

June 20, 2005

Civil Division-Kent County (739-7641)

Ms. Karen Hurley-Heyman  
207 East 2<sup>nd</sup> Street  
New Castle, DE 19720

Re: **Freedom of Information Act Complaint  
Against City of New Castle**

Dear Ms. Hurley-Heyman:

Our Office received your Freedom of Information Act (“FOIA”) complaint on June 1, 2005 alleging that the City of New Castle (“the City”) violated the open meeting requirements of FOIA by: (1) holding a meeting of the Planning Commission on March 28, 2005 one hour earlier than the time noticed to the public to discuss the proposed subdivision of 219 East 2<sup>nd</sup> Street; and (2) amending the agenda for the City Council meeting noticed for April 19, 2005 the day before the meeting to include the subdivision of 219 East 2<sup>nd</sup> Street for final action by the Council.

By letter dated June 9, 2005, we asked the City to respond to your complaint by the close of business on June 13, 2005. We received the Town’s response by facsimile the morning of June 14, 2005.<sup>1</sup>

The City acknowledges that the Planning Commission met on March 28, 2005 at 6:00 p.m. to discuss a proposed subdivision of 219 East 2<sup>nd</sup> Street and that the Commission “approved the

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<sup>1</sup> Because of the nature of your allegations and the potential consequences that might flow from a finding of a FOIA violation, we expedited our investigation and shortened the normal ten-day response time for the public body.

subdivision and made its recommendation to City Council.” The City also acknowledges that the notice of that meeting “was posted incorrectly on February 14, 2005. It listed the meeting at 7:00 p.m. The actual meeting was held at 6:00 p.m.”

According to the City, the Planning Commission only makes a recommendation to the City Council. “The City Council must vote on the subdivision. The Council is not bound by the Planning Commission’s recommendation. It can approve, amend or reject the subdivision plan.”

According to the City, the “Council held its regular meeting on April 19, 2005. The subdivision plan was approved at that meeting by Resolution No. 2005-06.” The City did not add that item to the agenda, however, until April 18, 2005. The City explains that the “delay in posting was due to ‘late arrival of information.’ . . . This Council has only one hold over from the previous Council and it was its first regular meeting. It is not surprising that materials were received late. Their election was on Saturday, April 8, 2005.”

#### Relevant Statutes

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those closed” for executive session if authorized by law. 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 the agenda to include “a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specified ground or grounds therefor . . . .” 29 *Del. C.* § 10001(g).

“When an 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.” *Id.* § 10004(e)(5).

#### Legal Authority

##### B. Notice of March 28, 2005 Planning Commission Meeting

It is not disputed that the City’s Planning Commission noticed a meeting for 7:00 p.m. on March 28, 2005 to discuss a proposed subdivision, but the Commission actually met one hour earlier at 6:00 p.m. As a consequence, a number of citizens who were interested in this matter of public business and planned to attend the meeting arrived only to find that the meeting was over and the Commission had voted to recommend approval of the subdivision.

The City contends that the incorrect time noticed for the Commission’s meeting on March 28, 2005 was a “clerical error,” and the public had a further opportunity to voice their opinion when the City Council met on April 19, 2005 to consider the Commission’s recommendation regarding the sub-division. Even if the error was inadvertent, it still deprived members of the public of their right to monitor and observe the discussion of a matter of public business. In contrast, in *Att’y Gen. Op.* 04-IB17 (Oct. 18, 2004), we determined that the change in the time for a public meeting from 2:00 p.m. to 3:00 p.m. “did not deprive the public of an opportunity to attend the meeting (112 citizens attended). The time of the meeting was moved one hour later, not earlier, and to attend the meeting the

public only had to wait an hour.”

We recognize that the Commission only decides whether to recommend a proposed sub-division and that the final decision lies with the City Council. The Chancery Court has held, however, that the application of Delaware’s open meeting law does not turn on whether the public body took any formal action. “[A]ction by a public body includes fact gathering, deliberations and discussions, all of which surely influence the public entity’s final decision.” *Levy v. Board of Education of Cape Henlopen School District*, C.A. No. 1447, 1990 WL 154147, at p.6 (Del. Ch., Oct. 1, 1990) (Chandler, V.C.).

We determine that the City violated the open meeting requirements of FOIA when the Planning Commission met on March 28, 2005 at 6:00 p.m. having noticed the meeting to the public for 7:00 p.m.

B. April 19, 2005 City Council Meeting

“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. 97-IB20* (Oct. 20, 1997)).

“Section 10004(e)(5) of FOIA allows a public body to amend its agenda 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.’” *Att’y Gen. Op. 05-IB09* (Apr. 11, 2005). We have cautioned that this exception does not authorize a public body to amend the agenda prior to a meeting for

any reason, but rather applies “to add items that come up suddenly and cannot be deferred to a later meeting.” *Id. See 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); *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).

The City Council first posted the notice and agenda for its April 19, 2005 meeting on April 7, 2005. The City posted an amended agenda on April 12, 2005, and amended the agenda three more times before the meeting (on April 14, April 18, and April 19, 2005). In the seven days prior to the April 19, 2005 meeting, the City added eight new items to the agenda for public discussion, including (on April 18, 2005) “Resolution 2005-06 approving a Minor Subdivision for property located at 219 East 2<sup>nd</sup> Street.” The final amended agenda stated that the “reasons for delay in posting” these eight matters of public business were “due to late arrival of information.”

The City contends that “[s]ince the resolution was posted more than 24 hours ahead of the Council Meeting with a reasonable explanation, it is believed that the City council did not violate FOIA.” FOIA authorizes a public body to give notice of a special meeting in less than the normal seven days, “but in any event not later than 24 hours before such meeting. . . . The public notice of a special . . . meeting shall include an explanation as to why” the normal seven notice “could not be given.” 29 *Del. C.* §10004(e)(3).

The 24-hour notice requirement authorized by Section 10004(e)(3) applies only to

the initial posting of the notice for a special meeting. When a public body has already published notice of a regular meeting at least seven days in advance, Section 10004(e)(5) controls: "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)(3).

The City amended the agenda for the Council's April 19, 2005 meeting at least six hours in advance to add the subdivision issue. The issue then is whether the City gave sufficient reason why it could not have included the subdivision in the agenda when it was originally posted on April 7, 2005. We understand that there was a municipal election on April 8, 2005, and new Council members took office after the original posting of the agenda for the April 19, 2005. But the Planning Commission met and voted to recommend the proposed subdivision on March 28, 2005. The new Council had until April 12, 2005 to post a new agenda to include the subdivision within the seven day notice requirement of FOIA. The subdivision matter did not "come up suddenly" after the original posting of the agenda on April 7, 2005. *Att'y Gen. Op.* 05-IB09 (Apr. 11, 2005). Nor is there any evidence in the record that consideration of the proposed subdivision by the Council was such a pressing matter that it could "not be deferred until a later date." *Id.*

We determine that the City violated the public notice requirements of FOIA when it amended the agenda for the April 19, 2005 Council meeting the day before to include the proposed subdivision of 219 East 2<sup>nd</sup> Street.

C. Remediation

In deciding whether to direct remediation, we are mindful that “[b]oth citizens and officials rely on governmental decisions in planning their everyday affairs.” *Wilmington Federation of Teachers v. Howell*, 374 A.2d 832, 836 (Del. 1977). In previous decisions, we have followed the lead of the Chancery Court and directed remediation when a public body has taken final action on a matter affecting “substantial public rights.” *Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at p.6 (Del. Ch., Aug. 29, 1986) (Allen, C.).

We have previously determined that substantial public rights are affected by actions involving land use. See *Att’y Gen. Op. 02-IB33* (Dec, 23, 2002) (conditional use exception for senior citizen retirement community).<sup>2</sup> We believe that the City’s FOIA violations affected substantial public rights by: (1) depriving interested citizens of the opportunity to influence the decision by the Planning Commission whether to approve the proposed subdivision; and (2) failing to give timely notice that the Council would take final action on the proposed subdivision so that interested citizens would know to attend the April 19, 2005

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<sup>2</sup> We are not directing remediation for other matters that may have been unlawfully added to the agenda for the April 19, 2005 meeting of the City Council because they appear to have involved procedural or other matters that did not result in final action (e.g., setting dates and times for interviewing candidates for position of City Clerk and to begin the budget process and meet with Trustees; discussion of areas of responsibilities of each Council person; authorization for financial chair of the Council to enter into discussions to establish a line of credit).

meeting.

It is the combination of these two FOIA violations which we believe requires remediation. In other cases, we have not directed remediation where a matter of public business “was thoroughly discussed in public before the Council took a vote.” *Att’y Gen. Op.* 03-IB20 (Sept. 3, 2003). If a public body fails to give sufficient notice before discussing a matter of public business, the public body may cure the violation at a later public meeting “provided that the later public meeting functions as a true *de novo* consideration of the challenged action.” *Levy*, 1990 WL 154147, at p.7

Here, the FOIA violations first by the Planning Commission and then by the Council deprived interested members of the public of the only two opportunities they might have had to make their views known about the proposed subdivision. Since the Planning Commission only makes a recommendation to the Council, the Commission’s notice violation might have been cured if the public had received timely notice that the Council would take final action on the proposed subdivision at its April 19, 2005 meeting. By twice violating the notice requirements of FOIA, the Commission and the Council impaired the substantial rights of citizens to observe and monitor the resolution of this important matter of public business. *See Levy*, 1990 WL 154147, at p.7 (“[t]here may be circumstances where this Court would legitimately conclude that a later public vote at a meeting held in compliance with the sunshine law would remedy an earlier violation” but not when “[t]he undisputed record shows a pattern of violations”).

Conclusion

For the foregoing reasons, we determine that the City violated the open meeting requirements of FOIA by: (1) noticing a meeting of the Planning Commission for 7:00 p.m. on March 28, 2005, but holding the meeting one hour earlier; and (2) amending the agenda the day before the City Council's April 19, 2005 meeting to add the subdivision as an item for final action by the Council without a sufficient reason seven days' notice could not given.

As remediation, we direct the Planning Commission to hold a public meeting in strict compliance with the notice requirements of FOIA within twenty (20) days of the date of this letter to re-consider the subdivision of 219 East 2<sup>nd</sup> Street. Within twenty days after that meeting of the Planning Commission, we direct the City Council to hold a public meeting in strict compliance with the notice requirements of FOIA to consider the Commission's recommendation regarding that subdivision. We direct the City Solicitor to report to us in writing within ten days after the Council's meeting to confirm that remediation has been perfected.

Very truly yours,

W. Michael Tupman  
Deputy Attorney General

APPROVED

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Malcolm S. Cobin  
State Solicitor

cc: The Honorable M. Jane Brady  
Attorney General

Ms. Karen Hurley-Heyman  
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