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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB21

September 27, 2021

VIA EMAIL

William Pickett
wpickett@webname.com

RE: FOIA Petition Regarding the Indian River School District

Dear Mr. Pickett:

We write in response to your correspondence alleging that the Indian River School District (the “IRSD”) 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 herein, we determine that the IRSD has violated FOIA as alleged in the Petition.

BACKGROUND

The Petition alleges that the IRSD Board of Education violated FOIA by holding two votes at its August 22, 2021 meeting without providing proper notice to the public on the agenda. The first vote was to express no confidence in the Governor, and the second vote was to petition the Delaware Department of Education for a change in its emergency order on masks in schools.

The IRSD, through its legal counsel, provided a response to the Petition on September 1, 2021 (“Response”). The IRSD argues that the Board of Education did not violate FOIA’s open meeting requirements as FOIA “allows for the amendment of the agenda for those items that ‘arise at the time of the public body’s meeting.’”¹ The IRSD further argues that the standard for

¹ Response.

amendment of the agenda at the meeting, which “requires a showing that the item truly did arise at the time of the meeting, as a natural evolution of discussions of a related publicly-noticed item”² was met.

IRSD asserts that its agenda for the August 23, 2021 meeting included a topic titled “5.02. 2021-2022 School Year (D)” which it asserts included a discussion “concerning Safe Return to In Person Instruction and Continuity of Services Plan”³ and one of the topics that came up during this discussion was masks.⁴ The IRSD argues that the two contested votes occurred after the public comment period during which “several members of the public expressed their dissatisfaction and concerns regarding the Governor’s mask mandate for students in Delaware schools and urged the Board to take action.”⁵ The IRSD asserts that the vote was made directly in response to the public comments and was a “natural evolution of the discussions related to the 2021-2022 School year plan, which was a publicly noticed item.”⁶

Petitioner provided a response to the IRSD’s submission and argues that the “2021-2022 School Year” agenda item was not sufficient notice as it was too vague to put members of the public on notice that masks would be included in that discussion. Petitioner further argues that the board was aware that masks were an issue of interest to the public, and cannot now claim that it came up for the first time at public comment and could not have been properly noticed.

DISCUSSION

FOIA requires that public bodies, such as the IRSD, give at least seven days’ notice of any meetings, and shall include in the notice “the agenda, if the agenda has been determined.”⁷ The agenda should, at least “‘alert members of the public with an intense interest in’ the matter that the subject will be taken up by the [public body].”⁸ The statute further provides that an agenda may be changed to “include additional items . . . which arise at the time of the public bodies’ meeting.”⁹

² *Id.* (citing *Del. Op. Att’y Gen.* 19-IB48, 2019 WL 5208244 (Sep. 9, 2019).

³ Response.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ 29 *Del. C.* § 10004(e)(2).

⁸ *Lechliter v. Del. Dep’t Nat. Res. and Env’t Control*, 2017 WL 2687690, at *2 (Del. Ch. 2017) (citing *Ianni v. Dep’t of Election of New Castle Cnty.*, 1986 WL 9610, at *4 (Del. Ch. Aug 29, 1986)).

⁹ 29 *Del. C.* § 10004(e)(3).

The agenda posted by the IRSD included a topic for discussion (not action) titled the “2021-2022 School Year (D).” While the IRSD asserts this title implies a planned discussion of “Safe Return to In Person Instruction and Continuity of Services Plan,” no such language was included on the agenda. The question is then whether the entry titled “2021-2022 School Year (D)” satisfies *Ianni* and was sufficient to “put members of the public ‘intensely interested’ in [masks] on notice that they should attend the meeting.”¹⁰ We find that it does not. This office has previously stated that

[w]hile the statute requires only a ‘general statement’ of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, 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 specific important subject will be treated.¹¹

The agenda item “2021-2022 School Year (D)” is too broad and general to satisfy *Ianni* by alerting the public that the IRSD was going to hold votes on the significant issues of finding that the IRSD has no confidence in the Governor and requesting the State Board of Education withdraw the mask mandate.

As the agenda was not specific enough, the issue is now whether the IRSD could add this item to the agenda after the start of the meeting. This office has previously found that “[a] public body has discretion to determine the agenda for any public meeting and to make additions, corrections or deletions, if necessary, at the next regularly scheduled meeting when the minutes are adopted.”¹²

IRSD argues that the two contested votes flowed naturally from the “2021-2022 School Year (D)” agenda item such that the votes were permitted changes to the agenda at the time of the meeting. We do not agree.

The agenda item “2021-2022 School Year (D)”, is a very broad and encompassing topic, and is too vague to be reasonably tied to the two contested votes. In *Del. Op. Atty. Gen. 97-IB20*, this office found that a vote to hire more teachers was a natural extension of a noticed discussion on “Class Sizes and Enrollment” and FOIA provides flexibility to address such situations.¹³

¹⁰ *Id.*

¹¹ *Del. Op. Att’y Gen. 97-IB20*, 1997 WL 800814 (Oct. 20, 1997) (citing *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610 (Aug. 29, 1986)).

¹² *Id.* (citing *Del. Op. Att’y Gen. 94-IO23*, 1994 WL 908550 (June 21, 1994)).

¹³ 1997 WL 800814 (Oct. 20, 1997).

However, this office cautioned that “[a]t some point, the issues may so far depart from the issues noticed on the agenda that they are better reserved for the next meeting of the public body so that the public will have adequate notice.”¹⁴ This is that point. While the IRSD argues that it was unable to notice a meeting due to the start of the school year and it had to be handled at that meeting, that is not a sufficient reason to avoid providing proper notice of important topics such as voting no confidence in the Governor or requesting a mask mandate be removed.

“If a public body knows that an item of public interest will be addressed at a meeting, then it cannot claim, in good faith, that the issue arose at the time of the public body’s meeting in order to circumvent the notice requirements of FOIA.”¹⁵ The IRSD knew or should have known that the State mask mandate would come up during the public comment period, and if it wanted to hold a vote on topics related to mask mandates, it should have been listed as its own item on the agenda to put parties on notice.

CONCLUSION

Based on the foregoing, we determine that the IRSD has violated FOIA by voting on two items that had not been adequately noticed on the agenda.

Very truly yours,

/s/ Annie Cordo

Annie Cordo
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: James H. McMackin, III, counsel for IRSD

¹⁴ *Id.*

¹⁵ *Id.*