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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 22-IB19**

**May 16, 2022**

**VIA EMAIL**

William Pickett  
[wpickett@webname.com](mailto:wpickett@webname.com)

**RE: FOIA Petition Regarding the Sussex County Vocational - Technical School District**

Dear Mr. Pickett:

We write in response to your correspondence alleging that the Board of Education of the Sussex County Vocational - Technical School District 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. For the reasons set forth below, we determine that the Board violated FOIA by improperly discussing substitute compensation in executive session.

**BACKGROUND**

On March 9, 2022, the District's Board of Education held a regular Board meeting. The agenda included an executive session for "Personnel recommendations – Hires, Retirements, Resignations, Non-renewals, Reassignments, EPERS, Substitute Compensation."<sup>1</sup> The minutes indicate that an open session item, "Approval of Personnel Action Items," occurred later in the open session of the meeting. Under this item, the minutes list a batch of personnel issues that were approved, including "Substitute Compensation changing effective January 2022. Class 'A'

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<sup>1</sup> Petition.

Substitute from \$116 daily rate to \$179. Class ‘B’ Substitute from \$99 daily rate to \$143. Class ‘C’ Substitute from \$74 daily rate to \$113.”<sup>2</sup>

This Petition followed, alleging that the discussion of substitute compensation in an executive session and voting under a catch-all heading in public session was inappropriate.<sup>3</sup> After returning to open session, you assert that the Board voted with apparently no further discussion about the personnel matters, the details of which were posted in the minutes after the next Board meeting. You claim that these violations were intentional; “[i]n short, the Board both talked about both an improper item secretly and voted to take action on that item secretly without proper notice to the public and without public discussion of the item.”<sup>4</sup> As the substitute compensation is a financial matter with direct bearing on district finances and employment practices, you ask this Office to order immediate remediation and require FOIA training for Board staff.

On April 21, 2022, the Board, through its legal counsel, answered the Petition (“Response”). The Board first references an earlier petition you made prior to this same meeting, alleging that another item, entitled “Legal Matters,” was inappropriately scheduled for executive session. The Board states that it resolved that earlier petition by removing the proposed item from the executive session agenda. The Board asserts that it does “not disagree that compensation of substitutes could have been discussed in open session,” but notes that the issue may have been avoided entirely if you had made the Board aware of your complaint regarding executive compensation prior to the meeting at the same time as your earlier petition.<sup>5</sup> In addition, the Board asserts that any FOIA violation was not intentional, as the topic of substitute compensation was stated plainly on the agenda, voting occurred in open session, and the minutes were made public. With regard to your second issue related to the vote, the Board maintains that its use of catch-all voting via a “personnel” or “consent” agenda is appropriate and a common practice among Delaware school districts. The Board contends that voting by catch-all topics such as a personnel agenda is supported by Attorney General precedent, and that operating without a personnel agenda would be unworkable for volunteer school boards, as the Board meetings would last many hours in order to take up each action item individually, rather than in a batch. Finally, to address these issues, the Board offers that it plans to hold FOIA training this summer, and that agendas will be sent to the Board’s counsel for review prior to posting.

## **DISCUSSION**

Subject to certain limited exceptions, FOIA requires the meetings of all public bodies to be open to the public. Although certain topics may be discussed privately in executive session, all

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Response.

voting on any items of public business must take place during open session.<sup>6</sup> When a public body decides to meet in executive session, it carries the burden of proof to justify that this executive session complies with FOIA.<sup>7</sup> In this case, the Board does not dispute that compensation for District substitutes was an inappropriate topic for executive session. As FOIA provides no exception for discussing substitute compensation privately, we agree that the discussion in executive session constitutes a violation of FOIA.<sup>8</sup>

The Petition claims that the Board committed a second violation of FOIA, as the agenda did not give sufficient notice of the vote on the substitute compensation. An agenda for a public meeting must include a “general statement of the major issues” which a public body expects to discuss<sup>9</sup> and must be worded in “plain and comprehensible language.”<sup>10</sup> Delaware courts have opined on the means to determine the sufficiency of an agenda:

In order that the purpose of the agenda requirement be served, it 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]. In other words, members of the public interested in an issue should be able to review a notice and determine that an issue important to them will be under consideration. . . .<sup>11</sup>

However, “the point of the agenda is to put the public on notice, not to answer every question about the agenda item.”<sup>12</sup> Further, “nothing in FOIA, and importantly nothing in a common-sense reading of the statute in light of its purpose, requires public notice to provide every alternative that may take place with respect to a specific subject under consideration.”<sup>13</sup> Here, the

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<sup>6</sup> 29 Del. C. § 10004(c).

<sup>7</sup> 29 Del. C. § 10005(c).

<sup>8</sup> 29 Del. C. § 10004(b).

<sup>9</sup> 29 Del. C. § 10002(a).

<sup>10</sup> *Chem. Indus. Council of Del. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*8 (Del. Ch. May 19, 1994).

<sup>11</sup> *Lechliter v. Del. Dep’t of Natural Res. & Env’t Control*, 2017 WL 2687690, at \*2 (Del. Ch. Jun. 22, 2017) (quoting *Ianni v. Dep’t of Elections of New Castle Cty.*, 1986 WL 9610, at \*4 (Del. Ch. Aug. 29, 1986)).

<sup>12</sup> *Del. Op. Att’y Gen.* 10-IB12, 2010 WL 4154564, at \*1 (Sept. 28, 2010).

<sup>13</sup> *Lechliter v. Becker*, 2017 WL 117596, at \*2 (Del. Ch. Jan. 12, 2017) (finding that an agenda stating that the City would “present and consider” an item was sufficient public notice that a vote would take place).

Board's agenda indicated that under the topic of "Personnel recommendations" a number of specific items, including "Substitute Compensation," would be considered in the executive session, and "Approval of Personnel Action Items" was planned later in the agenda. We believe that this agenda constitutes adequate notice to the public that substitute compensation was anticipated to be an item under consideration at the meeting, and the agenda gave those citizens with an intense interest in substitute compensation sufficient notice to attend the meeting. Accordingly, we find no violation in this regard.

Having found that the Board violated FOIA by improperly discussing substitute compensation in executive session, we must determine whether it is appropriate to recommend any remedial steps. The authority to invalidate a public body's action or impose other relief is reserved for the courts, and the courts have emphasized that the "remedy of invalidation is a serious sanction and ought not to be employed unless substantial public rights have been affected and the circumstances permit the crafting of a specific remedy that protects other legitimate public interests."<sup>14</sup> In determining whether invalidation is appropriate, the court will consider the impact of "adverse consequences upon innocent parties."<sup>15</sup> When a public body violates FOIA by privately discussing a matter that is later voted upon at a public meeting, the court when evaluating a remedy also may consider "whether there was a substantial reconsideration of the challenged decision," the nature of violation, and "whether it was an isolated incident or an ongoing pattern of infractions."<sup>16</sup>

In this case, the Board improperly discussed the topic of substitute compensation privately and then held a vote in public session, possibly without further discussion. This violation was not the first issue with the March 9, 2022 Board meeting brought to this Office's attention. Prior to the March 9, 2022 meeting, the Board proposed to discuss another topic, "Legal Matters," which it presumably conceded was not appropriate under FOIA and struck from the executive session agenda prior to the meeting. Additionally, in Attorney General Opinion No. 19-IB48, the "totality of the factors" warranted a cautionary note to the Board to review its use of executive sessions to ensure it was complying with FOIA.<sup>17</sup> While we do not find this record sufficient to determine that a court is likely to invalidate the Board's action on this item, we nonetheless recommend that

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<sup>14</sup> *Ianni*, 1986 WL 9610, at \*7.

<sup>15</sup> *Chem. Indus. Council of Del., Inc.*, 1994 WL 274295, at \*15.

<sup>16</sup> *Levy v. Bd. of Educ. of Cape Henlopen School Dist.*, 1990 WL 154147, at \*7 (Del. Ch. Oct. 1, 1990).

<sup>17</sup> *Del. Op. Att'y Gen. 19-IB48*, 2019 WL 5208244, at \*4 (Sept. 19, 2019) ("Finally, the Petition references concerns with the District's alleged practice of routinely holding executive sessions for typically 45 to 60 minutes at the outset of the Board meetings for purposes such as 'personnel' or 'legal.' The Petition and Reply also raise the specter of whether improper discussions may have occurred in executive session; . . . While we do not determine the accuracy or merits of any of these particular allegations, the totality of these factors warrant a cautionary note to the District suggesting review of its use of executive sessions, in light of their limited scope under FOIA.").

the Board hold a public discussion of substitute compensation to inform the public of the rationale for its vote on the substitute compensation. Further, we recommend the Board undertake the FOIA training as it has indicated it has planned.

**CONCLUSION**

For the foregoing reasons, we conclude that the Board violated FOIA by improperly discussing substitute compensation in executive session.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

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Aaron R. Goldstein  
State Solicitor

cc: James H. McMackin, III, Attorney to Sussex County Vocational-Technical School District