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

**Attorney General Opinion No. 19-IB63**

**November 8, 2019**

**VIA EMAIL**

Mr. John Young  
[Jyd1988@gmail.com](mailto:Jyd1988@gmail.com)

**RE: Two FOIA Petitions Regarding the Christina School District Board of Education**

Dear Mr. Young:

We write in response to your two documents alleging that the Christina School District Board of Education (“Board”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as two Petitions for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur and issue this combined opinion to address both Petitions. As discussed more fully herein, we determine that the Board has violated FOIA, and we recommend that it conduct a public vote on its vacancy in open session at a future public meeting.

**BACKGROUND**

On October 8, 2019, the Board held a meeting to discuss its Board member vacancy for Nominating District D. At the outset of the public meeting, the Board entered executive session; one of the items on the executive session agenda was “Board Vacancy – Nominating District D.”<sup>1</sup> During the public session of that same meeting, the Board voted on this vacancy by “secret ballot” in which each member wrote down her/his nomination and passed it to the Board President who read the votes aloud without attributing any specific vote to a particular member. By a 4-2 vote, a new Board member was selected. You filed two Petitions in response.

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<sup>1</sup> First Petition sent Oct. 10, 2019.

The first Petition challenges the Board’s vote by secret ballot, asserting such voting procedure violates Title 14, Chapter 10 of the Delaware Code and alleging that the Board, as it seemingly adopted a completely new voting procedure, must have had an improper discussion about its voting procedures in the executive session in violation of FOIA. You believe that a “cursory discussion/interview of board members would reveal the non-allowable topic being covered/discussed in executive session outside of public view.”<sup>2</sup> As a remedy for these violations, you request that the Board be required to revote in public and inform the Board that such improper discussions in executive session are unlawful and should not be repeated. The second Petition again challenges the secret ballot procedures under Title 14, Chapter 10 of the Delaware Code, and further alleges this secret ballot vote violated Section 10004(f) of the FOIA statute, which requires that the minutes record the votes by individual members. The second Petition also realleges that the executive session violated FOIA, as you believe the implementation of this new procedure without discussion “strongly suggests” that the secret ballot method was discussed in executive session.<sup>3</sup>

The Board responded through counsel to each of your Petitions (“Responses”). In response to the first Petition, the Board acknowledges that the Board’s vote by secret ballot occurred. Although the Board also acknowledges it “arguably” committed a procedural violation of Title 14, Chapter 10 of the Delaware Code by failing to vote by roll call, the Board contends that this Office cannot consider this violation, as it is outside the scope of this Office’s jurisdiction under FOIA.<sup>4</sup> Nonetheless, the Board states that “the District will cure this alleged violation” at its November 5, 2019 “Study Session” meeting.<sup>5</sup> Regarding the executive session, the Board notes that you submitted no facts showing improper discussions but “acknowledges that to the extent there was a discussion in executive session of the manner in which the vote would occur, this discussion was appropriate for open session.”<sup>6</sup> In response to the second Petition, the Board reiterates its commitment to cure the alleged violation as you have requested, by holding another vote at its November 5, 2019 meeting.

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

<sup>3</sup> Second Petition sent Oct. 21, 2019.

<sup>4</sup> First Response sent Oct. 16, 2019. *See also* 14 *Del. C.* § 1048(d) (“A roll call vote of all board members on every motion or resolution shall be recorded as part of the minutes of such meetings. . . .”).

<sup>5</sup> First Response.

<sup>6</sup> *Id.*

## DISCUSSION

The Petitions raise two issues for our consideration: 1) whether the Board's vote by secret ballot at its October 8, 2019 meeting violated FOIA; and 2) whether the Board's October 8, 2019 executive session included improper discussions in violation of FOIA.<sup>7</sup> A meeting, other than an executive session or other exception, must be open to the public to allow citizens to observe the public body as it conducts its public business.<sup>8</sup> A public body's vote by secret ballot clearly subverts this requirement. Further, FOIA requires a public body to maintain meeting minutes that must "include a record of those members present and a record, by individual members . . . , of each vote taken and action agreed upon."<sup>9</sup> The Board admits that there was no such vote during the public session. Based on this record, we conclude that the Board violated FOIA by conducting a secret ballot vote.

The Petitions next allege that the October 8, 2019 executive session included improper discussions about this secret ballot voting procedure. The burden is on the public body to justify its decision to meet in executive session.<sup>10</sup> In response to the Petitions, the Board's counsel merely notes that to the extent any discussions of voting method occurred in the executive session, it would be improper. Discussions of voting methods in executive session are improper, as voting procedures do not fall within one of the enumerated exceptions permitting a public body to meet in executive session.<sup>11</sup> However, the Board submits no factual allegations upon which we can determine whether a discussion of voting procedures actually occurred during the October 8, 2019 executive session or if the executive session was held for a proper purpose. As such, we conclude that the Board failed to meet its burden and find a second violation occurred at the October 8, 2019 executive session.

As remediation, the Board committed to conduct a roll call vote in open session at a future meeting. To comply with FOIA, we recommend that the Board conduct a roll call vote or otherwise vote again on the matter in open public session in such a way that the public may observe how every member is voting.

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<sup>7</sup> The Petition also alleges a violation of Title 14, Chapter 10 of the Delaware Code. This Office's authority is limited to determining whether violations of the FOIA statute occurred; thus, this issue is not addressed. *29 Del. C. § 10005*.

<sup>8</sup> *See 29 Del. C. § 10004(a)*.

<sup>9</sup> *29 Del. C. § 10004(f)*.

<sup>10</sup> *29 Del. C. § 10005(c)*.

<sup>11</sup> *29 Del. C. §§ 10004(b)(1) - (9)*.

**CONCLUSION**

As set forth above, we conclude that the Board violated FOIA as alleged. To comply with FOIA, we recommend that the Board conduct a new vote by roll call or otherwise revote on the Board vacancy at a future public meeting in a manner by which votes may be observed by the public and attributed to individual members.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
State Solicitor

cc: James H. McMackin, III, Attorney for the Christina School District (via email)