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

**Attorney General Opinion 18-IB47**

**October 8, 2018**

**VIA EMAIL**

Mr. David Moskowitz  
Dewey Beach Commissioner-elect  
[Deweybeach2018@gmail.com](mailto:Deweybeach2018@gmail.com)

**RE: FOIA Petition Regarding the Town of Dewey Beach**

Dear Commissioner-elect Moskowitz:

We write in response to your correspondence alleging that the Town of Dewey Beach (“Town”) 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. Because the attendees at the September 18, 2018 meeting did not constitute a public body and the subject of the meeting did not require compliance with open meeting requirements, we find that the Town has not violated FOIA as alleged.

**BACKGROUND**

According to your Petition, you were recently elected as a Dewey Beach Commissioner, and you spoke with the Town’s independent auditor about a meeting scheduled for September 18, 2018 between him, the Town’s contract accountants, Town Manager, and the Audit Committee chair regarding the Town’s audit issues. Subsequent to this discussion, you sent a Petition to this Office alleging that this upcoming meeting would violate FOIA because the rest of the Audit Committee must be invited to the meeting, and the meeting must conform to open meeting requirements. On September 20, 2018, the Town Solicitor sent a letter (“Response”) indicating that the meeting had occurred on September 18, 2018 as scheduled but denying any violation of FOIA. The Town argued that the meeting was not conducted by a “public body,” and FOIA’s open meeting requirements were inapplicable. Further, the Town asserted that the Town Manager may

meet with the auditor about administrative matters outside a public meeting and the question of whether the Audit Committee should call another meeting is outside the scope of FOIA.

In your correspondence of September 24, 2018 (“Reply”), you stated that “reading the plain language of the FOIA statute, and reflecting on the manner in which public business has been conducted in the Town of Dewey Beach over the last few years- this citizen sees the spirit of the law being violated.”<sup>1</sup> The Reply also noted that Mr. Larry Silver is not the former chair of the Audit Committee as the Response stated, but instead, has been continuing to act as the chair of the Committee. You argued that this misstatement demonstrates the need for governmental transparency through public meetings. You identified at least four questions in your Petition for this Office’s review:

... Some of the questions are:

1. Whether a meeting of the Town Manager, the town auditors and the Chair of the Audit Committee triggers public notice requirements;
2. Whether the Chair of the Audit Committee is duty-bound to provide an opportunity for Audit Committee members to attend a meeting that involves the public business of the Committee (and when a quorum is thus met, trigger public notice requirements);
3. Whether a meeting about a public business that is set up with the purposes of circumventing public notice requirements has the result of triggering those requirements; and
4. Whether when an issue is so clearly of great interest to the citizenry of the jurisdiction the Elected Public Servants of that jurisdiction have the responsibility to be completely transparent and provide notice and opportunity for the public to observe that meeting.<sup>2</sup>

Next, you argued that the Audit Committee is the public body charged with audit responsibilities, and the members should have been invited to attend an open meeting on this subject. As support, you cited the Town Charter and Audit Committee Charter.

On September 25, 2018, the Town Solicitor sent a second letter to this Office to amend its Response (“Supplemental Response”), stating that Mr. Silver resigned earlier this year but suspended that resignation and has continued to act as the Committee chair during the time period in question. However, the Solicitor maintained that Mr. Silver’s role is not relevant to the Town’s alleged FOIA violations.

On September 26, 2018, you sent an additional submission (“Supplemental Reply”) which pointed to another factual error in the Town’s Supplemental Response regarding a vote at the

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<sup>1</sup> Reply, p. 1.

<sup>2</sup> Reply, p. 3 (emphasis in original).

August 17, 2018 Audit Committee meeting. Based upon your personal knowledge, you alleged that no such vote took place at that meeting.

## DISCUSSION

We find that the Petition presents two primary legal questions: 1) whether the group that met on September 18, 2018 constitutes a public body which would trigger open meeting requirements; and 2) whether the subject of that meeting required compliance with open meeting provisions under FOIA.<sup>3</sup>

*The September 18, 2018 meeting was not a meeting of a “public body” which triggered open meeting requirements.*

Delaware’s FOIA requires that “every meeting of all public bodies shall be open to the public,”<sup>4</sup> except those closed pursuant to delineated provisions of the statute.<sup>5</sup> 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.”<sup>6</sup> “Public business is defined as “any matter over which the public body has supervision, control, jurisdiction or advisory power.”<sup>7</sup>

Only public bodies are subject to the open meeting requirements, and to determine whether a group is a public body as defined by FOIA, a two-part test must be met.<sup>8</sup> First, we must determine whether the entity is a “regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State,” which includes a “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

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<sup>3</sup> As noted above, your Reply identified four specific questions for this Office’s review and implied the Petition raised other questions. Reply, p. 2. The first and fourth questions are addressed in this Opinion. The second question relates solely to the obligations of the Audit Committee chair, which is a question of municipal law outside of this Office’s scope of review. See FN 13 *infra*. The third question presupposes that Town intentionally circumvented FOIA laws by conducting the September 18, 2018 meeting; this allegation is not adequately supported by the factual record. The remaining questions of municipal law, including those concerning audit responsibilities, are also outside the scope of FOIA.

<sup>4</sup> 29 Del. C. § 10004(a).

<sup>5</sup> See 29 Del. C. §§ 10004(b)-(d), (h).

<sup>6</sup> 29 Del. C. § 10002(g).

<sup>7</sup> 29 Del. C. § 10002(j).

<sup>8</sup> Del. Op. Att’y Gen. 18-IB28, 2018 WL 2994706, at \*1 (June 1, 2018).

body or public official of the State or otherwise empowered by any state governmental entity.”<sup>9</sup> If this first part is satisfied, we then must determine whether the entity is supported in whole or in part by any public funds, expends or disburses any public funds, or is impliedly or specifically charged to advise or to make reports, investigations, or recommendations. Both parts of this test must be met in order for an entity to be considered a “public body” under FOIA.<sup>10</sup>

The parties agree that the attendees at the September 18, 2018 meeting were the Town Manager, the Audit Committee chair, the Town’s contract accountants, and the Town’s independent auditor. This gathering does not meet the first prong of the analysis to qualify as a public body. No evidence has been presented that this group was established or appointed by the General Assembly, Town Council, or any other public body. These individuals, or a combination thereof, do not represent a quorum or ad hoc committee of any existing public body.<sup>11</sup> Thus, we find that the attendees at the September 18, 2018 meeting do not constitute a “public body” and FOIA’s open meeting requirements therefore do not apply. The Town has not committed a FOIA violation in this respect.

*FOIA does not require the Town to hold an open meeting for the topic discussed at the September 18, 2018 meeting.*

The September 18, 2018 meeting included discussions related to the Town’s audit. In the Petition, you argued that the audit discussions at the September 18, 2018 meeting must be conducted as an open meeting, due to the significant public interest and due to the requirements of the Town Charter and Audit Committee Charter. FOIA requires that every meeting of a public body to discuss or take action on public business be open to the public unless it meets a statutory exception,<sup>12</sup> but FOIA does not compel a public body to hold open meetings for certain topics, nor does it give this Office the authority to review questions of the Town’s compliance with its own charter or other legal authorities.<sup>13</sup> Based upon this record, we find that the Town did not violate FOIA in conducting the September 18, 2018 meeting.

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<sup>9</sup> 29 Del. C. § 10002(h).

<sup>10</sup> Del. Op. Att’y Gen. 12-IIB05, 2012 WL 1244481, at \*2 (Mar. 27, 2012) (stating that an entity is not a public body unless both parts of the two-part test are met).

<sup>11</sup> Del. Op. Att’y Gen. 18-IB08, 2018 WL 1061278, at \*1-2 (Feb. 12, 2018) (analyzing a gathering of individuals under the first prong of the two-party test for a “public body” under FOIA).

<sup>12</sup> 29 Del. C. § 10004(a).

<sup>13</sup> See 29 Del. C. § 10004; Del. Op. Att’y Gen. 16-IB13, 2016 WL 3462344, at \*6 (June 8, 2016) (“To be clear we offer no opinion as to whether a Council meeting *should have* been held in connection with either action. While we note that the Sussex County Code might require Council approval of certain executive decisions, whether the County Administrator exceeded his authority under the Sussex County Code is an inquiry beyond the scope of FOIA.”); Del. Op. Att’y Gen. 15-

**CONCLUSION**

Therefore, it is our determination that the Town has not violated FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Allison E. Reardon

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Allison E. Reardon  
State Solicitor

cc: Fred Townsend, Esq. (via email)

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IB06, 2015 WL 5014135, at \*10 (Aug. 19, 2015) (“FOIA does not carry with it the power to police town’s compliance with their charters or any other applicable law.”); *Del. Op. Att’y Gen.* 07-IB25, 2007 WL 4941957, at \*2 (Dec. 27, 2007) (stating that this Office cannot determine whether a Town official exceeded his authority, because it was “an issue of municipal law which is outside our Office’s jurisdiction under FOIA.”).