

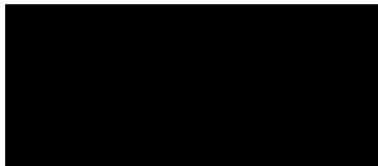


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 1, 2018

Via electronic mail



Via electronic mail

Ms. Nancy M. Newby, PhD, CEO
Washington County Hospital
705 South Grand Avenue
Nashville, Illinois 62263
nnewby@washingtoncountyhospital.org

RE: OMA Request for Review – 2017 PAC 49476

Dear [REDACTED] and Dr. Newby:

This determination letter 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 the Board of Directors (Board) of Washington County Hospital (Hospital) provided sufficient information to the public before adjourning to closed session during its July 25, 2017, meeting, but held an unauthorized discussion during that closed session.

On August 31, 2017, [REDACTED] submitted a Request for Review alleging, in pertinent part, that the Board went into closed session on July 25, 2017, after referencing merely "Open Meetings Public Act 88-621 Sections 2(C)(11)(17)(21)."¹ He alleged that the Board provided insufficient information to the public before entering closed session and questioned whether the Board held unauthorized discussions during that closed session.

¹E-mail from [REDACTED] to Public Access Counselor, Attorney General Office (August 31, 2017).

██████████
Dr. Nancy M. Newby
February 1, 2018
Page 2

On September 7, 2017, this office sent a copy of the Request for Review to the Board and asked it to provide this office with copies of the agenda, minutes, and closed session verbatim recording from the Board's July 25, 2017, meeting for this office's confidential review, together with a written response to the allegation that the Board failed to make a proper public disclosure under section 2a of OMA (5 ILCS 120/2a (West 2016)) before adjourning to closed session. On October 4, 2017, this office received those materials from the Hospital's chief executive officer, Dr. Nancy M. Newby.

On October 24, 2017, this office sent a follow-up letter to Dr. Newby asking the Board to address whether it limited its July 25, 2017, closed session discussion concerning legal matters to topics within the scope of the section 2(c)(11) exception (5 ILCS 120/2(c)(11) (West 2016)). On October 31, 2017, the Board's attorney responded. ██████████ did not submit a 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).

As an initial matter, to the extent that ██████████ alleged that the Board improperly took final action in approving the minutes of its June 27, 2017, Board and Executive Committee closed sessions, this office determined that no further action was warranted. Section 2.02(c) of OMA (5 ILCS 120/2.02(c) (West 2016)) provides that "[a]ny agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting." Additionally, section 2(e) of OMA (5 ILCS 120/2(e) (West 2016)) provides that "[f]inal 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." ██████████ acknowledged that the agenda for the meeting listed the minutes at issue² and that the Board announced in open session that it was voting to approve those minutes before doing so. The Board was not required to divulge the contents of its closed session discussions in order to approve the minutes of those closed sessions; it was sufficient for the Board to state that it was approving the closed session minutes from June.³ Because the Board listed the general subject

²See Washington County Hospital Board of Directors, Agenda Item VIII. A., Meeting(s) Minutes (refer to VII. A.), (July 25, 2017).

³See 5 ILCS 120/2.06(f) (West 2016) ("Minutes of meetings closed to the public shall be available only after the public body determines that it is no longer necessary to protect the public interest or the privacy of an individual by keeping them confidential[.]").

[REDACTED]
Dr. Nancy M. Newby
February 1, 2018
Page 3

matter of the June closed session minutes on the agenda and publicly recited sufficient information to approve those minutes, no further action was warranted on that issue.

Closed Session Procedure

Section 2a of OMA provides, in pertinent part, that "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."

[REDACTED] appeared to allege that the Board should have provided additional information to the public before entering closed session. Dr. Newby responded that "prior to going into closed session, the Chairman reads topics to be discussed from the agenda along with references from OMA as listed on the agenda."⁴

Although no Illinois reviewing court appears to have analyzed whether a public body may simply cite the number(s) of the applicable exception(s) in section 2(c) of OMA (5 ILCS 120/2(c) (West 2016)) before adjourning to closed session, Illinois reviewing courts have approved of mere references to the language of the exceptions. "[G]enerally calling attention to an exception is sufficient to meet the requirement that the public body cite the 'specific exception contained in [s]ection 2 of [the] Act which authorizes the closing of the meeting to the public.'" *Wyman v. Schweighart*, 385 Ill. App. 3d 1099, 1106 (4th Dist. 2008) (reference to "land acquisition" sufficient to invoke the section 2(c)(5) exception (5 ILCS 120/2(c)(5) (West 2006)), which stated: "The 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."); *see also Henry v. Anderson*, 356 Ill. App. 3d 952, 955 (4th Dist. 2005) (public body's public disclosure that it would discuss an "employee matter" and "reclassification of employment" in closed session was sufficient to identify the section 2(c)(1) exception (5 ILCS 120/2(c)(1) (West 2002)), which applied to "[t]he * * * employment * * * of specific employees of the public body, including hearing testimony on a complaint lodged against an employee to determine its validity.").

In this instance, while it appears that the public could have benefitted from further information concerning the Board's reasons for entering closed session, this office is unable to conclude that the Board failed to provide "a citation to the specific exception contained in Section 2 of this Act which authorizes the closing of the meeting to the public" when it cited the section numbers of the specific statutory exceptions under which it was adjourning to closed

⁴Letter from Nancy M. Newby, PhD, CEO, Washington County Hospital, to [Joshua] Jones (October 4, 2017).

session.⁵ According to the minutes, the Board publicly cited four specific exceptions to the requirement that public bodies discuss public business openly: sections 2(c)(1), 2(c)(11), 2(c)(17), and 2(c)(21) of OMA (5 ILCS 120/2(c)(1), (c)(11), (c)(17), (c)(21) (West 2016)).⁶ Because OMA required only a citation to the specific exceptions that authorized the Board to enter closed session on July 25, 2017, and because the Board cited the numbers of the specific exceptions it claimed were applicable, the Public Access Bureau concludes that the Board did not violate section 2a of OMA.

Closed Session Discussion

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2016)) 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. Section 2(c)(11) provides an exception for:

Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.

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)).

In response to this office's inquiry about whether the portion of the closed session discussion held pursuant to the section 2(c)(11) exception stayed within the scope of that exception, the Board Chairman, Matt Bierman, asserted that it did, stating that the discussion concerned "advice from Eric Trelz, our attorney, related to *potential* litigation after a Medicare audit found inappropriate/falsified documentation on Cardiac Rehabilitation patients." (Emphasis added.)⁷

Section 2(c)(11) of OMA permits public bodies to discuss "probable or imminent" litigation in closed session, but "there must be reasonable grounds to believe that a lawsuit is more likely than not to be instituted or that such an occurrence is close at hand[,] and such a

⁵This office notes that the reference to "Public Act 88-621" was outdated, as OMA has been amended by numerous public acts since then; the Board could simply refer to the "Open Meetings Act."

⁶Washington County Hospital Board of Directors, Meeting, July 25, 2017, Minutes 4.

⁷Letter from Matt Bierman, Board Chairman, Washington County Hospital, to Joshua M. Jones, Supervising Attorney PAC, Office of Attorney General (undated).

██████████
Dr. Nancy M. Newby
February 1, 2018
Page 5

determination must be made "by examining the surrounding circumstances in light of logic, experience, and reason." 1983 Ill. Att'y Gen. Op. No. 26, issued December 23, 1983, at 10. In *Henry v. Anderson*, 356 Ill. App. 3d at 956-57, the Illinois Appellate Court strictly construed the section 2(c)(11) exception, stating:

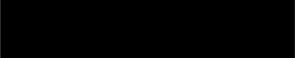
If the litigation has not yet been filed, the public body must (1) find that the litigation is probable or imminent and (2) record and enter into the minutes the basis for that finding. Evidently, the legislature intended to prevent public bodies from using the distant possibility of litigation as pretext for closing their meetings to the public.

Furthermore, in Ill. Att'y Gen. Pub. Acc. Op. No. 16-007, issued September 13, 2016, the Attorney General analyzed the section 2(c)(11) exception at length in concluding:

[T]he section 2(c)(11) exception does not permit a public body to enter closed session to discuss the possibility of litigation merely because it has taken action that generated public opposition, such as a backdoor referendum effort. In the absence of reasonable, specifically identified grounds to believe that litigation was close at hand or more likely than not to ensure, the mere possibility that a lawsuit might be filed does not constitute "probable" or "imminent" litigation within the scope of section 2(c)(11) of OMA. Ill. Att'y Gen. Pub. Acc. Op. No. 16-007, at 8.


In this instance, the closed session minutes do not contain a finding that litigation was probable or imminent, as is expressly required by section 2(c)(11). Instead, the closed session minutes and verbatim recording clearly show that the Board discussed at most the *possibility* of litigation. Accordingly, the Board violated section 2(a) of OMA by holding an improper closed session discussion on July 25, 2017, pursuant to the section 2(c)(11) exception.

To remedy this violation, this office asks the Board to vote to disclose the portions of the July 25, 2017, closed session minutes and closed session verbatim recording that document the Board's discussion of possible litigation, and then provide ██████████ with copies of those materials.


Dr. Nancy M. Newby
February 1, 2018
Page 6

The Public Access Counselor has determined that resolution of this matter does not require issuance of a binding opinion. This letter serves to close this matter. Please contact me at the Chicago address listed on the first page of this letter if you have any questions.

Very truly yours,


JOSHUA M. JONES
Supervising Attorney
Public Access Bureau

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