

May 23, 2008

Mr. Dennis J. Barbour
153 Columbia Ave.
Rehoboth Beach, DE 19971

**RE: Freedom of Information Act Complaint Against
City of Rehoboth Beach**

Dear Mr. Barbour:

On March 28, 2008, the Delaware Department of Justice (DDOJ) received your complaint alleging that the City of Rehoboth Beach (the “City” or “Rehoboth”) violated the Freedom of Information Act (FOIA), 29 *Del. C.* § 10001 *et seq.*, regarding events leading up to and including the October 15, 2007 adoption of an ordinance reducing the number of members of the Rehoboth Beach Planning Commission (“RBPC”).

Specifically, you complain that the October 1, 2007 and October 15, 2007 meetings of the City Commissioners discussed matters that were not on the published agendas for those meetings, and that serial email discussions of the RBPC matter between the October 1 workshop and the October 15 meeting were private meetings of a quorum of City Commissioners.

On March 28, 2008, we sent your complaint to Rehoboth, and, pursuant to this office’s grant of an extension of time in which to respond, we received their response on April 14, 2008. On April 15, 2008, you requested a copy of their response and time to

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provide us with a reply. On April 28, 2008, we received your reply to the City's response. Based on your reply, we requested further information from the City, which they provided on May 1, 2008.

Statement of the Facts

As the City has stated in its response, the Commissioners of the City of Rehoboth Beach ("City Commissioners") hold two public meetings a month; on the first Monday of the month, which in October 2007 was October 1, there is a "workshop" meeting at which the City Commissioners discuss public business, and on the third Monday of the month, which in October 2007 was October 15, they hold a "regular" meeting, at which formal votes are taken. On September 19, 2007, Commissioner Kuhns emailed the Mayor, suggesting that "a discussion of the upcoming committee, board and commission appointments be added to the October workshop." That lengthy and detailed email, which addressed existing committees, new committees, the assessment board, and the board of adjustment, included a one-sentence reference to "downsizing the planning commission to seven members." According to the public notice of the October 1, 2007 meeting, the agenda for that meeting included as "New Business:" "Discuss City committee structure." According to the minutes of the October 1 meeting, which you attended as a City Commissioner, Commissioner Kuhn introduced the topic of committee

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structure for discussion, which included among other issues his suggestion that the RBPC be reduced from nine to seven members, with a two-term limit.

The amended agenda for the October 15, 2007 meeting listed as new business “Consider Ordinance to amend Chapter 51 of the Municipal Code, reducing the number of Planning Commission members from nine to seven.” However, when the ordinance was introduced, it had two components—one reducing the size of the RBPC, and the other imposing term limits. Although a City Commissioner raised the question of whether term limits could be discussed when the agenda did not include that topic, the City Solicitor approved going forward with the ordinance as introduced. It appears from the detailed minutes of the October 15 meeting that both the public and the City Commissioners—including you—engaged in a full discussion of the ordinance, after which the ordinance was amended to delete the term limits and then was passed as amended.

The City provided us with all emails between City Commissioners relating to the subject of changing the structure of the RBPC, which dated from August 23, 2007 to October 13, 2007. The only emails that were sent to a quorum of the City Commissioners were the emails Commissioner Kuhns sent to the other City Commissioners and the Mayor attaching drafts of the RBPC ordinance that was introduced on October 15. Although Commissioner Kuhns solicited comments on the draft ordinance, no Commissioner commented or replied at all. The changes from the

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draft to the final resulted from the Mayor and the City Solicitor's suggestions, which were only sent to Commissioner Kuhns.

Relevant Statutes

29 *Del. C.* § 10002 (b) defines “[m]eeting” as a “gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.” “Every meeting of all public bodies shall be open to the public[.]” 29 *Del. C.* § 10004(a).

29 *Del. C.* § 10004(e)(2) requires public bodies to provide the public seven days' notice of the time, place and agenda (if one has been determined) for their regularly scheduled meetings. The agenda is defined as including a “general statement of the major issues expected to be discussed at a public meeting[.]” 29 *Del. C.* § 10002(a).

Discussion

The October 1 Meeting. There is no dispute that workshop meetings of the City Commission are meetings of a public body within the meaning of FOIA, and that therefore the City Commission has to provide notice, including an agenda, for its workshop meetings. You have asserted that the notice of the October workshop meeting did not sufficiently apprise the public that, under the topic of “committee structure,” the City Commissioners were going to address the size and term limits of the RBPC, which is a commission, not a committee. Rehoboth claims that the RBPC is one of the entities generically referred to as a committee on the October 1 agenda. The City points out that not only were committees discussed, but also the Planning *Commission*, the Assessment

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Board, the Parks and Shade Tree *Commission* (which the City notes was incorrectly called a Committee in the minutes), the Parking *Commission* and the *Board* of Adjustment, and the City Commissioners received a report from the *Board* of Elections under the topic of Committee Reports.

Because “[a]n agenda serves the important function of notifying the public of the matters which will be discussed,” *Att’y Gen. Op. 97-IB20*, 1997 WL 800814 at *2, “[a]n agenda should be worded in plain and comprehensible language.” *Chemical Indus. Council of De., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, *8 (Del. Ch.). Although the dictionary definitions of “committee” and “commission” are similar, they are not identical,¹ and the possibility of confusion exists.

It does seem that the City government uses the word “committee” to include boards and commissions. However, the burden is on the public body to prove that FOIA was not violated, 29 *Del. C.* § 10005(c), and there is nothing in the City’s response to your complaint from which to conclude that the public should have understood the City’s linguistic convention. Therefore, the notice of the October 1 meeting violated FOIA in not clarifying that commissions and boards, as well as committees, would be discussed.

The October 15 Meeting. The agenda for the October 15 meeting of the City Commissioners included under new business, “Consider Ordinance to amend Chapter 51 of the Municipal Code, reducing the number of Planning Commission members from nine to seven.” However, the ordinance as introduced also contained a provision setting

¹ For example, according to *Webster’s II New College Dictionary* a commission is a “group of people given official authorization to perform certain functions or duties,” while a committee is a “group of people delegated to perform a particular function or task.”

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term limits for the Planning Commission members. The City Commissioners and the public addressed both provisions before they were voted on—the term limits were rejected and the reduction in size was approved. The City asserts it was permissible to consider the topic of term limits because it arose as a “segue” from the topic of the size of the RBPC. 29 Del. C. § 10004(e)(2) provides that the meeting may consider matters that “arise at the time of the . . . meeting,” but considering that Commissioner Kuhns consistently included term limits in his discussions of the RBPC—in his September 19 email to the Mayor, in his comments at the workshop meeting on October 1, in his draft of the ordinance that he circulated to the Mayor and others between the workshop meeting and the October 15 meeting—it cannot be said that term limits came up on October 15 without warning or from the flow of discussion.² Because the issue of term limits was neither on the agenda nor did it “arise at the time of the . . . meeting,” that matter should not have been included in the business of the October 15 meeting, and it violated FOIA to have done so.

Remediation. Remediation is not necessary for either of the violations of FOIA. As to the violation of October 1, the violation is a “harmless” one, under the “harmless violation doctrine” as articulated in *Levy v. Bd. of Educ. of the Cape Henlopen School Dist.*, 1990 WL 154147, *7 (Del. Ch.): “a later public vote remedies earlier technical

² This determination does not address whether, if term limits had come up unexpectedly, the City could have considered that topic or would have had to defer the topic to the next meeting. See *Att’y Gen. Op.* 07-IB16, 2007 WL 4732799.

violations . . . provided that the later public meeting functions as a true *de novo* consideration of the challenged action.” The October 1 violation was remedied by the discussion and vote on October 15, which was not pro forma, but was “a substantial reconsideration” of the issue. *Id.*

In determining whether to require remediation, *Levy* also considers both “the nature of the infraction, *i.e.*, whether the violation was unintentional or deliberate and whether it was an isolated incident or an ongoing pattern of infractions.” *Id.* Because of the closeness in meaning between the two words at issue here, and because it does not appear that the City knowingly or intentionally misled the public, we determine that the October 1 violation was unintentional and not deliberate.³ Nor is there a pattern of violations, even though at both the October 1 and 15 meetings the City Commissioners addressed matters that were not properly noticed. In *Levy*, the Cape Henlopen School Board’s repeated illegal conduct provoked the court to describe the record as “littered with examples of where the Board departed from the sunshine law [FOIA], departures both substantive and procedural.” *Id.* at *6. In contrast, the City’s two infractions here do not rise to the level of egregiousness that would warrant the “very serious sanction” of invalidating the October 15 vote. *Wilmington Fed’n of Teachers v. Howell*, 374 A.2d

³ The record does not indicate who is responsible for the exact wording of the agenda, but according to the September 19 email from Commissioner Kuhn to the Mayor requesting that the matter be added to the agenda, Commissioner Kuhn described what he wanted on the agenda as concerning committees, boards and commissions. It seems more plausible that the change in wording was a clerical error rather than part of a conspiracy to sneak Commissioner Kuhn’s proposal into the discussion at the October 1 workshop meeting.

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832, 835 (Del. 1977). Nor does it weigh in favor of remediation that this complaint was made almost six months after the violations occurred. Both the public and the public body have a strong interest in the finality of government actions. *Id.* at 836.

For similar reasons the October 15 violation need not be remedied. No prejudice resulted from the violation, the matter omitted from the agenda having been voted down. You have asserted that there was prejudice because there was discussion on a matter that was not on the agenda. However, any such prejudice was at most theoretical, as it does not appear from the detailed minutes that debate on the question of reduction in size was crowded out by improperly including term limits in the discussion.

Moreover, FOIA does not require that the public have an opportunity to speak at a public meeting, only to observe. “There is nothing in the text of the declaration of policy or in the open meeting provision requiring public comment or guaranteeing the public the right to participate[.]” *Reeder v. De. Dep’t of Ins.e*, 2006 WL 510067, *12 (Del. Ch. 2006), *aff’d*, 931 A.2d 1007 (Del. 2006). Your theory that members of the public were somehow unable to speak to the issue they came prepared to address—the reduction in size of the RBPC—because they were not prepared to address term limits does not implicate any right created by FOIA.

You also claim prejudice because some City Commissioners who split their votes on the RBPC ordinance might have voted against reduction in size had they not already voted against term limits. However, the purpose of FOIA is open government, not the regularity of the public body’s voting process. FOIA is only concerned with whether the

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public has an opportunity to “observe” and “monitor” its government in action. *29 Del. C. §10001*. The public came to the October 15 meeting prepared to hear about the RBPC ordinance, and did. It would not be a FOIA violation if the addition of the issue of term limits had affected the vote on reduction in size.

You have asserted that the two issues—term limits and reduction in size—were inextricably linked, so that a violation as to one can be imputed to the other. But the two issues were not so entwined that they could not be separated, as evidenced by the fact that the term limits clause was voted down while the reduction in size measure was passed. The agenda stated that reduction in size of the RBPC would be voted on; it was discussed, it was voted on, and as to that vote, there has been no FOIA violation.

The emails. You have complained that a series of emails before the October 15 meeting on the subject of the RBPC ordinance constituted a closed meeting of a quorum of the City Commission, in violation of FOIA. A meeting, by statutory definition, has to contain a the public body conducting a discussion or taking some action. *29 Del. C. § 10002(b)*. Commissioner Kuhns, while asking for comments, did not stimulate a discussion, and as neither a discussion nor any action occurred among the City Commissioners before the October 15 meeting, the emails do not constitute a violation of FOIA.

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Conclusion

For the reasons stated herein, it is determined that the City Commissioners of the City of Rehoboth Beach violated FOIA on October 1, 2008 when they discussed changes to the structure of the Rehoboth Beach Planning Commission under the agenda heading of "Committee structure," and again on October 15, 2008 when they discussed a proposed ordinance imposing term limits on the Planning Commission when the agenda had described the proposed ordinance as only addressing the number of commissioners on the Planning Commission. However, because these violations were harmless and resulted in no prejudice to the public rights created by FOIA, we decline to recommend any remediation, although this determination should not be read as a green light for intentionally or persistently violating the FOIA notice requirements.

There was no FOIA violation when emails containing the proposed ordinance about the Planning Commission were sent from City Commissioner Kuhns to the City Commissioners and the Mayor.

Very truly yours,

Judy Oken Hodas
Deputy Attorney General

APPROVED

Lawrence W. Lewis
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