



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

April 29, 2022

Via electronic mail



Via electronic mail

The Honorable Paul Esposito
Mayor
City of Oakbrook Terrace
17W275 Butterfield Road
Oakbrook Terrace, Illinois 60181
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RE: OMA Request for Review – 2020 PAC 65272

Dear [REDACTED] and Mr. Esposito:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)).

BACKGROUND

On October 17, 2020, [REDACTED] submitted a Request for Review to the Public Access Bureau alleging that the City Council (City Council) of the City of Oakbrook Terrace (City) violated OMA at its August 25, 2020, meeting by improperly discussing in closed session the salary of the mayor and liquor commissioner. He directed this office to the City Council's August 25, 2020, meeting minutes, which stated that the City Council entered closed session pursuant to section 2(c)(11) of OMA.¹ The 2(c)(11) exception permits a public body to close a meeting to discuss "[l]itigation, 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[.]" [REDACTED] contended: "First, I allege

¹5 ILCS 120/2(c)(11) (West 2020).

that the City Council discussed matters in closed session that were not consistent with their motion and vote to enter into closed session. Second, I allege that the City Council entered closed session to discuss the salary of the mayor and liquor commissioner, which is not a permissible topic of closed session discussion."² He argued that there was no pending litigation and that the City Council's discussion of the mayor's salary was improper because the mayor is an elected officer rather than an employee "and the Liquor Commissioner position is also held by the Mayor."³

On October 27, 2020, this office forwarded a copy of the Request for Review to the City Council and asked it to provide this office with copies of the City Council's August 25, 2020, meeting agenda, minutes, and closed session verbatim recording for this office's confidential review, together with a written response to [REDACTED] OMA allegations. Having received no response, this office sent additional correspondence to the City Council on December 1, 2020, again asking it to respond. On December 16, 2020, this office received the requested materials. On December 21, 2020, this office forwarded a copy of the City Council's response to [REDACTED]; he did not submit a reply.

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 2020). "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).

Closed Session Procedure

Section 2a of OMA (5 ILCS 120/2a (West 2020)) sets forth the procedure for a public body to enter closed session. Among those requirements, section 2a provides that:

The vote of each member on the question of holding a meeting closed to the public and 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

²Letter from [REDACTED] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (October 17, 2020).

³Letter from [REDACTED] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (October 17, 2020).

the vote and shall be recorded and entered into the minutes of the meeting. (Emphasis added.)

This office's review of the August 25, 2020, meeting minutes confirmed that the City Council documented the vote of each member on the question of entering closed session. The minutes, however, are unclear as to the subject matter of the closed session, citing section 2(c)(11) of OMA as the authorization for recessing to executive session but stating that the executive session concerned the appointment, employment, compensation, discipline, performance, or dismissal of employees, which is language found in section 2(c)(1) of OMA.⁴ In its response to this office, the City Council asserted that it made a motion in open session to close the meeting pursuant to section 2(c)(1) of OMA and that the section 2(c)(11) exception documented in the meeting minutes "is a typographical error and an incorrect recordation of the motion that was made and passed in order to recess to executive session[.]"⁵ The City Council noted that even though the minutes' description of the motion to recess to executive session was inaccurate, the minutes correctly indicated that the executive session involved the discussion of employees. Additionally, the City Council stated that it would correct the typographical error in the minutes at its next meeting.

The available information indicates that the City Council publicly identified section 2(c)(1) by both its statutory subsection and statutory language before entering closed session, and this office has not received information to the contrary. Accordingly, this office is unable to conclude that the City Council violated section 2a of OMA by failing to publicly disclose the specific exception that served as the basis for closing the meeting in violation of section 2a of OMA. Although the City misidentified that exception in the meeting minutes, the City Council has corrected the August 25, 2020, meeting minutes so no further remedial action is necessary.⁶

Closed Session Exceptions

OMA requires that all meetings of a public body remain open to the public unless the public body properly invokes an exception in section 2(c) of OMA. 5 ILCS 120/2(a), (c)

⁴5 ILCS 120/2(c)(1) (West 2020).

⁵Letter from Thomas J. Halleran, Storino, Ramello & Durkin, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (December 16, 2020), at 2.

⁶City of Oakbrook Terrace City Council and Committee of the Whole, Meeting, August 25, 2020, Minutes 6, as corrected and reapproved on January 12, 2021, *available at* https://www.oakbrookterrace.net/sites/default/files/fileattachments/city_council/meeting/15991/august_25_2020_minutes.pdf.

(West 2020). The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2020).

Section 2(c)(1) of OMA permits a public body to discuss in closed session "[t]he appointment, employment, compensation, discipline, performance, or dismissal of **specific employees**" of the public body. (Emphasis added.) The "purpose of the [2(c)(1)] exception is to protect the identity and reputation of a person[.]" 1974 Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 128. The Attorney General has previously explained in binding opinions that "[t]he use of the phrase 'specific employees of the public body' significantly limits the scope of this exception. Based on this language, the exception is intended to permit public bodies to candidly discuss the relative merits of individual employees, or the conduct of individual employees." Ill. Att'y Gen. Pub. Acc. Op. No. 15-005, issued August 4, 2015, at 6 (quoting Ill. Att'y Gen. Pub. Acc. Op. No. 12-011, issued July 11, 2012, at 3). *See also* Ill. Att'y Gen. Pub. Acc. Op. No. 18-012, issued October 2, 2018, at 4 (closed session budgetary discussions that did not center on the merits or conduct of specific employees or prospective employees were not authorized by section 2(c)(1)).

Based on this office's review of the verbatim recording of the closed session of the August 25, 2020, meeting, the City Council did not discuss the relative merits of any particular individuals for most of the closed session. For instance, the City Council did not consider the performance of any particular individuals in discussing compensation. Rather, the City Council's discussion centered generally on the mayor and liquor commissioner positions. General discussions of compensation and employment for a position do not fall within the scope of section 2(c)(1) because they do not pertain to specific individuals. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 16-013, issued December 23, 2016, at 4 ("The amended language referencing 'specific employees' signifies that the General Assembly did not intend to permit public bodies to hold general discussions concerning categories of employees in closed session pursuant to section 2(c)(1)."). Indeed, any changes in compensation related to the salary of an elected officer would not have impacted the currently elected officer.⁷

However, a limited portion of the discussion concerned the compensation or performance of specific individuals. The Attorney General has issued a binding opinion concluding that the 2(c)(1) exception does not permit closed session discussions pertaining to occupants of a public office. Ill. Att'y Gen. Pub. Acc. Op. No. 17-013, issued November 21, 2017, at 4 ("Because elected members of a Village Board are occupants of a public office, not 'employees' of public bodies, section 2(c)(1) would not have provided a basis for the Board to

⁷*See* Ill. Const. art. VII, §9 ("An increase or decrease in the salary of an elected officer of any unit of local government shall not take effect during the term for which that officer is elected.").

close a meeting to discuss the conduct of a Board member."). In contrast to the section 2(c)(1) exception's focus on specific employees of the public body, section 2(c)(3) of OMA (5 ILCS 120/2(c)(3) (West 2020)) permits a public body to discuss in closed session:

The selection of a person to fill a public office, as defined in this Act, including a vacancy in a public office, when the public body is given power to appoint under law or ordinance, or the discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance.

Section 2(d) of OMA (5 ILCS 120/2(d) (West 2020)) defines the term "employee" as "a person employed by a public body whose relationship with the public body constitutes an employer-employee relationship under the usual common law rules, and who is not an independent contractor." Under that provision, "public office" is separately defined as:

[A] position created by or under the Constitution or laws of this State, the occupant of which is charged with the exercise of some portion of the sovereign power of this State. The term "public office" shall include members of the public body, but it shall not include organizational positions filled by members thereof, whether established by law or by a public body itself, that exist to assist the body in the conduct of its business.

The Attorney General has previously analyzed the two terms and concluded that "[t]he two definitions are mutually exclusive; the occupant of a position cannot simultaneously be both a public officer and an employee." Ill. Att'y Gen. Pub. Acc. Op. No. 18-015, issued October 30, 2018, at 6. Further, the Attorney General has stated:

The existence of an employer-employee relationship does not depend upon a single factor; instead all relevant factors must be considered. [Citation.] The factors to be considered include: "the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required in the work to be done, and who provides tools, materials, or equipment." [Citation.] Of these factors, the Illinois Supreme Court stated that the "right to control the manner in which the work is done is the most important in determining the relationship." [Citation.] Ill. Att'y Gen. Pub. Acc. Op. No. 18-015, at 7.

In that binding opinion, the Attorney General examined the Illinois Appellate Court's analysis in *Heller v. County Board of Jackson County*, 71 Ill. App. 3d 31, 37- 39 (5th Dist. 1979), which involved a county supervisor of assessment. Specifically, the court analyzed whether the county board exceeded its powers by interfering with the operation, control, and management of the supervisor, who was an appointed county officer. *Heller*, 71 Ill. App. 3d at 37-39. The court rejected the county board's argument that the board had the power to oversee the day-to-day operations of any county officer and highlighted that the term of office and duties of the county officer are set by statute, thus indicating the General Assembly's intent for the county officer to operate free from interference by the county board. *Heller*, 71 Ill. App. 3d at 37. Further, the county officer could only be removed for cause after judicial proceedings. *Heller*, 71 Ill. App. 3d at 37. Applying the *Heller* reasoning to the county auditor and coroner of McLean County, the Attorney General determined: "[I]t is clear that neither the Committee nor the Board has the authority to direct and control the manner in which the work of the county auditor or the county coroner is done." Ill. Att'y Gen. Pub. Acc. Op. No. 18-015, at 8. Thus, the Attorney General concluded that the county auditor and coroner are not "employees" of that county, and a county committee's closed discussion concerning them did not fall within the scope of section 2(c)(1). Ill. Att'y Gen. Pub. Acc. Op. No. 18-015, at 9-10.

In this matter, the City Council argued that the mayor and liquor commissioner are specific employees of the City and, therefore, the section 2(c)(1) exception authorized its closed session discussions regarding the employment and compensation of those individuals. With respect to the mayor's duties, the City Council contended that "[e]vidence of the City Council's control over the manner in which the mayor performs his job is found in various sections of the City Code."⁸ The City Council directed this office to certain provisions of the City's Code of Ordinances (City Code) describing the mayor's duties and authorities. The City Council argued that the mayor's authorities include the ability to appoint City department heads and officers, but only with the advice and consent of the City Council. Additionally, the mayor serves as the local liquor commissioner pursuant to the City Code.

The City Council disputed the Attorney General's binding opinions concluding that "employees" and "public officials" are mutually exclusive, asserting that "there is nothing in either definition which even remotely supports the conclusion that that [*sic*] the two definitions, employee and public official, are mutually exclusive or that the occupant of a position cannot simultaneously be both a public officer and an employee."⁹ The City Council argued that "the

⁸Letter from Thomas J. Halleran, Storino, Ramello & Durkin, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (December 16, 2020), at 3.

⁹Letter from Thomas J. Halleran, Storino, Ramello & Durkin, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (December 16, 2020), at 16.

Internal Revenue Code expressly provides otherwise" and that "[h]ad the legislature intended employees and public officials to be mutually exclusive, it would have so provided in the definition of 'employee.'"¹⁰ Directing this office to certain provisions of the Internal Revenue Code, the City Council argued, in relevant part:

Internal Revenue Code Section 3401(c) defines the term "employee" for income tax withholding purposes. That definition states:

... the term "employee" includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.

Subject to two exceptions that are not applicable to the Oakbrook Terrace Mayor or Liquor Commissioner and consistent with Internal Revenue Code Section 3401(c), Internal Revenue Code Sections 1402(c)(1) and 1402(c)(2)(e) exclude from the definition of "trade or business" "the performance of the functions of a public office." Because income tax is to be paid on self-employment income or net earnings from self-employment from a trade or business, this exclusion of "the performance of the functions of a public office" from the definition of "trade or business" underscores that persons who serve in public office do so as employees and not as independent contractors.^[11]

According to the City Council, the Internal Revenue Service had until recently applied "a twenty-common-law-factor test to determine whether a private individual is an employee or an independent contractor."¹² Performing an analysis of those 20 factors and describing in further detail the work performed by the mayor, the City Council argued that the mayor and

¹⁰Letter from Thomas J. Halleran, Storino, Ramello & Durkin, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (December 16, 2020), at 16.

¹¹Letter from Thomas J. Halleran, Storino, Ramello & Durkin, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (December 16, 2020), at 3.

¹²Letter from Thomas J. Halleran, Storino, Ramello & Durkin, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (December 16, 2020), at 4.

commissioner are "employees" of the City. The City Council further explained that "the Internal Revenue Service recently streamlined and consolidated the twenty factors into three main groups: behavioral control, financial control, and the type of relationship of the parties."¹³ It argued that under those groups, the mayor and liquor commissioner still met the definition of "employees" under the Internal Revenue Code.

In *Moy v. County of Cook*, 159 Ill. 2d 519, 21 (1994), the Illinois Supreme Court considered whether a county was vicariously liable under the doctrine of *respondent superior* for alleged negligence by the county sheriff in connection with the death of a county jail inmate. Because the applicability of that doctrine depended on whether the county and the sheriff had an employment relationship, the court analyzed whether the sheriff qualified as a county employee or officer. *Moy*, 159 Ill. 2d at 524. Noting that the right to control was a critical factor in the determination, the court emphasized that the "county is given no authority to control the office of the sheriff[]" because the county board could not add or alter duties, powers, and functions specifically imposed by law. *Moy*, 159 Ill. 2d at 525. The court cited the following factors in holding that the sheriff was an officer rather than an employee: (1) the lack of an express or implied employment contract; (2) a constitutional oath of office; (3) per the State constitution, duties provided by State law and county ordinance as well as common law and historical precedent; and (4) election to a four-year term and duties that are continuous regardless of who holds the office. *Moy*, 159 Ill. 2d at 529-30.

The office of the mayor is created under section 3.1-15-5 of the Illinois Municipal Code (65 ILCS 5/3.1-15-5 (West 2020)),¹⁴ and the occupant of that office is charged with some portion of the sovereign power of the State.¹⁵ Therefore, the Mayor of the City of Oakbrook Terrace (Mayor) is a "public officer." As the City Council noted, section 32.011 of the City Code sets forth the duties of the Mayor, which include "such duties as may be required by state statute or local ordinance."¹⁶ Among those duties, the City Code provides that "[t]he

¹³Letter from Thomas J. Halleran, Storino, Ramello & Durkin, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (December 16, 2020), at 10.

¹⁴65 ILCS 5/3.1-15-5 (West 2020) ("In all cities incorporated under this Code there shall be elected a mayor, aldermen, a city clerk, and a city treasurer (except in the case of a city of 10,000 or fewer inhabitants that, by ordinance, allows for the appointment of a city treasurer by the mayor, subject to the advice and consent of the city council).").

¹⁵The sovereign power of the State includes the power to appoint public officers. *People ex rel. Rudman v. Rini*, 64 Ill. 2d 321, 326 (1976). The mayor has the power to appoint public officers. See 65 ILCS 5/3.1-30-5 (West 2020) (mayors are authorized to appoint a collector, marshal, and "other officers necessary to carry into effect the powers conferred upon municipalities").

¹⁶OAKBROOK TERRACE, ILL. CODE § 32.011 (2020).

Mayor shall have general supervision and control of the police department and shall see that the various police officers are prompt and efficient in the discharge of their duties."¹⁷ The City Code further provides:

The Mayor shall have supervision over all executive officers and employees of the city, the power and the authority to appoint with the advice and consent of the City Council heads of departments of the city consistent with the employment policies and agreements of the city and to inspect all books and records pertaining to city affairs and kept by any officer or employee of the city, at any reasonable time.^[18]

Additionally, the Mayor may remove any officers appointed by the Mayor pursuant to the code, but must report the reasons for removal to the City Council.¹⁹ As the City Council noted, the City Code provides that the Mayor is also to serve as the Local Liquor Commissioner and sets forth the commissioner's duties.²⁰

Based on this office's review of the City Council's response and applying the reasoning in *Moy* and *Heller*, the position of mayor bears the characteristics of an officer rather than an employee. As discussed above, the office of the mayor is created by statute.²¹ The mayor takes a constitutional oath of office,²² and his or her elected term of office is four years, except in municipalities that have adopted a two-year term.²³ There is no indication that the mayor's duties arise from an employment contract, express or implied. The Illinois Municipal Code sets forth the general duties and authorities of a mayor, which include ensuring that "the laws and ordinances are faithfully executed" and providing annual updates on the current affairs

¹⁷OAKBROOK TERRACE, ILL., CODE § 32.011 (2020).

¹⁸OAKBROOK TERRACE, ILL., CODE § 32.011 (2020).

¹⁹OAKBROOK TERRACE, ILL. CODE § 32.013 (2020).

²⁰OAKBROOK TERRACE, ILL. CODE § 111.002 (2020).

²¹65 ILCS 5/3.1-15-5 (West 2020).

²²65 ILCS 5/3.1-10-25 (West 2020).

²³65 ILCS 5/3.1-15-10 (West 2020).

of the municipality.²⁴ The City Council cannot alter those duties, as they are prescribed by law. Moreover, the duties are continuous, regardless of who holds the office.

The City Code mirrors the language of the Illinois Municipal Code and sets forth additional mayoral duties and authorities, which again carries with the position rather than the particular person who holds it. As noted above, the City Code empowers the Mayor to supervise all executive officers and employees of the City, including the authority to generally supervise and control the City's police department. Additionally, the Mayor is empowered to appoint all heads of the City's departments. While the City Council provides some oversight by providing advice and consent on the Mayor's appointments for department heads, it does not have the authority to hire individuals for those positions. Further, as the City Council acknowledged, it does not have the authority to terminate the Mayor.²⁵ Although the Internal Revenue Code provides that an elected official may be considered an "employee" for income tax withholding purposes, the City Council has not sufficiently illustrated that the City Council has the right to control the manner in which the Mayor performs his or her work. Other than requiring the Mayor to report periodically to the City Council on his activities and providing equipment and other support for the Mayor to conduct his work, the City Council has not shown that it directs substantively any of the day-to-day operations of the Mayor's office. Considering all of the relevant factors, this office concludes that the Mayor and Local Liquor Commissioner are not "employees" within the scope of section 2(c)(1).

Accordingly, the Public Access Bureau concludes that the City Council's discussion falls outside the scope of section 2(c)(1) of OMA, except for a limited portion towards the end of the session which this office finds falls within the scope of section 2(c)(3) of OMA. To remedy this violation, this office requests that the City Council make available for public inspection a copy of the verbatim recording of the closed session portion of its August 25, 2020, meeting, specifically the portion up to the 11:17 mark.

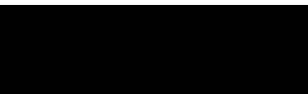
²⁴65 ILCS 5/3.1-35-5 (West 2020).

²⁵Letter from Thomas J. Halleran, Storino, Ramello & Durkin, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of Illinois Attorney General (December 16, 2020), at 9.


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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,



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Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
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