



**MATTHEW P. DENN**  
ATTORNEY GENERAL

**DEPARTMENT OF JUSTICE**  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX: (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX: (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX: (302) 577-6499

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

**Attorney General Opinion No. 17-IB28**

**July 19, 2017**

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

Daniel J. Kramer  
8041 Scotts Store Rd  
Greenwood, DE 19950  
[djmjkramer@gmail.com](mailto:djmjkramer@gmail.com)

**RE: November 28, 2016 FOIA Petition Regarding Sussex County Council**

Dear Mr. Kramer:

We write in response to your correspondence, dated November 28, 2016, alleging that Sussex County Council violated the open meeting provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). Specifically, you allege that the agenda for County Council's October 4, 2016 regularly scheduled meeting failed to provide adequate notice to the public that County Council would vote on a succession plan for leadership at the Sussex County Planning and Zoning Office. We conclude that County Council violated FOIA's open meeting requirements as alleged and recommend that County Council reconsider the issue at a subsequent public meeting.

**BACKGROUND**

Sussex County government consists of County Council, a five-member legislative body, several advisory bodies and various administrative departments charged with providing sewer, public safety, business development, planning and zoning and other vital services.<sup>1</sup> The Planning and Zoning Commission of Sussex County is a seven-member appointive panel that acts as an advisory body to County Council on various land use and zoning matters.<sup>2</sup> The Planning & Zoning Office supports the Planning and Zoning Commission and County Council on land-use matters.<sup>3</sup> The Planning and Zoning Office manages all land use applications and schedules public hearings

<sup>1</sup> See 9 *Del. C.* §§ 6101(2), 7002.

<sup>2</sup> See 9 *Del. C.* §§ 6803(a), 6807(a).

<sup>3</sup> See <https://www.sussexcountyde.gov/planning-zoning-commission> (last accessed July 19, 2017).

on subdivision, zoning and other land-use requests.<sup>4</sup> The Planning and Zoning Office, like other county-level departments, is overseen by a County Administrator appointed by County Council.<sup>5</sup> Day-to-day operations are managed by a Director who also serves at the pleasure of County Council.<sup>6</sup>

On October 4, 2016, County Council conducted a public meeting. During the meeting, County Council convened in executive session to discuss the retirement of Lawrence Lank, the former Director of Planning and Zoning, and the appointment of Janelle Cornwell, then-Planning and Zoning Manager, as the new Director. According to the minutes of the October 4, 2016 meeting (the “Minutes”), upon return to regular session, the County Administrator referenced the impending retirement of Mr. Lank and further noted that, as a result of the discussion in executive session, he (the County Administrator), Mr. Lank and County Council “recommend filling that position with the current Planning and Zoning Manager, Janelle Cornwell.”<sup>7</sup> Immediately thereafter, a motion was made to promote Ms. Cornwell to “Director Appointee,” effective immediately, and then as Director, effective upon the retirement of Mr. Lank.<sup>8</sup> County Council members voted unanimously (5-0) in support of the motion, with little or no discussion preceding the vote.<sup>9</sup>

The agenda for the October 4, 2016 meeting (the “Agenda”)<sup>10</sup> did not expressly state that County Council intended to discuss and vote on succession planning for top management at the Planning and Zoning Office. Instead, the Agenda included a statement of County Council’s intent to convene in executive session to discuss a “personnel” issue and other sensitive matters, as permitted under 29 *Del. C.* § 10004(b). The Agenda also indicated that County Council might take action on one or more items discussed in executive session.<sup>11</sup>

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<sup>4</sup> *See id.*

<sup>5</sup> *See* Sussex County Code § 29-3B.(1)(a).

<sup>6</sup> *See id.* at § B.(1)(e).

<sup>7</sup> Minutes at pp. 9-10. The Minutes are available online and may be reviewed or downloaded at the following address: <https://www.sussexcountyde.gov/sites/default/files/minutes/100416.pdf> (last accessed July 19, 2017).

<sup>8</sup> Minutes at p. 10.

<sup>9</sup> *See id.*

<sup>10</sup> The Agenda is available online and may be reviewed or downloaded at the following address: <https://www.sussexcountyde.gov/sites/default/files/agendas/100416.pdf> (last accessed July 19, 2017).

<sup>11</sup> *See* Agenda at p. 2. While outside the scope of this matter, we note that we previously addressed complaints about County Council’s use of such recurring action items. *See Del. Op. Att’y Gen.* 13-IB02, 2013 WL 2477026, at \*2-3 (May 1, 2013) (criticizing County Council’s longstanding practice of using recurring “action” items, including “Possible Action on Executive Session Items,” notwithstanding that County Council had no intention of taking any such action when the agenda was posted).

## POSITIONS OF THE PARTIES

You allege that County Council violated FOIA because the Agenda failed to put the public on notice that County Council would discuss Mr. Lank's retirement and select his replacement.

County Council's response does not address, directly or indirectly, whether the Agenda adequately disclosed the possibility that County Council would discuss or take action on succession planning for the Director of the Planning and Zoning Office. County Council's response addresses solely whether County Council properly convened in executive session to discuss Ms. Cornwell's competency and ability to succeed Mr. Lank, as permitted under 29 *Del. C.* §§ 10004(b)(9), 10004(c). That question is not before us.

## RELEVANT FOIA REQUIREMENTS

FOIA generally requires public bodies to provide the public with advance notice of public meetings.<sup>12</sup> FOIA further requires that each notice contain an "agenda."<sup>13</sup> By definition, each agenda must include "a general statement of the major issues to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor."<sup>14</sup>

## DISCUSSION

We agree that the Agenda failed to comply with FOIA's open meeting requirements. The Agenda did not include a "general statement" of all "major issues" that County Council expected to discuss at the October 4, 2016 meeting, as required by 29 *Del. C.* § 10002(a). The Agenda included no reference to an anticipated vacancy in the top position at the Planning and Zoning Office. Nor did it disclose any plan to fill that vacancy at the October 4, 2016 meeting.<sup>15</sup> County Council's disclosure of the possibility that it might take action on unspecified matters discussed in executive session was not sufficient to put the public on notice of *expected* discussions and action on an important topic in open session. Accordingly, the agenda did not satisfy the requirements of 29 *Del. C.* § 10002(a).<sup>16</sup>

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<sup>12</sup> See 29 *Del. C.* § 10004(e)(2).

<sup>13</sup> See *id.*

<sup>14</sup> 29 *Del. C.* § 10002(a).

<sup>15</sup> The record shows and we find that County Council, at the time it posted the Agenda, intended to discuss and vote on Ms. Cornwell's accession at the October 4, 2016 meeting.

<sup>16</sup> This determination is limited to the facts of this case, and is based in large part on the significance of the vacancy in question. We are aware that some public bodies routinely approve or ratify large numbers of personnel actions or licensing or other applications at regular meetings. This determination is not meant to imply that each individual matter must be separately noticed on a public agenda in order to comply with FOIA.

**REMEDATION**

In light of the passage of time since the filing of the petition, as well as other factors, we do not believe that invalidation is an appropriate remedy in this case. We nonetheless suggest that County Council, in the spirit of transparency, revisit its October 4, 2016 vote regarding the Planning and Zoning Office and explain, in a public forum, its reasons for selecting Ms. Cornwell as Mr. Lank's successor.

**CONCLUSION**

For the reasons discussed above, we conclude that County Council violated FOIA's open meeting requirements in connection with its October 4, 2016 meeting. County Council is encouraged to take remedial action as suggested herein.

Very truly yours,



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Jason W. Staib  
Deputy Attorney General

APPROVED BY:



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Aaron R. Goldstein, State Solicitor

cc: J. Everett Moore, Esq. (via email)  
Michelle E. Whalen, Deputy Attorney General (via email)