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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 23-IB28

October 3, 2023

VIA EMAIL

Randall Chase
Associated Press
rchase@ap.org

RE: FOIA Petition Regarding the Indian River School District

Dear Mr. Chase:

We write in response to your correspondence alleging that the Indian River School District 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 District's Board of Education violated FOIA by providing insufficient notice to the public in its June 26, 2023 and August 16, 2023 agendas. However, the Board did not violate FOIA by failing to state verbally the purpose of the executive sessions during its vote to enter the August 16, 2023 executive session.

BACKGROUND

Following an incident at Sussex Central High School, you submitted a FOIA request to the Indian River School District for employment information about several staff members, including suspension dates and leave status. After receiving the District's denial of this records request, you filed a petition with this Office, resulting in Attorney General Opinion No. 23-IB21 issued on July 25, 2023.¹ The Board of Education met on August 16, 2023 and privately discussed "personnel"

¹ The first claim in the Petition related to Attorney General Opinion No. 23-IB21 was not accepted for consideration.

issues during an executive session and voted on a “personnel agenda” and “personnel addendum.” Following this meeting, the District announced that the Board had approved the appointment of an acting principal of the Sussex Central High School during the meeting. This Petition followed.

In the Petition, you argue that at the August 16, 2023 meeting, the Board unconstitutionally restricted free speech by stating it would not hear complaints about the school personnel or others during public session. You assert that the Board failed to state the reason for the executive session when voting to go into executive session. In addition, you state that the Board routinely votes on “personnel agendas” at its meetings that do not give information about the positions or the individuals in question. The Board voted on a personnel agenda at the August 16, 2023 meeting, which included the appointment of the acting high school principal for Sussex Central High School. You also cite to the June 26, 2023 meeting in which a personnel agenda, excluding items numbered 79 and 120, was approved. Those two items were subject to separate votes and certain board members abstained from these votes. You assert that this conduct leaves the public to wonder what items were approved or why the board members abstained, as the public is not provided any information about the items on these personnel agendas. These personnel agendas are not available on the District’s website or explained in another publicly available document. Finally, you allege that the District’s refusal to provide information about staff suspensions is improper under state law and violates the District’s own past practices.

On September 13, 2023, the Board’s counsel replied on its behalf to the Petition (“Response”). The Board states that its August 16, 2023 and June 26, 2023 minutes reflect that the executive session was to “review a personnel agenda and personnel addendum,” and these meeting agendas stated the purpose would be “personnel.”² The Board contends that it was not required by the FOIA statute to make a statement about the reason for entering executive session. The Board also maintains that FOIA does not require the relevant employees to be named in the agenda. Rather, the Board claims that it is common practice for all Delaware school districts to list “personnel” or “personnel matters” for a personnel agenda or a consent agenda. The Board asserts that these agendas do not have specifics but include all employees - from the rank and file staff to the leader - in order to protect employee privacy. The Board concedes the “personnel agendas” are not published and all decisions made with regard to these employees are completely unknown to the public. The Board claims individual votes on employees would result in protracted meetings, and someone receiving a new position or promotion should be given the opportunity to notify others before the announcement. Rather than naming these individuals at the meetings, the Board asserts that citizens may obtain this information through the FOIA process after the meeting, subject to any remaining privacy concerns.

The Board argues that you mischaracterized its statement at the August 16, 2023 meeting regarding public comment; the Board asserts that the statement made at the meeting was that the public may “offer objective criticisms of school operations and programs, but the Board will not hear complaints about school personnel or other persons” and that “other channels provide for [the

² Response, p. 2.

Board’s] consideration of complaints involving those individuals.”³ The Board believes that this statement was appropriate in the circumstances.

DISCUSSION

The Board carries the burden of proof to demonstrate its compliance with FOIA.⁴ In certain circumstances, a sworn affidavit may be required to meet that burden.⁵ The first and fourth claims presented in the Petition, that the Board restricted free speech and that the Board violated other laws and its own precedent, are not allegations related to the FOIA statute. This Office lacks the authority to address non-FOIA claims and will not consider these claims in this Opinion.⁶

Subject to certain limited exceptions, FOIA requires the meetings of all public bodies to be open to the public.⁷ Although certain topics may be discussed privately in executive session, all voting on any items of public business must take place during open session.⁸ The Petition claims that the Board violated FOIA by failing to state its reason for entering executive session at the August 16, 2023 meeting. FOIA requires public bodies, prior to entering executive session, to receive an “affirmative vote of a majority of members present at a meeting of the public body.”⁹ FOIA also requires the purpose of the executive session to appear in the agenda.¹⁰ Accordingly, while explicitly stating the purpose of the executive session at the time of the vote would benefit the meeting attendees and we encourage such a practice, we find that the Board did not violate FOIA by failing to state the purpose for its executive session during the vote to enter the session.

The Petition next claims that the Board committed a violation of FOIA by voting on personnel agendas at the August 16, 2023 and June 26, 2023 meetings without sufficient notice to the public of the items subject to approval. 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

³ *Id.*, p. 3-4.

⁴ 29 *Del. C.* § 10005(c).

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

⁶ 29 *Del. C.* § 10005(e).

⁷ 29 *Del. C.* § 10004.

⁸ 29 *Del. C.* § 10004(c).

⁹ *Id.*

¹⁰ *Id.* (“The purpose of such executive sessions shall be set forth in the agenda and shall be limited to the purposes listed in subsection (b) of this section.”).

¹¹ 29 *Del. C.* § 10002(a).

“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 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

We consider these agendas in their totality. The Board’s August 16, 2023 agenda indicated an executive session for the purpose of “personnel” would be held and later in the agenda, the items, “personnel agenda” and “personnel addendum,” would be considered in open session.¹⁶ Similarly, the June 26, 2023 agenda indicated an executive session for three purposes, including “personnel,” which was followed by the open session items of “personnel agenda” and “personnel addendum.”¹⁷ In both agendas, no other information is provided. We believe that the August 16, 2023 meeting agenda’s use of the word “personnel” without further descriptors is not sufficient to alert any citizen with an intense interest in the significant matter of appointing the acting Sussex Central High School principal would be addressed at the meeting. In similar circumstances where board action was taken on a superintendent position following an executive session for “personnel” reasons, this Office determined that the open session item entitled “Personnel Action Items” was insufficient to alert citizens interested to attend the meeting that the Board voted on the appointment of the superintendent.¹⁸ Likewise, in this case, a citizen would have no way of

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 Cnty.*, 1986 WL 9610, at *4 (Del. Ch. Aug. 29, 1986)).

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 Response, Ex. D.

¹⁷ *Id.*, Ex. C.

¹⁸ *Del. Op. Att’y Gen.* 21-IB03, 2021 WL 961062, at *3 (Feb. 25, 2021); *see also Del. Op. Att’y Gen.* 23-IB12, 2023 WL L 3090720 at *2-3 (Apr. 18, 2023); *Del. Op. Att’y Gen.* 15-IB01, 2015 WL 3919060, at *4-5 (Jun. 12, 2015) (determining that an agenda noticing an executive session for “Legal and Personnel Issues” accompanied by a statement that the board “planned to take action with respect to each of the items discussed in executive session during the public meeting” was insufficient notice to the public for a vote on the renewal of the superintendent’s contract).

knowing the significant matter of the appointment of the acting Sussex Central High School principal would be considered at this meeting, in order to allow the citizen to decide whether to attend the meeting. Additionally, in its Response, the Board did not present any information regarding the items on the personnel agenda and therefore did not meet its burden to demonstrate that items 79 and 120, or any other personnel items, were appropriately noticed. Thus, we determine that Board violated FOIA by providing insufficient notice to the public with respect to these two agendas.

Having found that the Board violated FOIA, 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."¹⁹ In determining whether invalidation is appropriate, the court will consider the impact of "adverse consequences upon innocent parties."²⁰ Our Office has previously declined to recommend remediation when such a recommendation would cause significant disruption and the public had additional opportunities to observe the selection process.²¹ Selecting superintendents outside of public view has been previously determined to impact substantial public rights of students, parents, teachers, and other concerned citizens in the District.²²

Similar to selecting superintendents, we believe that this appointment of an acting high school principal impacts the substantial public rights of the school community and other concerned citizens. Neither party has submitted evidence that the public had any opportunity to observe the appointment process for the acting principal, and in these circumstances, we find that a ratification of this matter will not cause significant disruption to the District. Accordingly, we find that the Board's lack of specificity in the June 26, 2023 and August 16, 2023 agendas violated FOIA and, at a minimum, recommend that the Board ratify the appointment of the acting high school principal in open session at a future meeting with proper notice to the public. Additionally, it is recommended that the Board review the remaining items in these personnel agendas and determine whether, under the relevant precedent, more specific notice of the items intended for consideration should be provided.

¹⁹ *Ianni*, 1986 WL 9610, at *7.

²⁰ *Chem. Indus. Council of Del.*, 1994 WL 274295, at *15.

²¹ *Del. Op. Att'y Gen.* 02-IB17, 2002 WL 31031224, at *8 (Aug. 6, 2002).

²² *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.'").

CONCLUSION

For the reasons set forth above, we conclude that that the Board violated FOIA by providing insufficient notice to the public in its June 26, 2023 and August 16, 2023 agendas. However, the Board did not violate FOIA by failing to state verbally the purpose of the executive sessions during its vote to enter the August 16, 2023 executive session.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

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