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Attorney General Opinion No. 16-IB16

July 6, 2016

VIA EMAIL AND U.S. MAIL

Frank "Dan" Cannon
411 Nylon Blvd.
Seaford, DE 19973
seafordski@hotmail.com

Re: FOIA Petition Concerning the City of Seaford

Dear Mr. Cannon:

On March 16, 2016, the Delaware Department of Justice ("DOJ") received your petition ("Petition") requesting our determination, pursuant to the Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"), of whether the Council of the City of Seaford ("Council") violated FOIA's open meetings provisions by failing to accurately reflect the comments you made during the January 12, 2016 Council meeting. Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Council to submit a written response to your Petition. We received the Council's response ("Response Letter") on March 24, 2016. We have reviewed your correspondence and the Council's Response Letter. Because the minutes of the January 12, 2016 Council meeting summarized your comments in a way that was not materially misleading, we conclude that the Council has not violated FOIA as alleged in the Petition.

I. BACKGROUND

On January 12, 2016, the Council held its regularly scheduled public Council meeting. The meeting agenda included one general period for public comment as well as an agenda item for the following: "Present the proposed Social Media Policies for General Employees and Police Department Employees based on the review by the Council Solicitor" (the "Policies"). The meeting agenda included a copy of the Policies as attachments.

During the time for public comment, you made a statement regarding the proposed Policies. You also provided a written copy of your statement to the Council. Later in the meeting, the Council discussed and voted on the Policies.

At the next Council meeting, on January 26, 2016, the Council approved the minutes of the January 12, 2016 Council meeting. The minutes included significant verbatim excerpts from your statement commenting on the Policies. The minutes do not, however, include your entire written statement. The minutes also include a summary of the Council's discussion of the Policies and record of the vote by members of the Council.

II. SUMMARY OF ARGUMENTS

In your Petition, you allege that the Council violated FOIA by inaccurately recording your comments during the Council meeting held on January 12, 2016. Specifically, you allege that Council's choice to omit your critical commentary, a discussion of the precipitating incident, the role of a non-Seaford resident in the matter, your personal opinion regarding the employee's actions and context from its minutes constitutes "a distortion of the public record." In doing so, you allege that the Council "has failed in its duty to accurately record what actually happened thus depriving the public of important information needed to understand [your] opinion(s) regarding [the City's actions in relation to an employee's use of social media]." You also note that you "recognize that the minutes of a public meeting will not be a verbatim account of what transpires."

In its Response Letter, the Council acknowledges that FOIA requires public bodies to maintain minutes, but maintains FOIA does not require minutes to be a verbatim report of what was said. The Council contends that its minutes went into considerable detail and accurately reflected the substance of your statement.

III. APPLICABLE LAW

Pursuant to 29 *Del. C.* § 10004(f), public bodies are required to "maintain minutes of all meetings . . . Such minutes shall include a record of those members present and a record, by individual members....of each vote taken and action agreed upon."

IV. DISCUSSION

While Delaware's FOIA requires public bodies to maintain minutes of all meetings, it does not require minutes to include summaries of subjects discussed or attempt to define how specific a summary should be.¹ However, if a public body does summarize, then it must do so in a way that does "not misstate or omit what in fact happened."²

¹ *Common Cause of Del. v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 1995 WL 733401 *4 (Del. Ch. Dec. 5, 1995) (describing public body's duty to maintain minutes in context of executive session).

² *Del. Op. Atty. Gen.* 07-IB03 (quoting *Reeder v. Dep't of Ins.*, 2006 WL 510067 at p. 15 (Del. Ch., Feb. 24, 2006) (Strine, V.C.)).

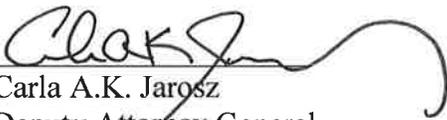
In *Reeder v. Department of Insurance*,³ the Court of Chancery reviewed the minutes of a meeting of the Defensive Driving Credential Committee of the Department of Insurance (“DDCC”). During the meeting, a member of the public asked the DDCC to request that the Insurance Commissioner conduct an investigation. The minutes of the meeting indicated that the request had been made, but did not reflect the DDCC’s affirmative response to the request. The court expressly declined to decide the question of whether the DDCC was required to include, in the first instance, the fact that the request had been made. Rather, the Court concluded that, once the DDCC decided to address the request in its minutes, it “became bound to reflect its own reaction to that request.”⁴ The court reasoned that, once the DDCC decided to address the matter in its minutes, “it had a duty to do so in a fair and balanced manner that [did] not misstate or omit what in fact happened.”⁵ In other words, “once a public body undertakes to cover a particular topic in minutes, it cannot describe the topic in a manner that is *materially* misleading.”⁶

Here, once the Council chose to summarize your public comments, it had a duty to portray them in a way that was not materially misleading. The meeting agenda included copies of the Policies. The Public Comment portion of the minutes included: the subject matter of your statement; a bullet-point list of your objections to the Policies (excerpted verbatim from your written statement); and your conclusion. Council’s discussion of and vote on the Policies is reflected under the heading Old Business in the minutes, consistent with the published agenda. We conclude that the Council addressed your statement in a fair and balanced manner and any omissions the Council made were not materially misleading.

CONCLUSION

Because the minutes of the January 12, 2016 meeting summarized your comments in a way that was not materially misleading, the Council has not violated FOIA as alleged in your Petition.

Very truly yours,


Carla A.K. Jarosz
Deputy Attorney General

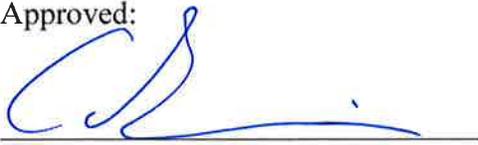
³ *Reeder v. Department of Insurance*, C.A. No. 1553-N, 2006 WL 510067, at *15 (Del. Ch., Feb. 24, 2006) (Strine, V.C.).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* (emphasis in original).

Approved:



Aaron R. Goldstein, State Solicitor

cc: Danielle Gibbs, Chief Deputy Attorney General (via email)
Michelle E. Whalen, Deputy Attorney General (via email)
James Fuqua, Esq. (via email)