



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB07

March 28, 2017

VIA U.S. MAIL & EMAIL

Paul J. Reiger, Sr.
18171 Deer Forest Rd.
Georgetown, DE 19947
paul@boatshopper.com

RE: December 27, 2016 FOIA Petition Regarding the Sussex County Board of Adjustment

Dear Mr. Reiger:

We write in response to your correspondence, received on December 27, 2016, alleging that the Sussex County Board of Adjustment (the "Board") violated the open meetings provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a petition (the "Petition") for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. Pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Board to submit a written response to the Petition. We received the Board's response on January 4, 2017. We have reviewed the Petition and the Response Letter. For the reasons set forth below, it is our determination that the Board committed, at most, a technical violation by including "public comment" as an agenda item without intending to allow for public comment or, in the alternative, by failing to remove the item from the agenda. In either case, we do not believe remediation to be warranted under the circumstances.

FACTS

The Board met on December 19, 2016. The agenda for the meeting listed six specific applications for the Board's consideration under the subheading "Public Hearings." The agenda was revised on December 12, 2016 to include the following notation:

Additional Business

Public Comments

During the December 19 meeting, following the scheduled public hearings, Board Chair Dale A. Callaway stated: “That is all of our business for this evening. Our additional business would be public comments.” Another Board member stated: “I didn’t know that was in our rules.” Mr. Callaway replied: “Well, we had to put that in there to be able to have comment for Mr. Lang’s retirement . . . to be able to discuss that and, you know, mainly it’s for him . . . Tonight it was just that only, for the purpose of any comments or any well-wishes.” Mr. Lang requested permission to step up to the podium, noting that he speaks better when he is standing. Mr. Lang then approached the podium and thanked the Board and staff. Individual Board members then thanked Mr. Lang for his service. Following this discussion, the Board adjourned the meeting. You then spoke, noting that the Sussex County Planning and Zoning Commission and Sussex County Council allow public comment. A Board member responded that the Sussex County Planning and Zoning Commission and Sussex County Council are legislative bodies and the Board does not allow public comment because it is quasi-judicial. The Board member stated that the office should be able to answer any questions.¹

POSITIONS OF THE PARTIES

In your Petition, you argued that if the words “public comment” appear on an agenda, the public must be allowed to speak. You stated that the words imply that you or any other member of the public will be permitted to speak. Finally, you noted that you wasted over three hours of your time by attending the meeting expecting to speak and being denied an opportunity to do so.

In its Response Letter, the Board stated that “public comments,” as used in the agenda, “was used . . . to refer solely to a public discussion among the Board, its attorney and Lawrence B. Lank regarding Mr. Lank’s impending retirement as Sussex County Director of Planning and Zoning after 47 years of service to the County.”² The Board noted that, as a general matter, the Board does not permit public comment that is not specific to an application or appeal before the Board in its quasi-judicial capacity.³ On December 19, 2016, the Board allowed public comment for each of the seven applications before the Board but treated all members of the public equally by not allowing any member of the public to comment on general matters.⁴

¹ We are unable to determine whether there was subsequent discussion. However, any such discussion is not relevant to our determination.

² Response Letter at 1.

³ *Id.*

⁴ *Id.* at 1-2.

RELEVANT STATUTES

FOIA requires all public bodies to “give public notice of their regular meetings and their intent to hold an executive session closed to the public, at least 7 days in advance thereof.”⁵ “The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings”⁶ An agenda is defined as including a “general statement of the major issues expected to be discussed at a public meeting.”⁷

DISCUSSION

As an initial matter, we note that the Board has stated that, “[a]s a general practice, the Board does not allot time at its meetings for public comment which is not specific to an individual case before it” and “only invites public comment on specific applications and appeals brought to the Board.”⁸ However, the question of whether the Board’s general practice comports with FOIA is not relevant to this determination.⁹ Rather, the question here is whether the Board violated FOIA, as alleged in the Petition, by failing to allow you to provide public comment once that agenda item came up for discussion.

The Board Did Not Violate FOIA by Not Allowing You to Provide Public Comment

As we have previously noted, “FOIA does not require a public body to allow members of the public to speak during a public meeting.”¹⁰ We have nonetheless concluded that, if a public

⁵ 29 *Del. C.* § 10004(e)(2).

⁶ *Id.*

⁷ 29 *Del. C.* § 10002(a).

⁸ Response Letter at 1 (citing *Del. Op. Att’y Gen.* 04-IB02, 2004 WL 257223, at *1 (Jan. 28, 2004) (noting that the Rehoboth Beach Board of Adjustment sits in a quasi-judicial capacity)).

⁹ In *Del. Op. Att’y Gen.* 04-IB02, we opined that FOIA does not require a county board of adjustment to entertain comment from members of the public. *Id.* at *2. However, we concluded that the board violated FOIA by hearing comment from one member of the public regarding a particular matter before the board to the exclusion of other members of the public. *Id.* at *3. Here, unlike in *Del. Op. Att’y Gen.* 04-IB02, we note that the Board here allowed public comment in the context of each matter. Although we do not believe FOIA mandates that the Board hear public comment on any matter, there is no evidence that you were denied an opportunity to speak on a particular matter before the Board.

¹⁰ *Del. Op. Att’y Gen.* 08-IB01, 2008 WL 772759 (Jan. 28, 2008) (citing *Reeder v. Del. Dep’t of Ins.*, 2006 WL 510067, at *12 (Del. Ch. 2006), *aff’d*, 931 A.2d 1007 (Del. 2006)).

body permits public comment, “then it must treat members of the public fairly and even-handedly.”¹¹ Here, we see no evidence here that one or more members of *the public* were permitted to speak to the exclusion of another. Rather, the only individuals permitted to speak were Mr. Lank, in his capacity as a county employee, and members of the Board. Because Mr. Lank was permitted to speak in his professional capacity and not as a member of the public, the Board’s actions in allowing him to speak while refusing to hear public comment did not, as a general matter, violate FOIA.¹² The question is thus whether the Board’s conduct in connection with its discussion of Mr. Lank’s retirement violated FOIA’s open meetings provisions in some other way.

The Board Violated FOIA by Including an Item on the Agenda in Error or, in the Alternative, by Failing to Subsequently Remove the Item from the Agenda

Delaware’s FOIA requires public bodies to give at least 7 days’ notice of their regular meetings and to include the agenda if it has been determined at the time.¹³ “An agenda is defined as including a “general statement of the major issues expected to be discussed at a public meeting.”¹⁴ As we have previously noted, a primary purpose of FOIA’s notice and agenda requirements is to “notify[] the public of important matters that will be discussed and possibly voted on so that members of the public can decide whether to attend a particular public meeting.”¹⁵ Importantly, however, you have not alleged that you were denied an opportunity to observe the Board discuss or vote upon any matter. Rather, you allege that you attended the December 19 meeting with the expectation that the Board would allow you, as a member of the public, to provide public comment.

Based upon the record, we believe that the Board misunderstood its obligations regarding FOIA’s notice provisions. Indeed, the Board appeared to be operating on the assumption that, in order to acknowledge Mr. Lank’s retirement, it was required to add “public comment” to its agenda. However, while the Administrative Procedures Act or some other body of law may dictate what the Board’s agendas must contain, there is no requirement *under FOIA* that a public body add “public comment” to its agenda for the sole purpose of acknowledging an individual’s retirement from public service and allowing that individual to speak in response thereto. While

¹¹ *Del. Op. Att’y Gen.* 04-IB13, 2004 WL 1302218, at *3 (June 1, 2004) (quoting *Del. Op. Att’y Gen.* 03-IB06, 2003 WL 21205415, at *2 (Jan. 21, 2003)).

¹² *See Del. Op. Att’y Gen.* 06-ID19, 2006 WL 2724979, at *3 (Sept. 5, 2006) (finding no FOIA violation where “[t]he persons invited to speak were all public officials who spoke in that capacity and not as members of the general public”).

¹³ 29 *Del. C.* § 10004(e)(2).

¹⁴ 29 *Del. C.* § 10002(a).

¹⁵ *Id.* at *3.

we express no opinion regarding whether FOIA mandated that the discussion be noticed on the agenda in the first instance,¹⁶ we note that the Board could have more accurately included the terms “Lank’s Retirement” or some other similar terminology to identify the discussion.

Notwithstanding the foregoing, it is our determination that the Board’s conduct here amounted to a FOIA violation. However, as noted above, the Board did not violate FOIA by failing to allow public comment. Rather, the Board violated FOIA either by identifying – in error – its intent to hear public comment despite the fact that it had no intention of doing so or, in the alternative, by failing to properly amend its agenda to remove “public comment” therefrom.¹⁷ This conclusion is supported, at least in part, by the fact that you appeared to rely on the Board’s agenda to your detriment, which reliance we believe to have been reasonable under the circumstances.

No Remediation is Warranted

Having determined that the Board violated FOIA, we nonetheless note that there is no remediation that we believe to be warranted under the circumstances. While it is unfortunate that you appear to have attended the meeting based solely upon the Board’s implication that it would entertain public comment, we cannot conclude that the Board’s actions substantially affected public rights under FOIA.¹⁸ Indeed, as noted above, FOIA does not require a public body to allow public comment and there is nothing in FOIA that would have prohibited the Board from voting to remove “public comment” from the agenda.¹⁹ As such, it is our determination that the Board’s error amounted to a technical violation for which no remediation is warranted.

¹⁶ See, e.g., *Del. Op. Att’y Gen.* 12-IIB12, 2012 WL 6858970, at *5 (Nov. 21, 2012) (concluding that presentation in support of a salary proposal was not a “major issue” requiring disclosure under FOIA). We nonetheless caution that public bodies should err on the side of disclosure in determining whether a discussion item is a “major issue to be discussed.”

¹⁷ We note that the proper procedure would have been for the Board to vote to amend the agenda. See *Del. Op. Att’y Gen.* 03-IB17, 2003 WL 22669563, at *3 n.2 (July 31, 2003) (“In the event that FOIA permits a public body to add items to the agenda, the ‘proper procedure is for [the public body] by motion to vote to amend the agenda. This was not done.’”) (quoting *Patterson v. DeCarbo*, 2000 WL 1865006, at *3 (Pa. Ct. Comm. Pl. Mar. 24, 2000)).

¹⁸ See *Ianni v. Dept. of Elections of New Castle County*, 1986 WL 9610, at *6 (Del. Ch. Aug. 29, 1986) (“Not every failure to comply with precision to the terms of [FOIA] will involve substantial public rights and thus not every technical violation will support either a declaratory judgment or, more importantly, injunctive relief.”); *Del. Op. Att’y Gen.* 00-IB12, 2000 WL 1092963, at *2 (June 28, 2000).

¹⁹ 29 *Del. C.* § 10004(e)(2) (“[T]he agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the meeting); see also *Del. Op. Att’y Gen.* 11-IIB11, 2011 WL 4062222, at *3 (Aug. 17, 2011) (“FOIA expressly provides that a public body may remove items from an agenda. 29 *De. C.* § 10004(e)(2). FOIA does not require that the Town provide a reason, let

CONCLUSION


Based on the foregoing, it is our determination that the Board violated FOIA either by identifying – in error – its intent to hear public comment despite the fact that it had no intention of doing so or, in the alternative, by failing to properly amend its agenda to remove “public comment” therefrom. Under the circumstances, however, we do not believe remediation to be warranted. We nonetheless recommend that the Board consult the FOIA statute and/or pursue FOIA training. Although FOIA dictates that these materials “shall not be construed as legal advice,” the Board may wish to consult prior Attorney General FOIA Opinions, the current Policy Manual for FOIA Coordinators, and the slides and video from the most recent Statewide FOIA Coordinator Training, which are available online at <http://www.attorneygeneral.delaware.gov/executive/opengov.shtml> as of the date hereof.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, State Solicitor

cc: J. Everett Moore, Esq. (via email)

alone a ‘compelling reason,’ for removing an agenda item.”); *Del. Op. Att’y Gen.* 09-IB02, 2009 WL 1433467, at *1 (May 5, 2009) (“No evidence has been submitted that the Superintendent cancelled the public comment portion of the March 10 meeting, but under *Reeder* it would not implicate FOIA if he had.”).