



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 28, 2017

Via electronic mail
Mr. Doug Nelson
WSPY News
wspynews@gmail.com

Via electronic mail
The Honorable Rick Olson
Mayor
City of Sandwich
505 North Castle Street
Sandwich, Illinois 60548
mayor@sandwich.il.us

RE: OMA Request for Review – 2017 PAC 49854

Dear Mr. Nelson and Mr. Olson:

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 City of Sandwich City Council (Council) improperly took final action when it approved terminating an employee in closed session without first voting in open session after providing an adequate public recital of the matter under consideration. The Public Access Bureau also concludes that the Council's closed session discussions on May 1, 2017, May 22, 2017, June 12, 2017, and June 26, 2017, did not exceed the scope of the open meetings exceptions the Council cited to close the meetings.

On September 28, 2017, Mr. Doug Nelson, on behalf of WSPY News, submitted a Request for Review to the Public Access Bureau alleging that during closed sessions sometime around May 2017, the Council improperly took final action to terminate an employee and discussed related topics that were not specified in its votes to close the meetings. On October 3, 2017, this office forwarded a copy of the Request for Review to the Council and asked it to provide this office with copies of the agendas, open and closed session minutes, and verbatim

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recordings of the closed sessions of the relevant meetings for this office's review, together with a written response to Ms. Nelson's OMA allegations.

On October 12, 2017, counsel for the Council provided this office with those materials and a written response in which it denied Mr. Nelson's allegations. The Council also explained that the employee in question was terminated from her duties with the Sandwich Police Department as Records Clerk, but that she was also the Treasurer of the Sandwich Police Benevolent Association (Association), which is "not run by the City of Sandwich."¹ On October 13, 2017, this office sent a copy of the Council's response to Mr. Nelson. He replied on October 25, 2017, arguing that discussion of the employee in relation to the Association should not have occurred during closed session because the Association is not a public body and because the open meetings exception the Council cited to close the meeting authorizes only the discussion of a public body's employees.

DETERMINATION

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2016).

As an initial matter, although Mr. Nelson alleged that the City violated the Local Records Act (50 ILCS 205/1 *et seq.* (West 2016)) and that the City's law firm has a conflict of interest, the Public Access Bureau's authority is limited to alleged violations of OMA and the Freedom of Information Act (5 ILCS 140/1 *et seq.* (West 2016)). *See* 15 ILCS 205/7(c)(3) (West 2016). Accordingly, allegations outside the scope of those two statutes are not subject to review by the Public Access Bureau.

Reasonable Diligence

Section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2016)) provides, in pertinent part:

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 60 days after the alleged OMA violation. If facts concerning the violation are not discovered within the 60-day period, but are discovered at a later date, not exceeding 2***

¹Letter from Cassandra A. Gottschalk, Foster, Buick, Conklin, Lundgren & Tritt, LLC, to Marie Hollister, Assistant Attorney General, Public Access Bureau (October 12, 2017), at 1.

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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.)

Mr. Nelson acknowledged in his Request for Review that the relevant meetings may have been held more than 60 days before he submitted his Request for Review, but he argued that he had not learned material facts concerning the alleged violations at the time that they occurred despite using reasonable diligence. He stated that WSPY initially had reason to believe that the meetings' executive sessions did not conform to OMA, but that these concerns were alleviated when the City's attorneys "creat[ed] the impression" that "the termination of the employee and executive sessions in question were a run of the mill employee misconduct termination that did not involve unusual factors" and that WSPY's concerns were unfounded.² However, Mr. Nelson stated, "[a]pproximately two months later in July 2017 WSPY became aware of a termination letter that spelled out many of the allegations WSPY had been aware of in May that were denied by officials[.]" as the letter indicated that the Council had made the employment termination decision but the Council's meeting minutes show no open session action on the matter.³

Mr. Nelson provided this office with facts sufficient to demonstrate that, despite utilizing reasonable diligence, he did not discover that the Council had terminated an employee without taking action during open session until more than 60 days after the alleged violation. Having inquired about the circumstances surrounding the employee's termination but lacking the termination letter or other information attributing that decision to the Council, it is reasonable that WSPY would not have been aware of material facts concerning the alleged violations by the Council within 60 days of their occurrence despite using reasonable diligence. Because the Request for Review appears to have been submitted within the time limits set out in section 3.5(a) of OMA, this office has authority to review Mr. Nelson's allegations.

Final Action

Section 2(e) of OMA (5 ILCS 120/2(e) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017) provides: "No final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the

²Letter from Doug Nelson, WSPY, to Attorney General, Public Access Counselor (September 28, 2017), at 2.

³Letter from Doug Nelson, WSPY, to Attorney General, Public Access Counselor (September 28, 2017), at 2.

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nature of the matter being considered and other information that will inform the public of the business being conducted."

In its response to this office, the Council stated that it "denies Mr. Nelson's allegation that it took final action during a closed session to terminate this person's employment with the City of Sandwich as the Records Clerk."⁴ The Council provided a timeline of its meetings from May 1, 2017, through July 10, 2017, indicating that during the May 22, 2017, meeting's closed session, "the Chief [of the Sandwich Police Department] advised the Council that he was going to terminate the subject employee. He inquired as to whether he had support for his action from the Council. Members of the Council expressed their support for the Chief's decision to terminate this individual."⁵ The following day, the Council asserted, James W. Bianchi, Chief of Police, delivered a letter to the employee terminating her employment; she promptly appealed. After reviewing the employee's termination in closed session on June 12, 2017, the Council stated, a motion to uphold the employee's determination passed unanimously during open session on July 10, 2017. The Council thus claimed that it "did conclude its appeal process in open session as required."⁶ The Council further argued that no final action could have been taken in closed session, citing *Bd. of Educ. of Springfield Sch. Dist. No. 186 v. Attorney Gen. of Illinois*, 2017 IL 120343, ¶74, 77 N.E.3d 625, 637 (2017).

In his reply, Mr. Nelson argued that the Council "misleadingly stated that Police Chief Bianchi terminated [the named employee]" because the termination letter states: "Please be advised that it has been **determined by the City Council**, following my recommendation, that for the good of the City, your employment with the City of Sandwich is hereby terminated."⁷ (Emphasis added.)

In *Springfield*, a board of education held several closed sessions to discuss entering into a separation agreement with the district's superintendent. *Springfield*, 2017 IL 120343, ¶5, 77 N.E.3d at 628. During one closed session, the superintendent signed and dated the agreement, and during the next closed session, six of seven members of the board signed the agreement but did not date it; the board's attorney explained to the board that it would have to

⁴Letter from Cassandra A. Gottschalk, Foster, Buick, Conklin, Lundgren & Tritt, LLC, to Marie Hollister, Assistant Attorney General, Public Access Bureau (October 12, 2017) at 1.

⁵Letter from Cassandra A. Gottschalk, Foster, Buick, Conklin, Lundgren & Tritt, LLC, to Marie Hollister, Assistant Attorney General, Public Access Bureau (October 12, 2017), at 2.

⁶Letter from Cassandra A. Gottschalk, Foster, Buick, Conklin, Lundgren & Tritt, LLC, to Marie Hollister, Assistant Attorney General, Public Access Bureau (October 12, 2017), at 3.

⁷Letter from Doug Nelson, President, WSPY, to Marie Hollister, Illinois Attorney General, Public Access [Bureau] (October 25, 2017), at 1.

publicly vote on the agreement. *Springfield*, 2017 IL 120343, ¶¶5, 6, 77 N.E.3d at 628. A reporter then filed a Request for Review with the Public Access Counselor alleging that the board violated OMA by signing the separation agreement without first publicly voting to approve it. *Springfield*, 2017 IL 120343, ¶7, 77 N.E.3d at 628. While that review was pending, the board posted a meeting agenda containing an item for approval of the separation agreement. *Springfield*, 2017 IL 120343, ¶8, 77 N.E.3d at 628. In open session during that meeting, the board recited that it would be voting on approving the separation agreement and then voted to approve it; the previously-signed agreement was then dated. *Springfield*, 2017 IL 120343, ¶¶8-11, 77 N.E.3d at 628. After the Public Access Bureau completed its review of the matter, the Attorney General issued a binding opinion concluding that the signing of the agreement in closed session by six of the board members constituted improper final action under section 2(e) of OMA. *Springfield*, 2017 IL 120343, ¶12, 77 N.E.3d at 628.

The school district appealed the binding opinion, however, and after the lower courts sided with the school district, the Attorney General appealed to the Supreme Court. *Springfield*, 2017 IL 120343, ¶¶13, 18, 77 N.E.3d at 629-30. The Court held that the school board did not take final action for purposes of section 2(e) when it signed the separation agreement in closed session because the Board voted to approve that agreement in open session at a subsequent meeting: "Under the plain language of section 2(e) of the Open Meetings Act, the public vote is not merely a ratification of a final action taken earlier in a closed session; it is the final action. Without the public vote, no final action has occurred." *Springfield*, 2017 IL 120343, ¶74, 77 N.E.3d at 637. The Court then cited two cases in which courts found actions taken by public bodies to be invalid because the public bodies did not hold votes on the matters in open session. *Springfield*, 2017 IL 120343, ¶74, 77 N.E.3d at 637 (citing *Lawrence v. Williams*, 2013 IL App (1st) 130757, 988 N.E.2d 1039 (finding electoral board's written decision null and void because it was not made by a quorum during an open meeting) and *Howe v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 2013 IL App (1st) 122446, 996 N.E.2d 664 (finding board's written denial of benefits invalid because the board had circulated the decision for signatures privately rather than voting on it in open session)).

Thus, *Springfield* stands for the proposition that a public body may reach a preliminary consensus in closed session but must vote on the matter in open session for valid final action to occur. Otherwise, section 3(c) of OMA (5 ILCS 120/3(c) (West 2016)), which authorizes a court to "declar[e] null and void any final action taken at a closed meeting in violation of" OMA, would not be given effect. See, e.g., *People ex rel. Illinois Dept. of Corrections v. Hawkins*, 2011 IL 110792, ¶23, 952 N.E.2d 624, 631-32 (2011) ("[A] statute should be read as a whole and construed so as to give effect to every word, clause, and sentence; we must not read a statute so as to render any part superfluous or meaningless."). See also Ill. Att'y Gen. PAC Req. Rev. Ltr. 43604, issued May 31, 2017, at 3 (public body violated section

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2(e) of OMA by appointing an interim mayor in closed session without taking final action openly after providing an adequate public recital).

In this instance, the language of the termination letter evinces that the Council had approved the termination of the Records Clerk's employment. Based on his office's confidential review of the Council's closed session verbatim recordings from May 1, 2017, and May 22, 2017, the termination required the Council's approval in order to be finalized and the Board reached a consensus to terminate the Records Clerk's employment at its May 22, 2017, meeting. Unlike in *Springfield*, where the school board planned to vote on the separation agreement in open session at a later date, here the Council finalized the employment termination without holding a vote in open session. Although the Council appears to argue that it did not take final action until it voted to reject an appeal of the termination in open session, it is clear that the Council's decision to reject the employee's appeal was distinct from its decision to terminate her employment—if the employee had not appealed, her termination would have stood without a public vote. Thus, the Council invalidly terminated the Records Clerk's employment in closed session without holding a vote in open session after an adequate public recital of the nature of the matter being considered and other information to inform the public of the business being conducted as required by section 2(e).

Because the Council subsequently upheld the termination, however, this office will not ask the Council to revote on the matter. Nevertheless, this office cautions the Council to refrain from taking action outside of open meetings.

Section 2(c)(1) of OMA

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017) provides that all meetings of a public body shall be open to the public unless the subject of the meeting falls within one of the exceptions set out in section 2(c) of OMA (5 ILCS 120/2(c) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017). Section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017), the exception on which the Council relied to close the meetings at issue, 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 or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity."

In its response to this office, the Council denied Mr. Nelson's allegation that it discussed topics in closed session that were not specified in its votes to close the meetings. The

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Council's attorney stated: "On three occasions, May 1, 2017; May 22, 2017; and June 12, 2017, the City Council entered executive session for the purpose of discussing the discipline, performance, or dismissal of a specific employee of the public body. Their motion, each time, properly referenced subsection 1 of Section 2(c) of the Open Meetings Act."⁸

In his reply, Mr. Nelson stated that the Records Clerk's termination letter states that her "termination occurred in part for her job performance in her capacity as Treasurer of the [Association,]" as she was alleged to have mishandled Association funds."⁹ Emphasizing that the Association is a separate entity from the City, Mr. Nelson alleged that "[a]ny discussion of job performance under section [2(c)(1)], by the plain meaning of the statute, would require that performance to relate only to work capacity for the public body."¹⁰ He argued that "[t]he plain meaning of [section 2(c)(1)] does not allow a public body to enter executive session and discuss the employee's role in other organizations that the [Council] maintains are separate from the public body."¹¹

Based on this office's confidential review of the verbatim recordings of the four relevant closed sessions, the Council's discussions stayed within the scope of the section 2(c)(1) exception.¹² This exception authorizes the Council to discuss the "employment" and the "dismissal" of individual employees, including reasons for dismissal that do not directly concern the employee's performance of his or her public duties. Because the Council has not voted to release the recordings to the public, this office cannot reveal the specific contents of the Council's discussions other than to confirm that any discussion of the employee's conduct in relation to the Association was discussed with respect to how that conduct impacted her employment with the City. Accordingly, this office concludes that the Council did not violate section 2(a) of OMA.

⁸Letter from Cassandra A. Gottschalk, Foster, Buick, Conklin, Lundgren & Tritt, LLC, to Marie Hollister, Assistant Attorney General, Public Access Bureau (October 12, 2017), at 3.

⁹Letter from Doug Nelson, President, WSPY, to Marie Hollister, Illinois Attorney General (October 25, 2017), at 1.

¹⁰Letter from Doug Nelson, President, WSPY, to Marie Hollister, Illinois Attorney General (October 25, 2017), at 1.

¹¹Letter from Doug Nelson, President, WSPY, to Marie Hollister, Illinois Attorney General (October 25, 2017), at 1.

¹²The June 26, 2017, closed session discussion did not involve the relevant employee here, but was properly held pursuant to section 2(c)(2) of OMA (5 ILCS 120/2(c)(2) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017), which allows for discussion of: "[c]ollective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees."

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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. Please contact me at (312) 793-0865 or the Chicago address listed on the first page of this letter if you have questions. This correspondence serves to close this matter.

Very truly yours,



MARIE HOLLISTER
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
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