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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB14

April 21, 2023

VIA EMAIL

Joshua F. Vincent, Esq.
joshvincentvf@gmail.com

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

Dear Mr. Vincent:

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 failing to provide proper notice of its executive session in its March 21, 2023 meeting agenda and by the manner in which the Board reordered its agenda without notice to the attendees in these particular circumstances.

BACKGROUND

The Delmar School District Board of Education held a regular meeting on March 21, 2023. The agenda for this meeting had thirteen sections. The fourth section on the agenda was an "Executive Session" that did not state the purpose of the executive session.¹ Under the ninth section for "Business Items," the first item was "Monthly Personnel Report."²

¹ Petition.

² *Id.*

This Petition alleges that immediately before the conclusion of the March 21, 2023 meeting, the Board entered into executive session without a stated purpose, and after about an hour, re-emerged into open session and held a vote to approve various personnel items without further discussion of the items or indication as to what those items were. An executive session, without a stated purpose, appeared earlier in the posted agenda, but when the Board reached that executive session, the Board did not hold an executive session. Instead, the Petition asserts after the Board President delivered her closing address, the Board voted to move into executive session, without explanation. Following the executive session, the Board went back into open session and voted on personnel items in a batch. The Petition alleges that the actions of the Board violated the spirit and letter of FOIA.

The Board's counsel replied to the Petition on April 3, 2023 on behalf of the Board ("Response"). The Board acknowledges that the agenda did not provide a purpose for the executive session, and the Board's counsel states that he intends to provide additional FOIA training to the Board. In addition, the Board argues that its use of a personnel report, or a similar type of consent agenda, to handle all personnel matters, involving those from rank-and-file employees to the superintendent, is appropriate. The Response further provides that the executive session involved the discussion of personnel items and the vote "simply ratified actions taken previously at the December 13, 2022 Board meeting to cure issues arising in" a different FOIA petition,³ which resulted in the recent Attorney General Opinion No. 23-IB12. The Board argues that FOIA does not require the discussion of executive session items in open session, as that would defeat the purpose of the executive session. The Board contends that its actions at the meeting did not deprive the public of notice or the ability to participate and observe the process. The Board maintains that nothing in FOIA prohibits reordering the agenda, and it did not result in the public being misled or prevent any interested person from attending the meeting.

DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.⁴ In certain circumstances, a sworn affidavit may be required to meet that burden.⁵ The Petition provides the basis for three claims: 1) the executive session for the March 21, 2023 meeting was not appropriately noticed; 2) the agenda items were considered out of order in violation of FOIA; and 3) the vote on the personnel items was improper under FOIA because it did not identify the specific items that were subject to the vote. We consider each issue in turn.

For the Petition's first claim, we agree that the March 21, 2023 meeting agenda for the executive session did not comply with FOIA, because the agenda failed to state the purpose of the executive session. FOIA requires that the "purpose of such executive sessions . . . be set forth in

³ Response, p. 4.

⁴ 29 *Del. C.* § 10005(c).

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

the agenda and . . . be limited to the purposes listed in subsection (b) of this section.”⁶ The agenda merely states “Executive Session.”⁷ Accordingly, we find the Board violated FOIA by failing to state the purpose of the executive session in the March 21, 2023 meeting agenda.

With regard to the second issue, the Board listed an executive session early on its agenda, but instead of voting on a reordered agenda or announcing any changes to the order in which the Board was going to discuss items on the agenda, the Board voted to approve the agenda, without amendment or any other comments, at the outset of the meeting.⁸ When the Board reached the executive session item, the Board skipped to the next agenda item without explaining it was reordering the agenda.⁹ When the Board reached the item for the “monthly personnel report,” the Board member simply read the name of the item but said nothing else, moving to the next item on the agenda.¹⁰ At the end of the regular business items on the agenda, the Board President gave comments that meeting attendees may have interpreted as meeting closing remarks and then voted to enter executive session, without indicating that the vote on the monthly personnel report would occur after this executive session.¹¹ Over an hour later, the Board returned to open session and voted on the personnel report.¹² “FOIA does not require that the items addressed by a public body in a meeting be discussed in the order in which they are listed in the agenda.”¹³ However, when a public body reorders its agenda, it may not do so in such a way that results in impeding Delaware citizens’ “opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy.”¹⁴ In these specific circumstances, we find that the Board’s actions, coupled with its lack of communication about these changes to the agenda, failed to give the members of the public attending this meeting notice of the opportunity to observe this vote on the personnel report.

⁶ 29 *Del. C.* § 10004(c).

⁷ Petition.

⁸ “Mar. 21, 2023 Board Meeting Audio Recording,” https://delmar.k12.de.us/Recordings/Recordings_2022-2023/DBOE%203_21_23%20Reg_%20Session.mp3 (last visited Apr. 13, 2023).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Del. Op. Att’y Gen.* 03-IB20, 2003 WL 22669565, *1 (Sept. 3, 2003).

¹⁴ 29 *Del. C.* § 10001.

For third claim, you object to the fact that the personnel items, which were the same items regarding the superintendent addressed at the December 13, 2022 meeting¹⁵ and were the subject of the Attorney General Opinion No. 23-IB12, were not addressed individually at the time of the vote. In Attorney General Opinion No. 23-IB12, it was determined that the Board violated FOIA by giving insufficient notice on its December 8 and 13, 2022 meeting agendas of the matters intended to be addressed in open session at these meetings and recommended ratification of the votes at a future meeting. As this Office has already found a violation with respect to providing notice to the public of the superintendent items and recommended ratification of those votes, we need not revisit this claim.

Having found that the Board violated FOIA by failing to provide adequate notice of its executive session and by reordering its agenda without notice to the attendees that an item of particular public interest, a personnel matter involving the superintendent, would be voted on after an hour-long executive session that was held after general remarks by the Board President, we must determine whether any remediation is appropriate to recommend. As noted above, the items considered in this executive session and the vote are the same items for which remediation was recommended in the Attorney General Opinion No. 23-IB12. Accordingly, we reiterate this same recommendation 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. In addition, the Board is again 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 failing to provide proper notice of its executive session in its March 21, 2023 meeting agenda and by the manner in which the Board reordered its agenda without notice to the attendees in these particular circumstances.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

¹⁵ Response, p. 4.

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