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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB29

December 2, 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’s committee violated the open meeting requirements of FOIA by failing to properly post notice and prepare minutes for its meetings to select and negotiate a contract with a superintendent candidate.

BACKGROUND

The Board selected a new superintendent earlier this year. The Board interviewed candidates during two executive sessions and held a public meeting on June 4, 2020. At the June meeting, the Board first entered executive session to discuss an item entitled “Superintendent Search.”¹ The meeting also included an open session item, “Board Action on Superintendent Search.”² At that time, the Board publicly voted to approve a contract with a candidate. This Petition followed.

¹ Petition.

² *Id.*

The Petition alleges the Board improperly selected the superintendent outside of public view. Pointing to a news article on the matter, you assert that the candidate was selected and terms of the contract were negotiated prior to the June 4, 2020 meeting. You attached the meeting agendas for the June 4, 2020, May 27, 2020, May 20, 2020, and May 18, 2020 meetings, showing no public discussions of the Board's selected candidate. You also cite to Attorney General Opinions 15-IB01 and 02-IB17, describing this precedent as "apt and very instructive on the question at hand."³ In addition, you allege that the meeting agendas lack specificity as they make no mention of a contract. In conclusion, you note that by the time a decision is reached on this matter, the new superintendent "will likely be weeks if not months into his role."⁴ Nonetheless, you argue "[t]hat does not render the power of this office to rule that Title 29 Chapter 100 was violated, even if remediation is impracticable[,] any less valuable."⁵

The Board responded through counsel to your Petition by letter dated September 29, 2020 ("Response"). The Board asserts it conducted interviews at the May 18, 2020 and May 20, 2020 meetings in executive session. The Board's counsel states that the Board President and Vice President then "set out . . . to negotiate with the" selected candidate but did so at their own risk, and "[f]or all they knew, they could have been alone in their assessment of [the selected candidate's] perceived support on the Board."⁶ The Board's counsel specifically states that the two members' discussions with the candidate were not subject to FOIA because there were only two Board members, and they "were not part of a Board-created committee."⁷ The Board's counsel also states the "seven Board members may be interviewed and all will agree: (i) there was no vote in executive session, (ii) there was no straw poll, (iii) there was no effort to seek a consensus, and (iv) there was no 'wink or nod.'"⁸ The Board also clarified that despite the news article's loose wording, no job offer was made before the June 4, 2020 vote, and any negotiations were subject to full Board approval. Finally, the Board's counsel contends that Attorney General Opinion 15-IB01 is a departure from the FOIA statute and established FOIA law. Even if it was still good law, the Board asserts that the facts here are distinguishable, as the Board in this case solely discussed the competencies and abilities of the candidate in the executive session, not the contract which had been emailed to the Board members for review two days earlier, "without advocacy or substantive comment."⁹ Based on the foregoing, the Board asked this Office to dismiss the Petition.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Response.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

DISCUSSION

The Petition contains two primary issues: 1) whether the Board improperly selected and negotiated with the new superintendent outside of public view; and 2) whether the June 4, 2020 meeting agenda sufficiently alerted the public regarding the vote on the superintendent contract. We address these two issues in turn below.

Meetings Outside of Public View

The petitioner carries the initial burden of establishing a *prima facie* case that a meeting occurred before the burden shifts to the public body to prove a meeting did not violate FOIA.¹⁰ In this instance, the Petition alleges improper discussions occurred at the executive session meetings on May 18, 2020, May 20, 2020, and June 4, 2020. The Board's counsel specifically states that no vote, consensus gathering, straw poll, or "wink and nod" occurred at these executive sessions to select the candidate.¹¹ Furthermore, the Board's counsel specifically represents that the Board did not discuss the contract for the new superintendent in the June 4, 2020 executive session. On the basis of these representations, we find the alleged violations did not occur.¹²

In addition, the Board's counsel acknowledges that two Board members, the President and Vice President, engaged in selecting a candidate and negotiating with that candidate, but he argues they were not a committee created by the Board subject to open meeting requirements. Instead, he asserts that these two individuals selected a candidate and negotiated a contract in the hopes that the Board would ultimately agree and accept the contract with this candidate. We must determine whether this two-member group constitutes a public body under FOIA. The test for whether an entity is a public body under FOIA is two-fold. The first inquiry is whether the entity is a "regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State," which includes a ". . . committee, ad hoc committee, . . . group, panel, council, or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or

¹⁰ *Del. Op. Att'y Gen.* 05-IB10, 2005 WL 1209240, at *2-3 (Apr. 11, 2005).

¹¹ Unlike Attorney General Opinion 02-IB17, which determined the Board in that case must have selected its new superintendent in an executive session, as no public discussion of the candidates' qualifications took place in public, the Board's counsel in this case denies any such discussions took place in executive session. *Del. Op. Att'y Gen.* 02-IB17, 2002 WL 31031224, at *8 (Aug. 6, 2002).

¹² *See Del. Op. Att'y Gen.* 17-IB59, 2017 WL 6348853, n. 12 (Nov. 20, 2017) (accepting the factual representations made by the public body's attorney); *Del. Op. Att'y Gen.* 03-IB16, 2003 WL 22404934, at *2 (Aug. 8, 2003) (accepting Town's representations about the urgency of the road improvement necessitating a special meeting); *see also Del. Op. Att'y Gen.* 15-IB06, 2015 WL 5014135, n. 2 (Aug. 19, 2015) (stating this Office does not, "in the context of evaluating petitions for determination under FOIA, operate as an independent fact-finding body").

appointed by any body or public official of the State or otherwise empowered by any state governmental entity.”¹³ If the first part is met, we then must determine whether the entity is supported in whole or in part by any public funds, expends or disburses any public funds, or “is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.”¹⁴

The Board is a public body that undertook a significant task, selecting and hiring a new superintendent.¹⁵ Despite the Board counsel’s arguments to the contrary, the factual record here indicates that two members of the Board must have been formally appointed to engage in regular meetings to undertake the next steps in the candidate selection process after interviews were completed and that this group was impliedly, if not directly, charged with negotiating with the candidate of their choice and returning to the full Board to advise of its recommendations.¹⁶ In other words, rather than having the full Board discuss and decide on the candidate and the terms of the agreement, the Board appointed this committee to meet regularly to have these discussions outside of public view. Based on this specific factual record, we find that the Board formally appointed this committee and charged the committee to select and negotiate with a candidate and make its recommendations to the full Board. As such, this committee is a public body that violated the open meeting requirements by not giving appropriate public notice of its meetings and preparing minutes when it engaged in a “meeting” as defined by FOIA.¹⁷

¹³ 29 *Del. C.* § 10002(h).

¹⁴ *Id.*

¹⁵ *Levy v. Board of Educ. of Cape Henlopen School Dist.*, 1990 WL 154147, at *2 (Del. Ch. Oct. 1, 1990).

¹⁶ See *Del. Op. Att’y Gen.* 17-IB12, 2017 WL 2917928, at *4 (Jun. 19, 2017) (finding a committee to be a public body when the City Council President, with her authority to appoint committees, formally appointed councilmembers to meet with City executive branch officials, and this committee was impliedly charged with making reports, as the group provided a summary of discussions to the full Council). We limit this finding to these specific facts presented here. For instance, we distinguish Attorney General Opinions 19-IB21 and 06-IB03, where two public body members, less than a quorum, attended a meeting with other officials, but there is no evidence that the council formally appointed a committee. *Del. Op. Att’y Gen.* 19-IB21, 2019 WL 4538307, at *2 (Apr. 23, 2019); *Del. Op. Att’y Gen.* 06-IB03, 2006 WL 1242013, at *3 (Jan. 23, 2006). Also, the facts of this case do not fit within the limited exception noted in Attorney General Opinion No. 17-IB12: a public body’s committee does not violate FOIA if the members were charged with taking a “stenographic recounting of information passively received at its meetings with the Executive Branch,” as opposed to engaging in substantive dialogue about issues. *Del. Op. Att’y Gen.* 17-IB12, 2017 WL 2917928, at *4.

¹⁷ 29 *Del. C.* § 10002(g) (defining meeting 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 video-conferencing.”).

Our Office has previously determined that open meeting violations resulting in the selection of a superintendent outside of public view affects the substantial public rights of students, parents, teachers, and other concerned citizens.¹⁸ When our Office finds a violation of the open meeting requirements, we may recommend remediation when a public body has taken action on a matter affecting substantial public rights.¹⁹ However, the authority to invalidate a vote or impose other injunctive relief is reserved for the courts.²⁰ As acknowledged in the Petition, the selection of the superintendent was subject to a public vote at the June 4, 2020 Board meeting, and the new superintendent has been in his position for months, while the students and staff are well into the new school year. Accordingly, we do not find any recommended remediation within our Office's authority is feasible at this time, but we strongly caution the Board to follow FOIA's requirements in similar circumstances in the future.²¹

June 4, 2020 Meeting Agenda Item Regarding Board Action on Superintendent Search

An agenda serves the important function of notifying the public of “a general statement of the major issues expected to be discussed at a public meeting.”²² An agenda should be worded in

¹⁸ *Del. Op. Att’y Gen.* 02-IB17, 2002 WL 31031224, at *8 (Aug. 6, 2002) (determining that selecting this superintendent outside of public view affected substantial public rights, but declining to support invalidation of the hiring of the superintendent due to the public access that occurred later in the process and the potential disruption to the students and staff so close to the beginning of a new school year).

¹⁹ *Del. Op. Att’y Gen.* 05-IB15, 2005 WL 2334344, at *4 (Jun. 20, 2005) (citing *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at *6 (Del. Ch. Aug. 29, 1986)).

²⁰ Pursuant to 29 *Del. C.* § 10005(e), this Office is charged with making “a written determination of whether a [FOIA] violation has occurred or is about to occur.” Although remediation may be recommended when appropriate, this Office is not vested with the authority to impose injunctive relief or punitive measures for FOIA violations. 29 *Del. C.* § 10005 (citing remedies that a court may impose); *Del. Op. Att’y Gen.* 17-IB15, 2017 WL 3426253, at *7 (July 7, 2017) (“However, this Office does not have the statutory authority to invalidate the CBOC or Board’s actions.”); *Del. Op. Att’y Gen.* 16-IB23, 2016 WL 7010495, at *2 (Oct. 28, 2016) (“[T]his Office is not vested with the authority to impose punitive measures for FOIA violations. You are free to seek redress in the courts if you believe that additional relief is warranted.”) (citation omitted).

²¹ In *Ianni*, the court states that “the remedy of invalidation is a serious sanction and ought not to be employed unless substantial public rights have been affected and the circumstances permit the crafting of a specific remedy that protects other legitimate public interests,” and asks the parties to submit “an appropriate and feasible remedy that may be implemented at this late date.” 1986 WL 9610, at *7.

²² 29 *Del. C.* § 10002(a).

“plain and comprehensible language.”²³ The agenda must alert those with an “intense interest” in a subject that this subject will be considered.²⁴ “In other words, members of the public interested in an issue should be able to review a notice and determine that an issue important to them will be under consideration.”²⁵ When an important specific aspect of a general subject is to be discussed, “it satisfies neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public’s attention to the fact that that specific important subject will be treated.”²⁶ However, FOIA does not require “public notice to provide every alternative that may take place with respect to a specific subject under consideration.”²⁷

The Petition alleges that the June 4, 2020 meeting agenda’s failure to reference the contract renders the notice insufficient under FOIA.²⁸ The agenda item for discussion at the June 4, 2020 meeting was described as “Board Action on Superintendent Search.”²⁹ This description allows any member of the public with an intense interest in the superintendent search to attend and observe the Board’s action on the subject.³⁰ Accordingly, we conclude that the June 4, 2020 agenda item for “Board Action on Superintendent Search” constituted adequate public notice.

²³ *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994).

²⁴ *Lechliter v. Delaware Dep’t of Envtl. Control and Natural Res.*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017) (citation omitted).

²⁵ *Id.*

²⁶ *Ianni*, 1986 WL 9610, at *5.

²⁷ *Lechliter v. Becker*, 2017 WL 117596, at *2 (Del. Ch. Jan. 12, 2017) (citation omitted).

²⁸ The Board’s counsel states that the contract was available only for the June 4, 2020 meeting, having only been drafted for review in the days immediately preceding the meeting. Thus, the June 4, 2020 meeting agenda is alleged to have this defect.

²⁹ Petition.

³⁰ See *Lechliter*, 2017 WL 117596, at * 2 (determining that an item to “present and consider” amending a lease and renaming a street is sufficient notice that a vote may occur on that matter); *Del. Op. Att’y Gen.* 17-IB29, 2017 WL 3426269, at * 3 (July 20, 2017) (determining that agenda item of “Delmarva Power & Light Co. Permanent Easement Request – Sedgeville Expansion of the Baker Farms District (N-99-01-187C)” was sufficient to alert the public of a potential vote on the request); *but cf.* *Del. Op. Att’y Gen.* 07-IB01 (Jan. 25, 2007) (determining that “Wastewater” in the agenda did not “sufficiently alert the public that the Town Council would consider and vote whether to privatize the Town’s wastewater treatment plant and to decide which of two contractors to engage in contract negotiations”); *Del. Op. Att’y Gen.* 05-IB05, 2004 WL 3266027, at *2 (Feb. 22, 2004) (listing “Town Solicitor” in the agenda was not “sufficient to inform the public that the Council would consider and vote on firing the Town’s legal counsel”).

CONCLUSION

As set forth above, we conclude that the Board created a committee for purposes of selecting and negotiating with a superintendent and find that this committee violated the open meeting requirements of FOIA by not providing public notice or maintaining the minutes of its meetings.

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