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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB28

November 9, 2020

VIA EMAIL

Councilmember Samuel L. Guy
Wilmington City Council
slguy@wilmingtonde.gov

RE: FOIA Petition Regarding the City of Wilmington

Dear Councilmember Guy:

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 did not violate FOIA as alleged.

BACKGROUND

This Petition pertains to the City’s actions with respect to one of its councilmembers. A councilmember was notified that he was barred from Council, due to residency requirements. In July, the President of the City Council sent the councilmember a letter to advise him that his position had been forfeited. On August 20, 2020, the City Council held a virtual public meeting and the Petition alleges the Councilmember was denied the access codes to participate. In addition, the Petition alleges that the City Council planned to do the same for the August 27, 2020 meeting. According to the City, the Council granted the councilmember’s request for a public hearing about his qualifications to hold the position.

This Petition contains several arguments about how this process violated FOIA. First, you argue the City Council President violated FOIA in July by conducting a legislative meeting “of

one person” without a quorum of the Council present.¹ You argue the forfeiture of a councilmember’s office is an item of public business that must be addressed in a public meeting of Council, citing to the City Charter. You contend another violation occurred on August 20, 2020 when City Council held a virtual public meeting, but the Mayor and Council President denied one councilmember a copy of the login information necessary to participate, a copy of the meeting agenda and notice, and his paycheck. Citing “hornbook law,” you argue that FOIA requires the topic of the councilmember’s revocation of office be addressed in a Council meeting and the information regarding the virtual meeting access be included on the agenda itself.² You assert the FOIA statute does not authorize a pre-emptive bar on a public body member’s participation in the public body’s meetings. You argue this violation would be repeated at the then-upcoming meeting scheduled for August 27, 2020. Thus, you contend “all actions taken regarding City Council Member . . . and during the meetings he has been excluded from in violation of FOIA should be void.”³

The City’s counsel replied to your Petition on October 19, 2020 (“Response”). The City explains the Council President sent a letter notifying the councilmember of his disqualification to serve and also granted him a public hearing on the matter. The City points out that the open meetings do not apply to a public body with only one member. The City argues that the City Council President is acting in her administrative role, the chief administrator for the City Council, by serving this councilmember with the forfeiture notice. In this administrative role, the City contends the Council President is a public body of one who is not required to satisfy open meeting requirements. Moreover, the City argues that although you may disagree with the Council President’s position that the forfeiture was not discretionary under the City Charter, this issue is not properly addressed by petitioning the Attorney General through the FOIA Petition process.

DISCUSSION

The Petition alleges that the City Council should have discussed the forfeiture of the councilmember’s seat at a public meeting. However, FOIA does not require public bodies to take up certain items of public business at a public meeting.⁴ Thus, we do not find a violation on this basis.

In addition, the Petition alleges that the Council President’s transmission of the letter to the councilmember violated FOIA. FOIA requires certain open meeting requirements be satisfied when the quorum of a public body gathers to discuss or take action regarding public business or

¹ Petition.

² *Id.*

³ *Id.*

⁴ *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)).

by videoconferencing.⁵ The threshold inquiry is whether the communications involved a quorum of the public body; a single person cannot be subject to the open meeting requirements.⁶ “Importantly, however, a complaining party must make a *prima facie* showing that a meeting may have occurred, at which point the burden then shifts to the public body to prove that no FOIA violation occurred.”⁷ In this case, the Petition presents no evidence of a meeting. The only evidence presented is that the City Council President sent a letter, which does not meet the threshold for a *prima facie* showing that a meeting occurred, nor can the Council President acting alone, whether properly or not, trigger open meeting requirements. As such, we cannot determine on this factual record that a FOIA violation took place.

The gravamen of the Petition’s remaining allegations is that the Mayor and City Council President lacked authority to take certain actions - forfeit a councilmember’s seat, pre-emptively bar him from public meetings, or refuse to provide a paycheck or copies of certain materials. These matters of municipal law, concerning the authority of the Council President or Mayor, are outside the scope of the FOIA statute, and thus, we make no determination regarding these issues.⁸

CONCLUSION

For the reasons set forth above, we determine that the City has not violated FOIA as alleged in the Petition.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

⁵ 29 *Del. C.* §§ 10002(g), 10004.

⁶ 29 *Del. C.* § 10004(h)(6) (exempting public bodies with one member from open meeting requirements).

⁷ *Del. Op. Att’y Gen.* 17-IB08, 2017 WL 1317850, at *3 (Apr. 3, 2017); *see also Del. Op. Att’y Gen.* 05-IB10, 2005 WL 1209240, at *2 (Apr. 11, 2005).

⁸ *See, e.g., Del. Op. Att’y Gen.* 16-IB13, 2016 WL 3462344, at *6 (Jun. 8, 2016); *Del. Op. Att’y Gen.* 15-IB06, 2015 WL 5014135, at *10 (Aug. 19, 2015); *Del. Op. Att’y Gen.* 07-IB25, 2007 WL 4941957, at *2 (Dec. 27, 2007).

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: John D. Hawley, Assistant City Solicitor