



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. 20-IB21

July 22, 2020

VIA EMAIL

Councilmember Vicki L. Carmean
Fenwick Island Town Council
vlcarmean@verizon.net

RE: FOIA Petition Regarding the Fenwick Island Town Council

Dear Councilmember Carmean:

We write in response to your correspondence alleging that the Fenwick Island Town Council 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.

The Petition involves the approval of a liquor license for an outdoor pool bar with music. The Petition alleges that multiple FOIA violations occurred, including certain unauthorized correspondence sent by the Town Manager and other staff about this matter, certain unauthorized statements by another Councilmember on behalf of the Town Council, certain Town officials' negotiations with the owner, and the Town Manager's unilateral decision to interpret the Code outside of a Council meeting. The Petition states in part, as follows:

Once again, I am not filing this complaint with the expectation that the FOIA Office will rule on either the interpretation of the Code of the Town of Fenwick Island or whether a liquor license should be issued. My concern is that I believe the Delaware Open Meetings laws have been violated by completely circumventing the prerequisite for a Town Council meeting, discussion, and a vote on a Town resolution to allow an open pool bar with music/live entertainment which appears to be in contradiction to our zoning ordinances. To what extent do the Town Manager and Town Solicitor have the authority to send legally binding letters

setting forth a new interpretation of the Code without reviewing these ideas directly with the Council Members first in a public or even executive setting and receiving written authority to alter such ordinances and/or submitting the new interpretation to the public via two readings and a vote?¹

The Petition also states your belief that “under FOIA, all documents that express the will of the people must be backed up by minutes, notes, or other documentation as to who made the decision and why.”²

The crux of the Petition is that the Town Council did not discuss in a public meeting the approval of the open pool bar and that certain Town officials made statements on behalf of the Town, allegedly without authority to do so. We offer no opinion on those allegations as the legality and appropriateness of such matters are outside the scope of Section 10005. “To be clear, FOIA ‘does not determine when a public body must take up a matter of public business.’”³ As such, the questions of whether the Town officials should have discussed the open pool bar at a public meeting and whether Town officials appropriately spoke on behalf of the Town are matters outside the scope of FOIA.

Based on above, we find that the Town has not violated FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Mary Schrider-Fox, Esq., Town Solicitor

¹ Petition.

² *Id.*

³ *Del. Op. Att’y Gen.* 17-IB09, 2017 WL 2345247, at *4 (Apr. 25, 2017) (quoting *Del. Op. Att’y Gen.* 07-IB24, 2007 WL 4913657, at *3 (Dec. 27, 2007)).