



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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July 31, 2023

Via electronic mail

Mr. Jeremy Williams
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Via electronic mail

The Honorable Barbara Bennett
Chair
Insurance Committee
Shelby County Board
301 East Main Street
Shelbyville, Illinois 62565
bbennett@shelbycounty-il.com

RE: OMA Request for Review – 2021 PAC 70666/2021 PAC C-0203¹

Dear Mr. Williams and Ms. Bennett:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2022)). For the reasons that follow, the Public Access Bureau concludes that the Insurance Committee (Committee) of the Shelby County Board (Board) violated the requirements of OMA at its August 5, 2021, meeting.

BACKGROUND

On August 12, 2021, Mr. Jeremy Williams submitted a Request for Review to the Public Access Bureau alleging that the Committee violated OMA at its August 5, 2021, meeting when (1) two of its members held an inaudible discussion during the meeting, and (2) the Committee voted on a matter that was not properly identified on the meeting agenda. This office

¹Because of the breach to the Attorney General's Office's computer network, this office initially opened this Request for Review under a temporary file number. Please note the permanent file number as indicated.

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construed Mr. Williams' assertions as alleging a violation of sections 2(a) and 2.02(c) of OMA (5 ILCS 120/2(a), 2.02(c) (West 2020)).

On August 23, 2021, this office forwarded a copy of the Request for Review to the Committee and asked it to provide this office with a written response to Mr. Williams' OMA allegations along with copies of the meeting agenda and minutes for its August 5, 2021, meeting, and a verbatim recording of that meeting, if such a recording existed. On August 26, 2021, Mr. Williams notified this office that we had misconstrued his Request for Review regarding one of the allegations.² On August 30, 2021, this office sent the Committee a revised letter correcting the second allegation in Mr. Williams' Request for Review. On September 16, 2021, this office received the response letter from Ms. Nichole Kroncke, the Shelby County State's Attorney, on behalf of the Committee, as well as the agenda and meeting minutes of the meeting at issue. Ms. Kroncke explained that the only recording of the meeting was made by Mr. Williams as a member of the public. On September 21, 2021, this office forwarded a copy of the Committee's response to Mr. Williams; he submitted a reply on September 22, 2021. On April 4, 2022, Ms. Kroncke submitted a supplemental response to this office with additional information. On April 6, 2022, this office forwarded a copy of that response to Mr. Williams; he submitted a reply on that same day.

DETERMINATION

Section 1 of OMA (5 ILCS 120/1 (West 2022)) provides 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." This same section also states that members of the public have "the right to attend all *meetings* at which any business of a public body is discussed or acted upon in any way." (Emphasis added.) Section 2.01 of OMA (5 ILCS 120/2.01 (West 2022)) 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.) "[T]he [Open Meetings] Act is designed to prohibit secret deliberation and action on business which properly should be discussed in a public forum due to its potential impact on the public." *People ex rel. Difanis v. Barr*, 83 Ill. 2d 191, 202 (1980); *see also Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989) ("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.")

²Initially this office misunderstood Mr. Williams' second allegations as regarding Agenda Item 1: "Discussion about Health Insurance and Family Health Insurance plan options." However, in an e-mail dated August 26, 2021, Mr. Williams clarified that his allegation concerned the action taken by the Committee regarding Agenda Item 2: "Discuss recommendation to be presented to county board regarding former employee." E-mail from Jeremy Williams to [Grace] Angelos (August 26, 2021).

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Inaudible Discussion by Committee Members

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2020)) 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." Therefore, the requirements of OMA apply to any gathering of members of a public body that constitutes a "meeting" as defined by section 1.02 of OMA (5 ILCS 120/1.02 (West 2020)):

"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.

The Committee explained that it is comprised of three members, two of whom attended the meeting on August 5, 2021. Because the Committee consists of only three members, two Committee members constitute a quorum and also a majority of the quorum. Therefore, any gatherings, either in-person or through audio or video conferencing technology, and any contemporaneous, interactive exchange of e-mail or other electronic communications involving two members of the Committee discussing "public business" would ordinarily constitute a "meeting" of the Committee subject to the procedural safeguards and requirements of OMA.

In his Request for Review, Mr. Williams alleges that during the August 5, 2021, meeting, the two members of the Committee in attendance "leaned toward each other and discussed some matter in such a way that the public was unable to hear the content of the discussion."³ In its response to the Request for Review, Ms. Kroncke explained that she inquired with the two Committee members in attendance at that meeting, Mr. Bryon Coffman and Ms. Theresa Boehm. Mr. Coffman surmised that Mr. Williams was referring to an exchange he had with Ms. Boehm regarding Agenda Item 2. Mr. Coffman explained that he asked Ms. Boehm whether she was in favor of making a decision on that Agenda item, and she responded in the affirmative.⁴ This exchange, albeit short, was a deliberative discussion of "public business"

³E-mail from Jeremy Williams to Public Access Counselor (August 12, 2021).

⁴Letter from Nichole Kroncke, Shelby County State's Attorney, to Ms. Grace Angelos, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (September 16, 2021) at 2.

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carried out by a quorum of the Committee members; it therefore constitutes a "meeting" under section 1.02 of OMA.

Mr. Williams alleged that because this exchange was inaudible to the public in attendance at the meeting, it violated OMA. The Committee responded that any inaudible discussion between the two members did not violate OMA because the entire meeting was open to the public, "no committee member intentionally spoke in a manner so that others present could not hear[.]" and the Committee immediately followed up on the subject matter of the inaudible discussion with open discussion and action.⁵ This office has reviewed a video recording of this portion of the meeting. Prior to the sidebar, the voices of the Committee members are fully audible. At one point, one of the Committee members turns toward the other, leans in, and appears to have a short exchange; neither of the members' voices are audible on the video recording while they are leaning toward each other.

The Illinois Supreme Court and Illinois Appellate Court have not specifically addressed the extent to which all proceedings of a meeting that is technically open to the public must be audible to attendees in order to comply with the requirements of OMA. Courts in other jurisdictions, however, have considered the level of access required in order to comply with their versions of OMA. In *State ex rel. Bratenahl v. Village of Bratenahl*, 157 Ohio St. 3d 309, 313, 136 N.E.3d 447, 451 (Ohio 2019), the Ohio Supreme Court observed that "[t]he Act is not satisfied simply because the doors of a council meeting are open to the public. Rather, an open meeting requires that the public have meaningful access to the deliberations that take place among members of the public body[.]" See also *State ex rel. Ames v. Portage County Board of Commissioners*, 165 Ohio St. 3d 292, 297, 178 N.E.3d 492, 497 (Ohio 2021) (A public body "violates the Open Meetings Act when its members conceal their deliberations by whispering among themselves or secretly passing notes between one another during a public meeting.").

To the extent that the whispered discussion of public business between the two Committee members was not audible, this portion of the meeting was not open to the public. Further, it appears the Committee members intentionally whispered to prevent members of the public from hearing the discussion until they were ready to proceed with a vote. Therefore, the Committee violated OMA by concealing a portion of its discussion while in open session. However, this office notes that this brief "meeting" lasted eight seconds, that the Committee has now revealed the content of the inaudible discussion in its response to this office, and that the Committee immediately voted publicly on the matter it discussed in whisper. As such, the violation was de minimis and no additional remedial actions is required. This office reminds the

⁵Letter from Nichole Kroncke, Shelby County State's Attorney, to Ms. Grace Angelos, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (September 16, 2021) at 2.

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Committee that because it has only three members, any discussions of public business between two of the members constitute "meetings" of the Committee, and must be held during properly noticed open meetings, and must be audible to the public

Section 2.02(c) of OMA

Section 2.02(c) of OMA provides, in pertinent part: "Any agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting." OMA does not contain a definition of "general subject matter." However, the Senate debate on House Bill No. 4687, which, as Public Act 97-827, effective January 1, 2013, added section 2.02(c) of OMA, indicates that the General Assembly intended this provision to ensure that agendas provide general notice of all matters upon which a public body would be taking final action:

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

The Public Access Bureau has previously determined that "the General Assembly's use of the term 'general subject matter' signifies that a meeting agenda must set forth the main element(s), rather than the specific details, of an item on which the public body intends to take final action." Ill. Att'y Gen. PAC Req. Rev. Ltr. 45667, issued February 16, 2017, at 4-5 (determining that voting to sign a new city administrator to a five-year contract under the agenda item "Appointment of the City Administrator" did not violate section 2.02(c) of OMA).

Agenda Item 2 for the August 5, 2021, meeting states:

2. Discuss recommendation to be presented to county board regarding former employee.^[6]

In his Request for Review and in his first reply, Mr. Williams objects to the fact that the Committee voted on Agenda Item 2 even though the agenda indicated that Agenda Item

⁶Notice of Insurance Committee Meeting [for August 5, 2021], Agenda Item 2 (July 28, 2021).

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2 was subject to discussion, and failed to indicate there would be a "vote." In its response to this office, the Committee contended that the agenda accurately described the topic that it considered and voted upon:

The committee discussed at length whether potential fraud existed with respect to the former employee's actions, consistent with the agenda item. Having determined that no fraudulent behavior had been committed, the committee determined that no further action was warranted in that there was no need to recommend to the board that further action be taken.

* * *

The agenda item provided notice that the topic of what recommendations, if any, were to be made to the county board regarding the conduct of a former employee was to be considered. The committee's decision to recommend to the county board that no further action is necessary is consistent with the notice provided on the agenda item."^[7]

The Committee's agenda to "[d]iscuss recommendation" signaled that the Committee might take action on a recommendation regarding the former employee. OMA does not require specific mention of a "vote" or "final action" as long as the agenda provides a general description of the matter upon which a public body would be taking final action. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 26622, issued February 27, 2018 (an agenda item describing the subject matter of an ordinance under consideration need not also specify the particular action the public body intends to take).

However, in this instance, the agenda description only indicated that the Committee would potentially take action on a "recommendation * * * regarding former employee." Agenda Item 2 does not include the general subject matter of the recommendation concerning the former employee. A recommendation regarding a former employee could concern countless subjects, and the posted agenda provided no indication that the general subject matter under consideration at the August 5, 2021, meeting related to a fraud allegation. The Committee argues that OMA requires only that a final action be "germane" to an item listed on the agenda, citing in support of its argument *In re Foxfield Subdivision*, 396 Ill. App. 3d 989 (2d

⁷Letter from Nichole Kroncke, Shelby County State's Attorney, to Ms. Grace Angelos, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois (September 16, 2021) at 2-3.

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Dist. 2009), and *Argo High School Council of Local 571 v. Argo Community High School District 217*, 163 Ill. App. 3d 578 (1st Dist. 1987). However, both of those decisions address whether meeting agendas complied with statutory requirements that are similar or substantively identical to the current version of section 2.02(a) of OMA. Both decisions pre-date the enactment of section 2.02(c) of OMA, which became effective on January 1, 2013; therefore, neither case holds that the "general subject matter" requirement in section 2.02(c) requires only that an agenda item be "germane" to the final action a public body takes.

Accordingly, this office concludes that the Committee violated section 2.02(c) of OMA during its August 5, 2021, meeting by voting to take no further action against its former employee relating to a fraud allegation without having listed the general subject matter of that final action on the meeting agenda. Because the Shelby County Board subsequently considered the matter relating to the former employee, there is no further remedial action that the Committee can take. This office cautions the Committee that at future meetings, it must ensure that the general subject matter of any final action it intends to take is listed on its meeting agenda.

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

Very truly yours,



GRACE ANGELOS
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
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