



**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-IB38**

**August 11, 2017**

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

The Hon. Samuel L. Guy  
Wilmington City Council  
800 N. French Street  
Wilmington, Delaware 19801  
Sguy41@comcast.net

**RE: April 21, 2017 FOIA Petition Regarding the City of Wilmington City Council**

Dear Councilman Guy:

We write in response to your correspondence, received on April 21, 2017, alleging that the City of Wilmington City 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 on May 9, 2017 ("Response Letter"). We have reviewed the Petition and the Response Letter. For the reasons set forth below, it is our determination that the Council's longstanding practice of failing to post an agenda for its meetings at least seven days in advance thereof, which it followed with respect to its April 6, 2017 meeting, does not comply with FOIA. As the conduct giving rise to this FOIA violation appears to be an ongoing pattern or practice of the Council,<sup>1</sup> we recommend that the Council revise its process moving forward. We do not recommend any remedial action with respect to the specific items voted on at the April 6, 2017 meeting, however, because we do not believe that the Chancery Court would necessarily invalidate those votes if asked to do so.

---

<sup>1</sup> See Response Letter at Seijo Aff. ¶ 10.

## FACTS

The Council's longstanding practice is to publish notice of the Council's regularly scheduled meetings at the beginning of each calendar year.<sup>2</sup> However, the agenda for each individual meeting is not available at the time of this annual notice.<sup>3</sup> As such, the Council circulates an internal, non-public tentative agenda on the Friday before each regularly scheduled Council meeting. That internal circulation occurs following a workshop meeting with the City Clerk and a representative of the City Law Department held that same day.<sup>4</sup> Then, "[a]round noon on the day before each regularly scheduled City Council meeting, the City Council President approves a final agenda, which incorporates any additions, amendments, and deletions that have been made to the internal draft agenda."<sup>5</sup> The Council then distributes the agenda internally and externally, and posts a copy of the agenda on the first floor of the City/County building.<sup>6</sup>

The Council followed this same general procedure in connection with its April 6, 2017 meeting. On March 31, 2017, at 4:31 PM, the Council Clerk distributed an internal email including a draft agenda (the "Draft Agenda") and legislation for the meeting.<sup>7</sup> Approximately mid-day on April 5, 2017, the City Clerk distributed the finalized agenda for the April 6, 2017 Council meeting (the "Initial Agenda") and posted a copy in the main lobby on the first floor of the City/County Building.<sup>8</sup> Neither the Draft Agenda nor the Initial Agenda contained any mention of a proposed resolution to censure you for conduct unbecoming of the office of a member of the Council. On April 6, 2017, at approximately 10:30 AM, the City Clerk distributed a revised agenda for the meeting (the "Revised Agenda") via email.<sup>9</sup> At approximately the same time, the City's Legislative and Policy Director posted a copy of the Revised Agenda in the main lobby on the first floor of the City/County Building.<sup>10</sup> The Revised Agenda included the aforementioned resolution.<sup>11</sup> The agenda included the following language:

---

<sup>2</sup> *Id.* at 5-6.

<sup>3</sup> *Id.* at 6.

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

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at Seijo Aff. ¶ 5.

<sup>8</sup> *Id.* at Seijo Aff. ¶ 6.

<sup>9</sup> *Id.* at Seijo Aff. ¶ 9.

<sup>10</sup> *Id.* at Karas Aff. ¶ 13.

<sup>11</sup> *Id.* at Seijo Aff. ¶ 8.

“This proposed legislation was added to the agenda on Thursday, April 6, at approximately 10:30 a.m., as the draft was not finalized until this time.” The Council met on April 6, 2017. During the meeting, the Council passed the following three pieces of legislation: (1) Ordinance No. 17-005 –relating to the audit review committee (agenda item #4330), (2) Ordinance No. 17-013 – relating to the salary rate for the Chief of Police (agenda item #4343), and (3) Resolution No. 17-026 – relating to a public censure of you in your capacity as City Councilman (agenda item #4350).<sup>12</sup>

### **POSITIONS OF THE PARTIES**<sup>13</sup>

First, you allege that the Council violated FOIA by failing to publish an agenda for its April 6, 2017 meeting at least seven days in advance thereof.<sup>14</sup> You maintain that the Council’s internal distribution of the Draft Agenda did not satisfy FOIA’s notice requirements and note that the Council did not post the Initial Agenda until, at the very earliest, one day before the meeting.<sup>15</sup> You allege generally that the Council has a practice of preparing internal draft agendas, publishing an incomplete agenda, and continually amending the agenda to add items by citing 29 *Del. C.* § 10004(e)(5) or the exception for issues arising at the time of the meeting in what appears to be a deliberate attempt to circumvent FOIA.<sup>16</sup> You maintain that the Council, in coordination with the City Law Department, has a practice of not signing off on legislation “as to form” in order to prevent those items from being included in the agenda even though the Council knows that the items will be discussed.<sup>17</sup>

You next allege that the Council violated FOIA by amending the Initial Agenda to include item #4350. You maintain that this item should have been included in the Initial Agenda, as “[t]he pendency of the Resolution as an item of business had to exist prior to the [sic] March 30, 2017, the date FOIA notice was required for the April 6, 2017 meeting.”<sup>18</sup> You argue that, under the circumstances, the Council violated FOIA by failing to provide seven days’ notice of this agenda item or otherwise postponing this agenda item to allow for seven days’ notice to

---

<sup>12</sup> *Id.* at 1-2.

<sup>13</sup> Many of your allegations are outside the scope of FOIA and, as a result, are not addressed herein. For example, you allege procedural deficiencies in the manner in which items are selected for inclusion in the Council’s agendas.

<sup>14</sup> Petition at 9.

<sup>15</sup> *See id.* at 6, 9. You also question whether the Council ever physically posted the Initial Agenda. *See id.* at 6.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> *Id.* at 4.

be provided. You also allege that because the resolution contains eight sponsors, all of whom ultimately voted in favor of the resolution, the Council must have engaged in a meeting on the matter prior to April 6, 2017.

The Council defends the practice of publishing agendas the day before the meeting as consistent with FOIA. As noted above, the Council states that notice of the Council's regularly scheduled meetings is posted at the beginning of each calendar year, at which point the agenda for each individual meeting is not yet available.<sup>19</sup> The Council notes that an internal draft agenda is circulated the Friday before the meeting and states:

At the time that the internal draft agendas for regularly scheduled City Council meetings are circulated, the full agendas are not yet determined because, at that point, it simply has not been determined what items will go forward at the Council meeting for a variety of reasons, such as the decision of the sponsor to hold proposed legislation, public sentiment regarding proposed legislation, or the failure of legislation to be moved/voted out of committee.<sup>20</sup>

The Council notes that it publishes its agenda on the day before the meeting after the Council President approves the final agenda.<sup>21</sup> The Council maintains that this does not run afoul of FOIA. Specifically, the Council appears to allege that the annual notice satisfies the seven day notice requirement contained in 29 *Del. C.* § 10004(e)(2) and that, because the agenda is not then available, 29 *Del. C.* § 10004(e)(5) only requires that the Council add the agenda to said notice at least six hours in advance of the meeting.

The Council states that this same general practice was followed in connection with the April 6, 2017 meeting.<sup>22</sup> Specifically, the City Clerk internally circulated the Draft Agenda to the Council on March 31, 2017.<sup>23</sup> Then, on April 5, 2017, the Council President finalized the agenda, which included agenda items #4330 (an ordinance relating to the audit review committee) and #4343 (an ordinance relating to the salary rate for the Chief of Police), but not the censure resolution.<sup>24</sup> At approximately 1:23 p.m., the City Clerk posted a copy of the Initial

---

<sup>19</sup> Response Letter at 5-6.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.*

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

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 6-7.

Agenda in the main lobby on the first floor of the City/County Building.<sup>25</sup> The Council maintains that the public had ample notice of both ordinances from events preceding the April 6, 2017 meeting.<sup>26</sup>

With respect to the censure resolution, the Council acknowledges that, by March 31, 2017, the Legislative and Policy Director had provided the Council President with a full draft of the resolution per her request.<sup>27</sup> However, the Council states that the resolution was not included in the Draft Agenda for the following reasons:

- 1) the City Council President had just received the full draft of the Resolution from the Legislative and Policy Director that same day;
- 2) she had not yet determined whether to include it on the agenda for the Council Meeting; and
- 3) she had not yet determined whether the proposed Resolution would adequately address the requests of her fellow City Council Members that something be done to attempt to curb [your] disturbing behavior.<sup>28</sup>

The Council states that it was not included in the Initial Agenda, which was posted on April 5, 2017, because:

- 1) it was still a draft that was being revised;
- 2) the Council President was not certain if there would be sufficient votes to pass the Resolution; and
- 3) the Council President still had not determined whether the proposed Resolution would adequately address the requests of her fellow City Council Members that something be done to attempt to curb [your] disturbing behavior.<sup>29</sup>

According to the Council, matters continued to escalate and “[a]n unforeseen event occurred on April 5, 2017 which created an urgent need to finalize the draft Resolution and move forward with it at the Council Meeting.”<sup>30</sup> Specifically, the Council stated that you posted an entry on Facebook alleging potentially criminal conduct on the part of a City Council staff member and a fellow Council member.<sup>31</sup> The Council states that, at approximately 10:30 a.m. on April 6, the

---

<sup>25</sup> *Id.* at Seijo Aff. ¶ 6.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.* at 8.

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

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

agenda was amended to add the censure resolution and an explanation that it was not originally included because “the draft was not finalized until this time.”<sup>32</sup> The Council states that the Revised Agenda was also posted in the main lobby on the first floor of the City/County Building.<sup>33</sup>

Finally, the Council denies that it held a meeting, in person or otherwise, to discuss the resolution prior to the April 6, 2017 meeting. Specifically, the Council argues that sponsorship by a majority of a public body’s members does not amount to a meeting under FOIA *per se*.<sup>34</sup> However, the Council acknowledges that the Council President “individually contacted eight Council Members (seven via telephone and one in person).”<sup>35</sup> The Council states that the purpose of those conversations was “to simply inform each of them about the draft Resolution and inquire whether they likely intended to support it.”<sup>36</sup> According to the Council, “the Council President informally polled each of the eight Council Members regarding how he/she likely intended to vote on the Resolution.”<sup>37</sup> The Council maintains that those conversations did not amount to a “meeting” as defined by FOIA, as they did not involve the active exchange of thoughts and opinions about the resolution and the Council President did not ask members to vote in a particular way or reach a consensus on what action to take.<sup>38</sup>

#### RELEVANT STATUTES

Delaware’s FOIA requires that “every meeting of all public bodies shall be open to the public,”<sup>39</sup> except those closed pursuant to delineated provisions of the statute.<sup>40</sup> 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.”<sup>41</sup>

---

<sup>32</sup> *Id.* at 9.

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

<sup>34</sup> *Id.* at 3.

<sup>35</sup> *Id.* at 4.

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

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

<sup>38</sup> *Id.*

<sup>39</sup> 29 *Del. C.* § 10004(a).

<sup>40</sup> *See* 29 *Del. C.* §§ 10004(b)-(d), (h).

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

FOIA requires public bodies to “give public notice of their regular meetings . . . at least 7 days in advance thereof.”<sup>42</sup> Such notice “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.”<sup>43</sup> The notice “shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings . . . .”<sup>44</sup> “When 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 on the agenda.”<sup>45</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>46</sup> Public bodies must maintain minutes of their meetings and make them available to the public for inspection and copying.<sup>47</sup>

### DISCUSSION

Here, we need not consider each of the allegations that you have advanced, as we are satisfied that the Council violated FOIA in at least one respect in connection with its April 6, 2017 meeting. Specifically, the Council violated FOIA by posting its April 6, 2017 meeting agenda on April 5, 2017, just one day prior to the meeting.

We believe that Council’s interpretation of FOIA’s notice requirements is incorrect as a matter of law. Indeed, the Council posits that its annual notice of the dates, times, and locations of its bi-weekly meetings for the upcoming year satisfies 29 *Del. C.* § 10004(e)(2).<sup>48</sup> The Council notes that Section 10004(e)(2) only requires that an agenda be included with such notice “if such has been determined at the time” and argues that, because no agenda is available at the time of the annual notice, Section 10004(e)(5) only requires the Council to post the respective meeting agendas “at least 6 hours in advance” thereof. This interpretation is not consistent with prior judicial interpretations of FOIA or prior opinions from the Department of Justice on this subject.

---

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

<sup>43</sup> 29 *Del. C.* § 10004(e)(4).

<sup>44</sup> 29 *Del. C.* § 10004(e)(2).

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

<sup>46</sup> 29 *Del. C.* § 10002(a).

<sup>47</sup> 29 *Del. C.* § 10004(f).

<sup>48</sup> *See* Response Letter at 6.

As the Court of Chancery has noted, “[t]he 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.”<sup>49</sup> Routinely delaying notice of the specific matters the public body intends to discuss until 24 hours – and at times as little as 6 hours – in advance thereof serves to frustrate that purpose. As we have previously warned, the exception contained in Section 10004(e)(2) that the agenda shall be subject to change must be read narrowly “lest the exception swallow the rule.”<sup>50</sup> For the same reason, so too must the exception permitting an agenda to be posted less than seven days in advance of the meeting. Indeed, implicit in the language “the reasons for the delay in posting shall be briefly set forth on the agenda” is an expectation that such delay is the exception rather than the norm. Thus, we do not interpret FOIA to permit a public body to avoid posting an agenda at least seven days in advance of a meeting by noticing the meeting itself so far in advance that the agenda for each specific meeting cannot ever be available. As the Council has acknowledged that it followed this routine practice in connection with its April 6, 2017 meeting, it is our determination that the Council violated FOIA.<sup>51</sup>

Un-finalized legislative drafts or the possibility that legislative items may not ultimately be discussed at a meeting do not justify a delay in posting an agenda under this office’s prior interpretations of FOIA. “We recognize that the business of government does not stop seven days before a public meeting, but FOIA provides flexibility for a public body to amend the agenda up to six hours prior to a meeting to add items that come up suddenly and cannot be deferred to a later meeting.”<sup>52</sup> Similarly, the statute expressly permits the deletion of items from an agenda.<sup>53</sup>

Having determined that the Council violated FOIA by failing to publish an agenda at least seven days in advance of its April 6, 2017 meeting, we need not determine whether Council violated FOIA by adding the censure resolution to the agenda on the morning of the meeting. Nor do we need to determine whether the President’s communications with individual Council members regarding the Resolution amounted to a FOIA violation.

---

<sup>49</sup> *Ianni v. Dep’t of Election of New Castle County*, 1986 WL 9610, at \*4 (Del. Ch. Aug. 29, 1986).

<sup>50</sup> *Del. Op. Att’y Gen.* 03-IB17, 2003 WL 22669563, at \*1 (July 31, 2003).

<sup>51</sup> In the alternative, the Council violated FOIA by failing to set forth the reasons for the delay in its agenda pursuant to 29 *Del. C.* § 10005(e)(5).

<sup>52</sup> *Del. Op. Att’y Gen.* 03-IB22 (Oct. 6, 2003).

<sup>53</sup> 29 *Del. C.* § 10005(e)(2) (“[T]he 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.”) (emphasis added).



## REMEDATION

Having determined that the Council violated FOIA, we next consider whether and to what extent remediation is warranted. You allege that, because the Council allows for public comment, the Council's failure to provide sufficient notice of specific agenda items deprived citizens of the opportunity to voice their opinions on the matters.<sup>54</sup> You also allege that citizens were denied the opportunity to monitor and observe the conduct of the Council.<sup>55</sup> To remediate these violations, you suggest that the Council should reconvene and reconsider the two ordinances.<sup>56</sup> You also suggest that the resolution to censure you should be declared null and void.<sup>57</sup> The Council argues that, even if a FOIA violation occurred, any such violation did not affect substantial public rights and, as such, no remediation is warranted.<sup>58</sup>

While we note that any action taken at a meeting in violation of FOIA may be subject to invalidation by the Court of Chancery,<sup>59</sup> we cannot say with certainty whether a Court would invalidate any or all of the above action items. For example, we note that the Police Chief has already been hired, and reopening the issue of his salary could have significant legal and public safety implications. In addition, because censure is a method for a legislative body to regulate the conduct of its members, it is not clear to us whether or to what extent a court would exercise judicial review over the censure resolution.<sup>60</sup> As such, we decline to request specific remedial action under the circumstances.

Moving forward, we recommend that the Council publish an agenda at least seven days in advance of each regularly scheduled Council meeting. Additionally, while we note that 29 *Del. C.* § 10007(d) dictates that these materials "shall not be construed as legal advice," the City may wish to consult the existing Attorney General FOIA Opinions, the current Policy Manual for FOIA Coordinators, and the slides and video from the most recent Statewide FOIA Coordinator

---

<sup>54</sup> Petition at 10-11.

<sup>55</sup> *Id.* We note that you have also alleged constitutional violations on the part of the Council which are outside the scope of FOIA. As such, we do not address them here.

<sup>56</sup> *Id.* at 11.

<sup>57</sup> *Id.*

<sup>58</sup> Response Letter at 12.

<sup>59</sup> *See* 29 *Del. C.* § 10005(a) ("Any action taken at a meeting in violation of this chapter may be voidable by the Court of Chancery.").


<sup>60</sup> Council's authority to censure is perhaps beyond judicial review. *See Rangel v. Boehner*, 20 F. Supp. 3d 148, 167-75 (D.D.C. 2013) (determining that a challenge to the censure of former Congressman was a political question incapable of judicial review), *aff'd* 785 F.3d 19 (D.C. Cir. 2015), *cert. denied*, 136 S.Ct. 218 (D.C. Cir. 2015).

Training. As of the date of this determination, those materials can be found here: <http://attorneygeneral.delaware.gov/executive/open-government/>.

**CONCLUSION**

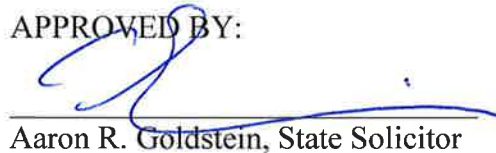
Based upon the foregoing, it is our determination that the City violated FOIA by posting notice of its April 6, 2017 meeting on April 5, 2017, just one day prior to the meeting.

Very truly yours,



Michelle E. Whalen  
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (via email)  
Luke Mette, City Solicitor (via email)  
Betsy Power, Esq. (via email)