



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

PHONE (302) 577-8400
FAX (302) 577-2610

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Opinion No. 16-IB14

June 9, 2016

VIA EMAIL AND U.S. MAIL

Vincent M. White
114 West 40th Street
Wilmington, DE 19802
vincent.provestrealty@gmail.com

Re: **November 16, 2015 FOIA Petition Concerning Potential Violations of “Open Meeting” Laws by the Wilmington Housing Authority Board of Commissioners**

Dear Mr. White:

This Opinion is provided in response to your November 16, 2015 petition (the “Petition”) seeking a determination regarding whether the Board of Commissioners of the Wilmington Housing Authority (the “Board”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”), by failing to comply with various requirements for conducting “open meetings.” Your first five allegations relate to conduct that occurred more than six months prior to the Petition. They are not timely and are not addressed in this Opinion. Two of your allegations are impermissibly vague and are not addressed in this Opinion. Your remaining allegations fail because FOIA does not require a public body to vote to hold a meeting. We find that your Petition fails to allege a FOIA violation.

I. BACKGROUND

On November 2, 2015, you submitted a letter to Governor Jack Markell alleging that the Board committed several violations of FOIA’s “open meeting” requirements. On November 3, 2015, you forwarded your letter to the Delaware Department of Justice. The letter stated that the Board: 1) held closed or executive sessions “with a full quorum of Board members” but did not

“disclos[e] subject or purpose for meeting or provid[e] minutes for the record”; and 2) failed “to provide adequate public meeting notices.”

On November 4, 2015, we requested additional information from you regarding: 1) whether you alleged that the November 2, 2015 meeting of the Board violated FOIA; and 2) the specific dates and times of other meetings and alleged FOIA violations.

On November 16, 2015, you responded and alleged the following specific FOIA violations, which we quote here verbatim:

1. October 7th 2013 Special Meeting Call 1:00 PM no record of notice no meeting minutes of executive session
2. February 7, 2014 No vote by WHA Commissioners to hold meeting. Commissioners went into executive session no record of discussion and/or minutes
3. May 14, 2014 Special Meeting for elections no ballot of candidates for office. Matter was discussed before the meeting with 5 commissioners during dinner. No record of minutes from Executive Session
4. August 21, 2014 Special Meeting called with no vote of commissioners to hold such. Commissioners went in to executive session to discuss hiring counsel. Voted 5-2 to do so. No record of whom voted or minutes from the executive session.
5. December 10, 2014 Special Meeting called with no vote by commissioners to do so. Commissioners went into executive session. No minutes of Executive Session
- December 11, 2014 Special Meeting Called, no vote by commissioners to do so. to review four resolutions adopted 12-8-2014. No adequate notice to public
6. Special Meeting called July 22, 2015, no vote taken by commissioners to do so
- November 2, 2015 Special Called, no vote taken by commissioners to do so.

Chair routinely discussion agency business orally and via email with selected commissioners before meeting times and dates and has publicly admitted to arranging meeting schedules to purposely exclude some commissioners.

Special Meeting are convened with adequate public notice. Chair motions to go into executive session, no record of executive sessions have been provided, yet the Chair has called for votes in the public session, with no minutes from the aforementioned executive sessions.

By letter dated November 20, 2015, and pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Board to submit a written response to your Petition. We received the Board's response ("Response") on December 2, 2015. In its Response, the Board stated that Allegations 1-5 were untimely, and that the final two paragraphs were too vague to be reasonably investigated. The Board also stated that Allegation 6 did not state a violation of FOIA, as seven days' public notice of the meeting was provided as required by law.

On January 12, 2016, we requested that the Board provide "copies ... of the public notice provided for [the July 22, 2015 and November 22, 2015] meeting[s], as well as information or any affidavits or other proof regarding when and how the notice was provided." On April 5, 2016, we also requested the minutes from those meetings. We received the Board's responses to these requests on March 1, 2016 and April 8, 2016, respectively.

II. APPLICABLE LAW

FOIA requires all public bodies to "give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof."¹ Public notice of less than seven days is permissible for a "special or rescheduled meeting," and must be provided "as soon as reasonably possible, but in any event no later than 24 hours before such meeting," with an explanation as to why seven days' notice could not be provided.² A special or rescheduled meeting is defined as "one to be held less than 7 days after the scheduling decision is made."³ Finally, "[t]he notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings"⁴

III. DISCUSSION

As an initial matter, this Office has "consistently declined to investigate open meeting complaints where . . . the alleged violations took place more than six months prior to the filing of a petition under FOIA § 10005(e)."⁵ Here, the open meeting violations alleged to have occurred

¹ 29 *Del. C.* § 10004(e)(2).

² 29 *Del. C.* § 10004(e)(3).

³ *Id.*

⁴ 29 *Del. C.* § 10004(e)(2).

⁵ *Del. Op. Att'y Gen.* 12-IIB11 (Nov. 7, 2012). *See also Del. Op. Att'y Gen.* 06-IB02 (Jan. 9, 2006) ("[O]ur Office has historically declined to investigate FOIA complaints of a violation of the open meeting laws where the alleged violation took place more than six months before our Office received the complaint."); 05-IB26 (Aug. 29, 2005) (noting "historical practice of [Attorney General's] Office not to entertain FOIA complaints relating to matters that occurred more than six months prior to . . . receiving the citizen's complaint"); *Del. Op. Att'y Gen.* 02-IB10 (Apr. 24, 2002) ("As a general rule, for fairness and practical reasons, we do not investigate events that occurred more than six months before we received the complaint.").

on or about October 7, 2013; February 7, 2014; May 14, 2014; August 21, 2014; December 8, 2014; December 11, 2014; and December 10, 2014 (*i.e.*, Allegations 1-5) fall well outside of this timeframe and, as a result, will not be addressed in this Opinion.

Furthermore, the two unnumbered paragraphs of your Petition are too vague to support further inquiry by this Office.⁶ As such, these allegations will not be addressed in this Opinion. If you have specific examples of the actions described in the two unnumbered paragraphs that you allege occurred in connection with any meeting held between May 16, 2015 and November 16, 2015, you may submit a new petition asserting those allegations on or before June 22, 2016, and we will treat the allegations as timely submitted.

The only allegations ripe for a determination by this Office are contained in paragraph number “6” of your Petition:

6. Special Meeting called July 22, 2015, no vote taken by commissioners to do so November 2, 2015 Special Called, no vote taken by commissioners to do so.

We read this statement to allege that the Board violated FOIA by calling special meetings on July 22, 2015 and November 2, 2015 without a “vote taken by the commissioners to do so.”

As an initial matter, notwithstanding the fact that the public notice identified the meetings as such, it is our determination that the July 22, 2015 and November 2, 2015 meetings were not, in fact, special meetings. A special meeting is specifically defined as one “to be held less than 7 days after the scheduling decision is made.”⁷ Here, we are satisfied that the Board provided seven days’ public notice of both meetings. First, copies of the agendas indicate that notice was posted on July 15, 2015 for the July 22, 2015 meeting and on October 26, 2015 for the November 2, 2015 meeting. Moreover, the Board provided a sworn affidavit of Sandella Burkholder, Confidential Secretary to the Board’s Executive Director, wherein Ms. Burkholder states: “With regard to the meetings held on July 22 and November 2, 2015, I state that notice of the meetings and agendas were distributed for posting seven days before the meetings.”⁸ As such, because the Board provided at least seven days’ notice of the July 22 and November 2 meetings, we conclude that they were not “special meetings,” of the Board.

⁶ See *Del. Op. Atty. Gen.* 96-IB05 (1996) (finding no FOIA violation occurred when only “sweeping, vague allegations” with “no specific facts are alleged” regarding conduct of meetings).

⁷ 29 *Del. C.* § 10004(e)(3).

⁸ Affidavit of Sandella Burkholder (Mar. 2, 2016), attached as Exhibit C to Letter from Lauren E.M. Russell, Esq., Young Conaway Stargatt & Taylor, LLP, to Brenda R. Mayrack, Esq., Deputy Attorney General, Delaware Department of Justice (Mar. 1, 2016).

Importantly, FOIA does not require a vote by the members of a public body to schedule a meeting, special or otherwise. Rather, FOIA simply requires that the public body provide notice of the meeting, as required by 29 *Del. C.* § 10004(e). As noted above, we are satisfied that the Board provided notice at least seven days in advance of the meeting as required by 29 *Del. C.* § 10004(e)(2), and that the notices otherwise complied with applicable law.⁹ Therefore, with respect to the July 22, 2015 and November 2, 2015 meetings, we conclude that your Petition fails to allege a FOIA violation.

IV. CONCLUSION

Allegations 1-5 of the Petition refer to conduct occurring more than six months prior to this Office's receipt of the Petition and, as a result, are not addressed by this Opinion. Likewise, the two unnumbered paragraphs of the Petition are too vague and, as a result, are not addressed by this Opinion but may be considered in a separate determination as discussed above. Finally, because FOIA does not require that a public body vote to hold a meeting, Allegation 6 fails to allege a FOIA violation.

Very truly yours,



Brenda R. Mayrack
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: Lauren E.M. Russell, Esq., Young Conaway Stargatt & Taylor, LLP (via email)
Danielle Gibbs, Chief Deputy Attorney General (via email)
Jennifer Noel, Deputy Attorney General (via email)
Michelle Whalen, Deputy Attorney General (via email)

⁹ See 29 *Del. C.* § 10004(e)(2); 29 *Del. C.* § 10004(c).