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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB57

October 24, 2017

VIA EMAIL

Mr. Randall Chase
rchase@ap.org

RE: October 6, 2017 FOIA Correspondence Regarding the State Aid to Local Law Enforcement Committee

Mr. Chase:

I write in response to your correspondence, received on October 6, 2017, alleging that the State Aid to Local Law Enforcement Committee (“SALLE Committee”) violated the open meetings provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). Specifically, you allege that SALLE Committee violated FOIA by noticing an intent to convene an executive session for an improper purpose. I treat your correspondence as a petition for a determination pursuant to 29 *Del. C.* §10005 regarding whether a violation of FOIA has occurred or is about to occur (“Petition”). I have reviewed your Petition and the SALLE Committee’s October 12, 2017 response (“Response Letter”). For the reasons set forth below, it is my determination that the SALLE Committee did not violate FOIA.¹

¹ You sent your Petition via email on Friday, October 6, 2017 at 7:01 PM. On Monday, October 9, 2017, we forwarded your correspondence to the SALLE’s counsel for a response. As your Petition concerned a meeting that was scheduled to occur at noon on October 10, 2017, we also informed you that we did not anticipate issuing a determination in advance thereof. Notably, the question of whether the agenda properly noticed the executive session is a separate inquiry from the question of whether the executive session itself was proper. *See O’Neill v. Town of Middletown*, 2007 WL 1114019, at *7 (Del. Ch. Mar. 29, 2007) (“A determination that a public body sufficiently noticed its intent to hold an executive session under FOIA does not confirm that the executive session itself was a proper one. The inquiries are separate.”). Under these unique circumstances, I have decided to opine on both issues.

By way of background:

Since 1969, the Delaware Legislature has annually allocated funds through the Grant-in-Aid Bill to aid local law enforcement agencies and improve their effectiveness. This program is known as the State Aid to Local Law Enforcement (SALLE) Grant Fund. All SALLE funds are appropriated to the Delaware Department of Safety and Homeland Security (DSHS), which is responsible for maintaining the funds in accordance with the State's accounting policies and distributing funds to local law enforcement agencies. An eight-person committee is responsible for the review and approval of applications for SALLE funds and to ensure agency expenditures are properly made.²

On October 3, 2017, the SALLE Committee posted notice and an agenda for an October 10, 2017 meeting. The agenda listed an intent to convene an executive session as follows: "An executive session will be held pursuant to 29 Del. C. § 10004 (b)(6); § 10002 (1) (3) – discussion of investigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files."

In your Petition, you challenge the SALLE Committee's notice of an intent to convene an executive session pursuant to 29 Del. C. § 10004(b)(6), which permits a public body to call for an executive session to discuss "the content of documents, excluded from the definition of 'public record' in § 10002 . . . where such discussion may disclose the content of such documents." Specifically, the SALLE Committee noticed an intent to discuss "[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files," which are exempted pursuant to 29 Del. C. § 10002(1)(3). You allege that an executive session is permissible only if the discussion might disclose the contents of such documents. You also appear to allege that, because the SALLE Committee is charged with making funding decisions regarding police agencies, "[i]t does not conduct or participate in *criminal* investigations and would have no reason to discuss nonpublic details of any ongoing or inactive investigations in making its funding decisions."³

² Response Letter at 2.

³ Petition (emphasis added). I note that Section 10002(1)(3) is not limited to "criminal investigations." Indeed, by its plain language, Section 10002(1)(3) includes examples *other than* "criminal investigative files." Perhaps more importantly, the rules of statutory construction suggest that the itemized list of exempted items in Section 10002(1)(3) is not exhaustive. *Del. Op. Att'y Gen.* 17-IB53, n.9 (Oct. 10, 2017) (citing *See City of Dover v. Intern. Tel. and Tel. Corp.*, 514 A.2d 1086, 1089-90 (Del. Super. 1986) ("The listing in the statute [following the words 'shall include'] is exemplary, not exhaustive.")). For example, the Chancery Court has held that the exemption applies to closed investigative files, even where no criminal charges were filed. *See News-Journal Co. v. Billingsley*, 1980 WL 3043 (Del. Ch. Nov. 20, 1980). In addition, this Office has previously determined that the exemption applies to administrative agencies' investigations. *See Del. Op. Att'y Gen.* 99-IB14, 1999 WL 1095345 (Nov. 5, 1999).

In its Response Letter, the SALLE Committee maintains that it properly noticed and held a permissible executive session pursuant to 29 *Del. C.* § 10004(b)(6). The SALLE also provided the following details regarding what was discussed during the October 10, 2017 executive session:

In the executive session, the SALLE Committee met with Investigator Roger Willey, a retired Lieutenant of the Delaware State Police, to review investigatory files and discuss the status of an active investigation of the SALLE fund. More specifically, DSHS discovered that some local law enforcement agencies are struggling to stay within the guidelines and standards set forth by the committees of funds managed by the DSHS, including the Fund to Combat Violent Crime (FCVC), the State Aid to Local Law Enforcement Grant Fund (SALLE), and the Emergency Illegal Drug Enforcement Grant Fund (EIDE), which had the appearance of a misappropriation or a misuse of funds. Lt. Willey is reviewing applications and related documentation to assess whether those uses are an error, an oversight, or a deliberate misuse of grant funds.⁴

The SALLE Committee added: “The FCVC, SALLE, and EIDE Committees consider this an active investigation vital to grant management and once fully informed will determine what actions or recommendations are necessary to remedy these concerns.”⁵

Under the circumstances, I am satisfied that the SALLE Committee did not violate FOIA as alleged. Not only did the SALLE Committee notice a proper purpose for an executive session, but I see no evidence that the executive discussion itself was improper or exceeded the scope of that permissible purpose. Indeed, I am not persuaded by your argument that the SALLE Committee – or perhaps any other public body for that matter – “would have no reason to discuss nonpublic details of any ongoing or inactive investigations.” Here, it is clear that the SALLE Committee convened an executive session to discuss the status of an active investigation of the SALLE fund with the assigned investigator, who is reviewing applications and related documentation as part of that investigation. As FOIA permits a public body to convene an executive session to discuss “the contents of documents, excluded from the definition of ‘public record’ in § 10002 . . . where such discussion may disclose the contents of such documents,” and Section 10002(1)(3) specifically exempts from the definition of “public record” “[i]nvestigatory files compiled for civil or criminal law-enforcement purposes including pending investigative files,” it is my determination that the SALLE Committee did not violate FOIA as alleged.

⁴ Response Letter at 3.

⁵ *Id.*

Finally, I feel compelled to note that I do not believe that the SALLE Committee was required to publicly disclose the fact of Lieutenant's Willey's investigation in connection with its October 10, 2017 meeting *or* in response to your Petition. Indeed, had the SALLE Committee so requested, I would likely have permitted the SALLE Committee to submit this information for an *in camera* review so as not to compromise the integrity of the ongoing investigation. Notably, however, the SALLE Committee chose not to make such a request. As such, while I do not intend to suggest that this Office expects a public body to divulge otherwise non-public information regarding an ongoing investigation – particularly if disclosing of the fact of the investigation would compromise the integrity of the investigation – I commend the SALLE Committee for what appears to be a deliberate choice to demonstrate a degree of governmental transparency above and beyond what FOIA requires.

Very truly yours,

A handwritten signature in black ink, appearing to read "L Roberts", written in a cursive style.

LaKresha S. Roberts

Chief Deputy Attorney General

cc: Aaron R. Goldstein, State Solicitor (via email)
Michelle E. Whalen, Deputy Attorney General (via email)
Lisa M. Morris, Deputy Attorney General (via email)