



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

September 11, 2020

Via electronic mail

Mr. Mick Dumke
Reporter
ProPublica Illinois
mick.dumke@propublica.org

Via electronic mail

Mr. Jeffrey C.B. Levine
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RE: OMA Request for Review – 2020 PAC 62981

Dear Mr. Dumke and Mr. Levine:

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 explained below, the Public Access Bureau concludes that the City Council (Council) of the City of Chicago (City) violated the requirements of OMA in connection with conference call gatherings of members of the Council on March 26, 2020, March 30, 2020, and April 6, 2020.

BACKGROUND

On May 13, 2020, this office received a Request for Review from Mr. Mick Dumke, on behalf of ProPublica Illinois, alleging that the Council gathered by video and/or audio conference in violation of OMA on March 26, 2020, March 30, 2020, April 6, 2020, and May 8, 2020. In particular, Mr. Dumke alleged the Council's gatherings were not open to the public and no notice of the meetings was provided to the public. On May 18, 2020, this office sent a copy of the Request for Review to the Council and requested that it or its representative provide a written response to the allegations in the Request for Review. The Public Access

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Bureau did not receive a response to its letter. On June 8, 2020, this office sent a second copy of the Request for Review to the Council and requested that it respond to Mr. Dumke's allegations. On June 26, 2020, the Public Access Bureau received the Council's written answer and summaries of the discussions during the gatherings. On June 29, 2020, this office forwarded a copy of the Council's answer to Mr. Dumke; he replied the same day.

DETERMINATION

It is the "public policy of this State that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." 5 ILCS 120/1 (West 2018). "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).

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019) 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 (5 ILCS 120/1.02 (West 2018)) defines a "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 a majority of a quorum 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.

If a gathering of a majority of a quorum of public body members is determined to be a "meeting," then all the requirements of OMA apply, including proper advance posting of notice and an agenda (5 ILCS 120/2.02 (West 2018)), holding the meeting at a specified time and place that is convenient and open to the public (5 ILCS 120/2.01 (West 2018)), keeping minutes, and allowing public comment (5 ILCS 120/2.06(a), (g) (West 2018)).

The requirements of OMA are not automatically triggered when a majority of a quorum or a quorum of a public body attends a gathering. *See University Professionals of Illinois v. Stukel*, 344 Ill. App. 3d 856, 868 (1st Dist. 2003) (OMA is not "triggered every time public officials meet and converse"). "Rather, the Act is designed to prohibit secret deliberation

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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. Coglianese*, 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 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 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" does not make a gathering subject to OMA, but that 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 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.").

In his Request for Review, Mr. Dumke alleged that the mayor, City officials, and the members of the Council gathered to hold non-public "briefings" by video or telephone conference where information was shared and aldermen "ask questions and make suggestions, and discussions and debates about [C]ity policies often ensue among aldermen, the mayor and members of her team."¹ In its response to this office, the Council acknowledged that the mayor and employees in her administration held conference calls concerning the COVID-19 pandemic with a quorum or majority of a quorum of the Council on March 26, 2020, March 30, 2020, and

¹E-mail from Mick Dumke, Reporter, ProPublica Illinois, to Public Access, Office of the Attorney General (May 13, 2020).

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April 6, 2020.² The Council characterized the gatherings as "briefings," asserting the requirements of OMA did not apply because (1) the alderman did not participate in the gatherings in a legislative capacity; (2) no deliberation occurred; and (3) the matters discussed were not "public business" as that term is used in section 1.02 of OMA. In particular, the Council asserted that "the aldermen participated in the calls as community representatives, not as legislators."³ In addition, the Council argued that the calls were not "meetings" subject to OMA because the aldermen participating did not deliberate on legislative matters. In his reply, Mr. Dumke disputed the Council's assertion that aldermen must reach a consensus to deliberate on a matter of public business. He asserted that the aldermen's participation in the calls constituted deliberation, and stated that the aldermen "raise[d] questions or concerns about comments the administration or other aldermen had made. Aldermen offered both suggestions and critiques – some of them accepted and some rejected at different points by the mayor, her aides, or other aldermen."⁴

The Council asserted that the aldermen participating on the call did so as "as community-based first responders" to receive "the most current and relevant information to share with their constituents."⁵ The Council argued that when aldermen gather for that purpose they do not meet as a "public body" under OMA. Section 1.02 of OMA defines a "public body" to include "all legislative, executive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State[.]" The Council is the legislative body of the City, and "shall meet in accordance with the Open Meetings Act." 65 ILCS 5/3.1-40-5 (West 2018). The Public Access Bureau has consistently held that

²The Council is comprised of fifty aldermen and the mayor, who is the presiding officer. A quorum of the Council is twenty-six aldermen, therefore a majority of a quorum is fourteen. The City's response to this office stated that attendance at the gatherings wasn't recorded, but it appears from summaries of the discussions that thirty-one aldermen attended the March 30, 2020, meeting, twenty-five attended the first March 26, 2020, gathering while nineteen attended a second gathering on the same day, and sixteen attended the April 6, 2020, gathering. The response asserted that only nine aldermen, which is not a majority of a quorum of the Council, participated in the May 8, 2020, conference call. In his reply, Mr. Dumke did not dispute the Council's assertion there was not a majority of a quorum of the aldermen present for that gathering. Consequently, the available information indicates that the May 8, 2020, conference call did not constitute a meeting subject to the requirements of OMA.

³Letter from Jeffrey C.B. Levine, Deputy Corporation Counsel, Department of Law, City of Chicago to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 26, 2020), at 2.

⁴E-mail from Mick Dumke, Reporter, ProPublica Illinois, to Lorraine Dunham, [Paralegal], Public Access Bureau (June 29, 2020).

⁵Letter from Jeffrey C.B. Levine, Deputy Corporation Counsel, Department of Law, City of Chicago to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 26, 2020), at 2.

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communications involving less than a majority of a quorum of the members of a public body are not meetings subject to the requirements of OMA. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 24827, issued June 8, 2015, at 2 (e-mails exchanged by two members of a seven-member public body did not constitute a meeting of a public body). However, when a majority of a quorum of aldermen gather to participate in a discussion about the City's response to a crisis such as the current pandemic, they do so as the legislative body of the City of Chicago even if they do not vote or otherwise take final action on how to respond. *See City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶42, 992 N.E. 2d 629, 630 (2013) ("[O]nce the individual city council members have convened a city council meeting (or 'study session'), it can reasonably be said that they are acting in their collective capacity as the 'public body' during the time the meeting is in session."). If there were a distinction between members of the Council gathering as "community representatives" rather than as legislators, it would be a distinction without a difference—aldermen represent their constituents in the community by virtue of their positions as elected members of the Council, which is a legislative body. Consequently, this office concludes that the aldermen gathered in their capacities as members of the Council and therefore constituted a "public body" as that term is defined in FOIA.

The Council further asserted that it did not hold "meetings" under OMA because the aldermen did not deliberate and did not discuss public business. Specifically, the Council argued that for a legislative body, such as the Council, "'discussing public business' means debating or voting on actual or potential legislation – no more, no less."⁶ The Attorney General has stated, however, that "discussing public business" must be construed broadly, concluding 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).

⁶Letter from Jeffrey C.B. Levine, Deputy Corporation Counsel, Department of Law, City of Chicago to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 26, 2020), at 3.

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In its response to this office, the Council stated that it addressed "public safety, economic recovery, housing assistance, and education initiatives already in effect, as well as general information regarding the pandemic[] [Footnotes omitted]"⁷ during the calls. The Council asserted that the purpose of the calls was for the administration to provide updates on the City's COVID-19 response, receive questions from aldermen, and answer those questions. The City argued that "[a]ldermen did not have an opportunity to substantively discuss the administration officials' remarks, to weigh or examine their proposals, or reach any consensus on a course of action or decision as a group."⁸ The Council also argued that the items discussed on the calls were not "public business" of the Council under section 1.02 of OMA.⁹ The Council continued to assert that only legislative considerations were the "public business" of the Council, and that nothing "remotely within the legislative sphere" was addressed during the calls.¹⁰

Where the language of a statute is clear and unambiguous, a reviewing body "may not depart from the plain language by reading into the statute exceptions, limitations, or conditions that the legislature did not express." *Hayashi v. Illinois Department of Financial and Professional Regulation*, 2014 IL 116023, ¶16, 25 N.E.3d 570, 576 (2014). Such clear and unambiguous language should be interpreted without resorting to aids of statutory construction. *In re B.L.S.*, 202 Ill. 2d 510, 515 (2002).

The General Assembly broadly defined "meeting" for purposes of OMA to encompass all discussions of "public business" attended by a sufficient number of members of a public body for a majority of a quorum, or a quorum for five-member public bodies. "Public" is defined as "[t]he people of a country or a community as a whole" while "business" is defined as "matters that come before a deliberative assembly for its consideration and action, or for its information with a view to possible action in the future." *Black's Law Dictionary* (11th ed. 2019), available at Westlaw BLACKS. Thus, "public business" includes not only those subjects on which that public bodies take action during a gathering, but also the information exchanged relating to matters that public bodies could potentially act upon in the future, regardless of whether action concerning the information is ultimately taken.

⁷Letter from Jeffrey C.B. Levine, Deputy Corporation Counsel, Department of Law, City of Chicago to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 26, 2020), at 3.

⁸Letter from Jeffrey C.B. Levine, Deputy Corporation Counsel, Department of Law, City of Chicago to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 26, 2020), at 4.

¹⁰Letter from Jeffrey C.B. Levine, Deputy Corporation Counsel, Department of Law, City of Chicago to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 26, 2020), at 5.

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It undisputed that at least a majority of a quorum of the aldermen on the Council were present on the conference calls on March 26, March 30, and April 6, 2020, and that issues concerning the City's response to the COVID-19 pandemic were discussed during the gatherings. The Council's response to this office stated that no legislative items were discussed and no consensus was reached during the gatherings. However, as previously discussed, section 1 of OMA provides that the public shall be given advance notice and the opportunity to attend a meeting where public business "is discussed or acted upon in any way." It is clear from the summaries of the calls provided for our confidential review that the purpose of the gatherings was to discuss the City's response to the pandemic and to allow the aldermen to express their thoughts and recommendations on how the response should proceed. Although the mayor may have informed aldermen of certain unilateral actions that had already been taken and that the Council would not be acting upon, the City's management of and response to a public health threat is critical public business of the City. Further, despite the Council's assertion that nothing "remotely within the legislative sphere" was addressed during the calls,¹¹ the Council subsequently took final action on ordinances related to the pandemic.¹² Therefore, the March 26, 2020, March 30, 2020, April 6, 2020, calls constituted "meetings" of the Council subject to the requirements of OMA.

Accordingly, based on the available information, this office concludes that, in connection with March 26, 2020, March 30, 2020, April 6, 2020, conference calls, the Council violated: (1) section 2.02 of OMA by holding the meetings without proper posting of notice and an agenda; (2) section 2.01 of OMA by failing to hold the meeting at a specified time and place that was open to the public; (3) section 2.06(a) of OMA by failing to keep minutes of the meeting; and (4) section 2.06(g) of OMA by failing to provide an opportunity for public comment. To remedy this violation, the Public Access Bureau requests that the Council make available for public inspection copies of the summaries of the March 26, 2020, March 30, 2020, April 6, 2020, calls.

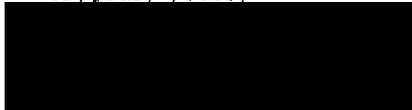
¹¹Letter from Jeffrey C.B. Levine, Deputy Corporation Counsel, Department of Law, City of Chicago to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 26, 2020), at 5.

¹²Journal of the Proceedings of the City Council of the City of Chicago, Illinois, Regular Meeting, April 24, 2020, at 15041-45 (Council passed ordinance O2020-2356, "Authorization for Various City Departments to Institute Emergency Measures in Response to COVID-19 Pandemic."); Journal of the Proceedings of the City Council of the City of Chicago, Illinois, Regular Meeting, June 17, 2020, at 17879-84 (Council passed Ordinance O2020-3501, "Establishment of Moratorium on Issuance of Notice of Termination of Tenancy for Failure to Pay Rent Due to COVID-19 Impact.").

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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 (217) 782-9054, mhartman@atg.state.il.us, or the Springfield address on the first page of this letter. This letter serves to close this file.

Very truly yours,



MAIT HARTMAN
Assistant Attorney General
Public Access Bureau

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