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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB51

September 16, 2019

VIA EMAIL

Mr. Kevin Madden
Kevin.p.madden@icloud.com

RE: FOIA Petition Regarding the Delaware Department of Natural Resources and Environmental Control

Dear Mr. Madden:

We write in response to your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with your request for records. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. As discussed below, we conclude that DNREC has not violated FOIA as alleged.

BACKGROUND

In April 2019, you sent a FOIA request to DNREC seeking “all documents covering, but not limited to, policy statements, guidance, interpretations, memos, staff papers, emails, calendars, phone calls in written or electronic format that is about, relates to, concerns, touches on, and/or applies to Delaware’s studies, working groups, proposals, agreements, contracts, membership, internal documents, legal and policy analyses, and /or affiliations with CAP and TRADE and other similar Delaware initiative(s).”¹ The request also asked for a waiver of all fees as the request is made in the public interest of all Delawareans. DNREC responded, asking you to provide more specific information, such as date ranges, addresses, facility site/facility names, and program

¹ Petition; Response.

details, noting that your request was very broad. You responded on July 2, 2019 stating that you missed the earlier email and wished to renew your request; DNREC again requested more specific information. In response, you stated that you would limit your request to the date range of January 1, 2014 to March 31, 2019. In addition, you stated that you wished to receive these documents from government and/or personal email accounts. You indicated your request would cover accounts of “individuals/employees working, advising, assisting and/or leading the Delaware / northeast State cap and trade effort,” and you noted that the “focus is on both on the transportation and energy sectors and the request is not limited to sites per se.”² DNREC responded to this modified request by supplying a cost estimate totaling an estimated \$5,217.94 in fees. The estimate indicates that DNREC must collect and review documents from its Division of Air Quality and Division of Climate, Coastal and Energy, anticipating at least 139 hours of staff time are necessary. The cost estimate contains a breakdown of the number of estimated hours each staff member requires to process this request. DNREC indicated that it was merely an estimate and “could increase if the Divisions determine that more time is needed to complete the request.”³ To begin the search, DNREC required prepayment of the estimated fee in total. DNREC indicated that you rejected this cost estimate by email on July 23, 2019.

This Petition followed, alleging several flaws in DNREC’s response. First, you argue that the DNREC’s requirement for payment of “an amount greater than \$5,200 in order to overcome the initial hurdle of DNREC even determining whether the information exists in the first instance, and if so, how much is available and releasable” places you in a “catch 22 situation” and can be “construed as governmental blackmail.”⁴ Although you “recognize a fee schedule is permissible under Delaware’s FOIA, the actions taken by the FOIA Coordinator are absurd, and really undercut the underpinnings of FOIA itself.”⁵ The Petition also argues that DNREC should have one person responsible for managing cap and trade efforts, and you question the efficiency of DNREC in maintaining its records. Additionally, despite cap and trade dealings with other states for almost a decade, you question why no annual or biannual publications have been issued, especially as DNREC employees are paid by the Delaware taxpayer. You also assert that unlike other states, Delaware does not have a fee waiver for requests made in the public interest and state “your office should recommend that the Governor and the legislative branch take the necessary steps to amend the Act.”⁶ You ask our Office to reverse this decision and other “similarly situated actions by FOIA Coordinators throughout Delaware.”⁷

² Response.

³ Petition.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

In a supplemental submission, your Petition also alleges that DNREC’s FOIA Coordinator failed in her responsibilities under FOIA, as she did not make every effort to assist you in identifying the records being sought and fostering cooperation between you and DNREC. You reiterate that the estimate constitutes an obstacle and argue that the cost estimate is contrary to FOIA, citing to Delaware Attorney General Opinion 02-IB34. You argue that the FOIA Coordinator did not offer assistance as to what information is already available to the public and did not consider that the fees “could/should” have been waived. You ask this Office to find numerous violations and to require DNREC to waive its fees for the information you requested.

On September 3, 2019, DNREC’s counsel replied to your Petition by letter (“Response”), arguing that DNREC has fulfilled its obligations under FOIA. DNREC cites to the FOIA statute and its codified regulations in support of its authority to charge administrative fees for “staff time associated with processing FOIA request” and to charge for any necessary Department of Technology and Information charges for fulfilling such a request.⁸ DNREC argues that the statement that DNREC is placing roadblocks is unsupported, pointing out that the FOIA Coordinator twice asked for the request to be modified, but you did not ask the FOIA Coordinator to assist in modifying your request. DNREC asserts that it complied with FOIA by providing an itemized cost estimate and giving you the opportunity to modify, cancel, or proceed with the request.

On September 4, 2019, you sent an email in response (“Reply”).⁹ First, you argue that the initial request was limited by seeking only five years of records although you believe that cap and trade efforts have been pending for ten years or more and by seeking records for energy and transportation sectors only. Second, you point to the overall goals of FOIA, stating that “FOIA came to fruition” because of the government’s failure to provide “transparency and availability to the public that ultimately pays for these services.”¹⁰ The Reply notes that DNREC’s counsel did not address the “whole picture” and instead focused on the appropriateness of the FOIA charges, which you allege “[i]n and of itself, is meaningless and ignores the overarching principles and precepts of transparency, equity, and fairness.” Third, you dispute DNREC’s assertion that the FOIA Coordinator’s efforts were adequate, stating your belief that based on Attorney General Opinions and FOIA manuals, the fees can be waived. Relying on Attorney General Opinion 02-IB34, the Reply argues that DNREC has taken an extreme view by stating that DNREC can require a requestor to pay all costs. You contend that the cost estimate is made in bad faith, stating that the some of the highest paid employees were used in the cost calculation. Finally, the Reply states that the FOIA Coordinator violated FOIA by providing a cost estimate without “any breath or exertion of how they could be reduced or waived. . .” and noting that she should have pointed you to public information related to your request. In conclusion, the Reply states that DNREC’s

⁸ Response.

⁹ Our consideration is limited to the claims raised in the Petition. *See, e.g., Del. Op. Att’y Gen.* 19-IB25 (May 10, 2019); *Del. Op. Att’y Gen.* 18-IB51, 2018 WL 6591816, at *n.4 (Nov. 20, 2018); *Del. Op. Att’y Gen.* 12-IIB11, 2012 WL 5894039, *4 (Nov. 7, 2012).

¹⁰ Reply.

response should be dismissed as “facially incomplete” for failing to “address the underlying issue in any equitable way raised in my initial and supplement petitions in conjunction with FOIA provisions, Delaware Attorney General Opinions and directives.”¹¹

DISCUSSION

The Petition raises two issues: 1) whether DNREC violated the goals and objectives of FOIA by responding to your request with a cost estimate, instead of waiving the fees to process the request; and 2) whether the FOIA Coordinator violated FOIA by failing to adequately cooperate and assist with your request.¹²

First, the policy objectives of FOIA are specifically defined in the statute:

It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. Toward these ends, and to further the accountability of government to the citizens of this State, this chapter is adopted, and shall be construed.¹³

In enacting FOIA, the General Assembly made it clear that the statute implements the goals of FOIA and represents the governing principles by which we measure DNREC’s response to your request. The public body’s right to assess copying charges and administrative fees is defined in the statute, and as the Petition acknowledges, Delaware’s FOIA statute does not mandate that fees be waived for requests within the public interest.¹⁴ Instead, Section 10003(m)(2) gives each public body the option to adopt a waiver of administrative fees in its policy,¹⁵ and

¹¹ *Id.*

¹² The Petition asserts several claims which are outside of the scope of FOIA and/or unable to be addressed through this FOIA petition process, including the alleged lack of efficiency in DNREC’s recordkeeping, DNREC’s obligation to publish any cap and trade reports, and the Department of Justice’s legislative policy initiatives.

¹³ 29 *Del. C.* § 10001.

¹⁴ *See* 29 *Del. C.* § 10003(m).

¹⁵ 29 *Del. C.* § 10003(m)(2) (“Notwithstanding the foregoing, any Freedom of Information Act policy adopted by a public body pursuant to subsection (b) of this section hereunder may include provisions for the waiver of some or all of the above administrative fees; provided that such waiver shall apply equally to a particular class of persons (i.e., nonprofit organizations).”).

DNREC's policy has not included such a provision.¹⁶ In addition, FOIA explicitly authorizes a public body to require payment of all fees prior to any service being performed.¹⁷ This Office's decisions must adhere to clear statutory law.¹⁸ Here, DNREC submitted a written, itemized cost estimate with a breakdown of the estimated time and fee for each staff member to process the request. We conclude that DNREC has the authority under FOIA to provide an itemized cost estimate stating the anticipated costs to process this request and to require payment up-front; also, DNREC acted in accordance with FOIA and its policy when it declined to waive the fees. Thus, we find that DNREC did not violate FOIA by providing a cost estimate in response to your request, instead of waiving or reducing applicable fees.

Second, the Petition alleges that DNREC's FOIA Coordinator failed to adequately cooperate in responding to your request, specifically noting that the FOIA Coordinator did not consider or offer advice about how the costs could be reduced or waived and did not point you to public materials related to your request. Section 10003(g)(2) states that the FOIA Coordinator must make every reasonable effort to assist the requesting party identifying responsive records and assisting the public body in locating and providing them.¹⁹ The FOIA Coordinator is to "foster cooperation between the public body and the requesting party."²⁰

Our Office has previously determined this inquiry is based upon the specific factual circumstances.²¹ You claim that DNREC's FOIA Coordinator must inform you of ways to reduce or waive costs. The FOIA Coordinator was not required to advise of any methods to waive the fees, because as concluded above, DNREC acted within the bounds of FOIA by declining to waive the fees associated with your request. DNREC's submissions indicate that the FOIA Coordinator previously asked for more specific information to narrow the request; if you wished to reduce costs, the record reflects that you were aware of the option to modify or narrow your request. In addition, you claim that the FOIA Coordinator should have cited to publicly available relevant materials in the response. FOIA does not require the FOIA Coordinator to point out public

¹⁶ 8 Del. Admin. C. § 900-4.0.

¹⁷ See 29 Del. C. § 10003(m)(5).

¹⁸ The Petition's argument about Attorney General Opinion 02-IB34 is inapposite here, as this 2002 opinion pertains to a town's specific FOIA fee policy enacted under a previous version of the FOIA statute. See *Del. Op. Att'y Gen. 02-IB34*, 2002 WL 34158593, at *7-8 (Dec. 21, 2002).

¹⁹ 29 Del. C. § 10003(g)(2) ("The FOIA coordinator and/or his or her designee, working in cooperation with other employees and representatives, shall make every reasonable effort to assist the requesting party in identifying the records being sought, and to assist the public body in locating and providing the requested records. The FOIA coordinator and/or his or her designee will also work to foster cooperation between the public body and the requesting party.").

²⁰ *Id.*

²¹ *Del. Op. Att'y Gen. 19-IB06*, 2019 WL 1511361, at *2 (Feb. 13, 2019) ("This analysis necessitates a 'fact-based examination' of the circumstances.") (citation omitted).

materials responsive to your request in these circumstances. The request did not seek the records that are publicly available; it sought a wider scope of records. DNREC was obligated to respond to the request that was submitted; DNREC reviewed your request and provided a cost estimate of the staff time needed to process this request. Additionally, neither party states that any publicly available records exist. On this record, we cannot find that DNREC's FOIA Coordinator breached her duties under FOIA in responding to your request, and we find no violation under 29 Del. C. § 10003(g)(2).

CONCLUSION

We conclude that DNREC has not violated FOIA as alleged.

Very truly yours,

/s/ Owen Lefkon

Owen Lefkon

Director, Fraud and Consumer Protection Division

cc: Devera B. Scott, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General