

Del. Op. Atty. Gen. 98-IB02, 1998 WL 148676 (Del.A.G.)

Office of the Attorney General
State of Delaware

Opinion No. 98-IB02

January 30, 1998

RE: Freedom of Information Act Complaint Against Town of Middletown

Ms. Patricia McCune

Dear Ms. McCune:

This letter is our written determination in response to your complaint alleging that the Town of Middletown (the "Town") violated the Freedom of Information Act, [29 Del. C. Sections 10001-10005](#) ("FOIA").

Your letter of complaint dated October 14, 1997 was received by this Office on October 27, 1997. By letter dated October 30, 1997, we asked the Town to respond within ten days to your allegations that the City had violated the open meeting requirements of FOIA. By letter dated November 10, 1997, the Town responded, denying any violations of FOIA.

By letter dated November 18, 1997, we asked the Town to provide us with copies of notices and agenda for various meetings, which were sent to us under cover of letter dated November 21, 1997.

In your letter, you allege that the Town violated FOIA by failing to give notice to the public of meetings to discuss the development and eventual adoption of the Town's Comprehensive Plan. You also allege that the Town did not hold a public meeting to review comments on the Draft Comprehensive Plan from the Cabinet Committee on State Planning Issues and the Office of State Planning Coordination.

As for your second allegation, the Town responds that it "merely submitted plans, as required by law to these State agencies. What happened, as far as they are concerned, is unknown to the Town, and certainly there was no Town involvement either official or unofficial with regard to the proceedings before the State committees after submission of the proposed plan."

The submission of local land use plans to state agencies is required by the Land Use Planning Act ("LUPA"), [29 Del. C. Chapter 92](#). To the extent you are complaining about whether the Town complied with LUPA, that is outside the jurisdiction of this Office and will not be addressed further. We will focus, instead, on your allegations that the Town failed to give the required notice to the public when it held meetings during 1997 to discuss and finally adopt its Comprehensive Plan for land use.

Summary of the Law

[Section 10004 of Title 29 of the Delaware Code](#) provides that "[e]very meeting of all public bodies shall be open

to the public” except as authorized by statute for executive session. A “public body” is defined to include any “board, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, [or] subcommittee” appointed by any body which is “impliedly or specifically charged” by another public body “to advise or to make reports, investigations or recommendations.” 29 [Del. C. Section 10002\(a\)](#).

[Section 10004\(e\)\(2\)](#) provides: “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, if such has been determined at the time, and the dates, times and places of such meetings;” [Section 10004\(e\)\(4\)](#) requires that notice “shall include, but not be limited to, conspicuous posting of said notice at the principal place of the public body holding the meeting,”

*2 “Agenda” is defined to “include but is not limited to 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 specific ground or grounds therefor” 29 [Del. C. Section 10002\(f\)](#).

Discussion and Findings

The Town's Draft Comprehensive Plan was initially prepared by the Institute for Public Administration of the College of Human Resources, Education and Public Policy of the University of Delaware. On January 9 and March 13, 1997, members of the Institute staff, the Town Planning Commission, the Mayor, and members of the Town Council held workshops to provide direction for the development of the plan. According to the Town, “[t]hese were not advertised meetings and were merely meetings to discuss generally the proposed form of the comprehensive plan, as well as the status of the study. Additionally, a quorum of the Council members were not in attendance at the meeting.”

These two meetings “were followed by an advertised public workshop which was held on April 23, 1997, the purpose of which was to secure citizen input to the proposed plan.” According to the Town, “[t]his meeting was actually called by personnel of Wilmapco [Wilmington Area Planning Council], and was not in any way called by Council of the Town of Middletown, nor any of its functioning boards.” The Town claims that notice of this meeting was published in [The News Journal](#). The copy of the notice provided to us advertised that there would be a “Mobility Friendly Design Standards Workshop” from 4:00-8:00 p.m. on Wednesday, April 23, 1997 at the Middletown Public Works Building.

The Town states that there was another “advertised public meeting on May 21, 1997 which was held in the Public Works Building of the Town of Middletown ... to secure citizen input.” Again, the only notice of this meeting was published in [The News Journal](#), and it advertised a “Mobility Friendly Design Standards Public Workshop.”

At a meeting on August 4, 1997, the Town Council reviewed the status of the Comprehensive Plan and invited people from the University of Delaware to answer questions about the plan. Notice of this meeting was published in the [Middletown Transcript](#) on July 31, 1997, as well as posted in the Town Hall (but on what date is not certain). The Comprehensive Plan was included as an item on the agenda for that meeting.

The Town Council again considered the Comprehensive Plan at its meeting on September 8, 1997. The Town claims that notice was given to the public in the newspaper as well as by posting in the Town Hall, but it is not clear when this was done since the Town did not provide us with copies of the notices which we requested. The

Town states that “[a]ction on the plan was deferred until the Council meeting in October of 1997.”

At a meeting on October 6, 1997, the Town Council voted to adopt the Comprehensive Plan. Notice of that meeting was published in the Middletown Transcript on October 2, 1997, as well as posted in the Town Hall (on what date, it is not clear). Approval of the Comprehensive Plan was included as an agenda item.

A. The Institute Workshops

*3 The Town admits that the two workshops held on January 9 and March 13, 1997 “were not advertised.” Apparently, the Town believes that since “a quorum of the Council was not in attendance at the meeting,” the open meeting law did not apply. This Office has previously determined that meetings of less than a quorum of a public body may still be subject to FOIA if they appear to be a deliberate attempt to circumvent the requirements of the law. See Att’y Gen. Op. 96-IB02 (Jan. 2, 1996). Moreover, just calling a meeting a “workshop” does not take it outside the requirements of the open meeting law. See Att’y Gen. Op. 96-IB11 (Mar. 20, 1996).

Even if less than a quorum of the Town Council was present at the Institute workshops, we find that they constituted an ad hoc committee of the Council and therefore their meeting, without notice to the public, violated FOIA. Since it would be counter-productive to turn the clock back to the beginning of the Comprehensive Plan process, we do not think that any remedial action for these violations of FOIA is required. This conclusion, however, is limited to the specific facts of this case, and our Office does not consider this aspect of our determination to be binding with respect to any similar complaint in the future.

B. The April-May Public Workshops

The Town describes the meetings on April 23 and May 21, 1997 as designed “to secure citizen input to the proposed plan.” As such, they were crucial to the public's opportunity to be heard and to influence the process by which local land use decisions would be made. The only documents supplied to us by the Town evidencing notice given of those meetings were published in The News Journal, not by the Town, but by Wilmapco. Further, those notices did not mention the Town's Comprehensive Plan, but rather a “Mobility Friendly Design Standards Public Workshop.” The Town did not submit any evidence as to whether any members of the public attended the workshops, or whether the Comprehensive Plan is what was really discussed. In any event, the Wilmapco notice in the newspaper -- buried deep in the legal notices section -- would hardly give a citizen of the Town adequate notice that his or her input into the Comprehensive Plan was being invited.

The Town suggests that it was not incumbent on it to provide the required notice under FOIA, because Wilmapco arranged the public workshops. This Office has previously determined that it is irrelevant who is the formal sponsor of a public meeting. “[A] meeting as defined in [Section 10002\(e\)](#) does not cease to be a meeting because the Council gathers as a result of an invitation of another public official or body.” Att’y Gen. Op. 94-IO36 (Dec. 15, 1994). We find that the Town violated the public notice provisions of FOIA by failing to post notices with agenda so as to inform the citizens of the Town that their input was being sought regarding the proposed Comprehensive Plan.

C. The Town Council Meetings

*4 With regard to the August 4, 1997 meeting, the Town published notice and the agenda (which included “Middletown Comprehensive Plan”) in the newspaper five days before (on July 31, 1997). The Town did not provide us with copies of the notices for the September 8, 1997 meeting, but the minutes show that the comprehensive plan was not discussed; the Mayor merely indicated that had copies for anyone's review. The notice and agenda for the October 6, 1997 meeting was published in the newspaper four days before (on October 2, 1997).

The agenda included "Comprehensive Plan approval."

Unless there are special circumstances, FOIA requires public bodies to post notice of their meetings at least seven days in advance. The Town Council did not, for either the August 4 or the October 6, 1997 meetings, and therefore violated FOIA. The violation is all the more serious since the Council was preparing to vote on a land use plan that would have considerable impact on the lives of all of the Town's citizens.

The Town takes the position that it made every effort to involve the public in the decision-making process leading up to the adoption of the Comprehensive Plan. The Town points out that there was a third public workshop on June 5, 1997, for which notice was "personally delivered to all the residents of the Town." In addition to the three public workshops, "there were presentations made to civic associations, the [Middletown] Chamber of Commerce, and the Appoquinimink School District." The Town maintains that "ample opportunity [[was] given to each and every citizen of the area as to the proposed plan and opportunities to have input."

We do not perceive any conscious intent by the Town to keep the public in the dark about the Comprehensive Plan. Nevertheless, a series of FOIA violations did occur, and they may have deprived some members of the public of timely and complete information about several crucial steps in the process that led to the Council's adoption of the Plan on October 6, 1997. Accordingly, we believe that the action taken by the Council adopting the Plan is void because it was done in violation of FOIA.

To remedy these FOIA violations, we direct the Town to call a special meeting to consider anew whether to adopt (not simply ratify) the Comprehensive Plan. Alternatively, the Town may include the issue of adoption of the Comprehensive Plan as an agenda item at a regular meeting provided that the notice of the regular meeting adequately provides notice that the issue of the Comprehensive Plan will be considered at such regular meeting. Notice of that meeting must be given at least seven days in advance, and the notice and agenda must be posted conspicuously in the Town Hall as required by FOIA. While not required by FOIA nor imposed by this office as a condition of FOIA compliance, the Town should also consider additional means (e.g., newspaper, personal mail) of giving the public notice so that all interested citizens can attend to voice their views.

*5 The courts of this state and the Department of Justice have been consistent in requiring strict compliance with FOIA. The Town should be vigilant to assure that all future meeting notices and agenda meet that standard of strict compliance irrespective of the matter of public concern under consideration.

Conclusion

Based on the complaint, and the Town's written responses and documents provided to us, we determine that the Town violated the open meeting requirements of FOIA by failing to post the required notices and agendas for the public workshops on April 23 and May 21, 1997, and for failing to provide the required notice for the Town Council meetings on August 4 and October 6, 1997. We direct the Town to take the remedial measures outlined above as soon as practicable, and to provide us with satisfactory proof that such measures have been taken in accordance with FOIA.

Very truly yours,
W. Michael Tupman
Deputy Attorney General

Approved:

Michael J. Rich
State Solicitor

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