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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 17-IB48**

**September 27, 2017**

**VIA EMAIL**

Mr. Xerxes Wilson  
xwilson@delawareonline.com

**RE: September 7, 2017 FOIA Correspondence Regarding New Castle County Council**

Dear Mr. Wilson:

We write regarding your correspondence, received on September 7, 2017, alleging that the New Castle County Council (the "Council") Personnel Subcommittee (the "Personnel Subcommittee") violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). Specifically, you allege that the Personnel Subcommittee violated FOIA by: 1) failing to indicate the potential for any vote other than a vote to approve meeting minutes on its August 14, 2017 meeting agenda, and 2) voting affirmatively on "the recommendations and discussions that Council collectively had during the executive session." We have reviewed the Council's response – which included draft minutes of the executive session – *in camera* and have compared them with the minutes of the public portion of the meeting. For the reasons set forth below, it is our determination that the Personnel Subcommittee did not violate FOIA as alleged.

**RELEVANT FACTS**

The Personnel Subcommittee convened a meeting on September 14, 2017. The following members were present at the start of the meeting: Cartier, Diller, Hartley-Nagle, Hollins, Kilpatrick, Powers, Sheldon, Smiley, Street, Tackett, Weiner, Woods. After voting to approve its July 11, 2017 meeting minutes, the Personnel Subcommittee convened an executive session "to discuss a confidential personnel matter." Following the executive session, the Personnel Subcommittee "vote[d] upon the recommendations and discussions that Council collectively had during the executive session." The following members voted in favor of the motion: Cartier, Diller, Hollins, Kilpatrick, Sheldon, Street, Woods, Weiner. No members voted against the motion, and the following members were, in the Personnel Subcommittee's words, "absent" from

the vote: Bell, Hartley-Nagle, Powers, Smiley, Tackett.<sup>1</sup> Councilman Weiner noted for the record that no votes were taken during executive session and stated that the Personnel Subcommittee “limited discussion to personnel consistent with the motion made to enter executive session.”

## DISCUSSION

As an initial matter, we conclude that the Personnel Subcommittee did not violate FOIA by noticing an intent to convene an executive session to discuss “a confidential personnel matter.” Indeed, the Delaware Court of Chancery has specifically held that reference to “personnel issues” satisfies FOIA’s notice requirements.<sup>2</sup> While our *in camera* review of the executive session minutes reveals that the Personnel Subcommittee also discussed “[s]trategy sessions, including those involving legal advice or opinion from an attorney-at law, with respect to collective bargaining or pending or potential litigation . . . when an open meeting would have an adverse effect on the bargaining or litigation position of the public body,”<sup>3</sup> and “documents, excluded from the definition of ‘public record’ in § 10002 of [FOIA],”<sup>4</sup> the record is clear that those discussions were inextricably intertwined with the noticed personnel matter.<sup>5</sup> As such, while the Personnel Subcommittee’s agenda would undoubtedly have been more accurate if it included those specific

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<sup>1</sup> The minutes suggest that Councilman Bell did not attend the meeting. However, the minutes also suggest that Councilmembers Hartley-Nagle, Powers, Smiley and Tackett were in attendance at the start of the meeting and during the executive session discussion. While the minutes state that those members were “absent” from the vote, the record is not clear (with perhaps one exception) as to when those individuals became absent. We recommend that the Personnel Subcommittee review and revise its minutes accordingly. *See* 29 *Del. C.* § 10002(f).

<sup>2</sup> *See O’Neill v. Town of Middletown*, 2007 WL 2752981, at \*7 (Del. Ch. Mar. 29, 2007) (“Although more precise reasons could have been offered by the Council and the Planning Commission, the reasons they did articulate on the agendas satisfy the FOIA. The statute requires public bodies to provide the reason for entering into an executive session, but that does not require public bodies to elaborate in great detail on the agendas what legal, personnel, or other subjects are to be discussed. Therefore, the Court concludes that there is no triable issue of fact regarding the sufficiency of the state reasons for the executive sessions.”) (internal citation omitted); *see also Del. Op. Att’y Gen.* 17-IB31, 2017 WL 3426271, at \*2 (July 24, 2017); *Del. Op. Att’y Gen.* 05-IB26, 2005 WL 3991284, at \*7 (concluding that public body’s use of the language “Executive Session (Personnel & Legal Issues)” did not violate FOIA’s notice requirements).

<sup>3</sup> 29 *Del. C.* § 10004(b)(4).

<sup>4</sup> 29 *Del. C.* § 10004(b)(6).

<sup>5</sup> *See* 29 *Del. C.* § 10004(b)(9) (providing that a public body may call for an executive session for “[p]ersonnel matters in which the names, competency and abilities of individual employees . . . are discussed”).

bases for executive session,<sup>6</sup> we cannot conclude that its failure to include them amounted to a FOIA violation.<sup>7</sup>

We also conclude that the Personnel Subcommittee did not violate FOIA by failing to specifically indicate the possibility of a vote in its agenda. Importantly, the record demonstrates that the Personnel Subcommittee's "vote" was to direct the Council's legal counsel to engage in legal research regarding the Council's options in connection with the noticed personnel matter. Under the circumstances, while it is not clear that a request for the Council's legal counsel to engage in legal research required a vote in the first instance, we are not persuaded that it qualifies as a "major issue expected to be discussed."<sup>8</sup> Thus, while we certainly encourage public bodies to notice the possibility of a vote following an executive session, and there may be circumstances under which we would conclude that a public body's failure to do so amounts to a FOIA violation,<sup>9</sup> we cannot conclude that the Personnel Subcommittee violated FOIA by failing to indicate the possibility of a vote on its agenda here. We nevertheless note that it was not unreasonable for you to believe that the Personnel Subcommittee's "vote" on "the recommendations and discussions that Council collectively had during the executive session" amounted to substantive action.

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<sup>6</sup> We nevertheless caution, as the Chancery Court has, that a public body may not use a "general listing of several of the potential grounds for an executive session provided for in § 10004(b)." *O'Neill*, 2007 WL 2752981, at \*7 (citing *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*10 (Del. Ch. May 19, 1994)); *see also* 29 *Del. C.* § 10002(a) ("'Agenda' shall include but is not limited to a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the *specific grounds* therefore.") (emphasis added);

<sup>7</sup> Additionally, based upon the available record, we believe that the discussion itself was proper for executive session. However, we recommend that the Council review the Chancery Court's discussion in *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*11, regarding the permissible scope of discussions held in executive session pursuant to 29 *Del. C.* § 10004(b)(9).

<sup>8</sup> *See* 29 *Del. C.* § 10002(a) (defining agenda as including a "general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific grounds therefore").

<sup>9</sup> *See, e.g., Del. Op. Att'y Gen.* 17-IB28, 2017 WL 3426268, at \*2 (July 19, 2017) (concluding that Sussex County Council violated FOIA by failing to notice an anticipated vacancy in the top position at the Planning and Zoning Office and its intent to fill the vacancy following an executive session discussion).

**CONCLUSION**

Based upon the foregoing, it is our determination that the Personnel Subcommittee did not violate FOIA as alleged in the Petition.

Very truly yours,



Michelle E. Whalen

APPROVED BY:



Aaron R. Goldstein  
State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (via email)  
Michael Migliore, Counsel to the Council (via email)