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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 22-IB14**

**April 20, 2022**

**VIA EMAIL**

William Weistling, Jr.  
[billwinfi@gmail.com](mailto:billwinfi@gmail.com)

**RE: FOIA Petition Regarding the Town of Fenwick Island**

Dear Mr. Weistling:

We write in response to your correspondence alleging that the Town of Fenwick Island 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 factual record does not support the alleged violation.

**BACKGROUND**

On March, 4, 2022, the Town Council held a public hearing to consider four ordinances, including an ordinance regarding low speed vehicles. Comments regarding the ordinance regarding low speed vehicles exceeded the allotted time for the public hearing, and the comment period was suspended to allow the previously-scheduled regular Council meeting to begin. The Council held a regular Council meeting, during which the public comment period regarding this ordinance resumed and the Council then voted on this ordinance. After the vote, the Town Council held another public comment period later on the agenda, called "Public Participation," where others continued to comment on this ordinance.

This Petition alleges that the Town Council improperly allowed only certain members of the public to speak at the public hearing. At the hearing, you allege that the Mayor announced that any member of the public who submitted written comments may not speak at the public comment

period of the hearing, as the written comments would be included in the record. You state that the written comments were not read into the record. You allege that one citizen, who had gathered 155 signatures on his comments was not permitted to speak until the regular meeting in a section called “Public Participation,” which was hours later, after the final vote on the ordinance, and after most of the attendees had left. Accordingly, you contend that the Town violated FOIA by not allowing all citizens to speak at this public hearing, and you ask that the Town be compelled to read aloud the previously submitted written comments at the beginning of a future meeting.

The Town’s counsel provided a response on March 30, 2022 (“Response”). The Town asserts that it met FOIA’s open meeting requirements and attached copies of the approved minutes for the March 4, 2022 public hearing and regular Council meeting. The Town states that although neither a public hearing nor a public comment period were required before passage of this ordinance, the Town voluntarily held a public hearing and allowed verbal and written public comment. The Town states that public comment was suspended at the end of the hearing and then re-opened during the Council meeting; any member of the public who wished to provide verbal comment on the Ordinance was given an opportunity to do so, either at the Hearing or at the Meeting; you provided comments during the meeting; and the written comments were submitted into the record and received by Council prior to the vote. The Town asserts that it “did not prohibit any member of the public from providing written or verbal comment.”<sup>1</sup> Prior to the vote, the Town states that the public was specifically asked whether there were additional comments. The Town asserts that “[i]f some members of the public chose to leave the Meeting, or otherwise chose not to make verbal comment, that was their choice, not the Town’s.”<sup>2</sup> Further, if certain members of the public chose to speak at the “Public Participation” period after the ordinance passed, the Town asserts that it was their decision to do so. The Town contends that there is no FOIA provision requiring that written public comments be read aloud at a meeting, and such a requirement would hinder the efficiency of the meeting and only serve to discourage public bodies’ acceptance of written comments.

## DISCUSSION

A public body carries the burden of proof to demonstrate compliance with FOIA.<sup>3</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>4</sup> A public body is not required to hold a public comment period during a meeting, but if it chooses to do so, it must conduct that public comment period in accordance with FOIA, the First Amendment, and all other

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<sup>1</sup> Response, p. 3.

<sup>2</sup> *Id.*, p. 4.

<sup>3</sup> 29 *Del. C.* § 10005(c).

<sup>4</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

applicable laws.<sup>5</sup> The Petition alleges that the Town Council did not allow people who submitted written comments to speak at the hearing, but in this case, the public comment period for this ordinance spanned the hearing and the meeting. The Town stated that “any member of the public who wished to provide verbal comment on the [o]rdinance was given an opportunity to do so, either at the [h]earing or at the [m]eeting.” As evidentiary support, the Town submitted the approved minutes for the Council meeting, which provided that “all individuals who had not had an opportunity to present their views at the hearing were given time to express their views during the Town Council meeting prior to any vote being taken,” and with respect to this ordinance in particular, that “[a]ll residents who had not had an opportunity to present their views during the scheduled hearing were permitted to offer their written and/or oral comments during the Town Council Meeting prior to voting.”<sup>6</sup> The approved minutes of the public hearing also support the Town’s contention, revealing that one resident, who submitted written comments, also gave verbal comments at the public hearing.<sup>7</sup>

Based on this evidence, we find that this ordinance’s public comment period, although it was conducted in a bifurcated format, allowed for verbal comments from citizens who submitted written comments. Thus, we determine that the factual record submitted by the parties in this case does not support the alleged violation.<sup>8</sup> To the extent that this dispute perhaps arose out of a misunderstanding regarding the acceptance of verbal public comments, we recommend the Town Council clearly inform attendees at future meetings how to offer verbal comments during the public comment period, especially when that comment period must be bifurcated.

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<sup>5</sup> *Reeder v. Del. Dep’t of Ins.*, 2006 WL 510067, at \*12-13 (Del. Ch. Feb. 24, 2006) (determining that although FOIA does not require a public body to hold a public comment period, “[t]his is not to say that there are not bodies of law that courts can and must apply to make sure that public bodies discharge their legal responsibilities in a non-arbitrary and public-regarding manner.”).

<sup>6</sup> Response, Ex. B.

<sup>7</sup> Response, Ex. A. The hearing minutes include the names and summaries of the comments received at the hearing and meeting and delineate the citizens who spoke at the hearing and those who spoke at the meeting.

<sup>8</sup> *See Del. Op. Att’y Gen.* 18-IB05, 2018 WL 1061276, at \*6 (Jan. 30, 2018) (“Under the circumstances, we are not able to make a determination in this case of whether a FOIA violation has occurred because the record reflects competing, irreconcilable statements of fact that cannot be resolved on this record.”).

## **CONCLUSION**

For the reasons set forth above, we find that the factual record does not support the violation alleged in the Petition.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
Deputy State Solicitor

cc: Luke W. Mette, Attorney for the Town of Fenwick Island