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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 22-IB10**

**April 14, 2022**

**VIA EMAIL**

Joe Berg  
[Joeberg55@yahoo.com](mailto:Joeberg55@yahoo.com)

**RE: FOIA Petition Regarding the Village of Ardencroft**

Dear Mr. Berg:

We write in response to your correspondence alleging that the Village of Ardencroft 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 more fully herein, we conclude that the Village violated FOIA by failing to demonstrate it gave timely notice of its March 17, 2022 meeting agenda and failing to adequately describe the major items expected to be discussed on its agendas. We find that the Village did not violate FOIA by meeting without an anchor location at its March 17, 2022 virtual meeting.

**BACKGROUND**

The Village of Ardencroft is an incorporated municipality established by the State of Delaware and governed by the Charter of Ardencroft.<sup>1</sup> The Village planned to hold a virtual public Town Meeting on March 17, 2022.<sup>2</sup> This Petition was filed prior to the meeting and asserts that

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<sup>1</sup> Response, p. 1.

<sup>2</sup> According to the Charter, “[t]he government of the Village and the exercise of all powers conferred by this Act, except as otherwise provided herein, shall be vested in the Town Meeting of the Village of Ardencroft, . . . .” The Town Meeting consists of all the persons over the age of

the agenda was received in the mail two days before the meeting but should have been received two weeks in advance. The Petition asserts that despite multiple new issues being presented at various board meetings, the agenda over the past year has not been updated. For example, you note that at the September 16, 2021 meeting, the Village voted to hire a new trash management company and voted to adopt a hazard mitigation plan without prior notice to the public. Both the September 2021 and March 17, 2022 agendas were included with the Petition, citing various general topics, such as officer reports, updates on ongoing Town Business, and committee reports. You further allege that the meeting was noticed as virtual, but you believe it should have been held in person due to the Governor's issuance of the *Termination of State of Emergency for the State of Delaware Due to Public Health Threat* on March 1, 2022. You contend that the March 17th meeting should be rescheduled.

Counsel to the Village provided a response on March 24, 2022 ("Response"). The Village states that there are three issues to consider: 1) the virtual format of the meeting; 2) the delivery and content of the meeting agenda; and 3) the request to postpone the March 17th meeting. The Village asserts that it is permitted by 29 *Del. C.* § 10006A(b) to hold its meetings in a virtual format outside of a public health emergency. With respect to the delivery and content of the agenda, the Village contends that FOIA does not require the agenda to be sent two weeks in advance, and the Charter and By-laws have no such requirement. The Village sets the dates of the meetings months in advance and when the agendas are determined, they are mailed to each resident, along with a copy of the prior meeting's minutes. For new items, the Village states that it follows Robert's Rules of Order which allow for the introduction of new business. The Village asserts that the Charter and By-laws have no requirements for the content of an agenda; the discussion items that are tabled for the next meeting are noted in the minutes, and the minutes, which are included in the mailing to the residents, are approved at the start of the meeting. The Village asserts that the specific items you cited would have been contained in the minutes as ongoing topics for discussion. Regarding the request to reschedule, the Village notes that this request is moot, as the meeting has already been held, and even if it wanted to reschedule, the Village did not receive your request in time to give the twenty-four hours' notice required for a rescheduled meeting. The Village states that the dates for the future meetings are posted many locations, including the Village's website and a monthly publication serving Arden, Ardencroft, and Ardentown, and are listed on the mailed agendas as well.

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eighteen who have resided in the Village for a period of 30 consecutive days. For purposes of this Opinion, we refer to the governing body as the "Village."

## DISCUSSION

A public body carries the burden of proof to demonstrate compliance with FOIA.<sup>3</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>4</sup> This Petition presents three allegations for consideration: 1) the fully virtual format of the March 17, 2022 meeting was improper under FOIA; 2) the March 17, 2022 meeting agenda was not timely posted as required by FOIA; and 3) the agendas for the past year’s meetings provide insufficient detail of the items discussed, as required by FOIA.<sup>5</sup> We address each claim in turn below.

### *Virtual Format of the March 17, 2022 Meeting*

The Petition claims that the March 17, 2022 meeting was required to be held in person and further alleges that the fully virtual format was improper. “During a state of emergency, a public body may hold a virtual meeting at which members participate through the use of an electronic means of communication without an anchor location” if certain requirements are met, including the requirements contained in both subsections (c) and (e).<sup>6</sup> In other words, during a state of emergency, a public body does not have to provide a physical location where the public can attend in person.

On March 1, 2022, the Governor issued a *Termination of State of Emergency for the State of Delaware due to a Public Health Threat*, along with a *Declaration of a Public Health Emergency for the State of Delaware*. A “state of emergency” is broadly defined as “an emergency proclaimed pursuant to an emergency order by the Governor.”<sup>7</sup> The definition also states that “all emergency orders issued under this chapter shall indicate the nature of the emergency or disaster, the area or areas threatened, and the conditions which have brought it about and may limit the order to a geographic area or specific resources.”<sup>8</sup> It is evident from the title that the *Declaration of a Public Health Emergency for the State of Delaware* continues to proclaim a public health emergency. It is an order issued “pursuant to Title 20, Chapter 31, Subchapter V of the Delaware

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<sup>3</sup> 29 Del. C. § 10005(c).

<sup>4</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1011 (Del. 2021) (holding that “any person seeking to establish facts based on personal knowledge must do so under oath, regardless of that person’s title or profession”).

<sup>5</sup> This Office’s authority is limited to determining claims involving FOIA. 29 Del. C. § 10005(e) (“Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur.”). Thus, all claims regarding the Village Charter or By-laws are not considered herein.

<sup>6</sup> 29 Del. C. § 10006A(e).

<sup>7</sup> 20 Del. C. § 3102(10).

<sup>8</sup> *Id.*

Code, to control and prevent the spread of COVID-19 within the State of Delaware.” As this order continues to declare an emergency related to COVID-19, we determine that a state of emergency for purposes of Section 10006A was in effect at the time of the March 17, 2022 meeting. As such, we find that the Village was permitted under FOIA to hold its meeting fully virtual.

#### *Timeliness of the March 17, 2022 Meeting Agenda*

The Petition asserts that the agenda for the March 17, 2022 meeting was not provided on a timely basis. FOIA requires that public bodies give at least seven days’ notice of any meetings and shall include “the date, time, and place of a meeting, including whether the meeting will be conducted under § 10006A of this title” and the agenda, if it “has been determined.”<sup>9</sup> If the agenda is not posted at least seven days in advance with the public notice of the meeting, the agenda must be posted at least six hours in advance of the meeting, and the reasons for the delay in posting must be briefly set forth in the agenda. Public bodies must conspicuously post the agenda at the principal office of the public body or if no such office exists, the place where the meetings are generally held, unless the meeting is virtual without an anchor location in accordance with Section 10006A.<sup>10</sup> As the March 17, 2022 meeting took place during a state of emergency, the Village was not required to post at those physical locations. Absent a specific requirement for the manner of publishing notice, we consider the facts presented to determine if the Village’s manner of publishing notice reasonably meets FOIA’s requirement of notifying the public of the March 17, 2022 meeting and its agenda seven days in advance.

The Village sets its meeting dates many months in advance and thus, claims it cannot set the agenda at the time the meetings are set. The Village’s attorney states that the dates of the public meetings are published various places, including a local publication and on its website. The Village did not provide copies of such notices, nor specify when the agendas were mailed, except to say they are mailed after the agenda is determined.<sup>11</sup> As the Village has not submitted competent evidence of when the agendas are mailed, published to its website, or otherwise publicly noticed,

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<sup>9</sup> 29 *Del. C.* § 10004(e)(2).

<sup>10</sup> 29 *Del. C.* §§ 10004(e), 10006A(e).

<sup>11</sup> This Office considered a similar practice of delaying agendas in Attorney General Opinion No. 17-IB38. In that case, the City of Wilmington set its meeting dates at the beginning of the year, and by noon on the day before the meeting, the agendas were posted. This Office determined that this practice of routinely delaying the posting of the agenda violated FOIA. The purpose of posting the agenda is to alert citizens so that those interested in an agenda item will know to attend the meeting, and requiring a reason for the delay for an agenda posted after seven days implied that a delay in posting the agenda is intended to be the exception to the rule. *Del. Op. Att’y Gen.* 17-IB38, 2017 WL 3628771, at \*5 (Aug. 11, 2017) (citing *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at \*4 (Del. Ch. Aug. 29, 1986)). This Office held that “we do not interpret FOIA to permit a public body to avoid posting an agenda at least seven days in advance of a meeting by noticing the meeting itself so far in advance that the agenda for each specific meeting cannot ever be available.” *Id.*

we determine that the Village has not demonstrated that the agenda for the March 17, 2022 meeting was timely provided to the public in accordance with FOIA.

### *Content of the Meeting Agendas*

The Petition finally asserts that the agendas for the past year do not adequately describe the items for discussion. We consider the propriety of the Village's agendas for meetings occurring in the last six months before the Petition.<sup>12</sup> FOIA requires that an agenda must "include but is not limited to a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor under § 10004(b) of this title."<sup>13</sup> The agenda should "alert members of the public with an intense interest in' the matter that the subject will be taken up by the [public body]."<sup>14</sup> "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."<sup>15</sup> This Office has determined that "[w]hile the statute requires only a 'general statement' of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfies neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public's attention to the fact that specific important subject will be treated."<sup>16</sup> In this instance, the provided agendas merely state general topics: "Officer's Reports," "Standing Committee Reports," "Special Committee Reports," "Old Business," "New Business (as brought to the Town at the Meeting)," "Good & Welfare," "Updates on ongoing Town Business" and "Committee Reports."<sup>17</sup> This Office has previously determined

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<sup>12</sup> DEL. DEP'T. JUST., RULES OF PROCEDURE FOR FOIA PETITIONS AND DETERMINATIONS, at 3 (2019), <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2019/09/DDOJ-Rules-of-Procedure-for-FOIA-Petitions-and-Determinations.9.26.19.pdf>; see also *Del. Op. Att'y Gen.* 17-IB31, 2017 WL 3426271, at \*1 (July 24, 2017) (stating "this Office does not generally consider petitions alleging FOIA violations occurring more than six months prior to our receipt of the petition" and "this is a general rule that we adhere to 'for fairness and practicality reasons'"); *Del. Op. Att'y Gen.* 16-IB14, 2016 WL 3462345, at \*2 (June 9, 2016); *Del. Op. Att'y Gen.* 12-IIB11, 2012 WL 5894039, at \*5 (Nov. 7, 2012) ("We believe your petition is untimely and you have provided us with no reason to deviate from our long-standing policy and practice in this case."); *Del. Op. Att'y Gen.* 05-IB26, 2005 WL 3991284, n. 3 (Aug. 29, 2005).

<sup>13</sup> 29 *Del. C.* § 10002(a).

<sup>14</sup> *Lechliter v. Del. Dep't Nat. Res. and Env'tl Control*, 2017 WL 2687690, at \*2 (Del. Ch. Jun. 22, 2017) (citing *Ianni*, 1986 WL 9610, at \*4).

<sup>15</sup> *Id.*

<sup>16</sup> *Del. Op. Att'y Gen.* 97-IB20, 1997 WL 800814 (Oct. 20, 1997) (citing *Ianni*, 1986 WL 9610, at \*5).

<sup>17</sup> Petition.

that general headings such as these are not sufficient to give notice of items that the public body intends to discuss at the meeting.<sup>18</sup> In this case, the Village states that it describes the old business items for discussion in the minutes and includes the minutes with its agenda mailing; we find that this practice does not comply with the requirements of FOIA.

The Village also argues that it is permitted to raise new items of business at the meeting without notice, pursuant to Robert's Rules of Order. Section 10004(e)(3) states that an agenda may include additional items which arise at the time of the public body's meeting. However, these additional items are limited to those items that naturally evolve from a publicly-noticed item that is already on the agenda.<sup>19</sup> Despite the general categories noted on the agenda, the minutes from the September 2021 meeting indicate that the Village is discussing and taking action on specific contracts and other major items that could have been better described on the agenda. FOIA requires that the agenda provide notice of the major items intended for discussion and that those items should be added to the agenda with sufficient specificity to alert members of the public with an intense interest in the matters for discussion.<sup>20</sup> Thus, we find that the Village's practice over at least the last six months of failing to specifically describe major items of old and new business on its agendas that are intended for discussion or action violates FOIA.

#### *Remediation*

Having found that the Village violated FOIA by failing to provide a timely agenda for the March meeting and failing to provide sufficiently specific agendas for at least the past six months, we must determine whether to recommend any remediation. While any action taken at a meeting in violation of FOIA may be subject to invalidation by the Court of Chancery, it is unclear whether a court would invalidate any of the items that were discussed and approved at these meetings.<sup>21</sup> The factual record does not clearly establish all the items of public business discussed in that time. The examples provided are the trash management company contract and hazard mitigation plan approved at the September 2021 meeting. As these items have been approved and presumably implemented for many months, a court would likely consider the legal and public health issues involved with invalidating such items. Accordingly, on this record, we decline to recommend any specific remedial action. Instead, we recommend that the Village revise its practices related to these violations to comply with FOIA in the future.

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<sup>18</sup> *Del. Op. Att'y Gen.* 05-IB26, 2005 WL 3991284, at \*6 (Aug. 29, 2005) (“If a matter of public business had been the subject of discussion at a previous public meeting and is to be discussed again, there is no reason why the public body cannot be more specific in the agenda. Otherwise, a public body could re-visit any issue discussed at any previous meeting.”)

<sup>19</sup> *See, e.g., Del. Op. Att'y Gen.* 19-IB48, 2019 WL 5208244, at \*3 (Sep. 9, 2019).

<sup>20</sup> *See, e.g., Del. Op. Att'y Gen.* 21-IB21, 2021 WL 4786751, at \*2-3 (Sept. 27, 2021) (finding that “2021-2022 School Year Plan (D)” was insufficient notice of votes on two mask mandates).

<sup>21</sup> 29 *Del. C.* § 10005(a).

**CONCLUSION**

For the reasons set forth above, we determine that the Village violated FOIA by failing to demonstrate that it gave timely notice of its March 2022 meeting agenda. We also find that the Village's practice of not describing the major items expected to be discussed at the meeting on its agendas violates FOIA. However, conducting the March 17, 2022 meeting in a virtual format without permitting in-person attendance did not constitute a violation.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
State Solicitor

cc: Edward B. Rosenthal, Attorney for the Village