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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion 19-IB02

February 11, 2019

VIA EMAIL

Ms. Christina Jedra
The News Journal
950 West Basin Road
New Castle, DE 19720
cjedra@delawareonline.com

RE: FOIA Petition Regarding the City of Wilmington

Dear Ms. Jedra:

We write in response to your correspondence alleging that the City of Wilmington violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. Your challenge focuses on the City’s position that it must use an outside vendor to gather the documents you requested and the reasonableness of the fees the City was quoted by such a vendor. Here, the City has provided sworn affidavits supporting its position that an outside vendor must be used and provided you with fee estimates generated by two vendors. Accordingly, we find no FOIA violation has occurred.

BACKGROUND

This Petition arises out of the same facts as those discussed in *Del. Op. Att’y Gen.* 18-IB53 (Dec. 3, 2018). In this current Petition, you allege you submitted a FOIA request on December 7, 2018 to the City of Wilmington seeking all emails from January 2017 to the present between the Buccini/Pollin Group and eight separate officials at the City of Wilmington.¹ On January 2, 2019, the City provided you two separate cost estimates from two vendors who the

¹ Petition.

City indicated it would need to utilize in order to fulfill your request.² The City gave you the option of proceeding with the lesser expensive of the two quotes, withdrawing your request, or modifying your request.³ This Petition followed.

In your Petition, you assert that the “City should be able to process [your] request in-house with reasonable effort,” and you set forth the process you believe the City should use to gather the records you requested.⁴ Alternatively, you assert this Office should determine that the expense quoted by both outside vendors is unreasonable or that the vendors are being sought out to impermissibly assist with legal review.⁵

In its January 25, 2019 Response, the City asserts that there is but one City employee with the training and experience required to perform the searches you request, which include emails spanning back 24 months for eight separate City officials.⁶ Due to the breadth and scope of your request, the City estimates that the number of responsive emails would overwhelm the limited resources of the City’s IT Department and collection cannot be reasonably accomplished without utilizing an outside vendor.⁷ The City Solicitor further provided a sworn affidavit, attesting that none of the cost estimates you have been provided include any time for legal review and were all based entirely on the estimated time necessary for third party vendors or employees of the City to locate, search, retrieve, and duplicate the documents you requested.⁸

In your January 28, 2019 Reply, you contend that your Petition does not re-argue any previously-decided issues and that the affidavit of Demond May is insufficient.

DISCUSSION

Your Petition first challenges the City’s position that the emails you requested cannot be gathered in-house. Under 29 *Del. C.* § 10003(m), the public body is required to identify the lowest-paid employee to conduct the searches related to a records request. The City has provided a sworn affidavit from its IT Director, attesting that due to the breadth and scope of the emails you requested—involving eight officials over twenty-four months—the request cannot be

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Response, Affidavit of Demond May.

⁷ *Id.*

⁸ Response, Affidavit of William B. Larson, Jr.

completed in-house. Consistent with the practices of this Office, we accept this sworn representation.⁹

Your Petition further challenges the reasonableness of the price quoted by the outside vendors to perform the search.¹⁰ As a general matter, we agree that this Office has the ability to review estimates for reasonableness under appropriate circumstances.¹¹ Pursuant to 29 *Del. C.* § 10003(m)(2), the “public body shall make every effort to ensure that administrative fees are minimized, and may only assess such charges as are reasonably required to process FOIA requests.” The determination of whether a cost is reasonably required is fact-based, and a public body’s existing resources can affect the extent to which the charges are reasonably required.¹²

Here, the City supplied an affidavit from its IT Director regarding the need for an outside vendor. He attested that the alternative search method you suggest is not the industry standard for handling enterprise-level email searches and would not sufficiently locate and retrieve all documents sought. The City Solicitor has attested that the fees quoted by the outside vendor are not for the purposes of legal review. The City obtained cost estimates from two separate vendors and provided you with both estimates, offering you the opportunity to modify your request if you desired. Thus, the City has provided sworn testimony explaining its need for utilizing an outside vendor and has provided documentation of two separate vendors’ fees for performing the search you requested. Accordingly, the City is not setting fees in an attempt to turn a profit, nor are the fee estimates set by the City in an attempt to discourage you from pursuing your request. We find no FOIA violation in these circumstances.

⁹ *Del. Op. Att’y Gen.* 17-IB03, 2017 WL 955568, at *4 (Feb. 15, 2017) (concluding that the public body adequately supported its contention with a sworn affidavit that an employee was the lowest-paid employee capable of performing the service).

¹⁰ The City provided you with two quotes, from two separate vendors. Your Petition challenges the reasonableness of the lesser of the two amounts quoted.

¹¹ *Del. Op. Att’y Gen.* 15-IB03, 2015 WL 4394195, at *4 (June 12, 2015) (“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.”).

¹² *See Del. Op. Att’y Gen.* 16-IB19, 2016 WL 5888771, at *14 (Sept. 30, 2016).

CONCLUSION

Based on the foregoing, it is our determination that the City has not violated FOIA as alleged.

Very truly yours,

/s/ Patricia A. Davis

Patricia A. Davis
Deputy State Solicitor

Approved:

/s/ Allison E. Reardon

Allison E. Reardon
State Solicitor

cc: Rosamaria Tassone DiNardo, City Solicitor
Dorey L. Cole, Deputy Attorney General