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

**Attorney General Opinion No. 19-IB60**

**October 28, 2019**

**VIA EMAIL**

Ms. Holly Kirkland  
[Holly.kirkland@gmail.com](mailto:Holly.kirkland@gmail.com)

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

Dear Ms. Kirkland:

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 to determine whether a violation of FOIA has occurred. As discussed below, we conclude that DNREC has not violated FOIA as alleged.

**BACKGROUND**

You filed a FOIA request with DNREC on August 7, 2019 seeking thirty separate items related to Canadian geese and migratory birds. After you did not receive a response, you filed your first petition regarding this request on August 30, 2019 challenging DNREC’s timeliness. DNREC then responded on September 3, 2019 by sending a cost estimate to fulfill your request. DNREC’s estimate listed the job titles of the individuals necessary to search for and gather all of the documents you requested, those individuals’ hourly rates, and the time estimated necessary to search, concluding that the search would take 99.5 hours costing \$3,665.36. DNREC requested you provide payment or an amended request by September 17, 2019. On September 10, 2019, you submitted questions to DNREC’s FOIA Coordinator about the estimate to determine how you might narrow your request. A few weeks later, this Office issued its determination regarding the first petition. DNREC acknowledges it has not responded to your September 10 inquiries. This Petition followed.

This Petition alleges several flaws in DNREC’s response. First, you argue DNREC’s FOIA Coordinator failed to provide adequate cooperation and assistance because you did not receive a response to your September 10, 2019 questions. Second, you challenge the cost estimate, arguing that DNREC could use lower-paid employees to perform the search of electronic records; that the nature of the work required is not included in the estimate; and that there is “no proof that the cost estimate does not include prohibited fees for legal analysis.”<sup>1</sup> You request that DNREC be required to waive all fees to fulfill your request due to its alleged noncompliance.

On October 8, 2019, DNREC’s counsel replied to your Petition (“Response”), arguing that DNREC has fulfilled its obligations under FOIA. DNREC states that it did not respond to your September 10, 2019 questions because it did not wish to cause confusion while the previous matter was pending and the instant Petition was filed before it could respond. DNREC further asserts that FOIA does not require a particular form of itemization in a cost estimate. DNREC argues there is no factual or legal basis to support your claim that the individuals selected to search or the estimated hours violate FOIA. DNREC contends the Petition does not properly allege “lack of good faith or any misconduct beyond failure to meet [your] subjective expectations.”<sup>2</sup> DNREC’s Response includes a sworn statement of the FOIA Coordinator outlining her steps to identify the individuals necessary to respond to your request and determine the time needed to search for and provide the requested records. DNREC explains that the technical nature of the documents you requested necessitate “staff knowledgeable in the underlying science and methodologies to efficiently and accurately access and identify the responsive documents.”<sup>3</sup> DNREC notes that you did not follow up on your questions or provide a date by which you expected a response. Finally, DNREC argues that FOIA does not authorize a waiver of fees as a remedy for noncompliance.

## DISCUSSION

The Petition raises two issues: 1) whether DNREC’s fee estimate is proper under FOIA; and 2) whether DNREC’s FOIA Coordinator violated FOIA by failing to adequately cooperate and assist with your request. We consider each issue in turn.

FOIA mandates that when a public body proposes to charge administrative fees, it must “provide an itemized written cost estimate of such fees to the requesting party, listing all charges expected to be incurred in retrieving such records.”<sup>4</sup> Further, FOIA requires that a public body make every effort to ensure that the administrative fees are minimized and that the charges are billed at the hourly pay grade of the “lowest-paid employee capable of performing the service.”<sup>5</sup>

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<sup>1</sup> Petition.

<sup>2</sup> Response.

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

<sup>4</sup> 29 *Del. C.* § 10003(m)(2).

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

“In connection therewith, the public body shall minimize the use of nonadministrative personnel in processing FOIA requests, to the extent possible.”<sup>6</sup>

DNREC’s cost estimate included the hourly rates of the necessary staff and the estimated time for each staff member to gather documents under her/his control responsive to your request. DNREC submitted with its Response an affidavit attesting that the fee estimate “reflects the lowest-paid employee capable of performing the services necessary to identify, acquire, and compile an adequate response to [the subject FOIA request].”<sup>7</sup> DNREC’s counsel represents that responding to this request requires “staff knowledgeable in the underlying science and methodologies to efficiently and accurately assess and identify the responsive documents.”<sup>8</sup> DNREC’s counsel further represents that the fees in the estimate are needed to “access, identify, and compile” the requested information;<sup>9</sup> there is no indication in the record that DNREC included costs related to the legal review of the applicability of FOIA’s exemptions to the responsive records. In accordance with this Office’s practice, we accept these representations, including the FOIA Coordinator’s sworn statement made under penalty of perjury, and find no FOIA violation with respect to DNREC’s cost estimate.<sup>10</sup>

Finally, the Petition alleges that DNREC’s FOIA Coordinator provided inadequate assistance by failing to respond to your inquiries about the cost estimate. Public bodies must “provide reasonable assistance to the public in identifying and locating public records to which they are entitled access”<sup>11</sup> and a FOIA coordinator must “make every reasonable effort to assist the requesting party in identifying the records being sought” and “work to foster cooperation between the public body and the requesting party.”<sup>12</sup> Determining whether a FOIA coordinator met these obligations necessitates a “fact-based examination” of the circumstances.<sup>13</sup> Here,

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

<sup>7</sup> Response, Affidavit of FOIA Coordinator S. Lee Sobocinski.

<sup>8</sup> Response.

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

<sup>10</sup> *Del. Op. Att’y Gen.* 19-IB02, 2019 WL 1511357, at \*2 (Feb. 11, 2019) (accepting sworn representations of the records custodian regarding the cost estimate); *Del. Op. Att’y Gen.* 17-IB59, 2017 WL 6348853, at \*2 (Nov. 20, 2017) (accepting factual representations of the public body’s counsel); *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).

<sup>11</sup> 29 *Del. C.* §10003(d)(1).

<sup>12</sup> 29 *Del. C.* §10003(g).

<sup>13</sup> *Del. Op. Att’y Gen.* 18-IB51, 2018 WL 6591816, at \*3 (Nov. 20, 2018).

DNREC acknowledges receipt of your request for additional information and explains its delay by stating it did not wish to confuse matters while the first petition was pending. Once this Petition is resolved, DNREC commits to responding promptly to your questions and assisting you in narrowing your request. We do not believe these circumstances rise to the level of a FOIA violation. However, DNREC is encouraged to provide reasonable assistance to you in narrowing your request in accordance with FOIA.

### **CONCLUSION**

We conclude that DNREC has not violated FOIA as alleged, and DNREC is encouraged to provide reasonable assistance in your efforts to narrow your request.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Kayli H. Spialter, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General