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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE
Attorney General Opinion No. 16-IB05

March 11, 2016

VIA EMAIL

Representative Kim Williams
411 Legislative Avenue
Dover, DE 199013
Via Email: kimberly.williams@state.de.us

Re: FOIA Complaint Concerning the State Board of Education

Dear Representative Williams:

On January 24, 2016, the Delaware Department of Justice (“DOJ”) received your email complaint requesting our determination pursuant to the Freedom of Information Act, 29 *Del. C. Ch. 100* (“FOIA”), of whether the State Board of Education violated the FOIA open meeting requirements. We treat your email as a petition for a determination of whether a violation of FOIA has occurred or is about to occur. 29 *Del. C. §10005(e)*. Our determination is set forth herein.

FACTUAL BACKGROUND¹

On January 21, 2016, a State Board of Education (“Board”) meeting was held in Dover. Representative Williams attended the meeting along with other members of the public. During that meeting, the Board entertained a motion to approve the Wilmington Education Improvement Commission (“WEIC”) Plan. A member of the audience asked if a member of the WEIC would be able to speak before the motion was voted on. Board President, Dr. Teri Quinn Gray, noted that she did not think there was going to be any public comment or presentations but asked for clarification. Board Counsel, Ilona Kirshon, stated that the Board had the ability to waive the no-comment rule. Dr. Gray noted that they would “hold that” and asked Executive Director of the Board, Donna Johnson, to discuss with Ms. Kirshon at “sidebar.”

¹ The Factual Background Section of this Opinion refers to your communications as made by “Representative Williams” for ease of future reference by third parties.

ALLEGED VIOLATIONS

Representative Williams alleges that during the meeting, Dr. Gray “instructed someone to have a side bar conversation.” Representative Williams also alleges that she later witnessed “Dr. Gray coming over to the attorney’s table and asked the attorney questions about WEIC and what had taken place with the vote and the amendment.” Representative Williams’ argues that the Board violated FOIA’s open meeting requirements by conducting conversations off the record.

Representative Williams also contends that the Board’s vote on the WEIC plan was improper because “[t]hey voted yes with an amendment.” Representative Williams argues that the Board was required to vote “yes or no.”

THE BOARD’S RESPONSE TO THE ALLEGATIONS

The Board, through counsel Ilona Kirshon, responded to Representative Williams’ allegations by letter dated February 2, 2016. Regarding Representative Williams’ first allegation, that Dr. Gray asked the Executive Director of the Board, Donna Johnson, to confirm with counsel the statement counsel had made on the record, Ms. Kirshon argues that the “conversation between counsel to the Board and administrative staff did not constitute a violation of the Open Meetings section of FOIA as it was not part of the public body’s conduct of ‘public business’ as defined in 29 Del. C. § 10002(h) and (j).” Regarding Representative Williams’ second allegation, Ms. Kirshon responded that, “[t]he conversation between a single individual, Dr. Gray, and SBE counsel did not constitute action by or even discussion by the Board, as a single member cannot speak for the Board.”

REPRESENTATIVE WILLIAMS’ RESPONSE

Upon receipt of the Board’s response, Representative Williams provided a follow-up response. In that response, Representative Williams questioned whether the Board President had authority to deny an attendee’s right to speak/present at the meeting: “The entire board should have had discussion and then voted on whether or not [the individuals] could have addressed the State Board since the law allows for the SBE to waive the rules.” Representative Williams also noted that “[w]hen the public is present, all questions and any clarifications should be made public so the public can have a better understanding of what is actually happening.” Finally, Representative Williams raised concerns surrounding Board Executive Director Donna Johnson’s participation in the meetings: “why is Ms. Johnson allowed to speak openly during SBE meetings yet the public cannot? Ms. Johnson is not an appointed board member, she is the executive director.”

APPLICABLE LAW

“Every meeting of all public bodies shall be open to the public except those closed [for a permitted reason].” 29 Del. C. § 10004(a). “Public body” includes any subcommittee of a public body that is supported by public funds, spends public funds or is charged with making “reports, investigations or recommendations” to a public body. 29 Del. C. § 10002(c).

A public body must vote at a public meeting to move into executive session, and “all voting on public business must take place at a public meeting and the results of the vote made public.” 29 *Del. C.* § 10004(c).

LEGAL ANALYSIS

The Board did not violate FOIA when the President of the Board asked a staff member to confirm advice with Counsel.

During the January meeting, Dr. Gray asked whether there was to be public comment regarding the WEIC plan, as this was contrary to Board rules. Ms. Kirshon, as counsel to the Board, stated on the record that the Board has authority to waive its procedural rules. Dr. Gray then instructed someone, who Representative Williams identifies as Executive Director Donna Johnson, to “sidebar” with Ms. Kirshon about this advice. Representative Williams alleges that this side conversation between Ms. Kirshon and Ms. Johnson is a FOIA violation. We disagree.

A public meeting is defined 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 either in person or by video-conferencing.” 29 *Del. C.* § 10002(g). A discussion between Ms. Kirshon and Ms. Johnson was not a discussion by a quorum of the members of any public body. We have previously held, “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.” *Del. Op. Att’y Gen.* 10-IB12 (2010). Therefore, the side conversation between the Board’s attorney and Board staff did not violate FOIA.

The Board did not violate FOIA when the President of the Board consulted with the Board’s Counsel.

Representative Williams states that Dr. Gray approached counsel’s table to discuss the WEIC vote during the meeting. This exchange was not recorded but counsel for the Board confirms that she had a discussion with Dr. Gray about the vote and the timing of a draft order. The discussion between the President of the Board and the Board’s counsel was not a discussion by a quorum. As noted above, “conversations with each other or with staff do not need to be public unless they include a quorum of the members.” *Del. Op. Att’y Gen.* 10-IB12 (2010). In addition, it is clear that Representative Williams was able to hear what Dr. Gray and counsel discussed. We cannot find a FOIA violation because “absent some evidence that the members knowingly avoid public monitoring of the deliberations of the quorum, there is no basis on which to find that FOIA has been violated.” *Id.*

REMAINING ISSUES

Representative Williams raises concerns about the Board’s failure to vote “yes or no,” the Board’s refusal to allow a representative from WEIC to speak at the meeting and fact that Board Executive Director, Donna Johnson was permitted to speak at the meeting, whereas the public was not. The substantive validity of the Board’s vote is not a matter covered by the Freedom of Information Act and cannot be determined here. The validity of the Board’s procedural rules, or of its decision to waive those rules, is also not a matter covered by FOIA. Ms. Johnson is a member

of the Board's staff, and, as such, she is permitted to speak a public meeting of the Board. FOIA does not, however, mandate that public comment be permitted at every public meeting. We often encourage public bodies to permit public comment whenever possible, but when they elect not to do so, we cannot find that the choice violates FOIA.

CONCLUSION

We conclude that the aforementioned conduct did not violate FOIA.

This decision is directed solely to the parties identified herein. It is based on the facts relevant to this matter. It does not constitute precedent and should not be cited as such by future parties.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Danielle Gibbs".

Danielle Gibbs
Chief Deputy Attorney General

cc: Ilona Kirshon, Deputy State Solicitor, Delaware Department of Justice (via email)



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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 16-IB17

July 28, 2016

VIA EMAIL AND STATE MAIL

Representative Kim Williams
Legislative Hall
411 Legislative Avenue
Dover, DE 19903
kimberly.williams@state.de.us

Re: FOIA Complaint Concerning the State Board of Education

Dear Representative Williams:

The Delaware Department of Justice (“DOJ”) received your letter dated February 25, 2016 requesting our determination, pursuant to the Freedom of Information Act, 29 *Del. C. Ch. 100* (“FOIA”), of whether the State Board of Education violated the FOIA open meeting requirements. We treat your email as a petition for a determination of whether a violation of FOIA has occurred or is about to occur. 29 *Del. C. §10005(e)*. Our determination is set forth herein.

I. FACTUAL BACKGROUND¹

On February 18, 2016, a State Board of Education (“Board”) meeting was held in the second floor Cabinet Room of the Townsend Building located at 401 Federal Street in Dover. Representative Williams attended the meeting along with other members of the public. During the meeting, the Board entertained a motion to approve the Wilmington Education Improvement Commission (“WEIC”) Plan with an amendment.

¹ The Factual Background Section of this Opinion refers to your communications as made by “Representative Williams” for ease of future reference by third parties.

II. POSITIONS OF THE PARTIES

The Petition alleges that the Board “was aware that many people would be attending th[e] meeting and did not change their meeting location to accommodate all the people.” As a result, Representative Williams alleges “many people had to stand out in the hallway.” The Petition also alleges that the Board violated FOIA’s open meeting requirements by conducting conversations off the record and out of the presence of the members of the public who were in attendance:

The State Board during their public discussion on the original motion stopped the discussion and went off the record and out of the room to speak with their attorneys and board members – it was done when they were getting ready to vote. The State Board of Education, Donna Johnson, Secretary Godowsky, attorneys and others were going into the back room – obviously they were in discussions about the motion ...

Finally, the Petition alleges that the Board acted improperly by considering the WEIC recommendations with conditions after the motion on the WEIC Plan had been voted down by a vote of 4 to 3. Specifically, pursuant to Senate Bill 122, the Petition alleges that the Board was required to vote yes or no, and if they voted no, “they [we]re to send the recommendations back to the WEIC Commission with an explanation as to why they voted no.”

The Board submitted its response to the Petition on March 9, 2016. Regarding the allegation that the Board should have moved the meeting location in advance of the meeting, the Board argues that the Board was unaware that the meeting would be as heavily attended as it was. In fact, the Board noted that WEIC representatives had reached out to the Board and requested that six chairs be reserved in the audience for the meeting. The Board also responded that it has held its meetings in the Cabinet Room for more than forty years. With respect to the allegation that the Board improperly engaged in conversations off record, the Board responded that the President of the Board discussed a procedural question for the Board’s counsel during a break, but that “at no time was a quorum of the board involved in any private or ‘back room’ meeting,” and there was thus no violation of FOIA as a result of conversations among Board members that may have taken place during the break.

On March 10, 2016 and March 20, 2016, Representative Williams supplemented her Petition. In the March 10 correspondence, Representative Williams asserted that members of the public have repeatedly complained about the size of the meeting location and the fact that the Board has always met in the Cabinet Room is not a sufficient basis for the meetings to remain in that room. Additionally, she alleged that any questions that were discussed during the break should have been discussed in public. In the March 20 correspondence, Representative Williams asserted that “[t]he discussion should have never occurred in the back room, with or without a quorum, behind closed doors.” She also provided an email from Michael Matthews, who asserted that “[a]ll Board members, Sec. Godowsky and State Board Executive Director Donna Johnson left the room together...”

III. REQUEST FOR ADDITIONAL INFORMATION

On June 9, 2016, we requested additional information from the Board regarding the size of the Cabinet Room. The same day, the Board responded that, when the room is set up for State Board of Education meetings, there are 57 chairs. However, for the February meeting, there were about 64 chairs. The Board noted that, for each meeting, there are about 20 reserved chairs. Based upon this information, including the six chairs specifically reserved for the WEIC at the February 18 meeting, there were about 38 chairs open at the February meeting.

The Board also provided a count of attendees at previous meetings based solely upon the individuals who chose to sign in at each meeting, which the Board indicated was its only mechanism for counting attendance.² The September 2015 meeting during which WEIC was discussed, had 37 guests sign in. WEIC was also discussed at the October meeting, which had 22 guests. The next time WEIC was discussed during a Board meeting was December, when there were 47 guests. At the January 2016 meeting the WEIC proposal was presented for action and there were 31 guests. Finally, at the February 2016 meeting at issue here, there were 58 individuals who signed in. There were 35 guests who signed in for the final WEIC meeting in March 2016.

IV. APPLICABLE LAW

FOIA's "Declaration of Policy" provides that "citizens shall have the opportunity to observe the performance of public officials and to monitor the decisions that are made"³

"Every meeting of all public bodies shall be open to the public except those closed [for a permitted reason]."⁴ "Public body" includes any subcommittee of a public body that is supported by public funds, spends public funds or is charged with making "reports, investigations or recommendations" to a public body.⁵

A public body must vote at a public meeting to move into executive session, and "all voting on public business must take place at a public meeting and the results of the vote made public."⁶

² There is no evidence in the record that the DOE asks all attendees to sign-in at meetings.

³ 29 *Del. C.* § 10001.

⁴ 29 *Del. C.* § 10004(a).

⁵ 29 *Del. C.* § 10002(c).

⁶ 29 *Del. C.* § 10004(c).

V. DISCUSSION

The Board Violated FOIA by Not Moving or Considering Whether to Move the February 18, 2016 Meeting From the Cabinet Room.

Representative Williams alleges that the Townsend Building Cabinet Room was too small to hold the public interested in the WEIC matter. The Board responded that it could not have anticipated the number of people who attended the meeting, especially because WEIC only requested that six chairs be reserved.

When considering whether a public body has violated the open meeting requirement based upon the alleged inadequate size of the venue, we have looked both at what the public body knew at the time of scheduling and how it responded to an unexpected overflow.⁷ “[T]he governmental unit must balance the public right of access against the burdens that providing additional public access would impose on the governmental unit.”⁸ The standard for any individual meeting is reasonableness under the circumstances.⁹

FOIA does not require the public body to predict the exact number of citizens who may attend a public meeting.¹⁰ But, we have stated that “if a public body has reason to know that a large number of citizens is likely to attend a meeting, then FOIA requires the public body to find another, larger place for the meeting.”¹¹ A venue that may be reasonable at the time a meeting is noticed may become unreasonable due to an unanticipated overflow at the meeting.¹² Thus, we have also stated: “[I]n the event of an overflow, a public body should consider adjourning the meeting to another time at a facility that can accommodate all of the interested citizens.”¹³

Viewed from the perspective of what the DOE knew before the meeting, we find this to be a close call. The WEIC matter was highly-publicized and politically charged. The Board has been using the Cabinet Room for its meetings for more than 40 years,¹⁴ including for the four previous meetings of the WEIC. Representative Williams contends that the public has “repeatedly

⁷ *Del. Op. Att’y Gen.* 98-IB12 (Nov. 10, 1998).

⁸ *Del. Op. Att’y Gen.* 02-IB09 (Apr. 4, 2002) (quoting *Del. Op. Att’y Gen.* 96-IB23 (June 20, 1996)).

⁹ *Del. Op. Att’y Gen.* 98-IB12 (Nov. 10, 1998).

¹⁰ *Id.*

¹¹ *Del. Op. Att’y Gen.* 02-IB09 (Apr. 4, 2002).

¹² *Del. Op. Att’y Gen.* 98-IB12 (Nov. 10, 1998).

¹³ *Del. Op. Att’y Gen.* 02-IB09 (Apr. 4, 2002).

¹⁴ This historical fact is not relevant to whether the venue for any particular meeting is reasonable under the circumstances. But, it suggests that if someone was aware that a large number of people would attend the meeting, that person might have informed the DOE in advance. *Cf. id.*

complained” about the inadequate size of the room, but she does not identify to whom such complaints were directed, and there is no evidence that anyone contacted the DOE before the meeting to request that the meeting be moved to a larger venue. Also, the sign-in sheets reveal that 23% more people signed in at the February 18 meeting than the highest number DOE had seen from the previous meetings. Perhaps attendance at this meeting was anomalously high. Unfortunately, the number of people who sign the sign-in sheets reveals little about the actual attendance at any of the prior meetings.

But, we must also consider what information DOE had at the beginning of the meeting, when it could have made some reasonable accommodation for an unanticipated overflow. The exact size of the overflow is not clear. Representative Williams says that “many” people were made to stand in the hallway. We have no information from DOE respecting the size of the overflow at the meeting, except for the information we can glean from the sign-in sheet, which, again, reveals little about actual attendance. What is clear, however, is the absence in the record of any facts suggesting that the DOE considered or attempted to respond to the overflow or to make reasonable accommodations to facilitate citizens’ attendance at the meeting.¹⁵

On the whole, we must conclude that the DOE has not met its burden to prove that it satisfied its obligations under FOIA in connection with the February 18 meeting.

The Board Did Not Violate FOIA When the President
of the Board Consulted With the Board’s Counsel.

Representative Williams states that the Board took a break during the February meeting in the middle of discussing the WEIC motion. This exchange was not recorded, but counsel for the Board confirms that the Board President and counsel for the Board engaged in a discussion about the vote. Counsel also states that three other Board members approached counsel with questions, each separately. Counsel for the Board states that at no time was there a quorum of Board members discussing public business during a break.

A public meeting is defined 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....”¹⁶ Moreover, “conversations with each other or with staff do not need to be public unless they include

¹⁵ Indeed, the DOE’s response that the Cabinet Room has been used for forty years suggests that it has not adopted a practice of considering the adequacy of its standard venue in connection with each public meeting. *Cf. Del. Op. Att’y Gen.* 96-IB23 (June 20, 1996) (noting public body’s history of selecting meeting space based upon anticipated or actual attendance); *Del. Op. Att’y Gen.* 14-IB03 (June 16, 2014) (public body did not violate FOIA, despite turning attendees away from meeting, where it had forgone its regular meeting venue and noticed meeting for a significantly larger venue); *Del. Op. Att’y Gen.* 98-IB12 (Nov. 10, 1998) (public body responded reasonably to unanticipated attendance by moving to larger space to discuss one issue that generated great interest).

¹⁶ 29 *Del. C.* § 10002(g).

a quorum of the members.”¹⁷ Indeed, “absent some evidence that the members knowingly avoid public monitoring of the deliberations of the quorum, there is no basis on which to find that FOIA has been violated.”¹⁸

Here, there is no evidence that a quorum of members discussed the vote with the Board’s counsel. As such, we find no FOIA violation in connection with Board members’ individual discussions with the Board’s counsel.

The Substantive Validity of the Board’s
WEIC Vote is Outside the Scope of FOIA.

Representative Williams raises concerns regarding the substantive validity of the Board’s vote on the WEIC matter. The substantive validity of the Board’s vote is a matter outside the scope of FOIA and, as a result, is not addressed here.¹⁹

VI. CONCLUSION

We conclude that the Board violated FOIA when it failed to consider the adequacy of the venue upon learning of an overflow of attendees. However, we decline to find that the Board’s actions at the February 2016 meeting should be invalidated. To invalidate the numerous actions taken at the February meeting would have “draconian consequences.”²⁰ Additionally, invalidation of the SBE’s approval of the WEIC plan is moot given that the General Assembly sent the redistricting plan back to the WEIC for further consideration and development. We suggest that the Board consider the adequacy of the Cabinet Room as a venue when scheduling future meetings or when thereafter confronted with unanticipated interest.

This decision is directed solely to the parties identified herein. It is based on the facts relevant to this matter. It does not constitute precedent and should not be cited as such by future parties.

Very truly yours,



Danielle Gibbs
Chief Deputy Attorney General

¹⁷ *Del. Op. Att’y Gen.* 10-IB12 (2010). *See also Del. Op. Att’y Gen.* 16-IB05 (2016).

¹⁸ *Del. Op. Att’y Gen.* 10-IB12 (2010).

¹⁹ *See Del. Op. Att’y Gen.* 16-IB05 (2016); *Del. Op. Att’y Gen.* 15-IB06 (2015).

²⁰ *See Levy v. Bd. of Educ. of Cape Henlopen Sch. Dist.*, 1990 WL 154147, at *8 (Del. Ch. Oct. 1, 1990).

cc: Patricia A. Davis, Deputy Attorney General (via email)

