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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB32

December 1, 2023

VIA EMAIL

Jamila Davey
jamilanur@hotmail.com

RE: FOIA Petition Regarding the City of Wilmington

Dear Ms. Davey:

We write regarding your correspondence alleging that the City of Wilmington violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 (“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 the FOIA statute authorizes fees for processing FOIA requests in Section 10003 and the City did not violate FOIA by estimating three hours of staff time in this cost estimate.

BACKGROUND

Between August 24, 2023 and September 8, 2023, you submitted three requests for records, which the City numbered 933, 267, and 268, related to the Rodney Reservoir, seeking records related to the bidding process; meeting records between the City and contractors related to the work; correspondence, plans, work orders, memoranda, budget information related to certain work; and documents, including correspondence and meeting records, about the environmental testing and remediation at the Rodney Reservoir. The City responded in part to these requests, in addition to another previous request of yours, on September 25, 2023. The City stated that the building plans, schematic drawings, manuals, and other records of water systems were exempt as production of these records could jeopardize the security of the facility and could endanger City residents. The City shared a link to its Rodney Reservoir webpage where some drawings about Rodney Reservoir were posted online. The City stated that your multiple requests since January 1, 2023 have required more than an hour of staff time to process in the aggregate and to perform the administrative tasks associated with your four outstanding requests, the City would provide a

cost estimate for the associated administrative fees. The City asked you to confirm whether you would like to proceed with, cancel, or modify your requests. You confirmed you wished to proceed on October 3, 2023. After approximately two weeks passed without receiving the cost estimate, you filed your first petition alleging the City failed to respond, which was dismissed upon the City's provision of the requested estimate. This cost estimate charged three hours for administrative fees – one hour for the Deputy Commissioner of the Department of Public Works to identify responsive emails and two hours for the project manager to complete the remainder of the requests, for a total of \$145.00. With respect to the request for proposal you sought, the City stated that this record was not yet in existence but would be published to the City website when available.

After receipt of the cost estimate for fulfilling these requests, this Petition followed. You allege that the City's charge for information violates FOIA, as the information you seek is within the parameters of FOIA law and should be part of the regular duties of City workers to fulfill tasks to comply with the law. In addition, you believe that it will not take staff members three hours to search for records and fulfill the request. You request the disclosure of these records as soon as possible.

The City's counsel replied to this Petition on the City's behalf ("Response") and attached an affidavit from the Deputy Commissioner of the Department of Public Works. The City asserts the Deputy Commissioner is in charge of the Rodney Reservoir project and is copied on all the emails related to the project. The Deputy Commissioner attests that he "will need to personally review [his] email for responsive documents" because he is the only City employee with access to his email account and that this review will take an hour.¹ In addition, the Deputy Commissioner attests that the project manager is the lowest paid administrative employee in the Department capable of processing the remainder of the requests, because no other administrative staff have access to all the records that are potentially responsive; other staff would require more time to identify and produce the responsive records. The City's counsel states that having the City's Department of Information and Technologies search the Deputy Commissioner's emails and then assigning the review and identification to administrative staff would take more time than the Deputy Commissioner's personal review.

DISCUSSION

The City carries the burden of proof to demonstrate its compliance with FOIA.² In certain circumstances, a sworn affidavit may be required to meet that burden.³ 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.⁴

¹ Response, Ex. A.

² 29 *Del. C.* § 10005(c).

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

⁴ 29 *Del. C.* § 10003(m).

Prior to fulfilling a request that requires administrative fees, a public body must send an itemized written cost estimate to the requesting party. 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).”⁵ 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.”⁶ 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.”⁷ “Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.”⁸

The Petition’s first claim is that the City is not authorized to assess any fees for its processing of these FOIA requests. The FOIA statute is clear that fees, assessed in conformance with Section 10003, are legally permissible.⁹ Thus, we find no violation in that regard.

The Petition’s second claim is that the estimate of three hours is improper. The City has provided a sworn affidavit from the Deputy Commissioner, attesting that this project is under his direct supervision; he is the only employee with access to his email account; and one hour is required to search and identify responsive emails related to the project. The Deputy Commissioner also attests that the program manager working on the project is the lowest paid administrative employee in the Department who can locate the other records potentially responsive to the request, and she requires two hours to identify records. Thus, given the totality of these circumstances and the City’s sworn assertions, we find that the City complied with FOIA in determining the estimated hours to process these requests.¹⁰ We caution the City to continue to closely review its resources in the future to minimize charging for the time of nonadministrative personnel, especially staff in leadership positions.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Del. Op. Att’y Gen.* 22-IB45, 2022 WL 17732512, at *3 (Nov. 28, 2022).

CONCLUSION

For the foregoing reasons, we determine that the FOIA statute authorizes fees for processing FOIA requests in Section 10003 and the City did not violate FOIA by estimating three hours of staff time in this cost estimate.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: John D. Hawley, Assistant City Solicitor