



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

May 9, 2018

Via electronic mail

Via electronic mail

The Honorable Marshall E. Hatch
Board of Trustees
Chicago State University
9501 South King Drive
Chicago, Illinois 60628
trustees@csu.edu

RE: OMA Request for Review – 2018 PAC 50757

Dear [REDACTED] and Dr. Hatch:

This determination letter 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 that follow, the Public Access Bureau is unable to conclude that Chicago State University Board of Trustees (Board) violated OMA by failing to make a complete verbatim recording of the closed session portion of its April 7, 2017, meeting.

In their Request for Review, [REDACTED] and [REDACTED] allege that the Board violated OMA by failing to record the complete closed session portion of its April 7, 2017, meeting. Specifically, they alleged that an unnamed Board member ordered the technician to discontinue the recording while discussing an action item. This office construed the Request for Review as alleging a violation of section 2.06(a) of OMA (5 ILCS 120/2.06(a) (West 2016)), which provides: "All public bodies shall keep written minutes of all their meetings, whether open or closed, and a verbatim record of all their closed meetings in the form of an audio or video recording."

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On January 29, 2018, this office sent a copy of the Request for Review to the Board and asked it to respond to the allegation that the Board failed to record the complete closed session portion of its April 7, 2017, meeting and to provide a copy of the closed session recording. On February 8, 2018, the Board president responded by asserting that the Board recorded the closed session in its entirety and only stopped the recording device to change the recording medium, at which point discussion of public business ceased until the recording resumed.

On February 19, 2018, [REDACTED] replied by stating that a former Board member, Nikki Zollar, told him that University personnel had been "specifically instructed not to turn on the recording device at the beginning of executive session."¹ Ms. Zollar also sent this office an e-mail stating that she attended the closed session with the intent of criticizing the manner in which Board meetings were conducted and the conduct of Board members, and discovered between 30 and 45 minutes after the closed session started that the recording device was not functioning. She stated that she then located the Board liaison, who began taping the closed session, and that she reported the alleged failure to record the entire closed session to University administrators immediately after the meeting.

On March 7, 2018, this office sent a copy of [REDACTED] reply and Ms. Zollar's e-mail to the Board, and asked that it respond to the additional information concerning the allegation that the Board did not record a portion of the closed session. On March 20, 2018, the Board president responded by again denying the allegation and submitting correspondence from other Board members and the Board liaison who either refuted the allegation or stated that they were unable to recall what transpired in closed session. The Board's vice-chairman stated, in pertinent part:

After the open session recessed, I walked to the conference room where the executive session was to be held. As I walked into the room, I noticed all of the trustees were not yet present and neither was Bonnie Phillips, the CSU Board liaison. I recall other staffers not privy to our discussion were present as they setup for the meeting. Trustee Tiffany Harper was visibly upset, and I was told that the CSU Provost and Trustee Harper had been engaged in a heated argument following the open session.

As other trustees were trying to ascertain what had occurred, Trustee Zollar walked into the room and sat at one end of

¹Letter from [REDACTED], Class of '64", Illinois Taxpayer, to Steve Silverman, Bureau Chief, Public Access Officer, Office of the Attorney General (February 19, 2018).

the long conference table, as everyone else was preparing to sit at the other end of the table. Trustee Zollar began yelling and Trustee Harper continued to be upset following her encounter with the Provost. * * * Ms. Phillips then walked into the conference room, and Chairman Hatch instructed the CSU employees to leave the room – including Ms. Phillips and the sound technician, who was sitting in front of the recording machine.^[2]

The Vice-Chairman added: "The purpose of the executive session was to discuss the new leadership for the university. So, from my perspective, the meeting had not yet commenced at the time that Trustee Zollar began her tirade. Rather, the trustees were trying (in vain) to calm both Trustee Zollar and Trustee Harper – which lasted no more than 15 minutes."³ In addition, the Board liaison stated that there was a "chaotic emotional scene" when she arrived at the conference room before the closed session started.⁴ She stated that she waited outside the conference room, and that Trustee Zollar later emerged from the room and asked her why the recording device had not been activated. She said she entered the conference room and, after the Board president stated that he was ready to begin the closed session, asked the technician to start the recording device and the closed session commenced with the first item on the closed session agenda.

DETERMINATION

As an initial matter, section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2016)) provides:

A person who believes that a violation of this Act by a public body has occurred may file a request for review with the Public Access Counselor established in the Office of the Attorney General **not later than 60 days after the alleged violation. If facts concerning the violation are not discovered within the 60-day period, but are discovered at a later date, not exceeding 2**

²Letter from Nicholas A. Gowen, Esq., Vice Chairman, Chicago State University Board of Trustees, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (March 15, 2018), at 1-2.

³Letter from Nicholas A. Gowen, Esq., Vice Chairman, Chicago State University Board of Trustees, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (March 15, 2018), at 1-2.

⁴Letter from Bonnie Phillips to Dr. Marshall E. Hatch, Sr., Chairman, Board of Trustees, Chicago State University (March 10, 2018).

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years after the alleged violation, by a person utilizing reasonable diligence, the request for review may be made within 60 days of the discovery of the alleged violation. The request for review must be in writing, must be signed by the requester, and must include a summary of the facts supporting the allegation.

On December 7, 2017, the requesters submitted a letter to this office alleging that they recently had been informed that the Board violated OMA by either failing to record the entire April 7, 2017, closed session, or by destroying a portion of the recording. That submission was incomplete because it was unsigned and did not include any facts supporting that allegation. In a letter dated January 12, 2018, the requesters submitted a signed Request for Review asserting that "[o]ver the Christmas holiday, it was confirmed by one of the Trustees present at the April 7, 2017 Regular Board meeting" that the Board president "ordered the technician to discontinue the recording of the closed session."⁵

However, in reply to the Board's response, [REDACTED] acknowledged that he attended the April 7, 2017, Board meeting and stated that "[a]fter executive session I was told by University administrators that portions of the executive session[] had intentionally not been taped. * * * After making additional inquiries I was informed by [a] former Board member, Nikki Zollar[,] that University personnel had been specifically instructed not to turn on the recording device at the beginning of executive session."⁶ In its supplemental response, the Board asserted that the Request for Review was not submitted within the applicable 60-day statutory period because [REDACTED] claims he became aware of the alleged violation eight months before his submission to this office. Because [REDACTED] acknowledged that he discovered facts concerning the alleged violation on the date of the April 7, 2017, meeting but did not file the Request for Review within 60 days of that discovery as required by section 3.5(a), the Public Access Bureau does not have authority to substantively review this matter.

The Public Access Counselor also is charged with providing advice and education with respect to OMA to the public and to public officials. *See* 15 ILCS 205/7(a), (b), (c) (West 2016). In that capacity, this office notes that even if the requesters had submitted this Request for Review before the statutory time limit for doing so expired, the limited and conflicting evidence provided to this office is insufficient to establish that the Board violated section 2.06(a) of OMA. Although Ms. Zollar adamantly asserts in her e-mail that the recording device was not

⁵Letter from [REDACTED], [REDACTED] and [REDACTED] to Office of the Attorney General, Attorney General Lisa Madigan (January 12, 2018).

⁶Letter from [REDACTED] Class of "64", Illinois Taxpayer, to Steve Silverman, Bureau Chief, Public Access Officer, Office of the Attorney General (February 19, 2018).

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functioning at the beginning of the closed session, the Board president directly denied that claim in his response to this office. Based on this office's review of the closed session recording, it begins with a Board member signaling the start of the closed session by alluding to the closed session agenda. There are no acknowledgments or complaints that unrecorded closed session discussions had already occurred.

It appears, however, that there may have been an argument between a Board member and an administrator and that a conflict ensued in the conference room in which members of the Board and CSU employees gathered before the closed session formally commenced. The precise nature of the conflict and the participants are unclear—the most descriptive account this office received indicated that Board members tried to calm two other Board members who were upset. Thus, the available information does not indicate that a majority of a quorum of Board members held a deliberative discussion of public business subject to the requirements of OMA⁷ before the recording device for the closed session was activated. See Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 7 ("whether a gathering falls within the definition of a meeting as used in the Act, would depend upon the peculiar facts in each situation."); *Nabhani v. Coglianesse*, 552 F. Supp. 657, 661 (N.D. Ill. 1982) (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, [and] no attempt to reach accord on a specific matter of [public] business.").

Nevertheless, this office recommends that the Board be mindful that discussions of public business among a majority of a quorum of Board members which occur after a public body votes to enter closed session may constitute a "meeting" subject to the requirements of OMA, even if those topics were not anticipated to be part of the closed session discussion. This office cautions the Board to refrain from any such discussions that are not authorized by the relevant exceptions, to the general requirement that public bodies conduct public business openly, that the Board cites when it votes to enter closed session.

⁷The requirements of OMA apply to each "meeting" of a public body, which section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)) defines as:

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 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.

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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 (312) 814-6756 or ssilverman@atg.state.il.us. This file is closed.

Very truly yours,

STEVE SILVERMAN

Bureau Chief

Public Access Bureau

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