Atty Gen. Op. No. 09-1608

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November 6, 2009

Mr. Jim Parks
2411 Berwyn Rd.
Wilmington, DE 19810

RE: Freedom of Information Act Complaint Against Brandywine School District

Dear Mr. Parks:

On July 31, 2009, the Delaware Department of Justice ("DDOJ") received your complaint that the Brandywine School District ("the District") violated the Freedom of Information Act ("FOIA") by going into executive session on July 13, 2009 for a reason not permitted by FOIA. On July 31, 2009, the DDOJ forwarded your letter to the District. We received its response on August 19, 2009 as requested. We asked for additional information from the District, and received its timely response on September 8, 2009. This is the DDOJ's determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

RELEVANT FACTS

On July 6, 2009, the District posted notice of a "Special Action Meeting" to be held July 13, 2009. The notice referenced the agenda for a statement of the purpose of the meeting—to address the 2009-2010 calendar and the "HB 295 Section 25 (vi) Five

Day Leave Plan"[1]—and further advised the public that "the Brandywine School District Board of Education may enter into executive session to consider strategy with respect to personnel matters . . . and pending and potential litigation . . . ." In fact, the Board went into executive session not to discuss personnel matters but to address its strategies for negotiating salary and wage increases with the unions in light of the requirements of HB 295, and to discuss how to handle the threats of litigation from some union representatives in connection with the elimination of paid work days. In response to your complaint, the District thoroughly explained to the DDOJ its situation regarding those negotiations and discussions.

RELEVANT STATUTES

While 29 *Del. C.* § 10004 requires that all meetings of public bodies be open to the public, it permits a public body to meet in closed (executive) session to discuss specific topics provided the public receives notice of the body's intent to meet in executive session, the agenda includes the specific purposes for the executive session (29 *Del. C.* § 10002(a)), the vote to enter into executive session is conducted at the public meeting, and all votes are made in public. One of the permitted purposes for an executive session is "strategy sessions . . . with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body." 29 *Del. C.* § 10004(b)(4).

[1] HB 295 § 25(vi) required the District to establish, with the concurrence of the representatives of the collective bargaining units, a plan to eliminate five paid work days for its employees.

DISCUSSION

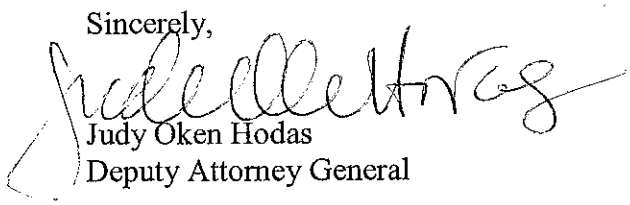
Ordinarily the DDOJ does not entertain FOIA complaints that are based solely on speculation. *Del. Att'y Gen. Op. 05-IB10*, 2005 WL 1209240 (Del. A.G. Apr. 11, 2005); *Del. Att'y Gen. Op. 04-IB14*, 2004 WL 1547683 (Del. A.G. June 28, 2004). Although your complaint rests on conjecture, we will nonetheless make a determination pursuant to 29 *Del. C.* § 10005(e) in this case because—while the DDOJ is satisfied that the Board entered into executive session for proper purposes—the reasons for going into executive session stated in the July 7, 2009 public notice and agenda did not correctly reflect the actual purposes for the July 13, 2009 executive session.

The July 13 meeting notice stated that personnel matters and pending or potential litigation might be discussed in executive session. However, the agenda contained no personnel or litigation items—only the calendar and HB 295. One of FOIA's purposes is to enable the public to "observe" and "monitor" the making and implementing of public policy by public officials, and to "further the accountability" of public officials, and FOIA must be construed with these purposes in mind. 29 *Del. C.* § 10001. If the public notice and agenda do not accurately reflect the public body's intentions for the meeting, the notice and agenda defeat FOIA's purpose of enabling the citizenry to attend the meeting and observe and monitor the actions of the public officials. In the case before us, a poorly drafted notice and agenda resulted in the confusion that precipitated your complaint.

CONCLUSION

For the reasons stated herein, the Brandywine School District did not violate the Freedom of Information Act by entering into an executive session to discuss strategies concerning collective bargaining and threatened litigation that would have had an adverse effect on the District's bargaining or litigation position had they been discussed at a public meeting. However, the District did violate FOIA by misleading the public as to its reasons for going into executive session. The District's notice or agenda should have stated that the executive session would concern collective bargaining and potential litigation issues relating to HB 295. We resolve that no remediation is required. *Del. Op. Att'y Gen. 03-IB20*, 2003 WL 22669565, *2 (Del. A.G. Sept. 3, 2003). Nevertheless, the District is warned that going forward it must give such notice as will accurately and adequately inform the public of the purpose for an executive session. Except where specifying the topic properly warranting an executive session would compromise confidentiality, a mere recitation of language from 29 *Del. C.* § 10004(b) is not sufficient.[2]

Sincerely,



Judy Oken Hodas
Deputy Attorney General

Approved:

Lawrence W. Lewis, State Solicitor

[2] Previous DDOJ opinions on the sufficiency of notice of executive sessions are cited in *Del. Op. Att'y Gen. 07-IB20*, 2007 WL 4732803, *2 (Del. A.G. Sept. 10, 2007).

cc: Katrina Barbour, Opinion Coordinator ✓
Ellen Marie Cooper, Esquire