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

**Attorney General Opinion No. 18-IB19**

**April 10, 2018**

**VIA U.S. MAIL AND EMAIL**

John Young  
109 Cypress Drive  
Newark, DE 19713

**RE: FOIA Correspondence Regarding the Christina School District**

Dear Mr. Young:

We write regarding your correspondence, received on March 20, 2018, alleging that the Christina School District (“District”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur (“Petition”). We invited the District to provide a response to the Petition. We received the District’s response (“Response Letter”) and your reply thereto (“Reply”) on March 23, 2018. For the reasons set forth below, we conclude that your Petition as it relates to fees is moot.

On March 7, 2018, you submitted a FOIA request to the District for “all emails between Wendy Lapham (or other district employee) and Jessica Bies (News Journal reporter) from 12.1.2017 to 03.06.2018 regarding the Christina School District.” You requested that the District contact you if the cost of fulfilling your request would exceed \$1.00. On March 16, 2018, Ms. Evelyn MacPhee, the District’s FOIA Coordinator, sent you an email stating that the Delaware Department of Technology and Information (“DTI”) charges \$100 per hour to conduct email searches. The email included a letter from Ms. MacPhee estimating 8 hours of administrative costs to process your request, for a total of \$800, and requesting half of that amount to proceed with your request. In her email, Ms. MacPhee stated: “If you have any questions, please let me know.” On March 19, 2018, you forwarded Ms. MacPhee’s email to the District’s Superintendent, Ms. Richard Gregg, expressing your displeasure with the fee estimate and stating “I only want emails FROM/TO Wendy FROM/TO Jessica.” On March 20, 2018, at approximately 9:55 AM and before receiving a response from Mr. Gregg, you submitted a petition to this Office challenging the District’s written cost estimate.

In its Response Letter, the District acknowledged that Ms. MacPhee’s March 16, 2018 response was based on a mistaken belief that DTI in fact charges \$100 per hour to conduct email

searches. The District nonetheless argued that “the projected cost of \$800.00 will certainly be less than the actual cost” due to the broad scope of your original request. In your Reply, you noted that you reached out to the District’s counsel following submission of your Petition. You then stated: “Had he reached out, he could have easily clarified the true desire of my request, even if submitted clumsily.” You requested that this Office issue a determination based on your original request and alleged bad faith on the part of the District.

Based upon the foregoing, we have determined that your Petition is moot. Indeed, you have repeatedly stressed that you never intended to request the entire universe of records identified in your original FOIA request, which is the request upon which the disputed fee estimate was based. Rather, you have stated that you intended to request a much narrower subset of email communications between Ms. Lapham and Ms. Bies only.<sup>1</sup> Under these unique circumstances, the issue regarding fees as to your original request is moot.<sup>2</sup> Of course, to the extent the District has not yet provided a response (or an itemized written cost estimate) regarding your request as amended on March 19, 2018,<sup>3</sup> we encourage the District to do so.

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<sup>1</sup> We also note that you did not communicate this clarification to the District’s FOIA Coordinator despite her invitation to let her know if you had any questions.

<sup>2</sup> Having determined that the Petition as to fees is now moot, we need not determine whether the District’s initial cost estimate violated FOIA. Indeed, absent additional information, we may well have determined that the District violated FOIA if you had not subsequently clarified the intended scope of your request. As such, notwithstanding the mootness of your petition, we caution the District to provide accurate itemized written cost estimates in the future. Here, the District has acknowledged that its initial cost estimate was made in error, but has not since provided an amended itemized written cost estimate. Instead, the District has provided a vague statement that “the projected cost of \$800.00 will certainly be less than the actual cost.” Under the circumstances, we feel compelled to remind the District that, while a public body may collect certain fees as provided in Section 10003(m), and may require advance payment thereof, the public body must first provide an itemized written cost estimate listing *all* charges expected to be incurred. Additionally, we note that the FOIA statute is clear that “[r]equests 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.” 29 *Del. C.* § 10003(i)(1). A public body may request the assistance of its information and technology personnel or other custodian, but only upon a determination that it cannot fulfill all or any portion of such request from its own records. *Id.* Finally, to the extent the District seeks to charge administrative fees as permitted by Section 10003(m)(2), we remind the District that it may do so only at the current hourly pay grade of the lowest-paid employee capable of performing the service.

<sup>3</sup> Specifically, you requested “FROM/TO Wendy [Lapham] FROM/TO Jessica [Bies].” We note that, in your March 23, 2018 Reply, you again sought to amend your request to include emails “FROM/TO Wendy Lapham and Richard Gregg, and FROM/TO Richard Gregg and Jessica Bies.” To the extent you wish to request those records, you may wish to submit a FOIA request to the District for those records pursuant to 29 *Del. C.* § 10003(h).

Very truly yours,



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Michelle E. Whalen  
Deputy Attorney General

APPROVED BY:



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Allison E. Reardon, State Solicitor

cc: James H. McMackin, III, Esq. (via email)