



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 21, 2017

PUBLIC ACCESS OPINION 17-013
(Request for Review 2017 PAC 49332)

OPEN MEETINGS ACT:
Discussion of the Conduct of a
Public Body Member in Closed Session

Pastor Marvin Hightower
President
Peoria NAACP
P.O. Box 6002
Peoria, Illinois 61601

The Honorable Carl Bishop
Mayor
Village of Mapleton
8524 West Main Street
Mapleton, Illinois 61547

Dear Pastor Hightower and Mayor Bishop:

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 2016)). For the reasons discussed below, this office concludes that the Board of Trustees of the Village of Mapleton (Board) violated section 2(a) of OMA (5 ILCS 120/2(a) (West 2016)) at its August 8, 2017, meeting. Specifically, the information provided by the Board indicates that it voted to enter closed session pursuant to the exception in section 2(c)(4) of OMA (5 ILCS 120/2(c)(4) (West 2016)), which allows closed session discussion of certain evidence or testimony. In this instance, however, the Board's closed session discussion was outside the scope of that exception or any other exception.

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BACKGROUND

In a letter dated August 18, 2017, and electronically submitted to the Attorney General's Public Access Bureau on August 22, 2017, Pastor Marvin Hightower, on behalf of the Peoria, Illinois branch of the National Association for the Advancement of Colored People, submitted a Request for Review to the Public Access Counselor alleging violations of OMA during the Board's August 8, 2017, meeting.¹ The Request for Review stated, as background, that "the Village had been facing backlash over racist comments made by a Village Board Member * * * during a May meeting."² The Request for Review alleged that the agenda for the August 8, 2017, meeting identified a resolution concerning the Board member's comments as an item for discussion, but rather than discussing the comments publicly, the Board entered closed session for this discussion.³ The Request for Review further alleged that the Board improperly cited the section 2(c)(1) exception (5 ILCS 120/2(c)(1) (West 2016)) to the general requirement that public bodies conduct public business openly as its basis for closing the meeting.⁴ The Request for Review also argued that, even though the Board did not cite section 2(c)(3) of OMA (5 ILCS 120/2(c)(3) (West 2016)) when voting to enter closed session, the closed session discussion would not have been permissible under that exception because the Board is not authorized by law or ordinance to remove the Board member from office.⁵

On September 5, 2017, the Public Access Bureau sent a copy of the Request for Review to the Village's mayor and requested copies of the open and closed session minutes (in draft form, if necessary) and the verbatim recording of the closed session portion of the Board's

¹Letter from Pastor Marvin Hightower, President[,] Peoria NAACP, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (dated August 18, 2017, and transmitted to the Public Access Bureau via e-mail on August 22, 2017).

²Letter from Pastor Marvin Hightower, President[,] Peoria NAACP, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (dated August 18, 2017, and transmitted to the Public Access Bureau via e-mail on August 22, 2017), at 1.

³Village of Mapleton, Board Meeting, Agenda Item X.M/ Resolution 2017-08-8-02 Condemning Comments Made by a Board Member (Mayor) (August 8, 2017). See http://www.mapletonillinois.com/uploads/1/6/6/9/16699010/agenda_august_8_2017_-_final.pdf (last visited November 15, 2017).

⁴Letter from Pastor Marvin Hightower, President[,] Peoria NAACP, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (dated August 18, 2017, and transmitted to the Public Access Bureau via e-mail on August 22, 2017).

⁵Letter from Pastor Marvin Hightower, President[,] Peoria NAACP, to Sarah Pratt, Public Access Counselor, Office of the Attorney General (dated August 18, 2017, and transmitted to the Public Access Bureau via e-mail on August 22, 2017).

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August 8, 2017, meeting for this office's confidential review.⁶ This office also requested a written response identifying the exception in section 2(c) of OMA (5 ILCS 120/2(c) (West 2016)) that the Board cited as its basis for closing the meeting, and an explanation of how that exception applied to the Board's closed session discussion.

On September 26, 2017, the Village clerk sent this office a copy of the verbatim recording of the closed session as well as a draft version of the closed session minutes.⁷ In a follow-up e-mail on the same day, the Village clerk furnished a copy of the draft version of the open session minutes.⁸ The Village did not, however, provide a written response. On September 26, 2017, an Assistant Attorney General (AAG) in the Public Access Bureau asked the Village clerk to provide a written response identifying the exception under which the Board entered closed session.⁹ This office, however, has not received a written response from the Board or its attorney.¹⁰ Under OMA, "the public body may, but is not required to, answer the allegations of the request for review." 5 ILCS 120/3.5(c) (West 2016). Because the Board was not required to provide a written response to the allegations, it fulfilled the procedural requirements of section 3.5(c) of OMA by furnishing copies of the verbatim recording and draft minutes, as requested by this office. 5 ILCS 120/3.5(c) (West 2016).

On October 20, 2017, this office extended the time within which to issue a binding opinion by 21 business days, to November 21, 2017, pursuant to section 3.5(e) of OMA.¹¹

⁶Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to The Honorable Carl Bishop, Mayor, Village of Mapleton (September 5, 2017), at 2.

⁷E-mail from Pat Briggs, Clerk, Village of Mapleton, to Steven Silverman (September 26, 2017, 10:56 a.m.).

⁸E-mail from Pat Briggs, Clerk, Village of Mapleton, to Steven Silverman (September 26, 2017, 12:48 p.m.).

⁹E-mail from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to [Pat] Briggs (September 26, 2017).

¹⁰On September 26, 2016, AAG Steve Silverman also spoke with Village Trustee Mark Brining, who stated that the Village had hired an attorney who might provide a written response. In a telephone conversation with AAG Silverman on October 5, 2017, the Village's mayor, Carl Bishop, also referred this office to the Village's attorney for a response. The Village's attorney, Erik Gibson, told AAG Silverman during an October 25, 2017, telephone conversation that he would provide a written response on behalf of the Board. On November 17, 2017, Mr. Gibson left a voice mail for AAG Silverman stating that he was still gathering information for the response.

¹¹Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Pastor Marvin Hightower, Liberty Church of Peoria, President, Peoria NAACP, and The Honorable Carl Bishop, Mayor, Village of Mapleton (October 20, 2017).

ANALYSIS

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2016). Section 2(a) of OMA 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." Those "exceptions * * * are in derogation of the requirement that public bodies meet in the open, and therefore, the exceptions are to be strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2016). If a public body votes to enter closed session, "a citation to the specific exception contained in Section 2 of this Act which authorizes the closing of the meeting to the public shall be publicly disclosed at the time of the vote and shall be recorded and entered into the minutes of the meeting." 5 ILCS 120/2a (West 2016).

Sections 2(c)(1) and 2(c)(3) of OMA

Although Pastor Hightower alleged in his Request for Review that the Board publicly cited and identified section 2(c)(1) of OMA as its basis for entering closed session, there is no indication from the materials provided by the Board that it did so. The section 2(c)(1) exception is limited to discussing the "appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body[.]" Because elected members of a Village Board are occupants of a public office, not "employees" of public bodies, section 2(c)(1) would not have provided a basis for the Board to close a meeting to discuss the conduct of a Board member.¹²

In his Request for Review, Pastor Hightower also discussed section 2(c)(3) of OMA and argued that it does not apply to the Board's August 8, 2017, closed session. Section 2(c)(3) of OMA permits discussion of the "discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance." It is undisputed that the Board did not publicly cite section 2(c)(3) of OMA as its basis for entering closed session in this case. Even assuming that the Board had cited section 2(c)(3) as its basis for entering closed session, this exception would apply and allow a closed session discussion relating to the Board member's comments only if the Board possessed the authority to remove the Board member under law or ordinance. There is no indication, however, that any law or ordinance authorizes the Board to remove one of its members from office. To the

¹²Section 2(d) of OMA (5 ILCS 120/2(d) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017) defines the term "public office" as a position created by or under the Constitution or laws of this State, the occupant of which is charged with the exercise of some portion of the sovereign power of this State. The term "public office" *shall include members of the public body[.]*" (Emphasis added.)

contrary, section 3.1-55-15 of the Illinois Municipal Code (65 ILCS 3.1-55-15 (West 2016)) authorizes the court and not the Board to remove a municipal officer from office and provides:

Misconduct. Every municipal officer who is guilty of a culpable omission of duty, or who is guilty of willful and corrupt oppression, malconduct, or misfeasance in the discharge of the duties of office, shall be guilty of a business offense and, on conviction, shall be fined not less than \$501 nor more than \$1,000.
The court entering the conviction shall enter an order removing the convicted officer from office. (Emphasis added.)

Further, section 3.1-10-50 of the Illinois Municipal Code (65 ILCS 5/3.1-10-50 (West 2016)) sets out those events for which a vacancy is created in an elective office in a municipality which, like the Village of Mapleton, has a population of less than 500,000. None of the events in that section of the Municipal Code would apply to the circumstances involved here.

Section 2(c)(4) of OMA

All of the information submitted to this office by the Board, as well as other information posted on the Village's website, indicates that the Board cited section 2(c)(4) of OMA as the basis for the closed session at its August 8, 2017, meeting. The draft minutes of the open session portion of the Board's August 8, 2017, meeting indicate that the Board voted to go into closed session to discuss the comments at issue.¹³ Further, the agenda for the August 8, 2017, meeting provides, in pertinent part:

- XI. Closed Session (if needed) citing exception Section 2 (c) (4) of the Open Meeting Act --** Testimony presented regarding item [M] on the agenda (Emphasis in original.)^{14]}

The draft minutes of the closed session also indicate that the Board closed the meeting pursuant to section 2(c)(4) of OMA, which permits a public body to enter closed session to discuss "[e]vidence or testimony presented in open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body, as defined in this Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning." Under OMA, a "quasi-adjudicative body" is "an administrative body charged by law or ordinance with the responsibility to conduct hearings, receive evidence or

7. ¹³Village of Mapleton, Board of Trustees, Draft Meeting Minutes, Item X(M), August 8, 2017, at

¹⁴Village of Mapleton, Board Meeting Agenda, August 8, 2017.

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testimony and make determinations based thereon, but does not include local electoral boards when such bodies are considering petition challenges." 5 ILCS 120/2(d) (West 2016).

This office has reviewed the verbatim recording of the closed session portion of the Board's August 8, 2017, meeting. The closed session primarily consisted of the Board's discussion of a resolution relating to comments by one of its members and certain matters regarding those comments. As part of these discussions, Board members did not consider evidence or testimony. Even assuming that discrete portions of the discussion could be considered "evidence or testimony," the Board considered this information as a legislative body in connection with a resolution rather than as a quasi-adjudicative body. *Meyer v. McKeown*, 266 Ill. App. 3d 324, 329 (3d Dist. 1994) (stating that a "Village board of trustees is a legislative body"); *see also* 65 ILCS 5/3.1-45-15 (West 2016) (a village board of trustees "shall perform the duties and exercise the powers conferred upon the aldermen of a city."). Further, the Board was not "specifically authorized by law" to conduct a hearing on the allegations in a closed session. Thus, the comments by the Board member that the Board discussed in closed session were not a matter subject to any adjudicatory or quasi-adjudicatory process.

Accordingly, section 2(c)(4) of OMA did not authorize the closed session discussion of the Board member's comments. Therefore, this office concludes that the Board violated section 2(a) of OMA by entering into closed session at its August 8, 2017, meeting to discuss the conduct of one of the Board members.

FINDINGS AND CONCLUSIONS

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

1) On August 22, 2017, Pastor Marvin Hightower, on behalf of the Peoria, Illinois branch of the National Association for the Advancement of Colored People, submitted a Request for Review alleging that during its August 8, 2017, meeting, the Mapleton Village Board of Trustees entered closed session to discuss racist comments by a Board member. The Request for Review alleged that the Board cited section 2(c)(1) of OMA as its basis for closing the meeting.

2) On September 5, 2017, the Public Access Bureau sent a copy of the Request for Review to the Village's mayor. The Public Access Bureau requested copies of the open and closed session minutes of the August 8, 2017, meeting, and the verbatim recording of the closed session portion of the Board's August 8, 2017, meeting. This office also requested a written response identifying the exception in section 2(c) of OMA that the Board cited as its basis for

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closing the meeting, and an explanation of how that exception applied to the Board's closed session discussion.

3) On September 26, 2017, the Village clerk submitted a copy of the verbatim recording of the closed session proceedings, as well as a draft version of the closed session minutes to this office for review. In a follow-up e-mail on the same day, the Village clerk furnished a copy of the draft version of the open session minutes. As allowed under section 3.5(c) of OMA, the Village did not provide a written response to the Request for Review.

4) On October 20, 2017, this office extended the time within which to issue a binding opinion by 21 business days, to November 21, 2017, pursuant to section 3.5(e) of OMA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

5) Section 2(a) of OMA 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."

6) The Request for Review alleged that the Board cited section 2(c)(1) of OMA as its basis for closing the August 8, 2017, meeting. The information submitted by the Board, however, does not indicate that the Board cited this exception when entering closed session on August 8, 2017. Even assuming the Board cited section 2(c)(1), it would not have provided a basis for the closed session that took place on August 8, 2017.

7) Section 2(c)(1) permits a public body to enter closed session to discuss "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body[.]" Because Board members hold a public office, and are not employees of the Village, section 2(c)(1) of OMA did not authorize the Board's closed session discussion of the Board member's comments.

8) In his Request for Review, Pastor Hightower also discussed the applicability of section 2(c)(3) of OMA. There is no indication that the Board cited section 2(c)(3) of OMA as a basis for entering closed session. As with section 2(c)(1), even if the Board relied on section 2(c)(3), it would not have provided a basis for the closed session. Section 2(c)(3) applies to closed session discussions of the "discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance." Here, the Board does not have the power to remove a Board member under law or ordinance.

9) The draft versions of the open and closed session minutes that the Board provided to this office indicate that the Board entered closed session pursuant to section 2(c)(4) of OMA. This section allows a public body to go into closed session to consider "[e]vidence or testimony presented in open hearing, or in closed hearing where specifically authorized by law,

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to a quasi-adjudicative body, as defined in this Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning."

10) There is no indication that, under the law or a Village ordinance, a Board member's comments could be subject to an adjudicatory or quasi-adjudicatory process by the Board. Moreover, during its closed session discussion, the Board acted as a legislative body rather than a quasi-adjudicative body. Therefore, section 2(c)(4) of OMA did not authorize the Board's closed session discussion. Accordingly, the Board violated section 2(a) of OMA by discussing the Board member's comments in closed session.

In accordance with these findings of fact and conclusions of law, the Board is directed to remedy this violation by disclosing to Pastor Hightower and making publicly available the verbatim recording of the closed session portion of its August 8, 2017, meeting. 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 2016)).

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2016). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook or Sangamon County within 35 days of the date of this decision naming the Attorney General of Illinois and Pastor Marvin Hightower as defendants. *See* 5 ILCS 120/7.5 (West 2016).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
Counsel to the Attorney General

CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 17-013) upon:

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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on November 21, 2017.


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