



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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July 13, 2022

Via electronic mail

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Via electronic mail

The Honorable Cohen Barnes
Mayor
City of DeKalb
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RE: OMA Request for Review – 2021 PAC 68219

Dear Mr. Charvat and Mr. Barnes:

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 City of DeKalb (City) City Council (City Council) held an improper closed session discussion about the City Clerk during its October 25, 2021, meeting.

In his Request for Review, Mr. Mark Charvat alleged that the City Council violated OMA by entering closed session to discuss the City Clerk pursuant to the exception—to the general requirement that public bodies openly discuss public business—in section 2(c)(3) of OMA (5 ILCS 120/2(c)(3) (West 2020)). On November 5, 2021, this office sent a copy of the Request for Review to the City Council and asked it to provide a verbatim copy of the closed session recording of the City Council's October 25, 2021, meeting and copies of the agenda and open and closed session minutes (draft form if necessary). We also requested a written response to the allegation that the City Council improperly discussed the City Clerk in closed session. On November 9, 2021, counsel for the City Council furnished those materials. On November 15,

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2021, this office sent Mr. Charvat a copy of the City Council's written response; he submitted a reply on November 23, 2021.

BACKGROUND

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 2020). The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2020).

Section 2(c)(3) of OMA 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.** (Emphasis added.)

Mr. Charvat's Request for Review alleged that the City Council does not have authority to discipline the City Clerk, who is an elected official. Among other provisions, the City Council's response to the office cited sections 3.1-10-50(b) and 3.1-10-50(c)(1) of the Illinois Municipal Code¹ as authorizing the City Council to remove the City Clerk from office:

(b) * * * A vacancy occurs in an office by permanent physical or mental disability rendering the person incapable of performing the duties of the office. The corporate authorities have the authority to make the determination whether an officer is incapable of performing the duties of the office because of a permanent physical or mental disability. A finding of mental disability shall not be made prior to the appointment by a court of a guardian ad litem for the officer or until a duly licensed doctor certifies, in writing, that the officer is mentally impaired to the extent that the officer is unable to effectively perform the duties of the office. **If the corporate authorities find that an officer is incapable of performing the duties of the office due to permanent physical or mental disability, that person is**

¹65 ILCS 5/3.1-10-50(b), (c)(1) (West 2020), as amended by Public Act 102-15, effective June 17, 2021.

removed from the office and the vacancy of the office occurs on the date of the determination.

(c) Vacancy by other causes.

(1) Abandonment and other causes. A vacancy occurs in an office by reason of abandonment of office; removal from office; or failure to qualify; or more than temporary removal of residence from the municipality; or in the case of an alderperson of a ward or councilman or trustee of a district, more than temporary removal of residence from the ward or district, as the case may be. The corporate authorities have the authority to determine whether a vacancy under this subsection has occurred. If the corporate authorities determine that a vacancy exists, the office is deemed vacant as of the date of that determination for all purposes[.] (Emphasis added.)

The City Council's response stated that the City Council "lawfully held the Meeting to discuss the City Clerk's performance of his duties as the City Council's recording secretary, the City Clerk's vacancy of his elected office by reasons of abandonment or disability, and the selection of the City Council's recording secretary."² The response stated that the City Clerk failed to attend several meetings during the summer of 2021, and that the City Council discussed in closed session whether he "abandoned his office by, among other considerations, utterly failing to occupy his physical office at City Hall, hold office hours to the general public, or submit timely, accurate, and complete minutes of the City Council's meetings."³

In his reply, Mr. Charvat asserted that the closed session discussion was unauthorized because neither the Illinois Municipal Code nor the City's Municipal Code set forth a standard for what constitutes abandonment of office. The reply also appears to contend that the City Council cannot discuss in closed session whether the City Clerk abandoned his office because members of the City Council cannot be penalized for missing meetings. In addition, the reply noted that section 3.1-10-50(b) of the Illinois Municipal Code restricts a city council from

²E-mail from Matthew D. Rose, Donahue & Rose, P.C., to Assistant Attorney General [Steve] Silverman (November 15, 2021).

³E-mail from Matthew D. Rose, Donahue & Rose, P.C., to Assistant Attorney General [Steve] Silverman (November 15, 2021).

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making a finding of mental disability until the appointment of a guardian ad litem for the officeholder or a determination of mental impairment by a licensed doctor.⁴

ANALYSIS

The primary objective when construing the meaning of a statute is to ascertain and give effect to the intent of the General Assembly. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "The most reliable indicator of legislative intent is the statutory language, given its plain and ordinary meaning." *Gaffney v. Board of Trustees of Orland Fire Protection District*, 2012 IL 110012, ¶56, 969 N.E.2d 359, 372 (2012). Where the language of a statute is clear and unambiguous, a reviewing body "may not depart from the plain language by reading into the statute exceptions, limitations, or conditions that the legislature did not express." *Hayashi v. Illinois Department of Financial and Professional Regulation*, 2014 IL 116023, ¶16, 25 N.E.3d 570, 576 (2014). Statutes must be construed "as a whole, so that no part is rendered meaningless or superfluous." *People v. Jones*, 223 Ill. 2d 569, 581 (2006).

The plain language of section 2(c)(3) of OMA only permits a municipal public body such as a city council to privately deliberate on an officeholder's performance, discipline or removal from office if it has been "given the power to **remove** the occupant under law or ordinance." (Emphasis added.) 5 ILCS 120/2(c)(3) (West 2020). The City has a managerial form of government. Under that form of government, the City Council is authorized to appoint a city manager who "may at any time be removed from office by a majority vote of the members of the council[.]" 65 ILCS 5/5-3-7 (West 2020), as amended by Public Act 102-15, effective June 17, 2021. No provision of the Illinois Municipal Code governing the managerial form of government permits the City Council to remove the city clerk, who is an elected officer, from office.

By comparison, in the Commission form of government the city clerk is among numerous officers who are appointed by a majority vote of the City Council.⁵ Section 4-5-9 of the Illinois Municipal Code⁶ further provides: "Except as otherwise provided in this article or by law, any officer or employee who has been elected or appointed by the council in accordance

⁴The reply also questions whether the City Manager or City Council violated Federal or State statutes by failing to attempt to provide accommodations for disabilities, and alleges that the City Council made an unnecessary amendment to the City Code to appoint another individual as its recording secretary. This office does not have authority to review those claims. See 15 ILCS 205/7 (West 2020) (limiting the Public Access Counselor's authority to reviewing alleged violations of OMA and the Freedom of Information Act (5 ILCS 140/1 *et seq.* (West 2020))).

⁵65 ILCS 5/4-5-4(a) (West 2020).

⁶65 ILCS 5/4-5-9 (West 2020).

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with the provisions of this article may be removed from office at any time by a vote of a majority of the council members." If the legislature intended to authorize city councils with a managerial form of government to remove a city clerk from office, it would have expressly provided that authorization as it did for city councils in a commission form of government.

The City Council's response to this office equates a determination that there is a "vacancy" in an office as tantamount to removing the officeholder. Section 3.1-10-50(b) of the Illinois Municipal Code provides that "[i]f corporate authorities find that an officer is incapable of performing the duties of the office due to permanent physical or mental disability, that person is removed from the office and the vacancy of the office occurs on the date of the determination." Thus, a determination by the City Council that the City Clerk's office is vacant due to the fact that the City Clerk is unable to perform his duties because of a mental or physical disability has the effect of removing the City Clerk from office. However, this power to remove can only be exercised if a guardian ad litem is appointed or licensed doctor makes a written finding that the officer is impaired; there is no indication that either of those conditions were satisfied at the time of the closed session discussion. Further, the City Council only briefly touched on the issue of disability in closed session, and that discussion did not focus on the possibility of removing the City Clerk from office because of a disability. As discussed below, most of the discussion concerned the City Clerk's performance with respect to recording minutes of City Council meetings. The narrowly construed section 2(c)(3) exception does not permit the City Council to engage in wide-ranging discussions of an officer's performance or discipline or removal from office simply because a provision of the Municipal Code authorizes the City Council to declare the City Clerk's office vacant under certain conditions, such as if it determines a disability impaired the City Clerk from performing his public duties after either the appointment of a guardian ad litem or a finding of impairment due to disability by a licensed doctor.

The City Council also asserts that section 2(c)(3) of OMA authorized the City Council to discuss in closed session whether the City Clerk's office was vacant by reason of abandonment. Section 3.1-10-50(c)(1) of the Illinois Municipal Code provides that "[a] vacancy occurs in an office by reason of **abandonment of office; removal from office**; or failure to qualify; or more than temporary removal of residence from the municipality; or in the case of an alderperson of a ward or councilman or trustee of a district, more than temporary removal of residence from the ward or district, as the case may be." (Emphasis added.) "[R]emoval from office" is one basis for determining that a vacancy exists, but that reason is separate and distinct from "abandonment of office" in section 3.1-10-50(c)(1) of the Illinois Municipal Code. Thus, the ability to determine that an office is vacant by reason of abandonment does not empower the City Council to remove the City Clerk from office. To conclude otherwise would render superfluous the term "removal from office[]" in section 3.1-10-50(c)(1) of the Illinois Municipal Code. Moreover, section 2(c)(3) of OMA does not authorize public bodies to discuss occupants

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of public office in closed session if they are empowered to determine their offices are vacant. Instead, discussions only are permissible under that exception if "the public body is given the power to remove the occupant under law or ordinance." 5 ILCS 120/2(c)(3) (West 2020).

Based on this office's review of the verbatim recording of the October 25, 2021, closed session,⁷ most of the City Council's discussion concerned the performance of the City Clerk with respect to recording minutes of City Council meetings. The City Council's response to this office asserted that the City Council properly discussed the City Clerk's performance as its recording secretary and the appointment of its Executive Assistant to replace him as recording secretary because the recording secretary position is a "public office" under the definition of that term in section 2(d) of OMA:⁸

"Public Office" means a position created by or under the Constitution or laws of this State, the occupant of which is charged with the exercise of some portion of the sovereign power of this State. The term "public office" shall include members of the public body, but it shall not include organizational positions filled by members thereof, whether established by law or by a public body itself, that exist to assist the body in the conduct of its business. 5 ILCS 120/2(d) (West 2020).

In *Fazekas v. City of DeKalb*, 2021 IL App (2d) 200692, ¶¶30-31 ___ N.E.3d ___ (2021), the Illinois Appellate Court held that the City did not violate section 6(f) of article VII of the Illinois Constitution⁹ by passing an ordinance that created the office of executive assistant with the same duties as the city clerk. The court held that section 3.1-30-5(a) of the Illinois Municipal Code¹⁰ authorized the mayor to "create the **office** of executive assistant[]" regardless of whether it was necessary to carry out the functions of government. (Emphasis added.) *Fazekas*, 2021 IL App (2d) 200692, ¶¶30-31 ___ N.E.3d ___. ___

The City's Municipal Code provides, in pertinent part:

⁷The audio quality of the recording was impacted by what appeared to be background noise of an individual continuously typing notes or draft minutes. This office suggests that the City Council put more distance between the keyboard and the recorder at future closed sessions or otherwise take measures to ensure that the verbatim recording is fully audible.

⁸5 ILCS 120/2 (West 2020), as amended by Public Acts 102-520, effective August 20, 2021; 102-558, effective August 20, 2021.

⁹Ill. Const. 1970, art VII, §6(f).

¹⁰65 ILCS 5/3.1-30-5(a) (West 2018).

a) Duties. The part-time duties of the City Clerk shall include, but are not limited to: taking and preparing minutes of the City Council's proceedings; faithfully recording the results of resolutions, ordinances and other actions approved by the City Council in said minutes; overseeing the review, approval and release of all Executive Session minutes; * * *.

b) Duties of the Executive Assistant. The full-time duties of the Executive Assistant shall include, but are not limited to: Acting as the Recording Secretary to the City Council by taking and preparing minutes of the City Council's meetings; faithfully recording the results of resolutions, ordinances and other actions approved by the City Council in said minutes and journal; overseeing the review, approval and release of all Executive Session minutes[.] DeKalb, Ill. Code §314(b), (c) (2019).

The City Clerk and Executive Assistant are each a "public office" under section 2(d) of OMA. Recording City Council minutes and serving as the City Council's recording secretary, however, are not separate public offices within the offices of the City Clerk and the Executive Assistant. Those responsibilities are simply among the designated duties of the City Clerk and Executive Assistant under the City's Municipal Code. Because the City Council's recording secretary is not an occupant of a public office, section 2(c)(3) of OMA did not authorize the City Council to hold closed session discussions of the performance or appointment of the recording secretary of the City Council.

Lastly, the City Council asserted that section 5-2-19 of the Illinois Municipal Code¹¹ authorizes the City Council to approve an ordinance making the City Clerk an appointed officer subject to removal by the City Council, or abolishing the office of the City Clerk. In his reply, Mr. Charvat contends that the section 6(f) of article VII of the Illinois Constitution of 1970 requires a referendum to approve changing the City Clerk's position from elected to appointed. It is not necessary for this office to resolve those conflicting interpretations as the City Clerk was not an appointed officer at the time of its October 25, 2021, meeting. Therefore, the City Council did not have the power to remove the City Clerk by law or ordinance when it discussed him in closed session.

For the reasons stated above, this office concludes that the City Council

¹¹65 ILCS 5/5-2-19 (West 2020), as amended by Public Act 102-15, effective June 17, 2021.

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improperly discussed the City Clerk and recording secretary position in closed session pursuant to the section 2(c)(3) exception. This office requests that the City Council remedy that violation by voting to publicly disclose those portions of the closed session minutes and verbatim recording. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have questions, you may contact me at (312) 814-6756 or steven.silverman@ilag.gov. This file is closed.

Very truly yours,



STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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cc: *Via electronic mail*
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