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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion 17-IB54

October 10, 2017

VIA U.S. MAIL & EMAIL

The Hon. Samuel L. Guy
Wilmington City Council
800 N. French Street
Wilmington, Delaware 19801
Sguy41@comcast.net

**RE: September 22, 2017 FOIA Petition Regarding the City of Wilmington
Council Organization Commission**

Dear Councilman Guy:

This letter is a response to your correspondence, received on September 22, 2017, alleging that the City of Wilmington (the "City") Council Organization Commission (the "Commission") violated the open meetings provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a petition (the "Petition") for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. We invited the City to submit a written response to the Petition. We received the City's response ("Response Letter") on September 28, 2017. Although the Response Letter raises an issue as to whether the Petition is directed to the appropriate body (the Commission as opposed to the City Council), the Response Letter does not respond to your claim that the Commission was a public body nor does it respond to your claim that the Commission's meetings should have been held in compliance with FOIA. For the reasons set forth below, it is our determination that the Commission is indeed a public body. As such, to the extent the Commission failed to adhere to FOIA's open meetings provisions, the Commission violated FOIA.¹

¹ We do not address your additional allegations, as they fall outside the scope of FOIA.

RELEVANT FACTS

On or about July 14, 2016, the Wilmington City Council (the “Council”) enacted a resolution establishing the Commission.² Pursuant to the resolution, the Commission was to be “comprised of five members to be appointed by the President of City Council, from residents of Wilmington who are not holding and/or seeking an elected public office.”³ The resolution specifically requested that the Commission conduct a review of the Council’s structure and organization, to include the following: 1) an appropriate number of Council members, 2) an appropriate distribution of district and at-large Council member positions, 3) whether the President’s duties and responsibilities are more part-time or full-time, and an appropriate salary level, 4) the reasonableness of staggering Council member terms.⁴ Finally, the resolution directed the City Council Deputy Chief of Staff to provide staff assistance to the Commission and requested that the City Law Department provide counsel to the Commission as required.⁵ The resolution provided that the “findings and recommendations made by the Council Organization Commission should be subsequently discussed and considered among the full body of the City Council, and the adoption of all or part of the findings and recommendations, if approved, shall take effect at the start of the term of the 108th Session of City Council, beginning in January 2021.”⁶

The Commission conducted its review as requested. The Commission issued a report to the Council on or about August 30, 2017 (the “Report”). In the Report, the Commission notes that it met on the following dates: March 8, April 25, June 19, July 10 and 31, and August 21, 2017. The Council publicly discussed the Report during its September 8, 2017 public meeting.

POSITIONS OF THE PARTIES

In your Petition, you allege that the Commission is a public body subject to FOIA. As such, you allege that the Commission violated FOIA by failing to adhere to FOIA’s open meetings provisions in connection with its six meetings.

In its Response Letter, the City first maintains that, because the Commission conducted a formal, independent review, your Petition is directed against the Commission and *not* the Council.⁷

² See Wilmington City Council Resolution No. 16-060 (July 14, 2016).

³ *Id.* at 2.

⁴ *Id.* at pp. 2-3.

⁵ *Id.* at 3.

⁶ *Id.*

⁷ Response Letter at 1. We note that this opinion is limited in scope to a determination of whether the Commission – which was established by Council resolution – is a public body subject to FOIA and, if so, whether the Commission violated FOIA in connection with its previously-held meetings. While we recognize that your Petition invites us to do so, we note that this legal

The Council also maintains that the Council itself complied with FOIA with respect to the Commission's August 30, 2017 report by posting timely and sufficient notice of its intent to discuss the report at a public meeting and then publicly discussing the report at the meeting.⁸ Finally, the Council states:

Although the City construes the Complaint as directed toward the Commission, to the extent the Attorney General's Office were to deem a response by the City necessary, and to the extent that it were to conclude that the Commission constitute a "public body" under FOIA, no remediation is warranted in this case for the following reasons: 1) the Council's discussion of the Report was publicly noticed and a public discussion of the Report occurred at the September 8, 2017 meeting . . . ; and 2) to the extent that minutes of the Commission's six meetings do not exist, the preparation of minutes for past meetings of the Commission would not be warranted⁹

Except as noted above, the Response Letter does not respond to your claim that the Commission was a public body nor does it respond to your claim that the Commission's meetings should have been held in compliance with FOIA but were not.

RELEVANT STATUTES

Delaware's FOIA requires that "every meeting of all public bodies shall be open to the public,"¹⁰ except those closed pursuant to delineated provisions of the statute.¹¹ FOIA requires public bodies to "give public notice of their regular meetings . . . at least 7 days in advance thereof."¹² Such notice "shall include, but not be limited to conspicuous posting of said notice at

determination does not require us to determine whether the Council (or any of its individual members) was under an obligation to advise the Commission regarding FOIA. We nevertheless note that Wilmington City Council Resolution No. 16-060 requested that the City Law Department provide counsel to the Commission as required.⁷ As we have not been advised that the Commission has its own separate legal counsel, we therefore directed our correspondence to the City's Law Department, which represents both the City and the Council.

⁸ *Id.* The question of whether the Council provided sufficient notice of its intent to discuss the Commission's August 30, 2017 report is not before us and, as such, will not be decided herein.

⁹ *Id.* at 2 (citations omitted).

¹⁰ 29 *Del. C.* § 10004(a).

¹¹ *See* 29 *Del. C.* §§ 10004(b)-(d), (h).

¹² 29 *Del. C.* § 10004(e)(2).

the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such notices available.”¹³ Public bodies must maintain minutes of their meetings, and the minutes shall be made available to the public for inspection and copying.¹⁴ “Such minutes shall include a record of those members present and a record, by individual members . . . , of each vote taken and action agreed upon.”¹⁵

A “public body” is defined as follows:

[U]nless specifically excluded, any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:

- (1) Is supported in whole or in part by any public funds; or
- (2) Expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions; or
- (3) Is impliedly or specifically charged by any public official, body, or agency to advise or to make reports, investigations or recommendations.¹⁶

A “meeting” is defined 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 either in person or by video-conferencing.”¹⁷

¹³ 29 Del. C. § 10004(e)(4).

¹⁴ 29 Del. C. § 10004(f).

¹⁵ *Id.*

¹⁶ 29 Del. C. § 10002(h).

¹⁷ 29 Del. C. § 10002(g).

DISCUSSION

Title 29, Delaware Code, Section 10002(h) defines a public body using a two-part test. First, it must be determined whether the group is a “regulatory, administrative, advisory, executive, appointive or legislative body...of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity.”¹⁸ The second part of the two-part test requires us to determine whether the entity is supported by or expends public funds, or is impliedly or specifically charged by any other public official, body, or agency to advise or make reports, investigations or recommendations.¹⁹ Here, the record demonstrates that the Commission meets both of these definitional elements.

As an initial matter, we note that the Council is a public body within the meaning of Delaware’s FOIA.²⁰ The Commission was established pursuant to a City Council resolution and its members were appointed by the President of the City Council.²¹ As such, the Commission is a “body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity.”

We next consider whether the Commission was: 1) supported in whole or in part by any public funds, 2) expended or disbursed any public funds, or 3) was impliedly or specifically charged by any public official, body, or agency to advise or to make reports, investigations or recommendations. We believe this definitional element is also clearly met, as the Commission was both supported by public funds *and* was specifically charged with making reports or recommendations to the Council. Indeed, the Commission was supported by public funds inasmuch as the Council’s Deputy Chief of Staff was directed to provide staff support to the Commission.²² The Commission was also specifically charged by the Council to make recommendations to the Council.

¹⁸ 29 Del.C. § 10002(h).

¹⁹ *Id.*

²⁰ See 29 Del. C. § 10002(i) (including within the definition of “public body” any regulatory, administrative, advisory, executive, appointive, or legislative body of the State, or any political subdivision of the State”); see also *News-Journal Co. v. McLaughlin*, 377 A.2d 358, 361 (Del. Ch. 1977) (“The [City of Wilmington] defendants do not dispute that the Council of the City of Wilmington is a public body within the meaning of the statute.”).

²¹ See Wilmington City Council Resolution No. 16-060.

²² If, in fact, the City Law Department provided counsel to the Commission as requested in the resolution, this would provide further support for our finding that the Commission was supported by public funds.

Under the circumstances, we are satisfied that the Commission was indeed a public body. As such, to the extent the Commission failed to adhere to FOIA's open meetings provisions in connection with its meetings, it violated FOIA.

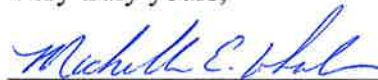
REMEDIATION

In order to remediate any FOIA violations, we recommend that the Commission make minutes of all prior meetings available for inspection and copying pursuant to 29 *Del. C.* § 10003. To the extent no such minutes exist, we recommend that the Commission create such minutes. Indeed, while this Office has in some prior instances declined to recommend the after-the-fact creation of minutes upon a determination that a group was indeed a public body, we note that the Report demonstrates that the Commission took action at several of its meetings.²³ Notwithstanding the fact that the Report contains some detail regarding the Commission's actions at those meetings, we believe the circumstances warrant the creation of minutes consistent with 29 *Del. C.* § 10004(f).

CONCLUSION

Based upon the foregoing, it is our determination that the Commission is a public body. To the extent the Commission failed to adhere to FOIA's open meetings provisions in connection with its meetings, we also determine that the Commission violated FOIA and recommend remediation as set forth herein.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein
State Solicitor

cc: Luke Mette, City Solicitor (via email)
Elizabeth D. Power, Esq. (via email)

²³ *Cf. Del. Op. Att'y Gen.* 13-IB05, 2013 WL 5615224, at *5 (Oct. 1, 2013) (declining to request that 24-member working group convened by the Governor to make recommendations for changes to Delaware's charter school policies and procedures create minutes of past meetings where "[t]he record is clear that no votes were taken at the . . . meetings").