

I wanted to let you all know my thoughts on the response from the DOJ regarding the FOIA changes. I will go into some of the details below, but I believe that this bill will prevent a significant amount of FOIA requests due to the new fees imposed under it (unless the fees are waived, but that is entirely discretionary and up to each individual public body). Charging public requesters the legal review fees could impose a massive cost and potentially allows for rampant abuse, as it would allow intensive, detailed legal review by highly paid attorneys of every line in every document requested. Currently, the government has to balance the financial burden of legal review, which limits it to the review that is necessary to prevent harmful information being released through FOIA requests. However, if the government is allowed to charge all those fees related to redaction to the public requesters, they will be extremely incentivized to investigate as many legal issues as possible. Additionally, the scanning fees have no justification as they are in addition to the administrative fees such as staff time, despite there being no actual scanning costs outside of the staff time.

The four new prohibitory clauses are also deeply troubling, especially the new language about "abusive" requests, and the examples provided by the DOJ highlight the exact concerns we should have about their potential abuse of that language. The comparisons to other states and the federal FOIA are also worrying given that they disingenuously ignore the qualifiers that limit that language in every one of those other statutes (qualifiers that are not included in the proposed Delaware changes).

I also continue to be concerned about the prohibition on monetary compensation and shortening the 60-day appeal window to 30 days. I do not think the 120-day vs. 6-month will have too much of an effect, and while I do not like a lot of the other new language about petitioning the AG or filing suit, I think it will only have a minor negative impact on the ability of the public to request information and seek redress for violations (largely because the AG already does so little in contentious cases, and it doesn't really change the process for court review).

## **NEW LEGAL FEES**

The DOJ responded that the proposed law "maintains the current statutes' prohibition against charging fees for lawyers and legal analysis necessary to respond to FOIA requests using language from the Federal FOIA statute." **That**

**is a blatant falsehood in several ways.** First, the proposed law does not prohibit fees for any "legal analysis", but only prohibits "any costs incurred while resolving **issues of law** that were raised in the course of processing the request." This is obviously a significantly narrower standard than the current statute, which prohibits "Costs associated with the public body's legal review of whether any portion of the requested records is exempt from FOIA." An "issue of law" is a narrow, theoretical question, and does not apply to any of the "questions of fact", which includes all of the review that looks at particular pages/documents and how the law applies to those pages/documents. Almost everything involving the redactions of actual documents would be allowed to be charged to any member of the public under the proposed law.

Second, this is also significantly narrower than the federal FOIA statute for numerous reasons:

1. The federal FOIA statute limits this to only to "direct costs incurred during the initial examination of a document" and also exempts 2 hours of search time and 100 pages of duplication (compared to 1 hour and 20 pages under Delaware law). Here is the federal statute's language:
  - Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—
    - (I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or
    - (II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.
2. Even more important, the federal FOIA statute **exempts all administrative fees** (except duplication) for any requests "made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media". Under Delaware law, the waiver of administrative fees is entirely voluntary and is decided by the specific public body that received the request. Here is the federal statute's language:

- In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.
  - (ii) Such agency regulations shall provide that—
    - (I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;
    - (II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and
    - (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.
- 3. Federal law also requires that, "Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."
- 4. Federal FOIA law also has other protections, such as not requiring any payment of fees until after the FOIA request is completed unless the fees are over \$250.

Also, this relates to the new FOIA exemption for a request that is "unreasonably broad, unduly burdensome, intended to disrupt the essential functions of the public body, or is abusive" since those terms are allowed to be a basis to deny "access to all or part of the requested records" and so a review for how these terms allow to particular pages or documents could be undertaken for every line (since there are none of the protections provided by the federal statute for this type of costs of legal review language). Note that the federal FOIA statute does not include any of those new terms that are proposed for the Delaware law.

## **NEW SCANNING FEES**

The scanning fees in the proposed law is an entirely new fee. The statement by the DOJ is false that this is simply "clear guidance on calculation" for administrative costs because this would allow public bodies to charge higher fees than under current law. The Delaware law explicitly says that "Administrative fees will be billed to the requesting party per quarter hour" (not per page) and that "Administrative fees will be in addition to any other charges incurred under this section for copying fees." Therefore, the scanning fee could almost certainly be charged **in addition to** the administrative fees for staff time. Is this additional charge supposed to be for the electricity used by the scanning machine?

Also, if you calculate exemption costs, the scanning fees don't make sense since administrative fees are not allowed to be charged for requests that take less than 1 hour, but only 20 pages are exempt from the scanning fee, when obviously it doesn't take a full hour to scan 20 pages. In fact, even if the employee doing the scanning was paid \$20 an hour under current law, that would be the equivalent of 400 scanned pages, which is a very low number of scanning for a full hour of work, especially since most scanning is an automatic process in office settings and does not require an employee to stand there next to the scanner the whole time.

If I am remembering correctly, the Markell administration once tried to charge copying fees for one of my dad's FOIA requests because they printed out the documents to do physical redactions and then had to scan the documents to put them back into electronic format. I can only imagine the additional potential abuse when scanning fees are allowed to be a separate charge, along with photocopying fees and administration staff time fees.

## **NEW BROAD FOIA EXEMPTIONS**

Under current Delaware law, a public body is only required to provide "reasonable effort" to fulfill FOIA requests. The "reasonable" standard is already in the law, and no public body is required to do anything "unreasonable", which is why unreasonably large requests are already allowed to be denied under the current Delaware law. The DOJ gave no examples of unreasonable requests that were fulfilled under current law.

Regarding the proposed language that adds "unreasonably broad, unduly burdensome, intended to disrupt the essential functions of the public body, or is abusive", I am not aware of any FOIA statute that includes this new language

together like this, and I could not find any FOIA statute that has that type of broad exemption for anything a public body may deem "abusive". In addition, the states that do include some of these terms in their FOIA statutes put additional requirements on the public bodies to use these exemptions. I am also deeply troubled by the examples provided by the DOJ on how they intend to interpret this new language. Please keep in mind that overturning any decisions made on the basis of this new language would require filing a lawsuit in court to get the court to overturn the decision to withhold the documents.

First, I want to compare the proposed Delaware law to the states mentioned by the DOJ as having similar parts of the proposed language, and then I will discuss the specific examples provided by the DOJ.

- **Illinois** requires that the burden outweigh the public interest, and also requires specific reasons why it is burdensome and the extent to which it is burdensome be provided to the requester.
  - *5 ILCS 140 §3(g)*: Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body **and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information**. Before invoking this exemption, the public body shall extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions. If any public body responds to a categorical request by stating that compliance would unduly burden its operation and the conditions described above are met, it shall do so in writing, **specifying the reasons why it would be unduly burdensome and the extent to which compliance will so burden the operations of the public body**. Such a response shall be treated as a denial of the request for information. Repeated requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied under this Act shall be deemed unduly burdensome under this provision.
- **Maine** goes even further and actually requires the public body to file for a protection order in court to be able to deny a request as "unduly burdensome".
  - *Me.Re.Stat. Ann. 1-13 § 408-A(4-A)*: A body, an agency or an official may seek protection from a request for inspection or copying that is unduly burdensome or oppressive **by filing an action for an order of protection in the Superior Court** for the county where the request for

records was made within 30 days of receipt of the request.

A. The following information must be included in the complaint if available or provided to the parties and filed with the court no more than 14 days from the filing of the complaint or such other period as the court may order:

(1) The terms of the request and any modifications agreed to by the requesting party;

(2) A statement of the facts that demonstrate the burdensome or oppressive nature of the request, with a good faith estimate of the time required to search for, retrieve, redact if necessary and compile the records responsive to the request and the resulting costs calculated in accordance with subsection 8;

(3) A description of the efforts made by the body, agency or official to inform the requesting party of the good faith estimate of costs and to discuss possible modifications of the request that would reduce the burden of production; and

(4) Proof that the body, agency or official has submitted a notice of intent to file an action under this subsection to the party requesting the records, dated at least 10 days prior to filing the complaint for an order of protection under this subsection. [PL 2015, c. 248, §2 (NEW).]

B. Any appeal that may be filed by the requesting party under section 409 may be consolidated with an action under this subsection. [PL 2015, c. 248, §2 (NEW).]

C. An action for protection may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require upon the request of any party. [PL 2015, c. 248, §2 (NEW).]

D. If the court finds that the body, agency or official has demonstrated good cause to limit or deny the request, the court shall enter an order making such findings and establishing the terms upon which production, if any, must be made. If the court finds that the body, agency or official has not demonstrated good cause to limit or deny the request, the court shall establish a date by which the records must be provided to the requesting party.

- **Kentucky** only allows for a request to be denied as "intended to disrupt the other essential functions of the public agency" if the request is part of "repeated requests". Also, a public body would have to show "clear and convincing evidence" for a court to uphold its refusal.
  - *Ky.Rev.Stat.Ann. 61.872(6)*: If the application places an unreasonable burden in producing public records or if the custodian has reason to

believe that repeated requests are intended to disrupt other essential functions of the public agency, the official custodian may refuse to permit inspection of the public records or mail copies thereof. However, refusal under this section shall be sustained by clear and convincing evidence.

- **Kansas** has similar language to Kentucky regarding only applying that language to "repeated requests", but sets an even lower standard of "preponderance of the evidence".
  - *Kan.Stat.Ann. 45-218(e)*: The custodian may refuse to provide access to a public record, or to permit inspection, if a request places an unreasonable burden in producing public records or if the custodian has reason to believe that repeated requests are intended to disrupt other essential functions of the public agency. However, refusal under this subsection must be sustained by preponderance of the evidence.

The DOJ's claims that this proposed language sets a "high bar" is false when you compare their proposed language to other FOIA statutes, even in conservative states with restrictive open access laws. In addition, the examples provided by the DOJ suggest a very low bar for what they consider qualifying as exempt. I am going to go through all their specific examples.

First, the DOJ gives 4 general examples:

1. "massive, broad FOIA requests, which if fulfilled would require multiple staff members for weeks on end"
  - These are already "unreasonable" under the current law, which is why the DOJ has no specific examples of any of these requests being fulfilled
2. "FOIA requests containing foul language and threats against staff"
  - Any requests that threaten staff or use foul language to an extent that the request could be considered "unreasonable" are already covered by the current law
3. "FOIA requests that state that any response will be placed in the trash"
  - Either the request takes less than 1 hour, or the requester is paying for something they say they are going to put in the trash. How would this ever be a reasonable justification to deny a FOIA request?
4. "large quantities of the same request by the same requestor over a short period of time"
  - This is obviously already covered by the current law, which explicitly says "When multiple FOIA requests are submitted by or on behalf of the requesting party in an effort to avoid incurring

administrative charges, the public body may in its discretion aggregate staff time for all such requests when computing fees hereunder."

Now, as for their specific examples, the only potentially unreasonable requests do not appear to have been fulfilled. If current law is already able to deal with all of the examples provided by the DOJ, then what exactly is the reason for changing the law to make it more restrictive? The DOJ needs to provide specific examples of requests that **actually were fulfilled under current law but that would not have been fulfilled under the proposed law.**

1. This example does not appear to have ever been fulfilled, and so why does the law need to be changed? Also, it is unclear what the DOJ is arguing for with this example. Is the DOJ arguing that this would be an "overbroad request" or that there should be fees charged for that time spent? Also, the estimated "54 weeks to complete its review" is fairly disingenuous. DelDOT should have more than a single employee spending 30 minutes a day on FOIA requests when needed. They are a major government agency that spends a lot of money, and they should be accountable to the public.
2. Another example that does not appear to have ever been fulfilled, and so once again, why does the law need to be changed? If there is a problem with **commercial requests**, then the Delaware law should simply be updated to specifically address commercial requests. Instead, they are proposing these same broad restrictions and new costly fees for any news media or other members of the public regardless of how great the public interest is in the documents.
3. I find it deeply troubling that the DOJ suggests disallowing people who are convicted of crimes from seeking FOIA information that may be relevant to their case. For example, what if a Deputy Attorney General has a conflict of interest or other reason to be biased or engage in misconduct in a case, and the person who was prosecuted by them is trying to file an appeal?
  - The current law already explicitly exempts "any personnel file" if "the disclosure of which would constitute an invasion of personal privacy", as well as any Department of Corrections records sought by an inmate in their custody. There are also exemptions for records that could "endanger the life or physical safety of an individual", but they are given narrow examples for how it applies, and for good reason (see Title 29 § 100002(l)(17)).
  - Which of those 4 new proposed exemptions would the DOJ be applying to deny these records? This seems like an example of the extremely expansive interpretation of the ambiguous word



"abusive" that goes far beyond the current "reasonable" standard in the current Delaware FOIA law.

4. Once again, which of the 4 new proposed exemptions would the DOJ apply to deny these records? This seems like another troubling example of the expansive interpretation of the word "abusive" by the DOJ. Are they saying that any request for the names of government employees could be rejected as potentially abusive? Would this example be denied on an initial request because they suspect it may be "abusive" or would the public body have to be able to connect some kind of "harassing" emails to a subsequent request for additional names? As with all of the other examples, if this request was objectively not "reasonable", then it could already be denied under current law.
5. I'm not sure what the point of this example is, as no FOIA law in the United States has ever required public bodies to fulfill requests in a specific manner determined by the requester. Indeed, the agency could have simply sent back the email and denied any further aspect of the request, since a requester cannot require an agency to manipulate documents for them.

I also want to make a note about the example provided by the DOJ about DeIDOT where they claim in their letter, "In the years 2017-2019, DeIDOT received an average of 350 FOIA requests per year requiring an average of 1000 hours of staff time. DeIDOT was able to recoup 3-4% of their expended costs." I'm assuming they don't mean that DeIDOT actually spent 350,000 hours fulfilling FOIA requests in a 3 year period, as that would be around 170 full-time employees working 40 hours a week, 52 weeks a year. Something is obviously wrong with those numbers, as that would be almost 10% of their total workforce. If instead they actually meant to write that the 350 requests took about 1000 hours total, then that would be a part-time job for one employee working around 20 hours a week. If the entire agency of DeIDOT only requires a part-time employee to fulfill all its FOIA requests in a year, then that does not seem like a lot considering the agency has almost 2,000 employees. How much of the 96-97% of the costs are they trying to put on news media and other members of the public anyway?

None of these examples seem to be instances where the FOIA request was fulfilled under current law but would not have been under the proposed language, except for under an extremely expansive interpretation of the new term "abusive". Requests that are unreasonable, including unreasonably broad

requests, could already be denied under current law. If there is a concern about large requests by commercial entities that are not meant to serve the public interest and are costly to government agencies, then that could be resolved by language limited FOIA requests for commercial purposes (such as restricting the new legal fees to only requests for a commercial purpose), as is already done in many other FOIA statutes, including the federal FOIA statute (which exempts all administrative fees entirely for non-commercial requests that are in the public interest).

### **NEW PROHIBITION ON MONETARY COMPENSATION**

Unlike federal FOIA law, Delaware requires fees to be paid in advance of any FOIA request being fulfilled (unless voluntarily waived by the public body in their sole discretion). To compensate for this, current Delaware law allows for members of the public to go to court where they can receive monetary compensation. The current law states, "Remedies permitted by this section include an injunction, a declaratory judgment, writ of mandamus **and/or other appropriate relief.**" The DOJ is lying when they claimed that proposed language merely makes "this prohibition of monetary damages explicit", as the current law ***does not*** prohibit monetary damages and instead explicitly allows any "appropriate relief", which would include compensatory monetary damages for unlawfully charged fees.

The DOJ example of a person who is charged improper fees is also extremely disingenuous as there is clearly almost no way of showing that cost estimate is actually excessive or unreasonable before receiving the documents. I can see no sense in prohibiting citizens who are unlawfully charged fees from being able to recover those fees in court, and the DOJ's claim that this is already prohibited is a lie.

### **NEW SHORTER TIME TO SEEK COURT RELIEF**

The current language in the law is a little confusing, and while I don't see any legitimate reason to reduce the 6-months to 120-days, I think the far more problematic aspect is restricting the ability to seek court relief after a determination by the AG from 60 days to 30 days. As DelCOG stated, this is not enough time to allow a citizen to identify and obtain an appropriate attorney with FOIA expertise. The DOJ's response that 30 days is "common and expected for private attorneys to file suits in this timeframe" ignores the reality that citizens would first need to find an attorney and develop their case with

them before any filing could occur, while 60 days is far more appropriate to allow citizens to obtain legal assistance if they choose to do so.

Regarding a few related issues, I do not think the "appeal" language has any significant practical effect. I also don't think removing the "about the occur" language will be that significant either, although I think it is a potentially beneficial avenue for the public that is being taken away without very good reasoning. I'm not sure if there are examples of where the current language has been used to stop some harmful government action before it occurred, but these types of "about to occur" requests are probably difficult for the DOJ to handle, and so this restriction is probably reasonable in my view.

## **CONCLUSION**

The new legal review fees in the proposed FOIA law will make Delaware one of the most costly states (if not the most costly) to request public information by ordinary citizens and news media. It would charge the public requestors the entire cost for redactions, as the only cost exempted is for the very narrow set of costs associated with "issues of law", which does not apply at all to how the law is applied to particular documents. These administrative costs would also be in addition to the new fees allowed for scanning.

The new legal exemptions for FOIA requests will make Delaware one of the most restrictive states (if not the most restrictive) to request public information. No other states make a broad exemption with these four categories, and the example states given by the DOJ also all have significant limitations on the government's ability to use these types of broad general exemptions. I am also not aware of any state using the ambiguous term "abusive" in their statute regarding FOIA requests, and given the DOJ's examples of supposedly "abusive" requests, their expansive interpretation of these terms is extremely worrying. The DOJ has also not provided any examples of FOIA requests that were fulfilled under the current law but would have been denied under the proposed language. Without any examples, there does not seem any valid reason to change the current "reasonable effort" standard under the current FOIA law in Delaware.

If the DOJ has a concern with large requests unrelated to the public's interest, then they should propose a bill that actually deals with the problem of large, commercial requests for information. The federal FOIA statute, for example, includes this type of language for commercial entities while explicitly exempting

any administrative fees (except the cost of photocopying) for news media, educational, and similar non-commercial uses.

I would strongly suggest DeICOG work with the state's news media to oppose this bill, as it will be a significant detriment to ordinary members of the public and possibly even more so for the news media that often makes regular, large requests for important information.

I apologize that this email is so long, but I wanted to give the reasoning and examples behind my view of this bill. Please feel free to share this information with anyone you want. If anyone has any questions, please feel free to contact me (302-528-9464).