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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB12

April 18, 2023

VIA EMAIL

A. Nicole Mezick
anichols999@comcast.net

RE: FOIA Petition Regarding the Delmar School District Board of Education

Dear Ms. Mezick:

We write in response to your correspondence, alleging that the Delmar School District Board of Education violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat this 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. As discussed more fully herein, we determine that the Board violated FOIA by giving insufficient notice on its December 8 and 13, 2022 meeting agendas of the executive sessions and the superintendent matters intended to be addressed in open session at these meetings. However, we find that the Board met its burden to demonstrate that it did not violate FOIA by meeting privately prior to the December 13, 2022 meeting to discuss deactivating the superintendent's access and making changes to the personnel report presented at the December 13, 2022 meeting.

BACKGROUND

At its December 13, 2022 monthly Board meeting, the Board unanimously approved motions to accept the retirement of its superintendent effective July 1, 2023, to place the superintendent on administrative leave until her retirement date, and after convening an intervening executive session, to appoint an interim superintendent.¹ Five days prior to this

¹ Petition, Ex. B.

meeting, the Board held a special meeting, in which the two substantive agenda items were an executive session without a stated reason and “V. Business Items – 1. Monthly Personnel Report.”² This Petition followed.

The Petition alleges that the December 13, 2022 motion placing the superintendent on leave was a “surprise” item and “never publicly presented or discussed.”³ As the Board’s Recording Secretary, you prepared the personnel report before this meeting pursuant to your duties, but you believe a board member amended it prior to the meeting to add placing the superintendent on leave and appointing the selected individual as the interim superintendent. You allege that the Board did not provide proper notice of its intention to make these changes to the superintendent position in the December 8 and 13, 2022 meeting agendas for the open and executive sessions. As the December 8, 2022 special meeting minutes also did not include any mention of the superintendent, you maintain that the public would have no reason to expect that the superintendent would be replaced at the December 13, 2022 meeting. In addition, at the January 17, 2023 Board meeting, you learned that the Board President had asked on the morning of December 13, 2022 for the superintendent’s access to State systems to be deactivated. You state that either the Board members had private discussions about its plans to deactivate the access and change the personnel report before the meeting in violation of FOIA, or the Board President acted unilaterally, which you believe is a violation of her authority as a board member.

The Board’s counsel replied to the Petition on March 28, 2023 (“Response”). The Board acknowledges that its past practice of “scant agenda descriptions” in its meeting agendas do not necessarily align with FOIA, but the issues with the superintendent⁴ arose suddenly, only a few hours before the meeting.⁵ The Board asserts that it could not defer action to a later meeting; Delaware Code requires a notice of nonrenewal be provided to the superintendent by December 30th in the year prior to the contract expiration, and the Board did not have availability before December 30, 2022 to schedule another meeting. The Board states that the December 8, 2022 executive session concerned one or more administrators’ contracts, and the superintendent then announced retirement on the eve of the December 13, 2022 meeting. To cure any potential deficiencies, the Board states that it ratified a “personnel report” with the two items of accepting the superintendent’s retirement and the appointment of an interim superintendent at its March 21, 2023 Board meeting. The Board’s counsel noted that he plans to provide the interim

² *Id.*, Ex. A.

³ *Id.*, at p. 2.

⁴ The Response repeatedly references a “certain administrator.” The Response states that this administrator submitted her retirement on December 12, 2022, was placed on leave, and was replaced with an interim appointee. The Petition and the Board’s December 13, 2022 minutes indicate that the administrator in question must be the superintendent. Although the Response is not entirely clear on this point, we assume that the superintendent is the administrator to which the Response is referring for purposes of this Opinion.

⁵ Response, p. 4.

superintendent, the Board, and the Board Secretary with relevant FOIA training. Regarding the claim alleging a private meeting, the Response included the sworn affidavit of the Board President, who attests that “[p]rior to amending the personnel report for the December 13, 2022 meeting and directing that a certain school employee’s network access be deactivated, I did not have any conversations with fellow Board members about these actions.”⁶

DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.⁷ In certain circumstances, a sworn affidavit may be required to meet that burden.⁸ For the Petition’s first claim, we determine that the December 8 and 13, 2022 meeting agendas for the executive and open sessions failed to give proper notice of the items related to the superintendent position. FOIA requires that the “purpose of . . . executive sessions shall be set forth in the agenda and shall be limited to the purposes listed in subsection (b) of this section.”⁹ Both agendas for the December 8 and 13, 2022 executive sessions merely state “Executive Session” and lack any mention of the purpose of the executive session.¹⁰ Accordingly, we find a violation of FOIA for both the December 8 and 13, 2022 executive session agendas.

Regarding the open sessions of the December 8 and 13, 2022 meetings, an agenda for a public meeting must include a “general statement of the major issues” which a public body expects to discuss¹¹ and must be worded in “plain and comprehensible language.”¹² Delaware courts have opined an agenda “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].”¹³ “In other words, members of the public interested in an issue should be able to review a notice and determine that an issue important

⁶ *Id.*, Affidavit of Board President Farrah Morelli dated Mar. 24, 2023.

⁷ 29 *Del. C.* § 10005(c).

⁸ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁹ 29 *Del. C.* § 10004(c).

¹⁰ Petition, Ex. A, B.

¹¹ 29 *Del. C.* § 10002(a).

¹² *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *8 (Del. Ch. May 19, 1994).

¹³ *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)).

to them will be under consideration.”¹⁴ 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.”¹⁵

In this case, the agendas both referred to personnel “reports” under the section called “Business Items” in open session. The December 8, 2022 agenda refers to the “monthly personnel report,” while the December 13, 2022 agenda includes an item merely identified as “personnel report.”¹⁶ The public could not review these agendas citing to a personnel report and discern that the Board planned to discuss and undertake the significant actions related to the superintendent’s employment.¹⁷ We find that the Board violated FOIA by insufficiently notifying the public in its agenda of the open session items related to the superintendent position at the December 8 and 13, 2023 meetings.¹⁸

The Petition’s second claim is that the Board must have met privately prior to the December 13, 2022 meeting to discuss the superintendent position in relation to the deactivation of the superintendent’s access and the pre-meeting changes to the personnel report for the December 13, 2022 meeting. A meeting under FOIA is “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.”¹⁹

¹⁴ *Id.*

¹⁵ *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).

¹⁶ Petition, Ex. A, B.

¹⁷ *See Del. Op. Att’y Gen.* 21-IB03, 2021 WL 961062, at *3 (Feb. 25, 2021) (“This agenda’s broad descriptors of ‘Personnel’ and ‘Personnel Action Items,’ are not sufficient to alert any citizen with an intense interest in the matter of the renewal of the superintendent’s contract that it would be addressed at the meeting.”); *Del. Op. Att’y Gen.* 15-IB01, 2015 WL 3919060, at *5 (Jun. 12, 2015) (“Here, the public had no way of knowing that the superintendent’s [c]ontract would be considered and voted upon by the Board at its June meeting.”).

¹⁸ We cannot discern from the Response whether any discussion or action about the superintendent occurred at the December 8, 2022 special meeting in open session. The Response indicates, through the unsworn statements of its counsel, that the discussions about certain administrator contracts, presumably including the superintendent’s contract renewal, were not concluded at the December 8, 2022 meeting. This Response does not create a sufficient factual basis to assess whether the Board discussed or undertook action related to the superintendent in open session at the December 8, 2022 meeting. Thus, the Board has not carried its burden of demonstrating with competent evidence whether any such discussion or action took place, and the December 8, 2022 special meeting is included in this violation.

¹⁹ 29 *Del. C.* § 10002(j).

When a petitioner makes a claim of a secret meeting between public body members, the petitioner carries the initial burden of making a *prima facie* case that a meeting occurred.²⁰ “A plaintiff must show substantive proof of a secret meeting rather than mere speculation in order to shift the burden of proof going forward.”²¹ The allegations must be sufficiently specific to allow consideration.²² “Once a plaintiff has made a *prima facie* case that a quorum of a public body has met in private for the purpose of deciding on or deliberating toward a decision on any matter,” the burden then shifts to the public body to prove that no violation of the open meeting requirements occurred.²³ This burden-shifting occurs to avoid requiring a public body from having to “prove a negative,” *i.e.*, prove that a meeting did not occur.²⁴ In this case, although the Petition has offered a basis to suspect that the Board may have met privately in violation of FOIA, the Board President attests that she did not have any conversations with other board members regarding the deactivation of the access or amending the personnel report prior to undertaking those actions. Accordingly, we find that the Board did not violate FOIA by holding these discussions outside a duly noticed public meeting.

Having found that the Board violated FOIA by failing to provide adequate notice of its executive and open session items related to the superintendent position, we must determine whether any remediation is appropriate to recommend. The authority to invalidate a public body’s action or impose other relief is reserved for the courts. The Delaware Court of Chancery stated 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.”²⁵ In determining whether invalidation is appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”²⁶ When a decision is reached primarily outside of public view, that factor is also weighed heavily in

²⁰ *Del. Op. Att’y Gen.* 17-IB20, 2017 WL 3426260, at *7 (July 12, 2017).

²¹ *Del. Op. Att’y Gen.* 05-IB10, 2005 WL 1209240, at *2 (Apr. 11, 2005) (citing *Gavin v. City of Cascade*, 500 N.W.2d 729, 732 (Iowa App. 1993)).

²² *See Del. Op. Att’y Gen.* 16-IB18, 2016 WL 5888777, at *5 (Sept. 29, 2016) (finding that the petitioner did not sufficiently support its *prima facie* case: “without specific information regarding specific dates, the number of Council members present, and the number of Council members to whom you allege the Mayor passed notes during specific meetings, these allegations are too vague to warrant consideration”).

²³ *Del. Op. Att’y Gen.* 05-IB10, 2005 WL 1209240, at *2 (citing *Harris v. Nordquist*, 771 P.2d 637, 641 (Or. App. 1989)).

²⁴ *Id.*

²⁵ *Ianni*, 1986 WL 9610, at *7.

²⁶ *Chem. Indus. Council of Del.*, 1994 WL 274295, at *15.

determining whether remediation is appropriate.²⁷ Selecting superintendents outside of public view has been previously determined to impact substantial public rights.²⁸ The deficiencies in these December meeting agendas means that the public could not discern that the superintendent position would be a topic of action at the meetings, and therefore, interested members of the public could not attend these meetings. The interim superintendent has been in place for several months. As such, we recommend that the Board ratify the votes related to the superintendent in open session at a future Board meeting, after providing appropriate notice of the superintendent items on its agenda. The Board is further cautioned to include the purpose of any executive sessions in its meeting agendas in the future.

CONCLUSION

For the reasons set forth above, we conclude that the Board violated FOIA by giving insufficient notice on its December 8 and 13, 2022 meeting agendas of the executive sessions and the superintendent matters intended to be addressed in open session at these meetings. However, we find that the Board met its burden to demonstrate that it did not violate FOIA by meeting privately prior to the December 13, 2022 meeting to discuss deactivating the superintendent's access and making changes to the personnel report presented at the December 13, 2022 meeting.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

²⁷ *O'Neill v. Town of Middletown*, 2007 WL 2752981, at *9 (Del. Ch. Mar. 29, 2007) (“In *Chemical Industry Council*, the Court concluded that the stern sanction of invalidation was the only appropriate remedy where there were material breaches of FOIA and where invalidation of the regulations would have no adverse consequences on innocent parties. Critical to the Court's conclusion, however, was not simply that illegal executive sessions were held but that the Board had essentially promulgated the regulations outside of public view. Although the regulations were formally approved in the Board's public meeting, they had been formulated, extensively deliberated upon, and agreed to in an executive session immediately preceding the public meeting. That was not the case here.”) (internal citations omitted).

²⁸ *See, e.g., Del. Op. Att’y Gen. 12-IIB13*, 2012 WL 6858971, at *5 (Dec. 21, 2012) (“We believe that the Board's conduct in this case affected substantial public rights. In *Att’y Gen. Op. 02-1B17*, a similar case also involving this Board, we determined that the Board violated substantial public rights ‘by deciding who to hire as the new [District] superintendent outside of public view.’”).

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: James H. McMackin, III, Esq., Counsel to the Delmar School District Board of Education