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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB48

September 9, 2019

VIA EMAIL

Kristin S. Gibbons
Kgibbons785@gmail.com

RE: FOIA Petition Regarding the Sussex County Vocational Technical School District

Dear Ms. Gibbons:

We write in response to your correspondence alleging that the Sussex County Vocational Technical School District (“District”)¹ violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA’s open meeting requirements has occurred or is about to occur. As set forth below, we conclude that the District committed a violation of FOIA but decline to file a lawsuit regarding this violation, as you requested.

BACKGROUND

The District recently decided to eliminate its hospitality program from the Sussex Technical High School curriculum. This Petition is filed by a parent of a student in the program who alleges that the District improperly considered and made decisions about this matter outside of public view and without sufficient public input, in violation of FOIA’s open meeting requirements.

The Petition makes the following specific allegations: 1) the District’s Board of Education (“Board”) improperly discussed and voted at its May 13, 2019 meeting to end the hospitality program through a four-year phase-out; 2) the Board exhibited a pattern of noncompliance by holding executive sessions at the outset of every regular meeting, typically 45 to 60 minutes in length, without proper public notice; and 3) noting that the agenda did not contain the hospitality

¹ The Petition is filed against the District’s Board of Education, but the petitioner’s arguments more broadly implicate the District’s Board of Education and the Superintendent. As such, we consider the District as the appropriate party to the Petition.

program item and that the minutes were not available at the time of your petition filing, you argue that the Board must have improperly decided to terminate the hospitality program effective immediately, due to the resignation of the only teacher in the program at the August 12, 2019 meeting without any public notice. The Petition concludes that “[a]ll of the affected students and parents are devastated by the Board’s abrupt decision to end the Hospitality Program without notice and an opportunity to be heard in any meaningful manner by those directly impacted.”² If a violation is found, the Petition requests that the Attorney General bring suit against the District on your behalf and others who are affected and seek “any and all equitable remedies pursuant to § 10005(d).”³

On August 22, 2019, the District’s counsel provided a responsive letter (“Response”). First, the District asserts that the Board’s discussion and vote to phase out the hospitality program at the May 13, 2019 meeting was proper, as FOIA permits public bodies to “amend an agenda when an issue arises suddenly and cannot be deferred.”⁴ The District explains that this issue arose suddenly, and prior to the meeting, “the Superintendent and his staff were working diligently to determine the options for and viability of the hospitality program.”⁵ The District asserts that “[t]hey were in heavy discussions as late as May 13, 2019 after engaging freshmen, parents and others with regard to what would be best for the students in the program.”⁶ Because one option under consideration was immediate termination and the District would have to notify the sole teacher by law by May 15, 2019, the issue had to be decided at the May 13, 2019 meeting. Second, the District states that both the August 12, 2019 executive session and regular meeting were proper, and no discussion of the elimination of the hospitality program occurred at those meetings; the District attached meeting minutes as supporting evidence. Instead, the District alleges that the Superintendent made the decision without Board approval to end the program immediately, due to the sole teacher’s resignation, and an affidavit from the District Superintendent was enclosed in support of these factual allegations.

By letter dated August 15, 2019, you responded to the District (“Reply”). First, citing to the April 18, 2019 letter from the High School principal, you claim that the Board’s decision at the April 8, 2019 meeting to initiate the elimination of the hospitality program during executive session is a violation of FOIA, as the descriptions “Personnel” and “Legal” do not provide adequate notice on the agenda and even if adequately noticed, the hospitality program discussion is an improper purpose for an executive session.⁷ Second, the Reply reiterates that the decision to phase

² Petition.

³ *Id.*

⁴ Response.

⁵ *Id.*

⁶ *Id.*

⁷ Reply.

out the hospitality program at the May 13, 2019 meeting was improper, as the topic did not unexpectedly arise at the meeting. Instead, you allege that the Superintendent proposed this addition at the beginning of the meeting, noting that he did not propose it for the agenda earlier because according to your transcription of the meeting, “he was still working with the option.”⁸ As further proof of the Superintendent’s prior knowledge, your Reply points to the Superintendent’s acknowledgment in his affidavit that his prior discussions about deleting the program “may have reached” certain Board members and you note the letter from the principal in which he states that rising sophomores would be counseled to another career pathway.⁹ On this basis, you allege that the District made a concerted effort “to keep those who might oppose the Board’s actions from attending meetings and fully participating.”¹⁰ Third, the Reply asserts that the Board improperly discussed ending the hospitality program under its executive session item for “personnel,” as the sole teacher had resigned that morning. You argue that ending the program constitutes public business and unless a delegation of authority had been made to the Superintendent, the Superintendent’s unilateral decision to end the program violated the District’s own policy and FOIA’s requirement to allow observation of public officials conducting public business. In either case, the Reply alleges a FOIA violation is present here.

The Reply concludes that the Board has “repeatedly taken action behind closed doors and in violation of FOIA laws designed to promote transparency among public bodies.”¹¹ As remediation for these alleged violations, you assert that the Board should be required to re-post the topic of the phase-out and/or the termination of the hospitality program at an open meeting with at least seven days’ advance notice, so “all who wish to be heard on the matter may be heard.”¹² You further argue that the decision to terminate the program is voidable and the Board should immediately seek a certified teacher for the program or offer alternatives through outside partnerships. If violations are found, you again ask the Attorney General to file suit on your behalf and the behalf of others to seek all available equitable remedies, including those noted above.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* FOIA does not mandate that the public be given the opportunity for comment in a public meeting. *See Reeder v. Delaware Dep’t of Ins.*, 2006 WL 510067, at *12 (Del. Ch. Feb. 24, 2006).

DISCUSSION

Our Office is limited to reviewing those issues raised in the Petition.¹³ We first determine that the claims regarding the August 12, 2019 meeting and executive session do not constitute a FOIA violation. Although you argue it was improper under FOIA and other laws for the Superintendent to unilaterally make the decision to eliminate the hospitality program, the boundaries of the Superintendent's legal authority to make decisions is outside the scope of FOIA, and FOIA does not dictate the specific types of decisions that a Board of Education is required to make at its public meetings versus those decisions reserved for a superintendent. The District has provided sworn testimony from its Superintendent that he made the decision to terminate the hospitality program this school year, and the District's counsel represents that no discussions of eliminating the program, other than a "tangential reference" related to the teacher's resignation, took place in executive session or at the regular meeting, citing to the relevant minutes in support of this contention.¹⁴ On this record, we can find no basis for a violation at the August 12, 2019 meeting.

The May 13, 2019 meeting is a different matter. The parties do not dispute that the phase-out of the program did not appear on the public agenda; instead, the Board voted at the beginning of the meeting to add this new item. FOIA requires an agenda to include a "general statement of the major issues expected to be discussed at a public meeting" including notice of an executive session and the specific grounds for the executive session.¹⁵ The agenda must alert members of the public with an "intense interest" in the matter that the subject will be taken up at the meeting.¹⁶ FOIA mandates that a public body give seven days' notice of a public meeting and its agenda but permits the agenda to be subsequently amended in two ways.¹⁷ First, the public body may amend the agenda up to six hours before the meeting for items which arise suddenly and cannot be deferred;¹⁸ this requires the public body to state briefly the "reasons for the delay in posting" on

¹³ See *Del. Op. Att'y Gen.* 19-IB25 (May 10, 2019) (finding newly raised claims are not part of the petition and stating "matters raised for the first time in a reply are severed and capable of being treated as separate petitions").

¹⁴ Response.

¹⁵ 29 *Del. C.* § 10002(a).

¹⁶ *Lechliter v. Del. Dep't of Natural Res. and Env'tl. Control*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017).

¹⁷ *Del. Op. Att'y Gen.* 05-IB23, 2005 WL 3991282, at *3 (Aug. 15, 2005).

¹⁸ *Del. Op. Att'y Gen.* 17-IB38, 2017 WL 3628771, at *5 (Aug. 11, 2017) ("FOIA provides flexibility for a public body to amend the agenda up to six hours prior to a meeting to add items that come up suddenly and cannot be deferred to a later meeting.") (citations omitted); *Del. Op. Att'y Gen.* 17-IB15, 2017 WL 3426253, at *6 (July 7, 2017) (citing a three-step test for determining if an agenda was properly amended six hours in advance of a public meeting, including a showing that each new matter of public business came up unexpectedly after the initial posting and required immediate attention); *Del. Op. Att'y Gen.* 07-IB10, 2007 WL 4732793, at *2 (May 10, 2007)

the amended agenda.¹⁹ Second, under 29 *Del. C.* § 10004(e)(2), FOIA allows the amendment of the agenda for those items that “arise at the time of the public body’s meeting,”²⁰ but this exception has been narrowly construed to prevent the exception from swallowing the rule.²¹ Section 10004(e)(2) requires a showing that the item truly did arise at the time of the meeting, as a natural evolution of discussions of a related publicly-noticed item.²² A public body may not simply amend its agenda at the meeting to adopt a new item.²³ At the May 13, 2019 meeting, the Board did not amend the agenda six hours in advance nor has the District demonstrated that the phase-out of the hospitality program arose out of discussions of another item on the agenda. Instead, the record reflects the Board made a motion at the meeting’s outset to amend its agenda to allow consideration and vote on this new item without any prior public notice. This constitutes a FOIA violation.

We next consider the appropriate remedial steps for this violation, including your request to file suit on your behalf and the behalf of any other affected parties. The discussion and vote at the May meeting to phase out the hospitality program was procedurally improper when viewed through the lens of FOIA, but the factual record demonstrates that the Superintendent unilaterally decided to change this decision a few months later to end the program after resignation of the sole teacher in the program. We view the gravamen of this dispute as one relating to the authority of the Superintendent to take a particular action. FOIA is not the appropriate legal tool to assess the

(stating that our Office has cautioned that Section 10004(e)(5) does not allow a public body to amend the agenda up to six hours prior to the meeting for any reason, but it permits the addition of items up to six hours before the meeting that come up suddenly and cannot be deferred to a subsequent meeting).

¹⁹ 29 *Del. C.* § 10004(e)(5).

²⁰ 29 *Del. C.* § 10004(e)(2).

²¹ *Del. Op. Att’y Gen.* 03-IB22 (Oct. 6, 2003) (“ . . . Section 10004(e)(2) of FOIA must be construed narrowly ‘lest the exception swallow the rule.’”) (citation omitted).

²² *Del. Op. Att’y Gen.* 97-IB20, 1997 WL 800814, at *2 (Oct. 20, 1997) (in concluding that the discussion of class sizes and enrollment “naturally evolved” into a discussion about the need for more teachers and necessary funding, stating “[i]t is not always possible, however, to anticipate every permutation of every issue contemplated for discussion, and FOIA permits a public body to add items to the agenda if they arise at the meeting and are reasonably related to items that were noticed in the agenda”).

²³ *Del. Op. Att’y Gen.* 05-IB23, at *3 (concluding that a matter of public business does not arise by way of a motion at the meeting to add the item to the agenda); *Del. Op. Att’y Gen.* 03-IB22 (in determining that a matter of public business does not “arise” at a public meeting by way of a motion to add the issue to the agenda, reasoning “[b]y that circular logic, there would be no limits on what business can be discussed at the meeting of a public body, so long as the agenda provided that it was subject to change”) (citation omitted).

contours of the Superintendent's authority. As such, we respectfully decline to engage in litigation regarding the matters raised in this Petition.

Finally, the Petition references concerns with the District's alleged practice of routinely holding executive sessions for typically 45 to 60 minutes at the outset of the Board meetings for purposes such as "personnel" or "legal."²⁴ The Petition and Reply also raise the specter of whether improper discussions may have occurred in executive session; both submissions included a copy of the High School principal's letter which states that initiating the deletion of the hospitality program was decided in the Board's executive session at the April meeting.²⁵ While we do not determine the accuracy or merits of any of these particular allegations, the totality of these factors warrant a cautionary note to the District suggesting review of its use of executive sessions, in light of their limited scope under FOIA.²⁶

²⁴ Three separate agendas were provided in connection with this matter, and all three stated executive sessions for the purposes of "Personnel" and "Legal" would occur at the beginning of each meeting. *See* Petition.

²⁵ The District's counsel advised that this statement was mistaken in a separate submission.

²⁶ *See Del. Op. Att'y Gen.* 94-IO33, 1994 WL 763204, at *4 (Nov. 28, 1994) ("FOIA contemplates that a closed session must be the exception, not the rule, for how a public body conducts its public business.").

CONCLUSION

For the reasons set forth above, this Office concludes that the District violated FOIA's open meeting requirements at its May 13, 2019 meeting but declines to file a law suit regarding this violation, as requested.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: James H. McMackin, III, Attorney for the District