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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB08

February 9, 2023

VIA EMAIL

Randall Chase
rchase@ap.org

RE: FOIA Petition Regarding the State of Delaware Board of Elections

Dear Mr. Chase:

We write regarding your correspondence alleging that the State of Delaware Board of Elections 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 the Board did not violate FOIA by allowing the public to access the January 9, 2023 meeting through audio means only.

BACKGROUND

The Board consists of eleven members, including the State Election Commissioner, who serves as an ex officio member and only votes in the event of a tie.¹ The Board held a fully virtual public meeting on January 9, 2023. Following the meeting, you filed this Petition, alleging that the Board violated FOIA by allowing board members to have visual and audio access to the meeting but limiting the public to audio access.² You state that the public was unable to see the

¹ Response, p. 2.

² The Petition also alleged that the Board violated FOIA by failing to provide an anchor location for the January 9, 2023 meeting. We determined that the Board did not violate FOIA, because at the time of this meeting, the Governor had extended the *Declaration of a Public Health Emergency for the State of Delaware*. See *Del. Op. Att’y Gen.* 22-IB25, 2022 WL 3373425, at *3 (July 20, 2022) (“[T]his Office has previously found that the Governor’s March 1, 2022 public

members or the documents or screens the members were sharing. You argue that Section 10006A(c)(4) requires the public body to provide the same means of accessing the meeting to the members and the public.

The Board, through its counsel, responded to the Petition (“Response”), attaching the affidavit of the Community Relations Officer, who also serves as the FOIA coordinator for the Delaware Department of Elections. The Community Relations Officer monitored the January 9, 2023 meeting, and she explains under oath that both the Board members and the public were invited to participate in the meeting by audio through Microsoft Teams; the Response included a copy of the meeting notice and agenda together with the email to the members stating “the meeting will be conducted exclusively by phone.”³ She attests that all members and the public attended the meeting by telephone; the sole exception was the Commissioner who selected the option for video access available to him as a State employee on his Microsoft Teams invitation. Thus, the Board members were not able to view each other or share screens or documents amongst themselves during the meeting. Even if the meeting was conducted with audio access for the public and videoconferencing for the Board, the Board argues that this would still comply with FOIA, as it is not prohibited from conducting a virtual meeting in this format. The Board contends that FOIA merely requires that the public be permitted to monitor the public meeting through an electronic means of communication, and both telephone and videoconferencing satisfy FOIA’s definition of “electronic” access. The Board maintains that your reliance on Section 10006A(c)(4), requiring that members and witnesses be able to hear or see and hear the recognized member or witness, is misplaced. Section 10006A(c)(4) allows audio or videoconferencing access for members and witnesses, and the Board points out that the public is neither a witness nor a member. Moreover, the Board contends that FOIA does not guarantee the public’s immediate access to records of the Board used or referenced at a virtual meeting; records are available by request under Section 10003, and in this case, the report under discussion was made available online prior to the meeting for the public’s review.

DISCUSSION

The public body carries the burden of proving compliance with the FOIA statute.⁴ Under certain circumstances, a sworn affidavit may be required to meet that burden.⁵ FOIA mandates that the meetings of public bodies, with limited exceptions, be open to the public⁶ and when certain

health emergency order qualifies as an order establishing a ‘state of emergency’ for purposes of Section 10006A, and under that order, anchor locations are not required for virtual meetings.”); *Del. Op. Att’y Gen. 22-IB10*, 2022 WL 1231750, at *2 (Apr. 14, 2022).

³ Response, Ex. 4.

⁴ 29 *Del. C.* § 10005(c).

⁵ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996, 1010-11 (Del. 2021).

⁶ 29 *Del. C.* § 10004.

requirements are satisfied, permits public bodies to hold a meeting virtually.⁷ Among the requirements, Section 10006A states that the public body must permit the members and witnesses simultaneously to hear or hear and see the member or witness who has been recognized by the presiding officer.⁸ The public is allowed, “through an electronic means of communication,” to “monitor the meeting” and “provide public comment, if the public body is required to accept, or provides an opportunity for, public comment.”⁹ “Electronic” means are defined as “technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities.”¹⁰ “A document used during the meeting by a member or witness, and that is accepted by the presiding officer or chair,” must be made available to the public under Section 10003.

The Board demonstrated, through the Community Relations Officer’s affidavit, that the January 9, 2023 virtual meeting was conducted for Board members and the public by telephone only, even though one member activated his camera. As the Board provided sworn evidence that it met FOIA’s requirement that the public was able to monitor the meeting via an electronic means of communication, we conclude that the Board did not violate FOIA by allowing the public to have audio access only in this meeting.

CONCLUSION

For the foregoing reasons, we determine that the Board did not violate FOIA by allowing the public to access the January 9, 2023 meeting through audio means only.

Very truly yours,

/s/ Alexander S. Mackler

Alexander S. Mackler
Chief Deputy Attorney General

cc: Frank N. Broujos, Deputy Attorney General
Dorey L. Cole, Deputy Attorney General

⁷ 29 *Del. C.* § 10006A.

⁸ 29 *Del. C.* § 10006A(c)(4) (“All participating members and witnesses can simultaneously do [one] of the following regarding each member or witness who is recognized by the presiding officer or chair: a.) hear the comments of each member or witness; b.) hear the comments of and view each member or witness.”).

⁹ 29 *Del. C.* § 10006A(c)(6).

¹⁰ 29 *Del. C.* § 10002(e) (citing 6 *Del. C.* § 12A-102).