



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

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April 29, 2016

*Via electronic mail*  
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*Via electronic mail*  
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RE: OMA Request for Review – 2015 PAC 38289

Dear Mr. Allen and Mr. Griffin:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2014), as amended by Public Act 99-402, effective August 19, 2015). For the reasons that follow, the Public Access Bureau concludes that the Edgar County Board (Board) violated OMA by failing to keep minutes of its October 26, 2015, study meeting and by discussing matters in closed session that are outside the scope of the section 2(c)(1), 2(c)(6), and 2(c)(11) exceptions (5 ILCS 120/2(c)(1), 2(c)(6), 2(c)(11) (West 2014), as amended by Public Acts 99-78, effective July 20, 2015; 99-480, effective September 8, 2015) to the general requirement that public bodies conduct public business openly.

On October 28, 2015, Mr. Kirk Allen filed this Request for Review alleging that the Board violated OMA at its October 26, 2015, study meeting by discussing matters in closed session that exceeded the scope of any of the exceptions to openness listed in section 2(c) of OMA (5 ILCS 120/2(c) (West 2014), as amended by Public Acts 99-78, effective July 20, 2015; 99-480, effective September 8, 2015). As evidence of the alleged violation, Mr. Allen asserted that during the open session a Board member stated, "You may have heard us talking about that

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earlier."<sup>1</sup> In additional correspondence submitted to this office on October 29, 2015, Mr. Allen alleged that the Edgar County Sheriff was present during the closed session and improperly granted "exclusive access to information."<sup>2</sup>

On November 4, 2015, this office sent the Board a copy of the Request for Review and asked that it provide a detailed written response to the allegations in the Request for Review together with copies of the agendas, verbatim recordings, and minutes for the open and closed sessions of the October 26, 2015, meeting. On November 13, 2015, the Board submitted a written response in which it asserted that the statement Mr. Allen attributed to a Board member concerned matters regarding the County airport and did not relate to any discussions in closed session; the Board also provided a recording of the closed session for our confidential review. On November 18, 2015, this office forwarded a copy of the Board's initial response to Mr. Allen; he did not reply.

On February 29, 2016, the County Clerk provided our office with notes taken during the open and closed sessions on October 26, 2015, and stated "[t]here are no typed minutes for either of these because they are both recorded."<sup>3</sup>

This office's review of the verbatim recording confirmed that there was not a closed session discussion relating to the statement made by the Board member in open session. However, on March 31, 2016, this office sent the Board a second letter requesting that it provide a detailed description of how each of the matters discussed during the October 26, 2015, closed session was within the scope of an exception to openness in section 2(c) of OMA. On April 8, 2016, the Board submitted a supplemental response in which it enumerated items of business discussed during the closed session (hereinafter "item no."), and asserted that each was authorized by a section 2(c) exception; the Board also noted that the Edgar County State's Attorney was present only for the first two items of business.

Our office forwarded a copy of a redacted response<sup>4</sup> to Mr. Allen on April 13, 2016; he replied on April 14, 2016 and asserted that item nos. 4 and 6 were improperly discussed in closed session.

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<sup>1</sup>E-mail from Kirk Allen to Public Access [Bureau] (October 28, 2015).

<sup>2</sup>E-mail from Kirk Allen to Public Access [Bureau] (October 29, 2015).

<sup>3</sup>E-mail from August Griffin, Edgar County Clerk and Recorder to William Roberts (February 29, 2016).

<sup>4</sup>The Board provided an abbreviated and redacted copy of the response for our office to provide to Mr. Allen under section 3.5(c) of OMA (5 ILCS 120/3.5(c) (West 2014), as amended by Public Act 99-402, effective August 19, 2015).

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## DETERMINATION

OMA requires that all meetings of a public body remain open to the public unless an exception in section 2(c) of OMA is properly invoked. *See* 5 ILCS 120/2(a) (West 2014), as amended by Public Acts 99-78, effective July 20, 2015; 99-480, effective September 8, 2015. Those "exceptions \* \* \* are in derogation of the requirement that public bodies meet in the open, and therefore, the exceptions are to be strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2014), as amended by Public Acts as amended by Public Acts 99-78, effective July 20, 2015; 99-480, effective September 8, 2015.

### Meeting Minutes

Under section 2.06(a) of OMA (5 ILCS 120/2.06(a) (West 2014)), "[a]ll public bodies shall keep written minutes of all their meetings, whether open or closed, and a verbatim record of all their closed meetings in the form of an audio or video recording." Public bodies also must "approve the minutes of its open meeting within 30 days after that meeting or at the public body's second subsequent regular meeting, whichever is later." 5 ILCS 120/2.06(b) (West 2014).

Under the plain language of section 2.06(a), a public body must maintain written minutes of all meetings, regardless of whether that meeting is also recorded by audio or visual means; only closed sessions are required to be recorded. In addition, as discussed below, there are procedural requirements for entering into a closed session under section 2(c)(11) of OMA that necessitate the keeping of written minutes. **The Board has acknowledged that no minutes were approved or maintained for either the open or closed session of the October 26, 2015, meeting. Accordingly, this office concludes that the Board violated section 2.06(a) and 2.06(b) of OMA by failing to approve and keep minutes of that meeting.**

### Section 2(c)(1) of OMA

Section 2(c)(1) of OMA permits a public body to close a meeting to discuss the "appointment, employment, compensation, discipline, performance, or dismissal of *specific employees* of the public body or legal counsel for the public body[.]" (Emphasis added.) The plain language of section 2(c)(1) "limits its operation to an individual and does not include a class of employees or officers." (Emphasis added.) 1974 Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 9.

**The Board asserted that items nos. 1, 2, 5, 8, and 9 could be discussed in closed session under the 2(c)(1) exception. However, item nos. 1 and 5 concerned classes of officials**

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and employees, not specific individuals. Therefore, those discussions fall outside the scope of section 2(c)(1) of OMA. Accordingly, we conclude that the Board violated section 2(a) of OMA by holding improper closed session discussions on items 1 and 5 pursuant to the section 2(c)(1) exception.

### **Section 2(c)(6) of OMA**

Section 2(c)(6) permits a public body to conduct a closed session meeting to discuss "[t]he setting of a price for sale or lease of property owned by the public body."

Under the plain language of section 2(c)(6), this exception is limited to a public body's consideration of the setting of a price for the sale or lease of property. The Public Access Bureau has previously determined that the section 2(c)(6) exception is restricted to discussions "directly tied to the setting of a price" and does not include the "timeline for negotiating and completing a sale of the property." Ill. Att'y Gen. PAC Req. Rev. Ltr. 13065, issued May 23, 2011, at 4.

The Board asserted that item no. 6 could be discussed in closed session under the section 2(c)(6) exception. During the closed session, the discussion was described as involving "negotiations" with a lessee, but the Board did not discuss the setting of a price for the property. Rather the Board discussed the process for and potential scope of an agreement. Accordingly, we conclude that the Board violated section 2(a) of OMA by holding an improper closed session discussion on item no. 6 pursuant to the section 2(c)(6) exception.

### **Section 2(c)(11) of OMA**

Section 2(c)(11) permits a public body conduct a closed session meeting to discuss litigation "[w]hen an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal" or when such litigation is "probable or imminent[.]" Section 2(c)(11) requires that "when the public body finds that an action is probable or imminent \* \* \* the basis for the finding shall be recorded and entered into the minutes of the closed meeting." As the Illinois Appellate Court has described:

[T]he 'litigation' exception is a forked path. If the litigation has been filed and pending, the public body need only announce that in the proposed closed meeting, it will discuss litigation that has been filed and is pending. If the litigation has not yet been filed, the public body must (1) find that the litigation is probable or imminent and (2) record and enter into the minutes the basis for

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that finding. *Henry v. Anderson*, 356 Ill. App. 3d 952, 956-57 (4th Dist. 2005).

The Board asserted that items nos. 1 and 4 were discussions of matters covered by section 2(c)(11), and specifically that those matters involved "probable" litigation. However, the Board did not record and enter into the closed session minutes findings that litigation with either matter was "probable," because, as described above, there were no minutes kept. Accordingly, we conclude that the Board violated section 2(a) of OMA by holding an improper closed session discussion pursuant to the section 2(c)(11) exception.

#### Access to Meeting

Mr. Allen also alleged that the County Sheriff was impermissibly allowed to attend the closed session, and as such, was provided with "exclusive access" to information in violation of the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2014)). No provision of OMA prohibits a public body from permitting individuals who are not members of the public body from attending a closed session meeting. Further, there is no indication that the Sheriff was permitted to attend the closed session in response to a FOIA request submitted by the Sheriff seeking access to information discussed in closed session. In addition, this office has recently determined that the provision of FOIA that prohibits a public body from granting any person or entity "the exclusive right to access and disseminate any public record" (5 ILCS 140/3(a) (West 2014)) must involve the grant of both the right to "access *and* disseminate." (Emphasis in original.) Ill. Att'y Gen. PAC Req. Rev. Ltr. 38669, issued March 31, 2016, at 3. Accordingly, the Board did not violate OMA or FOIA by allowing the Sheriff to attend the closed session.

#### CONCLUSION

Typically, in circumstances involving improper discussion during closed sessions, this office requests that public bodies release the verbatim recording of the closed session discussion and the related minutes to the public. Although the Board did improperly close portions of its October 26, 2015, meeting, the discussion of item no. 1 in particular involves communications that may nonetheless be protected by the attorney-client privilege given the presence of the State's Attorney and his participation in the discussions.

Accordingly, rather than requesting the release of the portion of the recording relating to that discussion, we instead encourage the Board to review it with counsel to determine whether there remains a continuing need for attorney-client confidentiality in this matter or whether the Board can release that portion of the recording. See *Minneapolis Star & Tribune Co. v. Housing and Redevelopment Auth. in and for the City of Minneapolis et al.*, 310 Minn. 313,

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323-24 (1976) (noting "[t]he attorney-client exception discussed herein would almost never extend to the mere request for general legal advice or opinion by a public body"). *Minneapolis Star* was cited favorably by the Illinois Supreme Court in the context of the Freedom of Information Act when it noted "we should be hesitant to read the attorney-client privilege so as to swallow up the duty to disclose." *Illinois Education Association v. Illinois State Board of Education*, 204 Ill. 2d 456, 470 (2003). There are numerous cases to which the Board can look to delineate what portions of an executive session are subject to the attorney-client privilege and what portions are not. *See, e.g., Kodish v. Oakbrook Terrace Fire Protection District*, 235 F.R.D. 447, 452-53 (N.D. Ill. 2006) (noting that "the mere attendance of an attorney at a meeting does not render everything said or done at that meeting privileged"); *see also Wilstein v. San Tropai Condo. Master Ass'n*, 189 F.R.D. 371, 378-80 (N.D. Ill. 1999) (noting questions pertaining to factual information underlying a legal claim must be answered in discovery).

With respect to items nos. 4, 5, and 6, which took place after the State's Attorney left the meeting, this office does not discern that the discussions consist of potentially privileged communications and therefore requests that those portions of the closed session recording be released. We also request that the Board prepare minutes for the open and closed sessions of the October 26, 2015, meeting in accordance with section 2.06(a) of OMA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, you may contact me at (217) 782-9078 or [nolson@atg.state.il.us](mailto:nolson@atg.state.il.us).

Very truly yours,



NEIL P. OLSON  
Assistant Attorney General  
Public Access Bureau

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