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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB08

April 4, 2022

VIA EMAIL

Ken Grant
ken.grant7@gmail.com

RE: FOIA Petition Regarding the Delaware Department of Transportation

Dear Mr. Grant:

We write regarding your correspondence alleging that the Delaware Department of Transportation (“DelDOT”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). 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. For the reasons set forth below, we find that DelDOT did not violate FOIA as alleged.

BACKGROUND

Beginning on November 15, 2021, you submitted a series of three FOIA requests to DelDOT to obtain records from its Division of Motor Vehicles (“DMV”). You initially sought all applications for salvage certificates without titles, (“the MV215 forms”), filed with the State of Delaware between January 1, 2019 and October 31, 2021. After DelDOT denied your three requests, you filed a Petition with this Office, and Attorney General Opinion No. 22-IB01 determined that DelDOT’s blanket denial of the MV215 forms violated FOIA and recommended that DelDOT provide a supplemental response. Subsequently, DelDOT reviewed its records and provided you with a cost estimate on February 24, 2022, totaling \$470.90. The estimate stated that it would take five hours at pay grade 24 with a rate of \$71.39 per hour and five hours at pay grade 7 with a rate of \$22.79 per hour, to complete the research for the request for MV215 forms. It also noted that “one hour of the cost has already been waived in computing this estimate.”¹ This Petition followed.

¹ Petition.

This Petition argues that the cost estimate is not compliant with FOIA, as you allege DelDOT did not make every effort to ensure that administrative fees are minimized and to minimize the use of nonadministrative staff. You point out that DelDOT is charging for the time of a pay grade 26 employee. You believe that a single form should be kept in an easily accessible file.

DelDOT, through its counsel, responded on March 15, 2022 to the Petition (“Response”). DelDOT maintains that its cost estimate is proper and provided an affidavit from the DMV Deputy Director with its Response to support that contention. The Deputy Director attested that during the relevant timeframe, the DMV processed 2,558,660 motor vehicle transactions for title; the DMV maintains its records in a system implemented more than twenty years ago which lacks the functionality and searchability of more modern programs; and the system does not allow users to search for salvage certificates or MV215 forms or allow an employee to identify each motor vehicle record containing an MV215 form or salvage certificate.

Given these limitations, DelDOT states it will have to manually search approximately 2.5 million records, which even at the lowest pay grade 7, would have resulted in an estimate of about \$9 million and would take a single employee more than 200 years to complete. To find a solution, DelDOT asserts that it needed staff with the appropriate skills, familiarity, and access rights to the system. DelDOT states that it met with the State’s Department of Technology and Information (“DTI”) to determine whether a DTI programmer familiar with this system could write a program that enables the MV215 forms to be identified and coordinated with DTI to create this cost estimate. The Deputy Director attested that she personally coordinated with DTI in these efforts and ensured that DTI identified the lowest-paid, qualified programmer to undertake this project, who has an hourly rate of \$71.39 and would require five hours to write the program. In her affidavit, she states that the “skill set required to write a program in a DOS based system is not one that DMV can push down to a Pay grade 7 employee or someone without specialized training, skills, experience and authorization to modify the . . . system.”² Once the program is created, the Deputy Director stated that it would take five hours for a pay grade 7 employee to “open each [record], identify and print the MV215 form and provide same to DelDOT legal.”³ The Deputy Director asserted that “the pay rate for the lowest level DMV employee who has both access to, training on, and the capability to review [motor vehicle records] in the . . . system is pay grade 7, with a rate of \$22.79 per hour.”⁴ As such, DelDOT contends that its estimate is proper under FOIA.

² Response, Affidavit of DMV Deputy Director.

³ *Id.*

⁴ *Id.*

DISCUSSION

FOIA does not require a public body to maintain its records in any certain format or system, nor does it require a public body to write a new program in order to collect records responsive to a FOIA request.⁵ When processing FOIA requests, a public body is permitted to charge requesting parties for certain fees, including administrative fees for any FOIA request requiring more than one hour of staff time to process.⁶ Prior to fulfilling a request that requires administrative fees, a public body must send an itemized written cost estimate to the requesting party, listing all charges expected to be incurred in retrieving such records. 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).”⁷ 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 it must “minimize the use of nonadministrative personnel in processing FOIA requests, to the extent possible.”⁸ 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.”⁹ “Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.”¹⁰

The Petition alleges that DelDOT failed to minimize its use of nonadministrative staff and failed to make every effort to minimize the administrative fees. The public body has the burden of proof to demonstrate compliance with the FOIA statute,¹¹ and a sworn affidavit may be required to meet that burden in certain instances.¹²

Here, DelDOT presented the sworn affidavit of the DMV Deputy Director, meeting its burden of demonstrating compliance with these two requirements. Her affidavit details DelDOT’s

⁵ 29 *Del. C.* §§ 10001-10007; *see, e.g., Del. Op. Att’y Gen.* 18-IB51, 2018 WL 6591816, at *3 (Nov. 20, 2018) (stating that “a public body is not required to convert data into a new format [or] create programming . . . as these actions would constitute creation of a new record.”).

⁶ 29 *Del. C.* § 10003(m).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 29 *Del. C.* § 10005(c).

¹² *Judicial Watch, Inc. v. Univ. of Del.*, 2021 WL 5816692, at *12 (Del. Dec. 6, 2021).

efforts to identify the records and the challenges accessing them in the current system. Rather than sending an exorbitant estimate and completion time based on a manual review of all motor vehicle records, DelDOT chose to voluntarily work with DTI to create a program to retrieve the requested records and calculated an estimate based on this approach.¹³ In support of its estimate, the Deputy Director attested that to create a program capable of identifying the MV215 forms and producing these records to DelDOT's attorney for legal review, the staff members listed on the cost estimate are the lowest-paid employees with permitted access to the system capable of performing the required tasks, and that this staff requires an estimated five hours each to complete the document retrieval. On this record, we find that DelDOT has demonstrated that it has minimized the use of nonadministrative staff to the extent possible and it has made every effort to minimize administrative fees, even exceeding FOIA's requirements to minimize your costs through the creation of a new program.

CONCLUSION

For the foregoing reasons, we determine that DelDOT's cost estimate did not violate FOIA as alleged in the Petition.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: George T. Lees, III, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

¹³ The estimate notes that one hour of administrative charges have already been waived in computing the estimate. Preliminary work is reflected in the Deputy Director's affidavit, wherein she describes her efforts to identify the records, coordinate with DTI, and identify the means to access those records.