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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB28

July 26, 2024

VIA EMAIL

Carol DiGiovanni
cmdigiovanni@yahoo.com

RE: FOIA Petition Regarding the Village of Arden

Dear Ms. DiGiovanni:

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 violated FOIA by failing to meet its burden to demonstrate the June 23, 2024 meeting was not subject to the open meeting requirements of FOIA.

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 scheduled a June 24, 2024 Town Assembly meeting to vote on the Schroeder Trust. The Petition alleges that the June 4, 2024 Advisory Committee meeting minutes indicated that a public meeting would be held to discuss the Schroeder Trust before the scheduled vote. A few days prior to the Town Assembly meeting, the Village sent an email to invite residents to attend an informational session about the Schroeder Trust on June 23, 2024. The Petition alleges that this informational session was not properly noticed in accordance with FOIA.

On July 2, 2024, legal counsel to the Town Assembly Chair replied to the Petition on the Village's behalf ("Response") and included the Chair's affidavit attesting that the factual

¹ Arden, Del., C. (Charter) § 4.

statements in the Response were true and correct to the best of his knowledge and belief. The Village states that the June 24, 2024 Town Assembly meeting to approve the Schroeder Trust was properly noticed, and the Village scheduled this informational session in advance of the meeting. The invitation to the meeting indicates the Trust document had been sent out and discussed at multiple Village meetings and that the information session was offered for “those interested in discussing the document in more detail prior to [the] Town Meeting.”² The Village asserts that this “session was not a public body (neither committee or town assembly meeting involved) and only involved presenting information and providing clarity to those who wanted it” and that “[n]o decision and no changes to the document were being considered.”³ The Village states that it emailed the meeting invitation to those residents who registered on the website three days prior to the meeting and approximately ten people, including the Chair, attended.

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 To advance FOIA’s objective of transparency, FOIA mandates that public bodies meet specific requirements when holding public meetings to discuss or take action on public business, including allowing public access, posting advance notice and an agenda, permitting an opportunity for public comment, and maintaining meeting minutes.⁶

In this case, the Village held an informational session about the Schroeder Trust. As the topic was scheduled for a later vote by the full Town Assembly, discussion of the Schroeder Trust clearly constitutes public business under the jurisdiction of the Village.⁷ The Delaware Court of Chancery has emphasized that policy decisions by public bodies “are best understood as a decisional process based on inquiry, deliberation and consensus building” and “[b]ecause informal gatherings or workshops are part of the decision-making process they too must be conducted openly.”⁸

² Response, Ex. 2.

³ *Id.*, p. 2.

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 29 *Del. C.* § 10002(m) (“‘Public business’ means any matter over which the public body has supervision, control, jurisdiction or advisory power.”).

⁸ *Levy v. Bd. of Educ. of Cape Henlopen Sch. Dist.*, 1990 WL 154147, at *6 (Del. Ch. Oct. 1, 1990).

The relevant inquiry here is whether this informational session constituted a meeting of a “public body,” as defined by FOIA. To make this determination, a two-part analysis is required.⁹ 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.”¹⁰ 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.”¹¹

To determine whether the informational session was a meeting of a public body, we require the information necessary to apply the statutory definition of public body, such as the meeting attendees and their roles, and how the meeting group was formed. As the burden is on the public body to establish FOIA compliance for this meeting and we find the information in the record is insufficient to make this determination, we are compelled to find that a violation occurred.

Having found that the Village 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.¹² 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.”¹³ In determining whether invalidation is appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”¹⁴ In this case, we recommend that the Village discuss this topic of the Schroeder Trust and ratify the vote at a future meeting held in compliance with FOIA’s open meeting requirements.

⁹ *Del. Op. Att’y Gen.* 18-IB28, 2018 WL 2994706, at *1 (Jun. 1, 2018).

¹⁰ 29 *Del. C.* § 10002(k).

¹¹ *Id.*

¹² 29 *Del. C.* § 10005.

¹³ *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *7 (Del. Ch. Aug. 29, 1986).

¹⁴ *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 violated FOIA by failing to meet its burden to demonstrate the June 23, 2024 meeting was not subject to the open meeting requirements of FOIA.

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