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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB33

December 4, 2023

VIA EMAIL

Tamara Skis
tamara.mskis@gmail.com

RE: FOIA Petition Regarding the Town Council of Ellendale

Dear Ms. Skis:

We write in response to your correspondence, alleging that the Town Council of Ellendale violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("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 Town Council's November 1, 2023 meeting agenda did not violate FOIA as alleged in the Petition. The statement in the agenda prohibiting rebuttals during the public comment period did not violate Section 10004(a), and the reasons given for the executive session are sufficient under FOIA.

BACKGROUND

The Town Council of Ellendale posted a meeting notice and agenda for its November 1, 2023 meeting. The agenda states under item 11, "RECOGNITION OF VISITORS: [a]t this time, anyone wishing to address the town council may do so, start by announcing your full name."¹ This item also states "[p]lease note that there is a two minute time limit and there is no rebuttal from council members or members of the public permitted."² Item 13 in this agenda indicates that an

¹ Petition.

² *Id.*

executive session would be held “to discuss personnel [m]atters, in which the name, competency and abilities of individual employees will be discussed and to discuss potential sales or leases of real property, and strategy sessions including legal advice from an attorney at law regarding pending or potential litigation. 29 Del. C. § 10004(b)(2), (4), (9).”³

This Petition followed, alleging that the Town Council’s November 1, 2023 meeting agenda violated FOIA in two ways. First, you assert that agenda item 11 violated FOIA, as it did not allow the public a meaningful opportunity for engagement as required by the FOIA statute. Next, you allege that the Town planned an executive session but did not disclose the reason for the executive session on the agenda, nor was the reason addressed as an amendment to the agenda at any time during the meeting.

The Town Council, through its legal counsel, replied to the Petition (“Response”) and enclosed the affidavit of the Council President attesting to the accuracy of the statements in the Response. The Council contends that it adhered to the requirements of Section 10004(a) which require public bodies to provide a time for public comment and this period must provide a “meaningful opportunity for the public to engage with the public body.”⁴ The Council argues that its public comment period in item 11 of the agenda sufficiently allows for the public to engage with Council and that Council is not required to respond to the public’s comments. The Town Council asserts that this provision is intended to require Council to give serious attention and actively listen to the public and when appropriate, schedule time on future agendas to address the public’s comments. In addition, the Town Council states that the three reasons for the executive session under Section 10004(b) were posted on the initial agenda one week prior to the meeting.

DISCUSSION

The public body has the burden of proof to demonstrate its compliance with the FOIA statute.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ FOIA provides that every meeting of a public body must provide a time for public comment, which “must provide a meaningful opportunity for the public to engage with the public body.”⁷ The Petition claims that the prohibition on the public or the councilmembers providing rebuttals during the public comment period constitutes a violation of FOIA. We believe that this public comment period is a time for the public to present its comments to the Council, and FOIA does not obligate

³ *Id.*

⁴ Response.

⁵ 29 Del. C. § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁷ 29 Del. C. § 10004(a)(2).

the Council to require rebuttals to the public’s comments made during this period. As such, we find no violation of FOIA in this regard.

In addition, the Council set forth three reasons, the exceptions listed in Section 10004(b)(2), (4) and (9), for the executive session in its agenda. FOIA requires an agenda to include “a statement of intent to hold an executive session and the specific ground or grounds therefor under § 10004(b) of [FOIA].”⁸ Public bodies are not required to elaborate the reasons for executive sessions in great detail, and these three reasons stated in the November 1, 2023 agenda are sufficiently specific to satisfy the requirements of FOIA.⁹ Thus, we also find no violation with regard to this second claim.

CONCLUSION

For the reasons set forth above, we conclude that the Town Council’s November 1, 2023 meeting agenda did not violate FOIA as alleged in the Petition. The statement in the agenda prohibiting rebuttals during the public comment period did not violate Section 10004(a), and the reasons given for the executive session are sufficient under FOIA.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: James P. Sharp, Town Solicitor

⁸ 29 *Del. C.* § 10002(a).

⁹ *O’Neill v. Town of Middletown*, 2007 WL 2752981, at *7 (Del. Ch. Mar. 29, 2007) (determining that the reasons for the executive session on the agendas, including “Personnel & Legal Issues,” satisfied FOIA, as FOIA “does not require public bodies to elaborate in great detail on agendas what legal, personnel, or other subjects are to be discussed.”).