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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB04

March 3, 2022

VIA EMAIL

Jayshree Tailor
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Nancy Fan
nfanmd@gmail.com

Jenn Ruebush
jennruebush@gmail.com

RE: Two FOIA Petitions Regarding the Charter School of Wilmington, Inc.

Dear Jayshree Tailor, Nancy Fan, and Jenn Ruebush:

We write in response to your communications alleging that the Charter School of Wilmington, Inc. and its Board of Directors (collectively, “the CSW”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). Jayshree Tailor submitted correspondence asserting that the CSW violated FOIA in conducting its December 3, 2021 Advancement Committee meeting (“Advancement Committee Petition”), and approximately a week later, Jayshree Tailor, Nancy Fan, and Jenn Ruebush submitted correspondence alleging that the CSW also violated FOIA in holding its January 20, 2022 Finance Committee meeting (“Finance Committee Petition”) (collectively, “Petitions”). We treat both communications as Petitions for a determination pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur and issue this combined opinion to address both Petitions.

For the reasons set forth below, we find that the CSW violated FOIA and recommend that the CSW, in accordance with FOIA, prepare minutes of the above-referenced meetings to the extent reasonably practicable and make those minutes available for public inspection. In addition, we encourage the appropriate CSW staff to engage in FOIA training.

BACKGROUND

The first Petition alleges that the Advancement Committee, a committee of the Board, held a meeting on December 3, 2021 without providing public notice or meeting minutes. The Petition included a copy of the invitation to the virtual meeting for the “Advancement Team” and alleges that there were three CSW board members in attendance, according to your sources.¹ In further support of the allegations, the Petition also included excerpts from the Board’s website showing that the Board of Directors’ webpage contains a reference to the Advancement Committee noting that the Committee is being restructured, and showing that no updated minutes have been posted to the site since February 2021.

The CSW’s counsel provided a response to the Advancement Committee Petition on February 11, 2022 (“Response”). The CSW admits that the former Advancement Committee, as a Board-created committee, was a public body subject to FOIA but argues that the group that met to discuss advancement issues on December 3, 2021 is not a public body. Consistent with its website’s notation, the CSW asserts that the Board’s Advancement Committee is being restructured, and CSW officials and some former members of the Advancement Committee met to discuss advancement issues in general on December 3, 2021. The CSW argues that this meeting of what it is calling its “Advancement Team” constitutes an administrative staff meeting, which is not subject to FOIA. If the Advancement Committee is reconstituted in the future, the CSW asserts that its activities will be conducted in accordance with FOIA’s open meeting requirements. The CSW also acknowledges that the Advancement Team could be perceived as the Committee and commits to limit the participants in the meetings to avoid an overlap with a quorum of the Committee as previously constituted.

The second Petition alleges that the Board’s Finance Committee met on January 20, 2022 without any public notice or minutes provided. In support of this contention, the Petition included a copy of the meeting invitation, excerpts of the CSW webpage showing no Finance Committee meeting information since October 2020 and a reference to the agenda and minutes webpage “showing that a discussion of this meeting took place subsequently at the [January 25, 2022] CSW Board Meeting,” an email with a photograph showing that the lack of public notice has occurred in the past, including an April 22, 2021 meeting with no minutes, an email in which a group of alumni and parents advised the Board about their concerns with no public notice for meetings, and a copy of the letter sent to CSW and Red Clay Consolidated School District by this group outlining their concerns about the lack of public notice.² The petitioners suggest that the lack of notice and minutes may constitute a longstanding pattern by the Committee.

The Board’s counsel provided a response on February 17, 2022 (“Response”). The Board admits that the Finance Committee, as a Board-created committee, is a public body under the meaning of FOIA and that its January 20, 2022 Finance Committee meeting failed to meet the

¹ Advancement Committee Petition.

² Finance Committee Petition.

open meeting requirements of FOIA. However, as no action was taken at this meeting, the Board asserts that no remedial action is necessary. In the future, the Board states that it “will be sure to properly notice Committee meetings and provide minutes of those meetings in compliance with FOIA.”³ Further, CSW commits to provide FOIA training for its staff.

DISCUSSION

The burden of proof is on the public body regarding any failure to comply with the FOIA statute.⁴ A sworn affidavit may be required to meet that burden.⁵ The Advancement Committee Petition questions whether a new group that discusses advancement issues is a public body and whether this group has been meeting outside public view in violation of the open meeting requirements of FOIA. We find that the CSW has not met its burden to demonstrate that this new group is excluded from FOIA’s open meeting requirements.

FOIA mandates that public bodies meet specific requirements related to meetings, including advance notice and the preparation of meeting minutes.⁶ These open meeting requirements only apply to a public body.⁷ To determine if an entity is a “public body,” a two-part analysis is required.⁸ 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, . . . 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 appointed by any body or public official of the State or otherwise empowered by any state governmental entity.”⁹ 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.”¹⁰ The Board’s Response to the Advancement Committee Petition does not provide sufficient evidentiary support to determine that the new group meeting to discuss advancement issues is not a public body. The new group is discussing the same public business as the prior public body, and some of the same

³ Response to Finance Committee Petition.

⁴ 29 *Del. C.* § 10005(c).

⁵ *Judicial Watch, Inc. v. Univ. of Del.*, 2021 WL 5816692, at *12 (Del. Dec. 6, 2021).

⁶ 29 *Del. C.* § 10004.

⁷ *Id.*

⁸ *Del. Op. Att’y Gen.* 18-IB28, 2018 WL 2994706, at *1 (Jun. 1, 2018).

⁹ 29 *Del. C.* § 10002(k).

¹⁰ *Id.*

people are members of both groups. The CSW asserts it was an administrative meeting with staff but provides no further explanation as to how this new group is so significantly different than the previous public body that it should not be considered a public body under the two-part test and subject to FOIA's open meeting requirements. Accordingly, on this record, we are compelled to find that the CSW is in violation of FOIA with respect to its December 3, 2021 meeting.

Regarding the Finance Committee Petition, the Board admits that this committee is a public body and it did not follow open meeting requirements in conducting its January 20, 2022 meeting. As such, we determine that the Board also violated FOIA with respect to this meeting. For these two violations, we recommend that the CSW, in accordance with FOIA, prepare meeting minutes for the two above-referenced meetings from existing notes and materials to the extent reasonably practicable and make them available for public inspection.¹¹ In addition, consistent with the suggestion in the Response, we encourage the appropriate CSW staff to engage in FOIA training.

CONCLUSION

For the reasons set forth above, we conclude that the CSW and its Board violated FOIA by failing to demonstrate that the above-referenced meetings complied with FOIA's open meeting requirements.

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 D. Taylor, Jr., Attorney for the Charter School of Wilmington, Inc. and its Board of Directors

¹¹ See, e.g., *Del. Op. Att'y Gen.* 21-IB16, 2021 WL 3160274, at *2 (July 6, 2021) ("When minutes exist or those meetings have been recorded or otherwise preserved, this Office has recommended that the public body make available the existing minutes or use the existing materials to create minutes compliant with Section 10004(f)"); *Del. Op. Att'y Gen.* 19-IB09, 2019 WL 1511364, at *4 (Feb. 22, 2019).