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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB02

January 17, 2024

VIA EMAIL

Jennifer Antonik
jenn.antonik@gmail.com

RE: FOIA Petition Regarding the Caesar Rodney School District

Dear Ms. Antonik:

We write in response to your correspondence alleging that the Caesar Rodney School District violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA"). We treat this 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 determine that the District violated FOIA by failing to provide sufficient evidentiary support demonstrating its cost estimate was compliant with FOIA's requirements and its search for the requested complaints was adequate. However, the Manga Review Committee is found not to be a public body subject to FOIA's open meeting requirements, and thus, no violation of the open meeting law occurred at the November 2, 2023 meeting. The District is recommended to process the November 3, 2023 request in accordance with the FOIA statute, including its fee provisions.

BACKGROUND

On October 19, 2023, you submitted a request seeking "all records relating to the Magnolia Middle School's Anime Club and Manga Library since the school opened several years ago, as well as the same documentation for the Anime Club at Postlethwait Middle School."¹ This request then listed several specific items that should be included, such as 1) "approval, disapproval" of

¹ Response, Ex. A.

club operations and materials; 2) documentation for a certain teacher to maintain a manga library; 3) documentation regarding parental permission for the anime clubs and manga libraries not previously provided; 4) any previous Board involvement regarding anime clubs and manga libraries; 5) all emails from or to Board members, District administration, or District staff regarding anime and manga content, manga libraries, classroom libraries, and anime clubs, including copies of all complaints (formal and informal) relevant to pulling the manga library and related documents; and 6) student petitions requesting an anime club and manga materials and responses to such inquiries. On November 3, 2023, you submitted a request seeking documentation, including emails, records, and summaries of conversations of the administration, District and Magnolia Middle School staff or Board members, regarding Manga Mania at Magnolia Middle School, the Manga Review Committee, and the Manga Review Committee's meeting on November 2, 2023 led by the Magnolia Middle School assistant principal. The request asserts that this committee was convened because of informal complaints of a parent and staff member regarding instructional materials and that District Policy KEC-R should apply.

On November 6, 2023, District staff emailed you to clarify the specific records you were seeking for these two pending requests and as costs would be incurred, to determine if you wished to proceed with the two requests. The email quoted \$38 per hour for the Delaware Department of Technology and Information ("DTI") services to search former staff emails and \$93 per hour for staff processing of internal records but noted the estimated times were unknown. You wrote back the next day, requesting three items: 1) formal content-related complaints submitted to the District administration during 2018 to 2023 school years and subsequent documentation pursuant to the Board Policy KEC-R; 2) emails to and from Board members, administration, and staff regarding anime and manga content, manga libraries, classroom libraries, and any anime club from 2021 to 2023 school years; and 3) student or teacher-led petitions and related documentation requesting an anime club, manga materials for any schools and documentation of the response to these inquiries. Your response did not mention the November 3, 2023 request or other items in the October 19, 2023 request.

On November 16, 2023, the District replied that it did not have any complaints related to the first item in this revised request, as manga and anime are not approved curriculum and the cited policy applies to curricular materials. To fulfill the second item seeking emails, the District estimated the following costs of employees, who were identified by name: two hours at \$93 per hour; two hours (of two different employees) at \$75 per hour; one hour at \$55 per hour; one hour at \$29 per hour; two hours at \$48 per hour; and one hour at \$140 per hour, in addition to \$38 per hour for approximately two hours of DTI time to pull former employee's emails for a total of \$732 for the second item. For the third item, the District estimated one hour of work at \$48 per hour. Thus, the total cost estimate provided was \$780.

On December 13, 2023, you followed up with the District about the November 3, 2023 request, noting that 28 business days had passed since this request. On the next day, the District replied it was aware of the November request and referred to the November 6, 2023 email in which the District advised you there would be costs associated with both requests, and the District was waiting for your response regarding the acceptance of fees before proceeding. You responded that day, stating that the November 3, 2023 request was separate and its costs were not outlined in the District's November 16, 2023 estimate, indicating to you that you would be charged more than the

\$780 already quoted. You declined to revise the November 3, 2023 request and asked for the District's clarification on fees, pointing out that fees should be reasonable and minimized under the FOIA statute. You requested a response by the next day, and on that following day, this Petition was filed.

The Petition makes four claims. First, you argue that the fees are not reasonable nor were they minimized in compliance with the FOIA statute. Second, you contend that the first item in the November 7, 2023 revised request seeking complaints was not appropriately denied, as you are aware of two complaints that would be responsive. Third, you claim that the November 3, 2023 request was completely ignored, and the District should not have combined it with the other request for purposes of fees. Finally, you contend that the District violated the open meetings laws with respect to the November 2, 2023 virtual Manga Review Committee meeting by preventing you from attending, as the meeting should have been open to the public. As the meeting was to review certain books purchased with school funds to be available to all students at the middle school, you argue that this meeting and the review process should have been public. Further, you believe that the Board's policies required this meeting to be public.

On December 22, 2023, the District's counsel replied on its behalf to the Petition ("Response") and attached the affidavit of the District FOIA Coordinator and Community Relations Specialist ("FOIA Coordinator"). For the first claim, the District asserts that its cost estimate was reasonable and compliant with the statute. The District states that the charges provided in the November 16, 2023 email were a good faith itemized cost estimate with all the charges expected to be incurred, including the DTI estimate, and that these charges were reasonable, as the District asserts that email searches of certain administrators must be conducted by the administrators as the District feels it would not be appropriate for administrative staff to review the potentially confidential emails of administrators.

Regarding the second claim, the District contends its response was appropriate but acknowledges that two informal complaints exist but are not responsive to your request which sought complaints made under Policy KEC-R; complaints filed under this policy are made to the Board or District administration. The District committed to provide these informal complaints to you upon conclusion of the holiday break from school.

The District contends your third claim about the November 3, 2023 request is without merit, as the FOIA statute expressly allows multiple requests submitted by the same requesting party to be aggregated for purposes of computing the fees. The District notes that everything requested pertained to the manga and anime issues, and thus, the requests were combined.

For the fourth claim, the District disputes that the November 2, 2023 meeting was required to be a public meeting under FOIA. The District asserts that the Manga Book Review Committee was formed by the middle school administration and was comprised of middle school employees, a District employee, two community members and a parent. Thus, the District argues that this committee is not a public body subject to FOIA's open meeting requirements, as the District Board did not attend or appoint this committee.

DISCUSSION

The District carries the burden of proof to justify its denial of access to records and to otherwise demonstrate its compliance with FOIA.² In certain circumstances, a sworn affidavit may be required to meet that burden.³ As a preliminary matter, we note this Office’s statutory authority is limited to allegations related to the FOIA statute, and the allegations related to the District’s compliance with its own policies are not addressed in this Opinion.⁴ The four claims in the Petition are discussed below.

I. November 16, 2023 Cost Estimate

The first claim asserts that the cost estimate is not compliant with Section 10003(m). The estimate cited a total of \$780 in fees, including hourly fees up to \$140 for the highest-paid administrator. The FOIA Coordinator attests that the hourly rates of the administrators that were provided are accurate. Because the request seeks certain administrators’ emails, the affidavit also swears that each administrator would need to conduct a review of their own emails, as they are the only ones with access to their email accounts, “and it would not be appropriate for administrative staff to review potentially confidential emails of administrators.”⁵ The affidavit also indicates that the two club sponsors needed to review their emails and documents for the request for anime and manga related content, manga libraries, classroom libraries, and any anime clubs.

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. 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 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

² 29 Del. C. § 10005(c).

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

⁴ 29 Del. C. § 10005(e).

⁵ Response, Aff. of FOIA Coordinator dated Dec. 22, 2023.

⁶ 29 Del. C. § 10003(m).

⁷ *Id.*

⁸ *Id.*

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 “When multiple FOIA requests are submitted by or on behalf of the requesting party in an effort to avoid incurring administrative charges, the public body may in its discretion aggregate staff time for all such requests when computing fees hereunder.”¹⁰ The public body is to waive one hour of the administrative fees incurred for processing the request.¹¹ “Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.”¹²

We find that the District has not adequately demonstrated that its November 16, 2023 estimate meets these standards. First, the estimate failed to account for the District’s performance of an hour of administrative work without charging any fees, as required. Additionally, the estimate is mostly based on hourly rates for District administrators. The District justifies these extremely costly hourly fees by stating that these administrators are the only ones with access to their own email accounts and that administrative staff’s review of “potentially confidential emails” would not be appropriate. We do not believe that this affidavit sufficiently supports that the District made every effort to minimize the administrative fees and minimized the use of nonadministrative staff in processing requests. The District must charge for the lowest-paid employee capable of performing the service, and the District has not alleged any specialized knowledge would make these individuals the only employees capable of collecting and reviewing such records.¹³ On their face, the issues of access and confidentiality are issues that most public bodies must contend with when searching emails; however, the District’s rationale fails to identify any efforts to address them and minimize the administrative costs and use of nonadministrative staff, possibly with additional DTI or other technological assistance, as an example. Accordingly, given the totality of these circumstances, we find that the District has not adequately supported its cost estimate and recommend that the District review its options and issue a new cost estimate in conformance with this Opinion and Section 10003 within fifteen business days of this Opinion.

II. Request for Complaints

The second claim is that the District inappropriately denied the request for all-content related complaints filed under Board Policy KEC-R from 2018 to 2023 school years, including

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Del. Op. Atty. Gen.* 22-IB08, 2022 WL 1125018, at *2 (Apr. 4, 2022).

¹² 29 *Del. C.* § 10003(m)(2).

¹³ *See Del. Op. Atty. Gen.* 21-IB22, 2021 WL 4786752, at *4 (Sept. 29, 2021) (“However, we find that the Department has not met its burden of demonstrating that it minimized the administrative costs by utilizing the lowest-paid staff member capable of handling the initial review. The Director of Community Relations clearly is not an administrative position, and the Department provides no explanation of why a director-level position is needed to perform the indicated review of these records.”).

those related to anime and manga. As you are aware of two complaints, you dispute the accuracy of this assertion. The *Judicial Watch, Inc. v. University of Delaware* case provides that Section 10005(c) “requires a public body to establish facts on the record that justify its denial of a FOIA request.”¹⁴ “[U]nless it is clear on the face of the request that the demanded records are not subject to FOIA, to meet the burden of proof under Section 10005(c), a public body must state, under oath, the efforts taken to determine whether there are responsive records and the results of those efforts.”¹⁵ However, generalized assertions in the affidavit will not meet the burden.¹⁶ For example, the Superior Court of Delaware determined that an affidavit outlining that legal counsel inquired about several issues, without indicating who was consulted, when the inquiries were made, and what, if any documents, were reviewed, was too generalized to meet this standard.

Here, the request sought all formal content-related complaints, including anime and manga related complaints, that were received pursuant to a Board policy. The District FOIA Coordinator attests that the District’s response to the request, that manga and anime are not approved curricula and any complaints under that policy are only against curricular materials, is “believed to be appropriate.”¹⁷ The affidavit states that the “District reviewed the FOIA request, performed a search, and concluded that there were no formal complaints pursuant to Policy KEC-R responsive to the request.”¹⁸ The FOIA Coordinator asserts that your Petition indicates that the informal complaints were submitted to the school principal, not the Board or District administration. Although the District may have taken additional steps to determine whether it had responsive complaints to this request, it is not evident from this affidavit, which primarily relies on generalized assertions. As such, we determine that the District has not met its burden of demonstrating a sufficient search for responsive records. It is recommended that the District, in compliance with the timeframes set forth in Section 10003, supplement its response to your request to address these issues, and if applicable, provide any additional public records.

III. November 3, 2023 Request

The third claim is that the November 3, 2023 request was ignored, and you believe it is improper to combine the November 3, 2023 request with your other pending request for purpose of the fees. Upon review of the parties’ communications related to this issue, it is apparent that the parties had a misunderstanding about the status of the November 3, 2023 request. The Director of Curriculum emailed you on November 6, 2023 about the two pending requests seeking further

¹⁴ 267 A.3d 996, 1010 (Del. 2021).

¹⁵ *Id.* at 1012.

¹⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 2022 WL 2037923, at *3 (Jun. 7, 2022) (“The Court finds that the generalized statements in the Affidavit do not meet ‘the burden to create a record from which the Superior Court can determine whether the University performed an adequate search for responsive documents.’”).

¹⁷ Response, Aff. of FOIA Coordinator dated Dec. 22, 2023.

¹⁸ *Id.*

clarification, noting it would cost \$38 per hour for a DTI search and \$93 per hour for collecting and reviewing internal records but the estimated times were unknown, and asking you to advise how you would like to proceed. Your response revised certain items in the October 19, 2023 request, but your intentions for the November 3, 2023 request were not stated. Nonetheless, your December 14, 2023 email clearly indicates that you wish to proceed with this November 3, 2023 request. It is recommended that the District process the November 3, 2023 request in accordance with FOIA.

In computing the estimated costs for processing this November 3, 2023 request, pursuant to Section 10003(m)(2), the District may aggregate the staff time to process this request with your other pending request. The District is recommended to provide an itemized cost estimate for this request in conformance with Section 10003(m).

IV. *Manga Review Committee Meeting*

The Petition's final claim is that the November 2, 2023 Manga Review Committee violated FOIA's open meeting provisions. Among other obligations, FOIA's open meeting requirements include holding a meeting open to the public, subject to certain delineated exceptions, providing advance notice and agendas for meetings, and preparing and maintaining meeting minutes.¹⁹ For FOIA's open meeting requirements to apply, the entity must be a "public body," as defined by the statute.²⁰ A two-part analysis is employed.²¹ The first inquiry is whether the entity is a "regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State," which includes a ". . . committee, . . . group, panel, council, or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity."²² If the first part is met, we then must determine whether the entity is supported in whole or in part by any public funds, expends or disburses any public funds, or "is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations."²³

The District FOIA Coordinator attests that the Manga Review Committee, consisting of community members, a parent, middle school staff, and a District employee was formed by the Magnolia Middle School administration. In addition, the FOIA Coordinator attests that the committee was formed to review books purchased through the Cash for Class program and to confirm that these books were appropriate for use of students in the newly formed anime-manga

¹⁹ 29 *Del. C.* § 10004.

²⁰ *Id.*

²¹ *Del. Op. Att'y Gen.* 18-IB28, 2018 WL 2994706, at *1 (Jun. 1, 2018).

²² 29 *Del. C.* § 10002(k).

²³ *Id.*

club. We determine, based on this record, that this committee does not meet the first prong of the test and accordingly, is not a public body subject to FOIA's open meeting requirements.

CONCLUSION

For the reasons set forth above, we conclude that the District violated FOIA by failing to provide sufficient evidentiary support demonstrating its cost estimate was compliant with FOIA's requirements and its search for the requested complaints was adequate. The District is recommended to take the steps outlined above for these violations. However, the Manga Review Committee is found not to be a public body subject to FOIA's open meeting requirements, and thus, no violation of the open meeting law occurred at the November 2, 2023 meeting. The District is recommended to process the November 3, 2023 request in accordance with the FOIA statute, including its fee provisions.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Allyson M. Britton, Counsel to the Caesar Rodney School District