



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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November 8, 2024

Via electronic mail



Via electronic mail

Ms. Susan E. Nicholas
Robbins Schwartz
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RE: OMA Requests for Review – 2023 PAC 77626; 2023 PAC 77627

Dear [REDACTED] and Ms. Nicholas:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2022)). For the reasons explained below, the Public Access Bureau concludes that the Board of Education (Board) of Urbana School District No. 116 did not hold unauthorized closed session discussions on January 17, 2023, or March 7, 2023.

BACKGROUND

In a Request for Review submitted on August 7, 2023, [REDACTED] alleged that records he recently received in response to Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2022)) requests indicated that the Board may have held improper closed session discussions on January 17, 2023, and/or March 7, 2023. [REDACTED] stated that on July 6, 2023, he received an email "dated January 11, 2023, relating to a potential school closure and renovation project[.]" but "[t]he 'ballpark cost' communicated in the email would have only provided sufficient details for initial discussions of the project."¹ [REDACTED] explained that he suspected that the Board discussed this topic in closed session on January 17,

¹E-mail from [REDACTED] to Counselor Bartelt (August 7, 2023).

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2023, because of the timing of the e-mail and because the Board did not discuss the topic in open session on that date. He alleged: "When the school closure was proposed later, it was promoted as creating budgetary savings in the specific District account that funds the majority of payroll expenses. Prior to this FOIA response, it was not known that project discussions had preceded the January 14, 2023, Board meeting."² Additionally, ██████████ alleged that:

In a FOIA response received July 24, 2023, with a request for "financial estimates, projections, and/or analysis" including sources of revenue and savings" related to recent union and non-union salary increases, the District withheld responsive records that were from the closed session of the March 7, 2023, Board meeting.^[3]

██████████ alleged that during either or both of these meetings, the Board improperly discussed in closed session "budget cuts, non-union staffing levels, District facility closures, and other topics not proper or eligible for"⁴ closed session discussion. He further claimed:

To the extent that budgetary discussions might have been related to the proper subjects for collective negotiation, they took place within the context of an expiring federal grant (ESSER III) that was leaving an ever larger revenue shortfall. Any necessary budget cuts would have required selecting staff, services, programs, and facilities from many different options and combinations of options. These choices should have been discussed and decided in an open meeting.^[5]

On August 11, 2023, this office forwarded a copy of the Request for Review to the Board and asked it to provide, for this office's confidential review, copies of any closed session minutes and closed session verbatim recordings from the January 17, 2023, and March 7, 2023, meetings. This office also asked for a detailed written response to the allegation that the Board exceeded the scope of the exceptions it publicly cited when voting to enter closed session on those dates. On August 22, 2023, outside counsel for the Board provided this office with those materials, including a complete version of the Board's written response for this office's

²E-mail from ██████████ to Counselor Bartelt (August 7, 2023).

³E-mail from ██████████ to Counselor Bartelt (August 7, 2023).

⁴E-mail from ██████████ to Counselor Bartelt (August 7, 2023).

⁵E-mail from ██████████ to Counselor Bartelt (August 7, 2023).

confidential review, and a redacted version for this office to forward to [REDACTED]⁶ The Board argued that [REDACTED] Request for Review was untimely and that its closed session discussions stayed within the scope of the sections 2(c)(1) and 2(c)(2) exceptions.⁷ On September 5, 2023, [REDACTED] submitted a reply.

DETERMINATION

Authority for Review

As an initial matter, the Board argued that [REDACTED] Requests for Review are untimely:

While [REDACTED] indicates that responses to recent Freedom of Information Act requests provided new knowledge which formed the basis of the Requests for Review, that is not well founded for the Requests for Review set forth in 2023 PAC 77626 and 2023 PAC 77627. It is entirely speculative, not based in fact, and the Requests for Review are untimely pursuant to Section 3.5(a) of the Open Meetings Act. There is nothing supporting the conclusion that there was a violation in the documents provided other than pure speculation, and it is untimely submitted.^[8]

In his reply, [REDACTED] stated:

In regard to closed meetings, members of the public are ordinarily limited by the OMA itself to only discovering events or records that create suspicions of violations. The ability to prove or disprove any suspicion is limited by the protections of closed meeting recordings and minutes that are allowed under the OMA. The public relies on the PAC to review whether the exceptions cited to invoke closed meeting protections were appropriately and

⁶See 5 ILCS 120/3.5(c) (West 2022) ("The Public Access Counselor shall forward a copy of the answer or redacted answer, if furnished, to the person submitting the request for review. The requester may, but is not required to, respond in writing to the answer within 7 working days and shall provide a copy of the response to the public body.").

⁷5 ILCS 120/2(c)(1), (c)(2) (West 2023 Supp.).

⁸Letter from Susan E. Nicholas to Illinois Attorney General, Public Access Bureau, ATTN: Joshua Jones (August 22, 2023), at 1-2.

narrowly observed, and public bodies rely on the PAC to maintain the protections of properly closed meetings.^[9]

Section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2022)) authorizes the Public Access Counselor to review the allegations in Mr. Schroeder's Request for Review. Section 3.5(a) of OMA provides, in relevant 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 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.

Although the Board argued that ██████████ Request for Review is untimely because the new information he stated he learned in the weeks before filing his Request for Review is entirely speculative as to whether the Board held an improper closed session discussion on either date, allegations by members of the public concerning closed session discussions inherently involve a degree of speculation. The particular facts of closed session discussions are generally unknowable by even the most diligent members of the public because closed session discussions are conducted in confidence. Accordingly, a member of the public questioning the propriety of a closed session discussion generally must draw reasonable inferences based on publicly-available factual information, which is what ██████████ appears to have done here. ██████████ allegation concerning the January 17, 2023, meeting is somewhat more tenuous than his allegation concerning the March 7, 2023, meeting because his claim concerning the prior meeting is based on the timing of an e-mail where there appeared to have been no open session discussion on the subject matter, whereas his allegation concerning the latter meeting is based on receiving direct insight into the contents of the closed session discussion. Nonetheless, given the newly discovered facts pertaining to each closed session discussion that ██████████ obtained pursuant to FOIA within the 60 days prior to his submission to this office, this office has the authority to review the two Board meetings at issue in his allegations.

⁹E-mail from ██████████ to Deputy Bureau Chief Jones, Counselor Bartelt, and [Susan] Nicholas (September 5, 2023).

Closed Session Discussion

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 2022). Accordingly, section 2(a) of OMA¹⁰ provides that all meetings of a public body must be open to the public unless the discussion falls within the scope of one of the exceptions set out in section 2(c) of OMA.¹¹ The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope."¹² See also *Henry v. Anderson*, 356 Ill. App. 3d 952, 996-97 (2005) (strictly construing OMA section 2(c)(1)).

Section 2(c)(1) of OMA permits a public body to enter closed session to discuss "[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." The section 2(c)(1) exception is designed to protect the reputation and identity of specific individuals. See, for example, Ill. Att'y Gen. Pub. Acc. Op. No. 15-007, issued September 16, 2015, at 4 (finding that discussions concerning the elimination of a job position held by a single employee for budgetary reasons would not implicate an employee's reputation, and therefore did not fall within the exception in section 2(c)(1)); Ill. Att'y Gen. Pub. Acc. Op. No. 16-013, issued December 23, 2016, at 4 (section 2(c)(1) did not authorize discussion of across-the-board salary increase for a broad category of employees).

Additionally, section 2(c)(2) of OMA allows discussion in closed session 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." By creating the section 2(c)(2) exception, the General Assembly recognized "that the very nature of meaningful collective bargaining requires that certain phases of the negotiating process must be conducted privately." Ill. Att'y Gen. Op. No. 80-024, issued August 12, 1980, at 10-11. The Public Access Bureau has previously determined that the exception for collective negotiating matters authorizes public bodies to enter closed session to discuss "subjects about which the parties are going to bargain." Ill. Att'y Gen. PAC Req. Rev. Ltr. 52158, issued June 14, 2018, at 3. However, the Attorney General has determined that section 2(c)(2) "does not encompass a discussion of unilateral budgetary actions that would affect members of collective bargaining units outside of active or imminent collective bargaining." Ill. Att'y Gen. Pub. Acc. Op. No. 15-007, issued September 16, 2015, at 7 (concluding that closed session discussion of a

¹⁰ 5 ILCS 120/2(a) (West 2023 Supp.).

¹¹ 5 ILCS 120/2(c) (West 2023 Supp.).

¹² 5 ILCS 120/2(b) (West 2023 Supp.).

hiring freeze was not authorized under section 2(c)(2) of OMA even though the hiring freeze would impact employees covered under collective bargaining agreement).

In the Board's non-confidential response to this office, counsel for the Board argued that during closed session on January 17, 2023, the Board first held a discussion that fell squarely within the scope of section 2(c)(2), and then a discussion that fell squarely within the scope of section 2(c)(1). The Board asserted that "[d]espite the very speculative connection to an email in January 2023, and the closed session, the subject of Wiley School was not discussed, nor is there any basis for the conjecture that it was."¹³ Similarly, the Board argued that during closed session on March 7, 2023, it first held a discussion authorized by section 2(c)(1), then a discussion authorized by section 2(c)(2). As to the section 2(c)(2) discussion, the Board asserted: "Arguably this discussion would also fall under Section 18 of the Illinois Educational Labor Relations Act, exempting it from the Open Meetings Act entirely, as it was entirely related to strategy in negotiations."¹⁴ Section 18 of the Illinois Educational Labor Relations Act (115 ILCS 5/18 (West 2022)) provides: "The provisions of the Open Meetings Act shall not apply to collective bargaining negotiations, including negotiating team strategy sessions, and grievance arbitrations conducted pursuant to this Act." The Board submitted much of its analysis under a claim of confidentiality, precluding this office from expressly discussing that analysis in this determination letter.

In his reply, [REDACTED] stated:

The redactions in the Board's response prevent me from responding to most of the Board's arguments. I am fully relying on the PAC to determine whether the cited exceptions were observed in an appropriately narrow manner. I am especially concerned about the discussion and/or planning of budgetary cuts, facility closures, and reductions in personnel who are outside of the relevant collective negotiating unit(s) as issues that weren't proper subjects for collective negotiation. With that stated, I'm also concerned about other potential improper topics.^[15]

This office's review of the closed session verbatim recordings from the two meetings at issue confirmed that the Board focused its discussions on matters within the scope of

¹³Letter from Susan E. Nicholas to Illinois Attorney General, Public Access Bureau, ATTN: Joshua Jones (August 22, 2023), at 2-3.

¹⁴Letter from Susan E. Nicholas to Illinois Attorney General, Public Access Bureau, ATTN: Joshua Jones (August 22, 2023), at 3.

¹⁵E-mail from [REDACTED] to Deputy Bureau Chief Jones, Counselor Bartelt, and [Susan] Nicholas (September 5, 2023).

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the section 2(c)(1) and section 2(c)(2) exceptions. Under section 2(c)(1), the Board discussed the job performance, employment, and dismissal of specific, named employees. To the extent the Board's discussions under section 2(c)(1) touched on other matters, they did so briefly in the intertwined context of evaluating one or more employee's and/or candidate's job performance and/or relative merits. Similarly, under section 2(c)(2), the Board discussed the subjects of collective bargaining and bargaining positions during active negotiations with the teachers' union. To the extent the Board discussed any of the issues [REDACTED] specified in his reply—"budgetary cuts, facility closures, and reductions in personnel who are outside of the relevant collective negotiating unit(s)"—it did so as a direct component of an appropriate discussion under section 2(c)(2). The Board did not discuss unilateral budgetary actions or other matters that would merely impact employees who are union members. Rather, the discussions adhered to the topic of collective negotiation matters in their own right. Under these circumstances, this office concludes that the Board's closed session discussions on January 17, 2023, and March 7, 2023, did not violate OMA.

The Public Access Counselor has determined that resolution of these matters does not require the issuance of a binding opinion. This letter shall serve to close these matters. If you have any questions, please contact me joshua.jones@ilag.gov.

Very truly yours,

[REDACTED]
JOSHUA M. JONES
Deputy Bureau Chief
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