

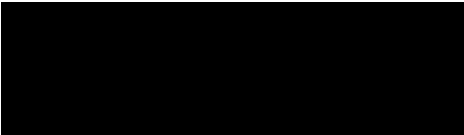


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

October 19, 2021

Via electronic mail
The Honorable Martin Fairchild
Trustee
Board of Trustees
Rochester Fire Protection District



Via electronic mail
Mr. David Livingstone
Stobbs, Sinclair & Livingstone, Ltd.
500 Bond Street
Alton, Illinois 62002
dlivingstone@sslalaw.com

RE: OMA Request for Review – 2021 PAC C-0028

Dear Mr. Fairchild and Mr. Livingstone:

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 concludes that the Rochester Fire Protection District (District) Board of Trustees (Board) improperly discussed matters that were outside the scope of the exception on which it relied to close a portion of its April 1, 2021, meeting. The Public Access Bureau also concludes that the Board improperly took final action when it approved a change in personnel policy without providing sufficient advance notice to the public.

On May 6, 2021, this office received a Request for Review in which Board member Martin Fairchild alleged that the Board violated OMA in connection with its April 1, 2021, meeting by (1) improperly discussing a policy change in closed session and (2) approving a policy change in open session without providing advance notice of that action on the meeting

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agenda. On May 18, 2021, this office sent a copy of the Request for Review to the Board and asked it to provide a written response to the allegations in the Request for Review. In particular, we asked the Board to address if it discussed a policy change in closed session and, if so, to identify the exception in section 2(c) of OMA (5 ILCS 120/2(c) (West 2020)) that the Board publicly cited and identified as authorizing discussion of that topic in closed session. Additionally, we asked the Board to address whether it took final action on the policy change and, if so, to identify the relevant item on the agenda which provided advance notice of that final action.

On May 28, 2021, the Board provided this office with a written response, minutes of the open and closed portions of the meeting in draft form, and an audio recording of the closed session. The written response indicates that the Board discussed a "personnel matter" pursuant to section 2(c)(1) of OMA¹ (5 ILCS 120/2(c)(1) (West 2020)). The meeting minutes indicate that the Board then returned to open session to vote on a motion "[t]o include in future personnel policies that no Trustee will speak about confidential personnel matters to any member of the Fire Department unless the member comes to the Trustee directly regarding an issue."² The meeting agenda included an item for "Discussion/Action regarding personnel matter discussed in closed session."³

DETERMINATION

Section 2(c)(1)

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2020)) provides that "all meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." The exceptions to the requirement that public bodies openly deliberate "are to be strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2020).

Section 2(c)(1) of OMA permits a public body to enter closed session to discuss, in pertinent part: "The appointment, employment, compensation, discipline, performance, or dismissal of specific employees[.]" "[T]he exception is intended to permit public bodies to candidly discuss the relative merits of individual employees[.]" Ill. Att'y Gen. Pub. Acc. Op. No.

¹Letter from David Livingstone, Stobbs, Sinclair & Livingstone, Ltd., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (May 28, 2021), at 1.

²Rochester Fire Protection District Board of Trustees, Special Meeting, April 1, 2021, Minutes 2.

³Rochester Fire Protection District Board of Trustees, Agenda Item New Business 1., (April 1, 2021).

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12-011, issued July 11, 2012, at 3. The applicability of the section 2(c)(1) exception "is limited to consider[ing] information concerning an individual employee or officer, and * * * the purpose of the 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 9. Section 2(c)(1) of OMA generally does not authorize public bodies to discuss policy matters that are broadly applicable to categories of employees. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 16-013, issued December at 23, 2016, at 5 (closed session discussion concerning an across-the-board raise for a category of employees and the impact on the public body's budget not permissible under section 2(c)(1)).

The Board's response to this office characterized the discussion in the closed session portion of the April 1, 2021, meeting as a discussion of the performance of an employee who was having a dispute with a Board member. Based on our review of the closed session minutes and the audio recording of the closed session, the discussion centered on a policy disagreement about the interactions between Board members and employees of the District in general. This discussion did not concern the appointment, employment, compensation, discipline, performance, or dismissal of any individual employee. Because the scope of section 2(c)(1) is limited to discussions of certain matters directly concerning individual employees,⁴ this office concludes that the Board violated OMA by discussing a policy matter that applies broadly to the District's employees.

Final Action

The public policy of this State, as declared in section 1 of OMA (5 ILCS 120/1 (West 2020)) 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." Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2020)) provides that "[a]n agenda for each regular meeting shall be posted at the principal office of the public body and at the location where the meeting is to be held at least 48 hours in advance of the holding of the meeting." OMA further provides that "[a]ny agenda required under this Section shall 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) (West 2020)).

The Board's response to this office asserts that its vote on a motion concerning interactions between Board members and employees did not constitute "final action" under OMA. Alternatively, the Board asserted that if it did take final action by voting on the motion, the meeting agenda provided sufficient advance notice of that final action.

⁴Section 2(c)(1) also permits closed session discussions of "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[.]"

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Prior to the addition of section 2.02(c) to OMA, the Illinois Appellate Court held that the generic agenda item "New Business" did not provide sufficient advance notice of final action by a public body. *Rice v. Board of Trustees of Adams County*, 326 Ill. App. 3d 1120, 1123 (4th Dist. 2002). The Senate debate on House Bill No. 4687, which was enacted as Public Act 97-827, effective January 1, 2013, and added section 2.02(c) of OMA, indicates that the General Assembly intended section 2.02(c) to ensure that agendas provide sufficiently descriptive advance notice of the matters upon which a public body anticipates taking final action:

[T]here was just no real requirement as to how specific they needed to be to the public of what they were going to discuss that would be final action. And this just says that you have to have a * * * general notice if you're going to have and take final action, as to generally what's going to be discussed so that – that people who follow their units of local government know what they're going to be acting upon. Remarks of Sen. Dillard, May 16, 2012, Senate Debate on House Bill No. 4687, at 47.

The Board's response to this office contended that the agenda item "Discussion/ Action regarding personnel matter discussed in closed session[]" provided sufficient advance notice of its vote on the policy matter concerning interactions between Board members and employees. The Board argued that "governing bodies of a unit of local government cannot include exact, precise and specific language on an agenda following a discussion of personnel in closed session. To do so would lead the public, and the personnel, to believe that the governing body has made up its mind before hearing any critical information."⁵

Section 2.02(c) of OMA, however, does not require public bodies to include exact, precise, or specific language of prospective final action; it only requires an agenda to set forth the general subject matter of final action. The Board's agenda item vaguely referenced a "personnel matter[.]" Such broad, all-inclusive wording could potentially apply to any matter that pertains to personnel in any way. Because the agenda item did not identify the general subject matter of the policy concerning interactions between Board members and employees, the Board failed to provide sufficient advance notice of its vote.

⁵Letter from David Livingstone, Stobbs, Sinclair & Livingstone, Ltd., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (May 28, 2021), at 2.

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In its response to this office, the Board argues that this vote did not constitute final action, as "it was a commitment or evidence of an intention to include certain language in a future, and not yet finalized, policy or policy manual."⁶ The response stated that the Board will vote on the matter in the future when a final policy manual is presented for the Board's approval.

In *Gosnell v. Hogan*, the plaintiff alleged that a school board impermissibly took final action in closed session by making a request for mediation as an alternative to the negotiations it had been conducting with the secretaries' union. *Gosnell*, 179 Ill. App. 3d at 176. The court held:

[T]he request for mediation was part of the process of reaching a final action with the secretaries union. Mediation, similar to negotiating, is not an end in itself, but rather, a means to an end. Negotiations and mediations are made up of many "unilateral" decisions, such as what to offer or counteroffer, and to hold that each of the unilateral strategical decisions that make up the constituent parts of a negotiation is in and of itself a final action is unreasonable. *Gosnell*, 179 Ill. App. 3d at 176.

Accordingly, a component of a public body's process of reaching final action generally does not, itself, constitute final action. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 32463, issued July 14, 2015, at 3 (city council's vote to direct staff to explore funding for a sporting event bid was not final action because it was merely a step in furtherance of reaching final action). Rather, "'final action' generally must bring a matter to a resolution." Ill. Att'y Gen. PAC Req. Rev. Ltr. 43111, issued August 4, 2016, at 3 (vote to reconsider whether to award a contract to the low qualified bidder was not final action because it did not resolve the matter, in that "final action on whether to in fact award the contract was held over until the next meeting").

However, the recording of the closed session at issue in this matter makes clear that the Board intended to regulate its members' and District employees' current conduct in order to resolve the underlying personnel matter. The open session vote also appears to implement the policy immediately. Even if the policy is included as part of a policy manual presented for Board approval in the future, the policy has already taken effect and therefore has been the subject of final action for purposes of OMA. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 58555, 56814, 56815, issued August 20, 2019, at 4 (public body took final action by reaching private consensus to ban camping at a park and implementing that decision by posting signs at the park which prohibited camping). Accordingly, this office concludes that the Board violated section

⁶Letter from David Livingstone, Stobbs, Sinclair & Livingstone, Ltd., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (May 28, 2021) at 2.

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2.02(c) of OMA because the April 1, 2021, meeting agenda did not include the general subject matter of the change to personnel policy.

In accordance with the conclusions expressed above, this office requests that the Board remedy its violations of OMA by releasing the verbatim recording of the policy discussion during its April 1, 2021 meeting, as well as reconsidering and taking final action concerning the personnel policy during an open meeting in which it fully complies with the requirements of OMA. 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 (773) 590-7878.

Very truly yours,



BENJAMIN J. SILVER
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
The Honorable John Fox
President
Board of Trustees
Rochester Fire Protection District

