



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

July 23, 2020

Via electronic mail

[REDACTED]

Ms. Yordana Wysocki
Hervas, Condon & Bersani, P.C.
333 Pierce Road, #195
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RE: OMA Request for Review – 2020 OAC 62578

Dear [REDACTED] and Ms. Wysocki:

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 Evanston Board of Ethics (Board) did not violate OMA by entering closed session at its March 3, 2020, meeting under section 2(c)(4) of OMA (5 ILCS 120/2(c)(4) (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019).

On April 13, 2020, this office received [REDACTED]'s Request for Review alleging that at its March 3, 2020, meeting, the Board improperly entered closed session pursuant to the exceptions in sections 2(c)(4) and 2(c)(15) of OMA¹ to discuss the Board's jurisdiction over ethics complaints filed by Dan Coyne, Devon Reid, and Misty Witenberg. The Board combined and then bifurcated the identical complaints filed by Mr. Reid and Ms. Witenberg into two complaints.

On April 15, 2020, this office sent a copy of the Request for Review to the Board, and requested that it provide a written response to [REDACTED] allegations. This office also

¹5 ILCS 120/2(c)(15) (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019.

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requested copies of the March 3, 2020, meeting agenda, minutes of both the open and closed sessions, recordings of the open and closed sessions, and relevant portions of the City of Evanston's Code of Ordinances (City Code).² On April 22, 2020, this office received the requested materials and the Board's answer, a portion of which was provided confidentially. The Board sent a copy of its response to [REDACTED] excluding any confidential materials. On May 1, 2020, this office received [REDACTED] 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).

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 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. The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019; *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)).

Section 2(c)(4)

Section 2(c)(4) permits a public body to hold closed meetings to consider "**evidence or testimony** presented in open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body * * * **provided that the body prepares and makes available for public inspection a written decision** setting forth its determinative reasoning." (Emphasis added.)

As a preliminary measure, section 1.10(8)(D) of the City's Code of Ordinances (Evanston, Ill. Code of Ordinances §1.10.8(D) (November 27, 2019)) requires that the City's Law Department issue a confidential written advisory report as to whether the Board has jurisdiction over the person and the misconduct alleged in an ethics complaint. Under section 1.10.8(E) of the City Code (Evanston, Ill. Code of Ordinances §1.10.8(E) (November 27, 2019)),

²The Evanston Code of Ordinances was revised between the time the complaints at issue were filed and when the March 2, 2020, meeting took place. As the Board is considering the allegations made in the complaints under the ordinance in effect at the time the complaints were filed, this office's determination is based on that version of the ordinance.

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the advisory report is then sent to each member of the Board and to the complainant. Section 1.10.8(E) also requires the Board to consider the advisory report in executive session to determine whether it has jurisdiction over a complaint.

On March 3, 2020, the Board held a meeting to consider whether it had jurisdiction over the three complaints at issue. It appears that before the meeting, the members of the Board were given copies of the Law Department's advisory reports regarding jurisdiction, and each of the complainants were given the advisory report for their respective complaints. The Board's draft meeting minutes show that during the open session portion of the meeting, the Board gave the complainants the opportunity to verbally supplement their written materials. According to the minutes, Mr. Coyne stated that he would stand on his written complaint and submissions, while Ms. Witenberg made a motion to disqualify the Board's attorney and provided an argument to supplement her written complaint. Ms. Witenberg's co-complainant, Mr. Reid did not attend the March 3, 2020, meeting.

argues that the written complaints and Ms. Witenberg's comments did not constitute "evidence or testimony" for purposes of section 2(c)(4) of OMA. Black's Law Dictionary defines "evidence" as "something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact[.]" Black's Law Dictionary (11th ed. 2019), available at Westlaw BLACKS. As sworn statements, the complaints as well as any additional information submitted in support of the complaints, including Ms. Witenberg's argument during the meeting, constitute "evidence or testimony" under section 2(c)(4) of OMA.

also argues that the Board should not have considered the advisory reports prepared by the Law Department because these reports were not presented in open hearing. Section 2(c)(4) of OMA does not limit the consideration of matters in closed session to evidence or testimony presented in open hearing. Rather, section 2(c)(4) allows for evidence or testimony "presented in open hearing, *or in closed hearing* where specifically authorized by law." (Emphasis added.) Section 1-10-8(E) of the City Code not only authorizes but requires the Board to "consider said [advisory] report and the findings and conclusions therein in executive session[.]"

Section 2(c)(4) of OMA only authorizes a public body to consider evidence and testimony in closed session if it prepares and makes available for public inspection a "written decision setting forth its determinative reasoning." Before the Board's open meeting on July 1, 2020, the Board issued and made publicly available its jurisdictional findings for two of the three complaints at issue in this matter. This office's review of those findings confirms that they adequately set forth the Board's determinative reasoning as required by section 2(c)(4) of OMA.


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With respect to the remaining complaint, although the Board found it had jurisdiction, it has not yet issued a written decision of its determinative reasoning. However, the Board's response to this office stated that the Board will issue a written opinion after hearing the merits of this complaint. Assuming that the opinion is made publicly available and sets forth the Board's determinative reasoning on its jurisdictional finding, the Board did not improperly enter executive session at its March 3, 2020, meeting. Because this determination resolves this matter, this office need not consider whether the Board's closed session discussion was also authorized by section 2(c)(15) of OMA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. Please contact me at (877) 299-3642 or the Chicago address on the first page of this letter if you have any questions.

Very truly yours,


GRACE ANGELOS
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
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