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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 26-IB03

January 13, 2026

VIA EMAIL

Janet Todd
janetmtodd@yahoo.com

RE: FOIA Petition Regarding the Town of Greenwood

Dear Ms. Todd:

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, because the Town Council's executive sessions at the two referenced meetings were authorized by the exception in Section 10004(b)(4).

BACKGROUND

The Petition alleges that the Town Council violated FOIA by discussing your employment issues in executive session at the August 13, 2025 meeting and the December 8, 2025 meeting, despite your requests for such discussions to be held in open session.¹ You allege that at the December meeting, the Council utilized an executive session to discuss your employment for three hours and then entered public session to read accusations against you and vote for your termination

¹ The Petition also alleged a violation at the August 27, 2024 meeting, but this claim was determined to not be timely filed under the Delaware Department of Justice Rules of Procedure for FOIA Petitions and Determinations.

of employment in thirty days. You state that you or your attorney notified the Council via the Town Solicitor that any discussion about your employment was to occur in open session on several occasions in 2024 and 2025. In addition, you assert that you had a right to a public hearing under the Town Charter.

On December 22, 2025, the Town Solicitor replied to this Petition (“Response”). The Response included the affidavit of the Mayor who attests that he was present at the referenced meetings, and he believes the Response is true and correct. The Town argues that your claim regarding the meetings largely mirror your previous claim in a 2025 FOIA petition, which resulted in Attorney General Opinion No. 24-IB51. The Town argues that although you requested the discussions of your employment be open, the threatened litigation and your employment are intertwined, and the Town cannot jeopardize its legal position by discussing your employment and the Town’s concomitant legal strategy during a public session. The Town states that at the August 13, 2025 meeting, the Council voted for a suspension with pay and authorized an investigation; the resulting report was reviewed at the December 8, 2025 executive session.

You retained legal counsel who sent a letter indicating you were enduring a hostile work environment and retaliation. In the October 24, 2024 letter, your attorney indicated his offer to confer to avoid litigation. The Town alleges that at the November 2024 meeting, you stated you would make a motion to sue the Town; the Town auditors also conveyed you made statements that you would sue the Town in the summer of 2025. The Town provided copies of additional correspondence to show that the litigation threat continues, as your same allegations continue. Regarding the assertion about your right to a public hearing under the Town Charter, the Town argues this claim is not related to FOIA and should be dismissed.

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.”² FOIA mandates that public bodies meet specific requirements when holding public meetings, including advance notice, posting notices and agendas, an opportunity for public comment, and maintaining meeting minutes. A meeting of a public body must be open to the public, except in limited circumstances.³ The public body has 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

² *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

³ *Id.*

⁴ 29 Del. C. § 10005(c).

⁵ *Judicial Watch, Inc.*, 267 A.3d at 1008-1012.

As an initial matter, the Petition’s assertion you have a right to a public hearing under the Town Charter is not appropriately considered herein. This Office’s authority under the FOIA petition process is limited to considering alleged violations of the FOIA statute.⁶

The Petition challenges the propriety of the August 13, 2025 and December 8, 2025 executive sessions. Public bodies, with proper notice of the intent to enter an executive session on an agenda, may hold an executive session to discuss one of the nine topics that are outlined in the statute.⁷ 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.”⁸ The Town acknowledges you requested any discussions about your job performance be public but argues these executive sessions were proper under the other applicable exemption, Section 10004(b)(4). We agree.

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.”⁹ In considering whether an invocation of potential litigation is appropriate, we must look at the public body’s knowledge at the time it asserted the exemption.¹⁰ Potential litigation “must be likely or reasonably foreseeable.”¹¹ “When determining whether litigation is ‘likely or reasonably foreseeable,’ the public body should look for objective signs that litigation is coming.”¹² The “potential litigation exception for executive session applies only when there is a ‘realistic and tangible threat of litigation’ based on ‘objective

⁶ 29 *Del. C.* § 10005(e).

⁷ 29 *Del. C.* § 10004.

⁸ 29 *Del. C.* § 10004(b)(9).

⁹ 29 *Del. C.* § 10004(b)(4).

¹⁰ See *Del. Op. Att’y Gen.* 07-IB21, 2007 WL 4732804, at *4 (Oct. 22, 2007) (“In reviewing a public body’s decision to withhold records, our Office ‘must of necessity limit the scope of [our] inquiry to an appropriate time frame’ and our ‘review properly focuses on the time the determination to withhold is made.’”) (quoting *Bonner v. U.S. Dep’t of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991)).

¹¹ *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).

¹² *Id.*

factors.”¹³ 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.”¹⁴ Other indicators may include prior litigation between the parties, 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.¹⁵

In this case, this matter of discussing your employment in executive session, despite your request for a public session, was raised in a previous FOIA petition, and this Office determined that potential litigation existed regarding this matter that justified a previous executive session. To support the assertion of this exception for the August and December 2025 meetings, the Town points out that in the July and August 2024 letters, your attorney alleged you were experiencing a hostile work environment and retaliation from the Town. In October 2024, your attorney reasserted the claims and offered to confer “to avoid litigation.”¹⁶ The Town also submitted sworn statements that at the November 2024 meeting, you stated you make a motion to sue the Town.¹⁷ The Town asserts you indicated your intent to sue its auditors in the summer of 2025. In August 2025, your counsel submitted a letter reiterating that you continue to face a hostile work environment, characterized by harassment and retaliatory actions.¹⁸ In the November 2025 letter, your counsel alleges that the work environment and retaliatory actions have only increased.¹⁹

The Town further provides in its Response, which was submitted under the oath of the Mayor, that at these executive sessions, the discussion of your employment and the potential litigation were intertwined and would have adversely affected the Town’s litigation position if they occurred publicly. The Town alleges that significant parts of the 2025 executive sessions were devoted to discussion between the Town and its employment counsel about your employment and legal issues that may arise. The Town states that at the August 13, 2025 meeting, the Council voted in open session for a suspension with pay and authorized an investigation of your performance and claims of a hostile work environment. The Town alleges that the resulting investigative report was reviewed and discussed during the December 8, 2025 executive session. The Town states the disciplinary action discussions must occur privately, as they involved the pros and cons of certain actions and revealed the Town’s litigation strategy. Based on the totality of

¹³ *Del. Op. Att’y Gen.* 02-IB17, 2002 WL 31031224, at *9 (Aug. 6, 2002).

¹⁴ *ACLU*, 2007 WL 901592, at *4.

¹⁵ *Id.*

¹⁶ Response, Ex. I.

¹⁷ *Id.*, Ex. K.

¹⁸ *Id.*, Ex. E.

¹⁹ *Id.*, Ex. J.

these circumstances, we find that this potential litigation threat existed at the time these executive sessions were scheduled and that the August 13, 2025 and December 8, 2025 executive sessions were authorized by Section 10004(b)(4) for discussing litigation strategy.

CONCLUSION

For the reasons set forth above, we conclude that the Town did not violate FOIA, because the Town Council's executive sessions at the two referenced meetings were authorized by the exception in Section 10004(b)(4).

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