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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE
Attorney General Opinion No. 16-IB05

March 11, 2016

VIA EMAIL

Representative Kim Williams
411 Legislative Avenue
Dover, DE 199013
Via Email: kimberly.williams@state.de.us

Re: FOIA Complaint Concerning the State Board of Education

Dear Representative Williams:

On January 24, 2016, the Delaware Department of Justice (“DOJ”) received your email complaint requesting our determination pursuant to the Freedom of Information Act, 29 *Del. C.* Ch. 100 (“FOIA”), of whether the State Board of Education violated the FOIA open meeting requirements. We treat your email as a petition for a determination of whether a violation of FOIA has occurred or is about to occur. 29 *Del. C.* §10005(e). Our determination is set forth herein.

FACTUAL BACKGROUND¹

On January 21, 2016, a State Board of Education (“Board”) meeting was held in Dover. Representative Williams attended the meeting along with other members of the public. During that meeting, the Board entertained a motion to approve the Wilmington Education Improvement Commission (“WEIC”) Plan. A member of the audience asked if a member of the WEIC would be able to speak before the motion was voted on. Board President, Dr. Teri Quinn Gray, noted that she did not think there was going to be any public comment or presentations but asked for clarification. Board Counsel, Ilona Kirshon, stated that the Board had the ability to waive the no-comment rule. Dr. Gray noted that they would “hold that” and asked Executive Director of the Board, Donna Johnson, to discuss with Ms. Kirshon at “sidebar.”

¹ The Factual Background Section of this Opinion refers to your communications as made by “Representative Williams” for ease of future reference by third parties.

ALLEGED VIOLATIONS

Representative Williams alleges that during the meeting, Dr. Gray “instructed someone to have a side bar conversation.” Representative Williams also alleges that she later witnessed “Dr. Gray coming over to the attorney’s table and asked the attorney questions about WEIC and what had taken place with the vote and the amendment.” Representative Williams’ argues that the Board violated FOIA’s open meeting requirements by conducting conversations off the record.

Representative Williams also contends that the Board’s vote on the WEIC plan was improper because “[t]hey voted yes with an amendment.” Representative Williams argues that the Board was required to vote “yes or no.”

THE BOARD’S RESPONSE TO THE ALLEGATIONS

The Board, through counsel Ilona Kirshon, responded to Representative Williams’ allegations by letter dated February 2, 2016. Regarding Representative Williams’ first allegation, that Dr. Gray asked the Executive Director of the Board, Donna Johnson, to confirm with counsel the statement counsel had made on the record, Ms. Kirshon argues that the “conversation between counsel to the Board and administrative staff did not constitute a violation of the Open Meetings section of FOIA as it was not part of the public body’s conduct of ‘public business’ as defined in 29 Del. C. § 10002(h) and (j).” Regarding Representative Williams’ second allegation, Ms. Kirshon responded that, “[t]he conversation between a single individual, Dr. Gray, and SBE counsel did not constitute action by or even discussion by the Board, as a single member cannot speak for the Board.”

REPRESENTATIVE WILLIAMS’ RESPONSE

Upon receipt of the Board’s response, Representative Williams provided a follow-up response. In that response, Representative Williams questioned whether the Board President had authority to deny an attendee’s right to speak/present at the meeting: “The entire board should have had discussion and then voted on whether or not [the individuals] could have addressed the State Board since the law allows for the SBE to waive the rules.” Representative Williams also noted that “[w]hen the public is present, all questions and any clarifications should be made public so the public can have a better understanding of what is actually happening.” Finally, Representative Williams raised concerns surrounding Board Executive Director Donna Johnson’s participation in the meetings: “why is Ms. Johnson allowed to speak openly during SBE meetings yet the public cannot? Ms. Johnson is not an appointed board member, she is the executive director.”

APPLICABLE LAW

“Every meeting of all public bodies shall be open to the public except those closed [for a permitted reason].” 29 Del. C. § 10004(a). “Public body” includes any subcommittee of a public body that is supported by public funds, spends public funds or is charged with making “reports, investigations or recommendations” to a public body. 29 Del. C. § 10002(c).

A public body must vote at a public meeting to move into executive session, and “all voting on public business must take place at a public meeting and the results of the vote made public.” 29 *Del. C.* § 10004(c).

LEGAL ANALYSIS

The Board did not violate FOIA when the President of the Board asked a staff member to confirm advice with Counsel.

During the January meeting, Dr. Gray asked whether there was to be public comment regarding the WEIC plan, as this was contrary to Board rules. Ms. Kirshon, as counsel to the Board, stated on the record that the Board has authority to waive its procedural rules. Dr. Gray then instructed someone, who Representative Williams identifies as Executive Director Donna Johnson, to “sidebar” with Ms. Kirshon about this advice. Representative Williams alleges that this side conversation between Ms. Kirshon and Ms. Johnson is a FOIA violation. We disagree.

A public meeting is defined as “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 either in person or by video-conferencing.” 29 *Del. C.* § 10002(g). A discussion between Ms. Kirshon and Ms. Johnson was not a discussion by a quorum of the members of any public body. We have previously held, “as a general matter, conversations with each other or with staff do not need to be public unless they include a quorum of the members.” *Del. Op. Att’y Gen.* 10-IB12 (2010). Therefore, the side conversation between the Board’s attorney and Board staff did not violate FOIA.

The Board did not violate FOIA when the President of the Board consulted with the Board’s Counsel.

Representative Williams states that Dr. Gray approached counsel’s table to discuss the WEIC vote during the meeting. This exchange was not recorded but counsel for the Board confirms that she had a discussion with Dr. Gray about the vote and the timing of a draft order. The discussion between the President of the Board and the Board’s counsel was not a discussion by a quorum. As noted above, “conversations with each other or with staff do not need to be public unless they include a quorum of the members.” *Del. Op. Att’y Gen.* 10-IB12 (2010). In addition, it is clear that Representative Williams was able to hear what Dr. Gray and counsel discussed. We cannot find a FOIA violation because “absent some evidence that the members knowingly avoid public monitoring of the deliberations of the quorum, there is no basis on which to find that FOIA has been violated.” *Id.*

REMAINING ISSUES

Representative Williams raises concerns about the Board’s failure to vote “yes or no,” the Board’s refusal to allow a representative from WEIC to speak at the meeting and fact that Board Executive Director, Donna Johnson was permitted to speak at the meeting, whereas the public was not. The substantive validity of the Board’s vote is not a matter covered by the Freedom of Information Act and cannot be determined here. The validity of the Board’s procedural rules, or of its decision to waive those rules, is also not a matter covered by FOIA. Ms. Johnson is a member

of the Board's staff, and, as such, she is permitted to speak a public meeting of the Board. FOIA does not, however, mandate that public comment be permitted at every public meeting. We often encourage public bodies to permit public comment whenever possible, but when they elect not to do so, we cannot find that the choice violates FOIA.

CONCLUSION

We conclude that the aforementioned conduct did not violate FOIA.

This decision is directed solely to the parties identified herein. It is based on the facts relevant to this matter. It does not constitute precedent and should not be cited as such by future parties.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Danielle Gibbs", is centered on the page. The signature is written in a cursive style.

Danielle Gibbs
Chief Deputy Attorney General

cc: Ilona Kirshon, Deputy State Solicitor, Delaware Department of Justice (via email)