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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB26

June 26, 2024

VIA EMAIL

Thomas Gaynor
Steven Linehan
Concerned Citizens of Rehoboth Beach
tomsjl1@msn.com

RE: FOIA Petition Regarding City of Rehoboth Beach

Dear Mr. Gaynor and Mr. Linehan:

We write in response to your correspondence, on behalf of Concerned Citizens of Rehoboth Beach, alleging that the City of Rehoboth Beach violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("FOIA"). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we determine that the City's Board of Commissioners violated FOIA by holding an executive session for an improper purpose, by failing to properly notice two executive sessions, and by failing to notice a public comment period on the agendas of the below-referenced meetings.

BACKGROUND

The City of Rehoboth Beach Board of Commissioners consists of the Mayor and six commissioners. The Petition alleges that the Board recently voted to hire a new City Manager with a substantial salary and compensation package, despite publicizing this position at a lower salary range. The new salary and compensation package was alleged to have been decided on in a nonpublic forum, in violation of FOIA's requirements for public business to be performed in an open and public manner.

In addition, the Petition alleges that the City Manager who was selected did not meet the requirements of the City’s charter for this position. You assert that the City was found in violation earlier this year for failing to notice the hiring of its new solicitor and that the Personnel Committee held a meeting in January but hiring actions were not discussed, nor were minutes published for that meeting. You also assert that the Personnel Committee’s purpose is to facilitate the search for the City Manager, but “the vice-mayor led the negotiations” without publicly disclosing the charter issues or the new pay thresholds.¹

On June 11, 2024, the City, through its legal counsel, replied to the Petition (“Response”) and attached the affidavit of the Mayor, who attested to being present at the meetings and executive sessions detailed in the Response and further attested that the facts in the Response are accurate. The City argues that its hiring and selection process for the City Manager was proper under FOIA, stating the public “had an ample opportunity to observe the decision-making process, and matters were appropriately discussed in executive session.”² The City asserts that “[a]t multiple properly noticed meetings, the Commissioners met in executive session for the purpose of discussing the qualifications of individual candidates for employment as the Rehoboth Beach City Manager as permitted by 29 *Del. C.* § 10004(b)(1).”³ The City noted that these executive sessions occurred on November 6, 2023, December 1, 2023, December 11, 2023, January 8, 2024, March 11, 2024, March 18, 2024, and March 25, 2024. Following these meetings, the Board held a meeting on April 8, 2024, in which they adopted an item in open session: “[c]onsideration of adoption of a resolution appointing an individual to the position of City Manager conditioned upon the individual’s execution of an employment agreement that forms a part of the resolution.”⁴ Based on these meetings, the City contends that the public had the opportunity to reasonably determine that the Board planned to appoint a new City Manager and that public comment was solicited at every public meeting.

DISCUSSION

The public body has the burden of proof to “justify a decision to meet in executive session or any failure to comply with [FOIA]”.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ As an initial matter, we note that this Office is not authorized to

¹ Petition, p. 2.

² Response, p. 2-3.

³ *Id.*, p.3.

⁴ *Id.*; “The Commissioners of Rehoboth Beach Special Meeting Amended Agenda April 8, 2024,” <https://cityofrehoboth.civicweb.net/filepro/documents/242504/?preview=242505> (last visited Jun. 20, 2024).

⁵ 29 *Del. C.* § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

consider the violations of the City’s charter, as this petition process is limited to determining FOIA claims.⁷ The Petition’s claim regarding the actions of the Personnel Committee is also not appropriate for consideration, as this claim does not allege a violation of FOIA.

The remaining claim is that the City failed to follow open meeting requirements when hiring the new City Manager at a much higher compensation package than advertised. FOIA’s purpose is to ensure government accountability by providing Delaware’s citizens access to open meetings, as well as access to the public records of those entities.⁸ FOIA requires that the meetings of public bodies, with limited exceptions, be open to the public.⁹ Public bodies, with proper notice of the intent to enter an executive session on its agenda, may hold an executive session to discuss one of the nine topics that are outlined in the statute.¹⁰ The Delaware Supreme Court has opined that “open meetings laws are liberally construed, and closed session exceptions within these statutes are strictly interpreted to limit nonpublic meetings.”¹¹ The public body also must permit a time for public comment at an open meeting in accordance with 29 *Del. C.* § 10004(a).

In this case, the City provides sworn testimony in its Response that the Board held seven executive sessions to discuss individual candidates’ qualifications for the City Manager position. At the April 8, 2024 meeting, the Board presented the resolution in open session to appoint the selected candidate and to authorize the Mayor to execute and deliver an employment agreement as a condition of employment, noting the new City Manager’s anticipated start date.¹² The motion was adopted unanimously by those commissioners present at the meeting without discussion.¹³ The March 25, 2024 executive session preceding this meeting included the topic: “[c]onduct an Executive Session for the purpose of discussing the qualifications of individual candidates for employment as the Rehoboth Beach City Manager, including individual interviews of the candidates and discussion of employment agreement, as permitted by 29 *Del. C.* §10004(b)(1).”¹⁴

⁷ 29 *Del. C.* § 10005(e).

⁸ 29 *Del. C.* § 10001; *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1004 (Del. 2021).

⁹ 29 *Del. C.* § 10004.

¹⁰ *Id.*

¹¹ *Del. Solid Waste Auth. v. The News Journal Co.*, 480 A.2d 628, 631 (Del. 1984).

¹² “The Commissioners of Rehoboth Beach Special Meeting April 8, 2024 Special Meeting,” <https://cityofrehoboth.civicweb.net/document/242506/?splitscreen=true&media=true> (Jun. 20, 2024).

¹³ *Id.*

¹⁴ “The Commissioners of Rehoboth Beach Special Meeting March 25, 2024,” <https://cityofrehoboth.civicweb.net/filepro/documents/242403/?preview=242404> (last visited Jun. 20, 2024).

Section 10004(b)(1) permits an executive session for the purpose of “[d]iscussion of an individual citizen’s qualifications to hold a job.” This exception does not allow private discussion of an employment agreement. This Office has found that “[o]n its face, FOIA does not permit public bodies to engage in private strategy sessions regarding employment-related contracts outside of a collective bargaining or litigation context.”¹⁵ Discussions of salary and other compensation involve the expenditure of public funds and are not related to the individual’s qualifications to hold a job.¹⁶ Public employees’ compensation is a matter of public record, as it is “well settled that citizens have a right to know how their public servants are compensated with taxpayer monies, in whatever the form that compensation might take.”¹⁷ Accordingly, we find that the City violated FOIA by engaging in discussions of the City Manager’s employment contract, and especially the compensation package, in executive session.

In addition to this violation, we also find that the City improperly noticed two executive sessions. The City alleges that “[a]t multiple properly noticed meetings, the Commissioners met in executive session for the purpose of discussing the qualifications of individual candidates” for the City Manager position, “as permitted by 29 *Del. C.* § 10004(b)(1).”¹⁸ Although the City cites to the proper purpose for most of the executive sessions, two executive sessions were not properly noticed with this reason in the agenda. The November 6, 2023 meeting agenda cites 29 *Del. C.* § 10004(b)(2), (6), and (9),¹⁹ and the January 8, 2024 meeting agenda cites 29 *Del. C.* § 10004(b)(6)

¹⁵ *Del. Op. Att’y Gen.* 15-IB01, 2015 WL 3919060, at *4 (Jun. 12, 2015) (citation omitted) (finding that “under the circumstances of this case, the Board violated FOIA when it discussed the renewal of the Contract in executive session.”).

¹⁶ 29 *Del. C.* § 10004(b); *see Del. Op. Att’y Gen.* 15-IB10, 2015 WL 8772946, at *2 (Dec. 1, 2015) (“School boards should be able to discuss the competencies and abilities of all of their employees, including superintendents, in executive session, and may do so within FOIA as long as those discussions are severed from express discussions regarding renewal of a superintendent’s [employment] contract.”); *Del. Op. Att’y Gen.* 15-IB01, 2015 WL 3919060, at *4; *see also Del. Op. Att’y Gen.* 22-IB27, 2022 WL 4263282, at *2 (Aug. 19, 2022) (determining that a public body violated FOIA by discussing employee bonuses and raises in executive session); *Del. Op. Att’y Gen.* 02-IB12, 2002 WL 1282812, at *2 (May 21, 2002) (determining that the discussion of police salaries and the emergency situation caused by police resignations were not the types of personnel matters appropriate for executive session).

¹⁷ *Del. Op. Att’y Gen.* 13-IB01, 2013 WL 2477025, at n. 6 (Mar. 6, 2013).

¹⁸ Response, p. 3.

¹⁹ “The Commissioners of Rehoboth Beach Special Meeting November 6, 2023,” <https://cityofrehoboth.civicweb.net/filepro/documents/210956/?preview=210957> (last visited Jun. 20, 2024).

and (9).²⁰ Section 10004(b)(9) pertains to discussions related to City personnel matters involving current City staff, as opposed to candidates for City employment. We find that the City violated FOIA by giving improper notice for the planned discussions of the qualifications of City Manager candidates at its November 6, 2023 and January 8, 2024 executive sessions. However, as the City provided sworn statements that these executive sessions were for the proper purpose of discussing individuals' qualifications to hold the City Manager position, we determine that no additional remediation, beyond the below recommendations for other violations, is suggested.²¹

As a part of the requirements to hold an open meeting, Section 10004(a) states that a “meeting that is open to the public under paragraph (a)(1) of this section must include time for public comment.” Although the seven meetings with an executive discussion about the City Manager candidates and the April 8, 2024 Special Meeting were public meetings, time for public comment was not scheduled on the meeting agendas.²² Agendas are required to include a general statement of all major items expected to be discussed at a public meeting.²³ A citizen should be able to review an agenda and determine whether an issue important to them will be under consideration and decide whether to attend.²⁴ A public comment period is a major issue for discussion, and citizens must receive public notice of their opportunity for public comment so they can decide whether they wish to attend the meeting. As such, we also find that the City further violated FOIA by failing to notice time for public comment on its agendas for each of these meetings.²⁵

²⁰ “The Commissioners of Rehoboth Beach Special Meeting January 8, 2024,” <https://cityofrehoboth.civicweb.net/filepro/documents/239954/?preview=239955> (last visited Jun. 20, 2024).

²¹ *Del. Op. Att’y Gen.* 19-IB16, 2019 WL 4538301, at *4 (Mar. 22, 2019) (“Therefore, it is our determination that the City committed a technical violation by citing to an improper purpose for the executive session in its agenda, but as the executive session was held for another proper purpose, we recommend no remediation in these circumstances.”); *Del. Op. Att’y Gen.* 03-IB20, 2003 WL 22669565, at *2 (Sept. 3, 2003) (“Since the Town could have met in lawful executive session to discuss the qualifications of a job candidate — and FOIA did not require the agenda to list the name of the candidate — we find this to be a technical violation for which remediation is not necessary.”).

²² “City of Rehoboth Beach / Home / Agendas / Mayor & Commissioners (Special),” <https://cityofrehoboth.civicweb.net/filepro/documents/3682/> (last visited Jun. 19, 2024).

²³ 29 *Del. C.* § 10002(a).

²⁴ *Lechliter v. Del. Dep’t of Natural Res. & Env’t Control*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017) (quoting *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *4 (Del. Ch. Aug. 29, 1986)).

²⁵ “A meeting that is open to the public under paragraph (a)(1) of this section must include time for public comment.” 29 *Del. C.* § 10004(a). As a vote to enter executive session must take place at a meeting of the public body open to the public, FOIA does not permit a “stand alone”

Having found that the City violated FOIA, we consider whether any remediation is appropriate to recommend. Section 10005(a) states that any “action taken at a meeting in violation of this chapter may be voidable by the Court of Chancery.” The authority to invalidate a public body’s action, or to impose other relief, is reserved for the courts.²⁶ The Delaware Court of Chancery stated that the “remedy of invalidation is a serious sanction and ought not to be employed unless substantial public rights have been affected and the circumstances permit the crafting of a specific remedy that protects other legitimate public interests.”²⁷ In determining whether invalidation is appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”²⁸ In this case, we recommend that the Board discuss the City Manager’s contract, including the compensation package, and ratify the vote associated with the City Manager’s contract at a future meeting held in compliance with FOIA’s open meeting requirements. This meeting agenda must include time for public comment.

CONCLUSION

For the foregoing reasons, we conclude that the City violated FOIA by holding an executive session for an improper purpose and failing to discuss the employment contract and compensation package in open public session, by failing to properly notice two executive sessions, and by failing to notice a public comment period on the agendas of the above-referenced meetings.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

executive session. *Del. Op. Att’y Gen.* 02-IB33, 2002 WL 34158592, at *3 (Dec. 23, 2002). As such, open meetings, even those in which the only substantive item is an executive session, are open to the public and must include a public comment period in accordance with Section 10004(a).

²⁶ 29 *Del. C.* § 10005.

²⁷ *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *7 (Del. Ch. Aug. 29, 1986).

²⁸ *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *15 (Del. Ch. May 19, 1994).

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Alex C. Burns, City Solicitor