

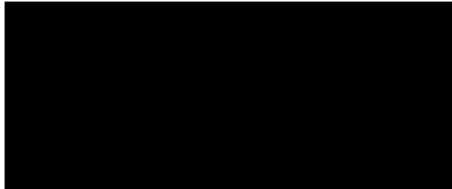


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

May 31, 2019

Via electronic mail



Via electronic mail

Mr. Andrew S. Paine
Tressler LLP
233 South Wacker Drive, 22nd Floor
Chicago, Illinois 60606
apaine@tresslerllp.com

RE: OMA Request for Review – 2018 PAC 54122

Dear [REDACTED] and Mr. Paine:

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 Elmhurst Park District (District) Board of Commissioners (Board) improperly discussed certain matters that were outside the scope of the exception on which it relied to close a portion of its October 10, 2017, meeting, but did not take final action in closed session during that meeting.

In his Request for Review, [REDACTED] alleged that at its October 10, 2017, meeting the Board improperly entered closed session under the section 2(c)(1) exception (5 ILCS 120/2(c)(1) (West 2017 Supp.)), to the general requirement that public bodies conduct public business openly, to discuss the succession plan for the District's executive director. Additionally, [REDACTED] asserted that the Board did not appear to have taken a vote in open session at the October 10, 2017, meeting, or any subsequent open meeting, to approve this succession plan. Therefore, [REDACTED] contended that the Board may have violated section 2(e) of OMA (5 ILCS 120/2(e)

██████████
Mr. Andrew S. Paine
May 31, 2019
Page 2

(West 2017 Supp.)) by taking final action in closed session during the Board's October 10, 2017, meeting.

On July 25, 2018, this office forwarded a copy of the Request for Review to the Board and asked it to provide this office with copies of the open and closed session minutes and the closed session verbatim recording of the October 10, 2017, meeting for this office's confidential review, together with a written response to the allegations in ██████████ Request for Review. On August 23, 2018, counsel for the Board furnished the records and two versions of the Board's written response: a complete version for this office's confidential review and a redacted version for this office to forward to ██████████. On August 24, 2018, this office forwarded a copy of the redacted response to ██████████; he did not reply.

DETERMINATION

Reasonable Diligence

Section 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.)

██████████ acknowledged in his Request for Review that the relevant meeting was held more than 60 days before he submitted his Request for Review, but he argued that he had not learned material facts concerning the alleged violations at the time that they occurred despite using reasonable diligence. ██████████ stated that the Board voted on June 11, 2018, to make the closed session meeting minutes for the October 10, 2017, meeting open for public inspection, and that he became aware of the content of the closed session discussions on July 10, 2018, only after he received the Board's response to his Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2016)) request for those closed session meeting minutes.

██████████
Mr. Andrew S. Paine
May 31, 2019
Page 3

Because the closed session portion of the Board's October 10, 2017, was not accessible to the public and because the minutes of the closed session were not made publicly available until June 11, 2018, ██████████ was unable to discover the subject matter of the Board's closed session discussion within 60 days of that discussion despite using reasonable diligence. Accordingly, this office has authority to review ██████████ allegations because he submitted them within the time limits set out in section 3.5(a) of OMA.

Alleged Violation of Section 2(c)(1) of OMA

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2016). Section 2(a) of OMA (5 ILCS 120/2(a) (West 2017 Supp.), as amended by Public Act 100-646, effective July 27, 2018) provides that all meetings of a public body must be open to the public unless the discussion falls within the scope of one of the exceptions set out in section 2(c) of OMA (5 ILCS 120/2(c) (West 2017 Supp.), as amended by Public Act 100-646, effective July 27, 2018). The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (5 ILCS 120/2(b) (West 2017 Supp.), as amended by Public Act 100-646, effective July 27, 2018); *see also Henry v. Anderson*, 356 Ill. App. 3d 952, 996-997 (4th Dist. 2005) (strictly construing OMA section 2(c)(1)). Section 2(c)(1) of OMA, the exception on which the Board relied to close the meeting at issue, permits a public body to enter closed session to discuss "[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.

In its non-confidential response to this office, the Board asserted that the meeting was properly closed pursuant to 2(c)(1). According to the Board, its annual evaluation of the executive director's performance involves reviewing whether the executive director has met his goals and directives. The Board stated that the executive director's continued employment and

██████████
Mr. Andrew S. Paine
May 31, 2019
Page 4

compensation is directly impacted by whether, and to what extent, these goals and directives are met. In this circumstance, the Board asserted that one such directive was to develop a succession plan for the executive director position. Therefore, the Board asserted its "evaluation of the Executive Director's performance over the past year necessarily involved a review of the succession plan and whether or not the Park Board felt the plan was satisfactory and in the best interests of the Park District."¹

The Board further asserted that the succession plan could not be separated from the executive director's evaluation and discussed separately in open session because the plan created three positions, which would include removing responsibilities from two specific employees of the District and the promotion of another specific District employee. The Board contended that the discussion of the merits of the succession plan required a candid discussion of the performance and abilities of these three individuals, including whether the current executive director and the Board believed that any of the identified employees were suitable to fill the executive director position. Therefore, the Board argued that a meaningful discussion of the potential succession plan could not have taken place without referring to the specific employees who would be impacted by the plan.

This office has reviewed the closed session minutes and the verbatim recording of the Board's October 10, 2017, meeting, and finds that a significant part of the Board's discussion of the proposed succession plan directly related to the employment, compensation, and performance of specific individual employees. In particular, the Board discussed specific employees' qualifications and abilities and the merits and limitations of the proposed changes in staffing as it related to those employees, all of which falls within the scope of the section 2(c)(1) exception.

The entirety of the Board's discussion, however, did not stay within the scope of the section 2(c)(1) exception. With the exception of a discrete portion of the discussion, the Board did not discuss the performance of the executive director or consider whether he had met his directive of developing a successful succession plan required by his 2016 performance evaluation. Rather, the remaining portions of the closed session involved the executive director presenting his proposed succession plan to the Board and addressing its merits, including how the plan would benefit the District both in the short and long term. These parts of the discussion, which concerned subjects such as the timing of the succession plan and budgetary considerations, were separate and distinct from discussions of the performance and relative merits of specific employees. When section 2(c)(1) is strictly construed, as OMA requires, the exception cannot be reasonably interpreted as authorizing public bodies to discuss in closed

¹Letter from Andrew S. Paine, Tressler, LLP, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (August 23, 2018), at 4.

██████████
Mr. Andrew S. Paine
May 31, 2019
Page 5

session whether to move forward on plans and projects produced by public employees simply because the employees' work on the plan or project will be considered in their performance reviews.

Because significant portions of the Board's discussion did not address the executive director's conduct or performance, or the performance or merits of other specific employees who would be impacted by the succession plan, those portions do not carry implications for the employees' reputations. *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); Ill. Att'y Gen. Pub. Acc. Op. No. 16-013 (section 2(c)(1) did not authorize discussion of across-the-board salary increase for a broad category of employees). Accordingly, this office concludes that the Board violated section 2(a) of OMA by discussing certain unauthorized topics in closed session during its October 10, 2017, meeting.

To remedy this violation, this office asks that the Board vote to release to ██████████ and make publicly available, the portions of the closed session verbatim recording that did not directly concern the appointment, employment, compensation, discipline, or performance of specific employees. The remaining portions in which the performance and relative merits of specific employees are discussed may be redacted.²

Final Action During Closed Session

██████████ Request for Review also questioned whether the Board took improper final action during a closed meeting because he could not locate the Board's vote during an open meeting to approve a succession plan for the District's executive director. Section 2(e) of OMA (5 ILCS 120/2(e) (West 2016)) provides that "[n]o final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

In *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 176 (1989), the plaintiff alleged that a school board impermissibly took final action in closed session by making a request for mediation as an alternative to the negotiations it had been conducting with the secretaries' union. The court rejected that allegation, holding that the school board only took an intermediate step toward resolving the dispute:

²Discussions of topics that centered on individual employees occurred from 2:28-4:35, 6:12-6:28, and 11:00-22:00.

Mr. Andrew S. Paine
May 31, 2019
Page 6

[T]he request for mediation was part of the process of reaching a final action with the secretaries union. Mediation, similar to negotiating, is not an end in itself, but rather, a means to an end. Negotiations and mediations are made up of many "unilateral" decisions, such as what to offer or counteroffer, and to hold that each of the unilateral strategic decisions that make up the constituent parts of a negotiation is in and of itself a final action is unreasonable. *Gosnell*, 179 Ill. App. 3d at 176.

Accordingly, a component of a public body's process of reaching final action generally does not, itself, constitute final action. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 52804, issued July 31, 2018, at 5 (by reaching consensus on jurisdictional issues concerning the scope of Board's review, rather than bringing complaint to resolution, Board took a step in the process of reaching final action, rather than final action itself). Rather, "'final action' generally must bring a matter to a resolution." Ill. Att'y Gen. PAC Req. Rev. Ltr. 43111, issued August 4, 2016, at 3 (vote to reconsider whether to award a contract to the low qualified bidder was not final action because it did not resolve the matter, in that "final action on whether to in fact award the contract was held over until the next meeting."); *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 38155, issued July 20, 2016, at 3 (Board's consensus on declining a proposed resolution to a student complaint was part of a process of reaching final action, rather than final action itself).

In its response to this office, the Board acknowledged that it reached a consensus on the succession plan during its October 10, 2017, closed session but denied that it amounted to final action. Instead, the Board argued that the new positions created by the succession plan, and the additional financial impact created by those positions, were included in the District's 2018 budget, which was approved by the Board in open session at its December 11, 2017, meeting.

This office has reviewed the closed session verbatim recording and concludes that in reaching a tentative consensus on moving forward with the suggestions proposed in the executive director's succession plan, the Board took a step in the process of reaching final action, rather than final action itself. The Board's closed session discussion did not bring its consideration of these matters to a final resolution; instead, only when the Board voted to approve the District's 2018 budget could the staffing changes in the succession plan be implemented.

This office has reviewed the minutes of the Board's November 13, 2017, November 27, 2017, and December 11, 2017, meetings along with the District's 2018 budget document which, among other things, specifically addressed the staffing changes proposed by

[REDACTED]
Mr. Andrew S. Paine
May 31, 2019
Page 7

the executive director's succession plan.³ These records confirm that the Board deliberated on the tentative 2018 budget in open session during its November 13, 2017, and November 27, 2017, meetings and voted on the matter in open session at its December 11, 2017, meeting. Accordingly, there is no basis from which this office could conclude that the Board violated section 2(e) of OMA by taking final action on the succession plan in closed session.

The Public Access Counselor has determined that the resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me by mail at the Chicago address at the bottom of the first page of this letter, by e-mail at sbarnaby@atg.state.il.us, or by phone at (312) 550-4480. This letter serves to close this file.

Very truly yours,

[REDACTED]
SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

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³Elmhurst Park District, <https://www.epd.org/budget-and-financial-information> (last visited May 9, 2019).