

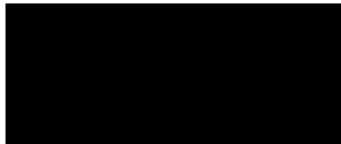


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 6, 2017

Via electronic mail



Via electronic mail

Mr. Garry Hensley, Chairman
Fulton County Board Health Committee
100 North Main Street
Lewistown, Illinois 61542



RE: OMA Request for Review – 2016 PAC 45191

Dear Ms. [REDACTED] and Mr. Hensley:

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 Fulton County Board Health Committee (Committee) did not violate section 2.01 of OMA (5 ILCS 120/2.01 (West 2014)) in connection with its October 31, 2016, and November 14, 2016, meetings. This office also is unable to conclude, from the available information, that the Board violated OMA by improperly restricting public comment in violation of section 2.06(g) of OMA (5 ILCS 120/2.06(g) (West 2014), as amended by Public Act 99-515, effective June 30, 2016).

BACKGROUND

On November 29, 2016, Ms. [REDACTED] submitted this Request for Review alleging that during its October 31, 2016, meeting, the Committee did not allow a member of the public to speak for the full five minutes permitted under the Committee's rules for public comment. Specifically, she alleged that three individuals notified the Committee before the meeting of their intent to speak and they completed a sign-up sheet upon arriving at the meeting. They were permitted to speak for five minutes. According to Ms. [REDACTED], a fourth individual

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who had not notified the Committee of her interest in making public remarks before the meeting and who did not complete the sign-up sheet at the meeting was not permitted to speak for the full five minutes. Ms. [REDACTED] also alleged that during the Committee's November 14, 2016, meeting, she and another member of the public were not permitted to speak for the full five minutes because they did not notify the Committee before the meeting of their intent to speak and were not offered a sign-up sheet at the meeting. Finally, Ms. [REDACTED] contended that the room in the Clayberg Nursing Home where the Committee held the October 31, 2016, and November 14, 2016, meetings was too small to comfortably accommodate the members of the public in attendance.

On December 8, 2016, this office sent a copy of the Request for Review to the Committee and requested a written response to the allegations therein, together with a copy of the Committee's established and recorded rules regarding public comment. This office also asked for an explanation in response to Ms. [REDACTED]'s allegations that the Committee restricted members of the public from addressing the Committee for the full five minutes permitted under the rules, including the Committee's basis for any restriction.

This office also asked for clarification regarding where the Committee held its meetings on October 31, 2016, and November 14, 2016, and asked the Committee to identify (1) the capacity of the room(s), (2) the number of people who attended those meetings, (3) the number of people the Committee expected to attend, (4) whether any members of the public were restricted from viewing and/or hearing the meetings and, if so, to describe any measures that were taken to accommodate them. This office also asked for copies of the agendas, minutes, and any open session recordings from the October 31, 2016, and November 14, 2016, meetings. On January 9, 2017, this office received the Committee's response letter and the requested agendas and minutes. On February 1, 2017, Ms. [REDACTED] replied. On February 27, 2017, in response to an inquiry by the Public Access Bureau, the Committee explained that it did not record the open sessions of its public meetings. On March 24, 2017, at the request of this office, the Committee provided its rules for public comment and additional information regarding the meetings at issue.

DETERMINATION

Section 2.01 of OMA: Meeting Accessibility

Section 2.01 of OMA (5 ILCS 120/2.01 (West 2014)) 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." "By its plain terms, section 2.01 requires a venue that is not only 'open,' but 'convenient,' to the public." *Gerwin v. Livingston County Board*, 345 Ill. App. 3d 352, 359 (4th Dist. 2003). Thus, "an open meeting in an inconvenient place violates the Act." *Gerwin*, 345 Ill. App. 3d at 359.

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In addressing the meaning of "convenient" for purposes of section 2.01 of OMA, the *Gerwin* court stated that "[a] meeting can be open in the sense that no one is prohibited from attending it, but it can be held in such an ill-suited, unaccommodating, unadvantageous place that members of the public, as a practical matter, would be deterred from attending it." *Gerwin*, 345 Ill. App. 3d at 361. Still, the court found that "[i]t would be unreasonable to suppose the legislature intended * * * that public bodies hold their meetings 'at such locations as are sufficient to accommodate *all* interested members of the public, such that they may see and hear all proceedings in reasonable comfort and safety.'" (Emphasis in original.) *Gerwin*, 345 Ill. App. 3d at 361. Accordingly, the court construed section 2.01 as requiring "not 'absolute accessibility' but 'reasonable accessibility.'" *Gerwin*, 345 Ill. App. 3d at 362, quoting *State ex rel. Badke v. Village Board of the Village of Greendale*, 173 Wis. 2d 553, 579, 494 N.W.2d 408, 418 (Wis. 1993).

In its response to this office, the Committee explained that its meetings are held in the day room at the Clayberg Nursing Home. The Committee contends that the day room is 16 feet by 24 feet and has sufficient capacity to hold the members of the Committee, the Clayberg staff who are required to attend the meeting, as well as members of the public. The Committee stated that approximately eight to fifteen people attend the Committee meetings, though the Committee does not count attendance. The Committee asserts that at no time are people barred from attending the meetings. The Committee also asserts that individuals who prefer to stand near the doorway have no difficulty hearing or viewing the meeting, as they would be only fifteen feet from the Committee members. Ms. [REDACTED] counters that the room where the Committee meets was once suitable for the few who attended the meetings, but is "now getting crowded."¹ She contends that there are a number of pieces of furniture and an aviary in the room, which limit the available space for meeting attendees. She asserts that there were an insufficient number of chairs for the November meeting attendees, forcing some people to stand. She believes that failing to provide enough chairs for the public will discourage individuals from attending the Committee meetings.

Although all members of the public who wished to attend may not have been able to sit during the November meeting, the Committee contends that all members of the public were able to listen to and participate in the proceedings. Ms. [REDACTED] does not allege otherwise in her Request for Review. If attendance at the Committee meetings increases in the future, the day room may become inconvenient, but based on the available information, the room currently is reasonably accessible. Accordingly, this office concludes that the Committee satisfied the requirements of section 2.01 of OMA in connection with its October 31, 2016, and November 14, 2016, meetings. However, we strongly encourage the Committee to be mindful of its need to anticipate instances in which accommodations may be necessary to meet its obligation to provide adequate facilities for its meetings and to plan accordingly.

¹E-mail from [REDACTED] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (November 29, 2016), at 2.

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Section 2.06(g) of OMA: Public Comment

Section 2.06(g) of OMA (5 ILCS 120/2.06(g) (West 2014), as amended by Public Act 99-515, effective June 30, 2016) provides that "[a]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." The Attorney General has concluded that section 2.06(g) of OMA "requires that all public bodies subject to the Act provide an opportunity for members of the public to address public officials at open meetings." See Ill. Att'y Gen. Pub. Acc. Op. No. 14-012, issued September 30, 2014, at 5; see also Ill. Att'y Gen. Pub. Acc. Op. No. 14-009, issued September 4, 2014, at 4 ("The plain language of section 2.06(g) of OMA provides that individuals are entitled to address a public body subject only to a public body's established and recorded rules.").

Although OMA does not specifically address the types of public comment rules that a public body may adopt, courts have clarified that, under the First Amendment to the U.S. Constitution, public bodies may promulgate reasonable "time, place, and manner" restrictions that are narrowly-tailored and serve a significant governmental interest. See *I.A. Rana Enterprises, Inc. v. City of Aurora*, 630 F. Supp. 2d 912, 923 (N.D. Ill. 2009). For example, a public body may adopt reasonable rules governing public comment in order to maintain decorum and ensure that meetings are conducted efficiently. *Timmon v. Wood*, 633 F. Supp. 2d 453, 465 (W.D. Mich. 2008); see also Ill. Att'y Gen. Pub. Acc. Op. No. 14-009, at 4. However, such rules must tend to accommodate, rather than to unreasonably restrict, the right to address public officials. See *I.A. Rana Enterprises, Inc.*, 630 F. Supp. 2d at 923-25; *Timmon*, 633 F. Supp. 2d at 459.

Provided that it is reasonable in time and scope, a rule that promotes order and decorum by requiring members of the public to sign up before addressing public officials does not violate OMA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 39640, issued June 22, 2016, at 3 (finding that it was not impermissible to require prospective commenters to sign up at the start of a meeting). In contrast, the enforcement of an advance sign-up rule violates OMA if the rule restricts the ability to address public officials to a greater degree than is necessary to promote a significant governmental interest. See Ill. Att'y Gen. Pub. Acc. Op. No. 14-012, at 6 (rule requiring members of the public to sign up to comment five days in advance of meetings – before the public body was required to post its agenda – imposed an unreasonable restriction on public comment); Ill. Att'y Gen. PAC Req. Rev. Ltr. 34760, issued October 8, 2015, at 3 (rule requiring members of the public to sign up to comment seven days in advance of meetings was unreasonable).

In response to this office's request for a copy of the Committee's established and recorded rules regarding public comment, the Committee provided a December 9, 2014,

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resolution regarding the Fulton County Board Rules of Order for the 2014-2016 term. Section 7(a) of the Rules provides the following regarding Public Remarks:

Members of the Public who wish to address the Board must provide the Chairperson with prior written notice of their intent to speak. The written notice shall identify the name and address of the speaker, as well as a short statement indicating the speaker's topic. Each citizen is limited to five (5) minutes. Citizen's remarks shall not exceed thirty (30) minutes per meeting.^[2]

The same language was included on the agendas and minutes for the October 31, 2016, and November 14, 2016, Committee meetings.³

The Committee's rule that individuals "must provide the Chairperson with prior written notice of their intent to speak" does not specify how far in advance prospective speakers are required to give notice. In its response to this office, the Committee explained that those citizens who inform the Committee before the meeting that they would like to speak are posted on the agenda and those citizens who appear at the meeting without having provided advance notice of their interest in speaking are "normally" asked to sign a sheet at the meeting and are given the opportunity to speak for up to five minutes.⁴ When there is no sign-up sheet, the

²Rules of Order, Fulton County Board, Fulton County, Illinois, 2014-2016 Term. Although not raised in the Request for Review, the provisions of the Committee's public comment rules requiring prospective speakers to provide their comment topics and addresses are potentially unreasonable. Requiring a member of the public to set forth the topic of his or her comment in writing in advance of a meeting may create a chilling effect on speech at public meetings. A person may be reluctant to put comments in writing, especially if the comments may be controversial, although controversial statements are no less protected from government censorship under the First Amendment to the U.S. Constitution. (U.S. Const., amend. I ("Congress shall make no law * * * abridging the freedom of speech)). In addition, the requirement could be enforced to restrict the content of speech by precluding comments a person may wish to make after reviewing the resolutions or other information disseminated by the Committee during the meeting. Similarly, it is unclear how requiring a speaker to submit his or her address before addressing the Committee advances any significant governmental interest, such as promoting order and decorum at meetings. A sign-up sheet set out just prior to the meeting asking for the names of individuals who wish to address the Committee, or simply requiring prospective speakers to notify the Committee's office shortly before the meeting could accomplish the goal of running a timely and orderly meeting in a much less restrictive manner. See Ill. Att'y Gen. PAC Rev. Ltr. 37503, issued April 8, 2016.

³Fulton County Board – Health Committee, Meeting, Agenda Item 5 (October 31, 2016); Fulton County Board – Health Committee, Meeting, October 31, 2016, Minutes I; Fulton County Board – Health Committee, Meeting, Agenda Item 5 (November 14, 2016); Fulton County Board – Health Committee, Meeting, November 14, 2016, Minutes I.

⁴Letter from Garry Hensley, Fulton County Health Committee Chairman, to Laura Harter, Assistant Attorney General, Public Access Bureau (December 15, 2016).

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individuals are still permitted to speak and "that has never been a problem."⁵ The Committee did not specify whether those individuals who do not sign up in advance, but are nevertheless allowed to speak, are limited in the length of time they may address the Committee.

The Committee's explanation for how the advance sign-up rule works in practice does not clarify when individuals must sign up to speak, but rather appears to indicate that the Committee does not enforce its established and recorded advance sign-up rule. The facts here are conflicting and do not provide clarification regarding how the Committee enforces its rule. Regarding the October 31, 2016, meeting, Ms. [REDACTED] contends that a speaker who had not signed up to speak in advance of the meeting or on the meeting sign-up sheet was allowed to speak, but told to "make [her comments] fast" and Ms. [REDACTED] believes that the speaker was not given five full minutes to address the Committee.⁶ The Committee argues that the individual who asked to speak was permitted to address the Committee, but her comments were about her union steward not representing her in a fashion that suited her. The Committee contends that Chairman Hensley intervened during the individual's comments not because she did not sign up in advance, but because the Committee could not address her issue; it was one only her union could address. The available information does not demonstrate that this point of clarification effectively prohibited or was intended to prohibit the speaker from addressing the Committee. Regarding the November 14, 2016, meeting, Ms. [REDACTED] asserts that she and another individual did not sign up for public comment before the meeting and that unlike the October meeting, there was no sign-up sheet for prospective speakers. She and the other prospective speaker were told by Chairman Hensley that they would be permitted to speak briefly. Ms. [REDACTED] contends that they were not allowed a full five minutes to address the Committee. The Committee disputes that the two individuals were restricted in their speaking times. The Committee contends that Chairman Hensley used the timer on his cellphone to monitor the speaking times and that each speaker was permitted a full five minutes. In light of these conflicting versions, this office does not have sufficient evidence to conclude that the Committee improperly restricted public comment at its October 31, 2016, and November 14, 2016, meetings.

This office notes, however, that the Committee's rule as to when exactly a person must sign up to participate in public comment is vague, and it appears to be enforced inconsistently, if at all. Such a lack of clarity undermines the purpose of having rules for public comment, as individuals are not aware of what they may be required to do to exercise their statutory right to address the Committee. If the Committee chooses to restrict public comment based on an advance sign up requirement, we suggest that the Committee clarify its rules for public comment to make clear when and how individuals must sign up to address the Committee

⁵Letter from Garry Hensley, Fulton County Health Committee Chairman, to Laura Harter, Assistant Attorney General, Public Access Bureau (December 15, 2016).

⁶E-mail from [REDACTED] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (November 29, 2016), at 1.

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and to explain any limits placed on individuals who do not sign up in advance. Although this office makes no finding as to what period for advance sign up is a reasonable rule under OMA, we reiterate that such a rule should promote order and decorum and not restrict the ability to address public officials to a greater degree than is necessary to promote a significant governmental interest.

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,

[REDACTED]

LAURA S. HARTER
Assistant Attorney General
Public Access Bureau

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