



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 20, 2018

Via electronic mail

Mr. Kirk Allen

[REDACTED]
kirk@illinoisleaks.com

Via electronic mail

Mr. Daniel J. Dowd

Dowd, Dowd & Mertes, Ltd.

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Des Plaines, Illinois 60016-4549

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RE: OMA Request for Review – 2017 PAC 49828

Dear Mr. Allen and Mr. Dowd:

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 Maine Township (Township) Board of Trustees (Board) violated the requirements of OMA in connection with its August 22, 2017, and September 26, 2017, 6:30 p.m. gatherings and its September 26, 2017, 7:30 p.m. Board meeting.

BACKGROUND

On September 27, 2017, this office received Mr. Kirk Allen's Request for Review alleging that the Board held gatherings at 6:30 p.m. prior to both the August 22, 2017, and September 26, 2017, regular Board meetings, that those gatherings were "meetings" as defined by OMA, and therefore the Board violated OMA by: (1) failing to provide an agenda and post notice of the meetings either on its website or at the meetings' locations; (2) not keeping written minutes of the meetings; and (3) not making the meetings open to the public for public comment. Mr. Allen also alleged that the schedule of regular meetings posted to the Board's website did not list the place of the Board meetings, which he asserted was a violation of section 2.02 of OMA (5

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ILCS 120/2.02 (West 2016)). He also contended that at the September 26, 2017, 7:30 p.m. regular meeting, the doors were locked for a period of time, restricting at least one citizen's ability to enter the meeting.

On October 3, 2017, this office sent a copy of the Request for Review to the Township supervisor and requested that the Board or its representative provide a written response to the allegations in the Request for Review and to provide certain records for this office's review. On October 20, 2017, the Board provided an answer and the requested materials. On October 24, 2017, Mr. Allen replied. On October 27, 2017, this office requested additional information from the Board. On November 28, 2017, and December 5, 2017, the Board provided the additional information.

DETERMINATION

"The Open Meetings Act provides that public agencies exist to aid in the conduct of the people's business, and that the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly." *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989).

6:30 p.m. Gatherings

Section 2(a) of OMA 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." Section 1.02 of OMA defines "meeting" as:

[A]ny 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[,] * * *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.

If a gathering of public body members is determined to be a "meeting," then all the requirements of OMA apply, including proper posting of notice and an agenda (5 ILCS 120/2.02 (West 2016)), holding the meeting at a specified time and place that is convenient and open to the

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public (5 ILCS 120/2.01 (West 2016)), keeping minutes, and allowing public comment (5 ILCS 120/2.06(a), (g) (West 2016)).

The full Board is comprised of five members: the supervisor and four trustees. Accordingly, three Board members constitute a quorum. Therefore, under the specific rule for five-member bodies under section 1.02, contemporaneous, interactive communications involving at least three members of the Board which concern "public business" would ordinarily constitute a meeting of the Board which would be subject to the procedural safeguards and requirements of OMA.

OMA "is not intended to prohibit bona fide social gatherings of public officials, or truly political meetings at which party business is discussed. Rather, the Act is designed to prohibit secret deliberation and action on business which properly should be discussed in a public forum due to its potential impact on the public." *People ex rel. Difanis v. Barr*, 83 Ill. 2d 191, 202 (1980); *see also Nabhani v. Coglianesi*, 552 F. Supp. 657, 660-61 (N.D. Ill. 1982):

A "meeting" under the Act, has been variously described as a gathering "designed to discuss or reach an accord with regard to public business,"[citation], or as "collective discussion...and exchange of facts preliminary to the ultimate decision." [Citation] Third New International Dictionary (1976) defines "deliberate" as follows: "to ponder or think about with measured careful consideration and often with formal discussion before reaching a decision or conclusion."

The Office of the Attorney General has stated that "whether a gathering falls within the definition of meeting as used in the Act, would depend upon the peculiar facts in each situation." Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 126. The Office of the Attorney General has also noted that "[i]n theory, there is no absolute prohibition against the members of a public body attending an 'informational meeting' without triggering the application of" OMA, as long as the members do not make "[d]eliberational statements" or engage in the discussion of public business amongst themselves. Ill. Att'y Gen. Op. No. 95-004, issued July 14, 1995, at 10-11. In that opinion, the Attorney General concluded that the "mere fact that a majority of a quorum of the members of a public body attend and participate in a bona fide presentation on new legislative developments in an area of public concern" did not make the presentation subject to OMA, but the extensive discussions of public business by members of two county boards during the presentation did trigger the requirements of OMA. (Emphasis in original.) Ill. Att'y Gen. Op. No. 95-004, at 10-11; *see also Nabhani*, 552 F. Supp. at 661 (a gathering does not constitute a meeting for purposes of OMA when there is "no examining or

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weighing of reasons for or against a course of action, no exchange of facts preliminary to a decision, [or] no attempt to reach accord on a specific matter of public business.").

It is undisputed that the Board did not hold the 6:30 p.m. gatherings on August 22, 2017, and September 26, 2017, in accordance with the requirements of OMA, although the Board noted that the regular meeting agenda stated that trustees would meet at 6:30 p.m. to review bills. The Board's answer to this office contends that the gatherings were not subject to the requirements of OMA because the Board did not discuss public business. It argued in its answer that the 6:30 p.m. gatherings are for the Trustees to individually review the Township's bills, and that no deliberation or discussion concerning the bills takes place. The Board explained that the payment of bills is an agenda item at the regular Board meetings, which convene at 7:30 p.m., after the bill review gatherings. The Board explained that at the August 22, 2017, meeting, up to four trustees were present, but not all arrived at the same time and one or more left the room during the session. The Board also stated that:

[q]uestions were asked of staff by at least two trustees and staff responded directly to the trustee who posed the question. No discussion about the bills took place between the trustees. One trustee raised a question about an employee payroll check and was referred by the staff member to the Supervisor. The Supervisor and this trustee had a private conversation. While the other trustees were physically present in the room, they were not part of the personal discussion between [the trustee and Supervisor].^[1]

The Board further explained that at the September 26, 2017, meeting, three trustees were present from time to time, not all arrived at once, and not all remained present for the duration of the meeting. The Board also asserted that "several questions were posed to staff about various bills and staff responded directly to the trustee who asked the question. There was no discussion or deliberation between trustees on Township business at this gathering."²

Based on the information provided by the Board, a quorum was present for at least part of both the August 22, 2017, and September 26, 2017, 6:30 p.m. gatherings. Further, the topic of the gatherings was unquestionably public business, as the review of bills pertains to the expenditure of the Township's funds. The Board denies that any deliberation occurred at the 6:30 p.m. gatherings, but it states that the trustees sought and received information concerning

¹Letter from Daniel J. Dowd to Laura S. Harter, Assistant Attorney General, Public Access Bureau (December 5, 2017), at 1.

²Letter from Daniel J. Dowd to Laura S. Harter, Assistant Attorney General, Public Access Bureau (November 28, 2017), at 2.

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the bills. It appears that all of the trustees present at the gatherings could hear the questions raised and the answers provided. Contrary to the Board's assertion that its members did not engage in deliberation because there was no discussion, the Attorney General has noted that "[d]eliberation *** connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision." Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 125 (quoting *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 263 Cal. App. 2d 41, 47-48, 69 Cal. Rptr. 480, 485 (Cal. Ct. App. 1968)). In the same opinion, the Attorney General also quoted *Sacramento Newspaper Guild* for the proposition that,

[t]here is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the *collective inquiry* and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. (Emphasis added.) Ill. Att'y Gen. Op. No. S-726, at 125 (quoting *Sacramento Newspaper Guild*, 263 Cal. App. 2d at 50, 69 Cal. Rptr. at 487).

Because the purpose of the 6:30 p.m. gatherings was to obtain information in anticipation of voting on the payment of the bills at the ensuing regular Board meetings, the information obtained during those gatherings was preliminary to the ultimate decision of whether to approve the bills. During its 6:30 p.m. gatherings, the Board engaged in the collective inquiry phase of deliberation before voting at 7:30 p.m. on the approval of the Township bills. Therefore, the 6:30 p.m. gatherings constituted meetings subject to the requirements of OMA.

Accordingly, based on the available information, this office concludes that, in connection with its August 22, 2017, and September 26, 2017, gatherings, the Board violated (1) section 2.02 of OMA by holding meetings without proper posting of notice and agendas; (2) section 2.01 of OMA by failing to hold the meetings at specified times and places that were open to the public; (3) section 2.06(a) of OMA by failing to keep minutes of the meetings; and (4) section 2.06(g) of OMA by failing to provide an opportunity for public comment. Because the Board did not vote upon items of final action at the meetings, no further remedial action is required, but this office cautions the Board to comply with all of the requirements of OMA when gathering to deliberate on matters of public business.

Posting of Meeting Location

Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2016)) provides, in pertinent part, that "[a]n agenda for each regular meeting shall be posted at the principal office of the

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public body and at the location where the meeting is to be held at least 48 hours in advance of the holding of the meeting[.]" Section 2.02(a) also describes the annual schedule of regular meetings: "Every public body shall give public notice of the schedule of regular meetings at the beginning of each calendar year or fiscal year and shall state the regular dates, times, and places of such meetings." Section 2.02(b) of OMA (5 ILCS 120/2.02(b) (West 2016)) requires "[p]ublic notice shall be given by posting a copy of the notice at the principal office of the body holding the meeting or, if no such office exists, at the building in which the meeting is to be held." Lastly, section 2.02(c) of OMA (5 ILCS 120/2.02(c) (West 2016)), states, "[a]ny agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting."

Mr. Allen alleged that his review of the Township website, meeting notices, and agendas did not locate a schedule of regular Board meetings that included information regarding the location of the meetings. In its answer to this office, the Board stated that it did not include the location of its meetings on its agendas, but its website did include location information posted with the annual schedule of regular Board meetings.

This office has reviewed the copies of the Township's website listing the Board meeting agendas and confirms that location information was included above the list of the schedule of regular Board meetings. As described above, as opposed to the annual schedule of regular meetings, OMA does not include a requirement that a particular meeting agenda include the location of a meeting. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 50231, issued October 30, 2017, at 2 ("The plain language of section 2.02 of OMA[] does not require a public body to include the physical address of the location where the meeting will be held on its agenda or notice."). Accordingly, this office concludes that the Board did not violate OMA.

Access to September 26, 2017, Meeting

Section 2.01 of OMA (5 ILCS 120/2.01 (West 2016)) provides, in pertinent part, 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." "Open" and "convenient" are not synonymous under OMA. *Gerwin v. Livingston County Board*, 345 Ill. App 3d 352, 359 (4th Dist. 2003). A meeting which is open to the public is a meeting where "no one is prohibited from attending it[.]" *Gerwin*, 345 Ill. App. 3d at 361. A meeting is not convenient if it is "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. The concept of public convenience implies a "rule of reasonableness, not 'absolute accessibility' but 'reasonable accessibility.'" *Gerwin*, 345 Ill. App. 3d at 362 (citations omitted).

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There is no dispute that the doors to the Township Hall were locked for part of the time when the September 26, 2017, Board meeting was taking place. The Board stated in its answer to this office that a part-time Township employee had locked the door for a period of time in violation of his employment responsibility. Mr. Allen alleged that the locked doors temporarily prevented a citizen from gaining access to the meeting.

This office has reviewed the portion of the recording of the September 26, 2017, Board meeting in which a member of the audience reported that he found the doors to the Township Hall locked at 8:30 p.m. and he was delayed in entering the meeting. He did not indicate how long he had been kept out of the meeting. This office does not have information that any other individuals were denied access to the September 26, 2017, Board meeting.

This office has found previously that merely holding a meeting in a locked area is not a violation of OMA, provided that measures are taken to ensure members of the public who wish to attend are able to do so. *See Ill. Att'y Gen. PAC Req. Rev. Ltr. 17711*, issued March 27, 2012 (holding meeting in locked area of police station was a reasonable security measure that did not violate the requirements of OMA because members of the public were able to request entry). Here, there were no measures in place to admit members of the public to the Town Hall. As one citizen was temporarily denied access to the September 26, 2017, Board meeting, this office finds that the Board violated the requirement in section 2.01 of OMA that public meetings be "open to the public." This office cautions the Board to ensure that the doors to the Township Hall remain unlocked for the duration of its future meetings.

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 (217) 524-7958 or LHarter@atg.state.il.us. This letter serves to close this file.

Very truly yours,



LAURA S. HARTER
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
The Honorable Laura J. Morask
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