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

**Attorney General Opinion 18-IB49**

**October 9, 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 Town Manager and Police Chief do not constitute a public body for which open meeting requirements must be met and open meeting requirements are not otherwise implicated, we find that the Town has not violated FOIA as alleged.

**BACKGROUND**

This Petition arises from a dispute over two Town documents. The Town Manager and Chief of the Police Department of Dewey Beach (“Police Chief”) signed a document, LESO Program Compliance Policy and Internal Guidelines (“LESO Program Document”). The Police Chief also executed a State Plan of Operation between the State of Delaware and Dewey Beach Police Department. (“SPO Document”) (collectively, referred to as “Documents”). Although these Documents were signed weeks before, you alleged that the public meeting regarding these Documents was not held until September 14, 2018, and at this meeting, the Commissioners first received notice of the signatures on these Documents.

You then filed a Petition with this Office alleging that both Documents were improperly executed without the approval of the Town Council at a public meeting and should be revoked. In your Petition, you also cited to a late posting of LESO Program materials on the Town's website. You stated that these materials were not released in accordance with what you believe is a required 48 hours for a public written comment period.<sup>1</sup>

On September 26, 2018, the Town Solicitor sent a letter ("Response") asserting the Town has not violated FOIA because questions related to the Town employees' signature authority are outside the scope of FOIA. However, even if these matters were appropriate under FOIA, the Town asserted that the Town Manager holds the proper authority to establish internal administrative policies and sign documents. In its Response, the Town also stated that "[p]erhaps the Commissioner-elect should consider influencing the governing body to revise or revoke the LESO Policy and terminate the State Plan of Operation during the course of a duly noticed public meeting."

In your correspondence of October 1, 2018 ("Reply"), you stated that "reading the plain language of the FOIA statute, and reflecting on the manner in which 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>2</sup> In addition, your Reply raised the following issues:

- 1) The Town Manager and the Police Chief did not have the authority to execute those agreements without the express authorization of the Town Commissioners (which are a public body, and thus, this action should have been noticed and open to the view of the public); and
- 2) The Town Manager and Police Chief, in making those decisions, was a 'public body', and [their] actions should have been noticed and open to the view of the public; and
- 3) The decision of the Town Manager and Police Chief, is a matter of ongoing, vocal public concern, and warrants notice and a public meeting.<sup>3</sup>

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<sup>1</sup> FOIA does not contain any requirements for a public comment period for meeting materials nor does FOIA require a public body to conduct a public comment period during an open meeting. *See Reeder v. Delaware Dept. of Ins.*, 2006 WL 510067, at \*12 (Del. Ch. Feb. 24, 2006) ("Although FOIA entitles citizens to notice of public meetings and to attend meetings of public bodies, FOIA does not mandate that public bodies allow for public comments at any or all meetings.").

<sup>2</sup> Reply, p. 1.

<sup>3</sup> *Id.* at 2-3.

Your Reply<sup>4</sup> expands upon these arguments, citing various substantive objections to the Documents, including allegations of increased financial risk and liability in addition to the lack of governmental accountability. You also argued that the Town Manager alone is a public body; his execution of this document was not administrative in nature and is subject FOIA notice requirements.<sup>5</sup>

## DISCUSSION

We address each of your three primary arguments. First, you argued that the Town Manager and Police Chief did not have the authority to execute the Documents without the express authorization of the Town Commissioners. This argument hinges on questions of the authority of the Town Council, Town Manager, and the Police Chief. These questions require the interpretation of municipal law, which is outside the scope of this Office.<sup>6</sup>

Second, you argued that the Town Manager and Police Chief constitute a public body or the Town Manager is a public body of one member<sup>7</sup> and should have considered these matters in

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<sup>4</sup> On October 8, 2018, this Office received a late submission to supplement your Reply, which was entitled “Addendum in Response in Support of Original Correspondence Regarding FOIA Violations in Town of Dewey Beach.” This Addendum offers additional evidence related to the question of municipal law regarding the Town Manager’s and Police Chief’s legal authority. As discussed herein, this question is not under the review of this Office.

<sup>5</sup> In addition to these submissions, our Office also received two letters from Town citizens. One letter from the “Dewey Citizens for Accountability” contained over 70 signatures urging this Office to allow Town Council and public input into the LESO Program document and to put this document on hold until a legal review can be done. A Town resident sent a second letter, urging this Office to ask the Town to provide residents proper notice on this matter and to seek the Commissioners’ approval. We note that this Office’s role in this matter is limited to statutory analysis.

<sup>6</sup> *See 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-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.”).

<sup>7</sup> Regarding the argument that the Town Manager is a “public body of one,” we need not determine if any individual is a public body of one for purposes of open meeting requirements, because FOIA’s open meeting requirements are specifically inapplicable to public bodies with one member. Thus, even if the Town Manager were a public body, open meeting requirements do not

an open meeting. 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 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 Town Manager and Police Chief do 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. No evidence has been presented that these individuals, or a combination thereof, represent a quorum or *ad hoc* committee of any existing public body.<sup>11</sup> Thus, we find that the Town Manager and Police Chief do not qualify as a “public body” and FOIA’s open meeting requirements therefore do not apply.

Third and finally, you argued that the significant public interest and scrutiny in these matters must trigger open meeting requirements. However, under the FOIA statute, public interest in a matter is not a relevant factor to determine whether an open meeting is required. Instead, FOIA requires that “every meeting of all public bodies shall be open to the public,”<sup>12</sup> except those closed pursuant to delineated provisions of the statute.<sup>13</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

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apply. *See* 29 *Del. C.* § 10004(h)(6); *Del. Op. Att’y Gen.* 17-IB37, 2017 WL 3500080, at \*5 (Aug. 7, 2017).

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

<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(b)-(d), (h).

action on public business either in person or by video-conferencing.”<sup>14</sup> In other words, when a quorum of a public body meets for the purpose of discussing or taking action on public business, FOIA open meeting requirements apply. The matter must relate to public business, but FOIA does not compel a public body to hold open meetings for certain topics.<sup>15</sup> Thus, the Town did not violate FOIA when it did not convene a public meeting for the discussion of these Documents.

### CONCLUSION

Based on the foregoing, 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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<sup>14</sup> 29 *Del. C.* § 10002(g).

<sup>15</sup> *Id.*