



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

March 22, 2023

Via electronic mail

Mr. John Kraft
Edgar County Watchdogs
Box 124
Paris, Illinois 61944
john@illinoisleaks.com

Via electronic mail

Ms. Kimberly M. Jannotta
Senior Partner
Del Galdo Law Group, LLC
1441 South Harlem Avenue
Berwyn, Illinois 60402
jannotta@dlglawgroup.com

RE: OMA Request for Review – 2022 PAC 74454

Dear Mr. Kraft and Ms. Jannotta:

This determination letter is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)). For the reasons that follow, the Public Access Bureau concludes that the Board of Education (Board) of Dolton School District 149 improperly held an emergency meeting on November 29, 2022, but has since remedied the issue.

On November 29, 2022, the Public Access Bureau received a Request for Review from Mr. John Kraft alleging that the Board improperly held an emergency meeting on November 29, 2022, because there was no *bona fide* emergency warranting less than 48 hours' notice. He also alleged that the Board improperly conducted the meeting over Zoom because no finding had been made that an in-person meeting was not feasible because of a public health emergency. Mr. Kraft argued that these alleged violations resulted in the Board improperly removing a Board member from office. This office notes that the minutes of the Board's preceding November 3, 2022, meeting reflect that the Board voted to "convict," "censure," and

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remove Ms. Rayya A. Ghani from her seat on the Board.¹ At the Board's November 29, 2022, meeting, the Board voted to appoint a new member to fill Ms. Ghani's seat.

On December 5, 2022, this office sent a copy of the Request for Review to the Board. This office also sent the Board a letter requesting copies of the notice, agenda, and minutes (in draft form if necessary) from the November 29, 2022, meeting, and a written response to the allegation that it improperly conducted the meeting as an emergency meeting. This office also requested an explanation of if and when the head of the District determined that an in-person meeting was not practical or prudent, including any evidence that this determination was made. On December 14, 2022, the Board's counsel provided a copy of the agenda, a copy of the draft minutes, and a response letter asserting that the Board did not violate OMA. On December 21, 2022, Mr. Kraft submitted a 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).

Basis for Remote Meeting

Mr. Kraft alleged that the Board's November 29, 2022, remote meeting did not comply with section 7(e)(2) of OMA,² which provides:

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

* * *

(2) the head of the public body as defined in subsection (e) of Section 2 of the Freedom of Information Act determines that an in-person meeting or a meeting

¹Dolton School District 149 Board of Education, Meeting, November 3, 2022, Minutes [1]-[5].

²5 ILCS 120/7(e)(2) (West 2020).

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conducted under this Act is not practical or prudent because of a disaster[.]

In response to Mr. Kraft's allegation, the Board's attorney asserted:

The Board President made such a determination that an in-person meeting was impracticable and imprudent due to the growing concerns of the spread of COVID-19 and the recent Thanksgiving holiday, as noted in the then-current Gubernatorial Disaster Proclamation. With a meeting being held shortly after a holiday where people would be traveling and the Illinois Public Health Department urging caution, the Board President made the determination that an in-person meeting would likely become a congregate setting unsafe for those in attendance.^[3]

Mr. Kraft disputed that assertion in his reply, claiming:

The chairman DID NOT make any determination that an in-person meeting was not feasible or was impractical. This school has in-person teaching of students every day and without a masking requirement. The simple fact is they did not want the public present to observe their appointment to a vacancy that did not exist.^[4]

Although the Board's attorney asserted that the Board President properly made the necessary determination under section 7(e)(2), the Board's attorney offered no evidence or specifics. Notably, section 7(e)(2) does not contain any requirement that the determination be recorded or otherwise memorialized. This office's review of the agendas and minutes on the District's website found that the Board had switched back and forth between Zoom and in-person meetings in recent months.⁵ The meeting materials indicate that the Board met remotely on October 27, 2022, November 29, 2022, and December 14, 2022, but met in person on October 11, 2022, November 3, 2022, and November 16, 2022. This oscillation could be inferred to support the allegation that the Board chose meeting in person versus meeting remotely on the basis of convenience or other considerations than the practicality and prudence of meeting under

³Letter from Kimberly M. Jannotta, Attorney for Board of Education of Dolton School District 149, Del Galdo Law Group, LLC, to Joshua M. Jones, Deputy Bureau Chief (December 14, 2022), at 2.

⁴E-mail from John Kraft to Joshua Jones (December 21, 2022).

⁵Dolton School District 149, Board of Education, <https://www.schooldistrict149.org/vnews/display.v/SEC/Board%20of%20Education> (last visited January 18, 2023).

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the conditions of the COVID-19 pandemic. On the other hand, the family gatherings and other group settings in which the Thanksgiving holiday is typically celebrated were a particular factor to consider in deciding how to hold the November 29, 2022, meeting. While there is insufficient evidence from which this office could conclude that the Board President failed to make the necessary finding of impracticality or imprudence due to COVID-19 under section 7(e)(2), this office reminds the Board that its decision on meeting remotely or in person must be necessitated by the impact of the public health emergency rather than any other factors.

Emergency Meeting

Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2020)) provides that:

Public 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, which notice shall also include the agenda for the special, rescheduled, or reconvened meeting, but the validity of any action taken by the public body which is germane to a subject on the agenda shall not be affected by other errors or omissions in the agenda. (Emphasis added.)

OMA does not define the phrase "bona fide emergency," and no Illinois appellate court has addressed the issue of what constitutes a *bona fide* emergency for purposes of section 2.02(a). An "emergency" is defined as "an **unforeseen** combination of circumstances or the resulting state that calls for **immediate** action."⁶ (Emphasis added.) Based on this definition, the Public Access Bureau has previously determined that "unanticipated circumstances requiring immediate action that would justify providing less than 48 hours' notice[]" are necessary for a meeting to qualify as one held in the event of a *bona fide* emergency. Ill. Att'y Gen. PAC Req. Rev. Ltr. 23656, issued May 31, 2013, at 4. In that matter, this office rejected a public body's assertion that an account deficit that could have resulted in the public body failing to meet payroll constituted a "*bona fide* emergency" under section 2.02(a), partly because the "situation that precipitated" the meeting "was clearly foreseeable." Ill. Att'y Gen. PAC Req. Rev. Ltr. 23656, at 4; *see also River Road Neighborhood Ass'n v. South Texas Sports*, 720 S.W.2d 551, 557 (Tex. App. 1986) ("The mere necessity for quick action does not constitute an emergency where the situation calling for such action is one which reasonably should have been anticipated.").

In its response to this office, the Board's attorney stated:

⁶WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 741 (1993).

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The Board contends that this meeting was called in response to a bona fide emergency. This meeting was called to fill a vacancy on the Board within the statutorily allotted 60 calendar days. Due to recent issues with having a quorum at meetings due to Board member scheduling issues, as well as the availability of the applicants for the vacant Board seat during the holiday season, the meeting had to be held at the first opportunity when all necessary parties were available in order to comply with the 60-day period to fill a vacant Board position. The November 29, 2022, meeting agenda was posted on November 28, at 2:22 p.m. on the main entrance door of every school building and on the District's website, and it was emailed to all District staff.⁷

Mr. Kraft replied by arguing: "There was no bona fide emergency. There is no circumstance in this state where one board member vacancy would or could be considered an emergency – especially when the alleged emergency was a creation of the district itself."⁸

The Board's explanation does not demonstrate that there was a *bona fide* emergency warranting an emergency meeting on November 29, 2022. The 60-day statutory deadline that the Board's attorney claims the Board was facing was clearly foreseeable when the Board was contemplating removing Ms. Ghani from office. Thus, the Board could have begun planning and scheduling the meeting to appoint her successor even before its November 3, 2022, meeting. Similarly, the notion of scheduling limitations around the holiday season was readily foreseeable. The only potentially unforeseen issues that the Board's attorney referenced are unidentified scheduling issues involving Board members and applicants for the disputed Board seat. It is not evident from the Board's attorney's response that the Board member scheduling issues arose suddenly or were so restrictive that the Board could not hold a meeting with at least 48 hours' notice. This office did not receive facts as to the extent to which any relevant applicant(s) were unavailable at other times either. The vague assertions concerning scheduling issues provide an insufficient basis for this office to conclude that the Board had a *bona fide* emergency as cause for an emergency meeting on November 29, 2022.

The Board's attorney advised, however, that the Board would re-vote on the actions it took at its November 29, 2022, meeting at its subsequent regular meeting on December 14, 2022, in order to resolve any potential OMA violation. The Board's attorney has since provided this office with a copy of the draft minutes of that meeting, which reflect that the Board

⁷Letter from Kimberly M. Jannotta, Attorney for Board of Education of Dolton School District 149, Del Galdo Law Group, LLC, to Joshua M. Jones, Deputy Bureau Chief (December 14, 2022), at 2.

⁸E-mail from John Kraft to Joshua Jones (December 21, 2022).

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re-voted on appointing a new member to fill the seat that was held by Ms. Ghani. Under these circumstances, no further remedial action is necessary under OMA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any question, please contact me at joshua.jones@ilag.gov. This letter serves to close this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Jones", written in a cursive style.

JOSHUA M. JONES
Deputy Bureau Chief
Public Access Bureau

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