



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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November 9, 2021

Via electronic mail

Mr. Benjamin T. Cox
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Via electronic mail

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RE: OMA Request for Review – 2021-PAC-S-0521

Dear Mr. Cox and Mr. Cross:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)). For the reasons explained below, the Public Access Bureau concludes that the Board of Trustees (Board) of the Village of South Jacksonville (Village) violated section 2.06(g) of OMA (5 ILCS 120/2.06(g) (West 2020)) by denying members of the public the opportunity to address the Board during the open portion of its August 5, 2021, meeting.

On August 11, 2021, Mr. Benjamin T. Cox submitted a Request for Review alleging that the Board violated section 2.06(g) of OMA during its August 5, 2021, meeting because it required members of the public to address the Board in closed session if they wished to comment on the dismissal of the Village's police chief. On August 23, 2021, this office forwarded a copy of the Request for Review to the Board and asked it to provide a detailed written response to Mr. Cox's allegation and to provide this office with copies of the agenda,

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minutes, verbatim recordings, and rules regarding public comment. On September 3, 2021, Mr. Roland R. Cross, an attorney for the Village, furnished a written response on behalf of the Board along with various records. Mr. Cox replied on September 27, 2021.

DETERMINATION

"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). Section 2.06(g) of OMA provides that "[a]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body."

This office has reviewed the materials provided by Mr. Cox and the Board. The Board acknowledged that prior to the August 5, 2021, meeting, four people signed up to provide public comment during the open meeting. As the first speaker began to provide comments about the Village's police chief, the Mayor and Village's attorney interrupted his comments. The Village attorney stated "I think if we are going to have comments about any individual, I think the board should hear them in executive session so we're not hearing comments about any individual employees in public. That is why there is that exception. * * * That's up to you. But that's what I recommend"¹ After its attorney provided that advice, the Board voted "to adjourn to executive session to discuss personnel, which is the exception c, and to hear comments."²

The Board contended in its response that section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2020)) allowed it to require the speakers to address it in closed session when the speakers were going to discuss individual employees. Section 2(a) of OMA (5 ILCS 120/2(a) (West 2020)) provides that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." The section 2(c) exceptions "are in derogation of the requirement that public bodies meet in the open, and therefore, the exceptions are to be strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2020). The section 2(c)(1) exception 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

¹Village of South Jacksonville, Meeting, August 5, 2021, Audio Recording, 4:15-4:46.

²Village of South Jacksonville, Meeting, August 5, 2021, Audio Recording, 4:47-5:31. The Board explained in its response that at the time it voted to go into closed session it understood that each of the persons wishing to address it wanted to speak about the police chief, but that it later learned that the last speaker wish to talk about other matters.

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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."

This office's review of the material Mr. Cox and the Board provided, including the relevant portions of the open and closed session verbatim recording, confirmed that members of the public who addressed the Board had intended their remarks for public consumption. In its response to this office, the Board explained that it planned the closed session so that the Mayor could explain to the Board his reasoning for terminating the chief of police.

Citing *Roxana Community Unit School Dist. No. 1 v. Environmental Protection Agency*, 2013 IL App (4th) 120825, 998 N.E.2d 961 (2013), the Board argued that it did not violate section 2.06(g) of OMA because it allowed members of the public to address the Board, albeit in closed session. In *Roxana Community Unit School Dist. No. 1*, a board did not allow the public to offer public comment at two open meetings, asserting that its rules only allowed written comments. *Roxana Community Unit School Dist. No. 1*, 2013 IL App (4th) 120825, ¶17, 998 N.E.2d at 965. The Appellate Court held that the board's actions, of denying public comment at two open meetings, not only violated section 2.06(g) of OMA but also OMA's overarching purpose of openness. *Roxana Community Unit School Dist. No. 1*, 2013 IL App (4th) 120825, ¶¶49, 57-58, 998 N.E.2d at 969-971. The court did not conclude that a public body may satisfy section 2.06(g) by permitting members of the public with an opportunity to provide public comment in closed session.

Although the Board could properly discuss the performance and dismissal of the police chief in closed session pursuant to section 2(c)(1), the plain language of that section does not authorize a public body to prohibit the public from addressing it on matters pertaining to individual employees, such as the firing of the police chief, in an open meeting. While section 2(c) allows a public body to hear testimony in closed session on a complaint lodged against an employee, it is not required to do so. Section 2(b) of OMA expressly provides that the exceptions to the general requirement that public bodies conduct public business openly "authorize but do not require the holding of a closed meeting to discuss a subject included within an enumerated exception." *See also* 5 ILCS 120/2a (West 2020) ("Nothing in this Section or this Act shall be construed to require that any meeting be closed to the public."). Citing that provision, the Attorney General has recently concluded that it is a violation of OMA to require members of the public to provide public comment on the retention of employees during a closed meeting, rather than in an open meeting. Ill. Att'y Gen. Pub. Acc. Op. No. 21-009, issued September 21, 2021, at 6-8.

Additionally, the Attorney General has issued a variety of binding opinions affirming that a public body must provide an opportunity for public comment at each open

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meeting, subject to any reasonable rules it has established and recorded. Ill. Att'y Gen. Pub. Acc. Op. No. 14-009, issued September 4, 2014, at 2; Ill. Att'y Gen. Pub. Acc. Op. No. 14-012, issued September 30, 2014, at 2; Ill. Att'y Gen. Pub. Acc. Op. No. 19-002, issued January 9, 2019, at 3; Ill. Att'y Gen. Pub. Acc. Op. No. 19-009, issued October 1, 2019, at 3. The Board's established and recorded public comment rules make no mention of requiring members of the public who wish to provide public comment on employees to address the Board in closed session. Instead, the Board's rules provide that "[d]uring **the open session portion of all meetings** of the Board of Trustees * * *, each citizen addressing the Board or committee shall be limited to five (5) minutes, unless authorized to speak longer by a majority vote of the trustees or committee persons then voting." Village of South Jacksonville, Ordinance No. 948, §1, adopted June 3, 2011. Accordingly, the Board's established and recorded rules required it to provide an opportunity for members of the public to address it during "the open session portion" of its August 5, 2021, meeting.³

Further, although some members of the public spoke after the Board returned from its closed session, the dialogue between the Board and public was a free form discussion centered on one of the trustee's comments pertaining to saying the pledge of allegiance at meetings, the Mayor's military service, and one commentator regarding the Chief of Police. The Board does not contend, nor does the recording reveal, that each of the individuals the Board required to provide comments in closed session had an opportunity to speak in the open session. Accordingly, this office concludes that the Board violated OMA by prohibiting those four speakers from addressing the Board during the open meeting.

The Village has continually expressed its desire to settle this matter by providing Mr. Cox copies of the audio recording of the public comments received in closed session after the Board votes to make those matters public. Mr. Cox, however, indicated that providing the recordings would not resolve this matter because the comments should have been public initially and a determination from this office might act as a deterrent to future similar conduct. As a result, this matter could not be satisfactorily resolved via mediation. Accordingly, based on the conclusions expressed above, this office has determined that the Board violated OMA by denying members of the public the right to address it during the open session of its August 5,

³Even if the Board adopted a rule requiring members of the public who wish to provide public comment on employees to address the Board in closed session, enforcement of such a rule would violate OMA because it would unreasonably restrict a speaker's right to address the Board in an open meeting. Ill. Att'y Gen. Pub. Acc. Op. No. 21-009, issued September 21, 2021, at 6 ("Although a public body may properly adopt reasonable public comment rules aimed at fostering order and decorum and may stop disruptive conduct during a meeting, a rule or practice of forbidding public comment on the retention of public employees would unduly restrict the right of speakers to address the Board."). *See also Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, 135 S. Ct. 2218, 2226 (2015) (content-based laws, which are those that target speech based on its communicative content, are generally prohibited).

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2021, meeting. This office requests that the Board refrain from requiring the public to address it in closed session, rather than during an open meeting. No further remedial action is required, however, because the Board's attorney informed this office that the Board voted at its October 7, 2021, meeting to make public the audio recording of the comments received during its August 5, 2021, closed session, and planned to post a copy of that recording on its website.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have any questions, please contact me at (312) 814-5201 or the Chicago address on the first page of this letter.

Very truly yours,



EDIE STEINBERG
Senior Assistant Attorney General
Public Access Bureau

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