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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB25

July 20, 2022

VIA EMAIL

Janice Lorrh
Janicelorrh2012@yahoo.com

RE: FOIA Petition Regarding the Elections and Government Affairs Committee, Senate, Delaware General Assembly

Dear Ms. Lorrh:

We write in response to your correspondence alleging that the Elections and Government Affairs Committee of the Senate of the Delaware General Assembly (“Committee”) 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 explained below, we conclude no violation of FOIA has occurred.

BACKGROUND

The Committee conducted a fully virtual public meeting without an anchor location on June 15, 2022. The Petition alleges that three violations of FOIA occurred at this meeting. First, you argue that the Committee violated FOIA by conducting the meeting without an anchor location. As you believe that Delaware is no longer under a Governor’s “state of emergency” order, you allege that 29 *Del. C.* § 10006A requires the Committee to have an anchor location where you could appear in person. Second, you state that the Committee did not vote on the four bills under consideration at the meeting, and you believe that the Committee votes privately by email. You maintain the Committee’s voting outside of the public meeting violates FOIA’s requirement that the public be able to monitor a public body’s vote. Third, you allege that you were improperly removed from the meeting without cause in violation of FOIA. After giving testimony on a proposed bill, your connection to the meeting was dropped, and when you tried to

reconnect, you received a message that you were removed by the meeting host. By the time you were able to rejoin by telephone, the meeting was in the process of concluding. Based on all of this, you contend that the Committee should be found in violation of FOIA.

The Committee's Chair replied to your Petition on behalf of the Committee, on June 29, 2022 ("Response"). The Committee asserts that the Petition's three claims are without merit. First, the Committee states that in accordance with the *News-Journal Co. v. Boulden* case and the Delaware Constitution, each House of the General Assembly determines the rules of its proceedings.¹ To do so, the 151st General Assembly enacted House Concurrent Resolution No. 1, in which it invoked its own emergency powers under the Delaware Constitution and declared that the Speaker of the House and President Pro Tempore of the Senate are authorized to issue notice that the General Assembly and its legislative committees may conduct a virtual meeting during an emergency. The Committee states that such notice was issued in January 2021 and remains in effect and consistent with *Boulden*, the subsequent enactment of Section 10006A in June 2021 did not modify rules that the 151st General Assembly adopted and will not control the rules governing the General Assembly proceedings that future General Assemblies adopt. In addition, the Committee argues that as FOIA is a general statute and the General Assembly's House Concurrent Resolution No. 1 is specific legislation, the more specific Resolution No. 1 prevails. This canon of construction, the Committee argues, is consistent with Mason's Manual of Legislative Procedure, which specifically lists the sources from which rules of legislative procedure are derived and provides if there is a conflict, the "adopted rules," prevail over the statutory provisions. The Committee asserts that Mason's Manual of Legislative Procedure decides any questions of parliamentary procedure not specifically covered by the Rules of the Senate or the Delaware Constitution, per Senate Rule 50. Alternatively, the Committee contends that even if Section 10006A applied to its committee meetings, the Governor's public health emergency order in place constitutes a "state of emergency" under FOIA, and a virtual format without an anchor location was therefore permitted under Section 10006A for its June 15, 2022 meeting.

Second, the Committee explains that it has no requirement to vote during a hearing. Noting again that the Constitution permits each chamber to determine its rules of its proceedings, the Committee states that the Senate of the 151st General Assembly adopted Senate Rule 46, which states that for a bill to be released from standing committee, a majority of the members of the standing committee must sign the backer of the bill. As the courts have held that the specific mandate prevails over any general requirements to the extent of any conflict, the Committee argues that Senate Rule 46 prevails over the general requirements of FOIA, and also because of the order set by Mason's Manual, the Senate rules prevail over the FOIA statute. Finally, the Committee asserts that the legislative assistant managing the virtual meeting inadvertently removed you from the meeting after your testimony as an expert and attached the assistant's affidavit swearing to the circumstances of this error.

¹ 1978 WL 22024, at *4 (Del. Ch. May 24, 1978).

DISCUSSION

The preliminary question in this matter is whether any of these allegations are appropriately considered in the context of the FOIA petition process. For the reasons set forth below, our Office lacks any legal basis to decide the majority of your claims.

In *Boulden*, the plaintiffs requested injunctive relief to prevent twenty-five State Representatives from privately meeting in caucus, because this number of Representatives, constituting a majority of House members, created a quorum of the House of Representatives, and FOIA's open meeting law required such meetings be publicly held. The Court of Chancery determined that the plaintiffs had failed to set forth a cause of action on which injunctive relief can be granted, because the Court refused to accept that "one General Assembly, by statute, can vest this Court with the authority to control the manner in which a subsequent General Assembly exercises the lawmaking power reposed solely in it by the Constitution."² The Court stated that each General Assembly has a life span of two years and declined to find that the 128th General Assembly could, by statute, empower the Court to void legislative action taken by the 129th General Assembly whenever the latter has failed to meet procedural standards for lawmaking established by the 128th General Assembly. Noting the Delaware constitutional provision allowing each House to determine the rules of its proceedings, the Court stated "[s]ince there is no constitutional prohibition against a party caucus being closed to the public, even when those in attendance would constitute a quorum of one of the Houses, I see no basis for this Court to attempt to enforce such a prohibition purportedly created by the statutory enactment of a prior legislative body."³ Rather, the Court concluded that "[d]issatisfaction with the performance of their duties by these defendants is a matter between them and the voters."⁴

This Petition alleges violations of three sections of FOIA: 1) Section 10004's requirement that votes at a meeting occur in public session; 2) Section 10004's general requirement that meetings, unless otherwise authorized, be open to the public; and 3) Section 10006A's requirements for virtual meetings. The *Boulden* case does not allow our consideration of the first two violations; the 151st General Assembly enacted its own rules for conducting these committee meetings and Section 10004's requirements at issue here were adopted by earlier assemblies.⁵ Under *Boulden*'s holding, this Office may not determine whether a later General Assembly has failed to follow an earlier assembly's procedural standards when exercising its lawmaking powers.

Unlike the Section 10004 requirements, the 151st General Assembly adopted Section 10006A, which describes the circumstances in which public bodies may convene for a virtual meeting. While the Petition argues that it was a violation of Section 10006A to hold the Committee

² 1978 WL 22024, at *4.

³ *Id.*

⁴ *Id.*

⁵ 60 Del. Laws ch. 641, § 1 (1977); 65 Del. Laws ch. 191, § 10 (1985).

meeting solely in virtual format without an anchor location, the Committee asserts that its own procedures enacted pursuant to House Concurrent Resolution No. 1 that do not require an anchor location prevail over Section 10006A requirements. However, determining whether the Committee is obliged to follow its adopted procedures or Section 10006A would require this Office to render a decision on the scope of the laws applicable to the General Assembly, and thus, this matter is also outside this Office's authority.⁶

Assuming *arguendo* this question was appropriate for resolution by this Office, this Office has previously found that the Governor's March 1, 2022 public health emergency order qualifies as an order establishing a "state of emergency" for purposes of Section 10006A, and under that order, anchor locations are not required for virtual meetings.⁷ The Governor's public health emergency order was in effect at the time of this June 15, 2022 Committee meeting.⁸ Thus, Section 10006A would allow the Committee to hold its June 15, 2022 virtual meeting without an anchor location.

CONCLUSION

Based on the foregoing, we determine that the majority of the Petition's allegations are not appropriate for resolution. However, the Committee did not violate FOIA by holding a virtual meeting without an anchor location.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved by:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Senator Kyle Evans Gay, Chair, Senate Elections and Government Affairs Committee

⁶ 29 *Del. C.* § 10005(e) ("Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur.").

⁷ *Del. Op. Att'y Gen.* 22-IB10, 2022 WL 1231750, at *2 (Apr. 14, 2022).

⁸ Third Extension of Declaration of a Public Health Emergency for the State of Delaware, <https://governor.delaware.gov/wp-content/uploads/sites/24/2022/05/Third-Extension-of-Public-Health-Emergency-05.26.2022.pdf> (last visited July 18, 2022).