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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB52

October 9, 2017

VIA U.S. MAIL AND EMAIL

Kevin Ohlandt
9 Crosley Court
Dover, DE 19904
Kevino3670@yahoo.com

Re: FOIA Petition Concerning DelTech Community College's Advisory Boards Dated May 10, 2017

Dear Mr. Ohlandt:

The Delaware Department of Justice ("DOJ") has received your petition requesting our determination, pursuant to the State of Delaware Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 ("FOIA"), of whether DelTech Community College ("DTCC") has violated FOIA. Specifically, you requested that we determine whether the following entities created by DTCC are public bodies and as such are required, and failed to adhere to FOIA's open meeting and public records requirements:

- The Collegewide Criminal Justice Advisory Board ("CJ Advisory Board");
- The Collegewide Safety/Security Committee;
- The Ad Hoc President's Council;
- The President's Council of DTCC Administrators;
- The College Educational Foundation ("Foundation");
- The Learning Community Collegewide Steering Committee; and
- 70 similar unspecified advisory committees.¹

We have reviewed DTCC's original and supplemental responses along with your Petition. Our determination is set forth below.

¹ You do not list the 70 similar advisory committees by name, but instead reference a website without further identification of these entities. However, this determination is limited to the entities specifically identified in your Petition.

As an initial matter, we note that DTCC is not exempted from certain FOIA obligations as are the State's two other public institutions of higher learning.² For example, we note that FOIA specifically exempts the University of Delaware and Delaware State University from FOIA's open meeting provisions, with the exception of meetings of their full Boards of Trustees.³ It is not clear why the General Assembly has chosen to treat DTCC differently than the University of Delaware and Delaware State University with respect to the Freedom of Information Act. But given that the General Assembly has not carved out a similar exemption for the DTCC, we must approach this analysis as we would any other entity.

29 Del. C. § 10002(h) defines a public body using a two-part test. First, it must be determined whether the group is a "regulatory, administrative, advisory, executive, appointive or legislative body...of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council *or any other entity or body* established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State *or otherwise empowered by any state governmental entity.*"⁴ The second part of the two-part test requires us to determine whether the entity is supported by or expends public funds, or is impliedly or specifically charged by any other public official, body, or agency to advise or make reports, investigations or recommendations.⁵

Collegewide Criminal Justice Advisory Board

The General Assembly established DTCC's Board of Trustees (the "Board of Trustees") and granted it with the "custody of and [responsibility] for the management and control of [DTCC]."⁶ The Board of Trustees is also tasked with "determin[ing] the educational program of [DTCC]."⁷ It is undisputed that the Board of Trustees is a public body as defined by FOIA.⁸ Here,

² See 29 Del. C. § 10002(i).

³ *Expressio unius est exclusio alterius*. DTCC's absence from this section of FOIA granting exemption to similarly situated parties permits the inference that DTCC and its various committees are likely public bodies. *Fuller v. State*, 104 A.3d 817, 822 (Del. 2014); *Brown v. State*, 36 A.3d 321, 325 (Del. 2012).

⁴ 29 Del.C. § 10002(h) (emphasis added).

⁵ *Id.*

⁶ 14 Del. C. § 9105(c).

⁷ 14 Del. C. § 9105(d)(5).

⁸ Response Letter at 1.

DTCC maintains that “[t]here is *no relationship* between the Board of Trustees and the chairpersons of [DTCC’s] individual academic programs.”⁹ Similarly, DTCC states that “[t]he authority for the establishment, composition and meeting frequency for Program Advisory Boards is found in the College’s curriculum guidelines,” which “are administrative in nature and are adopted by the College’s Vice President for Academic Affairs in consultation with the Deans of Instruction for each campus.”¹⁰ The question, of course, is whether the apparent attenuation between the CJ Advisory Board and the Board of Trustees shields the CJ Advisory Board from FOIA’s broad definition of what constitutes a public body. It is not clear from the record presented by DTCC whether the CJ Advisory Board provides advice to DTCC in a formal way through votes of the Board, or whether its individual members simply provide feedback to DTCC in an ad hoc fashion. Absent clarity with respect to this important fact, we are required by the FOIA statute to err on the side of requiring transparency and determine that the CJ Advisory Board is a public body.

The CJ Advisory Board is comprised of a group of individuals, from within DTCC and externally, which is empowered by DTCC to, in relevant part:

“assist in the development of a new program by participating in needs assessment; (2) review[] the results of student learning outcomes assessment, job placement in the career field and licensure/national examination pass rates, among other information, as means to inform curriculum planning; (3) evaluate[] facilities and equipment and identify[] or obtain[] access to necessary equipment; (4) help[] with career guidance and placement; and promot[e] program education through a public information program.”¹¹

During its January 13, 2017 meeting, the CJ Advisory Board discussed its role and function in regards to curriculum; equipment, facilities and records; career guidance and placement; public relations; and community resources identification.¹² The CJ Advisory Board members engaged in discussion about changes and additions to the program in each of the delineated areas. While there may be circumstances under which this analysis might hinge on the extent to which decision-making authority has been delineated to the group at issue,¹³ the possibility that the CJ Advisory

⁹ Supplemental Response Letter at 1.

¹⁰ *Id.* at 1-2.

¹¹ Supplemental Response at 9-10.

¹² *Id.* at 12.

¹³ *See Del. Op. Atty. Gen.* 01-IB15, 2001 WL 1593115, at *2-3 (Oct. 23, 2001). In that opinion, we compared *Wood v. Marsten*, Fla. Supr., 442 So.2d 934 (1983) (sunshine law applied where University President appointed a committee to solicit and screen applicants and submit to him the best candidates for a new law school dean because the President delegated the decision on which candidates to reject to the committee) with *Bennett v. Warden*, Fla. App. 333 So. 2d 97, 99 (1976) (fact finding meetings to assist a public official to make a decision were not meetings of a public body) and *Cape Publications, Inc. v. City of Palm Bay*, Fla. App., 473 So. 2d 222 (1985)

Board is formally taking action as a group based on the factual record before us requires that we determine that it is a public body under FOIA. Should DTCC clarify in the future that the CJ Advisory Board does not take votes as a body or make formal recommendations as a body, a different conclusion with respect to FOIA might be appropriate.

Having determined that the CJ Advisory Board is a public body, we address your specific allegations that that the CJ Advisory Board held a meeting on January 13, 2017 and did not properly adhere to FOIA's open meetings laws in conjunction with that meeting. Based upon the record provided to us, we determine that the CJ Advisory Board violated FOIA by failing to observe FOIA's open meeting requirements in connection with its January 13, 2017 meeting. We therefore recommend that the CJ Advisory Board make its meeting minutes available to the public. We trust that DTCC is now on notice of its legal obligation to comply with the open meetings and public records requirements of FOIA and recommend that DTCC attend our annual FOIA coordinator training.

College Educational Foundation

The Foundation is not a public body in and of itself because it is a "private legal entity separate from DTCC."¹⁴ Notably, however, its composition includes seven members of the Board of Trustees,¹⁵ which is indeed a public body, as discussed above. A quorum of the members of the Board of Trustees is reached when 4 members are present.¹⁶ Since FOIA defines a "meeting" as "a 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,"¹⁷ any gathering of the Foundation that includes a quorum of the Board of Trustees, and during which public business is discussed, is considered a meeting of the Board of Trustees to which FOIA's open meetings requirements are applicable.

Collegewide Safety/Security Committee, Ad Hoc President's Council, President's Council, and Learning Community Collegewide Steering Committee

A group composed solely of DTCC staff members does not constitute a public body.¹⁸ As the record demonstrates, the above listed groups are – or were, in the case of the now-disbanded

(committee created to assist a city manager in finding information on qualifications of candidates for a job was not decision-making because they brought all the information to the city manager rather than screening or rejecting candidates themselves).

¹⁴ Supplemental Response at 6.

¹⁵ *Id.*

¹⁶ 14 *Del. C.* § 9013(i).

¹⁷ 29 *Del. C.* § 10002(g)


¹⁸ *Del. Op. Atty. Gen.* 17-IB37, 2017 WL 3500080, at *5 (Aug. 7, 2017). (noting that audio tape recordings of the Senate debates for the original FOIA bill "demonstrate that neither the

Ad Hoc President's Council and the Learning Community Collegewide Steering Committee – comprised solely of DTCC staff members, as such, we do not believe FOIA's open meetings provisions apply to them.

Very truly yours,


Carla A.K. Jarosz
Deputy Attorney General

Approved:



Aaron R. Goldstein, State Solicitor

cc: LaKresha Roberts, Chief Deputy Attorney General (via email)
Michelle E. Whalen, Deputy Attorney General (via email)
Brian Shirey, Esq. (via email)

definition of 'public body' nor the open meetings requirements were intended to include staff meetings.").