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## OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

### Attorney General Opinion No. 22-IB44

November 28, 2022

#### VIA EMAIL

Henry Clampitt  
[henry.clampitt@verizon.net](mailto:henry.clampitt@verizon.net)

**RE: FOIA Petition Regarding the Red Clay Consolidated School District Board of Education**

Dear Mr. Clampitt:

We write in response to your correspondence alleging that the Board of Education of the Red Clay Consolidated 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 did not violate FOIA by allowing Board Member Victor James Leonard, Sr., a member of the Board who was elected but unsworn at the time, to observe two executive sessions on July 11 and 13, 2022.

#### BACKGROUND

The Board held two executive sessions: one on July 11, 2022 and one on July 13, 2022 to discuss legal and personnel matters. Board Member Victor James Leonard, Sr. was elected to the Board on May 10, 2022, and his term began on July 1, 2022. Board Member Leonard was sworn in approximately an hour after the July 13, 2022 executive session. Despite the fact that he was not sworn in yet, he attended both executive sessions on July 11 and 13, 2022.

This Petition followed, alleging that the Board violated FOIA by allowing Board Member Leonard to observe these executive sessions. You argue that attendance at executive sessions is limited to public body members, although legal counsel and staff with germane knowledge of the

legal matters under discussion are also permitted to attend. You do not believe that Board Member Leonard should have been permitted to attend the executive sessions.

On November 2, 2022, the Board, through its legal counsel, answered the Petition (“Response”) and provided the affidavit of the District Superintendent in support of its Response. The Board acknowledges that Board Member Leonard was elected, but not sworn in, at the time of the executive sessions on July 11 and 13, 2022. The District Superintendent attests that Board Member Leonard’s term began on July 1, 2022 after the incumbent’s term expired on June 30, 2022 and that Board Member Leonard was sworn in at the first public Board meeting following his election to the Board and the expiration of the incumbent’s term.<sup>1</sup> Although Board Member Leonard had not yet undertaken his official duties, as he was not statutorily permitted to do so until after his swearing in, the Board asserts that he attended the sessions to ensure that he was informed of the pending issues of legal significance to the Board. Under these specific circumstances, the Board contends that Board Member Leonard should be treated as a board member at the time of these executive sessions. The Board argues that no votes occurred during these sessions, and even if a violation is found, it is a technical violation for which no remediation is necessary.

## DISCUSSION

Subject to certain limited exceptions, FOIA requires the meetings of all public bodies to be open to the public.<sup>2</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>3</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>4</sup>

Executive sessions, by their nature, are private and therefore closed to the public. In past Attorney General Opinions, this Office has found that inviting select members of the public as observers is not permissible.<sup>5</sup> As the interests of non-member observers are indistinguishable from those of any other member of the public, “their admission to the exclusion of others transforms the so-called executive session into a meeting that must be open to all of the public.”<sup>6</sup> However, a

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<sup>1</sup> The Response also cites to the Delaware statute setting Board member terms. Response, p. 2 (citing 14 *Del. C.* 1052(d)).

<sup>2</sup> 29 *Del. C.* § 10004.

<sup>3</sup> 29 *Del. C.* § 10005(c).

<sup>4</sup> *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

<sup>5</sup> See, e.g., *Del. Op. Atty. Gen.* 13-IB01, 2013 WL 2477025, n. 15 (Mar. 26, 2013); *Del. Op. Att’y Gen.* 02-IB17, 2002 WL 31031224, at \*10 (Aug. 6, 2002).

<sup>6</sup> *Del. Op. Att’y Gen.* 02-IB17, 2002 WL 31031224, at \*10.

public body may “invite individuals to attend an executive session to provide information related to the subject matter for which the executive session is authorized.”<sup>7</sup>

In this case, Board Member Leonard was an elected member at the time of the executive sessions. Board Member Leonard’s interest in the executive sessions, as an elected member, is distinguishable from the interests of other members of the public. His admission due to his unique status as an elected member, to the exclusion of others, did not transform the executive sessions into meetings that must be open to the public.<sup>8</sup> As such, we find that in these circumstances, the Board did not violate FOIA by permitting Board Member Leonard to attend the July 11 and 13, 2022 executive sessions.<sup>9</sup>

### **CONCLUSION**

For the foregoing reasons, we conclude that the Board did not violate FOIA by permitting Board Member Leonard, a member of the Board who was elected but unsworn at the time, to observe two executive sessions on July 11 and 13, 2022.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: Lauren E.M. Russell, Attorney for Red Clay Consolidated School District Board of Education

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<sup>7</sup> *Id.*

<sup>8</sup> This decision does not create an exception for any other invitees to an executive session. Board Member Leonard’s status as an elected Board member is determinative in this case.

<sup>9</sup> Any issue regarding Board Member Leonard’s duties or authority under any other Delaware statute is outside the scope of this Office’s jurisdiction. 29 *Del. C.* § 10005(e).