



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

KWAME RAOUL  
ATTORNEY GENERAL

March 25, 2021

*Via electronic mail*  
Mr. Kirk Allen

*Via electronic mail*  
Mr. Felix George  
Supervisor  
DuPage Township  
241 Canterbury Lane  
Bolingbrook, Illinois 60440

RE: OMA Request for Review – 2019 PAC 57400

Dear Mr. Allen and Mr. George:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2018)).

On March 26, 2019, Mr. Kirk Allen submitted a Request for Review to this office alleging that the DuPage Township Board of Trustees (Board) violated OMA during its February 15, 2019, meeting by discussing in closed session topics that are not authorized by any of the statutory exceptions to the general requirement that public bodies conduct public business openly. In support of that allegation, Mr. Allen submitted an e-mail from a Board member, the Honorable Alyssa Benford, alleging that such improper discussions occurred.

On March 29, 2019, this office sent a copy of the Request for Review to the Board and asked it to provide copies of the agenda, open and closed session meeting minutes (draft form if necessary), and closed session verbatim recording from the Board's February 15, 2019, meeting. We also requested a written response to Mr. Allen's allegations. On April 26, 2019, the Board the furnished the requested written documents and its written responses, portions of which were submitted confidentially. On April 30, 2019, this office sent Mr. Allen

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the written response with confidential portions redacted under section 3.5(c) of OMA<sup>1</sup> (5 ILCS 120/3.5(c) (West 2018)); he did not reply. On May 6, 2019, this office received by postal mail the verbatim recording of the closed session. After that copy was inadvertently damaged, the Board sent this office a second copy of the recording on March 15, 2021.

### **DETERMINATION**

It is "the public policy of this State that its 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 (West 2018). "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).

### **Section 2(c)(1) of OMA**

OMA requires that all meetings of a public body remain open to the public unless the public body properly invokes an exception in section 2(c) of OMA. 5 ILCS 120/2(a), (c) (West 2018). The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2018).

The Board's response to this office asserted that a portion of its February 15, 2019, closed session discussion was authorized by section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2018)). Section 2(c)(1) permits a public body to hold a closed session to discuss, in relevant part:

The appointment, employment, compensation, discipline, performance, or dismissal of specific employees, specific individuals who serve as independent contractors in a park, recreational, or educational setting, or specific volunteers of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee, a specific individual who serves as an independent contractor in a park, recreational, or educational setting, or a volunteer of the public body or against legal counsel for the public body to determine its validity.

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<sup>1</sup>Section 3.5(c) of OMA provides that a "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."

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The "purpose of the [2(c)(1)] exception is to protect the identity and reputation of a person[.]" 1974 Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 128. The exception is intended to permit public bodies to candidly discuss the relative merits of individual employees, or the conduct of individual employees." Ill. Att'y Gen. Pub. Acc. Op. No. 15-005, issued August 4, 2015, at 6 (quoting Ill. Att'y Gen. Pub. Acc. Op. No. 12-011, issued July 11, 2012, at 3).

This office's review of the closed session verbatim recording confirmed that the Board held a detailed discussion of the employment and employment-related conduct of a specific employee. Those portions of the discussion fell squarely within the scope of section 2(c)(1) and, therefore, did not violate FOIA.

#### **Section 2(c)(3) of OMA**

The Board's response to this office contended that the remaining portions of the closed session discussion were authorized by section 2(c)(3) of OMA (5 ILCS 120/2(c)(3) (West 2018)). That provision permits a public body to enter closed session to discuss:

The selection of a person to fill a public office, as defined in this Act, including a vacancy in a public office, when the public body is given power to appoint under law or ordinance, or the discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance.

By its plain language, the scope of the section 2(c)(3) exception is limited to the "selection of a person," and not other procedural matters incidental to that selection. Accordingly, this office has concluded that section 2(c)(3) "extends only to discussions about the qualifications and merits of individual candidates that directly bear on the selection of those persons to fill a public office." Ill. Att'y Gen. PAC Req. Rev. Ltr 47555, issued August 29, 2017, at 5.

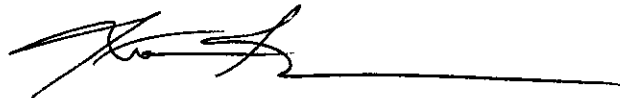
Based on this office's review, the vast majority of the discussion focused directly on a specific candidate to fill the vacant Township Supervisor position. Although some portions of that discussion included references to Township polices, fiscal matters, and other issues facing the Township, those matters were discussed in the context of assessing the candidate. Accordingly, those discussions were sufficiently intertwined with the candidate's qualifications to be authorized by the section 2(c)(3) exception. *See Gosnell*, 179 Ill. App. 3d at 175 (closed session discussion of goals developed to resolve complaints against an employee substantially complied with OMA because the topics were closely related and goals could not be effectively discussed in open session without referencing the complaints that prompted them).

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However, certain portions of the lengthy discussion strayed beyond the scope of section 2(c)(3). For example, a particular policy and a conflict between two individuals were permissibly discussed in the context of considering the candidate's inter-personal skills, but at times the discussion veered into the source of the underlying conflict and the content of specific communications. Those portions of the discussion involved the conflict itself and did not concern whether to select the candidate. Because it was not necessary to discuss these matters to deliberate on the selection of a Supervisor, those portions of the discussion did not substantially comply with OMA under the standard articulated in *Gosnell*, which the Board cited in its response to this office. In addition, at brief interludes the Board discussed the process for selecting a Supervisor rather than the candidate under consideration. As referenced above, such procedural matters are not within the scope of section 2(c)(3).<sup>2</sup> To remedy those violations, this office requests that the Board review the closed session recording and vote to release the discrete portions that do not directly concern the selection of a person to fill a public office or the employment of a specific employee.<sup>3</sup>

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

Very truly yours,



STEVE SILVERMAN  
Bureau Chief  
Public Access Bureau

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<sup>2</sup>A Board member also briefly referenced a personal matter when another Board member left the room to get the candidate for the Supervisor position. This reference was not a discussion of public business subject to the requirements of OMA.

<sup>3</sup>The Board's response argued that this office does not have authority to disclose or direct any portion of the closed session verbatim recording to be disclosed. Section 3.5(g) (5 ILCS 120/3.5(g) (West 2018)) requires this office to maintain the recording confidentially. However, section 3.5(e) of OMA (5 ILCS 120/3.5(e) of OMA also gives this office broad authority to resolve a Request for Review by a means other than the issuance of a binding opinion, which includes requesting that a public body take remedial action as this non-binding determination does.

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Ms. Alyssia Benford

