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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB49

September 29, 2017

VIA U.S. MAIL & EMAIL

Richard H. Cross, Jr.
Cross & Simon, LLC
1105 North Market Street, Suite 901
Wilmington, DE 19801
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RE: September 11, 2017 FOIA Correspondence Regarding the Town of Dewey Beach

Dear Mr. Cross:

We write regarding your correspondence, received on September 11, 2017, alleging that the Town of Dewey Beach (the "Town") violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA").¹ We treat your correspondence as a petition for determination, pursuant to 29 *Del. C.* § 10005(e), of whether a FOIA violation has occurred ("Petition").² In your Petition, you allege that the Town violated FOIA by failing to post notice of meetings that the Town intended to hold on September 13, 14, and 15 at least seven days in advance thereof.³ You

¹ As we stated in our September 12, 2017 letter to the parties, we do not address the allegation contained in your September 12, 2017 correspondence, as that allegation is currently pending before the Court of Chancery.

² While we note that you raised additional allegations in your September 20, 2017 correspondence, this determination is limited to the allegations contained in your September 11, 2017 correspondence.

³ In his September 15, 2017 response to the petition ("Response Letter"), Mr. Townsend states that your complaint included an allegation regarding the Town's September 18, 2017 meeting. However, as we see nothing in your September 11, 2017 correspondence regarding the September 18, 2017 meeting, we do not address it here. Similarly, we do not address the allegations raised for the first time in your September 20, 2017 correspondence. Of course, you are free to include those allegations in a new petition.

also allege that the noticed purposes for the executive sessions of those meetings was inadequate. As the Town cancelled the September 14 and 15 meetings, it is our determination your allegations concerning those meetings are now moot. With respect to your allegations concerning the September 13, 2017 meeting, it is our determination that the Town did *not* violate FOIA by noticing an intent to convene an executive session to discuss “documents excluded from the definition of public record where such discussion may disclose the content of such document.” However, the Town has failed to sustain its burden to demonstrate timely notice. We do not believe remediation to be warranted under the circumstances.

RELEVANT FACTS

At 2:30 PM on September 7, 2017, the Town posted notice of a meeting to be held at 5:00 PM on September 13, 2017. The notice included the following statement: “Documents relevant to discussion were not received in excess of the notice requirement.” The notice also included the agenda. The main item on the agenda was: “Executive session to discuss the content of documents excluded from the definition of public record where such discussion may disclose the content of such document pursuant to 29 Del.C. § 10004(6) [sic].”

DISCUSSION

The Town Did Not Violate FOIA by Noticing an Intent to Convene an Executive Session Pursuant to 29 Del. C. § 10004(b)(6).

As an initial matter, we conclude that the Town did not violate FOIA by noticing an intent to convene an executive session to discuss “the content of documents excluded from the definition of public record where such discussion may disclose the content of such document pursuant to 29 Del.C. § 10004(6) [sic].” This is a permissible purpose for executive session. As FOIA does not require the Town to provide additional detail,⁴ it is our determination that the Town did not violate FOIA by noticing an intent to convene an executive session pursuant to 29 Del.C. § 10004(b)(6).⁵

⁴ See *O’Neill v. Town of Middletown*, 2007 WL 2752981, at *7 (Del. Ch. Mar. 29, 2007) (“Although more precise reasons could have been offered by the Council and the Planning Commission, the reasons they did articulate on the agendas satisfy the FIOA. The statute requires public bodies to provide the reason for entering into an executive session, but that does not require public bodies to elaborate in great detail on the agendas what legal, personnel, or other subjects are to be discussed. Therefore, the Court concludes that there is no triable issue of fact regarding the sufficiency of the stated reasons for the executive sessions.”) (internal citations omitted); *Common Cause of Del. v. Red Clay Consolidated Sch. Dist. Board of Educ.*, 1995 WL 733401, at *2 (Del. Ch. Dec. 5, 1995) (“Although the Board’s most frequently stated purpose for calling executive sessions during the period in question was the need for strategy sessions concerning the desegregation case, notices also stated other proper statutory purposes, such as legal advice with respect to collective bargaining or contract negotiations, disciplinary cases, and personnel matters. 29 Del. C. § 10004(b). There is no question that the notices stated proper purposes for executive sessions.”).

⁵ Notwithstanding the typographical error, the agenda clearly demonstrates that the Town was referring to 29 Del. C. § 10004(b)(6).

The Town Has Failed to Sustain its Burden to Demonstrate Compliance with
FOIA's Notice Provisions with Respect to its September 13, 2017 Meeting

FOIA requires public bodies to “give public notice of their regular meetings . . . at least 7 days in advance thereof.”⁶ For any special or rescheduled meeting, the public body shall give public notice “as soon as reasonably possible, but in any event no later than 24 hours before such meeting.”⁷ However, “[t]he public notice of a special or rescheduled meeting shall include an explanation as to why [seven days’ notice] could not be given.”⁸ Importantly, a “special or rescheduled meeting” is defined as “one to be held less than 7 days after the scheduling decision is made.”⁹

In its Response Letter, the Town acknowledges that it posted notice of its September 13 meeting less than seven days in advance thereof.¹⁰ The Town nonetheless notes that it posted said notice six days, two and one-half hours prior to the meeting, and that the notice contained an explanation for the delay.¹¹ The Town argues that “the explanation for why only six plus days’ notice was given, although concise, was adequate.”¹² You challenge the veracity of the Town’s explanation.

Under the circumstances, we conclude that the Town’s conduct amounted to, at most, a technical violation of the notice provisions of the FOIA statute. To the extent the scheduling decision was made at least seven days in advance of the meeting, the Town violated FOIA by failing to provide seven days’ notice thereof.¹³ If, in fact, the scheduling decision was made less than seven days in advance, we note that the Town was required to, and did, provide an explanation as to why seven days’ notice could not be given.¹⁴ Here, the record is not clear regarding when the scheduling decision was made. As the Town bears the burden of proof pursuant to 29 *Del. C.*

⁶ 29 *Del. C.* § 10004(e)(2).

⁷ 29 *Del. C.* § 10004(e)(3).

⁸ *Id.*

⁹ *Id.*

¹⁰ Response Letter at 2.

¹¹ *Id.*

¹² *Id.* at 3.

¹³ *See* 29 *Del. C.* § 10004(e)(2).

¹⁴ *See* 29 *Del. C.* § 10004(e)(3) (“The public notice of any special or rescheduled meeting shall include an explanation as to why the notice required by paragraph (e)(2) of this section could not be given.”).

§ 10005(c), we are constrained to conclude that the Town violated FOIA by failing to provide seven days' notice of its September 13, 2017 meeting.

Importantly, we do not believe remediation to be warranted. Indeed, “[n]ot every failure to comply with precision to the terms of [FOIA] will involve substantial public rights and thus not every technical violation will support either a declaratory judgment or, more importantly, injunctive relief.”¹⁵ As Vice Chancellor Glasscock recently warned:

[T]he purpose of FOIA is to ensure that public business is done in the open, so that citizens can hold public officials accountable. The purpose of FOIA is *not* to provide a series of hyper-technical requirements that serve as snares for public officials, and frustrates their ability to do the public's business, without adding meaningfully to citizens' rights to monitor that business.¹⁶

Here, the only item on the agenda was an intent to convene an executive session. As we have already determined, the Town identified a permissible basis for the executive session in its meeting agenda. In addition, there was no identifiable action taken during the September 13, 2017 meeting (aside from the procedural vote to convene the executive session).¹⁷ Under the circumstances, we cannot conclude that FOIA's purposes were frustrated by a delay of less than one day in posting notice and an agenda for a meeting called for the sole purpose of convening an executive session for a permissible purpose, and during which no substantive votes were taken.

¹⁵ *Ianni v. Dep't of Elections of New Castle County*, 1986 WL 9610, at *6 (Del. Ch. Aug. 29, 1986).

¹⁶ *Lechliter v. Del. Dep't of Nat. Res. & Environ. Contr.*, 2017 WL 117596, at *2 (Del. Ch. Jan. 12, 2017).

¹⁷ *See O'Neill*, 2007 WL 275981, at *10 (declining to order remediation following improper executive sessions because “there was no identifiable ‘action’ taken during these executive sessions” and “[t]he record d[id] not support any reasonable inference that the executive sessions somehow made the outcome a foregone conclusion (or even more likely).”). We do not mean to suggest that there can be never be a remedy where a public body privately meets and no formal action was taken. *See Levy v. Bd. of Educ. of Cape Henlopen Sch. Dist.*, 1990 WL 154147, at *6 (Del. Ch. Oct. 1, 1990).

CONCLUSION

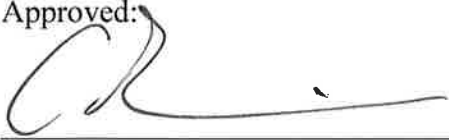
Based upon the foregoing, we conclude that the Town's conduct amounted to, at most, a technical violation of the statute with regard to timely notice of its September 13, 2017 meeting. However, for the reasons set forth above, we do not believe remediation to be warranted.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein
State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (vie email)
Frederick A. Townsend, III (via email)