



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion 20-IB06

February 5, 2020

VIA EMAIL

Frank Daniel Cannon, Jr.
seafordski@hotmail.com

RE: FOIA Petition Regarding the City of Seaford

Dear Mr. Cannon:

We write in response to your correspondence alleging that the Board of Adjustment of the City of Seaford (“City”) 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 City has not violated FOIA as alleged.

BACKGROUND

The City’s Board of Adjustment (“BOA”) held a public meeting on December 4, 2019. At the meeting, the City considered a variance request for “a producer of refurbished motorcycle and ATV parts to operate out of the existing building.”¹ The agenda gave public notice of one item: “Case No. V-08-19: Harim Millsboro, located on Shipley St, Tax Map and Parcel 531-13.10-19.00, seeks a variance for Showtime Power sports, producer of refurbished motorcycle and ATV parts to operate out of the existing building.”²

¹ Response, Ex. A.

² Petition (quoted in original format).

Your Petition asserts that the City violated FOIA by failing to adequately identify the variance, the property owner of the subject property, and the location of the subject property in the December 4, 2019 BOA agenda. More specifically, you first allege that this variance is not the “mundane” type of variance typically brought to the BOA; instead it involves a special exception that is not in the City Code.³ Without the approval of this variance, you contend that there was a “looming likelihood that substantially higher value improved commercial property might well become substantially lower value residential property.”⁴ You argue that at a minimum, the agenda should have clearly noticed that the variance was for a new, non-conforming business (different than a hatchery) to begin to operate in a lower density residential zone. Without such information, you contend the public could not know the importance of this request. Second, you allege that the property owner was improperly identified, as there was no part of the Harim Millsboro properties located on Shipley Street, Harim Millsboro has no mailing address on Shipley Street, and only one of the two co-owners of the property was listed on the notice, omitting Allen Harim Foods LLC whose name has particular significance in Seaford. Third, you argue the BOA did not include proper identification of the property. You assert that unlike past variances, this variance was not listed with a street address, which would not allow the public to find the property through online mapping or by a physical search. Also, you argue that the City should have used the legal property description and that the use of this tax parcel number on the agenda is misleading, as the larger parcel and two other parcels were divided into eleven new tax parcels in 2018. You state that this same tax parcel number had been used at least three times in past agendas to identify other portions of the parcel. Considering these defects in their totality, you contend that this December 4, 2019 BOA agenda is improper under FOIA.

On January 14, 2020, the City’s legal counsel sent a response to the Petition, asserting the City has not violated FOIA (“Response”). The City attached a copy of the approved minutes for the December 4, 2019 meeting, including the portion in which you offered comments. Because you and other members of the public attended the hearing and you acknowledged the agenda’s compliance with FOIA in previous correspondence, the City asserts that—coupled with your vocal opposition to the variance—these factors indicate that “this Complaint relates more to [your] disagreement with the BOA’s decision on the variance application than a genuine belief that there was a FOIA violation concerning notice of the meeting.”⁵ The City asserts that the applicant, Harim Millsboro, LLC, was properly identified on the agenda, attaching a copy of the hearing application indicating as such.⁶ The City also states that the agenda properly identified the larger parcel on which the subject property sits; there was simply no street address to assign because a request for the subject property street address had not yet been submitted to the appropriate authority. Finally, the City argues that the agenda properly identified the type of variance as “a

³ Petition.

⁴ *Id.*

⁵ Response. We note that a petitioner’s purpose or belief is not germane to our analysis in this determination.

⁶ Response, Ex. C.

variance for Showtime Power Sports, producer of refurbished motorcycle and ATV parts to operate out of the existing building.” Pointing to the meeting minutes, the City states that this description certainly matches the type of variance discussed.

DISCUSSION

The purpose of FOIA is “to further the accountability of government to the citizens of this State” by allowing the public the opportunity to observe and monitor decision-making by public bodies.⁷ To achieve this objective, an agenda for a public meeting must include a “general statement of the major issues” which a public body expects to discuss⁸ and must be worded in “plain and comprehensible language.”⁹ Delaware courts have opined on the means to determine the sufficiency of an agenda:

In order that the purpose of the agenda requirement be served, it should, at least, “alert members of the public with an intense interest in” the matter that the subject will be taken up by the [public body]. In other words, members of the public interested in an issue should be able to review a notice and determine that an issue important to them will be under consideration. . . . FOIA provides an informational right to allow public involvement in government.¹⁰

“[T]he point of the agenda is to put the public on notice, not to answer every question about the agenda item.”¹¹ BOA’s agenda must be analyzed against these requirements.¹² The December 4, 2019 agenda included the name of the applicant, the fact the applicant is seeking a variance, the purpose of the variance, the tax parcel number on which the variance would be located, and the

⁷ 29 Del. C. § 10001.

⁸ 29 Del. C. § 10002(a).

⁹ *Chem. Indus. Council of Del. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994).

¹⁰ *Lechliter v. Del. Dep’t of Natural Res. & Env’t Control*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017) (quoting *Ianni v. Dep’t of Elections of New Castle Cty.*, 1986 WL 9610, at *4 (Del. Ch. Aug. 29, 1986)).

¹¹ *Del. Op. Att’y Gen.* 10-IB12, 2010 WL 4154564, at *1 (Sept. 28, 2010).

¹² *See also Lechliter v. Becker*, 2017 WL 117596, at *2 (Del. Ch. Jan. 12, 2017) (“[T]he 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 frustrate their ability to do the public’s business, without adding meaningfully to citizens’ rights to monitor that public business.”).

case number.¹³ Considering this description in its totality, we find that the December 4, 2019 BOA agenda meets FOIA’s minimum requirements and provides sufficient notice to the members of the public with an intense interest that this variance will be discussed.¹⁴

CONCLUSION

Based on the foregoing, it is our determination that the City 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: Daniel A. Griffith, Attorney for the City of Seaford

¹³ You allege, and the City does not address, that the agenda includes an improper mailing address for Allen Harim, LLC. Even if we assume the address on the agenda is an error, we find that the other information provided in the notice adequately alerts the public about the variance to meet the minimum standards of FOIA.

¹⁴ See *Del. Op. Att’y Gen.* 10-IB12, 2010 WL 4154564, at *2 (finding no violation of FOIA when the Sussex County Board of Adjustment’s agenda identified one proposed variance’s location by “West of Road 78” and a second proposed variance’s location by “Route 26” and noting that “anyone concerned with Road 78 or Route 26 could have availed themselves of several means of getting more information”).