



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNCIL
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. 18-IB07

February 9, 2018

VIA U.S. MAIL AND EMAIL

Mr. Frank “Dan” Cannon
411 Nylon Blvd.
Seaford, DE 19973
seafordski@hotmail.com

RE: FOIA Correspondence Regarding the City of Seaford

Dear Mr. Cannon:

We write regarding your correspondence alleging that the Council of the City of Seaford (“Council”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur (“Petition”). We invited the Council to submit a written response to the Petition. We received the Council’s response (“Response Letter”) on January 31, 2018 and your reply thereto (“Reply”) on January 30, 2018. As set forth more fully below, it is our determination that the Council did not violate FOIA as alleged.

In your Petition, you allege that the Council violated FOIA by holding a meeting on January 16, 2018 without providing proper notice thereof. Specifically, you argue that a gathering of a quorum of the Council’s members at a January 16, 2018 press conference, during which the Mayor, one Councilman Dan Henderson, and several other individuals spoke about the Council’s recent passage of a city ordinance, amounted to a “meeting” of the Council. You note that you observed the following paper notice outside of City Hall on January 9, 2018: “The City of Seaford Mayor and City Council will be present at the following events: Press Conference—Tuesday, January 16 starting at 12:30 p.m. at City Hall in the Council Chambers.” However, you argue that the Council violated FOIA by failing to publish an agenda with a statement of the major issues to be discussed.¹

¹ See 29 *Del. C.* § 10004(e)(2) (“All public bodies shall 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. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings, including whether such meeting will be conducted

You argue that the Council's failure to properly notice the press conference is particularly disturbing due to the potential illegality of the ordinance, which you state is of major public concern.² In support, you cite to this Office's recent opinion, *Del. Op. Att'y Gen. 17-IB17*,³ wherein we determined that the Council violated FOIA by failing to include an agenda with the notice for its 2017 Planning Session and by subsequently failing to include a general statement of the major issues expected to be discussed.

In its Response Letter, the Council argues that "[t]he Press Conference was not for the purpose of 'discussing or taking action on public business.'" The Council notes that the ordinance had already been discussed and enacted by the Council on December 12, 2017 and argues: "a Press Conference, intended to attract economic development, is not part of the policy-making process that FOIA was intended to regulate."

In your Reply, you argue that the matters discussed at the press conference are indeed "public business" as defined by FOIA.⁴ You note that the ordinance was not then in effect and again highlight the "potential illegality" of the ordinance. You also state that Councilman Henderson presented a vigorous defense of the ordinance during the press conference.⁵

As you correctly note, a "meeting" is defined in Delaware's FOIA as "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business."⁶ Importantly, we believe a necessary element of this definition is that members of *the public body* discuss public business. Here, we recognize that a quorum of the Council attended the press conference, that various individuals provided statements regarding a matter of public concern, and that one councilmember was among the speakers, we see no evidence of a discussion *among* the attending councilmembers during the press conference.

by video-conferencing . . ."); 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 ground or grounds therefor under § 10004(b) of this title.").

² The question of whether the Council had the legal authority to enact the ordinance is outside the scope of FOIA and, as such, is not addressed herein.

³ 2017 WL 3426255 (July 11, 2017).

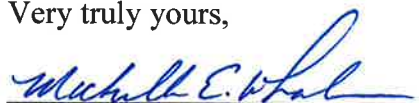
⁴ See 29 *Del. C.* § 10002(j) (defining "public business").

⁵ You also appear to request that this Office impose punitive sanctions on the Council. However, this Office has made clear that it does not have the authority to impose punitive measures for FOIA violations. See, e.g., *Del. Op. Att'y Gen. 16-IB23*, at *2 (Oct. 28, 2016) ("We routinely request remediation where we believe such remediation to be appropriate, but this Office is not vested with the authority to impose punitive measures for FOIA violations."). "Rather, our enforcement power would be limited to initiating suit, at our sole discretion, after a finding of a FOIA violation." *Del. Op. Att'y Gen. 18-IB05* (Jan. 30, 2018) (citing 29 *Del. C.* § 10005(e)).

⁶ 29 *Del. C.* § 10002(g).

Under the circumstances, we are not persuaded that the gathering amounted to a meeting of the Council. Accordingly, it is our determination that the Council did not violate FOIA as alleged.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Allison E. Reardon, State Solicitor

cc: James Fuqua, Esq. (via email)