



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-IB37

August 7, 2017

VIA U.S. MAIL & EMAIL

Kevin Ohlandt
9 Crosley Ct.
Dover, DE 19904
kevin3670@yahoo.com

RE: May 10, 2017 Correspondence Regarding the Family Services Cabinet Council

Dear Mr. Ohlandt:

We write in response to your correspondence, received on March 8, 2017, alleging that the Family Services Cabinet Council has violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). Specifically, you allege that the Council is a "public body" as defined by Delaware's FOIA and it failed to adhere to the open meetings provisions. We treat your correspondence as a petition ("Petition") for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. We invited the Office of the Governor ("OGov") to submit a written response to the Petition. We received OGov's response on March 31, 2017 ("Response Letter"). We have reviewed your Petition and OGov's Response Letter. We believe that the arguments raised in your Petition are not unreasonable, and that the formality of the Executive Order creating the Council could suggest that the Executive Order created an advisory group. However, the actual language of the Executive Order, which defines membership of the Council as including only specifically-identified Cabinet officials and senior staff, and names the Governor personally as a member, means that the meetings are actually staff meetings for the Governor. Therefore, it is our determination that the Council is not a public body as long as its membership continues to be limited to those persons enumerated in the Executive Order, other Cabinet officials and staff. As such, it is not subject to FOIA's open meetings provisions.

RELEVANT FACTS

On May 17, 1993, then-Governor Thomas R. Carper issued Executive Order Number Six, which established the Family Services Cabinet Council (the “Council”) “to develop a statewide family strategy to assure that public and private initiatives are coordinated and focused to provide the support and assistance required for the success of families in today’s society.”¹ Per Executive Order Number Six, Council’s mission was “to design and implement new service alternatives for school and community-based family-centered services, and otherwise act as a catalyst for public-private partnerships to reduce service fragmentation and make it easier for families to get supportive services.”² Responsibilities of the Council included, among other things, “mak[ing] recommendations regarding the appropriate responsibilities of all interagency and departmental boards, commissions, committees and other state governmental entities involved in the delivery or coordination of services to families,” and “review[ing] and, where appropriate, propos[ing] modifications of existing public programs and other initiatives to target present and proposed resources”³ The Council was composed of the following individuals: “the Governor, the Secretary of Services for Children, Youth, and Their Families, the Secretary of Health and Social Services, the Superintendent of the Department of Public Instruction, the Secretary of Labor, the Secretary of Public Safety, the Director of the State Housing Authority, and such others as the Governor shall appoint.”⁴ Executive Order Number Six also mandated that the Governor serve as Chairperson and vested the Council with the authority to “form such committees, including membership beyond its members, as necessary to do its work.”⁵

The record is unclear as to the dates in which the Council formally operated and whether the Council’s meetings were ever open to the public.⁶ Nevertheless, on February 28, 2017, Governor John C. Carney issued Executive Order Number Five, which officially re-established the Council and rescinded the May 17, 1993 Executive Order.⁷ Governor Carney’s revised executive order retained the mission and primary functions of the Council.⁸ The revised executive order also retained the same general membership, modified only to reflect the changes to the

¹ Exec. Order No. 6 at ¶ 1 (May 17, 1993) (Gov. Carper).

² *Id.* at ¶ 2.

³ *Id.* at ¶¶ 3-4; *see also id.* at ¶¶ 5-6.

⁴ *Id.* at ¶ 7.

⁵ *Id.* at ¶¶ 8-9.

⁶ In its Response Letter, OGov suggests that the Council “went dormant in or around 2000” and that its understanding was that the Council’s meetings were closed to the public.

⁷ Exec. Order No. 5 at ¶¶ 1, 12 (Feb. 28, 2017) (Gov. Carney).

⁸ *See id.* at ¶¶ 2, 4-7.

respective agency names and to add the Director of the Office of Management and Budget and the Commissioner of the Department of Correction.⁹ The revised executive order maintained the same mandate that the Governor serve as Chairperson,¹⁰ and the same authority to form committees beyond its membership.¹¹ Executive Order Number Five added a provision providing that administrative support would be provided by staff within the respective state agencies and the Office of the Governor.¹² Governor Carney “expected that the meetings of the [Council] would be private.”¹³

On May 8, 2017, Governor Carney issued Executive Order Number Nine,¹⁴ which effectively amended Executive Order Number Five.¹⁵ His purpose in doing so was to express the Governor’s intent that the Council’s meetings were to be private, and to “improve consistency and provide further support for the intention and right to conduct confidential meetings.”¹⁶ Executive Order Number Nine substituted “invite” for “appoint” in the membership clause and removed any reference to the Governor’s status as Chairperson and the Council’s ability to form committees beyond its membership.¹⁷ The following paragraph was also added: “In accordance with the common law privilege protecting executive communications concerning the deliberative and policy-making processes, the records, investigations, internal communications, deliberations and draft work product of the Council shall be confidential and may be disclosed only at the direction of the Governor.”¹⁸

⁹ *Id.* at ¶ 8. For example, “Superintendent of the Department of Public Instruction” became “Secretary of the Department of Education.”

¹⁰ *Id.* at ¶ 9.

¹¹ *Id.* at ¶ 10.

¹² *Id.* at ¶ 11.

¹³ Response Letter at 2.

¹⁴ Exec. Order No. 9 (May 8, 2017) (Gov. Carney).

¹⁵ Executive Order Number Nine also officially rescinded Executive Order Number Five. *Id.* at ¶ 12.

¹⁶ Response Letter at 2.

¹⁷ Compare Exec. Order No. 5 (Feb. 28, 2017) (Gov. Carney), with Exec. Order No. 9 (May 8, 2017) (Gov. Carney).

¹⁸ Exec. Order No. 9 at ¶ 11 (May 8, 2017) (Gov. Carney).

SUMMARY OF ARGUMENTS

In your Petition, you allege that the Council is a public body subject to FOIA's open meetings provisions. You challenge the Council's invocation of the executive privilege to justify closing its meetings to the public.

In its Response Letter, OGov states that "[t]he only members of the Family Services Cabinet Council are Cabinet members."¹⁹ OGov maintains that the "body of one" exemption applies to the Council, as the Governor is a body of one and the Council meetings are, in substance, meetings between the Governor and his senior executive branch officials.²⁰ In the alternative, OGov maintains that the doctrine of executive privilege applies.

RELEVANT STATUTES

Delaware's FOIA defines a "public body" as:

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
- (3) Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.²¹

With limited exceptions, Delaware's FOIA requires that "[e]very meeting of all public bodies shall be open to the public."²² The open meetings requirements do not apply to "[p]ublic bodies having only 1 member."²³

¹⁹ Response Letter at 2.

²⁰ *Id.* at 3.

²¹ 29 *Del. C.* § 10002(h).

²² 29 *Del. C.* § 10004(a).

²³ 29 *Del. C.* § 10004(h)(6).

DISCUSSION

As an initial and undisputed matter, the Governor is not vested with the legal authority to declare, by executive order or otherwise, whether an entity is or is not a “public body” for purposes of FOIA. Rather, the authority to decide that an entity is exempted from FOIA’s broad definition of “public body” rests with the General Assembly and, through case decisions, the judiciary, both of which are co-equal branches of government. We turn to each of those sources for guidance here.

In *Guy v. Judicial Nominating Commission*,²⁴ the Delaware Superior Court considered whether the Judicial Nominating Commission (the “Commission”) was a “public body” under FOIA. The court addressed the issue in the context of a challenge to the Commission’s denial of access to its records in response to a FOIA request. In justifying its denial of the plaintiff’s FOIA request, the Commission argued that it was not a public body for purposes of FOIA. The Commission also maintained that its records were nonetheless exempted from disclosure pursuant to the executive privilege.²⁵ The Commission also argued that application of FOIA to the Commission would violate the separation of powers doctrine.²⁶

Like the Council, the Commission was established by executive order and continued to exist through executive order of subsequent administrations.²⁷ At the time of the court’s consideration of the matter, the Commission’s membership consisted of eight members appointed by the Governor and a ninth member appointed by the Delaware State Bar Association.²⁸ The Governor was not a member of the Commission. Pursuant to the executive order then in effect, the Commission’s mandate was to find “highly qualified candidates for judgeships to which the Governor [wa]s empowered to make appointments.”²⁹ The executive order also imposed the following requirement of confidentiality upon the Commission:

All records and deliberations with respect to persons under consideration as nominees or prospective nominees shall be held in confidence by the Commission and shall be disclosed only at the direction of the Governor and only to the Governor or his designee. The Judicial Nominating Commission is established by the Governor solely to assist him in the exercise of his discretion

²⁴ 659 A.2d 777 (Del. Super. 1995).

²⁵ *Id.* at 780-81.

²⁶ *Id.* at 781.

²⁷ *See id.* at 779 n.1.

²⁸ *Id.* at 779.

²⁹ *Id.* (citing Exec. Order No. 3 at ¶ 2 (March 29, 1883) (Gov. Carper)).

regarding judicial appointments, and the creation of the Commission and its adoption of rules, procedures and standards in no way waives any privilege attaching to the source and substance of any advice or information provided to the Governor in this regard, nor waives any privilege attaching to the records, investigations and deliberations of the Commission regarding the performance of its duties under this Executive Order.³⁰

The executive order was subsequently amended to authorize the Commission to disclose its records and deliberations to the Delaware State Bar Association's Committee on Judicial Appointments for its views regarding candidates.³¹

The *Guy* court opined as an initial matter that the Commission fell within FOIA's broad definition of "public body."³² The court noted that the commission was "an executive commission, appointed by a public official, which is specifically charged by the Governor to make recommendations."³³ The court therefore concluded that, absent legislative intent to the contrary, "the Judicial Nominating Commission is a 'public body' within the definition of the [Freedom of Information] Act."³⁴

Having determined that the Commission was a public body, the court stated: "As a public body, the Commission's records are available for inspection by the public unless they fall within any of the fourteen exceptions to the term 'public record,' see § 10002(d), or unless the application of the Act would impermissibly encroach upon the powers under the Delaware Constitution of a co-equal branch of government, in this case the Governor."³⁵ The court then assessed whether the Commission's records were protected by 29 *Del. C.* § 10002(1)(6), which exempts "[a]ny records specifically exempted from public disclosure by statute or common law." Specifically, the court considered whether the records would be protected pursuant to the "executive privilege."³⁶ The court then recognized an "executive privilege" "with respect to the source and substance of communications to and from the Governor in the exercise of his appointive power,"³⁷ and stated that the privilege was both a common law and constitutional privilege, both of which fell within

³⁰ *Id.* at 779-80 (quoting Exec. Order No. 3 at ¶ 6 (March 29, 1883) (Gov. Carper)).

³¹ *Id.* at 780 (citing Exec. Order No. 10 at ¶ 10 (Aug. 20, 1993) (Gov. Carper)).

³² *Id.* at 781.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See id.* at 782-86.

³⁷ *Id.* at 785.

Section 10002(1)(6).³⁸ The court warned: “The executive privilege is not absolute,” as “it is for the benefit of the public, not the executive who asserts it.”³⁹ The court nevertheless determined that the plaintiff had failed to demonstrate the reasons why the need for disclosure outweighed the interest in confidentiality so as to overcome the presumption of executive privilege.⁴⁰ The court, therefore, concluded that the records were not “public records” under FOIA. The court specifically declined to address the constitutional question of whether the separation of powers doctrine *per se* precluded the application of FOIA to the Commission.⁴¹ Because we do not find that the Council in this case is a public body, we need not address the common law or constitutional issues identified in *Guy*.

FOIA’s broad definition of “public body” includes “any . . . body or entity . . . appointed by any body or public official of the State or otherwise empowered by any state governmental entity . . . impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.”⁴² Moreover, the audio tape recordings of the Senate debates for the original FOIA bill demonstrate that the bill’s original authors intended to include “advisory boards set up by the Governor” within FOIA’s definition of “public body.”⁴³ However, the recordings also demonstrate that neither the definition of “public body” nor the open meetings requirements were intended to include staff meetings.⁴⁴ For example, the discussion acknowledged that entities like the Governor’s Advisory Council for Exceptional Children (now the Governor’s Advisory Counsel for Exceptional Citizens are public bodies, whereas staff meetings – such as meetings between the Secretary of the Department of Natural Resources and Environmental Control (DNREC) and his department heads – were not.⁴⁵

³⁸ The court noted that Section 10002(1)(6) addresses statutory exemptions, but reasoned that “it would be incongruous to hold that the General Assembly intended a statutory exemption but not an exemption based upon the constitution to be sufficient to preclude disclosure.” *Id.* at 782-83. As such, the court concluded: “‘statute’ within the meaning of this exemption under the [Freedom of Information] Act is sufficiently inclusive to embrace the provisions of the State Constitution.” *Id.* at 783.

³⁹ *Id.* at 785.

⁴⁰ *Id.*

⁴¹ *Id.* at 785-86.

⁴² 29 *Del. C.* § 10002(h).

⁴³ S.B. No. 256, Senate Debate, 128th Gen. Ass. (enacted at 60 *Del. Laws c.* 641 (1977)).

⁴⁴ *See id.*

⁴⁵ *See id.* This finding is consistent with FOIA’s exemption of “public bodies having only 1 member” from its open meetings requirements. *See* 29 *Del. C.* § 10004(h)(6).

As noted above, “[p]ublic bodies having only 1 member” are exempted from FOIA’s open meetings requirements.⁴⁶ Importantly, and as we have previously stated, this exemption is not lost if a public “body of one” consults with his or her staff.⁴⁷ It is well-settled that the Governor is a “body of one” for purposes of FOIA.⁴⁸ Here, OGov has represented that the Council’s current membership includes *only* the Governor and Cabinet members. The Council’s composition is distinguishable from entities such as the Judicial Nominating Commission and the Governor’s Advisory Council for Exceptional Citizens, whose membership includes individuals beyond the Governor’s staff. Under the circumstances, we believe the distinction to be dispositive. Indeed, we believe that the Council’s meetings are more akin to a staff meeting between the Governor and his cabinet secretaries than an advisory group whose membership extends beyond the staff level. As such, it is our determination that the “body of one” exemption applies and the Council – in its current form – is *not* a public body for purposes of FOIA.

It is important to note that our conclusion in this case is based specifically upon the membership of the Council as defined in the Executive Order and as clarified by OGov’s submissions to our Office. If the membership or operational status of the Council changes, its status with respect to FOIA could change as well.

As noted at the outset, we believe that the arguments raised in your Petition are not unreasonable. Indeed, we note that the formality of Executive Order Nine appears to suggest that the Governor is creating an advisory group of the type contemplated within FOIA’s broad definition of “public body.” We also recognize that the plain language of Executive Order Number Nine appears to provide flexibility to the Governor to add members outside of his Cabinet and staff. However, in light of the Governor’s status as a “body of one,” we cannot ignore the actual composition of the Council. We again note that extending *membership* in the Council beyond Cabinet members might vitiate the “body of one” exemption and render the Council a “public body” for purposes of FOIA.⁴⁹

⁴⁶ *Id.*

⁴⁷ *See, e.g., Del. Op. Att’y Gen.* 01-IB15, 2001 WL 1593115, at *2 (Oct. 23, 2001) (holding that FOIA’s open meeting provisions did not apply to budget discussions between county administrator, as a “body of one,” and his department heads and staff).

⁴⁸ *See, e.g., Del. Op. Att’y Gen.* 12-IIB07, 2012 WL 1680116, at *2 (May 4, 2012) (“The open meeting requirements of FOIA, at 29 Del. C. § 10004 subsection (h)(6), specifically excludes public bodies with one executive decisionmaking/voting “member,” such as the Governor’s Office or a Mayor’s Office.”)

⁴⁹ We believe the extension of membership beyond the Governor’s Cabinet is distinguishable from the invitation of one or more individuals to a particular meeting for a particular purpose.

CONCLUSION

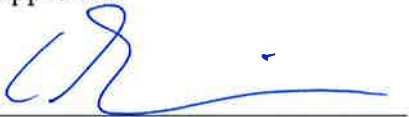
Based upon the foregoing, we conclude that the Family Services Cabinet Council is *not* a public body and, as such, it is not subject to the open meetings provisions of Delaware's Freedom of Information Act.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein
State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (via email)
Danielle Gibbs, Esq. (via email)
Chris Johnson, Esq. (via email)