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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB11

February 19, 2025

VIA EMAIL

Jared Silberglied
American Civil Liberties Union of Delaware
jsilberglied@aclu-de.org

RE: FOIA Petition Regarding the Seaford School District

Dear Mr. Silberglied:

We write in response to your correspondence filed on behalf of the American Civil Liberties Union of Delaware (“ACLU”), alleging that the Seaford 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 of whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that the District did not violate FOIA, as it met its burden of demonstrating that the Supervisor of Instruction was the lowest-paid employee capable of collecting the responsive records.

BACKGROUND

On October 9, 2024, the ACLU submitted a FOIA request for various records related to the District’s English Learner programming and data, consisting of ten categories of records.¹ Following receipt of this request, the District produced a cost estimate in the amount of \$392.58 in total, asking you to confirm if you wished to proceed. After you followed up seeking more information, the District provided an itemized cost estimate stating that the Supervisor of Instruction would take six hours to gather the information at an hourly rate of \$65.43. You asked

¹ Petition.

whether this supervisor was the lowest-paid employee capable of performing this work, and the District confirmed it was. This Petition followed.

In the Petition, you argue that while you believe the time estimate is appropriate given the large scope of this request, you do not believe that the quoted hourly rate for the Supervisor of Instruction is proper under FOIA. You allege that this position is held by a individual with a doctorate, and although “the request was long, it was not complicated.”² You point out that FOIA requires public bodies to charge for the lowest-paid staff capable of performing the search, minimize the use of nonadministrative personnel, and make every effort to minimize administrative fees; you do not believe that the use of the Supervisor of Instruction meets these requirements.

The District, through its legal counsel, replied to the Petition and enclosed the affidavit of the Assistant Superintendent who also serves as the Director of Human Resources for the District (“Response”). The Assistant Superintendent attests that the District attempted to minimize the use of nonadministrative staff, but to acquire this information, it is “not a simple report to run,” stating this information is “not simple to access, and there must be sorting, certainty of deidentification, and disaggregation.”³ The Assistant Superintendent attests that this Supervisor of Instruction is the lowest-paid employee capable of gathering responsive records; the only other person with the access and capability to obtain this information is the Director of Instruction, who has a higher rate. “In addition to the passwords and training, only [the Director and Supervisor of Instruction] have the specialized knowledge to collect and review the requested records.”⁴ On this basis, the District argues that its cost estimate based on this employee’s time is appropriate.

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 states 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

² *Id.*

³ Response, Aff. of Assistant Superintendent and Director of Human Resources, dated Jan. 30, 2025.

⁴ *Id.*

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).

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 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 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

In this matter, the ACLU does not believe that the Supervisor of Instruction is the lowest-paid employee capable of gathering the requested records. The District provided sworn statements from the Assistant Superintendent, who attests that the District attempted to minimize the use of nonadministrative staff, but this information is “not simple to access, and there must be sorting, certainty of deidentification, and disaggregation.”¹³ The Assistant Superintendent attests that this Supervisor of Instruction is the lowest-paid employee capable of gathering responsive records. Accordingly, we find that the District’s affidavit sufficiently supports that the hourly rate of the Supervisor of Instruction was appropriately asserted in the cost estimate.

CONCLUSION

For the reasons set forth above, we conclude that the District did not violate FOIA, as it met its burden of demonstrating that the Supervisor of Instruction was the lowest-paid employee capable of collecting the responsive records.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ One hour of administrative fees in connection with this request is free. *Del. Op. Att’y Gen.* 24-IB02, 2024 WL 629389, at *4 (Jan. 17, 2024).

¹² 29 *Del. C.* § 10003(m)(2).

¹³ *Id.*

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: James H. McMackin, III, Attorney for the Seaford School District