



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

May 21, 2013

PUBLIC ACCESS OPINION 13-007
(Request for Review 2013 PAC 23488)

OPEN MEETINGS ACT:
Taking Final Action at Closed Session Prohibited;
Duty to Record Closed Meetings; Summary of
Discussion Required in Minutes

Ms. Molly Beck, Education Reporter
The State Journal-Register
1 Copley Plaza
P.O. Box 219
Springfield, Illinois 62705

Mr. Chuck Flamini
President, Board of Education
Springfield Public School District No. 186
1900 West Monroe Street
Springfield, Illinois 62704

Dear Ms. Beck and Mr. Flamini:

This is a binding opinion issued by the Attorney General pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2010)). For the reasons discussed below, this office concludes that the Springfield Public School District No. 186 Board of Education (Board) violated section 2(e) of OMA (5 ILCS 120/2(e) (West 2011 Supp.), as amended by Public Acts 97-813, effective July 13, 2012; 97-876, effective August 1, 2012) by taking final action on an employment separation agreement in closed session.

BACKGROUND

On February 21, 2013, Ms. Molly Beck submitted, on behalf of *The State Journal-Register*, a Request for Review alleging that the Board violated OMA on January 31, 2013, when six of its seven members signed a separation agreement with the school district's

Ms. Molly Beck
Mr. Chuck Flamini
May 21, 2013
Page 2

former Superintendent, Dr. Walter Milton, Jr., which the Board had not publicly voted to approve.¹ Ms. Beck provided this office with a copy of the sixteen page Separation Agreement and Release and three exhibits that Dr. Milton signed and dated January 31, 2013; the Board members signed the agreement but did not date their signatures.²

On February 28, 2013, the Public Access Bureau forwarded a copy of the Request for Review to the Board and asked it to:

[P]rovide a written response which describes the circumstances under which Board members signed the separation agreement. Please clarify whether Board members held any discussions and/or votes concerning the agreement, and identify the date and location of those discussions and the number of Board members who participated. If any such discussions occurred during a Board meeting, please provide copies of the agenda and the meeting minutes; if any such discussions occurred during a closed session of the Board, please provide copies of the verbatim closed session recording and closed session minutes.³

On March 22, 2013, through its attorney, the Board responded that it had discussed Dr. Milton's employment and possible separation from the District pursuant to section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2011 Supp.), as amended by Public Acts 97-813, effective July 13, 2012; 97-876, effective August 1, 2012) during closed meetings held on November 5, 2012, November 19, 2012, December 3, 2012, December 12, 2012, December 17, 2012, January 7, 2013, January 22, 2013, February 4, 2013, February 18, 2013, and February 25, 2013.⁴ The Board did not provide copies of the closed session minutes as requested. The Board did, however, provide copies of relevant portions of several recordings of the closed sessions, but stated that its attempts to record the relevant portions of the January 7, 2013, January 22, 2013, and February 4, 2013, closed meetings failed, except for a 40-second segment of the February 4,

¹E-mail from Molly Beck, Education Reporter, *The State Journal-Register*, to Public Access Bureau, Office of the Attorney General (February 21, 2013).

²Separation Agreement and Release between Dr. Walter J. Milton, Superintendent, and Board of Education, Springfield School District No. 186 (January 31, 2013).

³Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Susan White, President, Board of Education, Springfield School District No. 186 (February 28, 2013).

⁴Letter from Ms. Lorilea Buerkett, Brown, Hay & Stephens, LLP to Steve Silverman, Assistant Attorney General, Public Access Bureau (March 22, 2013).

Ms. Molly Beck
Mr. Chuck Flamini
May 21, 2013
Page 3

2013, meeting. The Board's response stated that during that February 4, 2013, closed meeting (not January 31, 2013, as originally alleged), six of the seven Board members signed the agreement that Dr. Milton had signed on January 31, 2013. The Board's response also asserted that the agreement was "purposefully not dated by the Board on that evening because no public vote had been taken."⁵ Instead, the Board dated the agreement after a roll call vote to approve it at the Board's March 5, 2013, open meeting.⁶ The agenda for the March 5, 2013, Board meeting included an item entitled "Approval of a Resolution regarding the Separation Agreement and Release Between Superintendent Dr. Walter Milton, Jr. and the Board of Education."⁷

This office has reviewed a video recording of the March 5, 2013, regular meeting which is referenced in the Board's response and is posted on the School District's website. The recording shows a Board member making a motion to approve Dr. Milton's separation agreement, which was described as: "Item 9.1, approval of a resolution regarding the separation agreement. The Board President recommends that the Board of Education of Springfield School Dist No. 186 vote to approve the separation agreement and release between Dr. Walter Milton Jr. and the Board of Education."⁸ The motion, which was seconded, provided no details of the separation agreement. Another Board member then made a motion to table that agreement and expressed support for the Superintendent, adding that both she and members of the public were unaware of the reasons for the separation agreement. "I don't know why this is happening. * * * I speak up for myself and I've heard and had people have discussion with me about why they're doing this and I can't give them a good reason."⁹ The motion to table the agreement was not seconded. Another Board member thanked the Superintendent for his service to the District, and called for a vote on the motion to approve the separation agreement. The motion was approved by a 6-1 vote.¹ Prior to the vote, the Board did not publicly discuss the terms of the agreement,

⁵Letter from Ms. Lorilea Buerkett, Brown, Hay & Stephens, LLP to Steve Silverman, Assistant Attorney General, Public Access Bureau (March 22, 2013).

⁶Letter from Ms. Lorilea Buerkett, Brown, Hay & Stephens, LLP to Steve Silverman, Assistant Attorney General, Public Access Bureau (March 22, 2013).

⁷Springfield Public School District No. 186 Board of Education, Agenda Item 9.1, Regular Board Meeting (March 5, 2013).

⁸Springfield Public School District No. 186 Board of Education, Meeting, March 5, 2013, available at <http://www.sps186.org/channel22/?p=56081&i=329199>, last visited May 21, 2013.

⁹Springfield Public School District No. 186 Board of Education, Meeting, March 5, 2013, available at <http://www.sps186.org/channel22/?p=56081&i=329199>, last visited May 21, 2013.

Ms. Molly Beck
Mr. Chuck Flamini
May 21, 2013
Page 4

which included a \$177,796.97 lump sum payment to Dr. Milton,¹⁰ or the reasons that led to the parties' agreement to terminate Dr. Milton's employment.

The Board's response to the allegations in the Request for Review asserts that a confidentiality provision in the separation agreement prohibited either party from publicly discussing the agreement, and that counsel for the Board advised it not to do so: "In response to questions from Board members about what they could say to the public, Cross [Board Counsel] can be heard advising that even though the Agreement 'will be voted on in public' Board members were bound by the Agreement not to discuss its terms."¹¹ The Board's response further states that there "is a definite distinction between the Board members individually discussing the Agreement's terms and the Board voting on it in public. The Agreement prohibits the first; the Board always understood and complied with the requirement of the second."¹²

On March 25, 2013, this office forwarded a copy of the Board's Response to Ms. Beck, with confidential information redacted pursuant to section 3.5(c) of OMA (5 ILCS 120/3.5(c) (West 2010));¹³ she did not reply.

On April 16, 2013, this office properly extended the time to issue a binding opinion by 21 business days pursuant to section 3.5(e) of OMA.¹⁴

On April 25, 2013, this office again requested from the Board copies of the minutes of the closed sessions in which the separation agreement was discussed.¹⁵ On April 30, 2013, the Board, through its attorney, provided minutes of the January 7, 2013, January 22, 2013,

¹⁰Separation Agreement and Release between Dr. Walter J. Milton, Superintendent, and Board of Education, Springfield School District No. 186, par. 3 (January 31, 2013).

¹¹Letter from Ms. Lorilea Buerkett, Brown, Hay & Stephens, LLP to Steve Silverman, Assistant Attorney General, Public Access Bureau (March 22, 2013).

¹²Letter from Ms. Lorilea Buerkett, Brown, Hay & Stephens, LLP to Steve Silverman, Assistant Attorney General, Public Access Bureau (March 22, 2013).

¹³Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Molly Beck, Education Reporter, *The State Journal-Register* (March 25, 2013).

¹⁴Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Lorilea Buerkett, Brown, Hay & Stephens, LLP, and Susan White, President, Board of Education, Springfield School District No. 186, *The State Journal-Register* (April 16, 2013).

¹⁵E-mail from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Attorney General to Lorilea Buerkett (April 25, 2013).

Ms. Molly Beck
Mr. Chuck Flamini
May 21, 2013
Page 5

and February 4, 2013, meetings;¹⁶ the Board provided the remaining minutes on May 8, 2013, together with a supplemental response to the Public Access Counselor's inquiry.¹⁷ On May 8, 2013, this office forwarded Ms. Beck a copy of that supplemental response with confidential information redacted pursuant to section 3.5(c) of OMA;¹⁸ she did not reply.

ANALYSIS

Section 2 of OMA (5 ILCS 120/2 (West 2011 Supp.), as amended by Public Acts 97-813, effective July 13, 2012; 97-876, effective August 1, 2012) 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." Section 2(c)(1) of OMA permits a public body to hold a closed meeting to discuss the "appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body[.]"

This office has reviewed copies of the available closed session recordings and a confidential affidavit that describes the discussion at the Board's February 4, 2013, closed session. To the extent that the Board's discussions directly concerned Dr. Milton's employment and compensation,¹⁹ those discussions were properly closed to the public pursuant to section 2(c)(1) of FOIA. The remaining issues are whether the Board improperly took final action by signing the agreement during its February 4, 2013, closed session, and, if not, whether the Board adequately informed the public of the nature of the matter under consideration before recording a vote to approve the agreement during its March 5, 2013, meeting.

Citing *Grissom v. Board of Ed. of Buckley-Loda Community School Dist. No. 8*, 75 Ill. 2d 314 (1979), and *Jewell v. Board of Ed., DuQuoin Community Unit Schools, Dist. No. 300*, 19 Ill. App. 3d 1091 (5th Dist. 1974), the Board asserts that OMA permits a public body to deliberate and sign a decision in closed session provided that the public body votes to approve the decision in open session.

¹⁶Letter from Lorilea Buerkett, Brown, Hay & Stephens, LLP, to Steve Silverman, Assistant Attorney General, Public Access Bureau (April 30, 2013).

¹⁷Letter from Lorilea Buerkett, Brown, Hay & Stephens, LLP, to Steve Silverman, Assistant Attorney General, Public Access Bureau (May 8, 2013).

¹⁸Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Molly Beck, Education Reporter, *The State Journal-Register* (May 8, 2013).

¹⁹The Board also discussed topics related to the appointment of an interim superintendent during those closed sessions. Those discussions are the subject of a pending Request for Review, 2013 PAC 23604.

Ms. Molly Beck
Mr. Chuck Flamini
May 21, 2013
Page 6

In *Jewell*, the court considered whether a school board violated section 2 of OMA by holding a closed meeting in which board members were polled and unanimously agreed to dismiss a teacher, and then prepared a motion to do so. *Jewell*, 19 Ill. App. 3d at 1092. That motion was read in open session and approved by a roll call vote. *Jewell*, 19 Ill. App. 3d at 1092. The court held that the Board did not violate the statute by taking the first vote in closed session, emphasizing that "the crucial fact is that the final vote was taken at an open session." *Jewell*, 19 Ill. App. 3d at 1095.

Similarly, in *Grissom* the court cited *Jewell* in holding that a school board did not violate OMA by compiling and signing its findings concerning a dismissal in closed session because the school board reconvened in open session where each board member publicly identified his vote on the dismissal by acknowledging his signature on the findings. *Grissom*, 75 Ill. 2d at 327. Both of these decisions, however, interpreted an earlier, different version of section 2 of OMA (Ill. Rev. Stat. 1971, ch. 102, par. 42; Ill. Rev. Stat. 1973, ch. 102, par. 42), which at the time stated:

This Section does not prevent any body covered by this Act from holding closed sessions to consider information regarding appointment, employment or dismissal of an employee or officer or to hear testimony on a complaint lodged against an employee or officer to determine its validity, but no final action may be taken at a closed session.

In 1989, however, the General Assembly amended section 2 of OMA (*see* Public Act 85-1355, effective January 1, 1989) to require that "[a]ll final action taken at an open session shall be preceded by a public recital of the nature of the matter being considered and such other information as would inform the public of the business being conducted." According to its sponsor, the amendment "provides a re-definition of the word 'final action.' * * * This clarifies it." Remarks by Senator Philip, June 22, 1988, Third Reading of House Bill 2004 (which as Public Act 85-1355, effective January 1, 1989, enacted the provision in question), at 201. Section 2(e) in the current version of OMA is substantively identical to the 1989 version: "No 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."

Thus, after the *Jewell* and *Grissom* decisions upon which the Board relies, the General Assembly amended OMA to expressly require public bodies to inform the public of the nature of matters under consideration and the business being conducted *before* taking final action. This requirement effectively prohibits a public body from taking final action in a closed session and then ratifying it in an open session, which is essentially what took place here.

Ms. Molly Beck
Mr. Chuck Flamini
May 21, 2013
Page 7

Six of the seven Board members present signed the separation agreement at the February 4, 2013, closed session – one of the Board members refused to sign. This was not a "straw vote" taken merely to gain a sense of the support or opposition to a proposed action.²⁰ To the contrary, the Board's approval of the agreement was completed during the closed session as witnessed by the signatures of the several Board members. The Board's subsequent vote to approve that agreement during the open session of its March 5, 2013, meeting merely reiterated the decision that already had been finalized in written form and signed by both parties.

Moreover, at the March 5, 2013, meeting, the Board described the nature of the matter under consideration only in vague, general terms by calling for a vote on a motion to approve the separation agreement with Dr. Milton. The public was given no specific information concerning the separation agreement or its terms. In particular, the public was not informed that the separation agreement included a substantial lump sum payment of public funds.

The Board appears to contend that the confidentiality provision in the separation agreement with Dr. Milton precluded it from publicly discussing or describing the agreement. The Separation Agreement and Release's confidentiality provision, however, restricts the disclosure of information "except * * * as required by applicable law[.]"²¹ Section 1.2 of FOIA (5 ILCS 140/1.2 (West 2010)), states that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." Under section 1.2, the school district generally was required to make the separation agreement available to the public (*see* Ill. Att'y Gen. Pub. Acc. Op. No. 12-006, issued March 16, 2012.), and did, in fact, provide a copy to Ms. Beck. In addition, section 2.5 of FOIA (5 ILCS 140/2.5 (West 2010)) provides that "[a]ll records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public. Consequently, the separation agreement did not preclude the Board's discussing or describing the agreement prior to a vote in open session.

²⁰*See* Ill. Att'y Gen. Pub. Acc. Op. No. 13-006, issued May 13, 2013, for a discussion on the propriety of secret ballots and "straw votes" by public bodies and Ill. Att'y Gen. Pub. Acc. Op. No. 13-003, issued April 23, 2013, regarding the prohibition on taking final action at a closed session.

²¹*See* Settlement Agreement and Release between Dr. Walter J. Milton, Superintendent, and Board of Education, Springfield School District No. 186, par. 14 (January 31, 2013).

Ms. Molly Beck
Mr. Chuck Flamini
May 21, 2013
Page 8

Accordingly, this office concludes that the Board violated section 2(e) of OMA by taking final action on the separation agreement in closed session on February 4, 2013. Even assuming, *arguendo*, that the Board could cure its violation by voting to approve the agreement during the March 5, 2013, open session, that action was not valid because the Board failed to adequately inform the public of the nature of the matter under consideration prior to its vote.

We further conclude that the Board violated section 2.06(a) of OMA (5 ILCS 120/2.06(a) (West 2010)) by failing to create and maintain a verbatim recording of its January 7, 2013, January 22, 2013, and February 4, 2013, closed session. Section 2.06(a) provides that "[a]ll public bodies shall keep * * * a verbatim record of all their closed meetings in the form of an audio or video recording[.]" Additionally, the Board's minutes of its January 7, 2013, January 22, 2013, February 4, 2013, February 18, 2013, and February 25, 2013, closed sessions²² during which the Board discussed the separation agreement do not comply with the requirements of section 2.06(e)(3) of OMA (5 ILCS 120/2.06(e)(3) (West 2010)), which requires that all written meeting minutes include a "summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken."²³ These minutes merely state Dr. Milton's name or vaguely reference a personnel matter rather than summarizing any discussion concerning his employment and the separation agreement. Consequently, there appears to be no recording or documentation detailing the actions by the Board in approving the separation agreement on February 4, 2013.

²²The Board also discussed the separation agreement during its November 5, 2012, November 19, 2012, December 3, 2012, December 12, 2012, and December 17, 2012, closed sessions. Because those meetings occurred more than 60 days before Ms. Beck filed this Request for Review, this office makes no determination as to whether the closed session minutes of those meetings complied with section 2.06(e)(3) of OMA. See 5 ILCS 120/3.5(a) (West 2010)) ("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 established in the Office of the Attorney General not later than 60 days after the alleged violation.").

²³Springfield Public School District 186 Board of Education, Minutes of January 7, 2013 Executive Session Meeting (undated); Springfield Public School District 186 Board of Education, Minutes of January 22, 2013 Executive Session Meeting (undated); Springfield Public School District 186 Board of Education, Minutes of February 4, 2013 Executive Session Meeting (undated); Springfield Public School District 186 Board of Education, Minutes of February 18, 2013 Executive Session Meeting (undated); Springfield Public School District 186 Board of Education, Minutes of February 25, 2013 Executive Session Meeting (undated).

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the arguments of the parties, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On November 5, 2012, the Springfield Public School District No. 186 Board of Education held a closed session under section 2(c)(1) of OMA to discuss the possibility of entering into an employment separation agreement with Superintendent Dr. Walter Milton, Jr. The Board also discussed the agreement during meetings closed pursuant to section 2(c)(1) on November 19, 2012, December 3, 2012, December 12, 2012, December 17, 2012, January 7, 2013, January 22, 2013, February 4, 2013, February 18, 2013, and February 25, 2013.

2) On January 31, 2013, Dr. Milton signed a negotiated separation agreement; six of the seven Board members subsequently signed the agreement during a closed session on February 4, 2013.

3) On February 21, 2013, Ms. Molly Beck submitted a Request for Review to the Public Access Counselor alleging that the Board violated OMA by signing the separation agreement without publicly voting to approve it. Ms. Beck's Request for Review was timely filed and otherwise complies with the requirements of section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2010)). The Public Access Counselor extended the time to issue a binding opinion by 21 business days. Therefore, the Attorney General may properly issue a binding opinion with respect to Ms. Beck's Request for Review.

4) On February 28, 2013, the Public Access Bureau forwarded a copy of the Request for Review to the Board and asked it to respond to Ms. Beck's allegation and also to provide copies of the agenda and meeting minutes of any meeting in which the Board discussed the separation agreement; the Public Access Bureau also requested copies of the verbatim closed session recordings and minutes of any closed session discussion of the separation agreement.

5) The Board voted to approve the separation agreement during the open session portion of its March 5, 2013, meeting. The Board did not inform the public of the reasons for the separation agreement or its terms before voting.

6) On March 22, 2013, the Board responded to the Public Access Bureau's inquiry and provided several verbatim recordings of portions of closed sessions in which the

Ms. Molly Beck
Mr. Chuck Flamini
May 21, 2013
Page 10

Board discussed the separation agreement. However, the Board's response stated that its attempts to record its closed sessions on January 7, 2013, January 22, 2013, and February 4, 2013, failed, except for a 40-second segment of the February 4, 2013, meeting.

7) On April 30, 2013, and May 8, 2013, the Board provided the Public Access Bureau with copies of the minutes of the closed sessions in which the Board discussed the separation agreement.

8) The Attorney General finds that the Board did not violate OMA by discussing Dr. Milton's employment and the proposed separation agreement in meetings closed to the public pursuant to section 2(c)(1) of OMA. The signing of the separation agreement by six of the Board's seven members during the February 4, 2013, closed session, however, did constitute the taking of final action in violation of section 2(e) of OMA.

9) Assuming, *arguendo*, that the Board could have effectively ratified its improper final action by voting on the separation agreement at a properly noticed open meeting, the Board would nonetheless have violated section 2(e) of OMA by voting to approve the separation agreement at its March 5, 2013, meeting, because it failed to adequately inform the public of the nature of the matter under consideration or the business being conducted.

10) By failing to create and maintain verbatim recordings of the January 7, 2013, January 22, 2013, February 4, 2013, closed sessions, the Board violated section 2.06(a) of OMA.

11) By failing to summarize the discussions concerning the separation agreement in the minutes of its January 7, 2013, January 22, 2013, February 4, 2013, February 18, 2013, and February 25, 2013, closed meetings, the Board violated section 2.06(e)(3) of OMA.

In accordance with these findings of fact and conclusions of law, the Board is directed to: 1) compile and release to Ms. Beck and make available for inspection and copying a summary of the discussion during the February 4, 2013, closed session at which the Board improperly took final action by signing the separation agreement; 2) ensure that all future closed session discussions are properly recorded and that the minutes of closed sessions contain appropriate summaries of those discussions; and 3) conduct its future meetings in full compliance with OMA. As required by section 3.5(e) of OMA, the Board shall either take necessary action as soon as practical to comply with the directives of this opinion or shall initiate administrative review under section 7.5 of OMA (5 ILCS 120/7.5 (West 2010)).

This opinion shall be considered a final decision of an administrative agency for

Ms. Molly Beck
Mr. Chuck Flamini
May 21, 2013
Page 11

the purpose of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2010). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision, naming the Attorney General of Illinois and Ms. Molly Beck as defendants. *See* 5 ILCS 120/7.5 (West 2010).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
Counsel to the Attorney General

23488 rfr o vio sd

cc: Ms. Lorilea Buerkett
Brown, Hay & Stephens, LLP
205 South Fifth Street
Suite 700
P.O. Box 2459
Springfield, Illinois 62705