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

**Attorney General Opinion 19-IB17**

**March 25, 2019**

**VIA EMAIL**

Mr. Jeffrey C. Smith  
Dewey Citizens for Accountability  
[jcs@wpa.org](mailto:jcs@wpa.org)

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

Dear Mr. Smith:

We write in response to your correspondence filed on behalf of Dewey Citizens for Accountability alleging that the Town of Dewey Beach (“Town”) violated the open meeting requirements of 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. For the reasons set forth below, we find that the Town has not violated FOIA as alleged.

**BACKGROUND**

The Petition alleged numerous open meetings violations<sup>1</sup> arising from the Mayor’s request at a February 9, 2019 Town Council meeting and from a February 22, 2019 executive session. At

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<sup>1</sup> Your Petition included 10 numbered allegations or assertions. Our Office’s statutory authority is limited to determining violations of the FOIA statute. Allegations 2, 3, 6, and 9 regarding the timing of the request within the meeting, the notice to the Commissioners, the scope of the investigation, and the authority of the alleged group are outside the scope of FOIA and are not addressed in this Opinion.

the February 9, 2019 meeting, the Mayor stated that “the Cape Gazette wrote an article, Mr. Smith sent a FOIA, Mr. Bauer asked for more information about what happened with Seasons Pizza” and then requested that two Commissioners and the Town Manager “look into that FOIA.”<sup>2</sup> You allege this announcement constituted the formation of a “working group” to perform an investigation subject to open meeting requirements.<sup>3</sup> You argue that the formation of the working group was not on the meeting agenda nor was any other notice to the public that the topic would be addressed; that having the working group report back to the Mayor would constitute a quorum of Town Council members; that there had been no meetings scheduled or announced at the time this Petition was filed and that the investigation would be completed out of public view; and that if such an investigation was discussed during the executive session of the February 22, 2019 Town Council meeting, this matter would be an improper purpose for executive session.

The Town Solicitor sent a Response, asserting the Town has not violated FOIA. The Town argues that the Mayor’s request that an issue be “looked into” is a routine occurrence in public meetings. The Town further argues that an agenda must only state the major issues expected to be discussed and “no discussion, deliberation, motion, vote, authorized expenditure, or the like” took place with regard to this matter.<sup>4</sup> The Town asserts that the request could be made outside of a public meeting without violating FOIA and did not constitute a formal invocation of the Town’s authority to conduct formal investigations under its Charter. With regard to those allegations of what conduct could occur, the Town argues that speculation is not sufficient to support a finding of a violation. The Town asserts there was no evidence that the two Commissioners had reported to or met with the Mayor regarding this matter (or would do so), and thus, there is no evidence that a quorum of the Town Council met or took action out of the public view. The Town further denies that the executive session had been improper, and by separate submission to this Office, the Town’s counsel verified that this FOIA matter was not the subject of the February 22, 2019 executive session and submitted a copy of its executive session minutes *in camera*.

## DISCUSSION

Your allegations comprise three overall issues: 1) whether the individuals asked to “look into that FOIA” (“FOIA Investigation”) violated open meeting requirements; 2) whether the agenda provided sufficient notice of the Mayor’s announcement with respect to this request; and 3) whether the Town Council improperly discussed the FOIA matter in executive session. We address each issue in turn.

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<sup>2</sup> Petition.

<sup>3</sup> Petition.

<sup>4</sup> Response.

*Did the Individuals Involved in the FOIA Investigation Violate Open Meeting Requirements?*

During the Announcements portion of the agenda, the Mayor asked two Commissioners along with the Town Manager “to look into that FOIA.”<sup>5</sup> It is a violation of FOIA for a public body to conduct its meetings in private unless expressly permitted by the FOIA statute, but here, regardless of whether the individuals constitute a public body under FOIA, there is no evidence submitted in the record that these individuals have met or are about to meet.<sup>6</sup> Therefore, we do not have evidence to conclude that the individuals have violated or are about to violate FOIA on the basis of this record.<sup>7</sup>

*Is the February 9, 2019 Meeting Agenda Required to Include Notice of the Mayor’s Announcement of this FOIA Investigation?*

An agenda must provide for a “general statement of the major issues expected to be discussed at a public meeting.”<sup>8</sup> The agenda is intended to alert those with an “intense interest” in a subject that this subject will be considered.<sup>9</sup> Neither party alleges that the Town Council considered or discussed the substance of the FOIA Investigation; the Mayor made a brief announcement requesting individuals to work on this task. In addition, similar to this Office’s decision in Attorney General Opinion No. 17-IB48, we believe that a preliminary request for research or review of a matter of public business is not a “major issue to be discussed” that must be included on the meeting agenda.<sup>10</sup> As such, we find no violation.

*Was the FOIA Investigation Improperly Discussed at the February 22, 2019 Executive Session?*

You allege that the Town Council may have improperly discussed the FOIA Investigation in executive session at the February 22, 2019 meeting. The Town, through its counsel, has

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<sup>5</sup> Petition.

<sup>6</sup> 29 Del. C. § 10004.

<sup>7</sup> We note that in his announcement, the Mayor asked only two Commissioners to assist with the FOIA Investigation. As it is a five-member Council and there is no evidence that the Mayor included himself in the task, we find no basis to conclude that a quorum of Commissioners have met or are about to meet in violation of FOIA.

<sup>8</sup> 29 Del. C. § 10002(a).

<sup>9</sup> *Lechliter v. Becker*, 2017 WL 117596, at \*2 (Del. Ch. Jan. 12, 2017).

<sup>10</sup> *Del. Op. Att’y Gen. 17-IB48*, 2017 WL 4652338, at \*1-2 (Sept. 27, 2017).

confirmed that this matter was not the subject of the executive session on February 22, 2019.<sup>11</sup> As such, we find no violation in this regard.

### CONCLUSION

Based on the foregoing, it is our determination that the Town 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/ Allison E. Reardon

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Allison E. Reardon  
State Solicitor

cc: Fred Townsend, Esq., Town Solicitor (via email)

<sup>11</sup> *Del. Op. Att’y Gen.* 17-IB59, 2017 WL 6348853, at \*FN 12 (Nov. 20, 2017) (finding that the factual representations made by the public body’s legal counsel serve to satisfy the burden of proof).