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

**Attorney General Opinion No. 18-IB23**

**May 4, 2018**

**VIA U.S. MAIL AND EMAIL**

Ms. Amy Roe  
19 Sunset Road  
Newark DE 19711  
amywroe@gmail.com

**RE: Correspondence Regarding the City of Newark**

Dear Ms. Roe:

We write in response to your correspondence alleging that the City of Newark City Council (“Council”) violated the open meeting provisions of Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). Specifically, you allege that separate discussions between a Human Resources consultant and individual Council members amounted to a “meeting” of the Council held in violation of FOIA’s open meetings provisions. We treat your correspondence as a petition (“Petition”) for determination pursuant to 29 *Del. C.* § 10005(e). We invited the Council to submit a written response to your Petition. We received the Council’s response on April 16, 2018 (“Response Letter”)<sup>1</sup> and your reply thereto on April 18, 2018 (“Reply”). For the reasons set forth below, it is our determination that that the Council did not violate FOIA as alleged.

**RELEVANT BACKGROUND**

Section 2-11 of the City’s Code of Ordinances provides that “[t]he city manager shall be appointed by the council for an indefinite term.” On December 13, 2018, the Council hired a Human Resources consultant to assist the Council with its search for a new City Manager. The parties executed an agreement on January 23, 2018. Part of the consultant’s duties as charged by the Council was to “[w]ork with City Council to develop a candidate profile that meets the City’s

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<sup>1</sup> The City Solicitor submitted the Response Letter on behalf of the City.

desired qualifications and experience.”<sup>2</sup> The consultant provided Council members with a blank recruitment brochure to review prior to meeting individually with the consultant.

On February, 11, 2018, the consultant met individually with the following Council members individually: Councilman Mark Morehead, Councilman Chris Hamilton, Councilman Jen Wallace, and Councilman Jerry Clifton. On February 12, 2018, the consultant met individually with Councilman Stu Markham and Mayor Polly Sierer.<sup>3</sup> When meeting with each individual, the consultant did not relay any information regarding comments made by other Council members. After meeting with these individuals, the consultant prepared a draft City Manager Professional Announcement listing the attributes, a copy of which was posted to the City’s website on February 19, 2018.

On February 26, 2018, the Council discussed the draft listing at a public meeting for approximately twenty-three minutes.<sup>4</sup> On March 26, 2018, the Council discussed the position profile, advertising location, recruitment timeline, process, and dates for approximately one hour before hearing public comments on the matter.<sup>5</sup>

### **POSITIONS OF THE PARTIES**

In your Petition, you allege that the six individual meetings amounted to a “meeting” of the Council. Specifically, you allege that the individual meetings with five Council members and the Mayor amounted to a serial quorum. You note that public business – the hiring of the new City Manager – was discussed at each of the meetings. You argue that the facts here mirror the facts in *Del. Op. Att’y Gen. 96-IB02*,<sup>6</sup> wherein this Office determined that meetings between three *ad hoc* committees of the Council and the same University of Delaware staff to discuss essentially the same topics amounted to meetings of the Council that were held in violation of FOIA.

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<sup>2</sup> City of Newark Request for Proposal No. 17-04 at § C.1.

<sup>3</sup> Section 2-8(a) of the City’s Code of Ordinances provides that “[t]he mayor shall preside at meetings of the council and shall have a full voice and vote in the proceedings thereof.” According to the City, “These interviews were to aid the consultant in her preparation of a recruitment brochure listing by obtaining the following information from the Mayor and members of Council: 1) the positive aspects of the City of Newark; 2) the challenges facing Newark; and 3) the attributes a City Manager should possess.” Response Letter at 1.

<sup>4</sup> See February 26, 2018 City of Newark Delaware Council Meeting Minutes, at pp. 20-22, available at: <https://newarkde.gov/ArchiveCenter/ViewFile/Item/5503> (last visited May 4, 2018). The meeting minutes reflect that the Council invited public comment, but there was none.

<sup>5</sup> See March 26, 2018 City of Newark Delaware Council Meeting Minutes, at pp. 7-14, available at: <https://newarkde.gov/ArchiveCenter/ViewFile/Item/5565> (last visited May 4, 2018).

<sup>6</sup> 1996 WL 40923 (Jan. 2, 1996). We note that you inadvertently cited to *Del. Op. Att’y Gen. 96-IB01*, a determination unrelated to the matters at issue here.

In its Response Letter,<sup>7</sup> the City argues:

Unlike the 1996 case . . . , there was no consensus building, discussion, or exchange of views between Council members or third persons during this interview process. It was just one member of Council talking with the consultant about his or her views on these topics. Moreover, the views of Council members were not shared with other Council members during these interviews.

According to the City, the discussions “were simply information gathering sessions” and not “meetings” as defined by FOIA. The City also states: “The individual interview sessions were merely one step in the consultant’s process of gathering information for the recruitment brochure.” The City notes that other steps included a Facebook Live Video on February 12, 2018, public surveys, and two public Council discussions of the draft profile (on February 26 and March 26, 2018) with the opportunity for public comment. The City also appears to suggest that “public business” was not discussed during the interviews. Finally, the City argues that “[t]o hold that such one-on-one interviews constitute a violation of FOIA would lead to the absurd result that would effectively forbid an elected official from having *any* individual conversations involving Newark in private.”

In your Reply, you note that email correspondence specifically refers to the gatherings as “meetings.” You argue that the City’s argument that the meetings were information gathering sessions exempted from the definition of “meeting” is unavailing:

Information-gathering, either by or for City Council, is not exempt from the FOIA definition of meetings. Because the meetings were held in a “rolling quorum” style, where each meeting was separate and the Mayor and City Council were unable to directly communicate, the City of Newark appears to claim that information-gathering sessions are not meetings. The views of Council members, while perhaps not shared with other council members during the meetings, were shared in aggregate after the meetings, and information was shared and discussion was had between the individual members of Mayor and Council and the consultant, which were held off the record so the public could not witness or participate in our government in action.

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<sup>7</sup> The City included affidavits from each of the Council members and the Mayor.

You also challenge the City's suggestion that the topics of discussion were not "public business" as defined by FOIA, stating: "It would be completely inappropriate for a public body to write a contract, hire a contractor, use city staff to schedule meetings, and hold meetings at the city office building merely for the opportunity to socialize."<sup>8</sup> You also argue that FOIA does not contain a mechanism for a public body to conduct public business in earlier stages privately so long as there is a later opportunity for public participation. Finally, in response to the City's argument regarding an absurd result, you state:

If the Mayor and City Council are able to lawfully engage in numerous private discussions with the same entity over which they have decision-making authority off the record, without an agenda, minutes and public notice, that could lead to a situation where the public body is able to do all of their fact finding and ask all questions of developers about development projects or any other issue that requires City Council approval in private, and only hold meetings for the purpose of casting votes. That is not the intent of FOIA.

### **DISCUSSION**

As an initial matter, we note that the subject matter of the six individual discussions at issue was indeed "public business." "Public business" is defined as "any matter over which the public body has supervision, control, jurisdiction or advisory power."<sup>9</sup> The discussions involved the hiring of a City Manager. As the Council is responsible for appointment the City Manager per the City's Code of Ordinances, the discussions undoubtedly concerned "public business." The pertinent question, of course, is whether the discussions between the individual Council members and the consultant amounted to a "meeting" of the Council as defined by FOIA. As discussed more fully below, it is our determination that they did not.

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<sup>8</sup> You also note that, in response to a March 8, 2018 FOIA request for the consultant's notes, the City's FOIA Coordinator informed you that it was not in possession of any such notes, but that any responsive records would be exempted pursuant to the deliberative process/draft document privilege.

<sup>9</sup> 29 Del. C. § 10002(j).

For purposes of Delaware’s FOIA, “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>10</sup> With limited exceptions, meetings of public bodies shall be open to the public.<sup>11</sup>

Prior opinions of this Office have suggested that a series of discussions among less than a quorum of a public body may amount to a meeting.<sup>12</sup> Importantly, however, in each of those matters, there was a discussion *among* one or more members of the public body. Here, while we recognize that a quorum of the Council met individually with the consultant, we see no evidence of a discussion among any Council members on February 11 or 12, 2018, prior to the February 12, 2018 public meeting.<sup>13</sup> To the contrary, we note that the Council engaged in lengthy discussions at the February 26 and March 26, 2018 meetings regarding the very matters that they had individually discussed with the consultant.<sup>14</sup> As such, while we believe your concern to have been reasonable based upon the information available to you, we are not persuaded that the Council members’ individual discussions with the consultant amounted to a “meeting” under FOIA. Therefore, it is our determination that the Council did not violate FOIA as alleged.

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<sup>10</sup> 29 Del. C. § 10002(g).

<sup>11</sup> See generally 29 Del. C. § 10004.

<sup>12</sup> See, e.g., Del. Op. Att’y Gen. 17-IB09, 2017 WL 2345247, at \*5 (Apr. 25, 2017) (meeting occurred when a quorum of the Village of Arden Buzz Ware Village Center Committee discussed a reached consensus regarding a request via email) Del. Op. Att’y Gen. 03-IB11, 2003 WL 21431171, at \*4-5 (May 19, 2003) (exchange of emails among City of Newark Nominating Committee regarding public business violated FOIA); Del. Op. Att’y Gen. 96-IB05, 1996 WL 114716, at \*4 (Feb. 13, 1996) (Georgetown Town Council met in sub-groups to discuss, formulate and execute a memorandum); Del. Op. Att’y Gen. 96-IB02, 1996 WL 40923, at \*3 (series of three sub-quorum meetings between different groups of Council members and University of Delaware administrators to discuss the same topics amounted to ad hoc committee meetings under FOIA).

<sup>13</sup> See Del. Op. Att’y Gen. 17-IB08, 2017 WL 1317850, at \*4 (Apr. 3, 2017) (“As we have determined that there is no evidence of a discussion among a quorum of the Board, it is our determination that the Board did not violate FOIA as alleged in the Petition.”); see also Del. Op. Att’y Gen. 17-IB12, 2017 WL 2817928, at \*4 (June 19, 2017). (“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 . . . to constitute a quorum and are not attempts to evade FOIA’s public meeting provisions.”).

<sup>14</sup> These discussions provided ample opportunity for the public to observe the deliberative process of the Council. Similarly, while not dispositive to this analysis, we also note that the public was afforded ample opportunity to provide input and public comment.

**CONCLUSION**

For the reasons discussed above, it is our determination that the Council did not violate FOIA as alleged.

Very truly yours,



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Michelle E. Whalen  
Deputy Attorney General

APPROVED BY:



Allison E. Reardon, State Solicitor

cc: Paul E. Bilodeau, Esq. (via email)