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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion 19-IB52

September 17, 2019

VIA EMAIL

Police Chief Sam Mackert
Town of Dewey Beach
Sam.mackert@cj.state.de.us

RE: FOIA Petition Regarding the Town of Dewey Beach

Dear Chief Mackert:

We write in response to your correspondence alleging that the Town of Dewey Beach (“Town”) violated the open meeting requirements of the 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 has not violated FOIA as alleged.

BACKGROUND

The Town Council held a public meeting on August 9, 2019. At the meeting, a Town Commissioner, in the course of discussing a report about police matters, stated the report indicated “some degree of concern about the current effectiveness” of the Town’s Police Chief and stated that the Town Manager should be asked to place an advertisement for the position and the Town should start looking for a new police chief.¹ The Town Manager responded that the conversation needed to be ended, and the Mayor immediately interrupted the Commissioner’s further attempts to elaborate. The Town Solicitor then advised that this topic should be reserved for executive session.

¹ Response.

This Petition asserts that the Town violated FOIA in two ways: 1) failing to post the matter of your position on the agenda; and 2) failing to reserve this personnel discussion for executive session. On September 4, 2019, the Town Solicitor sent a Response, asserting the Town has not violated FOIA. First, the Town argues that the exemptions from open meeting requirements are enacted to benefit the public and do not prohibit any topic from public discussion. Second, the Town contends that the topic of your position was not necessary to include on the agenda, as the Town Council did not have any intention to discuss this topic as a major issue and the Town Council, in fact, did not discuss the matter. The Town contends that the Commissioner “blurted out” these statements on the subject, but the Town Council did not discuss it, nor should the statement be imputed to the Town Council as a whole.²

DISCUSSION

An agenda must include a “general statement of the major issues” which a public body expects to discuss.³ The Town has provided sufficient evidence demonstrating that a discussion of your position or performance did not take place at the August 9, 2019 meeting. The Commissioner briefly mentioned your position and performance, and the other attendees promptly ended the matter before any substantive discussions regarding these matters could occur. FOIA permits a public body to hold discussions about certain topics in executive session.⁴ However, FOIA does not prohibit a public body from discussing a topic in open session.⁵ Therefore, even if the Town had conducted a personnel discussion in open session, FOIA does not expressly forbid the Council from doing so.

² *Id.*

³ 29 Del. C. § 10002(a).

⁴ 29 Del. C. § 10004(b).

⁵ See 29 Del. C. § 10004(b) (“A public body *may* call for an executive session closed to the public”) (emphasis added); *Del. Op. Att’y Gen.* 13-IB01, 2013 WL 2477025, at *7 (Mar. 26, 2013) (“For sound policy reasons, FOIA permits, but does not require, public bodies to discuss certain matters in private.”).

CONCLUSION

Based on the foregoing, it is our determination that the Town has not violated FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Fred Townsend, Town Solicitor (via email)