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Office of the Attorney General of the State of Delaware

Attorney General Opinion No. 26-IB62

October 14, 2026

Via Email

Bernadette Ruf
beruffy@gmail.com

RE: FOIA Petition Regarding the Trustees of the New Castle Common

Dear Ms. Ruf:

We write in response to your correspondence alleging that the Trustees of the New Castle Common 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 of whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we determine that the Trustees violated FOIA by failing to post an agenda for the March 18, 2026 meeting and by failing to maintain accurate minutes regarding the Jefferson Street project. The remaining allegations do not constitute violations of FOIA.

Background

The Trustees of the New Castle Common held a budget workshop meeting on March 18, 2026. At this meeting, you allege that a motion was approved to table a discussion about a paving and parking lot project on Jefferson Street. You state that no subsequent vote appears in a later meeting, but a Trustee's May 6, 2026 letter to the editor in a local newspaper stated that a vote had occurred. You allege that no agenda appears to have been posted for the March 18 budget workshop and the minutes for this meeting were not posted until after the project was completed. You also contend that either no vote occurred or the minutes are inaccurate, as the minutes merely state the project discussion was tabled and omit any vote on this Jefferson Street project, despite the Trustee's letter to the editor indicating a vote occurred. Finally, you allege that the project was executed without being approved in a public meeting, and if the Trustees approved this project outside of a meeting, you believe it would be a violation of FOIA.

On September 3, 2026, the Trustees, through its legal counsel, replied to the Petition (“Response”). The Trustees enclosed the affidavit of the President of the Trustees, attesting this Response has been reviewed and the facts therein are accurate. The Trustees assert that as they are not a public body, they have not violated FOIA but provide this Response voluntarily. The Trustees acknowledge that they did not post an agenda prior to the March 18, 2026 meeting, stating that had an agenda been posted, it would contain the single item of the Trustees’ budget. The Trustees note that although not required to do so, the Trustees routinely post meeting minutes online after they are approved by the Trustees’ board of directors. The Trustees argue that the March 18, 2026 meeting minutes were timely posted, as they were posted shortly after the minutes were approved at the April 7, 2026 board meeting.

Regarding the vote on the Jefferson Street project that you allege is missing from the minutes, the Trustees state that “[w]hen the Precision Paving bid was discussed at the March 18th meeting, many of the Trustees present understood that the bid encompassed three proposed paving projects, the Asphalt Walkway to the River at the lower end of the 3rd Street Parking Lot, Penn Farm Driveway, and Jefferson Street.”¹ The Trustees assert this “understanding is demonstrated by the Trustees’ decision to amend the March 18th minutes at its April 7th board meeting to reflect that Precision Paving was also selected for the Penn Farm Driveway project, thereby confirming all three projects had been awarded to Precision Paving.”² Because of this amendment, the Trustees argue that the two votes taken on March 18, 2026 to award the 3rd Street Parking Lot and Penn Farm Driveway “constitute a vote that awarded the bid for all three paving projects to Precision Paving contingent on confirmation of the Jefferson street paving cost.”³ Thus, the Trustees argue that the Trustees’ use of the word “tabled” in the minutes regarding Jefferson Street merely reflects a deferment of discussions until after the price of the Jefferson Street project was received. The Trustees assert that when the Jefferson Street estimate was received, the Trustees considered all three projects approved by the two March 18th votes.

Finally, the Trustees argue that the project was not required to be approved during a public meeting because the Trustees are not a public body as defined in FOIA. The Trustees note that while this Office previously found them to be a public body, later opinions by other agencies have reached what it believes to be conflicting conclusions as to its status. The Trustees point to a 2021 Public Integrity Commission opinion, in which the Commission expressed doubt over their classification as a public body and the Commission’s jurisdiction over a complaint. The Trustees argue that it is not a public body under FOIA’s definition because they were not established by the General Assembly. Rather, the Trustees allege that they are a private charity that does not receive public funds, are not vested with responsibility to advise, make reports, investigations, or recommendations to any state or local government official, and do not perform an executive or legislative function. The Trustees assert that their Board of Directors is elected by qualified voters, not appointed by any government official, and their charitable purpose is to preserve and protect the historic Common lands for the use and benefit of the inhabitants of the town of New Castle.

¹ Response.

² *Id.*

³ *Id.*

The Trustees allege that in another non-FOIA matter, the Delaware Department of Justice, while reviewing the nature of the Trustees entity, did not assert that the Trustees were a public body, as defined by FOIA; instead, the Trustees assert they were directed to state on their Form 990 that they were a nonprofit corporation “which holds under trust fiduciary obligations and manages under corporate fiduciary obligations the properties known as the New Castle Common” and that they were “incorporated in 1764 and reincorporated by the Delaware State Assembly in 1792.”⁴

Discussion

Delaware’s FOIA law “was enacted to ensure governmental accountability by providing Delaware’s citizens access to open meetings and meeting records of governmental or public bodies, as well as access to the public records of those entities.”⁵ The public body has the burden of proof to demonstrate compliance with the FOIA statute.⁶ When presenting the facts essential to supporting its legal position, the public body must submit those factual representations under oath.⁷

This Office has previously determined that the Trustees constitute a public body for purposes of FOIA.⁸ For the first claim, the Trustees acknowledged that an agenda was not posted prior to the meeting, and as an agenda is required pursuant to Section 10004(e), we find a violation for failing to post the meeting agenda prior to the March 18, 2026 budget workshop meeting.

The Petition’s second claim alleging that the Trustees failed to post the meeting minutes until after the project’s completion, is not a violation of FOIA. Only State executive branch entities must post their minutes online.⁹ As the Trustees are not this type of public body, no violation is found in this regard.

⁴ Response. However, we note that the Response does not assert that the other division of the DOJ that reviewed their status made any findings regarding the Trustees’ designation as a “public body” under FOIA.

⁵ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

⁶ 29 Del. C. § 10005(c).

⁷ *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.”).

⁸ *Del. Op. Att’y Gen.* 17-IB34, 2017 WL 3426274 (July 28, 2017).

⁹ 29 Del. C. § 10004(f).

The remaining three claims relate to the motion regarding the Jefferson Street paving project. The Petition first alleges that the minutes did not include a public vote on the Jefferson Street Project, as indicated by a Trustee, and thus, the minutes are inaccurate. FOIA requires the minutes of a public meeting to include “a record of those members present and a record, by individual members ... of each vote taken and action agreed upon.”¹⁰ Implicit in this mandate, a public body, once it decides to address a topic in its minutes, must prepare minutes which do “not misstate or omit what in fact happened.”¹¹ Here, the March 18, 2026 minutes have separate items for the 3rd Street Parking Lot, Penn Farm Driveway, and Jefferson Street projects. For the 3rd Street project, the minutes indicate that the Committee recommended an award to Precision Paving, which was unanimously passed. For the Penn Farm Driveway, the minutes originally indicated the Committee recommended an award to Diamond Materials, which also passed. The April meeting minutes show the Trustees approved an amendment to the March 18, 2026 minutes to change the Penn Farm Driveway award to Precision Paving.

For the Jefferson Street project, the minutes state that a Trustee explained that the City requested this work be done, and “the Committee recommended that the bid award be given to Diamond Materials.”¹² The action taken was “Mr. Alfree made a motion to table discussion of repaving the Trust Jefferson Street paper street” and the “motion was seconded by Mr. Toner and was unanimously passed.”¹³ Contrary to this language, the Trustees state that the intent was to award this Jefferson Street project, along with the other two projects to Precision Paving, contingent upon receiving an estimate for Jefferson Street. Even accepting the Trustees’ sworn statements of what occurred, we still find a violation of FOIA, because the minutes, as they stand, do not reflect this. As such, we recommend that the Trustees amend the minutes to reflect what they allege occurred.

The Petition also claims that the Trustees may have undertaken this project without authorization, due to the lack of public vote. As the FOIA statute does not dictate the types of matters that require authorization by a public body, this claim is outside the scope of this Office’s scope of review.

The final claim is that if the project was approved informally outside of a meeting, this would be a violation. This claim is not sufficiently alleged. Again, the public body’s obligation to approve certain matters of public business is not addressed in FOIA, and if the claim is alleging

¹⁰ *Id.*

¹¹ *Reeder v. Dep’t of Ins.*, 2006 WL 510067, at *15 (Del. Ch., Feb. 24, 2006).

¹² Petition.

¹³ *Id.*

a meeting of the Trustees occurred privately, additional information about the meeting would be needed, in order to meet the burden of establishing a *prima facie* case that a meeting occurred.¹⁴

Conclusion

For the foregoing reasons, we conclude that the Trustees violated FOIA by failing to post an agenda for the March 18, 2026 meeting and by failing to maintain accurate minutes regarding the Jefferson Street project. The remaining allegations do not constitute violations 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: Glenn C. Mandalas, Esq., Attorney for the Trustees of the New Castle Common

¹⁴ *Del. Op. Att’y Gen.* 24-IB48, 2024 WL 4885079, at *2 (Nov. 14, 2024) (“When a petition alleges a secret meeting, the petitioner carries the initial burden of making a *prima facie* case that a meeting occurred. ‘A plaintiff must show substantive proof of a secret meeting rather than mere speculation in order to shift the burden of going forward.’ The allegations must be sufficiently specific to allow consideration. ‘Once a plaintiff has made a *prima facie* case that a quorum of a public body has met in private for the purpose of deciding on or deliberating toward a decision on any matter,’ the burden then shifts to the public body to prove that no violation of the open meeting requirements occurred.”) (internal citations omitted).