

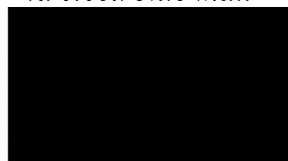


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 28, 2018

Via electronic mail



Via electronic mail
Ms. Sue E. McMillan
City Clerk
111 South Capitol Street
Pekin, Illinois 61554
smcmillan@ci.pekin.il.us

RE: OMA Request for Review – 2018 PAC 51599

Dear [REDACTED] and Ms. McMillan:

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 Pekin City Council (Council) violated OMA during its January 9, 2017, meeting by discussing certain matters in closed session that were outside the scope of the cited exception to the general requirement that public bodies conduct business openly.

BACKGROUND

On February 1, 2018, this office received [REDACTED] Request for Review alleging that on an unknown date, the Council violated OMA by discussing authorization for a bidding process during a closed session. To support his allegation, [REDACTED] cited a January 31, 2018, Freedom of Information Act (FOIA) response by the City of Pekin (City) referencing a closed session, the minutes of which were responsive to [REDACTED] request for documentation showing that "the Council had given [the city manager] authorization to buy

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products/vehicles/etc. through State and or National bids."¹ On February 8, 2018, this office sent a copy of the Request for Review to the Council and requested that it provide a written response to ██████████ allegation. This office asked the Council to identify the date of the meeting referenced in the City's January 31, 2018, FOIA response and to identify the specific exception(s) in section 2(c) of OMA (5 ILCS 120/2(c) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017) that the Council publicly cited as its basis for entering closed session. This office requested copies of the meeting agenda, open and closed session minutes, and the verbatim recording of the closed session discussion. On February 21, 2018, this office received the requested materials and the Council's answer. The Council indicated that the closed session referenced in its FOIA response occurred during its January 9, 2017, meeting.² On February 27, 2018, this office received ██████████ reply.

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).

¹Letter from Sue E. McMillan to ██████████ (January 30, 2018).

²Section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2016)) provides, in pertinent part:

A person who believes that a violation of this Act by a public body has occurred may file a request for review with the Public Access Counselor established in the Office of the Attorney General *not later 60 days after the alleged OMA violation. If facts concerning the violation are not discovered within the 60-day period, but are discovered at a later date, not exceeding 2 years after the alleged violation, by a person utilizing reasonable diligence, the request for review may be made within 60 days of the discovery of the alleged violation.*

The request for review must be in writing, must be signed by the requester, and must include a summary of the facts supporting the allegation. (Emphasis added.)

The available information indicates that the Council did not make available to the public the minutes of the closed session of its January 9, 2017, meeting, and therefore, it is reasonable that ██████████ would not have been aware of the alleged violations by the Council within 60 days of their occurrence despite using reasonable diligence. Because the Request for Review appears to have been submitted within the time limits set out in section 3.5(a) of OMA, this office has authority to review ██████████ allegations.

Closed Session Discussion

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017) provides that all meetings of a public body shall be open to the public unless the subject of the meeting falls within one of the exceptions set out in section 2(c) of OMA (5 ILCS 120/2(c) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017). The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017; *see also Henry v. Anderson*, 356 Ill. App. 3d 952, 996-97 (4th Dist. 2005) (strictly construing section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2002))).

The minutes provided by the Council of the open portion of its January 9, 2017, meeting indicate that the Council voted to enter 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; 100-465, effective August 31, 2017), which permits a public body to discuss in closed session "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body." In construing section 2(c)(1) of OMA, the Attorney General has concluded that "the General Assembly did not intend to permit public bodies to hold general discussions concerning categories of employees in closed session pursuant to section 2(c)(1)." Ill. Att'y Gen. Pub. Acc. Op. No. 16-013, issued December 23, 2016, at 4. Rather, "section 2(c)(1) of OMA 'is intended to permit public bodies to candidly discuss the relative merits of individual employees, or the conduct of individual employees.'" Ill. Att'y Gen. Pub. Acc. Op. No. 16-013, at 5 (quoting Ill. Att'y Gen. Pub. Acc. Op. No. 12-011, issued July 11, 2012, at 3). The Public Access Bureau has previously determined that "[t]he use of the term 'specific employees' in section 2(c)(1) significantly limits the scope of the exception" to "the hiring merits, performance, conduct or terms of employment of individual employees." Ill. Att'y Gen. PAC Req. Rev. Ltr. 12658, issued July 7, 2011, at 4.

The Council stated in its answer to this office that the closed session "discussion focused upon [the city manager's] performance as a new manager, and Council's views and expectations, and his anticipated performance to meet those expectations."³ This office has reviewed the closed session minutes and verbatim recording and finds that the Council did not evaluate the performance of the city manager, but rather, discussed the city manager's responsibility regarding a specific task. The Council addressed the duties of the city manager, generally, not the performance or merits of the current city manager, specifically. Because the

³Letter from Sue E. McMillan, City of Pekin FOIA Officer, to Laura S. Harter, Assistant Attorney General, Public Access Bureau (February 16, 2018), at 1.

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Council's discussion did not address the city manager's conduct, it does not carry implications for his reputation. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 15-007, issued September 16, 2015, at 4 (finding that discussions concerning the elimination of a job held by a single employee for budgetary reasons would not implicate an employee's reputation, and therefore did not fall within the exception in section 2(c)(1)). Accordingly, this office concludes that the Council violated section 2(a) of OMA by discussing an unauthorized topic in closed session during its January 9, 2017, meeting. To remedy this violation, this office asks that the Council vote to release to the public the relevant portion of the closed session minutes and verbatim recording from its January 9, 2017, meeting.

Closing of the Meeting

Section 2a of OMA (5 ILCS 120/2a (West 2016)) provides, in pertinent part, that

A public body may hold a meeting closed to the public, or close a portion of a meeting to the public, upon a majority vote of a quorum present, taken at a meeting open to the public for which notice has been given as required by this Act.[***] The vote of each member on the question of holding a meeting closed to the public and a citation to the specific exception contained in Section 2 of this Act which authorizes the closing of the meeting to the public shall be publicly disclosed at the time of the vote and shall be recorded and entered into the minutes of the meeting.[***]

At any open meeting of a public body for which proper notice under this Act has been given, the body may, without additional notice under Section 2.02, hold a closed meeting in accordance with this Act. (Emphasis added.)

In his reply to this office, [REDACTED] argued that the agenda for the Council's January 9, 2017, meeting did not list section 2(c)(1) of OMA as a reason for going into closed session. "The plain language of section 2a allows a public body to decide during a properly noticed open meeting to go into closed session without any additional notice." *Wyman v. Schweighart*, 385 Ill. App. 3d 1099, 1107 (2008). Therefore, the Council did not need to put in its agenda for the open meeting its intention to go into a closed meeting or the topics to be discussed in the closed meeting. *See Wyman*, 285 Ill. App. 3d at 1107. Further, the minutes of the open session of the January 9, 2017, Council meeting reflect that the Council cited the language of section 2(c)(1) as one of its bases for entering closed session. Although this office found that part of the Council's closed session discussion did not fall within the section 2(c)(1) exception, another portion of the discussion that is not at issue in this matter concerned "[t]he

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appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body[.]” Accordingly, this office finds that the Council adequately identified the relevant exception before going into closed session.

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[at]atg.state.il.us. This letter serves to close this file.

Very truly yours,

[REDACTED]
LAURA S. HARTER
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*

[REDACTED] t