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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion 17-IB12

June 19, 2017

VIA U.S. MAIL & EMAIL

The Hon. Samuel L. Guy
Wilmington City Council
800 N. French Street
Wilmington, Delaware 19801
Sguy41@comcast.net

RE: March 15, 2017 FOIA Petition Regarding the City of Wilmington Council Leadership

Dear Councilman Guy:

This letter is a response to your correspondence, received on March 15, 2017, alleging that the City of Wilmington (the "City") Council Leadership Team (the "Team") 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. Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Team to submit a written response to the Petition. The Team's response, which was provided by counsel for the City, was received on March 24, 2017.

Because the Wilmington City Council, through its actions, has treated the Team as a committee of the City Council, the Team is a public body and must comply with the requirements of the Freedom of Information Act if it continues with its current structure and role. The purpose of the Team is a noble one, but Delaware's FOIA law does not allow for the Team to exist as a formal City Council committee with formal reporting responsibilities unless it complies with the state's open meeting requirements.

Consideration of this petition has made clear to our office that elected and appointed officials are entitled to more general guidance as to how they can consult with one another, with

members of the public, and with other branches of government consistent with the Freedom of Information Act. Delaware courts have found that it was not the General Assembly's intention in passing the Freedom of Information Act to stifle all informal communication among legislators or between groups of legislators and third parties. For that reason, this office will be issuing more general guidance in the near future regarding this subject.

FACTS

The Wilmington City Council consists of thirteen members. On February 27, 2017, Wilmington City Council President Hanifa Shabazz appointed the following City Council members to the Team: Councilman Nnamdi O. Chukwuocha, Councilman Ernest "Trippi" Congo II, Councilman Charles M. "Bud" Freel, Councilwoman Rysheema Dixon, and Councilwoman Loretta Walsh.¹ The Team's purpose is to "meet regularly with the [City's] Administration to discuss high-level City-related issues" and provide a summary of each meeting to the full Council.²

On February 27, 2017, "Council Leadership met with [City of Wilmington] Mayor [Michael S.] Purzycki and key administrative staff to discuss a range of topics." Among the topics discussed were the status of the City's search for a police chief, the City's request for additional funding from the legislature, the appointment of a Baynard Stadium task force, litigation updates, the timing of City news releases, the City's decision to not apply for a lead paint remediation grant, updates on the Urban Bike Project, and a concern regarding the Edward M. Byrne Grant for West Center City.³

On March 13, 2017, "Council Leadership met with Mayor Purzycki and key administrative staff to discuss a high-level summary of the FY2018 Proposed Budget."⁴ The following people attended the meeting: Councilman Chukwuocha, Councilman Congo, Mayor Purzycki, Chief of

¹ See February 27, 2017 Council Leadership Meeting Summary at 1 ("President Shabazz appointed the following members of Council to the leadership team: Councilman Chukwuocha, Councilman Congo, Councilman Freel, Councilwoman Dixon, and Councilwoman Walsh."). We note that President Shabazz is also a member of the Council Leadership team. See Response Letter at 2 ("The six members of City Council that are invited to Council Leadership meetings include the City Council President and five other Council members, who are invited by the Council President."); City Council Rule 4 ("The President shall appoint the chairperson and members of all Council Committees, whether standing, ad-hoc, special or otherwise and shall be an ex-officio member, with vote, in each.").

² *Id.* ("Leadership will meet regularly with the Administration to discuss high-level City-related issues. A summary of each meeting will be provided to all of Council.").

³ See *id.* at 1-2.

⁴ March 13, 2017 Council Leadership Meeting Summary at 1.

Staff Tanya Washington, Deputy Chief of Staff John Rago, Deputy Chief of Staff Tom Ogden, Deputy Chief of Staff Marchelle Basnight, and Director of Communications Antoine Oakley.⁵

There is no evidence that Team meetings are publicly noticed. However, summaries of the meetings appear to be distributed to all members of the City Council, just as minutes of formal City Council committee meetings are.

POSITIONS OF THE PARTIES

In your Petition, you argued that the Team is a “public body” subject to FOIA and, as such, has violated FOIA by failing to adhere to FOIA’s open meetings provisions.⁶ Specifically, you alleged that Team meetings are not publicly noticed, are by invitation only, and not open to the public.⁷

In its Response Letter, the City argued that the Team is not a public body and, as such, is not subject to FOIA’s open meetings provisions.⁸ The City provided the historical context of Team meetings, stating that then-Mayor James Baker introduced the concept approximately 27 years ago.⁹ The City stated that “[t]he Mayor’s Chief of Staff and City Council’s Chief of Staff propose the issues that are discussed at Council Leadership meetings” and, further, that “[n]o decisions are made and no votes are taken at Council Leadership meetings.”¹⁰ The City stated that “[t]he five Council members who were invited by the Council President to the two Council Leadership meetings that have occurred in 2017 were chosen based upon factors such as seniority, whether the Council member chairs a City Council Committee, and the Council member’s availability to attend the meetings.”¹¹ However, the City stated that “[t]he Council President may choose to invite a different set of five Council members to future Council Leadership meetings.”¹² According to the City, Council Leadership is “a forum for the Mayor (and select members of his staff) and several members of City Council (and select members of City Council’s staff) to have an informal, open exchange of information regarding issues affecting the City.”¹³

⁵ *Id.*

⁶ Petition at 2.

⁷ *Id.*

⁸ Response Letter at 1.

⁹ *Id.*

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1.

RELEVANT STATUTES

Delaware's FOIA requires that "every meeting of all public bodies shall be open to the public,"¹⁴ except those closed pursuant to delineated provisions of the statute.¹⁵ FOIA requires public bodies to "give public notice of their regular meetings . . . at least 7 days in advance thereof."¹⁶ Such notice "shall include, but not be limited to conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such notices available."¹⁷ Public bodies must maintain minutes of their meetings; and the minutes shall be made available to the public for inspection and copying.¹⁸

A "public body" is defined as follows:

[U]nless specifically excluded, any 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 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, which:

- (1) Is supported in whole or in part by any public funds; or
- (2) Expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions; or

¹⁴ 29 *Del. C.* § 10004(a).

¹⁵ *See* 29 *Del. C.* §§ 10004(b)-(d), (h).

¹⁶ 29 *Del. C.* § 10004(e)(2).

¹⁷ 29 *Del. C.* § 10004(e)(4).

¹⁸ 29 *Del. C.* § 10004(f).

(3) Is impliedly or specifically charged by any public official, body, or agency to advise or to make reports, investigations or recommendations.¹⁹

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.”²⁰

The Delaware Supreme Court has noted that Delaware’s Freedom of Information Act, like other state open meeting laws, is to be liberally construed, *Delaware Solid Waste Authority v. The News Journal Company*, 480 A.2d 628, 631 (Del. 1984), but has also noted that the General Assembly has placed specific provisions in FOIA recognizing “a demarcation between the public’s right of access and the practical necessity that government must function in an orderly, but nonetheless legitimate, basis.” *Id.* at 635 (discussing requirement of a quorum for open meeting law to apply). In interpreting the statute, this office will interpret ambiguities in the statute with an eye toward fulfilling the purpose of the statute as stated in 29 *Del. C.* §10001:

It is vital in 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.

But, this office will avoid interpreting the statute in a manner that results in outcomes that the General Assembly would view as absurd.²¹

¹⁹ 29 *Del. C.* § 10002(h).

²⁰ 29 *Del. C.* § 10002(g).

²¹ *One-Pie Investments LLC v. Jackson*, 43 A.3d 911, 914 (Del. 2012) (when construing a statute, literal or perceived interpretations which yield mischievous or absurd results are to be avoided).

DISCUSSION

Here, the City does not dispute that the full City Council is a public body within the meaning of FOIA.²² Nor does the City dispute that attendees discuss public business at Council Leadership meetings.²³ Rather, the City argues, “Council Leadership does not fall into any of the categories of executive or legislative entities of the City that constitute a public body under FOIA.”²⁴ In addition, the City contends, Council Leadership “is not supported by public funds, does not expend or disburse public funds, and is not charged by any other public body to advise or make reports, investigations, or recommendations.”²⁵

The record indicates that the Team is appointed by the President of Wilmington City Council. Under the Wilmington City Council’s rules, the Council President is responsible for appointing the members of all City Council committees, whether standing, ad hoc, special, or otherwise, and is also empowered to appoint special committees.²⁶ Therefore, given that the City Council President had the explicit authority to establish an ad hoc or special committee and name its members, and in fact did so, the Team is a committee established by a political subdivision of the State.

Having determined that the Team is a committee of the Council, we next address whether the Team is impliedly or specifically charged by any public official, body, or agency to advise or to make reports, investigations, or recommendations. According to the City, “[Council Leadership] does not provide a final report, or any report for that matter, to the City Council.”²⁷ However, as noted above, the minutes of the February 27, 2017 meeting make clear that Council members were appointed by the Council President for the purpose of meeting regularly with the City’s administration and providing a summary of each meeting to the full Council.²⁸ If the purpose of the Team were simply to provide a stenographic recounting of information passively

²² See 29 Del. C. § 10002(i) (including within the definition of “public body” any regulatory, administrative, advisory, executive, appointive, or legislative body of the State, or any political subdivision of the State”).

²³ See 29 Del. C. § 10002(b) (defining “public business” as “any matter over which the public body has supervision, control, jurisdiction or advisory power”).

²⁴ *Id.* at 2 (citing *Del. Solid Waste Auth.*, 480 A.2d at 632).

²⁵ *Id.* at 9.

²⁶ Wilmington City Council Rules 4, 12.

²⁷ Response Letter at 6.

²⁸ See February 27, 2017 Council Leadership Meeting Summary at 1 (“Leadership will meet regularly with the Administration to discuss high-level City-related issues. *A summary of each meeting will be provided to all of Council.*”) (emphasis added).

received at its meetings with the Executive Branch, those might not constitute “reports” under the Freedom of Information Act. But under those circumstances there would be no need for the Team to exist. Instead, the apparent purpose of the Team is for a substantive dialogue regarding city issues to take place between the legislative and executive branches of Wilmington’s city government, and for the results of that dialogue to be analyzed by the Team and then communicated to the entire City Council.

Based upon the foregoing, although it appears that Wilmington City Council created the Team in good faith based on past practice, and with good intentions, the Team is a public body as currently constituted and must comply with FOIA’s open meeting provisions. However, we make this finding on the very narrow basis that the Team is a formally appointed body of the Wilmington City Council. Members of legislative and executive branches of municipal governments should not be discouraged from having informal meetings to discuss matters of public interest, so long as those meetings do not involve sufficient members of the legislative branch to constitute a quorum and are not attempts to evade FOIA’s public meeting provisions. For the City of Wilmington, a small group of Councilmembers meeting with the executive branch, even on a regular basis, would comply with FOIA absent the formality and reporting requirements of the current Council Leadership construct.”²⁹

REMEDATION

As discussed in more detail above, the Team was a good faith effort by Wilmington City Council, and does not appear to have been a purposeful effort to either evade the FOIA or conceal information. Nevertheless, because FOIA does not permit the Team to continue holding private meetings as currently constituted, the Team should adhere to FOIA’s open meetings provisions moving forward if Wilmington City Council maintains the existence of this committee in its current form. In addition, the Team should make minutes of all prior meetings available for inspection and copying pursuant to 29 *Del. C.* § 10003.

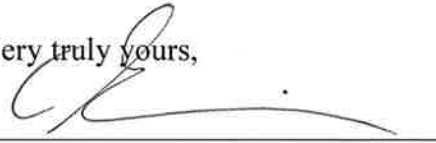
GUIDANCE TO OTHER GOVERNMENT ENTITIES

This case involved a specific circumstance where the Wilmington City Council appointed a formal committee for the purpose of ongoing interaction on a myriad of subjects with the executive branch of Wilmington city government, and formally reporting on those interactions to the City Council as a whole. However, our office is aware that a series of opinions from the Department of Justice over a period of several years have created some uncertainty as to what

²⁹ It is common knowledge that at the state level, leaders of party caucuses from both the State Senate and State House of Representatives regularly meet privately with one another and with members of the executive branch for the purpose of discussing public business. However, the General Assembly has explicitly and repeatedly excluded its own caucuses from the ambit of the Freedom of Information Act’s open meeting requirements. Therefore, this opinion should not be read as applying FOIA to informal meetings between legislative and executive branch leaders of state government, for the purpose of discussing issues that are then reported back to the confidential party caucuses, as this would result in an absurd result that could not have been intended by the statute.

guidelines elected and appointed officials should follow when interacting with one another, representatives of other branches of government, and the general public. For that reason, our office will be issuing more general guidance in the near future regarding this subject.

Very truly yours,

A handwritten signature in black ink, appearing to read 'A. Goldstein', written over a horizontal line.

Aaron R. Goldstein
State Solicitor

cc: Michelle E. Whalen, Deputy Attorney General (via email)
Elizabeth D. Power, Esq. (via email)