



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

November 24, 2020

PUBLIC ACCESS OPINION 20-007
(Request for Review 2020 PAC 64741)

OPEN MEETINGS ACT:
Requirement for the Public to Contemporaneously
Hear All Discussion, Testimony, and Roll Call
Votes in a Meeting Held Remotely
Pursuant to a Public Health Emergency

Mr. Brian Shirey
406 North Jefferson Street
Roanoke, Illinois 61561

The Honorable Michael Smith
Mayor and Board President
Village of Roanoke
101 North Main Street
Roanoke, Illinois 61561

Dear Mr. Shirey and Mr. Smith:

This binding opinion is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2018)). For the reasons discussed below, this office concludes that the Board of Trustees (Board) of the Village of Roanoke (Village) violated OMA during its remotely held September 8, 2020, meeting by muting a discussion of public business.

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BACKGROUND

On September 10, 2020, Mr. Brian Shirey submitted a Request for Review to the Public Access Bureau via e-mail alleging that the Board muted a discussion during its September 8, 2020, meeting, which was conducted electronically using the Zoom video conferencing platform.¹ Mr. Shirey asserted that at the meeting, Board "President Mike Smith² asked Trustee Jeremy Hilton to 'mute all mikes' of the ZOOM meeting."³ He stated that this request occurred "during a discussion with the Roanoke Village Ambulance Chief, Renee Arnold."⁴ Mr. Shirey contended that the Board did not announce that it was entering closed session or provide an explanation for muting the audio component of the meeting. Mr. Shirey further asserted that "the Village is still NOT allowing public presence at board meetings."⁵ (Emphasis in original.) He stated that Board President Smith had cited "the displacement of the village office because of flooding and th[ei]r inability to accommodate additional public access" as the reasons for not permitting public presence.⁶

On September 16, 2020, the Public Access Bureau forwarded a copy of the Request for Review to the Mayor, together with a letter asking the Board to respond in writing to the allegations raised in the Request for Review.⁷ The Public Access Bureau noted in its letter that this office had construed Mr. Shirey's claims as alleging violations of sections 2(a) and

¹E-mail from Brian Shirey to Public Access [Bureau, Office of the Attorney General] (September 10, 2020).

²Correspondence submitted by legal counsel for the Village refers to Mr. Smith's Village office as Mayor. Mr. Shirey's Request for Review refers to Mr. Smith as the Village President. Copies of Village Board minutes submitted for this office's review refer to Mr. Smith as the Mayor. A review of the village's website indicates that Mr. Smith is referred to as Mayor and Board President (<http://roanokeil.org/villageboard/>). To avoid any confusion, for purposes of this binding opinion, Mr. Smith will be referred to as the Mayor, except in language quoted from Mr. Shirey's Request for Review.

³E-mail from Brian Shirey to Public Access [Bureau, Office of the Attorney General] (September 10, 2020).

⁴E-mail from Brian Shirey to Public Access [Bureau, Office of the Attorney General] (September 10, 2020).

⁵E-mail from Brian Shirey to Public Access [Bureau, Office of the Attorney General] (September 10, 2020).

⁶E-mail from Brian Shirey to Public Access [Bureau, Office of the Attorney General] (September 10, 2020).

⁷Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Michael Smith, Board President, Village of Roanoke Board of Trustees (September 16, 2020).

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7(e)(4) of OMA (5 ILCS 120/2(a) (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019; 5 ILCS 120/7(e)(4) (West 2018), as amended by Public Act 101-640, effective June 12, 2020).⁸ The Public Access Bureau asked the Board to include a description of the manner in which the public was allowed to connect to this meeting and to provide a copy of the notice explaining how the public could access the meeting remotely.⁹ Additionally, the Public Access Bureau asked the Board to provide copies of the agenda, minutes, and verbatim recording of the September 8, 2020, meeting.¹⁰

On September 24, 2020, legal counsel for the Village e-mailed a written response on behalf of the Board,¹¹ along with a copy of the September 8, 2020, meeting agenda, and draft minutes of the open session portion of that meeting. The Board also submitted a copy of the verbatim record of the open session portion of the Board's September 8, 2020, meeting, as well as a written transcript of the muted discussion.¹² On September 25, 2020, this office forwarded a copy of the Village's written response to Mr. Shirey;¹³ he did not reply.

On November 5, 2020, the Public Access Bureau properly extended the time within which to issue a binding opinion by 21 business days, to December 10, 2020, pursuant to section 3.5(e) of OMA.¹⁴

⁸Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Michael Smith, Board President, Village of Roanoke Board of Trustees (September 16, 2020).

⁹Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Michael Smith, Board President, Village of Roanoke Board of Trustees (September 16, 2020).

¹⁰Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Michael Smith, Board President, Village of Roanoke Board of Trustees (September 16, 2020).

¹¹Letter from Scott A. Brunton, Miller, Hall & Triggs, LLC, to Teresa Lim, Assistant Attorney General, Office of the Illinois Attorney General, Public Access Bureau (September 24, 2020).

¹²On or about September 29, 2020, the Public Access Bureau received a copy of the verbatim record of the open session portion of the Board's September 8, 2020, meeting and a written transcript of the muted discussion.

¹³Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Brian Shirey (September 25, 2020).

¹⁴Letter from Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Brian Shirey and the Honorable Michael Smith, Board President, Village of Roanoke Board of Trustees (November 5, 2020).

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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 2018). Section 2(a) of OMA (5 ILCS 120/2(a) (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019) 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."

On March 9, 2020, pursuant to his authority under section 7 of the Illinois Emergency Management Agency Act (20 ILCS 3305/7 (West 2018)), the Governor of Illinois "declare[d] all counties in the State of Illinois as a disaster area[]" in response to the outbreak of COVID-19.¹⁵ The Disaster Proclamation became effective immediately on March 9, 2020, to "remain in effect for 30 days."¹⁶ Because of the continued spread and resurgence of COVID-19 in the State, the Governor has since issued additional Disaster Proclamations declaring the State as a disaster area. Such a proclamation was in effect at the time of the Board's September 8, 2020, meeting.¹⁷

The General Assembly recently amended OMA to permit a public body to hold remote meetings without the physical presence of a quorum of its members during a public health emergency, such as the COVID-19 pandemic, provided that certain conditions are satisfied. Section 7(e) of OMA (5 ILCS 120/7(e) (West 2018), as amended by Public Act 101-640, effective June 12, 2020) sets out the conditions for a public body to hold a remote meeting and provides, in pertinent part:

(e) Subject to the requirements of Section 2.06 but notwithstanding any other provision of law, an open or closed meeting subject to this Act may be conducted by audio or video conference, without the physical presence of a quorum of the members, so long as the following conditions are met:

(1) the Governor or the Director of the Illinois Department of Public Health has issued a disaster declaration related to public health concerns because of a disaster as defined in Section 4 of the Illinois Emergency

¹⁵Gubernatorial Disaster Proclamation, §1, issued March 9, 2020, at 2.

¹⁶Gubernatorial Disaster Proclamation, §11, issued March 9, 2020, at 3.

¹⁷Gubernatorial Disaster Proclamation, §1, issued August 21, 2020, at [5].

Management Agency Act, and all or part of the jurisdiction of the public body is covered by the disaster area;

(2) the head of the public body as defined in subsection (e) of Section 2 of the Freedom of Information Act determines that an in-person meeting or a meeting conducted under this Act is not practical or prudent because of a disaster;

* * *

(4) for open meetings, members of the public present at the regular meeting location of the body can hear all discussion and testimony and all votes of the members of the body, unless attendance at the regular meeting location is not feasible due to the disaster, including the issued disaster declaration, in which case the public body must make alternative arrangements and provide notice pursuant to this Section of such alternative arrangements in a manner to **allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes**, such as by offering a telephone number or a web-based link[.] (Emphasis added.)

The Board's September 8, 2020, meeting agenda stated, in pertinent part:

THE PUBLIC CAN ONLY ATTEND THIS MEETING REMOTELY VIA ZOOM. IN-PERSON ATTENDANCE BY THE PUBLIC IS CURRENTLY PROHIBITED. TO JOIN IN THE MEETING, FOLLOWING THIS LINK: [specified weblink].¹⁸ (Emphasis in original.)

¹⁸Roanoke Village Board, Regular Village Board Meeting (September 8, 2020).

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The agenda then provided a meeting ID number and passcode to log into the meeting.¹⁹ In addition, the agenda provided a telephone number to "dial in and listen to the meeting and comment during public comment period[.]"²⁰

The Board's response to this office confirmed that "the Village is not currently allowing in-person public attendance at Village Board meetings[.]" but asserted that the Board's September 8, 2020, remote meeting complied with the conditions set out under section 7(e) of OMA.²¹ The Board noted that the Governor issued a Disaster proclamation on August 21, 2020, in response to the COVID-19 pandemic that was effective for 30 days from its issuance. The Board also stated that the Village's Mayor, Michael Smith, had determined "that full in-person meetings were not practical or prudent during the current ongoing COVID-19 pandemic and until further notice due to the small size of the Village Board meeting room and the conditions of the pandemic."²² The Board stated that it livestreamed the meeting "on the Zoom video conferencing platform, which allowed for public attendance and participation[.]"²³

The Board has demonstrated that a disaster declaration related to public health concerns arising out of the COVID-19 pandemic was in effect at the time of its September 8, 2020, meeting.²⁴ According to the Board, the head of the Village, Mayor Smith, had also determined at the time of the meeting that a full in-person meeting was not practical or prudent in light of the ongoing pandemic and the limited capacity of the Village's meeting space. Mr. Shirey questioned the continued necessity of the restriction on in-person attendance by members of the public. Section 7(e)(2) of OMA, however, provided Mayor Smith the authority to make that determination and authorized the Board to meet by video or audio conference without the physical presence of a quorum of Board members, so long as all the conditions set out in section 7(e) were satisfied.

¹⁹Roanoke Village Board, Regular Village Board Meeting (September 8, 2020).

²⁰Roanoke Village Board, Regular Village Board Meeting (September 8, 2020).

²¹Letter from Scott A. Brunton, Miller, Hall & Triggs, LLC, to Teresa Lim, Assistant Attorney General, Office of the Illinois Attorney General, Public Access Bureau (September 24, 2020), at 3.

²²Letter from Scott A. Brunton, Miller, Hall & Triggs, LLC, to Teresa Lim, Assistant Attorney General, Office of the Illinois Attorney General, Public Access Bureau (September 24, 2020), at 2.

²³Letter from Scott A. Brunton, Miller, Hall & Triggs, LLC, to Teresa Lim, Assistant Attorney General, Office of the Illinois Attorney General, Public Access Bureau (September 24, 2020), at 2.

²⁴See Gubernatorial Disaster Proclamation, issued August 21, 2020.

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The Board's response to this office did acknowledge, however, that "the Zoom meeting livestream was muted for approximately one minute (60 seconds)."²⁵ The Board stated, in relevant part:

Essentially, what occurred during this muted time period was a "sidebar" between Mayor Mike Smith and Village Clerk Jennifer Crumrine regarding the appropriateness for a personnel matter to be discussed in open session or closed session. Rather than holding this sidebar outside of the livestream, the Mayor requested that the audio for the Zoom meeting be shut off – which it was for this 60 second period. Subsequently, during the closed session portion of this meeting held at the end of this Village Board meeting, this personnel matter was discussed by the Village Board in closed session.^[26]

The Board contended that the "sidebar" did not violate the conditions set forth in section 7(e). Specifically, the Board argued:

Section 7(e) does not prohibit the practice of a sidebar between the Mayor and Village Clerk to discuss a matter of procedure. It is not uncommon for sidebars to occur during a public meeting to clarify a matter of procedure. Further, this sidebar dealt with a sensitive personnel matter that was to be discussed in closed session later during the meeting. This sidebar allowed the meeting to continue without the significant disruption of going into closed session just to determine whether the matter should be discussed in closed session.^[27]

²⁵Letter from Scott A. Brunton, Miller, Hall & Triggs, LLC, to Teresa Lim, Assistant Attorney General, Office of the Illinois Attorney General, Public Access Bureau (September 24, 2020), at 1.

²⁶Letter from Scott A. Brunton, Miller, Hall & Triggs, LLC, to Teresa Lim, Assistant Attorney General, Office of the Illinois Attorney General, Public Access Bureau (September 24, 2020), at 1-2.

²⁷Letter from Scott A. Brunton, Miller, Hall & Triggs, LLC, to Teresa Lim, Assistant Attorney General, Office of the Illinois Attorney General, Public Access Bureau (September 24, 2020), at 3.

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The Board nevertheless stated that in future remote meetings, it would ensure that the Zoom livestream remains audible and is not muted during any portion of an open session, including sidebars.²⁸

In construing a statute, the primary objective is to ascertain and give effect to the intent of the General Assembly. *Southern Illinoisan v. Illinois Dep't of Public Health*, 218 Ill. 2d 390, 415 (2006). "[T]he surest and most reliable indicator of" legislative intent "is the statutory language itself, given its plain and ordinary meaning." *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, ¶24, 77 N.E.3d 625, 630 (2017). When the language of a statute is clear and unambiguous, a reviewing body "may not depart from the plain language by reading into the statute exceptions, limitations, or conditions that the legislature did not express." *Hayashi v. Illinois Dep't of Financial and Professional Regulation*, 2014 IL 116023, ¶16, 25 N.E.3d 570, 576 (2014).

The language of section 7(e)(4) is clear and unambiguous. Section 7(e)(4) provides that a public body holding a remote meeting without the physical presence of a quorum of its members must make "alternative arrangements in a manner to allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes[.]" 5 ILCS 120/7(e)(4) (West 2018), as amended by Public Act 101-640, effective June 12, 2020. The Board acknowledged that it muted a discussion between the Mayor and Village Clerk. This office's review of the verbatim record of the portion of the meeting that was muted and the written transcript of the muted discussion confirmed that the "sidebar" generally concerned a personnel matter, although specific details of that matter were not discussed. Despite the fact that the discussion was brief and limited to clarifying a procedural issue, the plain language of section 7(e)(4) of OMA expressly and unambiguously requires that members of the public be able to contemporaneously hear all open session discussion. Unlike a meeting in which a public body experiences a technical difficulty or disruption that renders the proceedings temporarily inaudible, the Board in this instance intentionally muted a portion of its meeting to prevent the public from listening to a discussion of public business. Although no provision of OMA prohibits a member of a village board and another village official from having a brief, inaudible exchange during an in-person meeting, section 7(e)(4) does not provide an exception for a "sidebar" discussion of public business between Village officials during a remote meeting. Because members of the public could not contemporaneously hear the muted discussion, this office concludes that the Board violated section 7(e)(4) of OMA during its September 8, 2020, meeting.

²⁸Letter from Scott A. Brunton, Miller, Hall & Triggs, LLC, to Teresa Lim, Assistant Attorney General, Office of the Illinois Attorney General, Public Access Bureau (September 24, 2020), at 3.

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 September 10, 2020, Mr. Brian Shirey submitted a Request for Review alleging that the Village of Roanoke Board of Trustees violated OMA during the open session portion of its September 8, 2020, remotely-held meeting by muting a discussion among Village officials and personnel. He also alleged that the Board violated OMA because it prohibited members of the public from physically attending meetings. Mr. Shirey'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 2018)).

2) On September 16, 2020, the Public Access Bureau forwarded a copy of the Request for Review to the Village's Mayor and asked the Board to provide copies of the notice, agenda, minutes, and verbatim recording of its September 8, 2020, meeting for this office's confidential review, together with a written answer to Mr. Shirey's allegations. This office also asked the Board to describe the manner in which the public was allowed to connect to the meeting and to provide a copy of the public notice explaining how the public could access the meeting remotely.

3) On September 24, 2020, the Board's counsel provided a written answer and copies of the Board's September 8, 2020, meeting agenda and draft minutes.

4) On September 25, 2020, the Public Access Bureau forwarded a copy of the Board's written answer to Mr. Shirey. He did not reply.

5) On or about September 29, 2020, the Public Access Bureau received a copy of the verbatim record of the open session portion of the Board's September 8, 2020, meeting and a written transcript of the muted portion of the meeting.

6) On November 5, 2020, the Public Access Bureau properly extended the time within which to issue a binding opinion by 21 business days, to December 10, 2020, pursuant to section 3.5(e) of OMA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) 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."

8) Section 7(e) of OMA provides that a meeting of a public body "may be conducted by audio or video conference, without the physical presence of a quorum of the

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members[]" provided that ten enumerated conditions are satisfied. Among the conditions are that the "the Governor or the Director of the Illinois Department of Public Health has issued a disaster declaration related to public health concerns because of a disaster as defined in Section 4 of the Illinois Emergency Management Agency Act[.]" and "the head of the public body * * * determines that an in-person meeting or a meeting conducted under this Act is not practical or prudent because of a disaster[.]" 5 ILCS 120/7(e)(1), 7(e)(2) (West 2018), as amended by Public Act 101-640, effective June 12, 2020).

9) The requirements of sections 7(e)(1) and 7(e)(2) of OMA for holding a remote meeting were satisfied for the meeting at issue. The Governor had issued a Disaster Proclamation on August 21, 2020, in response to the ongoing COVID-19 pandemic. That proclamation was in effect at the time of the Board's September 8, 2020, meeting. The Board's response to this office stated that the Village's mayor had determined that full in-person meetings were not practical or prudent in light of the ongoing pandemic. It is undisputed that the Board livestreamed its September 8, 2020, meeting via the Zoom platform, and that the livestream was accessible to the public.

10) Section 7(e)(4) of OMA provides that if "attendance at the regular meeting location is not feasible due to the disaster, * * * the public body must make alternative arrangements and provide notice pursuant to this Section of such alternative arrangements in a manner to allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes, such as by offering a telephone number or a web-based link[.]"

11) The Board acknowledged that it muted a discussion between the Village Mayor and Village Clerk during the open session portion of the livestreamed meeting.

12) Because members of the public could not hear the muted discussion, the Board violated section 7(e)(4)'s requirement that it provide the public with access to the meeting in a manner that allows the public to contemporaneously hear all discussion.

Therefore, it is the opinion of the Attorney General that the Board of Trustees of the Village of Roanoke violated section 7(e)(4) of the Open Meetings Act. In accordance with these findings of fact and conclusions of law, the Board is directed to remedy this violation by making publicly available the complete verbatim record of the open session portion of the September 8, 2020, 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 2018)).

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

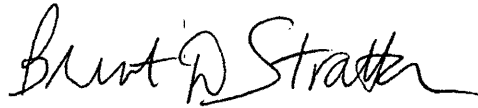
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et seq. (West 2018). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision, naming the Attorney General of Illinois and Brian Shirey as defendants. *See* 5 ILCS 120/7.5 (West 2018).

Sincerely,

KWAME RAOUL
ATTORNEY GENERAL

By:

A handwritten signature in black ink, appearing to read "Brent D. Stratton", written over a horizontal line.

Brent D. Stratton
Chief Deputy 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 20-007) upon:

Mr. Brian Shirey
406 North Jefferson Street
Roanoke, Illinois 61561
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The Honorable Michael Smith
Mayor and Board President
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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 24, 2020.


SARAH L. PRATT
Public Access Counselor

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