

ILGL Annual Conference

February 17, 2020

PAC DETERMINATION LETTERS¹ REGARDING:

1. OMA/FINAL ACTION OUTSIDE OPEN MEETINGS

-2019 PAC 5855; 2019 PAC 58614; 2019 PAC 58615

-2018 PAC 5553

-2017 PAC 50401 & 2017 PAC 50430

2. OMA/ CONTEMPORANEOUS INTERACTIVE COMMUNICATION

-2019 PAC 53781

-2018 PAC 53819

-2018 PAC 54002

-2016 PAC 39667

-2016 PAC 39667

3. OMA/PUBLIC OFFICIALS ATTENDANCE AT OTHER MEETINGS

-2017 PAC 48812

-2019 PAC 58228

-2018 PAC 51521 AND 51896

¹ Provided by Leah Bartelt, Deputy Public Access Counselor



*Final Action
Outside Open
Meetings*

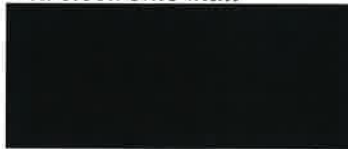
OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Kwame Raoul
ATTORNEY GENERAL

August 20, 2019

Via electronic mail
Mr. John Kraft
john@illinoisleaks.com

Via electronic mail



Via electronic mail
The Honorable JoAnn Quigley
Supervisor
Wesley Township
21333 Ballou Road
Wilmington, Illinois 60481
Wesleysuper2017@outlook.com

Via electronic mail



RE: OMA Request for Review – 2019 PAC 58555; 2019 PAC 58614; 2019 PAC 58615

Dear Mr. Kraft, [REDACTED], [REDACTED], and Ms. Quigley:

This determination letter is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2018)). For the reasons that follow, the Public Access Bureau concludes that the Wesley Township Board of Trustees (Board) violated OMA by improperly taking final action outside of an open meeting.

In June 2019, Mr. John Kraft, [REDACTED], and [REDACTED] submitted Requests for Review alleging that the Board prohibited camping at the Township Park (Park) without complying with the requirements of OMA. In support of those allegations, each submission alluded to a video of the Board's June 13, 2019, meeting which is posted on the internet. The video shows a member of the public questioning why "no camping" signs were placed in the Park without the Board taking action to prohibit camping during an open meeting. The Township supervisor responded that "we had a situation, we acted on it. It was in our estimation an emergent situation that we needed to stop any more problems with the Park, with

Mr. John Kraft
[REDACTED]
[REDACTED]

The Honorable JoAnn Quigley

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the camping area. Four Board members agreed that we needed to stop the camping."¹ The member of the public replied that he could not recall the Board reaching such an agreement at a Board meeting.

On June 24, 2019, this office sent copies of the Requests for Review to the Board and asked it to provide a written response to the allegation that the Board held a private gathering and took action to prohibit camping at the Park. If the Board had prohibited camping at the Park, we asked the Board to explain when and how that decision was made and to describe how Board members communicated about the matter and reached a consensus. On July 2, 2019, the Township supervisor responded that the Board did not hold any meetings about camping at the Park. Instead, she stated that after problems at the Park which resulted in the involvement of police were reported to Board members, "[t]he supervisor was contacted by phone or in person by each of the four Board members."² The response further stated, in pertinent part:

Each board member stated they wanted camping at the Park suspended until further notice. The trustees felt the enjoyment [of] Park patrons camping was being interfered with by dissenting residents.

A notice of no camping at the Park until further notice was placed in the local paper and at the Park. It was also made available on the township website.^{3]}

[REDACTED] and [REDACTED] replied to that response by asserting that the Township supervisor's explanation demonstrated that the Board violated OMA by improperly taking final action outside of an open meeting.

DETERMINATION

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2018). Section 2(e) of OMA

¹Wesley Township Board of Trustees, Meeting, June 12, 2019, Video File, available at <https://www.youtube.com/watch?v=cm6OYWteso8&feature=youtu.be> (last visited August 16, 2019).

²E-mail from JoAnn Quigley, Wesley Township Supervisor, to [Steve] Silverman (July 2, 2019).

³E-mail from JoAnn Quigley, Wesley Township Supervisor, to [Steve] Silverman (July 2, 2019).

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[REDACTED]
[REDACTED]

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(5 ILCS 120/2(e) (West 2018)) provides that "[n]o final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." A public body must post an agenda that sets 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 2018).

It is permissible for a public body to take a preliminary vote in a closed session, but all final actions must be taken in an open meeting. *Board of Education of Springfield School District No. 186 v. Attorney Gen. of Illinois*, 2017 IL 120343, ¶¶ 73-74, 77 N.E.3d 625, 637 (2017); see also *Howe v. Retirement Board of the Firemen's Annuity & Benefit Fund, Howe*, 2013 IL App (1st) 122446, ¶29, 996 N.E.2d 664, 670 (2013) (vacating the board's decision to deny disability benefits because the board had circulated the decision for signatures privately rather than voting on it in open session); *Lawrence v. Williams*, 2013 IL App (1st) 130757, ¶ 21, 988 N.E.2d 1039, 1043-44 (2013) (finding electoral board's written decision null and void because the decision was not made in an open meeting).

The Board's response to this office stated that camping was prohibited at the Park after four Board members contacted the Township supervisor and indicated that they wanted camping suspended until further notice. Although there is no indication that the five-member Board⁴ held an improper "meeting" as that term is defined by OMA,⁵ the Board members manifested a collective decision to prohibit camping at the Park through their communications with the Township supervisor. The Board has not asserted that this decision was subsequently ratified at an open meeting after the Board provided proper advance notice, a public recital of its final action, and otherwise complied with the requirements of OMA. Further, the decision to prohibit camping at the Park was implemented by posting "no camping" notices at the Park and

⁴The Township Board consists of the Township supervisor and four Board members. 60 ILCS 1/80-5 (West 2018).

⁵Section 1.02 of OMA (5 ILCS 120/1.02 (West 2018)) defines "meeting" as:

any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of **contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business.** (Emphasis added.) There is no indication that three or more members of the five-member Board engaged in contemporaneous interactive communications concerning the Park.

Mr. John Kraft
[REDACTED]
[REDACTED]

The Honorable JoAnn Quigley
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on the Village's website. Even if the Board considered the problems at the Park an emergency, OMA still requires a public body addressing a "bona fide emergency" to take final action in open session.⁶ Accordingly, this office concludes that the Board violated section 2(e) of OMA.

In accordance with the conclusions expressed above, this office requests that the Board remedy its violation of OMA by reconsidering and taking final action concerning camping at the Park during an open meeting in which it fully complies with the requirements of OMA. The Public Access Counselor has determined that resolution of these matters does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-6756. These files are closed.

Very truly yours,

[REDACTED]

STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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⁶Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2018)) provides that "[p]ublic notice of any special meeting except a meeting held in the event of a bona fide emergency, or of any rescheduled regular meeting, or of any reconvened meeting, shall be given at least 48 hours before such meeting[.]" Because the Board did not hold a meeting, the question of whether the camping problems constituted a bona fide emergency is not at issue in this matter.



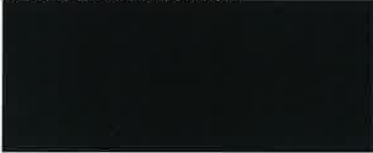
*OMA - Final Action
Outside Open
Meetings*

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

October 3, 2019

Via electronic mail








Via electronic mail

Mr. Mark Schuster
Bazos, Freeman, Schuster & Pope LLC
1250 Larkin Avenue, Suite 100
Elgin, Illinois 60123
mschuster@bazosfreeman.com

RE: OMA Request for Review – 2018 PAC 55553

Dear  and Mr. Schuster:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2018)). For the reasons stated below, the Public Access Bureau concludes that the Board of Trustees of the Village of Sleepy Hollow (Board) improperly took final action outside of an open meeting.

On October 30, 2018, , a member of the Board, submitted a Request for Review alleging that on or about September 5, 2018, the Board violated OMA by voting on three matters of public business through a series of e-mails, rather than at a public meeting. On November 9, 2018, this office forwarded a copy of  Request for Review to the Board and asked it to provide this office with a detailed written response to   allegations, as well as with copies of the e-mails and any records of the final approval of these matters. On November 21, 2018, counsel for the Board mailed this office a response as well as the requested records.  submitted a reply.

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2018). Section 2(e) of OMA

██████████
Mr. Mark Schuster

October 3, 2019

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(5 ILCS 120/2(e) (West 2018)) provides that "[n]o final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." While a public body may take a preliminary vote in a closed session, a public body must take all final actions in an open meeting. *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, ¶¶ 73-74, 77 N.E.3d 625, 637 (2017).

The Board does not dispute that it voted on three matters of public business through e-mail communication rather than at an open meeting. The Board asserted that it did not intend to circumvent OMA, but it had a new Village Clerk who was attempting to pursue matters that were listed on its agenda for its September 4, 2018, meeting, which was cancelled due to a lack of a quorum. The Board stated that it voted by e-mail to approve (1) accounts payable, (2) a request by a not-for-profit organization to solicit funds for charity, (3) the final version of the Fall newsletter in order "to comply with imminent deadlines, including payment of Village payroll for its employees[.]"¹ The Board also confirmed that it ratified each of the e-mail votes at its September 17, 2018, open meeting, and provided this office a copy of those minutes. ██████████ ██████████ replied that conducting public business by e-mail is an ongoing problem of the Board and not just a one-time occurrence.

When a public body finalizes a decision, that final action must be taken openly. *See Howe v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago*, 2013 IL App (1st) 122446, ¶26, 996 N.E.2d 664, 974-75 (2013) (finding board's written denial of benefits invalid because the board had circulated the decision for signatures privately rather than voting on it in open session). It appears that the Board took action by e-mail because upcoming deadlines required the underlying decisions to be implemented before the Board's next meeting. For example, the Board's response to this office stated that payroll had to be approved in order to meet September 7, 2018, payroll obligations for Village employees. Because those underlying decisions took effect before they were ratified at the September 17, 2018, meeting, the Board's e-mail votes do not merely constitute preliminary votes reflecting a tentative consensus. Accordingly, this office concludes that the Council violated OMA by taking final action by voting on public business through e-mail exchanges rather than at an open meeting.

Because the Board already voted to ratify each of the votes at its September 17, 2018, open meeting, no further remedial action is required. This office cautions the Board to take steps to ensure that it votes on matters of public business at an open meeting, rather than conducting business through e-mail exchanges or in any other manner outside of an open meeting.

¹Letter from Mark Schuster, Bazos, Freeman, Schuster & Pope LLC, to Office of the Illinois Attorney General, Public Access Bureau, Edie Steinberg (November 21, 2018), at 2.

[REDACTED]
Mr. Mark Schuster
October 3, 2019
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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, you may contact me at (312) 814-5201 or at the Chicago address on the bottom of the first page of this letter.

Very truly yours,

[REDACTED]
EDIE STEINBERG
Assistant Attorney General
Public Access Bureau [REDACTED]

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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 3, 2018

Via electronic mail

RE: OMA Request for Review – 2018 PAC 52223

Dear [REDACTED]

Pursuant to section 3.5(a) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(a) (West 2016)), the Public Access Bureau has received your Request for Review alleging possible violations of OMA in connection with a breakfast event attended by the Village of Wheeling (Village) Village President, the Mayor of the City of Prospect Heights (City), and members of the Wheeling/Prospect Heights Chamber of Commerce on March 14, 2018, at the Ramada Plaza in Prospect Heights. For the reasons set forth below, the Public Access Bureau has determined that the information you have furnished provides no basis to conclude that the Village or the Village Board violated OMA.

Section 3.5(a) of OMA provides that "[a] person who believes that a *violation of this Act* by a public body has occurred may file a request for review with the Public Access Counselor[,]" which "must include a summary of the *facts supporting the allegation.*" (Emphasis added.)

Your Request for Review alleges that the Village violated OMA when members of the public were required to sign up and pay a fee to attend the March 14, 2018, "State of the Village and City" event. You allege that this event was a public meeting where Village business was discussed. You further allege that you were not permitted to attend this event because you did not sign up or pay the fee in advance.

Section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)) defines "meeting" as "any gathering * * * or other means of contemporaneous interactive communication, of a *majority of a quorum of the members of a public body* held for the purpose of discussing public business."

[REDACTED]
April 3, 2018

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If the interactions among a majority of a quorum of the members of the Village of Wheeling Village Board (Board) during the breakfast event were sufficient to meet this definition, then the Board would have been required to adhere to the notice requirements and other provisions of OMA. In determining whether a gathering of a majority of a quorum of members of a public body constitutes a "meeting" subject to OMA, the Illinois Supreme Court has instructed that "[t]he Act is only addressed to meetings designed to discuss or reach an accord with regard to public business which properly should be deliberated or acted upon in an open forum." *People ex. rel. Difanis v. Barr*, 83 Ill. 2d 191, 210 (1980).

The materials that you provided to this office indicate that the Village President and the City's Mayor would be giving addresses on the State of the City and the State of the Village at an event held by the Wheeling/Prospect Heights Area Chamber of Commerce. Although such addresses do pertain to public business, there is no indication that a majority of a quorum of the members of the Village Board attended the event and engaged in contemporaneous interactive communications pertaining to public business. The requirements of OMA do not apply to a speech by an individual member of a public body while attending an event held by a not-for-profit organization such as a chamber of commerce.

Because your Request for Review does not set forth facts alleging that a majority of a quorum of the Board gathered at the breakfast event and engaged in deliberative discussions of public business, there is no basis for this office to conclude that the event constituted a Board meeting subject to the requirements of OMA. Accordingly, this office has determined that no further action is warranted on this matter.

If you have any questions, please contact me at the Chicago address on the first page of this letter. This letter serves to close this matter.

Very truly yours,

[REDACTED]
S. PIYA MUKHERJEE
Assistant Attorney General
Public Access Bureau

52223 o no fi war mun

cc: The Honorable Patrick Horcher
Village President
Village of Wheeling
2 Community Boulevard
Wheeling, IL 60090



*OMA - Final Action
Outside Open
Meetings*

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 5, 2018

Via electronic mail

Mr. David Giuliani
Reporter
The Times
110 West Jefferson Street
Ottawa, Illinois 61350
davidg@mywebtimes.com

Via electronic mail

Mr. Ronald L. Dickerson
Vice Chairman
Illinois River Area Chamber of Commerce
135 Washington Street
Marseilles, Illinois 61341
iracc@mtco.com

Via electronic mail

Mr. Richard L. Burton
Hupp, Lanuti, Irion & Burton, P.C.
227 West Madison Street
Ottawa, Illinois 61350
rburton@hupplaw.com

RE: OMA Requests for Review – 2017 PAC 50401 & 2017 PAC 50430

Dear Mr. Giuliani, Mr. Dickerson, and Mr. Burton:

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 that follow, the Public Access Bureau concludes that the Marseilles City Council (Council) improperly took final action outside a public meeting, but there is insufficient evidence that members of the Council improperly held a private meeting without complying with OMA.

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On November 8, 2017, Mr. David Giuliani, on behalf of *The Times*, filed a Request for Review via e-mail enclosing a November 3, 2017, letter signed by all the members of the Council about the City's renewal of its membership with the Illinois River Area Chamber of Commerce (Chamber). Mr. Giuliani requested that this office review whether the Council's actions with respect to the letter complied with OMA. This matter was docketed as 2017 PAC 50401.

On November 13, 2017, this office received a Request for Review from Mr. Ronald L. Dickerson, who is the Vice Chairman of the Chamber. Mr. Dickerson alleged that statements by the City's Mayor about the consideration of the November 3, 2017, letter demonstrated that the Council had attempted to "circumvent" OMA.¹ He also enclosed a November 6, 2017, letter from the Chamber to the Council alleging, among other things, that the Council had violated OMA by not considering the Chamber renewal issue in a public session. This matter was docketed as 2017 PAC 50430.

On November 20, 2017, this office sent copies of the Requests for Review to the Council and asked it to provide a written response to the allegations in the Requests for Review, including a detailed explanation of the Council's process for considering and deciding the issues addressed in the November 3, 2017, letter. In particular, we asked the Council to address whether any gathering of Council members to consider the letter was a "meeting" as defined by section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)). This office suggested that the Council may wish to address both Requests for Review in a consolidated answer.

On November 30, 2017, the Council submitted a consolidated written answer to this office. On December 1, 2017, this office forwarded a copy of the Council's written answer to Mr. Giuliani and Mr. Dickerson. Mr. Giuliani submitted a written reply on December 5, 2017. Mr. Dickerson also submitted a written reply on December 5, 2017.

DETERMINATION

Alleged Violation of Meeting Requirements

Section 2.01 of OMA (5 ILCS 120/2.01 (West 2016), as amended by Public Act 100-477, effective September 8, 2017) provides that "[a]ll *meetings* required by this Act to be public shall be held at specified times and places which are convenient and open to the public." (Emphasis added.) In addition, section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2016))

¹Letter from Ronald L. Dickerson, Vice Chairman, Illinois River Area Chamber of Commerce, to Office of the Attorney General, Attn.: Sarah Pratt, Public Access Counselor (November 7, 2017).

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generally requires a public body to provide the public with at least 48 hours advance notice of its meetings. In order for the requirements of OMA to apply, a gathering must constitute a "meeting" as defined by section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)):

"Meeting" means any *gathering*, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, *of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business.*

Accordingly, for a 5-member public body, 3 members of the body constitute a quorum and the affirmative vote of 3 members is necessary to adopt any motion, resolution, or ordinance, unless a greater number is otherwise required. (Emphasis added.)

The Council consists of five elected commissioners. Under the specific rule for 5-member public bodies in section 1.02 of OMA, if a quorum of three or more members of the Council gather and engage in contemporaneous, interactive, deliberative discussions of public business, the procedural safeguards and requirements of OMA would apply to that gathering.

The Council described the process by which it considered and drafted the letter:

When concerns arose about the Chamber and the appearance of one or more representatives becoming adversarial with the City, Mayor Trager (the Commissioner of Public Affairs) was absent due to medical concerns. Pursuant to Section 4-5.1 of the ILLINOIS MUNICIPAL CODE and §32.22 of the CODE OF MARSEILLES, the Commissioner of Accounts and Finances, James Hollenbeck, assumed duties as Mayor Pro Tem.

In assuming duties as a Mayor Pro Tem, Commissioner Hollenbeck believed that a letter should be written to the Chamber Board addressing concerns from the City's perspective as a member of the Chamber. He wrote an initial draft of the letter and tendered such to the City Clerk to place a copy of the draft letter in the City Hall mailboxes of the other commissioners with the

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direction to the City Clerk to have any Commissioner with concerns or comments to get in touch with him. Various Commissioners did respond to Commissioner Hollenbeck on a one by one basis. At no point, however, were three or more commissioners present discussing the draft letter or otherwise conducting a meeting as defined and contemplated under OMA (ie a gathering of a quorum wherein contemporaneous interactive communication took place for the purpose of discussing public business).

Prior to the mailing date (on or about November 3, 2017) Mayor Trager started to resume some of his duties and personally spoke with Commissioner Hollenbeck about his draft letter prepared as Mayor Pro Tem. Mayor Trager believed a letter was appropriate and drafted revisions. He similarly requested the City Clerk to place a copy of the draft letter in the City Hall mailboxes of the other commissioners with the direction to the City Clerk to have any Commissioner with concerns or comments to get in touch with him. At no point, however, were three or more commissioners present discussing the draft letter [or] otherwise conducting a meeting as defined and contemplated under OMA (ie a gathering of a quorum wherein contemporaneous interactive communication took place for the purpose of discussing public business). Upon Commissioners signing their consent to the Mayor's letter, the Clerk mailed said letter to the Chamber.^[2]

Based on the available evidence, no more than two of the members gathered and engaged in contemporaneous, interactive, deliberative discussion of the letter. Accordingly, there is insufficient evidence to conclude that the Council conducted a "meeting" as defined by OMA to consider the November 3, 2017, letter.

Final Action Outside of an Open Meeting

Section 1 of OMA (5 ILCS 120/1 (West 2016)) provides:

²Letter from Richard L. Burton, City Attorney for Marseilles, to Office of the Attorney General, State of Illinois, ATTN: Neil P. Olson, Deputy Public Access Counselor (November 30, 2017), at 1-2.

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It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.

With respect to final action by a public body, section 2(e) of OMA (5 ILCS 120/2(e) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017) provides: "No final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

The Council does not dispute that it issued the November, 3, 2017, letter without discussing or voting on it at an open meeting, or for that matter, as part of a closed session at a Council meeting. However, it asserts that no official action was necessary and no official action was taken:

[Counsel for the Council] is unaware of any mandate under the Illinois Municipal Code that appears to require City Council action to mail a letter under the presenting circumstances. Careful review of the content of the November 3, 2017 letter is helpful. The thrust of the letter is advisory. It complains of inability of the Chamber to cooperate with the City. It complains about the [adversarial] actions of the Chamber's Administrative Assistant. The letter warns that the City will not renew its membership. The clear thrust of the letter is to inform Chamber members and the Chamber Board that the relationship between certain Chamber representatives and the City has become adversarial and that corrective action is needed if the Chamber and the City are to cooperatively work as opposed to being adversarial and destructive. No official City action is taken by said letter.^[3]

This office agrees that the primary evidence of the action taken by the Council is the November 3, 2017, letter itself. The letter begins that its purpose is "to inform you that the

³Letter from Richard L. Burton, City Attorney for Marseilles, to Office of the Attorney General, State of Illinois, ATTN: Neil P. Olson, Deputy Public Access Counselor (November 30, 2017), at 3.

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City of Marseilles will not be renewing its membership in the Illinois River Area Chamber of Commerce for 2018" and ends with the statement that the "City will not renew its membership in IRACC for next year."⁴ The letter also refers to the Council's "decision" not to renew the membership, and did not invite any further discussion or negotiations with the Chamber.⁵ The letter was signed by all five members of the Council.

The Appellate Court has held that when a public body finalizes a decision in a document, that final action must be taken openly:

No public body in Illinois subject to the Open Meetings Act can take final action by merely circulating some document for signature and not voting on it publicly. Imagine, for instance, the legal problems if the Chicago city council "adopted" ordinances by publicly voting on a concept that had never been reduced to writing, directed a staff attorney to prepare it in a more detailed written form, circulated the final version around city hall for signatures of a majority of the 50 alderman, and then ordered the city clerk to publish it as if it were a valid legislative act. *Howe v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago*, 2013 IL App (1st) 122446, ¶26, 996 N.E.2d 664, 974-75 (2013) (finding board's written denial of benefits invalid because the board had circulated the decision for signatures privately rather than voting on it in open session).

Given its unambiguous and mandatory language, the letter cannot be characterized as anything other than a final action by the entire Council not to renew its membership in the Chamber. The Council itself characterized it as a decision. The Council did

⁴Letter from Mayor Jim Trager, Accounts & Finance Commissioner Jim Hollenbeck, Public Health & Safety Commissioner Gary Lewey, Streets and Public Improvements Commissioner Bob Davis, and Public Property & Water Commissioner Jim Buckingham, to Illinois River Area Chamber of Commerce (November 3, 2017), at 1.

⁵Letter from Mayor Jim Trager, Accounts & Finance Commissioner Jim Hollenbeck, Public Health & Safety Commissioner Gary Lewey, Streets and Public Improvements Commissioner Bob Davis, and Public Property & Water Commissioner Jim Buckingham, to Illinois River Area Chamber of Commerce (November 3, 2017), at 1.

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not discuss or vote on its decision not to renew the Chamber membership at any public meeting.⁶ Regardless of whether the Council was required to consider the issue as a resolution or ordinance, it took final action on a specific issue, namely the renewal of the Chamber membership. As recognized by the *Howe* court and this office, that final action must be taken openly. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 21599, issued March 19, 2013, at 2 (board violated OMA when four of five members signed a letter in support of an ordinance without publicly discussing the letter prior to signing it). Accordingly, this office concludes that the Council violated OMA by not taking final action on the renewal issue at an open meeting subject to OMA's requirements.

Based on the conclusions in this determination, this office requests that the Council re-consider and vote on the issue of Chamber membership at a public meeting held in compliance with OMA. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, you may contact me at (217) 782-9078.

Very truly yours,



NEIL P. OLSON
Deputy Public Access Counselor
Public Access Bureau

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⁶In this respect, these circumstances are distinguishable from *Board of Educ. of Springfield Sch. Dist. No. 186 v. Attorney Gen. of Illinois*, 2017 IL 120343, ¶74, 77 N.E.3d 625, 637 (2017), in which the Illinois Supreme Court held that a school board did not take final action when it signed a separation agreement in closed session because the school board voted to approve that agreement in open session at a subsequent meeting.



*Contemporaneous
interactive
communications*

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

January 31, 2019

Via electronic mail



Via electronic mail

The Honorable John Wagnon, President
Board of Education
O'Fallon Community Consolidated School District No. 90
118 East Washington Street
O'Fallon, Illinois 62269
jwagnon@of90.net

RE: OMA Request for Review – 2018 PAC 53781

Dear [REDACTED] and Mr. Wagnon:

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 O'Fallon Community Consolidated School District No. 90 (District) Board of Education (Board) did not violate OMA in connection with an e-mail statement issued on May 17, 2018.

BACKGROUND

On June 28, 2018, this office received [REDACTED] Request for Review alleging that six Board members discussed and coordinated via e-mail the drafting of a May 17, 2018, statement to the parents and students in the District. On July 3, 2018, this office sent a copy of the Request for Review to the Board and requested that it provide a written response to [REDACTED] allegations. This office asked the Board to identify any and all discussions and communications that occurred between and among Board members outside of open meetings concerning the May 17, 2018, e-mail statement referenced in [REDACTED] Request for Review. This office requested copies of any records that documented those discussions, as well as copies

[REDACTED]
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of any records of communications, such as e-mails and text messages. This office also asked the Board to address whether it took improper final action regarding the May 17, 2018, e-mail statement. On July 11, 2018, the Board provided a written response and the requested materials. On July 25, 2018, [REDACTED] replied. On November 28, 2018, and December 6, 2018, in response to follow-up inquiries from this office, the Board provided additional materials.

According to the background information provided by the parties, [REDACTED] made comments at an April 15, 2018, O'Fallon City Council meeting "on the intended audience [for the reading of a children's book] and the possible improper use of a publically funded facility."¹ Many members of the public were outraged by [REDACTED] comments. According to a news report, hundreds of people attended the Board's May 15, 2018, meeting, many of whom spoke during the public comment periods to share their thoughts on [REDACTED] statements.² One member of the public read excerpts from copies of [REDACTED] e-mails in which he questioned school policy concerning the needs of transgender and other students. The comments in [REDACTED] e-mails added to the growing public controversy. On May 17, 2018, six Board members issued an e-mail statement to local news media outlets, District staff, and parents, as follows:

As a leader in public education, District 90 teaches tolerance, acceptance, and kindness from the moment our students walk into our classrooms. As Superintendent Hruby stated, "Each and every school day, one can witness students being encouraged to explore and grow their own strengths, but perhaps more importantly, to find strengths in one another by embracing our differences."

We, as Board members, believe it is the responsibility of public education in America to be the great equalizer--to offer opportunities for all children to succeed. To that end, authority is granted to the elected officials of the Board of Education as a whole, not to each member individually, to make decisions for the betterment of all students. [REDACTED] is one member of the Board of Education. When he voiced his opinions, his voice was his alone. Furthermore we do not agree with nor support the

¹Letter from [REDACTED] to Laura S. Harter, Assistant Attorney General, Public Access Bureau (July 18, 2018), at 1.

²Robyn L. Kirsch, *Emails fuel call for resignation of O'Fallon school board member 'branded as a racist'*, BELLVILLE NEWS-DEMOCRAT, May 16, 2018, <https://www.bnd.com/news/local/community/ofallon-progress/article210776579.html>.

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comments made in the released emails and will not endorse discriminatory policies of any kind.^{3]}

DETERMINATION

Alleged Violation of Meeting Requirements

Section 2.01 of OMA (5 ILCS 120/2.01 (West 2017 Supp.)) provides that "[a]ll meetings required by this Act to be public shall be held at specified times and places which are convenient and open to the public." (Emphasis added.) In addition, section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2016)) generally requires a public body to provide the public with at least 48 hours advance notice of its meetings. In order for the requirements of OMA to apply, a gathering must constitute a "meeting" as defined by section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)):

"Meeting" means any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business.

Under this statutory definition, a "meeting" may include communications through e-mail or other electronic means. The Board is comprised of seven members. Accordingly, four Board members constitute a quorum, and a majority of the quorum is three members. Therefore, contemporaneous, interactive e-mail or other electronic communications involving at least three members of the Board which concern "public business" would ordinarily constitute a meeting of the Board which would be subject to the procedural safeguards and requirements of OMA.

OMA does not define "interactive" or "contemporaneous." 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).

³Letter from S. Jeff Funk to Ms. Laura S. Harter, Assistant Attorney General, Public Access Bureau (July 11, 2018), Attachment 3.

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"Interactive" is defined, in relevant part, as "mutually or reciprocally active."⁴ This office has reviewed the e-mails concerning the May 17, 2018, statement. Most of the e-mails included only one Board member interacting with a non-Board member.⁵ Other e-mails included two Board members⁶ or two Board members and a non-Board member.⁷ A third Board member was copied on some of these e-mails, but never participated in the e-mail exchanges with the other two Board members.⁸ Certain e-mails were sent to five or six Board members,⁹ but no more than two Board members replied to all recipients on those e-mail strings.¹⁰ Importantly, none of the e-mail strings provided to this office regarding the draft statement included three Board members engaged in interactive communications by responding to each other's e-mails.

One e-mail string provided by the Board that did not involve drafting the statement did involve "interactive" communications, as three Board members interacted with each other over the course of three messages.¹¹ Whether the e-mails constituted a meeting under OMA depends on whether the messages were also "contemporaneous." "Contemporaneous" is defined as "existing, occurring, or originating during the same time."¹² The Public Access Bureau has noted previously that "Illinois' appellate courts have not yet been called upon to

⁴Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/interactive> (last visited December 4, 2018).

⁵OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachments 3, 4, 5, 6, 7, 15, 16a, 17, 18.

⁶OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachment 9a, 21. *See also* OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachment 22 (e-mail messages that do not concern the May 17, 2018, statement).

⁷OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachments 1, 9, 14.

⁸OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachment 11.

⁹OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachments 2, 8.

¹⁰OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachments 13, 16.

¹¹OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachment 19.

¹²Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/contemporaneous> (last visited December 5, 2018).

decide how close in time electronic communications must be in order to be 'contemporaneous,' for purposes of OMA; nor does the legislative history of the statutory language provide any guidance in defining 'contemporaneous.'" Ill. Att'y Gen. PAC Req. Rev. Ltr. 18676, issued September 9, 2013, at 3 (quoting Ill. Att'y Gen. PAC Req. Rev. 17172, issued September 7, 2012, at 3). A "contemporaneous interactive communication" occurs in the same general time frame, but is not necessarily simultaneous. Ill. Att'y Gen. PAC Req. Rev. Ltr. 14722, issued August 12, 2011, at 4 (citing John H. Brechin, *E-mail and the Open Meetings Act*, Illinois Bar Journal, 94 ILBJ 666, 667 (2006)). In prior matters, this office determined that we could not conclude that e-mails sent over a period of hours or longer were "contemporaneous" as a matter of law. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 39667, issued February 18, 2016 (e-mails separated by more than an hour, in the case of one, and more than two days, in the case of another, were not contemporaneous); Ill. Att'y Gen. PAC Req. Rev. Ltr. 18676, issued September 9, 2013, at 3 (e-mail responses sent hours apart did not constitute contemporaneous, interactive discussions of public business); Ill. Att'y Gen. PAC Req. Rev. 17172, issued September 7, 2012, at 3 (e-mail responses sent hours or days after initial e-mail were not contemporaneous). *See also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 40976, issued August 24, 2016, at 3 (unable to conclude that "text messages that may have stretched over a period over two hours" constituted contemporaneous communications).

Here, the first two messages in the e-mail string were sent only four minutes apart, but the third message was not sent until more than an hour and a half later. As one of the three e-mails was sent more than an hour after the first two messages, this office cannot conclude that the e-mail string constituted a "contemporaneous interactive communication." Accordingly, this office concludes that none of the e-mail strings provided to this office by the Board constituted a "meeting" subject to the requirements of OMA.

Final Action Outside of an Open Meeting

Section 1 of OMA (5 ILCS 120/1 (West 2016)) provides:

It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.

With respect to final action by a public body, section 2(e) of OMA (5 ILCS 120/2(e) (West 2017 Supp.)) provides: "No final action may be taken at a closed meeting. Final

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action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

The Appellate Court has held that when a public body finalizes a decision in a document, that final action must be taken openly:

No public body in Illinois subject to the Open Meetings Act can take final action by merely circulating some document for signature and not voting on it publicly. Imagine, for instance, the legal problems if the Chicago city council "adopted" ordinances by publicly voting on a concept that had never been reduced to writing, directed a staff attorney to prepare it in a more detailed written form, circulated the final version around city hall for signatures of a majority of the 50 alderman, and then ordered the city clerk to publish it as if it were a valid legislative act. *Howe v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago*, 2013 IL App (1st) 122446, ¶26, 996 N.E.2d 664, 974-75 (2013) (finding board's written denial of benefits invalid because the board had circulated the decision for signatures privately rather than voting on it in open session).

Further, this office has previously determined that a board violated section 2(e) of OMA by improperly taking final action when four of five board members signed a letter in support of a wage ordinance without publicly discussing the letter prior to its signing. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 21599, issued March 19, 2013, at 2.

[REDACTED] argues that the act of issuing a statement is a final action. He contends that the statement pertained to the business of the Board because its purpose was to clarify the Board's position on a contentious public issue. The Board does not dispute that it issued the statement without discussing or voting on it at an open meeting. However, the Board asserts that because [REDACTED] controversial comments did not involve Board business, the Board's statement concerning [REDACTED] comments cannot be characterized as involving Board business. The Board also noted that the Board members did not make any decisions regarding [REDACTED] comments other than to issue the statement.

It is undisputed that [REDACTED] comments resulted in significant public controversy. Six members of the Board determined that they would address the public's concerns by issuing a statement expressing a general sentiment of unity and disavowing [REDACTED] comments. Contrary to [REDACTED] assertion that issuing a statement on a contentious public issue is always a final action under OMA, this office has found that issuing a

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statement clarifying a public body's position is not necessarily a final action. Specifically, this office concluded that a letter sent by all trustees of a public body that sought to clarify the public body's position on an issue was not a final action. *See* Ill. Att'y Gen. PAC Rev. Ltr. 50318, issued January 30, 2018, at 6. This office found that:

the letter summarizes past discussions that have been held during open sessions at various Board meetings and the deliberations that occurred during the Township Annual Meeting concerning on-going issues related to Township funds. Further, it does not appear from the letter, or the meeting minutes, that the Board has come to a decision on how to handle the funds at issue. Therefore, this letter cannot be characterized as a "final action" by the Board. Ill. Att'y Gen. PAC Rev. Ltr. 50318, issued January 30, 2018, at 6.

Similarly, here, the May 17, 2018, e-mail statement is not a final action. Most of the e-mail consists of factual or philosophical statements, none of which can be construed as asserting a new policy or deciding a Board matter. The final sentence, "[f]urthermore we do not agree with nor support the comments made in the released emails and will not endorse discriminatory policies of any kind,"¹³ reflects the only definitive positions taken by the members: that they disagree with [REDACTED] comments, and that they will not endorse discriminatory policies. [REDACTED] e-mail comments are his opinions, none of which are binding on the Board. Likewise, the six members' expression of disagreement is a statement of opinion that has no binding effect on the Board and does not resolve any matter of Board business. Even if the opinion could be considered relevant to Board policy accommodating transgender students, the opinion was merely an interim decision on a Board matter, and this office has found that interim decisions do not constitute final action. *See* Ill. Att'y Gen. PAC Rev. Ltr. 54002, issued October 22, 2018, at 8 (concluding that a University Board of Trustees' decision to publically voice its support for an individual to become University President was an interim decision at the time of the Request for Review, rather than a final action).

Further, stating that the members would not endorse any discriminatory policies is not an assertion of a new policy position, as promising not to discriminate is a fundamental

¹³Letter from S. Jeff Funk to Ms. Laura S. Harter, Assistant Attorney General, Public Access Bureau (July 11, 2018), Attachment 3.

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obligation of public service. In their oaths of office,¹⁴ all seven Board members implicitly vowed not to support discriminatory policies by swearing to act in accordance with the equal protection clauses of the United States¹⁵ and Illinois Constitutions.¹⁶

In sum, the May 17, 2018, e-mail statement did not constitute final action, as it did not put forth a new Board position, nor was it binding on any Board business. Accordingly, this office concludes that the Board did not improperly take final action outside of a public meeting.

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 the Springfield address on the first page of this letter, LHarter@atg.state.il.us, or (217) 524-7958. This letter serves to close this file.

Very truly yours,

[REDACTED]
LAURA S. HARTER
Deputy Bureau Chief
Public Access Bureau

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cc: *Via electronic mail*
Mr. S. Jeff Funk
Miller, Tracy, Braun, Funk & Miller, Ltd.
316 South Charter
Monticello, Illinois 61856
jfunk@millertracy.com

¹⁴The Board members' oath provides: "I, (name), do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of member of the Board of Education of O'Fallon Community Consolidated School District No. 90, in accordance with the Constitution of the United States, the Constitution of the State of Illinois, and the laws of the State of Illinois, to the best of my ability." O'Fallon Community Consolidated School District No. 90, Board Policy Manual, §2:80 Board Member Oath and Conduct.

¹⁵U.S. Const., amend. XIV, §1.

¹⁶Ill. Const. 1970, art. I, §2.



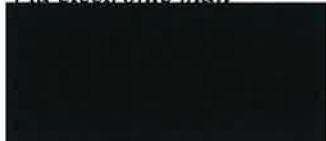
*Contemporaneous
interactive
communications*

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 29, 2018

Via electronic mail




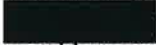
Via electronic mail

Mr. Sean Conway
Bond, Dickson & Conway
404 South Knoll Street, Unit C
Wheaton, Illinois 60187
seanconway@bond-dickson.com

RE: OMA Request for Review – 2018 PAC 53819

Dear  and Mr. Conway:

This determination letter 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 City of Wood Dale City Council (City Council) did not hold improper meetings via private text communications.

On July 2, 2018, this office received  Request for Review alleging that the City Council violated OMA by conducting public business via text messages. Specifically, he contended that members of the City Council along with the City Manager exchanged text messages concerning the hiring of an outside engineering firm. In support of this allegation,  provided this office with copies of certain text messages that he asserted were exchanged between the City Council and City Manager.

On July 18, 2018, this office forwarded a copy of the Request for Review to the City Council and asked it to provide a written response to the allegations in the Request for Review together with copies of all text messages between and among the City Council members

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and the City Manager related to the hiring of an outside engineering firm, if any. Additionally, this office asked the City Council to address whether these text messages among City Council members constituted a "meeting" as defined by OMA. On July 27, 2018, counsel for the City Council provided a written response asserting that City Council did not possess any text messages concerning the hiring of an outside engineering firm and argued that the text messages that were provided by ██████████ did not constitute a meeting under OMA. On July 31, 2018, this office forwarded the City Council's written response to ██████████; he replied on August 8, 2018.

DETERMINATION

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2017 Supp.), as amended by Public Act 100-646, effective July 31, 2018) 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." Section 1.02 (5 ILCS 120/1.02 (West 2016)) defines a "public meeting" as:

[A]ny gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business.

Under this statutory definition, a "meeting" may include communications through text messages or other electronic means. The City Council is comprised of eight alderman and the mayor. Accordingly, five City Council members comprise a quorum, and a majority of the quorum is four members. Therefore, if at least four members of the City Council engaged in contemporaneous, interactive text communications of a deliberative nature concerning "public business" those discussions would have constituted a meeting or meetings of the City Council subject to the procedural safeguards and requirements of OMA. Pleasenote that in the council-manager form of local government, a city manager is not an elected or appointed member of a city council but rather is an appointed city official. Therefore, a city manager is not a member of a "public body" as defined, for the purposes of OMA, in section 1.02 of OMA.¹ See Ill. Att'y

¹Section 1.02 of OMA defines a "public Body" as follows: "All legislative, executive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue[.]"

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Gen. PAC Req. Rev. Ltr. 32608, issued January 5, 2015, at 2 (determining that the city manager was not subject to the training requirements of section 1.05(b) of OMA because they were not a member of the public body).

Text Messages Provided with Request for Review

The City Council's response to this office stated that the text messages that provided with his Request for Review relate to:

- (1) a notification from the City Manager to City Alderman concerning the City's receipt of electric aggregation bids on May 3, 2018; and (2) notification from the City Manager to City Alderman concerning a major flooding event which occurred in the City on or about May 30, 2018. ^{12]}

This office has reviewed the text messages in question. The text messages were sent using group multimedia messaging service (MMS), which allows a person to create a group conversation by sending a message to a group of people at the same time and by allowing individuals included within the group to see all text message responses from any member of the group.³ The City Council's response to this office confirmed that the City Manager sent the group text messages to the alderman on the City Council.

With respect to the City Manager's May 3, 2018, message about the City's receipt of the electric aggregation bids, the City Council's response to this office indicated that two separate aldermen responded to the message to confirm that they had received the City Manager's message. Concerning the City Manager's May 30, 2018, message relating to the major flooding event, the City Council's response stated, "various Alderman responded to the City Manager with messages, photographs and a video indicating their observations of severe flooding conditions in the City. One Alderman did inquire of another Alderman as to whether houses were flooded or just streets, which inquiry received no response."⁴

²Letter from Sean Conway, One of the Attorneys for the City of Wood Dale, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (July 27, 2018).

³See, e.g., Send a group message on your iPhone, iPad, or iPod touch, APPLE.COM, <https://support.apple.com/en-us/HT202724> (last visited October 16, 2018).

⁴Letter from Sean Conway, One of the Attorneys for the City of Wood Dale, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (July 27, 2018), at 2.

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Although the City Council does not dispute that a majority of a quorum of the City Council received the messages in question, it argues that the exchange of the messages does not constitute a "meeting" under OMA because they do not qualify as "contemporaneous interactive communications" and because the messages do not show that deliberative discussions of public business occurred.

In previous determinations in which one member of a public body solicited feedback on public business from other members via e-mail, the Public Access Bureau has noted that "Illinois' appellate courts have not yet been called upon to decide how close in time electronic communications must be in order to be 'contemporaneous,' for purposes of OMA; nor does the legislative history of the statutory language provide any guidance in defining 'contemporaneous.'" Ill. Att'y Gen. PAC Req. Rev. Ltr. 18676, issued September 9, 2013, at 3 (quoting Ill. Att'y Gen. PAC Req. Rev. 17172, issued September 7, 2012, at 3). In those matters, this office determined that we could not conclude that e-mails sent over a period of hours or longer were "contemporaneous" as a matter of law. This office has also previously determined that a "contemporaneous interactive communication" occurs in the "same general time frame, but is not necessarily simultaneous." Ill. Att'y Gen. PAC Req. Rev. Ltr. 18676, issued August 12, 2011, at 4 (citing John H. Brechin, *E-mail and the Open Meetings Act*, Illinois Bar Journal, 94 ILBJ 666, 667 (2006)).

Here, it appears that two aldermen responded to the City Manager's May 3, 2018, message acknowledging receipt of his text message within the same general time frame that it was sent. Therefore, the group text message conversation between the City Manager and the two City Council Alderman constituted "contemporaneous interactive communications" within the scope of section 1.02 of OMA. The City Manager's May 3, 2018, text message, however, did not elicit a response by a majority of a quorum of the City Council. Accordingly, this office is unable to conclude that the May 3, 2018, group text message sent and received by City Council members constituted a "meeting" subject to the requirements of OMA.

On the other hand, this office's review of the City Manager's May 30, 2018, group text message confirms that at least a majority of a quorum of the City Council members collectively engaged in a discussion concerning the major flooding event. However, the messages appear to be separated by more than an hour, for some, and more than a day, for others. Therefore, given the significant time periods between the text messages, this office cannot conclude that those messages constituted "contemporaneous interactive communication" among a majority of a quorum of the City Council. Moreover, based on the limited information available to this office regarding the group text messages related to the flooding event, indicates that the messages were intended to be informational and does not show that deliberative discussions of public business occurred. This office reminds the members of the City Council to be mindful of the requirements of OMA if engaging in such text communications.

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Text Messages Concerning Engagement of Engineering Firm

The City Council's response to this office specifically asserted that it did not possess any responsive text messages relating to the hiring of the outside engineering firm. Additionally, the City Council's response indicated that "the City approved engagement of its outside Engineering Firm concerning the City's storm water design in an open Public Meeting on August 20, 2015."⁵ Along with its response, the City Council provided this office with a copy of the meeting minutes from that meeting. The minutes show that the City Council approved:

A RESOLUTION SEEKING TO APPROVE A CONTRACT
BETWEEN THE CITY OF WOOD DALE AND ROBINSON
ENGINEERING FOR THE DESIGN AND CONSTRUCTION
MANAGEMENT OF THE WARD 3 STORMWATER PROJECT
IN THE NOT-TO-EXCEED AMOUNT OF \$79,070.00.⁶

reply disputes the City Council's assertion that it does not possess any responsive text messages, stating "[m]y complaint is based on screen shots taken from Alderman Eugene Wesley's personal phone."⁷ however, has not provided any additional evidence to support his allegations or to contest the information provided by the City Council indicating that the text messages that he provided with his Request for Review do not relate to the hiring of an outside engineering firm. also does not dispute that the City Council took final action to approve the hiring of the outside engineering firm at an open public meeting on August 20, 2015. Therefore, based on the available information, there is insufficient evidence from which this office could conclude that the City Council held improper meetings concerning the hiring of an outside engineering firm via private text communications.

The Public Access Counselor has determined that resolution of this matter does

⁵Letter from Sean Conway, One of the Attorneys for the City of Wood Dale, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (July 27, 2018).

⁶Wood Dale City Council, Meeting, August 20, 2015, Minutes, VIII. Consent Agenda A. Omnibus Vote, 2.

⁷Letter from to Shannon Barnaby, Assistant Attorney General (August 8, 2018). reply also mentions, in general terms, the possibility of an alleged additional OMA violation that was not raised in his Request for Review. Because that issue was not mentioned in his Request for Review, this office will not address it in this determination.

[REDACTED]
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not require the issuance of a binding opinion. If you have any questions, you may contact me by mail at the Chicago address listed on the first page of this letter, by e-mail at sbarnaby@atg.state.il.us, or by phone at (312) 550-4480.

Very truly yours,

[REDACTED]
SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

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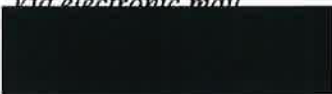
*Contemporaneous
interactive
communications*

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 22, 2018

Via electronic mail



Via electronic mail

The Honorable Wheeler G. Coleman
Chair, Board of Trustees
Northern Illinois University
EC-United
321 North Clark Street, Suite 5031
Chicago, Illinois 60654
wcoleman@niu.edu

RE: OMA Request for Review – 2018 PAC 54002

Dear [REDACTED] and Mr. Coleman:

This determination letter 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 that follow, the Public Access Bureau concludes that the Northern Illinois University (University) Board of Trustees (Board) did not engage in improper communications with a potential candidate for president that constituted a meeting subject to the requirements of OMA, or improperly take final action outside of an open meeting.

On July 12, 2018, [REDACTED] submitted a Request for Review to the Public Access Bureau alleging that the Board potentially violated OMA by approaching Dr. Lisa Freeman, Acting President of the University, with its support and asking her to reconsider her candidacy for University president. [REDACTED] questioned whether the Board held a meeting with Ms. Freeman without adhering to the requirements of OMA and/or took action in connection with its support for her candidacy outside of a properly-noticed open meeting. She

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The Honorable Wheeler G. Coleman

October 22, 2018

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provided a copy of an "NIU Official Announcement" which stated that "[a]s a board, we approached [Dr. Freeman] with our support and asked her to consider a candidacy."¹

On July 20, 2018, this office forwarded a copy of ██████████ Request for Review to the Board and asked it to respond to her allegations. On August 8, 2018, counsel for the Board provided a written response asserting that the Board "did not hold a meeting with Dr. Lisa Freeman that required adherence with the Illinois Open Meetings Act and it has not taken any final action outside of a properly-noticed open meeting with regards to her candidacy."² On August 10, 2018, this office forwarded a copy of the Board's response to ██████████. On August 16, 2018, she submitted a reply which argued that the Board's response was misleading, and that the University's "Official Announcement" demonstrated that there was a decision made that did not comply with the requirements of OMA. On August 20, 2018, the Board provided this office a copy of verbatim recording of the closed session portion of its June 14, 2018, meeting in which it discussed Dr. Freeman's potential appointment.

DETERMINATION

Alleged Violation of Meeting Requirements

This office construes ██████████ Request for Review as alleging, in part, a violation of section 2 of OMA (5 ILCS 120/2 (West 2016)), which 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." She attached to her Request for Review a copy of an NIU Official Announcement which explained: (1) the Board created a Presidential Search Planning Committee (Planning Committee) which issued findings and recommendations, including a profile of desirable qualifications for NIU's next president; (2) the Board was in the process of conducting Dr. Freeman's annual performance review while it reviewed the profile developed by the Planning Committee; (3) based on her qualifications, the Board approached Dr. Freeman and asked her to reconsider her previous position to not be a candidate for president; (4) at its July 16, 2018, meeting, the Board intended to propose an "adjusted process" in which Dr. Freeman would be put forth as the candidate for president and information gathering sessions would be held with various constituency groups to provide the Board with feedback; and (5) "[d]iscussion among trustees regarding the hiring of the new President will take place at a pre-scheduled

¹"NIU Official Announcement" by Wheeler Coleman, Chair, Board of Trustees, and Dennis Barsema, Vice Chair, Board of Trustees (July 11, 2018), at 3.

²Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 1.

[REDACTED]
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trustees meeting and after the completion of the information gathering sessions. We will also make plans for a university wide-forum where Dr. Freeman will outline her vision for the future."³ [REDACTED] Request for Review asserts that thus announcement demonstrates that the Board violated OMA by improperly meeting with Dr. Freeman and selecting her as the candidate for president.

In its response to this office, the Board stated that (1) the Chair of the Board asked Dr. Freeman during a June 8, 2018, telephone call to reconsider her position that she would not seek the permanent presidential position; (2) "[t]hrough individual, one-on-one communications with each of the other trustees, Chair Coleman had previously received high praise for Dr. Freeman's performance and support for considering her as the permanent president[;]" (3) on June 14, 2018, Board members confirmed their support for Dr. Freeman in a closed session discussion held pursuant to the section 2(c)(1) exception (5 ILCS 120/2(c)(1) (West 2016))⁴ to the general requirement that public bodies conduct public business openly; (4) the Chair and Vice Chair conveyed the Board's support to Dr. Freeman after the closed session and she agreed to be considered as a candidate; (5) on July 16, 2018, the Board held a special meeting at which it approved the "Adjusted Presidential Search Process" to consider Dr. Freeman's candidacy, which was outlined in the NIU Official Announcement document attached to the Request for Review."⁵

In her reply, the requester argues that:

³"NIU Official Announcement" by Wheeler Coleman, Chair, Board of Trustees, and Dennis Barsema, Vice Chair, Board of Trustees (July 11, 2018), at 4.

⁴Section 2(c)(1) of OMA permits a public body to enter closed session to discuss:

The appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity. However, a meeting to consider an increase in compensation to a specific employee of a public body that is subject to the Local Government Wage Increase Transparency Act may not be closed and shall be open to the public and posted and held in accordance with this Act.

⁵Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 2-3.

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Talking to each individual member of the Board about board business to arrive at an action and or a board decision is also a violation of OMA. This one on one method, whether it is by phone, email or other means, is used to get around the rules stated in the Open Meetings Act. * * * In effect, NIU is using this method of one at a time decision making to avoid the OMA and produce a board action. NIU admits that the Chairman used these one on one conversations as a basis for his action.^[6]

Our determination in this matter hinges on whether the private communications between Board members preceding the announcement of Dr. Freeman's selection as the candidate for the permanent presidential position constituted a "meeting" subject to the requirements of OMA. Section 1.02 (5 ILCS 120/1.02 (West 2016)) defines a public meeting as:

[A]ny gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business. (Emphasis added.)

We note that "contemporaneous interactive communication" under section 1.02 does not require the continuous and uninterrupted presence of a majority of a quorum. Contemporaneous is defined as "existing, occurring, or originating during the same time," as in "the contemporaneous publication of two articles" or "contemporaneous accounts of the battle from officers on both sides[.]"⁷ "Interactive" is defined as "mutually or reciprocally active" or "involving the actions or input of a user; *especially* : of, relating to, or being a two-way electronic communication system (as a telephone, cable television, or a computer) that involves a user's orders (as for information or merchandise) or responses (as to a poll)[.]" (Emphasis in original).⁸ Thus, a "contemporaneous interactive communication" occurs in the same general time frame, but is not

⁶E-mail from [REDACTED] to Brady Gregory and Marie Hollister (August 15, 2018).

⁷Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 2.

⁸Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 2.

necessarily simultaneous. See John H. Brechin, *E-Mail and the Open Meetings Act*, Illinois Bar Journal, 94 ILBJ 666, 667 (2006).

In this instance, it is undisputed that each member of the Board *individually* discussed the potential candidacy of Dr. Freeman with the Board Chair on at least one occasion. However, there is no indication that any of these communications involved a majority of a quorum of the Board, or were contemporaneous with a majority of a quorum such as through a chain of Board members discussing this topic with one another systematically. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 50318, issued January 30, 2018, at 3-4 (Board did not engage in contemporaneous, interactive, deliberative discussion concerning a letter written to local media which was drafted by one trustee and then edited by other trustees at later, separate times). Moreover, the Board's response that the Chair had received high praise for Dr. Freeman's performance and support for considering her as the permanent president and that he shared these "collective observations"⁹ indicates that these conversations occurred over the course of time and were not undertaken as an individual poll of trustees or as an attempt to circumvent the requirements of OMA. Accordingly, this office is unable to conclude from the available information that any of the Board members' communications concerning Dr. Freeman constituted improper meetings subject to the requirements of OMA.

Final Action

[REDACTED] Request for Review also alleged that the Board must have taken an improper final action because she could not locate the Board's vote to support Dr. Freeman as a candidate listed in any of several meeting agendas that she checked. Section 2(e) of OMA (5 ILCS 120/2(e) (West 2016)) provides that "[n]o final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

In its response to this office, the Board stated that:

Chair Coleman set the potential appointment/employment of Dr. Freeman as permanent president as a topic of conversation by the full Board during closed session at the next meeting of the Board of Trustees. On June 14, 2018, at its meeting, the Board of Trustees went into closed session to discuss items under Section 2(c)(1) of the Illinois Open Meetings Act, which covers *The appointment,*

⁹Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 2.

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employment, compensation, discipline, performance, or dismissal of specific employees of the public body...' Dr. Freeman was not present for this discussion a[s] this closed session.¹⁰ (Emphasis in original.)

The Board also explained that its July 11, 2018, announcement "announced a plan to propose to the full Board of Trustees an adjusted presidential search process with Dr. Freeman as the candidate for consideration by the Board and the University."¹¹ The Board also explained that the Board properly approved the Adjusted Presidential Search Process with Dr. Freeman as the candidate for consideration at its July 16, 2018, special meeting. The Adjusted Presidential Search Process includes opportunities for University constituencies to provide their feedback "on Dr. Freeman's candidacy for review and consideration by the full Board at one of its future meetings."¹² Lastly, the Board explained that it "has taken no final action to appoint/employ a permanent president and is in the midst of the Adjusted Presidential Search Process with the rest of the University[.]"¹³ and that "[a]ny final action on the presidency will, of course, be done in open session."¹⁴

In her reply, the requester clarified that she is only contesting the Board's actions on July 11, 2018, and prior, in regard to the official announcement. She argued that, through that announcement, the University "made a deliberate decision to tell the public that the board approached [Dr. Freeman] with our support[]"¹⁵ and that "[t]he words 'As a Board we...' have

¹⁰Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 2.

¹¹Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 3.

¹²Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 3.

¹³Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 4.

¹⁴Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 4.

¹⁵E-mail from [REDACTED] to Brady Gregory and Marie Hollister (August 15, 2018).

special meaning – the board [met] in quorum and took action. The chair of a board or individual members of a board do not have the authority to speak for the board on any issue that the board has not met upon and taken action on the issue."¹⁶

In *Gosnell v. Hogan*, 179 Ill. App. 3d 161 (5th Dist. 1989), the plaintiff alleged that a school board impermissibly took final action in closed session by deciding to make a request for mediation as an alternative to the unsuccessful negotiations it had been conducting with its secretaries' union. *Gosnell*, 179 Ill. App. 3d at 169. The court rejected that allegation, holding that the school board only took an intermediate step toward resolving the dispute:

[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.

See also Ill. Att'y Gen. PAC Req. Rev. Ltr. 32463, issued July 14, 2015, at 3 ("A component of a public body's process of reaching final action generally does not, itself, constitute final action."), and Ill. Att'y Gen. PAC Req. Rev. Ltr. 38155, issued July 20, 2016, at 3 ("A school district's discussion during closed session to decline a proposed resolution from the Department of Education's Office of Civil Rights (OCR) was part of a process of reaching final action, rather than final action itself, including because the OCR's complaint processing procedures expressly provided for continued negotiation after a public body rejects a voluntary resolution.")

This office has reviewed the verbatim recording from the Board's June 14, 2018, closed session in which the potential appointment of Dr. Freeman as permanent president was discussed. Based on that review, this office has determined that the Board's consensus on publically voicing its support of her candidacy in the Adjusted Presidential Search Process was part of a process of reaching final action, rather than final action itself. It is clear from the recording that the Board was aware that its position on supporting Dr. Freeman for president was subject to change, rather than irreversible. Likewise, the consensus of the Board expressed in the NIU Official Announcement that [REDACTED] attached to her Request for Review reflects only the intermediate step of tentatively supporting Dr. Freeman's candidacy and seeking additional feedback. Indeed, the Adjusted Presidential Search Process expressly provided for the

¹⁶E-mail from [REDACTED] to Brady Gregory and Marie Hollister (August 15, 2018).

[REDACTED]
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Board to receive continued input and other information from various stakeholders after the Board recommended a candidate, followed by final action at an open meeting. Because the District's decision to publically voice its support for Dr. Freeman as permanent president was an interim decision at the time of [REDACTED] Request for Review, rather than "final action" (such as appointing Dr. Freeman to the position) the Board did not violate section 2(e) of OMA by reaching a consensus on that position.

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, you may contact me at (312) 793-0865 or the Chicago address on the bottom of the first page of this letter. This letter shall serve to close this matter.

Very truly yours,

[REDACTED]
MARIE HOLLISTER
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
Mr. Gregory A. Brady
Acting Vice President and General Counsel
Northern Illinois University
Altgeld Hall 330
DeKalb, Illinois 60115-2828
gbrady@niu.edu



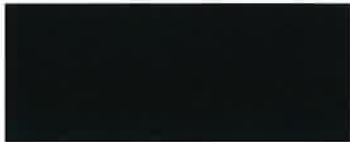
*Contemporaneous
interactive
communications*

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 18, 2016

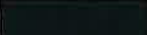
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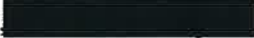

Via electronic mail

Ms. Gina L. Madden
Attorney for the Mokena Community Park District
15850 New Avenue, Suite 114
Lemont, Illinois 60439
Gmaddenlaw@gmail.com

RE: OMA Request for Review – 2016 PAC 39667

Dear  and Ms. Madden:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2014), as amended by Public Act 99-402, effective August 19, 2015). For the reasons that follow, the Public Access Bureau concludes that there is insufficient evidence to find that Board of Commissioners for the Mokena Community Park District (Board) violated OMA.

On January 18, 2016,  who is a member of the Board, submitted a Request for Review alleging that the Board President conducted public business via e-mail with the entire Board on two subjects—an open Board seat and the Executive Director's contract—without complying with the procedural requirements of OMA. In support of this allegation,  provided copies of e-mail communications between Board members. On January 27, 2016, this office forwarded a copy of the Request for Review to the Board and requested it to provide a detailed explanation of how the Board considered the two subject matters at issue and to address whether any gathering of Board members by electronic means on or about January 15, 2016, was a "meeting" as defined by section 1.02 of OMA (5 ILCS 120/1.02 (West 2014)). This office also requested copies of all e-mail correspondence related to these matters, including but not limited to, correspondence between and among Board members.

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On February 5, 2016, counsel for the Board submitted a written response to this office together with relevant e-mails. The Board described that the Board President had sent an e-mail to all Board members on January 15, 2016, at 4:55 p.m. requesting that the members submit a list of three recommended candidates for the open Board seat and that the e-mail instructed the Board members to "cc all commissioners."¹ The Board contended that the "email was sent to all Commissioners in an effort to remain transparent and share as much information with the entire Board as possible in order to avoid any appearances of favoritism during this selection process."² The Board provided copies of two e-mails from Board members responding to the President's original e-mail which had been sent on January 15, 2016, at 4:55 p.m. The first e-mail response was sent to the entire Board on January 15, 2016, at 6:16 p.m. The other e-mail was sent to the entire Board on January 18, 2016, at 10:40 a.m. Both e-mails listed only three names without any comment or other text. The Board argued that these e-mails did not constitute a "contemporaneous interactive communication" as defined by OMA because they took place over a three-day period. With respect to the Executive Director's contract, the Board asserted that no Board members responded to the e-mails between the Board President and counsel for the Board, even though they were copied on the messages.

This office forwarded a copy of the Board's response to [REDACTED] on February 11, 2016. On February 15, 2016, [REDACTED] replied.

DETERMINATION

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2014), as amended by Public Act 99-78, effective July 20, 2015; 99-235, effective January 1, 2016; 99-480, effective September 9, 2015) 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." Section 1.02 of OMA defines a "public meeting" as:

[A]ny gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of *contemporaneous interactive communication*, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member

¹Letter from Gina L. Madden to Neil P. Olson, Assistant Attorney General, Public Access Bureau (February 5, 2016), at 1.

²Letter from Gina L. Madden to Neil P. Olson, Assistant Attorney General, Public Access Bureau (February 5, 2016), at 1.


public body, a quorum of the members of a public body held for the purpose of discussing public business. (Emphasis added.)

Under this statutory definition, a "meeting" may include communications through e-mail or other electronic means. The full Board is comprised of seven members, although six members served on the Board at the relevant time period because of a vacant seat. Accordingly, under either the measure of the full seven-member Board or the existing six-member Board, four Board members comprise a quorum, and a majority of the quorum is three members. Therefore, contemporaneous, interactive e-mail or other electronic communications involving at least three members of the Board which concern "public business" would ordinarily constitute a meeting of the Board which would be subject to the procedural safeguards and requirements of OMA.

In previous determinations with similar circumstances in which one member of a public body solicited feedback on public business from other members via e-mail, the Public Access Bureau has noted that "Illinois' appellate courts have not yet been called upon to decide how close in time electronic communications must be in order to be 'contemporaneous,' for purposes of OMA; nor does the legislative history of the statutory language provide any guidance in defining 'contemporaneous.'" Ill. Att'y Gen. PAC Req. Rev. Ltr. 18676, issued September 9, 2013, at 3 (quoting Ill. Att'y Gen. PAC Req. Rev. 17172, issued September 7, 2012, at 3). In those matters, this office determined that we could not conclude that e-mails sent over a period of hours or longer were "contemporaneous" as a matter of law. Likewise, the e-mails relating to the vacant Board seat are also separated by more than an hour, in the case of one, and more than two days, in the case of the other. Therefore, given the significant time periods between the three e-mails, we cannot conclude that those e-mails constituted "contemporaneous interactive communication" among a majority of a quorum of the Board. Similarly, with respect to the e-mails regarding the Executive Director contract, no Board member responded to e-mails between the Board President and counsel for the Board. Therefore, based on the available information, there was no "contemporaneous interactive communication" between any of the Board members on that subject. Accordingly, there is insufficient evidence from which this office can conclude that the Board violated OMA.


Although we recognize that it is sometimes expedient for members of a public body to communicate with one another between meetings, e-mails concerning public business which are sent to or received by a majority of a quorum skirt the purpose of OMA,³ and have the potential to violate OMA. We therefore caution the members of the Board to be mindful of the requirements of OMA, as well as the public policy favoring the open discussion of matters affecting the public interest, before engaging in such e-mail communications.

³Section 1 of OMA (5 ILCS 120/1 (West 2014)) provides that "is is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly."


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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 nolson@atg.state.il.us or (217) 782-9078.

Very truly yours,


NEIL P. OLSON
Assistant Attorney General
Public Access Bureau

39667 o 2a meeting proper pkd



OMA
Public officials
attending another
meeting

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

December 6, 2019

Via electronic mail

Mr. Michael L. Schrock
500 South Jefferson Street
Greenup, Illinois 62428
mike@cumberlandconcepts.com

Via electronic mail

The Honorable Stacey Carl
Village President, Village of Greenup
115 East Cumberland Street
P.O. Box 246
Greenup, Illinois 62428
c/o clerk@villageofgreenup.com

RE: OMA Request for Review – 2017 PAC 48812

Dear Mr. Schrock and President Carl:

This determination letter is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2018)). For the reasons that follow, the Public Access Bureau concludes that the Greenup Village Board (Board) violated the requirements of OMA in connection with the May 30, 2017, meeting of the Board's Committee for Economic Development (Committee).

On July 20, 2017, Mr. Schrock submitted this Request for Review alleging, in pertinent part,¹ that the Committee's May 30, 2017, meeting turned out to be an illegal Board meeting when all but one of the Board members participated in the discussion concerning the economic incentive agreements he was seeking. On July 31, 2017, this office sent a copy of the Request for Review to the Board and asked it to provide a detailed written response to Mr.

¹In a January 11, 2018, telephone conversation with an Assistant Attorney General in the Public Access Bureau, Mr. Schrock confirmed that he is contesting only the circumstances surrounding the May 30, 2017, Committee meeting.

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Schrock's allegations, together with copies of the notice, agenda, and minutes of the May 30, 2017, meeting.

On August 3, 2017, Village President Stacey Carl, on behalf of the Board, provided a copy of the notice for the Committee meeting, a "Committee Meeting Attendance & Reporting of Meeting" document, and a written response. Village President Carl explained that, in addition to the three Committee members, he and two other Board members attended the open meeting, but he did not clarify the extent to which the non-Committee members participated in any discussion or deliberation. Rather, Village President Carl stated:

Discussion was made as to the properties for which an economic incentive agreement was requested primary focusing on the Old Amoco filling station property. There was also a discussion of the terminology of the statute in which economic incentive agreements could be provided and the meaning of the terms "vacant" and "under utilized[.]"^[2]

On August 9, 2017, Mr. Schrock submitted a reply, again alleging that the May 30, 2017, meeting was improper because of the attendance of and deliberation by a majority of a quorum of Board members. Mr. Schrock also alleged that the May 30, 2017, meeting minutes were vague and inadequate.

On August 10, 2017, Village President Carl responded to Mr. Schrock's reply, asserting that the non-Committee members attended the meeting as Village citizens, not in their official capacities as Board members, but that the Board was "not aware of a prohibition against other Board members attending a committee meeting."³ Village President Carl also asserted that all discussions fell within the agenda topic of requested economic incentives but did not further elaborate which Board or Committee members engaged in discussions. On August 21, 2017, Mr. Schrock replied and enclosed a letter from Mr. Johnny St. John, who attended the meeting with him. Both Mr. Schrock and Mr. St. John acknowledged that Board member Mike Oakley did not participate in the deliberations during the meeting. Mr. Schrock and Mr. St. John also both alleged that they were excluded from the latter half of the meeting, and Mr. Schrock contested Village President Carl's assertion that the discussion during the meeting adhered to the item on the agenda.

²Letter from Stacey Carl, Village President, to Christopher R. Boggs, Assistant Attorney General, Public Access Bureau, Office of Attorney General (August 3, 2017), at 2.

³Letter from Stacey Carl, Village President, to Christopher R. Boggs, Assistant Attorney General, Public Access Bureau, Office of Attorney General (August 10, 2017), at 1.

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On August 23, 2017, Village President Carl provided a final response, again asserting that no members of the public were excluded from any part of the May 30, 2017, meeting. Village President Carl also stated that "[t]he purpose of the meeting was twofold. First, it was primarily to discuss incentive agreements requested by Mr. Schrock. A second purpose of the meeting was to discuss formation of a Tax Increment Financing district after an inquiry had been made. Discussion had concluded insofar as Mr. Schrock's incentive agreements."⁴

In an August 25, 2017, e-mail to an Assistant Attorney General in the Public Access Bureau, Mr. Schrock stated that he had no further 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).

As an initial matter, section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2016)) provides, in pertinent part:

A person who believes that a violation of this Act by a public body has occurred may file a request for review with the Public Access Counselor established in the Office of the Attorney General not later than 60 days after the alleged violation. If facts concerning the violation are not discovered within the 60-day period, but are discovered at a later date, not exceeding 2 years after the alleged violation, by a person utilizing reasonable diligence, the request for review may be made within 60 days of the discovery of the alleged violation. The request for review must be in writing, must be signed by the requester, and must include a summary of the facts supporting the allegation.

Under the plain language of this provision, a Request for Review must be submitted within 60 days after an alleged violation unless facts concerning the violation were not discovered during that time period. In this instance, more than 60 days had elapsed after the May 30, 2017, meeting before Mr. Schrock alleged, in his August 21, 2017, reply to the Board's supplemental response, that the discussion during the meeting exceeded the scope of the item on the agenda

⁴Letter from Stacey Carl, Village President, to Mr. Christopher R. Boggs, Assistant Attorney General, Public Access Bureau, Office of Attorney General (August 23, 2017), at 1.

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and that a portion of the meeting was improperly closed to the public. There is no indication, however, that Mr. Schrock was unaware of the relevant facts pertaining to these allegations at the time of the meeting, as he was in attendance. Therefore, Mr. Schrock's allegations concerning discussion outside of agenda items and exclusion of the public from part of the meeting were raised outside of FOIA's time limitations and are not subject to review by this office.

Additionally, this office notes that the Public Access Counselor's authority to resolve disputes is limited to alleged violations of OMA and the Freedom of Information Act (5 ILCS 140/1 *et seq.* (West 2018)). See 15 ILCS 205/7(c)(3) (West 2018). Accordingly, this determination is limited to reviewing whether the Board violated OMA in connection with the Committee's May 30, 2017, meeting.

Section 2(a) of OMA

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2016)) provides that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." Section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)) defines a meeting as:

[A]ny gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business[.]

The requirements of OMA are not automatically triggered when a majority of a quorum or a quorum of a public body attends a gathering. See *University Professionals of Illinois v. Stukel*, 344 Ill. App. 3d 856, 868 (1st Dist. 2003) (OMA is not "triggered every time public officials meet and converse"). Rather, the Office of the Attorney General has stated that "whether a gathering falls within the definition of meeting as used in the Act, would depend upon the peculiar facts in each situation." Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 126. A gathering does not constitute a meeting for purposes of OMA when there is "no examining or weighing of reasons for or against a course of action, no exchange of facts preliminary to a decision, [and] no attempt to reach accord on a specific matter of [public] business." *Nabhani v. Coglianese*, 552 F. Supp. 657, 661 (N.D. Ill. 1982).

The Board is comprised of six members, including Village President Carl; a majority of the members—four members—comprise a quorum, and three members comprise a majority of a quorum. Therefore, when at least three Board members engage in

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contemporaneous, interactive communications concerning Board business, those discussions may constitute Board meetings subject to the procedural safeguards and requirements of OMA.

There is no dispute that that the Committee provided proper notice of its meeting to discuss various requests for economic incentives. Mr. Schrock, however, contended that the attendance of the Village President and two non-Committee Board members converted the otherwise properly-noticed Committee meeting into a full Board meeting, for which notice was not provided. Although there is no prohibition on non-Committee Board members simply *attending* the Committee meeting, here non-members participated in the meeting discussion. Mr. Schrock and Mr. St. John conceded that Mr. Oakley did not take part in deliberations during the meeting, and it is not entirely clear the extent to which the Village President and the non-Committee Board members did participate in the discussion. The available information indicates, however, that five of six Board members deliberated about public business at the May 30, 2017, meeting, turning the meeting into one of the full Board, rather than just a committee meeting. This conclusion is supported by the fact that on June 5, 2017, the Board took action on the item discussed at the May 30, 2017, meeting. Given the short time span, it appears likely that information exchanged at the May 30, 2017, meeting informed the action on the economic incentive agreements at the Board's June 5, 2017, meeting. The requirements of OMA apply to gatherings in which members of a public body obtain information in anticipation of taking action at a subsequent meeting. Ill. Att'y Gen. PAC Req. Rev. Ltr. 49828, issued June 20, 2018, at 5 (public body violated OMA by gathering in private to review bills upon which action was taken at ensuing meeting). Based on the available information, this office concludes that the Board violated the requirements of OMA in connection with the May 30, 2017, Committee meeting by engaging in deliberations among five of six Board members without having notified the public that a Board meeting would occur.

Because it has not been alleged that final action was taken during the meeting in question, no remedy is available at this time. The Board should be mindful that the participation of non-committee Board members at committee meetings creates the possibility of transforming the gathering into a Board meeting in violation of OMA, if the meeting has not also been noticed as a Board meeting.

Finally, although Mr. Schrock did not expressly request review of the sufficiency of the May 30, 2017, meeting minutes, the Public Access Bureau has previously concluded that one-sentence general statements in minutes merely noting the topic(s) of discussion are insufficient to satisfy the requirements of section 2.06(a)(3) of OMA (5 ILCS 120/2.06(a)(3) (West 2016)).⁵ See Ill. Att'y Gen. PAC Req. Rev. Ltr. 18824, issued February 6, 2013, at 2; Ill.

⁵Section 2.06(a)(3) of OMA (5 ILCS 120/2.06(a)(3) (West 2016)) requires, in pertinent part, that minutes include "a **summary of discussion** on all matters proposed, deliberated, or decided, and a record of any votes taken." (Emphasis added.)

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Att'y Gen. PAC Req. Rev. Ltr. 18307, issued July 2, 2012, at 4. In this office's capacity of providing advice and education to both the public and public officials,⁶ this office urges the Board to summarize in its minutes the arguments and points made concerning any proposals deliberated during meetings, as well as any outcomes.

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 file. If you have any questions, please contact me at (217) 785-7438 or at the Springfield address on the bottom of the first page of this letter.

Very truly yours,



CHRISTOPHER R. BOGGS

Supervising Attorney
Public Access Bureau

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⁶See 15 ILCS 205/7(a), (b), (c) (West 2018).



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

October 2, 2019

Via electronic mail

Via electronic mail
Ms. Alexandra B. Ruggie
Assistant City Attorney
City of Evanston
2100 Ridge Avenue
Evanston, Illinois 60201
aruggie@cityofevanston.org

RE: OMA Request for Review – 2019 PAC 58228

Dear [REDACTED] and Ms. Ruggie:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2018)). For the reasons explained below, the Public Access Bureau concludes that the City of Evanston (City) City Council (City Council) did not violate the requirements of OMA in connection with a May 20, 2019, community meeting concerning the Robert Crown Community Center (Community Center).

On May 21, 2019, [REDACTED] submitted a Request for Review alleging that the City Council cancelled its regularly scheduled meeting¹ to hold a special public meeting on May 20, 2019, to "respond to the residents' request for transparency and disclosure to know how the

[REDACTED] Request for Review does not include the date of the allegedly cancelled City Council meeting, and it appears from a review of the City Council's website that the City Council held its regularly scheduled meetings during the months of April and May. See <https://www.cityofevanston.org/government/agendas-minutes/city-council-agendas-and-minutes> (last visited September 12, 2019).

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Public officials
attending another
meeting

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City of Evanston plans to finance the [Community Center][.]² Request for Review alleged that a majority of a quorum of the members of the City Council attended this public meeting³ and discussed public business without providing an agenda for the meeting. also asserted that at this meeting, the City manager prohibited members of the public from addressing the City Council because they had not submitted their written comments on index cards prior to the meeting, which she contended was not in accordance with the City Council's established and recorded public comment rules.

On May 31, 2019, this office sent a copy of the Request for Review to the City Council and asked it to provide a written response to the allegation that the City Council members' attendance and participation in the public meeting constituted a City Council meeting. On June 6, 2019, the City provided a written response along with a link to the City's YouTube channel that contained a video of the May 20, 2019, event.⁴ On June 7, 2019, this office forwarded a copy of that response to On June 10, 2019, she submitted a reply that included links to what appear to be an individual's social media account that also contain portions of the meeting at issue.⁵

DETERMINATION

The requirements of OMA apply to each "meeting" of a public body. 5 ILCS 120/1 (West 2018). Section 1.02 of OMA (5 ILCS 120/1.02 (West 2018)) defines "meeting" as:

[A]ny gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of

²E-mail from to AG Public Access [O]ffice (May 21, 2019).

³Sneha Dey, *Expressing frustration, residents disrupt playing of video at Robert Crown community meeting*, THE DAILY NORTHWESTERN, (May 21, 2019), <https://dailynorthwestern.com/2019/05/21/city/expressing-frustration-residents-disrupt-playing-of-video-at-robert-crown-community-meeting>

⁴City of Evanston, *Robert Crown Center Community Meeting 5-20-2019*, YOUTUBE (May 21, 2019), <https://www.youtube.com/watch?v=wcE83bSyfOM&t=3558s>.

⁵Mary O'Rourke Rosinski, FACEBOOK, (May 20, 2019) <https://www.facebook.com/maryrosinski/videos/10157162245079076/>;
<https://www.facebook.com/maryrosinski/videos/10157162212134076/>;
<https://www.facebook.com/maryrosinski/videos/10157162364819076/>

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a majority of a quorum of the members of a public body held for the purpose of discussing public business[.]

The Office of the Attorney General has stated that "whether a gathering falls within the definition of meeting as used in the Act, would depend upon the peculiar facts in each situation." 1974 Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 126. "In theory, there is no absolute prohibition against the members of a public body attending an 'informational meeting' without triggering the application of" OMA, as long as the members do not make "[d]eliberational statements" or engage in "unrecorded discussions" among themselves. Ill. Att'y Gen. Op. No. 95-004, issued July 14, 1995, at 10-11. In that opinion the Attorney General concluded that the "mere fact that a majority of a quorum of the members of a public body attend and participate in a bona fide presentation on new legislative developments in an area of public concern" did not make the presentation subject to OMA, but the extensive discussions of public business by members of two county boards during that particular presentation did trigger the requirements of OMA. (Emphasis in original.) Ill. Att'y Gen. Op. No. 95-004, at 10-11; *see also Nabhani v. Coglianesi*, 552 F. Supp. 657, 661 (N.D. Ill. 1982) (a gathering does not constitute a meeting for purposes of OMA when there is "no examining or weighing of reasons for or against a course of action, no exchange of facts preliminary to a decision, [and] no attempt to reach accord on a specific matter of public business.").

The City Council is comprised of a mayor and nine aldermen.⁶ Here, it is undisputed that the City Council did not post an agenda or otherwise follow the requirements of OMA for the May 20, 2019, community meeting and that a majority of a quorum of aldermen, five, gathered at the event. Therefore, to determine whether this event constituted a meeting of the City Council that was held in violation of OMA the question is whether five members of the City Council engaged in deliberative discussion of public business during the May 20, 2019, community meeting.

According to the background information provided by the parties, the Community Center is a City project to build a new facility that includes a new ice rink and library branch. The City's response to this office indicated that the project was organized by the City Manager's office and was approved by the City Council on October 17, 2011.⁷ According to several news reports, some members of the public began voicing concerns about the cost of the project, many of whom spoke during the public comment periods of City Council meetings to share their

⁶City of Evanston, *City Council*, <https://www.cityofevanston.org/government/city-council>

⁷City of Evanston, *Crown Center Project*, <https://www.cityofevanston.org/residents/robert-crown-community-center-ice-complex-and-library>.

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thoughts on this subject matter.⁸

The City's response stated that the May 20, 2019, meeting at issue was the fifth community meeting of its type in which the City Manager, Mr. Wally Bobkiewicz, provided an update on the project, with the focus of this meeting being on the costs and financing of the Community Center. The City contended that the event did not constitute a City Council meeting because the aldermen in attendance were not there in their official capacity, but instead, attended as interested residents of the City. The response further asserted:

The City Council members did not address the members assembled, sit on a panel discussion, or take comments from the persons present. Rather, the aldermen sat in the audience to listen to speakers and watch the video presented by the City.^{9]}

Moreover, the City asserted that the aldermen did not "deliberate on any issues or take any actions before the City Council or its committees."¹⁰ The City's response also asserted that Mr. Bobkiewicz led the community meeting—not the City Council—and only when the prepared video experienced playback issues did one City Council member, Alderman Peter Braithwaite, assist Mr. Bobkiewicz with answering written audience questions.

In her reply to the City's response, ██████████ maintained that the May 20, 2019, event amounted to a City Council meeting because: "5 aldermen [were] in attendance and the 10+ city staff were all present to attend this meeting of City Business."¹¹ ██████████'s reply also disputed the City's account that the aldermen did not engage in any discussion or deliberation

⁸Sneha Dey, *High costs, 'privatized interests' of Northwestern in Robert Crown Center push Evanston residents to voice concerns* THE DAILY NORTHWESTERN, (February 14, 2019), <https://dailynorthwestern.com/2019/02/14/city/high-costs-privatized-interests-of-northwestern-in-robert-crown-center-push-evanston-residents-to-voice-concerns/>; Sneha Dey, *Residents concerned over increased cost of Robert Crown Community Center, even after construction has begun* (February 28, 2019), <https://dailynorthwestern.com/2019/02/28/city/residents-concerned-over-increased-cost-of-robert-crown-community-center-even-after-construction-has-begun/>.

⁹Letter from Alexandra B. Ruggie, Assistant City Attorney, City of Evanston to Shannon Barnaby, Assistant Attorney General, [Public Access Bureau], Office of the Illinois Attorney General (June 6, 2019), at 2.

¹⁰Letter from Alexandra B. Ruggie, Assistant City Attorney, City of Evanston to Shannon Barnaby, Assistant Attorney General, [Public Access Bureau], Office of the Illinois Attorney General (June 6, 2019), at 4.

¹¹E-mail from ██████████ to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (June 10, 2019).

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concerning the Community Center, stating: "[n]one of them just happened to be there in some peripheral way. The aldermen interacted with each other discussing the City business matter at hand."¹² ██████████ reply emphasized that members of the public were frustrated by the format of the meeting and by the public comment procedure that was different from the format used at City Council meetings. Specifically, ██████████ stated: "[t]here was much expressed anger and dialogues with the aldermen present around the lack of transparency and the feeling of complete disrespect of the residents who had come out that evening and who had concerns."¹³

This office has reviewed the video footage of the May 20, 2019, event provided by both the City and ██████████. The meeting consisted of opening remarks by the City Manager, the presentation of a video concerning the Community Center project, followed by a question and answer session. As mentioned by the City in its response to this office, the viewing of the video was temporarily interrupted by what appeared to be a malfunction in the audio of the video recording, at which point Alderman Braithwaite assisted Mr. Bobkiewicz with the reading of audience members' written questions. After the remainder of the video was presented, a second question and answer session occurred, following the same format. The submitted questions were answered by Mr. Bobkiewicz, Alderman Braithwaite, and other City staff members in attendance, such as the Deputy City Manager, the City Engineer, and the City's Library Director. However, the recordings do not reflect that any other City Council members spoke during the presentation or the question and answer sessions.

In her reply, ██████████ alleges that the video footage available on the City's YouTube channel has been edited and that it "misrepresents the entirety of the meeting and mostly shows the 90 minute choreographed and edited video."¹⁴ Nonetheless, while the video footage provided by ██████████ does show that the individuals who were recorded appear to be extremely frustrated, it does not appear to show any other members of the City Council speaking, providing comments, or otherwise discussing public business.

Therefore, the available information does not include facts from which this office can conclude that May 20, 2019, community meeting was a meeting of the City Council subject to the requirements of OMA. The fact that the City Manager and more than ten City employees were present and discussing public business is not relevant to an analysis of whether this event

¹²E-mail from ██████████ to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (June 10, 2019).

¹³E-mail from ██████████ to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (June 10, 2019).

¹⁴E-mail from ██████████ to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (June 10, 2019).

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constituted a "meeting" of the City Council under OMA because they are not members of that public body. Likewise, the fact that a majority of a quorum of City Council members attended the community meeting did not transform that event into a City Council meeting. Only one member of the City Council publicly spoke at the event and there is no information indicating that at any time during this meeting five or more members of the City Council engaged in deliberation or discussion of public business. Accordingly, this office concludes that the City Council did not violate OMA in connection with the May 20, 2019, community meeting.

To the extent that ██████████ Request for Review alleged that the City Council violated the first amendment rights of attendees at the May 20, 2019, community meeting, those allegations are not subject to review by this office, as the Public Access Counselor's authority to resolve disputes is limited to alleged violations of OMA and the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2018)). *See* 15 ILCS 205/7(c)(3) (West 2018).

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, you may contact me at the Chicago address on the first page of this letter. This letter serves to close this file.

Very truly yours,

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SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

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OMA -
Public officials
attending other
meeting

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 13, 2018

Via electronic mail

The Honorable Allen Skillicorn
State Representative, 66th District
245 Dunridge Circle
East Dundee, Illinois 60118
Loudes13@yahoo.com

Via electronic mail

Ms. Mallory A. Milluzzi
Klein, Thorpe & Jenkins, Ltd.
20 North Wacker, Suite 1660
Chicago, Illinois 60606-2903
mamilluzzi@ktjlaw.com

RE: OMA Request for Review – 2018 PAC 51521 and 51896

Dear Representative Skillicorn and Ms. Milluzzi:

This determination letter 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 that follow, the Public Access Bureau concludes that the East Dundee Village Board of Trustees (Board) did not violate OMA in connection with public forums concerning a referendum.

On February 1, 2018, Representative Allen Skillicorn submitted a Request for Review (2018 PAC 51521) alleging that on January 31, 2018, a quorum of Board members attended a public forum concerning a referendum on whether to repeal the Village's home rule authority¹ and discussed public business without providing advance notice, taking meeting minutes, or otherwise complying with the requirements of OMA. Representative Skillicorn asserted that four of the Board's seven members "attended the meeting, interrupted the speaker,

¹Erin Sauder, *Divided audience argues over repealing East Dundee home rule*, ELGIN COURIER-NEWS (February 1, 2018, 1:15 p.m.), <http://www.chicagotribune.com/suburbs/elgin-courier-news/news/ct-ecn-east-dundee-anti-home-rule-meeting-st-0202-20180201-story.html>

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and tried to dominate the discussion."² He also provided an internet link to a video of the public forum. On February 13, 2018, this office sent a copy of the Request for Review to the Board and asked it to provide a written response to the allegation that the Board members' attendance and participation in the public forum constituted a Board meeting.

On February 26, 2018, Representative Skillicorn submitted another Request for Review alleging that the Board violated OMA on that date in connection with an informational meeting concerning the home rule referendum. He stated that five members of the Board attended, and that Village business, taxes and finances were discussed. On March 5, 2018, this office sent a copy of the Request for Review to the Board and asked it to respond to that allegation.

On March 23, 2018, counsel for the Board provided a consolidated response to both Requests for Review and a video recording of the February 26, 2018, event. On March 26, 2018, this office forwarded a copy of that response to Representative Skillicorn. On March 30, 2018, Representative Skillicorn submitted a reply to which counsel for the Board responded on April 3, 2018. This office has considered all of the parties' submissions.

DETERMINATION

The requirements of OMA apply to each "meeting" of a public body. 5 ILCS 120/1 (West 2016). Section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)) defines "meeting" as:

[A]ny gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business[.]

The Office of the Attorney General has stated that "whether a gathering falls within the definition of meeting as used in the Act, would depend upon the peculiar facts in each situation." 1974 Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 126. "In theory, there is no absolute prohibition against the members of a public body attending an 'informational meeting' without triggering the application of" OMA, as long as the members do not make "[d]eliberational statements" or engage in "unrecorded discussions" among themselves. Ill. Att'y Gen. Op. No. 95-004, issued July 14, 1995, at 10-11. In that opinion the Attorney General concluded that the "mere fact that a majority of a quorum of the members of a public body attend and participate in a bona fide presentation on new legislative developments in an area of public

²E-mail from State Representative IL 66, Allen Skillicorn to Public Access [Bureau, Office of the Attorney General] (February 1, 2018).

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concern" did not make the presentation subject to OMA, but the extensive discussions of public business by members of two county boards during the presentation did trigger the requirements of OMA. (Emphasis in original.) Ill. Att'y Gen. Op. No. 95-004, at 10-11; *see also Nabhani v. Coglianese*, 552 F. Supp. 657, 661 (N.D. Ill. 1982) (a gathering does not constitute a meeting for purposes of OMA when there is "no examining or weighing of reasons for or against a course of action, no exchange of facts preliminary to a decision, [and] no attempt to reach accord on a specific matter of public business.")

The Board is comprised of the Village president and six trustees. Thus, if three members of the Board engaged in deliberative discussions of public business during the January 31, 2018, and February 26, 2018, events, all of the procedural safeguards and requirements of OMA would apply. It is undisputed that the Board did not post an agenda or follow the requirements of OMA for either event. Therefore, this office must analyze whether those events constituted meetings of the Board under OMA.

This office has reviewed a video recording of the January 31, 2018, event, which was a forum sponsored by the Fox Valley Libertarian Party concerning the referendum on the Village's home rule authority. Representative Skillicorn alleged that four Board members attended, while the Board acknowledged that three of its members attended. Regardless, three members is a majority of a quorum of the Board. Two of the Board members made substantive comments related to the referendum and the Village's exercise of home rule authority.

In his Request for Review, Representative Skillicorn asserted that the Board members "were active participants in the discussion. All four were in the room together at the same time and they made no effort to limit how many trustees were in the room, how they would speak, or any efforts to comply with the Open Meetings Act."³ In response, counsel for the Board contended that the forum did not constitute a Board meeting because only two Board members, which is less than a majority of a quorum, participated in the discussion. The response further asserted that the "trustees were not engaged in a deliberation as to a decision. They provided some factual information as part of an open discussion with other people about state laws and past actions of the village. * * * The trustees were not sitting together and were not speaking together about this issue."⁴ In addition, the response contended that the referendum is not the public business of the Board because the voters, rather than the Board, ultimately decided whether to approve the referendum. In his reply, Representative Skillicorn stated that he exchanged pleasantries with two of the Board members and that the other two Board members

³E-mail from State Representative IL 66, Allen Skillicorn to Public Access [Bureau, Office of the Attorney General (February 1, 2018).

⁴Letter from Mallory Milluzzi, Assistant Village Attorney, Klein, Thorpe and Jenkins, Ltd., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (March 23, 2018), at 5.

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actively discussed public business. He alleged that "the mere presence of elected officials in a public setting where village business is discussed, is a violation of the intent and letter of the law. One does not have to speak at a meeting to be present."⁵

This office also has reviewed a video recording of the February 26, 2018, event, which was an informational forum concerning the home rule referendum hosted by the Village. The forum consisted of a presentation by the Village administrator followed by a question and answer session. At the beginning of the forum, the administrator stated that members of the Board as well as several public employees such as the police chief were in attendance, and encouraged members of the public to ask them questions afterward. However, none of the Board members spoke during the presentation or the question and answer session that was recorded. The Board's response to this office denied that there was any "discussion or deliberation by Village Board members about any topic."⁶ In his reply to the Board's response, Representative Skillicorn alleged that after the administrator gave her presentation and responded to questions, "[a]ll seven elected officials stayed and discussed this matter, in an official capacity, with the attendees for another 30 minutes. Again the mere presence is a violation of OMA and the active engagement of the attendees by all seven elected officials is further evidence of a violation."⁷ The Board's supplemental response noted that most of those details did not appear in Representative Skillicorn's Request for Review, which only stated that Board members attended a forum in which public business was discussed, but characterized his submissions as still lacking any evidence of an OMA violation: "He merely states that elected officials were present for 30 minutes after the information forum and may have talked with residents, but has no personal knowledge as to what they talked about, nor does he provide any evidence or even allegations that more than two of them were talking to a single resident at a time."⁸

The available information does not include facts from which this office could conclude that either of the events in question were meetings of the Board subject to the requirements of OMA. Only two members of the Board publicly spoke at the January 31, 2018, forum. Many if not most of their comments appeared to be made in response to criticism or comments made by others in attendance; the Board members' comments were separated in time and did not appear to be coordinated. At no time during the forum did three or more members of the Board engage in deliberative discussions of public business. The fact that a majority of a

⁵E-mail from State Representative Allen Skillicorn to Lidia Sanchez (March 30, 2018).

⁶Letter from Mallory Milluzzi, Assistant Village Attorney, Klein, Thorpe and Jenkins, Ltd., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (March 23, 2018), at 2.

⁷E-mail from State Representative Allen Skillicorn to Lidia Sanchez (March 30, 2018).

⁸E-mail from Mallory A. Milluzzi, Senior Associate, Klein, Thorpe & Jenkins, Ltd., to [Steve] Silverman (April 3, 2018).

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quorum or a quorum of Board members attended the forum did not transform that event into a Board meeting.⁹

Likewise, this office has not received evidence that at least a majority of a quorum of Board members held deliberative discussions of public business among themselves during or after the February 26, 2018, public forum. Even if members of the public spoke with Board members after the administrator's presentation, as they were encouraged to do by the Village administrator, such discussions do not constitute deliberations among Board members which trigger the requirements of OMA. Accordingly, this office concludes that the Board did not violate OMA in connection with either event.

This letter serves to close this file. 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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⁹Letter from Mallory Milluzzi, Assistant Village Attorney, Klein, Thorpe and Jenkins, Ltd., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (March 23, 2018), at 5.