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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB54

September 26, 2019

VIA EMAIL

Mr. Keith Steck
steckke@gmail.com

RE: FOIA Correspondence Regarding Sussex County's Buffers and Wetlands Working Group

Dear Mr. Steck:

We write in response to your correspondence alleging that Sussex County's Buffers and Wetlands Working Group ("the Working Group") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") with respect to open meeting requirements. 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. In this Petition, you set forth three separate allegations. You allege Sussex County's Buffers and Wetlands Working Group posted notices of its meetings at an inappropriate location, the agendas of the Working Group were deficient, and that the Working Group minutes do not meet the statutory requirements of FOIA.¹ For the reasons set forth below, we conclude that the Working Group did not violate FOIA as you allege.

BACKGROUND

Following the consideration of a proposed ordinance related to the exclusion of wetlands from density calculations, the President of the Sussex County Council on December 4, 2018 asked that a working group be established "for consideration of buffers and for a recommendation to Council by the end of the First Quarter 2019."² Thereafter, the Working

¹ Petition.

² Response, p. 3.

Group “was assembled by the County Administrator” and consisted of various stakeholders from a variety of backgrounds, including County staff members and the Assistant County Attorney.³ The Council hired a consultant for the express purpose of facilitating the Working Group meetings, and the County Administrator explained to the consultant what was expected.⁴

The Working Group met monthly, from February 2019 to June 2019.⁵ The consultant that the Council hired led the discussions and communicated with the Working Group participants.⁶ The Petition alleges that “[a]lthough the County Council posted notices of meetings [of the Working Group] in the form of an agenda for each meeting, these notices were not posted where the meetings occurred at the County’s West Complex Building” and were instead posted “at the County Council’s office location in the County’s Administrative Building at 2 The Circle in Georgetown.”⁷ You challenge the sufficiency of the agendas solely because “the monthly agendas made no reference to a review and/or approval of the minutes of the meetings” in violation of the FOIA.⁸ Finally, the Petition alleges the minutes are defective insofar as they do not “identify each member’s business, organization, or other affiliation nor their expertise or their role as a ‘stakeholder’ such as farmer, real estate developer, environmentalist, or land use expert.”⁹ Finally, you allege the minutes are defective, as they do not contain a meaningful recitation of the discussions that were had by the Working Group members.¹⁰

The County submitted a letter through counsel on September 16, 2019 (“Response”). The County asserts that the Working Group is not a “public body” subject to FOIA’s open meeting requirements.¹¹ Specifically, the County asserts that the Working Group “was not created, selected, approved, appointed or ratified by County Council, and no Council Members are members of the Working Group.”¹² The County maintains that the Working Group

³ Response, p. 3.

⁴ Response, p. 3.

⁵ Petition, Exhibits 2-8. It appears that the Working Group met twice in March and twice in April.

⁶ Response, p. 3.

⁷ Petition, p. 4.

⁸ Petition, p. 4.

⁹ Petition, p. 6.

¹⁰ Petition, p. 6.

¹¹ Response.

¹² Response, p. 3.

membership was “assembled by the County Administrator” and not the Council.¹³ Finally, the County asserts that its primary role in the Working Group was “simply providing a location for the meeting, with limited participation in the discussions”¹⁴

The County next asserts that if the Working Group is found to be a public body, it complied with FOIA’s open meeting requirements. The County points out that the Petition concedes that when minutes of the Working Group were requested under the FOIA, minutes were provided.¹⁵ The County continues that, despite the Petition’s assertion that the minutes are not substantive, the minutes comply with the requirements of FOIA.¹⁶

On September 19, 2019, you submitted your rebuttal to the County’s position (“the Reply”) wherein you assert that the Working Group is a public body, citing in part to the Working Group’s reference to the FOIA on its meeting notices. The Reply also reiterates your position that meeting minutes should be required to include the title of each of the Working Group members.

DISCUSSION

The primary determination to be made is whether FOIA’s open meeting requirements apply to the Working Group. Deciding this question requires a determination of whether the Working Group is a public body, which is a two-part test.¹⁷ 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.”¹⁸ If the first part 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,

¹³ Response, p. 3.

¹⁴ Response, p. 4.

¹⁵ Response, p. 6.

¹⁶ Response, p. 6.

¹⁷ *Del. Op. Att’y Gen.* 18-IB28, 2018 WL 2994706, at *1 (June 1, 2018).

¹⁸ 29 *Del. C.* § 10002(h).

or recommendations.”¹⁹ Both parts of this test must be satisfied in order for an entity to be considered a “public body” under FOIA.

The County asserts that the Working Group is not a public body because the Council “did not make a motion to create or approve the Working Group or to appoint or endorse the chosen members” and further because the County Administrator chose the membership of the Working Group.²⁰ However, the Response makes clear that the Council President asked for the Working Group’s formation specifically to make recommendations back to the Council.²¹ If the Working Group was not created by official action of the Sussex County Council, the Council nonetheless called for its formation and hired a consultant specifically to facilitate the Working Group’s meetings. The lynchpin here however is the County’s concession that the Working Group “originated with the County Administrator” who selected all of the members of the Working Group.²² Where, as here, a body is comprised of members appointed by a “public official,” the body will be found to meet the first part of the “public body” test.²³ The Working Group’s membership was selected by the County Administrator and, as such, the first part of the two part test has been met. We turn then to the second part of the test, whether the Working Group is impliedly or specifically charged to advise or to make reports, investigations, or recommendations.

Here, we find that the Working Group was in fact charged with making reports to the Sussex County Council. The County concedes that the consultant hired by the Council to facilitate the Working Group meetings “periodically makes reports to the Council” and that on September 10, 2019 the consultant “provided a presentation to the Council in open session to provide Council and the public with the Working Group progress.”²⁴ Finding that both parts of the two-part test have been met, we determine that the Working Group is a public body.

We turn then to your allegations regarding the Working Group’s failure to comply with FOIA’s open meeting requirements. First, you allege the Working Group’s meeting notices were

¹⁹ 29 *Del. C.* § 10002(h).

²⁰ Response, p. 3.

²¹ Response, p. 3 (citing minutes of the December 4, 2018 meeting of the Sussex County Council).

²² Response, p. 5. *See also* Response, p. 3 (“In the audio of the February 5th meeting, Council Vice President Irwin G. Burton, III states to Todd Lawson, the County Administrator, ‘I applaud you in the group you have picked’”).

²³ *See Del. Op. Att’y Gen.* 18-IB21, 2018 WL 2266972, at *3 (Apr. 27, 2018) (finding the Seaford City Manager a “public official” for purposes of the two part test); *see also Del. Op. Att’y Gen.* 97-IB13, at * (Jun. 2, 1997) (finding a committee appointed by the Mayor of the City of Lewes a public body).

²⁴ Response, p. 4.

“not posted where the meetings occurred at the County’s West Complex Building” but were posted “at the County Council’s office location in the County’s Administrative Building at 2 The Circle in Georgetown.”²⁵ The FOIA requires conspicuous posting of the notice of meeting.²⁶ Such notice must be posted “at the principal office of the public body holding the meeting, or if no such office exists at the place where the meetings of the public body are regularly held”²⁷ Here, the record is clear that the Working Group’s notices were posted at the principal office of the County Council and the County Administrator.²⁸ Accordingly, there is no FOIA violation in the posting of the notices.

You next challenge the sufficiency of the agendas solely because “the monthly agendas made no reference to a review and/or approval of the minutes of the meetings” in violation of the FOIA.²⁹ The County concedes that minutes of the Working Group meetings have not yet been approved.³⁰ Because the County has not taken an action that was not included on its agenda, we find no FOIA violation.

Finally, the Petition alleges the minutes are incomplete as they do not “identify each member’s business, organization, or other affiliation nor their expertise or their role as a ‘stakeholder’ such as farmer, real estate developer, environmentalist, or land use expert.”³¹ You assert the minutes should contain a meaningful recitation of the discussions that were had by the Working Group members.³² The FOIA requirements for minutes are clear that minutes must include a recitation of the members present, and how each member voted.³³ Here, the Working Group was gathering input from a number of stakeholders across a wide berth of specialties, collecting that input, and providing reports back to the Council.³⁴ There is no indication on this record that any votes were taken at these meetings and, on this record, we cannot find a violation.

²⁵ Petition, p. 4.

²⁶ 29 *Del. C.* § 10004(e)(4).

²⁷ *Id.*

²⁸ Response, p. 5 (“Since the Working Group originated with the County Administrator, who is also a member, this location would also be considered the office of the Working Group.”)

²⁹ Petition, p. 4.

³⁰ Response, p. 6.

³¹ Petition, p. 6.

³² Petition, p. 6.

³³ 29 *Del. C.* § 10004(f).

³⁴ Response, p. 3.

Finally, the County indicates that it has now created a website for the Working Group and all past and future agendas will be posted online.³⁵ This website will also include draft minutes and PowerPoint presentations, and will soon include the September 10, 2019 PowerPoint and Summary Report of the Working Group. We encourage these and any other developments that help to increase transparency.

CONCLUSION

We determine that there has been no violation of FOIA as alleged in the Petition.

Very truly yours,

/s/ Patricia A. Davis

Patricia A. Davis
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: J. Everett Moore, Jr., Esquire
Attorney for Sussex County (via email)

³⁵ Response, p. 5.