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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 16-IB10

May 9, 2016

VIA EMAIL

Ms. Crystal Smith
160 Main Street
Dover, DE 19901-4801
girlsmithtrucking@aol.com

Re: FOIA Petition Concerning the Town of Little Creek

Dear Ms. Smith:

On March 10, 2016, the Delaware Department of Justice (“DOJ”) received your petition (“Petition”) requesting our determination, pursuant to the Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”), of whether the Town of Little Creek (“Town”) violated FOIA’s open meetings and public records provisions in connection with your request for certain information. By letter dated March 14, 2016, and pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Town to submit a written response to your Petition. We received the Town’s response (“Response Letter”) on March 21, 2016. We have reviewed your correspondence and the Town’s Response Letter. Because FOIA does not require that public bodies outside of the executive branch of state government post minutes to a website, we conclude that the Town did not violate FOIA by failing to post its meeting minutes to its website. However, we conclude that the Town violated FOIA’s requirement of reasonable access by making the Town Council meeting minutes available for your review only at the Council Secretary’s private residence. Notwithstanding our conclusion that the Town violated FOIA’s reasonable access requirement, no remediation is necessary because the Town subsequently provided you copies of the minutes you requested by mailing them to you.

FACTS

On October 22, 2015, you sent a FOIA request via email to Town Council Secretary Penny Gentry (“Council Secretary”) for “meeting minutes for all meetings held regarding the Town’s Comprehensive Plan, the committee meeting minutes, and the results of the survey conduct (sic)

regarding the comprehensive plan” and “meeting minutes for the Town Board meeting starting with the month of April 2015, to present.” That same day, the Council Secretary indicated her belief that you requested the Comprehensive Plan in error and asked if she could call you. You replied that you would be home after 5:00 p.m. You also noted that you had not received a copy of the flood elevation certificate that had recently been prepared for your property, which you wanted to compare with the information that was on your flood elevation certificate from when you purchased your house. You also stated that you had obligations which prevented you from attending Town Council meetings and had previously expressed your opinion several times that the information regarding meetings should be available online. In response, the Council Secretary stated that Ed Strouse, a Delaware Emergency Management Agency employee who had been appointed to the Town Planning Commission by Mayor Glenn Gauvry (“Mayor”), had copies of all flood elevation certificates and that she would try to have copies sent or delivered to you. The Council Secretary also noted that she assumed that it would be possible to post Town Council meeting minutes online, but stated that someone else would have to do so because she did not believe that she would personally be able.

On October 28, 2015, you sent an email to the Council Secretary stating that you still had not received your flood elevation certificate. You asked whether she had requested the document or whether you should do so. In response, the Council Secretary provided you the contact information - including work email address - for Mr. Strouse. That same day, you forwarded the correspondence to Mr. Strouse. On October 29, 2015, Mr. Strouse responded to your email, attaching your flood elevation certificate and additional information that had been provided by the surveyor.

On November 3, 2015, you sent an email to Mr. Strouse noting a concern that you had regarding your flood elevation certificate. You sent follow-up correspondence on January 13, 2016, to which Mr. Strouse replied that the Town had reached out to the surveyor but had not received a reply. Mr. Strouse also stated that he had since resigned from his position with the Town. You forwarded Mr. Strouse’s correspondence to the Mayor and others, expressing your frustration with the lack of resolution regarding your concern with your flood elevation. You also noted that you still had not received a response to your FOIA request, stating that the Town was “in direct violation of” 29 *Del. C.* § 10004(f). On January 25, 2016, the Mayor replied to your email, specifically requesting that you arrange a meeting with other property owners to discuss the flood elevation certificates. That same day, you responded that you would not arrange such a meeting. You also stated: “the Town still does not have public access to all public meetings,”¹ which you stated was in direct violation of FOIA and was an issue that Mr. Strouse had raised several times during prior Town Council meetings. Your January 25 correspondence also noted that you still had not received Town Council meeting minutes that you had requested and indicated that your next step would be to take the issue to your State Representative and the Attorney General.

¹ Because your Petition does not allege that you or anyone else was denied access to Town Council meetings, we interpret this to refer to public meeting documentation; specifically, Town Council meeting minutes.

On February 2, 2016, the Mayor forwarded you an email concerning the upcoming meeting in which individuals would be present to help address concerns regarding the flood elevation certificates. In his correspondence, he asked whether you had received notice of the meeting and whether you planned to attend. You responded that you planned to attend the meeting.

On March 1, 2016, you sent an email to Senator Colin Bonini and Representative William Carson. In your email, you noted that you are a constituent of the Town of Little Creek and expressed concern regarding the Town Council members' adherence to FOIA's open meeting provisions. Specifically, you stated that you were unable to access Town Council meeting minutes online despite visiting the Town's website and clicking on the link for meeting minutes. You further stated that you attempted to address the matter with several Town Council members and the Mayor, but were informed by the Mayor that the Town need not adhere to 29 *Del. C.* § 10004. You also stated that you requested access to previous meeting minutes, but were told that these were only available for you to view at the Council Secretary's house, which you did not feel comfortable doing. Finally, you stated that, on October 22, 2016,² you requested information regarding the Town's Comprehensive Plan and the town meeting regarding the flood plan, but had not yet received a response. You forwarded your correspondence to this office on March 8, 2016 and it was received by the FOIA Coordinator on March 10, 2016.

SUMMARY OF ARGUMENTS

We interpret your Petition to allege that the Town violated FOIA by: 1) not posting Town Council meeting minutes to its website; and 2) making the Town Council meeting minutes available for your review only at the Council Secretary's private residence.³

In its Response Letter, the Town contends that FOIA does not require that meeting minutes be posted online. The Town also relies on *Del. Op. Att'y Gen.* 07-IB24 to support its position that FOIA does not require that minutes be "open to inspection and copying during regular business hours" in a "public place," but rather a "physical place," which they are. *See Del. Op. Att'y Gen.* 07-IB24 (Dec. 27, 2007) ("Implicit in the concept of 'business hours' is that the public records must be made available in a physical place, in most cases at the public body's principal place of business."). The Town notes that Town Council meetings are held at the fire hall and the Town's office is used only for storage and for picking up the mail. As such, it is the Town's position that FOIA permits such records to be made available for inspection and copying at the homes of the

² We assume that this is a typographical error and that you were referring to the October 22, 2015 meeting.

³ Through correspondence with this office following receipt of your Petition, you clarified that your Petition did not concern the Comprehensive Plan. As such, we do not address the issue here.

town's officers. The Town also notes that the Council Secretary had "subsequently"⁴ mailed you copies of all minutes from April 2015 through January 2016.

LEGAL ANALYSIS

FOIA Does Not Require the Town to Post Minutes of Public Meetings to its Website

FOIA does not require that meeting minutes be posted to the Town's website. Indeed, FOIA requires public bodies in the *executive branch of state government* that are subject to FOIA to post draft and final minutes to a designated State website. *See 29 Del. C. § 10004(f)*. However, that requirement does not extend beyond those public bodies. Here, it is clear that the Town Council is not a public body in the executive branch of state government. As such, we conclude that the Town's failure to publish its Town Council meeting minutes to its website does not amount to a FOIA violation.⁵

The Town Denied You Reasonable Access to Public Records by Making Town Council Meeting Minutes Available for Your Review Only at the Council Secretary's Private Residence

The Town is correct that FOIA only requires that public records be "open to inspection and copying during regular business hours." *29 Del. C. § 10003(a)*. However, the Town's argument that FOIA requires only that such records be made available in a "physical place," as opposed to a "public place," misses the point. Indeed, FOIA requires "[r]easonable access to and reasonable facilities for copying of these records." *29 Del. C. § 10003(a)* (emphasis added). The issue, then, is whether making the meeting minutes available for review only at the Council Secretary's private residence amounted to a denial of "reasonable access to and reasonable facilities for copying of these records." *Id.*

Here, we conclude the Town denied you "reasonable access to" public records by making the meeting minutes available only at the Council Secretary's private residence. *Cf. Del. Op. Att'y Gen. 15-IB02* (June 17, 2015) (reasonable access where public body offered two alternatives – public computer terminals in public body's office or online service – to review public records). We are not convinced that an individual's private residence qualifies as "reasonable access to" public records, particularly where, as here, the requesting party indicates that he or she is not comfortable with the proposal. While we also question whether the Council Secretary's private residence contained "reasonable facilities for copying," we need not make this determination here, because *29 Del. C. § 10003(a)* requires both "reasonable access to" and "reasonable facilities for

⁴ While the Response Letter does not identify a date, we interpret this to mean that the meeting minutes were mailed to you at some point after you filed your Petition, but prior to March 21, 2016.

⁵ We note, however, that the Town maintains a website that implies that such minutes are made available online and therefore encourage the Town to resolve any confusion by either publishing the minutes online or changing its website to remove the implication that it does so.

copying,” and we have already determined that “reasonable access” had been denied.⁶ We therefore conclude that the Town violated FOIA by denying you “reasonable access” to the Town Council meeting minutes. This constitutes a technical violation of FOIA, because the Town later provided you with the minutes by mail. Accordingly, no remediation is currently required.

CONCLUSION

Because FOIA does not require that public bodies outside of the executive branch of state government post minutes to a website, the Town did not violate FOIA by failing to post its meeting minutes to its website. However, the Town violated FOIA’s requirement of “reasonable access” to public records by making the Town Council meeting minutes available for your review only at the Council Secretary’s private residence. Notwithstanding the Town’s FOIA violation, we conclude that no remediation is warranted for the reasons set forth herein.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: Danielle Gibbs, Chief Deputy Attorney General (via email)
Sandra W. Dean, Esq. (via email)

⁶ We offer no opinion regarding whether the Town office or fire hall could provide “reasonable access to and facilities for copying” the Town Council’s public records.