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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB16

April 29, 2024

VIA EMAIL

Brian Geller
bgeller066@gmail.com

RE: FOIA Petition Regarding the Town of Leipsic

Dear Mr. Geller:

We write in response to your correspondence alleging that the Town of Leipsic 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 Town violated FOIA by failing to meet its burden to demonstrate that the Town Council held an executive session for an appropriate purpose under FOIA and by failing to conduct a public vote to enter executive session at its March 26, 2024 meeting.

BACKGROUND

The Petition alleges that the Leipsic Town Council held an executive session at its March 26, 2024 meeting in violation of FOIA. The meeting notice states the "Town Council Executive Meeting/Session" was for "Council Members Only," and the sole item scheduled for discussion was "proposed and existing Town ordinances prior to any scheduled public reading," with two subsections: "specifically, draft ordinance document dated September 23, 2023" and "powers of Leipsic Town Charter and its application to ordinances (new, proposed, or existing)."¹ You allege that the items on this agenda are not proper reasons to enter executive session under the open meeting requirements of FOIA. Additionally, you allege that this stand-alone executive session

¹ Petition.

was also a violation, as the Council did not take a vote in public session to enter the executive session.

On April 3, 2024, the Mayor replied to the Petition on the Town’s behalf (“Response”). The Town asserts that it was unaware that it would “be violating . . . FOIA by having an Executive Meeting that was properly posted.”² The Town states that “the only action taken was a decision to not move forward with a [d]raft packet of town ordinances before more research could be done on the subject matter.”³

DISCUSSION

The Town carries the burden of proof “to justify a decision to meet in executive session or any failure to comply with [FOIA].”⁴ In certain circumstances, a sworn affidavit may be required to meet that burden.⁵ The Petition’s first claim is that the executive session was not held for a purpose authorized by FOIA. Section 10004 requires all public bodies’ meetings to be open to the public, unless an executive session is permitted by one of the designated provisions.⁶ In its Response, the Town does not explain how the items discussed in this meeting are appropriate for executive session, nor does the agenda expressly state the reasons for entering the executive session. We find that the Town violated FOIA by failing to justify its decision to meet in executive session at its March 26, 2024 meeting.

The second claim is the Town Council, in violation of FOIA, did not take a vote in public before entering executive session. The agenda indicated it was an “Town Council Executive Meeting/Session” for “Council Members Only.”⁷ Because public bodies must take a public vote to enter executive session and make those results public, FOIA does not permit a public body to hold a stand-alone executive session meeting.⁸ As the agenda indicates it was an executive session

² Response.

³ *Id.*

⁴ 29 *Del. C.* § 10005(c).

⁵ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁶ 29 *Del. C.* § 10004(a) (“Every meeting of all public bodies shall be open to the public except when closed under subsections (b), (c), (d), and (h) of this section.”).

⁷ Petition.

⁸ 29 *Del. C.* § 10004(c) (“The vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public, and the results of the vote shall be made public and shall be recorded in the minutes.”); *Del. Op. Att’y Gen.* 17-IB27, 2017 WL 3426267, at *3 (July 18, 2017) (“[T]he record demonstrates that the Council appears to have treated the meeting as a stand-alone executive session, which FOIA does not permit.”); *Del. Op.*

closed to the public and the Town did not present any evidence of compliance with these requirements, we find that the Town violated FOIA by holding a stand-alone executive session in violation of FOIA.

Having found that the Town violated FOIA as set forth above, we consider whether any remediation is 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.⁹ 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.”¹⁰ In determining whether invalidation is appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”¹¹ Here, the items planned for discussion were proposed and existing ordinances, the specific subjects of which were not identified, and a discussion of the Town’s authority under the charter. The Town indicates it decided not to move forward with a draft packet of ordinances. We recommend that the Town discuss the items of the March 26, 2024 meeting, including the ratification of any votes taken, in open session at a future meeting, after providing appropriate public notice pursuant to FOIA’s open meeting requirements.

CONCLUSION

Based on the foregoing, we conclude that the Town violated FOIA by failing to meet its burden to demonstrate that the Town Council held an executive session for an appropriate purpose under FOIA and by failing to conduct a public vote to enter executive session at its March 26, 2024 meeting.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Att’y Gen. 02-IB33, 2002 WL 34158592, at *3 (Dec. 23, 2002) (“FOIA does not permit a ‘stand alone’ executive session.”).

⁹ 29 *Del. C.* § 10005.

¹⁰ *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *7 (Del. Ch. Aug. 29, 1986).

¹¹ *Chem. Indus. Council of Del. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *15 (Del. Ch. May 19, 1994).

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Samuel J. Fox, IV, Town Mayor
F. Michael Parkowski, Attorney for the Town