



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

Lisa Madigan  
ATTORNEY GENERAL

July 11, 2017

*Via electronic mail*



The Honorable Stephan Pickett  
President, Board of Trustees  
Village of Sleepy Hollow  
1 Thorobred Lane  
Sleepy Hollow, Illinois 60118

Re: OMA Request for Review – 2017 PAC 46770

Dear [REDACTED] and Mr. Pickett:

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 concludes that Board of Trustees (Board) of the Village of Sleepy Hollow (Village) violated OMA during its March 21, 2016, September 6, 2016, January 16, 2017, February 6, 2017, and February 20, 2017, meetings by discussing in closed session matters outside the scope of the exception to the Act's openness requirements on which the Board relied to close the meetings.

On March 7, 2017, [REDACTED] submitted a Request for Review to this office alleging that the Board violated OMA during its March 21, 2016, and September 6, 2016, meetings, as well as during subsequent meetings, by holding closed session discussions concerning leasing Village property that exceeded the scope of section 2(c)(6) of OMA (5 ILCS 120/2(c)(6) (West 2016)). Specifically, [REDACTED] stated that he had recently obtained copies of the Board's March 21, 2016, and September 6, 2016, closed session minutes pursuant to a Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2016)) request, and that the minutes revealed that the Board had not limited its discussions to the setting of a price for the lease of property owned by the Village; rather, [REDACTED] alleged, the Board had discussed various aspects of a proposal to lease land for a cell tower besides the lease price, and had

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continued to hold improper closed sessions concerning the cell tower since the September 6, 2016, meeting.

On March 17, 2017, this office forwarded a copy of the Request for Review to the Board and asked it to provide, for this office's confidential review, copies of the closed session minutes and closed session verbatim recordings from its March 21, 2016, and September 6, 2016, meetings, as well as from any other meetings since September 6, 2016, wherein the proposed cell tower was discussed pursuant to section 2(c)(6) of OMA. This office also requested a written response to [REDACTED] allegations. On April 7, 2017, this office received those materials. The written response consisted of a letter from the Village President, Mr. Stephan Pickett, and an unsigned, undated "Statement in Support of the Village's Response" setting out legal analysis. On April 19, 2017, [REDACTED] submitted a reply.

On May 9, 2017, [REDACTED] was sworn in as a Village Trustee.<sup>1</sup>

On July 3, 2017, an attorney in the Public Access Bureau contacted [REDACTED] by e-mail to verify whether he had since received any further closed session materials concerning the proposed cell tower. On July 5, 2017, [REDACTED] responded that the Board had voted to release relevant closed session minutes on July 3, 2017, but that he had not received them.

#### DETERMINATION

As an initial matter, Mr. Merkel's allegation that the Board violated its own Village Code is not subject to review by the Public Access Bureau because this office's authority to resolve disputes is limited to alleged violations of FOIA and OMA. *See* 15 ILCS 205/7(c)(3) (West 2016). Accordingly, this determination is limited to [REDACTED] OMA allegations.

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 2016)) 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." Correspondingly, section 2a of OMA (5 ILCS 120/2a (West 2016)) provides:

[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. \* \* \*

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<sup>1</sup>Erin Sauder, *Sleepy Hollow trustee wants access to executive session records*, The Courier-News (June 19, 2017, 11:01 PM), <http://www.chicagotribune.com/suburbs/elgin-courier-news/news/ct-ecn-sleepy-hollow-executive-session-st-0621-20170619-story.html>.

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\* \* \* Only topics specified in the vote to close under this Section may be considered during the closed meeting.

The exceptions "are in derogation of the requirement that public bodies meet in the open, and therefore, the exceptions *are to be strictly construed, extending only to subjects clearly within their scope.*" (Emphasis added.) 5 ILCS 120/2(b) (West 2016).

Section 2(c)(6) of OMA allows public bodies to enter into closed session to consider "[t]he *setting of a price* for sale or lease of property owned by the public body." (Emphasis added.) The clear and unambiguous language of section 2(c)(6) of OMA, which must be strictly construed, does not allow a public body to discuss the sale or lease of public property in closed session other than to set a price. If the General Assembly had intended to allow closed meetings to discuss general issues concerning the sale or lease of public property, it would have written such an exception into OMA, as have other jurisdictions. *See, e.g.,* section 551.072 of the Texas Open Meetings Act (Tex. Gov't Code Ann. § 551.072 (West 2016) ("A governmental body may conduct a closed meeting to deliberate the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person.")). Indeed, section 2(c)(5) of OMA (5 ILCS 120/2(c)(5) (West 2016)), which allows a public body to enter closed session to discuss "[t]he purchase or lease of real property for the use of the public body, including meetings held for the purpose of discussing whether a particular parcel should be acquired[.]" directly contrasts with the significantly narrower scope of section 2(c)(6). While section 2(c)(5) of OMA allows general closed session discussions concerning the purchase or lease of real property for the use of the public body, neither it, nor section 2(c)(6), authorizes general discussions regarding the sale or lease of public property. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 15-003, issued March 19, 2015, at 5 (section 2(c)(6) of OMA does "not extend to the discussion of general issues concerning the disposal of publicly-owned property.").

In its response to this office, the Board acknowledged that it discussed the proposed cell tower in closed session under section 2(c)(6) of OMA during its March 21, 2016, September 6, 2016, January 16, 2017, February 6, 2017, and February 20, 2017, and March 20, 2017,<sup>2</sup> meetings, and it provided this office with copies of the closed session minutes and closed session verbatim recordings from those meetings. The Board stated that "those portions" of the March 21, 2016, and September 26, 2016, closed session minutes "that did not relate specifically and exclusively to the price to be set by the Village for the proposed lease" had been released following the Board's most recent semi-annual review of its closed session minutes on December

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<sup>2</sup>The March 20, 2017, meeting is outside the scope of this Request for Review because it was held after [REDACTED] March 7, 2017, submission.

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5, 2016, and that the Board would consider whether to disclose the more recent closed session minutes during its next semi-annual review at the end of June 2017.<sup>3</sup>

With respect to whether the Board's closed session discussions were authorized under section 2(c)(6) of OMA, the Board asserted:

The record of the executive session held on March 21, 2016 shows that not only was pricing for the proposed lease specifically discussed, but also many of the factors that may affect such pricing were presented. The meeting was attended by the prospective lessee. During the closed session, the Board was informed of the total cost of the project, collocations anticipated for the tower, and the offer of the applicant for pricing on the rent, the rent escalator and the collocation fees, all factors which could go into the pricing decision.

After the March 21, 2016 closed session, the Board of Trustees conducted five (5) subsequent closed sessions for discussion of setting a price for such lease[.]<sup>[4]</sup>

The Board did not provide further information concerning those five subsequent closed sessions. Instead, the Board cited *Board of Education School District 67 v. Sikorski*, 214 Ill. App. 3d 945 (1st Dist. 1991) for the proposition that "it is improper to declare a public body's decision null and void when its initial decision, although reached during an improper executive session, has been subsequently ratified by additional public meetings."<sup>5</sup> In *Sikorski*, the Illinois Appellate Court held that a board had held an unauthorized closed session discussion in which it voted to delay a property sale, but the court declined to void the ensuing sales contract because the board's "subsequent actions, taken during public meetings, ratified and cured" the board's improper closed session decision to delay the sale. *Sikorski*, 214 Ill. App. 3d at 952.

Analogizing this matter to *Sikorski*, the Board depicted its open session discussions concerning the proposed cell tower as follows:

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<sup>3</sup>Letter from Stephan Pickett, Village President, Village of Sleepy Hollow, to Joshua Jones Supervising Attorney, Office of the Attorney General (April 4, 2017), at 1.

<sup>4</sup>Statement in Support of the Village's Response (undated), at 1.

<sup>5</sup>Statement in Support of the Village's Response (undated), at 2.

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The March 21, 2016 meeting \* \* \* included a wide-ranging presentation of elements of the proposed lease, and the applicant was allowed to be present. This was so as to inform the Board members of the various elements of a lease agreement which might affect its decision regarding setting its price for any such lease. That [meeting] occurred one year before final action was taken by the Board of Trustees on the price of the lease, and approval of an Option and Lease Agreement with the applicant.

\* \* \*

[After the March 21, 2016, meeting, the Board] had not less than 10 open sessions at which the matter of a lease for purposes of erecting a telecommunication tower was discussed, as well. Prior to the March, 2016 date, there had been one open session (November 4, 2015) conducted as a special meeting for the sole purpose of allowing comment on the proposal to lease a site for a telecommunications tower on public property (the Village hall site), including pricing of the lease. Finally, there were five (5) additional meetings of the Board at which citizens commented (in general) on the proposal to lease a site for a telecommunications tower on public property in the Village.<sup>[6]</sup>

The Board argued that "subsequent meetings of the Board \* \* \* served to cure any violation" of OMA with respect to any improper closed session discussions concerning the cell tower, and thus that "[t]he final action taken by the \* \* \* Board \* \* \* to set a price for and to approve a lease of space \* \* \* for a telecommunications tower on Village property should not be undone."<sup>7</sup>

In reply, [REDACTED] questioned whether the response this office received was truly from the Board or instead from Village President Pickett with assistance from an attorney, as two trustees had told him they were unaware of the matter.<sup>8</sup> Additionally, he stated: "President Pickett and the author of the Statement [in Support of the Village's Response] seem to suggest they can speak in executive session in violation of the Open Meetings Act and make it

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<sup>6</sup>Statement in Support of the Village's Response (undated), at 1.

<sup>7</sup>Statement in Support of the Village's Response (undated), at 2.

<sup>8</sup>For purposes of this determination, Village President Pickett represented the Board; the extent to which Village President Pickett had the backing of the rest of the Board in doing so is beyond the scope of this office's review.

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right by sharing some of the information later in open session. This is clearly not the intent of the Open Meetings Act."<sup>9</sup>

This office's review of the closed session materials showed that the Board exceeded the scope of section 2(c)(6) to varying degrees during the closed session portions of its March 21, 2016, September 6, 2016, January 16, 2017, February 6, 2017, and February 20, 2017, meetings. During closed session on March 21, 2016, representatives of National Wireless Ventures, LLC (National) – the company proposing to lease land from the Village for a cell tower – stated the price the company could offer for the lease, but a lengthy discussion of logistics lacking a direct relation to the lease price ensued. The portions of the discussion concerning pricing did not so much concern the setting of a price as they did hearing National's offer. The September 6, 2016, closed session contained scarce discussion of the price for the lease, but significant discussion of other matters pertaining to the cell tower. Similarly, the January 16, 2017, closed session involved substantial discussion concerning the cell tower but little to no discussion pertaining to setting a lease price. In contrast, the Board did work on setting a price in closed session on February 6, 2017, such as by discussing comparables and the pricing structure acceptable for the Village. However, the discussion strayed into siting logistics and matters tangential to the lease proposal at hand. Finally, during closed session on February 20, 2017, the Board touched on pricing but also discussed unrelated considerations pertaining to the cell tower. By failing to limit its closed session discussions on these five dates to the topic authorized by section 2(c)(6) of OMA, the Board violated section 2(a) of OMA.

Unlike in *Sikorski*, here there is no allegation that the Board improperly took final action in closed session. Accordingly, the Board's claim of having ratified and cured its improper closed session discussions is misplaced, but at the same time there is no cause for this office to conclude that any agreement between the Village and National is void. Rather, as [REDACTED] alluded to in his reply, no subsequent open session discussion can fully remedy improper closed session discussions, because the public misses out on deliberations to which it should have had access at the time. Nonetheless, the remedy that is available, and that this office requests, is for the Board to provide [REDACTED] with<sup>10</sup> and publicly disclose the portions of its March 21, 2016, September 6, 2016, January 16, 2017, February 6, 2017, and February 20, 2017, closed session minutes and closed session verbatim recordings that do not specifically involve

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<sup>9</sup>E-mail from [REDACTED] to Joshua Jones (April 19, 2017).

<sup>10</sup>This office notes that section 2.06(e) of OMA (5 ILCS 120/2.06(e) (West 2016)) provides that "[a]ccess to verbatim recordings shall be provided to duly elected officials[.]" and section 2.06(f) of OMA (5 ILCS 120/2.06(f) (West 2016)) likewise provides that "duly elected officials \* \* \* shall be provided access to minutes of meetings closed to the public." Thus, [REDACTED] is entitled to access to the Board's closed session materials under OMA regardless of the Board's violations here.

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the setting of a price for the lease of land for the cell tower. This office also cautions the Board to conduct its future meetings in full compliance with OMA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, please contact me at (312) 814-8413.

Very truly yours,

[REDACTED]  
JOSHUA M. JONES  
Supervising Attorney  
Public Access Bureau

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