



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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December 17, 2024

Via electronic mail

Mr. Rob Dorman
Rob62234@gmail.com

Mr. SJ Morrison
Agency for Community Transit
One Transit Way
Granite City, Illinois 62040

RE: OMA Request for Review – 2019 PAC 61108

Dear Mr. Dorman and Mr. Morrison:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2022)).

On December 23, 2019, Mr. Rob Dorman submitted the above-referenced Request for Review alleging that the Board of Directors for the Agency for Community Transit (ACT Board) violated OMA at its December 17, 2019, meeting by voting to fill the position of Executive Director for the Agency for Community Transit (ACT) without providing advance notice of that vote in the meeting agenda. At this meeting, Mr. Dorman stated that the current Executive Director, Jerry Kane, resigned and the Board voted on his replacement. Mr. Dorman provided this office with a copy of the Board's December 17, 2019, meeting agenda and a press release announcing Mr. Kane's resignation dated December 20, 2019.

On January 22, 2020, this office forwarded a copy of the Request for Review to the ACT Board and asked it to provide copies of the agenda and minutes of its December 17, 2019, meeting and a written response to the allegation that the ACT Board voted to fill the position of Board Director without providing the public with advance notice of that action. On February 3, 2020, counsel for the ACT Board provided a written response and copies of the agenda and draft minutes for the December 17, 2019, meeting. In its written response, the ACT

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Board asserted that it is not a "public body" subject to the requirements of OMA and is instead a not-for-profit corporation that contracts with Madison County Transit District (MCT District) to provide transit services; the Board provided a copy of its Certificate of Good Standing, dated February 3, 2020, from the Illinois Secretary of State's Office.

On February 4, 2020, this office forwarded a copy of the ACT Board's response to Mr. Dorman; he replied on February 9, 2020. In particular, Mr. Dorman asserted that the ACT Board is a public body because it is a subsidiary or an advisory body to the District. On February 26, 2020, an Assistant Attorney General (AAG) in the Public Access Bureau contacted the ACT Board and asked if it could provide copies of ACT's articles of incorporation and the contractual agreement it signed with the District. Later that day, counsel for the Board responded by providing our office with these materials and disputing Mr. Dorman's claim that the Board constituted a subsidiary body.

On May 26, 2020, counsel for the ACT Board advised this office that the Board "had another meeting last Friday, May 22, 2020, during which it reaffirmed the prior action taken on December 17, 2019, to hire Steven J. Morrison as Executive Director."¹ Although counsel asserted that the ACT Board is not a "public body" for purposes of OMA, the Board asserted that it had nonetheless resolved Mr. Dorman's concerns by re-voting on the matter at a subsequent open meeting after providing advance notice.

DETERMINATION

"In order that the people shall be informed, the General Assembly finds and declares that it is the intent of [OMA] to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (2022).

As background, ACT's articles of incorporation reflect that it was incorporated in 1984 as a not-for-profit corporation "to plan, coordinate, schedule, develop, and provide transportation for the residents of Madison County, Illinois."² The contract shows that in 2005, the District entered into a services agreement to provide:

[A] professionally managed-full service, public fixed-route transit operation for the benefit of the residents of Madison County. Such operation shall include but are not limited, the following: operator training; accident investigation; scheduling of personnel and

¹E-mail from Andrew Carruthers to Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau (May 26, 2020).

²Articles of Incorporation under the General Not For Profit Corporation Act, Agency for Community Transit (October 31, 1984).

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services; service evaluation; customer information; service supervisions; American with Disabilities Act service functions; *
* * overall operation of the transportation system.^[3]

According to this agreement, the ACT Board's Executive Director, Jerry Kane, would continue to serve as the Managing Director of the MCT District. The agreement also stipulates that the MCT District "agrees to pay to the AGENCY the sum of \$500,000.00 per year as and for payment of the General Management and Administrative services stated herein."⁴

Whether Agency for Community Transit is a Subsidiary or Advisory Body

The requirements of OMA apply only to "public bodies." (5 ILCS 120/1 (West 2022)). Section 1.02 of OMA (5 ILCS 120/1.02 (West 2022)) defines a "public body" as:

[A]ll 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, except the General Assembly and committees or commissions thereof.

In his reply to this office, Mr. Dorman asserted that the ACT Board is a subsidiary and an advisory body of the MCT District. Courts have considered four primary factors in determining whether an entity is a "subsidiary body" of a public body: (1) the extent to which the entity has a legal existence independent of government resolution, (2) the degree of government control exerted over the entity, (3) the extent to which the entity is publicly funded, and (4) the nature of the functions performed by the entity." *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶ 26. "[N]o single factor is determinative or conclusive, but as the definition indicates, the key distinguishing factors are government creation and control." *Better Government Ass'n*, 2017 IL 121124, ¶ 26.

In *Hopf v. Topcorp*, 256 Ill. App. 3d 887, 889 (1993), the Illinois Appellate Court considered whether a corporation that was created by the City of Evanston in conjunction with Northwestern University to develop a research park was subject to the requirements of OMA.

³Agreement for Services between Agency for Community Transit and Madison County Mass Transit District, Section 2(A) (June 7, 2005).

⁴Agreement for Services between Agency for Community Transit and Madison County Mass Transit District, Section 2(F) (June 7, 2005).

The corporation, Topcorp, Inc., was created to acquire the land while its subsidiary, Research Park, Inc. (RPI), was created to operate, market, and promote interest in the park. *Hopf*, 256 Ill. App. 3d at 889-90. The City and Northwestern equally shared the operating costs of Topcorp and RPI and each guaranteed half of a \$300,000 loan obtained by RPI. *Hopf*, 256 Ill. App. 3d at 891. The City and Northwestern both also appointed members to a board of directors for each entity; the City appointed its mayor, city manager and an alderman to the Topcorp board. *Hopf*, 256 Ill. App. 3d at 890. The court emphasized that although the City and Northwestern influenced the corporations through their appointments to the boards, "the functions of the two corporations remain proprietary []" and that "neither the City nor Northwestern can *control* the two corporations." (Emphasis in original.) *Hopf*, 256 Ill. App. 3d at 894. Further, the City's funding of half of each corporate entity's operations "in and of itself, does not render the corporations public bodies." *Hopf*, 256 Ill. App. 3d at 897. Therefore, the court concluded that Topcorp and RPI were not subsidiary bodies of the City, and were not subject to the requirements of OMA.

Applying the first factor listed above, ACT has an independent legal existence as a not-for-profit corporation registered with the Illinois Secretary of State's Office.

With respect to the second factor, the degree of government control, ACT is governed by a Board of Directors, which currently consists of six members.⁵ According to the December 20, 2019, press release, Jerry Kane served as Executive Director for ACT as well as the Managing Director of the MCT District. At the December 17, 2019, Board meeting, Mr. Kane resigned as Executive Director of ACT and was replaced by Mr. SJ Morrison, who is also the Managing Director of the MCT District.

In its response, counsel for the ACT Board pointed out that the services agreement specifies that ACT is an independent contractor and has the contractual right to subcontract out its services without permission or consultation with the MCT District. The Agreement for Services stipulates that:

It is acknowledged and understood by and between the parties that the DISTRICT is a unit of local government which has contracted for a certain portion of its services to be rendered by the AGENCY which is a not-for-profit corporation. The AGENCY, as an independent contractor, shall be fully responsible for the internal performance of [its] duties * * * At all time, the employees

⁵Agency for Community Transit, Agency for Community Transit Board of Directors, <https://actinfo.org/organization> (last visited November 20, 2024).

of the AGENCY shall be supervised by and under the direct control of the AGENCY. ^[6]

ACT's by-laws, however, state that the MCT District's Board of Trustees (MCT Board) appoints Directors to the ACT Board to serve seven-year terms, and is responsible for filling any vacancies on the ACT Board.⁷ Additionally, the by-laws stipulate that the "Managing Director of [MCT] shall serve as the Secretary/Treasurer of [ACT] * * * As Treasurer, the Secretary/Treasurer will review the expenditure of all funds."⁸

The third factor considers the degree of public funding received by the entity. As stated above, ACT is publicly funded, receiving \$500,000 annually from the MCT District per the terms of the services agreement. Finally, under the fourth factor, the nature of the functions performed by the entity, counsel for the ACT Board explained that ACT "is a contractual vendor for a unit of government * * * it maintains a website given the transportation services that it provides as third-party contractor, including information about its Board meetings."⁹ ACT's by-laws state that ACT's sole purpose is "to cooperate with and assist the [MCT] with the fulfillment of its legislative duty to provide for the transportation needs of the County of Madison."¹⁰ Specifically, ACT provides "transportation related services for residents, business, governments, and non-profits[.]" including "services to elderly, disabled, and low income individuals for a nominal fare."¹¹ The State Constitution recognizes that "[p]ublic transportation is an **essential public purpose** for which public funds may be expended. The General Assembly by law may provide for, aid, and assist public transportation, including the granting of public funds or credit to any corporation or public authority authorized to provide public transportation within the State." (Emphasis added.) Ill. Const. 1970, art. XIII, § 7.

Having reviewed the information submitted by the parties and in light of the relevant factors, this office concludes that ACT is a subsidiary body of the MCT District, and the ACT Board is a "public body" subject to the requirements of OMA. Although ACT has an independent legal existence as a not-for-profit corporation, it is apparent that ACT's sole purpose

⁶Agreement for Services between Agency for Community Transit and Madison County Mass Transit District, Section 3 (June 7, 2005).

⁷Bylaws, Agency for Community Transit (ACT), Article II, § 3 (last amended August 18, 2022).

⁸Bylaws, Agency for Community Transit (ACT), Article III, § 6 (last amended August 18, 2022).

⁹E-mail from Andrew K. Carruthers, Hepler Broom, LLC., to Christina Lucente-McCullough, Assistant Attorney General, Public Access Bureau (February 3, 2020).

¹⁰Bylaws, Agency for Community Transit (ACT), Article I(B) (last amended on August 18, 2022).

¹¹Agency for Community Transit, Form 990 Return of Organization Exempt from Income Tax (2022), at 2.

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is to provide public transportation services for the MCT District. As noted above, the State Constitution provides that "[p]ublic transportation is an essential public purpose[.]" Moreover, it is apparent that MCT exercises a significant degree of control over ACT's day-to-day operations. In his role as the MCT District Managing Director, Mr. Kane served as the Board's Executive Director and ACT's Secretary/Treasurer. As stated in the by-laws, ACT's Secretary/Treasurer is responsible for reviewing all financial expenditures. In addition, the MCT Board appoints the members of the ACT Board. These factors outweigh the operating agreement designating ACT as an independent contractor and the absence of any reference to the MCT District in the Board's Articles of Incorporation. The public nature of the function provided by ACT and the degree of control exercised by the MCT District and MCT Board are readily distinguishable from the circumstances in *Hopf*.

Accordingly, this office concludes that the ACT Board is a "public body" subject to the requirements of OMA, and therefore, it violated OMA by taking final action at its December 17, 2019, without providing advance notice in the meeting agenda. Although there is no remedy necessary given the ACT's Board subsequent action at its May 22, 2020, meeting, this office requests that the ACT Board adhere to the requirements of OMA at its future meetings, including the requirements to post a notice and agenda of its upcoming meetings as required by section 2.02 of OMA (5 ILCS 120/2.02 (West 2022)), to provide an opportunity for the public to address the ACT Board as required by section 2.06(g) of OMA (5 ILCS 120/2.06(g) (West 2022)), and for its members to take the electronic OMA training, as required by section 1.05(b) of OMA (5 ILCS 120/1.05(b) (West 2022)).

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,

Christina Lucente-McCullough

CHRISTINA LUCENTE-MCCULLOUGH
Assistant Attorney General
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