OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 22, 2018

Via electronic mail
[redacted]

Via electronic mail
The Honorable Wheeler G. Coleman
Chair, Board of Trustees
Northern Illinois University
EC-United
321 North Clark Street, Suite 5031
Chicago, Illinois 60654
wcoleman@niu.edu

RE: OMA Request for Review – 2018 PAC 54002

Dear [redacted] and Mr. Coleman:

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 Northern Illinois University (University) Board of Trustees (Board) did not engage in improper communications with a potential candidate for president that constituted a meeting subject to the requirements of OMA, or improperly take final action outside of an open meeting.

On July 12, 2018, [redacted] submitted a Request for Review to the Public Access Bureau alleging that the Board potentially violated OMA by approaching Dr. Lisa Freeman, Acting President of the University, with its support and asking her to reconsider her candidacy for University president. [redacted] questioned whether the Board held a meeting with Ms. Freeman without adhering to the requirements of OMA and/or took action in connection with its support for her candidacy outside of a properly-noticed open meeting. She

provided a copy of an "NIU Official Announcement" which stated that "[a]s a board, we approached [Dr. Freeman] with our support and asked her to consider a candidacy."[1]

On July 20, 2018, this office forwarded a copy of [redacted] Request for Review to the Board and asked it to respond to her allegations. On August 8, 2018, counsel for the Board provided a written response asserting that the Board "did not hold a meeting with Dr. Lisa Freeman that required adherence with the Illinois Open Meetings Act and it has not taken any final action outside of a properly-noticed open meeting with regards to her candidacy."[2] On August 10, 2018, this office forwarded a copy of the Board's response to [redacted] On August 16, 2018, she submitted a reply which argued that the Board's response was misleading, and that the University's "Official Announcement" demonstrated that there was a decision made that did not comply with the requirements of OMA. On August 20, 2018, the Board provided this office a copy of verbatim recording of the closed session portion of its June 14, 2018, meeting in which it discussed Dr. Freeman's potential appointment.

DETERMINATION

Alleged Violation of Meeting Requirements

This office construes [redacted] Request for Review as alleging, in part, a violation of section 2 of OMA (5 ILCS 120/2 (West 2016)), which provides that "all meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." She attached to her Request for Review a copy of an NIU Official Announcement which explained: (1) the Board created a Presidential Search Planning Committee (Planning Committee) which issued findings and recommendations, including a profile of desirable qualifications for NIU's next president; (2) the Board was in the process of conducting Dr. Freeman's annual performance review while it reviewed the profile developed by the Planning Committee; (3) based on her qualifications, the Board approached Dr. Freeman and asked her to reconsider her previous position to not be a candidate for president; (4) at its July 16, 2018, meeting, the Board intended to propose an "adjusted process" in which Dr. Freeman would be put forth as the candidate for president and information gathering sessions would be held with various constituency groups to provide the Board with feedback; and (5) "[d]iscussion among trustees regarding the hiring of the new President will take place at a pre-scheduled

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[1]"NIU Official Announcement" by Wheeler Coleman, Chair, Board of Trustees, and Dennis Barsema, Vice Chair, Board of Trustees (July 11, 2018), at 3.

[2]Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 1.

trustees meeting and after the completion of the information gathering sessions. We will also make plans for a university wide-forum where Dr. Freeman will outline her vision for the future."[3] [redacted] Request for Review asserts that thus announcement demonstrates that the Board violated OMA by improperly meeting with Dr. Freeman and selecting her as the candidate for president.

In its response to this office, the Board stated that (1) the Chair of the Board asked Dr. Freeman during a June 8, 2018, telephone call to reconsider her position that she would not seek the permanent presidential position; (2) "[t]hrough individual, one-on-one communications with each of the other trustees, Chair Coleman had previously received high praise for Dr. Freeman's performance and support for considering her as the permanent president[;]" (3) on June 14, 2018, Board members confirmed their support for Dr. Freeman in a closed session discussion held pursuant to the section 2(c)(1) exception (5 ILCS 120/2(c)(1) (West 2016))[4] to the general requirement that public bodies conduct public business openly; (4) the Chair and Vice Chair conveyed the Board's support to Dr. Freeman after the closed session and she agreed to be considered as a candidate; (5) on July 16, 2018, the Board held a special meeting at which it approved the "Adjusted Presidential Search Process" to consider Dr. Freeman's candidacy, which was outlined in the NIU Official Announcement document attached to the Request for Review."[5]

In her reply, the requester argues that:

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[3]"NIU Official Announcement" by Wheeler Coleman, Chair, Board of Trustees, and Dennis Barsema, Vice Chair, Board of Trustees (July 11, 2018), at 4.

[4]Section 2(c)(1) of OMA permits a public body to enter closed session to discuss:

> The 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. However, a meeting to consider an increase in compensation to a specific employee of a public body that is subject to the Local Government Wage Increase Transparency Act may not be closed and shall be open to the public and posted and held in accordance with this Act.

[5]Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 2-3.

> Talking to each individual member of the Board about board business to arrive at an action and or a board decision is also a violation of OMA. This one on one method, whether it is by phone, email or other means, is used to get around the rules stated in the Open Meetings Act. * * * In effect, NIU is using this method of one at a time decision making to avoid the OMA and produce a board action. NIU admits that the Chairman used these one on one conversations as a basis for his action.[6]

Our determination in this matter hinges on whether the private communications between Board members preceding the announcement of Dr. Freeman's selection as the candidate for the permanent presidential position constituted a "meeting" subject to the requirements of OMA. Section 1.02 (5 ILCS 120/1.02 (West 2016)) defines a public meeting as:

> [A]ny gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business. (Emphasis added.)

We note that "contemporaneous interactive communication" under section 1.02 does not require the continuous and uninterrupted presence of a majority of a quorum. Contemporaneous is defined as "existing, occurring, or originating during the same time," as in "the contemporaneous publication of two articles" or "contemporaneous accounts of the battle from officers on both sides[.]"[7] "Interactive" is defined as "mutually or reciprocally active" or "involving the actions or input of a user; *especially* : of, relating to, or being a two-way electronic communication system (as a telephone, cable television, or a computer) that involves a user's orders (as for information or merchandise) or responses (as to a poll)[.]" (Emphasis in original.)[8] Thus, a "contemporaneous interactive communication" occurs in the same general time frame, but is not

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[6]E-mail from [redacted] to Brady Gregory and Marie Hollister (August 15, 2018).

[9]Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 2.

[9]Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 2.

necessarily simultaneous. *See* John H. Brechin, *E-Mail and the Open Meetings Act*, Illinois Bar Journal, 94 ILBJ 666, 667 (2006).

In this instance, it is undisputed that each member of the Board *individually* discussed the potential candidacy of Dr. Freeman with the Board Chair on at least one occasion. However, there is no indication that any of these communications involved a majority of a quorum of the Board, or were contemporaneous with a majority of a quorum such as through a chain of Board members discussing this topic with one another systematically. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 50318, issued January 30, 2018, at 3-4 (Board did not engage in contemporaneous, interactive, deliberative discussion concerning a letter written to local media which was drafted by one trustee and then edited by other trustees at later, separate times). Moreover, the Board's response that the Chair had received high praise for Dr. Freeman's performance and support for considering her as the permanent president and that he shared these "collective observations"[9] indicates that these conversations occurred over the course of time and were not undertaken as an individual poll of trustees or as an attempt to circumvent the requirements of OMA. Accordingly, this office is unable to conclude from the available information that any of the Board members' communications concerning Dr. Freeman constituted improper meetings subject to the requirements of OMA.

Final Action

[redacted] Request for Review also alleged that the Board must have taken an improper final action because she could not locate the Board's vote to support Dr. Freeman as a candidate listed in any of several meeting agendas that she checked. Section 2(e) of OMA (5 ILCS 120/2(e) (West 2016)) provides that "[n]o final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the 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 Board stated that:

> Chair Coleman set the potential appointment/employment of Dr. Freeman as permanent president as a topic of conversation by the full Board during closed session at the next meeting of the Board of Trustees. On June 14, 2018, at its meeting, the Board of Trustees went into closed session to discuss items under Section 2(c)(1) of the Illinois Open Meetings Act, which covers *'The appointment,*

[9]Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 2.

> *employment, compensation, discipline, performance, or dismissal of specific employees of the public body...*' Dr. Freeman was not present for this discussion a[s] this closed session.[10] (Emphasis in original.)

The Board also explained that its July 11, 2018, announcement "announced a plan to propose to the full Board of Trustees an adjusted presidential search process with Dr. Freeman as the candidate for consideration by the Board and the University."[11] The Board also explained that the Board properly approved the Adjusted Presidential Search Process with Dr. Freeman as the candidate for consideration at its July 16, 2018, special meeting. The Adjusted Presidential Search Process includes opportunities for University constituencies to provide their feedback "on Dr. Freeman's candidacy for review and consideration by the full Board at one of its future meetings."[12] Lastly, the Board explained that it "has taken no final action to appoint/employ a permanent president and is in the midst of the Adjusted Presidential Search Process with the rest of the University[,]"[13] and that "[a]ny final action on the presidency will, of course, be done in open session."[14]

In her reply, the requester clarified that she is only contesting the Board's actions on July 11, 2018, and prior, in regard to the official announcement. She argued that, through that announcement, the University "made a deliberate decision to tell the public that the board approached [Dr. Freeman] with our support[]"[15] and that "[t]he words 'As a Board we...' have

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[10]Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 2.

[11]Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 3.

[12]Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 3.

[13]Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 4.

[14]Letter from Gregory A. Brady, Acting Vice President and General Counsel, Northern Illinois University, to Marie Hollister, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (August 8, 2018), at 4.

[15]E-mail from [redacted] to Brady Gregory and Marie Hollister (August 15, 2018).

special meaning – the board [met] in quorum and took action. The chair of a board or individual members of a board do not have the authority to speak for the board on any issue that the board has not met upon and taken action on the issue."[16]

In *Gosnell v. Hogan*, 179 Ill. App. 3d 161 (5th Dist. 1989), the plaintiff alleged that a school board impermissibly took final action in closed session by deciding to make a request for mediation as an alternative to the unsuccessful negotiations it had been conducting with its secretaries' union. *Gosnell,* 179 Ill. App. 3d at 169. The court rejected that allegation, holding that the school board only took an intermediate step toward resolving the dispute:

> [T]he request for mediation was part of the process of reaching a final action with the secretaries union. Mediation, similar to negotiating, is not an end in itself, but rather, a means to an end. Negotiations and mediations are made up of many "unilateral" decisions, such as what to offer or counteroffer, and to hold that each of the unilateral strategical decisions that make up the constituent parts of a negotiation is in and of itself a final action is unreasonable. *Gosnell*, 179 Ill. App. 3d at 176.

See also Ill. Att'y Gen. PAC Req. Rev. Ltr. 32463, issued July 14, 2015, at 3 ("A component of a public body's process of reaching final action generally does not, itself, constitute final action."), and Ill. Att'y Gen. PAC Req. Rev. Ltr. 38155, issued July 20, 2016, at 3 ("A school district's discussion during closed session to decline a proposed resolution from the Department of Education's Office of Civil Rights (OCR) was part of a process of reaching final action, rather than final action itself, including because the OCR's complaint processing procedures expressly provided for continued negotiation after a public body rejects a voluntary resolution.")

This office has reviewed the verbatim recording from the Board's June 14, 2018, closed session in which the potential appointment of Dr. Freeman as permanent president was discussed. Based on that review, this office has determined that the Board's consensus on publically voicing its support of her candidacy in the Adjusted Presidential Search Process was part of a process of reaching final action, rather than final action itself. It is clear from the recording that the Board was aware that its position on supporting Dr. Freeman for president was subject to change, rather than irreversible. Likewise, the consensus of the Board expressed in the NIU Official Announcement that [redacted] attached to her Request for Review reflects only the intermediate step of tentatively supporting Dr. Freeman's candidacy and seeking additional feedback. Indeed, the Adjusted Presidential Search Process expressly provided for the

[16]E-mail from [redacted] to Brady Gregory and Marie Hollister (August 15, 2018).

Board to receive continued input and other information from various stakeholders after the Board recommended a candidate, followed by final action at an open meeting. Because the District's decision to publically voice its support for Dr. Freeman as permanent president was an interim decision at the time of [redacted] Request for Review, rather than "final action" (such as appointing Dr. Freeman to the position) the Board did not violate section 2(e) of OMA by reaching a consensus on that position.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, you may contact me at (312) 793-0865 or the Chicago address on the bottom of the first page of this letter. This letter shall serve to close this matter.

Very truly yours,

[redacted]

MARIE HOLLISTER
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
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