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

**Attorney General Opinion No. 22-IB17**

**May 5, 2022**

**VIA EMAIL**

Eric Marquis  
[ericmarquis1@verizon.net](mailto:ericmarquis1@verizon.net)

**RE: FOIA Petition Regarding the City of Harrington**

Dear Mr. Marquis:

We write in response to your correspondence alleging that the City of Harrington 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. For the reasons set forth below, we determine that the City violated FOIA by failing to follow the open meeting requirements for the Budget Committee meeting held on February 22, 2022 in which employee bonuses were discussed.

**BACKGROUND**

On March 30, 2022, you sought information from the City about a Budget Committee meeting mentioned during a regular Council meeting, in which employee bonuses were discussed. The City initially denied that a meeting of the Budget Committee took place; instead, the City stated that several City officials and two members of the Committee met to informally discuss budgetary items, including the use of certain funds to give employee bonuses. You then filed this Petition, alleging that the City held a Budget Committee in violation of FOIA by meeting without public notice and creating no meeting minutes or recordings. In short, you contend that there was no way for the public to observe or comment on the City's decision to spend funds on these bonuses.

On April 6, 2022, the City, through its legal counsel, answered the Petition (“Response”), and included the City Manager’s affidavit attesting that the information in the Response and minutes are true and correct to the best of his knowledge. The City states that this meeting with the City Manager, Chief of Police, Finance Director and two councilmembers, both also members of the Budget Committee, occurred on February 22, 2022 and was “administrative in nature.”<sup>1</sup> The City acknowledges that this meeting, including two of the three members of the Budget Committee, constituted a quorum of the Budget Committee and thus, under FOIA, a Budget Committee meeting was held. Nonetheless, the City asserts that the Budget Committee merely makes recommendations to the entire Council and does not vote on any issues. The City states that this matter of employee bonuses was considered at a properly-noticed, regular Council meeting on March 7, 2022. After receiving no written or verbal comment from the public prior to or during this meeting, the Council unanimously voted to adopt the premium pay for employees at the Council meeting. The City notes that it prepared minutes of this February 22, 2022 meeting from the recollection of the staff in attendance and attached a copy to the Response. The City committed to make these minutes available for public inspection. Finally, the City states that it is not required by FOIA to post minutes to its website or make audio recordings of meetings.

### DISCUSSION

A public body has the burden of proof to demonstrate compliance with FOIA.<sup>2</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>3</sup> FOIA mandates that public bodies meet specific requirements related to meetings, including advance notice and the preparation of meeting minutes.<sup>4</sup>

In this instance, the City acknowledges that the Budget Committee is a public body, and a quorum of this public body conducted a meeting without following the open meeting requirements. As these facts are not in dispute, we determine that the City violated FOIA by failing to comply with the open meeting requirements for this February 22, 2022 meeting, in which employee bonuses were discussed. However, the Committee has no obligation to make recordings of its meetings or to post its minutes to its website.<sup>5</sup>

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<sup>1</sup> Response.

<sup>2</sup> 29 *Del. C.* § 10005(c).

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

<sup>4</sup> 29 *Del. C.* § 10004.

<sup>5</sup> *Id.*

When our Office finds a violation of the open meeting requirements, we may recommend remediation when appropriate.<sup>6</sup> However, the authority to invalidate a public body's action or impose other injunctive relief is reserved for the courts, and the courts have emphasized that the "remedy of invalidation is a serious sanction and ought not to be employed unless substantial public rights have been affected and the circumstances permit the crafting of a specific remedy that protects other legitimate public interests."<sup>7</sup> In determining whether invalidation is appropriate, the court will consider the impact of "adverse consequences upon innocent parties."<sup>8</sup> When a public body violates FOIA by privately discussing a matter that is later voted upon at a public meeting, the court, when evaluating a remedy, also may consider "whether there was a substantial reconsideration of the challenged decision," the nature of violation, and "whether it was an isolated incident or an ongoing pattern of infractions."<sup>9</sup>

In this case, evidence has been presented of a committee meeting that the City admits was inadvertently held in violation of FOIA, and the matter of employee bonuses was later considered, discussed, and voted on at a public City Council meeting. The City prepared minutes of the Committee meeting for public inspection. There is no information in the record about the status of implementing these pay increases, but a court also may consider whether steps to implement these pay increases have been taken and the impact of any remedy on the City and its employees. Based on this record, there is not a sufficient basis to conclude that a court is likely to find that the serious sanction of invalidating the City's decision to adopt the employee bonuses is appropriate. However, we emphasize that "citizens have the right to monitor decisions of public officials in formulating public policy and . . . discussions or deliberations, as well as action, on public business shall be conducted openly."<sup>10</sup> The Committee is cautioned to strictly follow the open meeting requirements for its meetings in the future.

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<sup>6</sup> *Del. Op. Att'y Gen.* 21-IB17, 2021 WL 3609560, at \*3 (July 23, 2021); *see also 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)).

<sup>7</sup> *Ianni*, 1986 WL 9610, at \*7.

<sup>8</sup> *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*15 (Del. Ch. May 19, 1994).

<sup>9</sup> *Levy v. Bd. of Educ. of Cape Henlopen School Dist.*, 1990 WL 154147, at \*7 (Del. Ch. Oct. 1, 1990).

<sup>10</sup> *Id.* at \*6.

**CONCLUSION**

For the foregoing reasons, we conclude that the City violated FOIA by failing to comply with the open meeting requirements for the February 22, 2022 Budget Committee meeting in which employee bonuses were discussed.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
State Solicitor

cc: Dianna E. Stuart, Attorney for the City of Harrington