

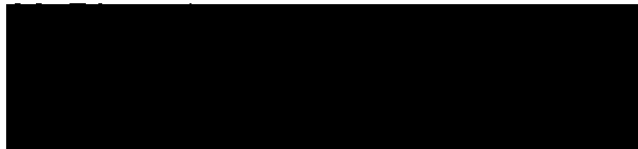


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

September 13, 2019

Via electronic mail



Via electronic mail

Mr. Jack Elsner
General Counsel
Forest Preserve District of DuPage County
3S580 Naperville Road
Wheaton, Illinois 60189
jelsner@dupageforest.org

RE: OMA Request for Review – 2018 PAC 55838

Dear [REDACTED] and Mr. Elsner:

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 that follow, the Public Access Bureau requests that the Board of Commissioners (Board) of the Forest Preserve District of DuPage County (District) approve the minutes of its closed sessions in open session.

On November 21, 2018, [REDACTED] submitted this Request for Review alleging that the Board violated section 2(e) of OMA (5 ILCS 120/2(e) (West 2018)) on October 16, 2018, by approving closed session minutes in closed session and failing to identify in open session which meetings' minutes were approved. On December 4, 2018, this office sent a copy of the Request for Review to the Board and asked it to respond to [REDACTED] allegation. This office also asked for copies of minutes of the Board's October 16, 2018, meeting (both open and closed sessions), together with the verbatim recording from the closed session in question. On December 11, 2018, the Board provided this office with a transcript of the closed session and a written response contending that, although it approved closed session minutes during closed session at its October 16, 2018, regular meeting, it did not violate section 2(e) of OMA. On

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December 14, 2018, this office forwarded a copy of the Board's written response to ██████████; he did not reply.

DETERMINATION

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(e) of OMA 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."

The Board entered closed session on October 16, 2018, pursuant to section 2(c)(21) of OMA (5 ILCS 120/2(c)(21) (West 2018)), which permits a public body to hold a closed session for "[d]iscussion of minutes of meetings lawfully closed under this Act, whether **for purposes of approval by the body of the minutes** or for semi-annual review of the minutes as mandated by Section 2.06." (Emphasis added.)

In its response to this office, the Board acknowledged that it met in closed session to review and approve previous closed session minutes and confirmed that it "thereafter took no further action regarding the minutes in open session."¹ The Board noted that there are two instances in which a public body must take action on closed session minutes in open session: (1) if the public body wishes to destroy the closed session verbatim recording from a meeting that occurred at least 18 months prior, the public body must first approve closed session minutes of the meeting that contain sufficient information (5 ILCS 120/2.06(c) (West 2018)); and (2) each public body must semi-annually decide and report on the extent to which it needs to keep its closed session minutes confidential. Because the Board was merely approving the draft minutes of closed sessions in this matter rather than serving either of those purposes, the Board argued, it was not obligated to take action in open session. The Board cited *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, 77 N.E.3d 625 (2017) for its assertion that "a public body can take action in closed session as long as it is not final action of business being conducted by the" public body.²


¹Letter from John T. Elsner, General Counsel, Forest Preserve District of DuPage County, to Leo Draws, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (December 11, 2018), at 1.

²Letter from John T. Elsner, General Counsel, Forest Preserve District of DuPage County, to Leo Draws, Assistant Attorney General, Office of the Attorney General, Public Access Bureau (December 11, 2018), at 2.

In *Springfield School District*, the Supreme Court of Illinois found that OMA "contains no bar to a public body's taking a preliminary vote at a closed meeting." *Springfield School District*, 2017 IL 120343, ¶73, 77 N.E.3d at 637. The Supreme Court stated that a public body must hold a public vote to properly take final action: "Without the public vote, no final action has occurred." *Springfield School District*, 2017 IL 120343, ¶74, 77 N.E.3d at 637. OMA does not define "final action," however, and no Illinois court has precisely defined that term. In *Gosnell v. Hogan*, 179 Ill. App. 3d 161 (5th Dist. 1989), the Illinois Appellate Court examined whether a board's decision in closed session to authorize a request for mediation as an alternative to the negotiations it had been conducting with the secretaries' union was a final action, and concluded that it was not; instead, the board's authorization of mediation was merely a step towards reaching final action on the union's contract. *See Gosnell*, 179 Ill. App. 3d at 176 ("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."). Accordingly, "final action" generally must resolve a matter. *Compare Davis v. Board of Education of Farmer City–Mansfield Community Unit School District No. 17*, 63 Ill. App. 3d 495, 499 (4th Dist. 1978) (adoption of resolution in closed session stating tentative intent to terminate superintendent's employment "did not dispose of the question of whether that employment should be terminated and, therefore, was not final action[,] where board subsequently took final action to terminate the superintendent's employment in open session); *with Kosoglad v. Porcelli*, 132 Ill. App. 3d 1081, 1092 (1st Dist. 1985) (vote to remove commissioner from police board in open session was final action);³ *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 32463, issued July 14, 2015, at 3 ("[A] component of a public body's process of reaching final action generally does not, itself, constitute final action.").

The approval of minutes disposes of the question of whether minutes are to be approved; such approval does not constitute a mere component of a larger decision-making process. Although the Board argues that it was not yet required to approve the closed session minutes at issue during its October 16, 2018, meeting because it was not yet seeking to destroy the corresponding closed session verbatim recordings, "final actions" are not limited to decisions that a public body is required to make at the time. Therefore, the approval of minutes is a final action that public bodies are required to take in open session. As set forth in *Springfield School District*, a public body may take a preliminary vote in closed session as to whether it intends to approve certain minutes. Nonetheless, in keeping with OMA's mandate that "no final action may

³For an analogous articulation of "final action" outside of the OMA context, *see U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016) (final agency action "[f]irst * * * must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 1168 (1997))).


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be taken at a closed meeting" the vote to approve the minutes that serves as final action should take place in open session.

This office is aware that public bodies may have interpreted the section 2(c)(21) exception, which contains the phrase "for purposes of approval by the body," as permitting final approval of minutes to occur in closed session. As noted in the Board's response, the Public Access Counselor's electronic training curriculum paraphrased the statute in a way that suggested that closed session minutes could be approved in closed session.⁴ This office has not previously considered this question in the context of a Request for Review. Upon careful consideration, this office concludes that in keeping with OMA's underlying purpose that actions and deliberations of public bodies be conducted openly, as well as the prohibition of final action in closed session, the better practice is to conduct the vote to approve minutes of closed sessions in open session. Just as the other OMA exceptions to open meetings allow discussion of particular, limited topics in closed session, but require public votes to take final action, closed session "[d]iscussion of minutes of meetings lawfully closed" is allowed, but the vote constituting the final approval should occur in open session.

This office's review of the verbatim transcript of the Board's October 16, 2018, closed session confirmed that the Board took a formal roll call vote in an attempt to approve certain closed session minutes. This office requests that the Board follow that closed session vote with a vote in open session to formally approve the minutes.

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) 782-1699, ldraws@atg.state.il.us, or the Springfield address on the bottom of the first page of this letter.

Very truly yours,


LEO DRAWS
Assistant Attorney General
Public Access Bureau

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⁴The online OMA training has been updated to clarify this point in keeping with the conclusions in this letter.