



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. 21-IB16

July 6, 2021

VIA EMAIL

William Pickett
wpickett@webname.com

RE: FOIA Petition Regarding the Governor's Council on Agriculture and the Delaware Council on Food and Farm Policy

Dear Mr. Pickett:

We write in response to your correspondence alleging that the Governor's Council on Agriculture and the Delaware Council on Food and Farm Policy (collectively hereinafter, "Councils") 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 both Councils are public bodies and have violated FOIA by failing to strictly adhere to the open meeting requirements.

BACKGROUND

This Petition concerns two entities involved with Delaware agriculture and alleges that both Councils failed to post meeting notices, agendas, or minutes in accordance with FOIA. As remediation, you ask our Office to mandate FOIA training for the Delaware Department of Agriculture staff and both Councils and require the Councils post online minutes of all past meetings.

On June 16, 2021, counsel responded on behalf of both Councils ("Response"). The attorney gives a brief background of each entity and acknowledges they both qualify as "public bodies" as defined by FOIA. The Governor's Council on Agriculture was formed by statutory mandate in 1970.¹ The statutory provision, 29 *Del. C.* § 8108, provides that seven members are appointed by the Governor and receive no compensation. The Council advises, recommends, and refers to the Secretary matters which are of "departmental concern" and must consider other matters that the Governor or Secretary refer. The Council on Agriculture had only met

¹ Response.

“sporadically in the last couple of years” and has not created notices, agendas, or minutes, noting “[m]eetings have mostly entailed the Secretary reporting on departmental and legislative information which is readily available to the public on either the [Department] or the General Assembly’s websites.”²

The Department also acknowledges that the Delaware Council on Food and Farm Policy (“DCFFP”) is a public body, explaining that it was formed in response to a 2016 Report entitled “Connecting Healthy Farms to Healthy Delawareans: A Farm and Food Report” that the Department and the University of Delaware’s Center for Research in Education and Social Policy drafted together. In 2018, the Department’s Deputy Principal Assistant convened a group of stakeholders and asked for volunteers; those volunteers were officially appointed by the Secretary of the Department to serve on this Council. Council members do not receive compensation and are tasked with advising the Secretary with regard to various matters related to food production, policy, distribution, access, and nutrition. The Response concedes that the DCFFP is a public body because “it was established by the [Department Secretary], its members were appointed and include non-employees of the Department, and they were specifically charged to advise him.”³ The Department points out that the DCFFP maintains a website with reports created by DCFFP, information on the farm and food policy within the State, and all past meeting minutes and presentations. The Department argues that although the DCFFP has not posted its meetings on the designated State of Delaware website, the DCFFP has met the spirit of the law by engaging the public on its own website. The DCFFP maintains minutes of its meetings on its own website, which it alleges is in compliance with FOIA. For both Councils, the Response committed to complying with FOIA’s open meeting requirements in the future.

DISCUSSION

FOIA mandates specific requirements related to public meetings, including advance notice, posting notices, and meeting minutes.⁴ These open meeting requirements only apply to a public body. To determine if an entity is a “public body,” a two-part analysis is required.⁵ 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 “. . . committee, . . . advisory board and committee . . . 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.”⁶ If the first part is met, we then must

² Response.

³ *Id.*

⁴ 29 *Del. C.* § 10004.

⁵ *Del. Op. Att’y Gen.* 18-IB28, 2018 WL 2994706, at *1 (Jun. 1, 2018).

⁶ 29 *Del. C.* § 10002(h).

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 by any other public official, body, or agency to advise or to make reports, investigations or recommendations.”⁷

As acknowledged in the Response, both Councils meet this definition. The Governor’s Council on Agriculture is a body established by an act of the General Assembly and is specifically charged with advising, recommending, and referring matters to the Department Secretary and considering other matters as directed by the Governor or Secretary. The DCFFP consists of members appointed by the Department Secretary and is responsible for advising the Secretary regarding various matters of food policy. The Response concedes that the Councils have not operated in strict compliance with certain open meeting requirements, although the DCFFP contends that it complied with the law by posting minutes and presentations to its own website. Posting minutes to its own DCFFP website does not comply with the letter of law, as Section 10004(f) provides that all public bodies in the executive branch of state government must post draft minutes if they meet less than four times a year and must post final approved minutes to the designated State of Delaware website.

Having found both Councils are public bodies and certain open meeting requirements have not been met, we must determine whether it is appropriate to recommend remediation. When minutes exist or those meetings have been recorded or otherwise preserved, this Office has recommended that the public body make available the existing minutes or use the existing materials to create minutes compliant with Section 10004(f).⁸ In this case, as the DCFFP represents that it has made minutes available on its website, to the extent that it can create minutes in accordance with Section 10004(f), we recommend it do so for meetings within the six months immediately preceding the date of this Petition filing (meetings since December 4, 2020). To the extent any other public meetings have been held in this timeframe which have been recorded or preserved in some way, we recommend that the Councils create minutes for those meetings as well.⁹ Any minutes created *post hoc* should be posted on the designated State website in accordance with Section 10004(f). Finally, we accept the Councils’ commitment to conduct future public meetings in accordance with FOIA and recommend the members of both Councils engage in FOIA training.

⁷ *Id.*

⁸ *See, e.g., Del. Op. Att’y Gen.* 19-IB09, 2019 WL 1511364, at *4 (Feb. 22, 2019).

⁹ *Del. Op. Att’y Gen.* 17-IB31, 2017 WL 3426271, at *1 (July 24, 2017) (stating “this Office does not generally consider petitions alleging FOIA violations occurring more than six months prior to our receipt of the petition” and “this is a general rule that we adhere to ‘for fairness and practical reasons’”) (citation omitted).

CONCLUSION

For the reasons set forth herein, we conclude that both Councils are public bodies and have violated FOIA by failing to comply with the open meeting requirements.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Carla A.K. Jarosz, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General