OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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Jim Ryan
ATTORNEY GENERAL

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PUBLIC RECORDS:
Access to Community College Records
by Community College Trustee

MEETINGS:
Polling Members of Body During
Closed Meeting

Geraldine Evans
Executive Director
Illinois Community College Board
509 South Sixth Street, Suite 400
Springfield, Illinois 62701-1874

Dear Ms. Evans:

I have your predecessor's letter wherein he inquired whether a community college board of trustees can properly adopt a policy prohibiting an individual trustee from inspecting college records which would not be available to the general public under the Freedom of Information Act (5 ILCS 140/1 et seq. (West 1994)), unless the board determines that additional information should be made available. In addition, Mr. Lach inquired whether it is permissible for a public body, when holding a closed meeting, to poll its members concerning matters being considered therein, e.g., whether certain items should be placed on the agenda for a public meeting. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion is necessary. I will, however, comment informally upon the questions you have raised.

With respect to your first question, it is my understanding that the Joliet Community College Board has proposed a policy providing:

> "A Trustee's request for information pertaining to College matters, shall be directed to the Office of the President. The President shall determine if the information is subject to exemption from public disclosure pursuant to the Illinois Freedom of Information Act. If the information is not subject to exemption from public disclosure, the President shall promptly make such information available to all Trustees. If the information is subject to exemption from public disclosure, the President shall refer the request to the Chairman of the Board, and the Board shall determine if it desires to obtain the information requested. If the Board determines that the requested information is to be provided to the Board, the President shall be directed to provide the information to the Board through the Chairman. The confidentiality of information which is exempt from public disclosure shall be maintained by the Trustees."

A trustee has objected to this proposed policy, and has complained of being denied information known to college administrators relating to such matters as personnel being considered for appointment or promotion, and bidding on equipment purchases.

Clearly, a board member is entitled, as is any person, to receive upon request any public records of the community college which are generally subject to inspection and copying under the Freedom of Information Act. The information and records at issue for purposes of this question are those which are conceded to be privileged from disclosure under that Act, but which are relevant to matters to be discussed and acted upon by the board. The issue therefore pertains to the rights and duties of a public official charged with the governance of a public institution or local governmental body, not public information per se.

There are few reported cases addressing the right or duty of a public officer to inform himself regarding matters on which he must act. In Oberman v. Byrne (1983), 112 Ill. App. 3d 155, 164-65, the appellate court construed a city ordinance which required all city departments "to permit examination of all their official records by any member of the city council * * *". A council member sought certain records of expenditures from the mayor's contingency fund. The court affirmed a writ of mandamus compelling disclosure, stating:

" * * *

* * * in examining the purpose of the ordinance, it is evident that access to such financial records is necessary so that members of the city council can make informed decisions regarding matters of future appropriation of public funds. * * * We have found no such law or ordinance restricting disclosure of the instant records * * *.

* * * "

In Wayne Township Board of Auditors v. Vogel (1979), 68 Ill. App. 3d 714, a mandamus action was brought by the township board against the township supervisor seeking disclosure of certain public aid records. The court ordered disclosure, based upon the supervisor's statutory duties and the principle that a public official may not refuse to comply with a statute on the grounds that if he complies with a statutory duty to deliver records, the receiving public official might violate the law by disclosing confidential records. Therefore, if the community college administrators have a duty to provide certain information to a board member, they cannot refuse to do so on the basis that the board member might misuse it.

In Lux v. Board of Regents of N.M. Highlands (N.M. App. 1980), 622 P.2d 266, the plaintiff, a professor at a State university, claimed his liberty interest had been violated by, among other things, a memorandum from the university president (Angel) to members of the university board of regents. The court held that no liberty interest was impaired because the statements were not made public, stating:

" * * *

* * * The communication between Angel and two of the Regents was obviously made in furtherance of Angel's duty of keeping them informed of conditions at the university. The Regents definitely had an interest in receiving the information to aid them in making necessary decisions concerning the governance of the university. It is readily apparent from the nature of the subject matter and the candidness of the statements that

they were made in confidence. * * *

" * * *

Lux v. Board of Regents of N.M. Highlands (N.M. App. 1980), 622 P.2d 266, 271.

While the cases cited above recognize the importance of receipt of information including confidential information by members of public bodies, they stop short of finding an affirmative right to such information, apart from a statute or ordinance so providing. In an analogous situation, courts have been more explicit with respect to the rights of directors of private corporations.

In an early case, Stone v. Kellogg (1895), 62 Ill. App. 444, the court held that the majority of a board of directors cannot exclude the minority from knowledge of what the company is doing, or from access to its files and records. Kellogg, a director and stockholder, was denied access to the books and records of the corporation by its president and secretary. The other directors declined to order the president and secretary to make the books and records available. In support of its holding, the court stated:

" * * *

It is not merely the right of petitioner to examine the records and books of account of the company in which he is a director--it is his duty, if he has reason to think that they contain that, a knowledge of which, if obtained by him, will be of service to stockholders, the trustee of all of whom he is.

" * * *

Stone v. Kellogg (1895), 62 Ill. App. 444, 463.

Stone v. Kellogg was favorably cited more recently in Kunin v. Forman Realty Corp. (1959), 21 Ill. App. 2d 221, 226, wherein executive officers of the realty corporation were ordered by the court to provide the plaintiff with a copy of (not merely access to) the reports of independent auditors. The court observed:

" * * *

When one views this matter in its true perspective, the issue centers on a determi-

> nation by those who control the corporation to cast obstacles in the way of a director's study of the affairs of the corporation. That is the real issue. In a large corporation with manifold interests, it is obvious that a director's function may be thus impeded. They may put him to the expense of having photostatic copies made of various documents he feels he should be able to study. They may make it difficult for him to get photostats by putting physical restrictions on his examination, as appears to have been done in the instant case. None of these things can be tolerated by the law. If there is a genuine basis for a director's being denied this privilege, it should be asserted openly and made the basis for a legal objection. Otherwise, executive officers of a corporation and members of a board of directors must co-operate to afford equal and reasonable facilities to all members of the board in their examination of the affairs of the company. * * *
>
> * * * "

The duty of diligence and care which must be exercised by members of a board of a public body does not differ significantly from that applicable to directors of a business corporation. In addition to their fiduciary duty to act solely in the interest of the corporation, corporate directors must exercise the degree of care which prudent men, prompted by self-interest, would exercise in the management of their own affairs. Under this standard, directors have a duty to attend and to participate in regular board meetings, and to inform themselves of the material facts necessary to exercise their judgment. (Stamp v. Touche Ross & Co. (1993), 263 Ill. App. 3d 1010, 1015.) Similarly, public officers are bound to bring to the discharge of their duties that prudence, caution and attention which careful men usually exercise in the management of their own affairs. (63A Am. Jur. 2d, Public Officers and Employees, §317.)

As to third parties, public officers, like directors of private corporations, are presumed to have knowledge of information in records of the entity which they govern. (City of Rockford v. County of Winnebago (1989), 186 Ill. App. 303, 312; Roth v. Ahrensfeld (1940), 373 Ill. 550, 555.) It is on that basis that county board members were presumed to know that which was in the record available to them in City of Rockford. Limit-

ing directors' access to information would run counter to this assumption. As public officers are held to similar standards of care, and presumption of knowledge, as directors of private corporations, it is necessary that they also have unfettered access to information in the files and records of the entity they are responsible for directing.

Each member of the board of a community college has a fiduciary duty and a duty of due care to the college and the citizens of the district. As the court concluded a hundred years ago in Stone v. Kellogg, permitting a majority of the board to exclude the minority from knowledge of what the college is doing, or from access to its files and records, is inconsistent with the imposition of such duties.

Your second question concerns whether it is appropriate for a public body meeting in a closed session to poll its members concerning matters being considered. The concern appears to be possible violation of subsection 2(e) of the Open Meetings Act (5 ILCS 120/2(e) (West 1994)), which prohibits the taking of final action at a closed meeting. Subsection 2(e) does not expressly prohibit the polling of members in a closed meeting; it merely prohibits final action being taken in a closed meeting.

It appears that the question of whether to place a particular matter on an agenda for a particular open meeting would not generally constitute final action on the matter. Since a proposed agenda is properly adopted at the beginning of each public meeting, a poll of members as to inclusion of a particular item during a closed meeting would not likely be "final action" even as to the agenda.

Several cases have discussed the requirement that final action be taken at open meetings. The decision of a school board, during a closed session, to request mediation to resolve an impasse in contract negotiations with a union was not "final action" for purposes of subsection 2(e). (Gosnell v. Hogan (1989), 179 Ill. App. 3d 161.) Passage in a closed meeting of a resolution of tentative intent to terminate a superintendent's contract was not an improper "final action", where the school board subsequently voted on the termination in open session. Davis v. Board of Education (1978), 63 Ill. App. 3d 495.

Therefore, it appears that it is not necessarily improper for a community college board to poll its members during a closed meeting, assuming that it does not constitute a final action. Any final action on matters so considered must be taken during an open meeting.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Sincerely,

[redacted]

MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Bureau

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