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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB25

June 26, 2024

VIA EMAIL

The Honorable Madinah Wilson-Anton
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House of Representatives
Delaware General Assembly

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

Dear State Representatives Wilson-Anton, Baumbach, Romer, Phillips, and Morrison:

We write in response to your correspondence alleging that the Christina School District Board of Education violated Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10008 ("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. We find that the Board violated FOIA at its March and May 2024 Board meetings as follows.

BACKGROUND

At the May 24, 2024 Christina School District Board of Education meeting, the Petition asserts that the Board held an unannounced executive session to discuss Robert's Rules of Order, which is not a permitted reason for an executive session. You also contend that a vote of no confidence in the superintendent was held at the May meeting without proper notice on the agenda. At the March 2024 Board meeting, you state that the Board discussed and voted to rescind a contract and to suspend the superintendent without appropriate public notice on the meeting agenda. In addition to these allegations of FOIA violations, the Petition also alleges that the Board failed to follow the Board's policies, Robert's Rules of Order, and other authority in various instances.

On June 7, 2024, the Board's counsel replied to the Petition on the Board's behalf ("Response"). In its Response, the Board addresses the FOIA allegations, noting that the violations of other legal authority, including a claim that a meeting recording did not record a vote due to a lapse in the audio recording, are not claims under the FOIA statute appropriate for determination in this process. The Board concedes two violations occurred: 1) an executive session at its May Board meeting to address parliamentary procedure was not noticed and was called for an improper purpose; and 2) the Board's failure to notice its vote of no confidence in the superintendent in the May meeting agenda.

Regarding the Petition's third claim that the contract rescission considered at the March 12, 2024 Board meeting was not appropriately noticed, the Board argues that its notice in the agenda was appropriate, as it noticed an executive session in the "Personnel Matters" section entitled: "[b]ased on actions, to reverse an Administrative contract (Employee 23-38) extension from June 30, 2025 through June 30, 2026 as voted on at the December 13, 2023 meeting."¹ The Board states that the "recording makes clear that the contract rescission concerned a sensitive employee matter involving a particular employee and contended acts or omissions by that employee."² Regarding the fourth claim that the agenda did not properly notice the suspension of the superintendent, the Board's counsel asserts that it is not accurate to state that the Board suspended the superintendent at that meeting. The Board points to the executive session item under "Personnel Matters" in the March 12, 2024 agenda, which states: "[d]iscussion and action upon Administrative recommendation in matter concerning employee 23-38."³ The Board argues again that the identity of the employee subject to this action is not appropriate for disclosure,

¹ Response, p. 5 (citing "Christina School District Board of Education – Posting March 12, 2024, <https://www.christinak12.org/cms/lib/DE50000539/Centricity/Domain/4/POSTING%20-%20BOE%20Meeting%20-%20March%2012%202024.pdf> (last visited on Jun. 20, 2024).

² *Id.*, p. 6.

³ *Id.* (citing "Christina School District Board of Education – Posting March 12, 2024, <https://www.christinak12.org/cms/lib/DE50000539/Centricity/Domain/4/POSTING%20-%20BOE%20Meeting%20-%20March%2012%202024.pdf> (last visited on Jun. 20, 2024).

stating “[a]n employee’s right to privacy with regard to discipline exceeds the public’s rights of transparency.”⁴

DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.⁵ In certain circumstances, a sworn affidavit may be required to meet that burden.⁶ In this case, the Petition alleges several violations, two of which are conceded by the Board.

First, the Board concedes that its May 7, 2024 executive session to address parliamentary procedure was a violation of FOIA. We agree. FOIA does not permit an executive session without notice in these circumstances, and it does not allow a public body to hold an executive session to discuss a parliamentary procedure issue.⁷ Second, the Board acknowledges that the vote of no confidence in the superintendent did not appear on the agenda in violation of FOIA. FOIA requires that a meeting agenda include “a general statement of the major issues expected to be discussed at a public meeting,” and we agree that the lack of notice for this vote of no confidence in the superintendent constitutes a second violation.⁸

We next consider the claims alleging the executive session items regarding the rescission of a contract and a vote to suspend the superintendent were inadequately noticed on the agenda. When considering the sufficiency of the notice provided in an agenda, we evaluate the agenda in its totality.⁹ These two items appear in the executive session portion of the agenda under “Personnel Matters.” The notice required for executive session discussions is less stringent; for example, the descriptor, “Legal & Personnel,” has been found adequate.¹⁰ The descriptions in the

⁴ *Id.*, p. 7.

⁵ 29 *Del. C.* § 10005(c).

⁶ *Judicial Watch, Inc. v. Univ. of Del.*, 267 A.3d 996 (Del. 2021).

⁷ 29 *Del. C.* § 10004(b), (e).

⁸ 29 *Del. C.* § 10002(a).

⁹ *Del. Op. Att’y Gen.* 23-IB28, 2023 WL 6798839, at *3 (Oct. 3, 2023).

¹⁰ *See, e.g., O’Neill v. Town of Middletown*, 2007 WL 2752981, at *7 (Del. Ch. Mar. 29, 2007) (stating the “statute requires public bodies to provide the reason for entering into an executive session, but that does not require public bodies to elaborate in great detail on agendas what legal, personnel, or other subjects are to be discussed” and determining that “Personnel & Legal Issues” are adequate descriptors on the executive session agendas); *Del. Op. Att’y Gen.* 12-IIB13, 2012 WL 6858971, at *4 (Dec. 21, 2012) (determining that noticing an executive session “for the purpose of discussing Personnel Matters” was adequate); *Del. Op. Att’y Gen.* 10-IB03,

March meeting agenda satisfy FOIA's requirement for public notice of these two executive sessions, and we find that no violation occurred in this regard.¹¹

The notice for open session items following an executive session require more scrutiny. Although discussions of certain authorized matters are permitted in executive session, "all voting on public business must take place at a public meeting and the results of the vote made public."¹² An agenda must include a general statement of the major items planned to be discussed. 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

In this case, the executive sessions were held for discussing "[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open."¹⁵ The personnel exception for an executive session "was intended to protect the personal privacy of individual employees, and applies only when the discussion reflects on an individual's 'competence or ability.'"¹⁶ "This exception reflects the balance between the public interest in open discussion of governmental matters and the rights of employees to have their work performance considered in private."¹⁷ In

2010 WL 1048826, at *2 (Mar. 10, 2010) (determining that "Executive Session to Discuss Contract and Personnel Issues" is adequate notice).

¹¹ Although the submissions do not address the propriety of discussing these topics in executive session, we note that the personnel matters exception is limited to the discussion of personnel matters in which the names, competency and abilities of individual employees or students are discussed. *See also Del. Op. Att'y Gen.* 15-IB10, 2015 WL 8772946, at *2 (Dec. 1, 2015) ("School boards should be able to discuss the competencies and abilities of all of their employees, including superintendents, in executive session, and may do so within FOIA as long as those discussions are severed from express discussions regarding renewal of a superintendent's [employment] contract.").

¹² 29 *Del. C.* § 10004(c).

¹³ *Lechliter v. Del. Dep't of Natural Res. & Envtl. Control*, 2017 WL 2687690, at *2 (Del. Ch. Jun. 22, 2017) (citation omitted).

¹⁴ *Id.*

¹⁵ 29 *Del. C.* § 10004(b)(9).

¹⁶ *Del. Op. Att'y Gen.* 98-IB05, 1998 WL 648714, at *2 (July 6, 1998).

¹⁷ *Del. Op. Att'y Gen.* 22-IB27, 2022 WL 4263282, at *2 (Aug. 19, 2022) (citing *Del. Op. Att'y Gen.* 02-IB12, 2002 WL 1282812, at *2 (May 21, 2002)).

the context of evaluating the requisite notice for an open session item following an executive session for a personnel matter, the interest in public disclosure must be weighed against the reason for the executive session – here, the employees’ rights to have their job performance or other personnel matters considered in private.

In this instance, the open session votes to rescind the employee contract and to take administrative action against this employee, which followed executive sessions on the same subjects, were entitled “Administrative Recommendations” and considered under the “Action, Discussion & Information Items” section of the agenda.¹⁸ The Board’s meeting recording reveals that this administrative action involved a vote to suspend an employee.¹⁹ Disciplinary actions taken against an employee present a significant privacy interest, which we do not believe is outweighed by the public interest.²⁰ As such, we find no violation with regard to the notice provided in the agenda for this vote on the suspension of an employee.

Open session items affecting employee contracts may require a different result. For example, this Office has previously found a significant public interest in contracts and appointments of superintendents and high school principals, requiring more specific public notice of the open session items involving these types of matters.²¹ In this case, the Board did not provide sufficient statements under oath or other evidence about this contract.²² Without further evidence

¹⁸ See Response, p. 6; “Christina School District Board of Education Meeting – March 12, 2024,” <https://www.youtube.com/watch?v=z0LzFF5a79w> (last visited on Jun. 20, 2024); “Christina School District Board of Education – Posting March 12, 2024,” <https://www.christinak12.org/cms/lib/DE50000539/Centricity/Domain/4/POSTING%20-%20BOE%20Meeting%20-%20March%2012%202024.pdf> (last visited on Jun. 20, 2024).

¹⁹ “Christina School District Board of Education Meeting – March 12, 2024,” <https://www.youtube.com/watch?v=z0LzFF5a79w> (last visited on Jun. 20, 2024)

²⁰ *Del. Op. Att’y Gen.* 23-IB30, 2023 WL 8125409, at *4 (Nov. 8, 2023) (stating “an employee’s privacy interest in keeping job performance and discipline private is significant.”).

²¹ See, e.g., *Del. Op. Att’y Gen.* 23-IB28, 2023 WL 6798839, at *3 (Oct. 3, 2023) (determining that the meeting agenda’s use of the word “personnel” without further descriptors is not sufficient to alert citizens that the appointment of the acting Sussex Central High School principal would occur at the meeting”); *Del. Op. Att’y Gen.* 21-IB03, 2021 WL 961062, at *3 (Feb. 25, 2021) (“The Petition next alleges that the agenda’s reference to “Personnel Action Items” is insufficient to alert the public to the Board’s intended vote on the appointment of the Superintendent. We agree.”); *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).

²² Response, p. 6. The Board’s counsel states in reference to the suspension, this employee was not the superintendent. This Office is unable to accept unsworn statements for purposes of

regarding whether this contract involved a position subject to significant public interest, this Office cannot determine whether the agenda's open session item constitutes adequate notice. As the Board has the burden to demonstrate its compliance with FOIA, we must conclude a violation of FOIA occurred regarding the notice of the contract rescission in the March agenda.

Finally, the Petition alleges violations of other legal authority outside of the FOIA statute. This Office's authority is limited to determining violations of the FOIA statute.²³ As such, the remaining claims in the Petition are not appropriate for consideration in this Opinion.

Having found violations of FOIA occurred, we consider the appropriate remediation to recommend. Section 10005(a) states that any "action taken at a meeting in violation of this chapter may be voidable by the Court of Chancery." The authority to invalidate a public body's action, or to impose other relief, is reserved for the courts.²⁴ 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

In this case, we recommend that the Board reconsider those noncompliant items, including the ratification of any votes, at a future public meeting held in strict accordance with FOIA. If the contract rescission involves a superintendent, principal, or staff in which the public interest is of similar significance, the Board is recommended to discuss and ratify the open session item on the contract in a future public meeting after providing appropriate public notice with greater specificity.

making this determination. *Judicial Watch, Inc.*, 267 A.3d 996 at 1010-11 ("Thus, the University is asking this Court to determine that it has met its burden of proof, fully resolving the dispute, based solely on these factual representations. But the resolution of a legal action must rest on competent, reliable evidence. And the Court has held that when an attorney seeks to establish facts based on personal knowledge, those facts must be asserted under oath. A statement made under oath, like a sworn affidavit, will ensure that the court's determination regarding the public body's satisfaction of the burden of proof is based on competent evidence.").

²³ 29 *Del. C.* § 10005(e) ("Any citizen may petition the Attorney General to determine whether a violation of this chapter has occurred or is about to occur.").

²⁴ 29 *Del. C.* § 10005.

²⁵ *Ianni v. Dep't of Elections of New Castle Cnty.*, 1986 WL 9610, at *7 (Del. Ch. Aug. 29, 1986).

²⁶ *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *15 (Del. Ch. May 19, 1994).

CONCLUSION

Based on the foregoing, we conclude that the Board violated FOIA by holding an unannounced executive session for an improper purpose and by failing to provide adequate notice in its March and May meeting agendas for the votes regarding the contract rescission and vote of no confidence. We find no violation with respect to the notice of the executive sessions on the March Board meeting agenda and the notice for the vote on the employee suspension on this same agenda.

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, Attorney for the Christina School District Board of Education