



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. 17-IB09

April 25, 2017

VIA EMAIL

Brooke Bovard
ardenkids@hotmail.com

RE: November 7, 2016 FOIA Petition Regarding the Buzz Ware Village Center Committee

Dear Ms. Bovard:

We write in response to your correspondence, which we received in its entirety on November 7, 2016, alleging that the Buzz Ware Village Center Committee (the “Committee”) 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 (the “Petition”) for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. By letter dated November 9, 2016, and pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Committee to submit a written response to the Petition. We received the Committee’s response on November 23, 2016 (“Response Letter”). We have reviewed the Petition, the Response Letter, and all supplemental correspondence. For the reasons set forth below, it is our determination that the Committee violated FOIA.

RELEVANT FACTS

The Village of Arden (“Village”) is a small municipality created by a town charter,¹ which establishes a purely democratic system of government.² The Village’s governing body is the Town Assembly,³ which is permitted to “elect such officials, including a Treasurer, and such agents,

¹ See Charter of Arden.

² Response Letter at 1.

³ *Id.*; Charter of Arden at § 4.

committees and commissioners of the Village which the Town Assembly may deem proper and necessary for the management of the Village and for the operation and enforcement of th[e town charter] and of any ordinances and resolutions.”⁴ To that end, on September 24, 1973, the Town Assembly approved the formation of a five-person committee tasked with managing the affairs of the Buzz Ware Village Center (“BWC” or “BWVC”), a building under the general jurisdiction of the Village.⁵ The Committee provides written reports to the Town Assembly of the BWC’s activities on a regular basis.⁶ Approximately five years ago, the Committee created a paid administrator position to handle the BWC’s day-to-day scheduling.

The BWC is located near the Arden Gild Hall, which is a polling location.⁷ Both the BWC and the Arden Gild Hall have designated parking areas.⁸

On October 20, 2016, you sent an email to Committee member Toby Ridings and Committee Co-Chair Walt Borders requesting permission to invite food trucks to set up in the BWC parking lot on Election Day, November 8, 2016.⁹ That same day, Mr. Ridings responded to Mr. Borders with his concerns about the request and stated: “I guess we can discuss this on Monday night.”¹⁰ Later that night, Mr. Borders sent an email to Committee Co-Chair Denis O’Regan expressing his concerns regarding the purpose of the food trucks, licensing requirements, and whether there should be a fee involved.¹¹

⁴ *Id.* at § 6(a).

⁵ Response Letter at 1-2.

⁶ *Id.* at 2.

⁷ *Id.*

⁸ *Id.* Although the parties appear to disagree as a factual matter about ownership of the parking lot and its permissible uses, those facts are not relevant to this determination.

⁹ Email from B. Bovard to T. Ridings and W. Borders dated October 20, 2016.

¹⁰ Email from T. Ridings to W. Borders dated October 20, 2016. Though not relevant to this determination, we are unable to ascertain whether Mr. Ridings copied anyone else on this correspondence.

¹¹ Email from W. Borders to D. O’Regan dated October 20, 2016. Though not relevant to this determination, we are unable to ascertain whether Mr. Borders copied anyone else on this correspondence.

The Committee originally scheduled to meet on October 17, 2016. However, according to the BWC's calendar of events, the Committee cancelled the October 17 meeting and scheduled a meeting for October 24, 2016.¹²

On November 4, 2016, Mr. O'Regan sent you an email denying your request and referring you to the Village.¹³ Mr. O'Regan copied Mr. Ridings and Mr. Borders on the email.¹⁴

We received your initial email correspondence on November 4, 2016, wherein you stated: "I believe, [sic] that in denying me this without any form of public meeting, and in the absence of even a virtual quorum, during discussion in private email, they have violated the open government laws."¹⁵ You indicated that you could provide the email string,¹⁶ which we requested.

You forwarded the above-mentioned email string via email on November 7, 2016.¹⁷ In your November 7 correspondence, you indicated that the Committee had since granted your request.¹⁸ You then stated: "However, this doesn't address the transparency issue of the committee response."¹⁹ On November 9, 2016, we forwarded your correspondence to the Committee for a response. We granted the Committee's request for a brief extension and, on November 25, 2016, we received the Committee's response ("Response Letter").

POSITIONS OF THE PARTIES

You allege that the Committee violated FOIA by denying your request "without any form of public meeting, and in the absence of even a virtual quorum, during discussion in private email."²⁰

12

<http://www.brownbearsw.com/freecal/bwvc?KW=arden%20delaware%20buzz%20ware;Op=ShowIt&Date=2016-10-01> (last visited April 25, 2017).

13 Email from D. O'Regan to B. Bovard dated November 4, 2016.

14 *See id.*

15 Email from B. Bovard to OpenGovernment@state.de.us dated November 4, 2016.

16 *Id.*

17 Email from B. Bovard to OpenGovernment@state.de.us dated November 7, 2016.

18 *Id.*

19 *Id.*

20 Email from B. Bovard to OpenGovernment@state.de.us dated November 4, 2016.

In its Response Letter, the Committee noted that it created a paid position to handle the BWC's day-to-day scheduling approximately five years ago.²¹ As such, according to the Committee, "the denial was not the result of a formal meeting, but rather the result of an administrative review of the BWC schedule."²² The Committee acknowledged that, "[i]ndependent of the denial, Ms. Bovard's request did prompt some editorial discussion among Committee members, not in the context of the committee making a specific usage decision, but rather in prompting future discussions about developing policies for such uses."²³ The Committee included as an attachment a November 24, 2016 email from Mr. Borders to Mr. O'Regan, Town Assembly Chair Mr. Jeffrey Politis, and counsel, which the Response Letter states contains the "procedural particulars" regarding the denial of your request.²⁴ In the email, Mr. Borders stated:

. . . [Ms. Bovard] missed submitting the request to have her request considered at the regular Buzz committee meeting on October 17th. The next scheduled meeting would be November 21st. The committee meets monthly unless a special meeting is called. A special meeting would need to be called so that permission could be granted before [Ms. Bovard]'s November 8th need of the building's parking lot.

The email was (and is) the means to find out how to approach a special situation. I believe the administrative problems with the request: already scheduled classes using the parking lot, the ethical nature of non-competitive commercial interests using town property for free versus the published policy for Community events disqualified the request from calling a special meeting. But, when I received the email, but [sic] I was out of town and could not follow up with the questions, (e.g. talk to the Civic Chair), that arose from [Ms. Bovard]'s email and so deferred to my co-chair, Denis.

As citizen-volunteers, we don't meet often enough as a committee, (monthly), to govern what is essentially a day-to-day business operation. Denis and I are the committee co-chairs for the Buzz. That position decides the regular maintenance issues and settles questions about [sic] arise daily. As my equal, Denis was solo "the decider."²⁵

²¹ *Id.* at 2.

²² Response Letter at 2-3.

²³ *Id.*

²⁴ Response Letter at Ex. A.

²⁵ *Id.*

Finally, the Committee suggested in its Response Letter that the Village's committees "should have a similar carve out from some, if not all, of the open meeting provisions of [FOIA]."²⁶

RELEVANT STATUTES

FOIA defines a "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." 29 Del. C. § 10002(g). FOIA's definition of "public body" includes any "committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee . . . appointed by any body or public official of the State or otherwise empowered by any state governmental entity . . . which is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations."²⁷ "Public business" is defined as "any matter over which the public body has supervision, control, jurisdiction, or advisory power."²⁸ With few exceptions, all meetings of public bodies shall be open to the public.²⁹

DISCUSSION

The Committee is a Public Body Subject to FOIA's Open Meeting Provisions

As an initial matter, we note that the Committee is a "public body" as defined by FOIA. It is undisputed that the Village and its governing body, the Town Assembly, are public bodies subject to FOIA.³⁰ However, FOIA's definition of "public body" also includes any "committee,

²⁶ *Id.* at 3. Due to what appears to be a typographical error, we are unable to determine whether the Committee's statement is a request or an argument. *See* Response Letter at 3 ("We would like to [sic] Arden committees should have a similar carve out from some, if not all, of the open meeting provisions of 29 Del. C. §§ 10001-10007, similar to the [sic] do for the municipal elections provision carve outs. The Ardens are very small communities with regular meetings and fully democratic processes that should ensure transparency."). We address both possibilities below.

²⁷ 29 Del. C. § 10002(h).

²⁸ 29 Del. C. § 10002(j).

²⁹ 29 Del. C. § 10004(a) ("Every meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of this section.").

³⁰ *See Del. Op. Att'y Gen.* 96-IB13, 1996 WL 254932, at *2 (May 6, 1996) (noting that all municipalities in the State of Delaware are subject to FOIA's open records provisions); *see also* 29 Del. C. § 10004(f) (noting that minutes of public meetings "shall include a record of those members present and a record, by individual members (except *where the public body is a town assembly* where all citizens are entitled to vote), of each vote taken and action agreed upon")

ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee . . . empowered by any state governmental entity ... which is impliedly or specifically charged . . . to advise or to make reports, investigations or recommendations.”³¹ Here, as the committee acknowledges, the Town Assembly formed the Committee to manage the affairs of the BWC and to “provide[] written reports to the Town Assembly of its activities on a regular basis.”³² As such, lest there be any doubt, it is our determination that the Committee is a “public body” subject to FOIA.³³

While the Committee does not argue that it is exempt from FOIA’s open meeting provisions *per se*, it nonetheless suggests that the Village’s committees “*should have* a . . . carve out from some, if not all, of the open meeting provisions.”³⁴ The Committee does not cite to, nor have we found, a specific statutory provision exempting it from FOIA’s open meeting provisions. Rather, the Committee argues that “[t]he Ardens are very small communities with regular meetings and fully democratic processes that should ensure transparency.”³⁵ By way of comparison, the Committee cites to 15 *Del. C.* § 7501, which specifically exempts the Village from Delaware’s municipal election laws due to its uniquely and purely democratic form of government.³⁶

(emphasis added); *Del. Op. Att’y Gen.* 15-IB06, 2015 WL 5014135, at *10 n.1 (Aug. 19, 2015) (recognizing that the Town Council of Dewey beach is a public body).

³¹ 29 *Del. C.* § 10002(h); *see also Del. Op. Att’y Gen.* 93-I012, 1993 WL 594362, at *1 (June 3, 1993) (noting that the General Assembly amended FOIA in 1985 to include committees in the definition of public body).

³² Response Letter at 2; *see also* Charter of Arden at § 6(a) (“The Town Assembly may elect such officials, including a Treasurer, and such agents, committees and commissioners of the Village which the Town Assembly may deem proper and necessary for the management of the Village and for the operation and enforcement of this Act and of any ordinances and resolutions adopted hereunder.”).

³³ *See Del. Op. Att’y Gen.* 16-IB27 (Dec. 22, 2016) (“The definition of ‘public body’ in FOIA is very broad, and includes a committee established by a body that was created by the State’s General Assembly that is charged with making recommendations to any other public body.”) (internal citation omitted).

³⁴ Response Letter at 3 (emphasis added).

³⁵ *Id.*

³⁶ *See id.* at 1 (citing 15 *Del. C.* §§ 7501, 7550-7560 relating to municipal elections); 15 *Del. C.* § 7501 (“Subchapters II and III of this chapter shall apply to the City of Wilmington and subchapter IV of this chapter shall apply to all other municipalities meeting the definition of ‘municipal corporation’ in § 801(3) of Title 22 except those whose powers are vested in a Town Meeting or Town Assembly consisting of all eligible voters, residents, and/or leaseholders in the municipality, including *Arden*, *Ardentown*, and *Ardencroft* . . .”) (emphasis added).

As noted above, with very few exceptions,³⁷ Delaware’s FOIA requires that “[e]very meeting of all public bodies shall be open to the public.”³⁸ A primary purpose of this requirement is to ensure “governmental accountability, inform the electorate, and acknowledge that public entities, as instruments of government, should not have the power to decide what is good for the public to know.”³⁹ This is consistent with FOIA’s declaration of policy, which states:

It is vital to a democratic society that public business be performed in an open and public manner so that our citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. Towards these ends, and to further the accountability of government to the citizens of this state, this chapter is adopted, and shall be construed.⁴⁰

We believe that the Committee’s suggestion that it should be exempt from FOIA’s open meeting provisions contradicts both the plain language and the intent of Delaware’s FOIA. The issue of whether the Village’s committees should be exempt from FOIA is an issue for the General Assembly to decide.

The Committee Violated FOIA by Discussing
And Reaching a Consensus on Your Request via Email

Having determined that the Committee is a public body subject to FOIA’s open meeting provisions, we turn next to whether the Committee violated FOIA in connection with your request. To be clear, FOIA “does not determine when a public body must take up a matter of public business.”⁴¹ As such, the question of whether the Committee was required to or otherwise should

³⁷ See, e.g., 29 Del. C. §§ 10004(h)(1)-(7) (identifying specific exemptions from FOIA’s open meetings provisions); 29 Del. C. § 10002(i) (noting that a “meeting” “shall not include the activities of the University of Delaware or Delaware State University” except for meetings of the full Board of Trustees).

³⁸ See 29 Del. C. § 10004(a) (“Every meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of this section.”) (emphasis added).

³⁹ *Delaware Solid Waste Auth. v. The News Journal Co.*, 480 A.2d 628, 631 (Del. 1984) (citation omitted).

⁴⁰ 29 Del. C. § 10001.

⁴¹ *Del. Op. Att’y Gen.* 07-IB24, 2007 WL 4913657, at *3 (Dec. 27, 2007); see also *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 . . .”).

have discussed your request at a public meeting is a matter outside the scope of FOIA.⁴² Rather, the relevant inquiry is whether the email exchange among Mr. Borders, Mr. Ridings, and Mr. O'Regan qualified as a "meeting" subject to FOIA's open meeting provisions. Indeed, "FOIA only requires a public body to give notice to the public of the matters of public business it intends to discuss *at a meeting*."⁴³

As noted above, FOIA defines a public meeting as "the formal or informal gathering of a quorum of the member of any public body for the purpose of discussing or taking action on public business either in person or by video-conferencing."⁴⁴ "Public business" is broadly defined as "any matter over which the public body has supervision, control, jurisdiction, or advisory power."⁴⁵ Moreover, as we have previously noted, serial telephone, email or other electronic communications among members of a public body may amount to a meeting of the public body.⁴⁶ Of course, "[i]t is the nature, timing, and substance of the communications which together may turn serial discussions into a constructive quorum."⁴⁷ For example, "a public body may achieve a quorum for purposes of FOIA though serial discussions which allow members of a public body 'to receive and comment on other members' opinions and thoughts, and reach consensus on action

⁴² We have identified certain factual inconsistencies in Mr. Borders' November 24 email. For example, we read Mr. Borders' email to suggest that the Committee met on October 17, 2016 and November 21, 2016. However, we have reviewed the Committee's calendar and note the following entry for October 17, 2016: "7:30pm BWVC Committee Meeting is cancelled tonight. It will be held Monday October 24th Room 3." We also note that Mr. Ridings stated in his October 20, 2016 email to Mr. Borders: "I guess we can discuss this on Monday night." Thus, it appears that the Committee did not meet on October 17, 2016. Rather, the Committee met on October 24, 2016, which was four days after your request and well in advance of November 8th, thereby calling into question Mr. Borders' representation that "[a] special meeting would need to be called so that permission could be granted before [Ms. Bovard]'s November 8th need of the building's parking lot." See Response Letter at Ex. A. As noted above, the question of whether the Committee was required to discuss your request at a public meeting is a matter outside the scope of FOIA. As such, the facts set forth in Mr. Borders' November 24, 2016 unsworn statement regarding Committee meeting dates are not relevant to this determination. We nonetheless caution the Committee to give careful consideration to its factual representations to this Office moving forward.

⁴³ *Del. Op. Att'y Gen.* 07-IB24, 2007 WL 4913657, at *3-4 (emphasis added).

⁴⁴ 29 *Del. C.* § 10002(g).

⁴⁵ 29 *Del. C.* § 10002(j).

⁴⁶ See 03-IB11, 2003 WL 21431171, at *4 (May 19, 2003).

⁴⁷ *Del. Op. Att'y Gen.* 06-ID20, 2006 WL 2724980, at *2 (Sept. 11, 2006) (quoting *Del. Op. Att'y Gen.* 06-IB16, 2006 WL 2435111, at *4 (Aug. 7, 2006)).

to take.”⁴⁸ Importantly, we have stated that “[t]he [open meetings] law is triggered only where the members of a public body ‘communicate about issues that may or will come before the [members] for a vote.’”⁴⁹ We have also required that the communications involve “‘an active exchange of information and opinions’ as opposed to ‘the mere passive receipt of information.’”⁵⁰

Here, we note that the Committee has represented that the decision to deny your request was not made by the Committee, but rather by one man, Mr. O’Regan, in Mr. Borders’ absence.⁵¹ Ordinarily, the question of who was vested with the authority to decide whether to approve or deny your request might be relevant to a determination regarding whether conversations about your request amounted to a “meeting” subject to FOIA’s open meetings provisions.⁵² However, based

⁴⁸ *Del. Op. Att’y Gen.* 06-ID20, 2006 WL 27224980, at *2 (quoting 03-IB11, 2003 WL 21431171, at *4). In *Del. Op. Att’y Gen.* 03-IB11, we distinguished *Tryon v. Brandywine Sch. Dist. Bd. of Educ.*, 1990 WL 1990 WL 51719 (Del. Ch. Apr. 20, 1990), in which the Chancery Court noted that, even if there were a constructive quorum, there was no violation because the serial telephone communications were only a straw poll to see if members were prepared to vote as opposed to an email exchange that would allow members to receive and comment on other members’ opinions and thoughts. *See Del. Op. Att’y Gen.* 03-IB11, 2003 WL 21431171, at *4.

⁴⁹ *Del. Op. Att’y Gen.* 03-IB11, 2003 WL 21431171, at *2 (quoting *Wood v. Battleground Sch. Dist.*, 27 P.3d 1208, 1217 (Wash. App. 2001)). *Compare Del. Op. Att’y Gen.* 03-IB11 2003 WL 21431171, at *3-5 (concluding that an improper meeting occurred where three members of an ad hoc nominating committee reached a consensus about names to submit after an exchange of emails over a two-day period), and *Del. Op. Att’y Gen.* 04-IB17, 2004 WL 2639714, at *4-6 (Oct. 18, 2004) (concluding that an improper meeting occurred where a council member spoke by telephone with other members about a \$15 million loan and sought their support on his funding proposal before holding a public meeting to discuss the matter and obtain the council members’ signatures), with *Del. Op. Att’y Gen.* 09-IB10, 2009 WL 4810671, at *2 (Nov. 23, 2009) (concluding that a Town Manager’s series of calls to individual Town Commissioners regarding his decision to accept or reject a grant failed to amount to a constructive or serial quorum “[b]ecause the decision-maker was the Town Manager, and not the Town Council, the phone calls he made to the Council members did not violate FOIA”), and *Del. Op. Att’y Gen.* 16-IB13, 2016 WL 3462344, at *5 (“[I]t is clear that the County Administrator made the decision to grant employees an additional day off in 2014 and to award the bonus in 2015 without the Council’s approval.”).

⁵⁰ *Del. Op. Att’y Gen.* 06-IB16, 2006 WL 2435111, at *4 (quoting *Del. Op. Att’y Gen.* 03-IB11, 2003 WL 21431171, at *5).

⁵¹ *See* Response Letter at Ex. A.

⁵² *See, e.g., Del. Op. Att’y Gen.* 16-IB13, 2016 WL 3462344, at *5 (“As an initial matter, we must determine who made the decisions to grant County employees an additional day off in 2014 and to award them a bonus in 2015.”); *Del. Op. Att’y Gen.* 09-IB10, 2009 WL 4810671, at *2 (“Because the decision-maker was the Town Manager, and not the Town Council, the phone calls he made to the Council members did not violate FOIA.”).

upon the record, we are not persuaded that the decision to deny your request was made by a single person. Importantly, we note that the Committee bears the burden of proof to demonstrate compliance with FOIA pursuant to 29 *Del. C.* § 10005(c). For the reasons set forth below, it is our determination that the Committee has failed to meet its burden.

We accept the Committee’s representation that it created a paid position to handle the BWC’s day-to-day scheduling approximately five years ago.⁵³ However, the Committee has failed to clearly identify the individual who holds the paid administrator position or any other authority granting such individual the sole power to make day-to-day scheduling decisions.⁵⁴ Moreover, to the extent we are to assume that Mr. Borders is the paid administrator vested with such authority, we note that Mr. Borders has represented that he “deferred to [his] co-chair, Denis [O’Regan].”⁵⁵ In either case, the paid administrator did *not* make the decision. Rather, the record demonstrates an interactive discussion involving a majority (three of the five) Committee members, which culminated in a decision to deny your request, as communicated to you by Mr. O’Regan. In the absence of sufficient evidence to support the conclusion that Mr. O’Regan retained and exercised sole decision-making authority, the record therefore belies Mr. Borders’ suggestion that Mr. O’Regan was “solo ‘the decider.’” As such, we conclude that a quorum of the Committee discussed and reached a consensus regarding your request via email,⁵⁶ thereby engaging in a

⁵³ Response Letter at 2.

⁵⁴ *Cf. Del. Op. Att’y Gen.* 16-IB13, 2016 WL 3462344, at *2 (“Among other things, the County Administrator administers the County personnel system pursuant to 9 *Del. C.* § 7006(a).”).

⁵⁵ Response Letter at Ex. A.

⁵⁶ Absent any evidence to the contrary, we presume that a majority of Committee members constitutes a quorum. *See* Black’s Law Dictionary (10th ed. 2014) (defining quorum as “a majority of all members, unless otherwise specified in the governing documents”); *Del. Op. Att’y Gen.* 06-IB03, 2006 WL 1242013, at *3 (Jan. 23, 2006) (“If the Town Council appoints a committee of three members, then a meeting of a quorum (two members) of the committee is a public body subject to FOIA.”).

“meeting” as defined by FOIA.⁵⁷ Because the Committee failed to comply with FOIA’s notice provisions in connection therewith,⁵⁸ it is our determination that the Committee violated FOIA.⁵⁹

Remediation

Having determined that the Committee violated FOIA, we must next determine what remediation, if any, is warranted. Here, because the action taken was ultimately reversed, as your request was subsequently and timely approved, we conclude that no specific remediation is warranted.⁶⁰ However, given our concern regarding the Committee’s suggestion that it should be exempt from FOIA, and its erroneous implication that this office retains the authority to issue such exemptions, we strongly recommend that the Committee take certain steps to seek clarification regarding the letter and spirit of FOIA, and to ensure its ongoing compliance therewith. At the very least, we encourage the Committee to consult the statute and to pursue FOIA training. Additionally, while we note that 29 *Del. C.* § 10007(d) dictates that these materials “shall not be construed as legal advice,” the Committee may wish to consult the existing Attorney General FOIA Opinions, the current Policy Manual for FOIA Coordinators, and the slides and video from the most recent Statewide FOIA Coordinator Training. As of the date of this determination, those materials can be found here: <http://attorneygeneral.delaware.gov/executive/open-government/>.

⁵⁷ See, e.g., *Del. Op. Att’y Gen.* 06-ID20, 2006 WL 2724980, at *3-4 (concluding that a school board violated FOIA when constructive quorum of the board met with the district’s Superintendent to discuss reductions in force and tax warrants without notice to the public); 03-IB11, 2003 WL 21431171, at *3-5 (concluding that an improper meeting occurred where three members of an ad hoc nominating committee reached a consensus about names to submit after an exchange of emails over a two-day period); *Del. Op. Att’y Gen.* 04-IB17, 2004 WL 2639714, at *4-6 (concluding that an improper meeting occurred where a council member spoke by telephone with other members about a \$15 million loan and sought their support on his funding proposal before holding a public meeting to discuss the matter and obtain the council members’ signatures). Cf. *Del. Op. Att’y Gen.* 15-IB06, 2015 WL 5014135 at *6-7 (email discussions not a “meeting” because they did not collectively involve a quorum); *Del. Op. Att’y Gen.* 07-IB08, 2007 WL 4732791, at (May 10, 2007) (no “meeting” where single council member exchanged emails with residents).

⁵⁸ See 29 *Del. C.* § 10004.

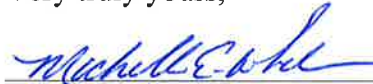
⁵⁹ Having determined that the Committee violated FOIA by discussing and reaching consensus regarding your request, we need not reach the issue of whether the Committee’s “editorial discussion” would have amounted to a “meeting” as defined by FOIA if in fact the decision regarding your request had been made by someone with sole decision-making authority.

⁶⁰ See, e.g., *Del. Op. Att’y Gen.* 15-IB12, 2015 WL 9406791, at *4 (Dec. 17, 2015) (no remediation warranted where a working group failed to notice meeting in which no action was taken because the “errors were technical violations that did not negatively affect substantial public rights”).

CONCLUSION

Based on the foregoing, because a quorum of Committee members discussed and reached consensus regarding your request via email, and without complying with FOIA's open meetings provisions, it is our determination that the Committee violated FOIA. While it is also our determination that no *specific* remediation is warranted under the circumstances, in light of our concerns regarding the Committee's suggestion that it should be exempt from FOIA, we recommend that the Committee familiarize itself with the FOIA statute and pursue FOIA training.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, State Solicitor

cc: Edward B. Rosenthal, Esq. (via email)