OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 20, 2014

Via electronic mail
Mr. John Kraft
7060 Illinois Highway 1
Paris, Illinois 61944
john@illinoisleaks.com

Re: OMA Request for Review- 2014 PAC 31511

Dear Mr. Kraft,

This letter is to advise you that we have received the enclosed response from the College of DuPage Board of Trustees (Board) with regard to your Request for Review. You may, but are not required to, reply in writing to the public body's enclosed response. If you choose to reply, you must submit your reply within 7 working days of the receipt of this letter pursuant to section 3.5(c) of the Open Meetings Act (5 ILCS 140/3.5(c) (West 2013 Supp.)). When you send your reply to our office, please also send a copy of your reply to the Board. If you have any questions, please contact me at the Springfield address below.

Very truly yours,

BENJAMIN REED
Assistant Attorney General
Public Access Bureau

cc: Ms. Barbara Mitchell (will receive letter only)
College of DuPage Board of Trustees
425 Fawell Boulevard
Glen Ellyn, Illinois 60137

Robbins Schwartz

55 West Monroe, Suite 800 | Chicago, IL 60603-5144

KENNETH M. FLOREY
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October 29, 2014

VIA UPS OVERNIGHT DELIVERY

Benjamin Reed
Assistant Attorney General
Office of the Attorney General
Public Access Bureau
500 South Second Street
Springfield, Illinois 62706

31511 BR

Re: OMA Request for Review – 2014 PAC 31511

Dear Mr. Reed:

This law firm represents the College of DuPage ("College") in the above referenced Request for Review. The Request for Review pursuant to the Open Meetings Act ("Act") was received by the College on October 20, 2014, and we provide this response for your review pursuant to Section 3.5(c) of the Act, 5 ILCS 120/3.5(c). Additionally, the following documents are enclosed herein:

- Agenda for the College's Regular Board Meeting of September 25, 2014;
- Draft of the minutes, which are awaiting approval, of the College's Regular Board Meeting of September 25, 2014;
- Video of the College's Regular Board Meeting of September 25, 2014;
- Notice of the Board of Trustees Meeting of September 25, 2014;
- College Board of Trustee Policy No. 5-145;
- College Board of Trustee Policy No. 5-150;
- Public comment rules and procedures adopted September 25, 2014 ("rules" or "rules for public comment").

At the outset it must be noted that nowhere is John Kraft ("Requester") claiming that he was denied the right to address the College's Board of Trustees. It is undisputed that Requester and all other members of the public were given an opportunity to address the College's Board of Trustees at two different times during the meeting of September 25, 2014. What Requester actually wants is the right to broadly dictate when the public comment portion of College Board meetings will take place and the terms upon which Requester gets to participate in the meeting so that he can advance his own personal views in the way he views most effective.

Below we address the ten allegations of the Requester in turn.

Allegation No. 1

Requester first claims that the College cannot enforce the rules for public comment at the same meeting where those rules were adopted. This claim by Requester that the Act contains a waiting period that must run its course before the College can enforce its rules is, of

course, not supported by the Act or any other law or regulation. If the Illinois legislature had intended for there to be a waiting period it would have specifically stated as much in the Act. Instead, the Act provides that the rules must be "established and recorded." The term "establish" means "to bring about or into existence" and "to settle, make or fix firmly." See "Establish," *Black's Law Dictionary*, Sixth Ed. The term "record" when used as a verb means "to commit to writing, to printing, to inscription or the like." See "Record," *Black's Law Dictionary*, Sixth Ed. There is no dispute that the College's rules for participation and public comment were in existence, available to the public with the agenda and Board Meeting packet prior to the meeting, approved by the College's Board of Trustees, and in writing before they were enforced. Just because the Requester claims the Act has a waiting period does not make it so.

The Requester also alleges that rules for public comment must be reasonable and also must "enhance (not further restrict) the public's ability to address their public officials during meetings." This allegation is made without further elaboration about what is supposedly unreasonable about the College's rules and there is no citation to any authority to support the claim that the College can only implement rules that enhance the public's ability to address public officials during meetings or that the College's rules do not have that effect. Allegation number 1, therefore, should be denied

Allegation No. 2

For this allegation, the Requester lists five reasons why Requester believes the College's rules for public comment violate the Act. First, the College notes important legal principles with respect to public comment at governmental meetings open to the public.

Section 2.06(g) of the Act became effective January 1, 2011 and provides that "any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." 5 ILCS 120/2.6(g). Prior to January 1, 2011 the Act did not guarantee members of the public the right to address public bodies. Clearly, even now the right to address a public body is not without limits.

The First Amendment to the United States Constitution provides freedom of speech rights, but "the First Amendment does not guarantee persons the right to communicate their views at all times or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981). It also does not "guarantee access to property simply because it is owned or controlled by the government." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S.37, 46 (1983).

The public comment portion of a meeting of a public body is a "limited designated public forum." *Thornton v. City of Kirkwood*, slip opinion at 4, 2008 WL 239575 (E.D. Mo. 2008) (emphasis added), *citing Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3rd Cir. 2004) (citizen's forum portion of township's board of supervisors meeting is a limited designated public forum); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) (city council meeting where citizens may address council regarded as limited public forum); *Jones v. Heyman*, 888 F.2d 1328, 1332 (11th Cir. 1989) (city commission meeting is forum where speech may be restricted to specified subject matter). There is a significant governmental interest in conducting orderly, efficient meetings of public bodies. *Rowe v. City of Cocoa, Florida*, 358 F.3d 800, 803

(11 Cir. 2004). Governmental bodies have legitimate reasons for having rules to maintain decorum at public meetings and to assure that meetings are efficiently conducted. *Timmon v. Wood,* 633 F. Supp. 2d 453, 465 (W.D. Mich. 2008).

There is no question that Requester has a right to address the College's Board of Trustees under the Act. 5 ILCS 120/2.06(g). There is also no question that Requester and every member of the public was afforded and took advantage of that opportunity on September 25, 2014. Nevertheless, Requester lists five reasons why he believes the College's public comment rules violate the Act. Requester is wrong on each point, as explained in the subsequent paragraphs below.

(a) Requester complains that the College's rules do not define the term "relevant subject matter" and that the Board Chair therefore has the authority to determine what the term means. His position leads him to read too much into this term by taking it out of context. Specifically, the rules state in pertinent part "[t]he initial Public Comment segment shall be limited to items specifically on the agenda. The Public Comment segment at the end of the meeting shall be open to any relevant subject matters." Thus, there are two public comment portions of a College Board of Trustees meeting, the initial portion where persons can talk about items specifically on the agenda and the public comment portion at the end of the meeting, where speakers can talk about any other topic. This is a perfectly reasonable approach. Allegation number 2(a), therefore, should be denied.

(b) Requester next complains that the requirement in the rules that "all speakers must address their comments to the Chair" somehow limits his opportunity to address public officials other than the Chair. The Requester's concern is a result of his erroneous assumption that the rules prohibit the Requester from addressing other public officials or that only the Chair may be addressed. The requirement that speakers address comments to the Chair is simply a formal acknowledgment that the Chair presides over Board of Trustee meetings at the College and in such role must be in a position to start and stop public speaker segments and hear and observe public comments in order to ensure decorum prevails and that the rules on public comment are followed. The requirement that speakers address comments to the Chair is not a prohibition on speakers also addressing other Board members. Nowhere do the rules state that other Board members may not be addressed. Allegation number 2(b), therefore, should be denied.

(c) The College's rules provide that "[s]peakers shall be courteous and should not make statements that are personally disrespectful to members of the Board or other individuals. Foul, abusive, or inappropriate language, displays, actions or materials are prohibited." The Requester, objects to this language because there is no definition for the several words used. It would, of course, be impossible to state every single action that could be discourteous and list ever single usage of language, every single display, every single action and all possible materials that nearly all people commonly know to be foul, abusive or inappropriate. But this is not required. Speakers at public meetings are subject to restriction when their speech "disrupts, disturbs or otherwise impedes the orderly conduct" of a meeting of a public body, and can be regulated when it is such. *White v. City of Norwalk,* 900 F.2d 1421, 1426 (9th Cir. 1990). Furthermore, the College, like other institutions in Illinois and in the United States must rely on the common sense and common decency of people. Generalized language in rules and laws

requiring courteous behavior is common. For example, criminal contempt, punishable in Illinois by fines and prison, is part of the common law and described with no more specificity than "verbal or nonverbal conduct calculated to embarrass, hinder, or obstruct a court in its administration of justice or to derogate from its authority or dignity, or bring the administration of justice into disrepute." *In re Marriage of Betts,* 200 Ill. App. 3d 26, 558 N.E.2d 404 (4th Dist. 1990). This is similar to the reasonable rules the College has adopted. Allegation number 2(c), therefore, should be denied.

(d) The Requester next claims that the right to address public officials at public meetings in Section 2.06(g) of the Act also means the right to have any and all media displays. The Act, of course, says nothing of the sort. Unsurprisingly, the Requester does not specify any other law or regulation that gives him the right to utilize the College's projector equipment for his own use during public comment. Nor does the Requester claim that there was a College policy permitting the public to use media equipment during public comment. And, in fact, no such policy exists.

Again, section 2.06(g) of the Act, provides that "any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." 5 ILCS 120/2.06(g) (emphasis added). The right to "address" public officials means that a person has the right to speak to the public officials. See "address" *Merriam-Webster Online Dictionary.* The right to address does not mean that the Requester has the right to use the media equipment of a public body or otherwise demand that the College make equipment available to Requester so that he can enhance his presentation during public comments. Allegation number 2(d), therefore, should be denied.

(e) The last reason given by the Requester for the rules violating the Act is that the College used the word "should" instead of "shall" in stating in the rules that "[a]ny individuals using cameras or other video equipment should stand or sit in the College designated area." There is no real issue to be addressed here. The Requester does not claim that the use of the word "should" instead of "shall" had the effect of prohibiting him from addressing public officials. Allegation number 2(e), therefore, should be denied.

Allegation No. 3 (erroneously labeled as Allegation No. 2)

For this allegation, the Requester claims that a person he knows only as "Laura" was denied the opportunity to speak at the initial public comment section and had to wait to the second public comment portion of the meeting to continue her comments. First, the Requester lacks standing to assert any claims that "Laura" may have. Nevertheless, Requester does not even describe a violation of the Act, since Requester acknowledges that "Laura" had the opportunity to and did address the College's Board of Trustees at the September 25, 2014 meeting during the second public comment period. Thus, no violation of the Act is described and this allegation should be denied.

Allegation No. 4 (erroneously labeled as Allegation No. 3)

Similar to the preceding allegation, this allegation does not describe a violation of the Act, since all speakers at the September 25, 2014 meeting were given a chance to make public

comments. Pursuant to the College's rules, public comment on agenda related topics takes place at the initial public comment portion of the meeting and at the second public comment portion of the meeting public comment is allowed on any other topic. As the video of the September 25, 2014 meeting shows, the Chair maintained meeting order and efficiency by not allowing speakers at the initial public comment section to violate the College's rules by speaking on items not related to the agenda. The efforts to maintain order were accomplished in a firm but civil manner, similar to the way a judge in a courtroom might require disorderly persons to become orderly. As there were no violations of the Act, this allegation must be denied.

Allegations No. 5 and 6 (erroneously labeled as Allegations No. 4 and 5)

For these allegations, the Requester claims that the public comment portion of the September 25, 2014 meeting was discriminatory because citizens of District 502 were able to make public comments before citizens-at-large and students and faculty and because persons speaking about agenda items were able to present at the initial public comment section of the meeting and persons not speaking about anything on the agenda had to wait until the end of the meeting. According to the Requester he was "forced to the back of the bus" (even though he was the fourth person to speak at the initial public comment section and therefore had to wait a mere 9 minutes). The Requester, it seems, does not like this arrangement because he is from Edgar County and wants to go first.

The public comment framework established by the College was established because it is an efficient and common sense approach for conducting meetings. Deciding, as the College has done, to classify speakers by topic enhances meetings and is reasonable because it allows those speakers to go first who want to talk about an item actually on the agenda. Public comment on non-agenda items is allowed at the end of the meeting so that the Board of Trustees can accomplish its work. With this arrangement, people who are present at the meeting because they are interested in a certain agenda item do not have to sit through hours of public comment on topics that have nothing to do with the agenda.

The Requester labels the College's practice of grouping speakers as "discriminatory" but before making his incendiary remarks he fails to recognize or consider that every procedure for determining who goes first during public comment is bound to make some people unhappy—someone has to go first. If, for example, the College had a "first in time first in line" practice, the College would allegedly be discriminating against members of the public who couldn't arrive first to the meeting. The Requester complaint that he cannot speak first at every meeting does not mean that the policy is unreasonable or a violation of the Act.

The College's reasonable approach to structuring public comment is fully constitutional. The First Amendment to the United States Constitution provides freedom of speech rights, but "the First Amendment does not guarantee persons the right to communicate their views at all times or in any manner that may be desired. *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 647 (1981). Governmental bodies have legitimate reasons for having rules to maintain decorum at public meetings and to assure that meetings are efficiently conducted. *Timmon v. Wood,* 633 F. Supp. 2d 453, 465 (W.D. Mich. 2008).

To the extent Requester is confused about the distinction between "District No. 502 Citizens" and "Citizens-at-Large" this letter clarifies that the former means citizens living within the boundaries of Community College District 502 and "Citizens-at-Large" means everybody else.

Requester has a right to address the College's Board of Trustees under the Act. 5 ILCS 120/2.06(g). But he does not have the right to tell the College how its agenda must be structured or the order in which the College will conduct business or hear public comment. This allegation, therefore, must be denied.

Allegation No. 7 (erroneously labeled as Allegation No. 6)

Next, Requester claims that it was a violation of the Act for the College to give the press designated seating in the Board meeting room while denying Requester the privilege of sitting in the press area. Like so many of his other violations, Requester does not actually state how the Act is violated or cite to a specific section of the Act. There is simply no section of the Act that mandates that the College allow all people to sit in the press section of the Board meeting room. Nor does the Requester claim that the establishment of a press section denied Requester the opportunity to address the Board.

Seating for the press is, of course, limited, and it is the practice of the College to provide members of the press who have historically covered the College and have notified the College of their status pursuant to Section 2.02(b) of the Act (i.e *Daily Herald, Chicago Tribune, Chicago Sun-Times, Glen Ellyn Patch, etc.*) seating at tables in the front of the Board meeting room. These media outlets send paid employee/reporters to cover College Board meetings and the reporters are typically working on a deadline for their respective publications. The College simply provides a press area to these traditional media outlets as a courtesy, but there is no requirement in the Act that the College open up the press area to all who want to sit there. This allegation, therefore, must be denied.

Allegation No. 8 (erroneously labeled as Allegation No. 7)

Requester claims that Board of Trustee meetings are not held in a large enough area. It is difficult to fully respond to this claim since Requester does not state or even approximate how many people were in attendance at the September 25, 2014 meeting, does not state or approximate how many of those attendees, if any, did not get a seat in the Board room or how many of the attendees notified the College in advance that they would be attending. These are important factors to consider, as *Gerwin v. Livingstone County Board*, 345 Ill. App. 3d 352, 802 N.E.2d 410 (4th Dist. 2003) instructs.

Section 2.01 of the Act requires meeting venues that are "convenient" and "open" to the public. 5 ILCS 120/2.01. These terms are not defined by the Act but in *Gerwin* the Illinois Appellate Court addressed the "convenient and open" requirement of the Act and shed much light on its meaning. The plaintiffs in *Gerwin* alleged that they were improperly precluded from attending a county board meeting where a landfill expansion was being considered because the meeting room was inadequate to accommodate the large number of attendees. *Gerwin*, 345 Ill. App. 3d at 354. The plaintiffs alleged that the county board chairman knew at least a week

ahead of time that a large number of people would be attending and that the meeting room would be inadequate but nevertheless decided not to move the meeting to a larger venue, even though one was available, because the county board chairman wanted to make attendance by the public inconvenient. *Gerwin*, 345 Ill. App. 3d at 355, 362. The closest plaintiff was to the meeting room was 10 feet from the door and she was standing there in a packed hallway with at least 100 other people breathing air that was "close, hot, airless and uncomfortable." *Gerwin*, 345 Ill. App. 3d at 356. According to the plaintiff, many members of the public left, either because they could not hear or see the meeting or because conditions in the building were intolerable. *Gerwin*, 345 Ill. App. 3d at 356.

The *Gerwin* court noted that a meeting can be "open in the sense that no one is prohibited from attending it, but it can be held in such an ill-suited, unaccommodating, unadvantageous place that members of the public, as a practical matter, would be deterred from attending it." *Gerwin*, 345 Ill. App. 3d at 361. But the *Gerwin* court then immediately notes that the Act does not specify how far a public agency must go in accommodating members of the public and that it would be unreasonable to suppose that the Illinois legislature intended public bodies hold their meetings at locations sufficient to accommodate *all* interested members of the public such that they may see and hear all proceedings in reasonable comfort and safety. The reason, as the *Gerwin* court further observed, is that if enough member of the public showed up, as in a mass demonstration, the business of government would come to a standstill for lack of a venue large enough to accommodate such crowds. *Gerwin*, 345 Ill. App. 3d at 361-62. This would "permit invalidation of any action by a public body by the simple method of overflowing the meeting room." *Gerwin*, 345 Ill. App. 3d at 362, quoting *Gutierrez*, 96 N.M. at 400, 631 P.2d at 306. "[T]o be safe," the public body "would have to hire [a] football stadium or hold its meetings in a wide open space." *Id.* Thus the *Gerwin* court concluded, the concept of public convenience implies a rule of reasonableness—not absolute accessibility to meetings but reasonable accessibility. *Gerwin*, 345 Ill. App. 3d at 362. In other words, a convenient meeting place "lay somewhere between the extremes of a broom closet and football stadium." *Gerwin*, 345 Ill. App. 3d at 362.

The College's Board of Trustees holds its meetings in a board room that is not unlike hundreds or thousands of other public body meeting rooms across the State of Illinois. The Board sits at a horseshoe shaped table facing the audience, and there are 30 general public seats available. At the front of the general seating area are press tables and to the side of the room is an area for people video recording or photographing the meeting. No standing in the aisles or in the back of the room is permitted, for safety reasons. From time to time the College reserves a few seats for persons or College employees who are giving special presentations, but in almost all meetings that have ever taken place in the room there has remained numerous seats for the public; even when seats are reserved they usually open up quickly as the presenters who were occupying those seats typically leave the meeting after conclusion of the presenter's portion of the meeting. Nevertheless, recognizing that unexpected overflow crowds are possible, the College also uses state-of-the-art technology to broadcast the meeting in nearby overflow rooms where ample seating (80 seats) and comfortable room conditions prevail. The College has determined that this arrangement is more accommodating than say, for instance, taking the time to move the meeting to a different building on campus such as an auditorium or gymnasium where audience members' view of the board meeting would be inferior to the view presented by video in the overflow rooms.

The Requester complains that persons in overflow rooms (though he does not claim that he is one of those persons) cannot observe the actions of board members when the camera is not focused on a particular board member. This concern is overblown and not a violation of the Act. When one person is talking the camera typically focuses in on that person, but when an exchange between board members occurs the camera pans out and the exchange is captured. The video enclosed herein is what was broadcast in the overflow room on September 25, 2014 and is representative of other meeting broadcasts. The Requester's concern is especially overblown given the holdings in *Gerwin*—reasonable accessibility, not absolute accessibility is required. There can be no question that the College has provided reasonable accessibility. Requester's complaint on the other hand is unreasonable. He attended the meeting, in the actual board meeting room, and was the fourth person in line to speak during the initial public session. His grounds to complain are non-existent.

Certainly, if the College had adequate advanced notice that large crowd greatly overwhelming the board room was planning to attend a meeting, and that the planned attendees preferred to see the meeting live instead of by broadcast, the College would make appropriate arrangements to move to a larger space. This is what is required by the *Gerwin* decision and the College takes no issue with this requirement.

Allegation No. 9 (erroneously labeled as Allegation No. 8)

Requester creates this issue with the intent of making the College appear as sinister as possible. But a simple explanation exists for the brief door locking episode, as Requester should and probably does know. For safety reasons, the doors to every College building including the building where College Board meetings are held automatically and electronically lock at 11:00 p.m. by computer timer. The meeting of September 25, 2014 ran late and during a closed session some people could have been briefly locked out at 11:00 p.m. because of the building's auto-lock system. In short order College police officers were available to let people back in the building.

Allegation No. 10 (erroneously labeled as Allegation No. 9)

The last allegation is that the Act was violated because Board member Kathy Hamilton was whispering to Board Chair Erin Birt. While this may have occurred, it is an uncommon practice which is discouraged by Chair Birt. Under the Act, two Board members whispering is not a violation of the Act. It seems to be the claim of Requester that when Board member Hamilton whispers to Chair Birt, a closed meeting has occured in violation of the Act. This is wrong because a "meeting" under the Act means a majority of a quorum held for the purpose of conducting public business. 5 ILCS 120/1.02. Since two members are not a majority of a quorum, their whispering cannot constitute a closed meeting in violation of the Act.

The situation would be different, of course, if the allegations made were that the Board as a whole, or a majority of a quorum, conducted business, deliberated and took votes in whispers. But that is simply not the case here. See PAC Opinion 2013 PAC 23488 (Section 2(e) of the Act was violated where the board did not publically recite item being voted on). This allegation, therefore, must be denied.

Conclusion

Thank you for your consideration. Should you require additional documents or information or wish to discuss these matters further, please do not hesitate to contact me.

Very truly yours,

ROBBINS SCHWARTZ

By: Kenneth M. Florey

MNS/mmm
Enclosures

cc: Erin Birt
Dr. Robert Breuder
Respicio Vazquez