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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB53

December 3, 2018

VIA EMAIL

Courtney French, Esq.
Legal Consultant, Gannett Co., Inc.
cofrench@gannett.com

RE: FOIA Petition Regarding the City of Wilmington

Dear Mr. French:

We write in response to your correspondence on behalf of your client, the News Journal, alleging that the City of Wilmington (“City”) violated Delaware’s 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 with regard to your client’s records requests. Specifically, you challenge the cost estimates the City provided in response to your client’s records requests. Because the parties are continuing to pursue resolution of the “snail mail” issue, we do not address that matter herein. Additionally, although we agree that this Office can review fee estimates for reasonableness under appropriate circumstances, we believe that the City’s sworn testimony adequately supports the City’s estimate for the text messages and emails, and thus, it is our determination that the City did not violate FOIA as alleged.

BACKGROUND

A News Journal reporter, Ms. Christina Jedra, submitted a records request to the City on September 18, 2018 for all correspondence between the representatives of the Mayor’s Office, including the Mayor, and the Buccini/Pollin Group (“BPG”) from January 2017 to present. The request encompassed three forms of communications: emails, text messages, and “snail mail.”¹ Over the next few weeks, the reporter and City representatives discussed modifications to the

¹ Petition.

original request. Although the requested timeframe remained the same, the News Journal reporter requested that the text message search be decreased to five City employees and the hard copies and emails searches be decreased to eight City employees. On October 8, 2018, the City provided the cost estimate for this modified request - a total of \$20,846.70, broken down as follows: 1) hard copy correspondence: \$2,876.70; 2) emails: \$14,470.00 based on provision of software by a third party vendor; and 3) text messages: \$3,500.00 based on the services of the same third party vendor.

The reporter then revised her request to emails between seven public employees and the BPG for a four-month period and suggested a software application to reduce the cost of retrieving the text messages. On October 18, 2018, she decided to “hold off” on the hard copy records request “for now.”² Based on these revisions, the City issued a second cost estimate on October 29, 2018 for the revised search limits in the amount of \$1,240.19, which reflected that the emails’ cost was reduced to \$985.20 (20 hours at \$49.26 rate) and the text message cost was reduced to \$254.99 (10 hours at \$21.00 rate plus \$44.99 for the text retrieval application).

You submitted this Petition on behalf of your client, alleging that both cost estimates for the full request and for the limited search were unreasonable. In support of your position, you set forth numerous arguments. With regard to the text messages, you alleged that the City has not provided sufficient explanation for its estimated time to retrieve the texts through the application that your client suggested. You disputed that your client should be responsible for the application cost, because it is a cost of the City’s obligation to meet its statutory obligations under FOIA. For the email messages, you argued that the City provided inadequate justification for its IT Department’s inability to search the emails, and further, the original cost estimate for the software is unreasonable because the revised cost charged by the IT Department extrapolates to a lower number than the cost of the third party software. You also disputed the reasonableness of the second estimate for \$985.20, claiming such cost is incongruent with other public bodies’ charges for email searches. Additionally, you questioned the reasonableness of the email cost estimate; how the City could accurately estimate the 20 hours of work necessary to review the emails; and whether an employee with a rate of \$50 per hour is the lowest-paid employee capable of performing the search. With respect to the hard copy correspondence, you argued that the estimated 93 hours of review is unreasonable, as the City instead could focus on topics likely to contain correspondence to limit its search and again, you questioned whether the City has identified the lowest-paid employees who can perform this work. Finally, you noted that such high fees would serve to deter future FOIA requesters and asked our Office to render an opinion determining the maximum amount of fees that the City may charge in these circumstances.

By correspondence dated November 28, 2018 (“Response”), the City submitted responsive arguments and five affidavits from City employees: Information Technologies (“IT”) Director Demond May, Director of Economic Development Jeffrey Flynn, Senior Assistant City Solicitor William Larson, Executive Assistant to the Director of Real Estate and Housing Sharmon Bowknight, and Special Assistant to the Mayor Ashley Christopher. First, the City contended that any discussion of the original cost estimate is moot, as the News Journal submitted a revised request. Second, the City questioned this Office’s authority under the FOIA statute to investigate or challenge a government’s good faith estimates substantiated with sworn affidavits, as its

² Petition, Ex. D.

affidavits are entitled to a presumption of good faith. Further, the City argued that your proposal to compare the time and cost estimates among the public bodies is unreasonable, as public bodies have differing storage systems, technological systems, and employee skill sets. The City indicated that it no longer intended to seek reimbursement for the text message retrieval application. Third, even if such a challenge were appropriate, the City has adequately demonstrated its cost estimates are reasonable through sworn affidavits.

By correspondence dated November 30, 2018 (“Reply”), you submitted additional information to this Office. First, you argued that the issues regarding the hard copy correspondence and the original cost estimate are not moot, as Ms. Jedra conveyed that she wished to hold off on the hard copy correspondence for now and that her original, broad request for emails had not been withdrawn. Second, you asserted that the City’s point about the prematurity of the claims had no merit and that it was appropriate under Delaware authority for our Office to review estimated charges. You also stated that your client cannot present specific evidence to refute the reasonableness of the fee estimates because that information is possessed by the City and not available to your client. To bolster the argument regarding the reasonableness of the email searches, you included the emails that Ms. Jedra exchanged with the State Department of Technology and Information (“DTI”) in which DTI staff described its rates. Finally, you argued that the News Journal reporting of the \$20,000.00 fee was accurate, that the City overstated the assets of the News Journal, and that the assets of a requester should not be relevant in the matter.

DISCUSSION

This Petition involves three questions for our review. First, what issues in the Petition are now appropriate for consideration? Second, has the City properly identified the lowest-paid employee for the email searches? Third, has the City adequately supported its estimates to perform the text and email searches? We address each question below.

What issues in the Petition are now appropriate for consideration?

As an initial matter, the City argued that the allegations related to the original cost estimate and the hard copy documents which the News Journal is no longer seeking are moot items that this Office is no longer required to address. We have reviewed the full set of correspondence between Ms. Jedra and City representatives provided by the parties. In the initial October 8, 2018 cost estimate, the City presented the itemized estimate and asked whether Ms. Jedra wished to proceed, modify, or withdraw the request.³ Through further correspondence, the parties continued working towards a narrowed request for the hard copy correspondence, and in the October 18, 2018 email, Ms. Jedra affirmed she wished to hold off on hard copy records “for now.” Thus, the record suggests that the parties are continuing to work towards a narrowed search, and this issue is not ripe until a party demonstrates that it is abandoning those efforts.

In the same email, Ms. Jedra chose to modify her request for the email searches to a subset and after reviewing, she will “be able to better limit my broader request in an effort to make it

³ Petition, Ex. B.

easier for everyone.”⁴ She no longer intended to pursue her original request as stated and instead, would proceed with a limited request. This language plainly demonstrates her withdrawal of the request related to the email searches.⁵ As this Office does not evaluate estimates for withdrawn requests, we find that the original estimate for the email search is moot and discuss the remaining issues below.⁶

Finally, the City represented that it no longer intends to seek reimbursement from your client for the software application to retrieve text messages.⁷ This issue also will not be addressed herein.

Has the City properly identified the lowest-paid employee capable of performing the email searches?

Under 29 *Del. C.* § 10003(m), the public body is required to identify the lowest-paid employee to conduct the searches related to a records request. The City has provided an affidavit affirming that the IT Director is the lowest-paid employee that can perform the necessary work for the email searches. Consistent with the practices of this Office, we accept these sworn representations.⁸

Has the City adequately supported its estimates for time and labor to perform the text message and email searches?

Your Petition asserted that the City did not adequately explain the time and labor estimates and that those estimates are not reasonable. As a general matter, we agree that this Office has the ability to review estimates for reasonableness under appropriate circumstances.⁹ Pursuant to 29

⁴ Petition, Ex. D.

⁵ The pre-Petition correspondence shows a coordinated good faith effort by both parties to narrow the request, and we do not countenance a course reversal by the Petitioner in their Reply to raise legal issues that are not currently present.

⁶ *See Del. Op. Att’y Gen.* 18-IB19, 2018 WL 2267111, at *1 (April 10, 2018) (finding the issues related to the original cost estimate were moot because the requester revised her original records request).

⁷ Response.

⁸ *Del. Op. Att’y Gen.* 17-IB03, 2017 WL 955568, at *4 (Feb. 15, 2017) (concluding that the public body adequately supported its contention with a sworn affidavit that an employee was the lowest-paid employee capable of performing the service).

⁹ *Del. Op. Att’y Gen.* 15-IB03, 2015 WL 4394195, at *4 (June 12, 2015) (“We do not believe that the General Assembly views FOIA as a profit-making opportunity for public bodies, nor that it would countenance the use of a high fee estimate as a device to discourage a citizen from pursuing a request.”).

Del. C. § 10003(m)(2), the “public body shall make every effort to ensure that administrative fees are minimized, and may only assess such charges as are reasonably required to process FOIA requests.” The determination of whether a cost is reasonably required is fact-based, and a public body’s existing resources can affect the extent to which the charges are reasonably required.¹⁰

Here, the City supplied an affidavit from its IT Director regarding the time and labor estimates for the email and text records. He attested that he has not used this text retrieval application in the past, but he reviewed the application to estimate the time and labor necessary for the retrieval. Regarding the email search, he attested his 20-hour estimate is based on the search of two separate servers and extrapolation from his experience performing past searches. Notably, the City also committed to reimburse any overcharges due to either project taking less time than estimated.¹¹ Thus, the City has provided sworn testimony explaining, to the extent of its available knowledge, its basis for the estimated time and labor reasonably required to complete the text and email searches and has committed to return any overcharges ensuring your client will not be overcharged if the estimates are too high. We find no FOIA violation in these circumstances.¹²

CONCLUSION

Based on the foregoing, it is our determination that the City did not violate FOIA as alleged in your Petition.

Very truly yours,

/s/ Dorey L. Cole _____
Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Allison E. Reardon _____
Allison E. Reardon, State Solicitor

cc: Luke Mette, City Solicitor (via email)

¹⁰ See *Del. Op. Att’y Gen.* 16-IB19, 2016 WL 5888771, at *14 (Sept. 30, 2016).

¹¹ Petition, Ex. E.

¹² We decline to compare these cost estimates to other public entities when we do not have access to information regarding the available resources or particular capabilities of those entities’ email systems.