



**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. 21-IB23**

**October 4, 2021**

**VIA EMAIL**

Councilmember Dee Durham  
New Castle County Council  
[Dee.durham@newcastlede.gov](mailto:Dee.durham@newcastlede.gov)

**RE: FOIA Petition Regarding New Castle County**

Dear Councilmember Durham:

We write in response to your correspondence alleging that New Castle County 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 explained below, we concluded that the County has not violated FOIA as alleged.

**BACKGROUND**

On July 7, 2021, you submitted a FOIA request to the County seeking “any [and] all documents or written communications, including texts or messaging, emails, memos, or other documents, covering the period January 1, 2021 through July 7, 2021, of [certain individuals] between themselves or to any other County employee or County Councilmember, which include any of the following key words or phrases: ‘EV Ready,’ ‘Electric vehicle,’ ‘energy conservation,’ or ‘EV.’”<sup>1</sup> The County Solicitor responded twenty days later, providing copies of certain responsive text messages and noting that she was working with the County’s Information Systems division (“IS”) to conduct a search of the records. She anticipated at least two weeks were needed to access and review the records or perhaps more, depending on the volume. The County Solicitor

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<sup>1</sup> Petition.

committed to update you upon receipt of these emails and documents. She also noted her concern that searching for “EV” may be over-inclusive, pulling every record with those two letters together. If her concern proved to be right, she hoped to work with you on a revised search to avoid the additional time and costs for reviewing the responsiveness of those records. You then responded by revising your request that same day, substituting “EV ordinance” for “EV.” On August 2, 2021, you followed up, asking whether IS had started the search. The County Solicitor responded the same day that she initially gave a two-week estimate to comply with FOIA’s requirement for a good faith time estimate; when additional time is needed to respond to a FOIA request, like the request here, FOIA allows extensions for voluminous records, the need for legal advice, and the need to retrieve the emails from storage. She explained that IS mistakenly believed searching “EV” would not pull every word with “EV” in it, so IS performed the original search. However, after checking a few emails, she discovered the search did, in fact, pull every record with those two consecutive letters, and the only IS employee authorized to perform this search was not currently available. She committed to ask this employee to repeat the search with the revised term, at which time she would update the time estimate.

After you followed up on August 12, 2021, the County Solicitor replied a day later to state that the revised search reduced the number of emails for review to approximately 250, and she anticipated the legal review to be completed by the end of August. On August 31, 2021, the County Solicitor updated you again, stating that upon a more detailed review of the records, she realized that the multi-layer folders in which the records were provided was not conducive to review. Consequently, the County sent the emails to an outside vendor, who advised the data would be promptly processed in their platform to allow for a quicker review. The County Solicitor stated that the data transfer, processing, and review should be complete within the week. On September 7, 2021 you emailed again, stating as two months have passed, you were “hopeful that [the County Solicitor] will be able to fulfill this request today as suggested.”<sup>2</sup> The County Solicitor promptly responded, noting that access to their records was granted later than expected and to avoid over-promising, she estimated two weeks to complete the review the records. On the following day, you filed this Petition.

Your Petition requests a determination whether the County’s delay in providing documents related to this FOIA request is reasonable. At this time, you contend that no valid statutory basis exists for the County’s revised time estimate because you believe the requested records have already been collected, are not voluminous, and in your opinion, “no legal advice is necessary as this pertains only to internal communications on pending legislation.”<sup>3</sup>

The County, through its legal counsel, provided a response on September 16, 2021 (“Response”). Noting its right and obligation to review responsive records for exempt information, the County states that the 2,158 emails and documents resulting from its search qualifies as a voluminous batch of records under the statute. The County argues that its delays were justified and reasonable under the circumstances. The County notes that its search for emails, which are

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

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

“among the most difficult and time-consuming documents” to collect and review, begins with a search request form and approval by two General Managers to allow one authorized IS employee to run searches of the County’s electronic records.<sup>4</sup> The County maintains that these searches often require “iterative searches to ensure that the results are not incomplete or over-inclusive.”<sup>5</sup> In this case, the County states that the initial search was over-inclusive and had to be re-run to omit the search for “EV.” When the search was re-run, the County asserts that it became clear that the manner in which the emails were provided, with “multiple subfolders within subfolders for each custodian,” rendered the review unworkable.<sup>6</sup> As such, the County decided to send its data to an outside vendor for processing in a document review program called Relativity, beginning this process on August 26, 2021. The County notes that this request is its first time using the Relativity document review platform for a FOIA request. The County states it was given access to 2,518 documents on September 2, 2021, which was triple the amount anticipated. Two business days later, the County advised you that an additional two weeks was estimated to complete the review. Noting that its Response to this Petition subsumed even more time that could have been spent on the document review, the County states that it still expects to complete the review by its estimated completion date, but completion is dependent on the County’s workload. In sum, the County contends that it complied with FOIA, because it began addressing your request immediately upon receipt, provided an initial batch of records, and continued to process six months of emails and documents as expeditiously as possible.

## DISCUSSION

FOIA requires public bodies to “respond to a FOIA request as soon as possible, but in any event within 15 business days after the receipt thereof, either by providing access to the requested records, denying access to the records or parts of them, or by advising that additional time is needed because the request is for voluminous records, requires legal advice, or a record is in storage or archived.”<sup>7</sup> If access cannot be provided within 15 business days, the public body must give one of the designated reasons “why more time is needed and provide a good-faith estimate of how much additional time is required to fulfill the request.”<sup>8</sup>

The Petition questions whether the County’s delay in providing the records was reasonable and challenges the County’s basis for withholding the records after the collection was complete. The County provided acceptable reasons under the statute for its delays and timely updates about the progression of its response, including estimated completion dates. Based on the County’s

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<sup>4</sup> Response.

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

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

<sup>7</sup> 29 *Del. C.* § 10003(h)(1).

<sup>8</sup> *Id.*

representations in its Response and the accompanying affidavit, there is no indication that the County's invocation of the need for additional time for the stated reasons was improper nor is there any evidence of the County's bad faith in estimating its timeframes for completion.<sup>9</sup> Based on this factual record, we find no violation of FOIA with respect to the County's delays in responding to your request.

### **CONCLUSION**

Based on the foregoing, we determine that the County has not violated FOIA as alleged in the Petition.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved by:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
State Solicitor

cc: Wilson B. Davis, County Attorney

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<sup>9</sup> *Del. Op. Att'y Gen.* 17-IB23, 2017 WL 3426263, at \*9 (July 14, 2017) (“While I recognize that you believe the additional time for legal review to have been ‘egregious,’ I see no evidence that DPH’s invocation of the need for additional time for legal review was improper, nor do I see evidence of bad faith in DPH’s estimate of how much additional time was needed.”).