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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB11

April 6, 2023

VIA EMAIL

Jack Guerin
jackguerin7@gmail.com

RE: FOIA Petition Regarding the City of Delaware City

Dear Mr. Guerin:

We write in response to your correspondence, alleging that the City of Delaware City violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat this 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 determine that the City did not violate FOIA as alleged.

BACKGROUND

The City's Mayor and Council scheduled a public meeting for February 27, 2023 at the Delaware City Fire Company. The meeting notice was posted on the City's website, with a link to the meeting's agenda. The agenda for this meeting stated that a public hearing on the special use permit application for the Marina Village development would start at 6:00 p.m., and the regular meeting of the Mayor and Council would start at 6:30 p.m. This Petition alleges that because the City did not separately post a notice for the public hearing regarding this special use permit, the City violated FOIA. The Petition asserts that the meeting notice that appeared on the webpage containing the link to the agenda merely stated "Mayor and Council Meeting." The Petition objects that a public hearing notice was not posted on the City's website and that the hearing was merely mentioned in the agenda.

The City’s counsel provided a response to the Petition on March 17, 2023 (“Response”). The Response asserts that the public hearing was properly noticed, pointing to the agenda’s statement “6:00 PM PUBLIC HEARING – Special Use Permit Application – Marina Village (Lennar Developers).”¹ The Response states that the agenda was timely posted on the website and at the Town Hall and four other locations.

DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.² In certain circumstances, a sworn affidavit may be required to meet that burden.³ Section 10004 requires that the meeting notice and agenda be conspicuously posted “at the principal office of the public body holding the meeting,” or if no such office exists, where the public body’s meetings are regularly held.⁴ While some public bodies are required to post their meeting notices and agendas online, municipalities such as Delaware City are not required to do so.⁵ Here, the City posted notice of its February 27, 2023 Mayor and Council meeting online nevertheless. The hearing at issue occurred during that meeting and was listed on the agenda of the February 27, 2023 meeting starting at 6:00 p.m. FOIA requires the posting of notices for meetings, but there is no requirement that separate online postings be made for a hearing of this type. Accordingly, we determine that the City did not violate FOIA by failing to post a separate hearing notice on the City’s website.⁶

¹ Response.

² 29 *Del. C.* § 10005(c).

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

⁴ 29 *Del. C.* § 10004(e)(5) (“Public notice required by this subsection shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such notices available.”).

⁵ *Id.* (“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 As this Office’s authority is limited to considering FOIA allegations, this Opinion does not address other legal authorities, if any, that might require additional notice for this type of hearing. 29 *Del. C.* § 10005(e).

CONCLUSION

For the reasons set forth above, we conclude that the City did not violate FOIA by failing to post the notice for the February 27, 2023 special use permit public hearing on the City's website.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: William J. Rhodunda, Jr., City Solicitor