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

**Attorney General Opinion No. 16-IB23**

**October 28, 2016**

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

Mr. Kevin Ohlandt  
9 Crosley Ct.  
Dover, DE 19904  
kevino@yahoo.com

**RE: October 11, 2016 FOIA Petition Regarding the Pathways to Prosperity Steering Committee**

Dear Mr. Ohlandt:

We write in response to your correspondence, which we received on October 11, 2016, alleging that the Pathways to Prosperity Steering Committee (the “Committee”) violated the open meetings provisions of Delaware’s Freedom of Information Act (“FOIA”), 29 *Del. C.* §§ 10001-10007 (“FOIA”). Specifically, you alleged that the Committee violated FOIA’s open meetings provisions in connection with its first meeting, which was held on October 7, 2016. We treat your correspondence as a petition (“Petition”) for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur.

As you know, we received the Committee’s response to your Petition (“Response Letter”) on October 19, 2016. In its Response Letter, the Committee acknowledged that it is a “public body” as defined by FOIA.<sup>1</sup> The Committee also acknowledged that it violated FOIA’s open meetings provisions by failing to provide public notice of its October 7, 2016 meeting.<sup>2</sup> The Committee stated that its failure to comply with FOIA’s notice requirements was due to an oversight and indicated that it would comply with FOIA’s open meetings provisions moving forward. The Committee included with its Response Letter a copy of the agenda and draft minutes

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<sup>1</sup> See 29 *Del. C.* § 10002(h) (defining “public body”).

<sup>2</sup> See 29 *Del. C.* §10004(e)(2) (“All public bodies shall give public notice of their regular meetings . . . at least 7 days in advance thereof.”).

for the October 7 meeting and stated that it would post the minutes online by the end of the week. We have since reviewed the Committee's website and note that the agenda, minutes, and other materials are available at: <https://sites.google.com/a/dtcc.edu/pathways/meeting-materials/10-7-16>.

Because the Committee does not dispute the FOIA violation, we consider what remediation, if any, is warranted. "When our Office finds a violation of the open meeting law, we *may* direct remediation *if a public body has taken action* on a matter affecting 'substantial public rights.'"<sup>3</sup> Of course, not every technical violation of FOIA will support remediation.<sup>4</sup>

Here, the minutes demonstrate that no action was taken by the Committee at the October 7 meeting.<sup>5</sup> Moreover, the Committee has published minutes from the meeting and has indicated an intent to comply with FOIA's open meeting provisions moving forward. Under the circumstances, we conclude that no additional remediation is warranted.<sup>6</sup> Indeed, given the nature of the meeting and the level of detail contained in the minutes, we believe that it would serve no significant purpose to request that the Committee re-notice and reconvene its October 7 meeting.

We note that your October 19, 2016 correspondence appears to suggest that the Committee's failure to comply with FOIA's open meetings provisions may have been intentional. Indeed, you state that "this is not the first time this has happened" and "surely the Governor would have known this body was in violation of FOIA." We believe the record is more consistent with the Committee's representation that the failure to notice the meeting was an oversight. This was

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<sup>3</sup> *Del. Op. Att'y Gen.* 06-ID18 (Sept. 5, 2006) (emphasis added) (citing *Ianni v. Dep't of Elections of New Castle County*, 1986 WL 9610, at \*6 (Del. Ch. Aug. 29, 1986)).

<sup>4</sup> *See Ianni*, 1986 WL 9610, at \*6-7 ("Not every failure to comply with precision to the terms of [FOIA] will involve substantial public rights and thus not every technical violation will support either a declaratory judgment or, more importantly, injunctive relief.").

<sup>5</sup> While we recognize that "'action' by a public body includes fact gathering, deliberations and discussions, all of which surely influence a public entity's final decision," *Levy v. Bd. of Educ. of Cape Henlopen Sch. Dist.*, 1990 WL 154147, at \*6 (Del. Ch. Oct. 1, 1990), we are satisfied that the discussion was introductory in nature and did not influence any anticipated Committee decision.

<sup>6</sup> *Compare Del. Op. Att'y Gen.* 15-IB12 (Dec. 17, 2015) (no remediation warranted where working group failed to notice meeting in which no action was taken because the "errors were technical violations that did not negatively affect substantial public rights"), *with Del. Op. Att'y Gen.* 12-IIB13 (Dec. 21, 2012) (invalidation of Board's vote to approve extension of Superintendent's contract appropriate where Board's actions and omissions caused attendees to leave before the discussion and vote), *and Del. Op. Att'y Gen.* 06-ID18 (Sept. 5, 2006) (town's failure to notify public that it planned to discuss and vote on appointment of Vice Mayor during upcoming meeting affected substantial public rights). *But see Del. Op. Att'y Gen.* 02-IB17 (Aug. 6, 2002) (invalidation of Board's vote to hire new Superintendent not appropriate because invalidation would cause serious disruption and citizens otherwise participated in part of the selection process).

the Committee's very first meeting as a public body. Moreover, as you note in your Petition, certain members of the Committee published photographs of its meeting on social media either, contemporaneously or immediately following the meeting. We find this to be inconsistent with an intentional failure to adhere to FOIA's open meetings provisions. We see no evidence of an intent – by the Governor or any other Committee member – to circumvent FOIA. Nor do we see an ongoing pattern of FOIA non-compliance which might warrant extreme remedy.<sup>7</sup>

Finally, we note that your October 19, 2016 correspondence, wherein you state that you “believe we are past the point of a slap on the wrist, and don't do it again,” appears to misinterpret this Office's authority under FOIA. Pursuant to 29 *Del. C.* § 10005(e), this Office is charged with making “a written determination of whether a [FOIA] violation has occurred or is about to occur.”<sup>8</sup> We routinely request remediation where we believe such remediation to be appropriate, but this Office is not vested with the authority to impose punitive measures for FOIA violations. You are free to seek redress in the courts if you believe that additional relief is warranted.<sup>9</sup>

We appreciate your effort in bringing this matter to our – and the Committee's – attention. As noted above, the Committee acknowledges, and we agree, that it violated FOIA by failing to provide notice of its October 7, 2016 meeting. However, having determined that no remediation is warranted under the circumstances, we consider this matter closed.

Very truly yours,



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Danielle Gibbs  
Chief Deputy Attorney General

cc: Michelle E. Whalen, Deputy Attorney General (via email)  
Alison May, FOIA Coordinator, Delaware Department of Education (via email)  
Mark Brainard, Chair, Delaware Pathways Steering Committee (via email)  
Steve Godowsky, Secretary, Delaware Department of Education (via email)  
Meghan Wallace, Office of Governor Jack A. Markell (via email)

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<sup>7</sup> Cf. *Levy*, 1990 WL 154147 (concluding that injunctive relief appropriate due to school board's pattern of FOIA violations); *Del. Op. Att'y Gen.* 00-IB12 (June 28, 2000) (“At some point, irrespective of whether the violations are merely technical and do not substantially affect public rights, a continuing pattern of violations will suggest that more formal action will have to be considered and more stringent sanctions sought to assure that the Board complies with FOIA and that the citizens . . . are not deprived of the public notice of meetings to which they are entitled.”).

<sup>8</sup> See 29 *Del. C.* § 10005(e).

<sup>9</sup> See 29 *Del. C.* § 10005(d) (identifying remedies that a court may impose in the case of a FOIA violation); 29 *Del. C.* § 10005(e) (noting that citizens retain the right to file suit in the case of an alleged FOIA violation).