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Attorney General Opinion No. 16-IB21

October 19, 2016

VIA U.S. MAIL AND EMAIL

Mr. Kevin Ohlandt
9 Crosley Ct.
Dover, DE 19904
kevinoh@yahoo.com

Re: FOIA Petition Concerning Gateway Lab Charter School

Dear Mr. Ohlandt:

On May 24, 2016, the Delaware Department of Justice (“DOJ”) received your petition (“Petition”) requesting our determination, pursuant to the Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”), of whether Gateway Lab Charter School’s Board of Directors (“Board”) violated FOIA’s open meetings provisions in connection with a vote held on April 4, 2016.¹ By letter dated May 24, 2016, and pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Board to submit a written response to the Petition. We received the Board’s response (“Response Letter”) on June 1, 2016. We have reviewed the Petition and the Response Letter. Our determination is set forth below.

¹ You also allege that “many Delaware charter schools request any public comments to be submitted ahead of time, sometimes as much as two weeks prior to a public meeting.” However, this allegation is too vague to warrant consideration by this office and, as such, is not addressed in this determination. *See Del. Op. Att’y Gen.* 16-IB14 (June 9, 2016) (concluding that two allegations, including an allegation that a board chair “routinely discussion (sic) agency business orally and via email with selected commissioners before meeting times and dates” were too vague to warrant consideration); *Del. Op. Att’y Gen.* 96-IB05 (Feb. 13, 1996) (finding no violation when only “sweeping, vague allegations” with “no specific facts are alleged” regarding conduct of meetings).

FACTS

On April 4, 2016, the Board held a special board meeting. The only items of business listed on the agenda for the April 4 special board meeting were a period for public comment and a due process matter. The agenda clearly noted that an executive session would be called for the due process matter. The only motion identified as held during public session was the motion to enter into executive session.

On April 18, 2016, the Board voted to approve the minutes of the April 4th meeting. The minutes as originally approved by the Board (“Original Minutes”) were one page in length and described the sequence of events as follows:

Old Business

- No Items
- Rachel made a motion to move into Executive Session to discuss an update on the Due Process Matter. Nate seconded the motion and it was approved by all directors present.

New Business

- Due Process Matter: Tim Griffiths updated the Board on the process of mediation and the current offer that was on the table. Discussion ensued.
- Rachel made a motion to accept the current offer from the mediation process. Nate seconded the motion. John, Mary, and Doreen voted in approval of the motion. Pam abstained. The motion passed.
- Rachel made a motion to move out of Executive Session at 5:49pm. John seconded the motion. The motion was approved by all members present.

The meeting was adjourned at 5:50pm.

On May 24, 2016, you filed the Petition with this office – along with a copy of the approved minutes of the April 4th meeting – alleging that the Board violated FOIA by holding a vote in executive session rather than in public session. In support, you submitted a copy of the approved minutes of the April 4th meeting. On June 1, 2016, the Board submitted its Response letter, stating:

. . . Instead of voting in executive session, the board re-entered public session and voted in public as required by FOIA. No voting took place during executive session and the board minutes will be corrected to reflect as much.

On June 21, 2016, the Board voted to revise the minutes of the April 4th meeting. The revised minutes (“Revised Minutes”) describe the sequence of events as follows:

Old Business

- No Items
- Rachel made a motion to move into Executive Session to discuss an update on the Due Process Matter. Nate seconded the motion and it was approved by all directors present.

New Business

- Due Process Matter: Tim Griffiths updated the Board on the process of mediation and the current offer that was on the table. Discussion ensued.
- Rachel made a motion to move out of Executive Session at 5:49pm. John seconded the motion. The motion was approved by all members present.
- Rachel made a motion to accept the current offer from the mediation process. Nate seconded the motion. John, Mary, and Doreen voted in approval of the motion. Pam abstained. The motion passed.

The meeting was adjourned at 5:50pm.

On June 28, 2016, you submitted additional information which you contended “len[t] further credence” to the Petition (“Supplemental Correspondence”). Among other things,² your Supplemental Correspondence included minutes of a February 2, 2016 board meeting which, as written, demonstrate that a vote was taken on a due process matter while in executive session. That same date, in order to assist with this determination, we requested that the Board provide the following information:

copies of all meeting agendas (to include original and revised agendas) and all meeting minutes (or draft minutes, if such minutes have not been approved) for all Gateway Board meetings since the April 4, 2016 meeting, as well as an affidavit of a Gateway Board member who was present at both meetings and can attest to what occurred at both meetings as they relate to the May 24, 2016 FOIA petition.

² We have reviewed the documents submitted with your Supplemental Correspondence and have determined that, with the exception of the minutes of the February 2, 2016 meeting, those documents are not relevant to the instant Petition. To the extent they are intended to allege additional FOIA violations, they were not identified in the original Petition and, as such, are not addressed in this determination.

The Board provided the requested information on July 8, 2016. The Board's submission included a sworn affidavit from Board Chair Rachel Anderson. In her affidavit, Ms. Anderson stated that she was present at the April 4, April 18, and June 21 meetings.³ Ms. Anderson also stated that the April 4 vote took place while in public session, that neither she nor anyone on the Board noticed the mistake in the minutes before voting to approve them on April 18, and that the Board voted to revise the April 4 minutes during its June 21 meeting to accurately reflect that the vote occurred in public session.⁴

SUMMARY OF ARGUMENTS

We interpret the Petition to allege that the School violated FOIA by holding a vote in executive session rather than in public session. The Board contends that the Original Minutes were incorrect and that the Board re-entered public session before voting.

RELEVANT STATUTES

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those closed [for a permitted reason].”⁵ Pursuant to 29 *Del. C.* § 10004(b), public bodies may “call for an executive session closed to the public” only for purposes permitted by the statute. Notwithstanding the fact that certain matters may be discussed in executive session, “all voting on public business must take place at a public meeting and the results of the vote made public.”⁶ Finally, FOIA mandates that public bodies “maintain minutes of all meetings, including executive sessions,” and that such minutes “include a record ... of each vote taken and action agreed upon.”⁷

LEGAL ANALYSIS

You do not allege that the executive session was improper. Rather, you allege that the Board voted in executive session, which is strictly prohibited under FOIA.⁸

As an initial matter, we note that the Original Minutes of the April 4th meeting, on their face, support a conclusion that the Board voted in executive session. This conclusion would be

³ Anderson Aff. at ¶ 2.

⁴ *Id.* at ¶¶ 5-6, 8.

⁵ 29 *Del. C.* § 10004(a).

⁶ 29 *Del. C.* § 10004(c).

⁷ 29 *Del. C.* § 10004(f).

⁸ See 29 *Del. C.* § 10004(c) (““Executive sessions may be held only for the discussion of public business, and *all voting on public business must take place at a public meeting and the results of the vote made public.*” (emphasis added)).

further supported by the February 2, 2016 meeting minutes which, on their face, appear to demonstrate that the Board voted on a due process matter while in executive session just three months prior. However, in her affidavit, Ms. Anderson stated that “[t]he vote to accept the current offer presented at mediation took place while in public session” of the April 4th Meeting.⁹ Ms. Anderson acknowledged that the Original Minutes “mistakenly reflected that the board voted . . . during executive session[,]” and that “neither [she] nor any other board member noticed the mistake” before approving the minutes at the April 18 meeting.¹⁰ Based upon Ms. Anderson’s factual representation, the truth of which was sworn to under penalty of perjury,¹¹ we conclude that the Board did not, in fact, vote in executive session at the April 4th meeting as alleged in the Petition.¹²

Under the circumstances, however, we conclude that the Board did violate FOIA by unanimously approving and subsequently publishing minutes that did not accurately reflect “each vote taken and the action agreed upon” at the April 4th meeting.¹³ To be clear, this determination does not stand for the proposition that a public body’s approval of imperfect or non-chronological minutes violates FOIA *per se*.¹⁴ Nor is it intended to discourage public bodies from amending

⁹ Anderson Aff. at ¶ 5.

¹⁰ *Id.* at ¶ 6.

¹¹ “A person is guilty of perjury in the second degree when the person swears falsely and when the false statement is: (1) [m]ade in a written instrument for which an oath is required by law; and (2) [m]ade with intent to mislead a public servant in the performance of official functions; and (3) [m]aterial to the action, proceeding or matter involved.” 11 *Del. C.* § 1222. Perjury in the second degree is a Class F felony, punishable by up to three years of incarceration and the imposition of such fines and penalties as the court deems appropriate. *Id.* § 4205.

¹² We also note that you have not alleged that you were denied an opportunity to attend the April 4th meeting. Thus, while we recognize that the Board bears the burden of proof pursuant to 29 *Del. C.* § 10005(c), we believe it is factually significant that you have not alleged that you attended the April 4th meeting or otherwise had firsthand knowledge of the sequence of events, which might have served to rebut Ms. Anderson’s sworn affidavit. *Cf. Levy v. Bd. Of Educ. of Cape Henlopen Sch. Dist.*, 1990 WL 154147, at *5 (Oct. 1, 1990) (noting that “it seems inconsistent with the broad policy declarations of [FOIA] to insist that a citizen seeking relief for asserted violations of [FOIA]’s provisions must bear the burden of establishing what was actually said or done at a meeting *from which he or she was excluded.*” (emphasis added) (citations omitted)).

¹³ *See* 29 *Del. C.* § 10004(f).

¹⁴ For example, we believe the instant facts to be distinguishable from this Office’s determination in *Del. Op. Att’y Gen.* 07-IB03 (Feb. 23, 2007), wherein we concluded that a town council did not violate FOIA when it amended minutes of a prior meeting. In that case, a councilmember voted to amend the minutes of a prior meeting to reflect that the council voted on a resolution at a prior meeting. *Id.* However, no other councilmember could recall such a vote.

their minutes when an error is recognized by the Board or a third party. Indeed, we encourage such a practice. Rather, where, as here, the minutes imply a blatant violation of FOIA's open meetings provisions (namely, that the Board voted while in executive session) and there is evidence that the Board may have committed the same error on at least one prior occasion, we believe that the circumstances warrant a finding that the Board has failed to meet its obligations under FOIA. Specifically, we conclude that the Board violated 29 *Del. C.* § 10004(f) by failing to maintain minutes that accurately reflected the votes taken and actions agreed upon at the April 4th meeting.¹⁵

CONCLUSION

We conclude that the Board did not violate FOIA by voting in executive session as alleged in the Petition. However, the Board did violate FOIA by failing to maintain minutes that accurately reflected the votes taken and actions agreed upon at the April 4th meeting.

To remediate this type of violation, we would ordinarily request that the public body reconvene an open meeting and revise its minutes to accurately reflect the votes taken and actions agreed upon.¹⁶ However, because the Board has already done so, we conclude that no further remediation is necessary.¹⁷

Id. As a result, rather than amend the minutes to reflect that the council voted on the matter as originally suggested, the council unanimously voted to amend the minutes to reflect that no such vote occurred. *Id.* Under the circumstances, we concluded that the council did not fail to prepare accurate minutes of the prior meeting. *Id.* Rather, when a motion was made to amend the minutes in a manner that was inconsistent with what had actually transpired at the prior meeting, “[c]ouncil performed its lawful duty to amend the minutes of the . . . meeting” to clarify the record in light of the motion. *Id.*

¹⁵ See *Del. Op. Att’y Gen.* 12-IIB13 (Dec. 21, 2012) (minutes inaccurately represented that school board informed the public about a plan to return to open session for a vote after reconvening an executive session that had been tabled earlier in the meeting).

¹⁶ See, e.g., *id.*

¹⁷ With respect to the minutes of the February 2, 2016 meeting, which are not presently before us, we do not have sufficient information to determine whether the Board erred by (a) voting in executive session or (b) as it did here, approving inaccurate minutes. We nonetheless request that the Board revisit those minutes at its next regularly-scheduled Board meeting if it has not done so already and, if necessary, revise them accordingly. If, however, the Board concludes that it did indeed violate Section 10004(c) by voting in executive session, the Board may wish to consider ratifying its vote. In any event, even assuming that the Board violated Section 10004(c) at the February 2 meeting, this office would not likely conclude that invalidation would be warranted under the circumstances. *Cf. Levy*, 1990 WL 154147, at *8 (concluding that preliminary injunction to prevent school board from implementing student reassignment plan not warranted because plan had already been implemented).

Very truly yours,


Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: Danielle Gibbs, Chief Deputy Attorney General (via email)
James D. Taylor, Jr., Saul Ewing LLP (via email)