



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
CRIMINAL DIVISION (302) 577-8500
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400
FAMILY DIVISION (302) 577-8400
FRAUD DIVISION (302) 577-8600
FAX (302) 577-2610

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB13

March 5, 2024

VIA EMAIL

Carol DiGiovanni
cmdigiovanni@yahoo.com

RE: FOIA Petition Regarding the Village of Arden

Dear Ms. DiGiovanni:

We write in response to your correspondence alleging that the Village of Arden 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 find that the Village violated FOIA by failing to post the February 13, 2024 Advisory Committee meeting notice and agenda with an explanation regarding why seven days' advance notice for this meeting could not be given.

BACKGROUND

The Village of Arden is a small municipality governed by the Town Assembly.¹ The Town Assembly has a standing committee known as the Advisory Committee.² This Committee, consisting of representatives from each of the Town Assembly's eleven committees, the three Trustees of Arden, and the Village Secretary, typically holds four regular meetings a year.³

¹ Arden, Del., C. (Charter) § 4.

² "Village of Arden, Committee Descriptions: Full Text," <https://arden.delaware.gov/committee-descriptions-full-text/> (last visited Feb. 26, 2024).

³ Petition; Response.

However, on January 31, 2024, the Chair of the Advisory Committee sent an email to the other members, stating that the Chair would like to have an Advisory Committee meeting on February 13, 2024 to discuss selecting a date for the Special Town Meeting, setting an agenda for that meeting, and recommending a process for changing the Town Charter.⁴ This Petition followed.

In the Petition, you allege that as of February 8, 2024 at 10:51 a.m., the Committee did not post a notice or agenda for this February 13, 2024 meeting. You state that there was no notice at the Buzz Ware Village Center meeting location, nor was there a posting at the Gild Hall, where meetings of this Committee and other committees occasionally are held. In addition, you assert that no notice of this meeting appeared in the January 2024 issue of the Arden Page newsletter or on the Arden website. You allege that the Village’s charter and bylaws do not permit the Chair to make a unilateral decision about holding a public meeting, and a quorum of the Advisory Committee must agree to a meeting. You argue that if this February 13, 2024 meeting occurs, it would be a violation of FOIA.

On February 16, 2024, the Village’s counsel replied to the Petition (“Response”) and attached the affidavit of the Chair of the Town Assembly attesting that counsel’s statements in the Response are accurate to the best of his knowledge and belief. The Village held the Advisory Committee meeting on February 13, 2024 as scheduled. The Village asserts that the Town Assembly previously voted to allow the Advisory Committee to schedule a special meeting of the Town Assembly concerning charter amendments and further asserts that municipalities act through elected or designated officials or committees. The Village states that a meeting notice and agenda were posted for the February 13, 2024 Committee meeting on February 8, 2024, and the Response included photographs of the meeting notice and agenda.⁵ The Chair attests that these photographs “are true and correct copies of the notices posted on February 8, 2024, at the Buzz Ware Center in Arden, concerning the Advisory Committee’s Special Meeting.”⁶ The posted agenda’s three items included deciding on a date and time for the Special Meeting of the Town Assembly, setting an agenda for this meeting, and producing “a recommendation for how this change to the Charter could be made (to be presented at the meeting).”⁷

⁴ Petition.

⁵ Response, Ex. 1.

⁶ *Id.*

⁷ *Id.*

DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.⁸ In certain circumstances, a sworn affidavit may be required to meet that burden.⁹ In this case, the Petition challenges the timeliness of the posting of the February 13, 2024 meeting notice and agenda and alleges that the Advisory Committee’s Chair does not have the unilateral authority to set up a committee meeting. As a preliminary matter, we find that the Chair’s authority to convene a meeting is a question concerning municipal law, which is outside the scope of this Office’s authority to decide.¹⁰

This Petition concerns the timeliness of the Village’s posting for the February 13, 2024 Advisory Committee meeting. Section 10004(e)(2) of the FOIA statute requires that a public body give seven days’ advance notice of a regular meeting. A special meeting is defined as a meeting “to be held less than 7 days after the scheduling decision is made.” The notice for a special meeting must “include an explanation as to why the notice required by [Section 10004(e)(2)] could not be given.”¹¹ Although the notice of the special meeting in this case was posted less than seven days in advance, the agenda contained no explanation as to why seven days’ advance notice could not have been given. This is a violation.

Having found that the Village violated FOIA, we must determine whether remediation would be appropriate. Section 10005(a) states that any “action taken at a meeting in violation of this chapter may be voidable by the Court of Chancery.” The authority to invalidate a public body’s action, or to impose other relief, is reserved for the courts.¹² The Delaware Court of Chancery stated 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.”¹³ In determining whether

⁸ 29 Del. C. § 10005(c).

⁹ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

¹⁰ 29 Del. C. § 10005(e); *see also Del. Op. Att’y Gen. 20-IB28*, 2020 WL 7663557, at *2 (Nov. 9, 2020) (“The gravamen of the Petition’s remaining allegations is that the Mayor and City Council President lacked authority to take certain actions – forfeit a councilmember’s seat, preemptively bar him from public meetings, or refuse to provide a paycheck or copies of certain materials. These matters of municipal law, concerning the authority of the Council President or Mayor, are outside the scope of the FOIA statute, and thus, we make no determination regarding these issues.”).

¹¹ 29 Del. C. § 10004(e)(4).

¹² 29 Del. C. § 10005.

¹³ *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *7 (Del Ch. Aug. 29, 1986).

invalidation is appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”¹⁴ Here, two of the three items on the agenda are logistical matters involving setting up a later public meeting, but the third item, discussing the process for amending the charter and adopting a recommended course for charter revisions, is a matter of significant public business. After providing appropriate notice in accordance with the FOIA statute, we recommend that the Committee discuss in a public meeting, at a minimum, this third agenda item and ratify any votes taken during that meeting regarding that matter.¹⁵

CONCLUSION

Based on the foregoing, we conclude that the Village violated FOIA by failing to post the February 13, 2024 Advisory Committee meeting notice and agenda with an explanation regarding why seven days’ advance notice for this meeting could not be given.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Edward B. Rosenthal, Attorney for the Town Assembly Chair, Village of Arden

¹⁴ *Chem. Indus. Council of Del. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *15 (Del. Ch. May 19, 1994).

¹⁵ *Del. Op. Att’y Gen.* 07-IB16, 2007 WL 4732799, at *4 (July 10, 2007) (“Our Office determines that the Town violated the public notice requirements of FOIA by posting an amended agenda on May 1, 2007 to include the Willow Grove Mill development. The Town can remediate this violation by re-noticing the Willow Grove Mill development for new and substantial reconsideration at a public meeting within thirty days of the date of this letter.”).