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Attorney General Opinion No. 16-IB25

December 13, 2016

VIA EMAIL

Ms. Laura Nash
len19711@gmail.com

Ms. Jackie Hilderbrand Kook
jax2816@yahoo.com

RE: November 22, 2016 FOIA Petition Regarding the Christina School District Board of Education

Dear Ms. Nash and Ms. Kook:

We write in response to your correspondence, received on November 22, 2016, alleging that the Christina School District Board of Education (the "Board") violated 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 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 "provide the Board's response to the allegations, including the factual basis and any legal authorities for its position, by December 2, 2016." We received a response from the Board's counsel on November 29, 2016 ("Response"). We have reviewed the Petition and the Response. As set forth more fully below, it is our determination that the Board violated FOIA by convening an executive session to discuss interview questions and next steps in the search process for the Christina School District Superintendent Position. To remediate this violation, we ask that the Board discuss the matters anew during its December 13, 2016 meeting.

FACTS

The Board met on November 21, 2016. Among other items, the agenda for the meeting contained the following "Action Items" under the "Regular Session Agenda":

- Approve Superintendent Search Interview Questions, and
- Approve Next Steps in Superintendent Search Interview Process.

The agenda also noted that “[t]he Board reserve[d] the right to adjourn to Executive Session.” During the meeting, the Board convened an executive session to discuss both items.¹

POSITIONS OF THE PARTIES

In your Petition, you allege that the Board violated FOIA by convening an executive session to formulate questions or discuss the interview process for its open superintendent position.

In its Response, the Board specifically declined to admit that the Board violated FOIA. However, in that same correspondence, counsel for the Board indicated that he anticipates that the Board will discuss those matters in an open session during its December 13, 2016 meeting,” but did not specify whether the anticipated discussion would be a continuation of the November 21 discussion or a reconsideration of the matters already discussed. We have since reviewed the agenda for the December 13 meeting and note that it contains the following “Action Items” under “Regular Session Agenda”:

- Superintendent Search Interview Questions
- Superintendent Search Finalist Interview Schedules
- Open Superintendent Position.

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].”² Pursuant to 29 *Del. C.* § 10004(b), a public body may “call for an executive session closed to the public” only for purposes expressly permitted by the statute. For example, FOIA permits a public body to meet in executive session to discuss “an individual citizen’s qualifications to hold a job or pursue training unless the citizen requests that such a meeting be open.”³ Similarly, “[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such meeting be open” may also be discussed in executive session.⁴ However, even in the case of an executive session, “all voting on public business must take place at a public meeting and the results of the vote made public.”⁵

¹ In the Response, counsel for the Board stated that he “anticipate[s] that at the December 13th meeting there will be an open session agenda item to discuss the matters at issue which apparently were discussed on November 21, 2016 executive session.” We interpret this statement to be an implicit acknowledgement that the Board indeed discussed those matters in executive session as alleged. As such, we deem this to be an uncontroverted fact.

² 29 *Del. C.* § 10004(a).

³ 29 *Del. C.* § 10004(b)(1).

⁴ 29 *Del. C.* § 10004(b)(9).

⁵ 29 *Del. C.* § 10004(c).

DISCUSSION

We agree that FOIA does not permit a public body to convene an executive session to formulate questions or discuss the interview process for an open employment position. The selection process for a new employee, including a school board's discussions and decisions relating to its superintendent selection process, cannot be discussed in executive session.⁶ Although FOIA permits a public body to discuss personnel matters in executive session, any private discussion must directly involve an individual employee's competency and abilities, or a specific individual's qualifications to hold a job.

Here, although the Board has not expressly acknowledged that it violated FOIA on November 21, 2016 as a legal matter, it is uncontroverted that, as a factual matter, the Board indeed discussed interview questions and next steps in the search process for the Christina School District Superintendent Position in executive session. The Board has offered no evidence to support a conclusion that the discussions directly involved consideration of an existing employee's competency and abilities,⁷ or of specific applicants' qualifications.⁸ As such, it is our determination that the Board violated FOIA by convening an executive session to discuss matters not permitted by FOIA.⁹ Additionally, while we are aware of no allegation or proof that the Board voted on either of these matters during the executive session, we note that any such vote would have also violated FOIA's mandate that "all voting on public business must take place at a public meeting and the results of the vote made public."¹⁰

⁶ Prior opinions issued by this office have suggested that application of the FOIA statute's exemptions relating to personal matters might apply differently to school superintendents and candidates for school superintendent because of the prominent and important nature of that position. To the extent that this has been suggested in prior opinions, that issue has been revisited, and the Department believes that personnel discussions relating to school superintendents and candidates for school superintendent should be treated the same way under the FOIA statute as personnel discussions relating to any other state employees or candidates for government employment. There is no language in the FOIA statute stating or implying that the exclusions for personnel matters apply differently to jobs that are deemed more or less important than others.

⁷ 29 *Del. C.* § 10004(b)(9).

⁸ 29 *Del. C.* § 10004(b)(1).

⁹ 29 *Del. C.* § 10004(a) ("Every meeting of all public bodies shall be open to the public except those closed [for a permitted reason]."). In the alternative, and absent any substantive argument from the Board regarding whether the Board's actions violated FOIA, it is our determination that the Board has violated FOIA inasmuch as it has failed to meet its burden of proof to justify its decision to meet in executive session. *See* 29 *Del. C.* § 10005(c); *Del. Op. Att'y Gen.* 13-IB01 (Mar. 26, 2013) ("Because the propriety of the . . . Executive Sessions has been challenged, the Board bears the burden of justifying its invocation of these exemptions.") (citing *Del. Op. Att'y Gen.* 97-IB14 (July 29, 1997)).

¹⁰ 29 *Del. C.* § 10004(c).

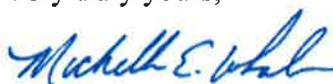
REMEDIATION

Having determined that the Board violated FOIA, we next address next whether and to what extent we believe remediation to be warranted. We recognize that the Board's counsel has represented that he anticipates that the Board will discuss the matters during the public portion of its December 13 meeting. We also note that the agenda for the December 13 meeting has since been published and contains action items under the regular session agenda which support this representation. However, as noted above, it is not clear to us whether the anticipated discussion will be a continuation of the November 21 discussion or a reconsideration of the matters already discussed. In light of this office's clear guidance that discussion of the mechanics of a superintendent hiring process are not proper for executive session, we request that, during the public session of its December 13 meeting, the Board discuss anew all of the matters discussed in its November 21, 2016 executive session regarding the formulation of questions and the interview process for its open superintendent position. To the extent that any votes were taken on the matters during the November 21 executive session, we also request that the Board revisit its votes after engaging in a meaningful public discussion of the matters.¹¹ Of course, we are mindful that certain steps may have been taken since November 21 in furtherance of the hiring process. As this office has stated previously, "[e]ven if the outcome . . . is unlikely to change, we think the Board members, at a minimum, have a duty to disclose and discuss publicly the factors supporting their decisions on those important issues."

CONCLUSION

For the reasons set forth above, it is our determination that the Board violated FOIA by convening an executive session to discuss interview questions and next steps in the search process for the Christina School District Superintendent Position. To remediate this violation, we ask that the Board discuss the matters anew during its December 13, 2016 Board meeting.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

APPROVED BY:



Aaron R. Goldstein, State Solicitor

cc: James H. McMackin, III, Esq.

¹¹ 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).