

**CITY COUNCIL OF THE MAYOR
AND COUNCIL OF NEW CASTLE
FOIA WORKSHOP
JULY 30, 2009
6 P.M.**

Present:

Council President William Barthel
Councilperson Ted Megginson
Councilperson Teel Petty

Absent:

Councilperson John Cochran
Councilperson John Gaworski

City Personnel Present:

Roger Akin, City Solicitor
Marian Delaney, Finance/HR Supervisor
John F. Klingmeyer, Mayor

Council President Barthel opened the workshop at 6 p.m. Roll call was taken.

Mr. Barthel turned the meeting over to Mr. Akin who is providing tonight's presentation. Mr. Akin opened by noting his credentials.

An outline summarizing tonight's presentation was distributed to attendees.

The Delaware Freedom of Information Act (FOIA) has been on the books in Delaware for 25-30 years. The fundamental policy behind the FOIA is that elected officials are elected/appointed to do the public's business; the public has every right to know what we do and to the greatest extent possible the public should be invited to our meetings and the public should see our writings. There should be very little that is kept from public view. This is how the courts and Attorney General's Office views FOIA. It has been Mr. Akin's experience that if there is a gray area as to whether the public should have access to something or not, almost always judges and deputies attorney general will decide on the public's side.

Delaware FOIA is available online and is in the Delaware Code, Title 29, Vol. 14A, Chapter 100.

The FOIA applies to all public bodies in Delaware. 'Public bodies' is defined as any board, bureau, commission, agency, committee, department, ad hoc committee, special committee, etc. of any body established by the General Assembly or established by a body that is established by the General Assembly.

Mr. Akin cited examples. If a Council, by ordinance, establishes a planning commission, because it was established by a body that is chartered by the General Assembly it is a public body and its business must be conducted in the public and its records are public records.

If the Planning Commission establishes a sub-committee to study a proposed project, that sub-committee is a public body because it was established by a body that was established by a body that was established by an act of the General Assembly. When they meet they must give notice of meetings and if minutes are generated the public must be given access to those minutes.

When a quorum (typically a majority) of a body meets, that constitutes a public meeting and that meeting must give public notice. Whenever you have a quorum of a public body meet to discuss a topic that is a meeting that must receive notice required under FOIA. This is regardless of location.

Electronic Meetings – This is a growing form of communication. There is a growing body of decisions in the courts and Department of Justice that says if a quorum is simultaneously online having a chat about the public's business, that is considered a public meeting even though the participants are not physically in one room together. Inviting public participation can be difficult but there are municipalities that are working out ways to hold meetings online and meet FOIA requirements and also allow the public to provide input on the issues being discussed. This is an acceptable way to meet and is considered a public meeting.

Notice of Meetings – FOIA requires that there must be a conspicuous public posting showing the date, time and place of a meeting along with as much of the agenda as known and it must be done seven (7) days before the meeting. This information is being provided online by many municipalities. At a minimum the notice of a meeting and the agenda must be posted at some public place (Town Hall, location of meeting) where all the people of the community can come to know what is going on.

Exception for Emergency Meetings – The FOIA allows for emergency meetings (strong storm, hurricane) to allow for the protection of the peace, health and safety of the public with less than seven (7) days' notice.

Agenda Amendment(s) – An agenda can be amended anytime up to the time of the meeting, but FOIA says that if you amend the agenda within a day or two of the meeting there should be a footnote on the bottom of the amended agenda as to why seven (7) days notice could not be met.

Meeting Location – The FOIA and court interpretations in Delaware now say that meetings must take place within the jurisdiction. Example: The New Castle City Planning Commission must be held within the geographic confines of New Castle unless circumstances exist to prevent this.

New Castle City Ordinances – City ordinances are not required to have a more restrictive notice provision than FOIA. The City of New Castle's notice requirements are fifteen (15) days before the hearing. City Council could change this language to make it consistent with FOIA but having an ordinance providing greater notice than seven (7) days is a compliment to the City.

Mr. Akin noted that if a quorum is meeting to discuss something that is border-line public business then the default rule should be to publicly notice the meeting.

FOIA Exceptions – A public body may close their doors to the public and press. These are called executive sessions. There are 8-10 reasons providing for why a public body can meet by themselves. These include legal issues affecting the jurisdiction to discuss strategy and meet with their counsel, ongoing legal matters requiring the body to meet privately with counsel for their advice/guidance, labor negotiations, acquisition of land, and personnel matters. Minutes must be prepared for executive sessions. However, the public cannot have access to those minutes until the matter(s) discussed have been resolved. An exception is in personnel matters where an employee can dictate whether their termination/disciplinary hearing will be conducted in a public or private session.

Room/Location Accommodations – If a body is hearing a controversial issue and knows that a large audience will be in attendance there is an obligation for that body to ensure they meet in a larger room or make accommodations for the public to hear the proceedings in another room. It is not acceptable to turn the public away if there is no more room in the meeting area.

Unruly Audience – No body is required to allow a disruptive person(s) to remain in the meeting and keeping the body from doing the public's business. There is a specific provision in FOIA allowing a body to exclude a disruptive person(s) from a meeting.

Trustees – Mr. Akin noted that the Trustees were chartered by the General Assembly, making them a body established by the General Assembly. He does not advise the Trustees or attend their meetings but will research what their obligation is.

Historic Area Commission (HAC) – In preparation for HAC meetings members of HAC travel around the City visiting properties on that meeting's agenda. Discussion about agenda items takes place during this time. Mr. Akin said that HAC is a public body and when they are reviewing properties and discussing same they are conducting the public's business. That is a matter committed to HAC under the ordinance. A judge in Delaware would likely rule that that mobile meeting is a meeting and if a quorum is in the vehicle then any citizen who wants to be with them would be permitted to do so.

Board of Adjustment – At times Board of Adjustment members visit a property prior to the hearing. There has never been a judicial decision stating that someone can't go and observe a property without actively engaging in a discussion with other Board members or the property owner. If a quorum visited a site and discussed same that is considered a meeting of the Board of Adjustment and FOIA rules would apply. All evidence and information the Board receives on a proposal should come in this room. Board members receive packets of background information prior to hearings and there is nothing wrong with individually learning more about an application. Board members may observe a property but cannot engage in discussion with an engineer representing the owner, neighbor, or the owner. If a

Board of Adjustment member or members wishes to educate themselves by attending a meeting conducted by a private citizen, it is permissible. Mr. Akin recommended that members not actively participate in discussion on the matter; that should be limited to this room at the scheduled meeting to address the matter. Engaging in active discussion about the matter in a forum other than their Board meeting means they are denying the right of the citizens to hear that discussion.

Public Records – Public records are information of any kind owned, made, used, retained, produced, composed, drafted or otherwise collected by any public body and which relates to public business, regardless of the physical form in which it is stored. All court decisions and FOIA itself say that electronically-stored information is considered public record. The public should never be given free access to your computer system. The general rule is to provide copies of the information on a disk. The City of New Castle established their own FOIA regulations for public records in Chapter A242 of the City Code that was adopted in June 1990. It encourages speaking with the City Solicitor when a FOIA request is received to ensure privacy issues are not violated. Voluminous amounts of information should be taken to a room and invite the citizen requesting this information to review same in that room. Copies can be made of documents they request. A citizen cannot insist that you prepare a report on something if it doesn't already exist. FOIA supports this. FOIA also allows for billing if production of information will consume a staff person's time and he suggested getting the money from the party before the information is provided.

Note: You cannot ask a person why they are making a request under FOIA.

Exceptions to Public Records – Personal and medical files if their release will constitute invasion of a person's privacy, personnel files, ongoing litigation, labor negotiations.

If a verbal request is received for a FOIA you should ask that it be put in writing and send it to the City Administrator then she and the City Solicitor will determine how best to handle the request.

Disclosing Records – If someone doesn't agree with the City's position on disclosing records the citizen can send a written complaint to the Attorney General's (AG) Office. The AG's Office will contact the City Solicitor with that complaint and request our response within ten (10) days as to why documents were not produced. If a citizen doesn't feel the AG's Office has handled the situation properly they can go to court. If the court believes the City has improperly withheld documents they can order the City to produce those documents and can also order the City to pay for attorney fees for the citizen.

Voting Rationale – Before a voting member casts their vote they should indicate the reason for voting the way they are voting allowing for a public record of that discussion to be made and if a party wishes to challenge the decision in court a judge has the ability to review why each voting party voted the way they did.

Ethics – Conflicts arise when you or a family member stands to gain from some action/inaction. When you anticipate this might occur you should recuse yourself from a vote. For non-financial conflicts Mr. Akin recommends disclosing on public record prior to a vote whatever appearance of impropriety or conflict that might exist. Your credibility and trust as a public official is in your good name. When in doubt simply state/be clear what you believe may be considered questionable prior to submitting your vote.

Liability – Public action of public bodies may expose the City to some liability. In liability cases, elected officials have insurance coverage by the City but the general rule is that public officials are dismissed from litigation unless it is deemed there has been some reckless or malicious act by the government official that was proven. A judge can then rule that you could then lose your immunity and be held personally liable.

Archives – City records are sent to the State Archives facility in Dover. The City maintains copies of all City records sent to State Archives; therefore, FOIA documentation requests can be satisfied within the City.

Mr. David Bird (Planning Commission, HAC) advised how he handles being approached (unsolicited) by citizens outside of a particular meeting. He informs the party who wishes to offer or discuss a matter to put what they wish to discuss in writing and send it to the City Administrator then it will be provided to the proper body and become part of the public record.

If any public official has any questions/concerns pertaining to FOIA they should contact the City Administrator who will then contact Mr. Akin to provide a response.

Mr. Barthel thanked for Mr. Akin for his presentation.

Mr. Megginson made a motion to adjourn the workshop; Mrs. Petty seconded the motion. The workshop was adjourned at 7:20 p.m.

Respectfully submitted,

Debbie Turner
Evening Stenographer