



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB04

February 11, 2019

VIA EMAIL

Petition No. 1

Jan Konesey
Brian Patterson
Jennifer Duncan
Gary Glass
Steve Latsios
Marjorie Holman
Bob Lawrence
c/o jkonesey@gmail.com

Petition No. 2

Sam Cooper
Beach.head@verizon.net

RE: Two FOIA Petitions Regarding the City of Rehoboth Beach

Dear Petitioners:

We received your two separate communications alleging that the City of Rehoboth Beach's wastewater working group committee ("Committee") is in violation of the open meeting requirements of the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). Jan Konesey, Brian Patterson, Jennifer Duncan, Gary Glass, Steve Latsios, Marjorie Holman, and Bob Lawrence filed one Petition with this allegation ("Konesey Petition"). Sam Cooper filed a second Petition raising three allegations, one of which makes the same assertion—that the Committee's meetings were conducted in violation of FOIA ("Cooper Petition").¹ We treat each correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur and issue this combined Opinion to address both Petitions.

For the reasons set forth below, we conclude that the Committee is a public body and recommend the remediation outlined below.

¹ This Office will address the two remaining issues in the Cooper Petition in a separate Opinion.

BACKGROUND

The City's Board of Commissioners is an elected body; the Mayor is the elected chief executive of the City and the presiding officer of the Board.² The City is considering substantial amendments to its wastewater services, and the Mayor and Board held a public "Town Hall" meeting to discuss the matter. Following that meeting, the Mayor established a group to study wastewater rate structures for rate payers and to make recommendations to him, which he would in turn pass onto the Board. The group consists of the City Manager, City Finance Director, City Public Works Director, and four members of the public ("Committee").³ The first Committee meeting occurred on January 14, 2019 without public notice, as the City believes this Committee is not a public body under FOIA.

Both Petitions asked this Office to determine whether the City was in violation of FOIA by conducting Committee meetings out of compliance with the open meeting requirements. By separate letters addressed to each Petition ("Responses"), the City's legal counsel submits that this Committee is not a public body. The Responses state that the Committee "was established by the Mayor, who is not a participant, for the sole purpose of advising the Mayor—and not the Commissioners—on potential rate structures."⁴ The City interprets the definition of "public body" to include only those bodies that are charged by "any other public official, body, or agency," other than the public official, body, or agency that created the body. Thus, the City believes the Committee was not a public body, as it was appointed and given its charge by the Mayor, and not separately charged by another public body or public official, such as the City Board of Commissioners. Further, the City asserts that if groups such as this Committee are deemed public bodies, it will significantly impede municipalities' day-to-day efficiency.⁵

² Rehoboth, Del., C. (Charter) §§ 5, 13(b).

³ In both Responses, the City acknowledged that the Mayor attended the first meeting but stated he is not a member of the Committee. The record reflects that the City consultant also joined the Committee at the first meeting, but the City's Response did not include the City consultant in its list of members. None of these potential additional members would alter the conclusion of this Opinion.

⁴ Cooper Response, p. 2; Konesey Response, p. 2.

⁵ However, it is well-settled that administrative staff meetings are not subject to the open meeting requirements, as a body of one is exempt from open meeting requirements when meeting with his or her staff members. *See Del. Op. Att'y Gen.* 17-IB37, 2017 WL 3500080, at *5 (Aug. 7, 2017) (concluding that a Governor-appointed Commission was not a public body and more akin to an administrative staff meeting when all Cabinet members were appointed to the Commission).

In their respective Replies,⁶ the Petitioners respond that the Committee is a public body, because it was established by the Mayor, supported by public funds of the City employees' salaries and the consultant fees, and is specifically charged to advise and make recommendations. Additionally, the Petitioners argue that the Committee members are not the staff to a "body of one." Finally, the Petitioners argue that contrary to the City's assertion, the Committee is impliedly charged to advise the Board of Commissioners, not merely the Mayor.

DISCUSSION

Only public bodies are subject to the open meeting requirements,⁷ and to determine whether a group is a public body under FOIA, a two-part test must be met.⁸ First, we must determine 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 "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."⁹ 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."¹⁰ Both parts of this test must be satisfied in order for an entity to be considered a "public body" under FOIA.

Under the first prong, we consider whether this Committee constitutes an advisory group appointed by a public official of the State. Here, the Committee is comprised of seven members: the City Manager, City Finance Director, City Public Works Director, and four members of the public.¹¹ The City acknowledged that the Mayor, as a public official, appointed this Committee by inviting specific members and does not dispute that this Committee meets this prong of the test.¹²

⁶ The Konesey Reply includes a request for a determination based upon "Principles of Professionalism." This Office's review is limited to whether a violation of FOIA has occurred or is about to occur.

⁷ 29 *Del. C.* § 10004(a).

⁸ *Del. Op. Att'y Gen.* 18-IB28, 2018 WL 2994706, at *1 (June 1, 2018).

⁹ 29 *Del. C.* § 10002(h).

¹⁰ *Id.*

¹¹ *See supra* note 3.

¹² Konesey Response, p. 5-6; Cooper Response, p. 5-6; *see also Del. Op. Att'y Gen.* 18-IB21, 2018 WL 2266972, at *3 (Apr. 27, 2018) (finding the Commission to be a public body and stating that "the Committee is comprised of members "appointed" by the City Manager, a public

Regarding the second prong, neither party has alleged that the Committee expends or disburses funding; thus, the remaining question is whether the Committee is supported by public funds and/or “is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations, or recommendations.” In its Responses, the City affirmed the Mayor set the Committee’s mission to recommend potential rate structures to the Mayor, who then will share those recommendations with the Commissioners.¹³ The record shows that the Mayor selected a fixed Committee membership at the outset and charged the Committee with creating recommendations through a collaborative effort.¹⁴ Therefore, this second prong is also satisfied, and we find that the Committee is a public body as defined by FOIA.¹⁵

official”); *Del. Op. Att’y Gen.* 97-IB13, 1997 WL 606460, at *2 (June 2, 1997) (in determining whether a Committee appointed by the Mayor was a public body, noting that the City did not dispute that “the Committee was appointed by a public official (the Mayor) to give advice and to make recommendations to a public body (the City Council)”).

¹³ See, e.g., Responses, Ex. A, p. 1 (MAYOR: “And with that, my thoughts are that working group would provide me with suggestions moving forward that I could suggest to the Commissioners.”); p. 2 (MAYOR: “Now, once they [Committee] make their thoughts known to the Commissioners through me, that could be the next step.”); p. 4 (MAYOR: “Our hope is to have our, direction, is to have a recommended structure that we would bring to the, that we could present to the ... workshop meeting. To be able to present it at the workshop meeting for the commissioners to look at.”).

¹⁴ *Del. Op. Att’y Gen.* 17-IB10, 2017 WL 2917920, at *5 (June 15, 2017) (in explaining why certain focus groups formed by a government consultant were not public bodies, citing that the focus groups were appointed by a consultant, were intended to gather and solicit preliminary information (and not collaboratively conduct investigations or make reports or recommendations), and “had little or no continuity of membership or interaction”).

¹⁵ Regarding the City’s primary argument, we are not persuaded that for an entity to be considered a public body, another public official or body (other than the public official or body establishing it) must charge the entity with making recommendations. Such an interpretation is inconsistent with a plain reading of the statute. The statute states that “‘public body’ means...any...body of ... any political subdivision of the State...which... (3) [i]s impliedly or specifically charged by another public official, body, or agency to advise or make reports, investigations, or recommendations.” 29 *Del. C.* §10002(h). The City cited Attorney General Opinion 89-I010 in support of its argument. *Del. Op. Att’y Gen.* 89-I010, 1989 WL 406044 (May 11, 1989). However, subsequent decisions have not supported this interpretation in contexts similar to the circumstances here. See, e.g., *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 781 (Del. Super. 1995) (in concluding that the Commission was a public body, stating the Commission was an executive commission, appointed by a public official and specifically charged by the Governor to make recommendations to the Governor) (emphases added); *Del. Op. Att’y Gen.* 17-IB54, 2017 WL 5256814, at *4 (Oct. 10, 2017) (in finding the Commission to be a “public body,” stating that the “Commission was also specifically charged by the Council to make recommendations to the Council.”) (emphases added). Therefore, it is our opinion that 29 *Del. C.*

As we have concluded that the Committee is a public body, the Committee must conduct itself in accordance with FOIA's open meeting requirements. It has been the long-standing practice of this Office to recommend certain steps for remediation.¹⁶ The City's Responses indicated that a Committee meeting was held on January 14, 2019, at which the City's Public Works Director gave a brief summary of the discussions and noted that the parties intended to meet again thereafter.¹⁷ It is unclear from the record whether other meetings have occurred, whether meeting minutes were created, what topics were discussed, or whether any meetings were recorded or otherwise preserved. This Office previously recommended that existing minutes be released and if no minutes exist, that those minutes be recreated if the meetings were recorded or preserved.¹⁸ Thus, to the extent that meeting minutes exist for previous Committee meetings, we recommend making those minutes publicly available in accordance with FOIA. To the extent that Committee meetings occurred and the discussions were preserved without creating minutes, we recommend that minutes be created and be made publicly available. The Committee is recommended to comply with all aspects of the open meeting requirements in the future.

§ 10002(h)(3) does not require a public body to be charged by an official or body other than the one that created the public body, and we do not impose this limitation here.

¹⁶ *Del. Op. Att'y Gen.* 13-IB05, 2013 WL 5615224, at *5 (Oct. 1, 2013).

¹⁷ Responses, Ex. A, p. 4.

¹⁸ This Office has previously recommended that minutes be recreated when the meetings were recorded or otherwise preserved, but in at least one opinion, recreating minutes was not recommended when the minutes would not "shed significant light" on the public body's activities. *Del. Op. Att'y Gen.* 16-IB27, 2016 WL 7743694, at *6 (Dec. 22, 2016); *see also Del. Op. Att'y Gen.* 17-IB52, 2017 WL 4652342, at *3 (Oct. 9, 2017) (recommending that a public body make its meeting minutes available to the public); *Del. Op. Att'y Gen.* 13-IB05, 2013 WL 5615224, at *5 (Oct. 1, 2013).

CONCLUSION

As the Committee is a public body, it is our determination that the City has violated FOIA. We recommend that this Committee comply with the open meeting requirements in the future. To the extent that meeting minutes exist for previous Committee meetings, we recommend making those minutes publicly available in accordance with FOIA. If meeting minutes were not created but previous discussions were otherwise preserved, we recommend that minutes be created and made publicly available.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Allison E. Reardon

Allison E. Reardon
State Solicitor

cc: Glenn C. Mandalas, Esq., Attorney for the City of Rehoboth Beach (via email)