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

**Attorney General Opinion 17-IB55**

**October 11, 2017**

**VIA U.S. MAIL & EMAIL**

Albert Porach  
220 E. Park Place  
Newark, DE 19711  
albertporach@yahoo.com

**RE: September 20, 2017 FOIA Correspondence Regarding the Newark City Council**

Dear Mr. Porach:

This letter is a response to your correspondence, received on September 20, 2017, alleging that the City Council of the City of Newark (the "Council") 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. We invited the Council to submit a written response to the Petition. We received the Council's response ("Response Letter") on September 27, 2017 and your October 2, 2017 reply ("Reply"). We have reviewed all correspondence in this matter. For the reasons set forth below, it is our determination that the Council did not violate FOIA.

**RELEVANT FACTS**

In May 2017, Director of Parks and Recreation for the City of Newark Joseph Spadafino submitted an application for a grant of \$675,000 from the Delaware Land and Water Conservation Trust Fund Outdoor Recreation Parks and Trails Program in support of the Charles Emerson Bridge Project (the "Project"). On June 20, 2017, the City received notification that it had made it past the pre-application process, but the City's application had been reduced to \$100,000. The City submitted its application for the next round of consideration on September 8, 2017. A condition of the grant is support from the City Council of the applying municipality, the City of Newark. Mr. Spadafino informed Robert Ehemann of the Delaware Department of Natural

Resources and Environmental Control (“DNREC”) that a final decision would be made at the September 11, 2017 Council meeting. Mr. Spadafino agreed to provide a status update to Mr. Ehemann by September 12, 2017.

On September 11, 2017, the Council voted against authorizing the City Manager, Tom Coleman, to execute a state contract with the Delaware Department of Transportation (“DelDOT”) through which the City would become responsible for certain costs associated with the design and construction of a proposed project. At the time, the City of Newark (the “City”) had secured \$1,000,000 in grant funding, but the total estimated cost was \$1,750,000.

On September 12, 2017, Mr. Spadafino informed Mr. Ehemann that the Project was not moving forward and to withdraw the City’s grant application. Mr. Spadafino also informed existing providers of grant funding that the Project was not moving forward. That same day, City Mayor Polly Sierer spoke with New Castle County Executive Matt Meyer regarding the possibility of up to \$200,000 financial assistance from New Castle County for the Project. Mayor Sierer contacted Mr. Coleman to determine if the existing \$1,000,000 in grant funding was already lost or if it could still be used and if the City’s \$100,000 pending grant application could still be considered. Mr. Coleman informed Mayor Sierer that he would speak with Mr. Spadafino.

On September 13, 2017, Mr. Coleman contacted Mr. Spadafino to determine whether the City would be able to get back the \$1,000,000 of the previously-secured grant funding and also proceed with the \$100,000 grant application. Mr. Spadafino was unable to reach either party until the next day, September 14, 2017. Mayor Sierer then contacted City Secretary Renee Bensley to inform her that other government officials and organizations had since indicated interest in providing additional funds for the Project, but that she did not have any written commitments and did not yet want to schedule a special meeting. Mayor Sierer asked Ms. Bensley whether a special meeting would be justified if the financial commitments had come to fruition. Also that day, Mayor Sierer met with State Representative Paul Baumbauch who indicated that a written commitment from he and Senator David Sokola was forthcoming. During that meeting, Ms. Bensley called Mayor Sierer to inform her that she had consulted with City Solicitor Bruce Herron and that additional funding would be a justification for a special meeting. At approximately 10:31 p.m. that night, Mr. Meyer informed the City’s Mayor, Polly Sierer, that the County would contribute \$200,000 in matching funds to the Project.

On September 14, 2017, Mr. Spadafino learned that the \$1,000,000 grant funding would still be available to fund the Project and the \$100,000 grant application would still be considered. Mr. Spadafino committed to calling Mr. Ehemann back that same day to inform him whether the Council would reconsider the Project. Mr. Ehemann informed Mr. Spadafino that he would need to know no later than September 21, 2017 in order to get the application materials to members of the Council on Greenways and Trails and the Park Council for their review prior to their October 10, 2017 meeting. Mr. Spadafino relayed this information to Mr. Coleman, who in turn relayed it to Mayor Sierer.<sup>1</sup>

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<sup>1</sup> We note one inconsistency in the record. Mr. Spadafino states in his affidavit that he relayed this information to Mr. Coleman on September 14, 2017, whereas Mayor Sierer states that

On September 14, 2017, per Mayor Sierer's request, Ms. Bensley contacted Council members regarding their ability for a special meeting and determined that six of seven Council members were available for Monday, September 18, 2017. Ms. Bensley then posted notice of a special Council meeting to be held on September 18, 2017 at 7:00 p.m. Specifically, she physically posted the agenda, posted the agenda to the City's website, posted on the events and meetings calendars on the City's website, and as front-page news on the City's website. The City's Communications Manager also issued a press release regarding the meeting. The agenda stated the following:

A Special City Council meeting will be held on Monday, September 18, 2017 at 7:00 p.m. in the Council Chamber. Council will be considering one or more additional proposed funding commitments for the Charles Emerson Bridge project that have been presented to the City after September 13, 2017. Council may ask questions of presenters, discuss next steps in the process, give direction to staff and/or vote regarding the path forward on the Charles Emerson Bridge project during this special meeting. Public comment will be permitted. This meeting could not be noticed within seven days because, based on the new information as stated above, a decision is needed from the Council before September 20 regarding the path forward for this project before an additional grant application deadline that would be submitted only if the project proceeds forward.

That same day, Mayor Sierer met with Alan Brangman, Vice President and University Treasurer for the University of Delaware. Mr. Brangman indicated that the University of Delaware would commit to partnering with the City and that he would speak with the University's President to discuss a dollar amount.

On September 16, 2017, Mayor Sierer received a written financial commitment from Representative Baumbach and Senator Sokola, which was revised on September 18, 2017. The University of Delaware sent its written financial commitment on September 18, 2017.

The Council met on September 18, 2017. At least 50 members of the public attended the meeting. During the meeting, at least a dozen individuals provided public comment both in support of *and* in opposition to the Project. The Council voted 5-1 to authorize the Acting City Manager to execute an agreement relating to the Project with DelDOT.

### **POSITIONS OF THE PARTIES**

In your Petition, you allege that the Council violated FOIA by failing to provide seven days' notice of its September 18, 2017 meeting. You allege that the meeting "had nothing to do

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this occurred on September 13, 2017. Under the circumstances, we do not believe the difference of one day to be of consequence to this determination.

with public peace, health, or safety,” and that the meeting “was called to revisit a decision enacted at a regular September 11, 2017 council meeting.”

In its Response Letter, the Council maintains that the decision to schedule the September 18, 2017 meeting was made on September 14, 2017.<sup>2</sup> The Council also notes that the public notice included an explanation for why seven days’ notice could not be given.<sup>3</sup> According to the Council, noticing the meeting at least seven days in advance “would have eliminated the City’s eligibility for a \$100,000 State grant.” The Council also provided sworn affidavits from Ms. Bensley, Mayor Sierer, and Mr. Spadafino.

In your Reply, you allege that the additional funding appeared to be illicit.<sup>4</sup> You also appear to allege that the public attendees did not represent the community at large, but a select group of supporters who received special advance notice from the City.<sup>5</sup>

### RELEVANT STATUTES

Delaware’s FOIA requires public bodies to “give public notice of their regular meetings . . . at least 7 days in advance thereof.”<sup>6</sup> For any special or rescheduled meeting, the public body shall give public notice “as soon as reasonably possible, but in any event no later than 24 hours before such meeting.”<sup>7</sup> A “special or rescheduled meeting” is defined as “one to be held less than 7 days after the scheduling decision is made.”<sup>8</sup>

Public notice “shall include, but not be limited to conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such

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<sup>2</sup> Response Letter at 1.

<sup>3</sup> Response Letter at 1.

<sup>4</sup> Reply at 6. We do not address this or any other similar allegation falling outside the scope of FOIA.

<sup>5</sup> Reply at 3.

<sup>6</sup> 29 Del. C. § 10004(e)(2).

<sup>7</sup> 29 Del. C. § 10004(e)(3).

<sup>8</sup> *Id.*

notices available.”<sup>9</sup> However, “[t]he public notice of a special or rescheduled meeting shall include an explanation as to why [seven days’ notice] could not be given.”<sup>10</sup>

### DISCUSSION

As an initial matter, we note that your petition alleges that the September 18, 2017 meeting “had nothing to do with public peace, health, or safety.” Importantly, we note that a “special meeting” and an “emergency meeting” are *not* the same. Indeed, FOIA’s notice provisions do not apply to an “emergency meeting.”<sup>11</sup> Here, the issue before us is whether the September 18 meeting qualifies as a “special meeting” and, if so, whether the Council provided timely notice thereof.

We have reviewed the record and are satisfied that the Council provided timely notice of its September 18, 2017 meeting. Indeed, we are satisfied that the scheduling decision was made less than seven days in advance thereof, that the Council provided notice “as soon as reasonably possible,” and that the notice included an explanation as to why seven days’ notice could not be given.<sup>12</sup> Finally, to the extent FOIA requires exigency or a compelling need to justify a special meeting, it is our determination that the Council has met this standard as well. Indeed, the record demonstrates that the Council believed that it needed to make a decision by the close of business on September 21, 2017.<sup>13</sup> Given that the scheduling decision was made on September 14, 2017,

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<sup>9</sup> 29 Del. C. § 10004(e)(4).

<sup>10</sup> 29 Del. C. § 10004(e)(3).

<sup>11</sup> See 29 Del. C. § 10004(e)(1) (“This subsection concerning notice of meetings *shall not apply* to any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety, or to the General Assembly.”) (emphasis added).

<sup>12</sup> See 29 Del. C. § 10004(e)(3).

<sup>13</sup> On September 23, 2017, you submitted an email to this Office stating that you “filed a FOIA request with the city to obtain a copy of the US Government grant request to verify the urgency of the 9-20-2017 deadline.” You also stated that you “a[re] in contact with the US Department of Transportation to provide information on the grant request procedure.” You appear to allege that this information will shed light on the urgency of the September 18, 2017 meeting and requested “permission, based on any information from these inquiries, sufficient time to respond to the city’s response.” While we have delayed the issuance of this opinion to accommodate your request, we issue this determination within 20 days of your Petition as required by statute. However, under the circumstances, it is not clear to us the referenced materials would have impacted our determination in any way. Indeed, our determination is based largely upon the sworn affidavit of Mr. Spadafino and his understanding of the timeline relayed to him by Mr. Ehemann. See Spadafino Aff. at ¶ 5.

and Council members would not likely have been available during business hours,<sup>14</sup> it does not appear to have been possible for the Council to provide at least seven days' notice.

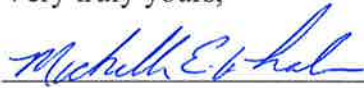
Finally, while not necessary to our determination, we note that the September 18, 2017 Council meeting was well-attended and included individuals both in favor of and opposed to the Project. The meeting minutes indicate that you attended the meeting and provided public comment in opposition to the Project. While we recognize that you have suggested that the Council only provided notice to supporters of the Project, we note that you were not the only individual to provide public comment in opposition to the Project. Under the circumstances, we believe this to provide additional support for the conclusion that FOIA's purpose has been served and, notwithstanding your arguments to the contrary, we see no evidence that the Council attempted to frustrate that purpose. Indeed, as Vice Chancellor Glasscock recently noted:

FOIA provides an informational right to allow public involvement in government. If that interest is complied with, FOIA is satisfied; it is not a tool for use by those who disagree with the actions of their government to have those actions set aside, after the fact, on hyper-technical grounds.<sup>15</sup>

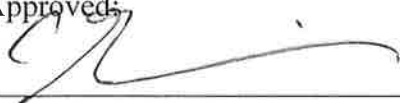
**CONCLUSION**

Based upon the foregoing, it is our determination that the Council did not violate FOIA as alleged.

Very truly yours,

  
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Michelle E. Whalen  
Deputy Attorney General

Approved:

  
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Aaron R. Goldstein  
State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (via email)  
Bruce Herron, Esq. (via email)

<sup>14</sup> Bensley Aff. at ¶ 5.

<sup>15</sup> *Lechliter v. Del. Dep't of Natural Res. And Env'tl. Control*, 2017 WL 2687690, at \*2 (Del. Ch. June 22, 2017).