



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

January 17, 2018

Via electronic mail

Via electronic mail

Ms. Merry Rhoades
Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.
101 West Vandalia, Suite 210
Edwardsville, Illinois 62025
mrhoades@tuethkeeney.com

RE: OMA Request for Review – 2017 PAC 50450

Dear [REDACTED] and Ms. Rhoades:

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 Board of Education of Freeburg Community High School District No. 77 (Board) violated OMA during its November 13, 2017, meeting by imposing a restriction on public comment that was not authorized by its established and recorded rules.

On November 14, 2017, [REDACTED] submitted a Request for Review to the Public Access Bureau alleging that during its November 13, 2017, meeting, the Board prohibited members of the public from addressing the members of the Board publicly. Instead, he claimed, the Board required members of the public "who wanted to make a comment or speak, [to] go into a conference room alone with the School Board to make those comments."¹

On November 17, 2017, this office sent a copy of the Request for Review to the Board and requested a copy of the Board's public comment rules, a copy of the agenda and the minutes from the November 13, 2017, meeting, and a detailed written response to the allegation that the Board improperly prohibited public comment during the meeting. On November 29, 2017, the Board provided those materials, including a complete version of its response for this

¹E-mail from [REDACTED] to Public Access [Bureau] (November 14, 2017).

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office's confidential review and a redacted version for this office to forward to ██████████.²
On December 7, 2017, ██████████ submitted a reply.

DETERMINATION

Section 2.06(g) of OMA (5 ILCS 120/2.06(g) (West 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.*" (Emphasis added.) Under the plain language of section 2.06(g), a public body must establish and record rules governing public comment, and may restrict public comment only pursuant to those rules. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 14-009, issued September 2, 2014, at 7.

In its response to this office, the Board stated that prior to its November 13, 2017, meeting, it became aware that parents and students would be making complaints against ██████████ ██████████ the spouse of ██████████ and the cheerleading coach for the District. The Board stated:

At the beginning of the meeting, the Board President made it clear that if the complaint was about an employee of the District, then that matter would be considered during closed session of the Board of Education. If, however, any member of the public wanted to address the Board of Education on any other matter, now was the time for them to present those comments. No person requested to address the Board of Education on any matter other than with respect to complaints about employees of the District.^[3]

The meeting minutes likewise provide that during the public comment portion of the meeting, the Board President, Doug Parrish, "asked that comments regarding coaches not be said at this time."⁴ After the Board went into closed session pursuant to section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-

²See 5 ILCS 120/3.5(c) (West 2016) ("Upon request, the public body may also furnish the Public Access Counselor with a redacted copy of the answer excluding specific references to any matters at issue. The Public Access Counselor shall forward a copy of the answer or redacted answer, if furnished, to the person submitting the request for review.").

³Letter from Merry Rhoades to Joshua M. Jones, Supervising Attorney, Public Access Bureau (November 29, 2017), at 2.

⁴Freeburg Community High School District No. 77 Board of Education, Meeting, November 13, 2017, Minutes 1.

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465, effective August 31, 2017), which permits closed session discussion of specific employees, members of the public sequentially were invited in to address the Board in private.

The Board did not argue that it properly prohibited the public from addressing its members about coaches in open session pursuant to the Board's established and recorded rules governing public comment. Indeed, the Board's established and recorded public comment rules do not provide for the Board to prohibit members of the public from publicly raising concerns about public employees.⁵ Rather, the Board argued that it properly required members of the public to address the Board about concerns regarding coaches behind closed doors because of the heated nature of the disputes. The Board stated that complaints about the head football coach required certain parents and students to be separated during the open portion of the meeting, and claimed that [REDACTED] "simply wanted to intimidate any person that made a complaint against his wife by requiring that the complaints be made public."⁶

In his reply [REDACTED] disputed the way that the Board characterized his conduct in connection with the meeting, and stated: "I do agree that [the Board has] the right to call a closed session to speak with my wife as well as the football coach, but any comments by the public, should have been allowed in a public format."⁷

OMA does not restrict a public body's discretion to allow non-board members into a closed session. Nothing in OMA prohibited the Board from inviting members of the public who were hesitant to voice opinions about coaches into closed session to make their remarks out of earshot of the rest of the meeting attendees. Thus, to the extent that the Board sought to accommodate members of the public who were unwilling to speak about the coaches in open session, the Board had a readily available alternative to barring members of the public who wished to raise their concerns publicly from doing so. In any event, the Board's established and recorded public comment rules did not permit the Board to prohibit comments about coaches

⁵See Freeburg Community High School District No. 77 Board of Education, Board Policy 2.230: *Public Participation at Board of Education Meetings and Petitions to the Board* (adopted June 19, 2017). Although the fourth of these rules permits the Board President to "determine procedural matters regarding public participation not otherwise defined in Board of Education policy[.]" a restriction aimed at the content of speech cannot be construed as procedural. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 45844, issued July 27, 2017, at 3-4 (construing a similar rule and concluding that restricting member of the public from reading aloud a passage from a novel involved in a dispute about appropriate school subject matter was content-based rather than procedural).

⁶Letter from Merry Rhoades to Joshua M. Jones, Supervising Attorney, Public Access Bureau (November 29, 2017), at 3.

⁷Letter from [REDACTED] to [Joshua] Jones (undated).

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during the public comment portion of its November 13, 2017, meeting.⁸ Therefore, the Public Access Bureau concludes that by imposing an unestablished and unrecorded rule limiting public comment during its November 13, 2017, meeting, the Board violated section 2.06(g) of OMA.

There are no means for the Board to remedy its violation in this instance. This office cautions the Board to refrain from limiting public comment at any future meeting except pursuant to its established and recorded rules, which must tend to accommodate, rather than unreasonably restrict, the right to address public officials. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 14-012, issued September 30, 2014, at 6.

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 Chicago address on the first page of this letter. This letter serves to close this file.

Very truly yours,

[REDACTED]
JOSHUA M. JONES
Deputy Bureau Chief
Public Access Bureau

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⁸This office notes that even if the Board's rules authorized the Board president to restrict the content of public comments, such a rule would be "subject to strict-scrutiny" and would have to "serve a compelling state interest and be narrowly drawn to achieve that purpose." *I.A Rana Enterprises, Inc. v. City of Aurora*, 630 F. Supp. 2d 912, 922-23 (N.D. Ill. 2009).