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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 17-IB03**

**February 15, 2017**

**VIA EMAIL**

James Dawson  
[james.dawson@wdde.org](mailto:james.dawson@wdde.org)

**RE: December 28, 2016 FOIA Petition Regarding the Delaware Technical and Community College**

Dear Mr. Dawson:

We write in response to your correspondence, received on December 28, 2016, respectively, alleging that the Delaware Technical and Community College (the “College”) violated the public records provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a petition (the “Petition”) for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Council to submit a written response to the Petition. We received the College’s response on January 13, 2017 (“Response Letter”). We have reviewed the Petition and the Response Letter. For the reasons set forth below, we conclude that the College did not violate FOIA.

**FACTS**

On November 22, 2016, you submitted a FOIA request to the College for “[a]ll emails pertaining to any proposed changes regarding the Academic Challenge program sent to or originating from Mark Brainard, Ileana Smith, Kimberly Holston, Brian Shirey, Gerard McNesby and Justina Sapna from July 1, 2015 to the present.” Mr. Shirey is the College’s general legal counsel.

On December 15, 2016, the fifteenth business day following your request,<sup>1</sup> Dr. Judi Sciple, the College’s Vice President for Institutional Effectiveness and College Relations, sent you an

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<sup>1</sup> We note that November 24, 2016 and November 25, 2016 were legal holidays.

email acknowledging receipt of your request and included an itemized written cost estimate.<sup>2</sup> Dr. Sciple estimated a total cost of \$467.97, broken down as follows:

1. Scan server logs to verify email domain(s). Export relevant email boxes to usable and searchable data. (One senior systems specialist, 5 hrs @ 30.33/hr = \$151.65)
2. Construct mail server programming code to search the mail server log files to obtain the email message ID transaction tags for all email addresses. Search export, document, and format all emails containing keywords. (One senior systems specialist, 4 hrs @\$30.33/hr = \$121.32)
3. Construct a single, printable output file of all assembled emails. Assemble documents and prepare report. (One director of systems, 3 hrs @ \$65/hr = \$195).<sup>3</sup>

Dr. Sciple stated that this was “[t]he itemized list of tasks necessary to fulfill your request ... along with estimated time and hourly rates of the personnel required to perform those tasks.”<sup>4</sup> She asked you to indicate whether you wished to proceed with, cancel, or modify your request.<sup>5</sup>

On December 16, 2016, you responded to Dr. Sciple by citing to 29 *Del. C.* § 10003(m)(2), which requires that administrative fees “be billed at the current hourly pay grade (prorated per quarter hour increments) of the lowest-paid employee capable of performing the service.”<sup>6</sup> You stated that, based upon your prior experience with FOIA requests and your review of prior FOIA opinions issued by this Office, “rarely do these requests require senior staff, let alone a director, to process them.”<sup>7</sup> You then requested a new itemized cost and indicated that you would “appeal” the matter to this Office if the estimate did not include the lowest-paid employee capable of performing the tasks.<sup>8</sup> On December 17, 2016, Dr. Sciple responded by stating that requests for emails are governed by 29 *Del. C.* § 10003(i).<sup>9</sup> She then stated: “However, to the extent that §

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<sup>2</sup> Email from J. Sciple to J. Dawson dated December 15, 2016.

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

<sup>4</sup> *Id.*

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

<sup>6</sup> Email from J. Dawson to J. Sciple dated December 16, 2016 (citing 29 *Del. C.* § 10003(m)).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Email from J. Sciple to J. Dawson dated December 17, 2016.

10003(m) is applicable to your request, please be advised that a senior systems specialist is the lowest paid employee capable of performing the services you requested in this instance due to the level and scope of the information they will be accessing to complete the task.”<sup>10</sup> She again asked you to indicate whether you wished to proceed with, cancel, or modify your request.<sup>11</sup>

### POSITIONS OF THE PARTIES

In your Petition, you alleged that the College violated FOIA by failing to provide an itemized written cost estimate that included the lowest-paid employee capable of performing the tasks necessary to fulfill your request.<sup>12</sup>

In its Response Letter, the College noted that its current email system “is separate and distinct from the email system maintained by the Delaware Division of Technology and Information (“DTI”) for most other state agencies.”<sup>13</sup> According to the College, its “current system does not have the ability to perform dashboard level searches based upon simplified search criteria like DTI performs for other state agencies.”<sup>14</sup> The College stated that searches of the scope your request “often require customized programming code to be written, which is also known as ‘scripting’” and “[t]he lowest paid position at the College capable of writing the script needed to perform an email search is a Senior Systems Specialist.”<sup>15</sup> The college stated that this cost was included in your estimate, but you will not be charged if scripting is not required in connection with your request.<sup>16</sup> The College also stated that its “information security protocols require administrative rights to access . . . user accounts” and “the lowest paid position that possesses the level of administrative rights needed to access the user accounts is a Senior Systems Specialist.”<sup>17</sup> Next, the College stated that, because the emails retrieved may contain sensitive or confidential information not germane to your FOIA request, “the College’s information security protocols require the results of the search to be reviewed and approved by the College’s Information Security Officer.”<sup>18</sup> The College noted that such a review would not be a legal review to determine whether responsive information is exempt from disclosure, but rather a review to determine whether the

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

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

<sup>12</sup> Email from J. Dawson to [OpenGovernment@state.de.us](mailto:OpenGovernment@state.de.us) dated December 28, 2016.

<sup>13</sup> Response Letter at 1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

search yields any non-responsive content that could compromise the security of the College's electronic networks.<sup>19</sup> Finally, the College stated that responsive information "must be compiled into a single, printable output file to prevent alteration or manipulation by the requestor or another third party, as well as to enable the Information Security Officer to redact non-responsive content of a sensitive or confidential matter."<sup>20</sup> The College noted that the College's Director of Systems serves as the Information Security Officer and, as a result, is the lowest-paid employee capable of performing this task.<sup>21</sup> The College included an affidavit from its Associate Vice President for Informational and Instructional Technology, Dr. Richard C. Kravevich, attesting to each of the facts set forth in its Response Letter.<sup>22</sup>

### RELEVANT STATUTES

Delaware's FOIA provides:

Requests for e-mail records shall be fulfilled by the public body from its own records, if doing so can be accomplished by the public body with reasonable effort. If the public body determines that it cannot fulfill all or any portion of such request, the public body shall promptly request that its information technology personnel or custodians provide the e-mail records to the public body.<sup>23</sup>

However, "[b]efore requesting the information and technology personnel or custodians to provide e-mail records, the public body shall provide an itemized written cost estimate to the requesting party, listing all charges expected to be incurred in retrieving such records."<sup>24</sup> The requesting party may then "decide whether to proceed with, cancel, or modify the request."<sup>25</sup>

Section 10003(m)(2) provides:

Administrative fees shall be levied for requests requiring more than 1 hour of staff time to process. Charges for administrative fees may include staff time associated with processing FOIA requests, including, without limitation: identifying records; monitoring file

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1-2.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> *See* Kravevich Aff.

<sup>23</sup> 29 *Del. C.* § 10003(i)(1).

<sup>24</sup> 29 *Del. C.* § 10003(i)(2).

<sup>25</sup> *Id.*

reviews; and generating computer records (electronic or print-outs). Administrative fees shall not include any cost associated with the public body's legal review of whether any portion of the requested records is exempt from FOIA. The public body shall make every effort to ensure that administrative fees are minimized, and may only assess such charges as shall be reasonable required to process FOIA requests. In connection therewith, the public body shall minimize the use of non-administrative personnel in processing FOIA requests, to the extent possible.

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. Upon receipt of the estimate, the requesting party may decide whether to proceed with, cancel, or modify the request.

Administrative fees will be billed to the requesting party per quarter hour. These charges will be billed at the current hourly pay grade (prorated for quarter hour increments) of the lowest-paid employee capable of performing the service. Administrative fees will be in addition to any other charges incurred under this section for copying fees.<sup>26</sup>

Importantly, “[t]he public body may require all or any portion of the fees due [under Section 10003(m)] to be paid prior to any service being performed.”<sup>27</sup> Finally, Section 29 *Del. C.* § 10003(k) provides, in pertinent part: “Prior to disclosure, records may be reviewed by the public body to ensure that those records or portions of records deemed nonpublic may be removed pursuant to § 10002 of this title or any other applicable provision of law.”

## DISCUSSION

Here, we are satisfied that the College complied with 29 *Del. C.* §§ 10003(i) and (m) in connection with your request. As noted above, your request was for “[a]ll emails pertaining to any proposed changes regarding the Academic Challenge program sent to or originating from” six individuals associated with the college beginning July 1, 2015. The College has provided you with an itemized written cost estimate.<sup>28</sup> Based upon Dr. Kravich’s sworn affidavit, the truth of which

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<sup>26</sup> 29 *Del. C.* § 10003(m)(2).

<sup>27</sup> 29 *Del. C.* § 10003(m)(5).

<sup>28</sup> See 29 *Del. C.* §§ 10003(i)(2) (“Before requesting the information and technology personnel or custodians to provide e-mail records, the public body shall provide an itemized written cost estimate to the requesting party, listing all charges expected to be incurred in retrieving such records.”); (m)(2) (“Prior to fulfilling any request that would require a requesting party to

was sworn to under penalty of perjury,<sup>29</sup> we believe that the College's itemized written cost estimate was based on the hourly pay rate of the lowest-paid employees capable of performing the tasks required to fulfill your requests.<sup>30</sup> As such, it is our determination that the College did not violate FOIA as alleged in your petition. Of course, you retain the discretion to either "proceed with, cancel, or modify your request."<sup>31</sup>

### CONCLUSION

Because the College has provided you with an itemized written cost estimate of the charges expected to be incurred in fulfilling your request, billed at the current hourly pay grade of the lowest-paid employees capable of performing the tasks required to do so, it is our determination that the College did not violate FOIA as alleged in your petition.

Very truly yours,



Michelle E. Whalen  
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein  
State Solicitor

cc: Brian D. Shirey, Esq. (via email)

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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>29</sup> “A person is guilty of perjury in the second degree when the person swears falsely and when the false statement is: (1) [m]ade in a written instrument for which an oath is required by law; and (2) [m]ade with intent to mislead a public servant in the performance of official functions; and (3) [m]aterial to the action, proceeding or matter involved.” 11 *Del. C.* § 1222. Perjury in the second degree is a Class F felony, punishable by up to three years of incarceration and the imposition of such fines and penalties as the court deems appropriate. *Id.* § 4205.

<sup>30</sup> See 29 *Del. C.* § 10003(m)(2) (requiring that administrative fees be “billed at the current hourly pay grade (prorated for quarter hour increments) of the lowest-paid employee capable of performing the service”).

<sup>31</sup> See 29 §§ 10003(i)(2); (m)(2).