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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB01

January 3, 2020

VIA EMAIL

The Honorable John Kowalko
State Representative, 25th District
John.kowalko@delaware.gov

RE: FOIA Petition Regarding the Delaware Prosperity Partnership

Dear Representative Kowalko:

We write in response to your correspondence alleging that the Delaware Prosperity Partnership (“DPP”) 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. As set forth below, we conclude that DPP is not a public body and is not required to respond to your FOIA request.

BACKGROUND

In 2017, the General Assembly enacted legislation adopting significant revisions to the structure of the State’s economic development initiatives.¹ The revisions included the elimination of the Delaware Economic Development Office and the establishment of an economic development division under the Department of State, designated as the Division of Small Business. In this legislation, the General Assembly also created a Public/Private Partnership for economic development purposes, expressly stating:

The General Assembly further finds and declares that the creation of a Public/Private Partnership to attract large employers, innovative enterprises and international business opportunities while transferring duties formerly performed by the Delaware Economic Development Office to a division within the Department of State is in the best interest of the State to foster development in an increasingly competitive economy.²

¹ Del. H.B. 226, 149th Gen. Assem., 81 Del. Laws ch. 49 (2017).

² 29 *Del. C.* § 8701A.

The “Public/Private Partnership” is defined in the Code specifically as a nonprofit corporation that is “not established by the General Assembly.”³ The Delaware Code further states that “the Public/Private Partnership shall be governed by a board of directors.”⁴ The board of directors must contain at least 15 members, as follows: 1) Governor as co-chair; 2) a co-chair selected by the Governor from a list of recommendations; 2) two members (one from each majority and minority party) from the Senate appointed by the President *Pro Tempore*; 3) two members (one from each majority and minority party) from the House of Representatives appointed by the Speaker of the House; and 4) at least nine additional members appointed by the Governor, five of which are also selected from a list of recommendations. The Governor may appoint additional members as necessary. In summary, the Governor, President *Pro Tempore* and Speaker of the House appoint every member of the board of directors, other than the co-chair position reserved for the Governor.

The Code further specifies that the Public/Private Partnership formed “shall have the following responsibilities,” which include working with the Division of Small Business to assist early stage technology enterprises and entrepreneurs in applying for grants and other financial incentives, recruiting employers, developing marketing strategies, establishing recruiting, providing guidance to start-up business, conducting research, expanding international business opportunities, in addition to other activities that encourage economic development of the State.⁵ Two explicit references to the FOIA statute appear in connection with records of the Public/Private Partnership. First, the Public/Private Partnership is tasked with submitting annual reports to the Governor and General Assembly, including the IRS Form 990 tax returns, audited financial reports, and conflict, audit, and expense policies; the statute specifically notes that these reports shall be subject to the FOIA statute. Second, any director of the Public/Private Partnership who is not a “public officer” subject to a financial information filing requirement must still submit his or her financial information to the Governor and General Assembly on a form similar to those required by the Public Integrity Commission, and the Code notes that these forms “shall not constitute public records subject to [the FOIA statute].”⁶

Pursuant to these statutory provisions, the Delaware Prosperity Partnership was established on August 15, 2017 as a nonprofit nonstock corporation.⁷ DPP was granted two million dollars in State funding through the FY2020 Bond and Capital Improvements Act.⁸ On August 27, 2019,

³ 29 Del. C. § 8702A(6).

⁴ 29 Del. C. § 8706A(a).

⁵ 29 Del. C. § 8706A(c).

⁶ 29 Del. C. § 8706A(f).

⁷ Response.

⁸ Del. S.B. 180, 150th Gen. Assem., 82 Del. Laws ch. 86 (2019).

you submitted a request to DPP for “all treasurer reports that have been presented to the DPP Board of Directors” and “any documents related to the 2020 budget process and upcoming investor support efforts as presented to the DPP Board of Directors on May 13, 2019.”⁹ DPP replied to this request by asking for an opportunity to meet with you. You reiterated a second request for this same information on September 16, 2019. DPP responded again, attempting to arrange a meeting. Another reply from DPP followed, explaining that DPP is not a public body and that the records you seek are not subject to FOIA; DPP pointed you to publicly available records that may be responsive to your request and again offered an opportunity to meet. Your Petition followed, asserting that DPP is a public body that must respond to your FOIA request.

On November 25, 2019, DPP submitted a response to this Petition, arguing it is not a public body (“Response”). DPP contends that it does not meet the two-part test for public bodies. DPP argues that it is a nonprofit corporation established and created “pursuant to the authority in the [Delaware General Corporation Law].”¹⁰ DPP argues that Delaware Code is clear that it was not intended to be treated as a public body, as the Code expressly states that DPP was not created by the General Assembly and DPP cites specific legislative testimony and debate purported to support this interpretation. DPP further asserts it is not a “municipality, political subdivision, instrumentality, regulatory, administrative, advisory, executive, or legislative body of the State or of any political subdivision of the State.”¹¹ In addition, DPP argues that the creation of DPP is not the result of an appointment by any body or public official of the State, acknowledging that the Governor merely “may select certain members of the DPP’s board of directors either directly or from recommendations provided by non-governmental entities.”¹² DPP argues that the receipt of funds alone does not make an entity a public body under FOIA. Finally, DPP argues that the General Assembly intended to exclude all DPP documents not specifically mentioned in Code from the definition of “public record” under FOIA, noting “[h]ad the General Assembly intended to subject the DPP to the entirety of FOIA it would not have needed to specifically identify certain documents and records as all documents, records, etc. of the DPP would fall under the authority of FOIA.”¹³

DISCUSSION

⁹ Petition.

¹⁰ Response.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

FOIA’s public records requirements only apply to public bodies. To determine if an entity is a “public body,” a two-part analysis is required.¹⁴ The first inquiry is 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.”¹⁵ 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 to advise or to make reports, investigations, or recommendations. Public funds are defined as “those funds derived from the State or any political subdivision of the State.”¹⁶

Here, DPP’s authorizing statute provides that it is a “nonprofit corporation not established by the General Assembly.”¹⁷ FOIA’s definition of public body expressly includes entities “established by an act of the General Assembly.”¹⁸ As this language specifically addresses this aspect of FOIA’s public body definition by stating DPP is “not established” by the General Assembly, this language evidences a legislative intent to exclude DPP from FOIA.¹⁹ As further evidence of this intent, the statute states three categories of records *will* be subject to FOIA, including the IRS Form 990 returns, audited financial reports, and the conflict, audit, and expense policies. Such a statement would be surplusage if the General Assembly intended all of DPP’s records be subject to FOIA.²⁰ We therefore conclude on the basis of this specific statutory

¹⁴ *Del. Op. Att’y Gen.* 18-IB28, 2018 WL 2994706, at *1 (Jun. 1, 2018).

¹⁵ 29 *Del. C.* § 10002(h).

¹⁶ 29 *Del. C.* § 10002(k).

¹⁷ 29 *Del. C.* § 8702A.

¹⁸ 29 *Del. C.* § 10002(h).

¹⁹ We distinguish the present matter from our determination in *Del. Op. Att’y Gen.* 18-IB35, 2018 WL 3947263, at *2 (Aug. 7, 2018). In that matter, Wilmington Housing Partnership (WHP) did not dispute that it was established by the City of Wilmington (which is itself a public body under FOIA). In the present case, the General Assembly expressly declared that DPP was *not* so established and we are compelled to accept that declaration.

²⁰ *See Keeler v. Harford Mutual Ins. Co.*, 672 A.2d 1012, 1016 (Del. 1996) (“In determining legislative intent in this case, we find it important to give effect to the whole statute and leave no part superfluous.”). We recognize that this principle is not uniform in Delaware Code, as other statutes identify certain records of a public body as public records subject to FOIA. For example, the Code states that the Special Law Enforcement Assistance Fund (SLEAF) Committee is a public body and “[a]ll records, applications, approvals, authorizations and reports required by this subchapter shall be subject to Chapter 100 of Title 29.” 11 *Del. C.* § 4113. In addition, the Code

language, and the clearly expressed intent of the General Assembly,²¹ that DPP is not a public body and not obligated to respond to your records requests.²²

CONCLUSION

For the reasons set forth herein, we conclude that DPP is not a public body and is therefore not legally obligated to respond to your FOIA requests.

Very truly yours,

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Elio Battista, Jr., Esquire
Attorney for Delaware Prosperity Partnership

declares that a Board of Directors of a charter school is a public body and also states that the annual reports “shall be public records pursuant to Chapter 100 of Title 29.” 14 *Del. C.* §§ 503, 513.

²¹ During both chambers’ floor debates leading to the passage of DPP’s organic statute, a Deputy Attorney General responded to the same concerns raised by this Petition. In each instance, the Deputy Attorney General testified that the language of the bill renders DPP outside of FOIA’s definition of public body. Following that dialogue about DPP’s status as a non-public body, both chambers of the General Assembly overwhelmingly passed the bill without further amendment.

²² See *State ex. rel. Biden v. Camden-Wyoming Sewer and Water Authority*, 2012 WL 5431035, at *3 (Del. Super. Nov. 7, 2012) (concluding that Authority is a public body due to the explicit statutory language stating so in “curative legislation,” despite the fact that the Authority may not fully comport with the rest of the definition of “public body”).