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

**Attorney General Opinion No. 17-IB63**

**December 20, 2017**

**VIA EMAIL**

Ms. Sarah Bucic  
[sarah.bucic@me.com](mailto:sarah.bucic@me.com)

**Re: FOIA Petition Concerning the Delaware Department of Natural Resources and Environmental Control**

Dear Ms. Bucic:

We write in response to your correspondence, dated December 4, 2017 (“Petition”), requesting a determination of whether the Delaware Department of Natural Resources and Environmental Control (“DNREC”) violated Delaware’s Freedom of Information Act (“FOIA”) in connection with the June 6, 2017 Delaware Climate + Health Conference, which was hosted by the DNREC Division of Energy and Climate. We invited DNREC to submit a written response to the Petition. We received an initial response from DNREC on December 6, 2017 and a more detailed response on December 11, 2017 (collectively, “Response”). We have reviewed the Petition and the Response. For the reasons set forth below, it is my determination that DNREC did not violate FOIA as alleged in the Petition.

**RELEVANT FACTS**

On June 6, 2017, DNREC’s Division of Energy & Climate hosted the Delaware Climate Health Conference (the “Conference”) at the Buena Vista Conference Center located in New Castle, Delaware. The Conference “brought together health and medical professionals, environmental and social groups, and critical services stakeholders to explore the ways climate change is exacerbating challenges in public and environmental health in Delaware.”<sup>1</sup> The stated objectives of the conference were as follows: 1) “[u]nderstand how climate change affects and

<sup>1</sup> <http://www.dnrec.delaware.gov/energy/Pages/climatehealthconference.aspx> (last visited December 14, 2017).

threatens public health, with a focus on heat, air quality, and vector-borne diseases in Delaware,” 2) “[e]xplore ongoing adaptation initiatives in Delaware, highlighting projects that increase community and individual resilience to climate change effects on health,” and 3) “[p]articipate in stakeholder discussions to assess the need for a statewide vulnerability assessment.”<sup>2</sup> Approximately 70 participants and 10 speakers attended the conference.<sup>3</sup> Attendance at the conference was determined by invite only. Following the conference, DNREC published a Summary Report.<sup>4</sup> The report included a copy of the agenda, a conference overview, a summary of stakeholder discussions and comments, a summary of each speaker’s presentation, a list of attendees, and the speakers’ biographies.<sup>5</sup>

## DISCUSSION

You appear to allege that DNREC violated FOIA by failing to adhere to FOIA’s open meetings requirements in connection with the Conference. Specifically, you ask whether the Conference should have been publicly noticed (rather than noticed only to an identified subset of stakeholders) and whether minutes were required.<sup>6</sup> You emphasize that the Conference included discussions of strategies to help communities and vulnerable populations using taxpayer dollars.

By way of background, Delaware’s FOIA requires that “every meeting of all public bodies shall be open to the public,”<sup>7</sup> except those closed pursuant to delineated provisions of the statute.<sup>8</sup> FOIA requires public bodies to “give public notice of their regular meetings . . . at least 7 days in advance thereof.”<sup>9</sup> 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

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See <http://www.dnrec.delaware.gov/energy/Documents/Climate%20Health%20Conference/DE%20Climate%20+%20Health%20Report.pdf> (last visited December 14, 2017).

<sup>5</sup> *See id.*

<sup>6</sup> Your Petition included several questions regarding invitation and attendance at the meeting, which DNREC appears to have answered by way of an attachment to its Response. Importantly, this determination is limited to the question of whether a FOIA violation has occurred. As such, any questions falling outside the scope of FOIA are not specifically addressed herein.

<sup>7</sup> 29 *Del. C.* § 10004(a).

<sup>8</sup> See 29 *Del. C.* §§ 10004(b)-(d), (h).

<sup>9</sup> 29 *Del. C.* § 10004(e)(2).

of such notices available.”<sup>10</sup> Public bodies must also maintain minutes of their meetings, and the minutes shall be made available to the public for inspection and copying.<sup>11</sup> “Such minutes shall include a record of those members present and a record, by individual members . . . , of each vote taken and action agreed upon.”<sup>12</sup>

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
- (3) Is impliedly or specifically charged by any public official, body, or agency to advise or to make reports, investigations or recommendations.<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 action on public business either in person or by video-conferencing.”<sup>14</sup>

In its Response, DNREC states that the Conference was widely publicized and that there was no intent to discourage anyone from signing up or participating. DNREC maintains that the Conference was not subject to FOIA:

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<sup>10</sup> 29 Del. C. § 10004(e)(4).

<sup>11</sup> 29 Del. C. § 10004(f).

<sup>12</sup> *Id.*

<sup>13</sup> 29 Del. C. § 10002(h).

<sup>14</sup> 29 Del. C. § 10002(g).

The individuals attending the Conference would not constitute a “public body” as that term is defined in Section 10002(h) of FOIA. The attendees did not comprise a “regulatory, administrative, advisory, executive, appointive or legislative body of the State”. Nor did those attending the Conference comprise a “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 other entity of [sic] body”. The Conference was not “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”. It was merely a gathering of individuals to discuss and learn about topics of mutual interest, in an event sponsored by DNREC and its Division of Climate and Energy as an educational function.

The Climate Conference was not a “meeting” as defined by FOIA Section 10002(g). As the gathering had no formal status, the concept of a “quorum” does not apply. There was no intent to discuss or take action on public business, and indeed those in attendance lacked any authority to do so. This was an effort to share information and gather ideas in an informal setting, rather than to take action or conduct public business.

DNREC further argues that “[n]o purpose would be served by applying FOIA to an event to which it was not intended to apply.” I agree.

Under the circumstances, I am satisfied that the Conference was not a meeting of a public body. As we have previously noted, “Title 29, Delaware Code, Section 10002(h) defines a public body using a two-part test.”<sup>15</sup> First, we must determine whether an entity is a:

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 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

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<sup>15</sup> *Del. Op. Att’y Gen.* 17-IB54, 2017 WL 5256814, at \*3 (Oct. 10, 2017).

official of the State or otherwise empowered by any state governmental entity.<sup>16</sup>

If this part of the test is satisfied, we must next “determine whether the entity is supported by or expends public funds, or is impliedly or specifically charged by any other public official, body, or agency to advise or make reports, investigations or recommendations.”<sup>17</sup> An entity is not a public body unless both of these definitional elements are satisfied.

Here, neither the Conference attendees nor the presenters constitute a “legislative body of the State, or of any political subdivision of the State” as defined in Section 10002(h). As such, the first part of the two-part test has not been satisfied. It is therefore not relevant for purposes of this analysis that the Conference may have been supported in whole or in part by public funds. As neither the Conference attendees nor the presenters constitute a “public body,” the Conference was not subject to FOIA’s open meetings provisions.

### CONCLUSION

Based upon the foregoing, it is my determination that the Conference was not subject to FOIA.

Very truly yours,



LaKresha S. Roberts  
Chief Deputy Attorney General

cc: Aaron R. Goldstein, State Solicitor (via email)  
Michelle E. Whalen, Deputy Attorney General (via email)  
Ralph K. Durstein, III, Deputy Attorney General (via email)

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<sup>16</sup> *Id.* (quoting 29 Del. C. § 10002(h)).

<sup>17</sup> *Id.* (citing 29 Del. C. § 10002(h)).