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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB14

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VIA EMAIL

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RE: FOIA Petition Regarding Sussex County

Dear Petitioners:

We write in response to your correspondence alleging that Sussex County violated Delaware's 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 regarding whether a violation of FOIA has occurred or is about to occur. As discussed herein, we determine that the County has not violated FOIA as alleged in the Petition.

BACKGROUND

This Petition challenges the process by which the County Council and the County's Industrial Revenue Bond Committee approved the application for a series of Industrial Revenue Bonds for a gas production facility in Seaford, Delaware ("Facility"). To review the Bond application, the Industrial Revenue Bond Committee held a public hearing on March 17, 2021; the petitioners state that no members of the public attended. The Council then met on April 27, 2021 and approved the Bond application. The Petition alleges that the Council and the Committee violated several notice and public involvement requirements in this process.

The Petition alleges that the Committee's March 17, 2021 public hearing to consider the Bond application had multiple deficiencies. The Petition contends that the Committee did not provide reasonable notice of the March 17, 2021 hearing, as evidenced by the fact that not one citizen appeared at the hearing, despite significant public opposition in other hearings related to the Facility. In fact, the petitioners assert over 275 comment letters and a letter to the Governor signed by 32 public interest groups asking for his intervention were sent to the County in opposition to the Facility's conditional use application; this conditional use hearing was held on March 16, 2021, the day before the Committee hearing. In addition to alleging the County failed to follow the state law requirements in *9 Del. C. § 7002* for newspaper publication, the Petition maintains that the County's electronic posting of the hearing notice was deficient. After first noting that no notice on the website was available when the petitioners became aware the hearing had taken place, the petitioners assert that the electronic notice did not state it was a meeting or hearing in the title of the meeting, that it did not post specific information, such as the application, to allow the public to "meaningfully engage with the Committee or assess the importance of the 'meeting,'" and that the website had too many layers of vague language to reach this agenda.¹ In addition, the Petition contends that the County failed to inform the public about the Committee and its role in this process, noting that the Committee does not appear on the list of committees on the County's website and the public was not told about the Committee, even though the Council held a public hearing about the Facility's conditional use the day before the Committee hearing, which two members of the Committee attended.

With respect to the Council's meeting on April 27, 2021 in which the Council considered the Committee's recommendation, the Petition makes a single allegation - that the County failed to make a timely electronic posting of the agenda. The petitioners attached a print-out from the County's website, stating no agenda was available at 8:49am on April 21, 2021.

The County, through its legal counsel, provided a response on June 2, 2021, stating it provided adequate notice under FOIA ("Response"). The County maintains that the FOIA statute has no requirements for posting Council meeting notices or agendas on its website but does so as a service to the public. Noting that a lack of attendance is not a deficiency under FOIA, the County argues it properly noticed both the March 17, 2021 Committee hearing and the April 27, 2021 Council meeting by physically posting notices and agendas seven days in advance at the County Administration Building where the Committee hearing was held and the County Council

¹ Petition.

Administrative office is located.² To demonstrate its compliance, the County attached a copy of the March 17, 2021 notice and agenda along with a sworn affidavit from a staff member attesting that the notice and agenda were posted at 9:00am on March 10, 2021, which is seven days prior to the public hearing, as mandated by 29 *Del. C.* § 10004(e)(2). Although electronic posting is not required by FOIA, the County states that it posted notices about this Committee hearing in two places on its website – its “Meeting Calendar” and “Legal Notices” sections - on March 10, 2021 at 9:51am. In the “Meeting Calendar” section, the “Industrial Review Bond Committee” link directed to the agenda. Although the application itself was not included with the agenda, the County points out that the agenda describes the Bond application in detail and directed the public to the Finance Director to receive a copy. Although the County maintains that the requirements for notice under 9 *Del. C.* §7002 and the Internal Revenue Code are outside the scope of the FOIA statute and this Office’s authority to opine, the County also claims that it met those requirements.

For the April 27, 2021 Council meeting, the County maintains that it satisfied FOIA by posting the hard copy notice and agenda at the County Administration Building at 4:20pm on April 20, 2021 and attached an affidavit of the staff who performed the posting. Due to the Council’s weekly meetings scheduled every Tuesday, the County states it cannot post the notice sooner in the day, as the Council meetings often run past business hours and the County officials who set the agenda must attend the meeting and may incorporate unfinished matters into next week’s meeting agenda. Although FOIA does not require an electronic posting, the County provided evidence that it electronically posted notice of its Council meeting on its website the next day at 9:38am. The County also alleges that two of the petitioners contacted the County prior to the meeting, indicating both had actual notice of the meeting. Finally, the County noted that the Committee members present at the conditional use hearing held the day before had no obligation to raise the Bond application, as the conditional use hearing is a completely different hearing subject to different statutes, rules, and procedures, and as discussed *infra*, the County complied with FOIA in noticing the Committee’s public hearing.

DISCUSSION

FOIA requires public business to be performed in an open and public manner so that citizens “have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy.”³ This Petition alleges that for both the March 17, 2021 Committee hearing and April 27, 2021 Council meeting, the County failed to provide proper public notice on its website. FOIA requires that public bodies give notice of the date, time, and location of their regular meetings, along with the agenda, if available, at least seven days in advance of the meeting and to make a conspicuous posting of the notice and agenda at the principal office of the public body holding the

² The County states that the Committee meets infrequently; in fact, the last Committee meeting was held in 2016. *See* Response.

³ 29 *Del. C.* § 10001.

meeting, or if no such office exists, at the place where the meetings are regularly held.⁴ The County's counsel states that the Committee has no principal office, so the Committee's notice and agenda was posted at the County Administration Building where the Committee's public hearing was held, and the Council meeting notice and agenda was posted at Council's principal administrative office at the County Administration Building. As evidence that these requirements were met, the County submitted copies of the notices and agendas and sworn affidavits from the staff responsible for physically posting these items on March 10, 2021 and April 20, 2021, which constitutes seven days' advance notice. Counties are specifically excluded from the requirement to make any electronic postings for its meetings on their websites, but in this instance, the County made electronic postings after the physical postings were completed.⁵ Based on the foregoing, we conclude that the County posted the relevant March 17, 2021 and April 27, 2021 notices and agendas in the proper locations and within the time required by FOIA.

The Petition also alleges that the County failed in its obligations to inform the public of its upcoming Committee public hearing for the Bond application at the conditional use hearing held the day before and that the County website does not adequately inform the public about the Committee's existence and functions. FOIA does not require the County to inform the public about the Bond application at a separate hearing, nor does it require the County to incorporate general information about the Committee on its website. Additionally, this Opinion does not address the Petition's allegation regarding the other Delaware statutory provisions for newspaper publication, because this Office's authority is limited to determining whether violations of the FOIA statute occurred.⁶

⁴ 29 *Del. C.* § 10004(e)(1), (4); *see also Del. Op. Att'y Gen.* 19-IB57, 2019 WL 6047160, at *2 (Oct. 24, 2019) (determining that Sussex County Council's posting of its notice after business hours seven days in advance of the meeting was timely notice under FOIA).

⁵ 29 *Del. C.* § 10004(e)(4) (“In addition, for all noncounty and nonmunicipal public bodies, public notice required by this subsection shall include, but not be limited to, electronic posting on a designated State of Delaware website, approved by the Registrar of Regulations by May 1, 2013, which shall be accessible to the public. In addition, all public bodies in the executive branch of state government that are subject to the provisions of this chapter shall electronically post said notice to the designated State of Delaware website approved by the Secretary of State.”).

⁶ 29 *Del. C.* § 10005(e); *see e.g., Del. Op. Att'y Gen.* 18-IB50, 2018 WL 6015765, at *2 (Oct. 12, 2018) (finding that this Office has “no authority under FOIA to direct [the public body] with regard to this Office's interpretation of any other Delaware statute”); *Del. Op. Atty. Gen.* 96-IB28, 1996 WL 517455, at *2 (Aug. 8, 1996) (“To the extent you allege that Sussex County has not complied with the requirements of 9 *Del. C.* § 6921, that matter is beyond the jurisdiction of this office and is not addressed here”).

CONCLUSION

Based on the foregoing, we determine that the County has not violated FOIA as alleged in the Petition.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: J. Everett Moore, Jr., County Attorney