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

**Attorney General Opinion No. 21-IB22**

**September 29, 2021**

**VIA EMAIL**

Karl Baker  
[Kbaker6@gmail.com](mailto:Kbaker6@gmail.com)

**RE: FOIA Petition Regarding the Delaware Department of State**

Dear Mr. Baker:

We write in response to your correspondence alleging that the Delaware Department of State (“Department”) 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 the Department violated FOIA by failing to meet its burden to demonstrate that it minimized the use of nonadministrative personnel to the extent possible and recommend the steps outlined below.

**BACKGROUND**

You submitted a FOIA request to the Department on May 6, 2021, seeking the following:

I request records of all emails sent to or from state officials (listed below) between Jan. 1[,] 2018 and the present day that include in the sender/recipient lines the email addresses that end with “@gulftainer.co;” and/or include in the body or the sender/recipient lines, the names “Eric Casey” and/or Mike Hall and/or Michael Hall and/or Peter Richards. Current or former state officials whose email accounts should be searched for responsive records include Jeffrey Bullock, Eugene Bailey,

Doug Denison, Rick Geisenberger, David Mathe, Kristopher Knight, and David Mangler.<sup>1</sup>

The Department's FOIA Coordinator responded on May 11, 2021, stating that she was forwarding the FOIA request to the Office of the Secretary of State and to Diamond State Port Corporation ("DSPC") and noting that those offices may contact you directly if more information is needed to fulfill your request. After the Department asked for the request to be narrowed, you submitted a revised request as follows:

1. I'd like to request the responsive emails from the original request that were sent between October 1, 2019 and Jan. 1[,] 2020 and discuss the [] potential amendment to the concession agreement.
2. I'd like to request responsive emails from the original request that were sent between August 1, 2020 and the present that discuss investments made by GT USA Wilmington and /or financial statements provided to the state by GT USA Wilmington.
3. I'd like to request the responsive emails from the original request that were sent between October 1, 2020 and May 1, 2020 that include the terms "1694" and/or ILA and/or "Ashe" and/or "Cephas."<sup>2</sup>

After some delay for legal review, the Department responded that its search produced a total 3,801 emails. Estimating each email will require approximately one minute to review, the Department advised that the total estimated cost for staff time to review is \$2,061.00, exclusive of the costs for further legal review after the emails are sorted. After corresponding with the Department about the rationale for these costs, you filed this Petition.

In your Petition, you allege that the Department's response to your request violated FOIA in several ways. First, you allege that the Department's spokesperson, the Director of Community Relations, described the Department's initial review as identifying materials that are non-public, which you allege constitutes "legal review" under the statute and cannot be charged to citizens. You cite an August 20, 2021 Department email explaining that a person must "meticulously read through each e-mail/record to identify what is or could potentially be outside of the definition of 'public record'" and a July 20, 2021 Department email indicating that the response was "delayed pending legal review."<sup>3</sup> Moreover, you argue that this exorbitant fee constitutes a "cost-prohibitive tax that undermines government's responsibility to be open to the public," essentially prevents the press from performing government oversight, and precludes outside scrutiny of the Port of Wilmington, which is one of the State's largest assets.<sup>4</sup> The Petition also contends that the Department failed to comply with its statutory obligations to make every effort to ensure that the

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<sup>1</sup> Petition.

<sup>2</sup> *Id.*

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

<sup>4</sup> *Id.*

administrative fees are minimized and to sufficiently itemize its cost estimate, which merely stated that emails would take one minute each to review and does not disclose the tier of the employee performing the review.

On September 8, 2021, the Department’s counsel replied to your Petition (“Response”) and included an affidavit from the Director of Community Relations. The Department argues that its cost estimate complied with the FOIA statute and the Department’s regulations. After receiving the revised request, the Department asserts that it employed its three-step practice for requests seeking a large volume of electronic documents: 1) request a search by the State Department of Technology and Information (“DTI”); 2) perform an initial staff-level review of the records DTI produces in order “to determine which are responsive to the request and whether there are any non-custodial documents responsive to the request in the possession of another agency;” and 3) “once the records are identified and categorized for administrative purposes,” send the records to counsel for legal review.<sup>5</sup> The Department asserts that the “administrative fees for staff time to identify, track, and maintain records are assessed as administrative fees” and that “no administrative fees are assessed for legal review by counsel.”<sup>6</sup> In this case, the Department notes that the Director of Community Relations submitted the request to DTI for the responsive emails of both the Department and the Department of Finance. The Department’s counsel clarifies that the legal review had not actually begun when it asserted the need for a time extension and expressly asserts that the cost estimate did not include fees for legal review. This assertion was also set forth in the Director of Community Relations’ affidavit. The Department states that its estimate was based on a review of 3,801 emails (comprising 2,502 Department emails and 1,299 Department of Finance emails) with one-minute review time per email for a total of 63.35 hours, charged at \$37.48 per hour for the Director of Community Relations and resulting in a total of \$2,374.00. The Department states that its initial cost estimate incorrectly assigned 55 hours of review time, and this new total of \$2,374.00 is the correct total cost estimate for this request.

The Department argues this cost estimate is fully compliant with FOIA. Specifically, the Department’s legal counsel asserts that the emails were reviewed by the lowest salaried staff member capable of conducting its initial review to identify, track, and monitor the request and to determine the responsiveness of the emails and whether the information requested may be in the possession of other agencies. The Department states no administrative fees were charged for legal review. Noting this Office’s precedent, the Department alleges that its methodology for producing this estimate is sound and an even larger total fee has been found acceptable under FOIA in the past. The Department argues that your interpretation would require a public body to either provide records without review or to review records with legal counsel only to avoid administrative fees. Regarding your constitutional claims, the Department contends that Delaware’s FOIA is not a constitutional right.

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<sup>5</sup> Response.

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

## DISCUSSION

FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying.<sup>7</sup> The public body carries the burden of proving compliance with the FOIA statute.<sup>8</sup> The representations of the public body’s legal counsel may satisfy this burden.<sup>9</sup> FOIA permits public bodies to charge certain fees to fulfill a request for records and provides 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.”<sup>10</sup> In determining fees, the statute provides that “charges for administrative fees may include staff time associated with processing FOIA requests, including, without limitation: identifying records; monitoring file reviews; and generating computer records (electronic or print-outs).”<sup>11</sup> However, administrative fees may not include any cost associated with the public body’s legal review of whether any portion of the requested records is exempt from FOIA. Further, the public body is obliged to “make every effort to ensure that administrative fees are minimized, and may only assess such charges as shall be reasonabl[y] required to process FOIA requests” and must “minimize the use of nonadministrative personnel in processing FOIA requests, to the extent possible.”<sup>12</sup> Administrative fees must be billed at the “current hourly pay grade (prorated for quarter hour increments) of the lowest-paid employee capable of performing the service.”<sup>13</sup> “Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.”<sup>14</sup>

The Petition alleges that the cost estimate is not sufficiently itemized and improperly includes fees for the legal review of the records and that the Department did not make every reasonable effort to minimize administrative fees. The Department’s cost estimate specified the total emails produced from the DTI search, the time assigned for the review of each email, and the

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<sup>7</sup> 29 Del. C. § 10003(a).

<sup>8</sup> 29 Del. C. § 10005(c).

<sup>9</sup> *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).

<sup>10</sup> 29 Del. C. § 10003(m)(2).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

total cost.<sup>15</sup> Although the cost estimate did not give the specific hourly rate or identify the employee reviewing these records, the hourly rate of the reviewing employee could be calculated using the information provided, if it had been correct. As such, we believe that this estimate meets the minimum requirements of the statute, but we encourage the Department to state the hourly rate and reviewing employee's position in its cost estimates in the future.

The Department submitted sworn testimony and its counsel's statement that its cost estimate excluded any legal review fees.<sup>16</sup> The Department represents that it charged administrative fees for the Director of Community Relations' initial review to determine the responsiveness of the emails and whether responsive non-custodial records were in the possession of other agencies and to identify, track and maintain these records. Accordingly, we determine based on this factual record that the Department did not improperly assess a fee for legal review.

However, we find that the Department has not met its burden of demonstrating that it minimized the administrative costs by utilizing the lowest-paid staff member capable of handling the initial review.<sup>17</sup> The Director of Community Relations clearly is not an administrative position, and the Department provides no explanation of why a director-level position is needed to perform the indicated review of these records. While we do not foreclose the possibility that use of nonadministrative staff in performing a review may be supportable in some instances, we determine that the Department has not presented sufficient factual support in this case.

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<sup>15</sup> Petition ("In response to your FOIA request, a volume of emails produced is 3,801. These emails will require a review of each with an estimate of approximately 1 minute per email, initially. This does not include legal review once sorted. The estimated cost associated with the staff hours for the manual initial review is \$2,061.00.").

<sup>16</sup> Response, Affidavit of Director of Community Relations ("No administrative fees are assessed for legal review, nor are any fees assessed for collaboration between the [Department] and counsel on legal issues.").

<sup>17</sup> See *Del. Op. Att'y Gen.* 19-IB60, 2019 WL 6047163, at \*2 (Oct. 28, 2019) (determining that DNREC appropriately charged administrative fees for technical staff, based on the representations of DNREC's legal counsel that staff knowledgeable in the underlying science and methodologies was required to access and identify the records of a technical nature); *Del. Op. Att'y Gen.* 17-IB03, 2017 WL 955568, at \*3-4 (Feb. 15, 2017) (determining that use of certain nonadministrative staff was appropriate, due to the sworn testimony specifying why the senior systems specialist and director were required to fulfill the request); *Del. Op. Att'y Gen.* 16-IB09, 2016 WL 2619612, at \*3-4 (Apr. 7, 2016) (determining that the police lieutenant's review of records to determine whether certain security risks exist did not constitute a legal review, but must be charged at a lower rate if a lower ranked officer was capable of performing this evaluation, regardless of which individual does the actual work).

The remaining allegations in the Petition relate to issues that are outside the purview of this Office's authority. This Office is limited to determining whether a violation of the FOIA statute has occurred.<sup>18</sup>

### CONCLUSION

For the reasons set forth above, we find that the Department violated FOIA by failing to meet its burden to demonstrate that it minimized the use of nonadministrative personnel to the extent possible in responding to this request. We recommend that the Department revisit the basis for its cost estimate and provide an updated written estimate in accordance with this Opinion, including any revisions necessary to minimize the use of nonadministrative staff to the extent possible.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Lawrence W. Lewis, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General

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<sup>18</sup> 29 *Del. C.* § 10005(e) (“Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur.”).