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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB42

August 30, 2018

VIA EMAIL

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

Re: FOIA Petition Concerning Frankford Town Council

Dear Mr. Kramer:

On August 10, 2018, the Delaware Department of Justice ("DOJ") received your petition requesting our determination, pursuant to the Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"), of whether the Frankford Town Council (the "Council") violated FOIA's open meetings provision by holding an emergency meeting in executive session on May 1, 2018. You attached a letter from the Council denying your FOIA request for the minutes of the meeting, citing a "personnel" issue.

By letter dated August 13, 2018, we invited the Council to submit a written response to your Petition. We received the Council's response ("Response Letter") on August 15, 2018. In its Response Letter, the Council states that in late April 2018, officials of the Town of Frankford received a verbal complaint "concerning an appointed member of the Town government" involving "serious and quite sensitive" allegations.¹ The Council further stated that it held an executive session for the purposes of discussing the allegations, citing 29 *Del. C.* § 10004(b)(4), (8) & (9) as well as 29 *Del. C.* § 10004(f).²

¹ Response Letter, p. 1.

² 29 *Del. C.* § 10004(b) sets forth the permitted purposes for which a public body can hold an executive session closed to the public. 29 *Del. C.* § 10004(f) states, in pertinent part: "Each public body shall maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record....Such minutes or portions thereof, and any public records pertaining to

You then submitted a rebuttal to the Response letter, stating that the exceptions argued by the Council do not apply because the session is complete and the minutes should be made available. You further alleged that the Council voted in the aforementioned May 1, 2018 executive session meeting to fire the Frankford Town Solicitor. Based on that representation, we requested a supplemental response from the Council as well as a copy of the executive session minutes, which we reviewed in camera to determine if that allegation was correct.

After a review of the meeting minutes, we have determined that the Council did not vote to fire the Frankford Town Solicitor in the Executive Session meeting held on May 1, 2018, so we do not find a violation of FOIA on that allegation. Furthermore, we find that the executive session meeting pertained to discussion of a personnel matter, and therefore the Council did not violate FOIA's open meetings provision, for the reasons set forth below.

LEGAL ANALYSIS

As a preliminary matter, we note that under FOIA, a public body has the burden of proof "to justify a decision to meet in executive session." 29 Del. C. § 10005(c). Any exceptions to the open meeting requirements are to be construed narrowly. *Del. Solid Waste Auth. v. News-Journal Co.*, 480 A.2d. 628, 631 (Del. 1984) ("[O]pen meeting laws are liberally construed, and closed session exceptions within these statutes are strictly interpreted to limit nonpublic meetings."). The Council claims that the purposes set forth in 29 Del. C. § 10004(b)(4), (8) & (9) justify the executive session meeting, and we discuss each in turn.

Section 10004(b)(4) allows a public body to meet in executive session for strategy sessions with respect to collective bargaining or pending or potential litigation, "but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body."³ The "potential litigation exception for executive session applies only when there is a 'realistic and tangible threat of litigation' based on 'objective factors.'"⁴ Some indicia of such a situation might include a written demand letter, notice of threat to sue, or 'previous or pre-existing litigation between the parties or proof of ongoing litigation concerning similar claims.'"⁵ There was no explanation presented nor evidence submitted to support the Council's claimed justification under 29 Del. C. § 10004(b)(4). The Council did not state that this executive session was for the purposes of a strategy session connected to collective bargaining, nor any pending or potential litigation; the Council also did not state that the an open meeting on the matters discussed on May 1, 2018

executive sessions conducted pursuant to this section, may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but no longer."

³ 29 Del. C. § 10004(b)(4).

⁴ *Del. Op. Att'y Gen.* 02-IB17, 2002 WL 31031224, at *9 (Aug. 6, 2002).

⁵ *Del. Op. Att'y Gen.* 02-IB12, 2002 WL 1282812, at *4 (May 21, 2002) (quoting *Claxton Enterprise v. Evans County Board of Commissioners*, Ga. App., 549 S.E.2d 870, 874 (2001)).

would have had an adverse effect on any bargaining or litigation position. Therefore, we cannot find that this stated exception to the open meetings requirements of FOIA applies.

The other claimed exceptions, 29 *Del. C.* § 10004(b)(8) and (9), pertain to “the hearing of employee disciplinary or dismissal cases” and “[p]ersonnel matters in which the names, competency and abilities of individual employees . . . are discussed,” respectively. While it is true that FOIA permits a public body to discuss personnel matters in executive session, “a public body must establish that the private discussion directly involved the consideration of an individual employee’s competency and abilities.”⁶ In the case at hand, the Council claims that after receiving a verbal complaint about an “appointed member of Town Government,” they met in executive session to broach the allegations with the individual in a “confidential setting.”⁷ After a thorough review of the provided minutes, we conclude that there was a discussion about an individual employee’s competencies both in and out of that employee’s presence, and so the exception set forth in 29 *Del. C.* § 10004(b)(9) applies.⁸

⁶ *Del. Op. Att’y Gen.* 13-IB01, 2013 WL 2477025, at *17 (Mar. 26, 2013).

⁷ Response Letter, p. 1.

⁸ We note that your Petition asserts that the Town Solicitor is not an employee, and the personnel exception at 29 *Del. C.* § 10004(b)(9) does not apply, citing to *Del. Op. Att’y Gen.* 06-ID22, 2006 WL 3387935 (November 16, 2006), which dealt with an executive session meeting called to discuss the hiring of land use consultants. In that opinion, we found that the Sussex County Council had violated FOIA because the “job applicant” exception for open meetings found at Section 10004(b)(1) did not apply to “contractors marketing their credentials in order to do public business.” Here, the Council is claiming the “personnel” exception, which only applies to current employees. Although we have previously issued an opinion where a public body attempted to claim the personnel exception for a City Solicitor and Deputy Solicitor who were designated as independent contractors (*see Del. Op. Att’y Gen.* 05-IB02, 2005 WL 120844, at *2 (January 12, 2005)), that opinion does not stand for the blanket proposition that a Solicitor may never be an “employee” for the purposes of FOIA, but that there is a difference between an employee of a public body and an individual who does contractual work for a public body. Prior opinions applying the “job applicant” exception have discussed the difference between the discussion of a specified *individual* and a discussion of the selection process for a specific job. *See Del. Op. Att’y Gen.* 02-IB17, 2002 WL 31031224 (Aug. 6, 2002). There is no indication that Mr. Lingenfelder, whose termination was the subject of your Petition, was not an employee of the Town of Frankford, and the Council has not specified that he is an independent contractor. *See also Del. Op. Att’y Gen.* 05-IB14, 2005 WL 1449427, at *3 (June 8, 2005) (“A vendor or independent contractor does not share the same privacy concerns as an individual public employee or prospective public employee.”).

CONCLUSION

For the reasons stated above, we conclude that the Council did not violate FOIA when it discussed an individual employee's competency and abilities in executive session at the May 1, 2018 meeting.

Very truly yours,



Zoe Plerhopes
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis, Acting State Solicitor

cc: Scott Chambers, Esq. (via email)