



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 19, 2018

Via electronic mail

Mr. Darren B. Meyers, P.E.
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Via electronic mail

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RE: OMA Request for Review – 2018 PAC 54184

Dear Mr. Meyers and Mr. Kmett:

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 set forth below, the Public Access Bureau has determined that the Energy Code Advisory Council (Council) of the Capital Development Board (Board) was late to complete OMA's electronic training requirements, but that no further action is warranted as to the other allegations raised by Mr. Darren B. Meyers.

On July 25, 2018, Mr. Meyers, President of International Energy Conservation Consultants, LLC, submitted a Request for Review to the Public Access Bureau alleging that the Board and Council had violated OMA in various ways. Specifically, he alleged: (1) the Board had posted notice of the Council's July 16, 2018, meeting on July 9, 2018, rather than "adequate notice (10 or more days)"; (2) the Council had posted no notice for certain meetings in 2014 and 2015, and had posted between one and 21 business days' notice for 25 other meetings between February 15, 2012, and July 16, 2018 (including at least three business days' notice for the

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meetings held within the previous 60 days); (3) it was inconvenient to hold a meeting on July 16, 2018, because many of the parties were in Texas for an industry conference; (4) members of the Council had not completed OMA's electronic training curriculum, nor were they versed in Robert's Rules of Order or the "Capital Development Board Code Amendment Procedures for the Illinois Energy Conservation Code"; and (5) the Board/Council had not clearly communicated in the "Capital Development Board Code Amendment Procedures for the Illinois Energy Conservation Code" that position papers or other additional information could have been offered into testimony.¹ Mr. Meyers attached correspondence from the Council's e-mail list concerning Council meetings and a copy of the "Capital Development Board Code Amendment Procedures for the Illinois Energy Conservation Code."

This office determined that further action was warranted only as to whether all of the members of the Council had completed OMA's electronic training requirements. On August 27, 2018, this office sent a copy of the Request for Review to a Board attorney charged with advising the Council and asked for copies of the certificates of completion of the OMA electronic training for all of the members of the Council, together with a written explanation as to whether the Council members took the training within the time periods specified in section 1.05 of OMA (5 ILCS 120/1.05 (West 2016)). On September 4, 2018, the Council provided this office with certificates of completion for all twelve of its members and confirmed that they had completed the OMA electronic training curriculum.

On September 5, 2018, this office forwarded a copy of the Council's response to Mr. Meyers. On September 6, 2018, Mr. Meyers submitted a reply. On September 14, 2018, Mr. Meyers submitted a supplemental reply.

DISCUSSION

"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, the Public Access Counselor's authority to resolve disputes is limited to alleged violations of OMA and the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2016)). See 15 ILCS 205/7(c)(3) (West 2016). Accordingly, this office does not have the authority to review alleged violations of other statutes, rules, or regulations, such as Robert's Rules of Order or a State agency's adherence to its code amendment procedures.

¹Letter from Darren B. Meyers, P.E., President, International Energy Conservation Consultants, LLC, to Sara[h] Pratt, Public Access Counselor, Office of Attorney General (July 24, 2018), at 2-4.

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Meeting Notice

With respect to Mr. Meyers' allegations other than his claim that members of the Council had not completed the OMA electronic training curriculum, section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2016)) 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.** 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.)

Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2016)) generally requires a public body to post notice of any regular or special meeting at least 48 hours in advance of the start of the meeting. Accordingly, this office determined that no further action was warranted as to Mr. Meyers' allegation that the Council had provided three or more business days' notice for the meetings held within the 60 days prior to the submission of his Request for Review.

Mr. Meyers replied to that decision by arguing:

[I]n accordance with (5 ILCS 120/2.02), the [Council] has not nor [sic] ever prepared or made available a schedule of all its regular meetings at the beginning of any calendar of fiscal year, much less calendar years 2017 or 2018 or Illinois State fiscal years 2016-17, 2017-18, a violation of OMA and nullifying any claim to 48 hours' notice.

Thereby, and in accordance with (5 ILCS 120/2.03), announcements of regular meeting dates require at least ten (10) days' notice; and publication in a newspaper of general circulation

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in the area in which such body functions (i.e., the State of Illinois, 2015 Pop. 12,859,995).^[2]

Mr. Meyers claimed that the Council violated OMA in connection with its May 15, 2018, June 20, 2018, June 28, 2018, and July 16, 2018, meetings by not providing at least 10 days' notice.

Section 2.02(a) of OMA provides that "[e]very public body shall give public notice of the schedule of regular meetings at the beginning of each calendar or fiscal year and shall state the regular dates, times, and places of such meetings." Section 2.03 of OMA (5 ILCS 120/2.03 (West 2016)) further provides that "[i]n addition to the notice required by Section 2.02, each body subject to this Act must, at the beginning of each calendar or fiscal year, prepare and make available a schedule of all its regular meetings for such calendar or fiscal year, listing the times and places of such meetings." In construing these provisions, the Public Access Bureau has previously determined:

Under the plain language of these provisions, a public body that meets regularly and has scheduled regular meetings for the year must make its regular meetings schedule available to the public. In contrast, a public body that does not hold regularly-scheduled meetings is not required to produce an annual regular meeting schedule, as the rationale of providing transparency to the public about the plans a public body has made to meet in the future is inapplicable when the public body does not meet at regular intervals and has not yet decided when it will meet throughout the year. *Compare* Ill. Att'y Gen. PAC Req. Rev. Ltr. 26850, issued July 27, 2015, at 5 ("[I]f the meetings of a committee of the Board are set in advance at routine intervals throughout the year, the Board must provide annual notice of the schedule of such committee meetings[.]"), *with* Ill. Att'y Gen. PAC Req. Rev. Ltr. 41790, issued June 29, 2016, at 2 (public body with no present plans to meet in the future because of lack of funding had no schedule of regular meetings to make available and thus did not violate section 2.03), *and* Ill. Att'y Gen. PAC Req. Rev. Ltr. 17663, issued December 14, 2011, at 1 ("If a public body has not, or is unable to, establish a schedule of regular meetings at the beginning of the calendar year, the absence of a posted annual regular meeting schedule does not violate the requirements of

²Letter from Darren B. Meyers, P.E., President, International Energy Conservation Consultants, LLC, to Joshua M. Jones, Deputy Bureau Chief, Public Access [Bureau] (September 6, 2018), at 1-2.

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OMA."). Ill. Att'y Gen. PAC Req. Rev. Ltr. 49458, issued September 13, 2017, at 1-2.

On September 17, 2018, an Assistant Attorney General in the Public Access Bureau telephoned a Board attorney who advises the Council to verify whether the Council holds regular meetings throughout the year, or instead meets on an ad hoc basis. The Council's attorney confirmed that the Council is not the type of public body that holds regularly-scheduled meetings. Instead, it primarily holds meetings every three years around the time when the Illinois Energy Conservation Code³ is being updated. This office has not received any information to the contrary. Rather, Mr. Meyers referenced "the somewhat 'regular' meetings convened every three years,"⁴ and provided a list of Council meetings held since February 15, 2012, which evinces that the Council does not hold meetings at regular intervals throughout the year. Therefore, the following language from section 2.03 of OMA is inapplicable to the intermittent Council meetings that are within the scope of this Request for Review: "If a change is made in regular meeting dates, at least 10 days' notice of such change shall be given by publication in a newspaper of general circulation in the area in which such body functions." The Public Access Bureau has consistently determined that this ten-day notice requirement applies only when a public body is changing its regular meeting dates going forward (i.e. from the first Monday of each month to the first Tuesday of each month), rather than when a single (special) meeting is scheduled or rescheduled. *See e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 21021, issued March 11, 2013 (public body not required to provide 10 days' notice by publication for a special meeting). Mr. Meyers' claim that the Council was required to provide at least 10 days' advance notice of its May 15, 2018, June 20, 2018, June 28, 2018, and July 16, 2018, meetings is unsupported by the language of OMA and thus unavailing.

As to the meetings from more than 60 days before Mr. Meyers submitted his Request for Review, Mr. Meyers argued that he had not discovered those alleged instances of insufficient notice within 60 days after they occurred despite utilizing reasonable diligence; he stated that he had discovered those alleged deficiencies "upon reviewing the history of" Council meetings.⁵ However, he provided no information supporting the assertion that he utilized reasonable diligence in connection with those claims, such as checking for the posting of agendas around the times that those meetings were held. Therefore, his allegations concerning

³71 Ill. Adm. Code §600.100 *et seq.* (2018), last amended at 40 Ill. Reg. 2754, effective January 20, 2016.

⁴E-mail from Darren B. Meyers, P.E., CEM, REP, BPI-BA/EP, President, Architectural Engineering, International Energy Conservation Consultants, LLC, to Joshua [Jones] (September 17, 2018).

⁵E-mail from Darren B. Meyers, P.E., CEM, REP, BPI-BA/EP, President, Architectural Engineering, International Energy Conservation Consultants, LLC, to Sara[h] Pratt, Public Access Counselor, Office of Attorney General (July 24, 2018).

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those meetings are untimely, and this office lacks the authority to review them under section 3.5(a) of OMA.

Convenience of the July 16, 2018, Meeting Date

Section 2.01 of OMA (5 ILCS 120/2.01 (West 2016)) provides, in relevant part: "All meetings required by this Act to be public shall be held at specified times and places which are convenient and open to the public." OMA does not define what is "convenient." Undefined statutory terms must be given their plain and ordinary meaning. *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 275 (2009) (finding that where a statute fails to specifically define a word, a court may use a dictionary to determine the word's plain and ordinary meaning). "'Convenient' means 'suited to a personal comfort or to easy performance' or 'affording accommodation or advantage.'" *Gerwin v. Livingston Co. Board*, 345 Ill. App. 3d 352, 361 (4th Dist. 2003) (quoting Merriam-Webster's Collegiate Dictionary 252 (10th ed. 2000)). Although the court in *Gerwin* addressed the issue of whether a meeting place (a small room) rather than a meeting time was convenient, the term "convenient" in section 2.01 modifies both "times" and "places." "Open" and "convenient" are not synonymous under the Act; accordingly, "[a] meeting can be open in the sense that no one is prohibited from attending it, but it can be held in such an ill-suited, unaccommodating, unadvantageous place that members of the public, as a practical matter, would be deterred from attending it." *Gerwin*, 345 Ill. App. 3d at 361. To the same extent, a meeting can be held at such an unaccommodating, unadvantageous time that the public would be unreasonably deterred from attending it. The concept of public convenience implies a "rule of reasonableness, not 'absolute accessibility' but 'reasonable accessibility.'" *Gerwin*, 345 Ill. App. 3d at 362 (quoting *State ex rel. Badke v. Village Board of the Village of Greendale*, 173 Wis. 2d 553, 579, 494 N.W.2d 408, 418 (Wis. 1993)).

Mr. Meyers alleged that the July 16, 2018, meeting was not scheduled for a convenient time because "several, if not many, of the parties identified on the [Board's] e-mail meeting announcement would be" attending a conference on energy codes in Texas from July 15, 2018, through July 17, 2018.⁶ Although the information Mr. Meyers provided to this office suggests that the July 16, 2018, meeting time was inconvenient for at least some individuals who wished to attend, the e-mails Mr. Meyers provided to this office do not indicate that the timing of the meeting was unreasonable for the public in general. The meeting was scheduled for 10:00 a.m. to noon on a Monday, which was a business day. This office has previously determined that a meeting at 10:00 a.m. on a business day was not held at an unreasonable time. Ill. Att'y Gen. PAC Req. Rev. Ltr. 38389, issued June 19, 2017, at 5. Under the specific circumstances of this

⁶Letter from Darren B. Meyers, P.E., President, International Energy Conservation Consultants, LLC, to Sara[h] Pratt, Public Access Counselor, Office of Attorney General (July 24, 2018), at 2-4.

matter, the facts Mr. Meyers has alleged are insufficient to conclude that the July 16, 2018, meeting was held at an unreasonable time.

OMA Training

Section 1.05(b) of OMA (5 ILCS 120/1.05(b) (West 2016)) sets forth the requirements for members of public bodies to complete the electronic training program developed by the Public Access Counselor:

Except as otherwise provided in this Section, each elected or appointed member of a public body subject to this Act who becomes such a member after the effective date of this amendatory Act of the 97th General Assembly shall successfully complete the electronic training curriculum developed and administered by the Public Access Counselor. For these members, the training must be completed not later than the 90th day after the date the member:

- (1) takes the oath of office, if the member is required to take an oath of office to assume the person's duties as a member of the public body; or
- (2) otherwise assumes responsibilities as a member of the public body, if the member is not required to take an oath of office to assume the person's duties as a member of the governmental body.

Each member successfully completing the electronic training curriculum shall file a copy of the certificate of completion with the public body.

* * *

The failure of one or more members of a public body to complete the training required by this Section does not affect the validity of an action taken by the public body. (Emphasis added.)

It is undisputed that most of the members of the Council had not completed the OMA electronic training curriculum at the time that Mr. Meyers submitted his Request for Review, despite the fact that most of those members had served on the Council for years.

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Accordingly, the Council failed to complete the OMA electronic training requirement in a timely manner. By its plain language, however, section 1.05 of OMA does not invalidate any Council actions taken before all of the members had completed the training. This office cautions the Council to ensure that in the future, any new members who have not previously completed the OMA electronic training curriculum as a member of any other public body complete the curriculum within 90 days after taking the oath of office or, if no oath is required, otherwise assuming the responsibilities of a member of the Council.

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, please contact me at (312) 814-8413, jjones@atg.state.il.us, or the Chicago address on the first page of this letter.

Very truly yours,



JOSHUA M. JONES
Deputy Bureau Chief
Public Access Bureau

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