



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 4, 2013

PUBLIC ACCESS OPINION 13-010
(Request for Review 2013 PAC 23604)

OPEN MEETINGS ACT:
Requirement to Publicly Recite Nature of Matter
Being Considered and Other Information to
Adequately Inform the Public of the Business
Being Conducted Before Taking Final Action

Ms. Molly Beck, Education Reporter
The State Journal-Register
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Springfield, Illinois 62705

Mr. Chuck Flamini
President, Board of Education
Springfield Public School District No. 186
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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): 1) did not take final action in a closed session to appoint an interim superintendent; and 2) complied with the requirements of 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 adequately informing the public of the nature of the business being conducted before voting to appoint the interim superintendent in an open meeting.

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BACKGROUND

On March 4, 2013, Ms. Molly Beck submitted a Request for Review on behalf of *The State Journal-Register* stating that on February 25, 2013, the Board held a special meeting that included a closed session concerning the appointment of an interim superintendent, and then issued a press release the next day naming Mr. Robert Leming as the Board's selection. The Request for Review alleged that the Board violated OMA by appointing an interim superintendent without holding a public vote.¹

On March 8, 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 to the allegation in the Request for Review which clarifies whether the Board selected an interim superintendent during its February 25, 2013, special meeting or at any other time. If an interim superintendent was selected, please describe how the selection was made and indicate whether the Board held any public discussion and/or vote concerning the selection. Please also provide copies of the agenda, open session and closed session minutes, and the verbatim recording of the closed session discussion for the February 25, 2013, special meeting.²

On March 22, 2013, through its attorney, the Board confirmed that it had held closed session discussions concerning the selection of an interim superintendent and a related separation agreement with the District's Superintendent, Dr. Walter Milton, Jr., 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).³ The Board's response included several verbatim recordings of closed session discussions, including the closed sessions of its

¹E-mail from Molly Beck, Education Reporter, *State Journal-Register*, to Public Access Counselor (March 4, 2013).

²Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Susan White, President, Board of Education, Springfield Public Schools, District 186 (March 8, 2013).

³Letter from Ms. Lorilea Buerkett, Brown, Hay & Stephens, LLP, to Steve Silverman, Assistant Attorney General, Public Access Bureau (March 22, 2013).

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February 18, 2013, and February 25, 2013, meetings.⁴ The Board's response further stated, in relevant part:

Beginning in earnest on February 4, 2013, after the Board had completed deliberations on the issue of Dr. Milton's employment, the members undertook discussion of interim and successor superintendents. * * * The Board considered the appointment of Mr. Leming or a successor superintendent at these sessions, and there is no violation of the Act because final action was taken publicly.⁵

The response also asserted that the Board held a "robust" public discussion before voting to approve Mr. Leming's appointment during its March 5, 2013, meeting.⁶

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));⁷ she did not reply. On May 2, 2013, this office properly extended the time to issue a binding opinion by 21 business days pursuant to section 3.5(e) of OMA.⁸

ANALYSIS

Section 2(a) 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

⁴The Board issued a consolidated response to the Public Access Bureau's inquiry concerning this matter and a related Request for Review (2013 PAC 23488) concerning the Superintendent's separation agreement. See Ill. Att'y Gen. Pub. Acc. Op. No. 13-007, issued May 21, 2013.

⁵Letter from Lorilea Buerkett, Brown, Hay & Stephens, LLP, to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 7 (March 22, 2013).

⁶Letter from Lorilea Buerkett, Brown, Hay & Stephens, LLP, to Steve Silverman, Assistant Attorney General, Public Access Bureau, at 4 (March 22, 2013).

⁷Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Molly Beck, Education Reporter, *The State Journal-Register* (March 25, 2013).

⁸Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, to Molly Beck, Education Reporter, *The State Journal-Register*, Lorilea Buerkett, Brown, Hay & Stephens, LLP, and Susan White, President, Board of Education, Springfield Public Schools, District 186 (May 2, 2013).

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dismissal of specific employees of the public body or legal counsel for the public body[.]"
However, section 2(e) of OMA provides: "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."

This office has reviewed copies of the available closed session recordings. To the extent that the Board directly discussed Mr. Leming's appointment as interim superintendent, those discussions were properly closed to the public pursuant to section 2(c)(1) of OMA. The remaining issues are whether the Board improperly took final action during a closed portion of a meeting, and, if not, whether the Board adequately informed the public of the nature of the matter under consideration before voting to appoint Mr. Leming.

In *People v. Board of Ed. of Dist. 170 of Lee and Ogle Counties*, 40 Ill. App. 3d 819 (2nd Dist. 1976), the Illinois Appellate Court considered whether a school board violated OMA by holding a "general discussion" and reaching a "tentative consensus" during a closed session concerning employee retention and salaries of non-union employees while collective bargaining negotiations were pending with its teachers' union. The school board subsequently approved a collective bargaining agreement with its teachers' union and employment contracts with non-union employees during open meetings. *Board of Ed.*, 40 Ill. App. 3d at 821. The court emphasized that because the school board was awaiting the teachers' union's response to a contract offer that could have a significant impact on the school district's budget, the school board lacked sufficient information to make a final decision about non-union employees at the time of the closed session. *Board of Ed.*, 40 Ill. App. 3d at 822-23. Accordingly, the court held that the school board did not take final action by generally discussing and reaching a tentative consensus on the retention and salaries of non-union employees in closed session. *Board of Ed.*, 40 Ill. App. 3d at 823.

In *Gosnell v. Hogan*, 179 Ill. App. 3d 161 (5th Dist. 1989), the Appellate Court ruled that a school board did not take final action in closed session by choosing to pursue mediation of a contract negotiation with an employees' union. Instead, the court concluded that "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." *Gosnell*, 179 Ill. App. 3d at 176. Thus, under the reasoning in *Gosnell*, a public body's individual strategic choices during a decision-making process do not constitute final action under OMA. *See Gosnell*, 179 Ill. App. 3d at 176.

While both of these decisions interpreted earlier, different versions of section 2 of OMA (Ill. Rev. Stat. 1973, ch. 102, par. 42; Ill. Rev. Stat. 1987, ch. 102, par. 42) those versions included the language retained by the current version of section 2(e) stating that "no final action may be taken at a closed session." In 1989, the General Assembly amended section 2 of OMA

(see Public Act 85-1355, effective January 1, 1989) to specifically 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 Sen. Philip, June 22, 1988, Senate Debate on House Bill No. 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.

Thus, the General Assembly maintained the prohibition against public bodies taking final action in closed session which was at issue in the *Board of Ed. and Gosnell* decisions, while amending 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 in open session. This requirement effectively prohibits a public body from reaching a final decision in closed session, and then ratifying that decision in an open session.

The Board's response to this office acknowledged that it discussed the interim superintendent position during its February 4, 2013, closed session, but stated that its efforts to record that portion of the meeting failed except for a 40-second segment; the closed session minutes⁹ of that meeting contain no summary of the discussion.¹⁰ The Board, however, did provide the Public Access Bureau with copies of the verbatim recordings of the closed session portions of its February 18, 2013, and February 25, 2013, meetings. During the February 18, 2013, closed session, the Board voted to authorize its attorney to ask Mr. Leming whether he would consider serving as interim superintendent. Notably, one Board member indicated that Board members could continue to suggest additional candidates for interim superintendent after the vote.¹¹ On February 25, 2013, the Board interviewed Mr. Leming in the closed portion of its meeting to discuss his background and experience, potential role as interim superintendent, and the duration of the job and the rate of pay. The Board also informally agreed to issue a press

⁹Springfield Public School District No. 186 Board of Education, Meeting, February 4, 2013, Closed Session Minutes I.

¹⁰In Ill. Att'y Gen. Pub. Acc. Op. No. 13-007, issued May 21, 2013, the Attorney General determined that the Board violated section 2.06(a) of OMA (5 ILCS 120/2.06(a) (West 2011 Supp.)) by failing to create a verbatim recording of the closed session portions of its January 7, 2013, January 22, 2013, and February 4, 2013, meetings. The Attorney General also concluded that the Board violated section 2.06(e)(3) of OMA (5 ILCS 120/2.06(e)(3) (West 2011 Supp.)) by failing to include summaries of discussions in several closed session meeting minutes, including the minutes of the February 4, 2013, closed session. Therefore, it is unnecessary for this office to address the same violations in this binding opinion.

¹¹Springfield Public School District No. 186 Board of Education, Meeting, February 18, 2013, (Audio CD of Closed Session).

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release to notify the public that the Board intended to vote on the appointment of an interim superintendent at its March 5, 2013, meeting.¹² The Board issued a press release, dated February 27, 2013, stating that the Board had "reached a consensus" and "plans to take formal action naming" Mr. Leming interim superintendent at its March 5, 2013, meeting.¹³

Although this press release stated that the Board had reached a consensus to appoint Mr. Leming, the verbatim recordings of the February 18, 2013, and February 25, 2013, closed sessions show that the Board did not make a final decision to do so. Instead, the Board took only preliminary steps by authorizing its attorney to gauge Mr. Leming's interest in the interim superintendent position and by agreeing to put a resolution concerning his appointment on the agenda for the March 5, 2013, meeting. However, the Board neither voted, nor informally agreed in closed session to appoint Mr. Leming. The Board's decision to put that resolution on the agenda constituted, at most, recognition that a consensus existed. Therefore, because the Board did not take final action in a closed session, it did not violate section 2(e) of OMA.

Further, a recording of the March 5, 2013, meeting posted on the Board's website and referenced in its response to this office shows that the Board substantively described and publicly discussed Mr. Leming's appointment before voting to approve it. The agenda for the meeting included an item entitled "Approval of a Resolution Regarding the Interim Superintendent."¹⁴ The motion publicly recited at the meeting stated:

The President of the Board of Education of District 186 recommends that the Board of Education vote to name Robert Leming as Interim Superintendent from April 1, 2013, through June 30, 2013, at a salary of \$750 per day with a written contract to be approved at a later date.¹⁵

After the motion was seconded, a Board member initiated a discussion of Mr. Leming's salary and questioned how many days he was eligible to work under Teacher

¹²Springfield Public School District No. 186 Board of Education, Meeting, February 25, 2013, (Audio CD of Closed Session).

¹³Press Release, Springfield Public School District No. 186 Board of Education (February 27, 2013), available at <http://www.sps186.org/communications/?p=7672&i=168796>, last visited May 28, 2013.

¹⁴Springfield Public School District No. 186 Board of Education, Meeting Agenda Item 9.2 (March 5, 2013).

¹⁵Springfield 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 29, 2013.

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Retirement System guidelines: "It's only fair the public have these answers * * * I think the public is entitled to know these things."¹⁶ Mr. Leming responded to questions on those issues, and a Board member indicated that the interim superintendent's salary is based on the salaries of other superintendents and the District's financial condition. Another Board member asked Mr. Leming whether he perceived his role to include recommending the elimination of employment positions. After Mr. Leming described his perception of the role of interim superintendent in personnel and other matters, the Board voted to approve his appointment by a vote of 6-0, with one Board member voting "present."¹⁷ The Board's recital of the motion, discussion of the resolution, and vote to approve Mr. Leming's appointment spanned more than 15 minutes.¹⁸

The recording of the March 5, 2013, Board meeting demonstrates that the Board adequately informed the public of the nature of its proposed action, including discussing the salary and duration of Mr. Leming's employment, as well as his duties and responsibilities as interim superintendent, before voting to approve his appointment. Accordingly, this office concludes that the Board complied with the requirements of section 2(c) of OMA in appointing Mr. Leming as interim superintendent at its March 5, 2013, meeting.

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 February 4, 2013, February 18, 2013, and February 25, 2013, the Springfield Public School District No. 186 Board discussed the appointment of an interim superintendent in sessions closed pursuant to section 2(c)(1) of OMA.
- 2) On February 18, 2013, the Board voted in closed session to authorize its attorney to ask Mr. Robert Leming whether he would consider serving as interim superintendent.

¹⁶Springfield 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 29, 2013.

¹⁷Springfield Public School District No. 186 Board of Education, Meeting, March 5, 2013, Minutes 9.

¹⁸Springfield 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 29, 2013.

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3) On February 25, 2013, the Board informally agreed in closed session to include a resolution concerning Mr. Leming's appointment on the agenda of its March 5, 2013, meeting; the Board also informally agreed to issue a press release to inform the public that it intended to vote on the appointment during that meeting.

4) On February 27, 2013, the Board issued a press release stating that it "reached a consensus" and planned to "take formal action naming" Mr. Leming interim superintendent at its March 5, 2013, meeting.

5) On March 4, 2013, Ms. Molly Beck submitted a Request for Review to the Public Access Counselor alleging that the Board violated OMA by selecting Mr. Leming as interim superintendent without holding a public vote to approve his appointment. 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.

6) The Board voted to appoint Mr. Leming interim superintendent during the open session portion of its March 5, 2013, meeting.

7) On March 8, 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, open session and closed session minutes, and the verbatim recording of the closed session discussion for the February 25, 2013, meeting.

8) On March 22, 2013, the Board responded to the Public Access Bureau's inquiry and provided verbatim recordings of portions of closed meetings on February 18, 2013, and February 25, 2013.

9) The Attorney General finds that the Board did not violate section 2(e) of OMA by discussing Mr. Leming's possible appointment as interim superintendent during sessions which were closed to the public pursuant to section 2(c)(1) of OMA. Further, the Attorney General finds that the Board did not take final action to appoint Mr. Leming in a closed meeting.

10) Before voting to appoint Mr. Leming as the interim superintendent during its March 5, 2013, meeting, the Board complied with the requirements of section 2(e) of OMA by publicly reciting the nature of the matter under consideration and informing the public of the business being conducted.

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This opinion shall be considered a final decision of an administrative agency for 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 Springfield Public School District No. 186 as defendants. *See* 5 ILCS 120/7.5 (West 2010).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
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