



**MATTHEW P. DENN**  
ATTORNEY GENERAL

**DEPARTMENT OF JUSTICE**  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX: (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX: (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX: (302) 577-6499

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

**Attorney General Opinion No. 18-IB26**

**May 25, 2018**

**VIA US MAIL AND EMAIL**

Ms. Jennifer Hill  
Program Director/Lobbyist  
Common Cause Delaware  
PO Box 342  
Newark, DE 19715  
[jhill@commoncause.org](mailto:jhill@commoncause.org)

**RE: FOIA Correspondence Regarding the Office of Management and Budget**

Dear Ms. Hill:

We write regarding your correspondence alleging the Office of Management and Budget (“OMB”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your February 22, 2018 FOIA request. I treat your correspondence as a petition (“Petition”) for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, it is my determination that OMB’s wholesale denial of your request violated FOIA. OMB may make appropriate redactions to the requested records to the extent that applicable exemptions apply. I also conclude that vendor demonstrations are not meetings of a public body under FOIA.

**RELEVANT BACKGROUND**

On or about November 21, 2017, OMB published a request for proposals (“RFP”) on behalf of the State of Delaware Department of Government Support Services seeking professional services to establish a state-wide solution for Voting Machines, Electronic Poll Book, Elections Management, Voter Registration System, and Absentee Voting System. The RFP stated that it was being “issued pursuant to 29 *Del. C.* §§ 6981 and 6982.”<sup>1</sup> Section 11 of the RFP stated in part:

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<sup>1</sup> See Request for Proposals for Professional Services Elections System Solution Issued by Government Support Services Contract Number GSS18809-Election\_SYS, available at [http://bidcondocs.delaware.gov/GSS/GSS\\_18809Elections\\_rfp.pdf](http://bidcondocs.delaware.gov/GSS/GSS_18809Elections_rfp.pdf) (last visited May 21, 2018).

Subject to applicable law or the order of a court of competent jurisdiction to the contrary, all documents submitted as part of the vendor's proposal will be treated as confidential during the evaluation process. As such, vendor proposals will not be available for review by anyone other than the State of Delaware/Proposal Evaluation Team or its designated agents. There shall be no disclosure of any vendor's information to a competing vendor prior to award of the contract unless such disclosure is required by law or by order of a court of competent jurisdiction.

The State of Delaware and its constituent agencies are required to comply with the State of Delaware Freedom of Information Act, 29 Del. C. § 10001, *et seq.* ("FOIA"). FOIA requires that the State of Delaware's records are public records (unless otherwise declared by FOIA or other law to be exempt from disclosure) and are subject to inspection and copying by any person upon a written request. Once a proposal is received by the State of Delaware and a decision on contract award is made, the content of selected and non-selected vendor proposals will likely become subject to FOIA's public disclosure obligations.<sup>2</sup>

Section 11 further set forth a process by which vendors could designate portions of their proposals as confidential business information:

In order to allow the State to assess its ability to protect a vendor's confidential business information, vendors will be permitted to designate appropriate portions of their proposal as confidential business information.

Vendor(s) may submit portions of a proposal considered to be confidential business information in a separate, sealed envelope labeled "Confidential Business Information" and include the specific RFP number. The envelope must contain a letter from the Vendor's legal counsel describing the documents in the envelope, representing in good faith that the information in each document is not a "public record" as defined by 29 Del. C. § 10002, and briefly stating the reasons that each document meets the said definitions.

Upon receipt of a proposal accompanied by such a separate, sealed envelope, the State of Delaware will open the envelope to determine whether the procedure described above has been followed. A vendor's allegation as to its confidential business information shall not be binding on the State. The State shall independently determine the validity of any vendor designation as set forth in this section.

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<sup>2</sup> *Id.* at 7-8.

Any vendor submitting a proposal or using the procedures discussed herein expressly accepts the State's absolute right and duty to independently assess the legal and factual validity of any information designated as confidential business information. Accordingly, Vendor(s) assume the risk that confidential business information included within a proposal may enter the public domain.<sup>3</sup>

The deadline for bid responses was January 23, 2018. OMB received timely proposals from seven vendors and scheduled a series of vendor demonstrations.

On February 22, 2018, you submitted a FOIA request to OMB for "copies of the bids submitted for Elections System Solution received by the State of Delaware." On March 9, 2018, Robert Scoglietti, Director of Policy/External Affairs at OMB, denied your request pursuant to Section 11 of the RFP "until at least an award has been made pursuant to this procurement." Mr. Scoglietti further stated: "Vendor proposals may be considered public documents under FOIA once the procurement process has concluded, subject to any redaction or withholding of documents necessary to protect any proprietary, confidential or other non-public information contained in the proposals."

On April 25, 2018, you sent an email to Mr. Scoglietti stating:

Thank you for your response. We understand the denial.

On behalf of Common Cause we would like to ask for a review of the request because of the immense public impact that voting and purchase of any new voting system has on our State. We also contend that transparency in the acquisition of such should supersede the privacy concerns. There are ways to redact proprietary information by the vendors.

Is there anything else that I need to do?

On April 26, 2018, Mr. Scoglietti replied that he could not consider making the documents available until after completion of the procurement process.

On May 6, 2018, you sent an email to State Election Commissioner Elaine Manlove asking whether she had an award date planned. On May 7, 2018, Commissioner Manlove replied:

I'm following the rules set by OMB's contracting office. Once we have seen all the demos, my understanding is that we then take a vote of the evaluators. Any award date will be handled by OMB.

Also on or about May 7, you sent an email to Commissioner Manlove the following:

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

It has come to my attention that you will be holding vendor demos this week. If there is any way the public could be allowed we would really appreciate it. Having the public observe would certainly go a long way in demonstrating to the public that the Department is being transparent about the choices we have for a new voting system.

Commissioner Manlove replied that “the bidding regulations do not allow anyone but the evaluators to see the demonstrations.”

### **POSITIONS OF THE PARTIES**

In your Petition, you allege that OMB violated FOIA by denying your request. You state: “We believe that the terms allowing for complete secrecy prior to bid award unnecessarily prevent the public from participating in the process of choosing a voting system.” You argue that the FOIA exemption for trade secrets and proprietary information “should not apply (and exempt from disclosure) anything and everything submitted by prospective voting machine vendors on a matter of such keen current interest and public importance.” You also note that the Department of Elections invoked privacy concerns “as a reason why no legislator or the public are permitted to view demonstrations by the election system finalists.”

In its May 11, 2018 response to your Petition (“Response Letter”), OMB first argues that “public participation in the procurement process to the extent argued . . . (*i.e.*, reviewing proposals and decision-making) is not within the requirements of the State Procurement Code.”<sup>4</sup> OMB next quotes Section 11 of the RFP, which “clearly states that the proposals will be considered confidential during the evaluation process and that no one but the State’s evaluation team or its designated agents are permitted to review them.”<sup>5</sup> OMB maintains that access has not been denied, but has been delayed until after an award has been made, and subject to redaction of exempted information.<sup>6</sup> OMB argues that public release of the proposals prior to an award would undermine the procurement process and the State’s ability to achieve the goals of procurement.<sup>7</sup> OMB also argues that “release of the vendor’s commercial information and trade secrets could cause substantial harm to this competitive process and vendor’s competitive position.”<sup>8</sup> OMB maintains

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<sup>4</sup> Response Letter at 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 2-3 (The public release of proposals at this stage would undermine the procurement process and potentially impair the State’s ability to obtain such necessary information in the future, which could impair its ability to “create a more efficient procurement process to better enable the State to obtain the highest quality of goods, materials and services at the best possible price, thereby maximizing the purchasing value of public moneys.”) (quoting 29 *Del. C.* § 6901).

<sup>8</sup> *Id.* at 3 (citing *Del. Op. Att’y Gen.* 08-IB10, 2008 WL 3485366, at \*2-3 (July 16, 2008)).

that OMB and the Department of Elections retain the discretion to shape and direct the procurement process, including the decision to make procurement documents confidential during the evaluation process.<sup>9</sup> OMB also states that releasing proposals prior to an award being made could result in an unfair advantage to later vendors if the procurement were cancelled and restarted.<sup>10</sup> Finally, in response to your suggestion that legislators and members of the public should be entitled to observe vendor demonstration, OMB argues that the vendor demonstrations are not meetings of a public body under FOIA.

### DISCUSSION

As an initial matter, I recognize that State agencies are afforded broad discretion to shape and direct the professional services procurement process.<sup>11</sup> Nevertheless, State agencies may not, by way of the language of an RFP, exempt procurement documents from disclosure under Delaware's FOIA. Similarly, the broad procurement discretion discussed in *Doctors Pathology Services, P.A.* did not create a common law privilege capable of deployment through § 10002 (1)(6). Rather, in order to be exempted, a record – or portion thereof – must fall within one of the specifically-delineated FOIA exemptions.

Notably, certain sections of the procurement code exempt procurement documents from public disclosure.<sup>12</sup> For example, the procurement code specifically provides that sealed bids and proposals for materiel and nonprofessional services shall remain confidential until after a contract has been awarded.<sup>13</sup> The policy rationale behind this exemption is consistent with the primary

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

<sup>10</sup> *Id.* (“The State’s ability to ‘maximize the purchasing value of public moneys’ would be defeated or greatly diminished if proposals were released to the public (and accessed by other vendors) *prior* to an award being made. If for some reason the procurement were canceled and restarted, the proposals in the later procurement could be leveraged against the prior proposals, resulting in unfair advantages for some vendors and a more expensive procurement for the State.”).

<sup>11</sup> *See Doctors Pathology Services P.A. v. State of Div. of Public Health*, 2009 WL 4043299, at \*4 (Del. Ch. Nov. 20, 2009) (“[T]he professional services negotiation subchapter establishes only general guidelines for the procurement process: agencies are granted great discretion to shape the process to meet their needs.”).

<sup>12</sup> *See* 29 Del. C. § 10002(1)(6) (exempting from FOIA’s definition of public record “[a]ny records specifically exempted from public disclosure by statute or common law”).

<sup>13</sup> *See, e.g.,* 29 Del. C. § 6923(j)(4) (“Bids [for materiel and nonprofessional services] shall not be available for public inspection before receipt of a fully executed contract pursuant to paragraph (c)(3) of this section. After contract award, the bids shall be available for public inspection, except to the extent that withholding of information is permitted by Chapter 100 of this title or otherwise permitted or required by law. If the bidder designates a portion of its bid as confidential, it shall isolate and identify in writing the confidential portions. The bidder shall include with this designation a statement that explains and supports the firm's claim that the bid items identified as confidential contain trade secrets or other proprietary data.”); 29 Del. C. §

purpose of the State procurement law, which is to “[c]reate a more efficient procurement process to better enable the State to obtain the highest quality goods, materials and services at the best possible price, thereby maximizing the purchasing value of public moneys”<sup>14</sup> While that same goal exists in the context of a professional services procurement, I note that the professional services subchapter contains no express statutory exemption from FOIA. That is a distinction with a difference. *Expressio unius est exclusio alterius*.<sup>15</sup> Because there is no express statutory FOIA exemption for professional services bids, it is my determination that OMB’s wholesale denial of your request violated FOIA. I recommend that OMB review and revise its response. Of course, OMB may make appropriate redactions to the requested records to the extent that any FOIA exemptions apply.

Notwithstanding the foregoing, I am not persuaded that the vendor demonstrations are meetings of a public body as contemplated by FOIA. As such, I cannot conclude that any member of the public should have been afforded access thereto under FOIA.

### CONCLUSION

For the reasons discussed above, it is my determination that OMB’s wholesale denial of your request violated FOIA. OMB may make appropriate redactions to the requested records to the extent that any FOIA exemptions apply.<sup>16</sup>

Very truly yours,



Aaron R. Goldstein  
Chief Deputy Attorney General

cc: Michelle E. Whalen, Deputy Attorney General (via email)  
Mary Page Bailey, Deputy Attorney General (via email)

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6924(j)(4) (“After receipt of a fully executed contract, the proposals [for materiel and nonprofessional services] shall be open for public inspection in accordance with § 6923(j)(4) of this title.”).

<sup>14</sup> 29 *Del. C.* § 6901(1).

<sup>15</sup> See *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007).

<sup>16</sup> Section 11 of the RFP suggests that some or all of the vendors may have already identified portions of their bids as exempted pursuant to one or more FOIA exemptions, including 29 *Del. C.* § 10002(1)(2).