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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB08

February 13, 2024

VIA EMAIL

Jan Konesey
jkonesey@gmail.com

RE: FOIA Petition Regarding the City of Rehoboth Beach

Dear Ms. Konesey:

We write in response to your correspondence alleging that the City of Rehoboth Beach 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 determine that the City’s Mayor and Commissioners violated FOIA at the November 6, 2023 Special Meeting by holding a vote about selecting the new City Solicitor without sufficient public notice and by failing to meet its burden to justify that the discussions in the November 6, 2023 Special Meeting’s executive session about selecting the new City Solicitor were proper under FOIA.

BACKGROUND

On November 6, 2023, the Mayor and Commissioners of the City of Rehoboth Beach held a Workshop Meeting and a Special Meeting. The public notices and agendas for these two meetings did not mention the appointment of a new City Solicitor. At the Workshop Meeting, the then-City Solicitor publicly announced his resignation during the item named “City Solicitor’s Report” and recommended that Alex Burns, Esq. of his law firm be appointed the next City Solicitor. At the Special Meeting that followed that afternoon, an executive session occurred for the purposes of “discussing personnel matters in which names, competency and abilities of individual employees are discussed, as permitted by 29 *Del. C.* § 10004(b)(9),” “the content of documents excluded from the definition of ‘public record’ under the Freedom of Information Act

(FOIA) as permitted by 29 Del. C. § 10004(b)(6)” and “preliminary discussions on the sale or lease of real property as permitted by 29 Del. C. § 10004(b)(2).”¹ After exiting this executive session, the Mayor and Commissioners voted on two matters under the item “[c]onsideration and/or action on matters discussed in Executive Session,” one of which was a motion to “authorize the Mayor to execute an engagement letter with Baird Mandalas Brockstedt Frederico LLC naming Alex Burns, Esq. the City of Rehoboth Beach’s City Solicitor.”² Without any public discussion, the motion was approved unanimously. This Petition followed.

In the Petition, you argue that the City’s process for selecting its new City Solicitor violated FOIA’s open meeting requirements. You allege that the vote on selecting a solicitor was improper, as notice did not appear on the agenda that there was a vacancy, nor that the City would vote on a new solicitor. You point out that the City previously knew about the vacancy, as the City Solicitor sent a letter prior to the meeting. You state that the City Solicitor is not an employee of the City; the position is an independent professional. As such, you contend that there is no valid reason to hold these discussions in executive session. In addition, you claim that the three purposes set forth in the agenda did not provide adequate notice that a discussion on the vacancy and selecting of a new solicitor would occur.

On January 23, 2024, the new City Solicitor replied to this Petition on the City’s behalf (“Response”) and attached the affidavit of the Mayor, who attests he was present for and witness to the meetings and executive session and that “the statements in the Response are accurate.”³ The City argues that its actions were compliant with FOIA. The City contends that a properly noticed executive session was conducted for the discussion of public business and all voting took place in public view. The City maintains that its description of the purposes of the executive session are adequate, as FOIA does not require public bodies to elaborate in great detail on the subjects being discussed. The City asserts that the “executive session was conducted only for the discussion of appropriate public business and no vote was taken or consensus developed during said executive session.”⁴ The City states that following the executive session and after voting on another matter, the Mayor and Commissioners voted unanimously in the public session to authorize the Mayor to name the new City Solicitor, which the City contends “evolved organically as a natural progression of Mr. Burns’ tenure with the City, and as a direct result of a properly noticed agenda item at the Workshop Meeting, the City Solicitor Report, [and] did not require additional elaboration in the form of a surplus discussion at the Special Meeting.”⁵

¹ Petition.

² *Id.*

³ Response, Ex. A.

⁴ *Id.*, p. 2.

⁵ *Id.*, p. 3.

DISCUSSION

The City carries the burden of proof to “justify a decision to meet in executive session and any failure to comply with [FOIA].”⁶ In certain circumstances, a sworn affidavit may be required to meet that burden.⁷ Subject to certain limited exceptions, FOIA requires the meetings of all public bodies to be open to the public.⁸ The Petition’s first claim asserts that the matter of selecting a new City Solicitor was not sufficiently noticed in the agenda. Public bodies must provide advance notice and an agenda for its public meetings, and the agenda must include a “general statement of the major issues” which a public body expects to discuss⁹ and must be worded in “plain and comprehensible language.”¹⁰ Delaware courts have opined an agenda “should, at least, ‘alert members of the public with an intense interest in’ the matter that the subject will be taken up by the [public body].”¹¹ “In other words, members of the public interested in an issue should be able to review a notice and determine that an issue important to them will be under consideration.”¹²

In this case, the Workshop Meeting agenda referred to the City Solicitor’s Report, and the Special Meeting item, following an executive session, stated “[c]onsideration and/or action on matters discussed in Executive Session.”¹³ Even if viewed together, the public could not review these agendas and discern that the Mayor and Commissioners planned to discuss and undertake the selection of a new City Solicitor.¹⁴ We find that the City violated FOIA by providing insufficient notice to the public in its agenda of this vote.

⁶ 29 Del. C. § 10005(c).

⁷ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁸ 29 Del. C. § 10004.

⁹ 29 Del. C. § 10002(a).

¹⁰ *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994).

¹¹ *Lechliter v. Del. Dep’t of Natural Res. & Env’t Control*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017) (quoting *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *4 (Del. Ch. Aug. 29, 1986)).

¹² *Id.*

¹³ Petition.

¹⁴ *See Del. Op. Att’y Gen.* 21-IB03, 2021 WL 961062, at *3 (Feb. 25, 2021) (“This agenda’s broad descriptors of ‘Personnel’ and ‘Personnel Action Items,’ are not sufficient to alert any citizen with an intense interest in the matter of the renewal of the superintendent’s contract that it would be addressed at the meeting.”); *Del. Op. Att’y Gen.* 15-IB01, 2015 WL 3919060, at *5 (Jun. 12, 2015) (“Here, the public had no way of knowing that the superintendent’s [c]ontract would be considered and voted upon by the Board at its June meeting.”).

The remaining claims relate to the executive session at the Special Meeting. You allege that the executive session's notice for the topic of selecting a new solicitor was inadequate; the City must have discussed this vacancy and selection of the new solicitor in executive session; and those discussions in executive session were improper. To support the propriety of the executive session, the City does not provide minutes of the executive session or describe under oath the topics discussed during the executive session. Instead, the City attests that the executive session was conducted "only for the discussion of appropriate public business," and the City states that the motion for the new solicitor arose organically from a previous meeting and "did not require additional elaboration in the form of surplus discussion at the Special Meeting."¹⁵ The City does not specify whether discussions about the solicitor's selection took place in executive session. As it is the City's burden to support its position with appropriate facts under oath and the Special Meeting agenda indicates that the executive session included the topic of selecting the new solicitor, we assume for purposes of this decision that discussions about selecting a new solicitor did occur in the executive session.¹⁶ None of the three cited purposes in the agenda, including the purpose of a personnel matter involving names, competency and abilities of individual employees, applies to selecting a new solicitor with an outside legal firm.¹⁷ Accordingly, we find the City's Mayor and Commissioners violated FOIA in this regard. As we have concluded that the City did not demonstrate the propriety of discussing the selection of the City Solicitor in executive session, we need not determine the last claim in the Petition regarding whether notice of the improper discussions in the executive session was adequate.

Having found that the City violated FOIA by failing to provide adequate notice of its vote at the November 6, 2023 Special Meeting and by discussing the selection of the new solicitor in executive session, we must determine whether any remediation is appropriate to recommend. The

¹⁵ Response, p. 2-3.

¹⁶ *Judicial Watch, Inc.*, 267 A.3d at 1010-11 ("Thus, the University is asking this Court to determine that it has met its burden of proof, fully resolving the dispute, based solely on these factual representations. But the resolution of a legal action must rest on competent, reliable evidence. And the Court has held that when an attorney seeks to establish facts based on personal knowledge, those facts must be asserted under oath. A statement made under oath, like a sworn affidavit, will ensure that the court's determination regarding the public body's satisfaction of the burden of proof is based on competent evidence.").

¹⁷ *See Del. Op. Att'y Gen.* 05-IB02, 2005 WL 120844, at *2 (Jan. 12, 2005) ("As the City has acknowledged, the City Solicitor and the Deputy Solicitor are not public employees. Rather, they are independent contractors hired by the City to provide professional legal services. This office has previously held that the 'personnel' exception to the open meeting provisions of FOIA does not apply to independent contractors but only public employees. *See Att'y Gen. Op.* 02-IB17 (August 6, 2002). Similarly, we find that since the City Solicitor and Deputy Solicitor are not employees of the City, any records relating to their provision of legal services are not exempt from disclosure under the 'personnel file' exemption of FOIA. Therefore, the City erred when it went into executive session to discuss its contractual arrangements with the City Solicitor and Deputy Solicitor.").

authority to invalidate a public body’s action or impose other relief is reserved for the courts.¹⁸ 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.”¹⁹ In determining whether invalidation is appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”²⁰ When a decision is reached primarily outside of public view, that factor is also weighed heavily in determining whether remediation is appropriate.²¹ The deficiencies in this matter meant that the public did not have notice to attend and view the discussions about selecting a new solicitor. As such, we recommend that the Mayor and Commissioners discuss its reasons and ratify the vote related to the City Solicitor in open session at a future meeting, after providing appropriate notice of the item on its agenda in accordance with the FOIA statute.

CONCLUSION

For the reasons set forth above, we conclude that the City’s Mayor and Commissioners violated FOIA at the November 6, 2023 Special Meeting by holding a vote on selecting the City Solicitor without sufficient public notice and by failing to meet its burden to justify that the discussions about selecting the new City Solicitor in the November 6, 2023 Special Meeting’s executive session were proper under FOIA.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

¹⁸ 29 *Del. C.* § 10005.

¹⁹ *Ianni*, 1986 WL 9610, at *7.

²⁰ *Chem. Indus. Council of Del.*, 1994 WL 274295, at *15.

²¹ *O’Neill v. Town of Middletown*, 2007 WL 2752981, at *9 (Del. Ch. Mar. 29, 2007) (“In *Chemical Industry Council*, the Court concluded that the stern sanction of invalidation was the only appropriate remedy where there were material breaches of FOIA and where invalidation of the regulations would have no adverse consequences on innocent parties. Critical to the Court’s conclusion, however, was not simply that illegal executive sessions were held but that the Board had essentially promulgated the regulations outside of public view. Although the regulations were formally approved in the Board’s public meeting, they had been formulated, extensively deliberated upon, and agreed to in an executive session immediately preceding the public meeting. That was not the case here.”) (internal citations omitted).

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Alex C. Burns, Attorney for the City of Rehoboth Beach