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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB21

May 27, 2022

VIA EMAIL

Amanda Fries
AFries@delawareonline.com

RE: FOIA Petition Regarding the City of Wilmington

Dear Ms. Fries:

We write in response to your correspondence alleging that the City of Wilmington violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") in regard to 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 more fully herein, we find no basis to conclude that the City violated FOIA as alleged in the Petition.

BACKGROUND

You sent the City a FOIA request dated April 7, 2022 for "contract[s], subcontracts, and/or grants awarded to Our Youth, Inc. from Jan. 1, 2012 to April 7, 2022."¹ On April 28, 2022, the City responded to this request by providing a cost estimate based on the two hours to collect records the City estimated would be necessary, at the hourly rate of \$45.00.²

¹ Petition.

² The intervening holiday is not considered a "business day" in the timeframe allotted by the FOIA statute to respond to a request.

This Petition followed, alleging three claims. First, you contend that the cost estimate overcharged the administrative fees, as the City states that the lowest paid employee capable of collecting these records had a \$45.00 hourly rate. Second, you assert that the City failed to waive all fees for you; the records you requested should be readily available to you at no cost. Finally, you argue that as FOIA requires a response to be sent “as soon as possible,” you believe the City violated FOIA by improperly delaying its cost estimate related to this request by waiting until immediately before the deadline to send the cost estimate.

On May 2, 2022, the City responded to the Petition by acknowledging it made an error in its cost estimate and providing a corrected estimate charging \$22.45 per hour for the two hours necessary to collect the records (“Response”). The City included the affidavit of its Director of Finance attesting that two hours accurately reflects the estimated processing time and the \$22.45 hourly rate is associated with the City’s lowest paid employee capable of processing the request.

DISCUSSION

Under FOIA, a public body carries the burden of proof to justify denying a request for records.³ In certain circumstances, a sworn affidavit may be required to meet that burden.⁴ Despite the fact that the City did not deny you records, the Petition argues there have been three separate violations of FOIA. The Petition’s three claims are addressed in turn below.

First, you allege the City is overcharging the hourly fees in its cost estimate. FOIA requires that a public body charge administrative fees based upon the “current hourly pay grade (prorated for quarter hour increments) of the lowest-paid employee capable of performing the service.”⁵ The City provided sworn evidence that its revised estimate meets this standard, so we find that the City did not violate FOIA with respect to this claim.

Second, the Petition asserts that the records you seek should be readily available to the City, and you should not have to pay any fees for collecting these records. The FOIA statute does not mandate how a public body must maintain its records. Administrative fees may be charged for FOIA requests that require more than one hour of staff time to process, and those fees may include time for identifying and locating records.⁶ As noted above, the City provided a sworn statement with its response that the estimate for two hours of staff time at the hourly rate of \$22.45 was an accurate reflection of the City’s capability to respond to your FOIA request. On this record, we find that the City is permitted to charge administrative fees for this request, and thus, we determine no FOIA violation occurred regarding this claim.

³ 29 Del. C. § 10005(c).

⁴ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁵ 29 Del. C. § 10003(m)(2).

⁶ *Id.*

Finally, FOIA mandates that a public body respond to a request “as soon as possible, but in any event within 15 business days after the receipt thereof.”⁷ The Petition claims that under this standard, the City did not timely respond to your April 7, 2022 FOIA request. As the cost estimate was provided within fifteen business days of the City’s receipt of the request, this Office cannot determine that a violation of FOIA occurred on this record.⁸

CONCLUSION

For the reasons set forth above, we find no basis to conclude that the City violated FOIA as alleged in the Petition.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: John D. Hawley, Assistant City Solicitor

⁷ 29 *Del. C.* § 10003(h)(1) (“The public body shall 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.”).

⁸ To the extent you seek a determination regarding the City’s intentions or abilities to respond sooner than the fifteen business days set by statute, such a claim is not appropriate in the FOIA petition process. *See, e.g., Del. Op. Att’y Gen.* 20-IB18, 2020 WL 3240808, at *2 (May 22, 2020) (“Based on this record, we are unable to make a finding regarding this issue, as this Office does not operate as an independent factfinding body and cannot resolve the parties’ competing factual claims.”); *Del. Op. Att’y Gen.* 18-IB05, 2018 WL 1061276, at *6 (Jan. 30, 2018) (“Under the circumstances, we are not able to make a determination in this case of whether a FOIA violation has occurred because the record reflects competing, irreconcilable statements of fact that cannot be resolved on this record.”); *Del. Op. Att’y Gen.* 15-IB06, 2015 WL 5014135, n. 2 (Aug. 19, 2015) (“Please note that we do not, in the context of evaluating petitions for determination under FOIA, operate as an independent fact-finding body.”).