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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion 20-IB26

October 28, 2020

VIA EMAIL

Marie Hatkevich
Mhatkevich54@gmail.com

Harvey Shulman
HarveyJShulman@gmail.com

RE: Two FOIA Petitions Regarding the City of Rehoboth Beach

Dear Ms. Hatkevich and Mr. Shulman:

We write in response to your two separate communications alleging that the City of Rehoboth Beach violated the open meeting requirements of the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). Ms. Hatkevich submitted the first petition asserting that the August 21, 2020 City Commissioners’ meeting agenda violated FOIA (“Hatkevich Petition”) and Mr. Shulman and Ms. Hatkevich submitted a second consolidated petition (“Hatkevich and Shulman Petition”) alleging the same (collectively, “Petitions”). We treat each communication 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 and issue this combined opinion to address both Petitions.

For the reasons set forth below, we find that the City violated FOIA by improperly amending its Board of Commissioners meeting agenda for the August 21, 2020 meeting.

BACKGROUND

On August 14, 2020, the City posted an agenda for its August 21, 2020 Board of Commissioners meeting with the following item: “nomination of individual to fill remaining two

year term on Rehoboth Beach Board of Adjustment vacated by Linda Kauffman and corresponding vote.”¹ You allege that the Mayor selected the individual for nomination and disclosed the identity of the individual to certain citizens, but the agenda did not include the name of this individual and the City did not publicly announce the name of the individual prior to the meeting by another means.

The Hatkevich Petition argues that denying Rehoboth’s citizens the opportunity to know the name and background of this nominee, to be voted on by the Board of Commissioners, denies Rehoboth citizens’ right to know and have input in the selection of an official who will hold a two-year appointment. The Hatkevich and Shulman Petition also alleges that this agenda item violated FOIA, noting that as early as August 14, 2020, the Mayor knew who he intended to nominate, yet the meeting agenda did not disclose the name of the proposed appointee. You argue that the *Ianni v. Dep’t of Elections of New Castle Cnty.*² case applies to these circumstances, and the intentional withholding of the appointee’s name, combined with the fact that this agenda item was inexplicably vague compared to the rest of the detailed agenda, failed to meet the spirit or the letter of FOIA law by drawing public attention to the individual to be nominated to this important board. Further, the Hatkevich and Shulman Petition alleges that no other FOIA exemption precludes the release of the appointee’s name, as the FOIA exemption for personnel matters is inapplicable to a board appointee. Overall, you assert that the “public’s right to contact the [City] with feedback on any proposed [Board of Adjustment] member is meaningless unless the public knows – in the meeting agenda published 7 days in advance – SPECIFICALLY WHO is being nominated and voted on.”³ The Hatkevich and Shulman Petition requested interim injunctive relief or a written warning to the City before the meeting⁴ and asked this Office to find that the City violated FOIA by failing to include the name of the nominee in the agenda.

The City’s counsel replied on the City’s behalf on October 8, 2020 (“Response”), arguing that its original agenda was sufficient as it gave a general statement of the subject to be discussed and alerted any member of the public with an intense interest in the subject that this matter would be discussed. The City’s counsel distinguished Attorney General Opinion 98-IB08, arguing in that case the agenda was improper--not for failing to include the nominee’s name, but for failing to include notice that a vote would occur. The Response also asserts that although the City did not initially include the nominee’s name in the agenda when it was originally posted, the City did, in fact, “supplement the agenda” with the the name of the nominee.⁵ Specifically, the City claims

¹ Hatkevich Petition.

² 1986 WL 9610 (Del. Ch. Aug. 29, 1986).

³ Hatkevich and Shulman Petition.

⁴ The authority to issue injunctive relief for a FOIA violation is confined to the courts. 29 *Del. C.* § 10005.

⁵ Response.

the agenda item was supplemented on August 18, 2020 with a link to the nominee’s application showing his name.

DISCUSSION

As stated in 29 *Del. C.* § 10001, FOIA allows citizens to observe the performance of public officials and to monitor the decisions of those officials. “An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.”⁶ FOIA requires a public body to post a notice and agenda at least seven days prior to a regular meeting but permits a public body to amend an agenda up to six hours prior to a meeting, provided that the reason for the delay is set forth briefly in the agenda.⁷ However, “this exception does not authorize a public body to amend the agenda prior to a meeting for any reason, but rather applies ‘to add items that come up suddenly and cannot be deferred to a later meeting.’”⁸

In this case, the City amended the agenda to include the name of the nominee less than seven days prior to the meeting.⁹ The Response included a copy of the amended agenda with the nominee’s name in a link to the nominee’s application under the agenda item; the date of posting for this amended agenda is not indicated. This amended agenda does not provide a reason for the delay in adding this information.¹⁰ As such, we find that the City violated FOIA in this regard.

The Petitions suggest that the appropriate remedy here is invalidation of the vote to nominate this Board member. In determining remediation for an improperly-noticed nomination and vote to fill a vacant Council seat, this Office has previously concluded that “the issue of electing public officials is such an important fundamental public right that violations which might be excusable under another set of circumstances are not excusable in this context.”¹¹ Pursuant to 29 *Del. C.* § 10005, this Office is charged with making a written determination of “whether a

⁶ *Del. Op. Att’y Gen.* 05-IB11, 2005 WL 1209241, at *2 (Apr. 11, 2005) (citation omitted).

⁷ 29 *Del. C.* § 10004(e).

⁸ *Del. Op. Att’y Gen.* 05-IB15, 2005 WL 2334344, at *2 (Jun. 20, 2005) (citation omitted).

⁹ The City asserts that the updated agenda was posted on August 18, 2020; the petitioners assert that this date is incorrect, alleging the agenda was updated on August 20, 2020 at the earliest. *See* Response; Email dated Oct. 13, 2020 from Ms. Hatkevich.

¹⁰ Although previous opinions typically involve the addition of new items to the agenda, this opinion involves the addition of information to an agenda item. We interpret FOIA’s time limitation on amending agendas to be also applicable to these circumstances where the description of an agenda item is amended.

¹¹ *Del. Op. Att’y Gen.* 98-IB08, 1998 WL 648718, at *3 (Sept. 1, 1998).

[FOIA] violation . . . has occurred or is about to occur.”¹² Although remediation may be recommended when appropriate, this Office is not vested with the authority to impose injunctive relief or punitive measures for FOIA violations.¹³ In *Ianni v. Dep’t of Elections of New Castle Cnty.*, the court cautions “the remedy of invalidation is a serious sanction and ought not to be employed unless substantial public rights have been affected and the circumstances permit the crafting of a specific remedy that protects other legitimate public interests.”¹⁴ A court may also consider the impact of “any adverse consequences upon innocent parties.”¹⁵ Thus, although this improper notice issued for a nomination of a Board member may affect substantial public rights, we do not determine any recommended remediation within our Office’s authority is feasible at this time.

CONCLUSION

Thus, it is our determination that the City violated FOIA by improperly amending its agenda. We do not determine any recommended remediation within our Office’s authority is feasible at this time.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Glenn C. Mandalas, Attorney for the City of Rehoboth Beach

¹² 29 *Del. C.* § 10005(e).

¹³ 29 *Del. C.* § 10005(d).

¹⁴ 1986 WL 9610, at *7.

¹⁵ *Chemical Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *15 (Del. Ch. May 19, 1994) (finding the appropriate remedy is to void the regulations, in part because they are not “presently enforced” nor has the Board shown that a brief period pending a remedial rulemaking process will harm the public).