



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. 18-IB38

August 16, 2018

VIA U.S. MAIL & EMAIL

Daniel J. Kramer
8041 Scotts Store Rd
Greenwood, DE 19950
djmjkramer@gmail.com

RE: July 27, 2018 FOIA Petition Regarding Sussex County Council

Dear Mr. Kramer:

We write in response to your correspondence, dated July 27, 2018, alleging that Sussex County Council (the "Council") violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA") during its April 24, 2018 meeting. We treat your correspondence as a petition for determination pursuant to 29 *Del. C.* §10005(e) regarding whether the Council violated FOIA ("Petition"). We invited the Council to submit a written response to the Petition. We received the Council's response ("Response Letter") on August 1, 2018. For the reasons set forth below, we conclude that the Council did not violate FOIA as alleged.

BACKGROUND

On April 24, 2018, the Council held an open public meeting. At 10:42 A.M., the Council properly went into Executive Session to discuss matters relating to a land acquisition. Council members Michael H. Vincent, George B. Cole, Robert B. Arlett, Irwin G. Burton, III, Samuel R. Wilson, Jr. along with County Administrator Todd F. Lawson and County Attorney J. Everett Moore, Jr. were present during the executive session. The Council discussed the "potential purchase of a parcel of land located on Route 13 in Seaford for use as a paramedic station." At some point during the executive session, Mr. Arlett realized he may have had a potential conflict of interest and recused himself. At 11:06 A.M., the executive session concluded and the regularly scheduled open public meeting continued. A motion was made by Mr. Barton, seconded by Mr. Cole to approve the execution of a Contract and proceed to closing for a property identified as Land 2018-B. Mr. Burton, Mr. Cole and Mr. Vincent voted in favor. Mr. Arlett and Mr. Wilson were marked absent.

POSITIONS OF THE PARTIES

In your Petition, you appear to allege that Council violated FOIA by (1) not including the purchase price of land 2018-B in the minutes of its Executive Session meeting held on April 24, 2018; (2) not stating the purchase price in its motion to approve execution of the contract and proceed to closing for land 2018-B during its public meeting and (3) allowing Mr. Arlett to take part in the executive session discussing the land acquisition even though he recused himself due to a conflict. The Council responded that it did not violate FOIA because: (1) the minutes for the April 24, 2018 Council meeting met the parameters laid out in FOIA; (2) the purchase price was not included in the motion to pursue purchase of the property because doing so would have an adverse effect on the Council's negotiating position; and finally, (3) that Mr. Arlett was unaware of his potential conflict until near the end of the executive session and once he became aware, he notified the Council that he was recusing himself and left the meeting.

RELEVANT STATUTES

Delaware's FOIA provides that "[e]very meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of [section 10004]."¹ Pursuant to 29 *Del. C.* §10004(b), a public body may call for an executive session closed to the public for one of nine specific purposes including for "[p]reliminary discussions on site acquisitions for any publicly funded capital improvements, or sales or leases of real property."²

Delaware's FOIA requires a public body to vote at a public meeting to move into executive session, and "all voting on public business must take place at a public meeting and the results of the vote made public."³ In addition, public bodies must "maintain minutes of all meetings, including executive sessions" and to "make such minutes available for public inspection and copying as a public record."⁴ "Such minutes shall include a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon. Such minutes or portions thereof, and any public records pertaining to executive sessions conducted . . . may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose of the executive session, but no longer."⁵

DISCUSSION

You allege that Council violated FOIA by not referencing the purchase price of land 2018-B in its executive meeting minutes or in the language of its motion to approve execution of the

¹ 29 *Del. C.* § 10004(a).

² 29 *Del. C.* § 10004(b)(2).

³ 29 *Del. C.* § 10004(c). *See also*, *Del. Op. Att'y Gen.* 18-IB37.

⁴ 29 *Del. C.* §10004(f).

⁵ *Id.*

contract for purchase. The minutes contained a record of the people in attendance as well as a note that the Council was provided “additional information regarding the potential purchase of a parcel of land located on Route 13 in Seaford for use as a paramedic station.”⁶ While Delaware’s FOIA requires public bodies to maintain minutes of all meetings, it does not require minutes to include summaries of subjects discussed or attempt to define how specific a summary should be.⁷ Therefore, FOIA does not require the Council to include the proposed purchase price for land 2018-B in its minutes and the Council did not violate FOIA by not including it.⁸

Regarding Council’s motion during its public meeting, FOIA requires a vote on public business to take place at a public meeting.⁹ In Delaware Attorney General Opinion 15-IB11 and as recently discussed in Delaware Attorney General Opinion 18-IB37, this Office interpreted this requirement to mean “the public should be able to discern how and when a matter is decided.”¹⁰ The purchase price of a property is an essential aspect of “how” a site acquisition is decided. But, a property’s purchase price is necessarily kept confidential during the preliminary site acquisition process in order to protect the public body’s negotiating ability. Once the Council completed its acquisition of land 2018-B and it no longer needed to keep the purchase price of land 2018-B confidential, Council should have promptly disclosed it at a public meeting.¹¹ Because our prior opinions did not lay out a bright-line rule on this issue nor is this issue explicitly addressed in FOIA, we do not find that the Council violated FOIA in this instance. In the future, however, we may find a FOIA violation if information that is withheld from the public based on a temporary need for confidentiality, such as the contract or property price negotiations at issue here, is not

⁶ Executive Session Minutes dated April 24, 2018.

⁷ *Common Cause of Del. v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 1995 WL 733401 *4 (Del. Ch. Dec. 5, 1995) (describing public body’s duty to maintain minutes in context of executive session).

⁸ In your reply, you argue that Deputy Attorney General Jason Staib gave a presentation on FOIA in March 2014 in which he stated that he prefers, “very detailed Executive Session Minutes to know what you talked about, if I don’t know what you talked about I will need sworn affidavits from all 5 of you.” Deputy Attorney General Jason Staib’s presentation should not be considered legal advice or reflective of this office’s current position on policy and procedure. Furthermore, Mr. Staib stated, prior to the statement you reference, that FOIA only *requires* a record of who was present and what action or votes were taken.

⁹ 29 Del. C. § 10004(c).

¹⁰ *Del. Op. Att’y Gen.* 15-IB11, 2015 WL 9406788, at *2 (Dec. 11, 2015) (finding that the School Board violated FOIA when no public vote was taken and the decision to expunge a student’s record must have been decided in executive session or some other non-public forum).

¹¹ In its response to your FOIA petition, the County explained that at the time of the April 24, 2018 meeting the contract terms for the sale of the property had not been finalized nor had a contract been entered into. The County provided both the contract of sale and the HUD-1 for the property at issue with its response to your petition because the sale was finalized by that time.


promptly disclosed at a public meeting as soon as the need for confidentiality has been ended, for example, through consummation of the deal.

Finally, FOIA does not specifically govern what actions members of public bodies must take once they have recused themselves from an issue before the body. However, our office has previously opined that because executive sessions are, by definition, closed to the public, if non-member individuals are invited to attend it must be to provide information related to the subject matter for which the executive session is authorized and not as merely observers.¹² The reasoning is that once non-member observers are invited to an executive session the “interests of the non-member in attendance are indistinguishable from those of any other member of the public. Their admission to the exclusion of others transforms the so-called executive session into a meeting that must be open to all of the public.”¹³ We believe that the same reasoning applies for members of a public body who recuse themselves. If a member determines that they should recuse themselves during an executive session, they become mere observers with no greater right to be in attendance than members of the general public and should remove themselves from the session entirely during the discussion of the issue for which they have recused themselves. The assertions of both counsel for the Council and Mr. Arlett himself confirm that this is exactly what Mr. Arlett did. Therefore, we find that to the extent that FOIA is implicated in Mr. Arlett’s recusal, neither he nor the Council violated FOIA in this respect.

CONCLUSION

For the reasons discussed above, it is our determination that Council did not violate FOIA by not including the purchase price of a prospective property in the minutes of its executive session nor did it violate FOIA by not including the price in the language of its subsequent motion to execute a contract regarding the sale of the property. Finally, Council did not violate FOIA in regards to Mr. Arlett’s recusal.

Very truly yours,


Carla A.K. Jarosz
Deputy Attorney General

APPROVED BY:



Allison E. Reardon, State Solicitor

cc: J. Everett Moore, Esq. (via email)

¹² *Del. Op. Att’y Gen.* 05-IB26 (2005).

¹³ *Id.*