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

**Attorney General Opinion No. 18-IB08**

**February 12, 2018**

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

Albert Porach  
220 E. Park Place  
Newark, DE 19711  
[albertporach@yahoo.com](mailto:albertporach@yahoo.com)

**RE: FOIA Correspondence Regarding the City of Newark**

Dear Mr. Porach:

We write regarding your correspondence alleging that the City of Newark (“City”) violated the Delaware 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 your Petition and the City Manager’s January 12, 2018 Weekly Report.<sup>1</sup> As set forth more fully below, it is our determination that the City did not violate FOIA as alleged.

In your Petition, you allege that a January 12, 2018 meeting between the City Manager, City employees, and certain University (“UD”) administrators amounted to a “meeting” that should have been noticed in accordance with FOIA. Specifically, “several [City Department] Directors and [the City Manager] met with upper level management in UD Facilities and 1743

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<sup>1</sup> See City Manager’s January 12, 2018 Weekly Report, available at <https://newarkde.gov/ArchiveCenter/ViewFile/Item/5423> (last visited February 9, 2018).

[Holdings LLC] to discuss UD’s plans for expansion and new construction” and expressed a desire “to make the meetings a regular occurrence.”<sup>2</sup>

Under the circumstances, it is our determination that the gathering was not a “meeting” as defined by FOIA. Pursuant to the City’s Code of Ordinances, the City Manager is appointed by the City Council<sup>3</sup> and acts as “the chief administrative officer” of the City.<sup>4</sup> Assuming, *arguendo*, that the City Manager is a public body, he is a “body of one” to whom the open meetings provisions do not apply.<sup>5</sup> As we have previously noted, the exemption from FOIA’s open meetings provisions is not lost if a body of one consults with his or her staff.<sup>6</sup> Similarly, we note that the UD representatives are not themselves a “public body.”<sup>7</sup> Here, the pertinent question is whether a meeting between two groups that are not themselves subject to the open meetings requirements amounted to the creation of a new “public body” as the term is defined by FOIA.

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<sup>2</sup> *Id.* Upon information and belief, 1743 Holdings LLC is a wholly-owned subsidiary of the University of Delaware.

<sup>3</sup> *See* Newark City Code at § 2-11.

<sup>4</sup> *Id.* at § 2-20.

<sup>5</sup> *See* 29 Del. C. § 10004(h)(6) (providing that Section 10004 “shall not apply” to “[p]ublic bodies having only 1 member”).

<sup>6</sup> *See Del. Op. Att’y Gen.* 01-IB15, 2001 WL 1593115, at \*2 (Oct. 23, 2001) (“This statutory exemption is not lost if an executive official consults with his or her staff to obtain facts to make an informed executive decision.”).

<sup>7</sup> *See* 29 Del. C. § 10002(i) (providing that “[p]ublic body,’ ‘public record’ and ‘meeting’ shall not include the activities of the University of Delaware and Delaware State University, except that the Board of Trustees of both universities shall be ‘public bodies,’ . . . and each meeting of the full Board of Trustees of either institution shall be a meeting.”).

As we have previously noted, “Title 29, Delaware Code, Section 10002(h) defines a public body using a two-part test.”<sup>8</sup> First, we must determine whether an entity is a:

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 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.<sup>9</sup>

If this part of the test is satisfied, we must next “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.”<sup>10</sup> “An entity is not a public body unless both of these definitional elements are satisfied.”<sup>11</sup>

Here, the first definitional element is not met. Indeed, we see no evidence that the group was “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.”<sup>12</sup> Nor are we persuaded that the gathering amounted to an *ad hoc* committee of a public body.<sup>13</sup> Rather, the gathering appears to be an informational gathering of two groups of employees whose actions are not otherwise

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<sup>8</sup> *Del. Op. Att’y Gen.* 17-IB54, 2017 WL 5256814, at \*3 (Oct. 10, 2017).

<sup>9</sup> *Id.* (quoting 29 *Del. C.* § 10002(h)).

<sup>10</sup> *Id.* (citing 29 *Del. C.* § 10002(h)).

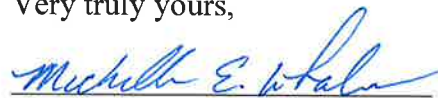
<sup>11</sup> *See Del. Op. Att’y Gen.* 17-IB63, 2017 WL 6569379, at \*3 (Dec. 20, 2017).

<sup>12</sup> *See* 29 *Del. C.* § 10002(h).

<sup>13</sup> *See Del. Op. Att’y Gen.* 99-IB 15, 1999 WL 33100497, at \*1 (Dec. 9, 1999) (“It is important to note that the City’s representatives were City employees, not members of the council. As employees fulfilling the duties of their employment, they do not constitute an ad hoc committee or subcommittee of the City that would require a finding that they constitute a public body as that term is defined in 29 *Del. C.* § 10002.”). The opinion that you cite as presenting the “identical” scenario presented here, *Del. Op. Att’y Gen.* 96-IB02, is distinguishable, as that matter involved the formation of several groups less than a quorum of the *City Council* to discuss the same topics with UD staff so as to circumvent the quorum requirement contained in 29 *Del. C.* § 10002(g). *See* 1996 WL 40923 (Jan. 2, 1996).

subject to FOIA's open meetings provisions. While the suggestion that the group meet regularly might ordinarily give us some pause, we believe the very fact that the suggestion appears to have been made by the individuals present at the meeting further supports this conclusion.<sup>14</sup> As the first part of the two-part test has not been met, there is no "public body" to trigger FOIA's open meetings provisions.<sup>15</sup> Accordingly, it is our determination that the City did not violate FOIA as alleged.

Very truly yours,



Michelle E. Whalen  
Deputy Attorney General

APPROVED BY:



Allison E. Reardon, State Solicitor

cc: Paul Bilodeau, Esq. (via email)

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<sup>14</sup> See City Manager's January 12, 2018 Weekly Report ("The meeting was very productive and there was a desire from both the City and the UD staff to make the meetings a regular occurrence.").

<sup>15</sup> 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 either in person or by video-conferencing") (emphasis added).