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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 17-IB20**

**July 12, 2017**

**VIA U.S. MAIL & EMAIL**

Melvin Cusick  
19114 Stonewood Lane, Unit 40  
Rehoboth Beach, Delaware 19971  
csandnat100@aol.com

**RE: January 17, 2017 FOIA Petition Regarding the Town of South Bethany**

Dear Mr. Cusick:

We write in response to your correspondence, received in its entirety on January 17, 2017, alleging that the Town of South Bethany Town Council (the "Council") violated the open meetings provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a petition (the "Petition") for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. We invited the Council to submit a written response to the Petition. We received the Council's response, inclusive of affidavits, on January 27, 2017 ("Initial Response"). We received your reply to the Initial Response on January 31, 2017 ("Reply"). Finally, we received the Council's response to your Reply, inclusive of additional affidavits, on February 3, 2017 ("Supplemental Response"). We have reviewed the Petition, the Initial Response, the Reply, and the Supplemental Response. For the reasons set forth below, it is our determination that the Council violated FOIA by failing to provide seven days' notice of its January 9, 2017 meeting, or, in the alternative, by failing to include an explanation in its January 6, 2017 notice as to why seven days' notice could not be provided. However, under the circumstances, we do not believe remediation to be warranted.

**FACTS**

Prior to January 9, 2017, you served as Town Manager for the Town of South Bethany (the "Town"). Pursuant to the Town's charter, the Town Manager "serve[s] at the pleasure of the Town

Council, and he may be suspended or removed from office by the Town Council for any reason whatsoever.”<sup>1</sup>

On January 6, 2017, the Council posted the agenda for a Town Council Special Meeting to be held at 2:00 PM on January 9, 2017 in the South Bethany Town Hall.<sup>2</sup> The agenda indicated the Council’s intent to convene an executive session, pursuant to 29 Del. C. § 10004(b)(9), “for the purpose of discussing a personnel matter in which the names, competencies, and abilities of individual employees will be discussed.”<sup>3</sup> The agenda also included the following notation: “Discussion and possible action on a personnel matter discussed in executive session.”<sup>4</sup>

On January 7, 2017, at approximately 8:25 AM, you sent an email to Mayor Pat Voveris (the “Mayor”), stating: “I would like to know what the Personnel Matter on the agenda is. If you are discussing an individual employee, that employee has the right to have the discussion in a public meeting.”<sup>5</sup> The Mayor did not respond to your inquiry.<sup>6</sup>

On January 9, 2017, at approximately 9:00 AM, you met with the Mayor and Councilman Frank Weisgerber.<sup>7</sup> During the meeting, the Mayor informed you that the Council would be meeting to discuss and potentially vote upon exercising the option to terminate your employment agreement.<sup>8</sup> You indicated that you would not be attending the meeting.<sup>9</sup> You did not at any time request that the meeting be open to the public.<sup>10</sup>

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<sup>1</sup> Town of South Bethany Charter § 14 - 7.

<sup>2</sup> See Petition; Town Council Special Meeting Agenda.

<sup>3</sup> Town Council Special Meeting Agenda at ¶ 4.

<sup>4</sup> *Id.* at ¶ 6.

<sup>5</sup> Email from Melvin Cusick to Pat Voveris dated January 7, 2017 (8:25 AM).

<sup>6</sup> See Petition (“The Mayor would not respond.”).

<sup>7</sup> See *id.*; January 27, 2017 Weisgerber Aff. at ¶ 2; January 27, 2017 Voveris Aff. at ¶ 2.

<sup>8</sup> January 27, 2017 Voveris Aff. at ¶ 3; January 27, 2017 Weisgerber Aff. at ¶ 3; Petition (“The employee was not notified that the meeting was being held to discuss his job/position until 9:15 a.m. on January 9, 2017.”).

<sup>9</sup> January 27, 2017 Voveris Aff. at ¶ 5; January 27, 2017 Weisgerber Aff. at ¶ 5; Reply at ¶ 3. We note that you dispute the Mayor and Councilman Weisgerber’s representation that the Mayor asked you whether you would attend the meeting.

<sup>10</sup> See January 27, 2017 Voveris Aff. at ¶ 6; January 27, 2017 Weisgerber Aff. at ¶ 6.

The Council met as scheduled at 2:00 PM. During the meeting, the Council convened an executive session, after which the Council voted to terminate your employment.<sup>11</sup>

### **POSITIONS OF THE PARTIES**

In your Petition, you argued that the Council violated FOIA by: 1) failing to provide notice of its January 9, 2017 meeting at least seven days in advance thereof, 2) failing to include an explanation in its January 6, 2017 meeting notice as to why seven days' notice could not be given, 3) failing to timely notify you that the meeting was being held to discuss your employment, 4) failing to provide you an option to have an open public meeting, and 5) voting or otherwise deciding to terminate your employment prior to the January 9, 2017 meeting.

In its Initial Response, the Council did not directly address your allegation that it violated FOIA by failing to provide seven days' notice of its January 9, 2017 meeting. However, the Council did acknowledge that it failed to include an explanation in its January 6, 2017 notice as to why it could not give seven days' notice.<sup>12</sup> The Council stated that this was due to an administrative oversight and, further, that “[i]nstructions have [since] been given to the Town’s FOIA coordinator to include an appropriate explanation on any future notices for special or rescheduled meetings regarding why seven days’ notice could not be provided.”<sup>13</sup>

With respect to your allegation that the Council violated FOIA by failing to provide you timely notification that you were the subject of the personnel matter, the Council noted that FOIA’s notice provisions dictate the Council’s obligations to notify *the public* of certain matters.<sup>14</sup> According to the Council, the public was not entitled to know the name of the employee, as FOIA does not require a public body to identify the personnel to be discussed in executive session.<sup>15</sup> Rather, the Council argued, to the extent you were entitled to the name of the employee to be discussed in executive session, any such right would have stemmed from your status as the employee being discussed and not as a member of the general public.<sup>16</sup> The Council noted that it did in fact notify you that you were the employee to be discussed and argued that it could not have violated FOIA by failing to notify you any earlier, as FOIA “does not prescribe any timeframe for notifying an employee that the employee will be discussed in executive session.”<sup>17</sup>

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<sup>11</sup> See Petition (“I was unexpectedly terminated by the Mayor and Council on January 9, 2017.”).

<sup>12</sup> Initial Response at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

With respect to your allegation that the Council violated FOIA by failing to provide you the option to have the personnel matter discussed in open session, the Council argued that FOIA is silent regarding any obligation that the public body might have to present such an option to the employee.<sup>18</sup> As such, the Council argues, FOIA places the affirmative obligation on the employee to request discussion of the matter in open session.<sup>19</sup> Moreover, the Council noted that you acknowledged as early as your January 7, 2017 email to the Mayor that you could request the open session discussion, but did not exercise that option.<sup>20</sup> The Council included affidavits from the Mayor and Councilman Weisgerber attesting to the fact that you made no such request after the Mayor informed you that you were the subject of the personnel matter.<sup>21</sup>

Finally, with respect to your allegation that the Council violated FOIA by voting or otherwise deciding to terminate your employment prior to the January 9, 2017 meeting, the Council argued that “no action was formally or informally taken by the Town Council to exercise its option to terminate [your] employment agreement prior to the Special Council Meeting.”<sup>22</sup> Rather, the Council argued, the Mayor specifically informed you that the Council would be meeting later that same day to discuss and potentially vote on exercising the option to terminate your employment.<sup>23</sup> The Council maintained that neither the Mayor nor Councilman Weisgerber informed you that you had been or would be terminated.<sup>24</sup> The Council acknowledged that the Mayor discussed terminating your employment with each of the Council members on an individual basis prior to the meeting.<sup>25</sup> Specifically, she “discussed [your] employment with each council member separately in order to determine whether it made sense to call a special meeting to allow council to discuss [your] employment and when any such meeting could potentially be held based on council members’ winter travel plans.”<sup>26</sup> The Council noted that one Council member acknowledged that he had the impression that other Council members supported exercising the

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2-3.

<sup>21</sup> *Id.* at 2, Ex. A.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.*; January 27, 2017 Voveris Aff. at ¶ 3; January 27, 2017 Weisgerber Aff. at ¶ 3.

<sup>24</sup> Initial Response at 3; January 27, 2017 Voveris Aff. at ¶ 4; January 27, 2017 Weisgerber Aff. at ¶ 4.

<sup>25</sup> Initial Response at 3.

<sup>26</sup> *Id.* at 4.

option to terminate your employment based upon his conversation with the Mayor.<sup>27</sup> According to the Council, however, the Council members' conversations with the Mayor did not violate FOIA, as they "did not result in an 'interactive exchange of thoughts and opinions' between the council members such that public business had been discussed or acted upon by a construction [sic] quorum of council through a series of meetings."<sup>28</sup>

In your Reply, you alleged that you could not have requested the discussion be open to the public, as that would have required an agenda change within six hours of the meeting.<sup>29</sup> Noting that you were Town Manager at the time, you also challenged the Council's representation that you are only entitled to the same notice that any member of the public would be entitled to under FOIA.<sup>30</sup> Next, you disputed the Mayor's representation that she asked you whether you would attend the meeting.<sup>31</sup> You stated: "I advised her that I would not be attending the meeting since I was just notified that the meeting was to discuss my termination and that I did not have sufficient time to seek legal representation if I chose to do so."<sup>32</sup> You stated that the Mayor informed you that you did not have to attend the meeting.<sup>33</sup> Finally, you challenged the Council's claim that it did not secure votes in advance of the meeting, asserting that, as she was leaving at 9:30, the Mayor advised you to turn in all Town-owned property and asked if you would need a ride home from the meeting after turning in your vehicle.<sup>34</sup>

In its Supplemental Response, the Council argued that, pursuant to 29 *Del. C.* § 10004(e)(5), the Council would have needed to evaluate amending the agenda or, alternatively, rescheduling the meeting if you had requested an open meeting.<sup>35</sup> Additionally, the Council

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<sup>27</sup> *Id.* at 5 n.11.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> Reply at ¶ 1 ("If FOIA requires that a posted agenda cannot be changed 6 hours prior to the scheduled meeting, how could the employee, once notified at 9:15 a.m., request that the meeting scheduled at 2:00 p.m. be open? This would require an agenda change.").

<sup>30</sup> *Id.* at ¶ 2.

<sup>31</sup> *Id.* at ¶ 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at ¶ 4 ("[I]f the votes were not secured before the 2:00 p.m. scheduled meeting, why did Mayor Voveris advise me 'to turn in all Town owned property' as she was leaving the office at approximately 9:30 a.m. and ask if I would need a ride home since I had to turn in the Town vehicle?").

<sup>35</sup> Supplemental Response at 1.

argued, “[t]o the extent that [you] had any right to know the name of the employee being discussed in executive session, any such right would have stemmed from [your] status as the employee being discussed and not from [your] status as the Town Manager.”<sup>36</sup> The Council argued: “Whether or not a town council should inform a town manager about the details of an executive session is a policy decision that is beyond the scope of FOIA.”<sup>37</sup> The Council included additional affidavits from the Mayor and Councilman Weisgerber, both of which again stated that the Mayor asked you whether you would be attending the meeting.<sup>38</sup> In the affidavits, the Mayor and Councilman Weisgerber also stated that the Mayor informed you that, depending on how the Council votes, it might be necessary to speak with you about turning over your town property, including your town vehicle.<sup>39</sup> In her affidavit, the Mayor stated: “At no time prior to the Special Council meeting did I ask Mr. Cusick to turn over his town property.”<sup>40</sup>

### **RELEVANT STATUTES**

FOIA defines a “meeting” as “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 either in person or by video-conferencing.”<sup>41</sup> FOIA requires all public bodies to “give public notice of their regular meetings and their intent to hold an executive session closed to the public, at least 7 days in advance thereof.”<sup>42</sup> For any special or rescheduled meetings, which FOIA defines as “one to be held less than 7 days after the scheduling decision is made,” notice shall be provided “as soon as reasonably possible, but in any event no later than 24 hours before such meeting.”<sup>43</sup> However, the public notice of any such meeting must include an explanation as to why 7 days’ notice could not be given.<sup>44</sup> Similarly, “[w]hen the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda.”<sup>45</sup>

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<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.*

<sup>38</sup> February 3, 2017 Weisgerber Aff. at ¶ 4; February 3, 2017 Voveris Aff. at ¶ 4.

<sup>39</sup> February 3, 2017 Weisgerber Aff. at ¶ 5; February 3, 2017 Voveris Aff. at ¶ 5.

<sup>40</sup> Voveris Aff. at ¶ 5.

<sup>41</sup> 29 *Del. C.* § 10002(g).

<sup>42</sup> 29 *Del. C.* § 10004(e)(2).

<sup>43</sup> 29 *Del. C.* § 10004(e)(3).

<sup>44</sup> *Id.*

<sup>45</sup> 29 *Del. C.* § 10004(e)(5).

Public notice of meetings “shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings . . . .”<sup>46</sup> However, “the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body’s meeting.”<sup>47</sup> An agenda is defined as including a “general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific grounds therefore.”<sup>48</sup> Among the permissible purposes for an executive session are “[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open.”<sup>49</sup>

## DISCUSSION

### The Council Violated FOIA by Failing to Provide Seven Days’ Notice of its January 9, 2017 Council Meeting or, in the Alternative, by Failing to Include an Explanation in its January 6, 2017 Meeting Notice Regarding Why Seven Days’ Notice Could Not Be Given

As an initial matter, we note that the Council did not address your allegation that it violated FOIA by failing to provide seven days’ notice of its January 9, 2017 meeting. Rather, the Council specifically identified the meeting as a Special Town Council Meeting. By definition, the January 9, 2017 meeting was indeed a special meeting of the Council, as the Council provided notice of the meeting on January 6, 2017, just three days in advance thereof.<sup>50</sup> Importantly, however, this Office has determined that a public body’s authority to call a special meeting is not absolute. Rather, in prior opinions, we have interpreted FOIA to require a public body to demonstrate exigency or compelling need to justify holding a special meeting.<sup>51</sup>

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<sup>46</sup> 29 Del. C. § 10004(e)(2).

<sup>47</sup> *Id.*

<sup>48</sup> 29 Del. C. § 10002(a).

<sup>49</sup> 29 Del. C. § 10004(b)(9).

<sup>50</sup> See 29 Del. C. § 10004(e)(3) (defining a special or rescheduled meeting as a meeting “held less than 7 days after the scheduling decision is made”).

<sup>51</sup> See, e.g., *Del. Op. Att’y Gen.* 07-IB09, 2007 WL 4732792, at \*2 (May 10, 2007) (concluding that there was a compelling need for elections committee to meet on three days’ notice with election only a week away so as to provide important information to voters as many days in advance of the election as possible); *Del. Op. Att’y Gen.* 04-IB01, 2004 WL 257228, at \*1 (Jan. 28, 2004) (exigent situation existed following court’s determination regarding legality of off-campus student housing ordinance to justify calling special meeting to place temporary moratorium on issuance of new rental permits); *Del. Op. Att’y Gen.* 03-IB16, 2003 WL 22404934, at \*2 (Aug. 8, 2003) (accepting public body’s representation regarding the urgency of the matter); *Del. Op. Att’y Gen.* 03-IB05 (Feb. 5, 2003) (town justified in calling special meeting to discuss filing of civil rights lawsuit against council members); *Del. Op. Att’y Gen.* 01-IB02, 2001 WL

Here, the Council has not provided a reason why it could not give seven days' notice of its intent to hold an executive session to discuss your personnel matter. There is some suggestion in the record that it selected the January 9, 2017 meeting date based on Council members' winter availability. However, in its Supplemental Response, the Council also appears to suggest that additional notice might have been possible.<sup>52</sup> Importantly, the public body bears the burden of proof pursuant to 29 *Del. C.* § 10005(c). Here, the Council has failed to demonstrate exigency or a compelling need to justify holding a special meeting. As such, it is our determination that the Council violated FOIA by failing to provide seven days' notice of its January 9, 2017 meeting.<sup>53</sup>

Assuming, *arguendo*, that the Council was justified in holding a special meeting, we conclude that the Council violated FOIA by failing to provide an explanation in its January 6, 2017 meeting notice as to why it could not give seven days' notice of the meeting. Since the meeting was, by definition, a special meeting of the Council, the Council was required to include in the notice an explanation as to why seven days' notice could not be given.<sup>54</sup> Here, the Council acknowledges that the meeting notice failed to include such an explanation.<sup>55</sup> As such, the Council violated FOIA by failing to provide an explanation on its meeting notice why it could not give seven days' notice of its January 9, 2017 special meeting.<sup>56</sup>

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1593102, at \*1 (Jan. 30, 2001) (town properly called special meeting to consult with its solicitor because time to appeal court decision would have expired by the time of next regularly scheduled meeting).

<sup>52</sup> Supplemental Response at 1 (“Had Mr. Cusick requested that the Town Council discuss his personnel matter in open session, the Town would have needed to evaluate whether it would have been appropriate under FOIA to amend the Special Council Meeting agenda pursuant to Mr. Cusick’s request. Had the Town determined that an amendment would not have been appropriate under FOIA, *the Town could have canceled the meeting and rescheduled it for another time.*”) (emphasis added).

<sup>53</sup> See *Del. Op. Att’y Gen.* 00-IB07, 2000 WL 1092968, at \*4 (Apr. 28, 2000) (concluding that “there was no exigent circumstance or compelling need for the [public body] to hold a ‘special’ meeting . . . without meeting the seven-day notice requirement for regular meetings”); *Del. Op. Att’y Gen.* 05-IB05, 2004 WL 3266027 (Feb. 22, 2005) (concluding that there was nothing in the record to suggest there were any exigent circumstances or compelling need for town council to meet on three days’ notice to discuss removal of Town Solicitor).

<sup>54</sup> See 29 *Del. C.* § 10004(e)(3) (“The public notice of a special or rescheduled meeting shall include an explanation as to why the notice required by paragraph (e)(2) . . . could not be given.”).

<sup>55</sup> Response Letter at 1.

<sup>56</sup> See, e.g., *Del. Op. Att’y Gen.* 16-IB27, 2016 WL 7743694, at \*5 (Dec. 22, 2016); *Del. Op. Att’y Gen.* 07-IB09, 2007 WL 4732792, at \*2; *Del. Op. Att’y Gen.* 06-ID18, 2006 WL 2724978, at \*3 (Sept. 5, 2005); *Del. Op. Att’y Gen.* 05-IB21, 2005 WL 2334349, at \*2 (Aug. 1, 2005); *Del. Op. Att’y Gen.* 04-IB01, 2004 WL 257228, at \*2; *Del. Op. Att’y Gen.* 01-IB02, 2001 WL 1593102,



The Council Did Not Violate FOIA by Failing to Notify You that You  
Were the Subject of the Executive Session or by Failing to Give You an Option to Have Your  
Personnel Matter Discussed in Open Session

In your Petition, you appear to allege that FOIA's language includes an implicit requirement that the public body provide notice to an employee that he or she is the subject of a personnel matter that the public body intends to discuss in executive session. We do not interpret FOIA to contain such an obligation.<sup>57</sup>

Importantly, we note that FOIA's open meeting provisions are intended to benefit *the public*. Indeed, FOIA's Declaration of Policy provides: "It is vital to 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 . . ."<sup>58</sup> However, the public's right to observe is not absolute. For example, FOIA permits a public body to convene an executive session to discuss certain matters outside of the public view.<sup>59</sup> Among those matters are "[p]ersonnel matters in which the names, competency and abilities or individual employees or students are discussed."<sup>60</sup>

A public body's notice obligations can be found in Section 10004(e). Section 10004(e) requires the public body to include an agenda with its notice at the time of initial posting or, if no agenda is available at such time, at least six hours in advance of the meeting.<sup>61</sup> An "agenda" is defined as including "a general statement of the major issues expected to be discussed at a public

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at \*1; *Del. Op. Att'y Gen.* 99-IB03, 1999 WL 1093143, at \*2 (Apr. 28, 1999); *Del. Op. Att'y Gen.* 98-IB05, 1998 WL 648714, at \*2 (July 6, 1998); *Del. Op. Att'y Gen.* 97-IB18, 1997 WL 606482, at \*2 (Sept. 2, 1997); *Del. Op. Att'y Gen.* 96-IB15, 1996 WL 254946, at \*20-21 (May 10, 1996); *Del. Op. Att'y Gen.* 94-IO37, 1994 WL 875916, at \*1 (July 26, 1994).

<sup>57</sup> The question of whether your status as Town Manager afforded you the right to advance notice of the employee's identity is outside the scope of FOIA and is not addressed herein.

<sup>58</sup> 29 *Del. C.* § 10001 (emphasis added).

<sup>59</sup> See generally 29 *Del. C.* § 10004(b)(1)-(9) (enumerating permissible purposes for executive session).

<sup>60</sup> See *Del. Op. Att'y Gen.* 02-IB12, 2002 WL 1282812, at \*2 (May 21, 2002) (noting that the personnel exemption for executive session "reflects the Legislature's judgement of the appropriate balance between the public interest in open discussion of governmental issues and the rights of individuals, such as state employees, to have their work performance considered in private and to avoid injury to the individual's reputation." (quoting *Meyer v. Bd. of Regents*, 510 N.W.2d 450, 454 (Neb. App. 1993)).

<sup>61</sup> See 29 *Del. C.* § 10004(e)(2), (5).

meeting, as well as a statement of intent to hold an executive session and the specific grounds therefore.”<sup>62</sup> As the Delaware Superior Court has recognized, “[t]he statute requires public bodies to provide the reason for entering into an executive session . . . .”<sup>63</sup> Notably, however, it “does not require public bodies to elaborate in great detail on agendas what legal, personnel, or other subjects are to be discussed.”<sup>64</sup> As such, FOIA does not require a public body to identify the personnel when convening an executive session to discuss personnel matters.<sup>65</sup>

Of course, we recognize that an employee cannot request that a discussion be open to the public unless the employee is aware that he or she is the subject of the discussion.<sup>66</sup> However, FOIA does not confer additional substantive or procedural rights to any particular class of public employees. Thus, to the extent a public employee is entitled to notice that he or she is the subject of a personnel matter to be discussed in executive session, any such right exists outside of the FOIA context.<sup>67</sup>

Here, the agenda indicated an intent to convene an executive session, pursuant to 29 *Del. C.* § 10004(b)(9), “for the purpose of discussing a personnel matter in which the names, competencies, and abilities of individual employees w[ould] be discussed.”<sup>68</sup> The agenda also

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<sup>62</sup> 29 *Del. C.* § 10002(a).

<sup>63</sup> *O’Neill v. Town of Middletown*, 2007 WL 2752981, at \*7 (Del. Ch. Mar. 29, 2007).

<sup>64</sup> *Id.*; see also *Del. Op. Att’y Gen.* 05-IB26, 2005 WL 3991284, at \*5 (Aug. 29, 2005) (agenda reference to “Personnel & Legal Issues” provided “adequate notice under FOIA of the intent to hold an executive session and the matters to be discussed in executive session”); *Del. Op. Att’y Gen.* 02-IB12, 2002 WL 1282812, at \*1-2 (agenda reference to “Executive Session to Discuss Personnel” satisfied “FOIA’s generalized requirements for an agenda”).

<sup>65</sup> See *Del. Op. Att’y Gen.* 07-IB20, 2007 WL 473803, at \*2 (Sept. 10, 2007) (concluding that FOIA did not require town to identify the person by name who would be the subject for discussion at executive session to discuss “personnel matter” when the discussion was the removal of a member of town’s planning commission); see also *Del. Op. Att’y Gen.* 06-IB15, 2006 WL 2355969, at \*2 (July 24, 2006); *Del. Op. Att’y Gen.* 03-IB20, 2003 WL 22669565, at \*1 (Sept. 3, 2003); *Del. Op. Att’y Gen.* 99-IB03, 1999 WL 1093143, at \*2; *Del. Op. Att’y Gen.* 97-IB23, 1997 WL 800821, at \*2 (Dec. 23, 1997); *Del. Op. Att’y Gen.* 96-IB27, 1996 WL 517437, at \*2 (Aug. 1, 1996).

<sup>66</sup> See 29 *Del. C.* § 10004(b)(9) (“Personnel matters in which the names, competency and abilities of individual employees or students are discussed, *unless the employee or student requests that such a meeting be open.*”) (emphasis added).

<sup>67</sup> This decision is limited to a determination of whether a violation of FOIA has occurred or is about to occur. As such, we do not address the question of whether some ancillary legal authority might provide you a separate basis for relief.

<sup>68</sup> Town Council Special Meeting Agenda at ¶ 4.

included the following notation: “Discussion and possible action on a personnel matter discussed in executive session.”<sup>69</sup> Although the Council could undoubtedly have included more specificity in this agenda item,<sup>70</sup> this was all that FOIA required under the circumstances.<sup>71</sup> While the Council ultimately informed you that you were the subject of the executive session, FOIA did not mandate that it do so, nor that it do so within a specified time period. As such, it is our determination that the Council did not violate FOIA by failing to notify you until the day of the meeting that you were the subject of the executive session.

In your Petition, you appear to allege that FOIA’s language contains an implicit mandate that the Council specifically inform you that you had the option to have your personnel matter discussed in open session. We disagree for the reasons stated above. FOIA does not require that a public body affirmatively present an employee with the option to have their personnel matter discussed in open session. As such, it is our determination that the Council did not violate FOIA by failing to affirmatively present you with the option to have your personnel matter discussed in open session.

The Council Did Not Violate FOIA by Voting or Otherwise Deciding to Terminate Your  
Employment in Advance of its January 9, 2017 Meeting

Based upon the record, we do not believe that the Council voted or otherwise decided to terminate your employment in advance of its January 9, 2017 meeting. As we have previously stated, “[w]e do not read Section 10005(c) of FOIA to place the burden on the public body to prove that a meeting did not in fact take place.”<sup>72</sup> Rather, the complaining party must make at least a

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<sup>69</sup> *Id.* at ¶ 6.

<sup>70</sup> For example, we believe that the following language would better satisfy FOIA both in letter and in spirit: “Discussion and possible action on personnel matter discussed in executive session, including but not limited to discipline or separation of employment for one or more public employees.”

<sup>71</sup> *Cf. Del. Op. Att’y Gen.* 05-IB05, 2004 WL 3266027, at \*2 (Feb. 22, 2004) (agenda item listing “Town Solicitor” insufficient to notify the public of the town’s intent to publicly discuss and vote upon removal of town solicitor where no executive session held on the matter). We nevertheless caution public bodies that including a catchall agenda item indicating discussion or possible action on one or more items discussed in executive session may run afoul of FOIA when there is no true intent to take action in public on a matter discussed in executive session. *See 29 Del. C. § 10002(a)* (“‘Agenda’ shall include but is not limited to a general statement of the major issues *expected* to be discussed at a public meeting . . . .”) (emphasis added).

<sup>72</sup> *Del. Op. Att’y Gen.* 05-IB10, 2005 WL 1209240, at \*2 (Apr. 11, 2005).

*prima facie* showing that a meeting may have occurred.<sup>73</sup> Once such a showing has been made, the burden then shifts to the public body to prove that no FOIA violation occurred.<sup>74</sup>

Here, even if we were to conclude that a *prima facie* showing has been made that a meeting may have occurred so as to shift the burden to the Council, we are satisfied, based upon the record, that no such meeting actually occurred. Indeed, the record does not support a finding that a quorum of the Council discussed a matter of public business with one another. As noted above, the Mayor – who is not a Council member – spoke with each Council member individually to determine whether there was interest among the Council members to discuss a personnel matter in which you were the subject and, if so, when such a meeting could be held.<sup>75</sup> While the Mayor concedes that she spoke with each Council member individually about this topic,<sup>76</sup> she has also stated, under penalty of perjury, that she did not relay information back and forth between Council members and did not attempt to persuade any Council members to take a particular position.<sup>77</sup> Under the circumstances, we conclude that a quorum of the Council did not discuss your termination with one another in advance of the January 9, 2017 meeting.<sup>78</sup>

### REMEDICATION

Having determined that the Council violated FOIA, we next consider whether, and to what extent, the violations warrant remediation. While we recognize that any action taken at a meeting held in violation of FOIA may be voidable by the Court of Chancery,<sup>79</sup> we do not believe that the circumstances warrant any remedial action. As noted above, it is intended that FOIA's open meetings provisions benefit *the public*. Here, it is undisputed that the public was denied legally adequate notice of the opportunity to observe the Council's discussion regarding your employment. However, there is no evidence in the record – nor do you allege – that the Council's initial decision to discuss the matter in executive session pursuant to 29 *Del. C.* § 10004(b)(9) was improper, or that the Council was under any obligation to discuss the matter in open session. Under these circumstances, and without assessing whether there might have been another available basis

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> January 27, 2017 Voveris Aff. at ¶ 7.

<sup>76</sup> *Id.*

<sup>77</sup> January 27, 2017 Voveris Aff. at ¶¶ 7-8.

<sup>78</sup> *See id.* at \*3-4 (no evidence of a discussion among a quorum of the board where individual board members separately contacted school's principal to express support for a decision that the principal had made and the principal subsequently informed a board member of the other board members' support for the decision).

<sup>79</sup> 29 *Del. C.* § 10005(a).

for the executive session, we do not believe it legally justifiable to now request that the Council re-notice its intent to discuss the matter, (presumably) discuss, and decide the matter anew in an open session. Indeed, even if we were to opine that such an extreme remedy were appropriate, we note that the Council retains the right to remove the Town Manager from office “for any reason whatsoever.”<sup>80</sup> For these reasons, we do not believe a reviewing court would order the Council to re-notice and re-decide this matter, and we similarly find such requested remediation unsupported by the record.

Having determined that no remediation is warranted, we remind the Council to provide seven days’ notice of meetings wherever possible and, if seven days’ notice cannot be given, to provide an explanation on the agenda as to why, as required by FOIA. We are confident that the Council now understands this obligation, as it has stated: “Instructions have been given to the Town’s FOIA coordinator to include an appropriate explanation on any future notices for special or rescheduled meetings regarding why seven days’ notice could not be provided.”<sup>81</sup>

### CONCLUSION

Based on the foregoing, it is our determination that the Council violated FOIA by failing to provide seven days’ notice of its January 9, 2017 meeting, or, in the alternative, by failing to include an explanation in its January 6, 2017 notice as to why seven days’ notice could not be provided. However, we conclude that these FOIA violations warrant no remediation. To the extent that you believe remediation to be warranted, or otherwise believe that you may be entitled to relief, you may wish to consult with an attorney regarding your options.

Very truly yours,



Michelle E. Whalen  
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, State Solicitor

cc: LaKresha S. Roberts (via email)  
D. Barrett Edwards, IV, Esq. (via email)

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<sup>80</sup> Town of South Bethany Charter § 14 - 7.

<sup>81</sup> Response Letter at 2.