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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB17

July 11, 2017

VIA U.S. MAIL AND EMAIL

Frank "Dan" Cannon
411 Nylon Blvd.
Seaford, DE 19973
seafordski@hotmail.com

Re: FOIA Petitions Concerning the City of Seaford Dated February 24, 2017 and April 26, 2017

Dear Mr. Cannon:

The Delaware Department of Justice ("DOJ") has received two petitions from you requesting our determination, pursuant to the *Freedom of Information Act*, 29 Del. C. §§ 10001-10007 ("FOIA"), of whether the Council of the City of Seaford ("Council") violated FOIA. As the petitions are related, we address both in today's letter. Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Council to submit a written response to your petitions. We received the Council's response and have reviewed it along with your correspondence.

We received your first petition on February 24, 2017 ("February Petition"). The February Petition requested a determination of whether the Council violated FOIA's open meetings provisions because the agenda for its 2017 Planning Session/City Planning Session ("2017 Planning Session") was not provided with the notice for the meeting and, when obtained by you, it omitted major items of public business discussed during the meeting. The 2017 Planning Session was held on February 17, 2017 and attended by the Mayor of Seaford and all five City Council members. As set forth more fully below, it is our determination that the Council violated FOIA as alleged in the February Petition.

We received your second petition on April 25, 2017 ("April Petition"). The April Petition requested a determination of whether the Council violated FOIA's open meetings provisions by failing to provide complete public notice of the planning sessions conducted by the

Council in the years 2007 through 2016. As set forth more fully below, we consider your petition to be untimely and unnecessarily cumulative; therefore, we will not make a determination on whether the Council violated FOIA as to these historic planning sessions.

I. BACKGROUND

Since at least 2006, the Council has been holding an annual “planning session.”¹ On February 17, 2017, the Mayor of Seaford and all five of the City Council members along with city management, department directors and certain supervisors of the City of Seaford attended the 2017 Planning Session at the Seaford District Library. The 2017 Planning Session began at 8:30 a.m. and continued until 2:00 p.m. It was open to the public and you attended the entire session. Notice of the 2017 Planning Session was not posted on the City of Seaford’s website, but it was referenced in the agenda of the regularly scheduled public meeting of the Council held on February 14, 2017, which was posted both physically and electronically. Additionally, notice of the 2017 Planning Session was separately posted apart from the mention in the February 14th meeting agenda. No agenda for the 2017 Planning Session was included with any of the notices. However, upon request, you obtained an agenda from Seaford’s City Hall. The agenda for the 2017 Planning Session very generally listed: opening and closing remarks and breaks but gave no substantive information about the intended topics of discussion. Based on the City of Seaford’s response to your request for the notice, agenda and minutes of all historic planning sessions held from 2007 through 2016, it is on information and belief, that the Council noticed and formatted its agenda for all historic planning sessions the same way it noticed and formatted the agenda for the 2017 Planning Session.

II. SUMMARY OF ARGUMENTS

In your petitions, you allege that the Council violated FOIA by failing to provide proper notice or a sufficient agenda for the 2017 Planning Session and all the annual planning sessions held by the Council since 2006. Specifically, the February Petition alleges that the 2017 Planning Session was an open meeting of a public body and therefore needed, but failed, to be properly noticed because the notice should have included, but did not include, an agenda describing the major issues expected to be discussed at the meeting. The April Petition alleges that the Council had been holding planning sessions since 2006 and they had never been properly noticed.

In response to your petitions, the Council avers that the 2017 Planning Session was “in the nature of a ‘Retreat’ and states that, ‘the purpose of the meeting was to review past efforts of the City, enhance team building and training and share information.’”² As such, the Council argues that the 2017 Planning Session was properly noticed and the agenda was sufficient to relay the general purpose of the meeting. The Council argues that more specificity in the agenda would have defeated the nature of the meeting, but it agrees to provide and post a more detailed agenda in the future. The Council did not separately respond to the April Petition.

¹ Response Letter.

² *Id.*

III. APPLICABLE LAW

Delaware's FOIA requires that "every meeting of all public bodies shall be open to the public,"³ except those closed pursuant to delineated provisions of the statute.⁴ A "meeting" is defined 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."⁵

FOIA requires public bodies to "give public notice of their regular meetings...."⁶ Such notice "shall include the agenda"⁷ and "shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such notices available."⁸ An agenda "shall include but is not limited to a general statement of the major issues expected to be discussed at a public meeting...."⁹ 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."¹⁰

FOIA permits Delaware citizens to "petition the Attorney General to determine whether a violation of [FOIA] has occurred or is about to occur."¹¹ Any such "petition shall set forth briefly the nature of the alleged violation."¹² FOIA also permits citizens to "challenge the validity . . . of any action of a public body by filing suit within 60 days of such action but in no event later than 6 months after the date of the action."¹³

³ 29 *Del. C.* § 10004(a).

⁴ *See* 29 *Del. C.* § 10004(b)-(d) and (h).

⁵ 29 *Del. C.* § 10002(g).

⁶ 29 *Del. C.* § 10004(e)(2).

⁷ 29 *Del. C.* § 10004(e)(2).

⁸ 29 *Del. C.* § 10004(e)(4).

⁹ 29 *Del. C.* § 10002(a).

¹⁰ 29 *Del. C.* § 10002(e)(2)

¹¹ 29 *Del. C.* § 10005(e).

¹² *Id.*

¹³ 29 *Del. C.* § 10005(a).

IV. DISCUSSION

a. February Petition

The February Petition alleges that the Council violated the open meetings requirements of FOIA in two ways: (1) in that it failed to post the agenda for the 2017 Planning Session along with the notice for the event; and (2) in that its agenda for the Planning Session did not include the major issues discussed at the meeting. The Council argues that the 2017 Planning Session was in the nature of a “retreat” rather than a regular public meeting and, therefore, it was unnecessary to adhere to FOIA’s open meetings requirements. The first question we must address is whether the 2017 Planning Session was a meeting as defined by FOIA. It was.

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....” It is undisputed that the 2017 Planning Session included a quorum of the Council. Minutes of the meeting reveal that the Council discussed a number of issues of significant public concern including:

facts and figures for property taxes, electric revenue, the budgets and charges for services in the FY 12 - FY 17; current staffing; code enforcement and process; conditions of properties and thoughts from the Rental License Committee on improvements; zoning; future projects like sewer district treatment and upgrade; collective bargaining agreement with the police force; and Economic Development Initiatives including the marketing and selling of lands controlled by the Council; and finally the Homeless Vet Initiative.

The Superior Court examined the idea of a “retreat” or a “workshop” in *Levy v. Board of Education of the Cape Henlopen School District*. In *Levy*, the Board held a daylong “workshop” with a quorum of its members at a local restaurant. The Board argued that no votes or other actions were taken and the members simply discussed a reorganization issue that was going to be considered later by the Board. The Court held that the Board’s “workshop” did violate FOIA’s open meeting requirements because “action by a public body includes fact gathering, deliberations and discussions, all of which surely influence the public entity’s final decision.”¹⁴ The same occurred during the Council’s 2017 Planning Session. The Council engaged in an overview of a large number of current and future issues to be considered by the Council. Although the minutes do reflect that no votes were taken, they also reflect that the Council engaged in significant discussions about public issues and fact gathering. Like the “workshop” in *Levy*, the “retreat” in this case met FOIA’s definition of a meeting and, since no exemption applied,¹⁵ must have been open to the public and properly noticed pursuant to FOIA’s open meetings requirements.

¹⁴ *Levy v. Bd. of Educ. of Cape Henlopen*, 1990 WL 154147, at *6, (Del. Ch. Oct. 1, 1990).

¹⁵ *See 29 Del. C. § 10004(a)-(d) and (h)*.

FOIA requires public bodies to “give public notice of their regular meetings...”¹⁶ Notice “shall include the agenda”¹⁷ and be conspicuously posted “at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held...”¹⁸ It is not disputed that notice of the 2017 Planning Session was appropriately posted in hardcopy format. Nor, is it disputed that the hardcopy notice failed to include an agenda. As a result, it is our determination that the Council did violate FOIA by not including a copy of the meeting agenda with the notice.

Although not included with the notice, a meeting agenda did exist and you were able to obtain it upon request. The agenda listed that opening and closing remarks would be made and gave the times when breaks and lunch would occur. It did not include any identification of the substantive issues that would be discussed at the meeting. An agenda “shall include but is not limited to a general statement of the major issues expected to be discussed at a public meeting...”¹⁹ Council argues that the meeting’s title, “City Planning Session,” was sufficient to indicate that the general purpose of the meeting was to “cover[] many issues relevant to the City”²⁰ and any further specification would have “defeat[ed] the very purpose of the planning session.” We disagree.

“The purpose for posting an agenda for a meeting of a public body is to alert the public so that those interested in an agenda item will know to attend the meeting.”²¹ “Broad generalities [that] fail to draw the public’s attention to the fact that [a] specific important subject” will be discussed “satisf[y] neither the spirit nor the letter of the Freedom of Information Act.”²² In the instant matter, the agenda was at best a “broad generality” and failed to provide any statement of what issues were to be discussed. We cannot accept the Council’s argument that the title of the meeting was sufficient to alert the public of the major issues to be discussed. It is difficult to imagine what, if any, Council meeting would not “cover issues relevant to the City” and we have determined that in this instance the public was not properly noticed of the opportunity to observe the Council’s discussion of these important topics. As a result, it is our determination that the Council did violate FOIA as alleged in the February Petition.

¹⁶ 29 Del. C. § 10004(e)(2).

¹⁷ 29 Del. C. § 10004(e)(2).

¹⁸ 29 Del. C. § 10004(e)(4).

¹⁹ 29 Del. C. § 10002(a).

²⁰ Response at 2.

²¹ *Del. Op. Atty. Gen.* 10-IB12, 2010 WL 4154564, at *1 (Sept. 28, 2010).

²² *Ianni v. Dep’t of Elections of New Castle County*, 1986 WL 9610, at *5 (Del. Ch. Aug. 29, 1986).

b. April Petition

The April Petition builds upon the February Petition by arguing, in that, the Council violated FOIA's notice and open meeting requirements for its 2017 Planning Session; the Council has similarly violated FOIA for the past ten years that it has been holding these planning sessions. As a general matter, the DOJ does not consider FOIA petitions alleging FOIA violations that occurred more than six months prior to our receipt of the petition.²³ We have noted that this is a general rule that we adhere to "for fairness and practical reasons."²⁴ When this office has considered untimely petitions, we have done so because the petitioner repeatedly attempted to bring the matter to various individuals' attention in a timely manner and because the respondent involved was aware of the allegations shortly after the violations occurred.²⁵ Neither is the case here. This involves a specific annual event and such that notice and open meetings violations occurred surrounding the event, remediation attributed to the February Petition is sufficient to address the issue. For these reasons, your second petition is denied as untimely.

²³ See, e.g., *Del. Op. Att'y Gen.* 12-IB11, 2012 WL 5894039, at *5 (Nov. 7, 2012); *Del. Op. Att'y Gen.* 16-IB14, 2016 WL 3462345, at *2 (June 9, 2016); *Del. Op. Att'y Gen.* 05-IB26, 2005 WL 3991284, at *10 n.3 (Aug. 29, 2005); *Del. Op. Att'y Gen.* 04-IB08, 2004 WL 771854, at *2 (Mar. 9, 2004); *Del. Op. Att'y Gen.* 00-IB05, 2000 WL 1092970, at *1 (Feb. 18, 2000); *Del. Op. Att'y Gen.* 97-IB23, 1997 WL 800821, at *1 (Dec. 23, 1997); *Del. Op. Att'y Gen.* 94-IO16 (Apr. 7, 1994); *Del. Op. Att'y Gen.* 93-IO28 (Sept. 21, 1993); *Del. Op. Att'y Gen.* 93-IO06 (Mar. 5, 1993).

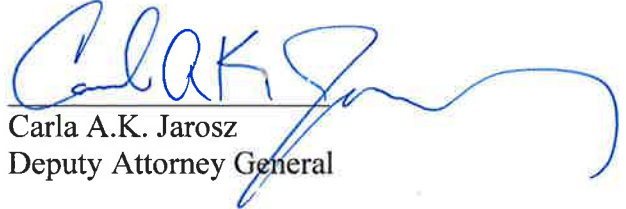
²⁴ *Del. Op. Att'y Gen.* 02-IB10, 2002 WL 970061, at *1 (Apr. 24, 2002).

²⁵ *Del. Op. Att'y Gen.* 17-IB15, (July 7, 2017).

V. **CONCLUSION**

It is our determination that the Council violated FOIA by failing to provide an agenda with its notice for the 2017 Planning Session; and because its agenda, when provided, failed to include a general statement of the major issues expected to be discussed. However, it is our determination that no remediation is warranted for either violation because no votes or official Council actions were taken during the at-issue meeting and it remains our belief that these violations will not be repeated in relation to Council's 2018 Planning Session.

Very truly yours,



Carla A.K. Jarosz
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: LaKresha Roberts, Chief Deputy Attorney General (via email)
Michelle E. Whalen, Deputy Attorney General (via email)
James Fuqua, Esq. (via email)