

OpenGovernment (MailBox Resources)

From: Tom Gaynor <tomsjl1@msn.com>
Sent: Friday, May 31, 2024 3:46 PM
To: OpenGovernment (MailBox Resources)
Cc: Tom Gaynor
Subject: Fw: FOIA Correspondence Regarding the City of Rehoboth Beach - attachments
Attachments: RehobothFOIAViolation.pdf; city manager recruitment brochure.pdf; Attorney General Opinion No. 24-IB08.pdf; Cape Gazette Story FOIA.pdf; Mayor Correspondence Oct 23.jpg; NextDoor Post attaching Mayor Correspondence.jpg

Attn: DOREY COLE

Please find attached the petition for the FOIA complaint for your review in addition to the following attachments:

Citizen complaint;
Attachment A - COPY of City Manager Job Posting;
Attachment B - 2 JPEG of NextDoor Post with Mayor Letter - pictures attached
Attachment C and C-1 - COPY of Cape Gazette Article and Prior Attorney General FOIA VIOLATION for Rehoboth.

If there is anything else necessary for your review and comment, please do not hesitate to reach out to us.

We look forward to your correspondence related to the matters set forth in the complaint.

Thank you and have a great weekend.

Tom Gaynor
Steven Linehan
323-868-0724

From: OpenGovernment (MailBox Resources) <OpenGovernment@delaware.gov>
Sent: Wednesday, May 8, 2024 1:56 PM
To: Tom Gaynor and Steven Linehan <tomsjl1@msn.com>
Subject: FOIA Correspondence Regarding the City of Rehoboth Beach

Dear Mr. Gaynor and Mr. Linehan:

Please see attached correspondence.

Sincerely,

Dorey L. Cole
Deputy Attorney General
FOIA Office, Delaware Department of Justice
opengovernment@delaware.gov

Date: May 31, 2024

From: Concerned Citizens and Stakeholders of Rehoboth Beach

To: Attorney General, State of Delaware

Subject: Request for Review of Rehoboth Beach, Delaware Board of Commissioners Violation of Title 29, Chapter 100. Freedom of Information Act (FOIA)

Dear Attorney General:

This is a petition for the Attorney General, under Title 29, Chapter 100, Section § 10005(e). Enforcement, to conduct a review of a potential violation of FOIA by the Rehoboth Beach, Delaware, Board of Commissioners. The nature of the alleged violation is described below.

1. The Rehoboth Beach Board of Commissioners (BOC) recently voted to hire a new City Manager at an unprecedented salary of \$250,000, with a \$50,000 relocation expense, and a \$750,000 interest free loan that will be forgiven after seven years of tenure as the City Manager. This is a new, unvetted, policy regarding the establishment of a total compensation package of over \$1,000,000 in year 1, more than any other public official makes in the State of Delaware and constitutes a ~600% increase over the previous salary for the Rehoboth Beach City Manager. This **new compensation policy was decided in a non-public forum** which explicitly violates Chapter 100, which states that “It is vital in a democratic society that **public business be performed in an open and public manner** so that the citizens shall be advised of the performance of public officials and of the **decisions that are made by such officials in formulating and executing public policy.**”
2. The petitioners understand that the details of the **individual** negotiation process were permitted to be conducted in an Executive Session; again, however, the specifics of the new, unprecedented hiring package compensation policy were not disclosed to the public, or to other potential candidates, prior to the solicitation, and ultimate selection of, the candidate. **Attachment A** shows the job announcement that was published by the City of Rehoboth Beach.
3. In addition, the person hired did not meet the requirements of Section 17 of the City Charter, as stated below, and this was **also not disclosed to the public**, although the express requirements were admitted to by the Current Mayor in an email attributed to the Mayor’s authorship to a resident (**Attachment B**) which was copied by screen shot from a broadcast social media discussion about the new hire.

Rehoboth Beach City Charter, Section 17b. **No person shall be appointed to the office of City Manager of the Commissioners of Rehoboth Beach unless he shall have received a degree in engineering from an approved college or university, or shall have served as City Manager of some other incorporated municipality for a period not less than four (4) years or shall have had practical engineering experience for a period of not less than four (4) years...**

The candidate does not possess a degree in engineering, nor has the selectee served as a City Manager for not less than four years. While the BOC has been given some

discretion in adding qualifications for the City Manager position, **it has not been given the authority to eliminate the two (2) stipulated required legal qualifications**, as stated above.

4. Please note that the Rehoboth Beach BOC was also found to have violated FOIA by “not properly noticing the potential hiring of a new city solicitor” in February 2024. **Attachment C** is the Cape Gazette Article about the recent FOIA violation and **Attachment C-1** is the Attorney General conclusion in that instance. This is troubling in many ways, especially given that the Personnel Committee held a meeting on January 24, 2024, and hiring actions and announcements were not discussed, nor were minutes published. The purpose of the Personnel Committee is, in part, chartered as follows: The Chair of the Committee is also responsible for **facilitating the search process for City Manager, City Solicitors and City Aldermen**, as necessary. It is our understanding that the vice-mayor led the negotiations on behalf of the City for this hire, without disclosing to the public the deviations from the Charter, or the substantial new pay thresholds.

The Concerned Citizens of Rehoboth requests support from the Attorney General, State of Delaware in reviewing this potential violation of Title 29, Chapter 100. Freedom of Information Act, by the Rehoboth Beach Board of Commissioners. In addition, if the BOC has been found in violation of FOIA for the second time within a year, we request that harsher penalties be imposed because of the blatant disregard of Delaware Law now happening on a serial basis for issues of materiality with the public’s money.

Thank you for your prompt consideration and future attention to this request. Respectfully submitted by the forty (40) signatories identified below.

Signatories were all personally confirmed and hereby electronically added to this Request as set forth below. All 40 Signatories below are from Rehoboth Beach, DE 19971 and live or own property there.

Beth Bowersock, 24 Sussex Street	Alexandra Armstrong, 76 Park Avenue
Ron Bowersock, 24 Sussex Street	Michael Biordi, 78 Columbia Avenue
Jess Behringer, 81 Oak Avenue	Pamela Biordi, 78 Columbia Avenue
Susan Behringer, 81 Oak Avenue	Ronald H. Parker, 69 Columbia Avenue
James Johnson, 84 Park Avenue	Kathleen Newberg, 70 Park Avenue
Matthew Shepard, 84 Park Avenue	Robert Snyder, 70 Park Avenue
Suzanne Goode, 1 Grove Avenue	Holley Morse, 75 Park Avenue
Jeffrey Goode, 1 Grove Avenue	John Hughes, 74 Columbia Avenue
Bayne Northern, 82 Park Avenue	December Hughes, 74 Columbia Avenue
Mark Basile, 90 Park Avenue	Diane Wolf, 74 Park Avenue
Steven Schnepf, 90 Park Avenue	John Wolf, 74 Park Avenue
Debbie Menditch, 78 Park Avenue	Richard Miller, 73 Park Avenue

Cynthia Alexander, 65 Park Avenue

Edward Alexander, 65 Park Avenue

Ann Bailey, 62 Park Avenue

Andrew Don, 46 Park Avenue

Anne Nickodem, 46 Park Avenue

Brendan O'Neill, 63 Henlopen Avenue

William Broydrick, 102 St. Lawrence Street

Donald Santarelli, 67 Henlopen Avenue

Cynthia Broydrick, 102 St. Lawrence Street

Becky Casey, 31 Kent Street

Joel Fradin, 107 5th Street

Nancy Fradin, 107 5th Street

Walter W. Brittingham, Jr., 123 Henlopen Avenue

Connie Santarelli, 67 Henlopen Avenue

Please refer any questions to the two additional signatories identified below:

Steven Linehan
80 Oak Avenue
Cell: 323-868-0724
Email: TOMSJL1@msn.com

Thomas Gaynor
29A Delaware Avenue
Cell: 323-868-0724
Email: TOMSJL1@msn.com

ATTACHMENTS: (A) PDF of City Manager JOB DESCRIPTION

(B) PDF of (attributed) Rehoboth Mayor's Correspondence shared on Next Door.com

(C) PDF of Attorney General's conclusion on prior FOIA violations in 2024



CITY OF REHOBOTH BEACH

City Manager





The Position

The City of Rehoboth Beach is seeking a proven leader to serve as the City Manager. Appointed by and reporting directly to the Board of Commissioners, the City Manager serves as the Chief Administrative Officer of the City, working under the policy direction and goals of the Board of Commissioners. This position implements priorities and directives of the Mayor and Board of Commissioners and ensures they are kept informed of functions, activities, and programs, as well as legal, social, and economic issues affecting City activities. As an administrative and municipal expert, the City Manager recommends and provides advice to the Mayor and Board of Commissioners on all personnel, fiscal, public safety, and planning and zoning matters affecting the City.

The City Manager supervises the daily operations of the City government, directs multiple work functions, and provides leadership and direction to the heads of City departments. These department heads include the Assistant City Manager, Director of Public Works, Bandstand Director, Chief of Police, City Arborist/Parks and Recreation Director, Communications Specialist, IT Director, City Secretary, and Human Resource and Payroll Administrator. The Assistant City Manager provides leadership and direction to the Director of Planning and Community Development, Finance Director, and Parking Department Supervisor. The City Manager oversees labor relations and human resources and consults with Department Heads regarding the hiring of City staff and recommends disciplinary actions as warranted.

The City Manager recommends and advises the Board of Commissioners on all ordinances, resolutions, and other items required for adoption and develops and proposes the annual operating and capital budget. Additionally, the City Manager prepares monthly and annual financial reports, and others as needed, and provides information on future operational needs, policy matters, and regulatory requirements. The City Manager is also responsible for advising the Board of Commissioners of the City's financial condition.

The City Manager facilitates internal and external communication and represents the City at various meetings, functions, and events throughout the community. The City Manager engages the community and effectively represents the City to the public and outside agencies. The City Manager oversees all work done on the City's streets, sidewalks, boardwalk, beaches, jetties, parks, and other infrastructure.

Priorities

- Provide consistent leadership and foster a welcoming, empowering, inclusive, and collaborative team environment that enables City staff to provide the highest level of service possible to the community and its visitors.
- Continue fiscal responsibility by promoting prudent financial planning with a view of short and long-term capital and staffing needs, maintaining appropriate reserves, and providing accurate financial information for decision-making.
- Prioritize maintenance and investment in quality infrastructure focusing on clean drinking water, efficient wastewater processing, effective stormwater management, proactive street maintenance, and modern communication technology.
- Continue professional development and training personally and for staff and work with Human Resources and department heads on succession planning for key positions.

The Successful Candidate

The ideal candidate brings highly developed communication skills and maintains objectivity in working with elected officials. The successful candidate has a strong history of developing effective relationships and partners with the Mayor and City Commissioners to provide sound advice and guidance. The successful candidate will take time to listen to and learn the flow of operations in a city with a growing year-round population and huge fluctuations in population during the summer months and weekends.

The highly personable City Manager brings a fresh and compassionate, measured voice and perspective to the City while always remaining open-minded. This forward-thinking leader demonstrates the community's values of tolerance, preservation of Rehoboth Beach's unique character, and a balance of resident, visitor, and business interests. The City Manager will bring a long-term perspective that will help the City prepare for continued excellence in the future. The next City Manager is highly tactical and has a deep understanding of developing and implementing strategic plans and initiatives.

A strong work ethic and a proven track record in local government management, the ability to motivate others, and practical problem-solving skills are vital to the candidate's success. The ideal candidate will be articulate, patient, strong, and engender trust through their own personal integrity. The ideal candidate will be organized to tackle a variety of projects, provide analysis that is both fiscally and environmentally responsible, and bring both interpersonal and technical savvy. A strong financial background with a commitment to long-term financial sustainability and a deep understanding of budgets, from development to implementation, is necessary for the success of the next City Manager.

Qualifications

Minimum requirements include a bachelor's degree in public administration or related field and seven (7) years of local government experience with at least five (5) years in progressively responsible management positions, including human resources and budget/financial management.

Preferred qualifications include tenure in a full-service local government, demonstrated community and business engagement, capital project financing and execution, and experience in a seasonal/tourist community. Both a master's degree and ICMA-Credentialed Manager certification are preferred.



Inside the City

The City of Rehoboth Beach operates under the council-manager form of government with a Mayor and six-member City Commission, elected for three-year, staggered terms. Fire protection services are provided by the independent Rehoboth Beach Volunteer Fire Company.

The City of Rehoboth Beach is a full-service city that employs 105 full-time and 19 part-time year-round staff members. Additionally, the City employs approximately 130 seasonal staff during the summer. The City has a 2023-24 budget of \$35.6 Million. The City provides police, beach patrol and lifeguards, parking, sanitation, street cleaning and maintenance, water and wastewater, building and licensing, Alderman (municipal) Court, and building and grounds maintenance services to City residents, as well as internal service functions such as fleet maintenance, finance, information technology, and administration.



The Community

Rehoboth Beach is a picturesque, thriving, and welcoming coastal city in Sussex County, Delaware. The City with a year-round population of 1,636, with summer daytime populations of around 25,000. On holidays and during special events, Rehoboth Beach's population swells as high as 40,000, plus daytime visitors, especially during the Fourth of July and Sea Witch Halloween celebrations.

As a tourist destination, the City hosts more than 3.5 million visitors annually. Known as the "Nation's Summer Capital" because of its proximity to, and summertime popularity with, the residents of Washington, D.C., Rehoboth Beach is a popular vacation destination for a diverse group of visitors and summer residents from the entire mid-Atlantic, including the metropolitan areas of Baltimore and Philadelphia. Since 2020, Rehoboth Beach has gained national attention as the vacation home of the president and the first family. The Rehoboth Beach Police Department coordinates with the Secret Service and other national security agencies to ensure the safety of these notable individuals. Visitors come to relax on the beach, visit Rehoboth's historic, mile-long wooden boardwalk, eat in its fantastic restaurants, and enjoy tax-free shopping. The compact size of the City, a one-mile square, makes it a wonderfully pedestrian and bicycle-oriented community for residents and visitors. The City boasts beautiful trees, ample green space, and quiet neighborhoods adjacent to its bustling downtown, boardwalk, and the Atlantic Ocean. The community is a mixture of residential property owners and businesses. Some residents are year-round, and others are present primarily on weekends and during the summer season. Similarly, many businesses operate 12 months of the year, while others are seasonal in operation.

Originally founded as Rehoboth Beach Camp Meeting Association by a Methodist minister in 1873, the City of Rehoboth Beach was formally incorporated in 1891. Rehoboth Beach has grown to become one of the premier vacation destinations on the East Coast, with beaches consistently ranked among the best in the country.

Rehoboth Beach has been given a five-star rating, the highest rating, by the Natural Resources Defense Council, for its commitment to ensuring the health and cleanliness of its beach. Only 13 of the 200 rated beaches received a five-star rating. Also, the Rehoboth Beach Boardwalk was named one of ten "Great Coastal Boardwalks" and "Happiest Seaside Towns" by Coastal Living magazine, and the City was designated one of "America's Best Little Beach Towns" by Travel and Leisure magazine. Parents Magazine named Rehoboth Beach one of the ten best beach towns for families. In addition to being known as a vacation destination, Rehoboth Beach and its environs in Southern Delaware were named as a top retirement destination by Where To Retire magazine.

Every summer since 1963, the City has sponsored the Rehoboth Beach Bandstand, a free concert series that entertains beachgoers Fridays through Sundays. On Tuesdays in the summer, rain or shine, Grove Park off Rehoboth Avenue hosts the Rehoboth Beach Farmer's Market, which draws over 600 shoppers and 30 vendors each week.

Rehoboth Beach is blessed with several active community organizations, including The Rehoboth Beach Historical Society and Museum, The Rehoboth Beach Homeowners Association, CAMP Rehoboth, The Village Improvement Association, The Country Club Estates Property Owners Association, several religious institutions, and others. Downtown Rehoboth Beach contains more than 200 boutique shops, galleries, and spas; 40 hotels and B&Bs; and over 100 gourmet restaurants, casual eateries, and spots for sweets and treats. A Main Street program and a strong Chamber of Commerce partner with the City on events and services to keep the business community thriving.



Compensation and Benefits

The expected hiring range is \$140,000 – \$175,000, depending on qualifications, with an excellent benefits package, including Medical and Prescription Insurance, Dental Insurance, Vacation Leave, Sick Leave, Personal Leave, Paid Legal Holidays, Retirements Savings Plan, 457(B) Deferred Compensation Plan, Employee Assistance Plan/Work-Life Benefits, Life Insurance, Short-Term and Long-Term Disability Insurance, Workmen’s Compensation Insurance, and Accidental Death and Dismemberment Insurance.

Residency within city limits is not required. However, the City Manager must live within a reasonable distance of the City, and a relocation package will be included as part of the total compensation.



How to Apply

Applications will be accepted electronically by Raftelis at jobs.crelate.com. Applicants complete a brief online form and are prompted to provide a cover letter and resume. The position will be open until filled with a first review of applications beginning **November 6, 2023**.



Questions

Please direct questions to Catherine Tuck Parrish at ctuckparrish@raftelis.com and Alexa Worrell at aworrell@raftelis.com.

Thanks again for sending in your observations about the job posting.

Our charter provides that :

"No person shall be appointed to the office of City Manager of the Commissioners of Rehoboth Beach unless he shall have received a degree in engineering from an approved college or university, or shall have served as City Manager of some other incorporated municipality for a period not less than four (4) years or shall have had practical engineering experience for a period not less than four (4) years".

However, that provision was passed July 5, 1967, when engineering was deemed the most valuable experience for a city manager and City did not employ a Director of Public Works. Since then, we have created the position of Director of Public Works (which means the City Manager no longer fills that function), and personnel and organizational management and other disciplines have become more crucial for a professional City Manager. In addition, the field of municipal management has become its own field of study and has been significantly professionalized. That is why we are considering a Charter amendment to catch up, but as you know this is a long process.

The Charter also says "Provided, however, that nothing contained herein shall prohibit the Commissioners of Rehoboth Beach from imposing such other qualifications as may be deemed necessary", which allows us to post the position with many other requirements or preferences for an applicant, and allows us to consider many relevant factors other than an engineering degree or experience when considering candidates. With this section of the Charter, yes, our job posting is in compliance, and we believe it will bring us the best candidate.



-Stan



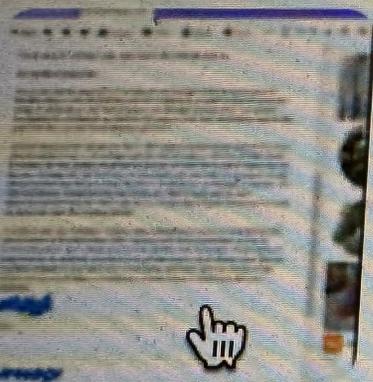
Tom G. Author · Downtown Rehoboth Beach · Edited 1h



DOTTIE You're spot on. The parking commission met in 2017-18 and made recommendations from residents. Never acted upon. This Commission hired Rossi at \$200k to make substantially the same recommendations. The insane surely are running the asylum at this point, and we're the suckers paying the bills and providing the cash for the checks Stan and co. keep writing. Enough. (edited)

Like Reply Share

Don Weber · Downtown Rehoboth Beach · 1h



In October 2023, a neighbor asked Stan about the charter requirements when job was posted. This was Stan's response. They proceeded even though they knew a Charter change was needed. I guess the City Attorney agreed with position. The voters are asleep at the wheel?

Like Reply Share



Tom G. Author · Downtown Rehoboth Beach · Edited 17m



Don Nice post of Stan's response that he intentionally proceeded to disregard the Charter. The rules apply to the rest of us, but not to Stan and co. This is the heart of the infuriating issues. Anyone who

AG: Rehoboth didn't follow FOIA when hiring new attorney

Agendas weren't clear enough for Nov. 6 workshop, executive session



The Attorney General's Office issued a ruling Feb. 13, saying the Rehoboth officials violated FOIA by not properly noticing the potential hiring of a new city solicitor. CHRIS FLOOD PHOTO

Chris Flood - Cape Gazette
February 16, 2024

Story Location:

Rehoboth Beach City Hall
229 Rehoboth Avenue
Rehoboth Beach, DE 19971

The Attorney General's Office has issued a ruling saying Rehoboth Beach mayor and commissioners violated Freedom of Information Act rules when they voted to hire a new city solicitor in November without sufficient public notice.

Former City Solicitor Glenn Mandalas, who had been with the city since 2006, [announced Nov. 6 he was stepping down](#). At the time, he said he would continue to work for the city as long as it took them to find his replacement, but he also strongly recommended Alex Burns, a junior attorney at his law firm. City commissioners discussed the recommendation in an executive session after the workshop. When they came out, they voted unanimously in favor of hiring Burns.

The petition questioning the hiring of Burns was filed by property owner Jan Konesey, who argued the selection of a new city solicitor was not sufficiently noticed on the agenda for a commissioner workshop Nov. 6.

Deputy Attorney General Dorey L. Cole issued her ruling Feb. 13. She said the general public could not discern that commissioners planned to discuss and undertake the selection of a new city solicitor even when viewing together the agendas of the Nov. 6 workshop and a special meeting following the workshop.

To clear up the matter, Cole recommends commissioners discuss their reasons and ratify the vote related to the city solicitor in open session at a future meeting.

Mayor Stan Mills said commissioners felt hiring Burns was important because he provided a level of continuity the city needed.

The day after the ruling, Feb. 14, Mills said transparency and accountability are paramount, and commissioners take the matter seriously.

“We are committed to rectifying this issue swiftly, and this incident will serve as a learning opportunity to enhance our adherence to FOIA

regulations and improve our transparency efforts,” he said.

Mills said the issue will be on the commissioner workshop and voting meeting agendas in March. This will provide the public with appropriate and adequate notice to attend and view the discussions about selecting a new solicitor.

Mills said Burns will continue to serve as the city solicitor.



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
CRIMINAL DIVISION (302) 577-8500
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400
FAMILY DIVISION (302) 577-8400
FRAUD DIVISION (302) 577-8600
FAX (302) 577-2610

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB08

February 13, 2024

VIA EMAIL

Jan Konesey
jkonesey@gmail.com

RE: FOIA Petition Regarding the City of Rehoboth Beach

Dear Ms. Konesey:

We write in response to your correspondence alleging that the City of Rehoboth Beach violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 (“FOIA”). We treat this correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that the City’s Mayor and Commissioners violated FOIA at the November 6, 2023 Special Meeting by holding a vote about selecting the new City Solicitor without sufficient public notice and by failing to meet its burden to justify that the discussions in the November 6, 2023 Special Meeting’s executive session about selecting the new City Solicitor were proper under FOIA.

BACKGROUND

On November 6, 2023, the Mayor and Commissioners of the City of Rehoboth Beach held a Workshop Meeting and a Special Meeting. The public notices and agendas for these two meetings did not mention the appointment of a new City Solicitor. At the Workshop Meeting, the then-City Solicitor publicly announced his resignation during the item named “City Solicitor’s Report” and recommended that Alex Burns, Esq. of his law firm be appointed the next City Solicitor. At the Special Meeting that followed that afternoon, an executive session occurred for the purposes of “discussing personnel matters in which names, competency and abilities of individual employees are discussed, as permitted by 29 *Del. C.* § 10004(b)(9),” “the content of documents excluded from the definition of ‘public record’ under the Freedom of Information Act

(FOIA) as permitted by 29 Del. C. § 10004(b)(6)” and “preliminary discussions on the sale or lease of real property as permitted by 29 Del. C. § 10004(b)(2).”¹ After exiting this executive session, the Mayor and Commissioners voted on two matters under the item “[c]onsideration and/or action on matters discussed in Executive Session,” one of which was a motion to “authorize the Mayor to execute an engagement letter with Baird Mandalas Brockstedt Frederico LLC naming Alex Burns, Esq. the City of Rehoboth Beach’s City Solicitor.”² Without any public discussion, the motion was approved unanimously. This Petition followed.

In the Petition, you argue that the City’s process for selecting its new City Solicitor violated FOIA’s open meeting requirements. You allege that the vote on selecting a solicitor was improper, as notice did not appear on the agenda that there was a vacancy, nor that the City would vote on a new solicitor. You point out that the City previously knew about the vacancy, as the City Solicitor sent a letter prior to the meeting. You state that the City Solicitor is not an employee of the City; the position is an independent professional. As such, you contend that there is no valid reason to hold these discussions in executive session. In addition, you claim that the three purposes set forth in the agenda did not provide adequate notice that a discussion on the vacancy and selecting of a new solicitor would occur.

On January 23, 2024, the new City Solicitor replied to this Petition on the City’s behalf (“Response”) and attached the affidavit of the Mayor, who attests he was present for and witness to the meetings and executive session and that “the statements in the Response are accurate.”³ The City argues that its actions were compliant with FOIA. The City contends that a properly noticed executive session was conducted for the discussion of public business and all voting took place in public view. The City maintains that its description of the purposes of the executive session are adequate, as FOIA does not require public bodies to elaborate in great detail on the subjects being discussed. The City asserts that the “executive session was conducted only for the discussion of appropriate public business and no vote was taken or consensus developed during said executive session.”⁴ The City states that following the executive session and after voting on another matter, the Mayor and Commissioners voted unanimously in the public session to authorize the Mayor to name the new City Solicitor, which the City contends “evolved organically as a natural progression of Mr. Burns’ tenure with the City, and as a direct result of a properly noticed agenda item at the Workshop Meeting, the City Solicitor Report, [and] did not require additional elaboration in the form of a surplus discussion at the Special Meeting.”⁵

¹ Petition.

² *Id.*

³ Response, Ex. A.

⁴ *Id.*, p. 2.

⁵ *Id.*, p. 3.

DISCUSSION

The City carries the burden of proof to “justify a decision to meet in executive session and any failure to comply with [FOIA].”⁶ In certain circumstances, a sworn affidavit may be required to meet that burden.⁷ Subject to certain limited exceptions, FOIA requires the meetings of all public bodies to be open to the public.⁸ The Petition’s first claim asserts that the matter of selecting a new City Solicitor was not sufficiently noticed in the agenda. Public bodies must provide advance notice and an agenda for its public meetings, and the agenda must include a “general statement of the major issues” which a public body expects to discuss⁹ and must be worded in “plain and comprehensible language.”¹⁰ Delaware courts have opined an agenda “should, at least, ‘alert members of the public with an intense interest in’ the matter that the subject will be taken up by the [public body].”¹¹ “In other words, members of the public interested in an issue should be able to review a notice and determine that an issue important to them will be under consideration.”¹²

In this case, the Workshop Meeting agenda referred to the City Solicitor’s Report, and the Special Meeting item, following an executive session, stated “[c]onsideration and/or action on matters discussed in Executive Session.”¹³ Even if viewed together, the public could not review these agendas and discern that the Mayor and Commissioners planned to discuss and undertake the selection of a new City Solicitor.¹⁴ We find that the City violated FOIA by providing insufficient notice to the public in its agenda of this vote.

⁶ 29 Del. C. § 10005(c).

⁷ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁸ 29 Del. C. § 10004.

⁹ 29 Del. C. § 10002(a).

¹⁰ *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994).

¹¹ *Lechliter v. Del. Dep’t of Natural Res. & Env’t Control*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017) (quoting *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *4 (Del. Ch. Aug. 29, 1986)).

¹² *Id.*

¹³ Petition.

¹⁴ *See Del. Op. Att’y Gen.* 21-IB03, 2021 WL 961062, at *3 (Feb. 25, 2021) (“This agenda’s broad descriptors of ‘Personnel’ and ‘Personnel Action Items,’ are not sufficient to alert any citizen with an intense interest in the matter of the renewal of the superintendent’s contract that it would be addressed at the meeting.”); *Del. Op. Att’y Gen.* 15-IB01, 2015 WL 3919060, at *5 (Jun. 12, 2015) (“Here, the public had no way of knowing that the superintendent’s [c]ontract would be considered and voted upon by the Board at its June meeting.”).

The remaining claims relate to the executive session at the Special Meeting. You allege that the executive session's notice for the topic of selecting a new solicitor was inadequate; the City must have discussed this vacancy and selection of the new solicitor in executive session; and those discussions in executive session were improper. To support the propriety of the executive session, the City does not provide minutes of the executive session or describe under oath the topics discussed during the executive session. Instead, the City attests that the executive session was conducted "only for the discussion of appropriate public business," and the City states that the motion for the new solicitor arose organically from a previous meeting and "did not require additional elaboration in the form of surplus discussion at the Special Meeting."¹⁵ The City does not specify whether discussions about the solicitor's selection took place in executive session. As it is the City's burden to support its position with appropriate facts under oath and the Special Meeting agenda indicates that the executive session included the topic of selecting the new solicitor, we assume for purposes of this decision that discussions about selecting a new solicitor did occur in the executive session.¹⁶ None of the three cited purposes in the agenda, including the purpose of a personnel matter involving names, competency and abilities of individual employees, applies to selecting a new solicitor with an outside legal firm.¹⁷ Accordingly, we find the City's Mayor and Commissioners violated FOIA in this regard. As we have concluded that the City did not demonstrate the propriety of discussing the selection of the City Solicitor in executive session, we need not determine the last claim in the Petition regarding whether notice of the improper discussions in the executive session was adequate.

Having found that the City violated FOIA by failing to provide adequate notice of its vote at the November 6, 2023 Special Meeting and by discussing the selection of the new solicitor in executive session, we must determine whether any remediation is appropriate to recommend. The

¹⁵ Response, p. 2-3.

¹⁶ *Judicial Watch, Inc.*, 267 A.3d at 1010-11 ("Thus, the University is asking this Court to determine that it has met its burden of proof, fully resolving the dispute, based solely on these factual representations. But the resolution of a legal action must rest on competent, reliable evidence. And the Court has held that when an attorney seeks to establish facts based on personal knowledge, those facts must be asserted under oath. A statement made under oath, like a sworn affidavit, will ensure that the court's determination regarding the public body's satisfaction of the burden of proof is based on competent evidence.").

¹⁷ *See Del. Op. Att'y Gen.* 05-IB02, 2005 WL 120844, at *2 (Jan. 12, 2005) ("As the City has acknowledged, the City Solicitor and the Deputy Solicitor are not public employees. Rather, they are independent contractors hired by the City to provide professional legal services. This office has previously held that the 'personnel' exception to the open meeting provisions of FOIA does not apply to independent contractors but only public employees. *See Att'y Gen. Op.* 02-IB17 (August 6, 2002). Similarly, we find that since the City Solicitor and Deputy Solicitor are not employees of the City, any records relating to their provision of legal services are not exempt from disclosure under the 'personnel file' exemption of FOIA. Therefore, the City erred when it went into executive session to discuss its contractual arrangements with the City Solicitor and Deputy Solicitor.").

authority to invalidate a public body’s action or impose other relief is reserved for the courts.¹⁸ The Delaware Court of Chancery stated that the “remedy of invalidation is a serious sanction and ought not to be employed unless substantial public rights have been affected and the circumstances permit the crafting of a specific remedy that protects other legitimate public interests.”¹⁹ In determining whether invalidation is appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”²⁰ When a decision is reached primarily outside of public view, that factor is also weighed heavily in determining whether remediation is appropriate.²¹ The deficiencies in this matter meant that the public did not have notice to attend and view the discussions about selecting a new solicitor. As such, we recommend that the Mayor and Commissioners discuss its reasons and ratify the vote related to the City Solicitor in open session at a future meeting, after providing appropriate notice of the item on its agenda in accordance with the FOIA statute.

CONCLUSION

For the reasons set forth above, we conclude that the City’s Mayor and Commissioners violated FOIA at the November 6, 2023 Special Meeting by holding a vote on selecting the City Solicitor without sufficient public notice and by failing to meet its burden to justify that the discussions about selecting the new City Solicitor in the November 6, 2023 Special Meeting’s executive session were proper under FOIA.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

¹⁸ 29 *Del. C.* § 10005.

¹⁹ *Ianni*, 1986 WL 9610, at *7.

²⁰ *Chem. Indus. Council of Del.*, 1994 WL 274295, at *15.

²¹ *O’Neill v. Town of Middletown*, 2007 WL 2752981, at *9 (Del. Ch. Mar. 29, 2007) (“In *Chemical Industry Council*, the Court concluded that the stern sanction of invalidation was the only appropriate remedy where there were material breaches of FOIA and where invalidation of the regulations would have no adverse consequences on innocent parties. Critical to the Court’s conclusion, however, was not simply that illegal executive sessions were held but that the Board had essentially promulgated the regulations outside of public view. Although the regulations were formally approved in the Board’s public meeting, they had been formulated, extensively deliberated upon, and agreed to in an executive session immediately preceding the public meeting. That was not the case here.”) (internal citations omitted).

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Alex C. Burns, Attorney for the City of Rehoboth Beach