



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB58

October 24, 2019

VIA EMAIL

Mr. Dion Wilson
Jdf0000@aol.com

RE: FOIA Petition Regarding the City of Wilmington

Dear Mr. Wilson:

We write in response to your correspondence alleging that the City of Wilmington (“City”) violated Delaware’s 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 regarding whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that the City violated FOIA by not permitting you to speak at its September 19, 2019 public comment period.

BACKGROUND

On September 19, 2019, you attended an open session in Council chambers identified as the “public comment period” preceding the City Council’s meeting.¹ The City Council Rules of Procedure indicate that this portion of the Council’s meeting is a meeting of the “Committee of the Whole” and occurs thirty minutes prior to the regular meeting of the City Council.² During this thirty-minute time, members of the public who sign up may speak for up to three minutes. The Council Rules specify that this public comment period will be televised and the President will establish and enforce rules to maintain the decorum of the chamber, including a prohibition on

¹ Response.

² *Id.*

obscene or profane language. Although you signed up to speak at the September 19, 2019 public comment period, the President ended the public comment period without calling you to speak, instead stating that further comments would not be permitted from anyone else on the list, due to the individual's "disrespect of Council Chambers and violation of FCC regulations."³ The City's response indicates that you then yelled "you ain't shit" and voluntarily left the Council chambers.⁴ Your Petition to this Office followed, in which you allege that the City violated FOIA by refusing to allow you to speak at the public comment period in violation of your First Amendment rights.

In its October 4, 2019 response, the City first argues that the public comment period does not constitute a "meeting" under FOIA, as no quorum of the City Council was present, the Council took no action, and any Councilmembers who attended did not discuss public business. Even if this public comment period is considered a meeting, the City argues it complied with FOIA by striking the right balance between allowing you to observe the Council meeting while enforcing Council rules calling for decorum. In support of the President's announcement that you previously disrespected the chamber, the City alleges that you attended the public comment period of the September 5, 2019 City Council meeting and, when afforded the opportunity to provide public comment, stated in part: "as far as Ciro Adams...he ain't shit."⁵ The City argues that because this language violated the Council Rules prohibiting profanity and "is potentially subject to Federal Communications Commission ("FCC") enforcement" due to the meeting's live broadcast, it was proper to prohibit you from speaking at the subsequent September 19, 2019 City Council meeting, noting it did not deprive you of the right to attend the meeting.⁶ The City included an affidavit from the Council President to support these factual allegations and cited to a relevant news article and the meeting video recordings available on the internet.

DISCUSSION

First, we must decide whether FOIA's open meeting requirements apply to the City's public comment period. The City Council and its Committee of the Whole, which is comprised of the same membership as the City Council, are both clearly public bodies subject to the FOIA statute.⁷ Although FOIA does not require a public body to accept public comments during an open meeting, a public body may include a public comment period on its regular meeting agenda. When

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *See Del. Op. Att'y Gen.* 17-IB54, 2017 WL 5256814, at *3 (Oct. 10, 2017) ("As an initial matter, we note that the [City of Wilmington] Council is a public body within the meaning of Delaware's FOIA.").

the comment period appears on the regular meeting agenda, it is subject to FOIA's open meeting requirements.

Here, the City holds a public comment period thirty minutes before the regular meeting of the City Council at the same day and the same location, designating it as a meeting of the Committee of the Whole during which public comments can be heard on "items on that [upcoming Council] meeting's agenda and/or City business."⁸ The Committee of the Whole is comprised of the same Councilmembers as the regular Council that meets immediately after.⁹ As such, we can find no meaningful distinction between Council's practice of holding a stand-alone meeting for public comments preceding a regular meeting and the inclusion of this public comment period on the regular City Council agenda. The lack of discussion at the meeting is not dispositive, as agenda item discussions may occur in the subsequent regular Council meeting and new items are not permitted for substantive discussion in any comment period, regardless of its place on the agenda. Thus, we conclude that this public comment session is subject to the open meeting requirements of FOIA and is, for practical purposes, indistinguishable from the City Council meeting that immediately follows. The City should take all steps necessary to ensure this public comment period complies with the open meeting requirements of FOIA.

Second, we determine whether the bar on your participation was permissible under FOIA.¹⁰ A public body is permitted to remove, and therefore bar the speech of, any person "who is willfully and seriously disruptive of the conduct of such meeting."¹¹ The profanity used at the September

⁸ Response, Affidavit of City Council President Hanifa Shabazz.

⁹ The Council's Rules indicate this public comment period is intended to be held by the Committee of the Whole, meaning a quorum of members should have been in attendance.

¹⁰ A public body is not required to permit public comments at an open meeting. *Reeder v. Dep't of Ins.*, 2006 WL 510067, at *12 (Del. Ch. Feb. 24, 2006) ("... FOIA does not mandate that public bodies allow for comments at any or all meetings."). However, when a body does permit public comment, laws other than FOIA, such as the First Amendment, operate "to encourage fair and equitable behavior by administrative agencies." *Id.* The Delaware Court of Chancery noted FOIA does not authorize the judiciary to create rules to regulate public participation at an open meeting, noting that "the mere fact that FOIA opens the door to public attendance does not mean that it contains an implicit license for the judiciary to invent a common law of public participation for public bodies." *Id.* The plaintiff in *Reeder* complained about the lack of opportunity to ask questions and his opportunity to speak being limited to five minutes. The Court did not address First Amendment issues arising from the plaintiff's FOIA claims, instead pointing out that if a public body allows comment at a public meeting, FOIA does not have time requirements for speech or require an opportunity for the plaintiff to ask questions. The Court refrained from creating such requirements, stating: "[i]f the General Assembly wished to include requirements for public participation in FOIA, it could have done so. It plainly did not, and it would be improper for me to write into FOIA requirements that are clearly not there. . . ." *Id.* at 13.

¹¹ 29 *Del. C.* § 10004(d) ("This section shall not prohibit the removal of any person from a public meeting who is willfully and seriously disruptive of the conduct of such meeting.").

5, 2019 meeting did not rise to the level that City deemed it necessary to remove you from chambers at that time. Instead, the City prevented you from speaking at the September 19, 2019 meeting due to your previous use of profanity. The second alleged incident occurred after the President stated you would be barred from speaking at the September 19, 2019 meeting. Accordingly, the second disruption could not have been the basis upon which the City determined you were disruptive. We do not believe the FOIA statute authorizes a pre-emptive bar on your participation in the public comment session in these particular circumstances.¹²

If your behavior had been willfully and seriously disruptive of the City Council's public comment portion of its meeting, FOIA permits the City to remove you. Moreover, a "public body is not without remedy to protect the public safety when it has good reason to believe that a citizen might do harm to persons or property at a public meeting," such as obtaining a restraining order or other judicial intervention.¹³ The factual record here does not support the City's pre-emptive decision to bar your participation from the public comment period on September 19, 2019 and reflects other judicial intervention may be sought if the City feels that it is appropriate.

¹² Unlike Attorney General Opinion No. 16-IB18, the City seeks to enforce a rule pre-emptively based on the past content of your speech. *Del. Op. Att'y Gen.* 16-IB18, 2016 WL 5888777 (Sept. 29, 2016). Accordingly, we confine our analysis to the allegations pertaining to FOIA's open meetings provisions. Our conclusion here is consistent with a previous Attorney General Opinion finding that a substantial degree of disruption is required to remove a citizen and that FOIA does not allow the public body to bar a citizen from a meeting based on the belief that "the citizen might become disruptive." *Del. Op. Att'y Gen.* 04-IB15, 2004 WL 2639713, at *4 (Sept. 10, 2004).

¹³ *Del. Op. Att'y Gen.* 04-IB15, 2004 WL 2639713, at *4.

CONCLUSION

For the reasons set forth above, we determine that the Committee of the Whole’s public comment period held immediately prior to regular City Council meetings are “public meetings” subject to the open meeting requirements and recommend the City take all steps necessary to comply with FOIA for future meetings. Based on this record, we further conclude that the City violated FOIA by prohibiting your opportunity to speak at the September 19, 2019 public comment period.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Marlane White, Senior Assistant City Solicitor, City of Wilmington (via email)