

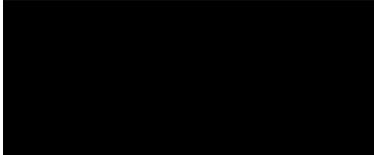


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

February 22, 2021

Via electronic mail



Via electronic mail

Mr. Brian Day
Corporation Counsel
Town of Normal
11 Uptown Circle
Normal, Illinois 61761
bday@normal.org

RE: OMA Request for Review – 2019 PAC 60662

Dear [REDACTED] and Mr. Day:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) 5 ILCS 120/3.5(e) (West 2018)). For the reasons that follow, the Public Access Bureau concludes that that the Town of Normal (Town) Town Council (Council) violated section 2.06(g) of OMA (5 ILCS 120/2.06(g) (West 2018)) by improperly limiting [REDACTED] public comment during its September 16, 2019, meeting. Because the Council has since revised its rules for public comment, however, no further remedial action is recommended.

On November 15, 2019, this office received [REDACTED] Request for Review alleging that the Council violated OMA by interrupting him and denying him the right to finish addressing the Council at its September 16, 2019, meeting because he was speaking about a topic that was not listed on the agenda. [REDACTED] asserted that the topic of his comment was germane to the agenda and that the Council allowed speakers immediately before him to address the Council on matters not on the agenda.

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On December 4, 2019, this office forwarded a copy of the Request for Review to the Council and asked it to provide this office with a detailed written response to the allegations raised by ██████████ and provide this office with copies of the minutes, agenda, and recordings of the September 16, 2019, meeting, as well as a copy of the Council's rules for public comment. On December 18, 2019, Mr. Brian Day, Corporation Counsel for the Town, furnished the requested information and a written response on behalf of the Council. ██████████ replied on January 3, 2020.

DETERMINATION

Section 2.06(g) of OMA provides: "Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body."

Section 2.06(g) Provides the Right to Comment at Public Meetings

In enacting section 2.06(g), the General Assembly created a statutory right, within the Open Meetings Act, to address public officials. The Council argued in its response that section 2.06(g) of OMA does not require public comment at *meetings* of public bodies because section 2.06(g) does not mention meetings. The statutory right to address public officials set out in section 2.06(g) of OMA, however, must be interpreted as part of OMA as a whole. *See Jackson v. Board of Election Commissioners*, 2012 IL 111928, ¶48, 975 N.E. 2d 583, 596 (2012) (a "statute should be evaluated as a whole, with each provision construed in connection with every other section."). The public policy of the State, as implemented by OMA, is that the public "be given advance notice of and the right to attend all *meetings* at which any business of the public body is discussed or acted upon in any way." (Emphasis added.) 5 ILCS 120/1 (West 2018).¹ OMA requires, among other things, proper posting of a notice and an agenda for every public *meeting* (5 ILCS 120/2.02 (West 2018)) and holding those *meetings* at specified times and places that are convenient and open to the public (5 ILCS 102/2.01 (West 2018), as amended by Public Act 101-640, effective June 12, 2020). Further, section 2.06 of OMA (5 ILCS 120/2.06 (West 2018)) requires public bodies to keep written minutes of all their *meetings*, to make minutes of open *meetings* available to the public, to make a verbatim recording of its closed *meetings*, among other statutory requirements for public body meetings. If the General Assembly intended to create a statutory right to address public officials outside of meetings

¹See also 735 ILCS 110/5 (West 2018) ("[I]t is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. * * * The laws, courts, and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation.").

subject to OMA, it would not have placed the right to address public officials within the Open Meetings Act and specifically added it to section 2.06, which sets forth a variety of requirements for meetings of public bodies. Viewing the right to address public officials within the framework of OMA as a whole, section 2.06(g) cannot reasonably be construed to exclude *meetings* of public bodies.

The Right to Public Comment is not Limited to Agenda Items

As stated above, 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." Although OMA does not specifically address the types of rules that a public body may enforce during the public comment portion of an open meeting, ordinarily only reasonable "time, place, and manner" restrictions that are content-neutral are permissible in such a designated public forum under the first amendment to the United States Constitution.² See e.g., *Surita v. Hyde*, 665 F.3d 860, 869-872 (7th Cir. 2011) (holding that audience time during city council meetings constitutes designated public forums under the first amendment, and that barring a speaker from addressing city council meeting unless he apologized for actions that occurred two days earlier was not a content-neutral, time, place or manner restriction, and, therefore, was unconstitutional); *Timmon v. Wood*, 633 F. Supp. 2d 453, 465 (W.D. Mich. 2008) ("City Councils have legitimate reasons for having rules to maintain decorum at public meetings[]" and "to assure that the meetings can be efficiently conducted."). Further, the rules must tend to accommodate, rather than unreasonably restrict, the right to address public officials. Ill. Att'y Gen. Pub. Acc. Op. No. 14-012, issued September 30, 2014, at 6; see, also e.g., *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, 135 S. Ct. 2218, 2226 (2015) (content-based laws, which are those that target speech based on its communicative content, are generally prohibited);

The Town's rules for public comment in effect at the time of the September 16, 2019, Council meeting provided, in pertinent part, that "[a]ll public comments must be germane to the meeting agenda of the public body."³ The Council cites several first amendment court decisions in support of its contention that it may limit public comments under section 2.06(g) to matters that are germane and relevant to the agenda. Although courts have held that a public body may limit public comment to matters on the agenda without violating the first amendment

²U.S. Const., amend. I, the protections of which apply to the states through the fourteenth amendment. See *Surita v. Hyde*, 665 F.3d 860, 869, n.2 (7th Cir. 2011).

³Town of Normal, Resolution No. 5683, adopted June 3, 2019.

right to address public officials in a designated public forum such as a council meeting,⁴ the statutory right to address a public body during an open meeting under OMA does not allow for such a narrow rule. Although first amendment case law pertaining to permissible limitations of speakers during public meetings provides useful guidance, OMA is a statutory scheme. The right to address public officials under section 2.06(g) of OMA must be analyzed in the context of that statute as a whole. OMA does not preclude members of a public body from "the consideration of items not specifically set forth in the agenda," (5 ILCS 120/2.02(a) (West 2018)), as long as the public body does not take final action on items not listed on the agenda. Given that the public body itself is able to discuss matters that are not specifically listed on the agenda, a rule that would prohibit members of the public from addressing matters that are not listed on the agenda would impermissibly restrict the right to public comment. Accordingly, this office has determined that a rule limiting participants to speaking only on subjects listed on the agenda would exceed the scope of permissible rulemaking authorized by section 2.06(g). *See, e.g.,* Ill. Att'y Gen. PAC Req. Rev. Ltr. 38037, issued August 1, 2016, at 3; Ill. Att'y Gen. PAC Req. Rev. Ltr. 45349, issued March 16, 2017, at 6.

These determinations, however, do not conclude that participants have complete freedom to address a public body on any issue. Rather, under section 2.06(g), a public body may establish rules that limit public comment to matters directly relevant or germane to the business of that particular public body. Otherwise, allowing the public to comment on matters unrelated to public business would impede the public body's ability to run efficient meetings. *See, e.g., Scroggins v. City of Topeka, Kan.*, 2 F. Supp. 2d 1362, 1373 (D. Kan. 1998) (city council did not violate first amendment to the United States Constitution by restricting personal comments about an appointee to a mayoral commission that were not directly relevant to the business of the public body); Ill. Att'y Gen. PAC Req. Rev. Ltr. 49820, issued January 31, 2019, at 6 (Commission did not violate 2.06(g) by limiting public comment to matters that were germane to matters that the Commission had the authority to consider); Ill. Att'y Gen. PAC Req. Rev. Ltr. 51665, issued February 5, 2019, at 7 (board did not violate section 2.06(g) by prohibiting speaker from commenting on highly personal matters not related to the business of the board).

⁴*See, e.g., Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 519 (6th Cir. 2019) (city council did not violate the first amendment because its rule requiring comments to be relevant to the agenda was reasonable in light of the purpose served by the forum -- meeting to approve a settlement that would give zoning permission to build a mosque -- and because the rule limiting public comment to the agenda item was viewpoint-neutral); *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004) ("[M]atters presented at a citizen's forum may be limited to issues germane to town government."); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("[I]n dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand."); *I.A. Rana Enterprises, Inc. v. City of Aurora*, 630 F. Supp. 2d 912, 924 (N.D. Ill. 2009) ("A council does not violate the First Amendment when it limits public participants to speaking only about subjects on the agenda.").

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This office has reviewed the material provided by the Council and ██████████, including the relevant sections of the recording of the meeting. Item 5(B) of the agenda for the September 16, 2019, meeting provides: "Report to Receive and File Town of Normal Expenditures for Payment as of September 11, 2019[.]"⁵ In its response to this office, the Council acknowledged that the expenditures included a subsidy payment to the local transit system, Connect Transit. While addressing the Council, ██████████ attempted to discuss an appointment to the local transit system board. The Mayor interrupted him twice and informed him each time that the matter was not an agenda matter, despite allowing other members of the public to freely discuss matters not on the agenda without interruption, including concerns over police and fire pensions and recycling. ██████████ abided by the Mayor's wishes and did not continue to speak on the matter.⁶ Later during the meeting, however, the Council discussed the local transit system, including the vacant board seat. A motion was made then to suspend its rules and allow ██████████ to speak; the motion failed.⁷

██████████ comments were arguably related to the agenda item concerning expenditures, in which case the Council would have failed to follow its own rule by cutting short his opportunity to comment. However, there is no question that ██████████ public comments were germane and relevant to the business of the Council since it discussed the very matter he wished to address during the meeting. Therefore this office concludes that the Council violated OMA when it enforced its improper rule limiting public comment to agenda items to preclude ██████████ from addressing comments to the Council concerning the appointment to the local transit system board.


On January 7, 2021, Mr. Day, attorney for the Council, provided this office with the Town's amended rules for public comment, which were revised on October 19, 2020. The amended rules provide that: "Comments germane to an agenda item will be heard immediately following the Pledge of Allegiance. Comments that are not germane to an agenda item will be heard immediately prior to the Concerns. All comments must be germane to matters concerning the business of the Town of Normal."⁸ Because the Town has amended its rules to expand the

⁵Normal Town Council, Agenda (September 16, 2019).

⁶Normal Town Council, Meeting, September 16, 2019, Video Recording, 4:15-21:23, available at <https://www.youtube.com/watch?v=FLtYshTBvMU&t=1271s>.

⁷Normal Town Council, Meeting, September 16, 2019, Video Recording, 2:00:06-2:28:52, available at <https://www.youtube.com/watch?v=FLtYshTBvMU&t=1271s>. Normal Town Council, Regular Meeting, September 16, 2019, Minutes 5-6.

⁸Town of Normal, Resolution No. 5820, adopted October 19, 2020.


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right to public comment consistent with this determination, no further remedial action is required.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, you may contact me at (312) 814-5201 or at the Chicago address on the bottom of the first page of this letter.

Very truly yours,



EDIE STEINBERG
Senior Assistant Attorney General
Public Access Bureau

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