



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-IB21

April 27, 2018

VIA U.S. MAIL AND EMAIL

Frank "Dan" Cannon
411 Nylon Blvd.
Seaford, DE 19973
seafordski@hotmail.com

RE: Correspondence Regarding the City of Seaford

Dear Mr. Cannon:

We write in response to your correspondence, received on April 9, 2018, alleging that the City of Seaford Employee Benefit Committee (the "Committee") violated the open meeting provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). Specifically, you allege that the Committee is a public body and has violated FOIA by failing to comply with the open meetings provisions contained therein. For the reasons set forth below, it is our determination that the Committee violated FOIA as alleged.

RELEVANT BACKGROUND

On or about January 26, 2016, the City of Seaford and the Seaford Fraternal Order of Police executed a Memorandum of Understanding ("MOU") for the time period July 1, 2015 through June 30, 2018. The MOU was executed by Mayor David Genshaw and then-City Manager Delores Slatcher on behalf of the City. One provision of the MOU provides as follows:

The City Manager shall appoint a Benefits Committee which will include the Chair of the Union Bargaining Committee, or designee. The Benefits Committee shall explore the possibility of changes in health insurance coverage. One purpose of this review process is to foster competition among prospective vendors. The Benefits Committee shall make its recommendation to the Mayor and Council. The Mayor and Council may implement the recommendation. In order for such a recommendation to be

implemented, the recommendation must satisfy the following criteria¹

The Benefits Committee met on March 13, 2018. By memorandum dated March 22, 2018, June Merritt, the City’s Director of Finance and Human Resources, presented the Committee’s recommendations regarding health and life insurance renewals to City Manager Charles Anderson.²

The Mayor and City Council met on March 27, 2018. At the March 27, 2018 meeting, Kris Smith, President of Integra, presented the health and life insurance renewal terms recommended by the Benefits Committee in its March 22, 2018 memorandum.³ The Council then voted unanimously to approve the recommendation as presented.⁴

On March 27, 2018, you sent a FOIA request to the City for the agenda and minutes of the Committee’s March 13, 2018 meeting. On April 6, 2018, the City’s FOIA Coordinator informed you that “no records responsive to your request ha[d] been located.”

POSITIONS OF THE PARTIES

In your Petition, you allege that the Committee violated FOIA by failing to post notice and an agenda for its March 13, 2018 meeting. You argue that the Committee is a “public body” as defined by FOIA and, as such, is subject to FOIA’s open meetings provisions.

In its April 12, 2018 response to your Petition, the City maintains that the Committee is not a “public body.” states that the Committee consists only of the City Manager, City Finance Director, and staff. According to the City:

. . . [T]he Benefits Committee is essentially a staff working group designed to assist in implementing a pre-negotiated term in the FOP Agreement. The Committee does not include the Mayor, the Vice Mayor or any member of the City Council.

Inasmuch as the City’s Finance Director would otherwise have the authority to select the vendor the FOP’s health care plan as part of the City’s annual budgetary process, the Benefits Committee

¹ MOU at § 14.4.

² See Letter from June Merritt to Charles D. Anderson dated March 22, 2018, *available at* http://www.seafordde.com/pdfs/Final_Web_Upload.pdf (last visited April 27, 2018).

³ See March 27, 2018 Minutes of the Regular Meeting of the City of Seaford Mayor and Council at pp. 4, *available at* http://www.seafordde.com/pdfs/3-27-18_Council_Minutes.pdf (last visited April 27, 2018).

⁴ *Id.* at p. 5.

is composed of staff members to assist with the purely ministerial task of implementing the terms of an existing agreement between the City and the FOP. There are no policy decisions made or recommended.

The City distinguishes the Committee from the Attorney General opinions referenced in your petition, noting that the Benefits Committee does not include the Mayor, the Vice Mayor or any member of City Council and that, therefore, no “decision maker” is present at any Benefits Committee meeting. The City also argues that the Committee is exempted from the open meetings requirements because the Committee discusses protected health information, which is specifically exempted from FOIA pursuant to 16 *Del. C.* § 1212(a).

In your April 15, 2018, you challenge the City’s argument that the Committee cannot be a “public body” unless it includes a member of the Council. You specifically note that the City’s Planning and Zoning Commission does not include any members of the Council and operates as a public body. You also note that the Committee makes specific recommendations to the Council for health insurance benefits for all City employees. Finally, you argue that the proper mechanism for the discussion of information exempted from the definition of “public record” is an executive session.⁵

DISCUSSION

As we have previously noted, “Title 29, Delaware Code, Section 10002(h) defines a public body using a two-part test.”⁶ 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.⁷

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

⁵ You also note that the City has not revealed the actual composition of the Committee.

⁶ *Del. Op. Att’y Gen.* 17-IB54, 2017 WL 5256814, at *3 (Oct. 10, 2017).

⁷ *Id.* (quoting 29 *Del. C.* § 10002(h)).

agency to advise or make reports, investigations or recommendations.”⁸ “An entity is not a public body unless both of these definitional elements are satisfied.”⁹

Under the facts as they have been presented, we believe that the Committee is indeed a public body subject to FOIA’s open meetings provisions. Pursuant to the MOU, the Committee is comprised of members “appointed” by the City Manager, a public official.¹⁰ The MOU also specifically charges the Committee to make recommendations “to the Mayor and Council.” We recognize that, but for the MOU, the City Manager may very well retain the authority to select benefits plans as part of the City’s annual budgetary process. Importantly, however, the MOU does not charge the Committee to make recommendations to the City Manager. Although the Committee may have sent its recommendation directly to the City Manager, we cannot ignore the fact that Section 14.4 of the MOU specifically provides that “[t]he Benefits Committee shall make its recommendation *to the Mayor and Council.*”¹¹ As such, we are not persuaded that the meetings in question were mere “ministerial” meetings between a single decision maker and his or her staff.

Finally, the Committee cannot be exempted from FOIA’s open meetings provisions just because the subject matter of its discussions may be exempted from FOIA’s definition of “public record.”¹² Rather, as you correctly note, the mechanism for the Committee to maintain the confidentiality of materials exempted from FOIA’s definition of “public record” is to call for an executive session pursuant to 29 *Del. C.* § 10004(b)(6).

⁸ *Id.* (citing 29 *Del. C.* § 10002(h)).

⁹ *See Del. Op. Att’y Gen.* 17-IB63, 2017 WL 6569379, at *3 (Dec. 20, 2017).

¹⁰ MOU at § 14.4.

¹¹ *Id.* (emphasis added).

¹² *See, e.g.,* 29 *Del. C.* § 9602 (empowering the State Employee Benefits Committee to select all carriers or third-party administrators necessary to provide coverages to State employees, and expressly stating that regular meetings shall be open to the public).

CONCLUSION

For the reasons discussed above, we conclude that the Committee is a “public body” subject to FOIA. As the Committee has failed to adhere to FOIA’s open meetings provisions in connection with its March 22, 2018 meeting, it is our determination that the Committee has violated FOIA as alleged. We therefore recommend that the Committee comply with FOIA’s open meetings provisions in the future.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Allison E. Reardon, State Solicitor

cc: Daniel A. Griffith Esq. (via email)