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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB27

July 18, 2017

VIA U.S. MAIL & EMAIL

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

Re: FOIA Petition Concerning the City of Seaford Dated May 7, 2017

Dear Mr. Cannon:

We write in response to your May 7, 2017 petition ("Petition") for a determination, pursuant to the Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"), of whether the Council of the City of Seaford (the "Council") violated FOIA's open meetings provisions. We invited the Council to submit a written response to the Petition. We received the Council's response on May 17, 2017 ("Response Letter"). On July 13, 2017, we requested supplemental information from the Council, which we indicated that the Council could provide *in camera* (for this Office's eyes only). We received the Council's supplemental submission on July 17, 2017. Our determination is set forth below.

I. BACKGROUND

On April 6, 2017, at approximately 2:30 PM, the Council posted notice (in the form of a meeting agenda) to its website of a meeting to occur at 5:00 PM that same day (the "Meeting").¹ The document was entitled "Executive Session of the Mayor and Council" and stated: "Mayor Genshaw to call the meeting to order for the purpose of discussing personnel."²

¹ Response Letter at 1. We note that your Petition states that you are unaware of any paper posting of such notice. However, as demonstrated more fully herein, the question of whether the Council posted physical notice of its April 6, 2017 meeting is not relevant to this determination.

² http://www.seafordde.com/pdfs/Exec_Session_4_6_172.pdf (last visited July 18, 2017).

On April 7, 2017, you sent an inquiry to Mayor David Genshaw (the “Mayor”) stating that you believed that several provisions of Delaware’s FOIA were not followed in connection with the Meeting and requesting that the Mayor explain the reason(s).³ The Mayor responded to your email the next day, stating that the meeting was called at his request and involved a personnel discussion.⁴

On April 30, 2017, you submitted a FOIA request to the City for the minutes of the April 6, 2017 meeting.⁵ The City’s FOIA Coordinator sent you a letter on May 3, 2017 denying your request on the basis that the minutes are not public records pursuant to 29 *Del. C.* § 10002(l)(10).⁶ Nonetheless, the City’s FOIA Coordinator identified the attendees, informed you that no voting occurred, and stated that the Meeting was “an emergency executive session called by Mayor David Genshaw to discuss a matter that was necessary for the immediate preservation of public peace, health or safety, or to the General Assembly as stated in Title 29, Chapter 100, §1004 (e)(1) of the Delaware State Code.”⁷

II. SUMMARY OF ARGUMENTS

In your Petition, you asked this Office “to determine if there is any legal basis for the actions taken/not taken by the City of Seaford for its 4/6/17 Executive Session.”⁸

In response to your Petition, the Council stated that the subject of the meeting was a personnel matter related a City employee, which the Mayor deemed to be “of an urgent nature that required an immediate meeting of the Council.”⁹ The Council noted that personnel matters are an authorized purpose for executive session and, further, that FOIA’s notice provisions did not apply, as the meeting was an “emergency meeting which [wa]s necessary for the immediate preservation of the public peace, health or safety”¹⁰

³ Petition.

⁴ *Id.*

⁵ *Id.*

⁶ See Letter from A. Cole to F. Cannon dated May 3, 2017.

⁷ *Id.*

⁸ Petition.

⁹ Response Letter at 1.

¹⁰ *Id.*

III. APPLICABLE LAW

Delaware's FOIA requires that "every meeting of all public bodies shall be open to the public,"¹¹ except those closed pursuant to delineated provisions of the statute.¹² A public body may call for an executive session pursuant to 29 *Del. C.* §§ 10004(c) and (e), but only for certain reasons. Among those reasons is the discussion of "[p]ersonnel matters in which the names, competency and abilities of individual employees . . . are discussed."¹³ Pursuant to 29 *Del. C.* § 10004(c):

A public body may hold an executive session closed to the public upon affirmative vote of a majority of members present at a meeting of the public body. The vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public, and the results of the vote shall be made public and shall be recorded in the minutes. The purpose of such executive sessions shall be set forth in the agenda and shall be limited to the purposes listed in subsection (b) of [Section 10004]. Executive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public.

Delaware's FOIA also contains notice requirements for meetings of public bodies, including executive sessions.¹⁴ Among those requirements are the requirement that the public body provide notice to the public and an agenda, with certain requirements regarding timing of such notice and the content of the agenda depending on whether the meeting is a regular meeting or a special or rescheduled meeting.¹⁵ Importantly, however, such requirements "shall not apply to any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety, or to the General Assembly."¹⁶

Finally, Delaware's FOIA requires public bodies to "maintain minutes of all meetings, including executive sessions . . . and shall make such minutes available for public inspection and

¹¹ 29 *Del. C.* § 10004(a).

¹² See 29 *Del. C.* §§ 10004(b)-(d) and (h).

¹³ 29 *Del. C.* § 10004(b)(9).

¹⁴ See 29 *Del. C.* §§ 10004(e)(2)-(5).

¹⁵ Compare 29 *Del. C.* § 10004(e)(2) (regular meeting), with 29 *Del. C.* § 10004(e)(3) (special or rescheduled meeting).

¹⁶ See 29 *Del. C.* § 10004(e)(1).

copying as a public record.”¹⁷ “Such minutes shall include a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon.”¹⁸

IV. DISCUSSION

Based upon our review of the Council’s *in camera* submission, we are satisfied that the April 6, 2017 Council meeting was an “emergency meeting which [wa]s necessary for the immediate preservation of the public peace, health or safety” pursuant to 29 *Del. C.* § 10004(e)(1). As such, the notice requirements contained in 29 *Del. C.* §§ 10004(e)(2)-(5) did not apply. Thus, while we recognize that the Council’s decision to post notice of the meeting to its website 2.5 hours beforehand, and its decision to include such notice in the “Special Meeting Agendas 2017” section of its website,¹⁹ might cause confusion, we cannot conclude that the Council violated FOIA by failing to comply with provisions of the statute that were not applicable under the circumstances. As such, it is our determination that the Council did *not* violate FOIA by failing to comply with the notice requirements contained in 29 *Del. C.* §§ 10004(e)(2)-(5) in connection with its April 6, 2017 meeting.

Similarly, we conclude that the Council’s discussion was proper for discussion in executive session, as the minutes make clear that the discussion concerned a “[p]ersonnel matter in which the names, competency and abilities of individual employees . . . [we]re discussed.”²⁰

Notwithstanding the foregoing, the record demonstrates that the Council appears to have treated the meeting as a stand-alone executive session,²¹ which FOIA does not permit.²² We recognize that no case decision or prior opinion of this Office provide any specific guidance in this situation. We also recognize that an emergent need for a public body to meet likely occurs under pressures that predominate over the requirement to analyze FOIA’s obligations. For these reasons, we do not find any indication of bad faith or that FOIA was intentionally violated by the Council. Given our obligation to review this matter and the luxury of a decision-making process free of such aforementioned pressures, we have determined that Council should have conducted a public vote on the question of whether to hold an executive session in this instance.²³ Similarly, the

¹⁷ 29 *Del. C.* § 10004(f).

¹⁸ *Id.*

¹⁹ See <http://www.seafordde.com/index.cfm?ref=37100> (last visited July 18, 2017).

²⁰ See 29 *Del. C.* § 10004(b)(9).

²¹ http://www.seafordde.com/pdfs/Exec_Session_4_6_172.pdf (last visited July 18, 2017).

²² See *Del. Op. Att’y Gen.* 02-IB33, 2002 WL 34158592, at *3 (Dec. 23, 2002) (“FOIA does not permit a ‘stand alone’ executive session.”).

²³ See 29 *Del. C.* . § 10004(c); *News-Journal Co. v. McLaughlin*, 377 A.2d 358, 360 (Del. Ch. 1977) (“[A]n executive session can only be called at a meeting otherwise open to the public.”).

Council should have maintained minutes of the public portion of the meeting and made such minutes available to the public.²⁴

At first blush, our determination might suggest wasted effort by a public body. We acknowledge that there are no notice obligations for an emergency meeting and therefore little likelihood that any member of the public would be present to witness public votes into executive session and to adjourn the public portion of an emergency meeting. But, there is an important objective in publically voting and maintaining minutes in these situations. These obligations might very well serve as the public's only mechanism to discover that such a meeting ever took place.²⁵ While such minutes will undoubtedly be short, they will, at the very least, inform the public of the fact of the emergency meeting, a record of those members present, the basis for the anticipated executive session, how the public body's members voted on the decision to convene the executive session, and the result of any subsequent vote. Therefore, to the extent the Council failed to conduct a public vote on whether to convene an executive session on April 6, 2017, to maintain minutes of the public portion of its meeting, and to record the results of the vote in said minutes, the Council technically violated FOIA. Accordingly, while we do not believe it appropriate to request that the Council reconvene for the sole purpose of voting to convene an executive session, we do believe it appropriate to request the Council to prepare minutes of the public portion of its April 6, 2017 emergency meeting to include a record of those individuals who attended, notice of its intent to convene an executive session, and a reference to 29 *Del. C.* § 10004(b)(9). We ask that the Council provide a copy of those minutes to this Office, copying you, within 10 business days of its next regularly-scheduled meeting.

We note that the agenda, the City's May 3, 2017 response to your FOIA request, and the minutes suggest that the Meeting was called by – and the decision to convene an executive session was made by – the Mayor.


²⁴ See 29 *Del. C.* § 10004(f).

²⁵ See *id.* (“[A]ny public records pertaining to executive sessions . . . may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but no longer.”); 29 *Del. C.* § 10002(l)(10) (exempting executive session minutes from FOIA's definition of “public record,” subject to 29 *Del. C.* § 10004(f)).

VI. CONCLUSION

It is our determination that the Council did not violate FOIA by failing to adhere to the notice requirements contained in 29 Del. C. §§ 10004(e)(2)-(5) in connection with its April 6, 2017 meeting, as we are satisfied that the meeting was an emergency meeting “necessary for the immediate preservation of the public peace, health or safety” and thus not subject to such notice requirements. The Council *did* violate FOIA, however, by failing to conduct a public vote on whether to convene an executive session, to maintain minutes of the public portion of its meeting, and to record the results of the vote in said minutes. We ask that the Council prepare minutes of the Meeting and to provide a copy to this Office within 10 business days of its regularly-scheduled meeting.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

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