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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB18

June 26, 2023

VIA EMAIL

Randall Chase
rchase@ap.org

RE: FOIA Petition Regarding the Diamond State Port Corporation

Dear Mr. Chase:

We write in response to your correspondence alleging that the Diamond State Port Corporation (“DSPC”) 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 DSPC violated FOIA by failing to meet its burden of demonstrating its executive session attendees were appropriate. In addition, we conclude no violation of FOIA occurred in relation to the Petition’s allegations about the May 22, 2023 executive session agenda.

BACKGROUND

The DSPC held a Board of Directors meeting on May 22, 2023. The original agenda indicated an executive session and listed “strategy sessions involving legal advice” and “the content of documents excluded from the definition of ‘public record,’” in addition to several other grounds. Before the meeting, you filed a petition, alleging that the listing of alternative grounds on the executive session agenda was improper under FOIA. Upon receipt of your initial petition on the day of the meeting, the DSPC revised its agenda to narrow “the list of topics to those that were, at the time the revised agenda was posted, intended to be discussed while in executive

session.”¹ The two remaining purposes on the May 22, 2023 agenda were “strategy sessions involving legal advice or the content of documents excluded from the definition of ‘public record’ in § 10002 of Title 29.” The initial petition was dismissed, and this Petition followed.

This Petition alleges that because the initial petition was received so close to the meeting, the DSPC could not have posted the revised agenda within six hours of the meeting as required; that the agenda failed to include a reason for the posting delay; and that the DSPC did not demonstrate that the issues came up unexpectedly and could not be deferred. You contend that the grounds for the executive session agenda are not sufficiently specific, as the DSPC listed two possible reasons for the executive session. Executive sessions are closed to the public, except for nonmembers who are necessary for the discussions. However, you believe that the DSPC may have improperly permitted nonmembers to attend the executive session.

On June 1, 2023, the DSPC’s counsel replied to the Petition on the DSPC’s behalf (“Response”). The DSPC cites to Section 10004(e)(3) which provides that an agenda is subject to change, to include the addition of items that arise at the time of the meeting and the deletion of items, including executive sessions. The DSPC provided an affidavit of its Executive Director attesting that when the agenda was prepared, and when the agenda was subsequently revised, those topics were intended to be discussed. The affidavit also identifies all the attendees of the executive session, including Board members and certain nonmembers. The Board’s counsel states that all the attendees were either a Board member or an advisor or other individual invited to provide subject matter expertise relating to the subject for which the executive session was authorized.

DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.² In certain circumstances, a sworn affidavit may be required to meet that burden.³ FOIA requires the meetings of public bodies, with certain delineated exceptions, to be open to the public.⁴ “FOIA contemplates that a closed session must be the exception, not the rule, for how a public body conducts its public business.”⁵ FOIA mandates that an agenda include a general statement of “the major issues expected to be discussed at a public meeting” and a “statement of intent to hold an executive session and the specific ground or grounds” for the session.⁶ In addition, FOIA requires

¹ Response, Ex. 2.

² 29 Del. C. § 10005(c).

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

⁴ 29 Del. C. § 10004.

⁵ *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *10 (Del. Ch. May 19, 1994).

⁶ 29 Del. C. § 10002(a).

a public body to post a notice and agenda at least seven days prior to a regular meeting but if an agenda is not available at the time of posting, a public body may post an agenda up to six hours prior to a meeting, provided that the reason for the delay is set forth briefly in the agenda.⁷ “[T]his exception does not authorize a public body to amend the agenda prior to a meeting for any reason, but rather applies to add[ing] ‘items that come up suddenly and cannot be deferred to a later meeting.’”⁸ However, FOIA expressly states that the deletion of items, including executive sessions, is permitted.⁹

In this case, the DSPC deleted several topics from the originally-posted executive session agenda on the day of the meeting, but two items remained: “strategy sessions involving legal advice or the content of documents excluded from the definition of ‘public record.’” To meet its burden, the DSPC provided sworn testimony that its intent at the time of the original agenda was to discuss the longer list of items, and when the DSPC narrowed the list of bases for its executive session, it did so to reflect the items intended for discussion. As the DSPC is allowed under FOIA to delete items from its agenda, we determine that the DSPC did not violate FOIA by deleting the several topics originally intended for its executive session.

Although we find, based on the sworn statements, that the Board did not violate FOIA in this instance, we wish to give a cautionary note against a practice of citing grounds for an executive session without the actual intent to discuss those items at the meeting and deleting the unnecessary items closer to or at the meeting.¹⁰ An agenda must include the items that the public body intends

⁷ 29 *Del. C.* § 10004(e)(3).

⁸ *Del. Op. Att’y Gen.* 05-IB15, 2005 WL 2334344, at *2 (Jun. 20, 2005) (citation omitted).

⁹ 29 *Del. C.* § 10004(e) (“Changes to an agenda may include . . . [t]he deletion of items, including an executive session.”); *Del. Op. Atty. Gen.* 11-IIB11, 2011 WL 4062222, at *3 (Aug. 17, 2011) (“FOIA expressly provides that a public body may remove items from an agenda. 29 *Del. C.* § 10004(e)(2). FOIA does not require that the Town offer a reason, let alone a ‘compelling reason,’ for removing an agenda item.”).

¹⁰ The use of “catchall” language is not appropriate in an executive session agenda. *Chem. Indus. Council of Del., Inc.*, 1994 WL 274295, at *10 (“A recital of several potential grounds for holding an executive session, concluding with a catch-all category such as ‘any other purpose provided by law,’ may have gratified a lawyer’s instinct to ‘cover all bases.’ However, that approach did not satisfy the spirit or the letter of FOIA’s mandate in § 10002(f), that the notice disclose to the public the ‘specific ground or grounds’ for holding an executive session.”). Based on the DSPC’s sworn representations that the DSPC revised executive session agenda to reflect its intent to discuss items under those purposes and that the discussions that day were “limited to topics relating to the grounds described in the published agenda,” we do not believe that executive session grounds here were a “catchall” category. Response, Ex. 2; see *O’Neill v. Town of Middletown*, 2007 WL 1114019, at *7 (Del. Ch. Mar. 29, 2007) (finding that “Legal Issues” and “Legal & Personnel Issues” were adequate notice on an executive session agenda); *Del. Op. Atty. Gen.* 18-IB09, 2018 WL 1405825, n. 8 (Feb. 12, 2018) (noting “we see no evidence here to suggest that the Town’s use of multiple bases for executive session for its February 9, 2018 meeting was

to discuss in private.¹¹ Including items that are not actually intended for discussion would be a violation of the spirit and letter of FOIA.

With respect to the executive session attendees, FOIA allows, for certain defined purposes, public bodies to “hold an executive session closed to the public.”¹² As executive sessions are private and allowing certain members of the public, to the exclusion of others, to attend would convert the session into an open session, mere observers are not permitted to attend.¹³ Although nonmember observers may not be present, nonmembers who are necessary to conduct the executive session for the authorized purpose(s) may be permitted to attend, such as nonmember staff responsible for taking minutes and nonmembers providing information related to the subject matter authorized for discussion in the executive session.¹⁴

In this case, the DSPC’s Executive Director identifies the nonmembers who attended the executive session, but the DSPC did not provide statements under oath specifying why those nonmembers attended. As such, we find that the DSPC has not met its burden of proof and find the DSPC violated FOIA by permitting nonmembers to attend the executive session. As remediation, we recommend that the DSPC ensure that its Board procedures reflect that only nonmembers necessary to conduct the executive session for the authorized purpose(s) be permitted to attend future executive sessions.¹⁵

used in such a catchall manner,” when the public body listed three purposes for an executive without a conjunction).

¹¹ 29 *Del. C.* § 10002(a).

¹² 29 *Del. C.* § 10004(b).

¹³ See *Del. Op. Att’y Gen.* 02-IB17, 2002 WL 31031224, at *10 (Aug. 6, 2002) (“We believe that FOIA allows a public body to invite individuals to attend an executive session to provide information related to the subject matter for which the executive session is authorized. But a public body cannot invite non-members as observers, or to participate in the discussion of matters not authorized for executive session. In such a role, the interests of the nonmember in attendance 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.”).

¹⁴ See *id.*

¹⁵ *Del. Op. Att’y Gen.* 13-IB01, 2013 WL 2477025, n. 15 (Mar. 26, 2013) (“As part of the Board’s remediation efforts, which we recommend below, we urge the Board to visit and assess the propriety of its practice of inviting non-members to attend executive sessions.”).

CONCLUSION

For the reasons set forth above, we do not find a violation regarding the Petition's allegations about the May 22, 2023 executive session agenda. We further find that the DSPC violated FOIA by failing to meet its burden of demonstrating its executive session attendees were appropriate.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Katherine H. Betterly, Counsel to the Diamond State Port Corporation