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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 25-IB48**

**October 3, 2025**

**VIA EMAIL**

Kelli Nuwer  
[ms.kellianne@icloud.com](mailto:ms.kellianne@icloud.com)

**RE: FOIA Petition Regarding the Town of Greenwood**

Dear Ms. Nuwer:

We write in response to your correspondence, alleging that the Town of Greenwood 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 of whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that the Town did not violate FOIA by failing to have its new FOIA coordinator on its website at the time of the Petition. The remaining claim regarding the propriety of the executive session discussions is not appropriate for consideration.

**BACKGROUND**

This Petition alleges that the Town did not have a current FOIA coordinator on its website, as required by FOIA. You also assert that at the August 13, 2025 Town Council meeting, an executive session to discuss litigation strategy and personnel matters was held for an improper purpose, because you believe the session concerned an employee who had stated that any discussions of their performance could be done in open session.

The Town, through its legal counsel, replied to this Petition ("Response") on September 15, 2025 and enclosed an affidavit of its Mayor. The Town argues that it has not violated the provisions of FOIA, because the Town has a new FOIA coordinator and updated its website and this Office within twenty working days, as required. The Town alleges that it had an interim FOIA

coordinator from August 14, 2025 to September 1, 2025 and appointed a new FOIA coordinator on September 2, 2025. The Town states it revised its website to add the new FOIA coordinator and notified this Office on September 8, 2025 of the change.

The Town states that you seek access to information that is not public, and the Town declines to address the veracity of the allegations you make pertaining to ongoing personnel matters. The Town asserts that its executive session was noticed for two purposes, specifically the exceptions for litigation strategy and personnel discussions as delineated in 29 *Del. C.* § 10004(b)(4) and (9). The Town contends that when an employee's request for a public discussion impedes on the Town's right to hold an executive session under Section 10004(b)(4), it is permissible for the Town to hold those discussions in executive session. The Town's employment counsel attests that the executive session was held to discuss personnel matters involving the names, competency, and abilities of individual employees and to seek and receive legal advice and opinion from this counsel related to strategies and considerations in response to potential litigation. Counsel further attests that a real and tangible threat of litigation exists regarding the personnel matter discussed, and publishing such information without *in camera* protections would adversely affect the Town's interests in the potential litigation.

### **DISCUSSION**

Delaware's FOIA law "was enacted to ensure governmental accountability by providing Delaware's citizens access to open meetings and meeting records of governmental or public bodies, as well as access to the public records of those entities."<sup>1</sup> The public body has the burden of proof to "justify a decision to meet in executive session or any failure to comply with [FOIA]."<sup>2</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>3</sup>

In this case, the Petition alleges that the Town did not have its current FOIA coordinator on its website, as required by FOIA. The Town's Response, submitted under oath, demonstrates that the Town had a designated FOIA coordinator at the time of this Petition, and this FOIA coordinator's information was updated on the website on September 8, 2025, which is within twenty working days of the change, as required by the statute.<sup>4</sup> We find no violation in this regard.

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<sup>1</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

<sup>2</sup> 29 *Del. C.* § 10005(c).

<sup>3</sup> *Judicial Watch, Inc.*, 267 A.3d at 1008-1012.

<sup>4</sup> 29 *Del. C.* § 10003(g)(1) ("The FOIA coordinator shall be identified on the public body's website and each public body shall provide the name and contact information for its FOIA coordinator to the Attorney General. The public body shall update this information on its website and with the Attorney General within 20 working days of any change in its FOIA coordinator or the FOIA coordinator's contact information.").

The Petition also alleges that the executive session of the August 13, 2025 Town Council meeting was held for an improper purpose. FOIA requires that the meetings of public bodies, with limited exceptions, be open to the public. Public bodies, with proper notice on the meeting agenda, may hold an executive session to discuss one of the nine topics that are outlined in the statute.<sup>5</sup> The Town cited two separate exceptions in its meeting agenda. The first, Section 10004(b)(4), allows an executive session for “[s]trategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body.”<sup>6</sup> The second, Section 10004(b)(9), relates to discussions about personnel matters in which the names and competencies of an employee are discussed may be held in executive session, if the employee does not request “that such a meeting be open.”<sup>7</sup>

This record does not contain a factual basis to determine whether these exceptions are applicable. Section 10004(b)(9) permits executive sessions for personnel matters about the names, competency and abilities of individual employees, unless the employee requests the meeting to be open. The Petition asserts that the employee requested that discussions of their performance take place in open session. However, the Town states it is unable to comment due to the confidentiality of ongoing personnel matters.

For an invocation of the strategy sessions for potential litigation exception to be appropriate under Section 10004(b)(4), potential litigation “must be likely or reasonably foreseeable,”<sup>8</sup> and disclosure of these discussions with the attorney must adversely affect the public body’s litigation position. “When determining whether litigation is ‘likely or reasonably foreseeable,’ the public body should look for objective signs that litigation is coming.”<sup>9</sup> The “potential litigation exception for executive session applies only when there is a ‘realistic and tangible threat of litigation’ based on ‘objective factors.’”<sup>10</sup> These signs may include factors such as a “written demand letter in which a claim is asserted, or action is demanded, [which] may give rise to a proper inference that litigation will soon follow.”<sup>11</sup> Other indications may include prior litigation between the parties,

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<sup>5</sup> 29 Del. C. § 10004.

<sup>6</sup> 29 Del. C. § 10004(b)(4).

<sup>7</sup> 29 Del. C. § 10004(b)(9).

<sup>8</sup> *ACLU v. Danberg*, 2007 WL 901592, at \*4 (Del. Super. Mar. 15, 2007) (adopting this Office’s test for determining the applicability of the “potential litigation” exemption).

<sup>9</sup> *Id.*

<sup>10</sup> *Del. Op. Att’y Gen.* 02-IB17, 2002 WL 31031224, at \*9 (Aug. 6, 2002) (citation omitted).

<sup>11</sup> *ACLU*, 2007 WL 901592, at \*4.

proof of ongoing litigation with similar claims, or retention of legal counsel with respect to the claim at issue and expression of an intent to sue.<sup>12</sup>

To demonstrate that Section 10004(b)(4) is applicable, the Town provided the affidavit of its employment attorney who gave the legal advice at this executive session. The Town's employment counsel attests that this personnel matter is inextricably intertwined with the potential litigation; a real and tangible threat of litigation exists with respect to the personnel matter; and publicizing even a portion of these discussions would adversely affect the Town's interest in the potential litigation. While this affidavit presents circumstances that appear likely to satisfy the standard of Section 10004(b)(4), it does not adequately describe the facts to support this exception. As this Office does not operate as an independent factfinding body, nor does this petition process contemplate *in camera* reviews,<sup>13</sup> this Office is unable to determine, based on this factual record, whether the Town's use of these exceptions was appropriate. You may wish to review Section 10005 to determine the options available to you through judicial action.

### **CONCLUSION**

For the reasons set forth above, we conclude that the Town did not violate FOIA by failing to have its new FOIA coordinator on its website at the time of the Petition. The remaining claim regarding the propriety of the executive session discussions is not appropriate for consideration.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

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<sup>12</sup> *Id.*

<sup>13</sup> *See, e.g., Del. Op. Att'y Gen.* 22-IB15, 2022 WL 1547875, at \*2 (Apr. 26, 2022) (noting that when considering the propriety of document redactions, “[u]nder Delaware’s FOIA law, this Office nor the courts are *required* to conduct an *in camera* review of withheld records.”); *Del. Op. Att’y Gen.* 20-IB18, 2020 WL 3240808, at \*2 (May 22, 2020) (“Based on this record, we are unable to make a finding regarding this issue, as this Office does not operate as an independent factfinding body and cannot resolve the parties' competing factual claims.”); *Del. Op. Att’y Gen.* 18-IB05, 2018 WL 1061276, at \*6 (Jan. 30, 2018) (“Under the circumstances, we are not able to make a determination in this case of whether a FOIA violation has occurred because the record reflects competing, irreconcilable statements of fact that cannot be resolved on this record.”); *Del. Op. Att’y Gen.* 15-IB06, 2015 WL 5014135, n. 2 (Aug. 19, 2015) (“Please note that we do not, in the context of evaluating petitions for determination under FOIA, operate as an independent fact-finding body.”).

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: James P. Sharp, Town Solicitor