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

**Attorney General Opinion 18-IB41**

**August 28, 2018**

**VIA EMAIL**

Craig O'Donnell, Dover Post  
Shannon McNaught, Dover Post  
c/o craigodonnell@doverpost.com

**RE: FOIA Petition Regarding the Dewey Beach Town Council**

Dear Mr. O'Donnell and Ms. McNaught:

We write in response to your correspondence received on August 9, 2018 alleging that the Dewey Beach Town Council ("Council") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. Since there was no discussion among the attending Commissioners at the Audit Committee's public meeting, we find that the Council has not violated FOIA as alleged.

**BACKGROUND**

Dewey Beach Town Council has five commissioners. One of the Town Council's standing committees, the Dewey Beach Audit Committee, held a public meeting on August 3, 2018. This Committee consists of four members plus a Commissioner Liaison. The parties do not dispute that the Committee properly posted a notice and agenda for the August 3, 2018 Committee meeting stating that it would: "[m]eet with the Town's outside auditors, TGM Group, to review a draft of the Town's fiscal 2018 (April 1, 2017 – March 31, 2018) audited financial statements" and "[m]eet with Town's outside auditors, TGM Group, to review Phase II of the Agreed Upon Procedures work." At the August 3, 2018 meeting, in addition to the Audit Committee, four Commissioners, excluding the Commissioner Liaison to the Committee, attended the meeting and posed questions and comments to the Audit committee members and the independent auditor.

You then sent a Petition to this Office, alleging that the presence of four members of Council at the Dewey Beach Audit Committee meeting violated the FOIA open meeting laws, because the meeting was not noticed as a Town Council meeting. By a letter received on August 14, 2018 (“Response”), the Town denied any violation of the open meeting laws, reasoning that the public had an opportunity to observe the discussions at the properly noticed Committee meeting, the attending Commissioners did not deliberate the matter among themselves, and the draft audit report prepared is not under the Council’s control. In your Reply, you responded that the Commissioners’ verbal comments during the meeting constituted part of the decision-making process, the conduct of the Commissioners appeared to indicate some Commissioners were texting during the meeting, and the audit report was under Council’s control.

### DISCUSSION

Delaware’s FOIA requires that “every meeting of all public bodies shall be open to the public,”<sup>1</sup> except those closed pursuant to delineated provisions of the statute.<sup>2</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>3</sup> “Public business is defined as “any matter over which the public body has supervision, control, jurisdiction or advisory power.”<sup>4</sup> This Office has found that in order to qualify as a “meeting” under FOIA, the quorum of members must have a discussion among the attending councilmembers.<sup>5</sup>

The Audit Committee meeting agenda clearly stated that the Committee members would meet with Town’s outside auditor, TGM Group, “to review Phase II of the Agreed Upon Procedures work.”<sup>6</sup> It is undisputed by the parties that four members, or a quorum of the Council, attended and offered questions and comments to the auditor and to the Audit Committee members. However, there is no allegation by either party that the attending Commissioners discussed or deliberated among themselves or reached a vote or consensus regarding public business. The purpose of FOIA is to allow citizens to monitor the government’s public business, and the public

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<sup>1</sup> 29 Del. C. § 10004(a).

<sup>2</sup> See 29 Del. C. §§ 10004(b)-(d), (h).

<sup>3</sup> 29 Del. C. § 10002(g).

<sup>4</sup> 29 Del. C. § 10002(j).

<sup>5</sup> *Del. Op. Att’y Gen.* 18-IB07, 2018 WL 1061277, at \*2 (Feb. 9, 2018) (determining that a gathering of a quorum of councilmembers at a press conference did not constitute a “meeting” under FOIA since the Office had “no evidence of a discussion *among the* attending councilmembers during the press conference.”) (emphasis in original).

<sup>6</sup> Response, Ex. A.

had the opportunity to do so here.<sup>7</sup> Thus, we do not find that the attendance of the Commissioners at this Audit Committee meeting violated FOIA as alleged.

In your Reply, you stated that Commissioners improperly shielded comments from the public during the meeting by texting each other. We find this statement is insufficiently vague when the only proffered evidence is general descriptions of the councilmembers' conduct during the meeting.<sup>8</sup>

### CONCLUSION

Based upon the foregoing, it is our determination that the Dewey Beach Town Council has not violated FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
Acting State Solicitor

cc: Fred Townsend, Esq. (via email)

<sup>7</sup> 29 *Del. C.* § 10001.

<sup>8</sup> Your Reply stated: “We believe the texting was part and parcel of the commissioners’ interactions during the meeting. Our reporter witnessed town commissioners obviously texting one another during the meeting...” In addition, you noted that you sent a FOIA request for those texts, but “Dewey Beach has claimed that there were no text messages on any topic of town business.” *See also Del. Op. Att’y Gen.* 16-IB18, 2016 WL 5888777, at \*5 (Sept. 29, 2016) (declining to consider the allegations of passing notes since the allegations were “too vague to warrant consideration”).