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

**Attorney General Opinion No. 19-IB50**

**September 16, 2019**

**VIA EMAIL**

Walter P. J. Gilefski  
[wpjgretired@yahoo.com](mailto:wpjgretired@yahoo.com)

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

Dear Mr. Gilefski:

We write in response to your correspondence alleging that the Sussex County Vocational Technical School District (“District”) violated the open meeting requirements of 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 requirements has occurred or is about to occur. As set forth below, we conclude that the District violated FOIA by failing to give proper public notice of its action regarding a contract for a feasibility study. However, we do not recommend additional steps, as the District subsequently ratified its vote regarding this contract in a publicly-noticed open session.

**BACKGROUND**

On December 20, 2018, the District released a public notice of a Request for Proposals for a consultant to conduct a feasibility study to “(i) assess existing buildings and grounds, (ii) make recommendations with regard to improving or replacing existing facilities, and (iii) assist with the development thereafter of a certificate of necessity for the project.”<sup>1</sup> While the original anticipated date of award was February 11, 2019, three finalists were not selected until March 1, 2019, and the price negotiations were concluded on March 5, 2019. On March 4, 2019, the District posted public notice, including an agenda, for a meeting of the District’s Board of Education (“Board”) on March 11, 2019; this agenda did not include this consultant’s contract as a topic.

At the March 11, 2019 meeting, the Board voted to add an agenda item at the outset of the meeting to approve the selection of a consultant for the study and later in that meeting voted

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<sup>1</sup> Response.

to approve the consultant selection. This Petition followed, alleging that both votes violated FOIA.

On September 3, 2019, the Board's counsel provided a responsive letter ("Response"). The District asserts that the Board's vote to add the agenda item and approve the consultant at the March 11, 2019 meeting was proper, as FOIA permits public bodies to "amend an agenda when an issue arises suddenly and cannot be deferred."<sup>2</sup> The District asserts that "the number of bidders, the length and complexity of the bids, and Procurement Act requirements" caused the District to miss its targeted deadline that would have permitted a vote at the February meeting.<sup>3</sup> The District argues that it "is the practice of the Superintendent to (i) notify all unsuccessful bidders before the successful candidate is identified publicly, and (ii) offer such unsuccessful bidders an opportunity to meet and discuss their proposal before the successful candidate is identified publicly" and that his schedule provided no opportunity to do so until March 11, 2019 before the meeting was to be held; therefore, the meeting was the only opportunity to add the agenda item.<sup>4</sup> The District further contends that the selection could not be deferred to a future meeting as it would delay the entire study and prevent its completion in time to apply for a certificate of necessity for potential construction by August 31, 2019. Finally, the District states that the Superintendent explained to the Board that negotiations had just concluded and that a year's delay in construction would be detrimental to the student population if the Board did not vote that day when requesting the addition of the agenda item.

By email dated September 3, 2019 ("Reply"), you dispute that missing the original deadline and the Superintendent's schedule were valid reasons for making this change at the meeting and argue that a delay would not have harmed the student population. You assert that the District's submission admits to not giving proper notice.

### **DISCUSSION**

The District acknowledges that the topic of the contract for the feasibility study was not on the public notice and agenda for the March 11, 2019 meeting. This topic "was added during the Meeting" and did not arise out of discussions related to a publicly-noticed item on the agenda.<sup>5</sup> Instead, the Board voted to amend the agenda at the outset of the meeting to add this new item and then proceeded to address and vote upon this matter. Consistent with our recent decision in Attorney General Opinion 19-IB48, this practice violates the open meeting requirements of FOIA.<sup>6</sup>

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<sup>2</sup> *Id.*

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

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

<sup>5</sup> *See id.*

<sup>6</sup> *Del. Op. Att'y Gen. 19-IB48 (Sept. 9, 2019).*

We next consider whether any remedial steps are appropriate. Our Office has previously determined that ratification at open session is the appropriate remedial step when a public body failed to give proper public notice of the approval of a contract change order.<sup>7</sup> By email dated September 10, 2019, the District’s counsel informed our Office that “[w]hile it was unnecessary for the Board of Education to do so, in caution the Board last night ratified the award of the Feasibility Study at issue in this dispute” and supplied a copy of the agenda and minutes of its public meeting in support thereof. By separate submission dated September 12, 2019, you objected to this ratification as appropriate remediation, noting that the agenda was not amended until three days prior to the meeting, instead of seven days.

FOIA allows the agenda to be amended up to six hours prior to a meeting to add items that come up suddenly and cannot be deferred to a later meeting, provided that a reason for delay is stated on the amended agenda.<sup>8</sup> By separate submission to this Office dated September 12, 2019, the District’s counsel contends that the District properly asserted a reason for delay in the agenda. The agenda states as the reason: “consulting with legal counsel regarding action to be fully transparent in light of a citizen’s concern regarding process for prior approval.” The District’s counsel also represents that the matter emerged suddenly through consulting its counsel in this petition process, and it could not be deferred in order to avoid having its vote approving the contract potentially invalidated, resulting in construction delays and cost accruals. On this record, we find this publicly-noticed ratification of the consultant’s contract sufficiently obviates the need to recommend additional remedial steps.

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<sup>7</sup> *Del. Op. Att’y Gen.* 05-IB23, 2005 WL 3991282, at \*4 (Aug. 15, 2005); *Del. Op. Att’y Gen.* 03-IB22 (Oct. 6, 2003).

<sup>8</sup> *See 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.”) (citation 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: 1) the amended agenda must adequately describe the new items and be posted at least six hours in advance of the meeting; 2) the amended agenda must include a brief statement describing the reason for delay; and 3) the public body must be able to make 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) (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) (citation omitted).

## **CONCLUSION**

For the reasons set forth above, this Office concludes that the District violated the open meeting requirements of FOIA in these circumstances. However, we do not recommend additional steps, as the District subsequently ratified its vote regarding this contract in a publicly-noticed open session.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

APPROVED BY:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
State Solicitor

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