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February 9, 2012

Frederick A. Townsend, III, Esquire
Schmittinger & Rodriguez, P. A.
414 South State Street
P.O. Box 497
Dover, DE 19903-0497

RE: FOIA Complaint Concerning Town of Dewey Beach

Dear Mr. Townsend

I understand that you are counsel to the Town of Dewey Beach. I have enclosed a letter with an attachment alleging certain violations the open meetings provision of the Delaware Freedom of Information Act, 29 *Del. C.* ch. 100 by the Town Council of Dewey Beach. While the letter requests the intervention of the Attorney General, we are reluctant to do so until we have the other side of the story.

May we please have the Town's responses to the various allegations within the next twenty (20) days?

Best regards,

Kent Walker
Deputy Attorney General

Enclosures

cc: Hon. Diane Hanson, Mayor
Lawrence W. Lewis, State Solicitor

Office of Attorney General
The Honorable Attorney General Joseph R. Biden III
820 North French Street
Wilmington, De 19801

January 25, 2012

Dear Mr. Biden;

In November 2011, the Commission of the Town of Dewey Beach announced a "Special Meeting" called for the purpose of conducting an "Executive Session" under the exemption of the provisions of 29 Del. C. §10004(b)(1). Since the Commissioners have abandoned the practice of dating the posting of a meeting Agenda, the original date of the posting is unknown.

Subsequently, on November 1, 2011 the Commissioners "AMENDED" the meeting Agenda and alleged an Execution Session was to be conducted for the purpose of "PERSONNEL AND LITIGATION" establishing "*This portion of the meeting will be conducted in executive session closed to the public in accordance with 29 Del. C. §10004(b)(1) and 29 Del. C. §10004(b)(4)*". A copy is attached.

When council came out of the November 11, Executive Session, the only "Regular Agenda" item that was specified was *1. Discuss and possibly vote on matters related to discussions during Executive Session related to personnel and litigation.*

- §10004 requires (a) Every meeting of all public bodies shall be open to the public except those closed pursuant to certain subsections. The Attorney General has consistently held "that no artificial rationales [are to be] employed to circumvent the specific requirements imposed on public bodies by FOIA."
- (b) A public body may call for an executive session closed to the public...but only for the following purposes:
 - (1) Discussion of an individual citizen's qualifications to hold a job or pursue training, unless the citizen requests that such a meeting be open.
 - (4) Strategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body.

A Motion was made and adopted after this Executive Session to hire an attorney for the purpose of reviewing an indemnification issue dealing with Mayor Diane Hanson as a result of a complaint filed against her in her individual capacity, not the Town, with the Public Integrity Commission. The Town had not voted on any form of indemnification for Hanson and therefore had no pending "legal" matter.

In Opinion 94-IO06 (February 1, 1994) also see, Opinion 93-IO06 (March 5, 1993) the Attorney General rejected the contention that a public body had properly gone into executive session to discuss "legal" matters when there was no attorney present, nor was the public body considering confidential, written legal advice from an attorney.

Furthermore, under FOIA, "to convene in executive session, the public body must satisfy several requirements":

- (1) publicly announce the purpose of the closed sessions in advance thereof;
- (2) approve holding such a session by a majority vote;
- (3) limit the agenda of the closed session to public business that falls within one of the purposes allowed for such meetings; and
- (4) prepare minutes of any closed session and make them available as public records for public inspection. The Attorney General has taken the position that the statutory exceptions for executive sessions "are exclusive and form the only basis for entering into closed session." Opinion 80-FO13 (Aug. 30, 1980).

In the present case, the hiring of a new attorney was neither privileged under personnel nor subject to interpretation of being a strategy session to discuss current or potential litigation. Therefore the public business should have taken place at a regular meeting open to the public not in secret session. Furthermore, there was no attorney present at Session.

On November 18, 2011, in a systematic pattern of denying the public access under the open meeting requirements, the Commission of the Town of Dewey Beach announced another "Special Meeting" called for the purpose of conducting an "Executive Session" under the exemption of the provisions of 29 Del. C. §10004(b)(1) and 29 Del. C. §10004(b)(4)". It is questionable if this meeting met the 7 day noticing requirement since this meeting was not scheduled at the time of the November 11, 2011 and since the Commissioners again did not date the Agenda, the actual date of the posting is unknown. A copy is attached.

It has been held by Delaware courts, catch-all phrasing although "gratified a lawyers' instinct to cover all bases" do not satisfy the spirit or the letter of FOIA's mandate in Section 10002(f), that notice must disclose to the public the "specific" grounds for holding an executive session.

When council came out of the November 18, Executive Session, the only "Regular Agenda" item that was specified was *1. Discuss and possibly vote on matters related to discussions during Executive Session related to personnel and litigation.*

A Motion was made and adopted after this Executive Session to pay the legal fees for Diane Hanson associated with the complaint filed with the Public Integrity Commission (PIC) against her in her individual capacity, not the Town. PIC subsequently ruled against Mrs. Hanson with their finding that she had a conflict of interest. The Town had not voted on any form of indemnification for Hanson and therefore had no pending "legal" matter.

A second motion, apparently discussed in Executive Session, but not noticed on an Agenda, was made the Commissioners and voted on.

In the November 18 matter, discussion and subsequent actions by the Commissioners, regarding paying Hanson's legal fees is neither privileged under personnel exemption, since she is not an employee but an elected official nor is the subject matter ripe for interpretation of being a strategy session to discuss current or potential litigation. Therefore the public business should have taken place at a regular meeting open to the public not in secret session. Furthermore, there was no attorney present at Session.

The public was not made aware of this vote until the December 10, 2011 meeting where it was announced. It was not an agenda item.

Diane Hanson has continuously patently brought up the issue of indemnifying her on the following dates:

Jan. 15, 2011 (not listed on the agenda but voted on), Feb. 12, 2011 (Hanson read a prepaid statement asking for indemnification), June 10, 2011, July 15, 2011, July 23, 2011 (work session), and August 12, 2011 (no minutes posted for this meeting) in concert with requests to pay her privately hired attorney, who represented her in the Public Integrity Commission (PIC) complaint against her.

The PIC found her to be wrong in having voted on a matter where she clearly had an admitted conflict of interest. They also found her to have a conflict of interest as related to her owning rental properties.

The public relies on FOIA being followed and since topics and content, in Executive Sessions, if Noticed properly for litigate purposes are in most instances privileged, the best the public can rely on, for transparency of our government, is to know what will be discussed, following those secret session, when the results are discussed and voted on in a public portion of a properly called meeting. There was no urgency of the subject matter for the November 18 meeting to not provide the appropriate 7 days notice, there was no pending litigation and there certainly was not a personnel issue privileged under FOIA, to the extent that a special meeting needed to be called. It should also be noted that even though this was not advertised or noticed to the public, members of Citizens to Preserve Dewey (CPD) had advanced knowledge of the vote and were present to support their CPD Commissioners.

In support of this complaint is a quoted admission of knowledge of wrong doing. Commissioner Laird stated the meeting was not noticed properly and yet participated in a vote taken in violation of FOIA. (Enclosed is a copy of the Cape Gazette article). Commissioner Laird also admitted that the vote was to cover the backs of council which suggests collusion on the part of this council.

"FOIA contemplates that a closed session must be the exception, not the rule, for how a public body conducts its public business. Therefore, the statute requires the public body to justify its invocation of that exceptional procedure. It also requires the public body to inform the public in the notice of the executive session of its precise reason or reasons

for convening in private. That is not done in general and specifically in the November 11 and 18th meetings.

Agenda items should be more explicit to allow the public the ability to decide if they wish to attend. FOIA defines an Agenda as a "general statement of the major issues expected to be discussed at a public meeting." The Delaware Chancery Court, has held "[a]n agenda should be worded in plain and comprehensible language and must directly state the purpose of the meeting." I believe this council has abused the use of Executive Sessions for the purpose of governing behind closed doors. They consistently add Executive Session to almost every meeting and call for special meetings with Executive Sessions as shown below:

Special called meetings with executive sessions

Jan. 15, 2011 (12:30 PM)
Feb. 5, 2011 (8:30 AM)
Feb 12, 2011 (8:30 AM) regular meeting with executive session**
Feb. 19, 2011 (8:00 AM)
Feb. 26, 2011 (10:00 AM)
March 26, 2011 (10:00 AM)
June 4, 2011 (9:00 AM) special called workshop
June 18, 2011 (9:00 AM)
July 23, 2011 (9:30 AM)
Sept. 2, 2011 (1:30 PM)
Oct 1, 2011 (9:00 AM) meeting not on regular charter date
Oct. 21, 2011 (5:30 PM)
Oct. 28, 2011 (6:00 PM)
Nov 11, 2011 (6:00 PM) listed on website as executive session only but they voted
Nov. 18, 2011 (6:00 PM)
Dec. 16, 2011 (7:00 PM)
Dec. 17, 2011 (9:00 AM)
Dec. 30, 2011 (1:00 PM)
Jan 6, 2012 (6:00 PM)
Jan. 7, 2012 (9:00 AM)
Jan. 28, 2012 (10:00 AM)

** The only regular meeting. The rest were all special called meeting.

- Many of the items discussed in executive session have to do with hiring that should have been done before the public.
- The constant addition of special meetings overwhelms the public and they can't possibly attend each of these.
- Our charter states we will have one meeting on the second Saturday of the month, with at least one meeting a quarter. As you can see, we are having three or more a month. This is unnecessary.
- They schedule important meetings such as budget and finance or Planning and Zoning for the same time as Town meetings making it impossible for concerned citizens to be able to attend both.

- The Attorney General office told the Town that meeting minutes MUST be done in a timely manner but meeting minutes are still not being posted timely with several minutes being approved months after the meetings. Some minutes have never been approved, and some minutes are approved only to have them brought back months later to be amended and approved a second time.
- Dewey citizens have no way to know what this council is doing.

This council has also hired a second attorney but no record can be found where this was ever posted on any agenda and voted on.

I respectfully request the actions taken at the November 11 and November 18 be remanded to the Town, as a result of the Town having conducted Town business outside the view of the public for matters not privileged by Executive Session and that further any actions taken by them be ordered set aside until such acts are properly noticed to the public, discussed and accordingly voted on in an open public meeting.

Thank you for your consideration in this matter.

Respectfully submitted,



Dell Tush
12 Rodney Ave
Dewey Beach, De. 19971
302-227-0938

Dewey Beach to pay mayor's legal fees
By Kara Nuzback | Nov 25, 2011

Dewey Beach — The Town of Dewey Beach will pay Mayor Diane Hanson's legal fees associated with a Delaware Public Integrity Commission finding that she violated state ethics law. At a Nov. 18 town council meeting, commissioners voted 4-0 to pay legal fees deemed to be reasonable in response to the ethics complaint and Hanson's subsequent appeal.

Hanson abstained from the vote and was not present during council's discussion prior to the vote, said Commissioner Joy Howell.

Council does not yet know how much it will contribute to Hanson's legal defense. "I've put out \$25,000 so far," Hanson said

Hanson's hearing is over, and the commission has issued a ruling. Howell said as a result, the town does not have control over Hanson's legal costs. "We are righting a wrong," Howell said. "The town doesn't have much right to second-guess her at this point."

Commissioner Jim Laird, who made the motion to indemnify Hanson, said he included the term "reasonable amount" so the town would not lose too much leverage with the amount it's willing to pay. Laird said he is concerned with how much the indemnification will cost, but fundamentally, he said, he believes the town should cover Hanson's legal fees. "The council needs to send a clear message that we have one another's backs unless there's criminal activity," he said.

Howell and Hanson also said the vote sends a message to Dewey Beach volunteers that the town will stand by them. "I think that's a very significant message," Hanson said. "I think it's long overdue."

Commissioners voted after a Nov. 11 closed-door session to hire an attorney to review town code and determine whether the town ought to have paid Hanson's legal fees. But an attorney was not hired, Howell said, because the code speaks for itself. "It's clear that you shall indemnify," Howell said. "It didn't make any sense to spend money on an attorney when it's black and white."

Laird said he was hesitant to vote to indemnify Hanson because the Nov. 11 vote took place after closed-door discussions, and neither the Nov. 11 nor Nov. 18 meeting agendas mentioned Hanson's indemnification would be discussed. "We're making a major decision on how to spend the town's money without the public involved," Laird said.

Laird said when the vote to hire an attorney to analyze the indemnification clause was announced to the public at the Nov. 12 town council meeting, no one approached him in opposition to the vote. "I used that to move forward," Laird said, noting council's action Nov. 18 to indemnify Hanson was proper.

Dewey Beach Town Code states the town must legally represent elected officials for any legal action arising from their official duties as long as commissioners believe the official was, in their mind, acting in good faith.

The issue stems from a Feb. 12 vote by the previous town council on whether to indemnify Hanson, which failed because of a 2-2 deadlock. Hanson had to pay the cost of legal representation out of her own pocket for a hearing before the commission.

Former Commissioners Zeke Przygocki and Rick Solloway voted not to indemnify Hanson against the complaint. Both said they did not believe Hanson was acting in the town's best interest.

The complaint, filed by resident and Civic League member Joe Nelson Sept. 29, 2010, was partly based on allegations that Hanson hid crucial information, obtained from a conversation with State Planning Director Connie Holland, from the public and council before a landmark vote concerning redevelopment of Ruddertowne.

The allegations were false and the commission found they could not be used in considering Nelson's complaint. The commission still found Hanson guilty of ethics violations May 13, saying she appeared to have a vested financial interest in the outcome of any vote concerning Ruddertowne because she owns real estate in Dewey Beach. Hanson is in the process of appealing the decision to Delaware Superior Court.