OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

March 10, 2020

Via electronic mail
[redacted]

Via electronic mail
Mr. Douglas S. Dorando
Daniels, Long, & Pinsel, LLC
The Daniels Law Building
19 North County Street
Waukegan, Illinois 60085
ddorando@dlplawyers.com

RE: OMA Request for Review – 2019 PAC 56926

Dear [redacted] and Mr. Dorando:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2018)). For the reasons explained below, the Public Access Bureau concludes that the City of Waukegan City Council (Council) violated OMA in connection with its February 4, 2019, meeting, but did not violate OMA in connection with its February 19, 2019, meeting.

BACKGROUND

In his February 20, 2019, Request for Review, [redacted] alleged that during its February 4, 2019, and February 19, 2019, meetings, the Council improperly interrupted his public comments and prevented him from using all of his allotted time to address the Council. [redacted] also alleged generally that the Council enforces its rules inconsistently. On February 27, 2019, this office sent a copy of the Request for Review to the Council and requested that it provide a written response to [redacted] specific allegations concerning the February meetings only. This office also asked the Council for a copy of its established and recorded rules regarding public comment. On March 4, 2019, the Council

provided a written answer and the requested materials. On March 5, 2019, this office forwarded a copy of the Council's answer to [redacted]; he did not submit a reply.

DETERMINATION

The intent of OMA is to "ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly" and to ensure that individuals are "given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." 5 ILCS 120/1 (West 2018); *see also Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989) ("the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly.").

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." 5 ILCS 120/2.06(g) (West 2018)). This offices notes that no Illinois reviewing court has interpreted this provision. Under the plain language of section 2.06(g), however, a public body must establish and record rules and may restrict public comment only pursuant to those rules. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 14-009, issued September 2, 2014 at 7. Although OMA does not specifically address the nature of rules that a public body may permissibly adopt, a board may adopt rules to maintain order and decorum at public meetings to ensure that meetings are conducted efficiently. *See Timmon v. Wood*, 633 F. Supp. 2d 453, 465 (W.D. Mich. 2008); *see also* Ill. Att'y Gen. Pub. Acc. Op. No. 14-0012, at 5 (a public body may promulgate reasonable "time, place and manner" rules aimed at preserving order and decorum). However, such rules must tend to accommodate, rather than to unreasonably restrict, the right to address public officials. *See I.A. Rana Enterprises, Inc. v. City of Aurora*, 630 F. Supp. 2d 912, at 923-25 (N.D. Ill. 2009). Although a public body may enforce rules regarding decorum, content-based restrictions must be narrowly construed. *See I.A. Rana Enterprises, Inc. v. City of Aurora*, 630 F. Supp. 2d 912, 922-23 (N.D. Ill. 2009) ("Any content-based restrictions, promulgated with reference to the content of the speech being restricted, are subject to strict-scrutiny, and must serve a compelling state interest and be narrowly drawn to achieve that purpose."). Further, rules that govern the decorum of a meeting are permitted only if it is directed to conduct which is "*actually* disturbing or impeding a meeting." *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (9th Cir. 2013) (ordinance unconstitutional because it provided for the removal of individuals for proscribed types of remarks even if those remarks did not disrupt a meeting). Disagreeing with the content of a speaker's speech is not evidence that the speaker created a disturbance or otherwise interfered with the efficiency of the proceedings. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 39239, issued June 29, 2016, at 4-5.

The Council's rules for public comment are established and recorded as Section 2-65.1 of the Waukegan Code of City Ordinances:

The presiding officer shall conduct city council meetings in an orderly manner. No person in the audience shall engage in disorderly conduct, including any act that disturbs, disrupts, or otherwise impedes the orderly conduct of any council meeting or the presentation of any speaker.

During the public comment portion of the city council meetings, if any, all public comments are limited to three minutes per individual. Individuals are directed to be brief and concise in making their remarks and to address topics directly relevant to business of the city council.

The presiding officer, after one warning, may rule any individual addressing the city council out of order if the individual:

(1) Becomes repetitive;
(2) Exceeds the three-minute limitation;
(3) Makes personal attacks against others;
(4) Makes rude or slanderous remarks;
(5) Becomes threatening or boisterous;
(6) Engages in electioneering for candidate(s); or
(7) Otherwise interferes with the orderly and dignified conduct of the meeting.

If ruled out of order and is found by the chair to be out of order, the individual may be barred from further remarks at that city council meeting and barred from further attendance at that meeting. This ruling of the chair can be overridden by a two-thirds vote of the aldermen present.

Nothing herein is intended to limit or restrain negative, positive or neutral comments about the manner in which an individual employee, officer, official or council member carries out his or her duties in public office or public employment of the city.[1]

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[1]Code of Ordinances of Waukegan, Illinois, Section 2-65.1, *available at* https://library.municode.com/il/waukegan/codes/code_of_ordinances?nodeId=COOR_CH2AD_ARTIICICO_DIV2RUORPR_S2-65.1RUDECOME.

February 4, 2019, Council Meeting

This office has reviewed the video recording of the portion of the February 4, 2019, meeting during which [redacted] addressed the Council. In the context of discussing his dissatisfaction with the Council's relationships with certain local businesses, [redacted] stated:

> What really bothers me, for the last year and a half I've brought evidence here showing you that you have two racist companies that you took on board. One was fired by the previous administration for overcharging blacks. The other one was fired for calling us [a racial slur.] [Gavel.] And you held on.[2]

The speaker clock was stopped and Mayor Cunningham stated, "[redacted] please do not use the word. Please, sir, I'm asking you as I asked [redacted] and he so kindly obliged me. Please, spell it out, do not use that. Please sir, thank you, sir."[3] The clock resumed and [redacted] continued to discuss the topic of the Council's business relationships. Towards the end of [redacted] comments, he again stated "it's a shame you're holding [on to] those companies for overcharging the black community and calling us [a racial slur.]"[4]

In its response to this office, the Council did not identify which rule Mayor Cunningham was enforcing when he interrupted [redacted] for using a racial slur. This office construes Mayor Cunningham's interruption as enforcing the Council's rule prohibiting interference with the "orderly and dignified conduct of the meeting."[5] The Public Access Bureau has previously held that a public body may adopt rules governing public comment that "accommodate the speaker's statutory right to address the public body, while ensuring that the public body can maintain order and decorum at public meetings." Ill. Att'y Gen. Pub. Acc. Op. No. 14-012, issued September 30, 2014, at 6.

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[2]Waukegan City Council, Meeting, February 4, 2019, video recording, 1:43:29, *available at* https://www.youtube.com/watch?v=wmsCf-EZHzs.

[3]Waukegan City Council, Meeting, February 4, 2019, video recording, 1:43:55, *available at* https://www.youtube.com/watch?v=wmsCf-EZHzs.

[4]Waukegan City Council, Meeting, February 4, 2019, video recording, 1:46:48, *available at* https://www.youtube.com/watch?v=wmsCf-EZHzs.

[5]Code of Ordinances of Waukegan, Illinois, Section 2-65.1, *available at* https://library.municode.com/il/waukegan/codes/code_of_ordinances?nodeId=COOR_CH2AD_ARTIICICO_DIV2RUORPR_S2-65.1RUDECOME.

[redacted] contends that he used the racial slur in the context of quoting language used by a local tow company to demonstrate the company's racism. Unlike a speaker who attempts to upset the decorum of a meeting by using obscene language, the alleged source of the racial slur that [redacted] recited was a company with which the City does business. The use of the term was therefore relevant to the Council's business and the comment did not appear to disrupt the order of the meeting. The mayor however, did not act unreasonably nor outside the scope of the established rules when he asked [redacted] to please not use that term. In fact, [redacted] used the same term again later during the course of his remarks without interruption. Further, the clock was stopped when the mayor interrupted [redacted]. This office has previously determined that a brief interruption that does not preclude a speaker from completing his or her public comment does not constitute an improper restriction on public comment. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 37496, issued December 11, 2015. Because the mayor's interruption was a brief request to refrain from repeating a racial slur, and because the clock was stopped during the interruption and [redacted] was permitted to continue with his remarks, this office concludes that under these circumstances, the Council did not violate section 2.06(g) of OMA.

[redacted] further contends that the Council improperly interrupted him when he suggested during public comment that one of the aldermen undergo a mental evaluation. The recording of the February 4, 2019, meeting shows that [redacted] stated "I'm also going to recommend that you have some kind of mental evaluation, Alderman Seger, because your reply to me—" before Mayor Cunningham struck his gavel and interrupted. The mayor informed [redacted] that he could not use personal attacks against the aldermen or members of the audience. [redacted] resumed his comments, stating "I'm going to say what I said, I'm going to recommend you have mental evaluation [gavel] in order for you to tell me that the two companies did you the same way. What can you do about it? And you're elected officials and as I stated, it's a shame before God that you are holding those two racist companies."[6]

In its response to this office, the Council asserted that Mayor Cunningham interrupted [redacted] to enforce the Council's rules prohibiting rude or slanderous remarks and personal attacks. This office has previously addressed the propriety of the Council's rules prohibiting personal attacks and slanderous remarks:

> On its face, this ordinance is susceptible to overbroad and arbitrary application to public statements that do not disrupt the Council's proceedings. For instance, whether a remark constitutes a "personal attack" is an entirely subjective question that is

[6]Waukegan City Council, Meeting, February 4, 2019, video recording, 1:45:14, *available at* https://www.youtube.com/watch?v=wmsCf-EZHzs.

> necessarily dependent upon the listener's personal perspective. When criticism involves the conduct of present or former public officials in the performance of their public duties, significant latitude must be allowed. Further, whether a comment is defamatory requires a legal judgement that a tort has been committed, including a finding that the alleged offending statement is false. *See Hadley v. Doe*, 2015 IL 118000, ¶30, 34 N.E.3d 549, 557 (2015) (stating elements of a cause of action for defamation). The Council's rules are devoid of any criteria for determining when a comment is improper, thus vesting the presiding officer with unbridled discretion to limit or prohibit legitimate public criticism by ruling it "out of order." Accordingly, we conclude that sections 2-65.1(3) and (4) of the Waukegan City Code exceed the permissible scope of rules regulating the statutory right to address public officials under section 2.06(g) of OMA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 39069, issued April 5, 2016, at 3 (restricting comment criticizing a public official by name impermissible).

Here, [redacted] comments regarding Alderman Seger were intended to convey his strong disagreement with the alderman's position regarding the City's use of the two tow companies. It does not appear that [redacted] comments alone created a disturbance or otherwise interfered with the efficiency of the Council's proceedings. A member of the audience chose to clap loudly in agreement with [redacted] but the Council did not instruct that individual to refrain from disturbing the order of the meeting. The Council's restrictions of [redacted] comments were directed towards his references to a particular Council member in connection with the public business of the City. Accordingly, the Council's rules as enforced against [redacted] impermissibly restricted his statutory right to address the Council. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 51665, issued February 5, 2019, at 6 (restricting comment criticizing individual board members); Ill. Att'y Gen. PAC Req. Rev. Ltr. 50824, issued July 10, 2018, at 4-6 (restricting comment criticizing elected officials by name in connection with public matters impermissible).

In its response to this office, the Council asserted that even though it enforced its rules during [redacted] comments, he nevertheless spoke for the full three minutes permitted under the Council's rules. This office's review of the recording confirmed that, excluding Mayor Cunningham's interruptions, [redacted] spoke for approximately two minutes and fifty-seven seconds before leaving the podium, but he was also asked to leave the Council chambers. Even though Mayor Cunningham did not completely prohibit [redacted] comments, the repeated interruptions unreasonably interfered with [redacted] statutory right to address the Council. Accordingly, this office concludes that the Council violated section 2.06(g) of OMA by

enforcing an unreasonable rule to infringe on [redacted] right to address the Council at its February 4, 2019, meeting.

February 19, 2019, Council Meeting

[redacted] further alleges that during the February 19, 2019, Council meeting, the mayor struck his gavel and told him that he could not stand to the side of the podium, but must face the mayor when delivering his public comments. [redacted] also contended that Mayor Cunningham violated OMA by having him removed for alleged electioneering during the public comment period.

This office has reviewed the recording of the February 19, 2019, Council meeting that is available on YouTube. [redacted] approached the podium from the side and turned his body away from the Council, towards the audience. He stated that he was "speaking to the citizens."[7] Mayor Cunningham repeatedly struck his gavel, asked [redacted] to face the Council, and informed [redacted] that he was out of order. After 39 seconds, however, Mayor Cunningham stopped interrupting and permitted [redacted] to proceed with his remarks.

Section 2.06(g) of OMA provides any person "an opportunity to address **public officials**" (emphasis added.). Both [redacted] actions in turning away from the Council members, and his declaration that he was speaking to the citizens make it clear that he was there to address the public present at the meeting, rather than the public officials. Therefore, the Council's interruption to advise [redacted] to address the Council did not violate section 2.06(g) of OMA.

[redacted] continued with his remarks, stating, in relevant part:

> What needs to happen here is, there needs to be a switching out of quite a few of these aldermen. And I tell you the truth when I tell you that the casino is priority way more than your health, and that's no good.
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> * * *
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> It's important that you citizens know that you're the boss, they're not your boss, you're their boss. And I ask you to remember, when it was time to raise taxes, remember those aldermen who raised

[7]Waukegan City Council, Meeting, February 19, 2019, video recording, 1:08:32, *available at* https://www.youtube.com/watch?v=6vMNaCjzC_s.

> taxes. Switch them out. It's time for change, people. A lot of this we bring on ourself. I think of Alderman Moisio is up this trip. Get rid of him. [redacted] will be transparent. She will tell the truth. Her record shows. Get him out of there. [Gavel.][8]

Mayor Cunningham then struck his gavel and ordered [redacted] to be removed from the Council chambers for electioneering. [redacted] continued to speak over Mayor Cunningham's objections, stating, "[a]nd as for [Alderman] Seger, * * * I view Segar as incompetent, lost in space, and I have no idea why you would not get rid of him."[9]

In its response to this office, the Council asserted that it had [redacted] removed from the Council chambers because he violated its rule prohibiting "[e]ngag[ing] in electioneering for candidate(s)."[10] The Council explained that the [redacted] referenced was [redacted] who was running against Alderman Moisio in the February 26, 2019, primary election for Waukegan's 3rd Ward alderman. The response also emphasized that [redacted] comment were directed to the audience rather than the Council.

Although this office has not previously addressed the reasonableness of a rule prohibiting electioneering during public comment, this office has determined that it is reasonable for a public body to limit public comment to topics germane to matters that a public body has the authority to consider. Ill. Att'y Gen. PAC Req. Rev. Ltr. 49820, issued January 31, 2019, at 6. Similarly, courts have consistently recognized an important governmental interest in limiting comments to matters directly relevant to that public body's business. *See, e.g., Scroggins v. City of Topeka, Kan.*, 2 F. Supp. 2d 1362, 1373 (D. Kan. 1998) (city council did not violate first amendment to the United States Constitution by restricting personal comments about an appointee to a mayoral commission that were not directly relevant to the business of the public body). Requiring a public body to permit public comment on matters unrelated to its public business would impede the public body's ability to run efficient meetings. *See Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 803 (11th Cir. 2004) ("a city council meeting is not open for endless public commentary speech but instead is simply a limited platform to discuss the topic at hand.").

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[8]Waukegan City Council, Meeting, February 19, 2019, video recording, 1:09:46, *available at* https://www.youtube.com/watch?v=6vMNaCjzC_s.

[9]Waukegan City Council, Meeting, February 19, 2019, video recording, 1:10:50, *available at* https://www.youtube.com/watch?v=6vMNaCjzC_s.

[10]Code of Ordinances of Waukegan, Illinois, Section 2-65.1(6), *available at* https://library.municode.com/il/waukegan/codes/code_of_ordinances?nodeId=COOR_CH2AD_ARTIICICO_DIV2RUORPR_S2-65.1RUDECOME.

Merriam-Webster's Dictionary defines "electioneer" as "to take an active part in an election *specifically*: to work for the election of a candidate or party[.]"[11] (Emphasis in original.) Electioneering is not part of the Council's authority, and therefore comments promoting specific aldermanic candidates are not germane to the Council's business. Although [redacted] initial comments could be construed as general criticism of the Council, he then urged the public specifically to vote for Alderman Moisio's competitor in an upcoming primary election by stating: "I think of Alderman Moisio is up this trip. Get rid of him. [redacted] will be transparent. She will tell the truth. Her record shows. Get him out of there."[12] Because the promotion of the candidate was not relevant to the work of the Council, this office concludes that the Council did not violate the requirements of OMA by enforcing its rule prohibiting electioneering to limit [redacted] public comments.

Other Allegations

[redacted] alleged that the Council enforces its rules inconsistently. The only example that [redacted] provided to support this allegation was that at an unidentified Council meeting, the mayor warned a woman to not use a certain expletive, but that "an elder"[13] used the same expletive on November 19, 2018, and the mayor did not warn or otherwise caution that speaker. Section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2018)) provides that "[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[,]" and that the submission "must include a summary of the facts supporting the allegation." [redacted] allegation regarding the mayor's warning to the woman is vague, as he did not identify a particular meeting during which the warning took place. This office has viewed the recording of the November 19, 2018, meeting, and observed that the man referenced in [redacted] Request for Review used the expletive after his time for comment had ended, but this office is unaware of any pertinent details regarding the woman's statement. Accordingly, [redacted] did not provide a summary of the facts sufficient to support a violation with respect to "Incident 4," and this office will take no further action as to this allegation.

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[11]https://www.merriam-webster.com/dictionary/electioneer

[12]Waukegan City Council, Meeting, February 19, 2019, video recording, 1:09:46, *available at* https://www.youtube.com/watch?v=6vMNaCjzC_s.

[13]E-mail from [redacted] to Attorney General [Kwame] Ra[o]ul (February 20, 2019).

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, please contact me at the Springfield address on the first page of this letter, LHarter@atg.state.il.us, or (217) 524-7958. This letter serves to close this file.

Very truly yours,

[redacted]

LAURA S. HARTER
Deputy Bureau Chief
Public Access Bureau

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