OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 16, 2015

PUBLIC ACCESS OPINION 15-007
(Request for Review 2015 PAC 35861)

OPEN MEETINGS ACT:
Failure to Cite an Applicable Exception
Before Closing a Meeting to the Public;
Improper Discussion of a Hiring Freeze
in a Closed Meeting

Mr. Marty Hobe
Government Reporter
The Register-Mail
140 South Prairie Street
Galesburg, Illinois 61401

The Honorable Brian Friedrich
Chairman, Knox County Board
200 South Cherry Street
Galesburg, Illinois 61401-4992

Dear Mr. Hobe and Mr. Friedrich:

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), as amended by Public Act 99-402, effective August 19, 2015). For the reasons discussed below, this office concludes that the Finance Committee (Committee) of the Knox County Board (Board) violated section 2(a) of OMA (5 ILCS 120/2(a) (West 2014)) at its June 17, 2015, meeting by failing to cite the exceptions upon which it relied to enter into closed session and by improperly discussing a hiring freeze in the closed session.

BACKGROUND

On June 18, 2015, Mr. Marty Hobe, on behalf of *The Register-Mail*, submitted a Request for Review alleging that the Committee of the Board violated OMA during its June 17, 2015, meeting by improperly discussing certain subjects in closed session. Specifically, Mr. Hobe stated:

> [T]he Finance Committee of the Knox County Board went into a closed session to discuss personnel matters. The committee chairman announced the committee would go into a closed session and it was on the agenda for the meeting, handed out before the meeting started.
>
> However, in speaking with the board chairman (who was also in attendance) the next day he said the committee spoke about personnel as a general topic, not issues pertaining to specific employees. Particularly how personnel affects the county's budget and where cuts could be made.[1]

On June 24, 2015, the Public Access Bureau sent a copy of the Request for Review to the chairman of the Board and asked that the Committee or its representative provide a written response to the allegations contained therein, including identifying the specific section 2(c) exception (5 ILCS 120/2(c) (West 2014)) that the Committee cited when it voted to close a portion of the June 17, 2015, meeting to the public. This office also requested copies of the agenda, the verbatim recording of the closed session discussion,[2] and both the open and closed session meeting minutes.[3]

On July 6, 2015, Scott Erickson, the Knox County Clerk, responded on behalf of the Committee by sending the Public Access Bureau a copy of the closed session minutes and a written response stating that there is no audio recording of the closed portion of the Committee's June 17, 2015, meeting because "the digital recorder that was used was not functioning properly

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[1]E-mail from Marty Hobe, Government Reporter, *The Register-Mail*, to Sarah Pratt (June 18, 2015).

[2]Section 2.06(a) of OMA (5 ILCS 120/2.06(a) (West 2014)) requires each public body to keep a "verbatim record of all their closed meetings in the form of an audio or video recording."

[3]Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to The Honorable Brian Friedrich, Chairman, Knox County Board (June 24, 2015).

and therefore no audio is available."[4] The response further stated that the Committee discussed two matters related to personnel: (1) a County employee hiring freeze, pursuant to section 2(c)(2) of OMA (5 ILCS 120/2(c)(2) (West 2014)); and (2) the termination of a County employee position in the Regional Office of Education, pursuant to section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2014)).[5] The response also stated that at its June 2015, meeting, the full Board approved the hiring freeze and tabled a motion concerning the termination of the County employee position. On July 17, 2015, this office forwarded a copy of the Mr. Erickson's response to Mr. Hobe.[6] He did not reply.

On July 21, 2015, this office sent a letter to the County Clerk requesting a copy of the minutes of the open session and a written response identifying the specific section 2(c) exception or exceptions that the Committee publicly cited and identified as its basis for entering into closed session on June 17, 2015. This office also requested clarification as to "whether or not the County was engaged in active collective bargaining negotiations at the time of the meeting with the union of the employees who were discussed during the closed session."[7] On August 7, 2015, Mr. Erickson furnished a copy of the open session minutes and an additional written response.[8] On August 17, 2015, this office forwarded a copy of Mr. Erickson's response to Mr. Hobe.[9] Mr. Hobe did not reply. On August 17, 2015, this office also extended the time within which to issue a binding opinion by 21 business days pursuant to section 3.5(e) of OMA.[10]

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[4]Letter from Scott G. Erickson, CCO, Knox County Clerk, to Steve Silverman, Public Access Bureau, Illinois Attorney General's Office (July 6, 2015), at 1.

[5]Letter from Scott G. Erickson, CCO, Knox County Clerk, to Steve Silverman, Public Access Bureau, Illinois Attorney General's Office (July 6, 2015), at 1.

[6]Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to Marty Hobe, *The Register-Mail* (July 17, 2015).

[7]Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to Scott G. Erickson, Knox County Clerk (July 21, 2015).

[8]Letter from Scott G. Erickson, CCO, Knox County Clerk, to Steve Silverman, Public Access Bureau, Illinois Attorney General's Office (August 7, 2015).

[9]Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to Marty Hobe, *The Register-Mail* (July 17, 2015).

[10]Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to Marty Hobe, Government Reporter, *The Register-Mail*, and Scott G. Erickson, Knox County Clerk (August 17, 2015).

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

Section 2a of OMA

Section 2a of OMA (5 ILCS 120/2a (West 2014)) provides that "[t]he 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." (Emphasis added.) The Committee's response to this office indicates that it entered into closed session pursuant to sections 2(c)(1) and 2(c)(2) of OMA which, as discussed below, permit a public body to discuss the "appointment, employment, compensation, discipline, performance, or dismissal of specific employees" and "collective negotiating matters[,]" respectively. The open session minutes of the Committee's June 17, 2015, meeting state: "**Member Friedrich moved and Member Pitman seconded to enter into executive session to discuss personnel**. The motion passed unanimously."[11] (Emphasis in original.)

"Personnel" is defined as: "[c]ollectively, the people who work in a company, organization, or military force." *Black's Law Dictionary* (10th ed. 2014), *available at* Westlaw BLACKS. Notably, the word "personnel" does not appear in sections 2(c)(1) or 2(c)(2) of OMA, but it does appear in two other exceptions. *See* 5 ILCS 120/2(c)(8) (West 2014) ("Security procedures and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff, the public, or public property[ ]"); 5 ILCS 120/2(c)(14) (West 2014) ("Informant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, when discussed by a public body with criminal investigatory responsibilities."). A mere reference to "personnel" does not adequately identify any exception that authorizes a public body to close part of a meeting. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 15-005, issued August 4, 2015, at 5. The minutes do not indicate, nor has the Committee asserted, that it informed the public that it

[11]Knox County Board, Finance, Insurance, Treasurer, Judicial & Clerk Committees, Meeting, June 17, 2015, Minutes 2.

would discuss either the appointment, employment, compensation, discipline, performance, or dismissal of specific employees or collective negotiations matters prior to closing the meeting. Accordingly, the Committee violated section 2a of OMA by failing to publicly disclose and record in the minutes that it entered into closed session pursuant to sections 2(c)(1) and 2(c)(2) of OMA.

Section 2(c)(1) of OMA

Section 2(c)(1) of OMA permits a public body to close a portion of a meeting to discuss "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body[.]" *See* Ill. Att'y Gen. Pub. Acc. Op. No. 12-011, issued July 11, 2012, at 3 ("[T]he exception is intended to permit public bodies to candidly discuss the relative merits of individual employees[.]"); *see also* Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 9 ("This provision is intended to protect the identity of prospective appointees or employees, and reputation of public employees").

Mr. Erickson's response to this office asserts, and the minutes of the closed session confirm, that a portion of the Committee's June 17, 2015, closed session discussion concerned "the termination of [a County employee] position in the Regional Office of Education. This position is paid for by the County[.]"[12] Our review of this matter is hampered by the lack of the required verbatim recording of the closed session. The available information, however, indicates that the Committee discussed the elimination of a particular County position as well as how the elimination of that position would affect the employment of a specific employee. The elimination of a job or position – even one held by only a single employee – for budgetary or other reasons unrelated to the performance of the employee is a matter relating to budget and management which does not carry implications for an individual employee's reputation. Thus, a discussion of eliminating a position itself which does not consider the performance of the employee or whether a particular employee should occupy the position, is not within the scope of the section 2(c)(1) exception. Although a public body may properly enter closed session to consider whether to eliminate a position based on an evaluation of a specific employee's performance, neither the closed session minutes nor the Committee's responses to this office provide any indication that the employee's performance was a factor in this instance. Therefore, only the portion of the closed session discussion which focused on how the elimination of the position would affect the specific employee who held the position was authorized by the section 2(c)(1) exception.

[12]Letter from Scott G. Erickson, CCO, Knox County Clerk, to Steve Silverman, Public Access Bureau, Illinois Attorney General's Office (July 6, 2015), at 1.

Section 2(c)(2) of OMA

Mr. Erickson's response to this office and the closed session minutes indicate that the discussion during the remainder of the closed session concerned the possibility of imposing a hiring freeze. The Committee's response stated that it relied on the section 2(c)(2) exception to close that portion of the discussion. Section 2(c)(2) permits a public body to close a meeting to discuss "[c]ollective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees."

The collective negotiation exception reflects the General Assembly's "recognition of the view that the very nature of meaningful collective bargaining requires that certain ***phases of the negotiating process*** must be conducted privately." (Emphasis added.) Ill. Att'y Gen. Op. No. 80-024, issued August 12, 1980, at 10-11. Thus, Attorney General Fahner advised that "as a general rule * * *, a public body may meet privately to consider a collective negotiating response[ ]" during an active collective bargaining process. Ill. Att'y Gen. Op. No. 80-024, at 10. Similarly, in *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 175-76 (5th Dist. 1989), the Illinois Appellate Court concluded that the section 2(c)(2) exception permitted a school board to close a meeting to discuss extending a term in a previous collective bargaining agreement with a teachers' union to the then-existing agreement; a proposed amendment to a collective bargaining agreement after the teachers' union threatened to file a grievance; and a request for mediation with the teacher's union.

Mr. Erickson's initial response to this office asserted that the Committee's discussion of the hiring freeze was authorized under section 2(c)(2) because "the majority of the employees in the employ of the County are covered under collective bargaining agreements with their respective Unions, [and] * * * discussion of this option in an open setting would present the potential for issues with said collective bargaining units and the County."[13] However, Mr. Erickson's supplemental response to this office conceded that the "County was not in active negotiations with it[s] collective bargaining units at" the time of the meeting, "but [was] preparing for such contact if the situation did arise."[14] Therefore, the hiring freeze was not a matter of "collective negotiation" between the County and its employees or their union representatives, but rather a unilateral proposal considered by the Committee and subsequently

[13]Letter from Scott G. Erickson, CCO, Knox County Clerk, to Steve Silverman, Public Access Bureau, Illinois Attorney General's Office (July 6, 2015), at 1.

[14]Letter from Scott G. Erickson, CCO, Knox County Clerk, to Steve Silverman, Public Access Bureau, Illinois Attorney General's Office (August 7, 2015).

acted upon by the Board.[15] The section 2(c)(2) exception does not encompass a discussion of unilateral budgetary actions that would affect members of collective bargaining units outside of active or imminent collective bargaining. Further, Mr. Erickson's response to this office acknowledged that some of the employment positions to which the hiring freeze applies are not covered by collective bargaining agreements. Accordingly, this office concludes that the Committee's closed session discussion of the hiring freeze was not authorized by section 2(c)(2); therefore, the Committee violated section 2(a) of OMA by improperly closing the discussion to the public.

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 June 17, 2015, the Knox County Board's Finance Committee closed a portion of its meeting to the public "to discuss personnel."

2) On June 18, 2015, Mr. Marty Hobe submitted a Request for Review in which he alleged that the Committee violated OMA by discussing general personnel matters in the closed session rather than discussing specific employees. Mr. Hobe'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), as amended by Public Act 99-402, effective August 19, 2015).

3) On June 24, 2015, the Public Access Bureau sent a copy of the Request for Review to the Chairman of the Board and asked the Committee to respond to Mr. Hobe's allegations and to provide copies of the Committee's June 17, 2015, agenda, open and closed session minutes, and closed session verbatim recording for this office's review.

4) On July 6, 2015, the Knox County Clerk, on behalf of the Committee, provided a written response and a copy of the closed session minutes of the Committee's June 17, 2015, meeting. The response stated that the Committee had relied on the section 2(c)(1) exception to discuss the termination of an employee and had discussed a hiring freeze pursuant to the section 2(c)(2) exception. The response also indicated that the Board subsequently approved the hiring freeze but tabled a motion concerning the termination of the employee. The response did not include a copy of the open session minutes or the verbatim recording of the closed session portion of the meeting; the response stated that a verbatim recording does not

[15] Letter from Scott G. Erickson, CCO, Knox County Clerk, to Steve Silverman, Public Access Bureau, Illinois Attorney General's Office (July 6, 2015), at 1.

exist because the digital recorder used by the Committee malfunctioned. On July 17, 2015, the Public Access Bureau forwarded a copy of the response to Mr. Hobe; he did not reply.

5) On July 21, 2015, this office sent a letter to the County Clerk requesting a copy of the Committee's open session minutes, a written response identifying the exception(s) the Committee publicly cited when it entered closed session, and clarification as to whether the County was engaged in collective bargaining with its employees' union at the time of the meeting.

6) On August 7, 2015, the County Clerk sent this office a copy of the open session minutes and a written response stating that the County was not in active collective bargaining at the time of the meeting. The open session minutes indicated that the Committee publicly cited and identified the exception for "personnel" to close the meeting. On August 17, 2015, the Public Access Bureau forwarded a copy of the response to Mr. Hobe; he did not reply.

7) On August 17, 2015, this office extended the time within which to issue a binding opinion by 21 business days, to September 16, 2015, pursuant to section 3.5(e) of OMA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) 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). Section 2a of OMA provides that 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."

9) The reference to "personnel" in the Committee's motion to close the meeting and the meeting minutes did not sufficiently disclose that the Committee was asserting section 2(c)(1) and section 2(c)(2) as its bases for closing its discussion to the public, in violation of section 2a of OMA. The Committee also violated OMA by failing to enter into its meeting minutes the specific exceptions authorizing the closing of the July 17, 2015, meeting.

10) Our review of the pertinent materials provided by the County Clerk reflects that during the Committee's June 17, 2015, closed session, the Committee discussed the elimination of a County employee position in the Regional Office of Education, the employment of a particular employee in that office, and a proposed countywide hiring freeze.

11) Section 2(c)(1) of OMA permits a public body to close a meeting or a portion thereof to discuss employment-related topics such as the performance, discipline, or dismissal of specific employees of the public body. The Committee's closed session discussion of how the elimination of a position would affect the employment of a specific employee was authorized by the section 2(c)(1) exception. The portion of the closed session discussion concerning the elimination of a County employee's position in the Regional Office of Education for reasons unrelated to the employee's performance, however, was not authorized by the section 2(c)(1) exception.

12) Because the County was not engaged in collective bargaining at the time of the meeting, the hiring freeze did not a constitute a "[c]ollective negotiating matter[ ] between the public body and its employees or their representatives[.]" 5 ILCS 120/2(c)(2) (West 2014). Accordingly, the Attorney General concludes that the Committee violated OMA by discussing in closed session matters outside the scope of the section 2(c)(2) exception.

13) These findings necessarily compel the further finding that the Committee violated section 2(a) of OMA, because meetings of public bodies must be open to the public unless properly closed under section 2a.

In accordance with these findings of fact and conclusions of law, the Committee is directed to remedy these violations by disclosing to Mr. Hobe the closed session minutes of its June 17, 2015, meeting. The Committee may redact the last sentence of the third paragraph in the body of the minutes that identifies a specific, named County employee because it relates to a matter that was properly discussed in closed session. The Committee is also directed to conduct its future meetings in full compliance with OMA, including the use of properly functioning recording equipment. As required by section 3.5(e) of OMA, the Committee 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 Mr. Marty Hobe 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

cc: The Honorable Scott G. Erickson
Knox County Clerk
Knox County Courthouse
200 South Cherry Street
Galesburg, Illinois 61401-4992