



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 10, 2014

PUBLIC ACCESS OPINION 14-001
(Request for Review 2013 PAC 23488-On Remand)

OPEN MEETINGS ACT:
Failure to Sufficiently Inform the
Public of the Business Being
Conducted before Taking Final Action

Ms. Erin Orr, Managing Editor
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Mr. Chuck Flamini
President, Board of Education
Springfield Public School District No. 186
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Dear Ms. Orr 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 2012)) and the circuit court's order in *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois and Molly Beck*, No. 13 MR 524 (Circuit Court, Sangamon County). On November 19, 2013, the circuit court remanded this matter to the Public Access Counselor (PAC) to allow the Springfield Public School District No. 186 Board of Education (Board) to submit evidence to the PAC concerning whether it sufficiently informed the public of the nature of the business being conducted prior to its vote to approve a separation agreement with former Superintendent Dr. Walter Milton, Jr. on March 5, 2013. For the reasons discussed below, this office concludes that

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the Board violated section 2(e) of OMA (5 ILCS 120/2(e) (West 2010)) by failing to provide a sufficient public recital of the nature of the separation agreement and other information necessary to inform the public of the business being conducted before taking final action to approve the agreement.

BACKGROUND

On February 21, 2013, Ms. Molly Beck, on behalf of *The State Journal-Register*, submitted 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 former Superintendent, Dr. Walter Milton, Jr., which the Board had not publicly voted to approve.¹ On May 21, 2013, the Attorney General issued binding opinion No. 13-007 in response to the Request for Review and concluded that:

[T]he 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. Ill. Att'y Gen. Pub. Acc. Op. No. 13-007, issued May 21, 2013, at 8.

The Attorney General further concluded 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 March 4, 2013, closed meetings. Ill. Att'y Gen. Pub. Acc. Op. No. 13-007, at 8. In addition, the Attorney General found that the Board violated section 2.06(a)(3) of OMA (5 ILCS 120/2.06(a)(3) (West 2010)) by failing to prepare minutes of those closed meetings, as well as its closed meetings on February 18, 2013, and February 25, 2013, that included a "summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken." Ill. Att'y Gen. Pub. Acc. Op. No. 13-007, at 8.

On June 25, 2013, the Board sought administrative review of the Attorney General's finding that the Board violated section 2(e) of OMA. *See* 5 ILCS 120/7.5 (West 2012). On November 19, 2013, the circuit court ruled that the roll call vote taken by the Board during the open session of its March 5, 2013, meeting, and not the signing of the separation agreement in the earlier closed meeting, constituted the Board's final action to approve the agreement.

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

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Board of Education, slip op. at 4. However, the circuit court remanded to the PAC the issue of whether the Board's final action was preceded by a public recital sufficient to comply with section 2(e) of OMA. The court directed the PAC to request that the Board submit evidence regarding the facts of its public recital and a written response on the question of whether such recital complied with section 2(e) of OMA. *Board of Education*, slip op. at 4-5.

On November 26, 2013, the PAC requested that the Board provide:

evidence demonstrating any "public recital" that was provided before the Board voted on the separation agreement, including any information and explanation provided to the public at the Board's March 5, 2013, regular meeting. * * * In addition, please provide a detailed written statement on the question of whether the Board's "public recital" complied with section 2(e) of OMA.^[2]

On December 9, 2013, this office received the Board's response, dated December 4, 2013.³ On January 3, 2014, the PAC forwarded that response to Ms. Beck; she did not reply.⁴ Because this office subsequently became aware that Ms. Beck is no longer employed by *The State Journal-Register*, a copy of the Board's response was forwarded to the newspaper's managing editor, Erin Orr, on January 23, 2014.⁵ On the same day, Ms. Orr advised this office that *The State Journal-Register* had no reply.⁶

The sole issue for determination is whether the Board's vote to approve the separation agreement at its March 5, 2013, open meeting was preceded by a public recital of the nature of the business sufficient to satisfy the requirements of section 2(e) of OMA.

²Letter from Sarah L. Pratt, Public Access Counselor, Office of the Illinois Attorney General, to Chuck Flamini, President, Board of Education, Springfield School District No. 186 (November 26, 2013).

³Letter from Lorilea Buerkett, Brown, Hay & Stephens, LLP, to Sarah L. Pratt, Public Access Counselor, Office of the Attorney General (December 4, 2013).

⁴Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Molly Beck, Education Reporter, *The State Journal-Register* (January 3, 2014).

⁵E-mail from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Attorney General, to Erin Orr (January 23, 2014).

⁶E-mail from Erin Orr, Managing Editor, *The State Journal-Register*, to Steve Silverman (January 23, 2014).

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ANALYSIS

Section 2(e) of OMA provides:

(e) Final action. 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.

In response to this office's request for evidence concerning the final action on the separation agreement, the Board directed us to a video recording posted on the School District's website that includes the following "recitation" by the Board President at the March 5, 2013, meeting:

Item 9.1, approval of a resolution regarding the separation agreement. The Board President recommends that the Board of Education of Springfield School District No. 186 vote to approve the separation agreement and release between Dr. Walter Milton, Jr. and the Board of Education. Do I have a motion?⁷

A motion to approve was made. Another Board member then moved to table the matter. The motion to vote on the separation agreement was then seconded. The Board member who moved to table the matter then expressed her 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 discussions with me about why are we doing this and I can't give them a good reason."⁸ The motion to table consideration of the agreement was not seconded. Another Board member thanked the Superintendent for his service to the School District, and the presiding officer called for a vote on the motion to approve the separation agreement. The motion was approved by a 6-1 vote.⁹ The Board did not publicly discuss or summarize the terms of the agreement, which

⁷Springfield Public School District No. 186 Board of Education, Meeting, March 5, 2013, available at <http://www.sps186.org/channel22/?p=56081&i=329199>, minutes 1:14:36 – 1:14:57.

⁸Springfield Public School District No. 186 Board of Education, Meeting, March 5, 2013, available at <http://www.sps186.org/channel22/?p=56081&i=329199>, minutes 1:15:35 – 1:17:18.

⁹Springfield Public School District No. 186 Board of Education, Meeting, March 5, 2013, available at <http://www.sps186.org/channel22/?p=56081&i=329199>, minutes 1:18:46 – 1:19:05.

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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.

In response to this office, the Board explains that a copy of the separation agreement was posted on the School District website as a viewable attachment to the agenda of the March 5, 2013, meeting. The Board contends that this posting in and of itself was "sufficient to inform the public of the business being conducted."¹¹ In support of that argument, the Board cites the federal district court decision *Roller v. Board of Education of Glen Ellyn School District #41*, No. 05-C-3638, 2006 WL 200886 (N.D. Ill. January 18, 2006) (Not Reported in F. Supp. 2d).

In *Roller*, a teacher alleged that a school board violated section 2(e) of OMA by failing to publicly recite that it was considering her dismissal or identify her by name before voting to dismiss her. *Roller*, 2006 WL 200886, at 4. The meeting minutes indicated that a school board member made a motion to recommend the release of fourth year full-time probationary teachers "as presented on the attached[,]'" which was a reference to a resolution authorizing Roller's dismissal that was attached to the meeting minutes. *Roller*, 2006 WL 200886, at 4. In addition, the meeting agenda stated that the Board would consider "Recommendations for Employment and Dismissal." *Roller*, 2006 WL 200886, at 4. The court noted that "it has not found, and Roller has not cited, a case discussing how specific a **public notice** must be in order to satisfy" section 2(e)." (Emphasis added.) *Roller*, 2006 WL 200886, at 4. The court went on to conclude that the "agenda posted prior to the meeting, together with the recital of the motion passed during the meeting itself, was enough to satisfy the statute." *Roller*, 2006 WL 200886, at 4.

The *Roller* decision, which does not have precedential authority in Illinois state courts,¹² did not provide any detailed rationale for concluding that information posted before a meeting constitutes part of a public recital under section 2(e) of OMA. As discussed below, such a conclusion is not persuasive because it fails to distinguish between the requirement in section 2(e) for taking final action following a closed meeting and the requirement of advance public notice of all meetings in section 2.02 of OMA (5 ILCS 120/2.02 (West 2012)). Indeed, the *Roller* court's reference to the question of how much "public notice" is required to satisfy section

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 Lorilea Buerkett, Brown, Hay & Stephens, LLP, to Sarah L. Pratt, Public Access Counselor, Office of the Attorney General (December 4, 2013).

¹²Federal district court opinions do not have precedential value in Illinois. *Kaufman v. Barbiero*, 2013 IL App (1st) 132068, ¶19, 999 N.E.2d 764, 768 (2013).

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2(e) appears to inappropriately merge that provision with the separate requirements for providing advance public notice of all meetings under section 2.02 of OMA. Therefore, this office declines to adopt the *Roller* court's analysis.

The Board's assertion that posting the separation agreement on its website together with the meeting agenda satisfied the requirements of section 2(e) finds no support in the language of OMA. Section 2(e) of OMA expressly provides that a public body may take a final action only in an open meeting. Section 2(e) further requires that before a public body takes final action, it must meet two additional requirements: (1) publicly recite the nature of its action; and (2) provide such other information as will inform the public of the business being conducted. In context, this language can only be construed to mean that the public body is required to provide a verbal explanation of the significance of its action to members of the public who are present at the meeting before the public body can proceed to consider taking action.

Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2010)) sets out the requirement of "Public notice of all meetings, whether open or closed to the public" and states that an:

agenda for each regular meeting shall be posted at the principal office of the public body and at the location where the meeting is to be held at least 48 hours *in advance of the holding of the meeting*. A public body that has a website that the full-time staff of the public body maintains shall also post on its website the agenda of any regular meetings of the governing body of that public body. (Emphasis added.)

Section 2.02(c) of OMA (5 ILCS 120/2.02(c) (West 2010)) further requires the posted agenda to "set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting."

The requirements of section 2(e) and section 2.02 are separate and distinct. Section 2.02 is clearly intended to require that a public body give the public advance notice of its meeting agenda and include the "general subject matter" of any agenda item on which the public body may take final action. The posting of an agenda merely provides a member of the public with enough information to determine whether to attend a public meeting. The Board satisfied this requirement by posting its agenda together with the separation agreement on its website more than 48 hours before the meeting. In contrast, section 2(e) is intended to ensure that prior to taking final action, the public body provides information sufficient to inform the public in attendance at the meeting of the business being conducted. Posting the agreement did not

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constitute the "public recital" that is required by section 2(e) because that recital must be verbal and must take place during the public meeting.

With respect to the sufficiency of the public recitation, section 2(e) expressly requires that the public body not only provide the public with the "nature of the matter being considered," but also provide "other information that will inform the public of the business being conducted." At its March 5, 2013, meeting, the Board only called for a vote on a motion to approve a separation agreement with Dr. Milton. Although the recitation of the resolution and the statement that the Board was voting to approve a separation agreement involving Dr. Milton may have adequately advised the members of the public of the general nature of the matter being considered, the Board did not provide any other information concerning the agreement. In particular, the public was not informed of any of the terms of the separation agreement, including a lump sum payment of \$177,796.97 in public funds to Dr. Milton. In order to comply with section 2(e)'s second requirement that members of the public receive "other information that will inform [them] of the business being conducted," the public must be informed of the key terms of a proposed public contract or agreement. It cannot reasonably be argued that members of the public attending the meeting who had not previously reviewed the separation agreement would have been "informed" of the significance of the Board's approval of the agreement based upon these limited comments.

The Board contends that it would be absurd to construe section 2(e) of OMA as requiring the Board to read the separation agreement in its entirety before taking final action: "[i]f indeed a public recital requires that a Board read any contract or agreement they would like to approve before voting on it, the public's business would slow to a snail's pace."¹³ Section 2(e) does not suggest that it is necessary to read aloud in its entirety every document coming before a public body for action in order to adequately inform the public of the business being conducted. Likewise, binding opinion No. 13-007 did not interpret section 2(e) to require a verbatim recitation of the separation agreement during the meeting. However, section 2(e) does require that the members of the public in attendance at the meeting receive sufficient "other information" to understand the business being conducted. While it is not required or necessary for a public body to read an entire agreement aloud, it would not have been impractical for the Board to provide the public with a summary of the pertinent terms of the agreement before voting on it. Even after a Board member questioned whether the separation agreement was warranted, the Board failed to provide any explanation or description of the agreement to inform the public of the business being conducted.

¹³Letter from Lorilea Buerkett, Brown, Hay & Stephens, LLP, to Sarah L. Pratt, Public Access Counselor, Office of the Attorney General (December 4, 2013).

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The Attorney General concluded in binding opinion No. 13-007 that the Board's vague and general discussion of the separation agreement "failed to adequately inform the public of the nature of the matter under consideration prior to its vote." Ill. Att'y Gen. Pub. Acc. Op. No. 13-007, at 8. For the reasons discussed above, after reviewing the information and arguments provided by the Board, on remand the Attorney General finds that the Board violated section 2(e) of OMA by taking final action to approve a settlement agreement between the District and former superintendent Dr. Walter Milton, Jr., without adequately informing the public of the business being conducted prior to its vote.

FINDINGS AND CONCLUSIONS

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

- 1) 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 a separation agreement to terminate the employment of Superintendent Dr. Walter Milton, Jr., without publicly voting to approve it. Ms. Beck's Request for Review was timely filed and otherwise complied with the requirements of section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2010)).
- 2) On May 21, 2013, the Attorney General issued binding opinion No. 13-007 finding that the Board violated section 2(e) OMA by taking final action to approve Dr. Milton's proposed separation agreement in meetings closed to the public pursuant to section 2(c)(1) of OMA. The Attorney General further concluded that even if 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.
- 3) On June 25, 2013, the Board sought administrative review of the Attorney General's finding that the Board violated section 2(e) of OMA.
- 4) On November 19, 2013, the circuit court ruled that the roll call vote taken during the open session of the Board's March 5, 2013, meeting, and not the signing of the separation agreement, constituted the Board's final action to approve the separation agreement. The circuit court, however, remanded to the Public Access Counselor the issue of whether the Board's final action taken at its March 5, 2013, regular meeting was preceded by a public recital sufficient to comply with section 2(e) of OMA.

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5) On November 26, 2013, the Attorney General asked the Board to provide evidence and a detailed written statement regarding whether the Board provided an adequate public recital before voting to approve the separation agreement.

6) On December 9, 2013, the Board responded by asserting that it had satisfied the requirements of section 2(e) by reading the resolution concerning the separation agreement during its March 5, 2013, meeting and by having previously posted a copy of the separation agreement on the District's website.

7) The Attorney General finds that the Board violated section 2(e) of OMA by voting to approve the separation agreement during its March 5, 2013, meeting without adequately informing the public of the business being conducted. The Attorney General concludes that the Board's posting of the separation agreement on its website did not constitute a public recital during an open meeting within the scope of section 2(e) of OMA. Further, the few comments made during the discussion leading to the vote were insufficient to provide the public with information from which it might comprehend the purpose and effect of the Board's action.

In accordance with these findings of fact and conclusions of law, the Board is directed to 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 2012)).

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 2012). 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. Erin Orr as defendants. *See* 5 ILCS 120/7.5 (West 2012).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:



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Counsel to the Attorney General

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