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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 26-IB04

January 16, 2026

VIA EMAIL

Brandy Topolski
btopolski25@gmail.com

RE: FOIA Petition Regarding the Delaware Department of Education

Dear Ms. Topolski:

We write regarding your correspondence alleging that the Delaware Department of Education 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 of whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we find that a public body may require payment of all fees in advance, and the Department did not violate FOIA in that regard. Regarding the cost estimate, we are recommending that the Department produce a new cost estimate in accordance with the below provisions.

BACKGROUND

You submitted a records request to the Department seeking multiple items, including “all ABHA [Architects] reviewed capacity files, capacity worksheets, revisions, and utilization percentages.”¹ In addition, you sought the following:

As required by DOE Regulation 401 and the FY26 manual, please provide:

1. All as built floor plans submitted to ABHA Architects since FY2017 for all impacted schools.

¹ Petition.

2. All updated drawings or facility assessment updates used to calculate capacity.
3. Any ABHA correspondence regarding changes in school layouts or room classifications.²

In response to these two items, the Department provided a cost estimate from ABHA Architects for a total of \$2,920.00. This cost estimate includes charges for reviewing file structures, reviewing BIM360 systems, reviewing Outlook correspondence, reviewing collected documents, FTP setup, and file transfers. This Petition followed.

In the Petition, you allege that the Department violated FOIA by improperly denying access to records and improperly assessing fees. You argue that the Department improperly asserted it is not the custodian of these records, but the School Construction Technical Assistance Manual requires the school districts to submit electronic as built drawings to ABHA Architects and the Department uses this database for statutory and operational purposes including capacity calculations and other purposes. You assert that “[c]harging \$2,920 for retrieval of existing digital records that DDOE routinely accesses for official purposes is unreasonable and constitutes a constructive denial of access.”³ You assert the estimate includes nonrecoverable fees. Finally, you contend that conditioning access on full payment of the contractor fee in advance violates FOIA.

The Department, through its legal counsel, replied to the Petition and enclosed the affidavit of the Department’s FOIA coordinator. (“Response”). The FOIA coordinator attests to the Department’s Education Associate having access to some of the requested information from the database that is in the custody of ABHA Architects, but the Department “cannot fulfill [your] request with reasonable efforts from the records it can access.”⁴ Rather, the FOIA coordinator asserts that a search by the Education Associate would take twice as long and be limited to the most recently uploaded floor plan information.

In its Response, the Department asserts it controls the requested information, but it is located within the BIM360 database, which is in the custody of ABHA Architects. As you asked for records spanning back nearly ten years and the Department could not fulfill this request with reasonable efforts, the Department contends it properly contacted ABHA Architects for retrieving the records under Section 10003(j). The Department argues the provided cost estimate is appropriate, and as the requirement for this cost estimate arises from Section 10003(j) and not 10003(m), it contends that Section 10003(m)’s requirements do not apply to this estimate. The Department asserts it has met Section 10003(j)’s requirement to list all retrieval charges expected to be incurred. The Department states it does not permit waivers for any class of persons, and FOIA expressly allows public bodies to require all or portion of the estimated fees in advance. The Department states that if you decide to proceed with the request, the Department will perform

² *Id.*

³ *Id.*

⁴ Response.

its own review to identify responsive, public documents. The Departments notes that it is likely that the requested materials will contain nonpublic documents, because under Section 10002(o)(17), records of buildings operated by the State “could facilitate the planning of a terrorist attack or put Delaware’s school children at risk of a mass casualty event.”⁵

DISCUSSION

Delaware’s FOIA law “was enacted to ensure governmental accountability by providing Delaware’s citizens access to open meetings and meeting records of governmental or public bodies, as well as access to the public records of those entities.”⁶ FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁷ The public body has the burden of proof to justify its denial of access to records.⁸ In certain circumstances, a sworn affidavit may be required to meet that burden.⁹ As an initial matter, we find that public bodies are permitted to collect the estimated fees in advance.¹⁰

In this case, the two items at issue in this request seek information about school district buildings that is potentially subject to Section 10002(o)(17). As such information is not subject to disclosure, we recommend that the Department review the potential scope of records in its possession and in ABHA Architects’ database to exclude those types of records subject to this exemption and within the timeframes of Section 10003, provide a new cost estimate to you.

CONCLUSION

For the foregoing reasons, we find that a public body may require payment of all the estimated fees in advance, and the Department did not violate FOIA in that regard. Regarding the cost estimate, the Department is recommended to produce a new cost estimate in accordance with above.

⁵ *Id.*

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

⁷ 29 Del. C. § 10003(a).

⁸ 29 Del. C. § 10005(c).

⁹ *Judicial Watch, Inc.*, 267 A.3d at 1008-1012.

¹⁰ 29 Del. C. § 10005(m)(5).

Very truly yours,



Daniel Logan
Chief Deputy Attorney General

cc: Carla A.K. Jarosz, Deputy Attorney General
 Dorey L. Cole, Deputy Attorney General