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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 23-IB09**

**March 22, 2023**

**VIA EMAIL**

Dr. Christopher T. Curry  
The Source  
[pastor@ezionfairchurch.org](mailto:pastor@ezionfairchurch.org)

**RE: FOIA Petition Regarding the Wilmington City Council**

Dear Dr. Curry:

We write in response to your correspondence, alleging that the Wilmington City Council violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat this 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 determine that the City Council's Committee of the Whole violated FOIA by voting via secret ballot in two executive sessions to select candidates for vacant Council seats. We recommend that these private votes be repeated in open session at a future Committee meeting held in compliance with FOIA.

**BACKGROUND**

The City Council had several vacancies recently, including the seats of a Councilmember At-Large and the First District Councilmember. The Council may appoint individuals to fulfill the remaining term of these two vacant seats.<sup>1</sup> The Council's Committee of the Whole met on

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<sup>1</sup> Response, Ex. E, L (The Nov. 28, 2022 and Feb. 1, 2023 Committee of the Whole meeting minutes both state "City Charter [S]ec. 2-101 provides Council with the authority to appoint a person to complete the remaining term based upon the qualifications as outlined in City Charter Sec. 2-103.").

November 28, 2022 and February 1, 2023 to interview candidates and discuss recommendations for candidates. The Committee met in executive session at both meetings.<sup>2</sup> The Petition alleges that the Council voted privately in those executive sessions to select candidates for the open Council seats in violation of FOIA.<sup>3</sup>

The City's counsel replied to the Petition on March 2, 2023 ("Response"), including an affidavit from the Chief of Staff for the Council who attended the executive sessions at issue. To fill the vacant seats, the City states that the Council followed the process in the City Code, which is led by the Council's Committee of the Whole. For the Councilmember At-Large seat, the Council issued a press release announcing the incumbent's resignation and publicly soliciting applications from qualified candidates. Following the public announcement of the candidates, the Committee met on November 28, 2022, and interviews of candidates were conducted in open session. After the interviews, a public comment period was held, and the Committee then entered executive session. According to the executive session minutes provided with the Response, the members discussed their "preference for not announcing their choices because there was a fear that someone [may] share their selections with the public even though they are in executive session."<sup>4</sup> Each candidate was given an identifier, and the Committee then voted by secret written ballot in executive session, submitting the ballots to the Council President, who verbally announced that Latisha Bracy received the most votes. The selection was not unanimous. After open session reconvened, the Council President announced a motion to recommend a resolution to appoint Latisha Bracy to the seat; this motion passed unanimously. At the December 1, 2022 Council meeting, the Council unanimously voted to adopt the resolution to appoint her to the Councilmember At-Large seat.

For the First District Council seat, following multiple press releases about the process and the candidates, the Committee held a meeting to consider the candidates for this seat on February 1, 2023, where it again interviewed the candidates in open session, accepted public comment, and then moved into executive session. In executive session, the Committee members gave the candidates identifiers and voted by secret ballot to select a single recommended candidate, first voting to choose the top two candidates and then voting again to select the top candidate, Vincent White. Again, the selection was not unanimous. After returning to open session, the Council President announced a motion to approve a recommendation to adopt a resolution appointing Vincent White to the vacant First District seat, which passed unanimously. The Council adopted this resolution at its February 2, 2023 Council meeting unanimously.

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<sup>2</sup> *Id.*, Ex. F, M.

<sup>3</sup> The initial Petition claimed improper voting occurred in three executive sessions. One executive session was held almost a year prior to this Petition, and this claim was dismissed as untimely. *See* 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>.

<sup>4</sup> Response, Ex. F.

The City acknowledges that a tally vote in executive session is improper. However, the City argues that the Council performed its appointments in an open and public manner, and any “technical violation” was harmless because the Council overwhelmingly complied with FOIA. The City contends that any violation was cured by the Committee’s consideration of the recommendations immediately after the executive sessions and by Council’s consideration of the resolutions at the later Council meetings. As nearly all the candidate selection process was performed in public, the City maintains that the public had ample opportunity to observe this process and to have their voices heard.

## DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.<sup>5</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>6</sup> In this instance, the City provided copies of the minutes for the open and executive sessions that are the subject of this Petition. The Chief of Staff attested that she attended the executive sessions, and the minutes are a complete and accurate record of the sessions. In the executive sessions, the Committee gave each candidate an identifier and then secretly voted by writing their choices on a form. The Council President tallied the votes and verbally announced the candidate with the most votes to the Committee. After leaving the executive sessions, the motions to recommend the selected candidates passed unanimously. The resolutions to appoint these candidates to the Council seats at regular Council meetings also passed unanimously.

FOIA provides that executive sessions “may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public.”<sup>7</sup> In addition, FOIA does not permit public bodies to vote in a meeting by secret ballot.<sup>8</sup> Accordingly, we find that the Committee violated FOIA by voting in executive session and by using written ballot to select candidates for recommendation to the two Council vacancies.

Having found a violation of the open meeting requirements, we may recommend remediation when appropriate.<sup>9</sup> The “remedy of invalidation is a serious sanction and ought not

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<sup>5</sup> 29 Del. C. § 10005(c).

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

<sup>7</sup> 29 Del. C. § 10004(c).

<sup>8</sup> 29 Del. C. § 10004(f) (stating that meeting minutes include “a record, by individual member ... of each vote taken and action agreed upon”); *see also Del. Op. Att’y Gen* 19-IB63, 2019 WL 6273317, at \*2 (Nov. 8, 2019) (finding a violation of FOIA occurred when a public body took a vote in open session by secret ballot).

<sup>9</sup> *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).

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.”<sup>10</sup> In this case, the Committee members’ votes in these executive sessions did not allow the public, or even the other Committee members, to observe how each member voted, as they took the votes by secret ballot in private and then “unanimously” adopted recommendations and accompanying resolutions for the chosen candidates in public.<sup>11</sup> Selecting candidates to fill open Council seats impacts substantial public rights, and it is recommended that the Committee’s voting on these candidates be repeated in a future meeting in open session.<sup>12</sup> While the Petition has requested removing candidates from office and invalidating Council actions, this Office lacks the authority to impose any of the requested remediation, as the authority to invalidate a public body’s action or impose other injunctive relief is reserved for the courts.<sup>13</sup>

### CONCLUSION

For the reasons set forth above, we conclude that that the Committee violated FOIA by voting by secret ballot in executive session at the November 28, 2022 and February 1, 2023 Committee meetings to recommend the selected candidates for two Council vacancies.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

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<sup>10</sup> *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at \*7 (Del. Ch. Aug. 29, 1986).

<sup>11</sup> Neither candidate was selected unanimously in the executive session. Response, Ex. F, M.

<sup>12</sup> *Ianni*, 1986 WL 9610, at \*6 (“When the decision involves the electoral process, these rights of the public take on an enhanced importance.”); *Del. Op. Att’y Gen.* 03-IB17, 2003 WL 22669563, at \*3 (July 31, 2003) (“Like *Ianni*, this case affects the fundamental right to vote and the important civil liberty of citizens to be governed by the representatives they elect. We do not see the Town’s FOIA violation as technical. The action taken by the Town Council in declaring a councilman’s office forfeited and voting to replace him with another person affected substantial public rights.”); *Del. Op. Att’y Gen.* 98-IB08, 1998 WL 648718, at \*3 (Sept. 1, 1998) (“Analogizing from *Ianni*, interested members of the public have a right to be heard on issues which substantially affect their right to determine the method and manner in which they will be governed”).

<sup>13</sup> 29 *Del. C.* § 10005.

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: John D. Hawley, Assistant City Solicitor