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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB46

October 25, 2024

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.* §§ 10001-10008 (“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. As discussed more fully herein, we determine that the DSPC did not violate FOIA by failing to give sufficient notice of the executive session regarding legal advice on its September 27, 2024 meeting agenda. We also find that the DSPC did not violate FOIA by discussing the labor strike in executive session, as the DSPC provided sworn evidence that this topic was not discussed in executive session at the meeting.

BACKGROUND

Prior to the September 27, 2024 Diamond State Port Corporation Board of Directors meeting, you filed this Petition, alleging that the DSPC was about to violate FOIA. The September 27, 2024 meeting agenda noticed a “[m]otion to move into executive session for strategy sessions involving legal advice and to discuss the content of documents excluded from the definition of ‘public record’ in §10002 of Title 29,” which you contend does not sufficiently specify the reason

for an executive session to receive legal advice.¹ You point out that FOIA does not have a blanket exception for legal advice. Further, if the DSPC planned a discussion of the potential labor strike in this session, you allege that this topic is not permitted for executive session.

On October 8, 2024, counsel for the DSPC replied to this Petition on the DSPC’s behalf (“Response”) and attached the affidavit of the Executive Director of the DSPC. The Executive Director attests that the session was for legal advice related to pending litigation. The DSPC asserts that the notice requirements for executive sessions are less stringent, and its notice for this executive session, “strategy sessions involving legal advice,” was appropriate. In addition, the Executive Director stated under oath that discussion of a labor strike was not planned for executive session and was not discussed therein; rather, this topic was addressed publicly under an open session item on the agenda.

DISCUSSION

The public body has the burden of proof to “justify a decision to meet in executive session or any failure to comply with [FOIA].”² In certain circumstances, a sworn affidavit may be required to meet that burden.³

FOIA’s purpose is to ensure government accountability by providing Delaware’s citizens access to open meetings, as well as access to the public records of those entities.⁴ FOIA requires that the meetings of public bodies, with limited exceptions, be open to the public. Public bodies, with proper notice of the intent to enter an executive session on its agenda, may hold an executive session to discuss one of the nine topics that are outlined in the statute.⁵ One of those topics is “[s]trategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body.”⁶ FOIA requires an agenda to include “a statement of intent to hold an executive session and the

¹ Petition.

² 29 *Del. C.* § 10005(c).

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

⁴ 29 *Del. C.* § 10001; *Judicial Watch*, 267 A.3d at 1004.

⁵ 29 *Del. C.* § 10004.

⁶ 29 *Del. C.* § 10004(b)(4).

specific ground or grounds therefor under § 10004(b) of [FOIA].”⁷ However, public bodies are not required to elaborate the reasons for executive sessions in great detail, and the reason given here, “strategy sessions involving legal advice,” is sufficiently specific to satisfy the requirements of FOIA.⁸

In addition, the Petition, which was filed before the meeting, contends that the topic of a labor strike was potentially planned for this executive session, and if so, this topic is inappropriate for executive session. In reply, the DSPC provided the Director’s sworn testimony, clarifying that the labor strike was not discussed in executive session, but instead, this matter was publicly discussed at the September 27, 2024 meeting. As such, the DSPC met its burden of demonstrating, with competent evidence, that it did not violate FOIA in this regard.

CONCLUSION

For the reasons set forth above, we conclude that the DSPC did not violate FOIA by failing to give sufficient notice of the executive session regarding legal advice on its September 27, 2024 meeting agenda. In addition, we find that the DSPC did not violate FOIA by discussing the labor strike in executive session, as the DSPC provided sworn evidence that this topic was not discussed in executive session at the meeting.

Very truly yours,

/s/ Dorey L. Cole

Dorey L. Cole
Deputy Attorney General

⁷ 29 Del. C. § 10002(a).

⁸ 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” and “Legal Issues” are adequate descriptors on the executive session agendas).

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Katherine H. Betterly, Attorney for Diamond State Port Corporation