



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
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March 9, 2018

Via electronic mail
Mr. John Kraft

[REDACTED]
john@illinoisleaks.com

Via electronic mail
The Honorable Kurt Prenzler
Chairman
Madison County Board
157 North Main Street
Edwardsville, Illinois 62025
kprezler@co.madison.il.us

Via electronic mail
Mr. Robert L. Jackstadt
Tueth Keeney Cooper Mohan Jackstadt P.C.
101 West Vandalia, Suite 210
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RE: OMA Requests for Review – 2017 PAC 50150, 2017 PAC 50207

Dear Mr. Kraft, Chairman Prenzler, and Mr. Jackstadt:

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 is unable to conclude that the Board of Trustees (Board) of the Fosterburg Water District (District) violated the requirements of OMA in connection with a gathering held on February 3-5, 2017.

On October 22, 2017, Mr. John Kraft submitted a Request for Review (2017 PAC 50150) to the Public Access Bureau alleging that the Board held a "Board retreat" that was not

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open to the public on February 3-5, 2017, at a location more than 45 miles from the regular meeting location, without (1) posting a notice or agenda 48 hours in advance of the meeting date, (2) permitting members of the public to record or provide comment, or (3) taking minutes of the meeting. Mr. Kraft further alleged that his Request for Review was timely, despite being filed more than 60 days after the alleged Board retreat, because he became aware that the retreat had taken place when he received the Board's response to his Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2016)) request for copies of credit card statements on October 18, 2017.

On October 25, 2017, Chairman Prenzler attempted to submit a Request for Review (2017 PAC 50207) to the Public Access Bureau alleging that the Board violated OMA on February 4 and 5, 2017, and that he discovered the violation on October 23, 2017. However, Chairman Prenzler's correspondence to this office did not provide any facts supporting his allegation, and did not describe the specific sections of OMA that the Chairman believed the Board had violated on those dates. On October 30, 2017, Chairman Prenzler supplemented his Request for Review by alleging that the Board held a retreat on February 4-5, 2017, which was paid for with District funds but for which the Board provided no notice to the public and did not approve meeting minutes. Chairman Prenzler further asserted that he first became aware of the Board retreat when information about it was published on the website of the Edgar County Watchdogs on October 23, 2017, and later, by the *Alton Telegraph*.

On November 1 and 3, 2017, this office sent copies of the Requests for Review to the Board and asked it to respond to the allegations by addressing whether a majority of a quorum of the Board gathered together on the dates in question, and if so, whether the members discussed public business during those gatherings. On November 27, 2017, the Board responded by stating that six members of the Board attended a social event on those dates, and asserting that the Board members in attendance did not discuss public business. On November 28, 2017, this office forwarded a copy of the response to Mr. Kraft and Chairman Prenzler. Chairman Prenzler did not reply. On December 14, 2017, Mr. Kraft replied by directing this office's attention to copies of hotel receipts posted on the Edgar County Watchdogs website. On December 28, 2017, this office forwarded Mr. Kraft's reply to the Board's outside counsel and asked it to furnish additional explanation about the Board retreat. The Board responded on January 8, 2018; Mr. Kraft submitted an additional reply on January 11, 2018.

Because these matters concern the same alleged event and raise the same legal issues, we have consolidated them for determination.

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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.)

Mr. Kraft acknowledged in his Request for Review that the Board retreat was held more than 60 days before he submitted his Request for Review, but he asserted that he did not become aware of the gathering only until October 18, 2017, when he reviewed District credit card statements reflecting payment for the retreat. Mr. Kraft argued that he could not have previously discovered that the retreat occurred because the Board did not post a notice or agenda for the retreat and never discussed it in meeting minutes. Chairman Prenzler asserted that he became aware of material facts giving rise to his allegation on October 23, 2017, when he reviewed information about the District's payment for the retreat that was published on a website.

Both Mr. Kraft and Chairman Prenzler provided this office with facts sufficient to demonstrate that, despite utilizing reasonable diligence, they did not discover that at least a majority of a quorum of the Board had gathered together in February until they reviewed financial records in October demonstrating that District credit cards had been used to pay for expenses associated with the gathering. Because the available information indicates that the Board did not provide public notice of the gathering, and did not approve and make available to the public the minutes of the gathering, it is reasonable that Mr. Kraft and Chairman Prenzler would not have been aware of the alleged violations by the Board within 60 days of their occurrence despite using reasonable diligence. Because the Request for Review appears to have been submitted within the time limits set out in section 3.5(a) of OMA, this office has authority to review Mr. Kraft's and Chairman Prenzler's allegations.

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Allegation of Undisclosed Meetings

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), as amended by Public Acts 11-201, effective August 18, 2017; 100-465, effective August 31, 2017) 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." Section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)) defines a "meeting" subject to the Act as:

[A]ny gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business.

If a gathering of members of a public body meets this definition, then all of the requirements of OMA apply, including the proper posting of notice and an agenda (5 ILCS 120/2.02(a) (West 2016)), holding the meeting at a specified time and place that is convenient and open to the public (5 ILCS 102/2.01 (West 2016)), keeping minutes (5 ILCS 120/2.06(a) (West 2016)), and allowing public recording (5 ILCS 120/2.05 (West 2016) and comment (5 ILCS 120/2.06(g) (West 2016)).

However, OMA "is not intended to prohibit bona fide social gatherings of public officials, or truly political meetings at which party business is discussed. Rather, the Act is designed to prohibit secret deliberation and action on business which properly should be discussed in a public forum due to its potential impact on the public." *People ex rel. Difanis v. Barr*, 83 Ill. 2d 191, 202 (1980). OMA "balance[s] the right of the press and the people to view the deliberative and decision-making processes of government first-hand with the right of public officials to speak their minds freely and associate with whomever they choose." *Barr*, 83 Ill. 2d at 210.

Mr. Kraft's Request for Review alleged that statements for a District credit card demonstrate that the District paid expenses associated with the February 3-5, 2017, gatherings, and that annotations on those statements described the gathering as a "Board retreat." In its

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reply, the Board's outside counsel asserted that the February event was a social gathering attended by six Board members and spouses, and that the members in attendance did not discuss public business: "There was no examining or weighing any course of action, no exchange of facts preliminary to a public business-related decisions, and no attempt to reach accord on any matter of public business."¹ Therefore, the Board argued, the gathering did not constitute a "meeting," and it was not necessary for the Board to open the gathering to the public and satisfy the other requirements of OMA.

Mr. Kraft replied to the Board's response, arguing that if no public business was discussed during the retreat, it was improper and illegal for the District to use public funds to pay for a purely social outing for Board members and spouses. Mr. Kraft also noted that District funds were used to reserve a separate suite, described on the invoices as "MTG," in addition to the rooms assigned to the individuals who attended the gathering. This office asked the Board's outside counsel to supplement its response to the Request for Review with an explanation about the use of the hotel room described in Mr. Kraft's reply. The Board's outside counsel asserted that the hotel room was labeled "MTG" on the receipt because it was not specifically assigned to an individual, that the room was used to host the social event, and that no discussions of public business were held in that room. In reply, Mr. Kraft asserted that the Board's responses admit it used public funds for a nonpublic purpose, and reiterated his argument that the use of funds was improper and illegal.

Although the available information indicates that a majority of a quorum of the Board gathered together at a hotel on February 3-5, 2017, and the Board has not contested Mr. Kraft's allegation that the District paid the expenses associated with that gathering, the Board's outside counsel asserted that the Board members in attendance did not discuss public business at this event, and this office has not received any evidence contradicting that statement. As discussed above, a gathering of a majority of a quorum of public body members is subject to the safeguards of OMA only if the members gather "for the purpose of discussing public business." *See, e.g.,* Ill. Att'y Gen. PAC Req. Rev. Ltr. 28092, issued March 6, 2014 (allegation that members of public body met at brewery per Facebook post was insufficient to find that an improper meeting was held absent evidence that public business was discussed). Accordingly, this office lacks sufficient evidence to conclude that the Board violated OMA when it held a non-public gathering on February 3-5, 2017.

¹Letter from Robert L. Jackstadt, Tueth Keeney Cooper Moran and Jackstadt P.C., to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (November 27, 2017).

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This office notes that the Public Access Counselor's authority is limited to reviewing alleged violations of the FOIA and OMA. *See* 15 ILCS 205/7)(c) (West 2016). This office does not have authority to review the District's alleged use of public funds for the retreat.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, you may contact me at (312) 814-6437.

Very truly yours,

A black rectangular redaction box covers the signature of Leah Bartelt.

LEAH BARTELT
Assistant Attorney General
Public Access Bureau

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