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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB34

September 15, 2022

VIA EMAIL

Tom Irvine
Southern Delaware Alliance for Racial Justice
tkirvine@gmail.com

RE: FOIA Petition Regarding the Town Council of Georgetown

Dear Mr. Irvine:

We write in response to your correspondence alleging that the Town Council of Georgetown 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 that a quorum of the Town Council violated FOIA by privately discussing and taking action on the Georgetown Historical Society's grant check without complying with the open meeting requirements.

BACKGROUND

The Town Council of Georgetown held a public meeting on July 25, 2022, in which it considered the Georgetown Historical Society's application for a Georgetown Recreation, Education, and Arts Trust ("GREAT") grant of \$24,750.00 for specified improvements to its property, the Marvel Museum.¹ In 2007, the Georgetown Historical Society had permitted another entity, The Delaware Grays, Sons of Confederate Veterans Camp No. 2068 ("SCV"), to establish

¹ Petition, p. 2, Ex. 6; "July 25, 2022 Georgetown Town Council Meeting," https://www.youtube.com/watch?v=ia9WIEi_3Cc (last visited Sept. 9, 2022).

and maintain a memorial on the Museum grounds, which included the Confederate flag.² Public comment on the matter lasted for approximately an hour and a half during the Town Council meeting.³ Following public comment, the Town Council adopted a verbal motion made by Councilmember Angela Townsend to approve the GREAT funding request from the Georgetown Historical Society in the amount of \$24,750.00 “for the specified improvements to the Marvel Museum, and with that, a committee would be formed to address the concerns whether it’s the monument and the flag, or just the flag or the monument.”⁴ On August 4, 2022, the Town Council held a Special Meeting and executive session, in which a memorandum of understanding about the committee was discussed.⁵

On August 9, 2022, the Southern Delaware Alliance for Racial Justice sent a letter to the Town Council expressing concerns about the display of the Confederate flag at the Marvel Museum, arguing that Council’s grant award to the Georgetown Historical Society was not compliant with the Town’s ordinance for the GREAT program.⁶ This letter enclosed a copy of the Georgetown Historical Society Board of Directors’ issued statement reported by Newstalk 92.7 WGMD on August 8, 2022, which asserted: “[o]ur Society appropriately gave its word of binding commitment to SCV, allowing them to exclusively select the flags to be evidenced as part of their memorial in perpetuity, upon which promise they have justifiably and materially relied continuously since” and indicated that the Society intends to permit the SCV to display any flag of its choice.⁷ The Mayor states that the Town Manager talked to the Town Solicitor after the Alliance’s letter was received and was advised to not proceed with the check.⁸ The Mayor states that email correspondence was sent to “everybody” advising to not move forward with issuing the check, but three individuals disagreed, stating that they “made a motion; [they] want the money.”⁹

The Petition presented evidence of the on-going press coverage for this matter that prompted your concern that a private meeting took place. On August 10, 2022, WHYY reported

² Petition, Ex. 1, 2.

³ “July 25, 2022 Town Council Meeting,” https://www.youtube.com/watch?v=ia9WIEi_3Cc (last visited Sept. 9, 2022).

⁴ *Id.*

⁵ “August 22, 2022 Town Council Meeting,” <https://www.youtube.com/watch?v=KgwW1Xoq8gM> (last visited Sept. 9, 2022).

⁶ Petition, Ex. 1.

⁷ *Id.*

⁸ “August 22, 2022 Town Council Meeting,” <https://www.youtube.com/watch?v=KgwW1Xoq8gM> (last visited Sept. 9, 2022); Response.

⁹ *Id.*

the Town Mayor's statement acknowledging that the approval of this grant did not comply with the Town ordinance and quoting him as stating that the Town "better withdraw" due to the potential threat of litigation.¹⁰ On August 11, 2022, the Alliance sent another letter noting its concerns with the open meeting compliance and submitted a FOIA request for records related to this matter.¹¹ The Alliance sent a second request for records the following day.¹² Also on August 12, 2022, the Delaware State News reported the Mayor's same admission as to the flawed approval process and reported a statement from Councilmember Townsend that she obtained the check and signed it, Councilmember Sue Barlow signed it, and they were waiting for Councilmember Penuel Barrett to sign it. The article further reported that upon receipt of the check, the councilmembers planned to deliver it to the President of the Georgetown Historical Society. On August 16, 2022, this Petition was filed with our Office. The Petition describes the Alliance's correspondence and the circumstances that the Alliance was aware of and expressed concern that the three councilmembers' private meetings about the check were in violation of FOIA.

On August 24, 2022, the Town, through its Town Manager, responded to the Petition. The Town indicates that despite its request to the three councilmembers involved in handling the check for written, notarized statements, the councilmembers did not provide any sworn or unsworn factual statements for this Response. Nonetheless, the Town cites to the video recording of its August 22, 2022 meeting.¹³ At this meeting, Councilmember Townsend describes the events of August 12, 2022. She states that she picked up the check from Town Hall, went back to her private workplace and called Councilmember Barlow to ask her to come and sign the check; Councilmember Barlow met with her to sign the check and left. Then, Councilmember Townsend called Councilmember Barrett who came to her private workplace to sign and after which, he left. She asserts that she then called Councilmember Barlow to ask her to deliver the check; she agreed and the two of them went to the Museum to deliver the check. The Town's Response notes that no Town Council meeting was publicly noticed for August 12, 2022 and as other Town Councilmembers and Town staff were not involved in or aware of the August 12, 2022 meeting, it has no further facts to offer and takes no position as to the legal merits of the Petition.

On August 25, 2022, you submitted a letter objecting to the three Town councilmembers' refusal to cooperate in this Office's request for information. You also requested this Office file suit under Section 10005.

¹⁰ Petition, Ex. 3.

¹¹ *Id.*, Ex. 4

¹² *Id.*, Ex. 5.

¹³ "August 22, 2022 Town Council Meeting," <https://www.youtube.com/watch?v=KgwW1Xoq8gM> (last visited Sept. 9, 2022). In these statements at the meeting, Councilmember Townsend also expresses her view that the committee was formed but it would be powerless to act. Specifically, she states that the Historical Society President formed a committee on "the 26th" and he contacted SCV to attend, but SCV refused. Councilmember Townsend then questions what a committee could do, as it could not decide anything on its own.

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.”¹⁴ “[O]pen meeting laws ensure governmental accountability, inform the electorate, and acknowledge that public entities, as instruments of government, should not have the power to decide what is good for the public to know.”¹⁵ 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.”¹⁶ “Public business” broadly encompasses “any matter over which the public body has supervision, control, jurisdiction or advisory power.”¹⁷ To hold a meeting, a public body must meet FOIA’s open meeting requirements, including the posting of a public notice and agenda in advance, giving the public the opportunity to attend, and the creation and maintenance of minutes.¹⁸

When a petition alleges a secret meeting, the petitioner carries the initial burden of making a *prima facie* case that a meeting occurred.¹⁹ “A plaintiff must show substantive proof of a secret meeting rather than mere speculation in order to shift the burden of going forward.”²⁰ The allegations must be sufficiently specific to allow consideration.²¹ “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

¹⁴ 29 Del. C. § 10001.

¹⁵ *Del. Solid Waste Auth. v. The News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984).

¹⁶ 29 Del. C. § 10002(j).

¹⁷ 29 Del. C. § 10002(m).

¹⁸ 29 Del. C. § 10004.

¹⁹ *Del. Op. Att’y Gen.* 17-IB20, 2017 WL 3426260, at *7 (July 12, 2017); *see also* 29 Del. C. § 10005(c).

²⁰ *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)).

²¹ *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”).

that no violation of the open meeting requirements occurred.²² This burden-shifting occurs to avoid requiring a public body to “prove a negative,” *i.e.*, prove that a meeting did not occur.²³

In this instance, the factual record contains allegations, including councilmembers’ statements, that three councilmembers corresponded on August 12, 2022 in order to sign and deliver a check. As three members constitute a quorum of the Town Council, we find that a *prima facie* case has been established, and the burden shifts to the Town to demonstrate compliance with FOIA.²⁴

We next must consider whether the Town Council met its burden to demonstrate compliance with FOIA. We determine it did not. Delaware courts have recognized that the conduct of public body members that is intended to defeat the essential aims of the FOIA statute may be considered a violation of FOIA.²⁵ 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.²⁶ The relevant inquiry is fact-specific and focuses on “the nature, timing,

²² *Del. Op. Att’y Gen.* 05-IB10, 2005 WL 1209240, at *2 (citing *Harris v. Nordquist*, 771 P.2d 637, 641 (Or. App. 1989)).

²³ *Id.*

²⁴ Georgetown C. (Charter) § 4.1 (“The Town Council shall be composed of four (4) Ward members and a Mayor . . .”).

²⁵ *See Del. Solid Waste Auth.*, 480 A.2d 634 (determining that standing committees of less than a quorum of the board were not subject to FOIA but noting with “reluctance and concern that it may be misconstrued as a license for abuse” and a “court of equity would not be powerless to devise an appropriate remedy in the face of conduct deliberately intended to defeat the Act’s essential aims.”); *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 [the superintendent] to the various board members were not a means of circumventing the Freedom of Information Act through serial telephone conversations. Rather, these phone conversations were merely a means by which Dr. Graham could informally poll the Board to find out how each member was likely to vote on the proposal. . . . There is no evidence that Dr. Graham made a series of calls or called repeated meetings to try to sway the Board members’ votes, as occurred in *Blackford v. School Board of Orange County*, 375 So.2d 578 (Fla. Dist. Ct. App. 1979).”).

²⁶ *See, e.g., 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.* 04-IB17, 2004 WL 2639714, at *4-5 (Oct. 18, 2004) (finding that a quorum of councilmembers violated FOIA by creating a consensus on a memorandum for a funding proposal, when one member called other members in the quorum to ask each member to agree to sign the memorandum); *Del. Op. Att’y Gen.* 96-IB05, 1996 WL

and substance of the communications which together may turn serial discussions into a constructive quorum.”²⁷ “Serial discussions may amount ‘to a constructive quorum of the public body when there was an interactive exchange of thoughts and opinions and members were asked to vote or adopt a particular point of view or reach a consensus on what action to take.’”²⁸ According to Councilmember Townsend’s unsworn statements at the meeting, her actions in concert with her two fellow Councilmembers, meet this standard. She called two fellow members to ask them to visit her on a consecutive basis on the same day to sign a check and by these serial phone calls and visits with each member created a constructive quorum of Town Council; this quorum privately reached a consensus to execute the check and then acted on this decision. These serial calls and meetings supplanted a Town Council public meeting to decide to issue and sign the check. We find that the conduct of these councilmembers frustrated the essential aim of FOIA to allow public observance of the Council’s decision and action and violated FOIA in this regard.

When our Office finds a violation of the open meeting requirements, we may recommend remediation when appropriate.²⁹ 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.”³⁰ In determining whether invalidation is appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”³¹ When evaluating a remedy, a court 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.”³² Our Office has previously determined that substantial public rights are affected by the expenditure of public funds.³³

114716, at *4 (Feb. 13, 1996) (determining that the Georgetown Town Council violated FOIA by meeting in sub-groups to discuss, formulate and execute a memorandum).

²⁷ *Del. Op. Att’y Gen.* 15-IB06, 2015 WL 5014135, at *6 (Aug. 19, 2015) (citation omitted).

²⁸ *Id.*

²⁹ *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).

³⁰ *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *7 (Del. Ch. Aug. 29, 1986).

³¹ *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *15 (Del. Ch. May 19, 1994).

³² *Levy v. Bd. of Educ. of Cape Henlopen School Dist.*, 1990 WL 154147, at *7 (Del. Ch. Oct. 1, 1990).

³³ *Del. Op. Att’y Gen.* 06-IB01, 2006 WL 1242008, at *3 (Jan. 4, 2006) (“We have previously determined that substantial public rights may be affected by the expenditure of public money,

In this case, a quorum of three councilmembers, through serial calls and meetings, discussed and took Council action to issue public funds outside of public view. As the check had already been signed and delivered, no substantial reconsideration of the decision to issue the check could occur at the following Council meeting in August. In addition to these factors, a court may consider the status of the Georgetown Historical Society's expenditure of these funds, the role of the Society, and other circumstances. However, we find that the structure of the discussions on that day corroborates an intent to avoid a physical quorum while taking Council action, and this factor, coupled with the significance of this decision on the expenditure of public funds, warrants a finding that a court is likely to void the action taken. Accordingly, we recommend that the Council construe the three councilmembers' decision and action on the check as void and convene a public meeting in compliance with FOIA to reconsider or take action on this matter.³⁴ Your request to bring suit against the Town will be considered forthwith.

CONCLUSION

For the reasons set forth above, we find that a quorum of the Town Council violated the open meeting requirements by privately discussing and taking action on the Georgetown Historical Society's grant check without complying with the open meeting requirements.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

hiring key personnel, and actions affecting the right to vote.”) (citation omitted); *Del. Op. Att’y Gen.* 02-IB12, 2002 WL 1282812, at *5 (May 21, 2002) (“We direct the Council to schedule a special meeting in compliance with FOIA's public notice requirements to discuss and approve any salary increases for the police department.”).

³⁴ *Del. Op. Att’y Gen.* 03-IB17, 2003 WL 22669563, at *3 (July 31, 2003); *Del. Op. Att’y Gen.* 96-IB05, 1996 WL 114716, at *4 (“The fact that Council met in sub-groups to discuss, formulate and execute the November 27, 1995 memorandum suggests that the Council acted deliberately to circumvent the public notice, agenda and record keeping requirements of the Act. We find this conclusion compelling because the November 27, 1995 memorandum set forth significant policies for employees which were discussed by the Council and upon which the Council took action.”).

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Eugene S. Dvornick, Jr., Town Manager, Town of Georgetown