

April 11, 2005

Civil Division-Kent County (739-7641)

Mr. John Flaherty  
Common Cause of Delaware  
1304 N. Rodney Street, 3<sup>rd</sup> Floor  
Wilmington, DE 19806

Re: **Freedom of Information Act Complaint  
Against New Castle County Council**

Dear Mr. Flaherty:

Our Office received your Freedom of Information Act (“FOIA”) complaint on January 31, 2005 alleging that the New Castle County Council (“the Council”) violated the open meeting requirements of FOIA by holding a special meeting on January 25, 2005 without the required notice to the public.

By letter dated February 1, 2005, we asked the Council to respond to your complaint within ten days. We granted the Council’s request for a short extension of time, and received the Council’s response on February 16, 2005.

According to the Council, a regular meeting of the Council’s Executive Committee was scheduled for January 25, 2005 at 7:00 p.m. The notice and agenda for that meeting were posted seven days in advance on January 18, 2005.

According to the Council, [s]everal Council members approached the President on Friday,

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January 21 and over the weekend, on January 22 and 23, to request the immediate scheduling of a special meeting to consider the Auditor's position." On Monday, January 24, 2005 at 11:00 a.m., the Council posted a notice and agenda for a special meeting to be held at 7:00 p.m. on Tuesday, January 25, 2005. The agenda noted that it "was not posted seven (7) days in advance of the scheduled meeting as a result of recent developments since the Audit Committee meeting of January 20, 2005. The agenda listed for discussion: "1. Call to order 2. Discussion of Confidential Personnel Matter 3. Other".

The first agenda for the special meeting on January 25, 2005 was posted more than twenty-four hours in advance of the special meeting. On January 25, 2005, the Council posted a revised agenda for the special meeting at 12 noon, more than six hours in advance of the meeting. The only change to the agenda was to revise the second line item to read: "Discussion of Confidential Personnel Matter (County Auditor)". According to the Council, this change was made "to clarify that the confidential personnel matter to be discussed involved the County Auditor."

#### Relevant Statutes

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by statute. 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 thereof. The notice shall include the agenda, . . . ." Id. §10004(e)(2).

FOIA requires a public body to give notice of any special meeting "as soon as reasonably possible, but in any event no later than 24 hours before such meeting." 29 Del. C. §10004(e)(2).

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A special meeting is defined “as one to be held less than 7 days after the scheduling decision is made.” Id. The notice of a special meeting “shall include an explanation as to why the [normal 7 days notice] could not be given.” Id.

“When the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda.” 29 Del. C. §10004(e)(5).

#### Legal Authority

##### A. Notice of Special Meeting on January 25, 2005

FOIA requires the notice of a special meeting to “include an explanation as to why [7 days notice] could not be given.” 29 Del. C. § 10004(e)(2). We have previously determined that FOIA “requires only a reason, not a specific detailed factual basis, why the seven-day requirement could not be met.” *Att’y Gen. Op.* 94-IO37 (July 26, 1994).

For example, in *Att’y Gen. Op.* 03-IB19 (Aug. 8, 2003), the town held a special meeting to discuss road improvements. The notice stated the town had to meet with less than seven days’ notice “to minimize any further delays in the work.” We determined that the town’s reason, as stated in the agenda, satisfied FOIA’s requirement for a special meeting.

The notice for the January 25, 2005 special meeting of the Council stated the reason why the Council felt it had to meet with less than seven days notice: “as a result of recent developments since the Audit Committee meeting of January 20, 2005”. We determine that this explanation satisfied the requirement of FOIA for noticing a special meeting.

B. Revised Agenda for the January 25, 2005 Special Meeting

“We recognize that the business of government does not stop seven days before a public meeting, but FOIA provides flexibility for a public body to amend the agenda up to six hours prior to a meeting to add items that come up suddenly and cannot be deferred to a later meeting.” *Att’y Gen. Op.* 03-IB22 (Oct. 6, 2002) (school district only learned of the need for a construction contract change order the morning of the scheduled meeting). *See Att’y Gen. Op.* 02-IB22 (Sept. 13, 2002) (the council’s executive committee did not violate FOIA when it posted an amended agenda four days after a regular meeting to include ethics issues raised at the city/council meeting two days after the original agenda was posted).

Section 10004(e)(5) of FOIA allows a public body to amend its agenda for a meeting up to six hours before the meeting to include additional matters that may come up after the posting of the original agenda, but requires that “the reasons for the delay in posting shall be briefly set forth in the agenda.” The Council did not state any reason for the posting of a revised agenda seven hours before the special meeting scheduled for January 25, 2005. In its response to your complaint, the Council now explains that it wanted to be sure that the public and the media knew that the “personnel” involved was the County Auditor.

We do not believe that the lack of an explanation for why the Council amended the agenda for the January 25, 2005 special meeting amounted to a violation of FOIA, however. FOIA only requires the agenda to include “a general statement of the major issues expected to be discussed at a public meeting.” 29 Del. C. §1000(2)(f). When a personnel matter is one authorized for executive session, FOIA does not require a public body to name the individual in the agenda. *See Att’y Gen. Op.* 99-IB03 (Apr. 28, 1999).

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We believe that the original agenda for the Council's January 25, 2005 special meeting satisfied the agenda requirements under FOIA by listing as a matter for discussion, "confidential personnel matter." When it amended the agenda seven hours before the special meeting on January 25, 2005, the Council did not add an entirely new matter of public business for discussion, but rather clarified that a matter already noticed (confidential personnel matter) involved the County Auditor. We do not believe that, under those circumstances, Section 10004(e)(5) of FOIA required an explanation in the notice and agenda for this change since the change was not required to satisfy the minimum requirements for an agenda under FOIA.

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Conclusion

For the foregoing reasons, we determine that the Council did not violate the open meeting requirements of FOIA by posting a notice and agenda of a special meeting for January 25, 2005 at least twenty-four hours in advance, and by posting a revised notice and agenda at least six hours in advance of that special meeting.

Very truly yours,

W. Michael Tupman  
Deputy Attorney General

APPROVED

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Malcolm S. Cobin  
State Solicitor

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cc: The Honorable M. Jane Brady  
Attorney General

Leonard E. Collins, Jr., Esquire

Phillip G. Johnson  
Opinion Coordinator