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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB57

October 24, 2019

VIA EMAIL

Daniel J. Kramer
8041 Scotts Store Rd
Greenwood, DE 19950
djmjkramer@gmail.com

RE: September 27, 2019 FOIA Petition Regarding Sussex County Council

Dear Mr. Kramer:

We write in response to your September 27, 2019 correspondence alleging that Sussex County Council's (the "Council") agenda for its September 24, 2019 Council Meeting violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a petition for determination pursuant to 29 *Del. C.* § 10005(e) regarding whether the Council violated FOIA ("Petition"). We invited the Council to submit a written response to the Petition. We received the Council's response ("Response Letter") on October 11, 2019. For the reasons set forth below, we conclude that the Council did not violate FOIA as alleged.

BACKGROUND

The Council meets on a weekly basis. On September 17, 2019 at 5:35 pm the Council posted a notice and agenda for its September 24, 2019 meeting. The Notice was posted outside the County Council Administrative Office in the County's Administration Building and online on the Council's website at sussexcountyde.gov/agendas-minutes.¹ On September 18, 2019, the Council amended the agenda for its September 24th meeting twice. The amended agendas each stated that they were amended and included a footnote explaining that the amendment was "to address a matter which arose after the initial posting of the agenda but before the start of the Council meeting."

¹ Response Letter.

POSITIONS OF THE PARTIES

In your Petition, you allege that the Council violated FOIA by (1) effectively not posting its notice and agenda for the September 24th meeting within seven days of the meeting because it was posted at 5:35 pm, after the County's Administration Building was closed to the public; and (2) not giving a reason for amending the agendas after their initial posting. Council responds first, that it holds weekly meetings on Tuesdays. It could not finalize its agenda for the September 24th meeting until its September 17th meeting was over and that meeting did not conclude until 4:45 pm, after business hours. Additionally, FOIA has no requirement that notices be posted prior to the end of the business day. Second, the Council argues that seven days in advance of September 24th would be September 18th, not September 17th, and since the Council made both of its amendments on September 18th they were not late, and therefore did not require an explanation as to why they were delayed. Even if seven days in advance of September 24th was September 17th and not the 18th, the Council did give a reason as required by 29 *Del. C.* § 10004(e) for amending the original notice.

DISCUSSION

Delaware's FOIA provides that "all public bodies shall give public notice of their regular meetings ... at least 7 days in advance thereof."² "Public notice ... shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting..."³ The notice shall include an agenda, but "[w]hen the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth on the agenda."⁴

The Council's posted notice of its September 24th meeting adhered to the requirements of FOIA because it was posted on September 17th, seven days in advance of the meeting, at the County's Administration Building, which is the principal office of the public body. Notice was also posted online. We understand your argument that by posting notice in the County's Administration Building after it was closed to the public, members of the public who received notice of the meeting through that posting would not have been able to view it until September 18th. However, "the purpose of FOIA is to ensure that public business is done in the open, so that citizens can hold public officials accountable. The purpose of FOIA is *not* to provide a series of hyper-technical requirements that serve as snares for public officials, and frustrates their ability to do the public's business, without adding meaningfully to citizens' rights to monitor that

² 29 *Del. C.* § 10004(e)(2).

³ 29 *Del. C.* § 10004(e)(4).

⁴ *Id.*

business.⁵ Requiring a public body who meets on a weekly basis to reorganize its meeting schedule to meet early enough in the day on a weekday to conclude their business and get an agenda out prior to the end of business day would unnecessarily frustrate the Council's ability to do the public's business and is not mandated by FOIA. Absent evidence of an intent to frustrate FOIA's purposes, we conclude based upon the facts before us that no such intent was present.

The Council amended its agenda for the September 24th meeting twice, both times on September 18th.⁶ You argue that the Council failed to give a reason for why the two items added to the agenda were not on the initial agenda. The record does not support your position. Council's provided reason was that the agenda was amended "to address a matter which arose after the initial posting of the agenda, but before the start of the Council meeting."⁷ We interpret your complaint to challenge the sufficiency of Council's reason.

FOIA allows a public body flexibility to amend its agenda when items come up suddenly that cannot be deferred to a later meeting.⁸ Public bodies need to give a reason for why the item was not included in the original agenda, but the reason does not need to be detailed.⁹ Our Office will review the sufficiency of the reason and whether the delayed agenda item could have been postponed in order to give the public full notice.¹⁰

The Council's amended agenda to its September 24th meeting stated that it was amended to "address a matter which arose after the initial posting of the agenda but before the start of the Council meeting." In response to your petition, the Council further explained the amendments, why they were not included in the original agenda and why they could not wait until the next Council meeting.¹¹ The first amendment was to discuss a personnel board appointment. It was not included in the original agenda because the person filling the role did not resign from the position until September 18th. It was necessary for the Council to address at its September 24th

⁵ *Lechliter v. Del. Dep't of Elections of Nat. Res. & Environ. Contr.*, 2017 WL 117596 at *2 (Del. Ch. Jan. 12, 2017).

⁶ The Council argued in its Response that it should be able to amend its agenda without any explanation up until seven days prior to the date of the meeting. This interpretation is not supported by statute. 29 *Del. C.* § 10004(e)(5) requires an explanation for any delay in posting an agenda after the initial posting of the notice regardless of when that notice is posted. As such, the Council was required to provide the public with a reason for each of the amendments it made to the agenda for its September 24th meeting.

⁷ Response Letter.

⁸ *Att'y Gen. Op.* 06-IB08 (Apr. 6, 2006) quoting *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003).

⁹ 29 *Del. C.* § 10004(e)(5) and *see also Att'y Gen. Op.* 08-IB06 quoting *Att'y Gen. Op.* 02-IB22 at 6 (September 13, 2002).

¹⁰ *Att'y Gen. Op.* 08-IB06 (Mar. 27, 2008).

¹¹ Response Letter.

meeting because ongoing personnel matters required the attention of a full Personnel Board. The second amendment was to discuss the City of Seaford – Utility Project Acceleration Request. The Council received a letter from the City of Seaford on September 18th. The City of Seaford was seeking grant funding and the grant request needed to be submitted by September 27, 2019, therefore there was not time to wait until the following meeting of the Council. We are satisfied that both amendments addressed items that could not be delayed to a later meeting and that there is no evidence that you or any member of the public was harmed by the delay.

CONCLUSION

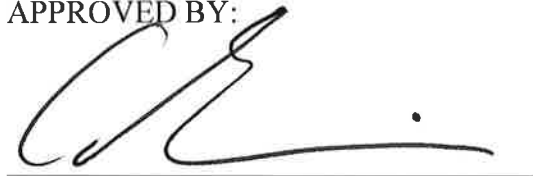
For the reasons discussed above, it is our determination that the Council did not violate FOIA as alleged.

Very truly yours,

/s/ Carla A.K. Jarosz

Carla A.K. Jarosz
Deputy Attorney General

APPROVED BY:



Aaron Goldstein, State Solicitor

cc: J. Everett Moore, Esquire (via email)