

**IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS**

KIRK ALLEN,)
)
Plaintiff,)
)
v.) **19CH000437**
)
ALGONQUIN TOWNSHIP BOARD,)
)
Defendant.)

NOTICE
THIS CASE IS HEREBY SET FOR A
SCHEDULING CONFERENCE IN
COURTROOM TBD ON
10-25-2019, AT 9:00 a.m.
FAILURE TO APPEAR MAY
RESULT IN THE CASE BEING
DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

COMPLAINT

NOW COMES Plaintiff, Kirk Allen, by his undersigned attorneys, LOEVY & LOEVY, and brings this Open Meetings Act suit to force Algonquin Township Board to comply with OMA. Defendant violated OMA by improperly discussing issues in closed session that were required to be discussed in open session and the minutes and recordings of those discussions must be produced. Defendant also violated OMA by refusing to produce the closed session materials to the Attorney General for review. In support of his Complaint, Plaintiff states as follows:

INTRODUCTION

1. Pursuant to the public policy of the State of Illinois, public bodies exist to aid in the conduct of the people's business and the people have a right to be informed as to the conduct of their business. Actions and deliberations of public bodies must be taken openly in order to promote transparency and accountability at all levels of government. Such openness is crucial to democracy. 5 ILCS 120/1.

2. Under the Illinois Open Meetings Act, 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. Exceptions to the public's right to attend exist only in those limited circumstances where the General Assembly has specifically determined that the public interest would be clearly endangered or that the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion. 5 ILCS 120/1.

3. The General Assembly has declared that it is the citizen's right to know and the provisions for exceptions of the open meeting requirements shall be strictly construed against closed meetings. 5 ILCS 120/1.

PARTIES

4. Plaintiff Kirk Allen is an individual who resides in Illinois.

5. Defendant Algonquin Township Board is a public body located in McHenry County Illinois.

JANUARY 19, 2018 MEETING

6. On January 19, 2018, Defendant held an open meeting pursuant to OMA.

7. At this meeting Defendant entered a closed session to discuss, among other things, personnel matters.

8. None of the Section 2(c) exceptions that Defendant cited as its bases for entering closed session authorized discussion of that topic—and potentially others—in closed session.

9. On January 21, 2018 Plaintiff submitted a request for review with the Attorney General challenging Defendant's actions at the January 19, 2018 meeting. Ex. A.

10. The Attorney General issued its determination on June 6, 2019. Ex. A.

11. On February 1, 2018, the Attorney General asked Defendant to provide materials including a verbatim recording of the closed session as well as a written response to Plaintiff's allegation. Ex. A.

12. On February 23, 2018, Defendant provided a response to the Attorney General, but refused to provide it with the closed session materials such as the verbatim recording. Ex. A.

13. The Attorney General determined that Defendant violated OMA Section 3.5(b) by refusing to provide it with the closed session materials including the verbatim recording. Ex. A.

14. The Attorney General was not able to determine whether all of Defendant's closed session discussions properly took place in a closed session given that the verbatim recording was never provided. Ex. A.

15. As of the date of filing, Defendant has not produced any of the records at issue.

COUNT I – VIOLATION OF OMA – JANUARY 19, 2018, MEETING

16. The above paragraphs are incorporated by reference.

17. Algonquin Township Board is a public body under OMA required to hold open meetings.

18. Algonquin Township Board violated OMA Section 2 by discussing topics in closed session that were required to be discussed in open session and by failing to disclose the minutes and recording of those topics.

WHEREFORE, Allen asks that the Court:

- i. enjoin Defendant from refusing to comply with the OMA;
- ii. order disclosure of all minutes and recordings of topics improperly discussed in closed session;
- iii. award Plaintiff reasonable attorneys' fees and costs;
- iv. award such other relief the court considers appropriate.

RESPECTFULLY SUBMITTED,

/s/ Joshua Hart Burday

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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Kwame Raoul
ATTORNEY GENERAL

June 6, 2019

Via electronic mail

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Via electronic mail

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RE: OMA Request for Review – 2018 PAC 51317

Dear Mr. Allen and Mr. Kelly:

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 explained below, the Public Access Bureau concludes that the Algonquin Township Board (Board) did not violate OMA's website posting requirements, but did violate OMA by refusing to provide certain records to the Public Access Counselor for confidential review. The Public Access Bureau further concludes that no additional action is warranted with respect to the allegation that the Board's January 19, 2018, closed session discussions violated the requirements of OMA.

On January 21, 2018, Mr. Kirk Allen submitted this Request for Review alleging that: (1) the Board failed to post notice and an agenda for its January 19, 2018, special meeting on the Township's website; (2) the Board had failed to post on the Township's website a schedule of its regular meetings for 2018, and that the posted schedule of its 2017 regular meetings did not inform the public of the meeting location(s); and (3) the Board improperly discussed a former employee during closed session at that meeting.

Exhibit A

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On February 1, 2018, this office sent a copy of the Request for Review to the Board and requested that the Board or its representative provide a written response to the allegations, together with copies of the notice, agenda, minutes (both open and closed), and closed session verbatim recording of the January 19, 2018, special meeting. On February 23, 2018, Township Attorney James Kelly provided, on the Board's behalf, both a non-confidential explanation for this office to forward to Mr. Allen and an additional explanation for this office's confidential review.¹ The Board, however, refused to provide either the closed session minutes or closed session verbatim recording of the meeting in question. Mr. Kelly claimed that doing so would waive the attorney-client privilege as to the discussions that took place during the closed session. On March 2, 2018, this office forwarded a copy of the Board's answer to Allen; he did not reply.

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).

Website Posting of Notice and Agenda for January 19, 2018, Meeting

Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2016)) requires, in pertinent part, that a public body provide "[p]ublic notice of any special meeting * * * at least 48 hours before such meeting, which notice shall also include the agenda for the special * * * meeting." Section 2.02(b) of OMA (5 ILCS 120/2.02(b) (West 2016)) adds that "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." (Emphasis added.)

The plain language of section 2.02(b) of OMA requires a public body to post notice of a special meeting on its website at least 48 hours before the meeting, **if** its full-time staff maintains the website. The Board's response to this office asserted that its website was not maintained by full-time staff of the Township. In a February 11, 2019, e-mail to a Supervising Attorney in the Public Access Bureau concerning unrelated matters,² Mr. Kelly specified that the website is maintained by IT Connections Inc. of Crystal Lake, Illinois. This office has not

¹ 5 ILCS 120/3.5(b) (West 2016) ("[T]he public body may also furnish the Public Access Counselor with a redacted copy of the answer excluding specific references to any matters at issue. The Public Access Counselor shall forward a copy of the answer or redacted answer, if furnished, to the person submitting the request for review.").

²2019 PAC 56598; 2019 PAC 56599.

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received any evidence to the contrary. Because full-time Township staff did not maintain the Township's website as of the January 19, 2018, special meeting, the Board was not required to post notice or an agenda for the special meeting on the website.

Schedule of Regular Meetings

Section 2.03 of OMA (5 ILCS 120/2.03 (West 2016)) provides, in pertinent part, that "[i]n addition to the notice required by Section 2.02, each body subject to this Act **must, at the beginning of each calendar or fiscal year**, prepare and make available a schedule of all its regular meetings for such calendar or fiscal year, listing the times and **places** of such meetings." (Emphasis added.) The Board's response to this office did not address Mr. Allen's allegations concerning the Board's annual meetings schedules. For the reasons discussed above, however, the Board was not required to post its schedule of regular meetings on its website. This office reminds the Board that an annual meetings schedule must include the place(s) where the meetings will be held.

Closed Session Discussions

Finally, we address Mr. Allen's allegation that if the Board discussed a former employee of the Township in closed session at its January 19, 2018, meeting, then those discussions violated OMA. Under OMA, when forwarding to the public body a copy of a Request for Review, the Public Access Bureau "shall specify the records or other documents that the public body **shall furnish** to facilitate the review." (Emphasis added.) 5 ILCS 120/3.5(b) (West 2016). Section 3.5(b) of OMA further states that "[w]ithin 7 working days after receipt of the request for review, the public body **shall provide copies of the records requested and shall otherwise fully cooperate with the Public Access Counselor.**" (Emphasis added.) Moreover, section 3.5(b) adds: "For purposes of conducting a thorough review, the Public Access Counselor has the same right to examine a verbatim recording of a meeting closed to the public or the minutes of a closed meeting as does a court in a civil action brought to enforce this Act."

Despite this office's express request to review the closed session materials from the Board's January 19, 2018, special meeting, the Board did not provide this office with those materials. This office does not agree with Mr. Kelly's unsupported assertion that disclosure of the requested closed session materials to this office would waive the attorney-client privilege, any more than would an *in camera* review by a court. The Board's refusal precluded this office from fully reviewing this matter and violated section 3.5(b) of OMA.

In the Board's non-confidential response, Mr. Kelly stated:

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The closed session was entered into to discuss personnel matters, pursuant to 5 ILCS 120/2(c) (1) and to discuss pending and threatened litigation against the Township pursuant to 5 ILCS 120/2(c) (11). During the closed session I advised the board of threatened litigation and updated the board on pending litigation, as well as discussed the strategy concerning the same.^[3]

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2017 Supp.)) 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 (5 ILCS 120/2(c) (West 2017 Supp.)). Section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2017 Supp.)) permits a public body to discuss in closed session "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body[.]" Section 2(c)(11) of OMA (5 ILCS 120/2(c)(11) (West 2017 Supp.)) provides an exception for the discussion of pending or probable or imminent litigation; Mr. Allen does not allege improper closed session discussion under this exception.

The Board's non-confidential response in this matter was insufficient to demonstrate the extent of what the Board considered to be its discussions under section 2(c)(1). However, the Board also provided this office with a confidential answer concerning the context of discussions that occurred in closed session which indicates that most if not all of the closed session discussion fell within the scope of the section 2(c)(11) exception. Further, because discussion of the dismissal of a specific employee is allowed under section 2(c)(1), Mr. Allen's specific allegation, even if true, might not constitute a violation of OMA, depending upon the nature of the matters discussed. In other words, matters related to the dismissal of an employee will not necessarily be resolved during a single meeting, and the ramifications thereof might well be a topic of discussion on multiple occasions.

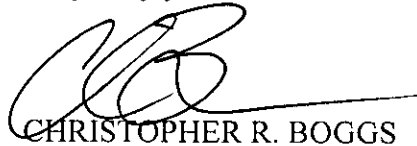
Had the Board provided the verbatim recording as required by OMA, such speculation would not be necessary. Its refusal to do so precluded this office from fully reviewing this matter and violated section 3.5(b) of OMA. Nonetheless, under the particular circumstances presented in this Request for Review, action to compel disclosure of the verbatim recording is not warranted.

³Letter from James P. Kelly, Matuszewich & Kelly, LLP, to Christopher R. Boggs, Assistant Attorney General, Public Access Bureau (February 23, 2018), at 1.

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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 (217) 785-7438 or cboggs@atg.state.il.us. This letter serves to close this file.

Very truly yours,



CHRISTOPHER R. BOGGS
Supervising Attorney
Public Access Bureau

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