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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB27

August 19, 2022

VIA EMAIL

John Reiss
Jreiss@comcast.net

RE: FOIA Petition Regarding the Town of Blades

Dear Mr. Reiss:

We write in response to your correspondence alleging that the Town of Blades 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 explained below, we conclude that the Town violated the open meeting requirements by failing to justify its decision to discuss employee bonuses and raises in private and by failing to provide any notice on the June 13, 2022 meeting agenda of employee bonuses, employee raises, or the water line extension project discussed and voted on at its Council meeting.

BACKGROUND

The Town Council held a public meeting on June 13, 2022. At the meeting, the Council entered an executive session to discuss the issue of employee bonuses and cost of living raises.¹ After leaving the executive session, the Council voted in open session to give each Town employee a bonus and a weekly cost of living raise. The Council then considered and voted on a project to extend a water line. These items were not noted on the agenda, and the executive session listed on the agenda did not name the grounds for entering the session. This Petition followed, alleging that

¹ Response.

the Town violated FOIA by considering and voting on these items at the meeting without proper notice on the agenda.

On July 26, 2022, the Town, through its Town Administrator, responded to the Petition, indicating that its agenda adequately covered these items. With respect to the employee compensation, the Town argues that the Council properly discussed this item in executive session, because the “discussion included names, competency and abilities of all employees.”² After the executive session, the Town states that it entered open session and voted to adopt pay bonuses and cost of living raises, followed by a discussion and vote on a water line extension project. Finally, the Town noted that the agenda expressly states that the Council or Mayor may call an executive session; the agenda is subject to change; and the agenda items may be considered out of sequence. The Town argues that it complied with Section 10004(e)(3), which allows the addition of items to the agenda, including executive sessions, which arise at the meeting.

DISCUSSION

A public body has the burden of proof to demonstrate compliance with FOIA.³ In certain circumstances, a sworn affidavit may be required to meet that burden.⁴ Meetings of public bodies, with limited exceptions, must be open to the public, and meeting notices and agendas must be timely posted in advance of the meeting in accordance with the statute.⁵ A public body carries the burden of justifying a decision to meet in executive session.⁶

FOIA mandates that the publicly-posted meeting agendas include “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.”⁷ 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].”⁸ “In other words, members of the public

² Response, p. 1.

³ 29 *Del. C.* § 10005(c).

⁴ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁵ 29 *Del. C.* § 10004.

⁶ 29 *Del. C.* § 10005(c).

⁷ 29 *Del. C.* § 10002(a).

⁸ *Lechliter v. Del. Dep’t Nat. Res. and Env’tl Control*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017) (citing *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *4 (Del. Ch. Aug. 29, 1986))

interested in an issue should be able to review a notice and determine that an issue important to them will be under consideration.”⁹

In this instance, the Town Council discussed employee bonuses and cost of living raises in executive session and then adopted a motion to implement these bonuses and raises in open session. FOIA requires that major issues expected to be discussed and executive sessions, including specific grounds for entering an executive session, be stated on the agenda.¹⁰ Accordingly, we find that the Town violated FOIA by failing to provide any notice of the employee bonuses and compensation discussion on its agenda.

In addition, we find that the Town failed to justify that its discussions related to employee compensation were appropriate for an executive session. The personnel exception in Section 10004(b)(9) does not cover general discussions about employee compensation; it is limited to matters ‘in which the names, competency and abilities of individual employees or students are discussed. . . .’¹¹ The discussion must “directly involve the consideration of individual employees by name, competency, and ability.”¹² This exception reflects the balance between the public interest in open discussion of governmental matters and the rights of employees to have their work performance considered in private.¹³ The Town merely states in its Response that the compensation discussions included names, competencies, and abilities of all employees. However, the vote was in favor of “cost of living” increases. Employee compensation involves the expenditure of public funds, a matter of utmost importance to every citizen. Even if the Council, in some portion of the executive session discussions, named employees and discussed their performance in relation to the increased compensation, we find that at least a portion of the discussions about employee bonuses and raises fell outside the scope of FOIA’s narrow exception for privately evaluating individual employees’ abilities and competencies. Accordingly, we find that the Town failed to justify that its decision to meet in executive session to discuss employee bonuses and raises was proper under FOIA.

The second agenda item, the water line extension project, did not appear on the June 13, 2022 meeting agenda. Without any advance notice to the public about this item, the Town Council adopted a motion in open session related to this water extension project. FOIA requires that the agenda include the major items expected to be discussed so that interested members of the public may attend the meeting. As no notice of this item was provided, we determine that FOIA was violated with respect to the vote and discussion regarding the water extension project item.

⁹ *Id.*

¹⁰ 29 *Del. C.* § 10002(a).

¹¹ *Del. Op. Att’y Gen.* 02-IB12, 2002 WL 1282812, at *2 (May 21, 2002) (finding that a discussion of police salaries was inappropriate for executive session).

¹² *Id.* (citing *Del. Op. Att’y Gen.* 96-IB32, 1996 WL 751552, at *2 (Oct. 10, 1996)).

¹³ *Id.*

Finally, the Town argues that as a general matter, the Council is permitted to discuss and vote upon new items of public business at the meeting that were not previously noticed. Under 29 *Del. C.* § 10004(e)(3), FOIA allows the amendment of the agenda for those items that “arise at the time of the public body’s meeting,” but this exception has been narrowly construed.¹⁴ Under Section 10004(e)(3), an item that actually arose at the time of the meeting, as a natural evolution of discussions of a related publicly-noticed item, may be added to the agenda.¹⁵ However, a public body may not simply amend its agenda during the meeting to add a new item for discussion or action.¹⁶ Allowing any item to be added to the agenda during the meeting as the Town suggests would have this narrow exception swallow FOIA’s rules for the advance notice of agenda items, which enables interested citizens to attend the meeting.¹⁷ As such, we determine that the Town Council was not permitted by Section 10004(e)(3) to raise these new items during the meeting for discussion or action.

When our Office finds a violation of the open meeting requirements, we may recommend remediation when appropriate.¹⁸ However, the authority to invalidate a public body’s action or impose other injunctive relief is reserved for the courts, and the courts have emphasized that 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.”¹⁹ In determining whether invalidation is

¹⁴ *Del. Op. Att’y Gen.* 03-IB22 (Oct. 6, 2003) (“... [This section] of FOIA must be construed narrowly ‘lest the exception swallow the rule.’”) (citation omitted).

¹⁵ *Del. Op. Att’y Gen.* 97-IB20, 1997 WL 800814, at *2 (Oct. 20, 1997) (in concluding that the discussion of class sizes and enrollment “naturally evolved” into a discussion about the need for more teachers and necessary funding, stating “[i]t is not always possible, however, to anticipate every permutation of every issue contemplated for discussion, and FOIA permits a public body to add items to the agenda if they arise at the meeting and are reasonably related to items that were noticed in the agenda”).

¹⁶ *Del. Op. Att’y Gen.* 05-IB23, at *3 (concluding that a matter of public business does not arise by way of a motion at the meeting to add the item to the agenda); *Del. Op. Att’y Gen.* 03-IB22 (in determining that a matter of public business does not “arise” at a public meeting by way of a motion to add the issue to the agenda, reasoning “[b]y that circular logic, there would be no limits on what business can be discussed at the meeting of a public body, so long as the agenda provided that it was subject to change”) (citation omitted).

¹⁷ *Del. Op. Att’y Gen.* 19-IB48, 2019 WL 5208244, at *3 (Sept. 9, 2019).

¹⁸ *Del. Op. Att’y Gen.* 21-IB17, 2021 WL 3609560, at *3 (July 23, 2021); *see also Del. Op. Att’y Gen.* 05-IB15, 2005 WL 2334344, at *4 (Jun. 20, 2005).

¹⁹ *Ianni*, 1986 WL 9610, at *7.

appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”²⁰ When evaluating a remedy, a court also may consider “whether there was a substantial reconsideration of the challenged decision,” the nature of violation, and “whether it was an isolated incident or an ongoing pattern of infractions.”²¹ Our Office has previously determined that substantial public rights are affected by the expenditure of public funds.²²

In this case, items were discussed and voted upon without any notice to the public, and at least some portion of the discussions about employee compensation was improperly discussed in private. Although these items relate to the significant public interest in the expenditure of public funds, there is no information in the record about the status of implementing these pay increases, nor is there information regarding the status of the water line project. A court may consider whether steps to implement these matters have been taken and the impact of any remedy on the Town and the affected parties. While we do not find this record sufficient to determine that a court is likely to invalidate the Council’s actions on these items, we nonetheless recommend that the Council hold a public discussion of these items to inform the public of the rationale for its votes on both matters.

CONCLUSION

For the reasons set forth above, we find that the Town violated FOIA by failing to justify its decision to discuss employee bonuses and raises in private and by failing to provide any notice on the meeting agenda of employee bonuses, employee raises, or the water line extension project discussed and voted on at its Council meeting.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

²⁰ *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *15 (Del. Ch. May 19, 1994).

²¹ *Levy v. Bd. of Educ. of Cape Henlopen School Dist.*, 1990 WL 154147, at *7 (Del. Ch. Oct. 1, 1990).

²² *Del. Op. Att’y Gen. 06-IB01*, 2006 WL 1242008, at *3 (Jan. 4, 2006) (“We have previously determined that substantial public rights may be affected by the expenditure of public money, hiring key personnel, and actions affecting the right to vote. In several cases, we have directed remediation where a public body violated the open meeting requirements of FOIA and took official action affecting land use.”).

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
Deputy State Solicitor

cc: Lisa Marks, Town Administrator
Craig T. Eliassen, Attorney for the Town of Blades