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September 26, 2014

RECEIVED

SEP 26 2014

Public Access Counselor

VIA HAND DELIVERY

Tola Sobitan
Assistant Attorney General
Office of the Attorney General
Public Access Bureau
100 West Randolph Street
Chicago, Illinois 60601

Re: OMA Request for Review – 2014 PAC 30969

Dear Ms. Sobitan:

This law firm represents the College of DuPage ("College") in the above referenced Request for Review. Your Request for Review pursuant to the Open Meetings Act ("Act") was received by the College on September 17, 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 August 21, 2014;
- Minutes of the College's Regular Board Meeting of August 21, 2014;
- Video of the College's Regular Board Meeting of August 21, 2014;
- College Board of Trustee Policy No. 5-145;
- College Board of Trustee Procedure No. 5-145;
- College's Meeting Preparation Protocol.

Much of the Request for Review concerns public comment at the College's August 21, 2014 Board meeting, and here at the outset of this response we note that every single person who wanted to address the Board at the August 21, 2014 meeting, including the Requester John Kraft ("Requestor"), was given the opportunity to speak. We will address the seven allegations of the Requestor in turn, though the discussion of allegations 1 and 6 will be limited because you advised our office by phone on September 23, 2014 that, after an initial consideration of the issues, the allegations 1 and 6 did not appear to you to be within the scope of the Act.

Allegation No. 1

Requester claims that the Act was violated by the College because the August 21, 2014 meeting of the College Board of Trustees did not start until 7:21 p.m. The Requester does not cite the section of the Act that is claimed to be violated because there is no requirement in the Act that a meeting start exactly at the time posted on the agenda. It is quite common for public meetings to start after the time stated on the agenda due to a variety of reasons such as waiting for board members to arrive or be ready to commence the meeting. This allegation, therefore, should be denied.

Allegation No. 2

Next, Requester claims that the President of the College's Board of Trustees "'modified' the agenda without approval and stopped public comment to conduct 'board business,' then returned to public comment." Please note that although the Requester makes allegations against the President of the College's Board of Trustees, the presiding officer of a community college board of trustees is the Chairperson and not the College President who is not a member of the elected board and instead is the effective CEO of the college. The Requester's allegation is, presumably, a reference to the fact that the College began the public comment portion of its August 21, 2014 meeting where contemplated by the agenda and then, after a half-hour of public comment, paused the public comment section of the meeting to conduct business before later resuming public comments towards the end of the meeting. The enclosed agenda, minutes and video of the meeting show how the public comment portion of the meeting was sectioned into two timeframes.

Moving the remainder of a public comment portion of a meeting from one meeting timeslot to another timeslot during the same meeting is no violation of the Act. The public policy of the Act is that "citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." 5 ILCS 120/1. The specific requirements for public notice and agendas of all open or closed meetings are set forth in section 2.02 of the Act, but, as the Public Access Counselor has recently acknowledged, no provision of the Act specifically addresses amendments to meeting agendas by public bodies. See PAC Op. 14-003. In Opinion 14-003, the Public Access Counselor ("PAC") noted that "an agenda is an informational guideline of what the public body anticipates considering at a meeting" (emphasis added) and that a public body is not required to address a matter just because it is on the agenda and that a board can decide not to amend its agenda and simply defer an item to a later time.

In this case, the College prepared and posted an agenda in full compliance with section 2.02 of the Act, setting forth the anticipated order of events. And while the College is not required to justify its reasons for moving the remainder of public comments to the end of the meeting, it did so here because one of the trustees was attending the meeting electronically as she had to be out of town as a result of a death in the family and the College wanted to have business items addressed sooner than they otherwise would have been. The College, of course, cannot completely remove the public comment portion of its agenda (as discussed more fully below), but there is no requirement that the College rigidly adhere to an agenda that is an "informational guideline" for what the College anticipates will happen at a meeting. Clearly the lack of merit is apparent as the Requester does not actually cite a section of the Act that the College has supposedly violated. This allegation, therefore, should be denied.

Allegation No. 3

Requester's third allegation is that the College's Board President put "unestablished and unrecorded" rules in place that violated existing rules concerning when public comment will take place at a Board meeting. In other words, in slight variation to allegation number 2, Requester is alleging that Board rules did not permit the Board to pause the public comment portion of the August 21, 2014 meeting to conduct Board business before then later resuming public

comments towards the end of the meeting. To be clear, Requester is not claiming that he was denied the right to address the College's Board of Trustees. Rather, Requester is claiming the right to dictate when his personal public comment portion of College Board meetings will take place.

In addressing this issue it is appropriate to look first to section 2.06(g) of the Act, which 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 College Policy Manual and Administrative Procedure Manual are the rules that govern procedures for the public to address the Board at regular meetings. These policies and procedures are based on Section 3-8 of the Illinois Community College Act, 110 ILCS 805/3-8 which provides in pertinent part:

> At each regular and special meeting which is open to the public, members of the public and employees of the community college district shall be afforded time, subject to reasonable constraints, to comment to or ask questions of the board.

Based on the language in Section 3-8 of the Community College Act, Policy No. 5-145 in the Policy Manual provides as follows:

> At each regular and special meeting which is open to the public, members of the public and employees of Community College District No. 502 will be encouraged and afforded time to comment or ask questions, <u>subject to reasonable limitations to ensure efficient meetings</u> of the Board of Trustees. (emphasis added).

Procedure No. 5-145 of the College's Administrative Procedure Manual, provides that all regular and special Board meetings will include an opportunity for the public to address the Board on any topic. (Procedure No. 5-145, 1 C) Further, Procedure No. 5-145 provides that the Board will set a time limit for each speaker and that the amount of time designated for public comments will be determined based upon the Board's agenda for the meeting in question. (Procedure No. 5-145, 1 E). Clearly, the applicable rules governing Board meeting permit the Board to act exactly as it did on August 21, 2014.

Though it is not clear, the Requester's reference to "Board Protocol" may be a reference to the College's Meeting Preparation Protocol located on the College's website at <u>http://www.cod.edu/about/board_of_trustees/index.aspx</u>, and enclosed herein. The Meeting Preparation Protocol document is simply a written explanation of how the College prepares for Board meetings and the document is primarily intended for the use of those persons (president, board members, and administrators) who most often are the initiators of agenda items. The Meeting Preparation Protocol is not a document that has been adopted by the Board of Trustees, is not a document that is required by law and there is no legal requirement that the document be adhered to. Rather, the Meeting Preparation Protocol is akin to an internal memorandum circulated in any large corporate or governmental organization to help increase

and promote organizational efficiency. As such, the recital in paragraph 10 of the Meeting Preparation Protocol that "public comment is held at the beginning of the Board meeting so Trustees can hear from employees and the community before voting on Board items" is nothing more than an observation of the pattern of typical Board meetings. It is not a Board approved rule and has no legal significance. This allegation, therefore, should be denied.

Allegation No. 4

Next, the Requester alleges that by providing a procedure for structuring the public comment session, the College has somehow engaged in illegal discrimination, although Requester does not specify what protected class has been disadvantaged, as all individuals desiring to address the Board were given the opportunity to do so.

The College's Board meetings are usually structured such that public comment from College employees is heard first, public comment from College students is next, then comments from persons residing inside the College's boundaries are heard and finally public comment from citizens at-large is allowed. This arrangement was in place during the August 21, 2014 Board meeting, as reflected in the agenda and minutes. The Requester, it seems, does not like this arrangement because he is from Edgar County and wants to go first.

We note that an allegation of discrimination is outside the scope of a PAC request for review of an alleged Open Meetings Act violation. As set out above, the Board's Policy No. 5-145 provides the rule that public comment is subject to reasonable limitations to ensure efficient meetings. Deciding, as the College has done, to allow College employees and students to speak first is perfectly reasonable given the mission of the College and the fact that those groups have the most day to day interactions at the College.

Moreover, the College's reasonable approach 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). 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 "<u>limited</u> 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 limited a 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).

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 dictate the timing of his personal comments, 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, should be denied.

Allegation No. 5

For allegation number 5, the Requestor claims that he should have been allowed to use the College's projector equipment to display images during public comment. He does not specify where in the Act it provides that he has the right to appropriate the College's projector equipment for his own use during public comment. Nor does the Requestor claim that there was a College policy permitting the public to use projector 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 Requestor has the right to appropriate the image projecting equipment of a public body or otherwise demand that the College make equipment available to Requestor so that he can enhance his presentation during public comments.

The College notes that it is clear from the Request for Review that that Requestor believes it was the content of the image displayed on the projector that motivated the decision of the College not to allow his use of the projector. No discussion is warranted here, since allegations of content based restrictions on speech are not appropriate for review by the Public Access Counselor under the Act, and it suffices to note that 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). This allegation, therefore, should be denied.

Allegation No. 6

Only brief attention will be paid to allegation number 6, as it too does not concern the Act. Without citation to the Act, the Requestor claims that the Board unlawfully excluded one of its members from a closed session. This claim has no merit, as the minutes clearly show that the Board member in question, Kathy Hamilton, was not excluded but voluntarily exited the closed session meeting at 7:32 p.m. Even if the claim had merit, it would be beyond the scope of the Public Access Counselor's jurisdiction under the Act. This allegation, therefore, should be denied.

Allegation No. 7

The Requestor's final allegation certainly could have been worded more clearly, but it appears to be a claim by the Requestor that an item on the agenda for the August 21, 2014 meeting was not specific enough. The claim has no merit.

The agenda item in question, 10. B. 1. on the Board's August 21, 2014 agenda, was listed as "Approval of Board Resolution for Censure of Board Trustee." This language is in accordance with the Act, which requires that an agenda "set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting." 5 ILCS 120/2.02(c). The Public Access Counselor has recently stated that the purpose of Section 2.02 of the Act is to give the public advance notice of its meeting agenda in order to provide members of the public with enough information to determine whether to attend a public meeting. PAC Opinion 14-001. Then, at the meeting itself Section 2(e) of the Act takes over and is intended to ensure that prior to taking final action, the public body provides information sufficient to inform the public in attendance at the meeting of the specific business being conducted. *Id.*

The Requester complains that the College's agenda was not in compliance with the Act because the agenda did not list the specific name of the trustee to be censured or specifically list the section of the censure resolution called "indemnification" (the Resolution Censuring Trustee Katharine Hamilton is stated in full in the minutes). The plain language of the Act does not require what Requester claims are lacking. The Act requires only that the "general subject matter" of any resolution to be considered be listed on the agenda. 5 ILCS 120/2.02(c). If the Requester's argument were to be accepted, it would mean that stating the "general subject matter" of a resolution is not sufficient for an agenda and that actually the *specific* subject matter must be listed. This cannot be what the legislature intended. The applicable definition of "specific" means "relating to a particular person, situation, etc." See "specific," *Merriam-Webster Online Dictionary.* On the other hand, the applicable definition of "general" means "relating to the main or major parts of something rather than the details: not specific." See "general," *Merriam-Webster Online Dictionary.* To hold that the specific subject matter of a resolution must be listed in the agenda instead of the general subject matter would render superfluous the word "general" in Section 2.02(c). No words in a statute are to be rendered superfluous or void. *Nelles v. State Farm Fire & Casualty Co.*, 318 Ill. App. 3d 399, 402, 742 N.E.2d 420 (1st Dist. 2000). If the legislature had wanted public bodies to list the specific subject matter of resolutions it could have used the phrase "specific subject matter" instead of "general subject matter."

Even before Section 2.02(c) with its "general subject matter" requirement was made effective, Illinois courts had considered agenda sufficiency and provided useful guidance which remains instructive today. In *In re Foxfield Subdivision*, 396 Ill. App. 3d 989, 920 N.E.2d 1102 (2d Dist. 2009), the court held that the Village's agenda notice of an annexation was sufficient despite the fact that the agenda did not identify the specific property to be annexed. The agenda provided for "discussion and consideration of potential annexation of property" and under this agenda item the village board annexed specific property. *Id.* at 1107. The Court stated that the Act does not require that an agenda be "specifically detailed" and the Act "does not require that an agenda be "specifically tailored" to reach those specific individuals whose private interests are most likely to be affected by the public body." *Id.* at 1110.

This allegation, therefore, should be denied.

Robbins Schwartz

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: Nanci Rogers

Enclosures

cc: Erin Birt, Chair of the College of DuPage Board of Trustees
Dr. Robert Breuder, President of the College of DuPage
Respicio Vazquez Attorney for the College of DuPage Board of Trustees

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