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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 19-IB64

November 12, 2019

VIA EMAIL

Ms. Kathryn Gifford
kgiffnewark@gmail.com

RE: FOIA Petition Regarding the Christina School District Board of Education

Dear Ms. Gifford:

We write in response to your correspondence 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 a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that the Board has not violated FOIA as alleged.

POSITIONS OF THE PARTIES

In August 2019, the Board began the process of selecting a candidate for a vacant board member position. In the Petition, you allege that as an applicant for this position, you attended every public meeting between August 6, 2019 to October 8, 2019. You indicate that the Board discussed the process to fill the vacancy at its August 13, 2019 meeting; however, you allege that “the final format and the method of determining what questions would be asked was not finalized at that meeting.”¹ Further, you state that neither the candidate interview format nor the questions were discussed at any other meeting prior to the October 1, 2019 meeting. You assert that you contacted the Board secretary for more information and were told that the format was “still being decided,” and on another occasion, you were told that the Board “has been conversing with each other about the format and procedures” but there was “no final information.”² At the October 1,

¹ Petition.

² *Id.*

2019 meeting, the candidates for the vacant board member position provided statements and were questioned by the Board. You allege the Board held no other discussions about the merits of the candidates in open session at any subsequent meeting until its vote on October 8, 2019.

The Board held a public meeting on October 8, 2019, in which a vote on the vacancy was planned. You allege that the Board typically uses a roll call vote,³ but at this meeting, the Board acknowledges that it held a vote in which each member submitted a written nomination to the Board President who announced the tally of the votes without a roll call.⁴

The Petition asserts several “concerns” arising from the Board’s selection of its new board member.⁵ First, you argue that the Board must have decided “as a group on interview questions to be asked at the candidate forum, and also on the interview format” outside of the public view.⁶ Noting Attorney General Opinion 16-IB25, you state that “the appointment of an applicant to a vacancy is not an employment or a personnel decision, which makes the formulation of questions or discussion of the interview process outside of a public meeting potentially even less appropriate under FOIA.”⁷ Second, you claim “a reliable source” informed you that the Board decided to vote by secret ballot because they could not agree unanimously, indicating the decision to vote by secret ballot “must have included board members” discussing their candidate preferences.⁸ You conclude that the Board must have discussed individual members’ candidate preferences and the voting by secret ballot in violation of FOIA’s open meeting provisions, as “there is no reason such a discussion would be allowed to occur among a quorum of Board members outside of a public meeting.”⁹

As remediation, you request that the Board be directed to discuss how they determined the interview questions and interview format and to hold a public discussion of the members’ opinions of the candidates and the secret ballot method. You also request that the Board be required to undertake FOIA training. Finally, you indicate that you have heard that the Board plans to revote at the November 12, 2019 meeting, but you state such remedy is inadequate and an additional violation of FOIA, as it does not remedy the earlier violations present in the Board’s candidate selection process. If a violation is found, you “believe the public should have opportunity to hear

³ *Id.*

⁴ Response.

⁵ Petition.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

the discussion that clarifies the process; what went wrong, why, and how it will be remedied; how such violations will be avoided in the future; and that the vote to appoint someone to the vacancy should not occur at the same meeting as the discussion of the process, *i.e.*, the vote to select an applicant should be delayed until the public can be assured that the process was compliant with FOIA and [the] Delaware code.”¹⁰

The Board responded through counsel to your Petition (“Response”). First, the Board acknowledges that the Board’s vote was conducted by written nominations and the Board President announced the tally of the votes without a roll call. Although the Board also admits it arguably committed a procedural violation of Title 14, Chapter 10 of the Delaware Code by failing to take a roll call vote, the Board contends that this Office cannot consider this violation, as it is outside the scope of this Office’s jurisdiction. Nonetheless, the Board states “the District will cure this alleged violation” at its November 5, 2019 “Study Session” meeting.¹¹ Regarding the interview format, the Board’s counsel states that the Board discussed the interview process and decided the candidates would be interviewed at a forum at its August 13, 2019 open session meeting. Further, the Board states that “[n]othing at all pertinent to the process or interview sessions occurred in executive session prior to the October 1, 2019 Board meeting where the candidates were interviewed.”¹² Between the August meeting and the October 1, 2019 candidate session, the Board Vice President invited members to submit interview questions to her, and the individual Board members emailed her questions individually, except one who replied to all. She combined similar questions with her own to create a question list. Noting there was no discussion among Board members about the questions, the Board argues that no “meeting,” as defined by FOIA, occurred which would trigger open meeting requirements. Acknowledging that a brief statement about the questions before the October 1, 2019 meeting occurred between a few board members, the Board’s counsel argues that this incident prior to the start of a meeting does not trigger open meeting requirements, as a quorum of members was not present and there was no discussion; instead, merely three of the seven-member Board were presented when one stated a fact about the questions.

DISCUSSION

A previous petition was recently filed against the Board regarding this same October 8, 2019 Board meeting, and our Office issued an opinion finding that the Board improperly voted by a secret vote ballot at its October 8, 2019 meeting and that the Board failed to present the factual allegations to justify its executive session at this same meeting. This Office found two FOIA violations at the October 8, 2019 Board meeting and recommended remediation; we refer you to that decision for the October 8, 2019 meeting claims.¹³

¹⁰ *Id.*

¹¹ Response.

¹² *Id.*

¹³ *See Del. Op. Att’y Gen.* 19-IB63 (Nov. 8, 2019).

The Petition raises two remaining issues for our consideration: 1) whether the Board violated FOIA by discussing the interview format outside of a public meeting; and 2) whether the Board violated FOIA by discussing the interview questions outside of a public meeting.¹⁴ The Board’s counsel represents that the Board discussed the interview process in open session at the August 13, 2019 meeting, and “[t]here, the Board decided the candidates would be interviewed in a forum.”¹⁵ He further states that “[n]o meeting occurred with regard to the process or the questions between August 13, 2019 and October 1, 2019.”¹⁶ In accordance with this Office’s practice, we accept the representations of the Board’s attorney and on that basis, find no violation.¹⁷

A meeting is defined by FOIA as “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business either in person or by videoconferencing.”¹⁸ In its Response, the Board cites two instances in which the Board mentioned the interview questions outside a public meeting. First, the Vice President invited members to submit questions to her via email, and several members did so; the President then compiled a list of questions from the questions received. The Board’s counsel represents that Vice President sent out an invitation to the Board to submit questions; the members did not discuss or debate questions or attempt to persuade members to take a particular position. The Vice President merely acted as receptacle for gathering the questions. These circumstances do not constitute a quorum under FOIA.¹⁹ Second, a Board member briefly made a statement about a question and made a substitution prior to the public meeting; the Board’s counsel represented that there was not a quorum of members present for this brief incident prior to the meeting. As such, neither instance constitutes a “meeting” under FOIA, and we find that the Board did not violate FOIA in this regard. However, we caution the Board to be mindful of FOIA’s open meeting requirements and limit discussions prior to a public meeting.

¹⁴ 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*.

¹⁵ Response.

¹⁶ *Id.*

¹⁷ *Del. Op. Att’y Gen. 17-IB59*, 2017 WL 6348853, n. 12 (Nov. 20, 2017).

¹⁸ *29 Del. C. § 10002(g)*.

¹⁹ *See Tyron v. Brandywine Sch. Dist.*, 1990 WL 51719, at *3 (Del. Ch. Apr. 20, 1990) (series of calls between Board President and three Board members did not violate the spirit of FOIA, as the President was merely polling each member and did not try “to convince any Board member to adopt a particular point of view”); *see also Del. Op. Att’y Gen. 17-IB20*, 2017 WL 3426260, at *7 (July 12, 2017); *Del. Op. Att’y Gen. 17-IB08*, 2017 WL 1317850, at *3 (Apr. 3, 2017).

CONCLUSION

For the reasons set forth above, we conclude that the Board has not violated the open meeting requirements of FOIA as alleged.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

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