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September 10, 2015

VIA EMAIL AND US MAIL

Cindy Wilton
Possum Point Road
Millsboro, DE 19966
cindywilton2@gmail.com

Re: FOIA Complaint Dated July 1, 2014

Dear Ms. Wilton:

We write in response to your email dated July 1, 2014, in which you asked this office to review a series of emails and "take steps to put an end to this outrageous response...." We are treating this submission as a petition (the "**Petition**") for determination whether the Delaware Department of Agriculture (the "**DDA**") violated the "open records" requirements of the Delaware Freedom of Information Act, 29 *Del. C.* §§10001, *et seq.* ("**FOIA**"), in connection with its handling of your request.

We find that the DDA did violate FOIA in connection with its treatment of the request for emails predating May 6, 2014. We set forth a set of next steps for the parties, in case they cannot move forward by agreement.

I. RELEVANT FACTS

The Request and Amendment

On May 6, 2014, you submitted the following FOIA request (as later amended, the "**Request**") to the DDA:

> 1. Please provide all communications, including, but not limited to letters, emails and other documents, between the Department of Agriculture, including Secretary Kee, and the Delmarva Poultry Industry regarding the 2013 study/power point presentation done by Dr. James Glancy, a University of Delaware researcher.

2. Please provide all communications, including, but not limited to letters, emails and other documents, between the Department of Agriculture, including Secretary Kee, and Dr. James Glancy regarding the 2013 study/power point presentation done by Dr. Glancy.

3. Please provide all communications, including, but not limited to letters, emails and other documents, between the Department of Agriculture, including Secretary Kee, and the Maryland Department of Agriculture regarding the 2013 study/power point presentation done by Dr. Glancy.

4. Please provide all communications, including, but not limited to letters, emails and other documents, between the Department of Agriculture, including Secretary Kee, and the Delmarva Poultry Industry regarding the 2013 award to Secretary Kee of the Edward H. Ralph DPI Medal of Achievement.

Contact if cost is greater than $50.00

On May 20, 2014, after a request from the DDA that you identify the study to which you referred in your May 6 request, you submitted the following, amended, request:

1. Please provide all communications, including, but not limited to letters, emails and other documents, between the Department of Agriculture, including Secretary Kee, and the Delmarva Poultry Industry and any of its representatives from January 1, 2012 to date.

2. Please provide all communications, including, but not limited to letters, emails and other documents, between the Department of Agriculture, including Secretary Kee, and Dr. James Glancy from January 1, 2012 to date.

3. Please provide all communications, including, but not limited to letters, emails and other documents, between the Department of Agriculture, including Secretary Kee, and the Maryland Department of Agriculture regarding poultry manure/litter on the Eastern Shore from January 1, 2012 to date.

4. Please provide all communications, including, but not limited to letters, emails and other documents, between the Department of Agriculture, including Secretary Kee, and the Delmarva Poultry Industry regarding the 2013 award to Secretary Kee of the Edward H. Ralph DPI Medal of Achievement.

Additional Correspondence with the DDA

The DDA provided the non-email records requested on June 18, 2014. There followed a series of additional exchanges regarding the requested emails, as described below.

On May 27, 2014, the DDA informed you by email that because the Delaware Department of Technology & Information ("**DTI**") only keeps email for twelve months, the DDA "would be unable" to fulfill the request for emails dating back to 2012. You responded later that day, with a link to a document retention policy for the Delaware Public Archives (the "**Archives**") and a request for proof that only twelve months of emails need be retained.

On June 6, 2014, the DDA provided you with a link to DTI's records retention policy, but made no comment about the Archives policy you had provided. The DDA also proposed to conduct a search for email in the files of four identified employees and of an unidentified number of additional employees within three specified groups. The DDA represented that the proposed known and then-unknown individuals were those likely to have had communications on the topics in your Request. The DDA stated that it could not estimate the amount of time it would take to conduct the email search with respect to this still-unknown number of employees.

Also on June 6, you agreed to the DDA's proposed search universe and stated that you would submit additional requests if necessary. You also continued to request information about the availability of email older than twelve months and whether such email was stored at the Archives.

The DDA responded on June 12. With regard to email sent within the preceding twelve months, the DDA stated: "We estimate a cost of $400 will be incurred in retrieving and preparing such email records." The DDA also stated that the $400 would have to be paid before the DDA would commence a search and estimated that the documents would be provided six weeks after receiving payment. The DDA did not address the inquiry regarding the earlier email.

Later that day, you requested the basis for the $400 estimate. The DDA responded the next day, June 13, with details about the $400 charge that the DDA had obtained from DTI, now identified as the party that would be conducting the search for the emails sent within the preceding twelve months. The DDA stated that it did not intend to charge any additional fees in connection with the FOIA Request. As it had stated that it was "unable" to provide any additional email, this meant that the DDA did not intend to charge fees in connection with the request for hard copy materials, which they provided five days later.

On June 14, you asked for additional details about the $400 charge, which the DDA provided on June 20. Also on that date, the DDA confirmed that DTI would be searching the files of twenty employees in connection with your Request. In addition, the DDA notified you that it had asked the Archives about the availability of email older than twelve months.

On June 27, the DDA informed you that the early email you requested was not available from the Archives, because the DDA's policy did not require the DDA to send these email to the Archives. The DDA attempted to or did provide a link to its records retention policy.[1]

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[1] The link may have taken you to a copy of the policy at the time the link was provided to you, but it took the DOJ to "a place that does not exist in the First State." Our office later obtained a copy of the policy from the DDA.

Investigation by the DOJ

Upon receiving the Petition, we sought additional information from the DDA, the most relevant of which is stated here. The DDA informed us that it initially asked DTI to perform a search for requested emails because the DDA was not able to search all agency and employee emails at one time. Rather, the DDA would have had to perform searches on individual users' computers. This, the agency states, would also entail a monetary charge, in the form of administrative fees, and could yield less comprehensive results than a DTI search. Of course, as it explained to you on May 27, it knew at the time that DTI had access to only twelve months of DDA email. As for emails older than twelve months, the DDA clams that they were and are "inaccessible" to the DDA because it would have to perform searches on individual users' computers.

II. APPLICABLE LAW

FOIA contemplates that a public body's public records will include email. The statute provides:

> (i) *Requests for e-mail.* —
>
> (1) Requests for e-mail records shall be fulfilled by the public body from its own records, if doing so can be accomplished by the public body with reasonable effort. If the public body determines that it cannot fulfill all or any portion of such request, the public body shall promptly request that its information and technology personnel or custodians provide the e-mail records to the public body.
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> (2) Before requesting the information and technology personnel or custodians to provide e-mail records, the public body shall provide an itemized written cost estimate 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.

29 *Del. C.* § 10003(i). Thus, a citizen's request for public records must be fulfilled "by the public body from its own records" if it can do so with reasonable effort.[2] If there is any part of the request that the public body cannot fulfill from its own records, however, the public body must seek the assistance of its information technology personnel or other custodians.[3] Once obtained by the person or entity enlisted to assist the public body, the emails must be provided to the public body so that it may fulfill the remainder of its obligations under the statute.[4]

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2 29 *Del. C.* § 10003(i)(1).

3 *See id.*

4 *See id.*

Where the public body expects to incur charges in connection with a FOIA request, the public body must provide an estimate of those charges to the requesting party before commencing or ordering the work.[5] The requesting party may alter or narrow his request after reviewing the written estimate.[6] The statute permits the public body to require payment of some or all of the estimated charges before any service is performed:

> The public body may require all or any portion of the fees due hereunder to be paid prior to any service being performed pursuant to this section.

29 *Del. C.* § 10003(m)(5).

III. ANALYSIS

The Petition raises the following issues: (1) Was it permissible for the DDA to ask DTI to conduct the email search for emails sent in the twelve months before May 6, 2014, (2) if so, did that absolve the DDA of all further responsibility to search for email and (3) was it permissible for the DDA to require that the $400 charge from DTI be paid in advance?

As to the first question, we find that the DDA did not violate FOIA by asking DTI to conduct the search for emails for the twelve months preceding May 6, 2014. FOIA states that a public body must fulfill a request from its own records if it can be accomplished with reasonable effort. In this case, we believe the alternative, i.e., that the DDA would perform serial searches on multiple employees' computers, would not constitute "reasonable effort" in light of (a) DTI's ability to handle the task more quickly and efficiently and (b) the fact that the DTI search is likely to yield more comprehensive results than would be available through the DDA's search of individual computers. Weighed in this conclusion is the amount that DTI proposes to charge for the search. It is not necessarily the case that a choice to use DTI or an outside vendor would always be appropriate because those entities might conduct searches more quickly or easily.[7]

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[5] *See* 29 *Del. C.* § 10003(i)(2); *see also id.* § 10003(j)(2) (requiring written estimate in connection with requests to any other custodian from whom the public body must request records).

[6] "Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request." 29 *Del. C.* § 10003(i)(2); *see also id.* § 10003(m)(2); (j)(2).

[7] Counsel contends that using DTI was necessarily proper because FOIA requires a public body to minimize administrative fees. Of course, we would not accept the argument that DTI may be used solely because that course of action would (by definition) minimize "administrative" fees. Rather, a public body must be sensitive to relative costs and to other

Jumping ahead to the third question, we find that the DDA did not violate FOIA by requiring advance payment of DTI's $400 charge. FOIA Section 10003(i) clearly contemplates that if there is a cost associated with another custodian's email search, that cost may be passed on to the requesting party. That is why the statute requires the public body to provide an estimate before commencing work.[8] Section 10003(m)(5) provides that a public body may require that some or all of the estimated costs be paid up front.[9] This provision protects the public body from the risk of non-payment. There is no indication in the statute that a public body should be permitted to mitigate this risk when a search is conducted by its own staff, but not when the search must be performed by the staff of an external custodian over whom the public body has no oversight or control.

Returning to question number two, the DDA proposes a creative interpretation of Section 10003(i)(2). As the DDA read the statute, if it was unable to fulfill with reasonable effort any portion of the Request, it was entitled to ask DTI to conduct the search *and* the DDA was thereby relieved of any further obligation to search for emails, including emails that the DDA knew that DTI did not possess. This was not a reasonable reading of the statute. It is DTI's policy, absent a litigation hold or other special circumstance, to retain only the last twelve months' worth of an agency's email. DTI does not archive email records that are older than twelve months. If the General Assembly had intended that any time a public body is unable to fulfill *any portion* of an email request the public body may rely *solely* on DTI – necessarily precluding citizens in the vast majority of cases from reviewing emails more than 12 months old – we think it would have stated so very clearly. There is no indication in the statute that this extreme result was intended, and it is, in fact, contrary to FOIA's stated policy and its exclusions from the definition of "public record".[10]

We find that the DDA violated FOIA when it declined to search for emails predating May 6, 2014 based upon its flawed interpretation of the statute. The DDA has control over emails older than twelve months, and it concedes that those emails can be obtained by

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relevant facts and circumstances regarding the reasonableness of its approach. Here, there is no indication that the DDA assessed or compared the relative cost of conducting the searches itself.

[8] 29 *Del. C.* § 10003(i)(2) (requiring that estimate be provided to requesting party and permitting cancellation or modification of request in response). The same is true for records that may be in the possession of other custodians. *See id.* § 10003(j)(2) (concerning custodians of other records).

[9] "The public body may require all or any portion of the fees due hereunder to be paid prior to any service being performed pursuant to this section." 29 *Del. C.* § 10003(m)(5). The statute uses the terms "fees" and "charges" interchangeably. *E.g., id.* § 10003 (i)(2), (m)(1)-(4).

[10] *See* 29 *Del. C.* § 10001 ("Declaration of policy."); *id.* § 10002(l) (listing records that shall not be deemed public).

performing searches on users' computers. The anticipated difficulty or inefficiency of the search effort cannot automatically overcome a citizen's right to review public records. The DDA should have provided you with an explanation of its limitations and a good faith estimate of the costs it would incur in complying with your Request so that you could determine whether the access to records was worth the cost.

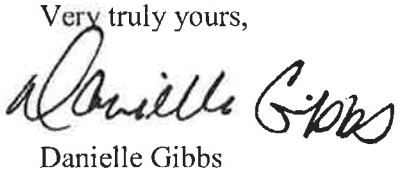
IV. CONCLUSION

If you still wish to review the emails dating back to 2012 (or any later date), as narrowed by agreement between you and the DDA, the DDA must make a good faith effort to follow the requirements of the statute. Of course, there is nothing precluding the parties from discussing whether the pending Request might be fruitfully modified.

In any event, unless the parties agree to proceed otherwise, you should tell the DDA within 10 business days of the date of this letter whether you will stand on the pending Request or narrow it. The DDA must respond to you within 10 business days and state whether any emails will be provided and, if so, provide a good faith estimate of the costs it expects to incur in fulfilling your request and of the time it will take to provide the records.[11] You may then modify your request, confirm that the searches may proceed or, if you believe a FOIA violation has occurred or is about to occur, file a new petition with this office. The DDA may require the payment of its estimated costs in advance.

Either party may appeal this determination to the Superior Court of the State of Delaware.

Very truly yours,



Danielle Gibbs
Chief Deputy Attorney General

cc: Andrew Kerber, Deputy Attorney General (by email)

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[11] *See* 29 *Del. C.* § 10003(h).