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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB16

March 22, 2019

VIA EMAIL

Mr. Doug Spelman
c/o Douglasspelman@gmail.com

Mr. John D.W. Hurlock
c/o johnhurlock@hotmail.com

RE: Two FOIA Petitions Regarding the City of Lewes

Dear Mr. Spelman and Mr. Hurlock:

We received your two separate communications alleging that the City of Lewes is in violation of the open meeting requirements of the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). Mr. Hurlock filed one Petition alleging two violations at the City’s January 31, 2019 special meeting (“Hurlock Petition”), and Mr. Spelman filed a second Petition raising the same allegations (“Spelman Petition”). We treat each correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) (collectively, “Petitions”) regarding whether a violation of FOIA has occurred or is about to occur and issue this combined Opinion to address both Petitions.

For the reasons set forth below, we conclude that the City committed a technical violation by citing to an improper purpose for the executive session in its agenda, but as the executive session was held for another proper purpose, we recommend no remediation in these circumstances.

BACKGROUND

In 2018, the City approved the annexation of a certain parcel known as the Brittingham Parcel into the City, and the application of zoning district amendments to this Parcel thereafter became a matter of dispute. The agenda for a January 7, 2019 meeting entitled “Executive Session” included 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.¹ The agenda did not mention the Brittingham Parcel in any manner. At the meeting, the Council held the executive session and after exiting executive session, voted in open session to not apply any amendments to its AX-RES zoning district to the Brittingham Parcel. After the January 7, 2019 meeting, you filed a joint FOIA petition challenging the City's actions at that meeting.

On January 31, 2019, the City held an executive session to discuss its response to your petition, which was noticed as follows: "Executive session relating to a Freedom of Information Act complaint dated January 22, 2019 for the purpose of discussing the content of documents, excluded from the definition of 'public record' under the Freedom of Information Act as permitted by 29 Del. C. Section 10004(b)(6) and for the Mayor and Commissioners to receive legal advice and opinion from the City Solicitor regarding potential litigation as permitted by 29 Del. C. Section 10004(b)(4)."² The next items on the agenda were "return to open session" and "possible action on matters discussed in Executive Session." On February 15, 2019, this Office issued Attorney General Opinion No. 19-IB07 addressing your claims regarding the January 7, 2019 special meeting. Your Petitions challenging the actions at the January 31, 2019 special meeting followed.

The current Petitions make two allegations about the January 31, 2019 special meeting: 1) the agenda item for the public open session ("possible action on matters discussed in Executive Session") did not provide sufficient specificity under FOIA; and 2) the agenda's rationale for holding an executive session does not meet 29 *Del. C.* § 10004(b)(4). The Petitions further argue that citing potential litigation was not proper justification because a petition to this Office does not qualify as litigation. To rectify these alleged violations, you both request the following: 1) a finding that the City violated the open meeting provisions of the FOIA by providing improper justification for the January 31, 2019 executive session; 2) a finding that the notice for the open session was inadequate; and 3) a recommendation that the City post its executive session minutes on its website. The Spelman Petition also requests a recommendation that the City refrain from using 29 *Del. C.* § 10004(b)(4) to justify an executive session unless the justification meets the standards set forth in Attorney General Opinion No. 19-IB07.

The City Solicitor, Mr. Glenn Mandalas, provided the City's Responses. First, the City argues that the agenda item for open session item was properly noticed, and in any event, is moot because the City took no action after the executive session. Second, the City argues that the executive session was for a proper purpose because the City's counsel presented a draft response for discussion, which was exempt from disclosure under 29 *Del. C.* § 10004(b)(6) as attorney client privileged and work product materials and that the pending FOIA complaint constituted a "quasi-judicial proceeding" which qualifies as litigation under the pending or potential litigation exemption in 29 *Del. C.* § 10004(b)(4). In support of its argument under 29 *Del. C.* § 10004(b)(6), the City attached the slides from a presentation by a Deputy Attorney General from August 14, 2014 and cited this Office's Policy Manual for FOIA Coordinators to demonstrate that materials subject to attorney-client privilege and attorney work product are exempted from the "public

¹ *Del. Op. Att'y Gen.* 19-IB07 (Feb. 15, 2019).

² Petitions, Attachment 1.

records” definition under 29 *Del. C.* § 10002(1)(6). Thus, the City argues the executive session was proper because it discussed a non-public record.

In your Replies, you withdraw your claims related to the open session item, as the agenda made reference to the FOIA complaint in the executive session item rendering more detail to the open session item, unlike the agenda which was the subject of Attorney General Opinion No. 19-IB07. You note, however, the City’s continued use of this “canned language” regarding possible actions following executive session may invite further petitions to this Office. With respect to the pending or potential litigation exemption, you reiterated that the petition to the Attorney General does not constitute litigation and that even if the petition process constituted litigation, the City failed to meet the standards for potential litigation under 29 *Del. C.* § 10004(b)(4).

DISCUSSION

Under FOIA, a public body has the burden of “justify[ing] a decision to meet in executive session.”³ As an initial matter, we acknowledge the claim regarding insufficient notice for the open session item of “possible action on matters discussed in Executive Session” has been withdrawn. Accordingly, we do not decide it.

Next, we consider whether 29 *Del. C.* § 10004(b)(6) or 29 *Del. C.* § 10004(b)(4) is a proper purpose for this executive session. Executive session is permitted pursuant to 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.” However, executive sessions discussing legal advice or opinion are different, as concluded in Attorney General Opinion No. 19-IB07. The discussion of attorney-client privileged and work product materials, standing alone, is insufficient justification for an executive session.⁴ We reaffirm the conclusion in Attorney General Opinion No. 19-IB07 that any executive session involving legal advice or opinion must meet the 29 *Del. C.* § 10004(b)(4) requirements, and we

³ 29 *Del. C.* § 10005(c).

⁴ In *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Bd.*, 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. 1994 WL 274295, at *10-12 (Del. Ch. May 19, 1994). The Court stated that the exemption in Section 10004(b)(4) is narrowly construed to prevent a broad interpretation from swallowing up the “open meeting” rule. *Id.* at *11. 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 a 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.” *See 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).

conclude that the City improperly cited to the 29 *Del. C.* § 10004(b)(6) exemption as rationale to discuss attorney-client privileged and work product materials in executive session.

The final inquiry is whether the executive session was nonetheless properly held under the other cited exemption, 29 *Del. C.* § 10004(b)(4). The exemption under 29 *Del. C.* § 10004(b)(4) allows a public body to meet in executive session 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.”⁵ The City asserts that the FOIA petition process is a quasi-judicial proceeding that constitutes “litigation” under this exemption and the discussions related to the draft response to a FOIA petition were appropriately held in executive session.

This Office previously found that other quasi-judicial proceedings qualify as pending or potential litigation under FOIA.⁶ Citizens may have the right to file suit based on the outcome of the FOIA petition process,⁷ and we believe that this adversarial process, in which citizens’ petitions are opined on and which may lead to a potential lawsuit, renders it sufficiently similar to a quasi-judicial proceeding. As such, we conclude that a FOIA petition process qualifies as pending litigation in these circumstances.

Under 29 *Del. C.* § 10004(b)(4), we must also consider whether the City has shown that an open meeting would have an adverse effect on its litigation position. The public body’s response to a FOIA petition forms its legal defense in the petition and in a later lawsuit, if one is filed. Here, the City presented sufficient facts to conclude that a public discussion of the attorney’s advice and opinion related to a draft response to a FOIA petition would adversely affect the litigation position of the City in these circumstances, where the petitioners would be privy to their legal defense strategy in the pending petition and in the related lawsuit, if one is filed. Thus, we determine that the executive session at the January 31, 2019 meeting was appropriately held for the purpose of discussing the City Solicitor’s advice and opinion regarding the pending litigation against the City under 29 *Del. C.* § 10004(b)(4).⁸

⁵ 29 *Del. C.* § 10004(b)(4).

⁶ See, e.g., *Del. Op. Att’y Gen.* 04-IB04, 2004 WL 335476, at *3-4 (Feb. 5, 2004); *Del. Op. Att’y Gen.* 03-IB26, 2003 WL 22931613, at *2 (Nov. 13, 2003); *Del. Op. Att’y Gen.* 03-IB10, 2003 WL 22931612, at *4-6 (May 6, 2003).

⁷ 29 *Del. C.* § 10005.

⁸ Although the agenda cites to “potential litigation” instead of “pending litigation,” we find it is a harmless error in these circumstances where the proper statutory citation was included, which references both pending and potential litigation.

CONCLUSION

Therefore, it is our determination that the City committed a technical violation by citing to an improper purpose for the executive session in its agenda, but as the executive session was held for another proper purpose, we recommend no remediation in these circumstances.⁹

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
Chief Deputy Attorney General

cc: Glenn Mandalas, Esq. City Solicitor (via email)

⁹ 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 require the agenda to list the name of the candidate -- we find this to be a technical violation for which remediation is not necessary.”).