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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 24-IB48

November 14, 2024

VIA EMAIL

Monica Moriak
mosbaskets@gmail.com

RE: FOIA Petition Regarding Christina School District Board of Education

Dear Ms. Moriak:

We write in response to your correspondence alleging that the Christina School District Board of Education (the “Board”) 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 Board did not violate the open meeting requirements of FOIA during the August 13, 2024 meeting.

BACKGROUND

The Board consists of eight members. The Board held a public meeting on August 13, 2024, during which the Board held an executive session. Following the executive session and before the Board reconvened in a public meeting, the Petition alleges that four Board members, Board President Donald Patton, Vice President Alethea Smith-Tucker, Y.F. Lou, and Dr. Naveed Baqir, privately discussed public matters in person and by text. The Petition also expresses concern that these four Board members decide things as a group before meetings and then all vote the same way without transparent discussion, in violation of FOIA.¹ On September 11, 2024, this Petition was filed with our Office.

¹ Petition.

On September 20, 2024, the Board, through its counsel, responded to the Petition (“Response”) and denied any FOIA violations occurred. In support of the Response, the Board submitted affidavits from members Patton and Smith-Tucker providing sworn statements.² Member Patton admits he told member Baqir to “just text” him but stated that no such texting actually occurred.³ Through their affidavits, members Patton and Smith-Tucker affirmed that after the executive session they briefly discussed permitting Dr. Deirdra Joyner, the District’s Assistant Superintendent, to sit on the stage with the Board during the public session.⁴ The Response argues that the seating location of the Assistant Superintendent at a public board meeting does not constitute “public business” and even if it did, a quorum was not present during the conversation.⁵ Finally, member Patton asserts that he does not engage in serial meetings with other Board members to pre-determine Board action or reach consensus or concurrence on matters of public business outside of properly noticed Board meetings.⁶

DISCUSSION

FOIA requires public business to be performed in an open and public manner so that citizens “have the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy.”⁷ “[O]pen meeting laws ensure governmental accountability, inform the electorate, and acknowledge that public entities, as instruments of government, should not have the power to decide what is good for the public to know.”⁸ A meeting under FOIA is “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.”⁹ However, the DDOJ has found that serial telephone, email or other electronic communications among members of a public body in groups of less than a quorum may amount to a meeting of the public body depending on the facts of the individual case.¹⁰ “Public

² Response.

³ Patton Affidavit at ¶ 11.

⁴ Patton Affidavit at ¶ 7; Smith Affidavit at ¶ 7.

⁵ Response.

⁶ Patton Affidavit at ¶¶ 13-14.

⁷ 29 *Del. C.* § 10001.

⁸ *Del. Solid Waste Auth. v. The News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984).

⁹ 29 *Del. C.* § 10002(j).

¹⁰ *Del. Op. Att’y Gen.* 84-IB03, 2008 WL 1727611, (Feb. 20, 2008). Like Delaware’s FOIA, the application of the open meeting laws in many other states may turn on whether a quorum of the members of a public body met to discuss public business. Some courts have held

business” broadly encompasses “any matter over which the public body has supervision, control, jurisdiction or advisory power.”¹¹ To hold a meeting, a public body must meet FOIA's open meeting requirements, including the posting of a public notice and agenda in advance, giving the public the opportunity to attend, and the creation and maintenance of minutes.¹²

When a petition alleges a secret meeting, the petitioner carries the initial burden of making a *prima facie* case that a meeting occurred.¹³ “A plaintiff must show substantive proof of a secret meeting rather than mere speculation in order to shift the burden of going forward.”¹⁴ The allegations must be sufficiently specific to allow consideration.¹⁵ “Once a plaintiff has made a *prima facie* case that a quorum of a public body has met in private for the purpose of deciding on or deliberating toward a decision on any matter,” the burden then shifts to the public body to prove that no violation of the open meeting requirements occurred.¹⁶ This burden-shifting occurs to avoid requiring a public body to “prove a negative,” i.e., prove that a meeting did not occur.¹⁷

In this instance, the Petition primarily relies on member Moriak’s reasonable suspicion that Board members discussed public business after the conclusion of the August 13, 2024 executive session while she was absent from the room. Member Moriak also believes that certain board members decide things as a group before meetings and then all vote the same way in violation of FOIA. Member Moriak has not provided any specific information regarding meeting dates or discussions where such votes are at issue. In response, the Board provided

that the open meeting laws nevertheless apply to meetings of less-than-a-quorum of the public body. See *Booth Newspapers, Inc. v. Board of Regents of the University of Michigan*, 507 N.W.2d 422 (Mich. 1993); *Moberg v. Independent School District No. 281*, 336 N.W. 2d 510 (Minn. 1983) (“serial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending on the facts of the individual case”). Here, there is no evidence in this record that the Board met in a series of subquorum groups to avoid the application of Delaware's FOIA.

¹¹ 29 Del. C. § 10002(m).

¹² 29 Del. C. § 10004.

¹³ Del. Op. Att’y Gen. 17-IB20, 2017 WL 3426260, at *7 (July 12, 2017).

¹⁴ *Id.*

¹⁵ See Del. Op. Att’y Gen. 16-IB18, 2016 WL 5888777, at *5 (Sept. 29, 2016) (finding that the petitioner did not make a *prima facie* case: “without specific information regarding specific dates, the number of Council members present, and the number of Council members to whom you allege the Mayor passed notes during specific meetings, these allegations are too vague to warrant consideration”).

¹⁶ Del. Op. Att’y Gen. 05-IB10, 2005 WL 1209240, at *2.

¹⁷ *Id.*

sworn affidavits of two Board members attesting that they do not engage in serial meetings with one another to pre-determine Board action or reach consensus or concurrence on matters of public business outside of properly noticed Board meetings, and that the seating location of the Assistant Superintendent at a public board meeting does not constitute public business.

As an initial matter, we agree with the Board that the seating location of the Assistant Superintendent at a public board meeting is not “public business.” Further, without more than Moriak’s premonition that discussions among Board members are occurring outside of an opening meeting or that consensus voting is taking place, these allegations are too vague to warrant consideration. Therefore, we find that the Petition does not establish the requisite *prima facie* case necessary to shift the burden to the Board to demonstrate compliance with FOIA. While we do not find that a *prima facie* case has been established in this case, the Board is strongly cautioned to refrain from discussions during meetings with less than a quorum in the future, and reminded that a robust discussion in front of the public prior to voting is always preferred to simply voting.

CONCLUSION

For the reasons set forth above, we conclude that the Board did not violate FOIA during the August 13, 2024 meeting.

Very truly yours,

/s/ Lisa Morris

Lisa Morris
Deputy Attorney General

Approved:

/s/ Patricia A. Davis

Patricia A. Davis
State Solicitor

cc: Michael P. Stafford