

March 9, 2005

Civil Division-Kent County (739-7641)

Mr. Stan Mills
38 Maryland Avenue
Rehoboth Beach, DE 19971-2129

Re: **Freedom of Information Act Complaint
Against Rehoboth Beach Board of Adjustment**

Dear Mr. Mills:

Our Office received your Freedom of Information Act ("FOIA") complaint on September 24, 2004 alleging that the Rehoboth Beach Board of Adjustment ("Board of Adjustment" or "Board") violated FOIA by: (1) failing to post the agenda of a public meeting held on July 26, 2004 seven days in advance; (2) failing to prepare minutes of public meetings held on July 26 and August 23, 2004; and (3) charging an unreasonable fee (\$4.00 per page) for a transcript of any meeting of the Board of Adjustment. ¹

By letter dated September 27, 2004, we asked the Board to respond to your complaint within ten days. By letter dated October 11, 2004, the Board's counsel requested a thirty-day

¹ You also allege that the Board of Adjustment has violated the record maintenance and retention provisions of Chapter 3 of Title 22 of the Delaware Code, and the State public archives law, Chapter 5 of Title 29 of the Delaware Code. Those issues are not within our jurisdiction under FOIA.

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extension of time because of his trial schedule, which we granted. We received the Board's initial response on November 1, 2004.

By letter dated November 29, 2004, we asked the Board for additional information and documents: the notices and agendas for the July 26 and August 23, 2004 meetings, and the date and time and place they were posted; and copies of any case decisions which the Board heard at the meeting on August 23, 2004.

By letter dated December 7, 2004, the Board provided us with copies of two case decisions heard at the meeting on August 23, 2004, but wrote that the Board would not be able to provide us with the other information we requested "until next week." When we did not hear anything back from the Board, we wrote again on February 28, 2005 advising the Board that if we did not receive the requested information by March 4, 2004, "then our Office will draw the adverse inference that the meetings were not noticed in compliance with FOIA as alleged in the complaint." Under cover of letter dated March 1, 2005 you provided us with the supplemental information we requested.

According to the Board of Adjustment, it meets to hear appeals from decisions by city officials regarding zoning ordinances (for example, an application for a variance). See 22 Delaware Code §§324, 326, 327. A court reporter is present at appeal hearings so that a transcript may be prepared, if necessary, in the event of an appeal to the Superior Court. Id. §§328, 331 (review by the Superior Court is on the record). The Board does not prepare and maintain "minutes" of its meetings, as that term is commonly understood. Instead, the Board issues a written decision with findings of fact and conclusions of law. The Board contends that the written decision satisfies the minutes requirements of FOIA.

RELEVANT STATUTES

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those closed” as authorized by statute for executive session. 29 Del. C. §10004(a).

“All public bodies 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. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings.” 29 Del. C. §10004(e)(2).

“Public notice required by this subsection shall include, but not be limited to, conspicuous posting of said notice at the principal office of the public body holding the meeting, or if no such office exists at the place where meetings of the public body are regularly held, and making a reasonable number of such notices available.” 29 Del. C. §10004(e)(4).

“Each public body shall maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record. Such minutes shall include a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon.” 29 Del. C. §10004(f).

“Any reasonable expense involved in copying” of public records under FOIA “shall be levied as a charge on the citizen requesting such copy.” 29 Del. C. §10003(a).

LEGAL AUTHORITIES

A. July 26, 2004 Meeting

You allege that the Board of Adjustment failed to post an agenda for this meeting seven days in advance as required by FOIA. You allege that the Board circulated an agenda at the start of the meeting, but then discussed two matters of public business not listed in the agenda: (1) placard notification program; and (2) proposed revisions to the Board's rules and procedures.

The documents provided to us by the Board show that on July 2, 2004 the Board posted notice of a public meeting to be held on July 26, 2004. The notice listed two requests for a variance as the matters of public business to be discussed. The Board acknowledges that it did not post an agenda seven days in advance of the July 26, 2004 meeting as required by FOIA, but rather circulated an agenda at the start of that meeting. The agenda lists -- in addition to the two requests for a variance -- under "New Business 1. Discussion of a letter from the Rehoboth Beach Homeowners' Association regarding posting of signs."²

"An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, and so that members of the public can decide whether to attend the meeting and voice their ideas or concerns." *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att'y Gen. Op.* 97-IB20 (Oct. 20, 1997)). "While the statute requires only a 'general statement' of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfies neither the spirit nor the

² You also allege that the Board discussed another matter of public business at the July 26, 2004 meeting -- proposed revisions to the Board's rules and regulations. You may have confused that topic with the discussion at the Board's August 23, 2004 meeting of revising the Board's by-laws. That matter of public business was listed in the agenda for the August 23, 2004 meeting which was posted seven days in advance as required by FOIA.

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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." Ianni v. Department of Elections of New Castle County, Del. Ch., 1986 WL 9610 (Aug. 29, 1986) (Allen, C.).

The agenda for the Board's July 26, 2004 meeting was not posted seven days in advance as required by FOIA, but rather handed out at the start of the meeting. The notice for the July 26, 2004 meeting was timely posted, but listed only the two requests for a variance for public discussion and did not mention the letter from the Rehoboth Beach Homeowners' Association regarding the posting of signs. We believe that the sign issue was a matter of public business substantial enough to require disclosure in an agenda published seven days in advance of the meeting.

We determine that the Board violated the public notice requirements of FOIA by failing to post an agenda for that meeting seven days in advance and listing all of the matters of public business to be discussed at that meeting.

B. Minutes

FOIA does not require any specific form for the minutes a public body must prepare and maintain for every meeting. "The Act requires that certain information be included in the minutes, but neither says that the subjects discussed must be summarized nor attempts to define how specific such a summary should be." Common Cause of Delaware v. Red Clay Consolidated School District, C.A. No. 13798, 1995 WL 733401, at p.4 (Del. Ch., Dec. 5, 1995) (Balick, V.C.). There is no "clearly implied statutory requirement to summarize the subjects discussed with any degree of specificity" in the minutes FOIA requires to be prepared and maintained. FOIA only requires the

minutes to include: “a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon.” 29 Delaware Code §10004(f).

The two case decisions the Board provided to us (both heard at the Board’s August 23, 2004 meeting) do not identify the individual Board members present or how they voted on the action agreed upon (application for a variance). The decisions state at the end: “By a vote of four in favor and none against, a motion to deny the Variance was carried”; and “By a vote of four in favor and none against, the Request for a Variance was GRANTED.”

We determine that these two written decisions do not satisfy the requirements of FOIA for preparing and maintaining minutes of the Board’s August 23, 2004 meeting. If all of the Board members had been present and the case decision unanimous, then the public could infer the vote of each individual Board member even if not named as voting in favor or against. But only four of the five members of the Board attended the meeting on August 23, 2004, so it is not possible to know from the written case decision who voted which way. Compare with East Coast Resorts, Inc. v. Board of Adjustment of the Town of Bethany Beach, C.A. No. 91A-10-002, 1993 WL 258707, at p.4 (Del. Super., June 17, 1993) (Lee, J.) (the votes of each individual board member were properly recorded in the minutes of the meeting and “the minutes were properly filed”). We determine that the Board of Adjustment violated FOIA by not preparing and maintaining minutes of its public meeting on August 23, 2004 with the information required by FOIA.

We are also concerned that the Board’s case decisions also may not reflect matters of public business that were discussed before or after a hearing on a zoning matter. For example, at the July 26, 2004 meeting the Board discussed at least one administrative matter: the letter from the Rehoboth Beach Homeowners’ Association regarding the posting of signs. That matter of public

business does not appear to be reflected in the two case decisions (requests for a variance) heard at the Board's July 26, 2004 meeting.

The Board contends that it acts only in a "quasi-judicial" capacity and therefore its case decisions reflect all of its public business. A board of adjustment, however, not only "has the quasi-judicial duty of hearing appeals urging error in decisions made by zoning officials" but also has "the power to grant special exceptions and variances. We do not understand this latter function to be the exercise of a quasi-judicial function. The exercise of these powers is the discharge of an administrative or delegated legislative function." Zoning Board of Adjustment of New Castle County v. Dragon Run Terrace, Inc., 216 A.2d 146, 147 (Del. 1965).³

The Board of Adjustment has not provided us with any writing to meet its burden of proof that it prepared minutes of its July 26, 2004 meeting in the form and content required by FOIA. We determine that the Board violated the open meeting requirements of FOIA by failing to prepare and maintain minutes of that meeting.

C. Copying Costs

FOIA allows a public body to charge a "reasonable expense involved in the copying" of public records. We have earlier determined that a copying cost of 50 cents per page was reasonable, *see Att'y Gen. Op. 95-IB08* (Feb. 6, 1995), but that was ten years ago. A better benchmark is what the courts in Delaware now charge (Superior Court, \$1.50 per page; Family Court, \$1.00 per page).

³ Dragon Run involved a county board of adjustment governed by Chapter 26 of Title 9 of the Delaware Code. The Supreme Court observed, however, that a municipal board of adjustment "is to all intents and purposes a counterpart in the City of the County Board of Adjustment." 216 A.2d at 147.

The Board has not responded to your allegation that charging \$4.00 per page for a transcript of a hearing is unreasonable and therefore the Board has not met its burden of proof that the charge is reasonable. We understand that not every hearing is transcribed for budget reasons, and that the usual catalyst for the court reporter to prepare a transcript is the filing of an appeal to the Superior Court. Until such time as the Board asks the court reporter or otherwise obtains a copy of a transcript, the data compiled by the court reporter at the hearing is not a "public record" in the custody of a public body for purposes of FOIA. Under those circumstances, if a citizen wants a transcript of a hearing then he or she will have to contract directly with the court reporter.

If, on the other hand, the Board has already purchased a transcript from the court reporter, or otherwise comes into possession of a copy before a citizen makes a FOIA request for it, then FOIA permits the public body to charge only the reasonable costs of photocopying the transcript, not the same charge the public body may have paid to the court reporter. "Once the transcript of an administrative hearing conducted by or on behalf of an agency has been filed with the agency, the transcript becomes a public record without regard to who ordered the transcription or bore its expense." Department of Health & Rehabilitative Services v. Southpointe Pharmacy, 636 So.2d 1377 (Fla. App. 1994). Under FOIA, a public body cannot charge the public "more than the actual cost of duplicating public records, including transcripts." Id.

To the extent that the Board of Adjustment is charging citizens \$4.00 per page to copy a transcript already prepared and in the custody, possession or control of the Board, we find that amount unreasonable and in violation of FOIA.

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Conclusion

For the foregoing reasons, we determine that the Board of Adjustment violated the open meeting requirements of FOIA by: (1) failing to post a timely agenda for a public meeting on July 26, 2004; and (2) failing to prepare and maintain minutes of public meetings on July 26 and August 23, 2004. We also determine it is unreasonable under FOIA for the Board to charge \$4.00 per page to copy a transcript of a Board case decision which has already been prepared by a court reporter at the request of the Board or one of the parties to the case and which is already in the custody, possession or control of the Board.

As remediation, we direct the Board of Adjustment to prepare and send to us within ten days of the date of this letter minutes for the July 26 and August 23, 2004 meetings which comply with FOIA. We also ask the Board's counsel to notify us in writing when remediation has been completed and enclose copies of the minutes of those two meetings.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED:

Malcolm S. Cobin, Esquire
State Solicitor

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cc: The Honorable M. Jane Brady
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