



**MATTHEW P. DENN**  
ATTORNEY GENERAL

**DEPARTMENT OF JUSTICE**  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX: (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX: (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX: (302) 577-6499

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

**Attorney General Opinion No. 18-IB05**

**January 30, 2018**

**VIA U.S. MAIL & EMAIL**

La Mar Gunn, Sr.  
President  
Central Delaware NAACP  
11 North State Street  
Dover, DE 19901  
[lamargunn@me.com](mailto:lamargunn@me.com)

**RE: FOIA Petition Regarding the City of Dover Ethics Commission**

Dear Mr. Gunn:

We write in response to your correspondence alleging that the City of Dover Ethics 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 for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur ("Petition"). We have reviewed all submissions and have conducted an *in camera* review of the executive session minutes and materials.<sup>1</sup> Our determination is set forth below.

---

<sup>1</sup> By way of background, we invited the Commission to submit a written response to the Petition. We received the Commission's response on December 14, 2017 ("December 14 Response Letter"), and your reply on December 20, 2017 ("December 20 Reply"). On December 27, 2017, we issued a letter to the parties noting that your Initial Reply included new, specific FOIA allegations. We requested the Commission's response, by January 2, 2017, to the new allegations and copies of all agendas and minutes for the Commission's November 14 and December 11, 2017 meetings. On December 28, 2017, you requested that we limit our determination to the issues raised in your December 11 correspondence. Hours later, we received a request from the Commission for an extension of time. You were not copied on the

## BACKGROUND

The Dover Ethics Commission was established pursuant to Section 30-71(a) of the Code of Ordinances of the City of Dover (“Dover Code”). Per the statute, the Commission consists of five members appointed by the Mayor of the City of Dover and confirmed by the City of Dover City Council.<sup>2</sup> The City Solicitor provides legal counsel to the Commission.<sup>3</sup>

Section 30-73(a) of the Dover Code provides: “Upon the sworn complaint of any person or on its own initiative, the ethics commission may refer to the city solicitor for investigation, any alleged violation of the conflict of interest provisions and of the code of conduct provisions . . . .” Section 30-72(a)(3) empowers the Commission, “after notice and a hearing, to recommend such disciplinary action as it may deem appropriate to such appropriate official or agency as the ethics commission shall determine, or to take such other disciplinary action as authorized by section 30-73(d) [sic] or other provisions of the City Charter or [Chapter 30 of the Dover Code].” However, the Dover Code does not require such a hearing, as Section 30-72(a)(3) provides that the Commission “may dismiss, without reference to the city solicitor, any complaint which the ethics commission determines is frivolous or fails to state a violation.” The Dover Code further provides that “[a]ll proceedings before the ethics commission relating to a violation of this chapter by a city official, appointed or elected, shall be maintained confidential by the ethics commission, unless: a. Public disclosure is requested, in writing, by the person charged; or b. The ethics commission determines after a hearing that a violation has occurred.”<sup>4</sup>

---

Commission’s December 28 correspondence. On January 2, 2018, we issued a letter to the parties stating that, pursuant to your request that we limit our determination to the issues raised in your December 11 correspondence, we did not require the Commission’s response to the allegations raised for the first time in your December 20 Reply. However, we renewed our request for the agendas and minutes, and included a new request for a copy of the materials that the Commission discussed while in executive session on November 14 and December 7, 2017. We requested that the Commission provide all materials by January 5, 2017. Also on January 2, and in response to our letter, you stated that you had planned to submit a second FOIA petition, but requested that we issue a determination addressing all of your allegations. On January 3, 2017, we received the Commission’s submission of the requested agendas and minutes. That same day, we requested the Commission’s response to the specific allegations contained in your December 20 Reply by January 8, 2017. We received the Commission’s response on January 8, 2017 (“January 8 Response Letter”) and your reply thereto on January 11, 2017 (“January 11 Reply”).

<sup>2</sup> Dover Code § 30-71(a).

<sup>3</sup> *Id.* at § 30-71(e).

<sup>4</sup> Dover Code § 30-73(h)(2).

On October 9, 2017, you submitted a sworn complaint to the Commission alleging violations of the City of Dover Code of Conduct by a City Councilman.<sup>5</sup> Following his review of your complaint, Commissioner Jackson (then-Chair of the Commission) “had questions about the meaning of [your] complaint” and “decided that the best procedure to employ by the Commission to achieve full understanding of the allegations in the complaint . . . was to set up a meeting and ask [you] to come in and explain [your] complaint to the commission.”<sup>6</sup> The Commission scheduled a meeting for November 14, 2017.

The Commission met at 10:00 a.m. on November 14, 2017.<sup>7</sup> In its meeting agenda, the Commission noticed an intent to convene an executive session, pursuant to 29 Del. C. § 10004(b)(6), to discuss the content of documents excluded from the definition of public record. Specifically, the Commission noticed an intent to discuss “[a]ny personnel, medical, or pupil file, the disclosure of which would constitute an invasion of personal privacy,” which is exempted pursuant to 29 Del. C. § 10002(l)(1).<sup>8</sup> Commissioners Jackson, Case, Coy and Enright attended the meeting.<sup>9</sup> Commissioner Shevock was absent.<sup>10</sup> You, City Clerk Traci McDowell, and City Solicitor Nicholas Rodriguez also attended the meeting.<sup>11</sup> The Commission convened an executive session for the noticed purpose.<sup>12</sup> The purpose of the executive session was “to ask [you] to explain several questions which the Commission had about [your] complaint.”<sup>13</sup> During the executive session, you answered a number of questions and stated your position on the

---

<sup>5</sup> December 14 Response Letter at 1.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> See November 14, 2017 Dover Ethics Commission Meeting Minutes, available at: [https://evogov.s3.amazonaws.com/meetings/27/minutes/11-14-2017%20Ethics%20Commission%20Minutes%20-%20ES%20ACTION%20\(PUBLIC\)%20-%20Decision%20Regarding%20Review%20of%20Complaint.pdf](https://evogov.s3.amazonaws.com/meetings/27/minutes/11-14-2017%20Ethics%20Commission%20Minutes%20-%20ES%20ACTION%20(PUBLIC)%20-%20Decision%20Regarding%20Review%20of%20Complaint.pdf) (last visited January 30, 2018).

<sup>8</sup> See November 14, 2017 Dover Ethics Commission Meeting Agenda, available at: <https://evogov.s3.amazonaws.com/meetings/27/agendas/11-14-2017%20Ethics%20Commission%20Agenda.pdf> (last visited January 30, 2018).

<sup>9</sup> See November 14, 2017 Dover Ethics Commission Meeting Minutes.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; December 14 Response Letter at 2. The record does not reflect whether other individuals also attended the meeting.

<sup>12</sup> See November 14, 2017 Dover Ethics Commission Meeting Minutes; November 14, 2017 Dover Ethics Commission Meeting Agenda.

<sup>13</sup> December 14 Response Letter at 2.

complaint.<sup>14</sup> The Commission convened a second executive session – during which you were not present – for the same stated purpose.<sup>15</sup> Following the second executive session, the Commission voted unanimously to refer your complaint to the City Solicitor for investigation.<sup>16</sup>

The Commission met again at 10:00 a.m. on December 7, 2017.<sup>17</sup> In its meeting agenda, the Commission again noticed an intent to convene an executive session pursuant to 29 *Del. C.* § 10004(b)(6) and 29 *Del. C.* § 10002(l)(1).<sup>18</sup> Commissioners Case, Coy and Enright attended the meeting, with Commissioner Case serving as Chair of the Commission.<sup>19</sup> Commissioner Shevock was absent.<sup>20</sup> Ms. McDowell and Mr. Rodriguez also attended the meeting.<sup>21</sup> The Commission convened an executive session for the noticed purpose.<sup>22</sup> During the executive session, the Commission members received the written and factual reports of the City Solicitor.<sup>23</sup>

---

<sup>14</sup> *Id.*; see also December 20 Reply at ¶ 8.

<sup>15</sup> See November 14, 2017 Dover Ethics Commission Meeting Minutes.

<sup>16</sup> *Id.* The record does not reflect whether any member of the public was present during this portion of the meeting.

<sup>17</sup> See December 7, 2017 Dover Ethics Commission Meeting Minutes, available at: [https://evogov.s3.amazonaws.com/meetings/27/minutes/12-07-2017%20Ethics%20Commission%20Minutes%20-%20ES%20ACTION%20\(PUBLIC\)%20-%20Decision%20Regarding%20Review%20of%20Findings.pdf](https://evogov.s3.amazonaws.com/meetings/27/minutes/12-07-2017%20Ethics%20Commission%20Minutes%20-%20ES%20ACTION%20(PUBLIC)%20-%20Decision%20Regarding%20Review%20of%20Findings.pdf) (last visited January 30, 2018).

<sup>18</sup> See December 7, 2017 Dover Ethics Commission Meeting Agenda, available at: <https://evogov.s3.amazonaws.com/meetings/27/agendas/12-07-2017%20Ethics%20Commission%20Agenda.pdf> (last visited January 30, 2018).

<sup>19</sup> See December 7, 2017 Ethics Commission Meeting Minutes. Prior to the meeting, “Chairman Jackson felt that he had a conflict of interest in acting as Commissioner because of a potential agreement he had which involved his family-owned property and the City of Dover, so he recused himself from acting as a member of the Commission.” December 14 Response Letter at 2. While not relevant to this determination, the record suggests that Mr. Jackson’s recusal is not permanent and that he is still a member of the Commission. See *id.* at 1 (“A chairperson is selected by the Commission, who, at the time, was *and is* Thomas C. Jackson, Esquire.”) (emphasis added).

<sup>20</sup> See December 7, 2017 Ethics Commission Meeting Minutes.

<sup>21</sup> See December 7, 2017 Ethics Commission Meeting Minutes.

<sup>22</sup> See *id.*; December 7, 2017 Dover Ethics Commission Meeting Agenda.

<sup>23</sup> December 14 Response Letter at 2.

Following the executive session, the Commission voted unanimously to dismiss your complaint for failure to state a violation pursuant to Section 30-72(a)(3) of the Dover City Code.<sup>24</sup>

### **POSITIONS OF THE PARTIES**<sup>25</sup>

In your Petition, you alleged that the Commission engaged in an “unlawful secret meeting” on December 7, 2017.<sup>26</sup> You also alleged that the Commission engaged in a “secret vote” to dismiss your complaint.<sup>27</sup> Finally, you stated: “It is further believed that proper notice of the December 7<sup>th</sup> meeting was not properly posted.”<sup>28</sup>

In its December 14 Response Letter, which was sworn to under penalty of perjury by Commissioner Case, the Commission provided a detailed factual summary of the its actions on November 14 and December 7, 2017.<sup>29</sup> With respect to its November 14, 2017 meeting, the Commission stated that it “voted to go into executive session in order to ask [you] to explain several questions which the Commission had about [your] complaint” and then “voted to come out of executive session.”<sup>30</sup> The Commission also stated: “In open session, the motion was made by a Commissioner and unanimously passed to ask the City Solicitor to gather certain

---

<sup>24</sup> See December 20 Reply at ¶ 16. It is unclear whether any member of the public was present during this portion of the Commission’s meeting.

<sup>25</sup> In addition to the specific allegations referenced herein, you allege generally that “the City and its Commission have engaged in repeated practices that constitute an ongoing deprivation of rights of the people of Dover and of the FOIA” and that “[f]or several years, the Commission has held both private meetings and performed votes in secret sessions only.” Petition at ¶ 2. Those allegations do not provide us with sufficient clarity to provide a determination. Accordingly, we limit this determination to the specific allegations contained in your submissions. See, e.g., *Del. Op. Att’y Gen.* 17-IB16, 2017 WL 3426254, at \*1 (July 10, 2017) (noting that allegation of ongoing open meetings violations which failed to identify specific dates was “too vague to warrant consideration”); *Del. Op. Att’y Gen.* 16-IB18, 2016 WL 5888777, at \*5 (Sept. 29, 2016) (allegations concerning conduct of Mayor at meetings, which did not allege specific dates, too vague to warrant consideration); *Del. Op. Att’y Gen.* 16-IB14, 2016 WL 3462345, at \*3 (June 9, 2016) (concluding that two allegations, including allegation that board chair “routinely discussion [sic] agency business with selected commissioners before meeting times and dates” were too vague to warrant consideration).

<sup>26</sup> Petition at ¶ 3.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See generally December 20 Reply.

<sup>30</sup> *Id.* at 2.

information pertaining to the complaint so that the Commission could better understand the complaint and decide whether or not to make a formal referral to the City Solicitor, to hold a hearing on the complaint, or to dismiss it for failure to state a violation in accordance with the provisions of Sec. 30-72(a)(3).”<sup>31</sup> With respect to the December 7, 2017 meeting, the Commission explained that it convened an executive session to discuss the contents of documents excluded from the definition of public record pursuant to 29 *Del. C.* § 10002(1)(1).<sup>32</sup> Specifically, the Commission met to review findings related to your complaint.<sup>33</sup> The Commission stated that the vote to dismiss your complaint was made in open session.<sup>34</sup> Finally, the Commission stated: “Notice of the [December 7, 2017] meeting was posted on November 30, 2017.”<sup>35</sup>

In your December 20 Reply, you alleged that there was no public vote to convene an executive session on November 14, 2017.<sup>36</sup> You stated that “the public was asked to leave the meeting from the very beginning”<sup>37</sup> and that you “witnessed the City tell Ms. Maria Pilar Figueroa that the meetings of the Ethics Commission were private and that she had to wait outside.”<sup>38</sup> You stated that you were asked to leave after providing answers to the Commission’s questions and that, after you left, members of the public were still prohibited from attending.<sup>39</sup> With respect to the December 7, 2017 meeting, you alleged that members of the press and public were not allowed to attend the meeting and were only informed of the vote to dismiss your complaint after it had occurred.<sup>40</sup> You also alleged that the Commission does not dispute that it

---

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; see also December 7, 2017 Ethics Commission Meeting Minutes.

<sup>34</sup> December 14 Response Letter at 2 (“After having received [the factual reports of the City Solicitor], both written and oral, the Commission voted to come out of executive session and go into executive session. No vote on any substantive issue was made in executive session. In open session, the Motion was made and unanimously adopted by the Commission, to dismiss the complaint for failure to state a violation in accordance with the provisions of Sec. 30-72(a)(3) and Sec. 30-73.”).

<sup>35</sup> *Id.*

<sup>36</sup> December 20 Reply at ¶¶ 7, 9.

<sup>37</sup> *Id.* at ¶ 7.

<sup>38</sup> *Id.* at ¶ 15.

<sup>39</sup> *Id.* at ¶ 8.

<sup>40</sup> *Id.* at ¶ 16.

deliberated the merits of your complaint during executive session.<sup>41</sup> You requested that this Office invalidate the Commission's vote to dismiss your complaint and require that the Commission hold a new hearing and deliberate its decision in public.<sup>42</sup> You also requested that we direct the Commission to provide unredacted copies of certain meeting minutes within five business days.<sup>43</sup>

In its January 8 Response Letter, which was also sworn to under penalty of perjury by Commissioner Case, the Commission argued that its records and proceedings are confidential pursuant to Dover Code.<sup>44</sup> The Commission noted that it is similar in structure to the State's Public Integrity Commission, whose records and proceedings are confidential pursuant to Delaware Code.<sup>45</sup> With respect to your allegation that there was no public vote to convene an executive session on November 14, 2017, the Commission stated: "As shown by the minutes . . . , the public was allowed to remain until the Commission voted to go into Executive Session at which time, all personnel present not involved in the proceeding were asked to leave with the exception of Mr. Gunn for whom the Executive Session was set up to hear his explanation of his complaint."<sup>46</sup> The Commission further stated: "The minutes accurately show that at all times, the Commission voted to go into Executive Session with no decision making vote occurring until

---

<sup>41</sup> *Id.* at ¶ 17.

<sup>42</sup> Importantly, we note that this Office does not have the statutory authority to invalidate the Commission's vote, as you request. *See Del. Op. Att'y Gen.* 17-IB15, 2017 WL 3426253, at \*7 (July 7, 2017) (finding FOIA violations but noting that "this Office does not have the statutory authority to invalidate the [public bodies'] actions"). Rather, as you correctly note, "[a]ny action taken at a meeting in violation of [Delaware's FOIA] may be voidable by the Court of Chancery." December 20 Reply at ¶ 20 (citing 29 *Del. C.* § 10005(a)).

<sup>43</sup> On a December 13, 2017 FOIA, you copied this Office on a request to the City Clerk for certain Commission records and, in turn, this Office appears to have been copied on all subsequent correspondence related thereto. Copying this Office on correspondence with the public body will not constitute new or separate FOIA petitions. As such, we limit this determination to the specific allegations regarding the Commission's compliance with FOIA's open meetings provisions. We nevertheless note that "minutes *or portions thereof*, and any public records pertaining to executive sessions conducted pursuant to [Section 10004], may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but no longer." 29 *Del. C.* § 10004(f) (emphasis added). We have reviewed the minutes of the executive session minutes for the Commission's November 14 and December 7, 2017 meetings and believe that, under the circumstances, only the Councilman's name may be redacted.

<sup>44</sup> January 5 Response Letter at 1.

<sup>45</sup> *Id.* at 1-2; *see also* 29 *Del. C.* ch. 58.

<sup>46</sup> *Id.* at 2.

the Commission was in Regular Session which was open to the public.”<sup>47</sup> With respect to your allegation that there was no public vote to dismiss your complaint, the Commission stated that, “after considering all of the facts in Executive Session, the Commission voted unanimously in Open Session that no ethical violation had occurred”<sup>48</sup> and that “[m]embers of the press were allowed to remain during Open Session.”<sup>49</sup>

In your January 11 Reply, you argued that the Commission “misrepresented the facts by claiming to have allowed the public to remain in meetings until going into executive session.”<sup>50</sup> You argued that “[t]here was never a vote to go into or come out of executive session”<sup>51</sup> and that “[t]he public was never noticed that it could return to the meeting for any vote or public session after being forced to leave.”<sup>52</sup> You argued that the Commission “has not provided any reason for going into executive session authorized by statute.”<sup>53</sup> You identified and provided contact information for two individuals who you claim were denied access to the meetings and stated: “Before anything was said by the City and Commissioners were still arriving, members of the public were asked to leave, doors were closed, and the public was only notified in the hallways once the meetings were over and the results of any voting.”<sup>54</sup> You again ask this Office to invalidate the Commission’s decision and require a new hearing.<sup>55</sup> You also request “that unredacted copies of the minutes from both previous meetings (November 14 and December 7, 2017) be provided within five business days of [this Office’s] decision.”<sup>56</sup>

---

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.*

<sup>50</sup> January 11 Reply at ¶ 2.

<sup>51</sup> *Id.* at ¶ 3.

<sup>52</sup> *Id.* at ¶ 4.

<sup>53</sup> *Id.* at ¶ 7.

<sup>54</sup> *Id.* at ¶¶ 10-11.

<sup>55</sup> *Id.* at p. 3. *See supra* note 42.

<sup>56</sup> January 11 Reply at p. 3. *See supra* note 42.



## RELEVANT STATUTES

Delaware's FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed [for a permitted reason]."<sup>57</sup> Pursuant to 29 *Del. C.* § 10004(b), a public body may "call for an executive session closed to the public" only for purposes expressly permitted by the statute. FOIA permits a public body to meet in executive session to discuss "[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such meeting be open."<sup>58</sup> FOIA also permits a public body to meet in executive session to discuss "the content of documents, excluded from the definition of 'public record' . . . where such discussion may disclose the contents of such documents."<sup>59</sup> This includes "[a]ny personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy"<sup>60</sup> and "[i]nvestigatory files compiled for civil or criminal law-enforcement purposes."<sup>61</sup> However, a public body may hold an executive session only "upon affirmative vote of a majority of members present" and "[t]he vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public . . . ."<sup>62</sup> In addition, "all voting on public business must take place at a public meeting and the results of the vote made public."<sup>63</sup>

"All public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof."<sup>64</sup> Such notice "shall include, but not be limited to, conspicuous posting of said notice at 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 . . . ."<sup>65</sup> Finally, "[t]he notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings . . . ."<sup>66</sup>

---

<sup>57</sup> 29 *Del. C.* § 10004(a).

<sup>58</sup> 29 *Del. C.* § 10004(b)(9).

<sup>59</sup> 29 *Del. C.* § 10004(b)(6); *see also* 29 *Del. C.* § 10002(l) (listing categories of records which "shall not be deemed public").

<sup>60</sup> 29 *Del. C.* § 10002(l)(1).

<sup>61</sup> 29 *Del. C.* § 10004(l)(3).

<sup>62</sup> 29 *Del. C.* § 10004(c).

<sup>63</sup> *Id.*

<sup>64</sup> 29 *Del. C.* § 10003(e)(2).

<sup>65</sup> 29 *Del. C.* § 10003(e)(4).

<sup>66</sup> 29 *Del. C.* § 10003(e)(2).

## DISCUSSION

### A. Whether the Commission's December 7 Meeting Notice Was Properly Posted

You have alleged: “It is further believed that proper notice of the December 7<sup>th</sup> meeting was not properly posted.”<sup>67</sup> However, it is not clear to us what you mean by “proper notice” or “properly posted.” For example, you have not alleged that the Commission’s notice was untimely,<sup>68</sup> was not physically posted as required,<sup>69</sup> failed to include an agenda that was available at the time such notice was posted,<sup>70</sup> or failed to identify the date, time, or place of the meeting.<sup>71</sup> Despite the absence of a specific alleged defect, we have reviewed the notice to assess whether it complied with FOIA and find it to be compliant. Indeed, the notice includes the date, time, and location of the meeting.<sup>72</sup> It also includes an agenda that identifies an intent to convene an executive session and the reasons therefore.<sup>73</sup> Finally, we note that the Commission maintains that it posted notice of the meeting on November 30, 2017.<sup>74</sup> We have determined that the notice for the December 7, 2017 meeting of the Dover Ethics Commission was legally sufficient.

### B. Whether the Commission Conducted a Public Vote to Convene an Executive Session on November 14 and December 7, 2017

You also alleged that the Commission failed to conduct a public vote to convene its executive sessions. The Commission maintains – and the meeting minutes appear to reflect – that the votes were indeed public. Under the circumstances, we are not able to make a determination in this case of whether a FOIA violation has occurred because the record reflects competing, irreconcilable statements of fact that cannot be resolved on this record. Resolution of the facts in this case would require either fact-finding beyond witness statements, assessments of

---

<sup>67</sup> Petition at ¶ 3.

<sup>68</sup> See 29 Del. C. § 10003(e)(2).

<sup>69</sup> See 29 Del. C. § 10003(e)(4)

<sup>70</sup> See 29 Del. C. § 10003(e)(2).

<sup>71</sup> See *id.*

<sup>72</sup> See December 7, 2017 Ethics Commission Meeting Agenda, available at <https://evogov.s3.amazonaws.com/meetings/27/agendas/12-07-2017%20Ethics%20Commission%20Agenda.pdf> (last visited January 30, 2018).

<sup>73</sup> See *id.*

<sup>74</sup> December 14 Response Letter at 2.

witness credibility, or both, which can only occur in a court of competent jurisdiction. As such, *based upon the record before us*, we are unable to determine whether the Commission violated FOIA with respect to its votes to convene the November 14 and December 7 executive sessions. Specifically, we are unable to determine whether the Commission failed to conduct public votes to convene the executive sessions as required by Section 10004(c).

C. Whether the Commission Convened an Executive Session on November 14 and December 7, 2017 for a Purpose Authorized by FOIA

You next alleged that the Commission convened an executive session for a purpose not authorized by FOIA. Based upon our review of the record – including our *in camera* review of the November 14 and December 7, 2017 agendas, minutes, and executive session minutes – we are satisfied that the Commission identified a proper purpose for the November 14 and December 7, 2017 executive sessions. Indeed, the agendas reflect that the Commission noticed an intent to convene an executive session to discuss the contents of documents excluded from the definition of public record.<sup>75</sup> Specifically, the Commission noticed an intent to discuss personnel files, “the disclosure of which would constitute an invasion of personal privacy,” which are exempted pursuant to 29 *Del. C.* § 10002(1)(1). As such, it is our determination that the Commission did not violate FOIA by convening an executive session on November 14 and December 7, 2017 for a purpose not authorized by FOIA.

D. Whether the Commission’s November 14 and December 7, 2017 Executive Session Discussions Were Permissible

You next appear to have alleged that the executive session discussions themselves were improper. We have reviewed the executive session minutes and have conducted an *in camera* review of the materials that the Commission discussed while in executive session on November 14 and December 7, 2017. While we recognize that the Commission invoked 29 *Del. C.* § 10002(1)(1), it is clear to us based upon the record and the nature of the Commission’s role that the records reviewed – which might have included personnel records and records protected by the attorney-client privilege<sup>76</sup> – are investigatory files and, as such, are exempted from FOIA pursuant to 29 *Del. C.* § 10002(1)(3). As such, although we encourage the Commission to give careful consideration to the stated purposes for its executive sessions, it is our determination that the Commission’s November 14 and December 7, 2017 executive session discussions did not violate FOIA.<sup>77</sup>

---

<sup>75</sup> See 29 *Del. C.* § 10004(b)(6).

<sup>76</sup> See 29 *Del. C.* § 10002(1)(6) (exempting “[a]ny records specifically exempted from public disclosure by statute *or common law*”) (emphasis added).

<sup>77</sup> Having made this determination, we need not address the question of whether the City of Dover may rely on 29 *Del. C.* § 10002(1)(6) to create FOIA exemptions through *city code*.

E. Whether the Commission Conducted a Public Vote Following the December 7, 2017 Executive Session

Finally, you have alleged that the Commission engaged in a “secret vote” to dismiss your complaint while in executive session. The Commission maintains – and the minutes appear to reflect – that its vote to dismiss your complaint was made in open session. As with your allegation concerning the Commission’s vote to convene the November 14 and December 7, 2017 executive sessions, the record reflects competing, irreconcilable statements of fact that cannot be resolved on this record. Similarly, resolution of these competing, irreconcilable statements of fact would require either fact-finding beyond witness statements, assessments of witness credibility, or both, which can only occur in a court of competent jurisdiction. As such, *based upon the record before us*, we are unable to determine whether the Commission violated FOIA with respect to its vote to dismiss your complaint. Specifically, we are unable to determine whether the Commission violated FOIA by voting on public business while in executive session.

**CONCLUSION**<sup>78</sup>

Based upon the foregoing we are satisfied that the Commission noticed an intent to convene executive sessions on November 14 and December 7, 2017 for purposes authorized by FOIA. We are also satisfied that the Commission’s executive session discussions were permissible under FOIA. However, we are unable to determine whether the Commission violated FOIA by failing to conduct a public vote to convene the executive sessions. Similarly, we are unable to determine whether the Commission violated FOIA by voting to dismiss your complaint while in executive session. Finally, your allegation concerning notice of the December 7, 2017 meeting is too vague to warrant consideration at this time.

Under the circumstances, we believe it necessary to note that this Office’s role is limited to issuing a determination of whether FOIA has been violated.<sup>79</sup> This determination is therefore advisory in nature.<sup>80</sup> As noted above, we do not have the statutory authority to invalidate the Commission’s vote as you have requested.<sup>81</sup> Rather, our enforcement power would be limited to

---

<sup>78</sup> As this determination is limited to the question of whether a FOIA violation has occurred, we do not address your allegations that fall outside the scope of FOIA. For example, we offer no opinion regarding whether the Commission’s handling of your complaint was consistent with Dover Code.

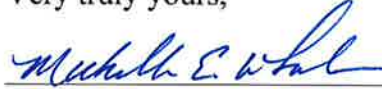
<sup>79</sup> See 29 Del. C. § 10005(e).

<sup>80</sup> See *Sullivan v. Local Union 1726*, 464 A.2d 899, 901 n.3 (Del. 1983) (“[A]n opinion of the Attorney General is advisory and not binding on those to whom it is given.”).

<sup>81</sup> See *supra* note 42.

initiating suit, at our sole discretion, after a finding of a FOIA violation.<sup>82</sup> To the extent you believe the Commission's factual representations to be inaccurate, and relief to be warranted, you are free to pursue the matter with the courts.<sup>83</sup>

Very truly yours,



Michelle E. Whalen  
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, Chief Deputy Attorney General  
on behalf of Allison E. Reardon, State Solicitor

cc: Nicholas H. Rodriguez, Esq. (via email)

---

<sup>82</sup> See 29 Del. C. § 10005(e) (“If the Attorney General finds that a violation of this chapter has occurred or is about occur, the citizen may: (1) File suit as set forth in this chapter; or (2) request in writing that the Attorney General file suit on the citizen's behalf. If such request is made, the Attorney General may file suit, and shall within 15 days notify the citizen of the decision to file suit, unless the custodian of records or public body has agreed to comply with this chapter.”).

<sup>83</sup> See *id.* (“The citizen shall have the absolute right to file suit regardless of the determination of the Attorney General . . .”).