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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB08

April 3, 2017

VIA U.S. MAIL AND EMAIL

Jea P. Street
Executive Director
Hilltop Lutheran Neighborhood Center
1018 W. Sixth St.
Wilmington, DE 19805
jea.street@hilltoplnc.org

Re: March 2, 2017 FOIA Petition Concerning the Red Clay Consolidated School District Board of Directors

Dear Mr. Street:

We write in response to your March 2, 2017 petition (“Petition”) for a determination, pursuant to the Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”), of whether the Red Clay Consolidated School District (the “District”) Board of Directors (the “Board”) violated FOIA’s open meetings provisions. By letter dated March 3, 2017, 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 March 10, 2017. On March 17, 2017, we requested that the Board provide one or more affidavits setting forth its factual contentions and signed by someone with personal knowledge. The Board supplemented its response on March 23, 2017 and included two affidavits therewith. We have reviewed the Petition, the Response Letter, and the Board’s supplemental response. For the reasons set forth below, it is our determination that the Board did not violate FOIA as alleged in the Petition. We nonetheless caution the Board and its members to give careful consideration to their public representations regarding the conduct of the Board.

RELEVANT FACTS

On Thursday, February 23, 2017, at 7:47 AM, you sent an email to the District’s Superintendent, Dr. Mervin Daugherty, requesting an “appeal and hearing” on behalf of a named

student and other similarly-situated students.¹ Your email included as an attachment a formal letter wherein you requested an emergency hearing before a fair and impartial hearing officer regarding the decision to end the Alexis I. du Pont High School boys' basketball season and a request that the season be immediately reinstated pending the outcome of any and all appeals.² Your letter identified ten reasons for your request, separated by numbered paragraphs.³ Dr. Daugherty responded to your email at 4:00 PM that same day.⁴ The email included as an attachment a letter responding to your identified reasons for the request and stated that any further actions or complaints should be directed to the District's counsel, who was copied on the email.⁵ At 7:03 PM, you sent an email to the entire Board stating the following:

I am asking that you consider this an emergency and convene a [sic] emergency meeting and determination accordingly.

I have written the attached letter of appeal to you regarding the decisions that have been made regarding the basketball team at A.I DuPont High School.⁶

On February 24, 2017, at 11:13 AM, the Board's President, Mr. Michael Piccio, responded to your email, stating: "The decision has been finalized by the school district to support the AI du Pont High School Principals' decision to remove the Boys Basketball Team from the state tournament. . . .We have also requested a formal investigation from DIAA" ⁷ That same day, at 2:38 PM, a parent of one of the players sent an email to the Board requesting a meeting or, in the alternative, that the state tournament be postponed until a hearing could be held.⁸ At 7:39 PM, Mr. Piccio responded to the parent as follows: "I stand by the decision made by the AI High principal. . . .The majority of the board also agrees with the decision."⁹

¹ Petition at 1.

² *Id.* at Ex. 1.

³ *See id.*

⁴ *Id.* at Ex. 2.

⁵ *Id.*

⁶ *Id.* at Ex. 3.

⁷ *Id.* at Ex. 4.

⁸ *Id.* at Ex. 5.

⁹ *Id.* at Ex. 6.

SUMMARY OF ARGUMENTS

In your Petition, you allege that “the only way the [Board] President could have been able to make the assertion that **‘the majority of the board also agrees with the decision’**” is that a quorum of the Board engaged in a “meeting” as defined by FOIA without providing notice thereof, thereby violating FOIA.¹⁰

In its Response Letter, the Board maintains that “no violation of FOIA’s Open Meetings provisions occurred,” as “[t]he Board neither held a ‘secret meeting’ nor engaged in inappropriate serial conversations by email or telephone to reach a decision outside of a properly noticed and convened public or executive session meeting.”¹¹ The Board cited to its own policies and noted that a special meeting may be called by the Board President on his own authority or if requested by two Board members.¹² According to the Board, “there was no need for the board to convene a special meeting- secret or otherwise- to consider the demand for a special meeting” as the Board President did not believe one to be necessary and he did not receive such a request for two or more members of the Board.¹³ Regarding the Mr. Piccio’s February 24, 2017 statement that “the majority of the board also agrees with the decision,” the Board stated:

Mr. Piccio’s comments were based purely on information provided to him by Kevin Palladinetti, the Principal at Alexis I. du Pont High School, and not the tainted fruits of an unlawful chain of secret or serial conversation with his fellow Board members. As the public controversy regarding the decision to end the boys basketball season grew, a number of Board members separately contacted Mr. Palladinetti to express their support for his decision.¹⁴

The Board stated that several Board members, including Mr. Piccio, visited the school at various times during the day on February 23, 2017 “to show solidarity with [Mr. Paladinetti] and demonstrate their support for the decision he had made.”¹⁵ According to the Board, “[i]t was

¹⁰ Petition at 2.

¹¹ Response Letter at 1.

¹² *Id.* at 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* The Response Letter stated that Mr. Piccio’s visit took place on Friday, February 24, 2017. However, the Board clarified in its March 23, 2017 correspondence that Mr. Piccio in fact visited on Thursday, February 23, 2017.

during his visit with the high school . . . that Mr. Piccio learned, directly from Mr. Palladinetti, that a majority of his Board colleagues had contacted him expressing their agreement with his decision.¹⁶

On March 17, 2017, we requested that the Board provide one or more affidavits setting forth the Board's factual contentions and signed by someone with personal knowledge. On March 23, 2017, the Board provided affidavits signed by Mr. Palladinetti and Mr. Piccio. The affidavits, which were sworn to under penalty of perjury,¹⁷ demonstrate that three Board members – Martin Wilson, Kenny Rivera, and Ken Woods – separately contacted Mr. Palladinetti to express their support for his decision.¹⁸ The affidavits also demonstrate that Mr. Piccio and another Board member, Cathy Thompson, visited the school on February 23, 2017, during which Ms. Thompson voiced her support for Mr. Palladinetti's decision in Mr. Piccio's presence and Mr. Palladinetti informed Mr. Piccio of the other Board members' showing of support.¹⁹

RELEVANT STATUTES

FOIA defines a “meeting” 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.”²⁰ With few exceptions, all meetings of public bodies shall be open to the public.²¹

DISCUSSION

This office has held that “serial” communications among members of a public body *may* amount to a meeting subject to FOIA's open records provisions.²² The threshold inquiry, of

¹⁶ *Id.*

¹⁷ “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.

¹⁸ Palladinetti Aff. ¶ 4.

¹⁹ *Id.* at ¶¶ 5-6; Piccio Aff. ¶¶ 6-8.

²⁰ 29 *Del. C.* § 10002(g).

²¹ 29 *Del. C.* § 10004(a) (“Every meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (h) of this section.”).

²² *See, e.g. Del. Op. Att’y Gen.* 04-IB17, 2004 WL 2639714, at *4 (Oct. 18, 2004) (concluding that “serial telephone calls amounted to a meeting of a quorum of the [New Castle

course, is whether the communications at issue involved a quorum of the public body.²³ Importantly, however, a complaining party must make a *prima facie* showing that a meeting may have occurred, at which point the burden then shifts to the public body to prove that no FOIA violation occurred.²⁴ As we have previously noted, we do not interpret FOIA to place the burden on the public body to prove that a meeting did not in fact take place.²⁵

Here, even if we were to conclude that a *prima facie* showing has been made that a meeting may have occurred in connection with Mr. Piccio's statement that "[t]he majority of the Board also agree[d] with the decision," we are satisfied, based upon the record, that no such meeting actually occurred. The record does not support a finding that a quorum of the Board discussed a matter of public business with one another, through a constructive quorum or otherwise. Rather, the record demonstrates that Mr. Piccio's statement regarding the opinion of "the majority of the Board" was based primarily upon information relayed to him by a third party. As noted above, three Board members separately contacted Mr. Palladinetti, who is not a Board member, to express their individual support for a decision that Mr. Palladinetti had made in his capacity as the school's Principal. Mr. Palladinetti then shared this information with Mr. Piccio during his February 23, 2017 visit to the school. Under the circumstances, we are satisfied that Mr. Piccio was merely a passive recipient of this information.

Of course, we recognize that Mr. Piccio may have discussed the matter with Ms. Thompson during his visit to the school. However, we note that any such discussion did not involve a quorum of the Board. As such, any discussion between Mr. Piccio and Ms. Thompson regarding Mr. Palladinetti's decision would not have amounted to a "meeting" in and of itself.²⁶ Moreover, as we have already concluded that Mr. Piccio was a passive recipient of information regarding the other Board members' support of Mr. Palladinetti's decision, we likewise conclude

County] Council in violation of the open meeting requirements of FOIA"); *Del. Op. Att'y Gen.* 03-IB11, 2003 WL 21431171, at *4 (May 19, 2003) (concluding that "the [Downtown Newark Partnership Ad Hoc] Nominating Committee held a meeting subject to FOIA in an exchange of e-mails over the course of two days").

²³ See 29 *Del. C.* § 10002(g) (defining "meeting" 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." (emphasis added)); *Del. Op. Att'y Gen.* 10-IB12, 2010 WL 4154564, at *2 (Sept. 28, 2010) ("A meeting of a public body means a meeting of a 'quorum of the members,' 29 *Del. C.* § 10002(b), and, 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.").

²⁴ See *Del. Op. Att'y Gen.* 05-IB10, 2005 WL 1209240, at *2 (Apr. 11, 2005).

²⁵ *Id.*

²⁶ See *Del. Op. Att'y Gen.* 11-IIB11, 2011 WL 4062222, at *4 (Aug. 17, 2011) ("Because less than a quorum of the Town Council met with the representatives, FOIA does not apply to that meeting.").

that the record fails to support a conclusion that a quorum of the Board discussed the matter with one another, in person or through a constructive quorum. As we have determined that there is no evidence of a discussion among a quorum of the Board, it is our determination that the Board did not violate FOIA as alleged in the Petition.²⁷

Having determined that the Board, as a legal matter, did not violate FOIA as alleged, we nonetheless wish to note that we believe your concern to have been reasonable under the circumstances. Indeed, on its face, Mr. Piccio's statement that "[t]he majority of the board also agrees with [Mr. Palladinetti's] decision" implied that a quorum of the Board discussed the matter outside of the public view. As the facts here demonstrate, this representation raised significant and justifiable concern that the Board's actions violated FOIA. Thus, while it is our determination that the Board did not violate FOIA as alleged, we nonetheless caution the Board and its members to avoid any representation that would imply that the Board discussed or decided any item of public business when, in fact, it had not.

CONCLUSION

Based upon the foregoing, it is our determination that the Board did not violate FOIA as alleged in your Petition. We nonetheless caution the Board and its members to give careful consideration to their public representations regarding the conduct of the Board.

Very truly yours,



Michelle E. Whalen
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: LaKresha S. Roberts, Chief Deputy Attorney General (via email)
Michael P. Stafford, Esq. (via email)

²⁷ We note that you appear to be dissatisfied with the Board's failure to convene a special meeting upon request. *See generally* Petition. Similarly, we note that the Board has cited to its own policy regarding the circumstances under which the Board may call a special meeting and has maintained that no such circumstances existed here. *See* Response Letter at 2; Piccio Aff. ¶¶ 4, 9. However, the question of whether the Board should have held a meeting as requested is outside the scope of FOIA and we are unable to express any opinion about whether such a meeting was appropriate under the circumstances.