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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB13

June 23, 2021

VIA EMAIL

Amanda Fries
Delaware Online/The News Journal
Afries@delawareonline.com

RE: FOIA Petition Regarding the Delaware Department of Health and Social Services

Dear Ms. Fries:

We write in response to your correspondence alleging that the Delaware Department of Health and Social Services (“DHSS”) 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 DHSS has not violated FOIA as alleged. While we find no violation of FOIA, the statement in the cost estimate that the search may not turn up any responsive or nonexempt records is inappropriate in these circumstances where the type of records - audits and reports of a certain vendor - have been identified. In these circumstances, we strongly recommend that DHSS undertake some minimal investigation to determine whether at least some portion of the records would be made available, before requesting payment of such a significant sum.

BACKGROUND

On April 27, 2021, you submitted a request to DHSS for “audits or any other assessments/reports of Connections Community Support Programs, Inc. completed between Jan. 1, 2015 to April 27, 2021.” Eight days later, DHSS denied your request, stating that certain records are exempt under 29 *Del. C.* § 10002(1)(6), as attorney-client privileged materials or otherwise exempt under common law, citing Attorney General Opinion No. 16-IB11. DHSS also asserted certain other records were exempt under 29 *Del. C.* § 10002(1)(3), which exempts “investigatory files compiled for civil or criminal law enforcement purposes including pending investigative files, pretrial and presentence investigations and child custody and adoption files where there is no criminal complaint at issue” and cited Attorney General Opinion No. 04-IB04. For the remaining records, DHSS provided a cost estimate as follows:

[Division of Healthcare Quality]: 6 hours at \$13.49 per hour = \$80.94
[Division of Developmental Disabilities Services]: 66.5 hours at \$24.80 per hour = \$1,649.20
[Division of Substance Abuse and Mental Health]: 8 hours at \$15.70 per hour = \$125.60¹

The cost estimate also stated that “the search may not turn up any responsive records, and responsive records that are found may be determined to be exempt from FOIA after legal review,” but noted that an hour of administrative fees was waived and no cost for legal review was included in the estimate.² After you questioned this response, DHSS’s FOIA Coordinator clarified by email that the Division of Medicaid and Medical Assistance possess the records deemed exempt, and the review of those records is not included in the cost estimate. In addition, DHSS’s FOIA Coordinator stated that the other Divisions who quoted an estimate have not reviewed the records, but merely identified their existence and location; the quoted costs include the time to review for responsiveness, but not the time for redactions. This Petition followed.

The Petition first alleges that DHSS improperly failed to specifically identify which parts of the records within its possession were subject to the exemptions for investigatory files and attorney-client privilege. Second, you state that the total cost of \$1,855.74 is excessive and gives no promise of ever receiving any records at the end of the process. You note you tried to resolve your concerns with DHSS but the agency merely recited parts of the Code in response. You contest the estimated time to review the records, which includes audits you allege should need no redactions. You maintain it is “imperative to the public’s understanding of government operations” to determine the State’s oversight over Connections. Finally, you contend that “a \$1,855 charge to *maybe* receive public records is cost-prohibitive for Delawareans and is the antithesis of open and transparent government operations.”³

DHSS’s counsel responded to the Petition on DHSS’s behalf on June 3, 2021 (“Response”), arguing that its response to your request was proper.”⁴ DHSS asserts that FOIA does not require a log detailing exempted records or any explanation of what specific records were being denied under a particular exemption. DHSS contends that its assertions of the investigatory files exemption and attorney-client privilege are proper, as the documents held by DMMA relate to the ongoing False Claims Act case brought by the Federal and State governments against Connections and include communications with the legal counsel. In response to the Petition’s argument that the timing estimate is improper, DHSS’s legal counsel represents that “DHSS has supplied a good faith time estimate.”⁵ DHSS notes that you have requested five years’ of audits and reports for a

¹ Petition.

² *Id.*

³ *Id.* (emphasis in the original).

⁴ Response.

⁵ *Id.*

vendor with almost one hundred locations throughout the state and collecting all those records will take time. In regard to the costs, DHSS's counsel states that rates used "are not leadership staff salaries but are the salaries of the 'lowest-paid employee capable of performing the service.'"⁶ DHSS closed its Response by offering to consider a "pared-down" request if you wish to submit one.

DISCUSSION

Under FOIA, a public body carries the burden of proof to justify denial of a request for records.⁷ The representations of the public body's legal counsel may satisfy this burden.⁸ The Petition first asserts that DHSS must provide, in its response to your request, an explanation of the specific records that DHSS alleges were exempt as investigatory file records or attorney-client privileged materials. While we encourage public bodies to generally identify the subsets of records subject to each exemption when reasonably practicable, FOIA does not require an index of exempted records or explicitly require that a detailed explanation be made.⁹ Instead FOIA requires that public bodies give a reason for its denial of the request and DHSS did so in this instance, citing to the specific Code provision and relevant precedent.¹⁰ DHSS's Response to this Petition also provided additional information about the records determined to be exempt. Based on this record, we find DHSS did not violate FOIA by failing to provide more explanation regarding the records subject to the exemption in its response to your request.

The Petition alleges that the cost estimate is excessive and promised no records at the end of the process, despite the significant cost. In addition, the Petition contests the estimated time of eighty hours, alleging that the audits are public and do not require redaction. FOIA states that "[p]rior to fulfilling any request that would require a requesting party to incur administrative fees, the public body shall provide an itemized written cost estimate of such fees to the requesting party, listing all charges expected to be incurred in retrieving such records."¹¹ Upon receipt, "the

⁶ *Id.*

⁷ 29 *Del. C.* § 10005(c).

⁸ *Judicial Watch, Inc. v. Del. Dep't of Justice*, 2021 WL 22550, at *5 (Del. Super. Jan. 4, 2021) (accepting the representations of the public body's attorney to meet the public body's burden of proof under FOIA).

⁹ 29 *Del. C.* § 10003(h)(2) ("If the public body denies a request in whole or in part, the public body's response shall indicate the reasons for the denial.").

¹⁰ *Id.*

¹¹ 29 *Del. C.* § 10003(m).

requesting party may decide whether to proceed with, cancel, or modify the request.”¹² FOIA requires a public body to estimate the cost of any administrative fees to fulfill the request, using estimated time and rates based on the lowest-paid staff who can perform this work, but excluding any costs for the legal review to determine whether an exemption applies.¹³ A public body may charge for administrative tasks necessary to fulfill the request, such as identifying records and monitoring file reviews, and generating computer records, but must “minimize the use of nonadministrative personnel in processing FOIA requests, to the extent possible.”¹⁴

In this instance, DHSS provided an itemized cost estimate and DHSS’s counsel represents that the rates in the estimate “are not leadership staff salaries but are the salaries of the ‘lowest-paid employee capable of performing the service.’”¹⁵ Furthermore, given the scope of the requested records - five years of audits and reports for a vendor with almost one hundred locations throughout Delaware, DHSS’s counsel represents that it is a “good faith time estimate” to collect and review these records.¹⁶ Based on the representations of DHSS’s legal counsel, we find that DHSS did not violate FOIA in this regard.

CONCLUSION

As set forth above, it is our determination that DHSS has not violated FOIA as alleged in the Petition.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Joanna S. Suder, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See Response.*

¹⁶ *See id.*