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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB10

March 12, 2020

VIA EMAIL

Mr. John Young
Jyd1988@gmail.com

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

Dear Mr. Young:

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.

BACKGROUND

The Board noticed a public meeting for February 11, 2020. Seven hours prior to the meeting, the Board amended its agenda to add the item: “Discussion and Action upon a Resolution of Censure with Regard to Inappropriate Comments by a Board Member.”¹ The agenda stated the reason for the delay in posting this item: “This item was added to the agenda and posted at 11:00am on February 11, 2020. It arose suddenly and cannot be deferred.”² At the outset of the meeting, the Board moved the censure resolution out of the “Board Discussion” section and into the “Action Items” section. The Board then discussed and adopted this resolution. This Petition followed.

¹ Petition.

² *Id.*

The Petition alleges the Board improperly considered the censure resolution at the February 11, 2020 meeting for several reasons. First, you argue that the Board implied this issue required emergency action, but the Board did not meet FOIA’s criteria for convening an emergency meeting. Second, you allege the placement of this item on the agenda under “Board Discussion” indicated no action would be taken and “function[ed] to dissuade the public of its potential importance as an item.”³ Third, because the item was voted upon as an “Action Item” and is not related to another previously posted item, you allege this agenda item may violate FOIA. Fourth, you argue that the addition of this agenda item is improper as this Office’s precedent emphasizes the importance of the public’s advance notice for item involving a school superintendent. You note there was no public discussion or vote regarding the nondeferrable nature of this item before the agenda’s amendment, “leaving the public to wonder how that determination was made since it was done so privately, outside of public view.”⁴ Finally, you allege that the language of the resolution censuring the Board member was not on the agenda for public review before or after the meeting, nor was the resolution provided to Board members prior to the vote. You request the Board be directed to re-vote on the resolution and provide ample prior notice to the public.

The Board responded through counsel to your Petition by letter dated February 21, 2020 (“Response”). The Board first notes that the criteria for emergency meetings is inapplicable. The Board argues that it properly posted the agenda more than six hours before the meeting and provided a reason for the delay and asserts that amending the agenda was necessary as the matter came up suddenly and was unable to be deferred. The Board contends that the remarks at issue occurred during its February 4, 2020 meeting and the Board “hoped that the issue was not going to develop into a storm.”⁵ After a news article quoting the remarks was published in the early morning hours of February 11, 2020, the Board asserts it added the matter to its agenda within hours in order to “disavow[] the notorious comments.”⁶ The Board contends that consideration of the matter could not be deferred, as “a storm was brewing” and a failure to address the comments at that night’s meeting “would appear to support the comments.”⁷ An article citing lawmakers’ demand for the Board member’s resignation did in fact appear in the press prior to the Board’s next meeting. Had the Board waited, it contends that “the article surely would have observed the lack of action by the Board and suggested the lack of action amounted to approval of the Board member’s censured comments.”⁸ The Board argues that its decision that such matter could not be deferred is entitled to deference and should not be second-guessed, especially given the Delaware

³ *Id.*

⁴ *Id.*

⁵ Response.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

precedent supporting the presumption that public officers perform their duties in good faith. The Board asserts that FOIA does not mandate where on an agenda an item is placed, so your argument that the public was dissuaded from attending the Board meeting because of the placement of the additional item on the agenda under the heading “Board Discussion” has no merit. Even if the placement was an issue, the item itself indicated action would be taken, which the Board asserts satisfies any concerns with notice to the public. Finally, the Response contends that FOIA contains no requirement that it attach the exact language of any resolution it seeks to adopt to its agenda before or after the meeting, nor does FOIA require the Board to hold a public discussion about its reasons for making an addition to a posted agenda.

DISCUSSION

First, we find that FOIA’s emergency meeting provisions are not applicable as the Board did not hold an emergency meeting.⁹ The Board provided more than seven days’ notice of the February 11, 2020 meeting, and the Petition challenges the amendment of the agenda and the placement of the new matter on that agenda. Regardless of where it is placed on the agenda, an agenda’s statement that a public body will consider an item is sufficient notice to the public that the Board may take a vote on that item.¹⁰ FOIA does not mandate that a public body hold a public meeting to revise an agenda, nor does FOIA require the exact language of resolutions to be considered at a meeting be attached to an agenda or provided to members of the public body before a vote.¹¹

The remaining issue is whether the Board sufficiently supported its delay in adding the censure resolution to the agenda with less than seven days’ notice. An agenda serves the important function of notifying the public of the major issues expected to be discussed. FOIA provides that notice of a public meeting must be posted seven days in advance of that meeting subject to the delineated exceptions, and if available, the agenda must be posted with the notice.¹² However, an agenda may be amended up to six hours before a meeting, provided a reason for the delay is stated

⁹ See 29 Del. C. § 10004(e).

¹⁰ See *Lechliter v. Becker*, 2017 WL 117596, at *2 (Del. Ch. Jan. 12, 2017) (“The notice does not explicitly say that a vote of the City Council would take place, and, of course, such notice would have been impractical; the Council could have considered the issue and undertaken a number of actions, including tabling the matter, as well as voting for or against it. Nothing in FOIA, and importantly, nothing in a common-sense reading of the statute in light of its purpose, requires public notice to provide every alternative that may take place with respect to a specific subject under consideration. All that the statute requires is that adequate notice of the matters to be considered is given to the public, so that interested members will have an opportunity to appear and monitor or participate in the proceedings.”).

¹¹ See 29 Del. C. §§ 10001-10007.

¹² 29 Del. C. § 10004(e)(1), (5).

on the agenda.¹³ A revised agenda posted less than seven days before the meeting may not be amended for any reason; the public body must demonstrate a later-added item arose suddenly and is unable to be deferred until a later meeting to allow for seven days' notice.¹⁴

The Board asserts that the need for discussion and voting on the Board's stance on this matter arose at the time of the publishing of the Board member's comments in a news article the morning of February 11, 2020. While the comments were made earlier in the week, the urgency for discussion arose on the day of the meeting when the news story broke, and the Board believed addressing the matter as soon as possible would help to stem the public outcry. The Board states it could not remain silent at that night's meeting and delay the matter to the next meeting, as the comments were sufficiently notorious and required immediate action. The Board found it imperative to announce it did not support the Board member's comments, noting that "[f]ailure to address the notorious comments would appear to support the comments."¹⁵ The Board is comprised of elected public officials, and in this capacity, the Board exercised its judgement over matters pressing upon its stature in the community it represents. Under these circumstances, we are satisfied that the Board met the standard under FOIA for amending this agenda.¹⁶

¹³ 29 *Del. C.* § 10004(e)(5).

¹⁴ *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 with less than seven days' notice 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).

¹⁵ Response.

¹⁶ The Petition argues that the circumstances here fall under Attorney General Opinion Nos. 13-IB01 and 11-IIB12, but those opinions are inapposite to our analysis here. In Attorney General Opinion No. 11-IIB12, the public body voted on an issue that did not appear on the agenda at all; in this case, the revised agenda was posted more than six hours in advance of the meeting. Attorney General Opinion No. 13-IB01 is also distinguishable from the circumstances here. This Office examined the circumstances surrounding the decision to add agenda items regarding bus routes and an overnight field trip, and this Office determined that those items did not meet this standard, as the public body had prior knowledge of the item or did not present evidence of when the issue arose and gave insufficient reasoning for why it could not take up these items at a later meeting.

CONCLUSION

As set forth above, we conclude that the Board has not violated 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, Esquire
Counsel for the Christina School Board (via email)