OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 4, 2015

PUBLIC ACCESS OPINION 15-005
(Request for Review 2015 PAC 35119)

OPEN MEETINGS ACT:
Failure to Cite Closed Session Exception;
Improper Discussion of Proposed
Police Services Contract in Closed
Session; Taking Final Action on
Matter Not on Meeting Agenda

Ms. Donna C. Spears
145 South Sunnyside Drive
Blue Mound, Illinois 62513

The Honorable Kenneth Ervin
Village President
Village of Blue Mound
P.O. Box 378
Blue Mound, Illinois 62513

Dear Ms. Spears and Mr. Ervin:

This is a binding opinion issued by the Attorney General pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2014)). For the reasons discussed below, this office concludes that the Board of Trustees of the Village of Blue Mound (Board) violated OMA by improperly closing a portion of its May 4, 2015, regular meeting to the public to discuss a proposed police services contract and by failing to include on the meeting agenda the general subject matter of the Board's final action on that contract.

BACKGROUND

On May 7, 2015, Ms. Donna Spears submitted a Request for Review alleging that the Board violated OMA at its May 4, 2015, regular monthly meeting. Specifically, Ms. Spears alleged:

> [d]uring this meeting the board members and Mayor convened in an executive session behind closed doors and voted to disband the Blue Mound Police Department effective July 1st, 2015. This decision was made without any advance notice to the public or the staff. This topic was not even listed on the meeting agenda. * * * Our community feels that such a decision should have been brought to the public[']s attention so that they could have had the opportunity to be put on the agenda, attend the board meeting, and voice their opinions and concerns on the issue.[1]

On May 13, 2015, the Public Access Bureau sent a copy of the Request for Review to the Village President and asked the Board to provide a written response to the allegations therein, including a detailed explanation of how the Board considered and decided any issues related to the Police Department at its May 4, 2015, meeting. This office also requested a copy of the meeting agenda, the open and closed session minutes, and the verbatim recording of the closed session.[2] On May 22, 2015, this office received the Board's response letter and the requested materials. The response stated that "[o]n the agenda, executive session was posted to discuss personnel[,]" and that during the open session, the Board voted "to enter into the executive session for the purposes of discussing personnel."[3] The Board asserted that "[t]he [O]pen [M]eetings [A]ct permits the board to discuss matters of personnel in executive session."[4] According to the response, during the executive session the Board:

> discussed a contract with the Macon County Sheriff's Office for the Sheriff's office to provide a full time officer to the Village.

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[1]E-mail from Donna Spears to Public Access Bureau (May 7, 2015).

[2]Letter from Neil P. Olson, Assistant Attorney General, Public Access Bureau, to Kenny Ervin, Village President, Village of Blue Mound (May 13, 2015).

[3]Letter from Kenny Ervin, Village President, Village of Blue Mound, to Neil P. Olson, Assistant Attorney General, Office of the Attorney General(May 19, 2015), at 1.

[4]Letter from Kenny Ervin, Village President, Village of Blue Mound, to Neil P. Olson, Assistant Attorney General, Office of the Attorney General (May 19, 2015), at 1.

> The purpose of the meeting was not to disband the Blue Mound Police Department but to listen to a proposal to be made by a Macon County Sheriff's Department representative.
>
> * * * There were no votes taken in the executive session nor any motions made regarding making any changes to the police department.[5]

The Board further asserted that the contract with the Macon County Sheriff's Office (Sheriff's Office) would result in cost savings to the Village.

The agenda for the May 4, 2015, regular meeting provided by the Board lists the eighth agenda item as "Executive Session," without additional details.[6] The full agenda for the May 4, 2015, regular meeting is as follows:

1. Minutes
2. Bills
3. Greg Dunn
4. Roger Cox
5. Tom Bingaman
6. Andy Bourey
7. Old Business
8. Executive Session

The open session minutes of the May 4, 2015, meeting reflect that the Board voted to go into executive session at 6:25 p.m. without providing a description of the subject of discussion or citing the relevant exception in section 2(c) of OMA (5 ILCS 120/2(c) (West

[5]Letter from Kenny Ervin, Village President, Village of Blue Mound, to Neil P. Olson, Assistant Attorney General, Office of the Attorney General (May 19, 2015), at 1.

[6]Village of Blue Mound [Board of Trustees], Agenda, Item 8 (May 4, 2015).

2014)) that would authorize the Board to hold a closed session.[7] The minutes further reflect that the Board reconvened in open session at 7:35 p.m. "to vote on the contract proposal presented by the Macon County Sheriff's Department * * * to provide police protection and support for the Village of Blue Mound with 30 days to review the contract."[8]

On May 28, 2015, the Public Access Bureau forwarded a copy of the Board's response to Ms. Spears.[9] On June 2, 2015, Ms. Spears replied that although the Board stated that the executive session was "for discussing personnel[,] * * * in truth it was to discuss a proposed contract (as mentioned in the letter from President Kenny Ervin and also in the meeting minutes submitted) with the Macon County Sheriffs [sic] Department."[10] Ms. Spears also pointed out that the meeting agenda listed only "executive session" as its final item and stated that "[t]here is nothing indicating what type of discussion was taking place in that executive session."[11]

At the request of the Public Access Bureau, the Board later produced a copy of the proposed contract between the Village and the Sheriff's Office, as well as a copy of the verbatim recording of the open session of the May 4, 2015, meeting. The Board also submitted a second response letter dated June 15, 2015, in which it reiterated that it closed part of the May 4, 2015, regular meeting to discuss the proposed contract with the Sheriff's Office, and added that "[e]ntering into this contract with the Sheriff's department would also mean that the Chief of the Police of Blue Mound would be losing his job in July of 2015."[12]

ANALYSIS

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 2014). Section 2(a) of OMA (5 ILCS 120/2(a) (West 2014)) 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." Such exceptions "are in derogation of the requirement that public bodies meet in the open, and

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[7]Village of Blue Mound Board of Trustees, Regular Meeting, May 4, 2015, Minutes, at 3.

[8]Village of Blue Mound Board of Trustees, Regular Meeting, May 4, 2015, Minutes, at 3.

[9]Letter from Neil P. Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Donna Spears (May 28, 2015).

[10]E-mail from Donna Spears to [Neil] Olson (June 2, 2015).

[11]E-mail from Donna Spears to [Neil] Olson (June 2, 2015).

[12]Letter from Kenny Ervin, Village President, Village of Blue Mound, to Neil P. Olson, Assistant Attorney General, Office of the Attorney General (June 15, 2015).

therefore, the exceptions ***are to be strictly construed, extending only to subjects clearly within their scope.***" (Emphasis added.) 5 ILCS 120/2(b) (West 2014).

Section 2a of OMA

In order for a public body to properly close a portion of a meeting, there must be:

> a majority vote of a quorum present, taken at a meeting open to the public for which notice has been given as required by this Act. * * * The vote of each member on the question of holding a meeting closed to the public and a citation to the specific exception contained in section 2 of this Act which authorizes the closing of the meeting to the public shall be publicly disclosed at the time of the vote and shall be recorded and entered into the minutes of the meeting. 5 ILCS 120/2a (West 2014).

Our review of the verbatim recording of the May 4, 2015, open session indicates that the Board did not cite a reason for its vote to enter into executive session. Moreover, the minutes of that meeting do not include a reference to a specific exception in section 2 of OMA that would authorize the Board to hold a closed session, or provide a general description of the subject to be discussed. In its response to this office, the Board described the subject of the closed session as "personnel," but did not cite a specific exception or explain why a discussion of "personnel" would authorize it to close part of the meeting. Although it is not necessary for a public body to indicate in a meeting agenda that it plans to hold a closed session or the subject to be discussed therein, the statute clearly requires a public body to cite the specific exception authorizing its action when it votes to enter closed session. Accordingly, this office concludes that the Board violated section 2a of OMA by not publicly disclosing and recording and entering into the minutes the specific exception authorizing the closing of a portion of the May 4, 2015, meeting to the public.

Section 2(c)(1) of OMA

Although the Board did not cite a specific exception authorizing it to enter into closed session during the May 4, 2015, meeting, it referred to "personnel" in its written response to this office. We note that public bodies frequently (but inappropriately) use the term "personnel" as a reference to section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2014)). This section does not provide a broad exception for discussions that might impact personnel. Instead, section 2(c)(1) provides that a public body may hold a closed meeting to discuss the "appointment, employment, compensation, discipline, performance, or dismissal of ***specific***

employees of 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." (Emphasis added.)

In construing the scope of the section 2(c)(1) exception, this office has stated:

> 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. * * * ***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.*** Ill. Att'y Gen. Pub. Acc. Op. No. 12-011, issued July 11, 2012, at 3. (Emphasis added.)

The verbatim recording and minutes of the May 4, 2015, closed session, as well as the Board's response to this Request for Review, indicate that the Board heard a presentation from a representative of the Sheriff's Office concerning a proposed contract for police services, and then discussed the scope and cost of that contract. Although the Board's decision to approve the contract may ultimately affect the employment status of certain Police Department employees, the Board did not discuss the performance or conduct of any **specific** employees, such as the Chief of the Police Department, during the closed session, other than a brief discussion about the Chief of the Police Department's awareness of the proposal. According to the Board, "[t]he purpose of the meeting was not to disband the Blue Mound Police Department but to listen to a proposal to be made by a Macon County Sheriff's Department representative."[13] The Board also described the proposed police services contract as a cost saving measure, rather than as a means of rectifying any shortcomings of a current employee or employees of the Police Department. Because the closed session discussion concerned a proposed contract with another public body rather than a personnel decision regarding a specific employee or employees of the

[13]Letter from Kenny Ervin, Village President, Village of Blue Mound, to Neil P. Olson, Assistant Attorney General, Office of the Attorney General (May 19, 2015), at 1.

Village, this office concludes that the Board violated section 2(a) of OMA by discussing in closed session matters outside the scope of the section 2(c)(1) exception.

Section 2.02(c) of OMA

The public policy of this State, as declared in section 1 of OMA (5 ILCS 120/1 (West 2014)) is that "citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2014)) provides that "[a]n agenda for each regular meeting shall be posted at the principal office of the public body and at the location where the meeting is to be held at least 48 hours in advance of the holding of the meeting." OMA further provides that "[a]ny 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." (Emphasis added.) 5 ILCS 120/2.02(c) (West 2014)).

The minutes of the May 4, 2015, open meeting indicate that the Board voted to approve the police services contract with the Sheriff's Office. The agenda for the May 4, 2015, meeting, however, does not contain any specific reference to this contract, or a general reference to police services for the Village. The agenda does not contain details about any item. It lists generic items ("Minutes," "Bills," "Old Business," and "Executive Session") and the names of certain individuals who were scheduled to speak before the Board. The information provided in the agenda does not suggest that final action was contemplated on any matter at the meeting.

Prior to the addition of section 2.02(c) to OMA, the Illinois Appellate Court held that the generic agenda item "New Business" did not provide sufficient advance notice of final action by a public body. *Rice v. Board of Trustees of Adams County*, 326 Ill. App. 3d 1120, 1123 (4th Dist. 2002). The Senate debate on House Bill No. 4687, which was enacted as Public Act 97-827, effective January 1, 2013, and added section 2.02(c) of OMA, indicates that the General Assembly intended section 2.02(c) to ensure that agendas provide sufficiently descriptive advance notice of the matters upon which a public body anticipates 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 agenda did not provide advance notice to the public that the Board was considering any change in the delivery of police services to the Village or, more specifically, that the Board might take final action to approve a contract with the Sheriff's Office for police services. Accordingly, this office concludes that the Board violated section 2.02(c) of OMA because the May 4, 2015, meeting agenda did not include the general subject matter of the contract for police services, which was the subject of final action.[14]

FINDINGS AND CONCLUSIONS

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

1) On May 7, 2015, Ms. Donna Spears submitted a Request for Review in which she alleged that the Board of Trustees of the Village of Blue Mound violated OMA by improperly holding a closed session during the May 4, 2015, regular meeting to discuss disbanding the Village of Blue Mound's Police Department. She also alleged that the agenda for the May 4, 2015, meeting did not include this topic. Ms. Spears'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 2014)).

2) On May 13, 2015, the Public Access Bureau sent a copy of the Request for Review to the Village President of Blue Mound and asked the Village Board to respond to Ms. Spears's allegations, and also to provide copies of the May 4, 2015, meeting agenda, open and closed session minutes, and the closed session verbatim recording for this office's review.

3) On May 22, 2015, the Board provided its written response and the requested materials. The response stated that the Board had entered into executive session at the May 4, 2015, meeting for the purpose of discussing "personnel," which is how it described a presentation by the Macon County Sheriff's Office regarding a contract to provide police protective services to the Village.

[14]The parties dispute whether the May 4, 2015, meeting agenda was posted within 48 hours of the meeting as required by section 2.02(a) of OMA. As this allegation was not part of the original Request for Review to which the Board responded, this office does not make a finding on this issue, other than to note that the content of the agenda did not provide adequate notice of the police services contract matter, regardless of when it was posted.

4) The Attorney General properly extended the time to issue a binding opinion by 21 business days, to August 4, 2015, pursuant to section 3.5(e) of OMA. Therefore, the Attorney General may properly issue a binding opinion with respect to Ms. Spears's Request for Review.

5) In order to close a portion of a meeting, section 2a of OMA requires a public body to cite the specific exception contained in section 2 of OMA which authorizes it to hold a closed session, and to vote to do so. The specific exception and the results of the vote must be publicly disclosed at the time of the vote and recorded and entered into the minutes of the meeting.

6) Section 2(a) of OMA requires that all meetings of public bodies be open to the public unless the subject of the meeting is covered by one of the limited exceptions enumerated in section 2(c). The subject that the Board cited as a basis for closing its meeting to the public was a discussion of "personnel." Although section 2(c)(1) does allow a public body to hold a closed session to discuss the "appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body," section 2(c) does not contain an exception authorizing a public body to hold closed sessions to discuss "personnel" in general or to discuss issues that may impact personnel.

7) The Board did not cite a specific exception enumerated in section 2 as a basis for closing a portion of its May 4, 2015, meeting. Accordingly, the Attorney General concludes that the Board violated section 2a of OMA by failing to publicly disclose and enter into the minutes an exception authorizing it to close a portion of the May 4, 2015, regular meeting.

8) Moreover, during its May 4, 2015, closed session, the Board primarily discussed the scope and cost of a proposed contract with the Sheriff's Office, and did not discuss the performance or conduct of any specific Village employees. Assuming that the Board intended to rely on section 2(c)(1) to hold its May 4, 2015, closed session, section 2(c)(1) does not authorize a public body to hold a closed session to discuss service contracts. Although the contract discussed by the Board could ultimately have an impact on the employment of Village employees, such discussions do not fall within the scope of section 2(c)(1). Accordingly, the Attorney General concludes that the Board violated OMA by discussing in closed session matters outside the scope of that section.

9) This finding necessarily compels the further finding that the Board violated section 2(a) of OMA, which requires that all meetings of public bodies be open to the public unless excepted by section 2(c), because the public was excluded from the improper closed session discussion.

10) Section 2.02(c) of OMA requires that a meeting agenda set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting.

11) The Board's May 4, 2015, regular meeting agenda did not contain an agenda item indicating that final action might be taken or any reference identifying the general subject matter of the police services contract. As a result, the agenda did not provide the public with advance notice that final action might be taken to enter into the police services contract. Accordingly, the Attorney General concludes that the Board violated section 2.02(c) of OMA by failing to include the general subject matter of this final action on the May 4, 2015, regular meeting agenda.

In accordance with these findings of fact and conclusions of law, the Board is directed to remedy these violations by: (1) disclosing to Ms. Spears and making available to the public a copy of the closed session minutes for and the verbatim recording of the closed session portion of the May 4, 2015, meeting; (2) reconsidering and re-voting on its May 4, 2015, final action at a properly noticed meeting for which the agenda specifically references the police services contract; and (3) conducting its future meetings in full compliance with OMA. As required by section 3.5(e) of OMA, the Board shall either take necessary action as soon as practical to comply with the directives of this opinion or shall initiate administrative review under section 7.5 of OMA (5 ILCS 120/7.5 (West 2014)).

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 2014). 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. Donna Spears as defendants. *See* 5 ILCS 120/7.5 (West 2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
Counsel to the Attorney General