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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB09

February 22, 2019

VIA EMAIL

Mr. Sam Cooper
beach.head@verizon.net

RE: FOIA Correspondence Regarding the City of Rehoboth Beach

Dear Mr. Cooper:

We write in response to your correspondence alleging that the City of Rehoboth Beach violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with respect to open meeting requirements. 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. In this Petition, you set forth three separate allegations. We addressed the third allegation regarding the wastewater advisory committee in Attorney General Opinion No. 19-IB04, and this Opinion addresses the two remaining allegations.

For the reasons set forth below, we conclude that the City violated FOIA by conducting a portion of the executive session at its November 5, 2018 Board of Commissioners meeting for an improper purpose under FOIA. In addition, we conclude that the Personnel Committee is a public body, and the City violated FOIA by failing to conduct its January 3, 2019 Personnel Committee meeting in compliance with open meeting requirements. We recommend the remediation outlined below.

BACKGROUND

Your Petition alleged two violations, as follows:

On November 5, 2018, the Commissioners of the City of Rehoboth Beach held a special meeting where, other than to convene and adjourn, the entire meeting was conducted in executive session. It appears nothing discussed in this meeting qualified for exemption from the open meetings provisions of FOIA or at a minimum the majority of the meeting should have been held in open session. It is

apparent the public should have had access, and that excluding them has tainted all future consideration of the subject topic.

At a meeting of the Commissioners today it was revealed the city's Personnel Committee met on January 3, 2019. However, there is no evidence this meeting was noticed or an agenda posted per FOIA. There is also suspicion that a quorum of the Commissioners attended this meeting, which would trigger additional noticing.¹

In addition, you provided the agenda and minutes of the above-referenced meetings, stated your belief that plans for the City's wastewater were discussed, and acknowledged that the documents did not reflect the topic of discussion in that executive session. You alleged that representatives of Sussex County, to whom the City is considering transferring wastewater management, were also present at that meeting.

The City submitted a letter through counsel on February 5, 2019 ("Response").² The City asserted that the executive session of November 5, 2018 was held to discuss among the Commissioners and Sussex County representatives a legal memorandum regarding utility sales or transfers prepared by the City's attorney. The City argued that this memorandum is subject to attorney-client privilege and thus is not a "public record" under 29 *Del. C.* § 10002(1)(6), which exempts "[a]ny records specifically exempted from public disclosure by statute or common law." Pursuant to 29 *Del. C.* § 10004(b)(6), the Board was permitted to discuss in executive session "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." The City also asserted the executive session was proper under 29 *Del. C.* § 10004(b)(2), which permits such sessions to discuss the sale or transfer of real estate, and that the discussion of real estate took place only among the Mayor and City Commissioners in a separate room from the representatives of Sussex County.

The City denied your allegation that a quorum of Commissioners attended the Personnel Committee meeting, stating that only two of seven Commissioners attended. With regard to the question of whether the Personnel Committee must comply with open meeting requirements, the City argued that this Committee acts exclusively for the purpose of administering City employees rather than to create public policy and that FOIA's purpose is only to protect the latter. The City also alleged that such meetings were not noticed or publicly held during most of your term as Mayor and challenged your Petition under the equitable doctrine of "unclean hands." Notwithstanding its position that the Personnel Committee is not and should not be deemed a public body, the City agreed to publicly notice future Personnel Committee meetings and open those meetings to the public.

¹ Petition.

² The parties agreed to an extension of eleven calendar days for the City's Response and agreed that this Office's time period in which to issue a determination was extended by the same eleven days.

In your submission dated February 8, 2019 (“Reply”), you challenged the City’s claim of attorney-client privilege with regard to the executive session, asserting that the City effectively waived the privilege by permitting the presence of individuals who are not members of the public body. You further asserted that 29 Del. C. § 10004(b)(2) was not applicable because the statute is intended to preserve the public body’s competitive advantage in the marketplace, and no such competition exists when there is no sale, lease, or market involved in transferring management of a government service to another government.

You also contested the City’s assertion that the Personnel Committee solely existed to address internal matters. You alleged that the Commissioners charged the Committee with making recommendations regarding City law that were discussed at the January 18, 2019 meeting and that the City Code vests responsibility for hearing and investigating complaints of employee harassment with the Committee. You denied the City’s allegations that Committee meetings were not properly noticed or open during your term and stated that the “unclean hands” doctrine is inapplicable in the FOIA petition process.

For these reasons, you asked this Office to find that the City violated FOIA by holding an executive session for improper reasons on November 5, 2018 and not noticing or opening to the public a meeting of the Personnel Committee on January 3, 2019.

DISCUSSION

November 5, 2018 Executive Session

The November 5, 2018 agenda stated that the City intended to convene an executive session for discussion of the contents of a document that is otherwise excluded from the definition of “public record” and “for the purpose of preliminary discussions on site acquisitions for any publicly funded capital improvements, or sales or leases of real property” as permitted by 29 Del. C. § 10004(b)(2).³ As this Office recently reaffirmed, using the executive session to discuss an attorney-client privileged memorandum is not a proper basis for an executive session, unless the reason for the executive session meets the parameters of 29 Del. C. § 10004(b)(4).⁴ The City has not demonstrated how the parameters of 29 Del. C. § 10004(b)(4) were met, and therefore, the discussions in the November 5, 2018 executive session about the memorandum were improper under FOIA.

³ Petition.

⁴ See Del. Op. Att’y Gen. 19-IB07 (Feb. 15, 2019) (determining that an executive session for discussing an attorney-client privileged memorandum is not an appropriate purpose for an executive session, as executive sessions for legal advice must meet the standards of 29 Del. C. § 10004(b)(4) for “[s]trategy sessions, including those involving legal advice or opinion from an attorney-at-law, 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”).

The City also cited to a second purpose for its executive session, “the preliminary discussions of . . . sales or leases of real property.”⁵ The City discussed the sale of the real property on which the City’s wastewater improvements are located. This Office has previously construed this exemption to “protect the government when it enters the marketplace to purchase real property as an ordinary commercial buyer or seller.”⁶ The City asserted that the Sussex County representatives did not attend these preliminary site discussions. You alleged that this Office should find these discussions improper, because it is actually a transfer of wastewater improvements, not a real estate sale, and the transfer to another governmental entity is not the type of commercial sale that the exemption was intended to cover. However, there is no basis in the statute to read this exemption in such a limited way. The sale of real property under discussion had improvements included in the sale, and the fact that only one buyer is under consideration at this stage does not render the proposed sale “non-commercial;” it is necessary to preserve the City’s bargaining position in the commercial market whether one or more buyers are currently at the table, especially when negotiations are in preliminary stages. Thus, we find that the City appropriately cited a proper purpose for this portion of the executive session.

January 3, 2019 Personnel Committee Meeting

The second issue is whether FOIA’s open meeting requirements apply to the City’s Personnel Committee. Deciding this question first requires a determination of whether the Committee is a public body, which is a two-part test.⁷ First, we must determine whether the entity is a “regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State,” which includes a “group, panel, council, or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity.”⁸ If the first part is met, we then must determine whether the entity is supported in whole or in part by any public funds, expends or disburses any public funds, or “is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations, or recommendations.”⁹ Both parts of this test must be satisfied in order for an entity to be considered a “public body” under FOIA.

⁵ 29 Del. C. § 10004(b)(2).

⁶ Del. Op. Att’y Gen. 05-IB24, 2005 WL 3991283, at *5 (Aug. 18, 2005) (citing Del. Op. Att’y Gen. 02-IB27, 2002 WL 31867901, at *1 (Nov. 4, 2002)).

⁷ Del. Op. Att’y Gen. 18-IB28, 2018 WL 2994706, at *1 (June 1, 2018).

⁸ 29 Del. C. § 10002(h).

⁹ Id.

The City did not submit any facts or arguments to address the two-part test, but the Reply supplied several relevant facts.¹⁰ The Reply indicated that the Committee was formed by another public body, the Rehoboth Board of Commissioners, satisfying the first prong of the test. Second, the Reply indicated that the Committee developed recommendations for the Board of Commissioners regarding Chapter 46 (“Personnel”) of the City Code, which meets the second prong of the test.¹¹ Based on these submissions, we conclude that the Personnel Committee is a public body and subject to the open meeting laws. As such, the City violated FOIA by failing to meet the open meeting requirements for the January 3, 2019 meeting.

As remediation, we recommend that any existing meeting minutes are made available in compliance with FOIA. If the meeting was recorded or otherwise preserved, we recommend that the City recreate meeting minutes from those records. If neither minutes nor records preserving the substance of the meeting exist, we need not recommend any further remediation, as the City has stated in its Response that it intends to operate the Personnel Committee in accordance with FOIA’s open meeting requirements in the future.¹²

¹⁰ See Response; Reply.

¹¹ Reply.

¹² The City claimed that FOIA does not apply to the Personnel Committee, as its discussions relate to the City’s internal policy directed exclusively at the administration of the City’s employees, and applying FOIA to such actions would “suffocate” day-to-day operations of a municipality. See Response. FOIA recognizes that certain government bodies, such as grand juries and the Board of Pardons and Parole, are not appropriately subject to open meeting laws, but the statute does not exempt employee-related or “internal administrative” bodies, as the City suggested. 29 *Del. C.* § 10004(h). The City also argued that you, as the former Mayor, should be barred by the equitable doctrine of “unclean hands,” from asserting claims here. Our Office is not a court of equity and have no basis to apply this doctrine in this case.

CONCLUSION

Therefore, we determine that the City violated FOIA by conducting a portion of the executive session at its November 5, 2018 Board of Commissioners meeting for an improper purpose under FOIA. In addition, we conclude that the Personnel Committee is a public body, and the City violated FOIA by failing to conduct its January 3, 2019 Personnel Committee meeting in compliance with open meeting requirements. We recommend the above-referenced remediation.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Allison E. Reardon

Allison E. Reardon
State Solicitor

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