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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB23

October 13, 2020

VIA EMAIL

Richard Abbott, Esq.
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RE: FOIA Petition Regarding the Environmental Appeals Board

Dear Mr. Abbott:

We write in response to your correspondence on behalf of your client, Delmarsh, LLC alleging that the Environmental Appeals Board (“Board”) violated the Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”) with regard to your records request. We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. For the reasons set forth below, it is our determination that the Board has not violated FOIA as alleged.

BACKGROUND

The Board held a public hearing involving your client on August 11, 2020. At the hearing, the Board entered executive sessions to deliberate a motion *in limine* and its final decision regarding your client. This Petition followed, challenging the Board’s authority to enter executive session in these circumstances. The Petition alleges that the Board improperly “failed to conduct its deliberations in public as required by FOIA.”¹

The Board’s legal counsel responded to the Petition (“Response”), pointing out that 7 *Del. C.* § 6008(a) is the specific statutory authority permitting the Board’s private deliberations. The Board contends that this provision is explicit and the principles of statutory construction need not be applied, but even if such principles were applied, 7 *Del. C.* § 6008(a) overrides the prior-enacted

¹ Petition.

FOIA statute and is a more specific “carve-out” of FOIA’s general meeting requirements. In other words, the Board argues that 7 *Del. C.* § 6008(a) supersedes FOIA’s restrictions on the Board’s ability to deliberate privately.

DISCUSSION

When there is an irreconcilable conflict between two statutes, the later-enacted statute prevails over the prior statute.² “It is assumed that when the General Assembly enacts a later statute in an area covered by a prior statute, it has in mind the prior statute and therefore statutes on the same subject must be construed together so that effect is given to every provision unless there is an irreconcilable conflict between the statutes, in which case the later supersedes the earlier.”³

Here, 7 *Del. C.* § 6008(a) states that the Board must conduct its public hearings for all appeals in accordance with Chapter 101 of Title 29 and that “[d]eliberations of the Board may be conducted in executive session.” Conversely, FOIA requires all meetings of public bodies to be conducted publicly, excepting several delineated instances in which executive session is appropriate. No FOIA exception permits all the Board’s deliberations to be private. As such, there is an irreconcilable conflict between these two statutes. In light of this conflict, we assume the General Assembly was aware of the previously enacted FOIA statute and intended 7 *Del. C.* § 6008(a) to supersede FOIA’s restrictions and allow the Board to deliberate privately.⁴

CONCLUSION

Based on the foregoing, we determine that the Board has not violated FOIA by deliberating in executive session at the August 11, 2020 hearing.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

² *State of Del. Dep’t of Labor v. Minner*, 448 A.2d 227, 229 (Del. 1982).

³ *Id.* (quoting *Green v. County Council of Sussex County*, 415 A.2d 481, 484 (Del. Ch. 1980)).

⁴ *See* 68 Del. Laws ch. 148, § 1 (1991); 60 Del. Laws, ch. 641, § 1 (1977).

cc: Kevin Maloney, Deputy Attorney General
Dorey Cole, Deputy Attorney General