



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

June 28, 2019

Via electronic mail

Mr. John Kraft



john@illinoisleaks.com

The Honorable Jean Kaczmarek¹
County Clerk
DuPage County
421 North County Farm Road
Wheaton, Illinois 60187

Via electronic mail

Mr. Sean Conway

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RE: OMA Request for Review – 2018 PAC 56086

Dear Mr. Kraft, Ms. Kaczmarek, and Mr. Conway:

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 DuPage County Election Commission (Commission) violated OMA

¹This letter is addressed to the County Clerk because after the meeting at issue, the DuPage County Election Commission was dissolved and merged into the County Clerk's Office. Alicia Fabbre, *DuPage Board votes 11-7 to dissolve election commission, despite clerk's push to wait till [sic] after April election*, NAPERVILLE SUN, (Jan. 15, 2019, 5:50 p.m.), <https://www.chicagotribune.com/suburbs/naperville-sun/ct-ecn-dupage-election-merger-debate-st-0116-story.html>.

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by improperly permitting a Commission member to attend its December 12, 2018, meeting by telephone.

BACKGROUND

On December 12, 2018, Mr. John Kraft submitted a Request for Review to the Public Access Bureau alleging that the Commission violated OMA during its December 12, 2018, meeting by permitting one of its members to attend the meeting by telephone for a reason that was not permitted under OMA. In particular, he alleged:

The Chairman, prior to the meeting, stated that the absent Commissioner had told people at the previous meeting that he would be visiting family and would not be attending this meeting.

The Chairman and remaining commissioner permitted him to attend via telephone, and even permitted him to Motion and Vote on items for action, including expenditures of public funds.¹²¹

Mr. Kraft argued that simply "visiting relatives" was not one of the permitted reasons for attending a meeting by means other than physical presence.³ He alleged that the Commission violated sections 7(a) and 7(c) of OMA (5 ILCS 120/7(a), (c) (West 2017 Supp.)).

On December 20, 2018, this office forwarded a copy of the Request for Review to the Commission and asked it to provide this office with copies of the December 12, 2018, meeting agenda, minutes, and any Commission rules governing member attendance by means other than physical presence for this office's confidential review, together with a written response to Mr. Kraft's OMA allegation. On January 3, 2019, this office received a written response and a copy of the Commission's remote attendance policy; the Commission stated that the minutes had yet to be prepared but that an audio recording of the meeting was posted online.⁴ On January 8, 2019, this office forwarded a copy of the Commission's response to Mr. Kraft; he did not reply.

²E-mail from John Kraft to AG PAC (December 13, 2018).

³E-mail from John Kraft to AG PAC (December 13, 2018).

⁴The County of DuPage, Election Commission Committee Meeting 12/12/2018 4:00 PM Room 3500B, http://dupage.iqm2.com/Citizens/Detail_Meeting.aspx?ID=7758 (last visited June 27, 2019).

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DETERMINATION

It is "the public policy of this State that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." 5 ILCS 120/1 (West 2016). "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).

Sections 7(a) and 7(c) of OMA set forth the procedure and requirements for allowing a member of a public body to attend a meeting by audio or video conference in limited circumstances, as follows:

(a) If a quorum of the members of the public body is physically present as required by Section 2.01, a majority of the public body may allow a member of that body to attend the meeting by other means if the member is prevented from physically attending because of: (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency. "Other means" is by video or audio conference.

* * *

(c) A majority of the public body may allow a member to attend a meeting by other means only in accordance with and to the extent allowed by rules adopted by the public body. The rules must conform to the requirements and restrictions of this Section, may further limit the extent to which attendance by other means is allowed, and may provide for the giving of additional notice to the public or further facilitate public access to meetings.

Under the plain language of these provisions, a public body with a quorum physically present has the discretion to permit a member who is not physically present to participate in the meeting by audio or video conference for any of the three reasons set forth in section 7(a) of OMA and in accordance with its rules for attendance by other means.

Section II.B. of the Commission's remote attendance policy states that a "Commissioner may attend a meeting by remote means *only* if he or she is prevented from

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physically attending because of: (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency." (Emphasis in original.)⁵
Section III further provides, in pertinent part:

- b. The presiding officer of the meeting must announce, prior to the roll call being taken, that one or more Commissioners are participating by remote means and the means of participation for each such Commissioner.
- c. The non-present Commissioner(s) must answer the roll call, and state that he or she is unable to attend the meeting in person, which of the reasons in Section II. b. of this Policy he or she is participating under, and that he or she is willing and able to participate by the remote means selected.⁶

In its response to this office, the Commission confirmed that one of its three members participated in the meeting at issue by audio conference. The Commission noted, however, that OMA does not specifically define what constitutes a "family or other emergency," and that there was no reported Illinois case law addressing that exception. The Commission asserted that "Member Boske participated in the December 12, 2018 meeting via telephone due to an out-of-state family matter. Moreover, two of the three Members of the Election Commission were in physical attendance at the meeting and could have conducted all business on the agenda without the participation of Member Boske."⁷ According to the Commission, "Member Boske felt a unique obligation to participate in the meeting" for political party representation reasons and that he "believed that the OMA authorized his participation in the

⁵Resolution No. 2012-10, A Resolution Adopting an Amended and Restated Policy for Conduct of Meetings of the Board of Commissioners of the DuPage County Election Commission via Remote Means, II.b. Pre-Meeting Requirements (adopted September 11, 2012).

⁶Resolution No. 2012-10, A Resolution Adopting an Amended and Restated Policy for Conduct of Meetings of the Board of Commissioners of the DuPage County Election Commission via Remote Means, III. Meeting Requirements (adopted September 11, 2012).

⁷Letter from Sean Conway, DuPage County Election Commission, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (January 3, 2019), at 2.

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meeting by telephone."⁸ The Commission further stated that "all items voted on for final action received approval by unanimous vote of all three members[.]"⁹

Black's Law Dictionary defines "emergency" as: "1. A sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm. 2. An urgent need for relief or help." Black's Law Dictionary (10th ed. 2014), available at Westlaw BLACKS. Thus, "a family or other emergency" entails an element of immediacy.

In this matter, the Commission stated that Member Boske did not attend the December 12, 2018, meeting in-person due to an out-of-state family matter, but did not demonstrate that the family matter involved a sudden and serious event or an unforeseen change in circumstances that needed immediate attention. Indeed, the Commission did not deny Mr. Kraft's allegation that Member Boske had informed the Commission and public at the previous month's meeting that he would not be at the next month's meeting, suggesting that the trip was pre-planned. Absent information indicating that the family matter concerned an urgent matter or required immediate action, this office is unable to conclude that Member Boske was prevented from physically attending the meeting due to a family emergency or other type of emergency. *See, for example*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 37382, issued May 26, 2016 (concluding that a board improperly permitted a commissioner, who had a pre-planned trip to take her son to college, to attend a meeting by telephone because the commissioner's absence did not meet the "family or other emergency" exception in section 7(a) of OMA). Because Member Boske's absence did not meet the emergency exception in section 7(a) of OMA, the Commission improperly permitted him to attend the December 12, 2018, meeting by telephone.

Additionally, the Commission did not adhere to the roll call procedure set forth in Section III.b of its remote attendance policy. Based on this office's review of the audio recording of the start of the meeting, Member Boske did not specify during the roll call that he was unable to attend the meeting in person, under which of the reasons in Section II.b. of the policy he was participating, or whether he was willing and able to participate by the remote means selected. Instead, Member Boske simply answered "here" during the roll call. Because section 7(c) permits remote attendance only to the extent allowed by the rules the public body has adopted, and because the Commission did not follow those rules, this office concludes that the Commission also violated section 7(c) of OMA.

⁸Letter from Sean Conway, DuPage County Election Commission, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (January 3, 2019), at 2.


⁹Letter from Sean Conway, DuPage County Election Commission, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (January 3, 2019), at 2.

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Nonetheless, this office's review of the Commission's December 12, 2018, meeting packet posted on the DuPage County website¹⁰ confirmed that each item on which the Commission took final action was approved by a unanimous vote. Thus, the vote of Member Boske, who participated in the meeting by telephone, would not appear to have changed the outcome of the Commission's final actions. Even if remedial action was warranted, the Commission was dissolved after the meeting at issue.

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. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,



TERESA LIM
Assistant Attorney General
Public Access Bureau

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¹⁰DuPage County, Election Commission – Committee Meeting, Packet (December 12, 2018), available at <http://dupage.iqm2.com/Citizens/FileOpen.aspx?Type=1&ID=8256&Inline=True> (last visited June 27, 2019).