



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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August 12, 2011

Via Electronic Mail

Mr. Kevin P. Craver, Senior Reporter
Northwest Herald
kcraiver@shawsuburban.com

The Honorable Ken Koehler
Chairman, McHenry County Board
2200 N. Seminary Avenue
Woodstock, IL 60098

RE: Open Meetings Act Request for Review – 2011 PAC 14722

Dear Mr. Craver and Mr. Koehler:

Pursuant to section 3.5(a) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(a) (West 2010)), we have received a Request for Review in which Mr. Kevin Craver of the *Northwest Herald* alleges the Legislative and Intergovernmental Affairs Committee (Committee) of the McHenry County Board (Board) failed to comply with the requirements of OMA. We have considered the Board's response to the allegations in the Request for Review as well as Mr. Craver's reply to that response.

Mr. Craver alleges that six Board members held a private gathering on May 24, 2011, about one hour before a scheduled meeting of the committee, to discuss an alternative to a proposed redistricting map. Three of the Board members who participated in the private gathering belonged to the seven-person committee. The proposed redistricting map, which was on the agenda for the scheduled committee meeting, required committee approval before it could be considered by the full Board.

In response to our further inquiry, the Board indicated that several Board members met to:

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[D]etermine whether an alternative map, drawing different boundary lines for proposed districts, should be considered or brought forward to the Legislative Committee meeting. * * * The discussion that took place was simply to determine whether the proposed alternate map * * * met the approval of a few other members of the County Board who would be significantly affected by changes to the map.¹

The discussion initially included two members of the committee, Marc Munaretto and Nick Provenzano. A third committee member then arrived:

When John Jung arrived it was immediately realized that the three of them could not be part of the discussion at the same time. To avoid a violation of the Open Meetings Act, one of the three Legislative Committee [m]embers left the gathering and did not return until one of the two remaining members had left the room. John Jung and Nick Provenzano alternated out of the discussion at least one time in order to view the map and/or provide comments on the suggested map changes to be brought to the Legislative Committee.²

There was no agenda for the private gathering, and no minutes were recorded. Mr. Craver's Request for Review alleges that the private gathering "violates both the letter and the spirit of [OMA], which is a meaningless law if public bodies can meet without notice and without recording minutes simply by swapping out one or more members."³

Minutes from the subsequent committee meeting show that the committee discussed the alternate map but ultimately adopted the original proposed redistricting map by a vote of 4-3, with Mr. Jung voting in favor and Mr. Munaretto and Mr. Provenzano voting in opposition. Mr. Munaretto then distributed copies of the alternate map via email to all 24 Board members "for the purpose of having the County Board still consider the alternate map, even though the Legislative Committee had passed the Resolution with the original map."⁴ The

¹Letter from Kenneth D. Koehler, McHenry County Board Chairman, to Steve Silverman, Assistant Attorney General, Office of the Attorney General (June 30, 2011).

² *Id.*

³Email from Kevin P. Craver, Senior Reporter, Northwest Herald, to Sarah Pratt, Acting Public Access Counselor, Office of the Attorney General (June 9, 2011, 7:19 p.m.).

⁴Letter from Kenneth D. Koehler, McHenry County Board Chairman, to Steve Silverman, Assistant Attorney General, Office of the Attorney General (June 30, 2011).

original proposed redistricting map was approved at the Board's June 21, 2011, meeting; amendments based on the alternate map were rejected.

DETERMINATION

Section 2 of OMA (5 ILCS 120/2 (West 2010)) provides that "all meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." Section 2.02(a) (5 ILCS 120/2.02(a) (West 2010)) also requires a public body to provide at least 48 hours advance notice for all special meetings, "except a meeting held in the event of a bona fide emergency[.]" In addition, section 2.06(a) (5 ILCS 120/2.06(a) (West 2010)) requires public bodies to "keep written minutes of all their meetings, whether open or closed, and a verbatim record of all their closed meetings in the form of an audio or video recording."

The facts are undisputed that the committee failed to provide notice for the private gathering, close the gathering to the public pursuant to a section 2(c) exception (5 ILCS 120/2(c) (West 2010)) in accordance with the procedural requirements of section 2(a), or keep written minutes or a verbatim recording of the discussion. Therefore, our determination hinges on whether the private gathering constitutes a "meeting" under OMA. Section 1.02 (5 ILCS 120/1.02 (West 2010)) defines a public meeting as:

[A]ny 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. (Emphasis added.)

We note that "contemporaneous interactive communication" under section 1.02 does not require the continuous and uninterrupted presence of a majority of a quorum. "Contemporaneous" is defined as "existing, occurring, or originating during the same time," as in "the contemporaneous publication of two articles" or "contemporaneous accounts of the battle from officers on both sides[.]"⁵ "Interactive" is defined as "mutually or reciprocally active" or "involving the actions or input of a user; *especially* : of, relating to, or being a two-way electronic communication system (as a telephone, cable television, or a computer) that involves a user's orders (as for information or merchandise) or responses (as to a poll)[.]" (Emphasis in

⁵ Merriam-Webster Online Dictionary, available at <http://www.merriamwebster.com/dictionary/contemporaneous?show=0&t=1312929447> (last visited August 9, 2011).

original.)⁶ Thus, a "contemporaneous interactive communication" occurs in the same general time frame, but is not necessarily simultaneous. See John H. Brechin, *E-Mail and the Open Meetings Act*, Illinois Bar Journal, 94 ILBJ 666, 667 (2006).

Illinois courts do not appear to have considered whether the requirements of OMA apply to a gathering in which a public body intentionally avoids the simultaneous presence of a majority of a quorum by alternating members in and out of the discussion. Courts in other jurisdictions, however, have been intolerant of similar practices. A federal District Court found that a series of informal gatherings of small groups individually composed of less than a quorum of the members of the San Antonio City Council prior to a scheduled meeting violated the Texas version of OMA because the discussions were intended to "reach a decision in private while avoiding the technical requirements" of the law. *Esperanza Peace and Justice Center v. City of San Antonio*, 316 F. Supp.2d 433, 477 (W.D. Tex., 2001). Similarly, the Ohio Supreme Court held that members of the Cincinnati City Council who collectively formed a quorum violated the Ohio Sunshine law by gathering in small groups for private, back-to-back discussions regarding a new football stadium. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St. 3d 540, 544, 669 N.E.2d 903, 906-07 (1996).

To find that Cincinnati's game of "legislative musical chairs" is allowable under the Sunshine Law would be to ignore the legislative intent of the statute, disregard its evident purpose, and allow an absurd result. * * * To rule in Cincinnati's favor would be to endorse the behavior undertaken by city council and the city manager in this case and make it applicable to every city council meeting in Ohio. The statute that exists to shed light on deliberations of public bodies cannot be interpreted in a manner which would result in the public being left in the dark.

OMA is intended to "ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly[.]" and to "protect the citizen's right to know[.]" 5 ILCS 120/1 (West 2010)). Further, "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.*" (Emphasis added.) 5 ILCS 120/1 (West 2010). The Office of the Attorney General has noted that "whether a gathering falls within the definition of a meeting, as used in the Act, would depend on the peculiar facts in each situation." 1974 Ill. Att'y Gen. Op. 123. A gathering in which facts are exchanged for the purpose of reaching a decision and different courses of actions are contemplated constitutes a meeting under OMA. *Nabhani v. Coglianesi*, 552 F. Supp. 657, 661 (N.D. Ill., 1982).

⁶ Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/interactive> (last visited August 9, 2011).


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In this instance, it is undisputed that three members of the committee, which is a majority of a quorum, were physically present for a private gathering to discuss an alternative to the proposed redistricting map. The members of the committee participated in a contemporaneous, interactive discussion concerning the alternative map, which the committee subsequently considered a short time later at its scheduled meeting. Although it does not appear that the members of the committee acted in bad faith by rotating in and out of the private gathering, it is clear they did so in order to discuss committee business without triggering the openness, notice, and recordkeeping requirements of OMA. We conclude that this maneuvering violated the spirit and intent of OMA. Finding otherwise would have the absurd result of sanctioning secret deliberations and discussions of public business provided that members of a public body rotate in and out of the meeting room to avoid the simultaneous presence of a majority of a quorum. Further, a "meeting" under OMA only requires contemporaneous -- rather than simultaneous -- interactive communication of a majority of a quorum. Accordingly, we conclude that the private gathering constituted a "meeting" under section 1.02 of OMA, and that the committee violated the openness, notice, and recordkeeping requirements of sections 2, 2.02(a), and 2.06(a) of OMA.

There is no remedial action that the committee can take to redress these violations, as the meeting was neither recorded nor documented with minutes, and the discussions did not lead to the adoption of the alternate redistricting map. However, we urge members of the committee to adhere to the requirements of OMA, and to avoid attempting to circumvent those requirements by rotating members in and out of discussions pertaining to committee business.

If you have any question, please contact me at (312) 814-6756. This letter shall serve to close this matter.

Very truly yours,



STEVE SILVERMAN
Assistant Attorney General
Public Access Bureau

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cc: Ms. Jamie Rein, Assistant State's Attorney
McHenry County State's Attorney's Office
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