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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB27

November 9, 2020

VIA EMAIL

Keith Steck
steckke@gmail.com

RE: FOIA Petition Regarding Delaware Department of Natural Resources and Environmental Control

Dear Mr. Steck:

We write in response to your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”) 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 below, we find that that DNREC did not violate FOIA as alleged.

BACKGROUND

Pursuant to its regulatory authority, DNREC is authorized to hold public hearings for permit applications. DNREC’s in-person permit application hearings typically follow the same format. A hearing officer, who is delegated authority by the Secretary of DNREC, presides over the hearing. DNREC staff first makes a presentation about the application and the regulatory program and gives preliminary comments. The applicant is then given an opportunity to make a presentation, followed by an opportunity for members of the public to give brief comments, limited to no more than five minutes per person. After the hearing concludes, the public is afforded an additional opportunity to submit written public comments into the record for a designated period of time. In light of the public health threat posed by COVID-19, DNREC held virtual public hearings on July 14, 2020 and July 21, 2020 regarding permit applications for the Delaware City Refining Company and Croda, Inc., respectively. These two virtual hearings followed this format,

except the hearing officer did not accept live comments, but permitted a period for written comments after the hearing.

This Petition followed, in which you allege that DNREC violated FOIA by failing to accept live public comment at both hearings, even though the applicants were given the opportunity to make a live presentation at the hearings. The Petition states that both hearings permitted written public comments until July 31, 2020. However, you argue “[b]ecause DNREC allowed CRODA and the Delaware City Refinery to present public comment at these hearings, DNREC should have included a reasonable period of public participation open to all citizens, which [it] did not.”¹

DNREC replied to the Petition through counsel (“Response”). Although DNREC is a public body, DNREC argues that not all meetings of DNREC are subject to FOIA. DNREC’s counsel explains that “Section 6004 of Title 7 provides the authority for DNREC to present permit applications at public hearings if the Secretary receives a meritorious request, or if the Secretary deems a hearing to be in the best interest of the State.”² DNREC argues that these hearings are not “meetings” as defined by FOIA, because there is no quorum present to discuss or decide on public business. DNREC asserts that the decision-maker, the Secretary, appoints a hearing officer to preside over the hearing, but regardless, the Secretary or his delegate is a “body of one.” DNREC contends that without a quorum, there can be no “meeting” as contemplated by FOIA. In addition, DNREC argues, even if FOIA applied, the statute does not require a public body to conduct a public comment period. Contrary to the Petition’s assertion, DNREC states that the applicant is not a member of a public and gives a presentation to “give the public more information on which to base their public comments.”³ As such, DNREC contends no inequitable treatment of citizens occurred at the hearings.

DISCUSSION

A public body having only one member is exempt from FOIA’s open meeting requirements.⁴ Our Office has previously determined that while DNREC is a public body subject to the records requirements, the Secretary or his or her designee, as a single executive decision-maker, is exempt from FOIA’s open meeting requirements when conducting a public hearing for a permit.⁵ Consistent with that determination, we find the July 14, 2020 and July 21, 2020 permit

¹ Petition.

² Response.

³ *Id.*

⁴ 29 *Del. C.* § 10004(h)(6).

⁵ *Del. Op. Att’y Gen.* 13-IB04, 2013 WL 5615222, at *2-3 (Sept. 27, 2013) (“Given that DNREC is headed by a single executive officer – namely, the Secretary – rather than a ‘group’ of individuals, DNREC is not subject to the open meeting provisions of FOIA.”).

application hearings are not subject to the open meeting requirements of FOIA. Accordingly, there can be no FOIA violation.

CONCLUSION

For the reasons set forth above, we find that DNREC did not violate FOIA as alleged in the Petition.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Devera B. Scott, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General