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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB03

February 18, 2022

VIA EMAIL

Randall Chase
rchase@ap.org

RE: FOIA Petition Regarding the Diamond State Port Corporation

Dear Mr. Chase:

We write in response to your correspondence alleging that the Board of Directors of the Diamond State Port Corporation (“DSPC”) 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 explained below, we determine that the DSPC violated FOIA by failing to provide proper public notice of its executive session held on January 21, 2022 and to take the requisite vote of its members in a meeting open to the public before entering the executive session. To remedy these violations, we recommend that the Board repeat this executive session in compliance with FOIA.

BACKGROUND

The Board scheduled a virtual meeting for January 21, 2022. The notice and agenda, entitled “Public Session Board of Directors Meeting,” indicated the meeting would begin at 10:00 am. In addition to other topics, the agenda included consideration of the Board’s October 6, 2021 Board meeting minutes and did not mention an executive session. On the day of the meeting, the Board convened an hour earlier than the noticed time to hold an executive session prior to the public session of the meeting. After the executive session ended, the public session began at approximately 10:27 am. At this public session, you allege that the Board referenced a prior

executive session to discuss “proprietary information.”¹ Following the conclusion of the meeting, you emailed the DSPC staff, who confirmed that an executive session did take place earlier that day. You filed this Petition, alleging that the Board did not comply with the open meeting requirements, as it failed to give public notice of this executive session and its purpose and failed to take a vote in public session to hold this executive session. In addition, you allege that contrary to the posted agenda, the Board’s October 6, 2021 meeting minutes were not considered at the public meeting.

The DSPC’s counsel provided a response on January 31, 2022 (“Response”), attaching the affidavit of its Executive Director. The DSPC acknowledges that the agenda improperly noticed the start time of the meeting and failed to provide notice of the executive session, including the purpose of this session. Notwithstanding the early start, the DSPC maintains it did take a vote before entering executive session, but the DSPC admits that its actions resulted in “the practical effect of precluding the public’s attendance at the opening of the public meeting and the vote into executive session.”² The DSPC asserts that its executive session was held for a proper purpose under 29 Del. C. § 10004(b)(6): to discuss the contents of a document excluded from disclosure pursuant to 29 Del. C. § 10002(o)(2) which exempts “trade secrets and commercial or financial information obtained from a person which is of a privileged and confidential nature.”³ The DSPC’s Executive Director attested that the discussions in executive session were limited to discussing “matters relating to the contents of documents that are financial or commercial information obtained from a person which is of a privileged or confidential nature,” that no vote occurred during the executive session, and that minutes from the executive session were recorded.⁴ As no vote took place during the executive session, the discussion was solely limited to matters properly considered outside of public view, and minutes were recorded, the DSPC argues repeating this executive session would not be appropriate. Finally, the DSPC provided its Executive Director’s sworn testimony that the October 6, 2021 minutes were approved at the January 21, 2022 meeting during the public session.

DISCUSSION

The Petition alleges that the DSPC committed three violations of FOIA: 1) failing to approve the October 6, 2021 meeting minutes as indicated in the agenda; 2) failing to give proper public notice of its January 21, 2022 executive session, including its purpose for convening this session; and 3) failing to take a vote to enter this executive session in public session. The burden of proof is on the public body regarding any failure to comply with the FOIA statute.⁵ A sworn

¹ Petition.

² Response, p. 5.

³ *Id.*, p. 3-4.

⁴ *Id.*, Affidavit of Executive Director Eugene Bailey.

⁵ 29 Del. C. § 10005(c).

affidavit may be required to meet that burden.⁶ As a preliminary matter, the DSPC’s sworn statement that its October 6, 2021 meeting minutes were approved at the public meeting satisfies DSPC’s burden of proof to overcome the allegation that DSPC failed to address this item.⁷ As discussed below, we find that the DSPC failed to meet its burden to demonstrate that it complied with FOIA with respect to the two remaining claims.

FOIA mandates that a public body provide public notice of its intent to hold an executive session in its agenda, including the purpose for the executive session.⁸ To enter an executive session, a majority of the present members of the public body must vote in a meeting open to the public in favor of entering executive session.⁹ In this case, the Board admits it failed to provide any public notice of its executive session on its January 21, 2022 meeting agenda. In addition, although the DSPC’s counsel asserts that the Board took a vote before its executive session about an hour before the posted public meeting time, this vote does not satisfy FOIA’s requirement that the Board vote to enter executive session in a meeting “open to the public,” as the Board provided no public notice to allow the public the opportunity to attend this session. Thus, the Board also failed to take the required vote in a meeting “open to the public” before entering executive session.¹⁰ Accordingly, we determine that the DSPC violated FOIA by failing to provide proper public notice of its executive session and failing to vote to enter this executive session in a meeting open to the public and recommend that the Board repeat this executive session in compliance with FOIA.

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 2021 WL 5816692, at *12 (Del. Dec. 6, 2021).

⁷ Response, Affidavit of Executive Director Eugene Bailey.

⁸ 29 *Del. C.* §§ 10002(a), 10004(c).

⁹ 29 *Del. C.* § 10004(c) (“A public body may hold an executive session closed to the public upon affirmative vote of a majority of members present at a meeting of the public body. The vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public, and the results of the vote shall be made public and shall be recorded in the minutes.”).

¹⁰ *Id.*; see also *Del. Op. Att’y Gen.* 17-IB27, 2017 WL 3426267, at *3 (July 18, 2017) (“Notwithstanding the foregoing, the record demonstrates that the Council appears to have treated the meeting as a stand-alone executive session, which FOIA does not permit.”); *Del. Op. Att’y Gen.* 02-IB33, 2002 WL 34158592, at *3 (Dec. 23, 2002) (“FOIA does not permit a ‘stand alone’ executive session.”).

CONCLUSION

For the reasons set forth above, we conclude that the DSPC violated FOIA by failing to provide proper public notice of its executive session held on January 21, 2022 and to take the requisite vote of its members in a meeting open to the public before entering the executive session.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

Aaron R. Goldstein
State Solicitor

cc: Katherine Betterly, Legal Counsel to Diamond State Port Corporation