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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB49

December 16, 2022

VIA EMAIL

Michael Platt, City Council President
New Castle City Council
mplatt@newcastlecity.delaware.gov

RE: FOIA Petition Regarding the New Castle City Council

Dear Council President Platt:

We write regarding your correspondence alleging that the New Castle City Council violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your 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.¹ For the reasons set forth below, we conclude that the Council did not violate FOIA’s open meeting requirements as alleged in the Petition. However, we encourage the Council to review its email practices with its legal counsel to ensure compliance with FOIA.

BACKGROUND

The City Council is comprised of five members. At a March 2022 Council meeting, the Council discussed and voted to directly hire a City tourism director under a one-year contract.² The resolution stated that the City Administrator was authorized to solicit applications for

¹ The claims arising prior to May 3, 2022 were not timely submitted for consideration. *See* DEL. DEP’T JUST., RULES OF PROCEDURE FOR FOIA PETITIONS AND DETERMINATIONS, at 2 (2019), <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2019/09/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations.9.26.19.pdf>.

² Response, City Council Resolution 2022-08.

candidates and report back to Council with recommendations regarding these candidates. At the July 21, 2022 meeting, the Council instead voted, by four to one with Councilmember Valarie Leary dissenting, to adopt a new proposal for the New Castle Historical Society (“NCHS”) to hire a tourism director, at the expense of the City, for a two-year period to perform both City and NCHS duties. The motion authorized the Administrator to negotiate a contract with NCHS and bring it back to Council for approval.

After this July 21, 2022 Council meeting, the Petition alleges that the following events occurred. On July 22, 2022, the Administrator received a call from Councilmember Leary, who stated she wished to “persuade Council to her position in the follow up meeting.”³ A few days later, Councilmember Russell Smith emailed the Administrator to indicate he wished to reverse his decision on the new proposal to have the NCHS hire the position for reasons similar to Councilmember Leary’s reasons. Councilmember Joseph Day had a meeting with the Administrator separately on July 29, 2022, wherein he expressed his opposition for similar reasons. The Petition alleges that these facts were conveyed to you by the Administrator, and you advised the Administrator to proceed with NCHS negotiations as authorized by the July 21, 2022 vote. However, you state that at the September 14, 2022 Council meeting, Councilmembers Day and Smith voiced opposition to the proposal to have NCHS hire the tourism director. The Petition included a copy of the draft September meeting minutes, indicating that the Council tabled the matter following a discussion about various concerns.

In the Petition, you allege that these events are no coincidence and that the three councilmembers engaged in active discussions outside of a public meeting. You further claim that “it is [your] suspicion that these three Councilpersons privately coordinated efforts to reject the proposed association with NCHS for the Tourism Director hire as a *quid pro quo* to secure support for a separate ordinance adopted earlier in 2022.”⁴ In addition, the Petition alleges that the three councilmembers frequently use private email accounts for City business to avoid public scrutiny and references an email sent on June 2, 2022 in which Councilmember Leary refers to Councilmember Day, stating: “[n]eed to chat with Joe to make sure he gets the votes he needs for anything before we step down.”⁵

The Council, through its counsel, responded on November 30, 2022 to the Petition (“Response”). The Council first argues that the Petition’s allegations for a secret meeting regarding the tourism director position do not meet the requisite *prima facie* burden of showing a meeting took place. The Council provided the affidavits of Councilmembers Day, Leary, and Smith. Councilmembers Smith and Leary swear that after the July 21, 2022 meeting, they did not “communicate verbally or in writing with a quorum of Council outside of a duly called public meeting to discuss the NCHS proposal, the tourism director position, or to otherwise pre-agree on any of public City business.”⁶ Councilmember Day attests in his affidavit that he set up the July

³ Petition.

⁴ *Id.*

⁵ *Id.*

⁶ Response, Aff. of Councilmembers Leary and Smith.

29, 2022 meeting with the Administrator to discuss various issues, including his misgivings about the NCHS proposal, and at no time in between the July 21, 2022 and this meeting, did he “discuss with any other Council members, whether verbally or in written form, [his] personal decision to not support a City funded tourism director for NCHS involving separate work responsibilities to both the City and NCHS.”⁷ Second, the Council contends that the Petitioner’s claim about other private meetings is without merit, because discussions between two members do not constitute a quorum of the members of the Council and as demonstrated by her sworn statement, Councilmember Leary did not engage in private discussions with Councilmember Day, despite her email professing her intent to do so.

DISCUSSION

FOIA requires public business to be performed in an open and public manner so that citizens “have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy.”⁸ A meeting under FOIA is “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.”⁹ When a petitioner makes a claim of a secret meeting between public body members, the petitioner carries the initial burden of making a *prima facie* case that a meeting occurred.¹⁰ “A plaintiff must show substantive proof of a secret meeting rather than mere speculation in order to shift the burden of proof going forward.”¹¹ The allegations must be sufficiently specific to allow consideration.¹² “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.¹³ This

⁷ *Id.*, Aff. of Councilmember Day.

⁸ 29 *Del. C.* § 10001.

⁹ 29 *Del. C.* § 10002(j).

¹⁰ *Del. Op. Att’y Gen.* 17-IB20, 2017 WL 3426260, at *7 (July 12, 2017); *see also* 29 *Del. C.* § 10005(c).

¹¹ *Del. Op. Att’y Gen.* 05-IB10, 2005 WL 1209240, at *2 (April 11, 2005) (citing *Gavin v. City of Cascade*, 500 N.W.2d 729, 732 (Iowa App. 1993)).

¹² *See Del. Op. Att’y Gen.* 16-IB18, 2016 WL 5888777, at *5 (Sept. 29, 2016) (finding that the petitioner did not sufficiently support its *prima facie* case: “without specific information regarding specific dates, the number of Council members present, and the number of Council members to whom you allege the Mayor passed notes during specific meetings, these allegations are too vague to warrant consideration”).

¹³ *Del. Op. Att’y Gen.* 05-IB10, 2005 WL 1209240, at *2 (citing *Harris v. Nordquist*, 771 P.2d 637, 641 (Or. App. 1989)).

burden-shifting occurs to avoid requiring a public body from having to “prove a negative,” *i.e.*, prove that a meeting did not occur.¹⁴

In this case, the Petition includes general assertions that a meeting must have been held because the three members’ concerns with the proposal for the NCHS to hire the tourism director aligned and the circumstances under which those concerns were expressed to the Administrator caused you to surmise that these members communicated. These events are unlikely to be a coincidence. However, the Council provided sworn testimony from each of the three councilmembers denying that any such discussions took place. Accordingly, we have no choice but to determine that the Council has demonstrated that the Petition’s claim regarding three members’ private meetings to discuss and reach a consensus on the tourism director position does not constitute a violation of FOIA.

The Petition next alleges that these councilmembers improperly engaged in discussions over private email accounts outside of public meetings and references the email from Councilmember Leary indicating that she needs to speak to Councilmember Day about his intended legislation demonstrates that Councilmember Leary engaged in further discussions of public business with a quorum of other members outside of a public meeting. To counter this specific allegation, the Council provided the sworn testimony of Councilmember Leary that despite this email, she “never contacted Mr. Day or later verbally or in writing to discuss matters of public business or to pre-agree on any vote before Council.”¹⁵ Again, we cannot, on this record, determine this initial allegation meets the burden of making a *prima facie* case that a meeting occurred after this email. The discussion between two members do not qualify as a quorum in these circumstances that would trigger open meeting requirements, and this sworn testimony makes it clear that no such discussions took place.¹⁶ As such, we must find that the Council demonstrated that Councilmember Leary did not engage in private discussions about public business with Councilmember Day.

While we find that these claims do not constitute violations of FOIA, the factual record in this case indicates that members of Council are regularly corresponding via public and personal email accounts. Such communications must be done with care to avoid running afoul of FOIA’s requirements. We encourage the Council to review its email practice with its legal counsel to ensure its compliance with FOIA.

¹⁴ *Id.*

¹⁵ Response, Aff. of Councilmember Leary.

¹⁶ Response, p. 1 (“The City Council has five members[;] hence, a quorum of Council requires three members to meet.”).

CONCLUSION

For the foregoing reasons, we determine that the Council has not voted FOIA as alleged in the Petition.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Daniel R. Losco, City Solicitor