

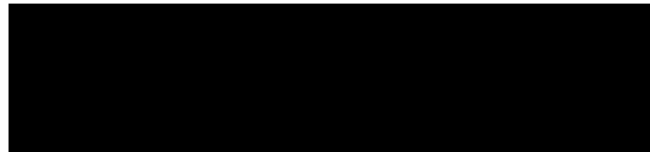


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 28, 2018

Via electronic mail



The Honorable Jim Kennedy
Chairperson
Public Works & Buildings Committee
City of Elmhurst
209 North York Street
Elmhurst, Illinois 60126

RE: OMA Request for Review – 2018 PAC 52812

Dear [REDACTED] and Mr. Kennedy:

This determination 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, this office concludes that the City of Elmhurst (City) Public Works & Buildings Committee (Committee) did not conduct a semi-annual review of all of its closed meeting minutes in accordance with section 2.06(d) of OMA (5 ILCS 120/2.06(d) (West 2016)).

In his April 23, 2018, Request for Review, [REDACTED] alleged that the Committee had not been conducting at least semi-annual reviews of the closed session minutes from its meetings. [REDACTED] asserted that he had submitted a Freedom of Information Act request to the City seeking copies of the minutes from the most recent meeting where the Committee reviewed its closed session minutes, and that the City responded that it maintained no responsive documents. Accordingly, [REDACTED] alleged that the Committee had violated section 2.06(d) of OMA, which provides:

Each public body shall periodically, but no less than semi-annually, meet to review minutes of all closed meetings. At such meetings a determination shall be made, and reported in an open session that (1) the need for confidentiality still exists as to all or part of those minutes or (2) that the minutes or portions thereof no longer require confidential treatment and are available for public inspection. The failure of a public body to strictly comply with the semi-annual review of closed session written minutes * * * shall not cause the written minutes or related verbatim record to become public or available for inspection in any judicial proceeding, other than a proceeding involving an alleged violation of this Act, if the public body, within 60 days of discovering its failure to strictly comply with the technical requirements of this subsection, reviews the closed session minutes and determines and thereafter reports in open session that either (1) the need for confidentiality still exists as to all or part of the minutes or verbatim record, or (2) that the minutes or recordings or portions thereof no longer require confidential treatment and are available for public inspection.

██████████ alleged that the Committee had discovered its failure to comply with the semi-annual review requirement on March 30, 2018, because of the opening of his related Request for Review, 2018 PAC 52254. On April 26, 2018, ██████████ sent this office an e-mail instead alleging that the Committee had discovered its failure to comply on or before March 14, 2018, and therefore that the Committee had until May 13, 2018, to review its closed session minutes within the 60 day time period set out in section 2.06(d) of OMA. On April 30, 2018, this office forwarded a copy of the Request for Review to the Committee and asked it to address whether it had met the requirements of section 2.06(d) within the previous six months. This office also requested a copy of the minutes of any meeting within the previous twelve months during which the Committee determined and reported on the need to keep closed session minutes confidential. On May 7, 2018, counsel for the Committee responded, acknowledging that it had not conducted such a review within the past six months, but asserting that it would do so at its May 14, 2018, meeting, and comply with its obligations under section 2.06(d) of OMA going forward.

On May 8, 2018, this office forwarded a copy of the Committee's response to ██████████. He replied on May 12, 2018, arguing that the Committee's May 14, 2018, agenda item to review closed session minutes did not include several other meetings where the closed session minutes were being kept confidential,¹ and that May 13, 2018, was the proper deadline for

¹ ██████████ listed 7/14/14, 10/14/15, 10/26/15, and 1/22/18 as dates of other Committee meetings with closed session minutes that still needed to be reviewed.

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review. On May 12, 2018, the Committee provided a copy of its upcoming May 14, 2018, meeting agenda to this office. On May 24, 2018, the Committee provided a supplemental response arguing that the 60 day time period in section 2.06(d) ran until May 14, 2018, and that it had voted to keep its closed session minutes confidential on that date. On May 24, 2018, this office forwarded a copy of the Committee's supplemental response to [REDACTED]. On June 21, 2018, he replied, again moving up the alleged date of the Committee's discovery of its non-compliance with the semi-annual review requirement to March 1, 2018.

On June 21, 2018, an Assistant Attorney General in the Public Access Bureau e-mailed counsel for the Committee seeking clarification as to whether it had in fact reviewed all of its closed session minutes on May 14, 2018. On June 28, 2018, counsel for the Committee clarified that it had not reviewed all of its closed session minutes:

[O]nly closed meeting minutes from 2017 (as enumerated in the agenda item for the May 14, 2018, meeting) were considered. We are now aware of the 2014 closed meeting minutes which were not considered; I have communicated to the Committee chairperson that the 2014 closed meeting minutes need to be considered along with all other closed meeting minutes for determining whether to maintain them as confidential at their next scheduled meeting on July 9, 2018.^[2]

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).

Although the parties in this matter initially disputed exactly when the Committee discovered that it had failed to conduct a semi-annual review of its meeting minutes to determine whether the need for confidentiality still exists, counsel for the Committee has now acknowledged that it did not review all of its closed session minutes within 60 days of that discovery. Therefore, the Public Access Bureau concludes that the Committee violated section 2.06(d) of OMA.

OMA does not, however, require the Committee to remedy this violation by disclosing all of its unreviewed closed session minutes. Section 2.06(d) does not contain

²E-mail from Donald J. Storino, Storino, Ramello & Durkin, to Marie Hollister (June 28, 2018).

language *requiring* the release of such closed session minutes, but instead provides that the failure to conduct a semi-annual review "shall not cause the written minutes * * * to become public or available for inspection in any judicial proceeding, other than a proceeding involving an alleged violation of this Act," if the public body conducts an appropriate review within 60 days after discovery of its non-compliance. Further, section 2.06(d) must be read in conjunction with section 2.06(f) of OMA (5 ILCS 120/2.06(f) (West 2016)), which provides that "[m]inutes of meetings closed to the public shall be available *only after* the public body determines that it is no longer necessary to protect the public interest or the privacy of an individual by keeping them confidential[.]" (Emphasis added.) See, e.g., *Cummins v. Country Mutual Insurance Co.*, 178 Ill. 2d 474, 482 (1997) ("In ascertaining the meaning of a statute, the statute should be read as a whole and all of the relevant parts must be considered.").

The General Assembly added the above statutory language to Section 2.06(f) by amendment³ after it amended section 2.06(d) to require public bodies to conduct semi-annual reviews of closed session minutes.⁴ The amended language of section 2.06(f) does not include any exception to the express requirement that a public body's vote is necessary to make closed session minutes available to the public.⁵ Therefore, to the extent that sections 2.06(d) and 2.06(f) conflict, the more recently-amended section 2.06(f) controls. See, e.g., *Moore v. Green*, 219 Ill. 2d 470, 480 (2006) (where two statutory provisions conflict, courts "will presume that the legislature intended the more recent statutory provision to control."). The provisions may be read harmoniously if judicial discretion to direct disclosure under section 2.06(d) is an implied exception to the general rule in 2.06(f).

If the 60 day deadline in section 2.06(d) would control, the Committee has not reviewed all remaining closed session minute within that time frame, regardless of either party's argument as to the date of discovery. The 2014 minutes, as mentioned by the requester, were not reviewed during the Committee's May 14, 2018, meeting, but the Committee stated they will be at the July 9, 2018, meeting. Accordingly, for the purposes of section 2.06(d) of OMA, the

³See Public Act 99-515, effective June 30, 2016.

⁴Public Act 94-452, effective August 10, 2005.

⁵Similarly, although section 2.06(d) discusses "related verbatim record" alongside "written minutes," Public Act 99-515 amended section 2.06(e) of OMA (5 ILCS 120/2.06(e) (West 2016)) without disturbing the portion that 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.


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Committee did not meet its obligations under OMA. However, in light of the Committee's recent review of certain closed session minutes, and its plans to review the remaining closed session minutes at its July 9, 2018, meeting, no further remedial action is required. This office notes that the Committee must continue to review its closed session minutes no less than semi-annually as required by section 2.06(d) of OMA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter will serve to close this matter. If you have any questions, please contact me at (312) 793-0865.

Very truly yours,



MARIE HOLLISTER
Assistant Attorney General
Public Access Bureau

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