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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 19-IB07**

**February 15, 2019**

**VIA EMAIL**

Mr. Doug Spelman  
Mr. John D.W. Hurlock  
c/o [Douglasspelman@gmail.com](mailto:Douglasspelman@gmail.com)

**RE: FOIA Correspondence Regarding the City of Lewes**

Dear Mr. Spelman and Mr. Hurlock:

We write in response to your correspondence alleging that the City of Lewes (“City”) violated the open meeting requirements of the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with regard to your records requests. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we find that the City violated FOIA by holding an executive session for an improper purpose and by posting an insufficient agenda.

**BACKGROUND**

In 2018, the City approved the annexation of a certain parcel known as the Brittingham Parcel into the City, and the zoning classification of this Parcel then became a matter of dispute. On December 14, 2018, the City held a special meeting to discuss the zoning classification, and sometime thereafter, the Parcel developer’s counsel contacted the City’s attorney and in the course of their discussions, stated that any changes to the zoning would “invite litigation.”<sup>1</sup> Based on these events, the City’s attorney prepared an attorney-client privileged memorandum for presentation at executive session. The City published an agenda for a January 7, 2019 meeting entitled “Executive Session,” including an executive session to discuss “personnel issues and discuss documents protected under FOIA,” an open session item for “possible action on matters discussed in Executive Session,” and an open session item regarding a dredge pipeline.<sup>2</sup> The agenda did not mention the Brittingham Parcel in any manner. At the meeting, the Council entered

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<sup>1</sup> Response.

<sup>2</sup> Petition, Ex. 3.

executive session and voted upon the zoning of Brittingham Parcel after coming back into open session.

You filed a Petition with this Office, asserting that the City violated the open meeting requirements of FOIA by providing improper notice of the executive session and by conducting an executive session for an improper purpose. The Petition noted other flaws in the process, including improper notice of the open session agenda items.

The City, through its counsel, submitted correspondence (“Response”) countering two of these allegations, asserting only two issues were raised for this Office’s determination. First, the City argued that the notice for the executive session on the agenda was adequate according to Delaware cases and this Office’s precedent, notwithstanding Attorney General Opinion 12-IIB09. Second, the City argued that the executive session was for a proper purpose because the City’s counsel presented an attorney-client privileged memorandum, which was exempt from disclosure under 29 *Del. C.* § 10004(1)(6).

In your Reply, you first clarified that the Petition raised three issues. In addition to the two issues that the City addressed, your Petition also raised the matter of whether the meeting agenda gave the public adequate notice of the open session items. Also, you contended that the true nature of the executive session was to discuss potential litigation, but the City failed to meet the standard to assert that exemption. Additionally, you argued that the agenda was improperly titled as an Executive Session, despite the open session items and that the expected action on the Brittingham Parcel was insufficiently noticed.

### **DISCUSSION**

We find as an initial matter that your Petition sufficiently raises three issues: 1) whether the agenda for the January 7, 2019 executive session adequately provided notice to the public; 2) whether the executive session was held for a proper purpose under FOIA; and 3) whether the agenda for the open session items adequately provided notice to the public of the matters for discussion. We address each argument in turn below.

#### *Agenda Item for Executive Session*

You alleged that the agenda’s notice for an executive session to discuss “documents protected under FOIA” was insufficient.<sup>3</sup> This agenda item pertains to 29 *Del. C.* § 10004(b)(6) which allows an executive session to discuss “the content of documents, excluded from the definition of ‘public record’ in § 10002 of this title where such discussion may disclose the contents of such documents.”<sup>4</sup> Additional detail or an exact recitation of the statutory language is not

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<sup>3</sup> *Id.* The Petition did not challenge the executive session for the personnel issues.

<sup>4</sup> 29 *Del. C.* § 10004(b)(6).

required.<sup>5</sup> Thus, we conclude that the “documents protected by FOIA” is sufficiently similar to the permissible reason in 29 *Del. C.* § 10004(b)(6) and find that the City did not violate FOIA by using this language to refer to 29 *Del. C.* § 10004(b)(6).

### *Purpose of the Executive Session*

Next, we consider whether 29 *Del. C.* § 10004(b)(6) was a proper purpose for this executive session, which is a separate inquiry. “A determination that a public body sufficiently noticed its intent to hold an executive session under FOIA does not confirm that the executive session itself was a proper one.”<sup>6</sup> In its Response, the City explained the executive session was held to discuss an attorney-client privileged memorandum with its attorney regarding the Brittingham Parcel’s zoning. In *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Board*, the Court expressly rejected an expansive view of 29 *Del. C.* § 10004(b)(4) which would permit a public body to receive “legal advice” in an executive session.<sup>7</sup> The Court stated that the exemption in 29 *Del. C.* § 10004(b)(4) is narrowly construed to prevent a broader interpretation from swallowing up the “open meeting” rule.<sup>8</sup> Our Office followed the Court’s view in subsequent decisions, finding that “FOIA is a statutory public waiver of any possible [attorney-client] privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute” and the public body is not permitted to “hold any executive session to receive legal advice about *any* issue or matter under discussion so long as it had not yet taken a stand or reached a conclusion about the issue.”<sup>9</sup> It continues to be our view that FOIA imposes certain qualifications on the scope of attorney-client privilege arising in the public meeting context. We believe that the same view of attorney-client privilege applies here, and the

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<sup>5</sup> As this Office previously noted, “[t]he Delaware Court of Chancery has specifically held that a public body’s use of the language ‘Personnel & Legal Issues’ satisfies FOIA’s notice requirements” with respect to executive session. *Del. Op. Att’y Gen.* 17-IB31, 2017 WL 3426271, at \*2 (July 24, 2017) (citing *O’Neill v. Town of Middletown*, 2007 WL 2752981, at \*7 (Del. Ch. Mar. 29, 2007)); *see also Del. Op. Att’y Gen.* 05-IB26, 2005 WL 3991284, at \*7 (Aug. 29, 2005) (concluding that public body’s use of the language “Executive Session (Personnel & Legal Issues)” did not violate FOIA’s notice requirements). *See also Del. Op. Att’y Gen.* 18-IB09, 2018 WL 1405825, at \*2 (Feb. 12, 2018) (“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.”).

<sup>6</sup> *O’Neill v. Town of Middletown*, 2007 WL 2752981, at \*8 (Del. Ch. Mar. 29, 2007).

<sup>7</sup> *Chem. Indus. Council of Del. v. State Coastal Zone Indus. Bd.*, 1994 WL 274295, at \*10-12 (Del. Ch. May 19, 1994).

<sup>8</sup> *Id.* at \*11.

<sup>9</sup> *Del. Op. Att’y Gen.* 05-IB28, 2005 WL 3991286, at \*4 (Sept. 7, 2005) (citation omitted); *Del. Op. Att’y Gen.* 02-IB12, 2002 WL 1282812, at \*4 (May 21, 2002) (citing *Chem. Indus. Council of Del.*, 1994 WL 274295, at \*11) (emphasis in original).

City may not circumvent the requirements of 29 *Del. C.* § 10004(b)(4) by discussing legal advice in the context of an attorney-client privileged memorandum under 29 *Del. C.* § 10004(b)(6). Any executive session involving legal advice must meet the 29 *Del. C.* § 10004(b)(4) requirements.

We next determine whether the executive session was nonetheless properly held under 29 *Del. C.* § 10004(b)(4). This exemption under 29 *Del. C.* § 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.”<sup>10</sup> The “potential litigation exception for executive session applies only when there is a ‘realistic and tangible threat of litigation’ based on ‘objective factors.’”<sup>11</sup> “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.’”<sup>12</sup> The City presented no explanation or evidence to support 29 *Del. C.* § 10004(b)(4), other than the mention of a verbal statement about “inviting litigation” by the developer’s counsel. Even if we were to find that this statement was a sufficiently objective indicia of a realistic and tangible threat of litigation, the City has not addressed how its discussions that occurred in executive session would have an adverse effect on their eventual litigation position. As the City has not met its burden with regard to 29 *Del. C.* § 10004(b)(4), we must find that the January 7, 2019 executive session was improper.<sup>13</sup>

#### *Open Session Agenda Items*

Finally, you contend that the January 7, 2019 agenda was improper with respect to the open session items. You first argued that the agenda created confusion and was inadequate notice of the two open session items. FOIA requires that the agenda include “general statement of the major issues expected to be discussed.”<sup>14</sup> To this end, the Court of Chancery has suggested that an agenda should be worded in “plain and comprehensible language.”<sup>15</sup> Here, the title of the Agenda is an “Executive Session,” but major issues of public business were also planned for open session discussion. Second, you argued that the agenda item of “possible action on matters discussed in Executive Session” provides the public with insufficient notice of this potential action. We agree;

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<sup>10</sup> 29 *Del. C.* § 10004(b)(4).

<sup>11</sup> *Del. Op. Att’y Gen.* 02-IB17, 2002 WL 31031224, at \*9 (Aug. 6, 2002).

<sup>12</sup> *Del. Op. Att’y Gen.* 02-IB12, 2002 WL 1282812, at \*4 (May 21, 2002) (quoting *Claxton Enterprise v. Evans County Board of Commissioners*, 549 S.E.2d 870, 874 (Ga. App. 2001)).

<sup>13</sup> 29 *Del. C.* § 10005(c) (“... [T]he burden of proof . . . shall be on the public body to justify a decision to meet in executive session . . .”).

<sup>14</sup> 29 *Del. C.* § 10002(a).

<sup>15</sup> *Chem. Indus. Council of Del.*, 1994 WL 274295, at \*8 (“An agenda should be worded in plain and comprehensible language and must directly state the purpose of the meeting.”).

the public was not on notice that a vote or action on the Brittingham Parcel was potentially planned for that meeting.<sup>16</sup> Thus, we find that the agenda was flawed because it provided insufficient notice of the open session items.

As remediation, we recommend that the City appropriately notice and address the topic of the zoning of the Brittingham Parcel at a future public meeting, including its reasons for the vote.<sup>17</sup> If you wish to pursue invalidation of the vote, that remedy is not within the limits of our authority under the statute.<sup>18</sup>

### **CONCLUSION**

It is our determination that the City has not violated FOIA by citing to its reason for the executive session in the January 7, 2019 meeting agenda. However, we conclude that the City violated FOIA by providing an insufficient agenda of the open session items and by failing to meet its burden to show that the executive session was for a proper purpose under 29 *Del. C.* § 10004(b)(4). As such, we recommend that the City appropriately notice and address the topic of the zoning of the Brittingham Parcel at a future public meeting, including its reasons for the vote.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
Chief Deputy Attorney General

cc: Glenn Mandalas, Esq. Attorney for the City of Lewes (via email)

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<sup>16</sup> *Del. Op. Att’y Gen.* 17-IB28, 2017 WL 3426268, at \*2 (July 19, 2017) (“County Council’s disclosure of the possibility that it might take action on unspecified matters discussed in executive session was not sufficient to put the public on notice of *expected* discussions and action on an important topic in open session.”) (emphasis in original).

<sup>17</sup> *Id.* (recommending that the improperly noticed vote be revisited and the public body explain its reasons at a public forum).

<sup>18</sup> 29 *Del. C.* § 10005(a).