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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 21-IB35

December 17, 2021

VIA EMAIL

Jose Matthews
Red Clay Consolidated School District Board Member
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Adriana Leela Bohm, Ph.D.
Red Clay Consolidated School District Board Member
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RE: FOIA Petition Regarding the Red Clay Consolidated School District Board of Education

Dear Board Members Matthews and Bohm:

We write in response to your correspondence alleging that the Board of Education of the Red Clay Consolidated School District (“Board”) violated the Delaware 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(e) regarding whether a violation of FOIA’s open meeting requirements has occurred. As set forth below, we conclude that the Board has not violated FOIA as alleged.

BACKGROUND

A standing committee of the Board, the Board Policy Review Committee (“Committee”), scheduled a virtual public meeting for October 27, 2021. The meeting notice and agenda indicated the meeting was open to the public and provided for a public comment period. You both attended the meeting virtually, but at the outset of the meeting, upon learning of your presence, the Committee members adjourned the meeting because a quorum of the full Board was suddenly, unexpectedly present and the meeting notice and agenda did not provide public notice that a full Board meeting would take place. The Petition alleges that the Committee members decided to reschedule the meeting for a later date. This Petition from you, the two Board members not on the Committee, followed.

The Petition questions whether the Committee's actions at this meeting complied with FOIA, and whether the Board's failure to post committee meeting minutes online and the Board's omission of certain discussions that pertain to the purview of the Board committees were proper. The Petition also alleges that the Board's committee meetings are not recorded. The Petition asks this Office to determine whether these omissions impede the public's rights under FOIA.¹

The Board, through its counsel, submitted a response to your Petition ("Response"). The Board included the affidavit of the Committee Chair, the District's Deputy Superintendent. The Chair attests that the Board consists of seven members, and four members constitute a quorum. The Committee consists of three members of the Board, the Deputy Superintendent, and several teachers' union representatives. At the October 27, 2021 meeting of the Committee, the Chair attests that the three Board committee members were in attendance and you two Board members attended the Committee meeting as members of the public. Because five members of the seven-member Board were present at the Committee meeting simultaneously, the Committee immediately adjourned the Committee meeting, fearing it was improperly holding a Board meeting that had not been publicly noticed as such, because a quorum of Board members were now present in the Committee meeting at the same time.

With regard to your allegations of the Board's failure to record its committee meetings, the Board maintains that there is no requirement in FOIA for the committee meetings to be recorded; instead, another statute, 14 Del. C. § 208, only requires the Board to digitally record its own public meetings. Regarding your allegation of missing minutes, the Board states that the Petition does not specify which meeting minutes are missing from the website, but the November 9, 2021 Community Financial Review Committee meeting minutes will be posted after they are approved at the next meeting; the October 26, 2021 Diversity Committee meeting minutes and the October 28, 2021 Student Code of Conduct Committee meeting minutes have already been posted. Copies of those minutes were attached to the Board's Response.

DISCUSSION

The Board has the burden of proof to demonstrate its compliance with FOIA.² A meeting is defined 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."³ The Board consists of seven

¹ As our Office is limited to determining whether a public body violated FOIA, this Opinion is limited to addressing the FOIA allegations and does not address the hypotheticals posed in this Petition. See 29 Del. C. § 10005(e).

² 29 Del. C. § 10005(c); see also *Judicial Watch, Inc. v. Univ. of Del.*, 2021 WL 5816692 (Del. Dec. 6, 2021).

³ 29 Del. C. § 10002(j).

members, and four members constitute a quorum.⁴ In this case, two Board members who were not Committee members attended a Committee meeting, inadvertently resulting in the presence of a quorum of the Board being present at the Committee meeting. The Committee immediately adjourned the meeting to avoid improperly conducting a Board meeting without public notice. Although cancelling a meeting for this reason does not run afoul of FOIA, FOIA does not mandate the Committee's immediate cancellation upon the mere presence of a quorum, as the silent observation of two Board members in the audience would not transform this Committee meeting into a Board meeting. A "meeting" under FOIA requires a quorum of members to gather for the purpose of discussing or taking action on public business, but the two members in this case intended to silently observe the meeting as members of the public.

We likewise find no violation of FOIA with respect to the remaining issues in the Petition.⁵ FOIA does not require audio recordings of meetings, and to the extent another statutory requirement exists, it is not within the purview of our authority to determine whether a public body properly adhered to a statute other than FOIA.⁶ In addition, the Board is not mandated by FOIA to post its meeting minutes online.⁷ As the Board voluntarily maintains its committee meeting minutes on its website and offered to rectify the omission of any committee meeting minutes, we encourage the Board to do so and to continue to make timely and complete postings of those minutes on its website.

⁴ Response, Affidavit of Deputy Superintendent, Chair of Board Policy Review Committee.

⁵ While the Petition suggests that committee meeting minutes may be incomplete due to the omission of certain discussions about the purview of the committees, the allegations were insufficiently specific to allow for review. However, we note that meeting minutes are required to include a record of the members present, and a record, by individual, of each vote taken and action agreed upon by the members.

⁶ See, e.g., *Del. Op. Att'y Gen.* 21-IB11, 2021 WL 2144533, at *2 (May 12, 2021); *Del. Op. Att'y Gen.* 18-IB50, 2018 WL 6015765, at *2 (Oct. 12, 2018) (finding that this Office has "no authority under FOIA to direct [the public body] with regard to this Office's interpretation of any other Delaware statute"); *Del. Op. Att'y Gen.* 96-IB28, 1996 WL 517455, at *2 (Aug. 8, 1996) ("To the extent you allege that Sussex County has not complied with the requirements of [9 Del. C. § 6921], that matter is beyond the jurisdiction of this office and is not addressed here.").

⁷ 29 Del. C. § 10004(f).

CONCLUSION

For the reasons 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 BY:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Michael P. Stafford, Attorney for the Red Clay Consolidated School District Board of Education