

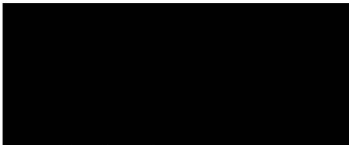


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

November 21, 2023

Via electronic mail



Via electronic mail

The Honorable Chris Rintz
President, Village Council
Village of Winnetka
510 Green Bay Road
Winnetka, Illinois 60093
CRintz@Winnetka.org

RE: OMA Request for Review – 2023 PAC 76914; 2023 PAC 76915

Dear [REDACTED] and Mr. Rintz:

This determination is issued pursuant to section 3.5 of the Open Meetings Act (OMA) (5 ILCS 120/3.5 (West 2022)).

BACKGROUND

On June 11, 2023, [REDACTED] submitted a Request for Review to the Public Access Bureau alleging that the Village Council (Council) of the Village of Winnetka (Village) violated OMA by holding improper closed session discussions at its September 21, 2021, and April 12, 2022, meetings. [REDACTED] stated that he became aware that the Council held closed sessions at the two meetings on June 5, 2023, and that he learned of those closed sessions from reviewing meeting materials for another Council meeting. Specifically, he stated that the "Council met in open session on November 1, 2022. At this meeting, the agenda included an item: 'Ordinance No. M-14-2022: Bertling Lane, Hill Road, and Woodland Avenue

Pathway Vacation (Public Hearing & Introduction)."¹ ██████████ directed this office's attention to a posted recording of the open session portion of that meeting and stated:

[T]he Assistant Director of Community Development reviewed the agenda item. His first statement was that "this matter has been discussed by the Council previously," and he then referenced the dates of the two closed sessions. The Assistant Director then stated: "The Council went into closed session to discuss the possible sale of land owned by the Village." The Assistant Director then described the Council's actions in closed session, including a review of the property's history, and direction by the Council to staff to contact other adjoining property owners.^[2]

██████████ alleged, based on the Assistant Director's remarks, that the Board did not limit its closed session discussions concerning the specified land to issues within the scope of the exception in section 2(c)(6) of OMA³ cited in the Board's minutes as its bases for closing, in part, the September 21, 2021, and April 12, 2022, meetings. He noted that an "Agenda Item Executive Summary" included in the agenda packet also stated that the Council held closed sessions at those two meetings to discuss the specified land.⁴

██████████ further asserted that he did not discover facts concerning the alleged violations within 60 days of when they occurred despite exercising reasonable diligence. He argued, in relevant part:

This matter was "discussed" in one open session, for approximately 10 minutes. However, it was not evident to me, until I expended significant effort in reviewing the recording of the meeting, that all substantive discussion and consideration of this vacation of public land had taken place behind closed doors. This included the decision to vacate this public land below its fair

¹Letter from ██████████ to Public Access Counselor, Office of the Attorney General (June 11, 2023), at 1.

²Letter from ██████████ to Public Access Counselor, Office of the Attorney General (June 11, 2023), at 2.

³5 ILCS 120/2(c)(6) (West 2022).

⁴Letter from ██████████ to Public Access Counselor, Office of the Attorney General (June 11, 2023), at 2.

market value, and a suggestion by Council that doing so was in the "public interest."

I only became aware of the improper closure of meeting after an in depth review of Council records. There was no "newspaper" account of this action. There was no indication in Village agendas or minutes that the substantive discussion on this topic had taken place in prior closed session.^[5]

On June 21, 2023, this office forwarded a copy of the Request for Review to the Council and asked it to provide a written response addressing ██████████'s assertion that his Requests for Review are timely because he did not discover the alleged OMA violations concerning the September 21, 2021, and April 12, 2022, meetings within 60 days of when they occurred despite exercising reasonable diligence. This office asked the Council to include a description of when/where the meeting materials for the Council's November 1, 2022, meeting were made available to the public. On June 30, 2023, this office received the requested response. On July 5, 2023, this office forwarded a copy of the Council's response to ██████████; he replied on July 11, 2023.

On October 16, 2023, this office asked the Village to issue a supplemental response addressing the substance of the allegations and to provide copies of the closed session minutes and verbatim recordings. Counsel for the Village responded by reiterating that the Requests for Review were untimely and by asserting "that it would set an unfortunate precedent and cause an unnecessary time and expense to proceed further when, on its face, the claims here are stale."⁶ ██████████ replied that OMA "does not authorize your office to make a determination on the validity of a request in isolation from a final determination of the request itself."⁷ He also stated that this office "appears to have determined that my request was filed in a timely manner. I believe this is correct."⁸ This office, however, did not make such a determination and did not intend to signal that it had done so by requesting a supplemental response from the Village.

The procedures for processing a Request for Review in section 3.5 of OMA do

⁵Letter from ██████████ to Public Access Counselor, Office of the Attorney General (June 11, 2023), at 4.

⁶E-mail from Benjamin L. Schuster, Elrod Friedman, to [Teresa] Lim (October 20, 2023).

⁷E-mail from ██████████ to [Teresa] Lim (November 7, 2023).

⁸E-mail from ██████████ to [Teresa] Lim (November 7, 2023).

not require this office to simultaneously review both the timeliness and substance of the allegations that underlie a Request for Review. Indeed, if a Request for Review is untimely, section 3.5(a) of OMA does not authorize this office to review the merits. Because a determination that [REDACTED] did not submit a timely Request for Review would obviate the need for the parties to expend additional resources on this matter, this office will first address that threshold issue of timeliness in the interest of efficiency.

DETERMINATION

Section 3.5(a) of OMA⁹ provides:

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 than 60 days after the alleged 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. (Emphasis added.)

OMA does not define "reasonable diligence," and the term has not been judicially defined by an Illinois reviewing court for purposes of OMA. Black's Law Dictionary defines "reasonable diligence" as "[a] fair, proper and due degree of care and activity, measured with reference to the particular circumstances[.]" Black's Law Dictionary 412 (5th ed. 1979). That definition provides little guidance as to how attentive or persistent an individual must be to discover facts concerning an alleged violation that were not publicly disclosed within 60 days of the alleged violation.

In Binding Opinion 23-004, the Attorney General considered as an initial matter whether a requester who submitted his Request for Review more than 60 days after but within 2 years of the date of the alleged OMA violation had exercised reasonable diligence. Ill. Att'y Gen. Pub. Acc. Op. No. 23-004, issued March 27, 2023. The Attorney General reviewed the legislative history of the "reasonable diligence" provision and determined that the provision exists to redress violations that could not reasonably have been discovered at the time they occurred. Ill. Att'y Gen. Pub. Acc. Op. No. 23-004, at 7. In that matter, this office described "reasonable diligence" as "keeping up with the activities of local government through attending or viewing open meetings and reviewing the minutes of those meetings." Ill. Att'y Gen. Pub.

⁹5 ILCS 120/3.5(a) (West 2022).

Acc. Op. No. 23-004, at 7. This office concluded that the requester presented facts illustrating that relevant information surrounding the severance agreement at issue was not evident on or around the time of the meeting. The meeting's agenda and minutes, for instance, made only generic references to a personnel report rather than any specific mention of the agreement. Ill. Att'y Gen. Pub. Acc. Op. No. 23-004, at 6. Because the requester showed reasonable diligence by submitting his Request for Review within 60 days after facts concerning the board's action on that specific agreement "became reasonably publicly available" through dissemination in the news media, this office concluded that the submission met the requirements of section 3.5(a). Ill. Att'y Gen. Pub. Acc. Op. No. 23-004, at 8.

The Council's response to this office contended that various information regarding the vacation of the property at issue has been publicly available on the Village website for more than half a year, including details of the two closed sessions. With respect to the September 21, 2021, and April 12, 2022, meetings, the Council stated it publicly announced and documented in the minutes that it was entering closed session "to discuss the setting for the price for the sale of the property" pursuant to section 2(c)(6).¹⁰ The Council also emphasized that at the November 1, 2022, meeting, the Council specifically disclosed in open session that it had discussed the property in closed session at those two prior meetings:

During that meeting, the Village's Assistant Director of Community Development made a presentation to the Village Council and the public, during which he expressly stated:

"This matter has been discussed by the Council previously beginning in September 2021 and April 12, 2022, where the Council went into closed session to discuss the possible sale of land owned by the Village."

The Assistant Community Development Director then went on to summarize – in detail – what was discussed during the closed sessions. The Village Council then considered the ordinance and voted to approve the ordinance on first reading.^[11]

¹⁰Letter from Peter M. Friedman, Elrod Friedman LLP, to Teresa Lim, Supervising Attorney, Public Access Bureau (June 30, 2023), at 3.

¹¹Letter from Peter M. Friedman, Elrod Friedman LLP, to Teresa Lim, Supervising Attorney, Public Access Bureau (June 30, 2023), at 5.

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The Council stated that it posted the November 1, 2022, meeting agenda and agenda packet on the Village website two days before the meeting. Additionally, the Council published notice of the meeting in a local newspaper, the *Winnetka Talk*, and mailed a notice to property owners who lived within 250 feet of the land on October 13, 2022. The Council stated it posted online the video recording of the meeting on November 2, 2022, and adopted the ordinance at a subsequent meeting held on November 15, 2022. The Council posted online the latter meeting's agenda and an agenda packet, which included a memorandum summarizing the prior November 1, 2022, meeting discussion, online on November 11, 2022.¹² The Council argued that a person exercising reasonable diligence would have been aware of the prior closed session discussions concerning the pathway by attending the November meetings, reviewing the posted recordings of those meetings, or reviewing the posted agendas and agenda packets. Additionally, the Council asserted that the meeting materials "are all posted in the most conspicuous of places on the Village's website. The website has tabs clearly labeled under the 'Governance' tab on its website."¹³

In reply to that answer, ██████████ disputed the Council's claim that information concerning the vacation of the pathway was readily available or apparent. He stated that he submitted a Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2022)) request to the Village on June 6, 2023, request seeking records related to the vacation of the land at issue and received some responsive records on June 15, 2023. He highlighted that the records included an e-mail, dated October 11, 2022, from the Assistant Director of Community Development to one of the private property owners. The e-mail indicated that the Village was already in communications with a private property owner prior to the November 1, 2022, meeting regarding the potential transfer of ownership. ██████████ maintained that the Council's holding of one public meeting to discuss the vacation of the land was inadequate for members of the public to reasonably discover that the Council or Village staff had prior discussions regarding the matter:

Awareness of all of the information advanced by the Village hinges on, essentially, the one episode of public notice for the open meeting regarding the property's vacation. While the Village did post notice in a newspaper that few read, and did provide direct notice to specific individuals (primarily those that had requested the vacation of public land), the Village had spent

¹²Letter from Peter M. Friedman, Elrod Friedman LLP, to Teresa Lim, Supervising Attorney, Public Access Bureau (June 30, 2023), at 5.

¹³Letter from Peter M. Friedman, Elrod Friedman LLP, to Teresa Lim, Supervising Attorney, Public Access Bureau (June 30, 2023), at 5-6.

the prior 3 years, since the original request in 2019, carefully avoiding any public notice or mention that it was considering the vacation of public land.^[14]

████████████████████ further argued that although the Council had announced at the two prior meetings that it was entering closed sessions to discuss the "setting of price for Village property," the public could not reasonably discern that "property" referred to Village land, as "Village 'property' is not limited to real estate[.]"¹⁵ He also stated that "the Village did provide documents on their website, but those documents were hidden among thousands of others, on a website platform that has been changing significantly over the last one or two years."¹⁶

Having reviewed the information submitted by the parties, the available information indicates that the relevant facts concerning the closed sessions at the September 21, 2021, and April 12, 2022, meetings became evident and were publicly available around the time of the Council's November 1, 2022, meeting. As noted above, ██████████'s cited bases for the alleged OMA violations are statements that were made in open session at that meeting, which was recorded and posted on the Village's website the day after the meeting. The November 1, 2022, meeting agenda and minutes identified the location of the property (Bertling Lane, Hill Road, and Woodland Avenue) and indicated that the property pertained to land by stating it concerned the vacation of a pathway. Members of the public who either attended that meeting or reviewed the meeting's recording within 60 days of when it was posted would have learned of the relevant facts concerning the two prior closed sessions. While it would be unreasonable to expect members of the public to physically attend all meetings of a public body, the recording of the November 1, 2022, meeting and other documents concerning the pathway were publicly available on the Village website for more than six months before ██████████ submitted his Request for Review. Members of the public who were keeping up with the activities of Village government or had a particular interest in matters related to Village land could have reasonably observed from the agenda that the Council planned to discuss the vacation of a specific pathway and viewed the recording of the meeting, which disclosed that the matter had been discussed in closed session during the Council's September 2021 and April 2022 meetings. In addition, the agenda packet containing the Agenda Item Executive Summary, which also indicated that the matter had been discussed in closed session at the September 2021

¹⁴Letter from ██████████ to Teresa Lim, Public Access Counselor [*sic*], Office of the Attorney General (July 11, 2023), at 6.

¹⁵Letter from ██████████ to Teresa Lim, Public Access Counselor [*sic*], Office of the Attorney General (July 11, 2023), at 4.

¹⁶Letter from ██████████ to Teresa Lim, Public Access Counselor [*sic*], Office of the Attorney General (July 11, 2023), at 7.

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and April 2022 meetings, was publicly posted. This office understands [REDACTED]'s concern that it was difficult to learn about the vacation of the pathway because the Council held only one meeting where it discussed in open session details of the matter. OMA does not, however, require a public body to hold multiple open session discussions on an issue, and this office's review of the Village website confirmed that the Council's meeting materials, including for the November 1, 2022, meeting, are posted in the "Governance" section. Although meeting materials for recent meetings are more visible on the site and thus easier to locate, a person may still search for past meetings by type of body, date, or word search.¹⁷

Under these particular circumstances, this office is unable to conclude that, despite exercising reasonable diligence, a person could not have discovered the relevant facts forming the basis of [REDACTED]'s Request for Review within 60 days of when that information was made available to the public on the Village's website. To conclude that exercising reasonable diligence does not include an obligation to discover within 60 days information disclosed in open meetings and made available in materials posted on a public body's website would invite complainants to dig through meeting materials for possible violations long after those materials were available to the public. The reasonable diligence provision was not designed for such circumstances. Accordingly, this office concludes that the Request for Review was not timely submitted, and this office lacks the authority to take further action on the allegations under section 3.5(a) of OMA.


This letter shall serve to close this matter. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,

[REDACTED]
TERESA LIM
Supervising Attorney
Public Access Bureau

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¹⁷Village of Winnetka, Agendas & Minutes, <https://www.villageofwinnetka.org/129/Agendas-Minutes> (last visited November 21, 2023).


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cc: *Via electronic mail*
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