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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB34

July 1, 2019

VIA EMAIL

Mr. Peter Kostyshyn



Wilmington, DE 19802

RE: FOIA Petition Regarding the Delaware Office of Defense Services

Dear Mr. Kostyshyn:

We write in response to your correspondence alleging that the Delaware Office of Defense Services (“ODS”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with regard to your records request. 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, it is our determination that that ODS has not violated FOIA as alleged.

BACKGROUND

You sent five FOIA requests to ODS seeking a variety of records, including the following: 1) resumes, “licensures,” certain business licenses, and permits for five individuals from 2013 to the present; 2) resumes, references, “licensures,” certain business licenses, and contracts for fourteen individuals; 3) all payments, checks, client names, worksheet submissions with regard to a certain attorney from January 1, 2017 to the present; 4) resumes, “licensures,” financial disclosures, business licenses, permits, references, contracts of three individuals or their family members working in the “ODS/OCC/PD” offices, and the nepotism policy from 2013 to present and copies of contacts with an individual you claim treated you unprofessionally; and 5) mission statement, organization chart, budget disbursements, and Public Integrity Commission disclosures, and disbursement payments to an individual for services rendered since January 2019.¹ For each

¹ Response.

of these five requests, you also made similar requests for the “time stamped copy of this filing and the envelope mailed in, [and] all resulting letter’s, memo’s, e-mail’s, fax’s it generate’s.”²

In a letter dated May 30, 2019, ODS provided an itemized estimate of \$351.74 in total costs to fulfill your requests in the aggregate and requested payment by June 15, 2019, after which ODS would consider your requests withdrawn. ODS also noted that it did not understand at least one of your enumerated requests.³ Your Petition to this Office followed.

You allege in your Petition that ODS did not provide you with time-stamped copies of your filings and your envelopes. You also allege that the estimate includes duplicate charges for budget information and charges which should be waived under FOIA’s allowance for free copies. You allege that ODS’s FOIA Coordinator Jonathan Offredo is “violating the transparency of FOIA,” as he did not respond to your voicemails requesting assistance and that you made requests months ago to which you did not receive a response.

ODS responded to your Petition in a letter dated June 17, 2019 (the “Response”). ODS asserts that FOIA permits a public body to withhold documents until payment is received and it has not provided the copies of your filings or any other requested documents because it has not yet received payment. ODS also asserts that the estimate is proper and Mr. Offredo’s affidavit details how the estimate was developed.⁴ With regard to the alleged duplication of charges, ODS states that the ODS Controller could only generate disbursement reports for two of its divisions—the Public Defender’s Office and Central Administration—while the third division, the Office of Conflict Counsel, would have to separately generate disbursement reports for the contract attorneys paid by that division. With regard to your allegation that ODS is not responsive to your communications, ODS provided a letter from Mr. Offredo to you indicating that he was responding to your voicemails in writing and extending the deadline for payment of the estimated charges. Finally, ODS explains that Mr. Offredo reviewed ODS’s FOIA log and found that ODS has responded to all of your requests within the past year.

DISCUSSION

We address four issues in your Petition. First, you allege that ODS failed to provide “time stamped copies of the filing an envelope it was mailed in.” In response to your FOIA request, ODS provided a cost estimate, which required prepayment of fees prior to performing those searches. This practice is compliant with 29 *Del. C.* § 10003(m)(5), which allows a public body to “require all or any portion of the fees due hereunder to be paid prior to any service being performed pursuant to this section.” Accordingly, we do not find a violation in this regard.

² *Id.*

³ Petition.

⁴ Response, Affidavit of Jonathan Offredo.

Second, you challenge ODS's cost estimate for your five separate requests. FOIA specifically gives public bodies the discretion to aggregate staff time when "multiple FOIA requests are submitted by or on behalf of the requesting party in an effort to avoid incurring administrative charges."⁵ ODS chose to do so here. ODS provided the sworn affidavit of the ODS FOIA Coordinator explaining how the costs were estimated. We have reviewed that description and find that ODS has provided sufficient evidence of its compliance with 29 *Del. C.* § 10003(m) in preparing the estimate.⁶ The Petition specifically questions whether the budget disbursements are duplicative, but as outlined in the Response, ODS explained the need to obtain this information from multiple sources, confirming that ODS's review and redaction of records from separate divisions are not duplicative. Thus, we determine ODS did not violate FOIA in preparing its cost estimate.

Third, the Petition asserts that the ODS FOIA Coordinator violated FOIA by making insufficient efforts to assist with your request. Among other duties, FOIA Coordinators must "make every reasonable effort to assist the requesting party in identifying the records being sought" and "to work to foster cooperation between the public body and the requesting party."⁷ Here, ODS's FOIA Coordinator reviewed your request and provided a cost estimate with specific instructions for payment. ODS's FOIA Coordinator stated that he had three incomplete voicemails from you on June 14, 2019, which were answered in writing by letter dated June 17, 2019. As such, we find on this record that the ODS did not violate FOIA's mandate to provide reasonable assistance.

Finally, you allege that you made unspecified requests, which went unanswered. We do not have adequate information to evaluate this claim. However, ODS asserts that it reviewed its past year of FOIA logs and found no such requests. On this record, we have insufficient information to find a FOIA violation.

⁵ 29 *Del. C.* § 10003.

⁶ See *Del. Op. Att'y Gen.* 18-IB53, 2018 WL 6591818, at *4 (Dec. 3, 2018) (relying on sworn testimony to support the cost estimate).

⁷ 29 *Del. C.* § 10003(g).

CONCLUSION

For these reasons, we conclude that ODS has not violated FOIA as alleged.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Carla A. K. Jarosz, Deputy Attorney General
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