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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 22-IB30

August, 24 2022

VIA EMAIL

India Scott
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RE: FOIA Petition Regarding the Caesar Rodney School District Board of Education

Dear Ms. Scott:

We write in response to your correspondence alleging that the Board of Education of the Caesar Rodney 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 failing to meet its burden to demonstrate that the rescheduled April 12, 2022 meeting was properly noticed. However, we find that the allegations about the public comment period at the July 26, 2022 meeting do not constitute a violation of FOIA.

BACKGROUND

The Petition alleges that violations occurred at the July 26, 2022 and April 12, 2022 Board meetings. At the July 26, 2022 Board meeting, although you emailed the account designated for public comments indicating you wanted to provide public comment virtually at the meeting, you assert that when the Board called for public comments during the meeting, you were not permitted to speak, because the Board was informed that no requests for public comment were submitted. District staff emailed you following the meeting to advise that a technical difficulty precluded them from seeing your email prior to the meeting; they apologized for the error, noting

for future reference that sign in sheets were available at the door and you may sign up to give public comment at future meetings by contacting the District office before 3:00 p.m. on the meeting date.

At the April 12, 2022 meeting, you allege that the posted start time was 7:00 p.m, but the Board changed the time to 6:00 p.m. without sufficiently notifying the public of the change. There was no electronic notice, and nothing posted on the website. You state that when you raised this issue with the District, the staff asserted that the notice of the rescheduled meeting was posted all day on the District office doors.

On August 1, 2022, the Board, through its legal counsel, answered the Petition (“Response”). The District apologized for the inadvertent error that precluded your ability to offer public comment at the July 26, 2022 Board meeting and explained the circumstances resulting in the error that caused your email to be missed. However, as FOIA does not require a public comment period be held, the District argues that no FOIA violation occurred. With respect to the April 12, 2022 Board meeting, the District accepts your factual summary and reiterates that the meeting time changed by an hour and the notice of the revised time was posted on the District office doors but not the website.

DISCUSSION

To allow citizens the opportunity to observe the performance of its public officials and monitor these decisions about public business, FOIA requires that the meetings of public bodies, with limited exceptions, be open to the public, and meeting notices and agendas be timely posted in advance of the meeting in accordance with the statute.¹ A public body has the burden of proof to demonstrate compliance with FOIA.² In certain circumstances, a sworn affidavit may be required to meet that burden.³

The Petition first alleges that the Board violated FOIA by not permitting you to speak during the public comment period of the July 26, 2022 meeting. Although other laws may govern a public comment period, FOIA does not require a public body to hold a public comment period.⁴ Thus, we find no violation of FOIA occurred with respect to the first allegation.

¹ 29 *Del. C.* §§ 10001, 10004.

² 29 *Del. C.* § 10005(c).

³ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁴ *Reeder v. Del. Dep’t of Ins.*, 2006 WL 510067, at *12-13 (Del. Ch. Feb. 24, 2006) (determining that FOIA does not require a public body to hold a public comment period, but “[t]his is not to say that there are not bodies of law that courts can and must apply to make sure that public bodies discharge their legal responsibilities in a non-arbitrary and public-regarding manner.”).

The Petition's second allegation is that the Board failed to provide proper notice of its rescheduled meeting on April 12, 2022. The Board acknowledges that the meeting notice with the time change was posted on its District office doors all day on the day of the meeting. A rescheduled or special meeting is defined as "one to be held less than 7 days after the scheduling decision is made."⁵ For a rescheduled meeting, FOIA requires that the Board give public notice "as soon as reasonably possible, but in any event no later than 24 hours before such meeting."⁶ In addition, the notice must explain why public notice of the rescheduled meeting could not be given seven days in advance.⁷ The Board has not presented any evidence that it met these requirements. Accordingly, we find that the Board violated FOIA by failing to demonstrate that it posted proper notice of its rescheduled meeting.

Having found that the Board violated FOIA, we must determine whether it is appropriate to recommend any remediation. 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."⁸ In this case, the Board did not give proper notice of its earlier start time, meaning that citizens wishing to attend the first hour of the meeting may not have received notice of the rescheduled meeting. This factual record does not specifically delineate the issues discussed prior to the properly-noticed 7:00 p.m. start time. While we do not find this record sufficient to determine that a court is likely to invalidate the Board's action on any items, we recommend that the Board revisit in a future Board meeting the items of public business that it publicly discussed or took action upon prior to the properly-noticed time of 7:00 p.m.

⁵ 29 *Del. C.* § 10004(e)(4).

⁶ *Id.*

⁷ *Id.*

⁸ *Ianni v. Dep't of Elections for New Castle Cnty.*, 1986 WL 9610, at *7 (Aug. 29, 1986).

CONCLUSION

For the foregoing reasons, we conclude that the Board violated FOIA by failing to meet its burden to demonstrate that the rescheduled April 12, 2022 meeting was properly noticed. However, we find that the allegations about the public comment period at the July 26, 2022 meeting do not constitute a violation of FOIA.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
Deputy State Solicitor

cc: James H. McMackin, III, Attorney to Caesar Rodney School District