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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB34

December 13, 2023

VIA EMAIL

Dan Shortridge
danshortridge@gmail.com

RE: FOIA Petition Regarding the City of Dover

Dear Mr. Shortridge:

We write in response to your correspondence alleging that the City of Dover violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA"). We treat your correspondence as two Petitions 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 issue this combined Opinion to address both Petitions and determine that the City's review committee violated FOIA by failing to prepare an agenda and maintain minutes for its August 29, 2023 meeting.

BACKGROUND

The City of Dover wished to sell surplus property known as the "Old Post Office." To select a purchaser, the City Manager formed a committee, consisting of the Mayor, City Manager, Assistant City Manager, Planning Director, and Central Delaware Chamber of Commerce president, to review proposals and make a recommendation to City Council. This review committee met on August 29, 2023 to evaluate the submitted proposals. On October 16, 2023, you submitted a FOIA request seeking the agendas and minutes of all the meetings of this committee. A few weeks later, the City denied this request, stating that the requested agenda and minutes are exempt from FOIA under 29 *Del. C.* § 10002(o)(2).

The First Petition followed, alleging that the City’s response is improper. You argue that the agenda and minutes could not be fully exempted from disclosure, and if only portions of a document are exempt under Section 10002(o)(2), it is to be redacted and the remainder of the record released. You also contend that agendas and minutes are intended for public disclosure by their definitions under FOIA. Finally, you assert that even if the committee had initially withheld those minutes under the executive session provisions of the statute, those minutes have lost any confidentiality, as the committee delivered its recommendation to the City Council and the committee’s actions were publicly shared through a press release. In response to this First Petition, the City’s counsel provided a response on the City’s behalf (“First Response”), noting that it sent some agendas and minutes of the July to October 2023 meetings of the City Council and its Council Committee of the Whole. The City also enclosed an affidavit from the City Manager. The City Manager attests that the committee met once on August 29, 2023, but because of the confidential nature of the topic discussed, no agenda or minutes were kept for the meeting.

Following receipt of this First Response, you filed a Second Petition, alleging that the City also committed a violation of the open meeting requirements of FOIA, as this committee was a public body and was required to prepare an agenda and minutes for its August 29, 2023 meeting. In its response to this Second Petition, the City replied through its counsel (“Second Response”), acknowledging that “a FOIA violation did in fact occur when the small committee failed to keep an agenda and or minutes.”¹ However, the City again argues that the agenda and minutes are not public records pursuant to Section 10002(o)(2), and it did not have an obligation to provide copies of those records in response to your FOIA request.

DISCUSSION

The public body has the burden of proof to justify its denial of access to records and to otherwise comply with the FOIA statute.² In certain circumstances, a sworn affidavit may be required to meet that burden.³ Section 10004 requires a public body to conspicuously post an agenda and to prepare minutes for its meetings and make those minutes available for public inspection and copying as a public record.⁴ Meeting minutes are required to “include a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon.”⁵ In this case, the City acknowledged that the committee held a meeting on August 29, 2023, and the committee committed a FOIA violation by failing to post an agenda and maintain minutes for the meeting. If the City had followed FOIA’s requirements, the City would have had records to produce in response to your request. Thus, we affirm that the City violated FOIA by

¹ Second Response.

² 29 *Del. C.* § 10005(c).

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

⁴ 29 *Del. C.* § 10004.

⁵ 29 *Del. C.* § 10004(f).

failing to prepare an agenda and minutes as required. To remediate this violation, we recommend that the City's committee prepare minutes for its August 29, 2023 meeting in accordance with the FOIA statute, without disclosing nonpublic information and make these minutes available to you no later than fifteen business days from the date of this Opinion.⁶

CONCLUSION

For the reasons set forth above, we conclude that the City's review committee violated FOIA by failing to prepare an agenda and maintain minutes as required for its August 29, 2023 meeting.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Nicholas H. Rodriguez, City Solicitor

⁶ *Del. Op. Att'y Gen.* 17-IB54, 2017 WL 52568140, at *4 (Oct. 10, 2017) ("In order to remediate any FOIA violations, we recommend that the Commission make minutes of all prior meetings available for inspection and copying pursuant to 29 *Del. C.* § 10003. To the extent no such minutes exist, we recommend that the Commission create such minutes."); *Del. Op. Att'y Gen.* 05-IB06, 2005 WL 840259, at *5 (Mar. 9, 2005) (advising the Board of Adjustment to prepare minutes for two meetings as remediation when the Board failed to keep these minutes as required).