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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB21

May 28, 2024

VIA EMAIL

Edward E. Bintz
ed.bintz360@gmail.com

RE: FOIA Petition Regarding Association of Coastal Towns

Dear Mr. Bintz:

We write in response to your correspondence alleging that the Association of Coastal Towns (“ACT”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 (“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. For the reasons set forth below, we determine that ACT is a public body that is required to meet FOIA’s requirements.

BACKGROUND

The Petition alleges that the Association of Coastal Towns is a public body and has failed to meet FOIA’s open meeting requirements, denying citizens the opportunity to observe or participate in matters related to US Wind’s offshore wind project.¹ The Petition cites the six-

¹ This Petition alleges that ACT violated FOIA over the past two years. Pursuant to the Rules of Procedure for FOIA Petitions and Determinations, the claims alleging violative conduct that occurred more than six months prior to the Petition were dismissed. DEL. DEP’T JUST., RULES OF PROCEDURE FOR FOIA PETITIONS AND DETERMINATIONS, at 2 (2023), <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2023/05/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations-FINAL.pdf>. In addition, this Office declined the Petition’s request to investigate other possible violations, as this is inconsistent with this Office’s

factor test outlined in Attorney General Opinion No. 02-IB19, pointing out that ACT was created by the member municipalities, is entirely controlled by the member municipalities, is supported by government funds, performs functions traditionally or commonly associated with the municipalities, and is wholly comprised of government officials. Based on information gathered through FOIA requests, you allege that ACT serves as an “arm” of its member municipalities, taking a major, and sometimes potentially exclusive, role on matters of significant concern to the municipalities. You argue that ACT has represented its member municipalities’ interest with respect to the US Wind project, including sending at least one letter to the Governor and negotiating with US Wind. You note that ACT banded together to advocate for other shared issues, such as beach replenishment. You allege that ACT’s two-member US Wind Committee is also a public body subject to FOIA. The Petition asserts four primary claims, summarized as follows:

1. ACT holds regularly scheduled, non-public meetings without providing appropriate public notice and public participation as required by Section 10004.
2. ACT held meetings on December 5, 2023 and December 20, 2023 without providing appropriate public notice and public participation required by Section 10004.
3. ACT did not maintain meeting minutes for the December 5, 2023 and December 20, 2023 meetings as required by Section 10004(f).
4. ACT appointed a two-member US Wind Committee, which met without appropriate public notice or public participation required by Section 10004.
5. ACT failed to maintain an online portal for receiving FOIA requests, implement a FOIA request policy, and designate a FOIA coordinator in accordance with Section 10003.²

On May 10, 2024, ACT, through its legal counsel, replied to the Petition (“Response”). ACT asserts that it is not a public body, arguing instead it is “a voluntary organization consisting of members from various coastal towns in Delaware,” which was not created by the General Assembly or the legislative bodies of any of the member municipalities.³ As such, ACT contends that it does not meet the first prong of the two-part statutory test cited in recent Attorney General Opinion precedent and therefore cannot be considered a public body. If Attorney General Opinion No. 02-IB19 did apply, ACT asserts that the six factors in that decision demonstrate that ACT is not a public body, contrary to the Petition’s assertion.

authority. *See* 29 *Del. C.* §§ 10001-10008; *Del. Op. Att’y Gen.* 15-IB06, 2015 WL 5014135, n. 2 (Aug. 19, 2015) (“Please note that we do not, in the context of evaluating petitions for determination under FOIA, operate as an independent fact-finding body.”).

² Due to the time limitations on filing petitions, these claims are limited to alleged violative conduct occurring on or after October 26, 2023.

³ Response, p. 1.

DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.⁴ In certain circumstances, a sworn affidavit may be required to meet that burden.⁵ FOIA mandates that public bodies meet specific requirements when holding public meetings, including advance notice, posting notices and agendas, an opportunity for public comment, and maintaining meeting minutes.⁶ These open meeting requirements only apply to a “public body” as defined by the FOIA statute. Public bodies are also required to make their public records available in accordance with the statute’s requirements.

ACT’s Status as a “Public Body” Under Section 10002(k)

To determine if an entity is a public body under FOIA, a two-part analysis is required.⁷ The first inquiry is whether the entity is a “regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State,” which includes a “. . . committee, . . . advisory board and 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.”⁸ If the first part is met, we then must determine whether the 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.”⁹

Here, seven mayors signed a charter to establish ACT as an unincorporated association that may “act for and on behalf of its members to promote, conduct and protect the general welfare and common interests of its members.”¹⁰ The members are limited to the seven Delaware coastal municipalities: Fenwick Island, South Bethany, Bethany Beach, Dewey Beach, Henlopen Acres, Rehoboth Beach, and Lewes. Each member “shall designate a principal delegate, normally the Mayor and/or others to attend meetings of the group.”¹¹ Each member has a single vote, with a

⁴ 29 Del. C. § 10005(c).

⁵ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁶ 29 Del. C. § 10004.

⁷ *Del. Op. Att’y Gen.* 18-IB28, 2018 WL 2994706, at *1 (Jun. 1, 2018).

⁸ 29 Del. C. § 10002(k).

⁹ *Id.*

¹⁰ Petition, Ex. J.

¹¹ *Id.*

simple majority deciding any issues, and annual dues are required to be paid for costs, such as insurance, consultant fees, meeting transcription services, and other administrative expenses. All seven municipalities were established by charters enacted by the General Assembly,¹² and thus, the municipalities are bodies established by the General Assembly. Therefore, ACT, established by bodies established by the General Assembly, is itself a public body. Alternatively, even if we assume that the seven mayors formed this entity without any needed authorization from their legislatures, the conclusion remains the same, as ACT's members were collectively appointed by public officials of the State.¹³ In either case, the first prong is satisfied.

As ACT collects annual dues from its members and disburses those public funds for expenses, including consultant services, the second prong is also met. Public funds are "those funds derived from the State or any political subdivision of the State."¹⁴ Financial statements attached to the Petition reflect that ACT collects annual dues to support its functions and disburses these funds for expenses.¹⁵ The dues of the members, except Fenwick Island, were committed to hire a consultant for "technical services related to the proposed Maryland Public Service Commission awards for U.S. Wind and Orsted and future offshore Central Atlantic lease areas off the coasts of Delaware and Maryland."¹⁶ As the public funds of the municipalities were collected to support ACT and disbursed for its expenses, the second prong is met. We determine that ACT is a public body pursuant to the statutory definition in *29 Del. C. § 10002(k)*.

Alleged Violations of FOIA

FOIA requires that the meetings of public bodies, with limited exceptions, be open to the public and that meeting notices and agendas be timely posted in advance of the meeting in accordance with the statute.¹⁷ The notice and agenda must be conspicuously posted at the principal

¹² See "Delaware's Town Charters," <https://charters.delaware.gov/> (last visited May 21, 2024).

¹³ *Del. Op. Att'y Gen.* 19-IB54, 2019 WL 5485989 at *3 (Sept. 26, 2019) (finding a work group selected by the County Administrator to be a public body, stating "[w]here, as here, a body is comprised of members appointed by a 'public official,' the body will be found to meet the first part of the 'public body' test."); *Del. Op. Att'y Gen.* 18-IB21, 2018 WL 2266972, at *3 (Apr. 27, 2018) (finding the Seaford City Manager a "public official" for purposes of applying the two-part test); *Del. Op. Att'y Gen.* 97-IB13, 1997 WL 606460, at *2 (Jun. 2, 1997) (finding a committee appointed by the Mayor of the City of Lewes, a public official, to be a public body).

¹⁴ *29 Del. C. § 10002(n)*.

¹⁵ Petition, Ex. K.

¹⁶ *Id.*, Ex. D; *see also id.*, Ex. G, K.

¹⁷ *29 Del. C. § 10004*.

office of the public body holding the meeting, or if no such office exists, at the place where meetings of the public body are regularly held.¹⁸ Municipalities are not obliged to post meeting notices, agendas, or minutes online.¹⁹ A meeting 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.”²⁰ Public business includes “any matter over which the public body has supervision, control, jurisdiction or advisory power.”²¹ The public body must permit a time for public comment in accordance with 29 *Del. C.* § 10004(a). Additionally, a public body is to designate a FOIA coordinator to serve as a point of contact for records requests made to the public body, implement a policy for addressing requests, and develop a web portal for receiving FOIA requests through the internet.²²

In this case, you assert five claims against ACT. The first three claims assert that ACT failed to meet the public notice requirements and allow public participation for ACT’s meetings on December 5, 2023, December 7, 2023, and December 20, 2023. In addition, you allege that ACT did not maintain meeting minutes for the December 5, 2023 and December 20, 2023 meetings. ACT has not provided sworn statements or other appropriate evidence to demonstrate that it met these open meeting requirements for these meetings.²³ As such, we find violations occurred with respect to the first three claims.

The fourth claim alleges that ACT established a two-person committee, known as the US Wind Committee, and that committee met without proper notice or public participation on December 1, 2023.²⁴ The Petition included a mayor’s December 1, 2023 email stating that two mayors of the alleged committee met with US Wind’s representative earlier that day about a

¹⁸ 29 *Del. C.* § 10004(e)(5).

¹⁹ *Id.*; 29 *Del. C.* § 10004(f); *see also Del. Op. Att’y Gen.* 22-IB23, 2022 WL 2759908, at *3 (July 2, 2022).

²⁰ 29 *Del. C.* § 10002(j).

²¹ 29 *Del. C.* § 10002(m).

²² 29 *Del. C.* § 10003.

²³ *Judicial Watch, Inc.*, 267 A.3d at 1010-11 (“Thus, the University is asking this Court to determine that it has met its burden of proof, fully resolving the dispute, based solely on these factual representations. But the resolution of a legal action must rest on competent, reliable evidence. And the Court has held that when an attorney seeks to establish facts based on personal knowledge, those facts must be asserted under oath. A statement made under oath, like a sworn affidavit, will ensure that the court’s determination regarding the public body’s satisfaction of the burden of proof is based on competent evidence.”).

²⁴ Petition, p. 4, Ex. I.

counterproposal related to the “US Wind/ACT agreement.”²⁵ In its Response, ACT argues that any committee also is not a public body because it was not created by an act of the General Assembly or a legislative act of the member municipalities, but does not include the factual basis to dispute this claim. As ACT failed to meet its burden to show that this meeting between two mayors and the US Wind representative was properly held under FOIA, we find that a violation of FOIA occurred at the December 1, 2023 meeting.

Finally, the Petition’s fifth claim is that ACT failed to follow Section 10003’s requirements to have an online portal for receiving FOIA requests, to implement a FOIA request policy, and to designate a FOIA coordinator. ACT did not present evidence of compliance with these requirements. Thus, we find that ACT violated FOIA in these respects.

Recommendations

Having found that ACT violated FOIA, we consider whether any remediation is appropriate to recommend. Section 10005(a) states that any “action taken at a meeting in violation of this chapter may be voidable by the Court of Chancery.” The authority to invalidate a public body’s action, or to impose other relief, is reserved for the courts.²⁶ The Delaware Court of Chancery stated 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.”²⁷ In determining whether invalidation is appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”²⁸

We recommend that ACT and its US Wind Committee discuss those items considered at noncompliant meetings, and ratify any votes taken, at a future meeting held in compliance with FOIA’s open meeting requirements. If minutes exist or any meetings have been recorded or otherwise preserved, it is recommended that ACT make available those existing minutes or use the available meeting materials to create minutes compliant with Section 10004(f).²⁹ Additionally, it is recommended that ACT appoint a FOIA coordinator, implement a FOIA request policy in accordance with the FOIA statute, and create an online portal for accepting FOIA requests.

²⁵ *Id.*, Ex. I.

²⁶ 29 *Del. C.* § 10005.

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

²⁸ *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *15 (Del. Ch. May 19, 1994).

²⁹ *See, e.g., Del. Op. Att’y Gen.* 19-IB09, 2019 WL 1511364, at *4 (Feb. 22, 2019).

To the extent you wish to pursue remedies, you are encouraged to promptly review whether you wish to file suit under Section 10005. Section 10005(a) provides that “[a]ny citizen may challenge the validity under this chapter of any action of a public body by filing suit within 60 days of the citizen’s learning of such action but in no event later than 6 months after the date of the action.” For example, the claim relating to the December 1, 2023 meeting will be time-barred by the six-month limitation on June 1, 2024, or possibly sooner depending on when you learned of the violative action.

CONCLUSION

For the foregoing reasons, we conclude that ACT is a public body, and ACT violated FOIA by failing to conduct certain meetings in accordance with the open meeting requirements and by failing to comply with the above-referenced requirements of Section 10003.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: James E. Liguori, Attorney for the Association of Coastal Towns