



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

November 4, 2021

Via electronic mail

[REDACTED]

Via electronic mail

Ms. Mallory A. Milluzzi
Klein, Thorpe and Jenkins, Ltd.
20 North Wacker Drive, Suite 1660
Chicago, Illinois 60606-2903
mamilluzzi@ktjlaw.com

Re: OMA Request for Review – 2021 PAC 66444

Dear [REDACTED] and Ms. Milluzzi:

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 discussed below, this office concludes that Homewood-Flossmoor School District 233 (District) Board of Education (Board) violated OMA at its November 17, 2020, meeting when it refused to read one of the four comments it received in advance of the meeting.

On January 10, 2021, [REDACTED] submitted a Request for Review alleging that the Board violated OMA (5 ILCS 120/2.06(g) (West 2020)) at its November 17, 2020, meeting when it refused to read aloud during the meeting the comment he had submitted to the Board by e-mail. In support of his Request for Review, [REDACTED] attached the minutes of the Board meeting, which document that the Board read aloud three comments submitted by members of the public but declined to read one comment because it was "not reflective of the level of discourse that is expected or encouraged at board meetings."¹

¹Homewood-Flossmoor High School District 233 Board of Education, Meeting, November 17, 2020, Minutes 2 (attached to E-mail from [REDACTED] to Public Access (January 10, 2021)).

On January 19, 2021, this office forwarded a copy of the Request for Review to the Board and requested that it provide a detailed written response to the allegation, along with copies of the agenda, minutes, any audio or video recordings of the November 17, 2020, meeting, and its rules for public comment. On January 28, 2021, the Board submitted a written response and the requested materials. ██████████ replied to the Board's response on February 10, 2021.

DETERMINATION

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." (Emphasis added.) Under the plain language of section 2.06(g), 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.

The Board explained that it has established and recorded rules for public participation at its meetings, affording speakers five minutes unless they have requested and received permission in advance of the meeting to speak for longer and prohibiting the presentation of "repetitious" material. The Board also explained that it has adopted Robert's Rules of Order, and asserted:

Robert's Rule of Order No. 7 states "Speakers must address their remarks to the presiding officer, be courteous in their language and deportment, and avoid all personalities, never alluding to the officers or other members by name, where possible to avoid it, nor to the motives of members." Rule No. 7 further provides: "Debate must address issues not personalities and that no one is permitted to make personal attacks or question the motives of other speakers." These rules govern decorum for anyone who wishes to participate in a School District Board Meeting, including citizens' participations during Citizens Concerns and Comments.^[2]

The November 17, 2020, meeting was held remotely due to the COVID-19 pandemic and the Board's agenda provided both a Zoom link and a telephone number to facilitate public access to the meeting. With respect to public comment, the agenda provided:

²Letter from Mallory A. Milluzzi, School District Attorney, Klein, Thorpe and Jenkins, Ltd., to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, at 2 (January 28, 2021).

Members of the public may comment on agenda and non-agenda items via email. Public comment will be accessible by email in advance to boardcomments@hf223.org. Public comments must be received by 4:00 p.m. Tuesday, November 17, 2020. Emailed public comments will be read out loud during the November 17, 2020, Board of Education meeting. Comments will be read out loud in the order they were received and the comment section will be limited to 30 minutes.^[3]

Despite these instructions, the Board noted to this office that it does not have a recorded rule allowing members of the public to have their comments read aloud, and further argued:

While in practice, the School District has allowed members of the public to submit email comments, its recorded rules does [sic] not make them automatic. * * * Therefore, since the School District does not have a recorded rule that gives citizens the right to have their public comments submitted via email and read aloud, the PAC cannot find that it violated OMA, as the District did not violate its recorded rules.^[4]

The Board further argued that it complied with its established and recorded rules by offering the public the opportunity to comment during the meeting on Zoom, and that ██████████ could have read his e-mail himself at that time.

In his reply, ██████████ contests the assertion that he could have provided his comments during the meeting live on Zoom. ██████████ states that the Board has not established and recorded rules about furnishing public comments during meetings held by audio or video conference during the COVID-19 pandemic and that its process for accepting comments changed as of the Board's July 12, 2020, meeting, when it switched from meetings by audio conference to holding meetings on Zoom. ██████████ asserts that he is a "phone participant" in the Zoom meetings and that the Board does not provide the same opportunity for phone participants to voice their comments as Zoom video participants. Finally, ██████████ argues

³Homewood-Flossmoor High School District 233 Board of Education, Meeting, November 17, 2020, Agenda.

⁴Letter from Mallory A. Milluzzi, School District Attorney, Klein, Thorpe and Jenkins, Ltd., to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, at 2 (January 28, 2021).

that the agenda for the Board's November 17, 2020, meeting sets forth instructions for providing public comment, and that agenda discusses only comments submitted by e-mail.

The minutes of the Board's November 17, 2020, meeting document that a Board member read aloud three comments the Board received by e-mail, and stated that he would not read one of the comments received "because it is not reflective of the level of discourse that is expected or encouraged at board meetings." The Board member then stated that after consulting with legal counsel, it was determined that the comment would not be read but that "[t]he board will entertain an appropriate comment by that member of the public as is appropriate."⁵ Although not reflected in the minutes, the audio recording of the November 17, 2020, meeting supports the Board's statement that it offered an opportunity for members of the public to comment during the meeting after the Board had read three of the e-mailed comments. The audio recording indicates that the Board asked members of the public to raise their hands on Zoom if they wished to provide comment. After allowing that opportunity, the Board President recognized one person (who did not provide a substantive comment), stated that he did not see any other hands raised, and moved on to the next item.

To make it possible for public bodies to continue to function during the COVID-19 pandemic, Governor Pritzker issued executive orders relaxing OMA's in-person quorum requirement and rules for remote participation by members of public bodies.⁶ The General Assembly subsequently amended OMA to create a framework for public bodies to be able to hold remote meetings without the physical presence of a quorum of their members during such public health emergencies.⁷ Section 2.06(g) of OMA, however, has remained unchanged. Public bodies have used various methods to incorporate public comment in their meetings as the circumstances of the pandemic have evolved over time, including accepting written comments prior to a meeting and reading them aloud, and inviting contemporaneous comments by telephone or on video conference platforms during designated public comment periods.

In a prior Request for Review, the Public Access Bureau determined that a committee violated section 2.06(g) of OMA when it failed to read aloud during the meeting most of the comments it had received by e-mail prior to the meeting. Ill. Att'y Gen. PAC Req. Rev. Ltr. 62755, issued July 15, 2020. In that matter, the agenda for the meeting had notified the

⁵Homewood-Flossmoor High School District 233 Board of Education, Meeting, November 17, 2020, Minutes 2.

⁶See Executive Order 2020-07, §6, issued March 16, 2020; Executive Order 2020-18, Part 1, issued April 1, 2020; Executive Order 2020-33, Part 1, issued April 30, 2020; Executive Order 2020-39, Part 1, issued May 29, 2020.

⁷See Public Act 101-640, effective June 12, 2020 (adding section 7(e) to OMA).

public that it should submit comments by e-mail prior to the meeting and that the committee chair would read the submitted comments. Ill. Att'y Gen. PAC Req. Rev. Ltr. 62755, issued July 15, 2020, at 7. Taking into account these instructions and the fact that the committee did not grant the public any other opportunity to provide comment during the meeting, this office concluded that the committee violated OMA when it decided to read only one of 42 comments it received from the public. Ill. Att'y Gen. PAC Req. Rev. Ltr. 62755, issued July 15, 2020, at 7. *See also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 66704, issued July 7, 2021, at 5 (concluding that village board violated section 2.06(g) of OMA when it voted against reading e-mailed comments during a meeting but the agenda had informed the public that comments would be read and the board provided public no other means to address it during the meeting).

However, the Public Access Bureau has also determined that section 2.06(g) does not require every public body to read every comment submitted to it by e-mail. Where the agenda, notice, and stated procedures for commenting during remote meetings are silent about the public body's use of the e-mailed comments, and the public body offers alternative methods for providing comment, a public body does not violate OMA when it chooses not to read aloud comments during a meeting. *See e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 64882, issued September 24, 2020, at 3-4 (meeting notice was ambiguous as to whether e-mailed comments would be read aloud, and the public body permitted individuals to provide comment in-person at village hall and over the phone); Ill. Att'y Gen. PAC Req. Rev. Ltr. 63402, issued August 21, 2020, at 2-3 (temporary procedures for public comment did not state that e-mailed comments would be read aloud and public body also permitted comments by telephone during the meeting). This office also determined that section 2.06(g) did not require a public body to read out loud 770 e-mails submitted to it when doing so would have impeded the orderly progress of the meeting, and the public body allowed public comment on Zoom and telephone, and made all e-mailed comments it received available online for public inspection. Ill. Att'y Gen. PAC Req. Rev. Ltr. 66997, issued March 9, 2021, at 2-3.

Here, the agenda for the November 17, 2020, meeting stated expressly that comments submitted by e-mail would "be read out loud during the November 17, 2020, Board of Education meeting."⁸ The Board argues that because that representation appeared on the agenda and not in its established and recorded public comment rules, this office cannot conclude that it violated OMA. The Board's rules for public comment, however, do not contain any procedures specific to meetings held by video and audio conference, and the Board nevertheless has permitted members of the public to submit comments by e-mail for those meetings, and generally, has read those comments during the meeting. In fact, the Board acknowledges in its response to this office that it has read aloud comments submitted by ██████████ at meetings

⁸Homewood-Flossmoor High School District 233 Board of Education, Meeting, November 17, 2020, Agenda.

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both before and after the November 17, 2020, meeting. OMA would not necessarily require the Board to permit a commenter to participate in public comment through a method not outlined in its rules. Yet, here, where the Board notified the public on the agenda of its upcoming meeting that it would accept e-mailed comments and read them aloud at that meeting, individuals who relied on that method would be deprived of their statutory right to address the Board if it refused without valid justification to read their comments.

For that same reason, the availability of a public comment period during the meeting through Zoom does not relieve the Board of the obligation to apply its procedures neutrally. The Board followed the instructions on its agenda and accepted and read all other comments it received for the November 17, 2020, meeting; it did not require any of the other commenters to raise their hands on Zoom and read their comments themselves. Although the availability of alternative methods of addressing the public body may relieve it, as a general matter, of the obligation to read aloud comments received in writing, OMA does not allow the body to disregard instructions on its agenda that members of the public relied upon to provide public comment.

Alternatively, the Board argues that it was allowed to refuse to read [REDACTED] e-mailed comment because it was a "personal attack[] and political campaigning" and "personal, slanderous remarks about individuals that are not relevant to their performance or qualifications as School District officials."⁹ For those reasons, the Board argues that [REDACTED] comment violated its established and recorded rules, and that OMA authorized it to prohibit [REDACTED] comment.

The Attorney General has previously concluded that a public body has inherent authority to conduct a meeting in an efficient and orderly manner. *See* Ill. Att'y Pub. Acc. Op. No. 19-002, issued January 9, 2019, at 6-7. Although OMA does not specify the nature of rules 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. 14-012, 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).

⁹Letter from Mallory A. Milluzzi, School District Attorney, Klein, Thorpe and Jenkins, Ltd., to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, at 5 (January 28, 2021).

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."). Rules that govern the decorum of a meeting are permitted only if they are directed to conduct which is "actually disturbing or impeding a meeting[.]" (Emphasis added.) *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); *Norse v. City of Santa Cruz*, 629 F.3d 966, 979 (9th Cir. 2010) (Kozinski, A., concurring) ("Even in a limited public forum like a city council meeting, the First Amendment tightly constrains the government's power; speakers may be removed only if they are actually disruptive."). That is not to suggest, however, that a public body must wait for a speaker's comments to cause an actual outburst before restricting them:

[T]he nature of a Council meeting means that a speaker can become "disruptive" in ways that would not meet the test of actual breach of the peace, [citation], or of "fighting words" likely to provoke immediate combat. [Citation.] A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers. *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

At the same time, comments during a city council meeting which pertain to matters of public concern are protected by the first amendment to the United States Constitution even if the speaker's "motive in commenting * * * could be an insensitive, mean spirited, personal attack[.]" *Gault v. City of Battle Creek*, 73 F. Supp. 2d 811, 815 (W.D. Mich. 1999). Because it would be illogical to construe OMA as permitting a public body to impose unconstitutional restrictions on members of the public addressing public officials, the Public Access Bureau has previously determined that section 2.06(g) of OMA does not permit a public body to apply public comment rules that are susceptible to overbroad and arbitrary application to comments that do not actually disrupt public meetings. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 39069, issued April 5, 2016, at 3-4 (finding public body violated OMA by imposing rule that prohibited "personal attacks against others" or "rude or slanderous remarks").

The Board argues that ██████████ written comment violated its established and recorded public comment rule, and that its rule is permissible under section 2.06(g) of OMA

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because it is "content and viewpoint neutral and serve[s] the significant government interest of maintaining civility and decorum."¹⁰ As explained above, the Board asserts that the section of its bylaws pertaining to visitors addressing the Board (Bylaw II.B.5) limits speakers to five minutes and prohibits the presentation of "repetitious material," but that those bylaws also document that the Board adopted Robert's Rules of Order (Bylaw II.B.4).¹¹ The Board asserts that Rule 7 of Robert's Rule of Order governs decorum for anyone who wishes to participate in a Board meeting, including citizens addressing Board members, and that rule requires speakers to "be courteous in their language and deportment, [and] that no one is permitted to make personal attacks or question the motives of other speakers."¹²

As an initial matter, this office notes that the Board's bylaw stating that its meetings "shall be conducted in accordance with Robert's Rules of Order, Revised," does not sufficiently notify the public that the Board may restrict public comment pursuant to Rule 7 specifically. Robert's Rules of Order include a large number of rules pertaining to many aspects of parliamentary procedure, and to the extent that the Board has adopted the current edition of Robert's Rules of Order, that document is not in the public domain or available on the internet in its complete form. This office was unable to locate on the Board's website the text or a summary of Rule 7, and the Board's response to this office does not provide any information indicating that it has apprised the public of the requirements of Rule 7. In order to better notify the public of the content of Rule 7, or any other rule contained in Robert's Rules of Order, that the Board may impose to govern the public's behavior at meetings, the Board may wish to amend its bylaws or adopt its own policies that restate the content of those rules.

The Board argues that [REDACTED] intended comment was a personal attack on an individual Board member that contained "personal, slanderous remarks about individuals that are not relevant to their performance or qualifications as School District officials."¹³ [REDACTED]

¹⁰Letter from Mallory A. Milluzzi, School District Attorney, Klein, Thorpe and Jenkins, Ltd., to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, at 4 (January 28, 2021).

¹¹Letter from Mallory A. Milluzzi, School District Attorney, Klein, Thorpe and Jenkins, Ltd., to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, at 4 (January 28, 2021) (referencing Homewood-Flossmoor High School Bylaws, II.B.4 (Rules of Order) and II.B.5 (Items of Business Not on Agenda)).

¹²Letter from Mallory A. Milluzzi, School District Attorney, Klein, Thorpe and Jenkins, Ltd., to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, at 2 (January 28, 2021).

¹³Letter from Mallory A. Milluzzi, School District Attorney, Klein, Thorpe and Jenkins, Ltd., to Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, at 5 (January 28, 2021).

furnished this office a copy of the comment he sent to the Board in advance of the November 17, 2020, meeting, which includes several mentions of the name of a Board member. ██████████ comment stated that the Board member "used to stand for something during his campaign" but that lately, his "passion has succumbed to a personal agenda of hate and creating a false narrative of pejoratives." ██████████ then asserted that at the last general meeting, the member "announced some conspiratorial agenda with regard to the issue of recording the general board meetings." ██████████ further stated that the "Planning Committee pledged to research this [issue regarding recording meetings] four years ago and report to the larger board[.]" that he was "tired of the constant, personal disrespect given to this issue" and to him, and that "[i]t is sheer arrogance when a public official feels haughtily justified in reducing a valid issue to a political conspiracy to create a political narrative for their own political reasons."¹⁴ In his reply to this office, ██████████ explained that his comment referred to the discussion that occurred among the Board at the October 2020 Committee of the Whole meeting concerning videotaping Board meetings. ██████████ directed our attention to the minutes of that meeting, which document that the identified Board member stated his opposition to videotaping Board meetings, and stated that only one community member talks about this issue, which ██████████ understood to be a personal reference to him.

This office has determined that "[w]hen criticism involves the conduct of present or former public officials in the performance of their public duties, significant latitude must be allowed." Ill. Att'y Gen. PAC Req. Rev. Ltr. 39069, issued April 5, 2016, at 3. On that basis, this office has repeatedly determined that a public body violates section 2.06(g) of OMA when it applies public comment rules prohibiting "personal attacks" or criticism of public employees or official by name to restrict comments about the manner in which public employees or officials exercise their official duties. *See e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 65871 *et al.*, issued March 16, 2021 (finding that city council violated section 2.06(g) of OMA when it applied public comment rules prohibiting "personal attacks" to mute commenter who criticized by name a public employee for the manner in which she carried out her public duties); Ill. Att'y Gen. PAC Req. Rev. Ltr. 50824, issued July 10, 2018, at 4-6 (public body may not prohibit comments that identify public officials by name in context of criticizing them for public duties, if speaker is not engaging in behavior that is disrupting the order and decorum of the meeting).

Although public bodies must generally permit members of the public to refer to public employees and officials that they are criticizing or otherwise commenting on by name, when public comment instead discusses personal matters separate and apart from the performance of public duties, the business of a board, or other public body matters, a board may limit the public comment to conserve time and to conduct the meeting in an efficient manner. *See Scroggins v. City of Topeka, Kan.*, 2 F. Supp. 2d 1362, 1373 (D. Kan. 1998) (city council did

¹⁴E-mail from ██████████ to "boardcomments@hf233.org" (November 17, 2020).

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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); Ill. Att'y Gen. PAC Req. Rev. Ltr. 56926, at 7-8, issued March 10, 2020 (public body was within its authority to prohibit comments promoting a candidate running against a sitting city council member); Ill. Att'y Gen. PAC Req. Rev. Ltr. 51665, at 6-7, issued February 5, 2019 (public body was within its authority to limit discussion of a public official's personal connection to a commenter and her ex-spouse).

██████████ comment specifically identified one Board member for criticism, attributed certain motives to that member, and used charged language in discussing the disagreement he had with that member. It is apparent, however, that ██████████ criticism relates to that Board member's position on an issue within the authority of the Board. In fact, ██████████ demonstrated that the disagreement mentioned in his comment—the issue of recording the general board meetings—had been discussed among Board members at a meeting that occurred just one month prior to the November 17, 2020, meeting. For that reason, ██████████ intended comment is distinguishable from the comments made in *Scroggins*, on which the Board relies in its response to this office. See *Scroggins, Kan.*, 2 F. Supp. 2d at 1366-67, 1374 (public body prohibited speaker from continuing comments that mayoral appointee had forged checks and opened other peoples' mail and called the appointee a pig). ██████████ comment did not use profanity or other words that would be considered disruptive. Although ██████████ referenced the Board member's prior campaign for election, he did not encourage voting against that member or endorse a competing candidate. His criticism of how a Board member carried out his official duties is a matter of public concern protected by the first amendment. Even if ██████████ comment was not permissible under Robert's Rules of Order, it would be illogical to construe OMA as permitting public bodies to impose restrictions on speakers that violate the first amendment. Accordingly, the Board refusal to read ██████████ comment violated section 2.06(g) of OMA.

In accordance with the conclusions of this letter, this office requests that the Board clarify its rules for providing public comment and expressly adopt rules it may wish to apply to regulate decorum at Board meetings, including remote meetings, and refrain at future meetings from applying public comment rules restricting comments that identify public officials or employees by name but do not impede the Board from conducting orderly meetings.

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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, you may contact me at (312) 814-6437 or the Chicago address listed on the first page of this letter.

Very truly yours,

[REDACTED]
LEAH BARTELT
Deputy Public Access Counselor
Public Access Bureau

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