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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB31

July 24, 2017

VIA EMAIL

Christine Wembly
cwembly@post.com

RE: June 8, 13 and 17, 2017 Correspondence Regarding Delaware Technical Community College¹

Dear Ms. Wembly:

We write regarding your correspondence, received on June 8, 13 and 17, 2017, alleging that the Delaware Technical Community College (the "College") Board of Trustees, Personnel Committee, and Finance Committee violated the open meetings provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We invited the College to

¹ We note that you continued to amend your initial correspondence by adding new FOIA allegations on at least three separate occasions. *See* Email from C. Wembly to OpenGovernment@state.de.us dated June 13, 2017 (7:18 AM); Email from C. Wembly to OpenGovernment@state.de.us dated June 13, 2017 (7:32 AM); Email from C. Wembly to OpenGovernment@state.de.us dated June 17, 2017 (10:03 PM). Under the circumstances, we treat your correspondence as three separate FOIA petitions, grouped by date. In the future, we respectfully request that you include all relevant information in your initial correspondence or, in the alternative, separately identify your additional allegations as a new FOIA petition. Additionally, we note that several of your submissions included hyperlinks to separate .pdf documents. We have determined that these particular documents are not necessary for this determination, as the factual record regarding the content of the agendas at issue is undisputed. We nevertheless note that the failure to provide us hardcopy or .pdf documents attached to an email might result in an unreliable or imprecise presentation and an inadequate record in the event litigation arises out of your petitions.

submit a response to your allegations. We received the College's response on June 26, 2017.² We have reviewed the record in its entirety, including all supplemental submissions from the parties. Our determination is set forth below.

June 8, 2017 Petition

In your June 8, 2017 petition, you allege open meetings violations in connection with an October 24, 2016 meeting. As we noted in our June 14, 2017 letter, this Office does not generally consider petitions alleging FOIA violations occurring more than six months prior to our receipt of the petition.³ We have noted that this is a general rule that we adhere to "for fairness and practical reasons."⁴ Among other reasons,⁵ this practice reflects this Office's awareness of the strict time limitations that Delaware courts apply to FOIA claims. For example, the Court of Chancery has determined that FOIA requires a citizen wishing to challenge the validity of any action of a public body initiate suit within 60 days of learning of the action.⁶ The Court has also determined that the statute "bars a FOIA claim filed after six months, even if the

² We note that we requested the College's response by June 21, 2017 and received no formal request for an extension of time from the College. We caution public bodies that a failure to adhere to this Office's deadlines may result in this Office's issuance of a determination based upon the available record and prior to our receipt of the public body's response to the allegation(s).

³ See, e.g., *Del. Op. Att'y Gen.* 16-IB14, 2016 WL 3462345, at *2 (June 9, 2016); *Del. Op. Att'y Gen.* 12-IB11, 2012 WL 5894039, at *5 (Nov. 7, 2012); *Del. Op. Att'y Gen.* 05-IB26, 2005 WL 3991284, at *10 n.3 (Aug. 29, 2005); *Del. Op. Att'y Gen.* 04-IB08, 2004 WL 771854, at *2 (Mar. 9, 2004); *Del. Op. Att'y Gen.* 00-IB05, 2000 WL 1092970, at *1 (Feb. 18, 2000); *Del. Op. Att'y Gen.* 97-IB23, 1997 WL 800821, at *1 (Dec. 23, 1997); *Del. Op. Att'y Gen.* 94-IO16 (Apr. 7, 1994); *Del. Op. Att'y Gen.* 93-IO28 (Sept. 21, 1993); *Del. Op. Att'y Gen.* 93-IO06 (Mar. 5, 1993).

⁴ *Del. Op. Att'y Gen.* 02-IB10, 2002 WL 970061, at *1 (Apr. 24, 2002).

⁵ For example, we have previously noted the unfairness and uncertainty that would result if decisions made by public bodies, and upon which citizens and officials rely, could be challenged at any future time. See, e.g., *Del. Op. Att'y Gen.* 06-IB02, 2006 WL 1242011, at *6 (Jan. 9, 2006) (citing *Wilmington Federation of Teachers v. Howell*, 374 A.2d 832, 836 (Del. 1977)); *Del. Op. Att'y Gen.* 12-IB11, 2012 WL 5894039, at *6 n.7 (recognizing that our "long-standing policy, like the statutory limitations period in FOIA § 10005(a), reflects a balance of competing interests and goals" including fostering "finality and certainty" in governmental decisions). We also note that the public body bears the burden of proof pursuant to 29 *Del. C.* § 10005(c), which its ability to satisfy might be prejudiced by the mere passage of time.

⁶ *Reeder v. Del. Dep't of Ins.*, 2006 WL 510067, at *9 (Del. Ch. Feb. 24, 2006); 29 *Del. C.* § 10005(a).

citizen did not learn of the public body's action until after that period,"⁷ and even if the citizen was previously unaware of his or her rights under FOIA.⁸ Indeed, the statute provides: "Any citizen may challenge the validity under this chapter of any action of a public body by filing suit *within 60 days of the citizen's learning of such action but in no event later than 6 months after the date of the action.*"⁹ While you correctly noted in your June 13, 2017 correspondence that we are not bound by the time limitations set forth in 29 *Del. C.* § 10005(a),¹⁰ you have "provided us with no reason to deviate from our long-standing policy and practice."¹¹

June 13, 2017 Petition

In your June 13, 2017 petition, you allege that the Board of Trustees violated FOIA by using the agenda heading "New Business" in its June 19, 2017 meeting agenda. You also allege that both the Board of Trustees and the Personnel Committee violated FOIA by using the language "Personnel and Legal" in their June 19, 2017 meeting agendas as the bases for their respective executive session discussions. We address each of those arguments separately.

⁷ See *id.* at *9; see also *Lechliter v. Del. Dep't of Natural Res.*, 2015 WL 7720277, at *4 (Del. Ch. Nov. 30, 2015) ("[T]he statute of repose as provided by 29 *Del. C.* § 10005(a) is six months."); *Lechliter v. Del. Dep't of Natural Res.*, 2015 WL 9591587, at *15 (Del. Ch. Dec. 31, 2015) ("I find that the Plaintiff's failure to contest the alleged FOIA infractions within six months amounts to laches, by analogy to the statute of repose, and grant summary judgment in favor of the Defendants for the FOIA claims embedded in Count II.").

⁸ *Reeder*, 2006 WL 510067, at *7 (stating that plaintiff's claim that his suit was untimely because he was unaware of FOIA "would be inadequate [to excuse his failure to file in the timeframe required by statute] even if it were true").

⁹ 29 *Del. C.* § 10005(a) (emphasis added).

¹⁰ See *Del. Op. Att'y Gen.* 06-IB01, 2006 WL 1242008, at *2 (Jan. 4, 2006) ("The sixty day/six month statute of limitations in Section 10005(a) applies only to suits a citizen may bring in Chancery Court. It does not apply to complaints under Section 10005(e) brought to the Attorney General's office for administrative review."); see also *Del. Op. Att'y Gen.* 97-IB23, 1997 WL 800821, at *1 ((noting that this Office is not bound by the time limitations set forth in 29 *Del. C.* § 10005(a) but exercising its discretion in concluding that petitioner's delay of almost six months warranted a determination that the petition was untimely).

¹¹ *Del. Op. Att'y Gen.* 12-IB11 2012 WL 5894039, at *5. While not dispositive, we note that the alleged FOIA violations occurred *during* the October 24, 2016 public meeting. As you appear to concede that the meeting was indeed public, we are not persuaded that you "could not have discovered" the alleged FOIA violations until the Board approved the minutes on April 11, 2017.

The Board of Trustees Did Not Violate FOIA by Using the
Agenda Heading “New Business” in Its June 19, 2017 Meeting Agenda

As the College correctly notes, FOIA does not prohibit public bodies from discussing matters at a meeting under the general heading of “New Business.”¹² Indeed, we have recognized that the use of such a heading “can serve important functions: citizens can bring issues and concerns to the attention of the public body; and the public body can inform the public of matters that will be addressed on [sic] the future.”¹³ However, we have cautioned that a public body may not rely on the general language “New Business” to identify a substantial matter of public interest that the public body intends to discuss.¹⁴ Indeed, an agenda must include “a general statement of the major issues to be discussed.”¹⁵

Here, the Board of Trustees’ use of the general heading “New Business” in its June 19, 2017 meeting agenda was not a FOIA violation *per se*. The question we must address, however, is whether FOIA required the Board of Trustees to separately notice its intent to adopt “a resolution recognizing a recently retired trustee for his 42 years of service and conferring the title of trustee emeritus upon him.” We do not believe that it did.

Of course, we recognize that the Board of Trustees’ decision to bestow an honorary title upon the retiring member by way of a resolution is a formal action in the literal sense. As such, we do not believe your position to be unreasonable. However, we note that FOIA only requires that an agenda include “a general statement of the *major* issues expected to be discussed.”¹⁶ While we do not mean to suggest that 42 years of service to the College is not a laudable accomplishment, we do not believe a public body’s decision to recognize a departing member’s service, in and of itself, would qualify as a “major issue” as contemplated by FOIA. Although the Board of Trustees could undoubtedly have identified the matter with specificity in its agenda, we cannot conclude that its failure to do so amounted to a FOIA violation. As such, and under these unique circumstances, it is our determination that the Board of Trustees did not violate FOIA by using the general heading “New Business” in its June 19, 2017 meeting agenda.

¹² *Del. Op. Att’y Gen.* 05-IB26, 2005 WL 3991284, at *5 (“We did not mean to suggest in *Att’y Gen.* 03-IB17 that the agenda requirements of FOIA prohibit a public body from discussing matters at a meeting under the heading of ‘New Business.’”).

¹³ *Id.* at *6.

¹⁴ *Cf. id.* (finding no FOIA violation where public body’s discussion under the agenda heading “New Business” was specifically “limited to announcements of future events, questions or comments by citizens, and the like” and did not include discussion of any “substantial matter of public business”).

¹⁵ 29 *Del. C.* § 10002(a).

¹⁶ *See id.* (emphasis added).

Neither the Board of Trustees Nor the Personnel
Committee Violated FOIA By Including the Language
“Personnel and Legal” in their June 19, 2017 Meeting Agendas

Notably, you have not alleged that the decision to convene an executive session, or even the executive session discussion itself, were improper. As such, we do not address those issues here. Rather, you allege that the use of the language “Personnel and Legal” to identify the bases for executive session in the June 19, 2017 meeting agendas violated FOIA *per se*. We disagree.

The Delaware Court of Chancery has specifically held that a public body’s use of the language “Personnel & Legal Issues” satisfies FOIA’s notice requirements.¹⁷ Of course, the Court has warned that a public body may not use a “general listing of several of the potential grounds for an executive session provided for in § 10004(b).”¹⁸ However, we see no evidence in the record to suggest that the use of “Personnel & Legal” was used in such a catchall manner by either the Board of Trustees or the Personnel Committee. As such, it is our determination that neither the Board of Trustees nor the Personnel Committee violated FOIA by using the language “Personnel and Legal” in their June 19, 2017 agendas to identify their intent to convene an executive session.

¹⁷ See *O’Neill v. Town of Middletown*, 2007 WL 2752981, at *7 (Del. Ch. Mar. 29, 2007) (“Although more precise reasons could have been offered by the Council and the Planning Commission, the reasons they did articulate on the agendas satisfy the FOIA. The statute requires public bodies to provide the reason for entering into an executive session, but that does not require public bodies to elaborate in great detail on the agendas what legal, personnel, or other subjects are to be discussed. Therefore, the Court concludes that there is no triable issue of fact regarding the sufficiency of the state reasons for the executive sessions.”) (internal citation omitted); see also *Del. Op. Att’y Gen.* 05-IB26, 2005 WL 3991284, at *7 (concluding that public body’s use of the language “Executive Session (Personnel & Legal Issues)” did not violate FOIA’s notice requirements).

¹⁸ See *id.* (citing *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *10 (Del. Ch. May 19, 1994)).

June 17, 2017 Petition

**The Finance Committee did Not Violate FOIA by Using
the Agenda Heading "Other Business" in its June 19, 2017 Meeting Agenda**

In your June 17, 2017 petition, you allege that the Finance Committee violated FOIA by using the agenda heading "Other Business" in its June 19, 2017 meeting agenda. For the same reason the agenda heading "New Business" is not a FOIA violation in and of itself, it is our determination that the Finance Committee's use of the heading "Other Business" in its June 19, 2017 meeting was not, as you allege, a *per se* FOIA violation.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: Brian Shirey, Esq. (via email)