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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 20-IB31

December 11, 2020

VIA EMAIL

Randall Chase
rchase@ap.org

RE: FOIA Petition Regarding the Finance/Employee Compensation & Benefits/Facilities Committee of the Delaware Association of Professional Engineers

Dear Mr. Chase:

We write in response to your correspondence alleging that the Finance/Employee Compensation & Benefits/Facilities Committee (“Committee”) of the Delaware Association of Professional Engineers (“DAPE”) 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. We determine that the Committee’s reference to an improper purpose for executive session constituted a technical violation of FOIA. However, because the Committee did not actually discuss such matters in executive session and has committed to removing “financial data” as a basis for executive session in future meeting agendas, no further remediation is necessary. We nevertheless caution the Committee to be more careful in drafting its future agendas.

DISCUSSION

The Committee noticed a meeting for November 10, 2020. The meeting agenda listed several discussion items and contained the following statement:

Pursuant to 29 *Del. C.* Section 10004(b), the Committee anticipates that it may go into Executive Session at this meeting, which session is closed to the public, to discuss personnel matters and to review financial data. The agenda shall be subject

to change to include additional items including executive sessions, which arise at the time of the public body's meeting (29 Del. C. 10004(e)(2)). No action is taken during Executive Session. All action is taken in Open Session.

On November 6, 2020, you filed a petition challenging the Committee's intended use of an executive session to "review financial data." The Committee responded to your Petition on November 18, 2020 ("Response"). Through its counsel,¹ the Committee acknowledged that the agenda contained a reference to "financial data" as a basis for executive session, but stated that "[t]he inclusion of the term was due to oversight" and that, "as a matter of practice, the Committee does not go into executive session to discuss financial information."² The Committee's counsel stated that she was a participant in the November 10, 2020 meeting, during which "[t]he Committee did not go into executive session and there was extensive discussion concerning DAPE's financial audit for fiscal year 2019-2020" in open public session. The Committee stated that it would remove any reference to "financial data" as a basis for executive session moving forward.

FOIA mandates that an agenda be posted in advance of a regular 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."³ Section 10004(b) lists the permissible grounds for executive session, but does not include an exemption for reviewing financial data, unless that financial data is in a record excluded from the definition of "public record" pursuant to Section 10002. The Committee did not allege that this financial data is exempt under Section 10002. Accordingly, we conclude that the Committee improperly referenced "review financial data" as a basis for a possible executive session.⁴ However, because the Committee did not actually conduct an executive session, its error was harmless.

CONCLUSION

Based on the above, we conclude that the Committee committed a technical violation of FOIA by citing to an improper purpose for executive session in its agenda. However, because the

¹ See, e.g., *Del. Op. Att'y Gen.* 17-IB59, 2017 WL 6348853, n. 12 (Nov. 20, 2017) (accepting the factual representations of the public body's counsel to satisfy the public body's burden of proof).

² By way of example, the Committee provided the meeting minutes from its most recent meeting prior to the November 10, 2020 meeting, during which the Committee discussed DAPE's budget in open session.

³ 29 *Del. C.* § 10002(a).

⁴ See, e.g., *Del. Op. Att'y Gen.* 19-IB16, 2019 WL 4538301, at *3-4 (Mar. 22, 2019) (concluding that the City committed a technical violation of FOIA by citing to an improper purpose for executive session in its agenda).

Committee did not actually discuss such matters in executive session and has committed to removing “financial data” as a basis for executive session in future meeting agendas, no further remediation is necessary. We nevertheless caution the Committee to be more careful in drafting its future agendas.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Eileen Kelly, Deputy Attorney General