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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB62

December 15, 2017

VIA U.S. MAIL AND EMAIL

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

RE: November 29, 2017 Correspondence Regarding the City of Seaford

Dear Mr. Cannon:

We write in response to your correspondence, dated November 29, 2017, alleging that the City of Seaford's City Council (the "Council") violated the open meeting provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). Specifically, you allege that the Council failed to provide sufficient notice in its November 28, 2017 meeting agenda of its intent to discuss a proposed ordinance. For the reasons set forth below, it is our determination that the Council did not violate FOIA as alleged.

RELEVANT BACKGROUND

On or before November 21, 2017, you reviewed the electronic posting of the Council's November 28, 2017 meeting agenda. The agenda contained the following item under the heading "New Business": "Reading of an ordinance relating to the promotion of Economic Development and Commerce by regulations of certain involuntary payments required of employees." On or about November 27, 2017, the Council updated its agenda to include copies of materials to be presented to the Mayor and Council during the November 28 meeting (the "Addendum"). Among the items included in the Addendum was the text of the proposed ordinance. The ordinance was introduced for a first reading during the November 28 meeting.

POSITIONS OF THE PARTIES

In your Petition, you allege that the Council's use of the following agenda item for its November 28, 2017 meeting violated FOIA: "Reading of an ordinance relating to the promotion

of Economic Development and Commerce by regulations of certain involuntary payments required of employees.” You argue that you “could not determine the true nature of the actual business being considered/conducted” and state that you “do not believe that any member of the general public could have known the true nature of the business being considered/conducted using only the agenda statement of that business.” You state that it was only after reading the November 27, 2017 Addendum that you were able to determine that the ordinance related to codifying a large number of “Right to Work” provisions. As such, you argue that the original meeting agenda failed to comport with the letter and spirit of FOIA. You request that this Office declare the First reading of the ordinance invalid.

In its Response Letter, the Council maintains that that the language at issue fully complied with FOIA. In fact, the Council argues that “[t]he language of the notice [wa]s not only a ‘general statement’ of the issue, but a specific statement identifying the ordinance to be considered” The Council also notes that its policy is to post copies of all materials that will be presented to the Mayor and Council to its website before 12:00 p.m. on the day prior to the Mayor and Council meeting. The Council states that FOIA does not require the Council to provide this information, but that it does so “to provide as much information to the public about City business as practical.” The Council maintains that it “fully complied with not only the letter but also the spirit of the FOIA.”

In your Reply, you argue that “both the title of the proposed ordinance and the agenda item based on it are general statements of gobbledegook—wordy and generally unintelligible jargon.” You continue:

Ordinary citizens, including this citizen, had little/no chance to understand any relationship between regulating mystery employee payments and local economic development in this gobbledegook. The jargon in the title/agenda item appears to be code words/characteristic idiom from a specific movement generally referred to as ‘right to work’ advocates. And in fact the term ‘right to work’ appears repeatedly in the full draft ordinance. Significantly, if ‘right to work’ jargon had been included in the agenda item perhaps some confusion over the gobbledegook could have been ameliorated.

You maintain that “[t]he existing presentation of a general, or indeed even a specific, statement of gobbledegook cannot satisfy FOIA requirements for proper public notice of a major agenda issue.” You note that “‘Right to Work’ laws are contentious public issues around the country and even in Sussex County” and state that, in your opinion, the Council “could have gone out of its way to ensure the public received proper, understandable notice of its intent to present and ultimately adopt such ordinances.”

RELEVANT STATUTES

FOIA requires public bodies to “give public notice of their regular meetings . . . at least 7 days in advance thereof.”¹ The notice “shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings”² “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.”³

DISCUSSION

As noted above, FOIA requires that the agenda include “general statement of the major issues expected to be discussed.”⁴ To this end, the Court of Chancery has suggested that an agenda should be worded in “plain and comprehensible language.”⁵ Accordingly, we assess the notice provided in an agenda by this objective standard.

Here, we do not believe that the agenda item was objectively incomprehensible or overly complicated. As such, we are satisfied that the Council’s use of the 22-word title of the proposed legislation satisfied FOIA’s minimum notice requirements.

To be clear, we note that your concern is not without merit. For example, we recognize that an ordinary citizen might not readily conclude that language in an agenda item referring to “promotion of Economic Development and Commerce by regulations of certain involuntary payments required of employees” relates to the City of Seaford’s intent to attempt to enact legislation declaring the City a “right-to-work” city. We also recognize that the Council could have described this ordinance by using the words “right to work” or through other more descriptive language. However, the availability of other, perhaps better, methods of describing an agenda item does not equate to a violation of FOIA *per se*.⁶ Indeed, we do not interpret “plain and comprehensible language” as used by the Court of Chancery to necessarily require the use of “colloquial” or “informal” terminology such as the phrase “right to work.” As such, while we do

¹ 29 Del. C. § 10004(e)(2).

² *Id.*

³ 29 Del. C. § 10002(a).

⁴ *Id.*

⁵ See *Chem. Indus. Council of Del. v. State Coastal Zone Indus. Bd.*, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994) (“An agenda should be worded in plain and comprehensible language and must directly state the purpose of the meeting.”).

⁶ See, e.g., *Del. Op. Att’y Gen.* 17-IB31, 2017 WL 3426271, at *2 (July 24, 2017) (“Although the Board of Trustees could undoubtedly have identified the matter with specificity in its agenda, we cannot conclude that its failure to do so amounted to a FOIA violation.”).

not believe that the Council's failure to use more specific terminology such as the phrase "right to work" violated FOIA in this instance, we nevertheless encourage the Council, in the interest of transparency, to provide more robust notice of this and similar agenda items in the future.

CONCLUSION


For the reasons discussed above, it is our determination that the Council did not violate FOIA as alleged.⁷

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, State Solicitor

cc: Jim Fuqua, Esq. (via email)

⁷ This opinion does not address whether the Council has the legal authority to enact such an ordinance, which is a legal question unrelated to FOIA.