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Office of the Attorney General of the State of Delaware

Attorney General Opinion No. 26-IB28

June 2, 2026

Via Email

Charlotte Torbert
chartorbert@yahoo.com

RE: FOIA Petition Regarding the Town of Greenwood

Dear Ms. Torbert:

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 these submissions 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 violated FOIA by failing to meet its burden to demonstrate the topics of the nonpayment of employee premium pay and changes to the employee handbook were appropriately discussed in executive session.¹ The remaining claims are not violations of FOIA.

Background

The Petition makes five FOIA claims about open meeting requirements, alleging the Town violated FOIA by: (1) holding a January 2026 public hearing in a venue that was not "open" in accordance with FOIA; (2) improperly discussing and voting on employee compensation and changes to the employee handbook in executive session at the March 11, 2026 meeting; (3) failing to have audio accompanying the live stream when the March meeting resumed after the executive session; (4) failing to accept comments through the live stream at the meeting; and (5) posting the April 15, 2026 meeting agenda five days in advance of the meeting, rather than the required seven days.

¹ Several claims were initially dismissed via letter dated May 5, 2026. This Opinion addresses the remaining claims.

The Town, through its legal counsel, replied to the Petition and included the affidavit of the Mayor of the Town Council, who attested to being present at the January 15-16, 2026, March 11, 2026 and April 15, 2026 meetings; to having first-hand knowledge of the representations in the Response; and to the Mayor's belief that the Response's statements were true and correct. The Town believes that the petition should be denied, because this petition is submitted by proxy and the real party in interest is the former Town Manager, who is located out of state.² Regarding your first claim that the venue for the January public hearings was not "open" as provided by FOIA, the Town points out that the venue was the Council Chamber, which is handicap accessible and the usual location for the Town Council meetings. The Town states no members of the public were turned away due to inadequate seating or space, and the capacity limit of the Chamber was not met during the two-day hearing.

For the second claim, the Town asserts that after the executive session at the March 11, 2026 meeting, the Council made motions to move forward with the nonpayment of premium pay to "Town Employee A" and the strategic plan to amend the current employee handbook as discussed; a third motion was also made to proceed with a strategy outlined by legal counsel from the forensic audit regarding a former employee.³ The Town argues that the purposes of the executive session cited in the agenda were proper: personnel matters in which the names, competencies, and abilities of an employee were discussed and strategy sessions or advice or opinions from an attorney regarding pending or potential litigation. The Town contends that addressing this claim without confidentiality protections places the Town at a disadvantage, and releasing the information about the executive session discussions would defeat the purpose for the executive session. Because this Office does not offer *in camera* review, the Town argues that analogous to the legal precedent permitting an attorney to swear to the sufficiency of exemptions applied in a document review, an affidavit from the Town's employment counsel who attended the executive session should be sufficient to demonstrate that statutorily authorized reasons exist for this executive session. Regarding employee handbook changes, the Town acknowledges those discussions are proper for open session but asserts that the handbook issues naturally flowed from the discussions about Employee A and intertwined with proper discussions about legal advice and Employee A's competency. The Town states that no action has been taken to amend the handbook, and the matter would be undertaken at a future open session.

For the third claim, the Town asserts that the votes following the executive session occurred publicly as required. The Town states that when the open session resumed, the live stream feed continued, but audio was not captured; however, because the Council is not required to live stream its meetings, this issue is not a violation of FOIA. Regarding the fourth claim, the Town asserts that a public comment period is not required for a live stream. The Town states that in conformance with FOIA's requirements, a public comment period was held at the beginning of the in-person meeting. For the fifth claim alleging that the Town gave less than seven days' notice for its April 15, 2026 meeting, the Town asserts that the agenda was posted on April 8, 2026 in

² The Town does not provide sufficient factual support necessary for consideration of this allegation.

³ Response, p. 7.

compliance with FOIA, as indicated on page 2 of the agenda. The Town contends that although the agenda was not uploaded to the Town's website immediately, the Town is not required to post its agendas online, so this is not a violation of FOIA.

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."⁴ The public body has the burden of proof to justify a decision to meet in executive session and to otherwise demonstrate compliance with FOIA.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶

The "Open" Requirement for the January Hearing

The Petition's first claim is that the January public hearings did not meet the "open" requirement of FOIA. You allege that the Council room has a maximum capacity of 26 people and does not provide restrooms for physically disabled individuals; you argue that the counsel for the Town Manager, who was the subject of the hearing, requested a larger venue two days before the hearing and because of the Town's failure to change locations, witnesses and speakers from the public supporting the Town Manager could not attend.

FOIA requires, with limited exceptions, that a public body's meetings be open to the public.⁷ When considering whether a public body has violated the open meeting requirement based upon the size of the venue, we have considered what the public body knew at the time of scheduling and how it responded to an unexpected overflow.⁸ "[T]he governmental unit must balance the public right of access against the burdens that providing additional public access would impose on the governmental unit."⁹ The standard for any individual meeting is reasonableness under the circumstances.¹⁰ In this case, the Town's counsel asserts that the Council room did not reach capacity and no one was turned away. The Mayor attested to attending the hearing and the veracity of the Town counsel's representations. Based on these sworn representations, we need

⁴ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

⁵ 29 Del. C. § 10005(c).

⁶ *Judicial Watch, Inc.*, 267 A.3d at 1008-1012.

⁷ 29 Del. C. § 10004.

⁸ *Del. Op. Att'y Gen.* 98-IB12, 1998 WL 910198, at *2 (Nov. 10, 1998).

⁹ *Del. Op. Att'y Gen.* 02-IB09, 2002 WL 970060, at *2 (Apr. 12, 2002).

¹⁰ *Del. Op. Att'y Gen.* 98-IB12, 1998 WL 910198, at *2.

not further consider this claim, as the room size cannot be considered inadequate, nor the decision to remain in that location unreasonable, when the room accommodated the number of attendees. The claim about inadequate disability access in the restrooms is outside the scope of the FOIA statute.¹¹ We find no violation in this regard.

Executive Session at the March 11, 2026 Council Meeting

The second claim is that the Council improperly discussed and voted on employee compensation and employee handbook changes in executive session at the March 11, 2026 meeting. The Town asserts that the executive session was properly held pursuant to the personnel exception, and the Town's employment counsel who was present remotely at this session, attests that the motions for nonpayment of premium pay and to proceed with the plan to amend the current handbook arose from and are inextricably intertwined with the discussions concerning the name, competency, and abilities of the employee. The personnel exception in Section 10004(b)(9) does not cover general discussions about employee compensation; it "is limited to matters 'in which the names, competency and abilities of individual employees or students are discussed'" and "must 'directly involve the consideration of individual employees by name, competency, and ability.'"¹² Changes to the employee handbook also are not one of the permissible purposes for an executive session.¹³ We cannot discern from the presented record how these topics would be inextricable from discussions of an employee's name, competency and abilities.¹⁴ Thus, we find that the Town has not met its burden of demonstrating that these issues are covered by the personnel exception and determine this constitutes a violation of FOIA.

Having found that the Town violated FOIA with respect to these executive session discussions, we must determine whether any remediation is appropriate to recommend. The authority to invalidate a public body's action or impose other relief is reserved for the courts. 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."¹⁵ To

¹¹ 29 Del. C. § 10005(e).

¹² *Del. Op. Att'y Gen.* 02-IB12, 2002 WL 128812, at *2 (May 21, 2002) (noting police salaries are not the type of the personnel matter authorized for discussion in executive session) (citations omitted).

¹³ *See Del. Op. Att'y Gen.* 05-IB24, 2005 WL 3991283, at *6 (Aug. 18, 2005) ("Discussion of the handbook would not have come under the 'personnel' exception for executive session[s] because it did not involve discussion of the 'names, competency and abilities of individual employees.'").

¹⁴ *See Del. Solid Waste Auth. v. News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984) ("[O]pen meeting laws are liberally construed, and closed session exceptions within these statutes are strictly interpreted to limit nonpublic meetings.").

¹⁵ *Ianni v. Dep't of Elections of New Castle Cnty.*, 1986 WL 9610, at *7 (Del. Ch. Aug. 29, 1986).

remediate, we recommend that the Town Council hold an open session at a future meeting to discuss any aspects of the executive session not covered by the personnel exception.

Regarding your assertion that votes related to these matters were improperly held during executive session, the factual record does not support that contention. The Town submitted the affidavit of the Mayor, who was present at the March meeting and affirms counsel's representations that the Council room doors were opened after the executive session and the Council returned to open session. The Town's employment counsel also indicates in the affidavit that those motions about employee pay and the handbook were made following the executive session. Based on these sworn statements, we find no violation of FOIA in that regard.

Live Stream of the March 11, 2026 Meeting

The third and fourth claims allege that defects with the live stream of this meeting violated FOIA. You argue that after the Council's return to open session, the audio portion of the live stream of the March meeting was not working. You also contend that the live stream did not allow citizens to provide public comments during the meeting. This meeting agenda does not indicate it had a virtual component under Section 10006 of FOIA. FOIA does not require a public body to present a live stream of its in-person meetings, and public bodies do not have to accept comments virtually at an in-person meeting. The Town provided a public comment period at the outset of the in-person meeting, as required.¹⁶ Accordingly, we find no violation regarding these two claims.

Posting of the April 15, 2026 Meeting Agenda

The final claim is that the agenda for the April 15, 2026 Council meeting was not posted within the requisite timeframe. FOIA requires public bodies to post the notice and agenda for a meeting at least seven days in advance, with some limited exceptions in statute.¹⁷ Towns are not required to post their meeting agendas online.¹⁸ The Town asserts that the agenda was in fact posted as required on April 8, 2026, which was noted on page 2 of the agenda; although the agenda was not immediately uploaded to the website, postings to the website are not required under FOIA. The Response indicates that the agenda was posted seven days in advance as required by FOIA, and the Mayor's affidavit attests to the veracity of the Response's statements. Based on the Mayor's sworn statement, we find that the Town did not violate FOIA.

¹⁶ 29 Del. C. § 10004(a)(2).

¹⁷ 29 Del. C. § 10004(e)(2).

¹⁸ *Id.*

Conclusion

For the reasons set forth above, we conclude that the Town violated FOIA by failing to meet its burden to demonstrate the topics of the nonpayment of employee premium pay and changes to the employee handbook were appropriately discussed in executive session. The remaining claims are not violations of 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