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

**Attorney General Opinion No. 20-IB02**

**January 3, 2020**

**VIA EMAIL**

The Honorable Kimberly Williams  
State Representative, 19<sup>th</sup> District  
[Kimberly.williams@delaware.gov](mailto:Kimberly.williams@delaware.gov)

**RE: FOIA Petition Regarding the Odyssey Charter School**

Dear Representative Williams:

We write in response to your correspondence alleging that the Odyssey Charter School Board of Directors (“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 violated FOIA by conducting an executive session at its December 3, 2019 meeting. The Board committed to remediate this violation by discussing the qualifications of the candidates and taking a vote in open session at a future public meeting; therefore, we recommend no additional steps. If the Board does not take steps to comply with FOIA, you are encouraged to file a new petition with our Office within the allowable timeframes.

**BACKGROUND**

The Board is in the process of selecting new Board members, and the Board’s Nominating Committee was tasked with evaluating potential candidates and making recommendations. The Board’s Nominating Committee issued notice it would hold fourteen executive sessions, one each day from November 6, 2019 to November 20, 2019 for “discussion regarding qualifications for job or personnel matters – 29 *Del. C.* §§ 10004(b)(1) & (9).”<sup>1</sup> The Board of Directors also noticed

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<sup>1</sup> Petition.

a public meeting for December 3, 2019 to discuss the item, “Nominating Committee Report and Recommendation for Review” in open session.<sup>2</sup> This meeting was scheduled to take place in the Intermediate School Building 22, First Floor Conference Room, which was locked at the meeting time and a different location from where Board meetings are typically held. The Board also held an executive session at this meeting which was not noticed on the agenda. No member of the public requested access or was denied entry to the December 3, 2019 meeting. You then filed this Petition, challenging the Board’s use of executive sessions to select new Board members outside of public view and the public’s lack of access to the building where the December 3, 2019 meeting was held.

The Board President responded to your Petition on December 12, 2019 (“Response”). At the outset, the Board acknowledges its inadvertent error in failing to notice the December 3, 2019 executive session. To remediate this conduct and address your concerns, the Board commits to discuss the candidates in a future open session and re-do its vote selecting the Board members. The Board further commits to have the Nominating Committee hold a public meeting to “re-do its evaluation of candidates and recommendation to the Board.”<sup>3</sup>

In addition, the Board states that a scheduling conflict required it to hold the December 3, 2019 meeting in a different location than usual, and although the building was locked, the Board arranged to have staff available to allow members of the public access to the meeting. The Board provided an affidavit from the school employee who was stationed at the main office, which is located next to Building 22, who was available from 4:15 to 6:00pm to allow members of the public access to the building for the 5:00pm meeting. In the affidavit, the employee attests to knowing in advance about the meeting and being prepared to allow entrance to any who asked; the employee attested no member of public asked to attend the meeting that night.

Regarding the executive sessions, the Board asserts that the Nominating Committee did not actually meet in executive session at any of the fourteen noticed meetings, but it did hold an executive session discussion at the December 3, 2019 meeting. The Board contends that it was appropriate for the Board to meet in executive session to discuss the candidates. The Board argues that a public discussion of the candidates’ qualifications would have a chilling effect on those who would want to apply and would prevent a “candid conversation about the negative characteristics of a potential candidate, arguably compromising a board member’s fiduciary duty to the school.”<sup>4</sup> Finally, the Board asserts, based on the plain language of the FOIA statute, it properly discussed an individual’s qualifications to hold a job under 29 Del. C. § 10004(b)(1); thus both the Board’s discussions in executive session at the December 13, 2019 and the Nominating Committee’s discussions, if it had held any such discussions, were proper under FOIA.

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

<sup>3</sup> Response.

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

## DISCUSSION

The Petition raises two issues for our consideration: 1) whether the Board's provision of access to its December 3, 2019 meeting violated FOIA; and 2) whether the Board's executive session at its December 3, 2019 meeting violated FOIA.

First, we consider whether the Board violated FOIA by holding a meeting in a locked building that is not the Board's typical location. 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>5</sup> "FOIA is silent as to the locations and times of public meetings," but this Office has found that as a matter of "good governmental practice," public bodies should "attempt to schedule their meetings at times that are convenient to the greatest number of citizens and at locations that are not only readily accessible but that can also accommodate all who may want to attend."<sup>6</sup> A public body may violate FOIA's mandate to hold an open meeting, if the public's right to attend is thwarted.<sup>7</sup> Here, the Board properly noticed the location of the meeting and provided an affidavit from the employee who was stationed at the main office next to the building where the meeting was held to allow members of the public to enter the building. Accordingly, although the Board could have provided a more readily accessible location and is encouraged to do so in the future, we find that the Board did not thwart the public's right to attend the December 3, 2019 meeting in these circumstances.

Second, we determine whether the Board violated FOIA by conducting an executive session on December 3, 2019. FOIA mandates that an agenda be posted in advance of a meeting. An agenda must include "a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor."<sup>8</sup> In this case, the Board's agenda did not provide notice of its executive session on December 3rd as FOIA requires. Accordingly, we find that the Board violated FOIA by conducting an executive session at this meeting. The Board committed to discuss the qualifications of the candidates and take a vote selecting the Board members in open session at a future public meeting; therefore, we recommend no additional steps for remediation.

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<sup>5</sup> 29 Del. C. § 10004(a).

<sup>6</sup> *Del. Op. Att'y Gen.* 05-IB04, 2005 WL 583338, at \*2 (Feb. 11, 2005) (finding no evidence that City Council scheduled the subject meetings on dates or in locations attempting to "thwart the public's right to attend the meetings").

<sup>7</sup> *See id.*

<sup>8</sup> 29 Del. C. § 10002(a).

## **CONCLUSION**

Based on the above, we conclude that the Board violated FOIA by conducting an executive session at the December 3, 2019 meeting. The Board committed to discuss the qualifications of the candidates and take a vote in open session at a future public meeting; therefore, we recommend no additional steps for remediation.

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: Josiah Wolcott, Esq., Odyssey Charter School Board President