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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB40

October 3, 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 (“Village”) 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. The material issue in this matter is whether the officers of the Town Assembly of the Village are a “public body” within the meaning of FOIA. For the reasons set forth below, we conclude that the officers are not a public body and therefore their “office hours” are not subject to FOIA.

BACKGROUND

The Village is a small municipality with a governing body, known as the Town Assembly, that consists of all residents of the Village.¹ On January 24, 2022, the Village held a town meeting. You allege that during that meeting, the Town Assembly passed a motion forming a new public body called “Officers” consisting of people already holding office with the Town Assembly: the Treasurer, the Secretary of Town Assembly, the Chair of the Advisory Committee, and the Chair

¹ Arden, Del., C. (Charter) § 4.

of Town Assembly. The Officers hold office hours once a month to “[d]iscuss village governance with officials of the Village of Arden, Delaware.”²

On May 9, 2024, office hours were held.³ On June 13, 2024, office hours were held with a “quorum of Officers” and two members of the Board of Assessors to discuss financial issues of the Village.⁴ On July 11, 2024, office hours were held with a “quorum of Officers” and a member of the Board of Assessors to discuss the presentation of the annual Budget Referendum.⁵

On June 2, 2024, you requested the minutes of the May 9, 2024 office hours.⁶ The Secretary of the Town Assembly responded stating that the town officers were not a public body, therefore when they meet they do not need to take minutes unless their meeting constitutes a quorum of the Advisory Committee.⁷ On July 30, 2024, you requested the minutes of the July 11, 2024 office hours and received no response.⁸

This Petition followed, alleging that the Village violated FOIA by not creating or producing minutes of the Officers’ office hours on May 9, 2024 and July 11, 2024. You contend that the Officers are a public body as defined by FOIA and that their office hours are public meetings subject to the requirements of FOIA.

On September 16, 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 statements in the Response were true and correct to the best of his knowledge and belief. The Village is governed by the Charter of Arden (“Charter”).⁹ The Charter defines two positions of the Town Assembly, the Chairman of the Town Assembly and the Secretary of the Town Assembly.¹⁰ Both positions are elected by the Town Assembly. “In 1968, the Village created the Advisory committee, which is a committee consisting of all of the standing chairs of the other committees.”¹¹

² Petition, p. 2.

³ Petition, p. 3.

⁴ *Id.*

⁵ *Id.*

⁶ Petition, p. 69.

⁷ Petition, p. 70.

⁸ Petition, p. 71.

⁹ Response, p. 1.

¹⁰ Response, p. 1 citing §§ 5(g) and 5(h) of the Charter of Arden.

¹¹ Response, p. 1.

The Advisory committee is chaired by the Advisory chair who is elected by the Town Assembly, unlike other committee chairs.¹² In 2007, the Town Assembly approved the addition of another position, the Town Treasurer. The Town Treasurer is also elected by the Town Assembly. At the same time that the Town Assembly approved the addition of the Town Treasurer, the four officers began holding general “office hours” at “regular intervals to be able to deal with [] operational responsibilities.”¹³

In the years following, confusion arose in the Town Assembly regarding the definition of the term “officers” as used in the Charter. At a meeting of the Town Assembly in January 2022, the Village sought to clarify what the term “officers” meant. A motion was presented and passed as follows:

“MOTION: The word “officers” in Village documents refers to the Chairs of the Town Assembly and Advisory Committee, the Village Secretary and the Village Treasurer. Calling them “officers” shall not confer any additional responsibilities on those holding these offices; that is, they shall have only those responsibilities authorized by the town charter or approved by the Town Assembly.”¹⁴

The Village asserts that the motion did not create a new public body.¹⁵

In response to your requests for the minutes of the office hours held on May 9, 2024 and July 11, 2024, the Village asserts: first, that it inadvertently sent a response to your request for the July 11, 2024 minutes to the wrong email address.¹⁶ Second, that the response to both your requests is the same: the Village does not have responsive documents because the officers are not a public body and office hours are not a meeting of a public body such that minutes would be required to be taken.¹⁷

¹² *Id.*

¹³ Response, p. 4.

¹⁴ Response, p. 4.

¹⁵ Response, p. 5.

¹⁶ *Id.*

¹⁷ *Id.*

DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.¹⁸ In certain circumstances, a sworn affidavit may be required to meet that burden.¹⁹ 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.²⁰

As a threshold matter, we must determine whether the Officers are a public body as defined by FOIA. To make this determination, a two-part analysis is required.²¹ 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."²² 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."²³

This Office has previously determined that, like all municipalities in the State of Delaware, the Village and its governing body, the Town Assembly, are public bodies and therefore subject to FOIA.²⁴ The Town Assembly's January 2022 meeting motion specially sought only to clarify the definition of the term "officers" and did not create a new group, committee or entity nor did it expand the charges already given to each officer's individual position. We determine, based on this record, that the officers of the Town Assembly do not constitute a public body subject to FOIA's open meeting and minutes requirements.

¹⁸ 29 Del. C. § 10005(c).

¹⁹ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

²⁰ 29 Del. C. § 10004.

²¹ *Del. Op. Att'y Gen.* 18-IB28, 2018 WL 2994706, at *1 (Jun. 1, 2018).

²² 29 Del. C. § 10002(k).

²³ *Id.*

²⁴ *Del. Op. Att'y Gen.* 18-IB28, 2018 WL 2994706 (citing *Del. Op. Att'y Gen.* 17-IB09, 2017 WL 2345247, at *3 (Apr. 25, 2017) (citing *Del. Op. Att'y Gen.* 96-IB13, 1996 WL 254932, at *2 (May 6, 1996)).

CONCLUSION

For the reasons set forth above, we conclude that the Village did not violate FOIA because the officers of the Town Assembly are not a public body.

Very truly yours,

/s/ Carla A.K. Jarosz

Carla A.K. Jarosz
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

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