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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB09

February 12, 2018

VIA U.S. MAIL AND EMAIL

Craig O'Donnell
Shannon Marvel
Dover Post
shannon.marvel@doverpost.com
craig.odonnell@doverpost.com

RE: FOIA Correspondence Regarding the Town of Dewey Beach

Dear Mr. O'Donnell and Ms. Marvel:

We write regarding your correspondence alleging that the Town of Dewey Beach ("Town") 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"). As set forth more fully below, it is our determination that the Town did not violate FOIA as alleged.

In your Petition, you allege that the Town violated FOIA by failing to provide sufficient detail in its agendas for its February 2, 2018 and February 9, 2018 executive sessions. By way of background, the agenda for the February 2, 2018 meeting noticed an executive session "[p]ursuant to 29 *Del. C.* §10004(b)(9) discussion of Town personnel matters regarding terms and conditions of employment contracts." The agenda for the February 9, 2018 meeting noticed an executive session as follows:

- Pursuant to 29 *Del. C.* §10004(b)(9) discussion of Town personnel matters regarding terms and conditions of employment contracts.
- Pursuant to 29 *Del. C.* §10004(6) Executive Session to discuss the content of documents excluded from definition of public record where such discussion may disclose the content of such document.

- Pursuant to 29 Del. C. §10004(b)(9) personnel matters in which the names competencies and abilities of individual employees are discussed.

To support your argument, you reference a public statement that the Mayor had made regarding meeting about the Dewey Beach Police Department’s participation in a federal program and email correspondence wherein the Mayor stated that the discussion would occur in executive session.¹ You state that, because of the lack of additional specificity in the agendas, “[t]he Dover Post was unable to determine whether the meeting of Feb. 2 or Feb. 9 concerned the police department.”² You state that you were able to determine through an exchange of emails that the February 2, 2018 meeting concerned the town manager search, but that “[t]he actual topic(s) of the Feb. 9 meeting are unknown”³ Due to your difficulty in determining the exact nature of the executive session discussions, you allege that the “agendas are defective and do not comply with FOIA.”⁴ Specifically, you allege: “Based on the statutory language itself, an agenda that merely quotes statutory exceptions claimed for an executive session is not, in fact, a legal agenda”⁵ We disagree.

As we have previously noted, “[t]he Delaware Court of Chancery has specifically held that a public body’s use of the language ‘Personnel & Legal Issues’ satisfies FOIA’s notice requirements” with respect to executive session.⁶ The Court stated:

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.⁷

¹ Petition at 2.

² *Id.* at 4.

³ *Id.*

⁴ Petition at 4.

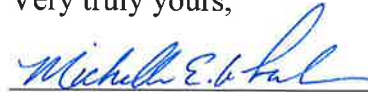
⁵ *Id.* at 5.

⁶ *See Del. Op. Att’y Gen.* 17-IB31, 2017 WL 3426271, at *2 (July 24, 2017) (citing *O’Neill v. Town of Middletown*, 2007 WL 2752981, at *7 (Del. Ch. Mar. 29, 2007)); *see also 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).

⁷ *O’Neill v. Town of Middletown*, 2007 WL 2752981, at *7 (internal citation omitted).

The Court of Chancery has already concluded that simply specifying “personnel and legal” satisfies FOIA’s minimum notice requirements. Here, we find that the Town’s agendas at issue meet the minimum notice requirements of the statute.⁸ Accordingly, it is our determination that the Town did not violate FOIA.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Allison E. Reardon, State Solicitor

cc: Fred A. Townsend, III, Esq. (via email)

⁸ Of course, the Court has cautioned that a “general listing of several of the potential grounds for an executive session provided for in § 10004(b).” *See id.* (citing *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *10 (Del. Ch. May 19, 1994)). However, we see no evidence here to suggest that the Town’s use of multiple bases for executive session for its February 9, 2018 meeting was used in such a catchall manner.