



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
CRIMINAL DIVISION (302) 577-8500
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400
FAMILY DIVISION (302) 577-8400
FRAUD DIVISION (302) 577-8600
FAX (302) 577-2610

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB45

November 28, 2022

VIA EMAIL

Richard L. Abbott
rich@richabbottlaw.com

RE: FOIA Petition Regarding the Delaware Department of Transportation

Dear Mr. Abbott:

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, because DelDOT met its burden of proof to support its estimated costs to compile the records requested.

BACKGROUND

On August 15, 2022, you requested “tab sheets for DelDOT projects that are in the real estate acquisition process.”¹ Your request stated that the tab sheets should include “project names and numbers, parcels from which acquisitions are to be made to construct the project, areas of taking being acquired, and names and addresses of parcel owners.”² On September 1, 2022, DelDOT responded, stating that the tab sheets are not in a centralized file and will require searching multiple years’ worth of files to find responsive documents, which must be done manually. With this response, DelDOT supplied a cost estimate of three hours at paygrade 14 with an hourly rate of \$36.39 and two hours at paygrade 17 with an hourly rate of \$44.50, for a total estimated cost of \$198.17. DelDOT noted that an hour of costs had been waived in preparing the

¹ Petition.

² *Id.*

estimate. If payment was not made in ten days, DelDOT stated the request would be considered withdrawn. You replied that it was “impossible to believe” that DelDOT does not know the properties in the acquisition process and questioned how DelDOT could track the acquisition process without having the cost tabs already prepared. DelDOT replied that compiling the tab sheets requires searching for the relevant materials, as they are not maintained in a single location. In response, you suggested that DelDOT contact the head of the Real Estate Section, who you believed must have these tab sheets. On October 4, 2022, DelDOT stated that its cost estimate is compliant with FOIA and as the date for payment had passed, closed your request. DelDOT offered to reopen it if you made payment. This Petition followed.

The Petition alleges that DelDOT has imposed unreasonable and unnecessary administrative charges because you believe the requested documents are “readily available for easy and convenient copying.”³ You state your belief that the records are likely available in hard copy and electronic formats. You enclosed some tab sheets you received from DelDOT in 2019 at no cost as an example. You argue that this cost estimate is over-estimated and imposes a barrier to your access to public documents, which you are entitled to as a citizen of Delaware. You ask this Office to instruct DelDOT to prepare a more realistic analysis of the time to copy these tab sheets and send them to you.

DelDOT, through its counsel, responded on November 2, 2022 to the Petition (“Response”), contending that it attempted to minimize the costs of providing records as required by the FOIA statute. Based on a review of its FOIA logs, DelDOT states that the last time you made similar requests for tab sheets occurred in 2017, 2018, and 2019. DelDOT explains that in 2017 and 2018, you were quoted, and paid, fees associated with those requests, and in 2019, DelDOT failed to assess a cost due to an internal error.

For this August 15, 2022 request, DelDOT asserts that the request was referred to the head of the Real Estate Section, the Chief of Right of Way, who provided an affidavit with the Response. The Chief noted that DelDOT does not maintain the records in a central location and DelDOT has experienced an increase in projects in the Capital Transportation Program; further, pending projects may require the review of multiple years of records. The Chief states he selected staff who had the training and capability to pull the requested tab sheets and he prepared the estimate based on the number of projects and after conferring with staff, estimating six hours of time to research and compile the responsive records: three hours of Right of Way Agent III time and three hours of Right of Way Agent IV time. The Chief further attests that “[t]here is no lower pay grade employee within Right of Way with the experience, training and knowledge who can efficiently and expeditiously review the project files, identify the Tab Sheets, and compile them for production without requiring additional oversight and review by higher pay grade Right of Way agents, which would then increase the cost estimate.”⁴ In reaching its final estimate, DelDOT waived one hour of administrative time for the higher Right of Way agent rate. Thus, DelDOT maintains that its estimate is fully compliant with FOIA, as it excludes time for legal review, lists the charges with specificity as to pay grade and time required, and involves the lowest-paid employee capable of performing the service.

³ *Id.*

⁴ Response, Ex. 12.

DISCUSSION

The public body carries the burden of proof to demonstrate compliance with the FOIA statute.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ 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.”⁷ In determining fees, the statute provides that “[c]harges 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).”⁸ 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.”⁹ 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.”¹⁰ “Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.”¹¹

You argue that the charges in the cost estimate are unnecessary and unreasonable, because you believe it cannot possibly take five hours to pull records you think should be readily accessible. DelDOT supplied the affidavit of the Chief of Right of Way, who oversees the DelDOT staff involved in the acquisition and disposal of real property. The Chief attests that the records are not located centrally; rather, these records are kept in individual project files for proposed or ongoing projects, which may span multiple years and that each file must be checked to locate and compile responsive records in these files. The Chief swears that he prepared the estimate based on his own knowledge and consultation with staff and determined that it would take six hours for two Right of Way agents to research and compile the records. He asserts that the staff was the “lowest level DelDOT Right of Way employees who have both access to, training on and the capability to review the various project files and plans and pull the requested documentation.”¹² The Chief further

⁵ 29 Del. C. § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁷ 29 Del. C. § 10003(m)(2).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Response, Ex. 12.

attests that “[t]here is no lower pay grade employee within Right of Way with the experience, training and knowledge who can efficiently and expeditiously review the project files, identify the Tab Sheets, and compile them for production without requiring additional oversight and review by higher pay grade Right of Way agents, which would then increase the cost estimate.”¹³ Based on this record, we find that DelDOT met its burden of proof to support its estimated costs to compile the tab sheets.

CONCLUSION

For the foregoing reasons, we determine that DelDOT did not violate FOIA as alleged, because DelDOT met its burden of proof to support its estimated costs to compile the tab sheets.

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

Id.