



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 18, 2016

Via electronic mail



Via electronic mail

Ms. Gina L. Madden
Attorney for the Mokena Community Park District
15850 New Avenue, Suite 114
Lemont, Illinois 60439
Gmaddenlaw@gmail.com

RE: OMA Request for Review – 2016 PAC 39667

Dear [REDACTED] and Ms. Madden:

This determination is issued 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 that follow, the Public Access Bureau concludes that there is insufficient evidence to find that Board of Commissioners for the Mokena Community Park District (Board) violated OMA.

On January 18, 2016, [REDACTED] who is a member of the Board, submitted a Request for Review alleging that the Board President conducted public business via e-mail with the entire Board on two subjects—an open Board seat and the Executive Director's contract—without complying with the procedural requirements of OMA. In support of this allegation, [REDACTED] provided copies of e-mail communications between Board members. On January 27, 2016, this office forwarded a copy of the Request for Review to the Board and requested it to provide a detailed explanation of how the Board considered the two subject matters at issue and to address whether any gathering of Board members by electronic means on or about January 15, 2016, was a "meeting" as defined by section 1.02 of OMA (5 ILCS 120/1.02 (West 2014)). This office also requested copies of all e-mail correspondence related to these matters, including but not limited to, correspondence between and among Board members.

On February 5, 2016, counsel for the Board submitted a written response to this office together with relevant e-mails. The Board described that the Board President had sent an e-mail to all Board members on January 15, 2016, at 4:55 p.m. requesting that the members submit a list of three recommended candidates for the open Board seat and that the e-mail instructed the Board members to "cc all commissioners."¹ The Board contended that the "email was sent to all Commissioners in an effort to remain transparent and share as much information with the entire Board as possible in order to avoid any appearances of favoritism during this selection process."² The Board provided copies of two e-mails from Board members responding to the President's original e-mail which had been sent on January 15, 2016, at 4:55 p.m. The first e-mail response was sent to the entire Board on January 15, 2016, at 6:16 p.m. The other e-mail was sent to the entire Board on January 18, 2016, at 10:40 a.m. Both e-mails listed only three names without any comment or other text. The Board argued that these e-mails did not constitute a "contemporaneous interactive communication" as defined by OMA because they took place over a three-day period. With respect to the Executive Director's contract, the Board asserted that no Board members responded to the e-mails between the Board President and counsel for the Board, even though they were copied on the messages.

This office forwarded a copy of the Board's response to [REDACTED] on February 11, 2016. On February 15, 2016, [REDACTED] replied.

DETERMINATION

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2014), as amended by Public Act 99-78, effective July 20, 2015; 99-235, effective January 1, 2016; 99-480, effective September 9, 2015) 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 1.02 of OMA 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

¹Letter from Gina L. Madden to Neil P. Olson, Assistant Attorney General, Public Access Bureau (February 5, 2016), at 1.

²Letter from Gina L. Madden to Neil P. Olson, Assistant Attorney General, Public Access Bureau (February 5, 2016), at 1.

public body, a quorum of the members of a public body held for the purpose of discussing public business. (Emphasis added.)

Under this statutory definition, a "meeting" may include communications through e-mail or other electronic means. The full Board is comprised of seven members, although six members served on the Board at the relevant time period because of a vacant seat. Accordingly, under either the measure of the full seven-member Board or the existing six-member Board, four Board members comprise a quorum, and a majority of the quorum is three members. Therefore, contemporaneous, interactive e-mail or other electronic communications involving at least three members of the Board which concern "public business" would ordinarily constitute a meeting of the Board which would be subject to the procedural safeguards and requirements of OMA.

In previous determinations with similar circumstances in which one member of a public body solicited feedback on public business from other members via e-mail, the Public Access Bureau has noted that "Illinois' appellate courts have not yet been called upon to decide how close in time electronic communications must be in order to be 'contemporaneous,' for purposes of OMA; nor does the legislative history of the statutory language provide any guidance in defining 'contemporaneous.'" Ill. Att'y Gen. PAC Req. Rev. Ltr. 18676, issued September 9, 2013, at 3 (quoting Ill. Att'y Gen. PAC Req. Rev. 17172, issued September 7, 2012, at 3). In those matters, this office determined that we could not conclude that e-mails sent over a period of hours or longer were "contemporaneous" as a matter of law. Likewise, the e-mails relating to the vacant Board seat are also separated by more than an hour, in the case of one, and more than two days, in the case of the other. Therefore, given the significant time periods between the three e-mails, we cannot conclude that those e-mails constituted "contemporaneous interactive communication" among a majority of a quorum of the Board. Similarly, with respect to the e-mails regarding the Executive Director contract, no Board member responded to e-mails between the Board President and counsel for the Board. Therefore, based on the available information, there was no "contemporaneous interactive communication" between any of the Board members on that subject. Accordingly, there is insufficient evidence from which this office can conclude that the Board violated OMA.

Although we recognize that it is sometimes expedient for members of a public body to communicate with one another between meetings, e-mails concerning public business which are sent to or received by a majority of a quorum skirt the purpose of OMA,³ and have the potential to violate OMA. We therefore caution the members of the Board to be mindful of the requirements of OMA, as well as the public policy favoring the open discussion of matters affecting the public interest, before engaging in such e-mail communications.

³Section 1 of OMA (5 ILCS 120/1 (West 2014)) provides that "is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly."

[REDACTED]
Ms. Gina L. Madden
February 18, 2016
Page 4

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, please contact me at nolson@atg.state.il.us or (217) 782-9078.

Very truly yours,

[REDACTED]
NEIL P. OLSON
Assistant Attorney General
Public Access Bureau

39667 o 2a meeting proper pkd