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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 25-IB15

March 3, 2025

VIA EMAIL

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RE: FOIA Petition Regarding the City of Newark

Dear Petitioners:

We write in response to your correspondence, alleging that the City of Newark 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 of whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that the City did not violate FOIA's open meeting requirements by meeting with the Newark Charter School on the three identified occasions to discuss the Folk Memorial Park proposal. The remaining allegations are not FOIA claims that this Office is authorized to consider.

BACKGROUND

The City of Newark's Council scheduled a public meeting for January 27, 2025, where it planned to discuss the agenda item, "Recommendation to Enter into an Agreement with Newark Charter School for a Proposed Project at Folk Memorial Park."¹ The proposed project was to allow

¹ Petition.

the Newark Charter School to construct baseball and softball fields on City parkland pursuant to a long-term agreement. This item was removed from the agenda and this discussion was delayed following “extensive public comment.”² This Petition followed.

The Petition alleges that the City, through the actions of the City Manager and Mayor, violated FOIA in three ways: (1) by not publishing their intent to initiate a contract to convert a municipal park to a baseball field, (2) by keeping secret the minutes of their contract discussions and not allowing any public review or discussion of this major capital project, and (3) by selling a Newark Park in secrecy. You state that typically, major capital projects such as this conversion of a park, are part of a public process to develop a capital budget. You believe that secret discussions have been occurring for fifty years to give the Folk Memorial Park to the Newark Charter School Head without the consent or knowledge of City residents or City Council members. You allege that there has been no public notice or input into this matter, and you think that statements made by the Head of the Newark Charter School suggest a specific contract with the City is already in place.

The City, through its legal counsel, replied to the Petition and enclosed the affidavit of the City Manager (“Response”), who attests that the Response is true and correct to the best of his knowledge. The City denies violating FOIA, as there were no “secret negotiations” involving any City public body.³ The City alleges that the Newark Charter School representatives, in late 2024, contacted the City Manager, Parks Director, and Deputy Parks Director about using one of three potential sites for their playing fields. In addition to a few phone calls and emails, the City asserts that these City employees had three meetings with Newark Charter School to learn about the Folk Memorial Park proposal, but a contract was not negotiated, nor was the field layout approved; rather, the Charter School provided a copy of another lease as a possible template and a list of terms important to the Charter School. The City alleges after these preliminary discussions, the matter went before City Council in executive session, where it was determined that this item should be set for a public discussion; the item then was scheduled for the January meeting with “the sole purpose being to ascertain if there was any interest in pursuing this concept any further.”⁴ However, the City states that the agenda item inaccurately suggested a vote on a contract would occur, and upon discovery of this mistake, the City removed the item from the agenda and announced at the January 27, 2025 meeting that a public information session would take place to allow public discussion of the proposal.

Based on these facts, the City argues that FOIA’s open meeting requirements do not apply here, as only City employees engaged in discussions with the Newark Charter School, and prior to the January 27, 2025 meeting, no City public body held discussions about this matter with Newark Charter School representatives. Further, despite the inaccurate agenda item, the City states that

² Response.

³ *Id.*

⁴ *Id.*

“no contract has ever existed on this proposal.”⁵ Rather, the City submits that “FOIA does not prevent City employees from engaging in meetings with Newark residents that may have an idea they believe is for the betterment of the City” and “[t]hat is literally all that happened here.”⁶ Finding otherwise “would seriously jeopardize the governance of municipalities such as Newark.”⁷

DISCUSSION

The public body carries the burden of proof to demonstrate compliance with the FOIA statute.⁸ In certain circumstances, a sworn affidavit may be required to meet that burden.⁹ Initially, we note that this Office’s authority is limited to determining “whether a violation of [the FOIA statute] has occurred or is about to occur.”¹⁰ Two of the Petition’s claims are not related to the FOIA statute, specifically the City’s requirements to incorporate this project into the City’s capital budget process and the City’s determination of what matters are required to be discussed or approved by Council. This Office does not have the authority to address those claims in the Petition.¹¹

The remaining claim is that the City improperly held private meetings to negotiate a contract with the Newark Charter School, without following the open meeting requirements of FOIA. 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.¹² These open meeting requirements only apply to a “public body” as defined by the FOIA statute.

The City submitted its Response under oath and asserted that no City public body was involved in the three identified meetings with the Newark Charter School representatives. The City clarified that these meetings involved the City Manager, Parks Director, and Deputy Parks

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ 29 *Del. C.* § 10005(c).

⁹ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

¹⁰ 29 *Del. C.* § 10005(e).

¹¹ *See Del. Op. Att’y Gen.* 20-IB28, 2020 WL 7663557, at *2 (Nov. 9, 2020) (“These matters of municipal law, concerning the authority of the Council President or Mayor, are outside the scope of the FOIA statute, and thus, we make no determination regarding these issues.”).

¹² 29 *Del. C.* § 10004.

Director. The open meeting requirements of FOIA do not apply to the City Manager,¹³ and consultation with his administrative staff does not transform those meetings into meetings of a public body.¹⁴

The final inquiry is whether the meetings between these two groups, the City employees and the Newark Charter School representatives, constituted the creation of a new public body.¹⁵ To make this determination, a two-part analysis is required.¹⁶ 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.”¹⁷ 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.”¹⁸

In this case, this first prong is not met. There is no evidence in the parties’ submissions that this group of City and Newark Charter School employees was “established by an act of the General Assembly of the State, or established by any body established by the General Assembly

¹³ Either the City Manager is not considered a public body or is a public body of one, to which open meeting requirements do not apply. *See 29 Del. C. § 10004(h)(6)* (“[FOIA] shall not apply to the proceedings of . . . public bodies having only 1 member.”); *Del. Op. Att’y Gen. 18-IB08*, 2018 WL 1061278, at *1 (Feb. 12, 2018) (“Pursuant to the City’s Code of Ordinances, the City Manager [of Newark] is appointed by the City Council and acts as ‘the chief administrative officer’ of the City. Assuming, *arguendo*, that the City Manager is a public body, he is a ‘body of one’ to whom the open meetings provisions do not apply.”).

¹⁴ *Del. Op. Att’y Gen. 18-IB08*, 2018 WL 1061278, at *1 (“As we have previously noted, the exemption from FOIA’s open meetings provisions is not lost if a body of one consults with his or her staff.”); *Del. Op. Att’y Gen. 01-IB15*, 2001 WL 1593115, at *2 (Oct. 23, 2001) (“This statutory exemption is not lost if an executive official consults with his or her staff to obtain facts to make an informed executive decision.”).

¹⁵ The Petition does not present the allegation that the Newark Charter School representatives as a group constitute a separate public body that would trigger the open meeting requirements, nor do the submissions specify the Charter School’s attendees of the meetings. That issue is therefore not addressed.

¹⁶ *Del. Op. Att’y Gen. 18-IB28*, 2018 WL 2994706, at *1 (Jun. 1, 2018).

¹⁷ *29 Del. C. § 10002(k)*.

¹⁸ *Id.*

of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity.”¹⁹ Instead, this “gathering appears to be an informational gathering of two groups of employees whose actions are not otherwise subject to FOIA’s open meetings provisions.”²⁰

Thus, we find that the City did not violate FOIA when the City Manager and his staff met with the Newark Charter School representatives on those three occasions to discuss the Folk Memorial Park proposal without following open meeting requirements. We note that the City Council has committed to allow public input on this Folk Memorial Park proposal at a future session.²¹

CONCLUSION

For the reasons set forth above, we conclude that the City did not violate FOIA’s open meeting requirements by meeting with the Newark Charter School on the three identified occasions to discuss the Folk Memorial Park proposal. The remaining allegations are not FOIA claims that this Office is authorized to consider.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Paul E. Bilodeau, City Solicitor

¹⁹ *Id.*

²⁰ *Del. Op. Att’y Gen.* 18-IB08, 2018 WL 1061278, at *2.

²¹ Response, Minutes of City Council, Jan. 27, 2025 Meeting (“While some may wish to speak on the matter of Folk Memorial Park, the decision was made yesterday to postpone that agenda item. A public information session will be held shortly, during which all proposal details will be shared, and residents will be allowed to participate.”).