



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

January 26, 2021

Via electronic mail

The Honorable Jeffrey Nowland
Trustee
Jefferson County Board
100 South 10th Street, Room 106
Mt. Vernon, Illinois 62864
jnowland@mtv80.org

Via electronic mail

The Honorable Clifford Lindemann
Chairman
Jefferson County Board
100 South 10th Street, Room 106
Mt. Vernon, Illinois 62864
district8@jeffil.us

RE: OMA Request for Review – 2020 PAC 65448

Dear Mr. Nowland and Mr. Lindemann:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) 5 ILCS 120/3.5(e) (West 2018)). For the reasons discussed below, this office concludes that the Jefferson County Board (Board) violated OMA on October 26, 2020, by discussing public business outside of an open public meeting.

BACKGROUND

On October 27, 2020, Mr. Jeffrey Nowland, a member of the Board, submitted a Request for Review to the Public Access Counselor alleging that the Board violated OMA prior to its October 26, 2020, Board meeting when some of the members of the Board gathered in the Board room before the meeting began and discussed voting in favor of purchasing certain equipment for the County Sheriff. Mr. Nowland stated:

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Prior to the start of the meeting, Randy Edwards, who is the vice chairman of the Jefferson County Board began to call board members over to where he was sitting to discuss 'how to' vote on the purchase of radio's for county squad cars. Edwards had the county chairman Cliff Lindleman sitting to his left and member Steve Draege sitting to his right. Board members Adam Ortgiesen, Sean Wilkey and James Malone were called over, or came over on their own, to join in on the conversation. Counting Edwards, there were a total of 6-7 members in the discussion at the same time. Wayne Hicks, another board member, was sitting in close proximity to the conversation. The conversation consisted of Randy Edwards discussing with the said board members on why they should vote " yes" on the purchase of equipment from Novacom. He addressed each member and made it very clear that they should side with his decision. This information was repeated multiple times. I was roughly 15 feet away from the conversation and heard this very clearly.^[1]

On November 13, 2020, the Public Access Bureau sent a copy of the Request for Review to the Chairman of the Board, Mr. Clifford Lindemann, together with a letter asking the Board to provide a detailed written response to the allegations raised in Mr. Nowland's Request for Review.² In particular, the Public Access Bureau asked the Board to (1) describe in detail, any and all discussions and communications that occurred between and among Board members outside of an open meeting concerning Board business, as referenced in Mr. Nowland's Request for Review; (2) provide the names of the persons who participated in such communications; (3) state the total number of Board members, and the total number of Board members who participated in these communications; and (4) provide for this office's confidential review a copy of the agenda, minutes, and any recordings from the October 26, 2020, meeting.

¹E-mail from Jeffrey Nowland to Public Access [Bureau, Office of the Attorney General] (October 27, 2020).

²Letter from Edie Steinberg, Senior Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to the Honorable Clifford Lindemann, Chairman, Jefferson County Board (November 13, 2020), e-mailed to Mr. Lindemann at district8@jeffil.us. The letter was also e-mailed to Ms. Suzy Tate, County Administrator, Jefferson County, at jeffcoboard@jeffil.us. Subsequent e-mail from Mr. Lindemann was either sent from an e-mail account labeled district8@jeffil.us or from what appears to be a personal e-mail account.

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On November 18, 2020, Mr. Lindemann provided a written response on behalf of the Board and copies of the October 26, 2020, meeting agenda and draft minutes, and a link to the recording of the meeting. The response stated that the Board is comprised of thirteen members and briefly described the discussion that occurred between the Board members: "Vice Chairman Edwards spoke to me prior to the meeting in regards to the radio bids as well as speaking to County Board Members Steve Draege, Adam Ortgiesen and James Malone. Mr. Edwards spoke to these members separately."³ Later that day, an Assistant Attorney General in the Public Access Bureau asked for a detailed description of the conversation that took place between Mr. Edwards and each of the Board members about the radio bids, and to provide the time period during which the discussion took place. Mr. Lindemann replied: "Mr. Edwards talked to the individuals for a minute or two from 6:45 to about 7:00. He expressed his views on buying the Novacom radios because they were a superior system."⁴ On November 20, 2020, the Public Access Bureau forwarded a copy of the Board's response to Mr. Nowland. He replied on November 24, 2020, asserting that "[a]ll of the board members listed were standing together in a group, around Mr. Edwards, discussing which provider of communications should be selected. Never did Mr. Edwards leave the group with an individual to discuss the matter in a true 'one-to-one' setting."⁵

On December 7, 2020, an Assistant Attorney General (AAG) in the Public Access Bureau asked Mr. Lindemann to describe the back and forth discussion that transpired between Mr. Edwards and the other Board members; he replied: "I did not hear the conversations in question. I was busy preparing for the board meeting."⁶ The AAG then asked Mr. Lindemann to "[p]lease ask the other members of the Board to describe in *detail* the back and forth conversation that transpired between Mr. Edwards and the other Board members prior to the meeting regarding the radios or any other Board business."⁷ (Emphasis in original.) Although

³Letter from Clifford Lindemann, Chairman of the Jefferson County Board, to Edie Steinberg, Senior Assistant Attorney General, Public Access Bureau [Office of the Attorney General] (November 18, 2020).

⁴E-mail from Clifford Lindemann's e-mail address labeled "Suzy Tate <district8@jeffil.us>" to Edie Steinberg [Senior Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (November 19, 2020).

⁵E-mail from Jeff Nowland to [Edie] Steinberg, [Senior Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (November 24, 2020).

⁶E-mail from Edie Steinberg, Senior Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General, to [Suzy] Tate and [Cliff] Lindeman (December 7, 2020); e-mail from Clifford Lindemann to Edie Steinberg [Senior Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (December 7, 2020).

⁷E-mail from Edie Steinberg, Senior Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General, to [Suzy] Tate and [Cliff] Lindeman (December 7, 2020).

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he did not state whether he asked other Board members about the discussion, on December 8, 2020, Mr. Lindemann replied: "Mr. Edwards stated to other board members that he felt we should follow the Sheriff's suggestion to go with the better radio equipment even though they cost more. The board members agreed with Edwards because the radios were far better. In my opinion Edwards did not talk to more than one member at a time."⁸

The AAG also asked Mr. Nowland to describe the conversation between Board members in more detail. He replied:

Mr. Edwards expressed his personal beliefs when he was speaking to the mentioned board members that "we need to vote for the purchase of the Novacom radios, because that is the best equipment and that is what the sheriff wants". As mentioned in a previous email, this conversation was with members Wilkey, Malone and Ortgiesen who had been called over to the location of Edwards. They were not in the proximity of Edwards prior to being called over. They left their seats to join the conversation. Board members Lindemann and Williams were already sitting next to Edwards. I am unable to state what the other members said specifically during the conversation, but I can say with 100% assurance that Edwards was not the only active member in the conversation. There was discussion back and forth between them regarding the matter.^[9]

DETERMINATION

It is the "public policy of this State that its 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 2018).

⁸E-mail from Clifford Lindemann, to Edie Steinberg, [Senior Assistant Attorney General, Public Access Bureau [Office of the Attorney General, State of Illinois] (December 8, 2020). On December 10, 2020, Mr. Lindemann sent an additional e-mail to the AAG stating: "Sorry for the late response. I must have deleted my reply. Mr. Edwards shared his concern to other members about purchasing an inferior radio system for the Sheriff's office. He told them each individually that he felt we should buy the best equipment for the sheriff. No other business was discussed." E-mail from Clifford Lindemann, Jefferson Co. Board Chairman, to Edie Steinberg, [Senior Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois] (December 10, 2020).

⁹E-mail from Jeff Nowland to Edie Steinberg, [Senior Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (December 7, 2020).

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"[T]he [Open Meetings] 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 Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989) ("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.").

Section 2.01 of OMA (5 ILCS 120/2.01 (West 2018), as amended by Public Act 101-640, effective June 12, 2020) provides that "[a]ll meetings required by this Act to be public shall be held at specified times and places which are convenient and open to the public." Further, section 2(a) of OMA (5 ILCS 120/2(a) (West 2018)), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019) 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." Therefore, the requirements of OMA to apply to any gathering of members of a public body that constitutes a "meeting" as defined by section 1.02 of OMA (5 ILCS 120/1.02 (West 2018)):

"Meeting" means any 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.

In determining whether a gathering of a majority of a quorum of the members of a public body constituted a "meeting" subject to OMA, the Illinois Supreme Court has instructed that "[t]he Act is only addressed to meetings designed to discuss or reach an accord with regard to public business which properly should be deliberated or acted upon in an open forum." *Barr*, 83 Ill. 2d at 210. In *Barr*, the Illinois Supreme Court held that nine public officials, a majority of a fifteen-member city council, violated OMA by holding a private meeting during which they discussed a new ward map, the appointments of public officers for two separate agencies, and a housing development—all items that were set to be discussed in a public meeting later that same night. *Barr*, 83 Ill. 2d at 202, 211; *see also Hinds County Republican Party v. Hinds County, Mississippi*, 432 F. Supp. 3d 684, 702 (S.D. Miss. 2020) (county supervisors who agreed during the recess of a meeting to adopt a certain plan violated Mississippi's version of OMA (Miss. Code Ann. § 25-41-1 *et seq.* (West 2018))).

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Mr. Nowland alleges that a majority of a quorum of the Board gathered prior to the October 26, 2020, Board meeting and discussed which communications provider should be selected for the purchase of equipment for the County Sheriff's Office. The Board consists of 13 members, including the chairman; a quorum of the Board is seven members and a majority of a quorum of the Board is four members. Therefore, if four or more members of the Board gathered and engaged in contemporaneous, interactive, deliberative discussions of public business, such a gathering would be a meeting to which the procedural safeguards and requirements of OMA would apply.

There is no dispute that between 6:45 p.m. and 7:00 p.m., just prior to the Board's October 26, 2020, 7:00 p.m. public meeting, Mr. Randy Edwards, the Vice Chair of the Board, discussed public business of the Board, its upcoming vote of purchasing certain radio equipment for county squad cars, with at least four other members of the Board. Indeed, during the October 26, 2020, meeting, the Board voted "to approve the bid from Novacom in the amount of \$118,750 for 3 cites for the Sheriff's digital radios."¹⁰ Further, while other members of the Board may have participated in the discussion, there is no dispute that Mr. Edwards discussed the purchase of the equipment prior to the Board meeting with four other members—Mr. Lindemann, Mr. Draege, Mr. Malone, and Mr. Orgiesen; those five members of the Board constitute a majority of a quorum. Accordingly, a majority of a quorum of the Board discussed public business immediately prior to the official Board meeting. Therefore, the determinative issue is whether the communication between the Board members was contemporaneous and interactive.

The information provided to this office establishes that the discussion between Mr. Edwards and the other members of the Board was interactive, i.e., reciprocally or mutually active.¹¹ First, Mr. Nowland described the communication that took place as reciprocal, stating: "I can say with 100% assurance that Edwards was not the only active member in the conversation. There was discussion back and forth between them regarding the matter."¹² Second, Mr. Lindemann also described the communication that took place as reciprocally active, stating that Mr. Edwards told the "other board members that he felt we should follow the

¹⁰Jefferson County Board, Full Board Meeting, October 26, 2020, Minutes 2, available at <http://www.jeffersoncountyillinois.com/sites/default/files/Full%20Board%2010.26.2020.pdf>.

¹¹"Interactive" is defined, in relevant part, as "mutually or reciprocally active." Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/interactive> (last visited January 15, 2021). See, e.g., *Valley Forge Insurance Co. v. Swiderski Electronics Inc.*, 223 Ill. 2d 352, 366 (2006) (undefined statutory terms should be afforded their "plain, ordinary, and popular meanings[.]" which may be gleaned from dictionaries).

¹²E-mail from Jeff Nowland to Edie Steinberg, [Senior Assistant Attorney General, Public Access Bureau, Office of the Attorney General] (December 7, 2020).

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Sheriff's suggestion to go with the better radio equipment even though they cost more. The board members agreed with Edwards because the radios were far better."¹³ Third, during the October 26, 2020, meeting, Mr. Edwards described the pre-meeting communication that took place about the radios to be purchased for use by the Sheriff's Office as mutually active. After Mr. Edwards spoke about the purchase of the radios during the meeting, Mr. Nowland asked Mr. Edwards: "Was this part of the conversation you had when you called half the board members up here earlier that the rest of us didn't hear?"¹⁴ After a bit of back and forth conversation between Mr. Edwards and Mr. Nowland, where Mr. Edwards initially denied any discussion with other Board members prior to the meeting, Mr. Edwards acknowledged the discussion between the Board members, stating loudly: "What I discuss between friends is my own business."¹⁵ Because the discussion of public business between a majority of a quorum of the Board constituted interactive communication, whether the pre-meeting gathering constituted a meeting under OMA depends on whether the communications were also "contemporaneous."

The information provided to this office establishes that the discussion between Mr. Edwards and the other members of the Board was contemporaneous, i.e., happening within the same time frame.¹⁶ Mr. Nowland has consistently provided detailed information to this office, which described Mr. Edwards discussing this matter with the group as a whole. The position of the Board has been inconsistent. At the meeting Vice Chair Edwards first denied any discussion at all, then he acknowledged that there was a discussion "between" him and "my friends." The Board's initial response to this office, by Mr. Lindemann, stated that Mr. Edwards spoke to Mr. Lindemann about the purchase of the equipment and then separately with the other Board members. Mr. Lindemann later informed this office that he did not hear the discussion between Mr. Edwards and the other Board members. Further, after being asked to contact the other Board members regarding the discussion, Mr. Lindemann, replied that it was his "opinion"

¹³E-mail from Clifford Lindemann, [Chairman, Jefferson County Board], to Edie Steinberg, Senior Assistant Attorney General, Public Access Bureau [Office of the Attorney General, State of Illinois] (December 8, 2020).

¹⁴Jefferson County Board, Full Board Meeting, October 26, 2020, Audio Recording at approximately 38:10-40:32, available at <http://jeffil-us.kfu.ghs.mybluehost.me/meetings/2020/Oct%20Full%20Bd%201of2%2010.26.2020.mp3>.

¹⁵Jefferson County Board, Full Board Meeting, October 26, 2020, Audio Recording at approximately 38:10-40:32, available at <http://jeffil-us.kfu.ghs.mybluehost.me/meetings/2020/Oct%20Full%20Bd%201of2%2010.26.2020.mp3>.

¹⁶"Contemporaneous" is defined as "existing, occurring, or originating during the same time." Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/contemporaneous> (last visited January 15, 2021).

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that Mr. Edwards only talked to "one member at a time."¹⁷ Based on the changing and cursory description given by the Board, this office accepts Mr. Nowland's consistent and detailed description of the events, in which he informed the Public Access Bureau that Mr. Edwards discussed the business of the Board with the other Board members at the same time as they gathered around him in a group. Accordingly, the discussion regarding which bid to accept for the radio equipment immediately prior to the official Board meeting constituted a contemporaneous, interactive, deliberative discussion of public business by a majority of a quorum of the Board. Therefore, this gathering constituted a meeting under the definition of that term in section 1.02 of OMA.

As in *Barr*, Board members thwarted the intent of OMA by informally discussing public business prior to the official meeting. Not only did that discussion constitute a secret meeting, it violated the letter of the law requiring public body meetings to be *open* unless falling within an exception set forth in section 2(c) of OMA (5 ILCS 120/2 (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019). The Board did not assert any such exception and none applies here. Under these circumstances, this office concludes that the informal discussion before the October 26, 2020, meeting commenced was an improper secret meeting held in violation of the requirement, in sections 2(a) and 2.01 of OMA, that meetings of public bodies be open to the public.

This office notes that even if Mr. Edwards held the discussion with each of the Board members separately, during the fifteen minutes immediately prior to the official meeting, the communications between a majority of a quorum of the Board still would have constituted a "meeting." As the Illinois Supreme Court noted in *Barr*, "[t]here is rarely any purpose to a non-public pre-meeting conference except to conduct some part of the decisional process behind closed doors." *Barr*, 83 Ill. 2d at 200, quoting *Sacramento Newspaper Guild, Local 92 v. Sacramento County Board of Supervisors*, 263 Cal. App. 2d 41, 50 (Cal. App. 1968). In light of the definition of "contemporaneous" as well as OMA's broad definition of a meeting and OMA's purpose of assuring that public bodies deliberate openly, "contemporaneous communications" is not limited to simultaneous or real time communications, but includes communications which occur in the same general time frame.¹⁸ Otherwise, a Board could evade the requirement to

¹⁷E-mail from Clifford Lindemann, Jefferson Co. Board Chairman, to Edie Steinberg, [Senior Assistant Attorney General, Public Access Bureau, Office of the Attorney General, State of Illinois] (December 10, 2020).

¹⁸While the Illinois Appellate Court has not yet been called upon to decide how close in time communications must be in order to be "contemporaneous," for purposes of OMA, that term must be construed as part of OMA as a whole. See *Jackson v. Board of Election Commissioners*, 2012 IL 111928, ¶48, 975 N.E. 2d 583, 596 (2012) (a "statute should be evaluated as a whole, with each provision construed in connection with every other section."). Pursuant to section 1.02 of OMA, a meeting includes in person meetings as well as electronic communication, such as e-mail or text, which by their very nature cannot occur at exactly the same time but may

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deliberate openly by rotating people in and out of secret discussions. Accordingly, even if Mr. Edwards discussed the purchase of the radio equipment with the four other Board members separately within the fifteen-minute time period immediately preceding the official Board meeting, where a vote on that subject was scheduled, those discussions would constitute contemporaneous interactive communications within the meaning of OMA, and be in violation of sections 2.01 on 2(a) of OMA.

To remedy the Board's violation of sections 2.01 and 2(a) of OMA, this office requests the Board to take appropriate action to comply with this opinion by refraining from engaging in secret deliberation, whether in person, by telephone, or electronically, in the future. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, you may contact me at (312) 814-5201 or at the Chicago address on the bottom of the first page of this letter.

Very truly yours,



EDIE STEINBERG
Senior Assistant Attorney General
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occur within the same general time frame. *See Tepfer v. Deerfield Savings & Loan Ass'n*, 118 Ill. App. 3d 77, 80-82 (1st Dist. 1983) (in construing the meaning of contemporaneous instruments, the court held that contemporaneous means proximate in time as to grow out of the transaction).