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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB50

December 16, 2022

VIA EMAIL

John D. Hawley
hawleyjd@gmail.com

RE: FOIA Petition Regarding the Delaware Department of Natural Resources and Environmental Control

Dear Mr. Hawley:

We write in response to your correspondence alleging that the Delaware Department of Natural Resources and Environmental Control (“DNREC”), the Delaware Parks and Recreation Council (“Parks Council”), and the Parks Council’s Stakeholder Workgroup (“Workgroup”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”), in connection with DNREC’s changes to the Delaware surf fishing permit program. 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, we determine that Parks Council did not violate FOIA with its agenda topics; however, we determined that the Workgroup is a public body under FOIA, and thus, did violate FOIA’s open meeting requirements. We caution the Parks Council and the Workgroup to comply with FOIA’s open meeting requirements.

BACKGROUND

On November 4, 2022, you filed a petition with this Office pursuant to 29 *Del. C.* § 10005(e). You also requested that the Attorney General file suit on your behalf in the Court of Chancery pursuant to 19 *Del. C.* § 10005(e)(2) if this Office found a FOIA violation.

You argue in your petition that the Parks Council and the Workgroup are both public bodies under FOIA and have violated FOIA by failing to adhere to FOIA’s open meeting requirements.

Specifically, you assert that the Parks Council violated FOIA’s open meeting requirements under 29 *Del. C.* § 10005(e)(2) because the Parks Council’s agendas for its February, May, August, and November 2022 meetings did not give adequate notice of its intent to review or change the surf fishing permit program. You also assert that the Workgroup was a public body under FOIA, and, thus, was required to provide public notice of its meetings.

DNREC and the Parks Council, through counsel, responded on November 23, 2022 to the Petition (“Response”). DNREC argues that the Workgroup is not a public body under FOIA, and thus, is not held to FOIA’s open meeting requirements.¹ DNREC does not dispute that the Parks Council is a public body; however, it argues that Parks Council’s public agendas for its February, May, August, and November 2022 meetings were sufficient to alert the members of the public with an “intense interest” in the subject matter.²

DNREC includes in its Response Ex. A, a letter from Director Bivens to Les Clemmer inviting him to serve on a “Department of Natural Resources and Environmental Control Surf Fishing Program Management Stakeholder Group.” The invitation states the goal of the group is to evaluate the existing surf fishing model and consider alternatives.³ It also includes the date of the first meeting and the frequency of future meetings, with recommendations due in September. The record shows that the first Workgroup meeting was started by Secretary Garvin.⁴ Two members of the Workgroup were members of the Parks Council and four members were legislators.⁵ Mr. Tholstrup, in his affidavit, stated that not all invited individuals accepted the invitation to join the Workgroup and not all members attended all four meetings.⁶

¹ Response, p. 8.

² Response, p. 6, 7.

³ Response, Ex. A. *See also* Response, Ex. E, Memorandum to Secretary Garvin from Mr. Tholstrup (“[A] stakeholder workgroup was formed in May to help evaluate and recommend the best package of potential solutions. Monthly meetings were held through the summer concluding with a final meeting held on August 3, where the group agreed upon the following recommendations.”)

⁴ Response, Ex. D, Parks Council May 5, 2022 Meeting Minutes, p. 2, 3 (“Shipman stated that Secretary Garvin started the meeting off by giving key points”). This Office infers that the meeting referenced is a Workgroup meeting because the Parks Council May 5, 2022 Meeting Minutes state that Vice Chairperson Joe Smack called the Parks Council Meeting to order.

⁵ *Id.* (“Bivens reports two members of the stakeholder group being from council-Ed Lewandowski and Clyde Shipman”).

⁶ Response, Affidavit of Mr. Tholstrup, p.3.

DISCUSSION

I. The Workgroup

FOIA requires all public bodies to comply with open meeting requirements, including advance notice, posting notices, and meeting minutes.⁷ These open meeting requirements only apply to a public body. There are two requirements to be considered a ‘public body.’ First, FOIA defines a ‘public body’ as:

any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity.

29 Del. C. § 10002(h). If the first requirement is met, we must then consider whether that group or entity is supported in whole or in part by any public funds, expends or disburses any public funds, or “is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.”⁸

The inquiry into whether an entity is a public body is a fact intensive inquiry. This Office finds that under a plain reading of the statute that the Workgroup falls within the public body definition. The definition of “public body” within FOIA includes an entity “*appointed by any body or public official* of the State or otherwise empowered by any state governmental entity.”⁹ The record shows that the Parks Director, on behalf of the Division of Parks and Recreation, invited certain individuals to form the Workgroup informing the invitees of the frequency of the meetings and the stated goal to meet with Parks’ employees to review the surf fishing program.¹⁰ The

⁷ 29 Del. C. § 10004.

⁸ *Id.*

⁹ 29 Del. C. § 10002(k) (emphasis added).

¹⁰ Response, Ex. A.

workgroup was empowered by the Director of Parks to meet with the Parks' employees in their review of the surf fishing program.¹¹ Based on this record, the Workgroup meets the first prong.¹²

For the second prong, there is no specific allegation in the Petition as to whether the Workgroup expends or disburses funding. However, the second prong can be met if the entity in question "impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations, or recommendations."¹³ The record shows that the Workgroup was explicitly tasked with evaluating the current surf fishing model and providing recommendations to Director Bivens or Parks and Recreation employees.¹⁴ DNREC argues that the Workgroup's purpose was not to make reports, investigations, or recommendations but functioned like a focus group to which Parks presented ideas and members of the Workgroup asked questions.¹⁵ This Office has found that certain focus groups created and run by a government consultant were not public bodies because the focus groups were appointed by a consultant without input from or oversight by two related public bodies, the focus groups had, at most, one member of one of the related public bodies, the focus groups met only once with little or no continuity of membership or interaction, and were not impliedly or specifically charged with conducting investigations or making recommendations.¹⁶ However, the Workgroup here is distinguishable. The record indicates that the Workgroup was made up of certain individuals selected by Director Bivens with the task to evaluate the current surf fishing model and provide recommendations.¹⁷ Accordingly, we find the Workgroup meets the second requirement to be a public body.

¹¹ DNREC asserts that the Workgroup was not established by the Parks Council as stated by Mr. Hawley, but that the Workgroup was comprised of "individuals who accepted the invitation of Parks Director Bivens." Response, p. 8. This Office does not find this distinction to be determinative as Parks Director Bivens is a public official empowered by DNREC's statute. *See Del. Op. Att'y Gen.* 13-IB05, 2013 WL 5615224, at *3 (Oct. 1, 2013) (finding that a Working Group comprised of individuals invited by the Governor to participate in the Group were "appointed" for the purposes of FOIA).

¹² *See Del. Op. Att'y Gen.* 19-IB04, 2019 WL 1511359, at *2 (Feb. 11, 2019) (holding that a committee comprised of seven members invited to join the group by a public official charged with creating recommendations through a collaborative effort was an advisory group subject to FOIA's open meeting requirements).

¹³ 29 *Del. C.* § 10002(k)(3).

¹⁴ Response, Ex. A.

¹⁵ Response, p. 8.

¹⁶ *Del. Op. Att'y Gen.* 17-IB10, 2017 WL 2917920 (Jun. 15, 2017).

¹⁷ Response, Ex. A, Ex. B, Aug 3, 2022 Powerpoint Slide presumably from a Workgroup meeting which states "[n]ext [s]teps...[p]repare [r]ecommendations for Park Council Review on August 4th...Submit to the Secretary for review and a final decision."

We conclude the Workgroup meets both requirements to be considered a public body under FOIA, and, thus, is subject to FOIA's open meeting requirements.¹⁸

Having found the Workgroup is a public body, we next evaluate whether it conformed itself to FOIA's open meeting requirements. The burden of proof is on the public body regarding any failure to comply with the FIOA statute.¹⁹ A sworn affidavit may be required to meet that burden.²⁰ The petitioner has the burden of making a *prima facie* case that a meeting may have occurred, and, after such a showing the burden shifts to the public body.²¹ FOIA defines meeting as "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."²²

The Petition here presented an announcement from DNREC that states that a "stakeholder workgroup was formed in May to evaluate the data and provide feedback on potential solutions" and meeting minutes from a Parks Council meeting that reference a first meeting of the stakeholder group.²³ Petitioner has made a *prima facie* case that a meeting occurred. The burden then shifts to the public body.

Interestingly, DNREC argues that, even if the Workgroup was considered a public body, the Workgroup meetings did not qualify as "meetings" under FOIA because there was no quorum of the members of the Workgroup. DNREC asserts that because the meetings of the Workgroup were not dependent on a quorum of members being present, the only conclusion is that no meeting of the Workgroup could qualify as a "meeting" under FOIA.²⁴

Mr. Tholstrup stated in his Affidavit that there were four "stakeholder meetings."²⁵ Mr. Tholstrup also stated that not all the stakeholders accepted the invitation and some people who agreed to participate did not attend all four meetings.²⁶ The record shows that the Workgroup

¹⁸ See *Del. Op. Att'y Gen.* 19-IB04, 2019 WL 1511359 (Feb. 11, 2019).

¹⁹ 29 *Del. C.* § 10005(c).

²⁰ *Judicial Watch, Inc. v. Univ. of Del.*, 2021 WL 5816692, at *12 (Del. Dec. 6, 2021).

²¹ *Del. Op. Att'y Gen.* 21-IB17, 2021 WL 3609560, at *2 (Jul. 23, 2021).

²² 29 *Del. C.* § 10002(j).

²³ Petition, Ex. A. and Ex. D.

²⁴ Response, p. 9.

²⁵ Response, Affidavit, p.3, No. 8.

²⁶ *Id.*

“agreed upon” recommendations that were presented to the Parks Council, approved by Parks Council, and eventually submitted to Secretary Garvin for approval.²⁷

The burden of proof is on the public body; here, the Workgroup. The Response’s argument that this public body evaded the requirements of FOIA by permitting less than a quorum to discuss public business is contrary to FOIA’s requirements that government business be conducted in an open, transparent manner.²⁸ It would be illogical and contrary to the spirit of FOIA to allow a public body to evade open meeting notice requirements on its unsupported belief that less than a quorum would be present and offer no record of attendees to show there was no quorum because it was not a meeting.

It is clear that the purpose of the meetings of the Workgroup was to discuss changes to the surf fishing program which falls under the definition of public business.²⁹ We conclude that the Workgroup did not meet its burden to show that its meetings were not “meetings” under 29 *Del. C.* § 10002(j).

FOIA mandates that public bodies meet specific requirements related to meetings, including advance notice and the preparation of meeting minutes.³⁰ Here, the Workgroup gave no public notice of its meetings nor was there any preparation of meeting minutes. On this record, the Workgroup failed to meet its burden and we find that the Workgroup is in violation of FOIA with respect to its four meetings.

Having found that the Workgroup was a “public body” under FOIA and failed to comply with FOIA open meeting laws, there is the question of remediation. Your Petition asks for this Office to recommend appropriate remediation prior to DNREC’s implementation of the proposed changes. Delaware courts have cautioned that invalidating a public body’s action or imposing injunctive relief is reserved for the courts and is a serious sanction appropriate only when “substantial public rights have been affected and the circumstances permit the crafting of a specific remedy that protects other legitimate interests.”³¹

²⁷ Response, Ex. E, p. 1, 2.

²⁸ See *Del. Op. Att’y Gen.* 22-IB34, 2022 WL 4457976 (Sept. 15, 2022) (finding that serial meetings with members of a public body discussing the same topic created a constructive quorum).

²⁹ “Public business” is defined in 29 *Del. C.* § 10002(m) as “any matter over which the public body has supervision, control, jurisdiction or advisory power.” The Workgroup was the entity charged with providing recommendations for the surf fishing program to Director Bivens or Parks’ employees for recommendations to the Parks Council. We find that the Workgroup’s discussion over the changes to the surf fishing program were within its advisory power.

³⁰ 29 *Del. C.* § 10004.

³¹ *Ianni v. Dep’t of Elections of New Castle Cty.*, 1986 WL 9610, at *7 (Del. Ch. Aug. 29, 1986).

Based on the record before us, we do not think that asking the Workgroup or DNREC to recreate the Workgroup’s minutes for past meetings is appropriate here. Minutes are only required to include a record of members present at each meeting and record each vote taken and action agreed upon. The record shows no evidence of any votes taken at the Workgroup meetings. It appears that the only action taken was to consider changes to the surf fishing program and give its recommendations which were presented to Parks Council who voted at an open meeting to recommend those changes.³²

II. The Parks Council

The Petition next asserts that the Parks Council failed to adequately describe the major issues to be considered by Parks Council, stating that there was “no indication that the Council would begin to consider changes to the surf fishing permit process at that time.”³³ DNREC does not dispute that the Parks Council is a public body under FOIA.

Public bodies are required to give sufficient notice of the topics that will be discussed in meetings. Agendas for public meetings must include “a general statement of the major issues expected to be discussed at a public meeting.”³⁴ Delaware courts have found that an agenda should “alert members of the public with an intense interest in the matter that the subject will be taken up by the public body.”³⁵ There is no requirement for the public body to detail every alternative that may take place with respect to a specific subject under consideration.³⁶

Parks Council agendas included “surf fishing” as an agenda item for February 3, May 5, August 4, and November 3, 2022. We find that was sufficient to alert members of the public with an intense interest in the matter that potential changes to the surf fishing program would be taken up by the public body. Parks Council did not violate FOIA’s open meeting laws.

³² This Office notes that, although it is not alleged in the Petition, it appears that there are no minutes from Parks Council August 4 or November 3, 2022 meetings. At the very least there are no minutes included in this record. This Office recommends that Parks Council review its minutes from the August 4 and November 3, 2022 meetings and ensure that they comply with FOIA’s open meeting requirements.

³³ Petition, p. 2, 4.

³⁴ 29 *Del. C.* § 10002(a).

³⁵ *Lechliter v. Del. Dep’t of Natural Res. & Env’t Control*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017) (quoting *Ianni v. Dep’t of Elections of New Castle Cty.*, 1986 WL 9610, at *4 (Del. Ch. Aug. 29, 1986)).

³⁶ *Lechliter v. Becker*, 2017 WL 117596, at *2 (Del. Ch. Jan. 12, 2017).

CONCLUSION

Based on the foregoing, we determine that Parks Council did not violate FOIA's open meeting requirements. However, we find that DNREC and the Workgroup have violated FOIA's open meeting requirements by advising the Parks' Council on a matter of its public business outside a public meeting.

Very truly yours,

/s/ Alexander S. Mackler
Alexander S. Mackler
Chief Deputy Attorney General

cc: Devera B. Scott, Deputy Attorney General
Victoria E. Groff, Deputy Attorney General