



KATHLEEN JENNINGS  
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
CRIMINAL DIVISION (302) 577-8500  
DIVISION CIVIL RIGHTS & PUBLIC TRUST (302) 577-5400  
FAMILY DIVISION (302) 577-8400  
FRAUD DIVISION (302) 577-8600  
FAX (302) 577-2610

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

**Attorney General Opinion No. 23-IB01**

**January 9, 2023**

**VIA EMAIL**

Mike Lang  
[Mikelang.302@gmail.com](mailto:Mikelang.302@gmail.com)

**RE: FOIA Petition Regarding the Delaware Interscholastic Athletic Association Board of Directors**

Dear Mr. Lang:

We write regarding your correspondence alleging that the Board of Directors of the Delaware Interscholastic Athletic Association (“DIAA”) violated the Delaware 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 find that in these circumstances, the Board did not violate FOIA at its November 10, 2022 meeting.

**BACKGROUND**

On November 10, 2022, the DIAA Board conducted an executive session for a “DIAA Personnel Matter.” After returning to open session, the Petition alleges that a Board member called for a vote on “that thing we discussed in executive session.”<sup>1</sup> Minutes of the meeting indicate that the motion was “to take administrative action as discussed in executive session.”<sup>2</sup> The motion carried unanimously. You believe that the public has a right to know what public bodies are voting on, even when the action results from an executive session. In the Petition, you argue that the vote

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<sup>1</sup> Petition.

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

should be declared invalid, as there is no language giving “any indication of what the vote was about.”<sup>3</sup>

The DIAA’s Board, through counsel, responded to the Petition (“Response”) and included an affidavit from the Chair of the Board. The Chair attests that DIAA has three employees, and the Board discussed the name, competencies, and abilities of one of the three employees in this executive session. The employee did not request a public discussion of the matter. The Chair also attests that the “Board did not specify the action in an effort to protect the employee’s privacy.”<sup>4</sup>

## DISCUSSION

FOIA mandates that the meetings of public bodies, with limited exceptions, be open to the public.<sup>5</sup> Although discussions of certain authorized matters are permitted in executive session, “all voting on public business must take place at a public meeting and the results of the vote made public.”<sup>6</sup> Executive sessions are allowed for “[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open.”<sup>7</sup> The personnel exception for an executive session “was intended to protect the personal privacy of individual employees, and applies only when the discussion reflects on an individual’s ‘competence or ability.’”<sup>8</sup> “This exception reflects the balance between the public interest in open discussion of governmental matters and the rights of employees to have their work performance considered in private.”<sup>9</sup> This Office has decided that “the import of the statute’s language that ‘all voting on public business must take place at a public meeting and the results of the vote made public’ is that the public should be able to discern how and when a matter is decided.”<sup>10</sup> However, in the context of the personnel exception, any interest in public disclosure must be balanced against employees’ rights to have their job performance considered in private.

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

<sup>4</sup> Response.

<sup>5</sup> 29 *Del. C.* § 10004(a).

<sup>6</sup> 29 *Del. C.* § 10004(c).

<sup>7</sup> 29 *Del. C.* § 10004(b)(9).

<sup>8</sup> *Del. Op. Att’y Gen.* 98-IB05, 1998 WL 648714, at \*2 (July 6, 1998).

<sup>9</sup> *Del. Op. Att’y Gen.* 22-IB27, 2022 WL 4263282, at \*2 (Aug. 19, 2022) (citing *Del. Op. Att’y Gen.* 02-IB12, 2002 WL 1282812, at \*2 (May 21, 2002)).

<sup>10</sup> *Del. Op. Att’y Gen.* 15-IB11, 2015 WL 9406788, at \*2 (Dec. 11, 2015).

The Petition alleges that the motion to take administrative action on a personnel matter discussed in the preceding executive session did not adequately describe the topic subject to vote. The Chair attests that the personnel matter involved a discussion of the competencies and abilities of one of the DIAA's three employees. As a result of the Board's discussions in executive session, it decided to take administrative action on this matter involving this employee; the Chair attests that the Board's lack of specificity in the motion was to protect the privacy of the employee. Citizens can discern from the meeting agenda and minutes that a personnel action was discussed at this meeting and the Board took action, but a small employee pool creates a heightened risk of exposing this employee's private personnel matters to the public. Based on these specific circumstances, we find that the Board did not violate FOIA by failing to describe the personnel action with more specificity.

### **CONCLUSION**

For the foregoing reasons, we determine that in these circumstances, the DIAA Board did not violate FOIA at its November 10, 2022 meeting by failing to describe more specifically the personnel matter subject to vote.

Very truly yours,

/s/ Alexander S. Mackler

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Alexander S. Mackler  
Chief Deputy Attorney General

cc: Laura B. Makransky, Deputy Attorney General  
Dorey L. Cole, Deputy Attorney General