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Office of the Attorney General of the State of Delaware

Attorney General Opinion No. 26-IB63

October 19, 2026

Via Email

Julia Merola
jmerola@spotlightdelaware.org

RE: FOIA Petition Regarding the Caesar Rodney School District

Dear Julia Merola:

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 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 determine that the District violated FOIA by including fees for legal review in its cost estimate for this request.

Background

On July 1, 2026, you submitted a FOIA request to the District seeking emails involving specified District staff containing key words related to immigration enforcement. The District advised that additional time would be needed, as the Delaware Department of Technology and Information ("DTI") has possession of the emails and legal review by counsel would likely be needed. On August 21, 2026, the District provided a cost estimate with a total amount of \$239.04. The cost estimate included a free hour of DTI searching and 1.5 hours of DTI searching charged at \$38.00 per hour. The estimate also included 4.0 hours of labor by a Human Resources Specialist

at \$45.51 per hour to review results “to ensure no unintended content is included,” compile the responsive records, and save the results to a flash drive.¹ This Petition followed.²

In the Petition, you argue that the cost estimate is not proper due to the inclusion of charges for review and redaction. You contend that the District can either turn over the responsive records or review and redact the records, but the District cannot charge for the review and redactions. You state that the District has conveyed it is not performing legal review but instead engaging in the ministerial act of redacting the information, which can be charged as time associated with processing the request. You argue that this statement is incorrect and reviewing records for potential redactions cannot be considered a ministerial act, as it would create a loophole limiting the public’s access to records. Finally, you note that the District already explained that it is reviewing records to ensure no unintended content is included, so it cannot argue that it already knows what should be redacted.

On September 10, 2026, the District through its legal counsel, replied to the Petition (“Response”). The District argues that it is not charging for legal review, as the statute prohibits. Instead, the District states that reviewing records pre-production is part of the processing of a FOIA request and permissible under the statute. The District points out that legal precedent has created a distinction between impermissibly charging for time spent determining whether a FOIA exemption or privilege applies and time spent removing or redacting information known to be exempt. In this case, the District contends that the redactions will be appropriate. The District’s counsel has given legal advice germane to the subjects of the underlying requests. The District advised that the staff has been alerted to look for certain key words in the emails, such as “attorney,” and the last names of the District’s counsel. The District states that the reflected advice then would be redacted. In an affidavit enclosed with the Response, the Director of Human Resources, who also serves as the FOIA coordinator, attests to being familiar with the factual assertions in the Response and swears that those assertions are correct. The Director specifically attests that the District received legal advice for the underlying subject matter of the request, and the Director knows what is privileged and needs redaction. The Director also states under oath that any time for questions sent to counsel will not be charged, and any time inquiring and receiving information from counsel regarding asserting exemptions will not be passed on to you.

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

¹ Petition.

² Only the citizen denied access to records has standing to submit this petition. *Del. Op. Att’y Gen.* 19-IB59, 2019 WL 6047162, at *2 (Oct. 19, 2019). The FOIA request was made by you and did not indicate the request was made on behalf of the Spotlight Delaware organization. As such, Spotlight Delaware and Jacob Owens are respectfully declined as parties to the petition.

bodies, as well as access to the public records of those entities.”³ FOIA requires that citizens be provided reasonable access to and reasonable facilities for the copying of public records.⁴ The public body has the burden of proof to demonstrate compliance with the FOIA statute.⁵ When presenting the facts essential to supporting its legal position, the District must submit those factual representations under oath.⁶

FOIA permits a public body to charge citizens certain fees for processing FOIA requests. “Prior 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 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 However, administrative fees may not include any cost associated with the public body’s legal review of whether any portion of the requested records is exempt from FOIA.⁹

The Petition asserts that the District has improperly charged for review and redactions. As noted, FOIA does not permit any fees associated with the public body’s legal review of whether any portion of the requested records is exempt from FOIA.¹⁰ This Office has stated that “[d]etermining whether a record may or must be withheld based upon an exemption listed in FOIA . . . constitutes legal review.”¹¹ “[T]he meaning of ‘legal review’ is plain: [a] requesting party may

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

⁴ 29 Del. C. § 10003(a).

⁵ 29 Del. C. § 10005(c).

⁶ *Judicial Watch, Inc.*, 267 A.3d at 1010-11 (“Thus, the University is asking this Court to determine that it has met its burden of proof, fully resolving the dispute, based solely on these factual representations. But the resolution of a legal action must rest on competent, reliable evidence. And the Court has held that when an attorney seeks to establish facts based on personal knowledge, those facts must be asserted under oath. A statement made under oath, like a sworn affidavit, will ensure that the court’s determination regarding the public body’s satisfaction of the burden of proof is based on competent evidence.”).

⁷ 29 Del. C. § 10003(m).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Del. Op. Att’y Gen.* 16-IB19, 2016 WL 5888771, at *12 (Sept. 30, 2016) (quoting *Del. Op. Att’y Gen.* 15-IB03, 2015 WL 4394195, at *6 (June 12, 2015)).

not be charged administrative fees for the time it takes ‘the public body’ to review a record for the purpose of assessing the applicability of FOIA’s exemptions, no matter who is conducting that review.”¹² Thus, even if a non-attorney reviews the records to determine if an exemption applies, the review is still considered legal review under the FOIA statute and the costs of such review may not be charged to the requesting party.¹³ However, this Office has held fees for performing the administrative task of removing or redacting exempt materials is permissible.¹⁴ But this type of removal process, in order to be permissibly charged, must be truly administrative and not require evaluation of the content. An administrative review could include following instructions that predetermined terms or items must be removed, such as a specific name or birth date.

In this matter, the District seeks to review the responsive emails and apply the attorney-client privilege, which is a well-established rationale for withholding or redacting records under FOIA.¹⁵ While the District’s counsel has given a set of instructions to the Director to review the emails, those instructions require the Director to review the context and substance of the emails to search for key words associated with the District’s legal representatives and then determine the portion of the text constituting legal advice to which the attorney-client privilege applies. As such, we find that this type of review constitutes reviewing for the purpose of assessing the applicability of a FOIA exemption, and the District’s fees for the Director to review and redact privileged information from the emails constitutes an impermissible charge for legal review. We recommend that the District, in accordance with the timeframes under Section 10003, review and revise its cost estimate consistent with this Opinion.

Conclusion

For the foregoing reasons, we conclude that the District violated FOIA by including fees for legal review in its cost estimate for this request.

¹² *Id.* at *13.

¹³ *Id.*; but *cf.* *Del. Op. Att’y Gen.* 16-IB09, 2016 WL 2619612, at *3 (Apr. 7, 2016) (concluding that a police department lieutenant’s prior, independent review of the police policy manual to determine the underlying factual basis for asserting the security exemption was not “a legal review to determine if exemptions apply”).

¹⁴ *See, e.g., Del. Op. Att’y Gen.* 16-IB19, 2016 WL 5888771, at *13 (Sept. 30, 2016); *Del. Op. Att’y Gen.* 15-IB03 (“[FOIA] does not, however, prohibit charging for time that staff members spend making any necessary redactions.”).

¹⁵ *Del. Op. Att’y Gen.* 18-IB10, 2018 WL 1405826, at *3 (Feb. 20, 2018) (“We have expressly recognized in the past that the FOIA exemption for ‘records specifically exempted from public disclosure by statute or common law’ applies to the attorney work product doctrine and the attorney-client privilege.”); *Del. Op. Att’y Gen.* 16-IB11, 2016 WL 3462342, at *8 (Jun. 6, 2016) (stating that attorney-client privilege “is a well-established basis for withholding records requested under FOIA.”).

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, Counsel for the Caesar Rodney School District