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Attorney General Opinion No. 16-IB26

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VIA EMAIL

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RE: November 2, 2016 FOIA Petition Regarding the University of Delaware Board of Trustees¹

Dear Senators and Representatives:

We write in response to your correspondence regarding the University of Delaware Board of Trustees (the "Board"), which we received on November 2, 2016, alleging certain violations of the open meetings provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"). We treat your correspondence as a petition ("Petition") for a determination

¹ We note that your correspondence is dated November 1, 2016, but was sent to us via email on November 2, 2016.

pursuant to 29 *Del. C.* § 10005(e) regarding whether a violation of FOIA has occurred or is about to occur. By letter dated November 9, 2016, and pursuant to our routine process in responding to petitions for determination under FOIA, we invited the Board to submit a written response. We received the Board's response ("Response Letter") on November 9, 2016. We have reviewed the Petition and the Response Letter.² As set forth more fully below, because the agenda for the May 17, 2016 meeting failed to identify a major issue that the Board expected to discuss, it is our determination that the Board violated FOIA. To remediate this violation, we ask that the Board consider the matter anew at its next meeting.

FACTS

On April 14, 2016, the Board's Committee on Academic Affairs ("Committee") held a meeting. Dr. Prasad Dhurjati and Dr. Fred Hofstetter, both members of the University of Delaware Faculty Senate ("Faculty Senate"), attended the meeting. During the April 14 meeting, Dr. Nancy Targett, then-Acting President of the University of Delaware, and Mr. Gil Sparks, a Board member and guest of the Committee, reviewed the process, timeline and proposed revisions to Article 3 of the University's bylaws. Dr. Hofstetter expressed appreciation to Dr. Targett and Mr. Sparks for their work and the openness with which the process was being conducted and, in turn, Board member John Cochran expressed appreciation to Dr. Hofstetter and faculty members who had been involved in the process. Dr. Targett and Mr. Sparks noted that the proposed revisions would be finalized and brought to the Board's Executive Committee ("Executive Committee") for further review at its May meeting.

On April 25, 2016, Dr. Targett sent a memorandum to Dr. Robert Opila, then-President of the Faculty Senate. The April 25 memorandum included as an attachment the recommended revisions "as they w[ould] be transmitted to the [Board]" and indicated that the recommended changes were developed by an advisory committee and informed by extensive input from the University of Delaware community of faculty and staff. The memorandum included information regarding the process and timeline. The timeline indicated that Dr. Targett would submit recommended changes to the Executive Committee on May 5, 2016, that the Executive Committee would consider recommended changes on May 10, 2016, and that the Board would vote on the Executive Committee's suggested changes on May 17, 2016.

On May 2, 2016, the Faculty Senate held a meeting. During the May 2 meeting, the Faculty Senate discussed and voted upon its concerns with Board's proposed revisions to Article 3 of the University's bylaws. The Faculty Senate also voted to approve a resolution thanking the Board for seeking to involve the Faculty Senate and requesting that the Board not approve revisions to Article 3 the University's bylaws until after the Faculty Senate has been given an opportunity to consider and vote to endorse any proposed revisions.

² While we note that the parties have submitted additional email correspondence, we have determined that those items are not relevant to this determination.

On May 10, 2016, the Executive Committee held a meeting. Dr. Opila, Dr. Dhurjati, and Dr. Calvin Keeler, then President-elect of the Faculty Senate, attended the meeting. Among other things, the Executive Committee discussed the proposed revisions and noted that they would be considered by the full Board on May 17, 2016.

The Board met on May 17, 2016. The agenda for the meeting included as an item “Additional Resolutions for Board Approval.” The agenda did not identify any specific resolution. However, among other items, the Board discussed and voted on amendments to Article 3 of the University’s bylaws during the meeting.

POSITIONS OF THE PARTIES

In your Petition, you allege that the Board violated FOIA by failing to notify the public that it expected to discuss revisions to Article 3 of the University’s bylaws at its May 17, 2016 meeting. In its Response Letter, the Board implicitly acknowledges that it intended to and did revise Article 3 of the University’s bylaws during its May 17 meeting. The Board notes that the form of agenda used for the May 17 meeting was a “traditional form, used by the University’s Board of Trustees over the years,” which “should and will be revised.” The Board also states that it will reconsider the bylaw revisions during its December meeting and that its agenda will include specific reference to the bylaw changes.³ The Board acknowledges technical compliance with FOIA is required, but maintains that your Petition “is not about . . . transparency.” Specifically, the Board notes that “faculty representatives (the constituents on behalf of whom [you] have complained) were fully aware that the amendments in question would be considered by the Board on May 17” and that “[t]hose faculty representatives (and, at times, all faculty) participated in a long and open process leading up to the May 17 meeting.” As a result, the Board argues that “this is not a case in which interested parties were unaware of what a ‘public body’ planned to consider at a ‘meeting[.]’”

RELEVANT STATUTES

FOIA requires all public bodies to “give public notice of their regular meetings and their intent to hold an executive session closed to the public, at least 7 days in advance thereof.”⁴ “The notice shall include the agenda, if such has been determined at the time, and the dates, times and

³ We have since reviewed the agenda for the December 13, 2016 meeting and note that the agenda includes “[a]pprove the revisions, as recommended, for Articles 1, 2 and 3 of the University of Delaware Bylaws.” The agenda contains an appendix entitled “Ratification of Actions Taken by the Board of Trustees at its Semi-Annual Meeting of May 17, 2016,” which lists “[a]pprove the revisions, as recommended, for Article 3 of the University of Delaware Bylaws” as an item for ratification.

⁴ 29 *Del. C.* § 10004(e)(2).

places of such meetings”⁵ An agenda is defined as including a “general statement of the major issues expected to be discussed at a public meeting[.]”⁶

DISCUSSION

As noted above, Delaware’s FOIA requires public bodies to give at least 7 days’ notice of their regular meetings and to include the agenda if it has been determined at the time.⁷ “While [FOIA] requires only a ‘general statement’ of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfie[s] neither the spirit nor the letter of [FOIA] to state the subject in such broad generalities as to fail to draw the public’s attention to the fact that that specific important subject will be treated.”⁸

Here, the May 17, 2016 agenda included as an item “Additional Resolutions for Board Approval.” The agenda did not identify any specific item or resolution. Nevertheless, the Board expected to and did discuss and vote upon revisions to Article 3 of the University’s bylaws during the May 17 meeting. There can be no doubt that revisions to a public body’s bylaws qualify as “a major issue.”⁹ We believe that the Board’s general reference to “Additional Resolutions for Board Approval” was insufficient to draw the public’s attention to the fact that the Board expected to discuss revisions to Article 3 of the University’s bylaws.¹⁰ As such, it is our determination that the

⁵ *Id.*

⁶ 29 *Del. C.* § 10002(a).

⁷ 29 *Del. C.* § 10004(e)(2).

⁸ *Ianni v. Dep’t of Elections of New Castle County*, 1986 WL 9610, at *5 (Aug. 29, 1986).

⁹ *See, e.g.*, Black’s Law Dictionary (10th ed. 2014) (defining “bylaw” as “[a] rule or administrative provision adopted by an organization for its internal governance and its external dealings”); *see also Del. Op. Att’y Gen.* 08-IB08 (May 5, 2008) (concluding that town did not violate FOIA by including in its agenda that a resolution to amend the town’s charter would be voted on, but noting that a reference to “Town Charter” would have violated FOIA).

¹⁰ *Compare Del. Op. Att’y Gen.* 15-IB01 (June 12, 2015) (School board’s use of “Legal and Personnel Issues” insufficient to notify the public that public body intended to discuss and take action on Superintendent contract), *and Del. Op.* 02-IB20 (Aug. 30, 2002) (“Town Charter Changes” insufficient to notify the public that the town would consider and vote to restrict voter eligibility), *with Del. Op. Att’y Gen.* 15-IB06 (Aug. 19, 2015) (no FOIA violation where agenda indicated that public body would discuss and potentially vote on acquisition of properties and identified the precise addresses of the properties under consideration), *and Del. Op. Att’y Gen.* 11-IIB11 (Aug. 17, 2011) (no FOIA violation where specific items identified in agenda).

Board violated FOIA by failing to include any reference to its intent to discuss and vote upon revisions to Article 3 of the University's bylaws in its May 17 agenda¹¹

To be clear, we are not persuaded by the Board's suggestion that FOIA's goal of transparency has been achieved because faculty representatives "were fully aware" that bylaw revisions would be discussed at the May 17 meeting. Indeed, the Board's assertion that "this is not a case in which interested parties were unaware of what a 'public body' planned to consider at a 'meeting'" misses the point. While we recognize that the faculty representatives may have been the most easily identifiable "interested parties" in the Board's expectation to discuss revisions to Article 3 of the University's bylaws, it is the citizens of Delaware whose rights FOIA seeks to protect.¹² FOIA's declaration of policy provides:

It is vital in a democratic society that public business be performed in an open and public manner so that *our citizens* shall 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 policy¹³

To that end, a primary purpose of FOIA's notice and agenda requirements is to "notify[] *the public* of important matters that will be discussed and possibly voted on so that *members of the public* can decide whether to attend a particular public meeting."¹⁴ Here, because the agenda failed to notify *members the public* of a major issue that the Board expected to discuss, FOIA's goal of transparency has *not* in fact been achieved.

¹¹ See 29 Del. C. § 10002(a) (agenda must include "a general statement of the major issues to be discussed").

¹² See Del. Op. Att'y Gen. 16-IB20 (Sept. 30, 2016) ("Citizens of this state are those most likely to be able to 'observe the performance of public officials' through the statute's open meeting provisions and to have the greatest need to "monitor the decisions" officials make in formulating and executing public policy. The citizens of this state are the people who face directly the consequences of the decisions made by Delaware's public officials and who, as compared to the citizens of other states, have the greater interest in and ability to hold those officials accountable.") (citation omitted).

¹³ 29 Del. C. § 10001 (emphasis added).

¹⁴ Del. Op. Att'y Gen. 12-IIB13 (Dec. 21, 2012) (emphasis added).

REMEDATION¹⁵

Having determined that the Board violated FOIA, we next address whether and to what extent remediation is warranted. In its initial response, the Board indicated an intent to reconsider the bylaw revisions during its December meeting and represented that its agenda would include specific reference to the bylaw revisions. We have since reviewed the agenda for the December 13 meeting and have confirmed that it contains specific reference to ratification of the Board's approval of the bylaw revisions as an action item. We request that the board engage in meaningful discussion on the matter to the greatest extent possible prior to its vote.¹⁶ Even if the vote is unlikely to change, we believe that a meaningful public discussion of the matter prior to the vote will satisfy the spirit of FOIA by enabling any interested member of the public to observe and better understand the choices made.¹⁷ We believe that the Board will have sufficiently remedied the aforementioned FOIA violation if it indeed ratifies its prior public vote during its December 13 meeting.¹⁸ Although we note that any action taken by a public body in violation of FOIA *may* be voidable by the Court of Chancery,¹⁹ we believe it unlikely that the Court would impose this extreme remedy under the circumstances presented here.²⁰

¹⁵ While this determination is limited to the agenda item at issue in the Petition, we nonetheless encourage the Board to remediate any known or potential FOIA violations.

¹⁶ See *Del. Op. Att'y Gen.* 07-IB03 (Feb. 23, 2007) (requesting that the board engage in new and substantial reconsideration of decision to change basis for tax assessments); *Del. Op. Att'y Gen.* 06-IB05 (Mar. 27, 2006) (public body cured FOIA notice violation by engaging in a "thorough public airing of the issue" before voting).

¹⁷ See *Del. Op. Att'y Gen.* 12-IIB12 (Nov. 21, 2012) ("FOIA ensures that members of the public have the opportunity to observe and monitor the Board's decisions. FOIA does not give citizens the right to make or rebut presentations or otherwise participate actively in public meetings").

¹⁸ See *Levy v. Bd. of Educ. of Cape Henlopen School Dist.*, 1990 WL 154147, at *6 (Del. Ch. Oct. 1, 1990) (noting that "there may be circumstances where this Court would legitimately conclude that a later public vote at a meeting held in compliance with the sunshine law would remedy an earlier minor violation").

¹⁹ See 29 *Del. C.* § 10005(a).

²⁰ See *Ianni*, 1986 WL 9610, at *7 (noting "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"). Cf. *Chemical Indus. Council of Del. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295, at *14 (Del. Ch. May 19, 1994) (voiding actions appropriate "[b]ecause most of the Board's deliberations on the proposed Regulations took place *behind closed doors*, the public had *no* opportunity to observe and monitor the Board's proceedings and to understand the basis for the Board's actions on a matter of public importance") (emphasis added).

CONCLUSION

For the reasons set forth above, it is our determination that the Board violated FOIA by failing to include proposed revisions to Article 3 of the University's bylaws – a major issue expected to be discussed – in its agenda for its May 17, 2016 meeting. Because the Board has indicated an intent to reconsider the issue and ratify the vote at its December 13 meeting, we do not believe any further remediation to be warranted.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, State Solicitor

cc: Laure Bachich Ergin, Esq. (via email)
Ms. Beverly Flannigan, Legislative Aide for the 9th Senate District (via email)