



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB31

August 26, 2022

VIA EMAIL

Amy Roe
amywroe@gmail.com

**RE: FOIA Petition Regarding the Childhood Lead Poisoning Committee,
Delaware Department of Health and Social Services**

Dear Ms. Roe:

We write in response to your correspondence alleging that the Childhood Lead Poisoning Committee and its subcommittees, which are administratively supported by the Delaware Department of Health and Social Services (“DHSS”), violated the Delaware 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(e) regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, and as conceded by DHSS and reflected in its plan to ensure future compliance, it is our determination that the Committee and its subcommittees violated FOIA as alleged in the Petition.

BACKGROUND

The Committee is comprised of ten members, the majority of whom are members by virtue of position.¹ The Committee is authorized to form advisory subcommittees, which may include nonmembers, to assist in its duties.² DHSS is statutorily required to provide staff support to the Committee.³ DHSS states that you are a member of three subcommittees but do not serve on the

¹ 16 *Del. C.* § 2605.

² *Id.*

³ *Id.*

Committee. On July 5, 2022, you sent DHSS a FOIA request seeking the minutes from all meetings and subcommittee meetings of the Childhood Lead Poisoning Advisory Committee from June 3, 2021 to the date of the request. You note in the request that June 3, 2021 is the date of the legislation requiring DHSS to provide staff support for the Childhood Lead Poisoning Advisory Committee.⁴ After receiving a production of records in response to this request, you filed this Petition alleging that the response was insufficient. The Petition asserts that the minutes provided did not cover all the meetings and subcommittee meetings that have been held, some minutes do not indicate that they were approved, and the minutes do not conform with the minimum statutory requirements, including a record of the members present, the votes taken, and the action agreed upon, and specification of draft status for those minutes that have not been approved. You would like this matter rectified, as some meetings from more than a year ago do not have minutes.

Counsel replied to the Petition on August 7, 2022 (“Response”), conceding all the claims you raised in the Petition. DHSS asserts that it recently learned that meeting minutes do not exist for many subcommittees; however, most 2022 meetings have minutes that have not been finalized and posted to the website. DHSS is also looking for a way to post the available recordings of virtual meetings to allow the public to view them while minutes are created, approved, and posted. DHSS also notes that although the minutes were not maintained regularly, the Committee and its subcommittees also did not continuously vote on sensitive or controversial matters. Rather, DHSS contends that the Committee engaged in limited voting, and those votes were reflected in approved, but not posted, Committee minutes. DHSS states that no votes at all were taken in subcommittee meetings. Nevertheless, DHSS emphasizes that it is working to recreate the 2021 minutes and finalize and post the 2022 minutes. Moreover, DHSS states that it has implemented policies and procedures to improve compliance going forward.

DISCUSSION

Under FOIA, a public body carries the burden of proof to demonstrate compliance with the FOIA statute.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ FOIA requires public bodies to maintain minutes for its meetings.⁷ All public bodies in the executive branch of State government are required to post the final, approved meetings minutes within five business days of approving those minutes.⁸ Public bodies in the executive branch

⁴ Petition, Ex. A.

⁵ 29 *Del. C.* § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁷ 29 *Del. C.* § 10004(f).

⁸ *Id.*

meeting four or less times a year must post draft minutes online within twenty business days after the meeting.⁹ However, a timeframe for approving minutes is not articulated in the statute.¹⁰

In this instance, you requested copies of certain meeting minutes. While the Committee provided some minutes, it concedes that its response is insufficient, as it failed to meet its obligation to maintain and post minutes for all Committee and subcommittee meetings. As we have no explicit record to specifically assess these failures and given the acknowledgement of noncompliance, we find that the Committee and its subcommittees, violated FOIA in this regard. To remediate this violation, we recommend that these entities, in compliance with FOIA's requirements, create, approve, and post all these 2021 and 2022 minutes as soon as reasonably practicable.¹¹ It is also recommended that copies of these approved and posted minutes be provided to you as soon as they are available.

CONCLUSION

As set forth above, it is our determination that the Committee and its subcommittees have violated FOIA as alleged.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Joanna S. Suder, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁹ *Id.*

¹⁰ *Reeder v. Del. Dep't of Ins.*, 2006 WL 510067, at *10 (Del. Ch. Feb. 24, 2006) (“By its explicit terms, Delaware's FOIA - unlike the FOIA of certain other states - does not contain a temporal requirement for the approval of minutes. The ability of a public body to prepare and approve minutes within a certain time period depends on several factors, including the adequacy of staffing and the frequency of the public body's meetings. Although I agree with Reeder that there is a point at which a public body's torpor in approving minutes rises to the level of a failure to keep minutes in accordance with § 10004(f), courts should be cautious about articulating a bright-line rule that the General Assembly could have, but did not, adopt.”).

¹¹ *See Del. Op. Atty. Gen.* 06-IB02, 2006 WL 1242011, at *3 (Jan. 9, 2006); *Del. Op. Att'y Gen.* 97-IB13, 1997 WL 606460, at *5 (Jun. 2, 1997).