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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB10

March 30, 2023

VIA EMAIL

Councilmember Tamara Skis
Ellendale Town Council
tamaramskis@gmail.com

RE: FOIA Petition Regarding the Town of Ellendale

Dear Councilmember Skis:

We write in response to your correspondence, alleging that the Town of Ellendale 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 Town violated FOIA by failing to establish that an agenda for the January 30, 2023 Planning and Zoning Commission meeting was properly posted. In addition, the Town Council violated FOIA by meeting via a constructive quorum without satisfying FOIA's requirements for open meetings.

BACKGROUND

The Town of Ellendale Town Council consists of five members. Two members were elected with terms beginning this year, and two other members were elected earlier. The Council has one vacant seat. The Petition submits two allegations for consideration: 1) the January 30, 2023 Planning and Zoning Commission meeting notice failed to include an agenda as required; and 2) a quorum of councilmembers met in person and communicated over email to discuss and

make decisions about public business outside of a public meeting.¹ With the Petition, you submitted various emails involving members of the Town Council and a photograph of the Town bulletin board, which you state was taken on January 26, 2023, showing the Planning and Zoning Commission meeting notice without an agenda.

The Town, through its Council President, replied to the Petition on March 14, 2023 (“Response”). The Town provided an affidavit signed by the three councilmembers accused of meeting privately in residences and the town hall, stating that “three of us have never met in person to discuss town business outside of a duly noticed meeting of the Ellendale Town Council.”² However, the three councilmembers admit that “between January 2023 and February 2023, [they] have exchanged email correspondence relating to mundane town business which, upon information and belief, is a technical violation of FOIA.”³ The members attest that they have been briefed by the Town Solicitor on this topic, and “the transgression will not be repeated.”⁴

DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ For the first claim, you state that the Town failed to post an agenda for its January 30, 2023 Planning and Zoning Commission meeting and provided a photograph alleged to be taken four days before the meeting, showing that the meeting notice did not include an agenda. The Response did not address this claim. As the Town failed to demonstrate it posted an agenda for this meeting as required by FOIA, we find that a violation of FOIA occurred in this regard.

The second claim alleges that a quorum of the Council engaged in private, in-person meetings and exchanged emails to make decisions outside of a public meeting. FOIA requires

¹ The Petition initially made two additional claims. First, the Petition questioned whether it is an ethics violation for the two married councilmembers to have access to the Town accounts. In the Response, the Town Council President agrees such a practice would be unethical and states that he and his spouse would not co-sign checks, but instead, must co-sign with another councilmember. Ethics claims are outside the FOIA Office’s authority to consider. The second claim, that the Town attempted to hold a meeting without proper notice but did not actually hold the proposed meeting, was dismissed, as no violation of FOIA occurred.

² Response.

³ *Id.*

⁴ *Id.*

⁵ 29 *Del. C.* § 10005(c).

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

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.”⁷ 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.”⁸ “‘Public business’ [is] any matter over which the public body has supervision, control, jurisdiction or advisory power.”⁹ When a public body holds a meeting, certain open meeting requirements, such as providing proper public notice and preparing minutes, must be satisfied.¹⁰ For a claim of a secret meeting between public body members, the petitioner carries the initial burden of making a *prima facie* case that a meeting occurred.¹¹ “A plaintiff must show substantive proof of a secret meeting rather than mere speculation in order to shift the burden of proof going forward.”¹² The allegations must be sufficiently specific to allow consideration.¹³ “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 that no violation of the open meeting requirements occurred.¹⁴ This burden-shifting occurs to avoid requiring a public body from having to “prove a negative,” *i.e.*, prove that a meeting did not occur.¹⁵

In this case, the Petition merely alleges that the three councilmembers “have been seen meeting at residences and in town hall together not during open sessions.”¹⁶ In response, the Council provided the sworn affidavit of the three councilmembers, attesting that they have never

⁷ 29 Del. C. § 10001.

⁸ 29 Del. C. § 10002(j).

⁹ 29 Del. C. § 10002(m).

¹⁰ 29 Del. C. § 10004.

¹¹ Del. Op. Att’y Gen. 17-IB20, 2017 WL 3426260, at *7 (July 12, 2017).

¹² Del. Op. Att’y Gen. 05-IB10, 2005 WL 1209240, at *2 (Apr. 11, 2005) (citing *Gavin v. City of Cascade*, 500 N.W.2d 729, 732 (Iowa App. 1993)).

¹³ See Del. Op. Att’y Gen. 16-IB18, 2016 WL 5888777, at *5 (Sept. 29, 2016) (finding that the petitioner did not make a *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”).

¹⁴ Del. Op. Att’y Gen. 05-IB10, 2005 WL 1209240, at *2.

¹⁵ *Id.*

¹⁶ Petition.

met in person to discuss town business outside of a duly noticed meeting of the Town Council.¹⁷ We cannot, on this record, determine this initial allegation meets the burden of making a *prima facie* case that a meeting occurred, and even if this allegation was sufficient, the Town has provided statements under oath that no such meeting occurred. As such, we find no violation with respect to the claim that a quorum of councilmembers met at a physical location and made decisions about public business outside of a public meeting.

The Town Council's email practices compel a different result. "[S]erial telephone, email or other electronic communications among members of a public body may amount to a meeting of the public body."¹⁸ "It is the nature, timing, and substance of the communications which together may turn serial discussions into a constructive quorum."¹⁹ For example, "a public body may achieve a quorum for purposes of FOIA through serial discussions which allow members of a public body 'to receive and comment on other members' opinions and thoughts, and reach consensus on action to take.'"²⁰ It is further required that the communications involve "'an active exchange of information and opinions' as opposed to 'the mere passive receipt of information.'"²¹ The members' exchanges cannot supplant a public meeting.²²

In this case, the Town attests, through the affidavit, that those emails involving more than two councilmembers involved "mundane town business."²³ The provided emails demonstrate that

¹⁷ Response, Aff. of Councilmembers Michael Workman, Lisa Workman, and Terrie Ottomano dated Mar. 8, 2023.

¹⁸ *Del. Op. Att'y Gen.* 17-IB09, 2017 WL 2345247, at *5 (Apr. 25, 2017) (citing *Del. Op. Att'y Gen.* 03-IB11, 2003 WL 21431171, at *4 (May 19, 2003); see also *See GO4PLAY, Inc. v. Kent Cnty. Bd. of Adjustment*, 2022 WL 2718849, n. 28 (Del. Super. July 12, 2022) ("There were no votes cast or exchanged during the email exchange. The members, for the most part, affirmed what they had already stated in the public hearing with the parties present, and the emails show no active exchange of ideas. . . . Therefore, the email exchange was not a means of circumventing FOIA.") (citing *Del. Op. Att'y Gen.* 10-IB17, 2010 WL 5186152 at *3 (Dec. 15, 2010) and *Tryon v. Brandywine Sch. Dist. Bd. of Educ.*, 1990 WL 51719 (Del. Ch. Apr. 20, 1990)).

¹⁹ *Del. Op. Att'y Gen.* 06-ID20, 2006 WL 2724980, at *2 (Sept. 11, 2006) (citation omitted).

²⁰ *Id.* (quoting *Del. Op. Att'y Gen.* 03-IB11, 2003 WL 21431171, at *4 (May 19, 2003)).

²¹ *Del. Op. Att'y Gen.* 06-IB16, 2006 WL 2435111, at *4 (quoting *Del. Op. Att'y Gen.* 03-IB11, 2003 WL 21431171, at *5).

²² *Del. Op. Att'y Gen.* 21-IB17, 2021 WL 3609560, at *2 (July 23, 2021) ("Thus, we find that this vote was not a poll to understand whether the Council was ready to discuss and vote on this issue at a subsequent meeting like the facts of the *Tryon* case; this vote by a series of emails and calls actually supplanted a meeting in which the Council could consider and vote on whether to designate this Juneteenth as a holiday.").

²³ Response, Aff. of Workman, Workman, and Ottomano.

the Town councilmembers addressed various matters with more than two members on several occasions. In one instance, after a councilmember initially questioned whether a letter regarding a tax increase should be approved at a Council meeting, a quorum of councilmembers actively exchanged their thoughts and reached a consensus on a letter notifying the community of a property tax increase adopted in August 2022, the elected councilmembers, and opportunities for the community to get involved in committees and other efforts to support the Town.²⁴ Accordingly, we find that a quorum of Town councilmembers violated FOIA in at least one set of email exchanges by privately discussing and deciding on public business outside of a public meeting.

This Office lacks the authority to invalidate a public body's action or impose other injunctive relief, as this authority is reserved for the courts.²⁵ When this Office finds a violation of the open meeting requirements, we may recommend remediation if appropriate.²⁶ 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."²⁷ In these circumstances, the record does not include sufficient information to determine the extent of the affected interests and whether the specific steps may remediate these violations while protecting other legitimate public interests. The Response states that the councilmembers are no longer engaging in this email practice, and the councilmembers attest that they "have now been briefed by the Town Solicitor on this topic and the transgression will not be repeated."²⁸ We recommend that the Town ensures that its agenda postings and email communications comply with FOIA in the future.

CONCLUSION

For the reasons set forth above, we conclude that the Town violated FOIA by failing to demonstrate that an agenda for the January 30, 2023 Planning and Zoning Commission meeting was properly posted. In addition, the Council violated FOIA by meeting via a constructive quorum without satisfying FOIA's requirements for open meetings.

²⁴ Petition.

²⁵ 29 *Del. C.* § 10005.

²⁶ *Del. Op. Att'y Gen.* 21-IB17, 2021 WL 3609560, at *3; *see also Del. Op. Att'y Gen.* 05-IB15, 2005 WL 2334344, at *4 (Jun. 20, 2005).

²⁷ *Ianni v. Dep't of Elections of New Castle Cnty.*, 1986 WL 9610, at *7 (Del. Ch. Aug. 29, 1986).

²⁸ Response, Aff. of Workman, Workman, and Ottomano.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Craig T. Eliassen, Town Solicitor