



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

**KWAME RAOUL**  
ATTORNEY GENERAL

January 31, 2019

*Via electronic mail*

[REDACTED]

*Via electronic mail*

The Honorable John Wagnon, President  
Board of Education  
O'Fallon Community Consolidated School District No. 90  
118 East Washington Street  
O'Fallon, Illinois 62269  
jwagnon@of90.net

RE: OMA Request for Review – 2018 PAC 53781

Dear [REDACTED] and Mr. Wagnon:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). For the reasons explained below, the Public Access Bureau concludes that the O'Fallon Community Consolidated School District No. 90 (District) Board of Education (Board) did not violate OMA in connection with an e-mail statement issued on May 17, 2018.

**BACKGROUND**

On June 28, 2018, this office received [REDACTED] Request for Review alleging that six Board members discussed and coordinated via e-mail the drafting of a May 17, 2018, statement to the parents and students in the District. On July 3, 2018, this office sent a copy of the Request for Review to the Board and requested that it provide a written response to [REDACTED] allegations. This office asked the Board to identify any and all discussions and communications that occurred between and among Board members outside of open meetings concerning the May 17, 2018, e-mail statement referenced in [REDACTED] Request for Review. This office requested copies of any records that documented those discussions, as well as copies

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of any records of communications, such as e-mails and text messages. This office also asked the Board to address whether it took improper final action regarding the May 17, 2018, e-mail statement. On July 11, 2018, the Board provided a written response and the requested materials. On July 25, 2018, [REDACTED] replied. On November 28, 2018, and December 6, 2018, in response to follow-up inquiries from this office, the Board provided additional materials.

According to the background information provided by the parties, [REDACTED] made comments at an April 15, 2018, O'Fallon City Council meeting "on the intended audience [for the reading of a children's book] and the possible improper use of a publically funded facility."<sup>1</sup> Many members of the public were outraged by [REDACTED] comments. According to a news report, hundreds of people attended the Board's May 15, 2018, meeting, many of whom spoke during the public comment periods to share their thoughts on [REDACTED] statements.<sup>2</sup> One member of the public read excerpts from copies of [REDACTED] e-mails in which he questioned school policy concerning the needs of transgender and other students. The comments in [REDACTED] e-mails added to the growing public controversy. On May 17, 2018, six Board members issued an e-mail statement to local news media outlets, District staff, and parents, as follows:

As a leader in public education, District 90 teaches tolerance, acceptance, and kindness from the moment our students walk into our classrooms. As Superintendent Hruby stated, "Each and every school day, one can witness students being encouraged to explore and grow their own strengths, but perhaps more importantly, to find strengths in one another by embracing our differences."

We, as Board members, believe it is the responsibility of public education in America to be the great equalizer--to offer opportunities for all children to succeed. To that end, authority is granted to the elected officials of the Board of Education as a whole, not to each member individually, to make decisions for the betterment of all students. [REDACTED] is one member of the Board of Education. When he voiced his opinions, his voice was his alone. Furthermore we do not agree with nor support the

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<sup>1</sup>Letter from [REDACTED] to Laura S. Harter, Assistant Attorney General, Public Access Bureau (July 18, 2018), at 1.

<sup>2</sup>Robyn L. Kirsch, *Emails fuel call for resignation of O'Fallon school board member 'branded as a racist'*, BELLVILLE NEWS-DEMOCRAT, May 16, 2018, <https://www.bnd.com/news/local/community/ofallon-progress/article210776579.html>.

comments made in the released emails and will not endorse discriminatory policies of any kind.<sup>[3]</sup>

## DETERMINATION

### Alleged Violation of Meeting Requirements

Section 2.01 of OMA (5 ILCS 120/2.01 (West 2017 Supp.)) 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." (Emphasis added.) In addition, section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2016)) generally requires a public body to provide the public with at least 48 hours advance notice of its meetings. In order for the requirements of OMA to apply, a gathering must constitute a "meeting" as defined by section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)):

"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.

Under this statutory definition, a "meeting" may include communications through e-mail or other electronic means. The Board is comprised of seven members. Accordingly, four Board members constitute 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.

OMA does not define "interactive" or "contemporaneous." In interpreting statutes such as OMA, undefined statutory terms must be afforded their "plain, ordinary, and popular meanings[.]" which may be gleaned from dictionaries. *See, e.g., Valley Forge Insurance Co. v. Swiderski Electronics*, 223 Ill. 2d 352, 366 (2006).

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<sup>3</sup>Letter from S. Jeff Funk to Ms. Laura S. Harter, Assistant Attorney General, Public Access Bureau (July 11, 2018), Attachment 3.

"Interactive" is defined, in relevant part, as "mutually or reciprocally active."<sup>4</sup> This office has reviewed the e-mails concerning the May 17, 2018, statement. Most of the e-mails included only one Board member interacting with a non-Board member.<sup>5</sup> Other e-mails included two Board members<sup>6</sup> or two Board members and a non-Board member.<sup>7</sup> A third Board member was copied on some of these e-mails, but never participated in the e-mail exchanges with the other two Board members.<sup>8</sup> Certain e-mails were sent to five or six Board members,<sup>9</sup> but no more than two Board members replied to all recipients on those e-mail strings.<sup>10</sup> Importantly, none of the e-mail strings provided to this office regarding the draft statement included three Board members engaged in interactive communications by responding to each other's e-mails.

One e-mail string provided by the Board that did not involve drafting the statement did involve "interactive" communications, as three Board members interacted with each other over the course of three messages.<sup>11</sup> Whether the e-mails constituted a meeting under OMA depends on whether the messages were also "contemporaneous." "Contemporaneous" is defined as "existing, occurring, or originating during the same time."<sup>12</sup> The Public Access Bureau has noted previously that "Illinois' appellate courts have not yet been called upon to

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<sup>4</sup>Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/interactive> (last visited December 4, 2018).

<sup>5</sup>OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachments 3, 4, 5, 6, 7, 15, 16a, 17, 18.

<sup>6</sup>OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachment 9a, 21. *See also* OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachment 22 (e-mail messages that do not concern the May 17, 2018, statement).

<sup>7</sup>OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachments 1, 9, 14.

<sup>8</sup>OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachment 11.

<sup>9</sup>OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachments 2, 8.

<sup>10</sup>OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachments 13, 16.

<sup>11</sup>OMA—Request for Review by Public Access Counselor submitted by [REDACTED] (June 24, 2018), Attachment 19.

<sup>12</sup>Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/contemporaneous> (last visited December 5, 2018).

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). A "contemporaneous interactive communication" occurs in the same general time frame, but is not necessarily simultaneous. Ill. Att'y Gen. PAC Req. Rev. Ltr. 14722, issued August 12, 2011, at 4 (citing John H. Brechin, *E-mail and the Open Meetings Act*, Illinois Bar Journal, 94 ILBJ 666, 667 (2006)). In prior 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. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 39667, issued February 18, 2016 (e-mails separated by more than an hour, in the case of one, and more than two days, in the case of another, were not contemporaneous); Ill. Att'y Gen. PAC Req. Rev. Ltr. 18676, issued September 9, 2013, at 3 (e-mail responses sent hours apart did not constitute contemporaneous, interactive discussions of public business); Ill. Att'y Gen. PAC Req. Rev. 17172, issued September 7, 2012, at 3 (e-mail responses sent hours or days after initial e-mail were not contemporaneous). See also Ill. Att'y Gen. PAC Req. Rev. Ltr. 40976, issued August 24, 2016, at 3 (unable to conclude that "text messages that may have stretched over a period over two hours" constituted contemporaneous communications).

Here, the first two messages in the e-mail string were sent only four minutes apart, but the third message was not sent until more than an hour and a half later. As one of the three e-mails was sent more than an hour after the first two messages, this office cannot conclude that the e-mail string constituted a "contemporaneous interactive communication." Accordingly, this office concludes that none of the e-mail strings provided to this office by the Board constituted a "meeting" subject to the requirements of OMA.

### **Final Action Outside of an Open Meeting**

Section 1 of OMA (5 ILCS 120/1 (West 2016)) provides:

It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.

With respect to final action by a public body, section 2(e) of OMA (5 ILCS 120/2(e) (West 2017 Supp.)) provides: "No final action may be taken at a closed meeting. Final

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action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

The Appellate Court has held that when a public body finalizes a decision in a document, that final action must be taken openly:

No public body in Illinois subject to the Open Meetings Act can take final action by merely circulating some document for signature and not voting on it publicly. Imagine, for instance, the legal problems if the Chicago city council "adopted" ordinances by publicly voting on a concept that had never been reduced to writing, directed a staff attorney to prepare it in a more detailed written form, circulated the final version around city hall for signatures of a majority of the 50 alderman, and then ordered the city clerk to publish it as if it were a valid legislative act. *Howe v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago*, 2013 IL App (1st) 122446, ¶26, 996 N.E.2d 664, 974-75 (2013) (finding board's written denial of benefits invalid because the board had circulated the decision for signatures privately rather than voting on it in open session).

Further, this office has previously determined that a board violated section 2(e) of OMA by improperly taking final action when four of five board members signed a letter in support of a wage ordinance without publicly discussing the letter prior to its signing. *See Ill. Att'y Gen. PAC Req. Rev. Ltr. 21599*, issued March 19, 2013, at 2.

[REDACTED] argues that the act of issuing a statement is a final action. He contends that the statement pertained to the business of the Board because its purpose was to clarify the Board's position on a contentious public issue. The Board does not dispute that it issued the statement without discussing or voting on it at an open meeting. However, the Board asserts that because [REDACTED] controversial comments did not involve Board business, the Board's statement concerning [REDACTED] comments cannot be characterized as involving Board business. The Board also noted that the Board members did not make any decisions regarding [REDACTED] comments other than to issue the statement.

It is undisputed that [REDACTED] comments resulted in significant public controversy. Six members of the Board determined that they would address the public's concerns by issuing a statement expressing a general sentiment of unity and disavowing [REDACTED] comments. Contrary to [REDACTED] assertion that issuing a statement on a contentious public issue is always a final action under OMA, this office has found that issuing a

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statement clarifying a public body's position is not necessarily a final action. Specifically, this office concluded that a letter sent by all trustees of a public body that sought to clarify the public body's position on an issue was not a final action. *See* Ill. Att'y Gen. PAC Rev. Ltr. 50318, issued January 30, 2018, at 6. This office found that:

the letter summarizes past discussions that have been held during open sessions at various Board meetings and the deliberations that occurred during the Township Annual Meeting concerning on-going issues related to Township funds. Further, it does not appear from the letter, or the meeting minutes, that the Board has come to a decision on how to handle the funds at issue. Therefore, this letter cannot be characterized as a "final action" by the Board. Ill. Att'y Gen. PAC Rev. Ltr. 50318, issued January 30, 2018, at 6.

Similarly, here, the May 17, 2018, e-mail statement is not a final action. Most of the e-mail consists of factual or philosophical statements, none of which can be construed as asserting a new policy or deciding a Board matter. The final sentence, "[f]urthermore we do not agree with nor support the comments made in the released emails and will not endorse discriminatory policies of any kind,"<sup>13</sup> reflects the only definitive positions taken by the members: that they disagree with [REDACTED] comments, and that they will not endorse discriminatory policies. [REDACTED] e-mail comments are his opinions, none of which are binding on the Board. Likewise, the six members' expression of disagreement is a statement of opinion that has no binding effect on the Board and does not resolve any matter of Board business. Even if the opinion could be considered relevant to Board policy accommodating transgender students, the opinion was merely an interim decision on a Board matter, and this office has found that interim decisions do not constitute final action. *See* Ill. Att'y Gen. PAC Rev. Ltr. 54002, issued October 22, 2018, at 8 (concluding that a University Board of Trustees' decision to publically voice its support for an individual to become University President was an interim decision at the time of the Request for Review, rather than a final action).

Further, stating that the members would not endorse any discriminatory policies is not an assertion of a new policy position, as promising not to discriminate is a fundamental

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<sup>13</sup>Letter from S. Jeff Funk to Ms. Laura S. Harter, Assistant Attorney General, Public Access Bureau (July 11, 2018), Attachment 3.

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obligation of public service. In their oaths of office,<sup>14</sup> all seven Board members implicitly vowed not to support discriminatory policies by swearing to act in accordance with the equal protection clauses of the United States<sup>15</sup> and Illinois Constitutions.<sup>16</sup>

In sum, the May 17, 2018, e-mail statement did not constitute final action, as it did not put forth a new Board position, nor was it binding on any Board business. Accordingly, this office concludes that the Board did not improperly take final action outside of a public meeting.

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, LHarter@atg.state.il.us, or (217) 524-7958. This letter serves to close this file.

Very truly yours,

[REDACTED]  
LAURA S. HARTER  
Deputy Bureau Chief  
Public Access Bureau

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cc: *Via electronic mail*  
Mr. S. Jeff Funk  
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316 South Charter  
Monticello, Illinois 61856  
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<sup>14</sup>The Board members' oath provides: "I, (name), do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of member of the Board of Education of O'Fallon Community Consolidated School District No. 90, in accordance with the Constitution of the United States, the Constitution of the State of Illinois, and the laws of the State of Illinois, to the best of my ability." O'Fallon Community Consolidated School District No. 90, Board Policy Manual, §2:80 Board Member Oath and Conduct.

<sup>15</sup>U.S. Const., amend. XIV, §1.

<sup>16</sup>Ill. Const. 1970, art. I, §2.