



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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April 7, 2017

Via electronic mail

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Via electronic mail

The Honorable Richard Hill
Mayor of Round Lake Beach
Chairman, Northwest FPA Wholesale Policy Advisory Committee
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RE: OMA Request for Review – 2016 PAC 44652

Dear Mr. Gardiner and Mayor Hill:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2015 Supp.)). For the reasons explained below, the Public Access Bureau concludes that the Northwest Facilities Planning Area Wholesale Policy Advisory Committee (Committee) violated the requirements of OMA in connection with an October 5, 2016, gathering.

BACKGROUND

On October 21, 2016, Mr. Thomas Gardiner, on behalf of the Village of Fox Lake (Fox Lake), submitted this Request for Review alleging that during an October 5, 2016, special meeting, the Committee violated OMA by, among other things, (1) failing to provide an agenda and post notice of the meeting at the Committee's principal office; (2) failing to provide media notification; and (3) by not making the meeting open to the public for public comment.

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On November 4, 2016, this office sent a copy of the Request for Review to the Committee and requested a written response addressing: (1) whether the Committee posted an agenda and public notice at least 48 hours prior to the October 5, 2016, meeting pursuant to section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2014)), and if so, to provide the office with copies of the notice and the agenda and an explanation of when and where they were posted; (2) whether any news medium had filed an annual request for notification of the Committee's meetings under section 2.02(b) of OMA (5 ILCS 120/2.02(b) (West 2014)), and if so, to furnish this office with a copy of any such notification that was provided for the Committee's October 5, 2016, meeting; and (3) whether any member of the public asked to address the Committee during its October 5, 2016, meeting, and if any individual did so and was denied an opportunity to comment, to explain why and provide a copy of the Committee's established and recorded rules governing public comment. This office also asked for copies of all minutes from that meeting, whether from open or closed sessions. On November 10, 2016, Mayor Richard H. Hill responded in his capacity as the Chairman of the Committee, and the Lakes Region Sanitary District, the Village of Round Lake, and the Village of Round Lake Heights responded as wholesaler members of the Committee. They argued that the gathering on October 5, 2016, was not a "meeting" as defined in section 1.02 of OMA (5 ILCS 120/1.02 (West 2014)).¹ On November 30, 2016, Fox Lake submitted a reply. On February 13, 2017, the Lakes Region Sanitary District, the Village of Round Lake, and the Village of Round Lake Heights provided a supplemental response.

DETERMINATION

"The Open Meetings Act provides that public agencies exist to aid in the conduct of the people's business, and that the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly." *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989). 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 1.02 of OMA defines "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[.]

¹The wholesalers asserted that Fox Lake's Request for Review was unclear as to whether it was alleging a meeting of the full Northwest FPA Wholesale Advisory Committee or its subcommittee, the Northwest FPA Wholesale Policy Advisory Committee. In its reply, Fox Lake clarified that it was alleging that the October 5, 2016, meeting held in violation of OMA was of the Northwest FPA Wholesale Policy Advisory Committee.

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If a gathering of public body members is determined to be a "meeting," then all the requirements of OMA apply, including proper posting of notice and an agenda (5 ILCS 120/2.02 (West 2014)), holding the meeting at a specified time and place that is convenient and open to the public (5 ILCS 120/2.01 (West 2014)), keeping minutes, and allowing public comment (5 ILCS 120/2.06(a), (g) (West 2014), as amended by Public Act 99-515, effective June 30, 2016).

OMA "is not intended to prohibit bona fide social gatherings of public officials, or truly political meetings at which party business is discussed. Rather, the Act is designed to prohibit secret deliberation and action on business which properly should be discussed in a public forum due to its potential impact on the public." *People ex rel. Difanis v. Barr*, 83 Ill. 2d 191, 202 (1980); *see also Nabhani v. Coglianese*, 552 F. Supp. 657, 660-61 (N.D. Ill. 1982):

A "meeting" under the Act, has been variously described as a gathering "designed to discuss or reach an accord with regard to public business," [citation], or as "collective discussion...and exchange of facts preliminary to the ultimate decision." [Citation] Third New International Dictionary (1976) defines "deliberate" as follows: "to ponder or think about with measured careful consideration and often with formal discussion before reaching a decision or conclusion."

The Office of the Attorney General has stated that "whether a gathering falls within the definition of meeting as used in the Act, would depend upon the peculiar facts in each situation." Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 126. The Office of the Attorney General has also noted that "[i]n theory, there is no absolute prohibition against the members of a public body attending an 'informational meeting' without triggering the application of" OMA, as long as the members do not make "[d]eliberational statements" or engage in the discussion of public business amongst themselves. Ill. Att'y Gen. Op. No. 95-004, issued July 14, 1995, at 10-11. In that opinion, the Attorney General concluded that the "mere fact that a majority of a quorum of the members of a public body attend and participate in a bona fide presentation on new legislative developments in an area of public concern" did not make the presentation subject to OMA, but the extensive discussions of public business by members of two county boards during the presentation did trigger the requirements of OMA. (Emphasis in original.) Ill. Att'y Gen. Op. No. 95-004, at 10-11; *see also Nabhani*, 552 F. Supp. at 661 (a gathering does not constitute a meeting for purposes of OMA when there is "no examining or weighing of reasons for or against a course of action, no exchange of facts preliminary to a decision, [or] no attempt to reach accord on a specific matter of public business.").

The Committee is a subcommittee of the Northwest Facilities Planning Area Wholesale Advisory Committee, which was formed in accordance with two contracts: (1) the agreement between Lake County and Fox Lake for sanitary sewer treatment service and (2) the

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agreement between Lake County and a group of wholesalers (including the Lakes Region Sanitary District, the Village of Round Lake, the Village of Round Lake Heights, and six others) for sanitary sewer transport and treatment service. The "Agreement for Sewage Disposal" entered into between Lake County and Fox Lake describes the Committee as follows:

1.35. Wholesale Policy Advisory Committee.

An advisory body comprised of one representative from each of the County, the Village, and each municipality, sanitary district, and public utility company that (i) owns local sewers that are located within the Northwest Lake FPA; (ii) is served by the Northwest Regional Water Reclamation Facility; and (iii) is a party to a current contract for such service with the County ("Wholesalers"). Representatives (as well as any alternative representatives) are to be approved by resolution of the respective corporate authorities of the County, the Village, and each Wholesaler. Representatives and alternate representatives shall be either members of the corporate authorities or administrative officials of the County, the Village, or a Wholesaler. The Wholesale Policy Advisory Committee is established for the ***purposes of communication and coordination on matters of mutual concern regarding sanitary sewerage service throughout the Northwest Lake FPA.***^{2]} (Emphasis added.)

The wholesalers pay for the sanitary sewer services, from which separate payments are made to Lake County and Fox Lake. On November 9, 2016, Lakes Region Sanitary District, the Village of Round Lake, and the Village of Round Lake Heights filed a complaint in the Nineteenth Judicial Circuit, Lake County, Illinois, against Lake County and Fox Lake alleging breach of contract and seeking relief related to the alleged overcharging of wholesalers.

Fox Lake contends that the discussion at the October 5, 2016, gathering concerned the Lake County and Fox Lake contract and was therefore a discussion of public business within the purview of the Committee's purposes. Fox Lake also argues that attendees at the October 5, 2016, gathering identified and agreed to items to be included in the agenda for the Committee's October 13, 2016, special meeting.

The Committee includes eleven members. Therefore, six members constitute a quorum, and a majority of the quorum is four members. The Committee does not dispute that six

²Letter from Thomas G. Gardiner to Laura S. Harter, Assistant Attorney General, Public Access Bureau, Exhibit 2 (November 30, 2016), at 9.

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Committee members were present at the October 5, 2016, gathering, but it argues that the matters discussed were beyond the purview of the Committee. The Committee contends that the "meeting was held solely for the purposes of exchanging information amongst potential plaintiffs. Each wholesaler was interested in recovering the Fox Lake/County overcharges, and each was independently considering the option of litigation against Fox Lake and the County."³ The wholesalers met in their individual capacities to exchange information among potential plaintiffs and to "collect information and discuss strategy related to the inappropriate conduct of Fox Lake and the County of Lake."⁴ The Committee argues that the gathering did not result in any official action to be taken by the Committee or any advisory opinion to be shared with the Committee, but rather the gathering resulted in each wholesaler making an independent decision regarding whether to pursue legal action against Fox Lake and Lake County. As proof, the Committee points out that the gathering resulted in three of the wholesalers joining a lawsuit against Fox Lake and Lake County. The Committee denies that there was any agenda-setting or discussion of matters to be addressed at the October 13, 2016, special meeting.⁵

The Committee has informed this office that there are no minutes or agenda from the October 5, 2016, gathering. The only evidence provided to this office that references the October 5, 2016, gathering is two e-mails provided by Fox Lake. In the first e-mail, sent on October 2, 2016, Kurt Stimpson of the Lakes Region Sanitary District announced an "[i]nformation meeting re: LC/FL Agreement and how it affects our constituents." He addressed the e-mail to "Policy Committee Members" and began by noting that there had been very limited information at the Committee meetings regarding the Lake County and Fox Lake agreement issue. He wrote:

[w]e would like to take the opportunity to clarify the issues, as we understand them, to the Villages and utilities that are tributary to the County system. We are proposing an **information session at the District office at 4pm on Wednesday, October 5th**. We will explain the events to date, as well as the various documents that are being referenced. This will be helpful for many of us prior to

³Letter from Robert T. O'Donnell to Laura S. Harter, Assistant Attorney General, Public Access Bureau (November 10, 2016), at 2.

⁴Letter from Robert T. O'Donnell to Laura S. Harter, Assistant Attorney General, Public Access Bureau (November 10, 2016), at 2.

⁵See letter from Robert T. O'Donnell to Laura S. Harter, Assistant Attorney General, Public Access Bureau (February 13, 2017). Although Fox Lake alleges that the Committee engaged in agenda-setting for the October 13, 2016, special meeting at the October 5, 2016, gathering, it has presented no evidence to substantiate its claim. Based on the limited information provided to this office, we cannot conclude that the Committee discussed or planned the agenda for the October 13, 2016, special meeting.

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the scheduled October 13th Special Meeting of the NW Policy Group.

We recommend you also bring your village administrators/managers for this discussion.^[6] (Emphasis in original.)

The second e-mail was sent by Mayor Dan MacGillis of the Village of Round Lake in response to Mr. Stimpson's e-mail. He wrote:

Thank you for offering this information meeting to describe complicated contracts and accounting principles. I encourage all policy members to attend this meeting along with your administrators. It is our fiduciary responsibility to best understand how our users fees have been misallocated once again. The future holds an agreement/settlement between Lake County and Fox Lake. We must feel satisfied that this is accomplished appropriately.^[7]

As described in the e-mails, the purposes of the October 5, 2016, gathering were to have an information session to prepare members for the October 13, 2016, special meeting, to provide information for general understanding, and to prepare members to assess any proposed settlement between Lake County and Fox Lake. The general topics discussed—the Lake County and Fox Lake contract and the alleged misallocation of fees—were within the scope of the Committee's "purposes of communication and coordination on matters of mutual concern regarding sanitary sewerage service throughout the Northwest Lake FPA" and therefore were matters of public business. Indeed, the Committee discussed the subject of the misallocation of fees at its May 11, 2016, July 13, 2016, and September 14, 2016 meetings.⁸ The topic was also the focus of the Committee's October 13, 2016, special meeting.⁹ Further, although the e-mails

⁶Letter from Thomas G. Gardiner to Laura S. Harter, Assistant Attorney General, Public Access Bureau, Exhibit 1 (November 30, 2016), at 2.

⁷Letter from Thomas G. Gardiner to Laura S. Harter, Assistant Attorney General, Public Access Bureau, Exhibit 1 (November 30, 2016), at 1.

⁸Northwest Lake County Wholesale Sewer Policy Advisory Committee, Meeting, May 11, 2016, Minutes 3; Northwest Lake County Wholesale Sewer Policy Advisory Committee, Meeting, July 13, 2016, Minutes 3; Northwest Lake County Wholesale Sewer Policy Advisory Committee, Meeting, September 14, 2016, Minutes 5-6.

⁹Northwest Lake County Wholesale Sewer Policy Advisory Committee, Special Meeting, Agenda (October 13, 2016); Northwest Lake County Wholesale Sewer Policy Advisory Committee, Special Meeting, October 13, 2016, Minutes.

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characterized the gathering as an "information meeting," and information sharing, which without more, would not necessarily trigger the requirements of OMA, the Committee did more than passively listen to a presentation or a workshop; the attendees "discuss[ed] strategy related to the inappropriate conduct of Fox Lake and the County."¹⁰

The Committee asserts that its discussion of the prospect of litigation on the misallocation of fees, and litigation by individual wholesalers is not the business of the Committee. Notably, the individual who called the gathering indicated in the e-mail cited above that the planned explanation of events and documents would be helpful information for an upcoming Committee meeting. Even if this office accepts the Committee's assertions regarding the purpose of the gathering, its logic is unpersuasive. Under the Committee's reasoning, there was no meeting because the attendees were not deliberating on a course of action that could be taken by the Committee, but on a course of action that could only be taken by the individual wholesalers. However, there is no question that the subject matter discussed was public business, as misallocation of fees had been before the Committee in the past and would appear before the Committee in the future. The Committee appears to be arguing for a narrow definition of a meeting that would allow members of public bodies to gather to discuss matters of public business so long as they could claim that no course of action by the public body was discussed. This office declines to interpret the requirements of OMA so narrowly. As noted in the case law, a meeting under OMA is a gathering "designed to discuss *or* reach an accord with regard to public business," *People ex rel. Difanis*, 83 Ill.2d at 210 (emphasis added), or a "collective discussion...and exchange of facts preliminary to the ultimate decision," Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 125. Finding that public bodies may convene out of the public view to discuss matters of public business at length solely because they did not also agree to a course of action would be contrary to the spirit of the law.

Even though one outcome of the October 5, 2016, gathering was that individual wholesalers decided whether to pursue litigation, the underlying subject matter of the meeting was still public business. Accordingly, based on the available information, this office concludes that in connection with its October 5, 2016, gathering, the Committee violated section 2.02 of OMA by holding a meeting without proper posting of notice and an agenda; section 2.01 of OMA by failing to hold the meeting at a specified time and place that was open to the public; and section 2.06(a) of OMA by failing to keep minutes of the meeting, and section 2.06(g) of OMA by failing to allow public comment. Because the Committee does not appear to have voted upon items of final action at the meeting, no further remedial action is required, but this office cautions the Committee to comply with all of the requirements of OMA when gathering for a meeting where matters of public business will be discussed, including proper posting of notice and an agenda pursuant to section 2.02 of OMA, holding the meeting at a specified time

¹⁰Letter from Robert T. O'Donnell to Laura S. Harter, Assistant Attorney General, Public Access Bureau (November 10, 2016), at 2.


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and place that is convenient and open to the public pursuant to section 2.01 of OMA, and keeping minutes and allowing public comment pursuant to section 2.06 of OMA.

In its Request for Review, Fox Lake also asserted that the Committee violates OMA at its general meetings by failing to post notice of the meetings at its principal office or on a website. Although the Request for Review did not allege sufficient facts for this office to review the allegation, we again caution the Committee to follow the notice procedures provided in section 2.02 of OMA (5 ILCS 120/2.02 (West 2014)).

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at the Springfield address on the first page of this letter. This letter serves to close this file.

Very truly yours



LAURA S. HARTER
Assistant Attorney General
Public Access Bureau

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206g pub comment improper mun

cc: *Via electronic mail*
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