



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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January 12, 2024

Via electronic mail

Ms. Tanya Koonce
tkoonce@week.com

Via electronic mail

Mr. Christopher J. Jump
Davis & Campbell L.L.C.
401 Main Street, Suite 1600
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RE: OMA Request for Review – 2022 PAC 71217

Dear Ms. Koonce and Mr. Jump:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2022)).

BACKGROUND

On April 12, 2022, this office received Ms. Tanya Koonce's Request for Review alleging that the Board improperly entered into closed session during its April 11, 2022, meeting pursuant to section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2020)). Specifically, Ms. Koonce alleged that the Board improperly discussed the performance of a volunteer firefighter where the agenda referred to "specific employees" and how the Village could respond to a Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2020)) request for related records.

On April 19, 2022, this office sent a copy of the Request for Review to the Board and asked it to provide a written response to the allegation in Ms. Koonce's Request for Review, along with copies of the April 11, 2022, meeting agenda, open and closed session meeting

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minutes, and closed session verbatim recording for this office's confidential review. On April 28, 2022, the counsel for the Board provided a written response, but furnished only a redacted copy of the closed session minutes and refused to provide the verbatim recording; counsel asserted that disclosing the unredacted minutes and verbatim recording for this office's confidential review would waive the attorney-client privilege. On May 3, 2022, this office forwarded a copy of the Board's response to Ms. Koonce; she did not reply.

DETERMINATION

Duty to Provide Records to the Public Access Counselor

As an initial matter, this office will address the Board's assertion that the attorney-client privilege exempts the Board from providing this office with the verbatim recording and unredacted closed session minutes of its April 11, 2022, meeting. In its response to this office, the Board cited Illinois Supreme Court Rule 201(b)(2) (Ill. S. Ct. R. 201(b)(2) (effective March 17, 2023)), which provides, in pertinent part:

All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure **through any discovery procedure**. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney. (Emphasis added.)

However, the Request for Review process does not involve the discovery process. To the extent that the Board contends that the verbatim recording and closed session minutes are otherwise protected by the attorney-client privilege, Illinois Supreme Court Rule of Professional Conduct 1.6 (Ill. S. Ct. R. Prof'l Conduct 1.6 (effective January 1, 2016)) provides, in pertinent part:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * *

(6) to comply with other law or a court order[.]

Section 3.5(b) of OMA (5 ILCS 120/3.5(b) (West 2022)) governs the process for provision of records pursuant to a Request for Review, stating, in pertinent part:

The Public Access Counselor shall specify the records or other documents that the public body shall furnish to facilitate the review. Within 7 working days after receipt of the request for review, **the public body shall provide copies of the records requested and shall otherwise fully cooperate with the Public Access Counselor.** If a public body fails to furnish specified records pursuant to this Section, or if otherwise necessary, the Attorney General may issue a subpoena to any person or public body having knowledge of or records pertaining to an alleged violation of this Act. For purposes of conducting a thorough review, **the Public Access Counselor has the same right to examine a verbatim recording of a meeting closed to the public or the minutes of a closed meeting as does a court in a civil action brought to enforce this Act.** (Emphasis added.)

Correspondingly, section 2.06(e) (5 ILCS 120/2.06(e) (West 2022)) provides, in pertinent part:

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. In the case of a civil action brought to enforce this Act, the court, if the judge believes such an examination is necessary, must conduct such in camera examination of the verbatim record as it finds appropriate in order to determine whether there has been a violation of this Act.

Thus, the plain language of OMA authorizes the Public Access Counselor to review a verbatim recording of a meeting closed to the public in order to conduct a thorough review, and the public body has a duty to provide those records. Pursuant to the exception in Illinois Supreme Court Rule 1.6 for revealing information to comply with a law, complying with this office's request to confidentially review the closed session verbatim recording law would not violate the attorney-client privilege. Nor would it risk further dissemination of the recording:

Records that are obtained by the Public Access Counselor from a public body for purposes of addressing a request for review under this Section 3.5 may not be disclosed to the public, including the requester, by the Public Access Counselor. Those records, while in the possession of the Public Access Counselor, shall be exempt from disclosure by the Public Access Counselor under the Freedom of Information Act. 5 ILCS 120/3.5(g) (West 2022).

On May 20, 2022, the Board suggested that this office should issue a subpoena for the records. While section 3.5(b) of OMA does provide this office with the authority to issue a subpoena, it also unambiguously provides this office with the authority to review verbatim recordings and minutes of closed meetings and requires public bodies to "provide copies of the records requested and * * * otherwise fully cooperate with the Public Access Counselor." The Board violated OMA by failing to provide this office with a verbatim recording and minutes of its closed meeting on April 11, 2022.

Closed Meeting Procedure

Section 2a of OMA (5 ILCS 120/2a (West 2020)), provides, in pertinent part:

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

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, specific individuals who serve as independent contractors in a park, recreational, or educational setting, or specific volunteers of the public body or legal counsel for the public body[.]"

The agenda for the Board's April 11, 2022, meeting listed "Motion to approve a closed session pursuant to 5 ILCS 120 2(c)1, the appointment, employment, compensation, discipline, performance, or dismissal of specific employees."¹ The minutes reflect that Board members "motioned to approve a closed session pursuant to 5ILCS 120 2(c)1."²

¹Village of Bartonville Board of Trustees, Meeting, Agenda Item Trustee Reports, Trustee Donley 1 (April 11, 2022).

²Village of Bartonville Board of Trustees, Meeting, April 11, 2022, Minutes 5.

In its response to this office, the Board confirmed that, while the agenda included an abbreviated version of the section 2(c)(1) exception that referred only to "employees," the closed session concerned volunteer firefighters. The Attorney General has issued a binding opinion concluding that a public body may satisfy section 2a by stating the statutory subsection of the relevant exception, or by reciting or paraphrasing the statutory language of the exception. Ill. Att'y Gen. Pub. Acc. Op. No. 15-007, issued September 16, 2015, at 4-5 (public body entering closed session pursuant to section 2(c)(1) must in open session either announce that it intends to close the meeting pursuant to "section 2(c)(1)" or recite language from section 2(c)(1) that sufficiently identifies that exception). Although the public would have been better informed if the Board had included in its recital the entirety of the section 2(c)(1) exception, or read only the language for "specific volunteers of the public body," the Board adequately identified the exception by stating its statutory subsection. Therefore, the Board did not violate section 2a of OMA during its April 11, 2022, meeting.

Scope of the Section 2(c)(1) Exception

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 OMA³ 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.⁴ The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope."⁵ See *also Henry v. Anderson*, 356 Ill. App. 3d 952, 996-97 (4th Dist. 2005) (strictly construing OMA section 2(c)(1)⁶).

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, 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). In strictly construing the scope of section 2(c)(1), this office has determined that even when a public body's extraneous discussion beyond the scope of section 2(c)(1) is not extensive, it may nonetheless violate OMA where that discussion is "reasonably

³5 ILCS 120/2(a) (West 2021 Supp.).

⁴5 ILCS 120/2(c) (West 2021 Supp.).

⁵5 ILCS 120/2(b) (West 2021 Supp.).

⁶5 ILCS 120/2(c)(1) (West 2021 Supp.).

segregable from the parts concerning specific employees' job performance." Ill. Att'y Gen. PAC Req. Rev. Ltr. 70604, issued November 29, 2022.

The Board's response to this office argued that the entirety of its closed session discussion fell within the scope of section 2(c)(1). The Board further argued that, though it discussed the potential release of records under FOIA, this discussion "pertained directly to the discipline of the specified volunteer firefighter. Counsel for the Village is allowed to review the FOIA request and make recommendations as to what can be redacted under Section 7 – those communications would be privileged and confidential."⁷

However, OMA does not contain a general exception for privileged communication from an attorney, nor does it contain an exception that incorporates other areas of privilege under law.⁸ Instead, section 2(c)(1) provides that a public body may hold a closed meeting to discuss:

Litigation, 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**, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.

The Board did not argue that its discussion concerned pending or probable litigation, nor did this office's review of the record provide any indication that litigation on any item discussed was pending or probable. Furthermore, as discussed above, a public body is required to provide a citation to the specific exception which authorizes a closed meeting; the Board only cited section 2(c)(1).

This office's review of the portions of the closed session minutes finds that, while much of the closed meeting concerned the performance and discipline of specific volunteers or employees, other portions concern more generalized employment and policy matters, including discussion of how firefighters are compensated and general procedural questions regarding discipline. This portion of the Board's discussion clearly exceeded the scope of the section 2(c)(1) exception by straying from a discussion of specific employees to broader matters involving the terms of agreement for all firefighters. Likewise, Board's discussion of a FOIA

⁷Letter from Christopher J. Jump, Davis & Campbell LLC, to Benjamin J. Silver, Assistant Attorney General, Public Access Bureau (April 28, 2022), at 2.

⁸*Compare* 5 ILCS 140/7(1)(a) (West 2020) (exempting from disclosure under FOIA "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law."

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request and potential response exceeded the exception when the Board discussed provisions of FOIA rather than describing specific records that relate to individual employees. These portions of the Board's discussion were "reasonably segregable from the parts concerning specific employees' job performance." Additionally, because the Board has failed to comply with its duty to provide a verbatim recording and unredacted minutes under section 3.5(b) of OMA, this office is unable to conclude that the unreviewed portions of the Board's closed meeting fell within the scope of section 2(c)(1).

In accordance with this determination, the Public Access Bureau requests that the Board release the portions of the verbatim recording and closed meeting minutes of its April 11, 2022, closed meeting that did not directly pertain to the discipline or performance of specific volunteers, as well as all portions redacted from the closed meeting minutes provided to this office.

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 benjamin.silver@ilag.gov or (773) 590-7878.

Very truly yours,



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