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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB17

July 23, 2021

VIA EMAIL

William Pickett
wpickett@webname.com

RE: FOIA Petition Regarding the Town of Georgetown

Dear Mr. Pickett:

We write in response to your correspondence alleging that the Town of Georgetown 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 herein, we determine that the Town has violated FOIA as alleged in the Petition and recommend the remediation outlined below.

BACKGROUND

The Petition, citing to a recent news article, alleges that the Town violated FOIA by conducting a vote via email correspondence, instead of holding a vote in a "properly announced public session."¹ The news article states that the Town Council made a decision on closing for June 18, 2021 in observance of the Juneteenth holiday by vote over email and quoted various council members discussing the rationale for their vote. The Petition contends that the Town Council could have held an emergency meeting on the matter.

¹ Petition.

The Town, through its legal counsel, provided a response on July 6, 2021 (“Response”). The Town argues that the Council did not violate FOIA’s open meeting requirements. Noting the State’s anticipated closure for the holiday only came to its attention a few days before the holiday, the Town maintains that the decision to close for the Juneteenth holiday was not a Council decision, but instead, it was “a last-minute administrative decision made by the Town Manager, albeit in consultation with members of Town Council.”² The Town argues it was not officially adopting a holiday, but attached its Code, which states that “[t]he following days and such other days as Town Council may designate are holidays with pay for full-time regular employees” and that the actual date of the holiday shall be determined annually by Council resolution.³

The Town alleges that the Town Manager polled Council members for their positions by sending an email addressed to all Council members. The Town Manager’s initial email to the Council asked each member to reply to him directly and to not reply to all and stated: “[t]he Town usually follows the State and County with respect to holidays, accordingly, please advise your agreement or disagreement with the Town closing this Friday as well.”⁴ In response, three Council members responded by email stating agreement or disagreement directly to the Town Manager, and one of those members copied the entire Council on his reply. The other two members called the Town Manager and spoke with him by phone. After collecting answers from all members which resulted in a 3-2 split favoring the Town not recognizing the holiday, the Town Manager then sent an email to all employees notifying them that “the Town Council has determined that the Town of Georgetown will not be observing the Juneteenth Holiday this year, on Friday, June 18, 2021” but a discussion of the 2022 Town-adopted holidays would occur in December.⁵ The Town also provided a sworn affidavit from the Town Manager affirming that the Response was accurate and specifically noting he polled the Council “for their feedback . . . , prior to making a decision as to whether to close Town offices on June 18, 2021,” and that “no discussion by email on the subject was intended or occurred; simply a poll of each Councilperson’s position on the issue.”⁶ The Town argues that an informal polling of Council members’ position does not create a “meeting” under the definition of FOIA; the Town Manager did not have an “email” discussion of the topic with a quorum of members, and “as in [the] *Tryon* [case], there is no evidence of “serial’ communications or any attempt to sway the councilmembers’ decisions.”⁷

² Response.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

DISCUSSION

FOIA requires public business to be performed in an open and public manner so that citizens “have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy.”⁸ A meeting is defined by FOIA as “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business,”⁹ and public business” includes “any matter over which the public body has supervision, control, jurisdiction or advisory power.”¹⁰ The public body has the burden of proof to demonstrate compliance with the FOIA statute.¹¹ However, the petitioner carries the burden of making a *prima facie* case that a meeting may have occurred; after this showing, the burden shifts to the public body.¹² This burden-shifting occurs to avoid requiring a public body from having to “prove a negative,” *i.e.*, prove that a meeting did not occur.¹³ The Petition presented public statements indicating the decision was based on a 3-2 vote by Council. We find that this *prima facie* showing was met, and the Town carries the burden of showing that it did not violate FOIA.

This Office has previously opined that a “meeting” for purposes of FOIA is only triggered when members of a public body “communicate about issues that may or will come before the [members] for a vote.”¹⁴ In the *Tryon v. Brandywine School Dist. Bd. of Educ.* case, the court recognized that a quorum was the legislative attempt to limit the scope of FOIA’s open meeting requirements but alluded to the possibility that serial discussions by a group less than quorum may violate FOIA if they are “a means of circumventing [FOIA].”¹⁵ In that case, the president of the school board separately called the members to determine if they were ready to vote on an upcoming issue and in some instances, asked how they were inclined to vote. The matter was then discussed and voted upon by the board in open session within a week after these discussions. The court found that the president did not try to persuade the other members’ votes and determined that this series of calls did not constitute a circumvention of FOIA, but instead were an informal poll to gain a sense of the board’s position and the members’ readiness to vote.

⁸ 29 Del. C. § 10001.

⁹ 29 Del. C. § 10002(g).

¹⁰ 29 Del. C. § 10002(j).

¹¹ 29 Del. C. § 10005(c).

¹² *Del. Op. Att’y Gen.* 17-IB20, 2017 WL 3426260, at *7 (July 12, 2017).

¹³ *Id.*

¹⁴ *Del. Op. Att’y Gen.* 16-IB13, 2016 WL 3462344, at *4 (Jun. 8, 2016) (citations omitted).

¹⁵ *Tryon v. Brandywine Sch. Dist. Bd. of Educ.*, 1990 WL 51719, at *3 (Del. Ch. Apr. 20, 1990).

The Response provides that it was the Town Manager’s decision to not close the Town offices for the holiday and he sent an email merely polling each Council member before making this decision. However, the designation of holidays is within the purview of the Council’s duties, as indicated by its Code, and it alone has this authority.¹⁶ The record reflects that the Town Manager followed the will of the majority of Council based on their votes. His email to Town staff following the conclusion of the vote clearly indicated that it was Council’s decision to remain open.¹⁷ Thus, we find that this vote was not a poll to understand whether the Council was ready to discuss and vote on this issue at a subsequent meeting like the facts of the *Tryon* case; this vote by a series of emails and calls actually supplanted a meeting in which the Council could consider and vote on whether to designate this Juneteenth as a holiday.¹⁸ In light of this factual record, we view this series of calls and emails as a circumvention of the public’s ability to observe the Council’s vote regarding public business within the Council’s authority. Here, the public was made aware of the decision but they were precluded from observing the viewpoints and discussion of each individual board member. On this basis, we determine that this series of emails and calls violated FOIA’s open meeting requirements.

Having found that the Town violated the open meeting requirements, we must determine whether any remediation is appropriate. When our Office finds a violation of the open meeting requirements, we may recommend remediation when a public body has taken final action on a matter affecting substantial public rights.¹⁹ However, the authority to invalidate a vote or impose other injunctive relief is reserved for the courts.²⁰ The Town Council took a vote in this instance

¹⁶ Response (“The following days and such other days *as Town Council may designate* are holidays with pay for full-time regular employees”) (emphasis added).

¹⁷ Response.

¹⁸ *Tryon*, 1990 WL 51719, at *3; *see also Del. Solid Waste Author. v. News-Journal Co.*, 480 A.2d 628, 635 (Del. 1984) (“But in reaching our conclusion here, it is crucial to note that the newspapers did not present any evidence of probative value that the function and operation of the standing committees, either in theory or effect, are the result of a deliberate intent to defeat the Act’s essential aims.”).

¹⁹ *Del. Op. Att’y Gen.* 05-IB15, 2005 WL 2334344, at *4 (Jun. 20, 2005) (citing *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *6 (Del. Ch. Aug. 29, 1986)).

²⁰ Pursuant to 29 *Del. C.* § 10005(e), this Office is charged with making a written determination of “whether a [FOIA] violation has occurred or is about to occur.” Although remediation may be recommended when appropriate, this Office is not vested with the authority to impose injunctive relief or punitive measures for FOIA violations. 29 *Del. C.* § 10005 (citing remedies that a court may impose); *Del. Op. Att’y Gen.* 17-IB15, 2017 WL 3426253, at *7 (July 7, 2017) (“However, this Office does not have the statutory authority to invalidate the CBOC or Board’s actions.”); *Del. Op. Att’y Gen.* 16-IB23, 2016 WL 7010495, at *2 (Oct. 28, 2016) (“[T]his Office is not vested with the authority to impose punitive measures for FOIA violations. You are

and opted to not recognize the holiday, conducting its regular business as usual; the Town indicated in its Response that it plans to discuss the adoption of this holiday at an upcoming Council meeting. Accordingly, we recommend that the Town follow through with its intent to discuss this holiday at a future properly noticed meeting where it can be observed by the public.

CONCLUSION

Based on the foregoing, we determine that the Town has violated FOIA's open meeting requirements by taking a vote on a matter of the Council's public business outside a public meeting.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Stephani J. Ballard, Esq., Town Solicitor

free to seek redress in the courts if you believe that additional relief is warranted.”) (citation omitted).