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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 18-IB37**

**August 14, 2018**

**VIA EMAIL**

Herman M. Holloway, Jr.  
kingcenter@verizon.net

**Re: FOIA Petition Regarding Wilmington Housing Authority**

Dear Mr. Holloway:

We write in response to your correspondence received on July 25, 2018, alleging that the Wilmington Housing Authority (“WHA”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) in relation to its July 23, 2018 meeting. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, we conclude that WHA committed a technical violation by citing the “personnel” exception on its July 23, 2018 meeting agenda. We further conclude that, because this Office has explicitly recognized the right of public bodies not to disclose the names of job applicants until the offers have been accepted in order to protect the privacy rights of job applicants, WHA has not violated FOIA as alleged with respect to its vote on the Executive Director selection. Although it was not required by FOIA, it would have been a better practice for WHA to disclose the position for which it was holding a vote at the meeting in question.

**BACKGROUND**

On July 23, 2018, WHA conducted a regular meeting. The agenda for that meeting included the following item: “Executive Session – Discussion of a personnel matter (if needed).”<sup>1</sup> During the meeting, WHA voted to amend the agenda in order to move the executive session earlier on the agenda.<sup>2</sup> WHA then entered executive session, and upon their return to regular session, WHA’s

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<sup>1</sup> Response, Ex. A.

<sup>2</sup> Response, Ex. B.

Chairman called for a motion “to approve the topic that was discussed at the Executive Session.”<sup>3</sup> You indicated that WHA first needed to come out of executive session and also questioned “what was being voted on.”<sup>4</sup> WHA then came out of executive session and again voted by roll call “to approve the topic that was discussed at the Executive Session.”<sup>5</sup>

You submitted a Petition to this Office on July 25, 2018, in which you alleged two FOIA violations: 1) the vote to approve the topic discussed in executive session did not allow for “public notice and understanding of what a public Board is voting on;” and 2) you “do not believe that this action taken was ever placed on the seven day notice of the agenda before the meeting.” WHA by letter dated August 2, 2018 submitted its Response, including a copy of the meeting agenda and minutes and stating that its vote was proper, since the discussion of the qualifications of the final candidate for Executive Director was the only topic of discussion and WHA issued a press release the next day announcing the successful candidate.

### **DISCUSSION**

FOIA requires that the meetings “of all public bodies shall be open to the public except those closed [for a permitted reason].”<sup>6</sup> FOIA allows executive session for “discussions of an individual citizen’s qualifications to hold a job ... unless the citizen requests that such a meeting be open” and “personnel matters in which the names, competency and abilities of individual employees or students are discussed.”<sup>7</sup> A public body must vote at a public meeting to move into executive session, and “all voting on public business must take place at a public meeting and the results of the vote made public.”<sup>8</sup> In addition, the purpose of the executive session must be included on the meeting agenda.<sup>9</sup>

You first allege that WHA never placed this matter on the agenda posted seven days before the meeting. WHA has provided a copy of the July 23, 2018 meeting agenda, which states “Executive Session – Discussion of a personnel matter (if needed).”<sup>10</sup> This “personnel” purpose

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> 29 Del. C. § 10004(a).

<sup>7</sup> 29 Del. C. § 10004(b)(1), (9).

<sup>8</sup> 29 Del. C. § 10004(c).

<sup>9</sup> *Id.*

<sup>10</sup> Response, Ex. B.

is often confused with the purpose of discussing a citizen's qualifications for a job.<sup>11</sup> The difference is that the "personnel" purpose is limited to discussing the names, competency, and abilities of current employees and the "job qualifications" purpose is to consider the qualifications of job applicants not yet hired.<sup>12</sup> Despite the confusion of terms, WHA still convened an executive session for a lawful purpose, and this Office has found that incorrectly citing a personnel matter instead of the job qualifications purpose on an agenda constitutes a technical violation of the FOIA statute "for which no remediation is necessary."<sup>13</sup> In addition, this Office is not vested with the authority to invalidate a vote.<sup>14</sup> Thus, we limit our finding here to state that WHA has committed a technical violation of FOIA by incorrectly stating the "Executive Session – Discussion of a personnel matter (if needed)" agenda item.<sup>15</sup>

Regarding WHA's motion following executive session, you allege that the vote did not allow the public to understand the underlying subject. The parties do not dispute that WHA voted by roll call on a motion to approve "the topic discussed in executive session" and no other information was presented to the public until WHA issued a press release the following day.<sup>16</sup> FOIA requires a vote on public business to take place at a public meeting.<sup>17</sup> In Delaware Attorney General Opinion 15-IB11, this Office interpreted this requirement to mean "the public should be

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<sup>11</sup> *Del. Op. Att'y Gen.* 06-ID22, 2006 WL 3387935, at \*2 (Nov. 16, 2006) ("This [job qualifications] exemption for executive session is often confused with the personnel exemption.")

<sup>12</sup> *Id.*

<sup>13</sup> *Del. Op. Att'y Gen.* 06-IB15, 2006 WL 2355969, at \*2 (July 24, 2006) (concluding that where the Board discussed qualifications for job applicants in addition to personnel matters of their employees but only publicly noticed the executive session for personnel matters was a "technical violation for which remediation is not necessary"... "[s]ince the [Board] could have met in lawful executive session to discuss the qualifications of a job candidate.") (quoting *Del. Op. Att'y Gen.* 03-IB20, 2003 WL 22669565, at \*2 (Sept. 3, 2003)).

<sup>14</sup> *Del. Op. Att'y Gen.* 17-IB15, 2017 WL 3426253, at \*7 (July 7, 2017) (noting that this Office is not vested with the authority to invalidate a vote, but reminding petitioner "that you retain an absolute right to file suit.").

<sup>15</sup> Refer to the FOIA statute if you wish to pursue additional remedies for this violation. 29 *Del. C.* §§ 10001-10007.

<sup>16</sup> Response; *see also* <https://www.delawareonline.com/story/news/local/2018/07/24/wilmington-housing-authority-hires-director-troubled-history/825785002/>.

<sup>17</sup> 29 *Del. C.* § 10004(c).

able to discern how and when a matter is decided.”<sup>18</sup> With respect to a job candidate selection, the public’s ability to discern how and when the candidate was selected cannot occur until after the job announcement is made due the applicants’ privacy interests. In Delaware Attorney General Opinion 05-IB12, this Office specifically considered how the public can monitor a job candidate selection, finding that a motion following executive session using code names, Candidates “A” and “B” was appropriate. In its opinion, this Office did “not believe that the public was deprived of a meaningful opportunity to monitor their government in action.” The public could discern from the public records how the successful applicant was selected after the selection was made public.<sup>19</sup> This Office found that the public body “struck a reasonable balance between the privacy rights of the applicants, and the public’s right to know.”<sup>20</sup>

It is undisputed that WHA took a public vote by roll call on “the topic discussed,” which gave the public notice that WHA was conducting a vote on a single matter discussed in executive session. The meeting minutes memorialized the results of that vote, and the information regarding the hiring of the successful candidate was publicly released the next day. In these circumstances, the public can readily discern how the Executive Director was selected (by public “roll call” vote, after an executive session discussion) and when (the July 23, 2018 meeting). The purpose of FOIA is “to enable citizens to see their government do business” and hold the government accountable through the democratic process.<sup>21</sup> Although WHA could have been more transparent by adopting a motion specific to the Executive Director position,<sup>22</sup> we find that WHA has sufficiently complied with the requirements of 29 *Del. C.* § 10004(c) under these circumstances.

## CONCLUSION

For the reasons set forth above, we determine that WHA technically violated FOIA with respect to its notice for the July 23, 2018 executive session as a “personnel matter,” but we

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<sup>18</sup> *Del. Op. Att’y Gen.* 15-IB11, 2015 WL 9406788, at \*2 (Dec. 11, 2015) (finding that the School Board violated FOIA when no public vote was taken and the decision to expunge a student’s record must have been decided in executive session or some other non-public forum).

<sup>19</sup> *Del. Op. Att’y Gen.* 05-IB12, 2005 WL 1209242, at \*3 (May 9, 2005) (stating that when a job offer is made and accepted, “the name of the job applicant necessarily will become public, and the public will know, from the minutes, which members of the public body voted to hire that applicant.”)

<sup>20</sup> *Id.*

<sup>21</sup> *Reeder v. Delaware Dep’t of Ins.*, 2006 WL 510067, at \*12 (Del. Ch. Feb. 24, 2006).

<sup>22</sup> *See Del. Op. Att’y Gen.* 06-IB12, 2006 WL 1779488, at \*3-4 (June 19, 2006) (finding that the Council should have publicly voted to select the final job candidate and suggesting that the Council “could have maintained their privacy by using code names while voting on the two candidates in public session”).

recommend no remediation. While the remaining allegation in your Petition is determined not to be a technical violation of FOIA, it is noted that WHA could have acted with more transparency.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

APPROVED BY:



Allison E. Reardon, State Solicitor

cc: Lauren E.M. Russell, Esq. (via email)