OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 11, 2012

PUBLIC ACCESS OPINION 12-011
(Request for Review 2012 PAC 19265)

OPEN MEETINGS ACT:
Improper Discussion in Closed
Session of Budgetary Matters

Ms. Jacqueline Lee
Reporter
Belleville News-Democrat
120 South Illinois Street
P.O. Box 427
Belleville, Illinois 62222

The Honorable James Rauckman
Mayor, Village of Swansea
1400 North Illinois Street
Swansea, Illinois 62226

Mr. John Openlander
Village Administrator
Village of Swansea
1400 North Illinois Street
Swansea, Illinois 62226

Dear Ms. Lee, Mr. Rauckman, and Mr. Openlander:

This binding opinion is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2010)). This Request for Review challenges the propriety of several closed session discussions by the Board of Trustees of the Village of Swansea. As discussed below, this office concludes that the personnel and finance committees of the Village of Swansea Board of Trustees violated section 2(a) of OMA (5 ILCS 120/2(a) (West 2010), as

amended by Public Acts 97-333, effective August 12, 2011; 97-452, effective August 19, 2011; 97-318, effective January 1, 2012), by discussing budgetary matters in a meeting closed to the public pursuant to section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-452, effective August 19, 2011; 97-318, effective January 1, 2012).

BACKGROUND

In a Request for Review filed with this office on April 12, 2012, Ms. Jacqueline Lee of the *Belleville News-Democrat* alleged that two committees of the Board of Trustees of the Village of Swansea had improperly discussed the Village's budget in closed session.[1] Specifically, she alleged that during the Board's personnel committee meetings on February 21, March 5, and March 19, 2012, and during the Board's finance committee meetings on March 19 and April 2, 2012, the respective committees closed portions of their meetings pursuant to section 2(c)(1) of OMA, which permits a public body to meet in closed session to discuss "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body[.]" Ms. Lee alleged that in addition to discussing individual employees, the committees also discussed budget cuts, a topic not authorized by any exception.

On April 23, 2012, this office forwarded the Request for Review to the Village and asked the Village for copies of the minutes and the verbatim recordings of the closed sessions for the dates in question.[2] We received the Village's response dated May 3, 2012, which included the minutes of the five closed sessions in question and the cassette tape recordings of the February 21 and March 5, 2012, personnel committee meetings.[3] This office had already received the cassette tape recordings of the March 19, 2012, personnel committee meeting and the March 19, 2012, finance committee meeting in connection with a separate Request for Review.[4] The Village informed us that it had inadvertently failed to record the closed session of the finance committee's April 2, 2012, meeting.

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[1]E-mail from Jacqueline Lee, Reporter, *Belleville News-Democrat*, to Sarah Pratt, Acting Public Access Counselor, Office of the Attorney General (April 12, 2012, 10:55 a.m.).

[2]Letter from Sarah Kaplan, Assistant Attorney General, Public Access Bureau, to Lauren O'Neill, Village Clerk, Village of Swansea (April 23, 2012).

[3]Letter from John J. Kurowski, Village Attorney, Village of Swansea, to Sarah Kaplan, Assistant Attorney General, Public Access Bureau (May 3, 2012).

[4]*See* Request for Review 2012 PAC 19238.

This office is required to keep the minutes and recordings of the closed sessions confidential under section 3.5(g) of OMA (5 ILCS 120/3.5(g) (West 2010)). We forwarded the non-confidential portions of the Village's response to Ms. Lee on May 9, 2012. Ms. Lee informed us that because she had no way to evaluate the content of the closed session discussions, she chose not to reply.[5]

ANALYSIS

Section 2(a) of OMA 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 2(c) (5 ILCS 120/2(c) (West 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-452, effective August 19, 2011; 97-318, effective January 1, 2012) lists several topics that public bodies may discuss in closed session. On the dates in question, the personnel and finance committees relied on the exception in section 2(c)(1) of OMA, which allows public bodies to discuss in closed session "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body[.]"

The use of the phrase "specific employees of the public body" significantly limits the scope of this exception. Based on this language, the exception is intended to permit public bodies to candidly discuss the relative merits of individual employees, or the conduct of individual employees. The exception is not intended to allow private discussions of fiscal matters, notwithstanding that they may directly or indirectly impact the employees of the public body. Decisions to reduce funding to certain departments of a governmental entity, or to dispense with discretionary programs, for example, may ultimately result in a public body having to determine which specific employees to retain or which to layoff or terminate. To the extent that a public body is required to discuss the relative merits of individual employees as a result of its fiscal decisions, such discussions may properly be closed to the public under section 2(c)(1) of OMA. The underlying budgetary discussions leading to those decisions, however, may not be closed to the public.

Based on our review of the minutes of the closed sessions in question and the available recordings, we find that although the Board did discuss details of the employment of specific employees of the public body, significant portions of their discussions centered on broader budgetary concerns, such as staffing needs, how staff reductions would affect the services provided by the Village, and which services were most valuable to Village residents. In

[5]Telephone conversation between Jacqueline Lee, Reporter, *Belleville News-Democrat*, and Sarah Kaplan, Assistant Attorney General, Public Access Bureau (approx. May 2, 2012).

particular, the number of paid staff required by the Village was the focus of several minutes of discussion at each closed session. Also, on March 19, 2012, the finance committee discussed strategies for balancing the Village's budget. These aspects of the committees' discussions were outside the scope of section 2(c)(1), and therefore were improperly closed to the public.

We note that during the March 5 and March 19, 2012, personnel committee meetings the Board also entered closed session under section 2(c)(1) to discuss the discipline of a specific employee, and entered closed session pursuant to section 2(c)(2) to discuss collective negotiating matters. Ms. Lee has not alleged that improper discussion occurred during those sessions, nor did our review of the closed session recordings reveal improper discussion during those closed sessions.

The Village asserts that although the employees were discussed in the context of the following year's budget, the content of the discussions remained within the exception in section 2(c)(1). The Village also states that a Trustee's question about the failure to include a staff reduction in the budget "could only be answered and discussed in the context of specific employees."[6]

We disagree. Because government budgets are generally heavily personal-services weighted, discussions of budgetary matters will often impact staffing levels. Section 2(c)(1) is not intended to allow a public body to discuss general fiscal issues in closed session simply because its budgetary decisions may impact the public body's employees and, thus, ultimately may lead to properly closed discussions of the employment of specific employees. For example, section 2(c)(1) does not authorize the discussion in closed session of issues that clearly impact the public body's budget, such as whether to fill a vacant position, the number of staff needed to provide an acceptable level of service, or which of a public body's functions are

[6]Letter from John Kurowski, Village Attorney, Village of Swansea, to Sarah Kaplan, Assistant Attorney General, Public Access Bureau (May 3, 2012).

most important to residents, although those issues may directly affect the employment of specific employees.[7]

With respect to the Village's failure to provide this office with the verbatim recording of the finance committee's April 2, 2012, meeting, the Village has provided us with evidence that its failure to record the meeting was accidental. The Village Clerk had prepared a cassette tape for that meeting and placed it in the recorder. When she attempted to turn the recording off at the end of the meeting, she discovered that she had failed to start the recording. The Village also states that it is not aware of any other closed sessions that were not recorded. Thus, while we remind the Village to ensure that all future closed sessions are recorded, we note that the failure to record this particular meeting appears simply to have been an inadvertent mistake.

FINDINGS AND CONCLUSIONS

After full review and giving due consideration to the arguments of the parties, the Public Access Counselor's findings, and the applicable law, the Attorney General finds that:

1) Ms. Jacqueline Lee of the *Belleville News-Democrat* submitted a Request for Review to the Public Access Counselor dated April 12, 2012, which this office received the same day. In her Request for Review, Ms. Lee alleged that the Village of Swansea's personnel committee improperly discussed the Village's budget in closed sessions during its meetings on February 21, March 5, and March 19, 2012, and that the Village of Swansea's finance committee improperly discussed the Village's budget in closed sessions during its meetings on March 19 and April 2, 2012. As the basis for closing these meetings to the public, the personnel and finance committees cited section 2(c)(1) of OMA, which allows public bodies to discuss in closed session "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body[.]"

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[7]We would note that in *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 534 N.E.2d 434 (1989), the Illinois Appellate Court interpreted the exception now contained in section 2(c)(1) of OMA as authorizing the discussion of topics that did not fall clearly within the scope of the exception but which were generally related thereto. Specifically, the court held that the discussion of related topics was permissible because the public body needed to consider the related matters simultaneously with the authorized topic in order for the discussion to be effective. However, *Gosnell* was decided prior to the enactment of Public Act 88-621, effective January 1, 1995, which added section 2(b) to OMA. Section 2(b) provides that the exceptions in the Act "are in derogation of the requirement that public bodies meet in the open, and therefore, *the exceptions are to be strictly construed, extending only to subjects clearly within their scope.*" (Emphasis added.) The amendatory language was intended, in part, to address the court's interpretation in *Gosnell*. *See* Remarks of Rep. Wennlund, April 20, 1993, House Debate on House Bill No. 1332, at 59 ("all exceptions are intended to be strictly construed under the amendatory language").

2) Ms. Lee's Request for Review was timely filed and otherwise complies with the requirements of section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2010)).

3) The Attorney General properly extended the time to issue a binding opinion by 21 business days pursuant to section 3.5(e) of OMA. Therefore, the Attorney General may properly issue a binding opinion with respect to Ms. Lee's Request for Review.

4) The Village of Swansea's personnel committee held closed sessions on February 21, March 5, and March 19, 2012. In each of these closed sessions, the committee discussed budgetary matters outside the scope of the exception in section 2(c)(1).

5) The Village of Swansea's finance committee held closed sessions on March 19 and April 2, 2012. In each of these closed sessions, the committee discussed budgetary matters outside the scope of the exception in section 2(c)(1).

6) By discussing general budgetary matters in meetings closed to the public pursuant to section 2(c)(1) of OMA, the personnel and finance committees violated section 2(a) of OMA, which requires that all meetings of public bodies be open to the public unless excepted in section 2(c).

In accordance with these findings of fact and conclusions of law, the Village is directed to release to Ms. Lee those portions of the closed session meeting minutes that detail discussions that were outside the scope of section 2(c)(1). Specifically, those minutes should include the discussions of budget and staffing issues that took place in closed sessions during the Board's personnel committee meetings on February 21, March 5, and March 19, 2012, and during the Board's finance committee meetings on March 19 and April 2, 2012. When releasing the minutes of the closed sessions, the Village may redact the portions of the minutes that directly relate to (a) the discussions that were properly conducted during closed session pursuant to sections 2(c)(1) and 2(c)(2); and (b) the discussions of one or more specific employees. The Village must make the redacted version of these minutes[8] available to members of the public upon request.

[8]This office also would ordinarily direct the Village to release those portions of the closed session recordings relating to topics that were outside the scope of section 2(c)(1). In this instance, however, the permissible and impermissible discussions are so intertwined that it is not practicable to separate them. This highlights a fundamental problem with improper closed session discussions – although the public will be able to review the minutes summarizing the committees' discussions, it will not have the opportunity to hear the actual commentary of the individual members concerning a significant issue that should only have been discussed in an open meeting.

This opinion shall be considered a final decision of an administrative agency for the purpose of administrative review under the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2010)). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision, naming the Attorney General of Illinois and Ms. Jacqueline Lee as defendants. *See* 5 ILCS 120/7.5 (West 2010).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: Michael J. Luke
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Counsel to the Attorney General