



JOSEPH R. BIDEN, III
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-6499
TTY (302) 577-5783

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

No. 12-IIB09

July 13, 2012

REQUESTED BY:

Ms. Dell Tush
12 Rodney Avenue
Dewey Beach, Delaware 19971

OPINION BY:

Kent Walker, Deputy Attorney General
Delaware Department of Justice

and

Ian R. McConnel, State Solicitor
Delaware Department of Justice

OPINION:

As this opinion explains, we have found that the actions of the Town Council of Dewey Beach between January, 2011 and April, 2012 demonstrate a clear pattern and practice to disregard the Open Meetings requirements of the Delaware Freedom of Information Act.

THE PETITION

We received from you a letter dated January 25, 2012 alleging certain violations of the Freedom of Information Act ("FOIA"), 29 *Del. C.* Ch. 100 by the Town Council of Dewey Beach ("the Council"). We are treating your letter as a petition ("Petition") under 29 *Del. C.* § 10005 (e) for a determination by the Attorney General as to whether violations of FOIA have

occurred. By letter of February 9, 2012 we referred your Petition to Fred A. Townsend, III, Esquire, Town Solicitor of Dewey Beach, for the Council's response. Mr. Townsend delivered a response on behalf of the Council on March 7, 2012.

The Petition focuses its allegations of FOIA violations primarily on the Council meetings of November 11 and November 18, 2011, but also suggests that similar violations occurred with respect to no fewer than eighteen other meetings of the Council between January 11, 2011 and January 28, 2012.

After careful review of the posted agendas and minutes for the November 11th and 18th meetings, we have determined that agendas for those meetings, and hence the meetings themselves, violated the Open Meeting requirements of FOIA, and we contend that any actions purported to have been taken by the Council at those meetings, whether in executive session or open meetings, were unlawful and are voidable.¹

We also have determined that similar violations occurred with respect seventeen out of eighteen meetings listed in the Petition and we have found violations relating to eleven additional meetings, for a total of twenty-eight FOIA Open Meeting violations for meetings of the Council from January 15, 2011 through April 14, 2012.

ANALYSIS

Agenda Notices of Intent to Hold an Executive Sessions.

We find that the Council violated FOIA by not specifying in its agendas for its November 11 and November 28, 2011 meetings the reason for its proposed executive sessions (closed to the

¹ While the Petition also complains of the legality of efforts by the Council to indemnify the Town Mayor in connection with findings against her by the Delaware Public Integrity Commission, those issues are not related to FOIA and we decline to address them in this opinion.

public). Each of these agendas simply note: “EXECUTIVE SESSION – PERSONNEL AND LITIGATION.” These notations fell far short of FOIA’s agenda requirements.

29 *Del. C.* § 10004(e)(2) requires that: “All public bodies [including town councils] shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof.² The notice shall include the agenda . . .” and § 10002(a) requires that the agenda include “a statement of intent to hold an executive session *and the specific ground or grounds therefor* . . .” [Emphasis supplied.] Lest there be any doubt of this requirement, § 10004(c) also requires that “[t]he purpose of such executive sessions shall be set forth in the agenda . . .” As our Court of Chancery has instructed:

“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.*” *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, Del. Ch., 1994 WL 274295, 1994 Del. Ch. LEXIS at 12 (May 19, 1994) (Jacobs, V.C.) [Emphasis supplied.]

We find that in Dewey Beach, executive sessions have been the rule, not the exception.

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

² The Council has not been dating its agendas or otherwise providing evidence of when notices of its meetings and the meeting agendas are posted. Council’s Solicitor protests that “[o]n [his] information and belief the notice [but not the agenda] of the November 18th meeting was prepared immediately after the November 11th meeting” and he refers to the undated November 18th agenda, which provides no information about when it was posted. We note that the Agenda for the April 14, 2012 meeting does indicate that it was posted (April 5, 2012), but the Agenda for the April 27, 2012 meeting, once again, does not indicate when it was posted.

closed session and make them available as public records for public inspection. *See Levy v. Board of Education of the Cape Henlopen School District*, Del. Ch., 1990 Del. Ch. LEXIS 163, at 3, C.A. No. 1447, Chandler, V.C. (Oct. 1, 1990). This Office 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-FOI3 (Aug. 30, 1980).

As this Office has often opined, the intent of FOIA is not merely to encourage transparency in government, but to require it. Just as the FOIA presumes that all government records are public and subject to disclosure, so too does it presume that all meetings of public bodies are open to the public, with narrow exceptions for non-public “executive sessions.” And when a public body proposes to conduct public business behind closed doors, the public is entitled to know *in advance* what that *specific* business will be. Because the Council failed to inform the public as FOIA requires, of the reasons for its anticipated executive sessions for the November 11th and November 18th meetings, each of those omissions violated FOIA. Similar omissions for numerous other meeting listed below also violated FOIA.

Failure to Give Agenda Notice of Major Issues to be Discussed.

29 *Del. C.* § 10002(a) declares that an “‘Agenda’ shall include but is not limited to a general statement of the major issues expected to be discussed at a public meeting. . . .” The agendas for the November 11th and November 18th meetings “notify the public” that the sole Regular Agenda item will be: “Discuss and possibly vote on matters related to discussions during Executive Session related to personnel and litigation.” These declarations in no way satisfy FOIA requirements of agenda notice. As this office has repeatedly observed:

“An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.” *Att’y Gen. Op.* 05-IB11 (Apr. 11, 2005) (quoting

Att'y Gen. Op. 03-IB22 (Oct. 6, 2003) (quoting *Att'y Gen. Op.* [*4] 97-IB20 (Oct. 20, 1997)).

Moreover, Council's agendas may **not** routinely be "subject to change to include additional items . . . which arise at the time of the public body's meeting" as permitted by § 10004(e)(2). There are two reasons why: (1) an additional item may not, in any event, be added to the Regular Meeting agenda where it arises from an inadequately noticed, and hence invalid executive session, and (2) such "additional item" cannot be said to "arise at the time of the public body's meeting", when Council called the meeting for the purpose of discussing that item.

We also conclude that when Council calls "Special Called Meetings," it has a reason for doing so, viz. "major issues [it] expects to be discussed." And we have determined that Council's failure to identify those reasons in its agendas violates FOIA and renders any action taken at those unlawful meetings voidable.

At the November 11th "Special Called Meeting" following their Executive Session, the Council voted to "consider several motions stemming from information discussed in the Executive Session." Thereupon, the Council voted to appoint the Chief Financial Officer of the Town to the position of Executive Office Manager, to extend the use-or-lose deadline for the newly appointed Executive Office Manager for one year, and to "engage an independent counsel to render an opinion regarding the Town's responsibility to indemnify the Mayor for legal fees in defense against [her] PIC complaint. Obviously, these items of business were not stated in the agenda and no member of the public had any notice that they would be considered.³ Pursuant to

³ Even if the Council had decided these items needed to be acted upon and had complied with the six-hour agenda-amending provision of § 10004, our Office has repeatedly opined that, when a public body does amend an agenda for a public meeting after its initial posting, the public body has the burden to show both that: (1) the matter of public business came up unexpectedly after the initial posting; and (2) the matter requires the immediate attention of the public body and cannot be deferred a later meeting for whose agenda provides at seven days' prior notice to the public.

29 Del. C. § 10005(e), we have determined that all those actions taken by Council at that meeting were without the notice required by FOIA and are invalid.

At the November 18th “Special Called Meeting,” without any reference in its agenda that this important matter would be considered, Council approved a motion to pay the legal fees incurred by the Town Mayor in defense of the complaint against her by the Delaware Public Integrity Commission. Council’s action here, too, was an obvious and blatant violation of 29 Del. C. § 10004 and was clearly unlawful.

The Petition also contends that similar violations concerning Executive Session and Regular Session agenda or amended agenda notices for numerous other “Special Called Meetings” similarly violated FOIA. Having determined that FOIA Open Meeting violations occurred with respect to the November 11th and November 18th meetings, we reviewed Council agendas and minutes for all Council meetings from January 15, 2011 through April 14, 2012. We found Open Meetings violations concerning Council meetings on all of the following dates: January 15, 2011; February 5, 2011; February 12, 2011; February 19, 2011; May 14, 2011; June 18; 2011; July 15, 2011; August 12, 2011,⁴ September 2, 2011; September 9, 2011; September 24, 2011; October 1, 2011; October 21, 2011, October 28, 2011, December 16, 2011; December 30, 2011; January 6, 2012; January 7, 2012; January 28, 2012, February 10, 2012; February 25, 2012; March 30, 2012; and March 31, 2012.⁵ April 14, 2012.

⁴ While the Agenda for this meeting gave insufficient notice of Executive Session, the minutes do not indicate that an executive session was held.

⁵ Although the Agenda for April 14, 2012 does not propose an executive session, its footnotes’ descriptions of the Council’s ability to amend the agenda are incomplete and misleading.

The following phrase is accurate only with the additional language not in italics: “*Please be advised that this agenda is subject to amendments including additional or deleted items,*” but only items of an emergency nature (29 Del. C. § 1004(e)(1)) or with notice at least six hours in advance of the meeting and only for items may not be reasonably deferred to a later meeting.

The following note is NOT the law with respect to Executive Sessions: “29 Del. C. § 10004(e)(2). *The Agenda items as listed may not be considered in sequence. This Agenda is subject to*

CONCLUSION

We conclude that the Council agendas for meetings on November 11, 2011 and November 18, 2011 did not specify the ground or grounds for the proposed Executive Sessions, nor did the agendas for the Public Meetings on those dates comply with FOIA's public meeting notice requirements that the major issues expected to be discussed be identified. Accordingly, we have determined that FOIA Open Meeting law was violated with respect to the two November 2011 meetings. We also conclude that all the other Council meetings referenced in the preceding paragraph violated FOIA and that all actions taken at those meeting were unlawful and may be voidable in litigation.

REMEDIES

Because the Open Meeting violations by the Council have been so obvious, prolonged and habitual, these extraordinary violations require extraordinary and rigorous remedies.

Accordingly, although we have no doubt that Superior Court, in a declaratory judgment action brought by the Attorney General, would find the violations as we have determined, we offer to the Council, in lieu of such litigation, the opportunity to enter into the attached FOIA Remedies Agreement.

We remind Council that FOIA provides significant remedies to private persons, as well as the Attorney General, who may challenge actions taken by Council in violation of FOIA.⁶

change to include additional items including Executive Sessions or the deletion of items including Executive Sessions, which arise at the time of the meeting." All Executive Sessions must be notice in advance and the reasons for them described with specificity.

⁶ § 10005. Enforcement

(a) Any action taken at a meeting in violation of this chapter may be voidable by the Court of Chancery. Any citizen may challenge the validity under this chapter of any action of a public body by filing suit within 60 days of the citizen's learning of such action but in no event later than 6 months after the date of the action.

We also reserve the right to pursue any further remedies we may have under 29 *Del. C.* § 10005.

Very truly yours,



Kent Walker
Deputy Attorney General

Approved:



Ian McConnell
State Solicitor

(c) In any action brought under this section, the burden of proof . . . shall be on the public body to justify a decision to meet in executive session or any failure to comply with this chapter.

(d) Remedies permitted by this section include an injunction, a declaratory judgment, writ of mandamus and/or other appropriate relief. The court may award attorney fees and costs to a successful plaintiff of any action brought under this section. The court may award attorney fees and costs to a successful defendant, but only if the court finds that the action was frivolous or was brought solely for the purpose of harassment.

FOIA REMEDIES AGREEMENT
BETWEEN THE
ATTORNEY GENERAL OF DELAWARE
AND THE
COUNCIL OF THE TOWN OF DEWEY BEACH

WHEREAS, a Petition was submitted to the Attorney General on January 25, 2012 alleging certain violations by the Council of the Town of Dewey Beach (“Council”) of the Delaware Freedom of Information Act, 29 *Del. C.* ch. 100 (“FOIA”) Open Meeting requirements set forth in 29 *Del. C.* § 10000, *et. seq.*;

WHEREAS, on July 13, 2012, the Attorney General issued Opinion No. 12-IIB08 in which he determined that actions by the Council from *at least* January 2011 to April 2012 demonstrated a clear pattern and practice to disregard the FOIA Open Meeting requirements;

WHEREAS, the FOIA Open Meeting violations by the Council are so obvious, prolonged and habitual, that these extraordinary violations require extraordinary and rigorous remedies; and

WHEREAS, the Attorney General is empowered to challenge those acts and omissions taken by Council in violation of FOIA; and to seek an order of court to resolve these FOIA violations and ensure future compliance with all of FOIA’s requirements.

NOW THEREFORE, the Council and the Attorney General, intending to be legally bound, hereby agree to this FOIA Remedies Agreement (“Agreement”) as follows:

The Council admits that it has committed all the FOIA violations identified in Attorney General Opinion No. 12-IIB08, and

The Council, in lieu of enforcement litigation by the Attorney General pursuant to 29 *Del. C.* § 10005, agrees to comply with all of the following:

1. Council shall deliver to Attorney General, within the ten (10) business days following the date of this Agreement, copies of the minutes of all public and all executive session for those meetings since November 10, 2011 that we have determined to have violated FOIA;¹
2. Council shall deliver to the Attorney General within twenty (20) business days of the date of this Agreement, Council's proposed remedies for all illegal actions taken at those meetings;
3. Council, effective with the next Council meeting, shall deliver to the Attorney General via email copies at least ten (10) days in advance of any meeting final agendas for *all* proposed regular and "Special Called" Council meetings. This requirement shall continue for a period of one (1) year from the date of this Agreement;
4. Council shall note prominently on the first page of every agenda the date, time and place(s) of its posting;
5. Council shall refrain from any mention on meeting notices and agendas of any right to amend any agenda; and
6. Council shall refrain from amending any posted agenda without first obtaining the consent of the Attorney General at least forty-eight (48) hours in advance of any meeting.

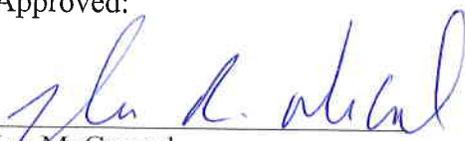
¹ November 11, 2011, November 18, 2011, December 16, 2011; December 30, 2011; January 6, 2012; January 7, 2012; January 28, 2012, February 10, 2012; February 25, 2012; March 30, 2012; and March 31, 2012.1, April 14, 2012

The Attorney General further reserves the right to pursue any remedies available under 29 *Del. C.* § 10005.

Joseph R. Biden, III
Attorney General:

By: 
Kent Walker
Deputy Attorney General

Approved:


Ian McConnell
State Solicitor

Dated this 12th day of July 2012,.

For the Council of the Town of Dewey Beach
