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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB21

April 23, 2019

VIA EMAIL

Mr. Mark Betchkal
mark@yesmarketingllc.com

RE: FOIA Petition Regarding the City of Rehoboth Beach

Dear Mr. Betchkal:

We write in response to your correspondence alleging that the City of Rehoboth Beach (“City”) 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. Because the City affirmed it did not prepare agendas and minutes for the below-referenced meetings, nor was the City required to do so, we conclude that the City did not violate FOIA in denying your records request for the meetings’ agendas and minutes.

BACKGROUND

Your Petition alleges that the City violated FOIA by failing to produce agendas and minutes for two meetings held on October 29, 2018 and November 21, 2018 in response to your records request. The meetings allegedly were discussions of possible zoning changes for parking requirements with an applicant and because these issues came before the Planning Commission and the City Commissioners, you argue “open government requires access to what was discussed in these meetings.”¹ You state your property abuts the “proposed zone change area,” and you have “a right to know” what the City discussed with the applicant.²

¹ Petition.

² *Id.*

The City submitted a responsive letter through counsel on April 7, 2019 (“Response”). Without confirming or denying whether the meetings occurred or that each specified individual attended, the City argues that the factual allegations of the Petition, if true, do not establish a basis for finding a FOIA violation. At the October 29, 2018 meeting, the attendees allegedly included the City Manager, the Executive Director of Clear Space Theater, and several City department staff including the Chief of Police, Building and Grounds Department Supervisor, Building Inspector, and Accounting Supervisor.³ At the November 21, 2018 meeting, the alleged attendees included the Executive Director of Clear Space Theater, two City Commissioners, and a realtor. The City argues that these meetings do not constitute meetings of a public body under FOIA, and thus, meeting agendas and minutes were not required to be created. The City confirmed that agendas and minutes for these meetings do not exist. For these reasons, the City argues that no FOIA violation occurred.

You submitted a Reply on April 10, 2019, alleging that the meetings were not administrative but instead the City “coached” the applicant regarding the three public meetings that occurred around the time of the meetings.⁴ You believe that the October 29, 2018 meeting was an extension of the Planning Commission’s public meeting held on October 12, 2018 to discuss parking requirements. “If not considered an extension of the October 12, 201[8] Planning Commission, the October 29, 2018 meeting should be considered preparation for the November 9, 2018, Planning Commission meeting. . . .”⁵ Similarly, you argue that the November 21, 2018 meeting should be considered part of the November 9, 2018 Planning Commission meeting or the February 4, 2019 Commissioners’ Workshop Meeting. Ultimately, you assert that the City’s actions are a plan “to defraud the citizens . . . by failing to represent what the city code actual[ly] says in order to allow the applicant to avoid compliance to the code.”⁶ Further, you argue that “[s]o important are these meetings that there must be a public record,” and if such record does not exist, “the Attorney General should begin an investigation of how the City acts to assist or deter applicants for zoning and other considerations before and between the meetings of public bodies.”⁷

³ The Response stated that the Petition’s facts, upon information and belief, are not true. For example, the Accounting Supervisor has no recollection of attending the October 29, 2018 meeting. Based upon the City’s emails you received, the Reply indicates the attendees of the October 29, 2018 meeting were the same attendees alleged in the Petition except the Accounting Supervisor and the Building and Grounds Department Supervisor.

⁴ Reply.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* This request is outside the purview of FOIA.

DISCUSSION

Your Petition alleges that the City improperly denied your records request, as you believe the City was required to create agendas and minutes for these meetings. FOIA only requires public bodies to post agendas and maintain minutes of their meetings.⁸ Thus, we must first determine whether the meetings constituted meetings of a public body or whether the meeting attendees represent a quorum of an existing public body. To determine whether an entity is a public body under FOIA, we apply a two-part test.⁹ First, we must determine whether the entity is a “regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State,” which includes a “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.”¹⁰ If the first part of the test is met, we then must determine whether the entity is supported in whole or in part by any public funds, expends or disburses any public funds, or “is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations, or recommendations.”¹¹ Both parts of this test must be satisfied in order for an entity to be considered a public body under FOIA.

Neither meeting qualifies as a meeting of a public body, as the record does not reflect that this group was appointed or established by the General Assembly, the City Commission, or another public body or official, or otherwise empowered by a state governmental entity.¹² In addition, only two Commissioners allegedly attended the November 21, 2018 meeting, which does not constitute a quorum of the City Commission. Thus, the City was not required to create agendas and minutes for these meetings.

As the City affirmed that these agendas and minutes do not exist and on this record, we find the City was not required to create them, the City appropriately denied your records request.¹³

⁸ 29 Del. C. § 10004.

⁹ Del. Op. Att’y Gen. 18-IB28, 2018 WL 2994706, at *1 (Jun. 1, 2018).

¹⁰ 29 Del. C. § 10002(h).

¹¹ Id.

¹² It is well-settled that administrative staff meetings are not subject to the open meeting requirements, as a body of one is exempt from open meeting requirements when meeting with his or her staff members. See Del. Op. Att’y Gen. 17-IB37, 2017 WL 3500080, at *5 (Aug. 7, 2017) (concluding that a Governor-appointed Commission was not a public body and more akin to an administrative staff meeting when all Cabinet members were appointed to the Commission).

¹³ Del. Op. Att’y Gen. 18-IB51, 2018 WL 6591816, at *2 (Nov. 20, 2018) (“However, FOIA does not require a public body to create a new document in response to a records request.”); Del.

CONCLUSION

Therefore, we determine that the City has not violated FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Allison E. Reardon

Allison E. Reardon
State Solicitor

cc: Glenn Mandalas, Esq., Attorney for the City of Rehoboth Beach (via email)

Op. Att’y Gen. 02-IB18, 2002 WL 32100328, at *1 (Aug. 19, 2002) (“Under FOIA, a public body is not required to create a document that does not exist.”).