



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

May 25, 2023

Via electronic mail

Mr. Dylan P. Grady
Brown, Hay & Stephens, LLP
205 South Fifth Street
P.O. Box 2459
Springfield, Illinois 62705
dgrady@bhslaw.com

RE: OMA Request for Review – 2023 PAC 76520

Dear Mr. Grady:

This determination is issued pursuant to section 3.5(b) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(b) (West 2020)). For the reasons that follow, the Public Access Bureau lacks the authority to review your allegations because your Request for Review is untimely.

On May 8, 2023, this office received your Request for Review alleging possible violations of OMA by the City Council (Council) of the City of Washington (City) related to the Council's discussions concerning a Phase 2B Farm Creek Trunk Sewer Project (Project). Specifically, you alleged that the Council improperly discussed this Project in closed session during eight specified meetings that were held in 2016.¹ You explained that you submitted a Freedom of Information Act (5 ILCS 140/1 *et seq.* (West 2020)) request to the City on February 7, 2023, seeking copies of the closed session minutes and recordings of Council meetings held in 2016, but that the City denied most of the request on March 9, 2023, despite more than six years having since passed. You also learned that some of the requested verbatim recordings were destroyed pursuant to section 2.06(c) of OMA (5 ILCS 120/2.06(c) (West 2021 Supp.)).

Section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2020)) limits this office's authority to review OMA complaints as follows:

¹The meetings were held on: June 6, 2016, July 5, 2016, August 1, 2016, August 8, 2016, August 15, 2016, September 6, 2016, October 3, 2016, and October 10, 2016.

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.)

Under the plain language of section 3.5(a) of OMA, a person using reasonable diligence who does not discover facts concerning an alleged OMA violation within 60 days after it occurs may still submit a Request for Review no more than two years after the date of the alleged violation upon discovery of relevant facts.

Your Request for Review acknowledges that more than two years have passed since the alleged OMA violations concerning the closed sessions took place, but you contend that the time to submit a Request for Review should be extended or tolled because your efforts to gather relevant facts "have been thwarted by the City's refusal to timely and comprehensively provide information" regarding the Project.² You argued that in circumstances where the City is able to deny requests for copies of the Council's closed session verbatim recordings³ and "then avail itself of the benefit of the 2-year" time limit to submit a Request for Review, "the Illinois Supreme Court in *DeLuna v. Burciaga*, 223 Ill.2d 49, 71-71, 857 N.E.2d 229, 306 Ill. Dec. 136 (2006) concluded that the Illinois Fraudulent Concealment statute [735 ILCS 5/13-215] applies to both statutes of limitation and statutes of repose."⁴

Section 13 of the Code of Civil Procedure (Code) (735 ILCS 5/13 *et seq.* (West 2020)) governs the statutes of limitation and statutes of repose for various types of civil actions, such as actions for legal malpractice, personal injury, and damages involving criminal acts. Section 13-215 of the Code (735 ILCS 5/13-215 (West 2020)) provides:

²Letter from Dylan P. Grady, Brown Hay & Stephens, to Leah Bartelt, Public Access Counselor, Office of the Attorney General (May 8, 2023), at 4.

³Section 2.06(e) of OMA (5 ILCS 120/2.06(e) (West 2021 Supp.)) provides: "Unless the public body has made a determination that the verbatim recording no longer requires confidential treatment or otherwise consents to disclosure, the verbatim record of a meeting closed to the public shall not be open for public inspection or subject to discovery in any administrative or judicial proceeding other than one brought to enforce this Act."

⁴Letter from Dylan P. Grady, Brown Hay & Stephens, to Leah Bartelt, Public Access Counselor, Office of the Attorney General (May 8, 2023), at 5.

If a person liable to an action fraudulently conceals the cause of action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards.

In *DeLuna*, the Illinois Supreme Court considered, in relevant part, "whether the statute of repose for legal malpractice may be tolled on grounds of fraudulent concealment[.]" *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59, 857 N.E.2d 229, 235 (2006). The Court reviewed the above-described fraudulent concealment provision and held that "when applicable, [section 13-215 of the Code] is an exception to the statute of repose contained in section 13-214.3(c) of the Code." *DeLuna*, 223 Ill. 2d at 74. The Court concluded that two of the plaintiffs' pleadings were sufficient to show a fraudulent concealment of facts supporting their causes of action and thus that the plaintiffs "timely filed within the limitations period set forth in section 13-215 of the Code." *DeLuna*, 223 Ill. 2d at 81-82.

The above-described exception to the statute of repose in the Code pertains to civil actions filed in court. A Request for Review filed with the Public Access Counselor, however, is an alternative to filing suit to resolve a dispute concerning OMA. Compare 5 ILCS 120/3(a) (West 2020) ("Where the provisions of [OMA] are not complied with * * * any person, * * *, may bring a civil action in the circuit court") with 5 ILCS 120/3.5(a) (West 2020) ("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"). "A binding opinion issued by the Attorney General shall be considered a final decision of an administrative agency, for purposes of administrative review under the Administrative Review Law (735 ILCS 5/Art. III)." 5 ILCS 120/7.5 (West 2020). The Code does not apply to administrative proceedings. *Desai v. Metropolitan Sanitary District*, 125 Ill. App. 3d 1031, 1033 (1st Dist. 1984) ("the Code of Civil Procedure is inapplicable to administrative proceedings[]" because "administrative procedure is simpler, less formal and less technical than judicial procedure.").

Because section 13-215 of the Code is inapplicable to the time limits for submitting a Request for Review to the Public Access Counselor set forth in section 3.5(a) of OMA, your submission is untimely and this office is unable to review the allegation that the Council violated OMA by holding improper closed session discussions in 2016. This office also notes that your submission appears to indicate that some or all of the alleged violations are the subject of a lawsuit pending in Tazewell County Circuit Court. OMA precludes this office from reviewing alleged OMA violations that are the subject of litigation. 5 ILCS 120/3.5(f) (West 2020) ("If the requester files suit under Section 3 with respect to the same alleged violation that is the subject of a pending request for review, the requester shall notify the Public Access

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Counselor, and the Public Access Counselor shall take no further action with respect to the request for review and shall so notify the public body.").

This letter serves to close this file. If you have questions, please contact me at the Chicago address on the bottom of the first page of this letter.

Very truly yours,



TERESA LIM
Supervising Attorney
Public Access Bureau

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cc: *Via electronic mail*
The Honorable Gary W. Manier
Mayor
City of Washington
301 Walnut Street
Washington, Illinois 61571
gmanier@ci.washington.il.us