



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

June 5, 2023

Via electronic mail

Mr. Kirk Allen



kirk@illinoisleaks.com

Via electronic mail



Via electronic mail

The Honorable Gary Marschke
Supervisor
DuPage Township
241 Canterbury Lane
Bolingbrook, Illinois 60440
gmarschke@dupagetownship.com

RE: OMA Requests for Review – 2019 PAC 56628; 2019 PAC 56642

Dear Mr. Allen, , and Mr. Marschke:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)).¹

On February 2, 2019, the Public Access Bureau received Mr. Kirk Allen's Request for Review alleging that the DuPage Township (Township) Board of Trustees (Board)

¹This office has consolidated these two Requests for Review in this determination because they concern similar allegations and legal issues.

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violated section 2.06(g) of OMA² by failing to provide an opportunity for public comment during its January 29, 2019, special meeting.³ On March 7, 2019, this office sent a copy of the Request for Review to the Board and asked it to provide a written response to the allegations in Mr. Allen's Request for Review. On March 15, 2019, then-counsel for the Board provided a written answer.⁴ Mr. Allen replied on April 3, 2019.

On January 31, 2019, the Public Access Bureau received [REDACTED] Request for Review, which asserted that he was not permitted to address the Board during the public comment portion of the Board's January 29, 2019, special meeting.⁵ On February 26, 2019, this office sent a copy of the Request for Review to the Board and asked it to provide a written response to the allegations in [REDACTED] Request for Review. On June 6, 2019, the Township provided the requested materials, and on June 21, 2019, counsel for the Township provided a written answer.⁶ [REDACTED] did not submit a reply.

Section 2(a) of OMA⁷ provides that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." In order for the requirements of OMA to apply, a gathering must constitute a "meeting" as defined by section 1.02 of OMA:⁸

"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,

²5 ILCS 120/2.06(g) (West 2018).

³2019 PAC 56628.

⁴Letter from John D. Spina, DuPage Township Attorney, Spina McGuire and Okal, P.C., to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (March 15, 2019).

⁵2019 PAC 56642.

⁶Letter from Jayman A. Avery III, Odelson & Sterk, Ltd., to [Sarbani] Mukherjee, [Assistant Attorney General], [Public Access Bureau] (June 21, 2019).

⁷5 ILCS 120/2(a) (West 2018).

⁸5 ILCS 120/1.02 (West 2018).

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for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business.

Accordingly, for a 5-member public body, 3 members of the body constitute a quorum and the affirmative vote of 3 members is necessary to adopt any motion, resolution, or ordinance, unless a greater number is otherwise required.

The Board is a 5-member public body comprised of the Township supervisor and four trustees. *See* 60 ILCS 1/80-5(a) (West 2020). Accordingly, under the above-cited statutory definition of a "meeting," when at least three members of the Board engage in contemporaneous, interactive communications concerning Township business, those discussions would ordinarily constitute Board meetings subject to the procedural safeguards and requirements of OMA.

Section 2.06(g) of OMA provides that "[a]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." This office has issued a variety of binding opinions affirming that a public body must provide an opportunity for public comment at each open meeting, subject to any reasonable rules it has established and recorded. *See, for example*, Ill. Att'y Gen. Pub. Acc. Op. No. 14-009, issued September 4, 2014, at 2; Ill. Att'y Gen. Pub. Acc. Op. No. 14-012, issued September 30, 2014, at 2; Ill. Att'y Gen. Pub. Acc. Op. No. 19-002, issued January 9, 2019, at 3; Ill. Att'y Gen. Pub. Acc. Op. No. 19-009, issued October 1, 2019, at 3; Ill. Att'y Gen. Pub. Acc. Op. No. 21-009, issued September 21, 2021, at 8.

The Board's response in both matters acknowledged that no time was provided for public comment at the Board's January 29, 2019, special meeting. The Board, however, argued that it did not violate OMA because before the time designated for public comment on the agenda occurred,⁹ the gathering no longer constituted a "meeting." Specifically, the Board stated that at the start of the Board's January 29, 2019, special meeting, all five Board members were present. However, after the Board voted to accept the then-Township supervisor's resignation, which was listed as agenda item V,¹⁰ two Board members left the meeting, leaving only two Board members in attendance. The Board asserted that because there was no longer a quorum of the Board present, the meeting had to be adjourned. This office has reviewed the video of the

⁹The agenda for the Board's January 29, 2019, special meeting included public comment as agenda item VIII.

¹⁰DuPage Township, Agenda Item VIII, Acceptance of Township Supervisor, William Mayer's Resignation (January 29, 2019).

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meeting in question¹¹ which supports the Board's description of the circumstances that occurred during the special meeting.

As discussed above, a public body violates section 2.06(g) of OMA when it does not provide the public with an opportunity to address its members during an open meeting. The Board convened a meeting on January 29, 2019, at which all five Board members were initially present, and deliberated and acted on six agenda items pertaining to the public business of the Township before adjourning. Therefore, this meeting was subject to all of the procedural safeguards and requirements of OMA, including the requirement to allow an opportunity for public comment. The Board prioritized other matters of public business and did not provide an opportunity for public comment before two Board members voluntarily left, which ended the meeting. Although the Board argues that it had no choice but to adjourn with only two members remaining, the voluntary departure of the other two Board members deprived the public of an opportunity to address the Board. The public's statutory right to address the Board cannot be circumvented by certain Board members voluntarily departing the meeting before the public had a chance to provide public comment. *See Roxana Community Unit School Dist. No. 1 v. Environmental Protection Agency*, 2013 IL App (4th) 120825, ¶¶17, 57-58, 998 N.E.2d 961, 965, 971 (2013) (board violated OMA by prohibiting the public from addressing the board in open session). Accordingly, this office concludes that the Board violated section 2.06(g) during its January 29, 2019, special meeting.

Although there are no means by which the Board can remedy its violation of section 2.06(g) in this instance, this office requests that the Board comply with the requirements of section 2.06(g) at future meetings.

¹¹YouTube, DuPage Township Special Meeting 1 29 2019, Edgar County Watchdogs, *available at* DuPage Township Special Meeting 1 29 2019 – YouTube (last visited December 7, 2022).

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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, my e-mail address is Shannon.Barnaby@ilag.gov. This file is closed.

Very truly yours,

[REDACTED]
SHANNON BARNABY
Senior Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
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