



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

June 13, 2017

Via electronic mail

Mr. Michael A. Dowell
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Via electronic mail

Mr. Timothy B. Zollinger
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RE: OMA Request for Review – 2016 PAC 43608

Dear Mr. Dowell and Mr. Zollinger:

This determination is issued pursuant to section 3.5(e) of OMA (5 LCS 120/3.5(e) (West 2015 Supp.)). For the reasons stated below, the Public Access Bureau concludes that the Whiteside County Airport Board (Board) violated OMA by holding a closed discussion that was not authorized by the exceptions, to the general requirement that public bodies conduct public business openly, that the Board cited as its bases for closing the meeting.

In his Request for Review, Mr. Michael Dowell, the manager of the Airport, alleged that on August 18, 2016, the Board improperly discussed in closed session an agreement or prospective agreement with him and the officers of his company, M & M Aviation Services, Ltd. In particular, Mr. Dowell contends that the Board improperly characterized the agreement as a "lease" in order to discuss the matter in closed session. On August 26, 2016, this office sent a copy of the Request for Review to the Board and asked it to provide copies of the agenda, open session minutes, closed session minutes, and verbatim recording of the closed session portion of the Board's August 18, 2016, meeting together with a written response identifying the specific exception in section 2(c) of OMA 5 ILCS (120/2(c) (West 2015 Supp.), as amended by Public

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Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016) under which the Board entered closed session. On October 20, 2016, counsel for the Board furnished those materials; Mr. Dowell did not reply.

DETERMINATION

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2014). Section 2(a) of OMA (5 ILCS 120/2(a) (West 2015 Supp.), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016) provides that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." The 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.*" (Emphasis added.) 5 ILCS 120/2(b) (West 2015 Supp.), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016). **Moreover, this office may not read into the unambiguous language of a statute "exceptions, limitations or conditions that the legislature did not express." *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990).**

The minutes of the Board's August 18, 2016, meeting indicate that the **Board voted to enter closed session "for the purpose of discussing the lease of the Airport property leased by the FBO/Airport Manager."**¹ The Board's response to this office clarified that the Board relied on sections 2(c)(5) and 2(c)(6) of OMA (5 ILCS 120/2(c)(5), (c)(6) (West 2015 Supp.), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016) to enter closed session. The response further explained that because Mr. Dowell's lease was expiring:

[T]he airport needed to negotiate the new prices and the new terms. Unlike prior years, however, there were two possible leaseholders competing for the lease. Thus, there was concern for confidentiality between the two competing lessees as to terms and rents, based on a substantial degree on the respective terms proposed by the respective tenants. For example, one tenant could propose the tenant's own fuel for sale, and the other might propose to have the airport own the fuel, which could create a substantial difference in rent.^[2]

¹Whiteside County Airport Board, Regular Meeting, August 18, 2016, Minutes 4.

²Letter from Timothy B. Zollinger, Ward, Murray, Pace & Johnson, P.C., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (October 20, 2016), at 1.

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Section 2(c-5) of OMA

Section 2(c)(5) of OMA allows a public body to enter closed session to discuss "[t]he purchase or lease of real property *for the use of the public body*, including meetings held for the purpose of discussing whether a particular parcel should be acquired." (Emphasis added.) Thus, the plain language of this exception is limited to discussions concerning the purchase or lease of real property for the use of the public body; **it does not authorize a public body to discuss selling or leasing its own public property.** See Ill. Att'y Gen. Pub. Acc. Op. No. 15-003, issued March 19, 2015, at 5.

This office has reviewed the verbatim recording of the Board's August 18, 2016, closed session discussion and the materials provided by the Board. There is no indication from any of the materials that the Board's closed session discussion concerned the lease of real property for the use of the Board or the Airport. Indeed, the Board's response to this office characterizes the discussion as concerning the lease of airport property. **Because the scope of section 2(c-5) does not encompass discussions concerning the lease of property owned by the Airport, this office concludes that the Board's closed session discussion was not authorized by that exception.**

Section 2(c-6) of OMA

The Board also contends that its closed session discussion was authorized by section 2(c)(6) of OMA, which permits public bodies to enter closed session to consider "[t]he *setting of a price* for sale or lease of property owned by the public body." (Emphasis added.) Mr. Dowell's Request for Review asserts that the closed session discussion was improper because the agreement in question is an agreement for services rather than for a lease. The Board's response to this office maintained that the agreement is a lease agreement and that the "[s]etting of a price * * * requires discussion of a number of components. These components can include the monetary aspect, past performance, duties to be performed, available competitive resources, and the specific needs of the airport."³

It is unnecessary for this office to determine whether the agreement in question is a "lease" agreement because, even assuming that it is, **the section 2(c)(6) exception would not apply to the Board's closed session discussion.** Although a portion of the discussion concerned certain issues that could potentially be relevant to setting a price for a lease in the future, **at no point did the Board actually discuss the setting of a price.** The Public Access Bureau has previously determined that the plain language of section 2(c)(6) of OMA, which must be strictly construed, does not allow a public body to discuss the sale or lease of public property in closed session other than to set a price. Ill. Att'y Gen. PAC Req. Ltr. 33966, issued January 31, 2017, at

³Letter from Timothy B. Zollinger, Ward, Murray, Pace & Johnson, P.C., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (October 20, 2016), at 2.

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3. If the General Assembly had intended to allow public bodies to discuss general issues relating to the sale or lease of property in closed meetings, it would have done so expressly by writing such an exception into OMA, as have other jurisdictions. *See, e.g.*, section 551.072 of the Texas Open Meetings Act (Tex. Gov't Code Ann. § 551.072 (West 2014)) ("A governmental body may conduct a closed meeting to deliberate the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person."). **Accordingly, this office concludes that the Board's closed session discussion was not authorized by the section 2(c)(6) exception. To remedy its violation of OMA, this office requests that the Board disclose to Mr. Dowell and make publicly available the verbatim recording of the Board's August 18, 2016, closed session discussion.**

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-6756. This file is closed.

Very truly yours,



STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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