search with special scripts written by DTI, which is more time intensive for DTI and costlier, DTI cannot provide an estimate for the costs associated with a narrowed/special script search until you provide this additional information. Therefore, please advise of the scope and terms of your narrowed search. Once the OST receives a sufficient response from you regarding a narrowed search, the OST will promptly submit a request to DTI for this final search. . . .<sup>59</sup>

With respect to OST’s alternative review proposal, OST’s counsel denied Mr. Flowers’ request to bring an attorney with him to review emails on OST’s premises on the basis that the emails could contain confidential or privileged information.<sup>60</sup> With respect to Mr. Flowers’ request to receive

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1 (Email from C. Flowers to L. Gerard dated March 16, 2015 (3:26 PM)).

<sup>57</sup> *Id.*

<sup>58</sup> Ex. 6 at 1-2 (Email from L. Gerard to C. Flowers dated March 17, 2015 (4:31 PM)).

<sup>59</sup> *Id.* at 1. Here it appears that OST’s counsel used the concept of a “narrowed search” in the manner that most people would, but not in the manner that Mr. Flowers used the term.

copies of any emails provided by OST in response to earlier FOIA requests, OST's counsel stated that copies of emails that had been provided pursuant to an unrelated 2013 FOIA request would be available for Mr. Flowers' review, along with the CD containing emails responsive to the January 5 Request.<sup>61</sup> Finally, OST's counsel stated: "Also, as mentioned in my initial email, there will be fees charged to you for OST to copy, review, redact and produce the emails you select based upon your review . . . . However, in accordance with FOIA, you will not be charged for legal review."<sup>62</sup>

The parties conferred by telephone on March 23, 2015.<sup>63</sup> It is not clear whether the parties reached any agreements on the call, but Mr. Flowers stated afterward that he believed the parties had made "significant progress."<sup>64</sup> On April 6, 2015, Mr. Flowers sent to OST a set of search instructions to be conveyed to DTI for execution.<sup>65</sup> With one exception, the search requests do not appear to "narrow" Mr. Flowers' FOIA request, in the sense that Mr. Flowers would agree to accept a smaller number of emails. Rather, they appear to be an attempt to organize categories of emails or to relate to Mr. Flowers' February 25 argument that certain categories of documents should not be reviewed by OST before delivery.<sup>66</sup> In fact, after providing the detailed instructions, Mr. Flowers stated: "[T]he aforementioned searches, unless otherwise stated . . . should in no way limit the scope of the FOIA submitted to the Treasury."<sup>67</sup>

Mr. Flowers' April 6, 2015 email stated, in pertinent part: "Per our discussion, we believe the following searches can be undertaken by DTI without objection, while we determine an appropriate path forward with respect to matters that may be covered by statutory protections under Delaware law."<sup>68</sup> The proposed search parameters were as follows:

1. All electronic mail correspondence to, from and cc'ing State Treasurer Chip Flowers from any non-Delaware government source (including communications from the White House and other federal

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See* Ex. 12 at 3-8.

<sup>64</sup> *Id.* at 1 (Email from C. Flowers to F. Broujos and K. Council dated April 6, 2015 (12:36 PM)).

<sup>65</sup> Ex. 11 at 1 (Email from C. Flowers to F. Broujos and K. Council dated April 6, 2015 (12:29 PM)).

<sup>66</sup> *See id.*

<sup>67</sup> *Id.* The second search request did expressly narrow the request for "electronic mail communications involving state officials" by excluding four categories of communications.

<sup>68</sup> *Id.* It is not clear what Mr. Flowers means by "without objection."

and non-Delaware agencies), excluding emails to, from or cc'ing (i) any state employee (designated by the extension – state.de.us in “To”; “CC” or “BCC” field) other [sic] Ms. Kelly Callahan or (ii) Clark Collins, Esq. (morrisjames.com). The information relating to Clark Collins will be discussed at a later date in the broader context of privilege.

2. We are willing to narrow our request for electronic mail communications involving state officials to exclude (i) any communications either to, from or cc'ing any staff personnel of the Board of Pardons (from our knowledge, this would involve only two individuals, Judy and Diane from the Board of Pardons – not the Board members), (ii) communications either to, from or cc'ing any member of the General Assembly that served at the time of State Treasurer's term in office, (iii) communications either to, from or cc'ing any staff personnel from the Delaware Farmland Preservation Board (not the Board members) and (iii) communications either to, from or cc'ing Amy Bonner or Kevin (AG). My apologies as I do not recall Kevin's last name.
3. All electronic mail correspondence to, from and cc'ing State Treasurer Chip Flowers provided under any FOIA issued during his term in office (this would include information relating to former Deputy State Treasurer Erika Benner and other information provided to individuals set forth in the Treasury's FOIA log).
4. All electronic mail correspondence to, from and cc'ing State Treasurer Chip Flowers from any cabinet secretary or statewide elected official that did not copy a member of the Office of the Attorney General (the applicable members of the Attorney General should be easily obtained – Annmarie Johnson, Frank Broujos, Laura Gerard, Elio Battista, Ed Black, Aaron Goldstein, Attorney General Beau Biden, Kathy Jennings, Tim Maloney and those individuals in the office that were “investigating” or “assigned” to the Treasury – call it a hunch, but we feel very confident that your office could provide a complete list of names to DTI for this search, including members of the AG's Special Investigative Unit assigned to the Treasury).<sup>69</sup>

OST's counsel responded to Mr. Flowers' April 6, 2015 email the following week, on April 13, 2015.<sup>70</sup> Regarding Mr. Flowers' search instructions, OST's counsel informed Mr.

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<sup>69</sup> *Id.*

<sup>70</sup> Ex. 13 at 1 (Email from L. Gerard to C. Flowers and K. Council dated April 13, 2016 (4:00 PM)).

Flowers that she understood Mr. Flowers' April 6 request to replace his two prior FOIA requests and asked Mr. Flowers to advise by April 17 if she was not correct.<sup>71</sup> OST's counsel noted that OST would be unable to "fill in" the names of those individuals at the Attorney General's Office as suggested by Mr. Flowers and requested those names by April 17.<sup>72</sup> Finally, OST's counsel confirmed that OST still intended to review any emails returned from Mr. Flowers' search request:

Once we hear from you, OST will communicate your newly provided search terms . . . to DTI. However, it is not at all clear to us that those search terms will address, with certainty, the exclusion of confidential non-public records (i.e. emails) to which you are not entitled, thereby reducing the number of responsive emails for review prior to providing you access.<sup>73</sup>

OST otherwise repeated several of the positions it had taken in its March 17, 2015 correspondence<sup>74</sup> and offered to provide to Mr. Flowers the non-confidential, non-privileged emails between Mr. Flowers and Deputy Treasurer Erika Benner that OST had previously provided to the News Journal.<sup>75</sup>

Mr. Flowers responded promptly to OST's counsel and asked her to speak directly with Mr. Flowers' FOIA Counsel.<sup>76</sup> He stated that, from his perspective, the FOIA requests were clear.<sup>77</sup> He asked OST to produce the documents or to explain in writing any objections to his four

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* Counsel stated that "no non-public records will be released - - to anyone - - by OST" including "requested emails that are exempt under FOIA due to confidential content." *Id.* Additionally, "[a]ll other public records . . . that may be subject to attorney-client privilege (existing between [Mr. Flowers] as Treasurer and [his] counsel) w[ould] be made available to [Mr. Flowers] (and only [Mr. Flowers]) for review only . . . at a mutually convenient time." *Id.* Counsel stated that OST would thereafter review any records requested by Mr. Flowers as a result of his review. *Id.*

<sup>75</sup> *Id.* The parties eventually reached agreement on this point, and OST sent the records to Mr. Flowers' FOIA Counsel. *See* Ex. 22 (Email from O. Masood to K. Council dated April 28, 2015 (3:16 PM)). Mr. Flowers was copied on the correspondence.

<sup>76</sup> Ex. 14 at 1 (Email from C. Flowers to L. Gerard and K. Council dated April 13, 2015 (4:31 PM)).

<sup>77</sup> *Id.*

searches so that he could pursue an appeal.<sup>78</sup> Finally, Mr. Flowers indicated that the question of who within the Attorney General's Office was assigned to the Treasury was a question for OST's counsel.<sup>79</sup>

The next day, however, April 14, 2015, Mr. Flowers sent an email to OST's counsel to identify email search software that he believed would assist DTI with the searches and avoid what he deemed a "grossly unreasonable" search fee of \$100 or \$200 per additional search.<sup>80</sup> Mr. Flowers explained that "his technology company" told him that technology was available to assist with the project.<sup>81</sup> Mr. Flowers provided OST with a link to the software and stated that he was willing to pay the \$200 cost for the software.<sup>82</sup>

The parties discussed "DTI's response regarding the [proposed] software" on April 29, 2015,<sup>83</sup> after which Mr. Flowers' FOIA Counsel requested a meeting with a DTI representative to "resolve the outstanding issues related to the search terms. . . ."<sup>84</sup>

On May 8, 2015, OST's counsel rejected Mr. Flowers' request for a meeting, stating that OST did not believe that there were any outstanding issues and, as a result, did not believe a meeting was necessary.<sup>85</sup> OST's counsel stated that the search terms from Mr. Flowers' April 6 email were unclear.<sup>86</sup> With respect to Mr. Flowers' January 6 request, OST's counsel stated:

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<sup>78</sup> See *id.* ("We encourage you to review each paragraph provided to start the process or submit us a letter setting forth the reasons why such information can't be provided, so we can file an appeal and keep the process moving via the Court.").

<sup>79</sup> *Id.*

<sup>80</sup> Ex. 15 at 1 (Email from C. Flowers to L. Gerard and K. Council dated April 14, 2015 (11:39 AM)).

<sup>81</sup> *Id.*; Ex. 16 at 1 (Email from C. Flowers to L. Gerard and K. Council dated April 14, 2015 (11:44 AM)).

<sup>82</sup> Ex. 15 at 1 (Email from C. Flowers to L. Gerard and K. Council dated April 14, 2015 (11:39 AM)).

<sup>83</sup> See Ex. 23 (Email from F. Broujos to K. Council dated April 28, 2015 (5:06 PM)); Ex. 25 (Email from K. Council to F. Broujos and L. Gerard dated April 30, 2015 (11:54 AM)).

<sup>84</sup> Ex. 25 (Email from K. Council to F. Broujos and L. Gerard dated April 30, 2015 (11:54 AM)).

<sup>85</sup> Ex. 26 at 1 (Email from F. Broujos to K. Council dated May 8, 2015 (5:01 PM)).

<sup>86</sup> *Id.* at 2.

It is OST's position that regardless of the search terms utilized, confidential emails may have been pulled and burned to the CD. Therefore, without OST (and/or its counsel) reviewing each of the 22,107 emails, OST believes the access [offered by OST's counsel on February 27] constitutes "reasonable access" required by FOIA (by providing immediate access and avoiding *significant* additional cost to Mr. Flowers for OST's review of the emails) and fulfills this request. . . .<sup>87</sup>

OST's counsel took a similar tack with Mr. Flowers' February 5 request, stating: "[N]o set of search terms (whatever they are) will exclude all potentially confidential emails – emails that cannot be turned over to *anyone* without OST's initial review and redaction (if necessary)."<sup>88</sup> OST's counsel offered to make the emails available under the same conditions as the emails responsive to Mr. Flowers' January 6 request.<sup>89</sup> OST's legal counsel stated that, "[o]ther than reviewing and providing (redacted if necessary) copies of the emails Mr. Flowers selects during his on-site review," OST would consider the requests closed.<sup>90</sup>

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<sup>87</sup> *Id.* at 3 (emphasis in original). We read the foregoing sentence as an offer: OST or its counsel would review all emails (as in the ordinary course of processing FOIA requests) or Mr. Flowers could review the emails first and identify a potentially smaller set of records for OST or its counsel to review.

<sup>88</sup> *Id.* (emphasis in original).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

On May 9, 2015, Mr. Flowers rejected OST's "alternative" approach to reviewing emails.<sup>91</sup> Mr. Flowers responded to OST's counsel, stating: "From our perspective, start producing the documents as you and I both know we would have no problem seeking a court order mandating the production with minimal costs."<sup>92</sup>

The record does not reveal whether the parties had communications between May 9 and May 28, 2015. On May 28, 2015, Mr. Flowers sent an email to Treasurer Simpler and OST's FOIA Coordinator, asking OST to provide him with a detailed plan for delivering all statutorily required documents "within five (5) business days or legal action w[ould] be forthcoming."<sup>93</sup> He added that he was willing to offer OST a document delivery schedule for the release of all relevant documents over a period of six months.<sup>94</sup> Again, Mr. Flowers did not suggest any change in his position on OST's fee estimate.

On June 9, 2015, OST's counsel wrote to Mr. Flowers' counsel to inform her, among other things, that DTI's search relating to the February 5 Request had returned 19,000 emails.<sup>95</sup> OST's counsel suggested again that Mr. Flowers review the materials in person to select the emails he would like OST to review and repeated that "there never has been nor will there ever be any costs incurred by [Mr. Flowers] or the Archives for [the Attorney General's] Office's legal review of the emails."<sup>96</sup>

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<sup>91</sup> See Ex. 28 at 3 (Email from C. Flowers to K. Council dated May 9, 2015 (9:01 AM)). We note that OST's counsel was copied on this correspondence.

<sup>92</sup> *Id.* (emphasis added). This response suggests that Mr. Flowers had not changed his view of OST's fee estimate. See also *id.* ("Since we have gone in circles on this issue, our position is now clear, produce the documents in the FOIA request.").

<sup>93</sup> Ex. 27 (Email from C. Flowers to K. Simpler and O. Masood dated May 28, 2015 (12:03 PM)).

<sup>94</sup> *Id.* We note that FOIA does not permit requesting parties to dictate the time within which a public body must conduct the legal review permitted by the statute, especially where, as here, the request is extraordinarily broad.

<sup>95</sup> Ex. 30 at 1 (Email from F. Broujos to K. Council dated June 9, 2015 (4:28 PM)). OST also reminded Mr. Flowers that approximately 22,000 emails had been returned in connection with the January 6 Request. *Id.* OST later accounted for duplicates and revised its tally of the total number of emails returned in connection with both requests. That number is approximately 19,320. Response at 10, 13 n.61.

<sup>96</sup> *Id.* at 1-2 (Email from F. Broujos to K. Council dated June 9, 2015 (4:28 PM)).

OST's counsel's June 9 email also contained a new contention. Counsel stated that OST had learned from DTI that Mr. Flowers had received a copy of all his state emails as part of a December 2014 eRecords request made while he was still in office as the State Treasurer.<sup>97</sup> As such, OST's counsel asserted her belief that Mr. Flowers already had a copy of the vast majority of emails he was then seeking through his FOIA requests.<sup>98</sup> Counsel stated her belief that the only emails Mr. Flowers did not already possess were those post-dating his request, which included late December and the first week of January 2015.<sup>99</sup> OST's counsel concluded: "Except for reviewing and providing copies (redacted as necessary) of emails Mr. Flowers requested for . . . (mid-December through 1/6/15) or which Mr. Flowers selects during his on-site review of the CD's at the Carvel Building, OST will consider both requests closed and its obligations under [FOIA] fulfilled . . . ."<sup>100</sup>

Mr. Flowers' counsel replied promptly that "Mr. Flowers' legal team [wa]s conferring on an appropriate response" to OST's June 9 email and stated that "such response w[ould] be forthcoming shortly."<sup>101</sup> The record does not reveal whether the parties had communications between June 10 and July 29, 2015.

On July 29, 2015, a new attorney representing Mr. Flowers ("Petition Counsel") sent a letter to OST's counsel: "seeking clarification of OST's position," "to request an itemized written cost estimate of any fees expected to be incurred," and "to propose a reasonable path forward toward amicably resolving this matter."<sup>102</sup> The July 29 letter set forth Mr. Flowers' legal position and stated that if OST declined to engage in the proposed resolution, Mr. Flowers would appeal the matter to the Attorney General's Office and/or the Delaware Superior Court.<sup>103</sup>

On August 3, 2015, the parties conducted a teleconference.<sup>104</sup> The record does not summarize the discussion, but Mr. Flowers' Petition suggests that some of the parties' issues may have been mooted or clarified. Likewise, OST described the teleconference as "productive (and

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<sup>97</sup> *Id.* at 2.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Ex. 31 at 1 (Email from K. Council to F. Broujos dated June 9, 2015 (10:25 AM)).

<sup>102</sup> Ex. 32 at 1 (Letter from P.C. Collins, Jr. to F. Broujos dated July 29, 2015).

<sup>103</sup> *See id.*

<sup>104</sup> Supplemental Response at 10.



extensive).”<sup>105</sup> Nevertheless, Petition Counsel informed OST during the call that Mr. Flowers would be filing a petition with the Attorney General’s Office the next day to “preserve” an appeal. Mr. Flowers filed his Petition the next day.

OST responded to the Petition on August 17, 2015 (the “Response”). On August 24, 2015, we asked OST to submit additional argument,<sup>106</sup> which it did on September 11, 2015 (the “Supplemental Response”).

Finally, Mr. Flowers wrote to this Office on August 27, 2015, to clarify the nature of his request.<sup>107</sup> Mr. Flowers stated clearly that he does not want “a selected subset of the non-exempt documents.”<sup>108</sup> Rather, Mr. Flowers argued that every email in OST’s possession is “necessarily and admittedly responsive” and that the only determination to be made is whether “any are exempt from public disclosure.”<sup>109</sup> Stated another way, Mr. Flowers wants to have at the end of the process a collection of emails that OST and its counsel have determined are available for public display.

## **II. CONTENTIONS OF THE PARTIES**

Mr. Flowers asked this Office to “investigate OST’s Response for violations of FOIA.”<sup>110</sup> We did not do so, as that is not our statutory mandate.

Mr. Flowers also argued that OST violated FOIA by: (1) including in its cost estimate fees for OST’s “legal review” of emails and for printing emails (the latter because Mr. Flowers specifically requested an electronic copy); (2) including photocopying fees in its cost estimate; (3) failing to provide any cost estimate in connection with Mr. Flowers’ February 5 Request; (4) “demanding” that Mr. Flowers perform an initial review of the emails to determine the

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<sup>105</sup> *Id.*

<sup>106</sup> Letter from D. Gibbs to F. Broujos dated August 24, 2015.

<sup>107</sup> Letter from P.C. Collins, Jr. to D. Gibbs dated August 27, 2015.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* We do not necessarily agree with this argument. Under FOIA, a requesting party is only entitled to obtain access to “public records.” In the context of these uniquely broad requests for every email sent and received over a period of four years, we believe that the set may contain emails that do not satisfy the definition (*e.g.*, personal emails, solicitations or announcements from the DSBA). If DTI has filtered all such emails out on the front end, however, Mr. Flowers’ argument may be correct.

<sup>110</sup> Petition at ¶ 1.

applicability of FOIA exemptions; (5) circumscribing Mr. Flowers' access to the requested emails based upon an erroneous belief that he "already possesses" copies of some of the emails; and (6) engaging in "obstinate tactics."<sup>111</sup> Mr. Flowers requests an award of attorneys' fees and costs.<sup>112</sup>

Although Mr. Flowers argued several times to OST that he was entitled to receive certain categories of emails without any prior review by OST or its counsel, Mr. Flowers did not challenge the fee estimate on this basis in his Petition to this Office.

In its Response, OST argues that this Office may resolve a "threshold" argument and avoid consideration of Mr. Flowers' individual arguments.<sup>113</sup> OST contends that the invitation to allow Mr. Flowers to inspect and cull the emails before OST undertakes any review constitutes "reasonable access" under FOIA and satisfies OST's statutory obligations in itself.<sup>114</sup> OST also notes that this offer was presented only after Mr. Flowers disputed OST's fee estimate and refused any further negotiation of search terms.<sup>115</sup> Finally, OST contests each of Mr. Flowers' arguments.<sup>116</sup> We address both parties' arguments in greater detail below.

### **III. RELEVANT AUTHORITY**

The purpose of Delaware's FOIA is set forth in its declaration of policy, which states:

It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have

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<sup>111</sup> *Id.* at ¶¶ 28-42.

<sup>112</sup> *Id.* at ¶ 1. FOIA does not permit this Office to award attorneys' fees and costs. *See 20 Del. C. § 10005(d)* ("The *court* may award attorney fees and costs to a successful plaintiff of any action brought under this section." (emphasis added)). Petitioners may proceed before this Office without retaining counsel, and there are no "costs" associated with presenting a petition to this Office in the sense that the term "costs" is used in the statute. *See, e.g., Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 723 (Del. 1976) ("Costs are allowances in the nature of incidental damages awarded by law to reimburse the prevailing party for expenses necessarily incurred in the assertion of his rights in court." (quotation marks and citation omitted)).

<sup>113</sup> Response at 12-13.

<sup>114</sup> Supplemental Response at 2.

<sup>115</sup> *Id.* at 2.

<sup>116</sup> Response at 13-20.

easy access to public records in order that the society remain free and democratic. Toward these ends, and to further the accountability of government to the citizens of this State, [Title 29, Delaware Code, Chapter 100] is adopted, and shall be construed.<sup>117</sup>

Before any public body provides records to a requesting party under FOIA, the public body may, and in many cases must, review the records to determine whether all or any portion of a record may or must be withheld. Section 10003(k) states, in pertinent part:

Prior to disclosure, records may be reviewed by the public body to ensure that those records or portions of records deemed nonpublic may be removed pursuant to § 10002 of this title or any other applicable provision of law.

FOIA allows public bodies to charge administrative fees in connection with certain of their efforts. Section 10003(m)(2) provides, in relevant part:

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 reasonabl[y] required to process FOIA requests. In connection therewith, the public body shall minimize the use of non-administrative personnel in processing FOIA requests, to the extent possible.

Prior to fulfilling any request that would require a requesting party to incur administrative fees, the public body shall provide an itemized written cost estimate of such fees to the requesting party, listing all charges expected to be incurred in retrieving such records. Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.

Delaware's FOIA also mandates that "each public body . . . designate a FOIA coordinator who shall serve as the point of contact for FOIA requests and coordinate the public body's response thereto."<sup>118</sup> "The FOIA coordinator . . . shall make every reasonable effort

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<sup>117</sup> 29 Del. C. § 10001.

<sup>118</sup> 29 Del. C. § 10003(g)(1).

to assist the requesting party in identifying the records being sought, and to assist the public body in locating and providing the requested records.”<sup>119</sup> The FOIA coordinator must also “work to foster cooperation between the public body and the requesting party.”<sup>120</sup>

#### **IV. ANALYSIS**

##### **A. Alleged Inflated Estimate of Administrative Fees In Connection with the First Request**

Delaware’s FOIA provides that, “[p]rior to fulfilling any request that would require a requesting party to incur administrative fees, the public body shall provide an itemized written cost estimate of such fees to the requesting party, listing all charges expected to be incurred in retrieving such records.”<sup>121</sup> This allows the requesting party to “decide whether to proceed with, cancel, or modify the request” before incurring any fees.<sup>122</sup>

Mr. Flowers alleges that OST violated FOIA by offering an inflated estimate of administrative fees to be incurred in connection with his first request.<sup>123</sup> Specifically, he alleges that the estimate includes time for OST’s “legal review” of the records, which is prohibited under the statute, and a fee for printing that is improper because Mr. Flowers requested an electronic copy of the records.<sup>124</sup> Mr. Flowers also contends that OST inflated its estimate by including printing fees.<sup>125</sup> Mr. Flowers argues that the foregoing charges violate FOIA’s requirements that public bodies ensure that administrative fees are minimized and assess only those charges reasonably required.<sup>126</sup>

As set forth more fully below, we agree with Mr. Flowers that OST’s fee estimate included time required for legal review, for which Mr. Flowers may not be charged. We cannot conclude, however, that including printing fees in the estimate was a violation of FOIA.

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<sup>119</sup> 29 Del. C. § 10003(g)(2).

<sup>120</sup> *Id.*

<sup>121</sup> 29 Del. C. § 10003(m)(2).

<sup>122</sup> *Id.*

<sup>123</sup> Petition at ¶¶ 28-31.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at ¶¶ 28, 31.

<sup>126</sup> *Id.* at ¶ 31; 29 Del. C. § 10003(m)(2).

## i. Legal Review

This Office has recently stated that “[d]etermining whether a record may or must be withheld based upon an exemption listed in FOIA . . . constitutes legal review.”<sup>127</sup> Likewise, the Department of Justice Policy Manual for FOIA Coordinators currently explains that 29 *Del. C.* § 10003(m)(2) “does not limit ‘legal review’ to reviews conducted by an attorney....”<sup>128</sup> These interpretations, which we note were published several months after OST’s February 18, 2015 estimate, are drawn from the language of the statute, which reads, in pertinent part, as follows:

. . . 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 . . .*<sup>129</sup>

This provision first enumerates specific tasks, administrative in nature, for which administrative fees may be charged.<sup>130</sup> In contrast, the next sentence identifies the “legal review of whether any portion of the requested records is exempt from FOIA” as a task for which administrative fees may not be charged.<sup>131</sup>

The statute contemplates that the assessment of exemptions will be undertaken by “the public body.” Perhaps this review will be conducted by a public body’s counsel, but, in the context of this statute, we do not believe that “legal review” is intended to be limited to review by counsel. Indeed, we do not believe that the General Assembly expects every public body to consult with counsel when fulfilling records requests under FOIA. Given the context in which this statute applies, we believe the meaning of “legal review” is plain: A requesting party may not be charged administrative fees for the time it takes “the public body” to review a record for the purpose of assessing the applicability of FOIA’s exemptions, no matter who is conducting that review.<sup>132</sup> One

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<sup>127</sup> *Del. Op. Att’y Gen.* 15-IB03 (June 12, 2015).

<sup>128</sup> Delaware Freedom of Information Act: Policy Manual for FOIA Coordinators at 6 (July 1, 2015), available at [http://attorneygeneral.delaware.gov/documents/FOIA\\_Manual\\_10-30-15.pdf](http://attorneygeneral.delaware.gov/documents/FOIA_Manual_10-30-15.pdf) (last visited September 26, 2016).

<sup>129</sup> 29 *Del. C.* § 10003(m)(2) (emphasis added).

<sup>130</sup> *See id.*

<sup>131</sup> *Id.*

<sup>132</sup> In *Del. Op. Att’y Gen.* 16-IB09 (Apr. 7, 2016), we concluded that a police department’s review of its policy manual to determine, as a matter of *fact*, which provisions could present a risk to public safety if disclosed, was an administrative review, and “not . . . a legal review to determine

practical reason for making such a choice would be to allow public bodies to consider these matters carefully, without concern that they might run afoul of the requirement to “make every effort to minimize administrative fees.”<sup>133</sup>

Based upon the foregoing, we conclude that OST violated FOIA to the extent that OST’s fee estimate anticipated time spent for OST’s FOIA Coordinator to, in OST’s words, “determine which e-mails or parts of e-mails falls within the exemptions under FOIA that warrant exclusion or redaction,”<sup>134</sup> or, in OST’s counsel’s words, “review (for FOIA exemptions other than attorney-client privilege).”<sup>135</sup> We believe that the appropriate remediation is for OST to provide Mr. Flowers with a revised itemized written estimate in accordance with the guidance provided in this determination. The fee estimate may include fees associated with OST’s FOIA Coordinator’s time spent performing administrative tasks such as removing or redacting records in accordance with a set of instructions provided by counsel,<sup>136</sup> but it should not include any fees associated with any review for a determination of whether FOIA exemptions apply.<sup>137</sup>

Given that there is now a single, de-duplicated data set for both of Mr. Flowers’ requests, we determine that OST should prepare the estimate (and conduct the review) using this set.<sup>138</sup> Although Mr. Flowers actually submitted two requests, the record suggests that there is considerable overlap in the data sets. Reviewing the two sets separately would result in

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if exemptions apply.” The opinion made clear that determining whether documents are exempt under FOIA is a “legal review” under the statute, whether the review is conducted by a public body or its counsel. *Id.*

<sup>133</sup> 29 *Del. C.* § 10003(m)(2).

<sup>134</sup> Ex. 1 at 3 (Email from O. Masood to C. Flowers dated February 3, 2015 (1:05 PM)).

<sup>135</sup> Ex. 5 at 3 (Email from L. Gerard to C. Flowers dated February 27, 2015 (2:31 PM)).

<sup>136</sup> *See Del. Op. Att’y Gen.* 15-IB03 (“[FOIA] does not, however, prohibit charging for time that staff members spend making any necessary redactions.”).

<sup>137</sup> The statute requires OST to prepare an estimate before reviewing the emails. *See* 29 *Del. C.* § 10003(m)(2) (“Prior to fulfilling any request that would require a requesting party to incur administrative fees, the public body shall provide an itemized written cost estimate of such fees to the requesting party, listing all charges expected to be incurred in retrieving such records.”). Here, OST prepared its estimate by assuming a two-minute review of each email and multiplying the time by the total number of emails. The total number of minutes was converted to hours, to be charged at a rate of \$13.42 per hour, the rate of OST’s lowest paid employee. Mr. Flowers has not challenged any aspect of the estimate aside from the charge for legal review, printing fees and photocopying fees.

<sup>138</sup> OST’s counsel has represented that he now believes that the total number of emails responsive to **both** requests is approximately 19,320. *See supra* note 95.

unnecessary and unfair charges to Mr. Flowers, and would not satisfy the statute's direction to minimize administrative fees.

## **ii. Printing Charges**

This Office has previously stated that “a public body cannot respond to a request for information in electronic form by supplying paper records that contain the same information.”<sup>139</sup> In that matter, it appears that the requesting party asked for records contained in an electronic database and the public body provided the records in hard copy instead.<sup>140</sup> The public body argued that it was only required by law to maintain hard copies, and it therefore was only required to provide the documents in hard copy.<sup>141</sup> That is not what OST proposes to do here. OST argues that it must print emails in order to review and redact them.<sup>142</sup> OST then intends to provide the records to Mr. Flowers in electronic form.<sup>143</sup>

We do not read FOIA to impose a blanket ban on printing (or photocopying) fees – or on fees for the administrative time it takes to print or make photocopies of emails – every time a requesting party asks for an electronic copy of records. The determination is fact-specific. For example, not every public body will have document review software that permits online review and redaction of electronic records. If a public body does have such software, then we would agree that it could not refuse to use that software in order to charge fees or to increase the amount of time required to process a FOIA request. If, however, a public body must conduct a review and redact documents without such software, then we believe it will have no choice but to print the

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<sup>139</sup> *Del. Op. Att’y Gen.* 06-IB17 (Aug. 21, 2006).

<sup>140</sup> *See id.*

<sup>141</sup> *See id.*

<sup>142</sup> Response at 15 (“At this time, however, OST does not have the ability to redact electronically. Accordingly, OST must print all Requested Documents and conduct a manual review and redaction process.”).

<sup>143</sup> *See id.* at 4 (“Generally, with respect to FOIA requests – and particularly requests for electronic copies, as here – OST’s practice under Mr. Flowers’ tenure as Treasurer was to print on paper the requested documents, even where citizens requested that they be provided electronically, manually redact non-public information as needed, and then save such documents into a PDF format.”) (citation omitted)).

documents, redact them by hand, and then photocopy or scan the documents before they may be delivered to the requesting party.<sup>144</sup> Importantly, we do not read FOIA to require a public body to purchase technology in order to respond to a request for records.<sup>145</sup>

Under the circumstances, we cannot conclude that OST committed a violation of FOIA by including printing charges in its estimate. OST has specifically represented that it would continue to evaluate options for conducting electronic review, but that it currently does not have the ability to redact emails in their electronic form and must instead print the emails and make necessary redactions on paper.<sup>146</sup> Should OST uncover an ability to conduct electronic review and redaction for some or all records, the revised estimate may exclude such fees, but we find that OST made a good faith effort in the challenged estimate.

## **B. Alleged Improper Photocopying Charges**

Mr. Flowers also alleges that OST violated FOIA by including an estimate of photocopying fees because Mr. Flowers has requested an electronic copy of the emails.<sup>147</sup> For the reasons set forth above, we cannot conclude that OST's inclusion of photocopying fees in its estimate amounted to a violation of FOIA. OST has indicated an intention to conduct its review according to a standard procedure and to provide the documents in electronic form. We accept this representation. Finally, we note that records redacted by hand commonly require photocopying. Thus, on this record, we cannot say that including photocopy charges in the estimate was unreasonable or that doing so constituted a violation of FOIA. Of course, the matter can be assessed again after the review is completed, and it will be much easier to determine whether any photocopy charges were necessary or reasonable.

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<sup>144</sup> Indeed, OST states that this is the way FOIA requests were processed during Mr. Flowers' tenure as State Treasurer. *See supra* note 143.

<sup>145</sup> Nor do we interpret FOIA to require DTI to purchase or accept an offer by a requesting party to provide specific software. Mr. Flowers offered to purchase software for DTI in order to reduce or eliminate costs which would be imposed for subsequent "narrowed" searches. *See* Ex. 5 at 3-4 (Email from L. Gerard to C. Flowers dated February 27, 2015 (2:31 PM)). DTI, of course, is not the public body responding to the FOIA request. But even if Mr. Flowers had offered to purchase software for OST, there is no indication that the software would have been compatible with OST's computer systems or that OST would be permitted to install the software under the State's various technology policies. *See* Response at 9 (stating that "DTI had determined this software was, in fact, not a viable option for the State's IT system"). Fundamentally, however, we do not believe that the statute requires public bodies to make these extraordinary efforts to satisfy any particular FOIA request.

<sup>146</sup> *See supra* note 142.

<sup>147</sup> Petition at ¶ 32.



### **C. Alleged Failure to Provide an Estimate of Administrative Fees in Connection with the February 5 Request**

Mr. Flowers next argues that OST violated FOIA by failing to prepare an estimate of charges in connection with his second request, which was submitted on February 5, 2015.<sup>148</sup> We disagree.

As an initial matter, we note that FOIA does not specify that the written cost estimate be provided at any particular time, but requires that an estimate be provided “[p]rior to fulfilling any request that would require a requesting party to incur administrative fees.”<sup>149</sup> The purpose, we believe, is to prevent a public body from incurring charges that may be imposed upon a requesting party without notice and an opportunity to avoid or minimize the charges.<sup>150</sup> The record reveals that OST was not taking any action unapproved by Mr. Flowers in connection with the second request.

In addition, the record reveals that the parties were negotiating and attempting to reduce the overall potential cost to Mr. Flowers until the date he filed the Petition. On February 27, 2015, OST proposed to allow Mr. Flowers to review documents responsive to Mr. Flowers’ January 6 Request in person.<sup>151</sup> In the same correspondence, OST’s counsel noted that OST had requested, but had not yet received, the emails responsive to Mr. Flowers’ February 5 Request.<sup>152</sup> Under the circumstances, no estimate would be required, or possible, until Mr. Flowers rejected OST’s proposal (or agreed and conducted an initial review) and OST knew the number of emails that would be returned pursuant to Mr. Flowers’ February 5 Request.

We believe that the parties reached an impasse regarding OST’s proposal to have Mr. Flowers conduct an initial review of the documents responsive to his January 6 Request as early as May 9, 2015.<sup>153</sup> Perhaps OST could have inferred at that time that Mr. Flowers was anticipatorily rejecting the proposal as to the February 5 Request. But, OST was not aware of the

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<sup>148</sup> *Id.* at ¶ 33.

<sup>149</sup> 29 *Del. C.* § 10003(m)(2).

<sup>150</sup> *See id.* (“Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.”).

<sup>151</sup> Ex. 5 at 3-4 (Email from L. Gerard to C. Flowers dated February 27, 2015 (2:31 PM)).

<sup>152</sup> *See id.* at 3. Moreover, OST noted that it would likely offer the same “first review” option to Mr. Flowers in order to reduce his costs. *See id.*

<sup>153</sup> Ex. 28 at 3 (Email from C. Flowers to K. Council dated May 9, 2015 (9:01 AM) (“Since we have gone in circles on this issue, our position is now clear, produce the documents in the FOIA request.”)).

number of emails that DTI would return in connection with the February 5 Request until June 9, 2015.<sup>154</sup> Thus, we believe that June 9 was the absolute earliest date upon which OST might have delivered an estimate.

We find that the failure to provide an estimate on that date or between June 10 and the date of the Petition (August 4, 2015) does not constitute a violation of FOIA under the circumstances. The record suggests that OST, having provided Mr. Flowers with new information on June 9, was waiting to see how Mr. Flowers would respond. When he did respond, through new counsel, Mr. Flowers requested another discussion, set forth the conditions upon which he would move forward, and requested the fee estimate he seeks.<sup>155</sup> Five days later, the parties conducted the requested discussion, and the following day, Mr. Flowers filed his Petition. On this record, we find no violation of FOIA for having failed to prepare a fee estimate for the February 5 Request.

For the reasons set forth earlier, we do not believe that OST may fairly review two separate data sets with a significant number of duplicates. Thus, two separate estimates would provide no useful information to Mr. Flowers. The revised estimate that we call for in remediation of OST's FOIA violation should relate to the de-duplicated data set.

#### **D. Alleged Demand That Mr. Flowers Perform an Initial Review of Records for Exemptions**

Mr. Flowers contends that OST has improperly demanded that he perform an initial review of the records “and remove what [Mr. Flowers] alone believed to be non-public documents . . .”<sup>156</sup> This is not supported by the record. As OST correctly notes: “OST has never demanded, or even suggested in any context, that Mr. Flowers perform an initial review of the requested emails for

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<sup>154</sup> Ex. 30 at 1 (Email from F. Broujos to K. Council dated June 9, 2015 (4:28 PM) (indicating that OST was in possession of CDs containing approximately 22,000 emails relating to Mr. Flowers' January 6 Request and 19,000 emails relating to his February 5 Request)).

<sup>155</sup> See Ex. 32 at 1 (Letter from P.C. Collins, Jr. to F. Broujos dated July 29, 2015) (stating an intention “to propose a reasonable path forward toward amicably resolving this matter”).

<sup>156</sup> Petition at ¶ 34.

exemptions under FOIA.”<sup>157</sup> Rather, OST’s counsel offered to allow Mr. Flowers to review all potentially-responsive documents and to identify a subset of emails that he wished to obtain.<sup>158</sup> OST would then review that smaller set of emails for FOIA exemptions.<sup>159</sup>

Notably, in the same correspondence, OST’s counsel stated that if the proposed option was not acceptable to Mr. Flowers, then proceeding in the ordinary course, pursuant to the February 18 cost estimate, continued to remain an option.<sup>160</sup> The “initial review” alternative was not a “demand” at all; it was offered by OST in an attempt to address Mr. Flowers’ concerns about administrative fees.<sup>161</sup> In that sense, the offer was consistent with the statute’s mandate that public bodies “make every effort to ensure that administrative fees are minimized . . . .”<sup>162</sup>

We therefore determine that OST did not violate FOIA on this basis as alleged in the Petition.

**E. Alleged Circumscribing of Access Based on a Belief That Mr. Flowers Has a Copy of Some or All Emails Already**

Mr. Flowers alleges that OST violated FOIA by “reject[ing]” or “circumscrib[ing]” access to the requested records on the basis that Mr. Flowers already obtained a complete set of his un-redacted email correspondence when he left office.<sup>163</sup> Mr. Flowers argues that he does not have

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<sup>157</sup> Response at 16.

<sup>158</sup> Ex. 5 at 3-4 (Email from L. Gerard to C. Flowers dated February 27, 2015 (2:31 PM)). Implicit in this proposal, we believe, was an assumption, which was or became incorrect, but that we believe was reasonable at the time, namely, that Mr. Flowers would not truly want every email ever sent from or received at his state email address to be placed in his archive, and that a good faith review would likely diminish the number of emails OST would be required to review for withholding or redaction.

<sup>159</sup> *Id.* at 3.

<sup>160</sup> *Id.* at 4.

<sup>161</sup> We note that the June 9 correspondence from OST’s counsel contains language that, when read in isolation, might be interpreted as a demand. In the context of the parties’ discussions, however, we believe OST referred only to the “initial review” option in this correspondence because it assumed the parties were not going to reach any agreement on the “traditional” approach without third party intervention. Aside from the clear difference of understanding regarding the meaning of “legal review,” the parties disagreed on the issue of whether Mr. Flowers was entitled to receive any category of documents without review by OST or its counsel.

<sup>162</sup> 29 *Del. C.* § 10003(m)(2).

<sup>163</sup> OST did make the assertion, and it submitted the affidavit of a DTI employee, which stated only that DTI “ran a request” for Mr. Flowers’ emails, the employee placed external media

copies of the emails and that, even if he did, it would not matter because what he wants are “documents that are *available for public disclosure*, which is different...”<sup>164</sup> Stated another way, even if Mr. Flowers has copies of his emails, he cannot mitigate the risks of displaying the emails in his public archive unless, as he has done here, he receives the records through the FOIA process and requires the State to review them.<sup>165</sup>

Mr. Flowers’ specific allegation is that OST has taken two different approaches to the manner in which it will review emails, based upon whether it believes that Mr. Flowers has the emails in his possession or not.<sup>166</sup> The difference in the approach, it appears, is whether OST will take the “ordinary” approach of reviewing the emails and providing only what is appropriate or will ask Mr. Flowers to take the “alternative” approach of reviewing emails first to see whether any might be unnecessary to his archive project.

In our view, OST has neither “rejected” nor “circumscribed” Mr. Flowers’ access to records by making the distinction it has made and has committed no FOIA violation. The “alternative” approach made its appearance in this case long before OST made any mention of its belief that Mr. Flowers possesses copies of the emails he seeks. As we have stated, the reason for the offer was to attempt to diminish the number of emails that OST and its counsel would have to examine and prepare for production, thereby potentially diminishing the costs to Mr. Flowers. The pool of emails that OST later proposed to review in the “ordinary” way concerns a period of three weeks and, we presume, will be much smaller in size. Thus, based on this record, it appears that OST took this position to be helpful and because doing so would not likely create a significant charge for Mr. Flowers.<sup>167</sup>

We therefore find that OST did not violate FOIA on this basis as alleged in the Petition.

#### **F. Alleged “Obstinate Tactics” by OST**

Mr. Flowers contends that OST violated FOIA by “[t]hreatening to impose substantial costs for review while at the same time ambiguously stating that no costs for ‘legal review’ would apply.”<sup>168</sup> In addition, Mr. Flowers argues that OST’s FOIA coordinator has “utterly failed” to

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containing the requested emails in a sealed envelope at the receptionist’s desk and the envelope was picked up. *See* Ex. 39 (Affidavit of C. Gause dated August 12, 2015). Mr. Flowers submitted no argument relating to the affidavit. *See* Ex. 32 (Letter from P.C. Collins, Jr. to F. Broujos dated July 29, 2015).

<sup>164</sup> Petition at ¶ 39.

<sup>165</sup> *Id.* We have noted our concerns about the propriety of using FOIA for this purpose.

<sup>166</sup> Petition at ¶ 38. *See also, supra*, fact section discussion related to notes 97-100.

<sup>167</sup> *See* Ex. 30 at 2 (Email from F. Broujos to K. Council dated June 9, 2015 (4:28 PM)).

<sup>168</sup> Petition at ¶ 41.

meet his statutory obligation to foster cooperation between the agency and Mr. Flowers and that he “rebuffed every attempt at cooperation by the Requestors and every proposed path forward to lessen OST’s burden.”<sup>169</sup> We do not read the record as Mr. Flowers does.

We have determined that OST’s cost estimate violated FOIA to the extent that it included time to be spent on “legal review.” We believe OST had too narrow a view of the meaning of “legal review” (as, we believe, did Mr. Flowers<sup>170</sup>). However, we note that OST’s fee estimate predated this Office’s determination in *Del. Op. Att’y Gen.* 15-IB03, and we see nothing in the record that amounts to a threat, explicit or veiled, by any state employee to impose inappropriate charges upon Mr. Flowers in order to discourage Mr. Flowers from pursuing his Requests under FOIA.<sup>171</sup>

Neither have we found evidence in the record demonstrating that OST’s FOIA Coordinator failed to meet his statutory obligation to foster cooperation between the agency and Mr. Flowers, or “rebuffed every attempt at cooperation” made by Mr. Flowers.<sup>172</sup> As stated above, Delaware’s FOIA requires that a public body’s FOIA Coordinator “serve as the point of contact for FOIA requests and coordinate the public body’s response thereto.”<sup>173</sup> In addition, the FOIA Coordinator must “work to foster cooperation between the public body and the requesting party,”<sup>174</sup> and “make every reasonable effort to assist the requesting party in identifying the records being sought, and to assist the public body in locating and providing the requested

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<sup>169</sup> Petition at ¶ 42.

<sup>170</sup> See Ex. 1 at 3 (Email from C. Flowers to O. Masood dated February 3, 2015 (1:20 PM) (“I am assuming the [Attorney General’s] office will be conducting the legal review, so the internal estimate should not be that much.”)); Ex. 5 at 4 (Email from C. Flowers to O. Masood dated February 26, 2015 (12:00 PM) (“Further, any **emails and** documents relating to legal privilege (where a AG office member was copied) would need to be reviewed by the Attorney General’s office for such determination as to whether the privilege was mine (which means the **email and attached** document could be disclosed) or the privilege belonged to the state and no charge would be attributed to me for such review **as there is no charge for legal review by the Attorney General’s Office.**”).

<sup>171</sup> See *Del. Op. Att’y Gen.* 15-IB03 (“We do not believe that the General Assembly views FOIA as a profit-making opportunity for public bodies, nor that it would countenance the use of a high fee estimate as a device to discourage a citizen from pursuing a request.”).

<sup>172</sup> Petition at ¶ 42. Mr. Flowers does not cite to any evidence in the record to support the claims in this paragraph.

<sup>173</sup> 29 *Del. C.* § 10003(g)(1).

<sup>174</sup> 29 *Del. C.* § 10003(g)(2).

records.”<sup>175</sup> Contrary to Mr. Flowers’ assertions, the record demonstrates that the FOIA Coordinator made good faith attempts to fulfill his duties as he understood them.

We therefore determine that OST did not violate FOIA on this basis as alleged in the Petition.

## **V. CONCLUSION**

Based upon the foregoing, we have determined that OST violated FOIA to the extent that the fee estimate for Mr. Flowers’ January 6 Request included charges for “legal review.” As to all other matters raised, we determine that OST did not violate FOIA.

As remediation, we ask OST to provide Mr. Flowers with a revised written estimate following the guidance provided in this determination. As set forth above, the fee estimate shall exclude any fees for OST’s legal review. The fee estimate may include fees associated with OST’s FOIA Coordinator’s time spent performing administrative tasks such as removing or redacting records in accordance with a set of instructions provided by counsel, but it should not include any fees associated with any review for the purpose of determining whether FOIA exemptions apply. Because there is a de-duplicated and substantially reduced data set sufficient to satisfy both of Mr. Flowers’ requests, we ask OST to prepare the revised estimate and conduct its review using this set of approximately 19,000 emails.

This letter is directed solely to the parties identified herein. It is based on the facts relevant to this matter and, as such, should not be cited as binding precedent by future parties.

Either party may appeal adverse determinations to the Superior Court within 60 days of the date of this letter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Danielle Gibbs".

Danielle Gibbs  
Chief Deputy Attorney General

cc: Omar Masood, FOIA Coordinator (via e-mail)  
Frank N. Broujos, Counsel for OST (via e-mail)  
Laura L. Gerard, Counsel for OST (via e-mail)  
Michelle E. Whalen, Deputy Attorney General (via e-mail)

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<sup>175</sup> *Id.*