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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB22

June 3, 2022

VIA EMAIL

Councilmember Linda Gray
Wilmington City Council
lhgray@comcast.net

RE: FOIA Petition Regarding the City of Wilmington

Dear Councilmember Gray:

We write in response to your correspondence alleging that the City of Wilmington 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 conclude that the Petition has not formed a sufficient basis to determine whether the City Council privately met in violation of FOIA.

BACKGROUND

The Petition claims that members of the Wilmington City Council held private meetings without advance public notice or the preparation of minutes, in violation of FOIA. In particular, you state that you have been informed that these periodic meetings, involving seven members of Council, were held at Councilmember Walsh's residence between January 6, 2022 and April 11, 2022. The Petition cites the audio recording of Councilmember Walsh's statement at a public meeting, indicating that quarantine confined her to her residence and she has held meetings involving up to four members at her residence. Further, you state that Councilmember Oliver informed you of another meeting at Councilmember Johnson's new office to discuss a selection for a vacancy. You also assert that Councilmember Darby publicly stated that Councilmember Oliver discussed meeting at Councilmember Walsh's residence and at Councilmember Johnson's

office. You state that you believe that a quorum of the Council consists of three members because “three council committee members can move legislation.”¹ Additionally, the Petition alleges a second violation occurred when eight Councilmembers met to decide the Council’s agenda and structure prior to the 108th session of Council, and then voted together as a block at the first Council meeting of that session.

On May 12, 2022, the City, through its legal counsel, responded to the Petition (“Response”). For the first claim, the City notes that Councilmember Walsh’s admission at the recent Council meeting merely indicated that the meetings involved up to four members. As the City requires seven members to reach a quorum, the City contends that the meetings do not constitute a meeting subject to the open meeting requirements. The City also asserts that a special committee did not convene, as the City has not formally appointed such a committee in accordance with Council’s rules. Regarding the second claim, the City argues that because the meeting of eight members allegedly occurred before the 108th session, which began in January 2021, it is time-barred from consideration in this Opinion. Alternatively, the City contends that the individuals meeting at that time were not yet sworn members of Council, and thus, a quorum of members was not present. In addition, the City acknowledges that three members of the Finance and Economic Development Committee could have been present at this meeting but asserts that the Petition does not specifically allege that public business of this committee was discussed.

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.”² A meeting under FOIA is “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.”³ As a preliminary matter, the claim regarding the alleged meeting held as late as January 2021 would have occurred more than six months prior to this Petition and is therefore time-barred from consideration in this Opinion.⁴

¹ Petition.

² 29 *Del. C.* § 10001.

³ 29 *Del. C.* § 10002(j).

⁴ DEL. DEP’T JUST., RULES OF PROCEDURE FOR FOIA PETITIONS AND DETERMINATIONS, at 3 (2019), <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2019/09/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations.9.26.19.pdf>; *see also 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’”); *Del. Op. Att’y Gen.* 16-IB14, 2016 WL 3462345, at *2 (Jun. 9, 2016); *Del. Op. Att’y Gen.* 12-IIB11, 2012 WL 5894039, at *5 (Nov. 7, 2012) (“We believe your petition is

For the allegation regarding meetings in 2022, the petitioner carries the initial burden of making a *prima facie* case that a meeting occurred.⁵ “A plaintiff must show substantive proof of a secret meeting rather than mere speculation in order to shift the burden of going forward.”⁶ The allegations must be sufficiently specific to allow consideration.⁷ “Once a plaintiff has made a *prima facie* case that a quorum of a public body has met in private for the purpose of deciding on or deliberating toward a decision on any matter,” the burden then shifts to the public body to prove that no violation of the open meeting requirements occurred.⁸ 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.⁹

In this instance, the Petition primarily relies on Councilmember Walsh’s public statement that meetings of up to four councilmembers occurred at her residence, coupled with the belief that only three members constitute a quorum of the City Council.¹⁰ As seven members constitute a quorum of the City Council,¹¹ the Petition merely supports a finding that, at best, meetings occurred with less than a quorum of councilmembers. Thus, we find that the Petition does not establish the requisite *prima facie* case necessary to shift the burden to the City to demonstrate

untimely, and you have provided us with no reason to deviate from our long-standing policy and practice in this case.”); *Del. Op. Att’y Gen.* 05-IB26, 2005 WL 3991284, n. 3 (Aug. 29, 2005).

⁵ *Del. Op. Att’y Gen.* 17-IB20, 2017 WL 3426260, at *7 (July 12, 2017); *see also* 29 *Del. C.* § 10005(c).

⁶ *Del. Op. Att’y Gen.* 05-IB10, 2005 WL 1209240, at *2 (April 11, 2005) (citing *Gavin v. City of Cascade*, 500 N.W.2d 729, 732 (Iowa App. 1993)).

⁷ *See also Del. Op. Att’y Gen.* 16-IB18, 2016 WL 5888777, at *5 (Sept. 29, 2016) (finding that the petitioner did not sufficiently support its *prima facie* case: “without specific information regarding specific dates, the number of Council members present, and the number of Council members to whom you allege the Mayor passed notes during specific meetings, these allegations are too vague to warrant consideration”).

⁸ *Del. Op. Att’y Gen.* 05-IB10, 2005 WL 1209240, at *2 (citing *Harris v. Nordquist*, 771 P.2d 637, 641 (Or. App. 1989)).

⁹ *Id.*

¹⁰ Assuming *arguendo* the additional statements in the Petition attributed to other members of Council were accurate or had evidentiary support, those statements are also insufficiently vague and fail to meet this burden.

¹¹ City Council Rule 3 (“The attendance of at least seven (7) Council Members is required to establish quorum for official meetings of City Council.”).

compliance with FOIA.¹² While we do not find that a *prima facie* case has been established in this case, former precedent suggests that a series of meetings of less than a quorum involving discussion of the same topic among more than one public body member may amount to a “meeting” under FOIA and may circumvent FOIA’s requirement that such discussions of public business be held in in public.¹³ The City Council is strongly cautioned to refrain from conducting meetings with less than a quorum in the future.

CONCLUSION

For the reasons set forth above, we determine that the Petition has not formed a sufficient basis to determine whether City Council privately met in violation of FOIA.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: John D. Hawley, Assistant City Solicitor

¹² In contrast to the seven members required to make a quorum of City Council, a committee of the City Council would likely require fewer members to make a quorum. The Petition did not allege that a quorum of any specific committee of the City Council met, and the City did not volunteer information that would have demystified that issue. If such an allegation had been made in this case, the claim would have been closely analyzed in light of Councilmember Walsh’s admission that up to four Councilmembers met at her residence.

¹³ See, e.g., *Tryon v. Brandywine School Dist. Bd. of Educ.*, 1990 WL 51719, at *3 (Del. Ch. Apr. 20, 1990) (“The evidence adduced by defendants and not controverted by the plaintiffs is that the phone calls made by Dr. Graham to the various board members were not a means of circumventing the Freedom of Information Act through serial telephone conversations.”); *Del. Op. Att’y Gen.* 18-IB23, 2018 WL 2266974, at *3 (May 4, 2018) (stating that “[p]rior opinions of this Office have suggested that a series of discussions among less than a quorum of a public body may amount to a meeting” when discussion occurred among more than one member of the public body); *Del. Op. Att’y Gen.* 96-IB05, 1996 WL 114716, at *4 (Feb. 13, 1996) (deciding that Georgetown Town Council met in sub-groups to discuss, formulate and execute a memorandum, which suggests that the Council acted deliberately to circumvent the open meeting requirements).