



Delaware Deputy A.G. Cole Issues Opinion of FOIA Petition Regarding the City of Rehoboth Beach

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Body

Delaware Deputy Attorney General Dorey L. Cole issued the following opinion (No. 19-IB31):

To: Mr. Gary Glass, garyaglass@yahoo.com

RE: FOIA Petition Regarding the City of *Rehoboth Beach*

Dear Mr. Glass:

We write in response to your correspondence alleging that the City of *Rehoboth Beach* violated the Delaware Freedom of Information Act, 29 Del. C. Sec. Sec. 10001-10007 ("FOIA") with respect to open meeting requirements. We treat your correspondence as a Petition for a determination pursuant to 29 Del. C. Sec. 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we conclude that the City has not violated FOIA as alleged.

BACKGROUND

On June 4, 2019, you submitted a Petition to this Office regarding a then-upcoming City Commissioners' meeting scheduled for June 10, 2019. The agenda for the meeting, a "Special Meeting," included two items: 1) "[p]otential executive session pursuant to 29 Del. C. Sec. 10004(b)(2), preliminary discussion on site acquisitions for any publicly funded capital improvement, or sales or leases of real property;" and 2) "[d]iscussion and consideration of vote on possible sale of City property."/1

The Petition alleges three violations. First, you assert that the failure to identify the specific property in the second agenda item does not provide adequate notice to the public. Second, you contend that it is "improper to hold an executive session about the sale of City property immediately before consideration of a vote on the sale of that property," as the negotiations clearly cannot be in the preliminary stages if the Commissioners are ready to vote to sell the property./2 Third, you argue that the agenda failed to include an explanation of the need to hold this discussion and vote in Special Meeting, also noting that this irregular schedule of "special meetings" inhibits the ability of the public to plan their schedules and attend these irregular meetings.

The City's counsel submitted a responsive letter on June 7, 2019 ("Response"). The City asserts that the agenda provides adequate notice of the open session item and that the executive session was proper under 29 Del. C. Sec. 10004(b)(2). Contrary to the Petition's allegations about the Commissioners' intentions, the City clarifies that the intent was to enter the marketplace before negotiations began: "[a]s a matter of basic common sense, the Commissioners must vote to approve or deny the sale of property before any bargaining and negotiations can take place, and that is the Commissioners' intention at the Special Meeting."/3 Finally, the City alleges that the notice for the Special Meeting complies with FOIA's seven-day notice

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requirement, and any dispute with the Commissioners' practice of irregular meetings should be raised with the City or the General Assembly to propose amendments to the open meeting requirements.

In your submission dated June 10, 2019 ("Reply"), you reiterate the Petition's claims and submit a new allegation regarding the statement of time on the agenda.⁴ First, you argue that the purpose listed on the agenda is merely a recitation of the FOIA exemption and that the City's new argument that the vote is not for the sale of the property, but to put the property up for sale, is a significant difference in meaning which should have been clear from the agenda. Second, you question the City's explanation, as you believe that it "defies common sense" to discuss putting a property for sale in executive session.⁵ Instead, you speculate that the City has struck a preliminary deal, which was to be privately finalized and submitted for vote immediately thereafter, precluding public input. You further argue that the City's reliance on Attorney General Opinion No. 15-IB06 is improper, as the public body's search for a new town hall was public information, and the only private discussions in executive session were conducted to maintain the public body's bargaining position. Where the City is the seller, you contend the identity of the property should not be shrouded in secrecy, only the potential buyers. Third, you claim that the fact that the Special Meeting was given seven days' notice is "beside the point," as the State law requires the City to explain its need to hold this discussion on the agenda.⁶

In a supplement to the Reply, you point out two City agendas in 2017 and 2008 that identified City properties it intended to sell. You argue that accepting the City's position here means that FOIA would be interpreted to "always allow governments to keep the identity of the government property a secret until the final public vote," which "[s]urely. . . is "not in keeping with the spirit and letter of FOIA."⁷

DISCUSSION

We address the three issues raised in the Petition: 1) whether the executive session was for an improper purpose, in light of your belief that the City planned to vote on a possible sale immediately following the executive session; 2) whether the open session item, described on the agenda as "discussion and consideration of vote on possible sale of City property," gave sufficient notice to the public whether the executive session was for an improper purpose, in light of your belief that the City planned to vote on a possible sale immediately following the executive session; and 3) whether the agenda required an explanation of why a "Special Meeting" was necessary.

First, you argue that the purpose of the executive session was improper because the Commissioners planned a final vote on the sale of City property following the executive session. The agenda states that the City may convene a potential executive session "for the purpose of preliminary discussion on site acquisitions for any publicly funded capital improvement, or sales or leases of real property" as permitted by 29 Del. C. Sec. 10004(b)(2).⁸ This Office has previously construed this exemption to "protect the government when it enters the marketplace to purchase real property as an ordinary commercial buyer or seller."⁹ In addition, this exemption "covers any discussions by a public body until the conclusion of a contract of sale in order to protect the public body's competitive position."¹⁰ You contend that this Office should find this executive session improper, because you do not believe the City's discussion could possibly have been preliminary, as you believe the City planned a vote on the final sale of the property immediately after coming out of executive session. The City's counsel represents that the discussions would pertain to putting the property up for sale, and the Commissioners did not intend to vote on the final sale of the property at the meeting.¹¹ Moreover, the agenda item states that in open public session, the most the City was contemplating was a vote on the "possible" sale of City property. Thus, we find nothing on the record submitted that supports your contention and find the City appropriately cited a proper purpose for this portion of the executive session.

Having found the executive session to be for a proper purpose, we next consider whether the open session item, "discussion and consideration of vote on possible sale of City property," provided insufficient notice to the public of the expected discussions and vote. The City alleges that this open session item follows an executive session regarding the same subject property. Therefore, we must consider the interplay between open session and executive session items regarding the same subject. FOIA requires that the agenda contain "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 Sec. 10004(b). . . ."¹² "While the statute requires only a 'general statement' of the subject to be addressed by the public body, when [a public body] knows that an important specific aspect of a general subject is to be dealt with, it satisfies neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public's attention to the fact that that specific important subject will be treated."¹³ Executive session notice requirements are less stringent. Although 29 Del. C.

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Sec. 10004(c) "requires public bodies to provide the reason for entering into an executive session, . . . that does not require public bodies to elaborate in great detail on agendas what legal, personnel, or other subjects are to be discussed."/14

Determining whether an agenda item is sufficient is a fact-based inquiry. We accept the City's representation that this agenda item was intended to notice a discussion and vote of possibly entering some City property into the marketplace for sale./15 This Office previously decided in Attorney General Opinion No. 15-IB06 that an executive session agenda item to discuss a site acquisition was adequately noticed by citing "preliminary discussion on site acquisitions for any publicly funded capital improvements" for one executive session and "possible site acquisition" for another./16 Any requirement for specificity in the executive session necessarily affects the amount of specificity required for an open session item noticing public discussion or action that follows a proper executive session. In this case, the identity of the property that is the subject of the executive session was properly excluded from the agenda; a finding that a discussion and vote following a proper executive session under 29 Del. C. Sec. 10004(b)(2) must identify the property discussed in executive session would undermine the purpose of the executive session./17

We find, in harmony with Attorney General Opinion No. 15-IB06, that an open session item following a proper executive session under 29 Del. C. Sec. 10004(b)(2) pertaining to preliminary discussions on property sales are not required to identify the property specifically. In these circumstances, although more precise notice may have been given, we conclude that the open session item, "discussion and consideration of vote on possible sale of City property," meets the minimum requirements of FOIA by providing notice of the City's stated intention to discuss and vote upon possibly proposing City property for sale in the marketplace.

Your third allegation is that the Special Meeting agenda failed to include an explanation why those agenda items could not be included on a regular meeting agenda. FOIA defines a special meeting "as one to be held less than 7 days after the scheduling decision is made."/18 FOIA requires that the public notice of a special meeting include an explanation as to why the seven days' notice could not be given./19 Although the City titled the agenda as a "Special Meeting," the parties do not dispute that the meeting here was scheduled with seven days' advance notice. Thus, the meeting was not a "special meeting" as defined by FOIA, and no additional explanation was required by FOIA.

CONCLUSION

Therefore, we determine that the City has not violated FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole

Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein

State Solicitor

cc: Glenn Mandalas, Esq., Attorney for the City of **Rehoboth Beach** (via email)

Footnotes:

1/ Petition.

2/ Id.

3/ Response (emphasis in original).

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4/ Our consideration is limited to the claims raised in the Petition. See, e.g., Del. Op. Atty. Gen. 18-IB51, 2018 WL 6591816, at *FN 4 (Nov. 20, 2018); Del. Op. Atty. Gen. 12-IIB11, 2012 WL 5894039, at *4 (Nov. 7, 2012).

5/ Reply.

6/ Id.

7/ Supplement to the Reply.

8/ Petition.

9/ Del. Op. Att'y Gen. 05-IB24, 2005 WL 3991283, at *5 (Aug. 18, 2005) (citing Del. Op. Att'y Gen. 02-IB27, 2002 WL 31867901, at *1 (Nov. 4, 2002)).

10/ Del. Op. Att'y Gen. 07-IB14, 2007 WL 4732797, at *3 (May 10, 2007).

11/ We do not decide municipal law matters in the FOIA petition process, but as a factual matter, we take note that your Reply cites the City Charter requirement that sales of City property must be approved by a majority vote taken after a public hearing. See Reply. This requirement lends credence to the City's factual assertion that it did not intend to purportedly act outside of its authority by following a private executive session with a vote to effectuate a final sale of City property because, as you point out, the City Charter precludes such an action.

12/ 29 Del. C. Sec. 10002(a).

13/ Ianni v. Dep't of Elections of New Castle Cnty., 1986 WL 9610, at *5 (Del. Ch. Aug. 29, 1986).

[14/ O'Neill v. Town of Middletown, 2007 WL 2752981, at *7 (Del. Ch. Mar. 29, 2007).

15/ Del. Op. Att'y Gen. 17-IB59, 2017 WL 6348853, at *FN12 (Nov. 20, 2017) (citing to the Delaware Lawyers' Rules of Professional Conduct and accepting the factual representations made by counsel).

16/ Del. Op. Att'y Gen. 15-IB06, 2015 WL 5014135, at *5-6 (Aug. 19, 2015).

17/ In making this conclusion, we reject the suggestion that the preliminary discussions of a public body selling property must be limited to the topic of discussing potential buyers. We can foresee a number of other subjects, such as property value and sale strategies.

18/ 29 Del. C. Sec. 10004(e)(3).

19/ Id.

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