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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB11

February 25, 2019

VIA EMAIL

Mr. Billy Bonbright
onetontomato2002@yahoo.com

RE: FOIA Correspondence Regarding the Town of South Bethany

Dear Mr. Bonbright:

We write in response to your correspondence alleging that the Town of South Bethany violated the open meeting requirements of Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). 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 Town violated FOIA at its November 8, 2018 meeting by holding an executive session purportedly for potential litigation, when the circumstances did not meet the standard of potential litigation. We recommend that this topic be discussed in an open session in the future. We further conclude that the Town committed a technical violation by citing to the potential litigation exception for a second topic, a personnel matter, also discussed during the November 8, 2018 executive session. We caution the Town to comply with identifying the proper purpose in the future. We find that no further violations with respect to the remaining matters challenged in the Petition.

BACKGROUND

On February 5, 2019, you submitted a letter to this Office alleging that the Town of South Bethany violated FOIA’s open meeting provisions on several occasions dating back to April 12, 2017. We consider only the two allegations regarding meetings held within the last six months.¹ You allege that on November 8, 2018 and January 29, 2019, the Town held improper executive sessions to discuss its Department of Public Safety and Police Chief out of public view. The

¹ As a matter of practice, this Office does not consider petitions regarding alleged open meeting violations that occurred more than six months prior to the date of a petition. *See, e.g., Del. Op. Att’y Gen.* 16-IB14, 2016 WL 3462345, at *2 (June 9, 2016); *Del. Op. Att’y Gen.* 12-IIB11, 2012 WL 5894039, at *5 (Nov. 7, 2012).

agendas for those two meetings state that executive sessions were held for strategy sessions regarding pending or potential litigation and a discussion of documents exempt from the definition of “public record” under FOIA.

The Town submitted a letter (“Response”) on February 11, 2019. The Town stated that the November 8, 2018 executive session was necessary to discuss threats of litigation, litigation that the Town might have to initiate, the past context for such possible litigation, potential legal strategies for which counsel’s advice was needed, and the content of civil investigatory files, which are exempt from FOIA. The Town asserted it could not further justify the appropriateness of the executive session unless this Office would accept *in camera* submissions which would contain information that would demonstrate the need for confidentiality. The Town further stated that the discussions of the November 8, 2018 executive session continued at the January 29, 2019 executive session. The Town asserted that there was no discussion of public safety or restricting the resources of the police department, as you alleged. The Town included redacted executive session minutes and an affidavit from the Town Manager attesting to the truthfulness of the Response.

You submitted your Reply to this Office on February 12, 2019. You questioned the veracity of the Town’s assertion that public safety had not been discussed in those executive sessions when the redacted minutes reflect a discussion of the police department. You also alleged that the Town voted after the executive session to proceed with the legal and administrative actions discussed, providing the public insufficient notice of the action taken. You asked this Office to find that the Town’s executive sessions on November 8, 2018 and January 29, 2019 violated FOIA.

On February 19, 2019, the Town submitted draft redacted minutes of the January 29, 2019 executive session. The Town also provided unredacted minutes and other information to this Office for *in camera* review.

DISCUSSION

Under FOIA, a public body has the burden of “justify[ing] a decision to meet in executive session.”² The November 8, 2018 and January 29, 2019 executive sessions presented the same two purposes in their agendas: 1) 29 *Del. C.* § 10004(b)(4) for “strategy 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;” and 2) 29 *Del. C.* § 10004(b)(6) for “discussion of 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 exemption under 29 *Del. C.* § 10004(b)(4) permits 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

² 29 *Del. C.* § 10005(c).

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

November 8, 2018 Executive Session

Two matters of potential litigation were discussed during the November 8, 2018 executive session, and we must determine whether the Town appropriately discussed both matters in executive session. We find that the Town has not met its burden of demonstrating that potential litigation was properly asserted for either matter, as one matter is characterized by the Town as involving potential litigation based on a “rumor” and the second matter likewise lacks any objective indicia of realistic and tangible threats of litigation. For the first matter, rumored to involve potential litigation, we recommend that the Town schedule this topic for discussion at a future open session. For the second matter, we find no remediation is required as the factual record demonstrates that the second matter was discussed in executive session properly under FOIA, although not for the purpose stated on the November 8, 2018 agenda. That is, we find that the second matter involved discussions related to “personnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open.”⁶ “The personnel exception for executive session was intended to protect the personal privacy of individual employees, and applies only when the discussion reflects on an individual’s ‘competence or ability.’”⁷ Thus, although we find the Town’s identification of the incorrect purpose on its agenda is a technical violation of FOIA, the discussions were permitted to take place in executive session under the “personnel” exemption, and we caution the Town to comply with stating the proper purpose of every executive session on its agenda in the future.⁸

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 Enter. v. Evans Cnty. Bd. of Comm’rs*, 549 S.E.2d 870, 874 (Ga. App. 2001)).

⁶ 29 *Del. C.* § 10004(b)(9).

⁷ *Del. Op. Att’y Gen.* 98-IB05, 1998 WL 648714, at *2 (July 6, 1998).

⁸ See *Del. Op. Att’y Gen.* 01-IB03, 2001 WL 1593103, at *2 (Feb. 16, 2001) (“FOIA authorized the School District to go into executive session to discuss labor negotiations or collective bargaining, and no purpose would be served by directing the School District to re-notice the matters discussed in earlier executive sessions since the School District would be allowed to discuss collective bargaining issues in an executive session outside of the public view.”); *Del. Op. Att’y Gen.* 03-IB20, 2003 WL 22669565, at *2 (Sept. 3, 2003) (“Since the Town could have met in lawful executive session to discuss the qualifications of a job candidate -- and FOIA did not

Finally, we reviewed *in camera* the documents discussed in executive session on November 18, 2018 and find that these records are exempt from the definition of “public record”⁹ and the executive session was therefore properly noticed insofar as it was noticed to discuss non-public records under 29 *Del. C.* § 10004(b)(6).

January 29, 2019 Executive Session

We have reviewed the Town’s *in camera* submissions regarding the potential litigation in the January 29, 2019 executive session and find that those discussions were appropriately held in executive session and appropriately noticed as “potential litigation.” The potential litigation was a realistic and tangible threat, and the Town provided sufficient facts to conclude that having these discussions in a public forum would have an adverse effect on its litigation position.

We also reviewed the *in camera* submissions of the documents discussed under 29 *Del. C.* § 10004(b)(6) and find that these records demonstrate this purpose was properly asserted, as the records are exempt from the definition of “public record.”¹⁰

January 29, 2019 Meeting Vote

Your Petition alleged that the Town noticed an executive session during its January 29, 2019 meeting to “confer and potentially vote” on an item. Your Reply, however, alleged that after returning to open session during the January 29, 2019 meeting, a Councilmember made a motion to “proceed with the administrative and legal actions discussed during the executive session.”¹¹ We have reviewed the unredacted executive session minutes, which do not indicate that a vote took place in executive session. FOIA requires that all votes be taken in open session, and we conclude that the Town met that requirement here.¹²

require the agenda to list the name of the candidate -- we find this to be a technical violation for which remediation is not necessary.”).

⁹ The agenda did not require more detail regarding these records. *Del. Op. Att’y Gen.* 17-IB49, 2017 WL 4652339, at *1 (Sept. 29, 2017) (determining that citing to 29 *Del. C.* § 10004(b)(6) as the executive session purpose constituted sufficient notice on the agenda).

¹⁰ *Id.*

¹¹ Reply. As the public meeting minutes were not provided, we rely on the motion re-statement set forth in your Reply in making this determination.

¹² 29 *Del. C.* § 10004(c). The subject matter of a motion must be limited when a privacy interest is at stake. *See Del. Op. Att’y Gen.* 18-IB37, 2018 WL 4053337, at *2 (Aug. 14, 2018) (noting that FOIA requires that the public be able to discern how and when a matter is decided and finding that a motion on “the topic discussed” at executive session was sufficient in light of the job applicant’s privacy interests). In these instances, this Office must strike a “reasonable balance between the privacy rights. . . and the public’s right to know.” *Id.* We find the January 29, 2019 motion and vote following executive session were sufficient under these circumstances.

CONCLUSION

Thus, it is our determination that the Town violated FOIA at its November 8, 2018 meeting by holding an executive session for rumored potential litigation, which is not a proper purpose. We recommend that this topic be discussed in an open session in the future. We also conclude that the Town committed a technical violation by citing to an improper purpose—potential litigation—for a personnel discussion during its November 8, 2018 executive session. We caution the Town to comply with identifying the proper executive session purpose in the future. We find no further violations with respect to the remaining matters challenged in the Petition.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Allison E. Reardon

Allison E. Reardon
State Solicitor

cc: Stephani J. Ballard, Esquire, Attorney for Town of South Bethany