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**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 24-IB29**

**August 9, 2024**

**VIA EMAIL**

Connie Merlet  
[cmerlet1@gmail.com](mailto:cmerlet1@gmail.com)

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

Dear Connie Merlet:

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 by failing to meet its burden to demonstrate that its votes at the July 9, 2024 Board meeting complied with FOIA.

**BACKGROUND**

The Petition states that the Christina School District Board of Education used computers to review information and record votes at its July 9, 2024 Board meeting. You assert that "[s]everal times during the meeting the Board took votes via computer but did not inform the public what those votes were or how individual members voted."<sup>1</sup> You state that the Board moved to the next item, and you left the meeting not knowing the results of these votes. In addition, the Petition claims that one Board member called for a point of order and the President refused to hear the point of order, which you believe is a violation of FOIA and Robert's Rules of Order. The Board did not submit a response to this Petition.

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<sup>1</sup> Petition.

## DISCUSSION

The public body has the burden of proof to demonstrate compliance with FOIA.<sup>2</sup> In certain circumstances, a sworn affidavit may be required to meet that burden.<sup>3</sup> In this case, the Petition makes two claims.

First, the Petition alleges that the Board used computers to vote at the meetings, resulting in the meeting audience being unable to ascertain the results of several votes and how the individual members voted. FOIA expressly requires that “all voting on public business must take place at a public meeting and the results of the vote made public.”<sup>4</sup> Public bodies cannot take a vote by secret ballot in an open meeting.<sup>5</sup> As the Board did not respond to the assertion that it did not adequately inform the meeting attendees about the results of several votes and how each member voted, we are compelled to find a violation of FOIA in this regard.

Second, the Petition alleges that the President improperly refused to hear a point of order, in violation of Robert’s Rules of Order. This Office’s authority is limited to determining violations of the FOIA statute.<sup>6</sup> The FOIA statute does not require compliance with Robert’s Rules of Order, nor does it address requirements for points of order. Thus, this claim is not appropriate for consideration.

Having found a violation 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.<sup>7</sup> 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.”<sup>8</sup> In determining whether invalidation is

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<sup>2</sup> 29 Del. C. § 10005(c).

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

<sup>4</sup> 29 Del. C. § 10004(c).

<sup>5</sup> *Del. Op. Att’y Gen.* 19-IB63, 2019 WL 6273317, at \*2 (Nov. 8, 2019) (finding a violation of FOIA occurred when a public body took a vote in open session by secret ballot); *see also* 29 Del. C. § 10004(f) (stating that meeting minutes must include “a record, by individual member ... of each vote taken and action agreed upon”).

<sup>6</sup> 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.”).

<sup>7</sup> 29 Del. C. § 10005.

<sup>8</sup> *Ianni v. Dep’t of Elections of New Castle Cnty.*, 1986 WL 9610, at \*7 (Del. Ch. Aug. 29, 1986).

appropriate, the court will consider the impact of “adverse consequences upon innocent parties.”<sup>9</sup> In this case, we recommend that the Board ratify any noncompliant votes from the July 9, 2024 meeting by conducting a roll call verbally in open session at a future public meeting held in strict accordance with FOIA.

### CONCLUSION

Based on the foregoing, we conclude that the Board violated FOIA by failing to meet its burden to demonstrate that its votes at the July 9, 2024 Board meeting complied with FOIA.

Very truly yours,

/s/ Dorey L. Cole

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Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

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Patricia A. Davis  
State Solicitor

cc: James H. McMackin, III, Attorney for the Christina School District Board of Education

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<sup>9</sup> *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at \*15 (Del. Ch. May 19, 1994).