

STATEMENT ABOUT THE ATTORNEY GENERAL'S OPINION REGARDING THE TOWN COUNCIL OF DEWEY BEACH AND THE FOIA

From: John Flaherty, President
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DelCOG supports the fair and reasonable enforcement of the Freedom of Information Act, but our organization also concerns itself with whether public officials operate within the authority they have been given by the State Legislature or the Constitution.

I personally have a disagreement with the quote attributed to Attorney General Biden this week in the Cape Gazette: "We're enforcing the law as it's presented to us. This is not about us becoming more zealous about open government," he said. "There is no sea change here."

The FOIA provides for the courts to make the final judgment on whether a public body has violated the Act for a reason. The Deputy Attorney General does not hear witnesses or allow testimony before making determinations. In other words, members of the Dewey Beach Town Council have had no real chance to defend themselves. In the vast majority of AG FOIA opinions this is unnecessary because most complaints do not result in even the threat of a lawsuit.

Public bodies are usually asked to correct their mistakes when they learn what they have been doing wrong and they do. I cannot recall a time when one was asked to sign a confession based upon an assumption by the Deputy A.G. that the Council acted in bad faith because they had a lot of executive sessions. He seems to have ignored the Town Attorney who advised him that unusual circumstances such as job interviews to replace staff and a lot of litigation or threatened lawsuits against the Town brought about the need for an unusual number of executive sessions.

The Opinion pointed out that the Council can better inform the citizens about their agendas and discuss more litigation in open sessions than they realized. I'm sure they will take this advice to heart, and all the FOIA calls for is their agreement to do that to satisfy the Attorney General.

There is no enforcement action mention in the Act to supervise on a monthly basis a Council that agrees to remedy any problems created by having failed to do specific things in the past. The citizen complaining can demand the Attorney General file suit to void past actions taken at illegal meetings, but that will simply result in the meetings having to be done over and the vote retaken.

Last year the Citizens to Preserve Dewey turned to the Delaware Citizens for Open Government to find help in fighting powerful and rich business interests who were defying town and state laws to find a way to build a huge hotel that would make Dewey's only road through town to the southern State beaches totally impassable in the

summers. For many years the Town has had a limitation on heights to 35 ft. and a restriction against more hotels. Current residents overwhelmingly supported those limitations through referendums and repeated elections. Nonetheless, as the lawsuit by a few citizens against the Town revealed, the project was unlawfully approved in a closed meeting by the former Council. Since then, two new members of the Council were elected last fall and the Mayor, who voted against it, was re-elected. The Deputy missed those violations and did not bother to note that he was writing about two different Town Councils.

I know how hard the new members and the Mayor have tried to do the right thing. The reality is that most towns handle the FOIA the same way Dewey Beach does, and now and then some have to be told they are doing agendas or sessions wrong. One can understand why this Council did not reveal who they were interviewing for what positions because in a small community--which they are in the off season--everyone knows everyone else's business. Bosses would have learned about their employees looking for another job. Privacy is an important consideration that trumps transparency sometimes. There is no limit to the number of executive sessions in the Act because there may be times like this new Council encountered when many hiring decisions and litigation decisions have to be made, but they must be noticed properly.

Even though the new members have attended at least two training sessions in how to conduct municipal government properly, the advice of the Town Attorney is critical. I'm sure the Council behaved as advised by him or her if at any time anyone was unsure they were not following customary procedures. However, if someone started doing the agendas wrong a long time ago, it would take a complaint to get them to check with the Town Attorney. Had this Council done that, they would have found that the Attorney General's office answered a complaint just last year that pretty much said the Town was giving notice properly.

The irony in this opinion is that Dewey Beach has most Town activities on a good website. Residents know constantly what their government is doing because they can view the Council meetings in live video streaming. Almost all past meetings are archived online also.

That is what DelCOG seeks to promote in Town governments—as much transparency as possible.

Small town government in Delaware can be a real sideshow, but every time volunteer small town officials get unfairly criticized, we lose more good people who will never run for public office. Democracy in the community is weakened when that happens.

So we hope the Attorney General will listen to the Dewey Town Council's side of the story before he undertakes further action. It would be a waste of the taxpayer's money to take court time to handle what can be done simply.

Only if there has been a matter of great public concern left unremediated by the Town Council when they have finished responding to this Opinion should any consideration of a court case be on his radar or the petitioner's.