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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB41

November 14, 2022

VIA EMAIL

Andrew West, Executive Editor
Delaware State News
awest@iniusa.org

Randall Chase
Associated Press
rchase@ap.org

RE: FOIA Petitions Regarding the Dover City Council

Dear Mr. Chase and Mr. West:

We write in response to your correspondence alleging that the Dover City Council violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat this correspondence as two Petitions for determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur.¹ We issue this combined Opinion to address both Petitions. As discussed more fully herein, we conclude that the Council may commit a violation of FOIA by discussing Item No. 27 in executive session, but we find no evidence that this alleged violation has occurred to date. Therefore, we recommend that the Council review FOIA precedent and discuss only the aspects related to Item 27 in executive session that meet one of the exceptions in Section 10004(b). In addition, we determine that the Council did not violate FOIA by failing to provide information in its meeting packet or a detailed outline about Item No. 27 before or during the October 10, 2022 meeting.

¹ Section 10005(e) allows any citizen to "petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur."

BACKGROUND

On October 10, 2022, the City Council held a public meeting to discuss multiple items of public business, including Item No. 27:

- Discussion of Special Event Overtime, Vacation, and City Vehicle Usage.
- a. Background of Special Event Overtime, Vacation, and City Vehicle Usage Topic – 2015B.
- b. Future Alternatives/Payment Methods.
- c. HR – Guidelines for Exempt and Non-Exempt Employees Henceforth.²

At the meeting, the Council engaged in a lengthy discussion on this topic. At the conclusion of the discussion, the Council voted to defer discussions on Item No. 27 to a future executive session.

Both Petitions followed. Mr. Chase alleges that the Council wanted to meet in executive session so they could continue their discussions and “talk freely” without the public present.³ This Petition contends that no exception permits a private discussion of special event overtime or any other financial compensation or benefits, such as vacation and the use of government-owned vehicles. This Petition argues that such a discussion would be a violation of FOIA.

Mr. West also filed a Petition regarding Item No. 27. He alleges that the Council’s discussions were improper under FOIA, as the Council’s discussions centered on policy matters, definitions of extra duty pay and eligibility, and whether the City complied with the Fair Labor Standards Act. This Petition alleges that these topics do not fall under one of FOIA’s reasons for an executive session. In addition, he questions whether the Council provided adequate information for this item, stating that the meeting packet had no additional information and at no time during or in advance of the meeting was the issue clearly outlined.

The City’s counsel replied to Mr. Chase’s Petition on October 26, 2022 (“Response”). The City argues that the Petition merely alleges a future violation but not a present violation of the law. The City asserts that the discussion of Item No. 27 lasted over forty minutes and ended with a motion to defer. The City’s counsel states that the vote on this motion may be construed as vote to defer discussions to a future executive session, but the City did not vote at that time for an executive session, as contemplated by FOIA. In addition, the City’s counsel believes that certain portions of the discussions related to Item No. 27 would qualify for executive session. The Mayor assigned police staff to a recent festival, and the City’s counsel states that, unknown to Council at the time, one of the officers, at the time of this meeting, had already filed a grievance with the City to obtain pay for the festival. The City notes that the police officer, if the grievance is not settled,

² West Petition.

³ Chase Petition.

“could certainly file a lawsuit against the City for compensation.”⁴ The City also contends that certain aspects of the discussions may fall under the personnel exemption, as “certain employees of the City may have received compensation in the past, which they were not entitled to receive so that Subsection 9 could be applicable, which would involve personnel matters where the names of individual employees would be discussed.”⁵ The affidavit of the Council President was also attached, in which he swore that he had reviewed the attached response from counsel and to the best of his knowledge and belief, the facts stated by counsel were accurate.

DISCUSSION

Meetings of a public body, with certain limited exceptions, are open to the public.⁶ “[O]pen meeting laws are liberally construed, and closed session exceptions within these statutes are strictly interpreted to limit nonpublic meetings.”⁷ A public body has the burden of “justify[ing] a decision to meet in executive session.”⁸

In this case, after engaging in a public discussion about Item No. 27, the Council voted to defer this topic to a future executive session. However, the item involves discussions about employee compensation, leave, and vehicle usage. These types of general discussions involving the expenditure of public funds do not fall under one of the exceptions.⁹ Moreover, a public body may not hold an executive session to receive legal advice on any matter of public business.¹⁰ Instead, when considering consultation with its attorney about pending or potential litigation, the public body must meet the requirements of Section 10004(b)(4).¹¹ Nor does the public body have

⁴ Response, p. 3.

⁵ *Id.*

⁶ 29 *Del. C.* § 10004.

⁷ *Del. Solid Waste Auth. v. The News Journal Co.*, 480 A.2d 628, 631 (Del. 1984).

⁸ 29 *Del. C.* § 10005(c).

⁹ 29 *Del. C.* § 10004(b); *Del. Op. Att’y Gen.* 22-IB27, 2022 WL 4263282, at *2 (Aug. 19, 2022) (determining that a public body violated FOIA by discussing employee compensation in executive session); *Del. Op. Att’y Gen.* 02-IB12, 2002 WL 1282812, at *2 (May 21, 2002) (determining that the discussion of police salaries and the emergency situation caused by police resignations were not the types of personnel matters appropriate for executive session).

¹⁰ *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *10-12 (Del. Ch. May 19, 1994) (rejecting a broad interpretation of Section 10004(b)(4), as such a broad interpretation would swallow the open meeting rule).

¹¹ *Id.*

the ability to enter executive session when an employee's name will be mentioned; executive session discussions under the personnel matter exception must "directly involve the consideration of individual employees by name, competency, and ability."¹²

The City provided sworn testimony that it has taken no action to schedule such an executive session.¹³ Accordingly, we find no evidence that a violation has occurred to date. Rather than discussing the totality of Item No. 27 in executive session, we recommend that the Council review FOIA precedent and only discuss items that meet one of the enumerated reasons for an executive session in Section 10004(b).¹⁴

Finally, the second claim in the Petitions is that the Council did not provide enough information about Item No. 27 in its meeting packet or by outlining the issues during or before the meeting. FOIA does not require that a public body include information in a separate meeting packet or provide a detailed outline of any matter expected to be discussed. Rather, FOIA requires that a public body provide a notice and agenda for a public meeting.¹⁵ The notice must include the time, date, and place of the meeting and whether it will be held virtually, and the agenda must include a "general statement of the major issues" which a public body expects to discuss.¹⁶ The agenda is to be worded in "plain and comprehensible language" and "[i]f a public body is uncertain as to what specific provisions or components of a complex proposal it will consider at an upcoming meeting, the agenda need not disclose each specific component of that proposal, so long as the agenda clearly and directly discloses the broader subject of which the components are a part."¹⁷ "[T]he point of the agenda is to put the public on notice, not to answer every question about the agenda item."¹⁸ Reviewing a meeting notice and agenda should allow members of the public to determine if they wish to attend a meeting.¹⁹ Specific information in a meeting packet or a detailed

¹² *Del. Op. Att'y Gen.* 02-IB12, 2002 WL 1282812, at *2 (citation omitted).

¹³ Response, Aff. of President of City Council.

¹⁴ The City believes certain aspects of the discussion would qualify for executive session, including past violations of certain laws, a grievance matter, and the issue of improper payments being made to certain employees which require the use of names to discuss. Exceptions for executive sessions are narrowly construed, and we encourage the City to review relevant Attorney General and court opinions in consultation with its legal counsel regarding the propriety of any discussions that it plans for executive session.

¹⁵ 29 *Del. C.* § 10004(e).

¹⁶ *Id.*; 29 *Del. C.* § 10002(a).

¹⁷ *Chem. Indus. Council of Del.*, 1994 WL 274295, at *8.

¹⁸ *Del. Op. Att'y Gen.* 10-IB12, 2010 WL 4154564, at *1 (Sept. 28, 2010).

¹⁹ *Lechlitter 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

outline is not required, and thus, we find that the Council did not violate FOIA by not providing these additional items before or during the October 10, 2022 meeting.

CONCLUSION

For the reasons set forth above, we find that that the Council may commit a violation of FOIA by discussing all matters contained in Item No. 27 in executive session, but we find no evidence that this alleged violation has occurred to date. Therefore, we recommend that the Council review FOIA precedent and discuss only the aspects related to Item No. 27 in executive session that meet one of the exceptions in Section 10004(b). In addition, we conclude that the Council did not violate FOIA by failing to provide information in its meeting packet or a detailed outline about Item No. 27 before or during the October 10, 2022 meeting.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Nicholas H. Rodriguez, City Solicitor

(Del. Ch. Aug. 29, 1986) (“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.”).