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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion 19-IB14

March 11, 2019

VIA EMAIL

Mr. Craig O'Donnell
Craig.odonnell@doverpost.com

RE: FOIA Petition Regarding the Town of Dewey Beach

Dear Mr. O'Donnell:

We write in response to your correspondence alleging that the Town of Dewey Beach ("Town") 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. For the reasons set forth below, we find that the Town has not violated FOIA as alleged.

BACKGROUND

This Petition challenges the Town's recently enacted Ordinance No. 747 ("Ordinance"), which amends the Dewey Beach Code to adopt a new "copy fee per page."¹ The synopsis of the Ordinance states the purpose is to lower the copy fee per page from \$1.00 per page to \$0.25 per page for "copies made by administrative departments of the town."² This copy fee of \$0.25 per page is applied to FOIA requests after the first twenty pages, which are free of charge.³ The

¹ Petition.

² *Id.*

³ *Id.*; Response.

Petition asserts three allegations: 1) the Town’s previous charge of \$1.00 per page exceeds the permissible fees set by FOIA statute; 2) the charge of \$0.25 per page “still exceeds the permissible amount;” and 3) the Ordinance does not specify other cases where a higher per page charge would apply.⁴ You argued that the copying fees in 29 *Del. C.* § 10002(3)(m)(1) are the maximum copying charges a public body may adopt, and the maximum fee for black and white standard copies are \$0.10 per page. Alternatively, you asserted that the copying charges must be examined for reasonableness, citing to 29 *Del. C.* § 10003(a) which requires reasonable access to and reasonable facilities for copying of records. You stated that the reasonableness of any charge must be based upon the actual costs and not arbitrary or estimated costs and the Town’s previous charge of \$1.00 per page and the current charge of \$0.25 per page are not reasonable.

On February 22, 2019, the Town Solicitor sent a Response, asserting the Town has not violated FOIA. The Town argued that it had lawfully adopted copying charges into its Town Code, which required a photocopying fee of \$0.25 after the first twenty copies are provided without charge. The Town further asserted that its Ordinance was proper and the fees charged by the Town were reasonable based upon a survey of the fees of neighboring jurisdictions. The Town enclosed a list of photocopying charges of local jurisdictions, along with an affidavit of the Assistant Town Manager, who compiled the list.

In your email sent the same day (“Reply”), you noted that the fee list for the neighboring jurisdictions was inappropriate, as it does not mean the other jurisdictions charge reasonable fees. You reiterated that the test for reasonableness is the relationship between the Town’s “actual cost (toner and paper)” and the charge assessed.⁵ However, if the test was in fact based upon a survey of other costs, you contend that the comparison would require a study of state-wide charges and “statistically speaking this would require at least 32 data points for a ‘T-test.’”⁶

DISCUSSION

We first address your primary argument that 29 *Del. C.* § 10002(3)(m)(1) establishes the maximum permissible fees for photocopies under FOIA at \$.10 per page for standard-sized black and white copies. The FOIA statute requires use of the fees set forth therein, “unless otherwise set forth in the Delaware Code or any applicable code of a county or municipal public body, the following fees shall apply. . . .”⁷ No other requirements or standards are delineated for a municipality to adopt new fees, and this Office has previously stated that the fees in the FOIA

⁴ This third allegation is outside the purview of the FOIA statute.

⁵ Reply.

⁶ *Id.*

⁷ 29 *Del. C.* § 10003(m).

statute are not the maximum permissible fees.⁸ Thus, we find that the photocopying fee of \$0.10 is not the maximum fee, and as the Town adopted the \$0.25 per page fee into its municipal code in compliance with the FOIA statute, we find that the Town has not violated FOIA in this respect.

Next, we determine whether this Office is required to evaluate whether the fees adopted by a municipality or state agency are reasonable, and if so, whether the Town's photocopying charge of \$0.25 is reasonable.⁹ The recent legislative history of 29 *Del. C.* § 10003 is significant to this analysis. Immediately prior to the adoption of the current 29 *Del. C.* § 10003(m), the FOIA statute previously charged the public body with establishing rules or regulations to set copying charges and stated that "any *reasonable* expense involved in the copying of such records shall be levied as a charge on the citizen requesting such copy."¹⁰ In considering challenges under the previous statute, this Office first determined whether an effective policy, rule, or regulation was in place, and if so, whether the fees in the policy, rule, or regulation were reasonable.¹¹ However, the General Assembly removed this language in its 2012 FOIA legislation including the requirement for a "reasonable expense," and as discussed *infra*, the statute now only requires that fees differing from the statutory amounts be adopted elsewhere in the Delaware Code or in the applicable code of a county or municipal public body. Therefore, we conclude that the General Assembly intended to confine this determination of reasonableness to the local or state political process, and this Office has no basis in the statute to conduct an independent review of the reasonableness of the Town's copying charges.

⁸ This Office has previously found that a municipality may adopt higher fees in excess of the statutory amounts if those fees are adopted or approved by the City Council by ordinance or otherwise. *Del. Op. Att'y Gen.* 13-IB11, 2013 WL 7017780, at *2 (Dec. 31, 2013).

⁹ This Office makes no determination with respect to the Town's previous \$1.00 fee that was previously adopted, as this issue is now moot.

¹⁰ 78 Del. Laws ch. 382 (2012) (amending 29 *Del. C.* § 10003) (emphasis added).

¹¹ See *Del. Op. Att'y Gen.* 11-IB09, 2011 WL 3562204, at *1 (Aug. 1, 2011); *Del. Op. Att'y Gen.* 07-IB05, 2007 WL 4732788, at *4-5 (Mar. 20, 2007); *Del. Op. Att'y Gen.* 05-IB06, 2005 WL 840259, at *4 (Mar. 9, 2005).

CONCLUSION

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

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Allison E. Reardon

Allison E. Reardon
State Solicitor

cc: Fred Townsend, Esq., Town Solicitor (via email)