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

**Attorney General Opinion No. 23-IB03**

**January 24, 2023**

**VIA EMAIL**

Amy Roe  
[amywroe@gmail.com](mailto:amywroe@gmail.com)

**RE: FOIA Petition Regarding the Department of Education**

Dear Ms. Roe:

We write in response to your correspondence alleging that the Delaware Department of Education (“DOE”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”), in connection with your October 28, 2022 FOIA request. 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 determine that DOE has not violated FOIA as alleged.

**BACKGROUND**

On October 28, 2022, you submitted through DOE’s FOIA portal a FOIA request seeking “[c]orrespondence (written or email) pertaining to water sampling or lead in water samples at the Gauger-Cobbs School and/or Christina School District, or with anyone from Christina School District about water sampling for lead, from October 2019 to the present.”

On November 17, 2022, DOE responded to you by email stating that the Delaware Department of Technology and Information’s (“DTI”) estimate for the search was 2 hours with 1 hour being billable time to extract data that meets your criteria from archives.<sup>1</sup> The response included that DTI’s labor rate is \$38 per hour and asked for payment to DTI for your FOIA request

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<sup>1</sup> Petition & Supporting Documents, p. 1-2.

to proceed. DOE stated that it “is responsible for redacting any emails deemed to be non-public, as defined by the FOIA Chapter of the Delaware Code at 29 *Del. C.* Ch. 100, including emails to/from the Controller General’s Staff, General Assembly and staff (29 *Del. C.* Sec. 10002(1)(16))” and “the cost for this work is \$36.91 per hour for any work that takes more than one hour.”<sup>2</sup>

On December 7, 2022, you filed this Petition with three questions. First, you ask whether a 12-month retention policy conforms to state guidelines, including the Delaware State Agency General Records Retention Schedule 2019 Edition and Delaware Public Archives Record Retention Manual, Guidelines for Electronic Records (Retention agreements) and Electronic Mail Communications and Records memo from 2017. Second, you ask if the allocation of fees to include time scrubbing results to ensure no unintended content is included is consistent with 29 *Del. C.* § 10003(m)(2) and if fees are to be billed in quarter hour increments. Third, you ask if the cost of potential redactions is in compliance with 29 *Del. C.* § 10003(m)(2).<sup>3</sup>

On December 22, 2022, DOE, through counsel, responded to your three questions. First, DOE asserted that your question about whether a retention policy conforms to state statute or guidelines is outside this Office’s jurisdiction. Next, DOE argued that the FOIA statute, under 29 *Del. C.* § 10003(i)(2), requires an agency to provide an itemized written cost estimate to the requesting party before requesting information and technology personnel retrieve e-mail records like the ones you requested here. DOE stated that it conformed to Section 10003(i) by returning the estimate from DTI for the necessary tasks for retrieval of the requested records, including scrubbing to ensure no unintended content is included. DOE explained that removal of unintended content is part of the retrieval of records by DTI. DOE stated that it gave you basic information on the cost of the administrative review of emails and would provide an itemized written cost estimate for administrative fees once the emails have been retrieved.

To your third question as to whether potential redaction costs can be included in cost estimates, DOE clarified that it will not charge for legal review. DOE included that it is unable to provide an administrative fee estimate until it knows how many emails will be retrieved.

## **DISCUSSION**

FOIA mandates that a public body provide citizens with reasonable access to its public records for inspection and copying.<sup>4</sup> The public body carries the burden of proving compliance with the FOIA statute.<sup>5</sup> FOIA permits public bodies to charge fees incurred when fulfilling a

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

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

<sup>4</sup> 29 *Del. C.* § 10003(a).

<sup>5</sup> 29 *Del. C.* § 10005(c).

request for records.<sup>6</sup> “Administrative fees shall be levied for requests requiring more than 1 hour of staff time...associated with processing FOIA requests, *including, without limitation*: identifying records; monitoring file reviews; and generating computer record (electronic or print-outs).”<sup>7</sup> FOIA expressly prohibits the public body’s legal review of whether the requested record or portion of the requested record is exempt from FOIA to be included in administrative fees.<sup>8</sup> Such administrative fees are to be billed per quarter hour.<sup>9</sup> If a request is for email records, FOIA requires public bodies that cannot fulfill all or any portion of an email request to promptly request its information and technology personnel or custodians provide the email records to the public body.<sup>10</sup> Prior to requesting the information and technology personnel to provide the emails, FOIA requires the public body to provide an itemized written cost estimate to the requesting party and list all charges expected to be incurred.<sup>11</sup>

It is reasonable that DOE would be unable to produce three years’ worth of emails from its own records. FOIA expressly permits public bodies to request email communications from custodians of such records when the public body is unable to fulfill the request itself. Further, this Office understands DOE’s explanation of “scrubbing the results to ensure no unintended content was included” to mean removing records that were erroneously included in search results, and not removing any records for FOIA exemptions or making legal determinations as to whether any FOIA exemptions apply.<sup>12</sup> This is supported by DOE’s cost estimate where it lists scrubbing the results under DTI’s tasks and included in the 1 non-billable hour. Further, DOE’s initial response indicated that DOE itself is responsible for redacting any emails deemed to be nonpublic and such redactions would be at a different cost estimate.<sup>13</sup> We find the inclusion of DTI’s cost of scrubbing email search results in this context to be consistent with FOIA.

Next, you asked us to determine if DOE’s planned inclusion of the cost of redactions in compliance with FOIA. DOE clarified that its intent to charge administrative fees for redaction is for emails deemed non-public, and not for the legal review.<sup>14</sup> This Office has previously held that while Section 10003(m)(2) expressly prohibits charging for any cost associated with the public

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<sup>6</sup> 29 Del. C. § 10003(m).

<sup>7</sup> 29 Del. C. § 10003(m)(2) (emphasis added).

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

<sup>9</sup> 29 Del. C. § 10003(m)(2).

<sup>10</sup> 29 Del. C. § 10003(i)(1).

<sup>11</sup> 29 Del. C. § 10003(i)(2).

<sup>12</sup> Response.

<sup>13</sup> Petition, p. 2, 3.

<sup>14</sup> Response.

body's legal review of whether any portion of the requested record is exempt from FOIA, agencies may charge for time that staff members spend making any necessary redactions.<sup>15</sup> At this point DOE has provided only the cost incurred for the retrieval by the custodians of the emails and the potential hourly rate beyond the initial hour for further administrative fees by DOE. This Office reminds DOE that we have previously held that "[a] requesting party may not be charged administrative fees for the time it takes 'the public body' to review a record for the purpose of assessing the applicability of FOIA's exemptions, no matter who is conducting that review" and that a sworn affidavit may be necessary for a public body to carry its burden, including minimizing administrative cost, under FOIA.<sup>16,17</sup> Further, DOE must bill its administrative fees in quarter hour increments.<sup>18</sup>

Finally, you asked whether DOE's email retention policy complied with state guidelines. This Office has been clear that it cannot make determinations of whether violations of Delaware statutes outside of FOIA have occurred.<sup>19</sup> Accordingly, we will not address whether DOE's retention policy complies with any state guidelines or statutes outside of FOIA.

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<sup>15</sup> *Del. Op. Atty. Gen.* 15-IB03, 2015 WL 4394195 (June 12, 2015).

<sup>16</sup> *Del. Op. Att'y Gen.*, 20-IB24, Oct. 21, 2020 (finding a FOIA violation when a public body included charges for a non-attorney staff member to determine whether any information is not public under FOIA).

<sup>17</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021). *See Del. Op. Att'y Gen.* 21-IB22, 2021 WL 4786752, at \*4 (Sept. 29, 2021) (finding that sworn testimony that the Department's cost estimate excluded legal review did not violate FOIA but that the Department failed to meet its burden of showing it minimized administrative costs by not including an explanation of why the director was needed to review the requested records).

<sup>18</sup> 29 *Del. C.* § 10003(m)(1).

<sup>19</sup> *See, e.g., Del. Op. Att'y Gen.*, 21-IB10, (May 4, 2021) (finding that "legality of the FOIA statute and other Delaware statutes...are outside the scope of this Office's statutory authority to opine on"); *Del. Op. Att'y Gen.* 18-IB50, 2018 WL 6015767, at \*2 (Oct. 12, 2018) (finding that this Office has "no authority under FOIA to direct [the public body] with regard to this Office's interpretation of any other Delaware statute"); *Del. Op. Att'y Gen.* 18-IB27, 2018 WL 2994705, \*2 (May 31, 2018) (finding that the school district did not violate FOIA when it provided access to the public records and declining to determine whether those records constituted an accurate portrayal of the district's revenue pursuant to separate statutory authority); *Del. Op. Atty. Gen.* 96-IB28, 1996 WL 517455, at \*2 (Aug. 8, 1996) ("To the extent you allege that Sussex County has not complied with the requirements of 9 *Del. C.* Section 6921, that matter is beyond the jurisdiction of this office and is not addressed here.").

**CONCLUSION**

Based on the foregoing, we determine that DOE has not violated FOIA as alleged.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Carla A.K. Jarosz, Deputy Attorney General  
Victoria E. Groff, Deputy Attorney General