



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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August 2, 2021

Via electronic mail

Mr. Kirk Allen
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Via electronic mail

The Honorable Nichole D. Kroncke
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RE: OMA Request for Review – 2021 PAC 66874

Dear Mr. Allen and Ms. Kroncke:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)). For the reasons that follow, the Public Access Bureau is unable to conclude that the Shelby County Board of Trustees (Board) improperly permitted a trustee to attend its December 7, 2020, meeting remotely.

BACKGROUND

On February 5, 2021, Mr. Kirk Allen submitted a Request for Review to the Public Access Bureau alleging that the Board violated the requirements of OMA at its December 7, 2020, meeting by permitting a Board member to participate remotely by telephone. He contended: "In the case of Shelby County, there are no rules adopted by the public body for such attendance, which means they are prohibited from doing so unless the conditions of 7(e) are met."¹ (Emphasis in original omitted.) Mr. Allen alleged that the Board failed to meet some of

¹E-mail from Kirk Allen to [Public Access Bureau] (February 5, 2021).

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the conditions set forth in section 7(e) of OMA (5 ILCS 120/7(e) (West 2020)), which permits a public body to hold a meeting without a quorum physically present because of a public health emergency, such as the COVID-19 pandemic. Specifically, he contended that the head of the public body did not make a determination that it was not practical or prudent to conduct a meeting in person, that several Board members could not hear the Board member who participated by phone, and that at times, members of the public could not hear the proceedings. Mr. Allen provided a link to a posted recording of the meeting.

On February 17, 2021, this office forwarded a copy of the Request for Review to the Board and asked it to provide this office with a written response to Mr. Allen's allegations and copies of its December 7, 2020, meeting agenda, minutes, and any Board rules or policies governing remote participation by members of the Board. On February 25, 2021, and March 1, 2021, this office received the requested materials from the Shelby County State's Attorney's Office on behalf of the Board. On March 2, 2021, this office forwarded a copy of the Board's written response to Mr. Allen; he replied on March 3, 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 2020). "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 7 of OMA governs the requirements and procedures for remote attendance by members of a public body. Section 7(a) of OMA (5 ILCS 120/7(a) (West 2020)) provides:

If a quorum of the members of the public body is physically present as required by Section 2.01, a majority of the public body may allow a member of that body to attend the meeting by other means if the member is prevented from physically attending because of: (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency. "Other means" is by video or audio conference.

Section 7(c) of OMA (5 ILCS 120/7(c) (West 2020)) further provides:

A majority of the public body may allow a member to attend a meeting by other means only in accordance with and to the extent allowed by rules adopted by the public body. The rules must conform to the requirements and restrictions of this Section, may further limit the extent to which attendance by other means is allowed, and may provide for the giving of additional notice to the public or further facilitate public access to meetings.

In its response to this office, the Board stated that it did not have a rule addressing remote voting, and this office's review of the Board's rules confirmed that it also does not have rules concerning remote attendance as described in section 7(c) of OMA. The Board clarified that it held the December 7, 2020, meeting pursuant to section 7(e) of OMA.

As noted above, section 7(e) of OMA permits a public body to hold a meeting remotely because of a public health emergency, so long as certain conditions are met. That provision provides, in relevant part:

- (e) Subject to the requirements of Section 2.06 but notwithstanding any other provision of law, an open or closed meeting subject to this Act may be conducted by audio or video conference, without the physical presence of a quorum of the members, so long as the following conditions are met:

* * *

- (2) the head of the public body as defined in subsection (e) of Section 2 of the Freedom of Information Act [FOIA] determines that an in-person meeting or a meeting conducted under this Act is not practical or prudent because of a disaster;
- (3) all members of the body participating in the meeting, wherever their physical location, shall be verified and can hear one another and can hear all discussion and testimony;
- (4) for open meetings, members of the public present at the regular meeting location of the body can hear all discussion and testimony and all votes of the members of the body, unless attendance at the regular meeting location is not feasible due to the

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disaster, including the issued disaster declaration, in which case the public body must make alternative arrangements and provide notice pursuant to this Section of such alternative arrangements in a manner to allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes, such as by offering a telephone number or a web-based link[.]

Addressing the condition set forth in section 7(e)(2) of OMA, the Board stated that at the time of the meeting, "there was no 'Head of the Public Body' as defined by" section 2(e) of FOIA (5 ILCS 140/2(e) (West 2020)).² The Board explained that the December 7, 2020, meeting was an organizational meeting to select a new chairman and that one Board member, Barbara Bennett, could not attend in person due to a medical condition. The Board stated that a "[a] chairman had not yet been selected at the time of the vote for chairman. Further, the previous chairman was no longer a member of the County Board, having been defeated in the 2020 primary election."³ The Board did not state who determined that an in-person meeting was not prudent, but it noted that Shelby County State's Attorney Nichole Kroncke "advised the County Board that Ms. Bennett should be allowed to vote remotely."⁴

The Board asserted that it complied with section 7(e)(3) of OMA. The Board stated that Ms. Bennett "reported her medical condition to the county clerk prior to the meeting and the county clerk, with Ms. Bennett's consent, called Ms. Bennett's phone during the meeting with a phone number that Ms. Bennett provided."⁵ The Board contended that it "was able to hear her vote for Bryan Coffman as chairman (as evidenced by the fact that the board acknowledged a tie of 11 to 11)."⁶ The Board stated that it did not believe that Ms. Bennett participated in any further discussion.

²Letter from Nichole Kroncke, Shelby County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau (February 24, 2021), at 2.

³Letter from Nichole Kroncke, Shelby County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau (February 24, 2021), at 2.

⁴Letter from Nichole Kroncke, Shelby County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau (February 24, 2021), at 1.

⁵Letter from Nichole Kroncke, Shelby County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau (February 24, 2021), at 2.

⁶Letter from Nichole Kroncke, Shelby County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau (February 24, 2021), at 2.

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The Board also contended that it complied with section 7(e)(4) of OMA, as "[m]embers of the public were able to hear Ms. Bennett's vote (as evidenced by the fact that the public participated in an animated discussion following the vote, recognizing that a tie vote for chairman had resulted, and proclaiming that Ms. Bennett's vote should not be counted)."⁷ Additionally, the Board argued:

If members of the public experienced difficulty hearing, it was likely during the period of time following the vote when a recess ensued. Members of the Board as well as members of the public spoke loudly and simultaneously. An inability to hear was not caused by Ms. Bennett's participation via remote audio participation.^[8]

In reply to that answer, Mr. Allen contended, in relevant part: "While an argument can be made that the presiding officer of the meeting in question was the County Clerk, there was no declaration by the County Clerk as outlined in section 7(c)(2) [*sic*] and the SA confirms that the requirement was not met."⁹

Section 2(e) of FOIA (5 ILCS 140/2(e) (West 2020)) defines "[h]ead of the public body" as "the president, mayor, chairman, **presiding officer**, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body, or such person's duly authorized designee." (Emphasis added.) OMA does not define "presiding," but in interpreting statutes such as OMA, undefined statutory terms must be afforded their "plain, ordinary, and popular meanings[,]" which may be gleaned from dictionaries. *See, e.g., Valley Forge Insurance Co. v. Swiderski Electronics*, 223 Ill. 2d 352, 366 (2006). "Preside" is defined, in relevant part, as "to exercise guidance, direction, or control[,]" "to occupy the place of authority: act as president, chairman, or moderator[,]" and "to occupy a position similar to that of a president or chairman." Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/preside>.

The Board explained that it did not have a chairman at the time of the meeting. Indeed, the purpose of the meeting was to elect a new chairman and vice chairman. In the absence of a chairman, the meeting's minutes reflect that the County Clerk led the meeting and

⁷Letter from Nichole Kroncke, Shelby County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau (February 24, 2021), at 2.

⁸Letter from Nichole Kroncke, Shelby County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau (February 24, 2021), at 2-3.

⁹E-mail from Kirk Allen to [Teresa] Lim (March 3, 2021).

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directed the selection process for chairman. The meeting minutes document that the County Clerk called the meeting to order and took a roll call of the Board. She then called for nominations for Board chairman and subsequently took down two nominations. The County Clerk called for votes on motions to elect those nominees and announced the results of the votes for each candidate. In this instance, the County Clerk appears to have exercised control over the meeting and acted as a chairperson would have. Accordingly, the County Clerk was the presiding officer and constituted the "head of the public body" for the Board's December 7, 2020, meeting.

As noted above, Mr. Allen contended that "there was no declaration by the County Clerk"¹⁰ that an in-person meeting was not practical or prudent due to an emergency. Section 7(e)(2) requires a determination, not a declaration or formal announcement, that an in-person meeting is not practical or prudent. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 66398, issued February 1, 2021 (taking no further action on a Request for Review alleging that a village did not publicly declare an emergency but indicated in its meeting agenda that the meeting would be held remotely due to an ongoing public health emergency). The Board's response to this office did not state who determined that a fully in-person meeting was not prudent, but the information provided indicated that the County Clerk was knowledgeable of Ms. Bennett's medical condition and willingly facilitated Ms. Bennett's remote participation. Therefore, the County Clerk, acting as head of the Board, appears to have determined that a fully in-person meeting was not prudent as required by section 7(e)(2) of OMA.

Mr. Allen also contended that some Board members could not hear Ms. Bennett, and members of public could not hear portions of the meeting. The Board denied that it could not hear its members. This office has reviewed the recording¹¹ of the meeting posted by Mr. Allen's group, Edgar County Watchdogs. The recording reflects the County Clerk opening the meeting and the State's Attorney announcing that Ms. Bennett could not participate in person and referencing the COVID-19 pandemic, as well as the Governor's executive order. The County Clerk then called Ms. Bennett and informed her that she was on speaker phone; Ms. Bennett responded affirmatively that she could hear her. Based on this office's review, the votes of each Board member on the two nominees are audible.

After the votes were tallied, the County Clerk announced a 10-minute recess. Returning from the recess, the Board held a public comment session in which members of the public raised concerns regarding the remote attendance and vote of Ms. Bennett. This office is

¹⁰E-mail from Kirk Allen to [Teresa] Lim (March 3, 2021).

¹¹Edgar County Watchdogs, Shelby County Board, Meeting, December 7, 2020, <https://www.youtube.com/watch?v=vOOYdJN9tBw&t=1551s>.

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unable to discern any particular parts of the Board's discussion or public comment session that were difficult to hear. As the Board noted in its response, during the recess some individuals were speaking with one another in the meeting room, creating a high volume of noise. However, this office is unable to determine that a majority of a quorum of the Board members engaged in deliberations concerning public business during that time. Mr. Allen did not provide examples of specific instances when he or other members of the public could not hear the Board's discussion, including any specific input provided by Ms. Bennett, while the meeting was convened. Accordingly, based on the available information, this office is unable to conclude that the Board did not meet the requirements of sections 7(e)(2), 7(e)(3), and 7(e)(4).

The Office of the Public Access Counselor, however, is charged with providing advice and education to both public officials and the public. *See* 15 ILCS 205/7(a), (b), (c) (West 2020). To that end, this office notes that the Governor's disaster proclamation,¹² which finds that in-person attendance of more than 10 people at a regular meeting location is not feasible for purposes of section 7(e), expired on July 24, 2021. That disaster proclamation further stated that the Governor "do[es] not expect to make this finding again, and public bodies should plan on its expiration as of July 24, 2021."¹³ As Mr. Allen highlighted, the Board did not have a rule permitting remote attendance by a member of the Board at the time he submitted his Request for Review. In the future, if the Board wishes to permit remote member attendance pursuant to section 7(c) of OMA for any of the reasons specified under section 7(a), it should establish and record a Board rule permitting such remote attendance if it has not already done so.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,



TERESA LIM
Assistant Attorney General
Public Access Bureau

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¹²Gubernatorial Disaster Proclamation, §12, issued June 25, 2021.

¹³Gubernatorial Disaster Proclamation, §12, issued June 25, 2021.