

April 25, 2024

By Email

Delaware Department of Justice
Attn: FOIA Coordinator
102 W. Water St.
Dover, DE 19904
opengovernment@delaware.gov

The undersigned ("Petitioner") is filing this petition with the Delaware Department of Justice pursuant to 29 Del. C. § 10005 for a determination that the Association of Coastal Towns (commonly referred to as "ACT") (a) is a "public body" and (b) has engaged in long-running violations of Delaware's Freedom of Information Act and Open Meetings statute (the "FOIA statute"). Petitioner also requests that ACT be directed to implement the remediation described in Section E of this letter, which includes directing ACT to hold one or more special meetings after public notice to discuss the range of important matters that ACT (including committees it has established) has considered over the past two years without FOIA-compliant public involvement and oversight.

A. Introduction and Background

As addressed in more detail below, ACT's failure to comply with the FOIA statute has, among other things, resulted in the public being denied a role in (or even knowing about) ACT's decision-making on matters of major public interest over the past two years relating to US Wind's offshore wind project (the "US Wind Project"). This includes the following:

- ACT's deciding to pursue discussions with US Wind for a "Community Benefits Agreement" rather than oppose the project or seek to have it modified.¹ *See* Exhibit A (July 7, 2022 ACT Non-Public Meeting Minutes); Exhibit B.
- ACT's determining that the US Wind Project would not adversely affect tourism. *See* Exhibit A (ACT April 7, 2022 Non-Public Meeting Minutes ("Tourism will not be impacted . . .")).
- ACT's determining that it was not possible for the US Wind Project to be relocated farther offshore. *See* Exhibit A (ACT April 7, 2022 Non-Public Meeting Minutes); Exhibit C.

¹ The records reviewed by Petitioner reflect that Fenwick Island declined to participate in ACT's pursuing "community benefits" from US Wind. *See* Exhibit D. It also appears that the Lewes may not have actively participated in pursuing community benefits from US Wind. For ease of discussion, references to ACT in this letter regarding ACT's dealings with US Wind generally do not carve out Fenwick or Lewes even though they had no or possibly limited involvement.

- ACT's allowing US Wind and ACT's desire for "community benefits" from US Wind to have what many in the public might view as excessive influence over ACT's decision-making with respect to the US Wind Project. For example:
 - ACT's agenda for its March 2, 2023 quarterly "public" meeting initially included the following agenda item: "Discuss and possibly vote on next steps concerning moratorium on windfarms due to marine life issues."² After seeing the agenda, US Wind emailed two ACT mayors questioning inclusion of the agenda item. In response to US Wind's email, an ACT mayor emailed two other mayors about the agenda item stating that "this is not helpful for the discussions we are having with the windfarm companies." The agenda item was subsequently removed from ACT's March 2, 2023 meeting agenda. *See* Exhibit E (full email string).
 - At ACT's May 5, 2022 Non-Public meeting, ACT decided not to support a Sea Colony resolution calling for the Bureau of Ocean Energy Management (BOEM) to, among other things, abandon wind farm lease areas that are within 30 miles of the Delaware's coast. The meeting minutes state that "[t]he response was against the resolution and how we need to move forward rapidly for funding from these companies." The minutes go on to state that "[t]he comments received were strong and visceral." *See* Exhibit A (ACT May 5, 2022 Non-Public Meeting Minutes); Exhibit F.
 - Neither ACT nor any of the ACT towns (other than Fenwick Island, which refused to participate in ACT's pursuing "community benefits" from US Wind) submitted comments on BOEM's draft Environmental Impact Statement (EIS) for the US Wind Project. Submitting comments was the only formal opportunity for ACT and its member towns to influence BOEM's EIS review process and represent constituents' views.³ Review of available ACT and member town council meeting agendas, minutes, and emails indicates that neither ACT nor its member towns (other than Fenwick) considered or discussed submitting comments to BOEM. When Bethany Beach and South Bethany held town council meetings during January 2024 to discuss the Community Benefits Agreement, the vast majority of public comments were against the Community Benefits Agreement and the US Wind Project.⁴

Even following US Wind's public announcement of the proposed Community Benefits Agreement, there has been an overall lack of transparency by ACT and member towns and their

² The agenda item appears to have been related to a letter signed by 30 New Jersey Mayors relating to whale deaths.

³ Bethany Beach, South Bethany, and possibly other ACT member towns sent emails to their constituents informing them of the BOEM's draft EIS and the 45-day comment period. But there is little equivalency between the significant weight that would be accorded to a municipality's comments compared to individuals' comments (setting aside the almost insurmountable challenge for most individuals in reviewing a more than 1,000-page draft EIS).

⁴ Bethany Beach meeting recording: https://bethanybeach.granicus.com/MediaPlayer.php?view_id=2&clip_id=978 (video) South Bethany meeting recording: [January Workshop Meeting](#) (audio). Public input and oversight might have resulted in ACT and its member towns considering possible options for submitting comments, including piggybacking on comments submitted by Ocean City, MD to minimize costs. Similar meetings in other ACT towns were not reviewed.

mayors regarding the extensive dealings between US Wind and ACT over the past two years.⁵ These dealings include scores of emails among US Wind and ACT, multiple meetings between ACT mayors and US Wind (including at least two meetings between ACT mayors and US Wind's CEO), and at least 3-4 exchanges of Community Benefits Agreement drafts between US Wind and ACT mayors.⁶ Adding to the transparency problem, US Wind's December 28, 2023 press release announcing the proposed Community Benefits Agreement is entitled "US Wind Initiates Benefits Discussions With Delaware Coastal Towns" and states that the ACT towns "have begun to evaluate the offer" (even though US Wind had been negotiating with ACT mayors for an extended period).⁷

Petitioner does not question that ACT intended to act in the best interest of member towns in its non-public activities (including in seeking "community benefits" from US Wind).⁸ But as previously recognized by the Office of the Attorney General, "[public bodies] should not have the power to decide what is good for the public to know."⁹ See e.g. *Del. Op. Att'y Gen.* 15-IB08 (November 3, 2015) citing *Del. Solid Waste Auth. v. The News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984).

B. ACT's Violations of the FOIA Statute

ACT's violations of the FOIA statute include the following:

1. ACT's holding of meetings without FOIA-compliant public notice or public participation in violation of 29 Del. C. § 10004. These meetings include:

- ACT's ongoing, regularly scheduled non-public meetings.
- The following non-regularly scheduled ACT meetings: (a) a December 5, 2023 meeting of the ACT mayors at which ACT considered a US Wind-provided revised draft of the Community Benefits Agreement, and (b) a December 20, 2023 meeting between ACT and US Wind representatives (including its CEO)

⁵ The extent to which town council members of ACT member towns were aware of the ACT's extensive dealings with US Wind is uncertain.

⁶ See Exhibit H. Many of the emails were between US Wind and the two-mayor committee ACT appointed to represent ACT in its pursuing community benefits from US Wind ("ACT's US Wind Committee").

⁷ <https://uswindinc.com/us-wind-initiates-benefits-discussions-with-delaware-coastal-towns/>

⁸ Reflecting this, one mayor spoke of "the need for us to be vigilant in pursuing our constituents' interest . . .; not to overlook the opportunity to obtain more needed resources; coastal residents deserve something for the changing of their landscape and reduction in the beauty of the shoreline. . . ." See Exhibit A (ACT April 7, 2022 Non-Public Meeting Minutes).

⁹ ACT and US Wind actively sought to keep their dealings out of public view. See Exhibit G; see also Exhibit A (ACT January 6, 2022 and July 7, 2022 (p.1) Non-Public Meeting Minutes).

regarding the Community Benefits Agreement. Fenwick Island was not invited to these meetings. *See* Exhibit H.¹⁰

- A September 27, 2022 meeting between ACT mayors and BOEM. *See* Exhibit H.
 - Meetings of (a) a committee ACT formed to represent it in discussions with US Wind regarding “community benefits” (“ACT’s US Wind Committee”) and (b) other committees formed by ACT for other specific purposes. *See* Exhibit I.¹¹
2. ACT’s failing to maintain meeting minutes for non-regularly scheduled meetings that occurred on December 5, 2023, December 20, 2023, and September 27, 2022 in violation of 29 Del. C. § 10004(f). It is not possible to determine if other violations of the requirement to maintain minutes have occurred due to ACT’s general failure to comply with FOIA.
 3. ACT’s ongoing failure to comply with 29 Del. C. § 10003, including failing to (a) maintain a web portal for receiving FOIA requests, (b) implement a policy for addressing FOIA requests, and (c) designate a FOIA coordinator.

Although the FOIA statute does not impose a deadline by which a petitioner is required to file a petition, it appears that the Office of the Attorney General generally declines to consider petitions alleging FOIA violations occurring more than six months prior to its receipt of the petition. The Office has stated, however, that this is not an immutable rule. It has also considered more than six-month old violations to gauge the scope and severity of noncompliance and determine remediation options. *See Del. Op. Att’y Gen.* 12-IIB11 (November 7, 2012).

C. What is the Association of Coastal Towns (ACT)?

Because ACT does not maintain an office or website and does not comply with the FOIA statute (making it impossible to file a FOIA request with ACT), information about ACT was gathered from internet searches and FOIA requests filed with some ACT member towns.¹² The information gathered reflects the following:

¹⁰ Based on the documents reviewed by Petitioner, it appears that most of ACT’s discussions from at least July 2022 through at least the end of 2023 regarding the US Wind Project occurred through emails, phone calls, and non-regularly scheduled meetings among ACT member mayors or ACT’s US Wind Committee.

¹¹ ACT’s US Wind Committee is composed of two ACT mayors. *See* Exhibit I. It had extensive email correspondence and other dealings with US Wind during 2022 and 2023. The email documentation reflecting this is substantial and is not included as an Exhibit to this letter.

¹² Petitioner filed FOIA requests with Rehoboth Beach (on March 25, 2024), Dewey Beach (on March 26, 2024), and Bethany Beach (on April 5, 2024) requesting copies of ACT’s meeting agendas and minutes for 2021 (Rehoboth Beach), 2023 (Dewey Beach); and 2024 (Bethany Beach). The requests also asked for copies of ACT’s organizational documents. Rehoboth Beach has not provided any documents in response. Bethany Beach provided a copy of ACT’s charter but refused to provide copies of ACT’s 2024 meeting agendas and minutes. Dewey Beach provided responsive documents. Petitioner also filed a FOIA request with South Bethany requesting copies of ACT’s 2022 meeting minutes and agendas and ACT-related correspondence. South Bethany provided responsive documents.

1. ACT's charter states that "ACT's principal purpose *shall be to act for and on behalf of its members* to promote, conduct and protect the general welfare and common interests of its members." (Emphasis added). See Exhibit J. ACT's membership is composed of Bethany Beach, Dewey Beach, Fenwick Island, Henlopen Acres, Lewes, Rehoboth Beach, and South Bethany. See Exhibit J.
2. ACT member towns are represented at meetings by their respective mayors (or a designee). See Exhibit J. The town/city managers of the member towns routinely attend ACT meetings. See generally Exhibit A.
3. It appears that ACT meets once a month "during the offseason" and hosts "public" meetings on a quarterly basis.¹³ It also appears that ACT generally maintains minutes of its regularly scheduled meetings and that it rotates annually the town that hosts the meetings, with the host town mayor serving as President. See Exhibit J. The annual host schedule for 2021 through present is as follows: Rehoboth Beach (2021); South Bethany (2022), Dewey Beach (2023); Bethany Beach (2024).
4. ACT is funded by dues from its member towns. See Exhibits J and K. ACT has also used member towns' resources. During April 2022, ACT assigned the Town Manager of one of its member towns to chair a committee of ACT town managers to research what revenue streams other municipalities have received from wind farm developers. See Exhibit A (April 7, 2022 ACT Non-Public Meeting Minutes).
5. ACT effectively functions as an arm of its member towns, taking a major (and sometimes primary or potentially exclusive) role on matters of significant concern to member towns and their constituents. This is consistent with ACT's Charter stating that "ACT's principal purpose shall be to act for and on behalf of its members to promote, conduct and protect the general welfare and common interests of its members." See Exhibit J. It is also reflected by the following:
 - ACT's functioning as the primary public body representing member towns' interests with respect to offshore wind projects. ACT's activities included sending at least one letter to Delaware's governor regarding offshore wind projects and extensive dealings with US Wind, as described in Section A. See, e.g., Exhibit A (January 6, 2022 and October 6, 2022 Non-Public Meeting Minutes); Exhibit H.

In contrast to ACT's extensive non-public dealings with US Wind during 2022 and 2023, review of Bethany Beach's and South Bethany's 2022 and 2023 Town Council meeting agendas and minutes reflects only the following discussions at town council meetings regarding the US Wind Project:

¹³ <https://www.townofdeweybeach.com/events/24006/>

- During July 2022, US Wind made separate presentations to Bethany Beach's and South Bethany's Town Councils. The minutes for the meetings and US Wind's presentation slides do not refer to any active or planned discussions between the towns and US Wind regarding payments or "community benefits" from US Wind. *See* Exhibit L.
- Minutes for South Bethany's October 13, 2023 Town Council Meeting reflect that South Bethany emailed constituents on its distribution list regarding BOEM's draft Environmental Impact Statement (EIS) and the opportunity to submit comments and/or participate in BOEM-sponsored public meetings. Bethany Beach's website reflects that it sent a similar email. Petitioner has not reviewed whether other ACT towns also sent similar notices.¹⁴
- ACT's discussing with Sussex County officials the county-wide reassessment of property values for purposes of real estate taxes. *See* Exhibit A (ACT January 6, 2022 Non-Public Meeting Minutes; ACT September 7, 2022 Public Meeting Minutes).
- ACT's sending a letter (jointly with The Bay Beach Association (BBA)) to Delaware's Governor and Attorney General supporting approval of a memorandum of agreement with the Army Corps of Engineers relating to beach replenishment.¹⁵
- ACT's developing positions on sharing Delaware Real Estate Transfer Taxes ("RTT") and sending a letter to state government representatives regarding the same. *See* Exhibit A (ACT January 6, 2022, February 9, 2022, and April 7, 2022 Non-Public Meeting Minutes).
- ACT's advocating at the state level for a "Back Bay Study" that would address back bay flooding issues. *See* Exhibit A (ACT February 9, 2022, April 7, 2022 and May 4, 2023 Non-Public Meeting Minutes; March 3, 2022 and March 2, 2023 Public Meeting Minutes).
- ACT's receiving legislative updates at many ACT meetings from ACT's legislative consultant/lobbyist relating to matters of substantial interest to ACT towns. *See generally* Exhibit A.

¹⁴ Based on the information reviewed by Petitioner, it appears likely that during 2022 and 2023 other ACT member towns also generally devoted much less attention than ACT did to the US Wind Project. Rehoboth Beach did, however, hold a special meeting during September 2022 that included speakers representing a range of viewpoints on wind farm projects. <https://cityofrehoboth.civieweb.net/Portal/MeetingInformation.aspx?Id=1700>

¹⁵ *See* <https://www.capegazette.com/article/bayshore-groups-reach-out-governor-attorney-general/272680>.

- ACT's receiving updates from DNREC on beach maintenance and replenishment, dredging, and other matters of substantial interest to ACT towns. *See generally* Exhibit A.

D. Analysis

1. Delaware's FOIA Statute

The FOIA statute requires that “[e]very meeting of all public bodies shall be open to the public” except as authorized by statute for executive session. 29 Del. C. § 10004(a). It also requires, among other things, that public bodies “give public notice” of their meetings “at least seven days in advance thereof” and “maintain minutes of all meetings.” 29 Del. C. §§ 10004(e), 10004(f).

FOIA defines a “public body” as “any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including but not limited to, any board, commission, department, agency, committee, ad hoc committee, subcommittee, legislative 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 agency, which: (1) is supported in whole or in part by any public funds; or (2) expends or disburses any public funds, including grants, gifts, or other similar disbursements and distributions; or (3) is impliedly or specifically charged by any other public official, body, or agency to make reports, investigations or recommendations. 29 Del. C. § 10002(k).

2. Relevant Attorney General Opinions and Other Precedent

a. Status of ACT as a Public Body

In *Del. Op. Att’y Gen.* 02-IB19 (August 19, 2002), the Office of the Attorney General considered whether a “Joint Board” composed of representatives of six public school boards in New Castle County was a “public body.” Under the facts of the Opinion, one or two board members of each of the respective public school boards would meet monthly for breakfast to discuss issues of common concern. The identity of the board members attending would vary monthly, although the Presidents of the boards would typically attend. In addition to board members, “two or three” administrators from the school boards would also attend. Other government officials would also sometimes be invited. Responsibility for coordinating meetings would rotate annually among the school boards, with the president of the “host” school board chairing meetings.

Based on these facts, the Office of Attorney General concluded that the Joint Board was a “public body” fully subject to Delaware’s FOIA statute. In reaching its decision, the Office of Attorney General considered six factors (not all of which supported a finding that the Joint Board was a public body). With respect to ACT, the factors all support finding that ACT is a public body.

The six factors and their application to ACT is as follows:

1. ***Whether the entity was created by government or had some origin independent of government.*** ACT was created by each member town executing ACT's charter. *See* Exhibit J. And just as with respect to the Joint Board in *Del. Op. Att'y Gen. 02-IB19*, ACT has become an institutionalized public body through its regular meetings to discuss public business.

2. ***Whether the functions performed by the entity were traditionally associated with government or commonly performed by private entities.*** ACT performs functions traditionally associated with municipal/town governments. As previously noted, ACT's charter states that "ACT's principal purpose shall be to act for and on behalf of its members to promote, conduct and protect the general welfare and common interests of its members." *See* Exhibit J. Among other things and as addressed above, ACT has advocated at the state government level on issues of interest and importance to member towns and, for at least 2022 and 2023, ACT has been the primary actor and decision-maker in dealings with US Wind.

3. ***Whether the entity has the authority to make binding governmental decisions, or only makes nonbinding recommendations.*** Although ACT does not have direct legal authority to bind ACT member towns, it takes actions that effectively serve as binding actions with respect to its member towns. For example, ACT selected and hired the wind farm consultant it used and decided when to wind down the consulting relationship. *See* Exhibit A (ACT April 7, 2022 Non-Public Meeting Minutes). As noted below, the ACT member towns funded the consultant's fees. *See* Exhibits D and K. And when ACT takes positions and sends correspondence to government officials, the positions and correspondence are understood to represent those of ACT member towns.

4. ***Whether the entity receives financial support from the government, which may include payment of the entity's members or fees as well as provision of facilities, supplies, and other nonmonetary support.*** ACT is funded by its member towns. *See* Exhibit K. This has included funding of more than \$12,000 in fees for the consultant ACT hired to provide assistance in ACT's wind farm activities. *See* Exhibit D. ACT has also used member towns' resources, as addressed in Section C.4.

5. ***Whether the government exercises control or supervision over the entity's operation.*** ACT is controlled by its member towns, normally acting through their mayors. *See* Exhibit J; *see generally* Exhibit A.

6. ***Whether the members of the entity are government officials or government employees.*** The persons serving as members of ACT are the mayors of ACT's member towns. *See* Exhibit J; *see generally* Exhibit A.

After applying the six factors to the Joint Board, the Office of the Attorney General in *Op. 02-IB19* concluded that "Delaware's open meeting laws apply to the Joint Board because it is 'composed of public servants' and is 'supported wholly or in part by public funds.'" (citing *North Central Ass'n of Colleges & Schools v. The Jonesboro Sun*, Ark. Supr., 548 S.W.2d 825, 826-27(1977)). The Office went on to state that "we do not think that it matters whether a group or association is appointed by a single public body, or collectively by different public bodies of a similar nature, where the collective body meets on a regular, ongoing basis." *See also Del. Op. Att'y Gen. 15-IB08* (Nov. 3, 2013) (finding that an "administrative" entity formed

by two school districts is a public body); *Del. Op. Att'y Gen.* 02-IB08 (Apr. 4, 2002) ("We do not believe, however, that the manner in which an advisory group comes into being is controlling, otherwise the open meeting law could be easily circumvented."); *Cf. Allen-Deane Corp. v. Township of Bedminster*, N.J. App., 379 A.2d 265, 268 (1977) ("[W]e fail to perceive any reason why a joint discussion meeting of several public bodies with respect to matters of mutual public concern should not be fully subject to [FOIA] as is a discussion of a single body with respect to matters of public concern.").¹⁶

Thus, under *Del. Op. Att'y Gen.* 02-IB19 and the other authority discussed above, ACT is a public body.

b. ACT's Committees are Public Bodies Subject to FOIA

In *Del. Op. Att'y Gen.* 02-IB33 (Dec. 23, 2002), the Office of Attorney General considered whether a committee established by a public body (the Town of Camden) was also a public body. In the Opinion, the Office concluded that "FOIA includes within the definition of a 'public body' a 'committee,' 'subcommittee,' or 'ad hoc' committee 'established' or 'appointed' by a public body." (Citing 29 Del. C. § 10002(a)). The Office went on to further conclude as follows:

A gathering of members of a committee of a public body is a "public meeting" if a quorum of the committee is present. See 29 Del. C. § 10002(e). If the public body has five members, and appoints a committee of three members, then a meeting of a quorum (two) members of the committee will be subject to FOIA.

Thus, ACT's US Wind Committee is subject to the FOIA statute's public meeting and other requirements, as are other ACT-established committees.

c. The FOIA Statute's Public Policy

Failing to treat ACT and its committees as public bodies subject to Delaware's FOIA statute would undermine the statute's "Declaration of Policy" (29 Del. C. § 10001) which states, in part, as follows:

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. . . .

ACT's and its committees' non-public dealings with US Wind and handling of other matters of substantial public interest resulted in the public being denied the opportunity to

¹⁶ Based on *Del. Op. Att'y Gen.* 02-IB19, ACT may also be viewed as an ad hoc committee or subcommittee of each of the ACT member towns in light of its acting as an arm of the ACT member towns.

observe the performance of public officials and monitor their decisions in formulating and executing public policy.

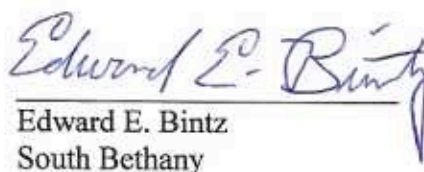
E. Remediation

Petitioner requests that the Office of the Attorney General direct ACT to undertake the following remediation:

1. Requiring ACT to post previously prepared minutes for all meetings since at least January 1, 2021. Because ACT does not maintain an office or website, the minutes should be posted on each of the member towns' websites.
2. Requiring ACT to create and post minutes for ACT's December 5, 2023 and December 20, 2023 meetings (addressed in Section B of this letter) and any other meetings that have occurred during at least the past six months for which minutes have not previously been prepared.
3. Requiring ACT's US Wind Committee and other ACT-created committees to create and post minutes for each of their meetings occurring during at least the past six months.
4. Requiring ACT to comply with 29 Del. C. § 10003 by among other things, establishing and maintaining a web portal for receiving FOIA requests through the internet and designating a FOIA coordinator.
5. Requiring ACT to hold one or more special meetings after public notice to discuss the matters of substantial public interest discussed by ACT or any of its committees at meetings that have occurred during the past two years. *See Del. Op. Att'y Gen* IB97-22 (Nov. 24, 1997); *Del. Op. Att'y Gen.* 97-IB13 (June 2, 1997).

The Office of Attorney General should also evaluate whether ACT has engaged in violations of the FOIA statute not addressed in this letter.

Respectfully submitted,


Edward E. Bintz
South Bethany