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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE
Attorney General Opinion No. 13-IB05
October 1, 2013

VIA EMAIL AND REGULAR MAIL

Mr. John D. Flaherty, President
Delaware Coalition for Open Government
712 W. 26th Street
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Ms. Eve E. Buckley
Christina School District parent
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Re: FOIA COMPLAINT CONCERNING CHARTER SCHOOL REFORM WORKING GROUP

Dear Mr. Flaherty and Ms. Buckley:

By petition dated June 10, 2013, you asked this Office to determine whether a 24-member working group convened by the Governor to make recommendations for changes to Delaware's charter school policies and procedures (the "**Working Group**") is a "public body" within the meaning of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10006 ("**FOIA**"), and, if so, whether the Working Group violated FOIA by failing to provide you with access to the minutes of the Working Group's monthly meetings. For the reasons discussed below, we determine that the Working Group is a public body subject to FOIA. The Working Group did not prepare formal minutes of its meetings. We do not believe that a court would require and therefore do not recommend that the Working Group attempt to reconstruct minutes

under the circumstances presented here, including the fact that the Working Group's recommendations are a matter of public record.

I. INTRODUCTION

This case involves an underlying debate about Delaware's 1995 charter school law. After the tension between charter school proponents and opponents escalated last year, members of the House of Representatives announced the approval of a task force that was to take a holistic and collaborative look at charter school issues. The task force, which was to include legislators, executive branch officials and other stakeholders, was never established. Several months after the task force announcement, the Governor, at the request of multiple legislators and constituent groups, convened the Working Group to discuss and propose recommendations to strengthen charter school policies and practices. The Working Group ultimately made such recommendations, and those recommendations were incorporated into and formed the foundation of House Bill 165. That bill, which made significant changes to Delaware's charter school law, was approved by the General Assembly and signed by the Governor in June 2013.

Delaware citizens have important rights -- rights protected in FOIA's "open meeting" provisions -- to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy. Those rights were frustrated with respect to the activities of the Working Group. The public had little ability to observe the performance of the Working Group members as they formulated the policy framework for what ultimately became House Bill 165. It is the position of this Office that FOIA requires more openness during the formulation of public policy on issues of critical importance to the citizens of this State.

II. BACKGROUND

By letters dated July 31 and August 1, 2012, the Governor extended invitations to a number of individuals to participate in the Working Group as representatives of several public bodies, including the General Assembly, the Department of Education and the State Board of Education, and various private stakeholder groups (the "**Invitations**"). The Invitations state that the purpose of the Working Group was to work together to propose "several tangible recommendations" to strengthen:

- the framework for assessing new charter applicants;
- the support provided to charter schools and associated requirements; and
- the process for reauthorizing charters.

As contemplated in the Invitations, the Working Group convened monthly meetings beginning in August 2012. The final meeting took place in January 2013.

On February 28, 2013, the Department of Education held a public meeting to provide members of the public with the opportunity to discuss and review the main content areas covered during the Working Group's meetings. At that meeting, Department of Education officials provided attendees with and discussed a handout summarizing the Working Group's recommendations.

On May 30, 2013, House Bill 165 was introduced in the House of Representatives. House Bill 165 appears to track closely the Working Group's recommendations. On June 11, 2013, the House held a lengthy hearing on the bill. After nearly two hours of debate, the House approved House Bill 165, and the bill passed to the Senate for deliberation. On June 25, 2013, the Senate approved House Bill 165. The Governor signed it into law the next day.

On June 10, 2013, you filed this appeal seeking access to the Working Group's meeting minutes. We received a response on July 11, 2013. The response indicates that the Working Group did not consider itself to be a "public body" within the meaning of section 10002(h), due primarily to the informal nature of the Working Group.

III. DISCUSSION

FOIA, Delaware's "sunshine law," mandates transparency and is designed to ensure government accountability through an informed electorate.[1] These "bedrock" principles are memorialized in FOIA's express declaration of policy, which states:

> It is vital in a democratic society that public business be performed in an open and public manner so that our citizens shall 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; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic. Toward these ends, and to further the accountability of government to the citizens of this state, this chapter is adopted, and shall be construed.[2]

As stated in FOIA's declaration of policy, and as twice reiterated by the Delaware Supreme Court, FOIA's open records and open meeting requirements are to be liberally construed to further the General Assembly's mandate of openness.[3]

FOIA, with certain exceptions not relevant here, establishes a public right to inspect all "public records" and requires that all meetings of public bodies be open to the public.[4] FOIA's

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1 *See Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. 1995).

2 29 *Del. C.* § 10001; *see also Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *7 (Del. Ch. May 19, 1994).

3 *See Guy*, 659 A.2d at 780; *Del. Solid Waste Auth. v. News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984); *see also Layfield v. Hastings*, 1995 WL 419966, at *3 (Del. Ch. July 10, 1995) ("Aside from the clear mandate of [FOIA] § 10001, it is a traditional principle of statutory construction that remedial statutes are to be construed liberally in order for the goal of the statute to be attained.").

"open meeting" provisions call for advance notice to the public of all public meetings and require public bodies to prepare and make available to the public agendas for and minutes of their public meetings.[5]

FOIA's open record and open meeting requirements apply only to the records and meetings of a public body. The definition of "public body" set forth in section 10002(h) is expansive and covers a wide range of government bodies associated with the executive and legislative branches of State government. We conclude that the Working Group was a "public body" within the meaning of FOIA.

FOIA generally defines a "public body" as "any regulatory, administrative, *advisory*, executive, appointive or legislative *body of the State*."[6] The Working Group clearly was "advisory" in nature.[7] It was asked to and did make recommendations for charter school reform. The primary question before us is whether the Working Group constituted an advisory "body of the State" as contemplated in section 10002(h).[8]

Section 10002(h) provides substantial guidance as to the types of entities and bodies encompassed within the phrase "body of the State." That concept, as used in FOIA, includes, among other things, any "group . . . appointed by any . . . public official of the State" that was

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4 *See generally* 29 *Del. C.* §§ 10003, 10004; *see also Guy*, 659 A.2d at 780.

5 *See* 29 *Del. C.* §§ 10002(a), 10004(e), 10004(f).

6 29 *Del. C.* § 10002(h) (emphasis added).

7 *See* http://www.merriam-webster.com/dictionary/advisory (defining "advisory" as "having or exercising power to advise"); *see also* http://www.merriam-webster.com/dictionary/advise ("advise" means "to give (someone) a recommendation about what should be done").

8 29 *Del. C.* § 10002(h).

"impliedly or specifically charged" with making recommendations.[9] The Working Group was a "body of the State" within the meaning of section 10002(h).

The Working Group easily fits within the very broad definition of a "group."[10] We also think the Governor "appointed" the Working Group within the meaning of section 10002(h). The word "appoint" means "to name officially."[11] The Governor, acting in his official capacity as the State's chief executive officer, convened the Working Group. He did so by issuing a series of Invitations that identified the various public bodies and other stakeholder groups that were to participate in the Working Group's activities, the specific goals for the Working Group, the frequency with which the Working Group members would meet and the general timeframe within which meetings would take place. Finally, as evidenced by the Invitations, the Working Group itself clearly was "charged" with making recommendations for proposed changes to the State's charter school law and practices.[12] The fact that the Governor, via the Invitations, only asked the addressees to participate in the Working Group is not determinative.

We conclude, based on a straight-forward reading and application of section 10002(h), that the Working Group was a public body subject to FOIA. The response asserts otherwise, based primarily on the grounds that the Working Group lacked the necessary "formality and

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9 *Id.*

10 *See* http://www.merriam-webster.com/dictionary/group (defining "group," in relevant part, as "a number of individuals assembled together or having some unifying relationship").

11 http://www.merriam-webster.com/dictionary/appoint (citing as an example: "a committee *appointed* by Congress"). Though we are not entirely sure what the General Assembly intended by employing the term "appointed," we are confident that that word does not have the meaning asserted in the response. The response suggests that the word "appointed," at least with respect to the Governor, requires the appointment of "officers." We disagree. The object of the verb "appointed" is a "body of the State," not an individual. 29 *Del. C.* § 10002(h).

12 *See* http://www.merriam-webster.com/dictionary/charge (the verb "charge" means "to impose a task or responsibility on").

structure" to be a public body. In support, the response directs us to the Federal Advisory Committee Act ("**FACA**") and case law decided under FACA.[13] For several reasons, we are not persuaded that FOIA requires the degree of formality and structure suggested in the response.

First, this Office consistently has rejected arguments that FOIA's applicability hinges on adherence to formalities in the creation of a public body, lest FOIA's goals of openness and government accountability be subverted.[14] Second, FACA, by its express terms, does not apply to or govern entities or bodies established to advise or make recommendations to state or local officials or agencies.[15] Third, we are hesitant to rely on FACA, or case law interpreting and applying same, as FACA contains different statutory language and, unlike FOIA, has been construed narrowly by federal courts to avoid constitutional separation of powers issues.[16]

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[13] FACA governs the federal government's solicitation of policy advice from "advisory committees" and provides the public with certain FOIA-like rights with respect to the activities of such groups. *See generally* 5 U.S.C. App. 2 §§ 1-16.

[14] *See, e.g.*, Op. Att'y Gen. 08-IB08 (May 5, 2008), 2008 WL 2397496, at *2 (dismissing argument that "Middletown Action Network" did not become a "public body" until after its bylaws were adopted); Op. Att'y Gen. 02-IB19 (Aug. 19, 2002), 2002 WL 31867895, at *6 (determining that meetings attended by representatives of individual school boards constituted a joint or hybrid public body notwithstanding that body was not created by any single formal action); Op. Att'y Gen. 02-IB08 (Apr. 4, 2002), 2002 WL 970059, at *3 ("We do not believe that the manner in which an advisory group comes into being is controlling, otherwise the open meeting law could be easily circumvented."); Op. Att'y Gen. 94-IO07 (Feb. 2, 1994), 1994 WL 55695, at *2 (rejecting argument that "informal meeting" between mayor and 4 members of city council to discuss and recommend potential amendments to city charter was not subject to FOIA).

[15] *See* 5 U.S.C. App. 2 § 4(c) ("Nothing in [FACA] shall be construed to apply to . . . any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.").

[16] FACA was designed, in part, to increase openness in the advisory committee system. According to scholarly authorities, FACA has not been effective in increasing transparency. *See, e.g.*, William Funk, PUBLIC PARTICIPATION AND TRANSPARENCY IN ADMINISTRATIVE LAW -- THREE EXAMPLES AS AN OBJECT LESSON, 61 Admin. L. Rev. 171, 185-188 (2009) ("FACA's quest to increase public participation and transparency in agency policymaking has not been particularly successful."); Michael J. Mongan, FIXING FACA: THE CASE FOR EXEMPTING

Finally, even if we were inclined to rely on FACA case law, the sole FACA decision cited in the response, *Nader v. Baroody*,[17] is readily distinguishable.[18]

Nader involved a challenge to the White House's failure to follow FACA in convening biweekly, three-hour meetings between high-level executive officials and representatives of major business organizations and private interest groups. A different group met every two weeks. The *Nader* court found the biweekly groups lacking because "there [was] little or no continuity of membership between meetings."[19] The court also noted that the meetings under

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PRESIDENTIAL ADVISORY COMMITTEES FROM JUDICIAL REVIEW UNDER THE FEDERAL ADVISORY COMMITTEE ACT, 58 Stan. L. Rev. 895, 896 (Dec. 2005) ("[FACA] is broken and badly needs fixing."). Contributing factors include decisions by the U.S. Supreme Court and other federal courts strictly construing FACA's terms to avoid constitutional separation of powers issues. *See Pub. Citizen v. U.S. Dept. of Justice,* 491 U.S. 440, 466 (1989) (rejecting literal meaning of the word "utilized" because construing FACA to apply to the American Bar Association's Standing Committee on the Federal Judiciary would "present formidable constitutional difficulties"); *Nader v. Baroody,* 396 F. Supp. 1231, 1234 (D.D.C. 1975) (refusing to construe FACA as covering informal bi-weekly White House meetings with various special interest groups in order to avoid "serious questions under our tripartite form of government as to the congressional power to restrict the effective discharge of the President's business").

[17] 396 F. Supp. 1231.

[18] This Office looked to FACA for guidance in applying FOIA on only one prior occasion. That case, Op. Att'y Gen. 02-IB08 (Apr. 4, 2002), 2002 WL 970059, involved allegations that county officials violated FOIA by discussing and developing a redistricting ordinance outside of public view. County council had directed the county attorney to prepare a draft redistricting ordinance. The county attorney, in turn, secured necessary information from the chairman of the county board of elections and obtained advice from a private consultant. Looking to FACA case law for a "helpful analytical framework," we determined that FOIA did not apply to the county attorney's meetings with those individuals because the meeting participants did not "render advice or recommendations, *as a group*." *Id.* at *4 (emphasis original). Our determination in Op. Att'y Gen. 02-IB08 was based on our finding that the meetings in question were part of "an unstructured arrangement" in which the county attorney sought advice from two individuals who did not significantly interact with each other. *Id.* at *5. The present case is distinguishable from our determination in Op. Att'y Gen. 02-IB08. The members of the Working Group were asked to and did work together as a group to formulate consensus-based changes to Delaware's charter school law.

[19] *Id.* at 1234.

scrutiny did not involve "a presidential request for specific recommendations on a particular matter of governmental policy."[20]

The facts here are much different. Unlike the situation in *Nader*, the Working Group had continuity of membership. The Working Group's public and private constituent groups were fixed at the outset and did not change during the course of the Working Group's meetings. The vast majority of the individual representatives who participated in the Working Group's activities also did not change throughout the course of the meetings. Further, this case, in contrast to *Nader*, involves written requests by the Governor for specific recommendations on a particular matter of governmental policy -- namely, ways to improve Delaware's charter school policies and practices.

We conclude that the Working Group had and exceeded whatever degree of formality and structure FOIA may require. The Working Group was an "advisory . . . body of the State" within the meaning of section 10002(h).

IV. REMEDIATION

Having determined that the Working Group is a "public body" within the meaning of section 10002(h), it follows that the Working Group had an obligation to comply with FOIA's open records and open meeting provisions, including the requirement that it maintain minutes of all meetings and make such minutes available for public inspection and copying.[21] It is undisputed that the Working Group did not prepare formal minutes of its meetings or otherwise adhere to FOIA's open meeting requirements. The remediation question posed is whether the Working Group should be required to recreate minutes for each meeting based on the collective

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20 *Id.*

21 *See* 29 *Del. C.* § 10004(f).

memory of the Working Group members and any documents evidencing the Working Group's discussions and other activities.[22]

Preliminarily, we note that this Office has no jurisdiction or authority to issue an injunction, a writ of mandamus or any other form of relief available under section 10005(d). It has been our long-standing practice, however, to suggest that public bodies take certain steps to remediate FOIA violations identified in our written determinations, absent which this Office may seek a court order to compel FOIA compliance and remedial action.

In the course of recommending remedial action, we have, on occasion, asked public bodies to prepare minutes for past meetings.[23] We do not think that such form of remediation is appropriate under the circumstances presented here. We doubt that minutes, if prepared, would shed significant light on the Working Group's activities. FOIA requires only that minutes include a record of those members present at each meeting and a record, by individual member, of each vote taken and action agreed upon.[24] The record is clear that no votes were taken at the Working Group's meetings. As far as we can tell, the only "action" the Working Group agreed upon was to make recommendations for changes to the State's charter school law and practices, which recommendations are a matter of public record. Further, the burdens associated with the preparation of formal minutes would outweigh whatever minimal benefit they may provide.

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[22] We note that petitioners, as part of their initial FOIA request, sought documents evidencing the Working Group's activities. Petitioners did not expressly seek those documents as part of this appeal, and the record is not clear as to whether or to what extent they were produced to petitioners. Given our determination that the Working Groups is a public body, we think that documents evidencing the Working Group's activities may be "public records" under section 10002(l), subject to applicable exemptions, if any.

[23] *See, e.g.*, Op. Att'y Gen. 97-IB13 (June 2, 1997), 1997 WL 606460, at *5 (requiring city to prepare minutes for meetings of city's "Personnel Policy Review Committee" during the prior two years where said meetings were tape-recorded and preserved).

[24] *See* 29 *Del. C.* § 10004(f).

While FOIA's minutes requirements are not onerous, the preparation of minutes for the Working Group's six meetings between August 2012 and January 2013 will take time. Unlike past cases where we have recommended that minutes be prepared after the fact, the meetings at issue here were not recorded.[25] Given the unique circumstances of this case, we do not believe that remedial efforts are warranted.

V. CONCLUSION

For the foregoing reasons, we conclude that the Working Group is a "public body" within the meaning of section 10002(h). We do not believe that a court would compel the Working Group to create minutes based on the record in this case.

Very truly yours,

Jason W. Staib
Deputy Attorney General

Approved:

/s/ *Allison E. Reardon*
Allison E. Reardon, State Solicitor

cc: Ian R. McConnel, Chief Deputy Attorney General (via e-mail
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[25] *See* Op. Att'y Gen. 97-IB13 at *5.