



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB24

October 21, 2020

VIA EMAIL

Ms. Jeanne Kuang
Jeanne.kuang@delawareonline.com

RE: FOIA Petition Regarding Wilmington Neighborhood Conservancy Land Bank Corporation

Dear Ms. Kuang:

We write in response to your correspondence alleging that the Wilmington Neighborhood Conservancy Land Bank Corporation (“Land Bank”) 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 set forth below, we determine that the Land Bank’s cost estimate violates FOIA, and we recommend that the Land Bank update its estimate within fifteen business days of this Opinion.

On August 4, 2020 you directed a FOIA request to the Land Bank seeking meeting minutes in calendar years 2019 and 2020, records of all acquisitions and dispositions of property in calendar years 2019 and 2020, all Land Bank balance sheets, income statements, and cash flow statements since the Land Bank’s creation, and all emails sent and received from a Land Bank employee’s email address for more than a year. The Land Bank responded with a cost estimate of \$1,970.00. Following receipt of this estimate, you objected to the time billed to gather the minutes and other records as you believe the Land Bank “should have [these records] readily on hand.”¹ You also narrowed your email request to three months, stating you do not expect a significant charge in light of a previous response from Wilmington Housing Partnership for no charge, and argued the charges for legal review are inappropriate under FOIA.² About a week later, the Land Bank

¹ Petition.

² *Id.*

responded that it agrees it is a public body, but indicated that it has only a two-person staff handling a larger property inventory than the Wilmington Housing Partnership. The Land Bank also asserted that the charges for a staff member to redact nonpublic information is not legal review, as it is not done by an attorney. The Land Bank provided a lower estimate of \$640.00, charging four hours for the disposition and acquisition records, ten hours for emails, and “three hours of review.”³

You then filed this Petition, arguing that the Land Bank improperly assessed charges for legal review in its cost estimate and supposing that the other unspecified fees for collecting the records also may include legal review fees. You asked our Office to order no fees are due.

The Land Bank’s counsel filed a response with our Office (“Response”). The Land Bank states it has a two-person staff handling a large number of transactions during the COVID-19 pandemic and unlike Wilmington Housing Partnership, it is not receiving any free assistance from the City of Wilmington in processing this request. Further, the Land Bank stressed the importance of redacting certain information about its property transactions but as redaction is not performed by an attorney, the Land Bank argues this review is an administrative review, not a legal one.⁴ Finally, the Land Bank notes that a decision preventing the Land Bank from recouping its costs in this instance means that “its operations will be at the mercy of whatever additional FOIA requests are made by this, or any other, requesting parties.”⁵

FOIA permits public bodies to charge various administrative fees, such as fees for identifying records, monitoring file reviews, and generating computer records; FOIA does not permit any charges associated with the public body’s legal review of whether any portion of the requested records is exempt from FOIA.⁶ This Office has recently stated that “[d]etermining whether a record may or must be withheld based upon an exemption listed in FOIA . . . constitutes legal review.”⁷ “[T]he meaning of ‘legal review’ is plain: A requesting party may not be charged administrative fees for the time it takes ‘the public body’ to review a record for the purpose of assessing the applicability of FOIA’s exemptions, no matter who is conducting that review.”⁸ Thus, even if a non-attorney reviews the records to determine if an exemption applies, the review

³ *Id.*

⁴ The Petition does not challenge the propriety of redacting this information, and that issue is not addressed herein.

⁵ Response.

⁶ 29 *Del. C.* § 10003(m)(2).

⁷ *Del. Op. Att’y Gen.* 16-IB19, 2016 WL 5888771, at *13 (Sept. 30, 2016) (quoting *Del. Op. Att’y Gen.* 15-IB03, 2015 WL 4394195, at *6 (June 12, 2015)).

⁸ *Id.*

is still considered legal review under the FOIA statute and the costs of such review may not be charged to the requesting party.⁹

The Land Bank states that its cost estimate includes charges for a staff member to determine whether any information is not public under FOIA. In other words, the staff member will determine whether any portion of the record is exempt from FOIA. Accordingly, we determine that the Land Bank violated FOIA to the extent its cost estimate includes fees for this legal review. It is recommended the Land Bank submit an updated cost estimate to you within fifteen days in accordance with this Opinion.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved by:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Richard E. Franta, Attorney for Wilmington Neighborhood Conservancy Land Bank Corporation

⁹ *Id.*; *but cf. Del. Op. Att’y Gen.* 16-IB09, 2016 WL 2619612, at *3 (Apr. 7, 2016) (concluding that a police department lieutenant’s review of its policy manual to determine the underlying factual basis for asserting the public safety exemption was an administrative review, not “a legal review to determine if exemptions apply”).