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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB24

June 25, 2024

VIA EMAIL

Warren Rosenkranz
wrosenk@yahoo.com

RE: FOIA Petition Regarding the Village of Arden

Dear Mr. Rosenkranz:

We write in response to your correspondence alleging that the Village of Arden violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("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 find that the Village's Governance Task Force violated FOIA by holding a "meeting," as defined by FOIA, through email communications, which did not comply with the open meeting requirements.

BACKGROUND

The Village of Arden is a small municipality with a governing body, known as the Town Assembly, that consists of all residents of the Village.¹ The Town Assembly formed a Governance Task Force for the purpose of reviewing and suggesting possible changes to Arden's governing documents.² On February 11, 2024, you submitted a FOIA request to the Village seeking the minutes for the December 7, 2023 Task Force meeting. The Village replied that the meeting minutes had not yet been approved, but they would be posted after approval. Later, the Village advised another citizen that the approval for the minutes was done remotely, and those minutes are

¹ Arden, Del., C. (Charter) § 4.

² Petition.

now posted on the Village’s website. This Petition followed, in which you allege that sometime between February 17, 2024 and February 22, 2024, the December minutes were approved remotely without the advance public notice required by FOIA.³

On June 4, 2024, legal counsel replied to the Petition on the Village’s behalf (“Response”). The Village states that “[o]n or about February 16, 2024, the draft minutes were circulated electronically to the GTF members, who provided several minor corrections.”⁴ The minutes were then posted on February 18, 2024 to the Village’s website.

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 FOIA mandates that public bodies meet specific requirements when holding public meetings, including allowing public access, posting advance notice and an agenda, permitting an opportunity for public comment, and maintaining meeting minutes.⁷ In this case, the Village acknowledges that the Task Force circulated the draft minutes to its members via email, and after several minor corrections from the group, those minutes were posted to the website.

The relevant inquiry is whether this email exchange qualified as a “meeting” subject to FOIA’s open meeting provisions. This Office has found that serial telephone, email or other electronic communications among members of a public body may amount to a meeting of the public body.⁸ However, “[i]t is the nature, timing, and substance of the communications which together may turn serial discussions into a constructive quorum.”⁹ For example, “a public body may achieve a quorum for purposes of FOIA though serial discussions which allow members of a public body ‘to receive and comment on other members’ opinions and thoughts, and reach

³ The Petition included another claim regarding meetings held more than six months before the filing, which was previously dismissed as untimely.

⁴ Response.

⁵ 29 *Del. C.* § 10005(c).

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

⁷ 29 *Del. C.* § 10004.

⁸ See *Del. Op. Att’y Gen.* 17-IB09, 2017 WL 2345247, at *5 (Apr. 25, 2017); *Del. Op. Att’y Gen.* 03-IB11, 2003 WL 21431171, at *4 (May 19, 2003).

⁹ *Del. Op. Att’y Gen.* 06-ID20, 2006 WL 2724980, at *2 (Sept. 11, 2006) (quoting *Del. Op. Att’y Gen.* 06-IB16, 2006 WL 2435111, at *4 (Aug. 7, 2006)).

consensus on action to take.”¹⁰ Importantly, this Office has stated that “[t]he [open meetings] law is triggered only where the members of a public body ‘communicate about issues that may or will come before the [members] for a vote.’”¹¹ The communications must involve “‘an active exchange of information and opinions’ as opposed to ‘the mere passive receipt of information.’”¹²

As this factual record indicates that the members of the Task Force, over email, discussed and approved the posting of the December 7, 2023 meeting minutes, a matter which would have been scheduled for discussion and action at the next meeting, we find that this exchange constitutes a “meeting” under FOIA. The Task Force violated FOIA by failing to follow the open meeting requirements for this meeting.

We next 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.¹³ 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.”¹⁴ In determining whether invalidation is appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”¹⁵ In this case, we recommend that the Task Force discuss those December 7, 2023 minutes and ratify the vote regarding those minutes at a future meeting held in compliance with FOIA’s open meeting requirements.

¹⁰ *Id.* (quoting *Del. Op. Att’y Gen.* 03-IB11, 2003 WL 21431171, at *4).

¹¹ *Del. Op. Att’y Gen.* 03-IB11, 2003 WL 21431171, at *2 (quoting *Wood v. Battleground Sch. Dist.*, 27 P.3d 1208, 1217 (Wash. App. 2001)).

¹² *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).

¹³ 29 *Del. C.* § 10005.

¹⁴ *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *7 (Del. Ch. Aug. 29, 1986).

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

CONCLUSION

Based on the foregoing, we conclude that the Village's Governance Task Force violated FOIA by conducting a "meeting" through email without satisfying FOIA's open requirements.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Edward B. Rosenthal, Attorney for the Village of Arden