

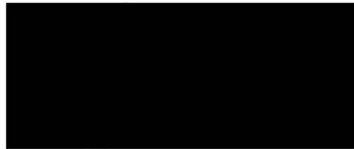


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 20, 2017

Via electronic mail



Via electronic mail

Ms. Patricia Johnson Lord
Senior Assistant City Attorney
City of Naperville
400 South Eagle Street
Naperville, Illinois 60540
lordp@naperville.il.us

RE: OMA Request for Review – 2017 PAC 49497

Dear [REDACTED] and Ms. Lord:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). For the reasons explained below, the Public Access Bureau concludes that a committee formed to evaluate Requests for Qualifications (RFQ) concerning potential redevelopment of City-owned property (Evaluation Committee) is not a public body subject to the requirements of OMA, therefore the City of Naperville (City) City Council did not violate OMA.

BACKGROUND

On September 1, 2017, [REDACTED] submitted a Request for Review to this office alleging that the City formed the Evaluation Committee, the Evaluation Committee is a subsidiary body of the Naperville City Council (City Council) subject to the requirements of OMA, and that the Evaluation Committee held meetings to score the RFQs concerning the potential redevelopment of certain City-owned property without complying with the requirements of OMA.

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On September 14, 2017, this office sent a copy of the Request for Review to the City Council and asked it to provide a detailed explanation of the Evaluation Committee's purpose and duties, and its relationship to the City Council. We also asked the City Council to clarify how the Evaluation Committee made recommendations to the City Council; to explain how the City Council used the Evaluation Committee's recommendations in the process of making decisions about the development of the property in question; to describe how members of the Evaluation Committee were appointed; to identify the members of the Evaluation Committee and the positions they hold; and to indicate whether the Evaluation Committee had a budget and whether its members were paid for their service. In addition, we asked the City Council to clarify whether the Evaluation Committee meetings were open to the public and whether advance notice was provided, and to furnish any recordings, written minutes, or other written documentation of those meetings.

The City provided its response and those materials on September 26, 2017. The City's response acknowledged that Evaluation Committee meetings were not open to the public and that advance notice was not provided, but maintained that the Evaluation Committee was not a "public body." On September 27, 2017, this office forwarded a copy of the City's response to [REDACTED] he replied on October 6, 2017.

DETERMINATION

The issue for determination in this matter is whether the Evaluation Committee is a "public body" subject to the requirements of OMA.

"In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (2016). Section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)) defines a "public body" as:

[A]ll legislative, executive, administrative or *advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts* and all other municipal corporations, boards, bureaus, committees or commissions of this State, *and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees* which are supported in whole or in part by tax revenue, or which expend tax revenue, except the General Assembly and committees or commissions thereof. (Emphasis added.)

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██████████ contends that the Evaluation Committee is an advisory body or subsidiary body of the City. He argues that members of the Evaluation Committee were appointed by the Mayor, had an investigatory function to consider developers of City-owned property, and had the sole authority to provide the City Council with a recommendation for the development company, which he states the City Council unhesitatingly adopted.

Citing *People ex rel. Cooper v. Carlson*, 28 Ill. App. 3d 569, 572 (2d Dist. 1979), *Pope v. Parkinson*, 48 Ill. App. 3d 797, 800 (4th Dist. 1977), and *University Professionals of Illinois, Local 4100 of the Illinois Federation of Teachers v. Stukel*, 344 Ill. App.3d 856, 865 (1st Dist. 2003), the City's response to this office asserted that the Evaluation Committee was not a committee of the City Council. Instead, the City described it as an *ad hoc* committee formed by City staff solely to evaluate responses to the RFQ in question (5th Avenue RFQ), to interview those who responded to the 5th Avenue RFQ, and to provide its scoring recommendations to the City. The City asserted that unlike the selection of members for various boards and committees of the City Council, which is codified in the City Code, the members of the Evaluation Committee were not appointed by the mayor for a specified term with the consent of the City Council. On the contrary, the City contends that the members of the Evaluation Committee were chosen by City staff with "input as to individuals who might be selected to participate from the community provided by Mayor and City Manager's Office."¹ The City indicated that the Committee was mostly comprised of area property owners, community stakeholders, and City staff experts, but did acknowledge that one City Council member served on the Evaluation Committee as a non-scoring liaison between the City Council and the Evaluation Committee.

According to the City, the Evaluation Committee members were unpaid and the Evaluation Committee had no budget, was not created by ordinance, resolution, or City Council action, and was not assigned any duties by the City Council. In fact, the City contends that "several City Council members expressed surprise and a total lack of awareness of even the existence of such a committee during a City Council meeting[.]"² The City further stated that the Evaluation Committee "served the Procurement Division of the City's Finance Department and did not have a relationship to the City Council except that its scoring recommendations with respect to the RFQ were provided to the City Council."³ Lastly, the City argued that neither the

¹Letter from Patricia Johnson Lord, Senior Assistant City Attorney, Naperville, to Shannon Barnaby, Assistant Attorney [General], Public Access Bureau, Office of the Illinois Attorney General (September 26, 2017) at 2.

²Letter from Patricia Johnson Lord, Senior Assistant City Attorney, Naperville, to Shannon Barnaby, Assistant Attorney [General], Public Access Bureau, Office of the Illinois Attorney General (September 26, 2017) at 2 n.2.

³Letter from Patricia Johnson Lord, Senior Assistant City Attorney, Naperville, to Shannon Barnaby, Assistant Attorney [General], Public Access Bureau, Office of the Illinois Attorney General (September 26, 2017) at 3.

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City nor the City Council are bound by any information or recommendation that the Evaluation Committee made.

In his reply, ██████████ disputed the City's interpretation of *Carlson, Pope*, and *Stuckel* and, citing *Board of Regents v. Reynard*, 292 Ill. App. 3d 968, 977-78 (4th Dist. 1997) argued, the following:

[T]he Committee on 5th Avenue [Evaluation Committee] was not an internal committee focused on internal administrative matters, but was a formal committee appointed by the Mayor. The [Evaluation] Committee had specific assigned duties [citations] which were in fact substantial, requiring a kick-off meeting and training session [citations], similar to other boards and commissions. The [Evaluation] Committee had rules [citations], including mention of attendance, confidentiality, and conflict of interest. Members of the [Evaluation] Committee signed an agreement to be bound by the rules of the [Evaluation] Committee [citations]. Ad hoc or internal committees with a sole function of advising on internal matters do not have similar formalities.^[4]

As described above, the definition of a "public body" includes an "advisory body" of the City Council and a "subsidiary body" of the City Council, such as a committee or subcommittee. In analyzing whether entities are advisory bodies, the Illinois Appellate Court has distinguished those that function independently and informal groups with limited duties from entities with defined responsibilities that are part of a public body's formal structure.

In *University Professionals of Illinois, Local 4100 of the Illinois Federation of Teachers v. Stukel*, 344 Ill. App. 3d 856, 865 (1st Dist. 2003), the plaintiff alleged that a group of presidents and chancellors of public universities (the Council), which made recommendations to the Illinois Board of Higher Education (IBHE), violated OMA by meeting privately before IBHE meetings to discuss issues related to funding for public education. *Stukel*, 344 Ill. App.3d at 858. The court identified the following factors as relevant to the determination of whether an entity is an advisory body, for purposes of FOIA:

[W]ho appoints the members of the entity, the formality of their appointment, and whether they are paid for their tenure; the entity's assigned duties, including duties reflected in the entity's bylaws or authorizing statute; whether its role is solely advisory or whether it also has a deliberative or investigative function; whether the entity

⁴Letter from ██████████ to Shannon Barnaby, Assistant Attorney [General], Public Access Bureau, Office of the Illinois Attorney General (October 6, 2017) at 7.

is subject to government control or otherwise accountable to any public body; whether the group has a budget; its place within the larger organization or institution of which it is a part; and the impact of decisions or recommendations that the group makes. *Stukel*, 344 Ill. App. 3d at 865.

In *Stukel*, the court held that the group was not an advisory body of IBHE in part because it was not incorporated into the formal organizational structure of IBHE, a factor that the court identified as a "*primary consideration* in determining whether an organization is a public body under the Meetings Act." (Emphasis added.) *Stukel*, 344 Ill. App. 3d at 865. The court explained that "the Council was formed by the presidents and chancellors of the various state universities to express its views to the IBHE. Granted, its role is advisory but that role is one that the Council [and not IBHE] created." *Stukel*, 344 Ill. App. 3d at 866; *see also People ex rel. Cooper v. Carlson*, 28 Ill. App. 3d 569, 572 (2d Dist. 1979) (OMA does not apply to voluntary "technical staff" meetings of "department heads or employees who seek to improve with dispatch their performance or function of assisting in the conduct of the people's business.").

Likewise, in *Pope v. Parkinson*, 48 Ill. App. 3d 797 (4th Dist. 1997), a student reporter for a University of Illinois newspaper, alleged that the University of Illinois (University) Assembly Hall Advisory Committee (Committee), which consisted of four faculty members and four students that were appointed by the chancellor of the University, and that advised the director of the assembly hall and, on occasion, the chancellor, violated OMA by refusing to open its meetings to the public. The court, however, held that the Committee was not an advisory body of the University because it was not appointed by, or accountable to, any public body. *Pope*, 48 Ill. App. 3d at 799. Specifically, the court stated:

[T]he Committee is an internal committee within the University whose sole function is to advise University administrators on matters pertaining to internal university affairs. No statute creates the Committee or defines the limits of its authority. The Committee's unpaid members are not 'officially' appointed by the chancellor, although they are informally appointed by the chancellor to an annual term and can be dismissed by the chancellor at any time. In the event of such a dismissal, the public tax burden will be neither increased nor decreased. *Pope*, 48 Ill.App.3d at 799.

The *Pope*, court further stated that OMA is:

[N]ot intended to open to the public the deliberations of merely informal advisory committees who discuss internal University

affairs. A public administrator like the Assembly Hall Director should be permitted to sample public opinion or to engage in reasonable inquiry regarding the acceptability of Assembly Hall programs. Similarly, the Chancellor should be able to appoint an advisory committee to assist him in his oversight of the Director's stewardship" *Pope*, 48 Ill.App.3d at 800-01.

Conversely, in *Board of Regents of Regency University System v. Reynard*, 292 Ill. App. 3d 968 (4th Dist. 1997), the appellate court concluded that the Athletic Council of Illinois State University (ISU) was an advisory body subject to FOIA. The Athletic Council served "as an advisory body to the athletic director, with primary advisory responsibility to the president. It gives advice on the development of budgets and policies governing the intercollegiate athletic program." *Reynard*, 292 Ill. App. 3d at 971. The Athletic Council "exists to provide faculty input to the decision-making bodies at ISU." *Reynard*, 292 Ill. App. 3d at 972. The athletic director "is free to reject its advice and there have been occasions when he has done so. The Council deals only with internal ISU matters, it has no budget, and none of its members are paid." *Reynard*, 292 Ill. App. 3d at 972. In concluding that the Athletic Council was an advisory body subject to the requirements of OMA, however, the court emphasized that the Council is "part of the formal organizational structure of ISU and its duties and responsibilities are set forth in the supplement [to the bylaws of the ISU Senate]. The broad scope of the Council's responsibilities as set forth in the supplement contrasts sharply with the limited duties of the committee in *Pope [v. Parkinson]*." *Reynard*, 292 Ill. App. 3d at 978.

After careful review of the arguments provided by [REDACTED] and the City, and based on our analysis of the factors set out in *Stukel*, this office concludes that the Evaluation Committee is more analogous to the informal advisory committee in *Pope*, the self-created group of university presidents in *Stukel*, and the group of department heads that held technical staff meetings in *Carlson* than to the Athletic Council in *Reynard*.

The available evidence indicates that Evaluation Committee was an *ad hoc* committee that functioned independently of the City Council, and which was not a part of the City Council's formal organizational structure, a primary consideration in determining whether an entity is an advisory body subject to OMA. Instead, as discussed above, the Evaluation Committee was a mixture of City staff experts, community stakeholders, property owners who were informally appointed by the mayor, and one non-scoring City Council member that acted only as a liaison between the City Council and the Evaluation Committee. The City Council appears to have had no control over the Evaluation Committee and, in fact, some City Council members were unaware of its existence. The members of the Evaluation Committee were unpaid for their service on the committee, had no budget, and appeared to have rendered advice to the City's Finance Department on one specific internal City matter, which the City then submitted to the City Council.

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Further, the available evidence indicates that the duties of the Evaluation Committee's members were not prescribed by any by-laws or rules or regulations of the City Council, and were not found in any statute. Based on the records provided by the City for our review, the information and documents necessary to fulfill the limited role of the Evaluation Committee were generally set forth in letters from the City's project manager.

Lastly, the available evidence demonstrates that any decision about moving forward with the potential redevelopment of the City-owned property would be made by the City in conjunction with the City Council. Neither the City nor the City Council were bound by any information or recommendation which the Evaluation Committee made. It is clear from our review of the applicable minutes of the City Council meetings that the Evaluation Committee's recommendations certainly may have enhanced the efficiency and knowledge of the City Council concerning the performance of the members' duties in awarding the 5th Avenue RFQ, but the recommendations did not appear to have a significant impact on the decisions made by the City Council. On the contrary, the City Council voted at the August 15, 2017, meeting to postpone the awarding of the 5th Avenue RFQ as recommended by the Evaluation Committee, and instead, decided to hold a City Council workshop on August 28, 2017—which was open to the public—concerning the 5th Avenue RFQ and the process that was used to evaluate the applicants. The City Council further discussed the matter at its September 5, 2017, and October 3, 2017, open meetings which appears to have included lengthy public comments, discussions by members of the City Council, and presentations by team members of the company recommended by the Evaluation Committee for both City Council members and the public. Therefore, we respectfully disagree with [REDACTED] characterization of the Evaluation Committee as having a "direct role in the legislative function"⁵ of the City Council.

For the reasons stated above, the Evaluation Committee lacks the features of an "advisory body" subject to OMA. Accordingly, we conclude that the Evaluation Committee is not a public body subject to OMA, and therefore, the conduct of its meetings did not violate OMA.

⁵Letter from [REDACTED] to Shannon Barnaby, Assistant Attorney [General], Public Access Bureau, Office of the Illinois Attorney General (October 6, 2017) at 5.

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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have questions, you may contact me by phone at (312) 550-4480, by e-mail at sbarnaby@atg.state.il.us, or by mail at the address listed on the first page of this letter. This letter serves to close this file.

Very truly yours,

[REDACTED]
SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

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