



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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September 15, 2017

Via electronic mail

Mr. Kirk Allen
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Via electronic mail

The Honorable James Niemann
Effingham County Board
101 North Fourth Street, Suite 301
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RE: OMA Requests for Review – 2017 PAC 48034, 48074, 48075

Dear Mr. Allen and Chairman Niemann:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). For the reasons that follow, the Public Access Bureau concludes that the Effingham County Board (Board) improperly discussed certain matters involving a new ambulance service contract during two closed sessions, and did not post notice for another meeting on its website as required by OMA.

On May 24, 2017, Mr. Kirk Allen filed three Requests for Review alleging that the Board violated OMA at three separate meetings held on February 24, 2017, March 29, 2017, and May 23, 2017. This office docketed these matters as 2017 PAC 48034, 2017 PAC 48074, and 2017 PAC 48075, respectively.

First, Mr. Allen alleged that the Board held an "emergency" meeting on February 24, 2017, when the circumstances did not constitute an emergency. He also alleged that the Board discussed matters in closed session during this meeting that were outside the scope of any of the exceptions to openness set forth in section 2(c) of OMA (5 ILCS 120/2(c) (West 2016)).

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Second, Mr. Allen alleged that the Board violated OMA at a March 29, 2017, special meeting when it discussed matters in closed session that were outside the scope of any of the exceptions to openness in section 2(c) of OMA.

Third, Mr. Allen alleged that Board violated OMA when it held a special meeting on May 23, 2017, without posting the meeting notice on its website as required by section 2.02(b) of OMA (5 ILCS 120/2.02(b) (West 2016)).

On June 5, 2017, this office sent copies of the Requests for Review to the Board and requested that it furnish a detailed written response to their allegations. With respect to the Request for Review concerning the February 24, 2017, meeting, this office requested that the Board address whether Mr. Allen's allegations were timely under section 3.5(a) of OMA (5 ILCS/120/3.5(a) (West 2016)). On June 9, 2017, the Board submitted a response that addressed the allegations in each of the Requests for Review. On June 29, 2017, this office forwarded a copy of the Board's response to Mr. Allen; he replied on July 28, 2017. As discussed further below, this office sought additional information from Mr. Allen about the timeliness of his Request for Review concerning the February 24, 2017, meeting. On September 5, 2017, this office requested that the Board furnish copies of three agreements that it discussed at the meetings at issue; on September 8, 2017, the Board furnished the requested records. Because these requests for review were filed together and issues overlap, we are addressing all three in this determination letter.

DETERMINATION

"The Open Meetings Act provides that public agencies exist to aid in the conduct of the people's business, and that the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly." *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989).

Authority to Review Allegations Concerning February 24, 2017, Meeting (2017 PAC 48034)

Section 3.5(a) of OMA provides:

A person who believes that a violation of this Act by a public body has occurred may file a request for review with the Public Access Counselor established in the Office of the Attorney General ***not later than 60 days after the alleged violation. If facts concerning the violation are not discovered within the 60-day period, but are discovered at a later date, not exceeding 2 years after the alleged violation, by a person utilizing reasonable***

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diligence, the request for review may be made within 60 days of the discovery of the alleged violation. The request for review must be in writing, must be signed by the requester, and must include a summary of the facts supporting the allegation. The changes made by this amendatory Act of the 99th General Assembly apply to violations alleged to have occurred at meetings held on or after the effective date of this amendatory Act of the 99th General Assembly. (Emphasis added.)

Mr. Allen filed his Request for Review concerning the February 24, 2017, meeting on May 24, 2017—89 days after the alleged violations. Under section 3.5(a), this office is precluded from considering this Request for Review unless Mr. Allen, despite using reasonable diligence, did not discover facts concerning the alleged violations until after the initial 60 days, and then filed his Request for Review within 60 days of those discoveries.

Mr. Allen asserted in his Request for Review that he discovered the alleged improper "emergency" meeting either during the "1st week of April 2017" or "April 14th, 2017[.]"¹ He alleged that he discovered the fact that the Board might have improperly discussed matters during a closed session on "May 28th, 2017[.]"² This office contacted Mr. Allen to clarify the dates on which he had discovered these alleged violations. In an e-mail dated August 2, 2017, Mr. Allen stated that he discovered the alleged violations on May 24, 2017—the same day he filed the Request for Review: "May 24th was the day after a very contentious board meeting and it was that day that numerous phone calls from public officials shared the true story of previous meeting being conducted and discussions taking place that were not as was previously claimed."³

The 99th General Assembly added the language permitting a person to submit a Request for Review within 60 days of discovery of an alleged violation, rather than the date of the violation, by passing House Bill 175, which was enacted as Public Act 99-402. The House sponsor's comments on House Bill 175 indicates that the General Assembly intended the amended section 3.5(a) to provide additional recourse for citizens who belatedly discover potential OMA violations:

¹E-mail from Kirk Allen to Public Access [Bureau], [Office of the Attorney General] (May 24, 2017).

²E-mail from Kirk Allen to Public Access [Bureau], [Office of the Attorney General] (May 24, 2017).

³E-mail from Kirk Allen to Neil Olson, [Deputy Public Access Counselor], [Public Access Bureau] (August 2, 2017).

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House Bill 175 would simply reform the Open Meetings Act by allowing problems with any violations to be reported 60 days after discovery instead of 60 days after the date of the meeting. In my area, there was a power plant that was being built within 300 yards of a school. There were secret meetings and there was no recourse. Remarks of Rep. McSweeney, March 5, 2015, House Debate on House Bill No. 175, at 11.

As reflected in the sponsor's comments, OMA violations may be hidden from public view by their very nature and may be impossible to discover until more than 60 days after they occur.

The statute imposes a duty of "reasonable diligence" on a person who seeks to file a Request for Review more than 60 days after the alleged violation. The term "reasonable diligence" is undefined in OMA. "Reasonable diligence" is generally defined as "a fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue." *Black's Law Dictionary* (10th ed. 2014), available at Westlaw BLACKS. Mr. Allen asserted he only learned about violations at the February 24, 2017, meeting on May 24, 2017, when unidentified public officials informed him of potential problems. The Board has not contended Mr. Allen could have learned of the alleged violations earlier. Based on the available information, this office concludes that Mr. Allen did not discover the alleged violation within 60 days despite using reasonable diligence, and filed this Request for Review well within 60 days of his discovery of the alleged violations, therefore we have authority to review his allegations regarding the February 24, 2017, meeting.

Allegation of Improper "Emergency" Meeting (2017 PAC 48034)

Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2016)) provides that "[p]ublic notice of any special meeting *except a meeting held in the event of a bona fide emergency*, or of any rescheduled regular meeting, or of any reconvened meeting, shall be given at least 48 hours before such meeting[.]" (Emphasis added.)

Mr. Allen alleges that the Board improperly held an emergency meeting on February 24, 2017. In support of this allegation, he points to an e-mail he received from the Board Chairman after asking about the matter:

With regard to our special meetings, we are in compliance with the open meetings act, and given the nature of the meetings and the need to freely consult with the board and possibly take action on advice of our attorney's regarding pending litigation, I believe

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these meetings fall under the emergency provision that is allowed in the open meetings act.^[4]

Although the Chairman referred to an "emergency provision," he also described the meeting as a "special meeting." The agenda for the meeting contains the heading "Special Board Meeting."⁵ Moreover, the Board asserts in its answer that it provided 48 hours' notice of the meeting by posting the agenda and notifying the press, as required for a special meeting.⁶ Mr. Allen has not provided any evidence to the contrary. Because the information submitted indicates that no "emergency" meeting was held, the allegation that circumstances did not warrant an emergency meeting is unfounded.

Closed Session Discussions by County Board (2017 PAC 48034 and 2017 PAC 48074)

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2016)) provides that all meetings of a public body shall be open to the public unless the subject of the meeting falls within one of the exceptions set out in section 2(c) of OMA. The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2016).

Mr. Allen asserts that the discussions during the closed sessions at the February 24, 2017, and March 29, 2017, meetings exceed the scope of the permitted exceptions to openness. The February 24, 2017, meeting minutes reflect that the Board closed the meeting to discuss "Litigation." The March 29, 2017, meeting minutes reflect that the Board closed that meeting to discuss the "Ambulance Contract and Litigation." This office construes the references to litigation to mean that the Board was invoking section 2(c)(11) of OMA (5 ILCS 120/2(c)(11) (West 2016)) as the basis to closed these meetings. That section permits a public body to enter closed session 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[.]"

As the Board explained in its response to this office, the closed session discussions generally concerned the settlement of a pending lawsuit between the County and Altamount Ambulance Service (Altamount), its now former ambulance service provider. Altamount had sued the County and the County had countersued in Effingham County Circuit

⁴E-mail from Jim Niemann to Kirk Allen (April 14, 2017).

⁵Effingham County Board, Agenda (February 24, 2017).

⁶Answer from James Niemann, Effingham County Board, to AAG (Neil) Olson, Barbara Yattoni, Illinois Attorney General's Office (June 9, 2017) at 4.

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Court.⁷ The discussions involved three separate agreements: (1) a settlement agreement and mutual release of claims between Altamount and the County; (2) a settlement agreement and mutual release of claims between Altamount and a new ambulance service, Abbott Ambulance (Abbott); and, (3) a new ambulance service agreement between the County and Abbott. As described above, the Board furnished this office with copies of these three agreements for our review.

In its response to this office, the Board stated that "[t]he closed session was to discuss litigation and finalizing the agreement between Abbott and Altamount Ambulance, if their agreement did not occur, then our settlement agreement was not in effect. * * * [T]here is no deviation from the topic of [the] lawsuit with Altamount Ambulance service and the settlement thereof."⁸ In his reply to the Board's response, Mr. Allen contended that the Board had improperly discussed the agreement between Abbott and Altamount.

This office has reviewed the recordings from both closed sessions in conjunction with the agreements at issue. The settlement agreement between Altamount and the County squarely fits within the section 2(c)(11) because it relates to pending litigation between those two parties. However, as described above, the Board discussed two other agreements in the context of that lawsuit.

Although the Board and Mr. Allen focused on the propriety of the discussions of the second agreement between Altamount and Abbott, neither addressed the third agreement—the new contract between the County and Abbott. Based on the totality of the circumstances, the settlement agreement between Altamount and Abbott related to the pending litigation and is within the scope of section 2(c)(11). The settlement agreement between Altamount and the County expressly obligates Altamount to assign the existing contract to Abbott and coordinate services with Abbott.⁹ Those obligations are included in the settlement agreement between Altamount and Abbott. The County's new contract with Abbott, however, although it was related to the litigation in the sense that the County needed to find a successor contractor, did not directly relate to the pending litigation and settlement with Altamount because it did not obligate Altamount to any additional obligations and services. Accordingly, any discussions relating the new contract with Abbott would not fall with the scope of section 2(c)(11) of OMA.

⁷*Altamount Ambulance Service, Inc. v. Effingham County, Illinois and Effingham County Board*, Docket No. 14-CH-45 (Circuit Court, Effingham County).

⁸Memorandum from James Niemann, Effingham County Board Chair, to A[ssistant] A[ttorney] G[eneral] [Neil] Olson, Illinois [A]ttorney General's Office (June 9, 2017), at 4.

⁹Settlement and Mutual Release, Altamount Ambulance Service, Inc.-Effingham County, Illinois, §§ 2-3 (March 29, 2017).

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With respect to the February 24, 2017, meeting, the discussion focused more on the settlement agreement between the County and Altamount, with the exception of certain portions of the discussion occurring at approximately the 8:05 to 11:50 marks, and at the conclusion of the session beginning at approximately the 17:25 mark. With respect to the March 29, 2017, meeting, Altamount had agreed to the terms of the settlement agreement, and the discussion was more focused on a draft of a new service agreement with Abbott. The discussion of the new contract commenced at approximately 4:15 mark, with two brief periods discussing the underlying litigation (from approximately 16:05-19:10 and 43:45-47:35); the remainder of the session also generally focused on the process for the new contract. Accordingly, the Board violated section 2(a) of OMA when it discussed the new contract with Abbott because those discussions were not within the scope of section 2(c)(11) of OMA.

Posting of Meeting Notice on Website (2017 PAC 48075)

As described above, section 2.02(a) of OMA provides that "[p]ublic notice of any special meeting except a meeting held in the event of a bona fide emergency, or of any rescheduled regular meeting, or of any reconvened meeting, shall be given at least 48 hours before such meeting[.]" Section 2.02(b) of OMA further provides that "[i]n addition, a public body that has a website that the full-time staff of the public body maintains shall post notice on its website of all meetings of the governing body of the public body."

In its response to this office, the Board acknowledges that a full-time staff person maintains its website, and that notice of the May 23, 2017, special meeting was not posted at least 48 hours before the meeting. Accordingly, the failure to post timely notice of the special meeting on the website violated section 2.02(b) of OMA. However, no further remedial action is necessary because the Board adjourned the meeting without taking any action. Moreover, section 2.02(b) provides that "[t]he failure of a public body to post on its website notice of any meeting or the agenda of any meeting shall not invalidate any meeting or any actions taken at a meeting."

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In accordance with the conclusions of this letter, this office requests that the Board publicly release the portions of the verbatim recordings and minutes of the closed sessions determined to have exceeded the scope of section 2(c)(11) of OMA.¹⁰ The Public Access Counselor has determined that resolution of this matter does not require issuance of a binding opinion. This letter serves to close this matter. Please contact me at (217) 782-9078 if you have any questions.

Very truly yours,



NEIL P. OLSON
Deputy Public Access Counselor
Assistant Attorney General, Public Access Bureau

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¹⁰Given that the County has settled the underlying litigation, the Board may wish to assess whether the need for confidentiality of these closed session materials still exists.