



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. 24-IB19**

**May 22, 2024**

**VIA EMAIL**

Richard L. Abbott  
Abbott Consulting Services  
[rich@richabbottlaw.com](mailto: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.* §§ 10001-10008 (“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 DelDOT did not violate FOIA as alleged, because DelDOT met its burden of proof to support its estimated costs to compile the requested records.

**BACKGROUND**

On March 25, 2024, you requested “DelDOT Real Estate spreadsheets for Project Acquisitions poised to move to the appraisal/offer/negotiation stage in the next 5-6 months,” to include “the Project name, property owner name, area and type of [t]aking (PE, FEE, TCE).”<sup>1</sup> You stated you would come to DelDOT’s office to review and designate the documents for copying.

On April 15, 2024, DelDOT responded, stating that the spreadsheets are not in a centralized file and not all the acquisitions have been added to the spreadsheet and that it would have to search its internal computer system to locate and print copies of all current acquisitions and those expected

---

<sup>1</sup> Petition.

to move to appraisal/offer/negotiation stage in the next five to six months. DeIDOT stated that a manual search was required and included a cost estimate of two hours at paygrade 17 with an hourly rate of \$45.86, three hours at paygrade 14 with an hourly rate of \$40.50, and four hours at paygrade 13 with an hourly rate of \$38.06, for a total estimated cost of \$356.46. DeIDOT noted that an hour of costs had been waived in preparing the estimate and that one hour of time is included in the estimate to have an employee present to monitor your in-person file review. That same day, you replied to say that no paralegal time is needed, as you will do the review and flag the documents you would like copied. Additionally, you stated that you only wanted the spreadsheets, and not any acquisitions not yet added to the spreadsheet.

On April 22, 2024, DeIDOT responded that it needed additional time for legal review, and you replied that you would like the final response sooner. The following day, counsel for DeIDOT responded, explaining what needs to be done and reiterating the offer to gather the records upon payment of the cost estimate. You replied that DeIDOT previously advised that part of the cost involved a file review for acquisitions that have not been placed on any spreadsheet, and you only wanted the spreadsheets. You also reiterated that you would review the files to pull the spreadsheets and that FOIA does not permit a charge for a monitor for the in-person review. You argue that the cost estimate is excessive and asked DeIDOT to advise if it would modify its position. DeIDOT's counsel replied on April 24, 2024, restating its position, and asking you to pay the estimate or file a petition if you believe that DeIDOT's position is incorrect. You then suggested that DeIDOT provide a revised cost estimate and you will pay that sum and then see the results. DeIDOT's counsel reiterated its offer to provide records for in-person review at the same cost, or to send the records for a reduced estimate of \$318.40, eliminating the one hour for in-person review. This Petition followed.

This Petition alleges that DeIDOT “refused to modify downward the estimated cost required to be paid by [you] as a prerequisite to respond to [your] public records request.”<sup>2</sup> You contend that you provided the FOIA coordinator with clarification that narrowed the scope of your request, but DeIDOT declined to reduce its estimate despite your contention that the costs must be lower than the original estimate. You note that you only wanted property acquisition spreadsheets and DeIDOT did not need to search “files to find future acquisition documents beyond those [s]preadsheets.”<sup>3</sup>

DeIDOT, through its counsel, responded on May 2, 2024 to the Petition and included an affidavit of the Chief of Right of Way (“Response”). DeIDOT notes that this request is like your other past requests for these spreadsheets, except you are now asking to review these records in person. DeIDOT states that its initial estimate was proper, as it needs to search individual project files and locate the spreadsheets requested. DeIDOT notes that the Chief's initial estimate range was nine to twelve hours of work to perform the search, but DeIDOT selected the lower end of the range, subtracted one hour of charges at the highest pay rate, and added another hour for the file review monitor at the lowest pay rate. The Chief's affidavit attests that the request seeks the same project acquisition spreadsheets, “albeit updated to reflect the current status of real estate

---

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

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

acquisitions by DelDOT.”<sup>4</sup> The Chief also states under oath that this estimate included a higher pay rate staff member than an estimate provided for a previous spreadsheet request, as the lower pay grade staff member is not available. As projects can be multiple years, the Chief explains that projects that may go back many years must be reviewed to determine the projects in the appraisal/offer/negotiation stage in the next five to six months. The Chief attests that he formulated this estimate based on his understanding on the ongoing projects and after consulting with Right of Way staff. He also attests to ensuring that the persons gathering the records “were 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 to pull the requested documentation,” noting that there is no lower pay grade employee within Right of Way with the experience, training, and knowledge to efficiently pull these files.”<sup>5</sup> The Chief states that the suggested narrowing did not result in a reduced cost estimate; the time initially estimated was required to compile the spreadsheets for project acquisitions going forward in the next five to six months. The Chief clarifies that your statement that you do not need acquisition information that is not part of the spreadsheet does not change the time to compile the spreadsheets themselves. The Chief further attests in his affidavit that the estimate did not include any time for legal review or redactions and that he has “worked to reduce the cost as much as possible.”<sup>6</sup> If less time is spent fulfilling the request than estimated, the Chief acknowledges that you will be reimbursed that amount.

## DISCUSSION

The public body carries the burden of proof to demonstrate compliance with the FOIA statute.<sup>7</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>8</sup> 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.”<sup>9</sup> 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).”<sup>10</sup> However, administrative fees may not include any cost associated with the public body’s legal review of whether any portion

---

<sup>4</sup> Response, Ex. 11.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 29 *Del. C.* § 10005(c).

<sup>8</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

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

<sup>10</sup> *Id.*

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.”<sup>11</sup> 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.”<sup>12</sup> The public body is to waive one hour of the administrative fees incurred for processing the request.<sup>13</sup> “Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.”<sup>14</sup>

In this case, you argue that DelDOT should have reduced its cost estimate after you asked it not to search for any future acquisition documents, but only to search for the property acquisition spreadsheets. DelDOT’s Chief of Right of Way attests that he oversees the DelDOT staff involved in property acquisitions. The Chief states under oath that the records are not located centrally; rather, these records are kept in individual project files, 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, at a minimum, the times noted in the estimate for Right of Way Agents III and IV, in addition to a lower pay grade 13 employee, to research and compile the records. The affidavit states that one hour at the highest pay rate was waived, and no fees were assessed for legal review. He asserts that the selected 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.”<sup>15</sup> 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.”<sup>16</sup>

The Chief’s affidavit corroborates DelDOT’s compliance with FOIA’s fee provisions, including the requirement to minimize the administrative fees and only charge fees reasonably required to process the request. DelDOT appropriately waived one hour of administrative fees as required, and its assessment of a one-hour file monitoring fee at the lowest pay rate is also acceptable under FOIA, as DelDOT establishes it is reasonably required to process the request. Accordingly, we find that DelDOT did not violate FOIA as alleged.

---

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Del. Op. Atty. Gen.* 24-IB02, 2024 WL 629389, at \*4 (Jan. 17, 2024); *Del. Op. Atty. Gen.* 22-IB08, 2022 WL 1125018, at \*2 (Apr. 4, 2022).

<sup>14</sup> 29 *Del. C.* § 10003(m)(2).

<sup>15</sup> Response, Ex. 11.

<sup>16</sup> *Id.*

**CONCLUSION**

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

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