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Opinion No. 16-IB13

June 8, 2016

VIA EMAIL AND U.S. MAIL

Mr. Daniel Kramer
8041 Scotts Store Road
Greenwood, DE 19950
djmjkramer@gmail.com

Re: FOIA Petitions Dated February 4, 2015 and January 11, 2016

Dear Mr. Kramer,

On February 4, 2015 and January 11, 2016, the Delaware Department of Justice (“DOJ”) received your correspondence alleging that the Sussex County Council (the “Council”) and the Sussex County Administrator (“County Administrator”) violated the open meeting provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in connection with its annual Mildred King Luncheon (collectively, the “Luncheons”).¹ We treat each correspondence as a petition (collectively, “Petitions”) for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. However, because the Petitions involve similar allegations, albeit one year apart, we address them both together here.

Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Council to submit written responses to your Petitions. We received the Council’s response to the February 4, 2015 petition on March 8, 2015 and its response to the January 11, 2016 petition – which included a December 22, 2015 WGMD radio recording – on January 21, 2016. We received your correspondence in response to the Council’s January 21, 2016 submission

¹ In a recent review of FOIA petitions, we noted that your February 4, 2015 petition had been deemed closed, but found no evidence of resolution. Out of an abundance of caution taken to ensure each case is properly closed, we chose to address both petitions here and offer our sincerest regret if the earlier petition was not resolved earlier.

on February 4, 2016. By letter dated April 21, 2016, we also invited the County Administrator to submit a written response to the Petitions. We received the County Administrator's single response to both Petitions on April 28, 2016. We received your correspondence in response to the County Administrator's submission on May 3, 2016.

We have reviewed your correspondence, the Council's responses, and the County Administrator's response. We find no FOIA violation in connection with the County Administrator's decisions to grant County employees an additional day off in 2014 and to award the bonus in 2015, as they were made by the County Administrator independent of Council's approval and the County Administrator is a "body of one" not subject to FOIA's open meeting requirements. Moreover, the fact that those decisions were announced at the Luncheons, where a quorum of the Council may have been present, did not transform the Luncheons into "meetings" for purposes of FOIA. Accordingly, we conclude that neither the County Council nor the County Administrator violated FOIA's open meeting provisions as alleged in the Petitions.

FACTS²

On December 5, 2014 and December 11, 2015, Sussex County ("County") held its Mildred King Luncheon, an annual event for County employees, department heads, and the Council, to honor deserving employees for exemplary job performance during the year. Prior to the December 5, 2014 luncheon, County Administrator Todd Lawson made the decision to grant County employees an additional day off at the end of the year. Prior to the December 11, 2015 luncheon, after conferring with County Finance Director Gina A. Jennings, Mr. Lawson made the decision to award County employees – including Council members and row officers – a \$750 bonus, using funding available in the Fiscal Year 2016 Budget ("FY 2016 Budget"). Each decision was announced at the respective luncheon.

POSITIONS OF THE PARTIES

The Petitions allege violations of FOIA in connection with the approval of the additional day off and the bonus. Although the Petitions do not cite a specific FOIA provision, we read the Petitions to raise the following two issues: (1) whether a FOIA violation occurred in connection with the decisions to approve the additional day off and the funding for the bonus; and (2) whether the Luncheons were meetings of a public body subject to FOIA's open meeting requirements.

The responses assert that: (1) the County Administrator made the decisions to grant employees the additional day off and to award them the bonus; (2) the County Administrator, as a "body of one," is not subject to FOIA's open meeting provisions; (3) the Council did not participate in the decisions; and (4) the Luncheons were not "meetings" under FOIA.

² We base our factual findings on the following: the February 4, 2015 petition; the Council's March 18, 2015 response to the February 4, 2015 petition; the January 11, 2016 petition; the Council's January 21, 2016 response to the January 11, 2016 petition; the December 22, 2015 WGMD radio recording; your February 4, 2016 email correspondence; the County Administrator's April 28, 2016 response to the Petitions; your May 3, 2016 email correspondence; and the notice, agenda, and meeting minutes for the June 16, 2015 Council meeting.

RELEVANT STATUTES

FOIA defines a “meeting” as “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.” 29 *Del. C.* § 10002(g). With few exceptions, all meetings of public bodies shall be open to the public.³ Among those exceptions, to which the open meeting requirements of FOIA do not apply, are “[p]ublic bodies having only [one] member.”⁴

The County Administrator is “the chief administrative officer of the County.”⁵ Among other responsibilities, the County Administrator administers the County personnel system pursuant to 9 *Del. C.* § 7006(a).

LEGAL DISCUSSION

The Decisions to Grant County Employees the Additional Day off in 2014 and to Award Employees the Bonus in 2015 Did Not Violate FOIA

The Petitions appear to allege that the decisions to grant County employees the additional day off in 2014 and to award them the \$750 bonus in 2015 constituted “a blatant violation of [FOIA].” For the reasons set forth below, we find no FOIA violations in connection with the decisions.

- A. The County Administrator Made the Decisions to Grant County Employees an Additional Day Off in 2014 and to Award Employees a Bonus in 2015 Independent of the Council’s Approval.

As an initial matter, we must determine who made the decisions to grant County employees an additional day off in 2014 and to award them the bonus in 2015. Your Petitions appear to allege that each decision was made by the Council. Specifically, your February 4, 2015 petition alleges that “there was a discussion and a (sic) agreement [at the 2014 luncheon] to give County employees an extra day off for Christmas.” Similarly, your January 11, 2016 petition alleges that the County Administrator “went to each [Council] member separately and ask (sic) them what their opinion was about giving the bonus.” In essence, you allege a meeting of the Council outside of the public view in connection with each decision.

As we have previously noted, we do not interpret FOIA to place the burden on the public body to prove that a meeting did not in fact take place.⁶ Rather, a complaining party must make a

³ 29 *Del. C.* § 10004(a) (“Every meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of this section.”).

⁴ 29 *Del. C.* § 10004(h)(6).

⁵ 9 *Del. C.* § 7003(d).

⁶ *Del. Op. Att’y Gen.* 05-IB10 (Apr. 11, 2015).

prima facie showing that a meeting may have occurred.⁷ Once the complaining party makes a *prima facie* showing that a meeting occurred, the burden shifts to the public body to prove that no FOIA violation occurred.⁸

As noted above, your February 4, 2015 petition alleges that “there was no posting that a quorum of the Council would be [at the 2014 luncheon] and that any County business would be conducted, when in fact there was a discussion and a (sic) agreement to give the County employees an extra day off for Christmas.” While you provide no further details to support your allegation, we also note that neither the Council nor the County Administrator appear to challenge your assertion that a quorum of Council members was present at the luncheon. On the other hand, the Council’s March 18, 2015 response states that “[t]he Council did not initiate a discussion at the luncheon regarding the potential for the employees to have an extra day off” and “there were no Council discussions or votes on any County business.” Similarly, in his April 28, 2016 response, the County Administrator states: “Any alleged Council comments regarding my decision to grant an additional day off were not based on any Council action taken, since there was no Council discussion or vote taken on this matter.”

With respect to the decision to award the bonus, your January 11, 2016 petition alleges that the County Administrator “went to each member separately and asked them what their opinion was about giving the bonus.” Unlike your February 4, 2015 petition, you offer additional information regarding this allegation. Specifically, you state that “one of the Council members made the Statement that they couldn’t vote in public, as then it wouldn’t be a surprise.” You later allege that the Council member made the statement during a December 30, 2015 telephone conversation with you.

There is also evidence in the record that the County Administrator engaged in a discussion with at least one other Council member regarding the decision to award the bonus. For example, the Council’s January 21, 2016 response states that “the [County] Administrator had no such discussion with each Council member,” but acknowledges that “some individual discussions *may have* taken place to simply advise a [Council] Member of [the County Administrator’s] decision.” (emphasis added). Finally, in the December 22, 2015 WGMD radio recording, when asked about the bonus, Council member George Cole stated: “the [County] Administrator talked to me and said ‘George, we’re thinking about giving a bonus.’ I had no objection to it and I’m sure he asked, you know, had the same discussion with other councilmen, you know, one on one” We note that, in his April 28, 2016 response, the County Administrator states:

I did not speak to *each* Council member, either individually or in a group, to obtain their individual votes or opinions as to whether to award the bonuses, nor did I personally notify *each* Council member

⁷ *Id.*

⁸ *Id.*

of my decision prior to making the announcement to all employees at the Mildred King Luncheon on December 11, 2015.

(emphasis added). However, we are unable to determine whether the County Administrator's response constitutes a denial of speaking with *any* Council members or *all* Council members.⁹

We are not persuaded that the mere presence of a quorum of Council members at the December 5, 2014 luncheon amounts to a *prima facie* showing that a meeting occurred,¹⁰ but we conclude that you have made a *prima facie* showing that a meeting may have taken place in connection with the decision to award the bonus in 2015.¹¹ Indeed, regardless of whether a *prima facie* showing has been made, we nonetheless conclude that the Council and the County Administrator have met their burden in proving that there was no "meeting" held in connection with either decision. Rather, as discussed below, we are persuaded that the County Administrator made the decisions to grant County employees an additional day off and to award them the bonus without the Council's approval.

To be clear, this office has consistently held that serial communications may amount to a meeting.¹² However, "FOIA is violated by a constructive quorum only where there has been 'an active exchange of thoughts and opinions *and* members were asked to vote or adopt a particular

⁹ We note that the County Administrator also stated that he "did not engage in serial discussions or obtain a serial vote with County Council members prior to granting Sussex County Employees an additional vacation day referred to in the 2015 Complaint or awarding the bonuses referred to in the 2016 Complaint." Importantly, a meeting does not require participation by each member – it requires only a quorum. *See 29 Del. C. § 10002(g)* (defining "meeting" as "the formal or informal gathering of a *quorum* of the members of any public body for the purpose of *discussing or taking action on public business*") (emphasis added). It is not clear whether the County Administrator's statement that he "did not speak to *each* council member" and did not "personally notify *each* Council member" is an attempt to make a legal distinction regarding whether a serial meeting occurred. However, we need not make that determination here, as discussed below.

¹⁰ Compare *Del. Op. Att'y Gen. 07-IB13* (May 10, 2007) (no *prima facie* showing where quorum attended national conference together and sometimes sat together during sessions and ate together) with *Del. Op. Att'y Gen. 08-IB10* (July 16, 2008) (petition did not substantiate allegation of secret meetings but public body's response admitted that such meetings had occurred). *But see Del. Op. Att'y Gen. 06-IB03* (Jan. 23, 2006) (finding *prima facie* case where petition alleged only three of seven council members attended meeting and considering whether group acted as subcommittee or ad hoc committee).

¹¹ *See, e.g., Del. Op. Att'y Gen. 09-IB10* (Nov. 23, 2009) (email to commissioners alluding to a vote on a grant decision sufficient to establish *prima facie* showing that a meeting occurred).

¹² *See, e.g. Del. Op. Att'y Gen. 04-IB17* (Oct. 18, 2004); *Del. Op. Att'y Gen. 03-IB11* (May 19, 2003).

point of view or reach a consensus on what action to take.”¹³ Importantly, “[t]he [open meetings] law is triggered only when the members of a public body ‘communicate about issues that may or will come before the [members] for a vote.’”¹⁴ For example, in *Del. Op. Att’y Gen.* 03-IB11, we concluded that an improper meeting occurred where three members of an ad hoc nominating committee reached a consensus about names to submit after an exchange of emails over a two-day period. Similarly, in *Del. Op. Att’y Gen.* 04-IB17, we concluded that an improper meeting occurred where a council member spoke by telephone with other members about a \$15 million loan and sought their support on his funding proposal before holding a public meeting to discuss the matter and obtain the council members’ signatures. By contrast, in *Del. Op. Att’y Gen.* 09-IB10, we concluded that a Town Manager’s series of calls to individual Town Commissioners regarding his decision to accept or reject a grant failed to amount to a constructive or serial quorum because “the Commissioners were neither asked to come to a decision, nor was the decision theirs to make.” We noted: “Because the decision-maker was the Town Manager, and not the Town Council, the phone calls he made to the Council members did not violate FOIA.”¹⁵

Here, as in *Del. Op. Att’y Gen.* 09-IB10, it is clear that the County Administrator made the decision to grant employees an additional day off in 2014 and to award the bonus in 2015 without the Council’s approval. Importantly, we note that both the Council and the County Administrator maintain that the County Administrator’s decisions to grant an additional vacation day and to award bonuses from a previously-approved budget do not require Council approval.

For example, in his April 28, 2016 response, the County Administrator maintains that “[n]either action is a function subject to Council approval.” According to the County Administrator, the decision to grant County employees an additional day of is “[his] and [his] alone and does not require Council approval or even discussion.” As such, “[a]ny alleged Council comments regarding [his] decision to grant an additional day off [in 2014] were not based on any Council action taken, since there was no Council discussion or vote taken on th[e] matter.” Similarly, as noted above, the County Administrator maintains that he “did not speak to each Council member, either individually or in a group, to obtain their individual votes or opinion as to whether to award the bonuses” and he “certainly did not make any effort to poll or solicit ‘votes’ or opinions from the Council members.” He stated:

I did not engage in serial discussions or obtain a serial vote with County Council members prior to granting Sussex County employees an additional vacation day . . . or awarding the bonuses . . . Both decisions are within the purview of my responsibility as the general head of personnel and are not a County Council function,

¹³ *Del. Op. Att’y Gen.* 09-IB10 (emphasis in original) (quoting *Del. Op. Att’y Gen.* 06-IB16 (Aug. 7, 2006)).

¹⁴ *Del. Op. Att’y Gen.* 03-IB11 (quoting *Wood v. Battleground Sch. Dist.*, 27 P.3d 1208, 1217 (Wash. App. 2001)).

¹⁵ *Del. Op. Att’y Gen.* 09-IB10.

except as to the funding of bonuses to the extent the Council approved the budget for Fiscal Year 2016 in June 2015.

Similarly, in its March 18, 2015 response, the Council states that the “County Administrator is not required to bring [his decision to grant an additional day off] before the Council for a formal vote.” Similarly, in its January 21, 2016 response, the Council maintains that “the County Administrator was not required to bring [his decision to award a bonus] before Council for a formal vote,” as the decision was “not subject to a Council vote, except to the extent the budget included sufficient funds for the bonuses and that the budget is ultimately adopted by Council.” Moreover, in the December 22, 2015 WGMD radio recording, Councilman George Cole stated that the County Administrator made the decision after consulting with the Finance Director. He also stated in connection with the bonus: “We didn’t have to vote on it. So [the County Administrator] decided, you know, they would go forward with the bonus.”

Under the circumstances, we are satisfied that there were no “meetings” in connection with the decisions to grant County employees an additional day off in 2014 and to award the bonus in 2015. Rather, the record reflects that the County Administrator made the decisions unilaterally, without Council’s approval.

B. The County Administrator is a Body of One to Which FOIA’s Open Meeting Requirements Do Not Apply.

Because there was no “meeting” in connection with the County Administrator’s decision to grant County employees an additional day off in 2014 and to award the bonus in 2015, we conclude that there was no FOIA violation in connection with either decision. Indeed, as this office has previously determined, the County Administrator is a “body of one” for purposes of FOIA’s open meeting requirements,¹⁶ meaning that he is not subject to these requirements.¹⁷ While the County Administrator acknowledged that he had conferred with the County’s Finance Director in connection with his decision to award the bonus, the County Administrator’s exemption from FOIA’s open meeting requirements as a “body of one” is not lost if he consults with his staff to obtain facts that would enable him to make an informed executive decision.¹⁸

To be clear, we offer no opinion as to whether a Council meeting *should* have been held in connection with either action. While we note that the Sussex County Code might require Council

¹⁶ See *Del. Op. Att’y Gen.* 01-IB15 (Oct. 3, 2001).

¹⁷ See *id.*; 29 *Del. C.* § 10004(h)(6) (public bodies having one member not subject to FOIA open meeting provisions).

¹⁸ See *Del. Op. Att’y Gen.* 01-IB15 (“It would be unrealistic, indeed intolerable, to require of such professionals that every meeting, every contact, and every discussion with anyone from whom they would seek counsel or consultation to assist in acquiring the necessary information, data or intelligence needed to advise or guide the authority by whom they are employed, be a public meeting....”).

approval of certain executive decisions,¹⁹ whether the County Administrator exceeded his authority under the Sussex County Code is an inquiry beyond the scope of FOIA.²⁰

The Luncheons Were Not “Meetings” for Purposes of FOIA

The Petitions also appear to allege – at least with respect to the December 2015 luncheon – that the Luncheons were “meetings” subject to FOIA’s open meeting requirements. Specifically, in your February 4, 2015 petition, you indicate that “[t]here was no posting that a quorum of the Council would be [at the December 5, 2015 luncheon] and that any Council business would be conducted, when in fact there was a discussion and a (sic) agreement to give County employees an extra day off for Christmas.” You further allege that “[t]he Council had more then (sic) ample time to post an Agenda and that County business would be conducted.”

The Luncheons served as occasions for camaraderie among employees and to recognize employees for their service and accomplishments. One does not ordinarily consider an employee appreciation luncheon or other purely social gathering to be a “public meeting.”²¹ In fact, there is no evidence in the record that the Luncheons were convened for “the purpose of discussing or

¹⁹ We note that both the Council and the County Administrator liken the decision to grant an additional day off to a decision to close the County government due to inclement weather. However, we question such a comparison in light of Sussex County Code Section 29-22(A), which specifically provides: “All employees, except part-time employees, shall receive their regular pay for the holidays as designated in 1 Del. C., Ch. 5, as it may be, and *any other days specifically designated by the County Council.*” (emphasis added).

Similarly, in connection with the decision to award the bonus, we note that the County Administrator cites *Del. Op. Att’y Gen.* 08-IB05 (Feb. 22, 2008), wherein this office noted that the Mayor of the Town of Middletown decided to pay employee bonuses out of a line item for “Other Employee Benefits” from an approved budget. However, in that case, the Town of Middletown “d[id] not have a written policy governing the amount of . . . bonuses and if and when these funds are given out.” Here, we do not have sufficient information regarding Sussex County’s written policies to render a determination regarding whether these facts are analogous to *Del. Op. Att’y Gen.* 08-IB05. However, we note that Sussex County Code Chapter 35 provides as follows: “[The salaries and compensation of all officers and employees of Sussex County are set forth from time to time *by the County Council . . .*]” (emphasis added).

²⁰ See, e.g., *Del. Op. Att’y Gen.* 15-IB06 (Aug. 19, 2015) (“FOIA does not carry with it the power to police towns’ compliance with their charters or any other applicable law.”); *Del. Op. Att’y Gen.* 07-IB25 (Dec. 27, 2007) (alleging Bethel Town Council President lacked authority under town-charter to proceed on permits and contracts without town council approval).

²¹ See, e.g., *Del. Op. Att’y Gen.* 07-IB13 (“If the purpose of the [national] conference is for general education and social interaction, then we do not believe that attendance at such a conference by a quorum of a public body amounts to a meeting for purposes of FOIA.”).

taking action on public business.”²² As discussed above, the County Administrator made the decisions regarding the additional day off and the bonus prior to each respective luncheon. The announcement of those decisions at the Luncheons did not constitute a “discussion of public business” that transformed those social occasions into public meetings. The number of Council members in attendance at the Luncheons, including whether a quorum was present, is therefore irrelevant.

CONCLUSION

Based on the foregoing, we determine that neither the Council nor the County Administrator violated FOIA as alleged in the Petitions.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: J. Everett Moore Jr., Esq.
Michael P. Stafford, Esq.
Danielle Gibbs, Chief Deputy Attorney General

²² See 29 Del. C. § 10002(g) (defining “meeting” as “the formal or informal gathering of a quorum of the members of any public body *for the purpose of discussing or taking action on public business....*”) (emphasis added).