

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

November 4, 2024

Via electronic mail

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Via electronic mail

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FOIA Request for Review: 2024 PAC 81492

Dear Ms. Klipp and Mr. Schilke:

This determination letter is issued by the Attorney General pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2022)). For the reasons discussed below, this office concludes that the Community Advisory Group (CAG) established by the Illinois Department of Transportation (IDOT) for the Illinois Route 120 Planning and Environmental Linkages (PEL) Study (Study) did not violate OMA by holding a meeting on May 9, 2024, without adhering to the requirements of the Act.

On May 20, 2024, Ms. Barbara Klipp submitted a Request for Review to the Public Access Bureau on behalf of the Midwest Sustainability Group alleging that the CAG improperly held its first meeting on May 9, 2024, without adhering to the requirements of OMA. Ms. Klipp, a CAG member, stated: "This is a governmentally run study that impacts a lot of

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nearby residents, and we are hoping the public will be allowed to participate and have access to the meetings."¹

On May 21, 2024, the Public Access Bureau sent a copy of the Request for Review to IDOT. The Public Access Bureau also sent IDOT a letter requesting, for this office's confidential review, copies of any notices, agendas, minutes, and recordings of the May 9, 2024, meeting, as well as any records describing or reflecting the formation and role/functioning of the CAG. The inquiry letter also asked IDOT to address whether the elements courts have used to determine whether entities constituted advisory bodies or subsidiary bodies applied to the CAG. On May 31, 2024, IDOT furnished a written answer and approximately 300 pages of related records for this office's review. On June 11, 2024, Ms. Klipp submitted a reply to that answer.

ANALYSIS

Section 1 of OMA (5 ILCS 120/1 (West 2022)) states 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."

Section 1.02 of the Open Meetings Act² defines "public body" as including:

all 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 limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue[.]

In analyzing whether an entity constitutes an advisory body of a public body, Illinois courts have examined (1) who appoints the members of the entity, (2) the formality of their appointment, (3) whether the members are paid for their tenure, (4) the entity's assigned duties, including duties reflected in its bylaws or authorizing statute, (5) whether the entity's role is solely advisory or whether it also has a deliberative or investigative function, (6) whether the entity is subject to government control or otherwise accountable to any public body, (7) whether the entity has a budget, (8) the entity's place within the larger public body, and (9) the impact of decisions or recommendations that the entity makes. *University Professionals of Illinois v.*

¹E-mail from Barbara Klipp, Executive Director, Midwest Sustainability Group, to Sir or Madam (May 20, 2024).

²5 ILCS 120/1.02 (West 2022).

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Stukel, 344 Ill. App. 3d 856, 865 (2003).³ None of the cases used to formulate the test, however, concerned a State agency convening a group of external volunteers. See *People ex rel. Cooper v. Carlson*, 28 Ill. App. 3d 569, 572 (1975) (voluntary staff meetings of department heads of county development department not meetings of public body subject to OMA); *Pope v. Parkinson*, 48 Ill. App. 3d 797, 801 (1977) (committee of students and faculty selected by chancellor to advise him on administration of university arena not a public body); *Board of Regents of the Regency University System v. Reynard*, 292 Ill. App. 3d 968, 980-81 (1997) (university athletic council created by university's academic senate and incorporated in university's formal organizational structure with assigned duties in supplement to bylaws was public body); *Stukel*, 344 Ill. App. 3d at 866 (group formed by presidents and chancellors of universities on their own initiative to express views to Illinois Board of Higher Education not a public body). Further, upon searching case law from all 50 states, this office was unable to find any published decisions analyzing whether community groups convened pursuant to PEL studies were or were not required to adhere to open meetings laws.

In its answer to this office, IDOT explained the genesis and purpose of the CAG as follows:

The CAG is one component of the Federal Planning and Environmental Linkages (PEL) study process, which requires public consultation as part of the National Environmental Protection Act. (NEPA). The purpose of the CAG is to provide community input on various elements of the study, including developing transportation needs, identifying issues important to the community, and providing feedback on transportation alternatives.^[4]

Addressing the first three factors from *Stukel*, IDOT asserted that "CAG participants are not appointed, and there is no mechanism by which to appoint them."⁵ Rather, "CAG is comprised solely of volunteers selected from a cross-section of the public who

³Additionally, in analyzing whether a *private* entity constitutes a subsidiary body of a public body, Illinois courts have analyzed (1) the extent to which the entity has a legal existence independent of government resolution, (2) the degree of government control exerted over the entity, (3) the extent to which the entity is publicly funded, and (4) the nature of the functions performed by the entity. *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶ 26. The advisory body factors from *Stukel* are the appropriate factors to analyze here.

⁴Letter from Jose Rios, P.E., Region One Engineer, Illinois Department of Transportation, to Joshua M. Jones, Deputy Bureau Chief, Office of the Attorney General – State of Illinois, Public Access Bureau (May 31, 2024), at 1.

⁵Letter from Jose Rios, P.E., Region One Engineer, Illinois Department of Transportation, to Joshua M. Jones, Deputy Bureau Chief, Office of the Attorney General – State of Illinois, Public Access Bureau (May 31, 2024), at 2.

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represent a wide variety of local interests, such as elected leaders, emergency services personnel, schools, residents, businesses, park districts, and others with a stake in the study's outcome."⁶ IDOT stated that at a public information meeting on April 23, 2024, a form was provided for any community members who wished to apply to be on the CAG, and all who applied were selected. IDOT acknowledged that an IDOT "representative assists in leading CAG meetings," but noted that "no Department employee or agent is a member of the group."⁷ IDOT confirmed that the participants do not receive pay, reimbursement, or any other compensation.

As to the CAG's duties and any sources of authority, IDOT stated:

There is no authorizing statute, regulation, resolution, or any other official action by any State entity transforming the CAG into a public body akin to a statutorily-authorized commission or committee; indeed, the CAG is simply a collection of the public invited to provide stakeholder input regarding an infrastructure project. The CAG has no State-sanctioned authority.

* * *

In keeping with the nature of the CAG as a mechanism for public input on infrastructure projects, CAG participants have no assigned duties and there is no formal organization within the CAG, such as a chairperson or vice chair. The CAG is governed by no bylaws and has no procedure by which it could even authorize such.^[8]

Additionally, addressing the role of the CAG, its place within IDOT, and its impact, IDOT asserted:

The CAG makes no binding decisions: its contributions are solely made in an advisory capacity for consideration by the Department and the Federal Highway Administration, which is

⁶Letter from Jose Rios, P.E., Region One Engineer, Illinois Department of Transportation, to Joshua M. Jones, Deputy Bureau Chief, Office of the Attorney General – State of Illinois, Public Access Bureau (May 31, 2024), at 1.

⁷Letter from Jose Rios, P.E., Region One Engineer, Illinois Department of Transportation, to Joshua M. Jones, Deputy Bureau Chief, Office of the Attorney General – State of Illinois, Public Access Bureau (May 31, 2024), at 1.

⁸Letter from Jose Rios, P.E., Region One Engineer, Illinois Department of Transportation, to Joshua M. Jones, Deputy Bureau Chief, Office of the Attorney General – State of Illinois, Public Access Bureau (May 31, 2024), at 1-2.

ultimately the final decisionmaker. While a Department representative may help lead meetings, the CAG is not included in the Department's organizational structure. Indeed, the CAG is not a part of the Department in any sense beyond an external group comprised of outside stakeholders informally organized by the Department to better understand the effect of transportation projects within a given community. The members of the public who join the CAG to share their input are not subject to the control of the Department or performing any State function. The Department merely organized the CAG to help inform the Department of transportation issues and what transportation alternatives should be considered in relation to its IL 120 PEL Study per federal requirements.^[9]

In reply, Ms. Klipp expressed disappointment that the CAG did not voluntarily comply with OMA. She argued that OMA should apply to CAG meetings because (1) the group "is providing federally required public input to a federal planning process regulated by the National Environmental Protection Act[,] (2) "[p]revious studies * * * regarding this project (The Blue-Ribbon Advisory Council and the Tri-County Access Study run by the Illinois Tollway) followed the OMA[,] and (3) public engagement is a core tenet of the PEL format.¹⁰ Ms. Klipp later provided this office with evidence that the Blue Ribbon Advisory Council adhered to OMA. Ms. Klipp argued that holding the CAG meetings without adhering to OMA meant that many members of the public were improperly shut out of the decision-making process: "[J]oining the CAG is a time commitment as you are asked to attend or have a substitute for all the meetings. A member of the public should be able to view part of or all of the meetings as they are able and interested to do so and not have to join a formal group with a larger time commitment in order to be informed."¹¹ She also alleged that "CAG membership applications closed on May 5th so members of the public who learned about the project after that time are being shut out without the opportunity to observe or participate."¹²

⁹Letter from Jose Rios, P.E., Region One Engineer, Illinois Department of Transportation, to Joshua M. Jones, Deputy Bureau Chief, Office of the Attorney General – State of Illinois, Public Access Bureau (May 31, 2024), at 2.

¹⁰Letter from Barbara Klipp, Executive Director, Midwest Sustainability Group, to Joshua M Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (June 11, 2024), at 1 -2.

¹¹Letter from Barbara Klipp, Executive Director, Midwest Sustainability Group, to Joshua M Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (June 11, 2024), at 2.

¹²Letter from Barbara Klipp, Executive Director, Midwest Sustainability Group, to Joshua M Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Illinois Attorney General (June 11, 2024), at 3.

This office has reviewed the website for the Study.¹³ In introducing the CAG, the website states that the group "is a collection of community representatives and serves as the focal point for the exchange of information between government entities and the local community."¹⁴ The website further states that "[t]he CAG is made up of representatives of diverse community interests, local government officials, community representatives, property owners and residents, and stakeholders with technical expertise[,] and that the CAG assists IDOT "in making better decisions on transportation related projects that benefit the community and environment."¹⁵ In a section addressing what a CAG member may expect, the website also states:

It is anticipated that this project will have up to six CAG meetings to review the information necessary to complete this Planning and Environmental Linkages Study. Meetings will generally be scheduled during normal business hours and may be in person or virtual. CAG members will be responsible for attending or designating a representative to attend the CAG meetings, providing general input on the study, communicating to stakeholders outside the CAG, and collaborating with the Department. The Study Team anticipates up to six (6) CAG meetings from May 2024 through 2025.^[16]

Under the first factor enumerated above for assessing whether CAG is an advisory body, it is evident that IDOT did not formally appoint members to the CAG. Rather, IDOT asserted that it permitted all volunteers in the community who filled out a form to join the CAG, and the materials this office has reviewed reflect that IDOT also invited certain local individuals to become members in the interest of having a balanced cross-section of stakeholders. The information indicating that the CAG has a fixed membership now that the application period has closed and that members are asked to attend all meetings or arrange substitutes for any absences suggests that there is some formality to the membership arrangement, though it is undisputed that the members are not paid for their tenure, and there appears to be no barrier to IDOT removing a member for any reason at any time. Additionally, while the materials IDOT provided to this office indicate that various local officials are members of the CAG, it is undisputed that no

¹³Illinois Department of Transportation, IL 120 Study, IL60 to Almond Road, Illinois Route 120 Planning and Environmental Linkages Study, <https://il120study.com/> (last visited September 16, 2024).

¹⁴Illinois Department of Transportation, IL 120 Study, IL60 to Almond Road, Community Advisory Group, <https://il120study.com/advisory-group/> (last visited September 16, 2024).

¹⁵Illinois Department of Transportation, IL 120 Study, IL60 to Almond Road, Community Advisory Group, <https://il120study.com/advisory-group/> (last visited September 16, 2024).

¹⁶Illinois Department of Transportation, IL 120 Study, IL60 to Almond Road, Community Advisory Group, <https://il120study.com/advisory-group/> (last visited September 16, 2024).

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member is an IDOT employee or agent. Moreover, IDOT confirmed that the CAG has no bylaws, and there is no Illinois authorizing statute or other State authority to formalize the group as an Illinois public body. Rather, IDOT convened the CAG as part of its choice to use the optional PEL approach to inform the federal environmental review process for the Illinois Route 120 project.¹⁷ Thus, the CAG does not have duties assigned by statutes or bylaws, but CAG members are asked to provide public input because PEL studies require public participation.¹⁸ This role is advisory, though members are asked to serve as community liaisons. The CAG members advise IDOT's study group for the project, which appears to consist of IDOT staff members and/or consultants for IDOT. While IDOT exercised a degree of control over the CAG in the sense of IDOT representatives running the group to gather such public input, the group has no budget and, significantly, no place in IDOT's formal organizational structure. *See Reynard*, 292 Ill. App. 3d at 977 ("[T]he definition of 'public body' * * * depends primarily upon organizational structure."). Further, the CAG has no authority to make binding decisions; it merely provides feedback, with the Federal Highway Administration as the final decisionmaker.

Evaluating these factors together, the CAG may serve a valuable public participation function under federal planning processes and procedures that pertain to the Study, but it does not do so as a "public body" of the State of Illinois. As an ad hoc entity of external volunteers, the CAG is more akin to a focus group than an advisory body of a public body. The CAG has several features that the court in *Pope* cited in determining that a committee of students and faculty was not an advisory body—specifically: (1) it is ad hoc in nature, (2) its members were not officially appointed, and (3) it falls outside IDOT's formal organizational nature. Although Ms. Klipp demonstrated that the Blue Ribbon Advisory Council convened by the Illinois Tollway for an earlier stage of the project adhered to OMA, she acknowledged that she was unsure whether it was required to do so. Notably, Ms. Klipp forwarded to this office an e-mail from Bill Morris, former member of the Illinois Tollway Board, which stated: "The Tollway Committee did operate under the Open Meeting guidelines. I was on the Tollway Board that established the Committee[.]"¹⁹ Unlike the Illinois Tollway, IDOT does not have a board governance structure, and it is undisputed that no legislative governing body, such as the Illinois Tollway Board, established the CAG. An entity may choose to adhere to OMA to promote transparency or because it finds the framework of the Act useful for conducting its activities, but it is only required to comply with OMA if it constitutes a "public body" under the definition of that term in section 1.02.

¹⁷See 23 U.S.C. § 168(d) (2018) (permitting use of "planning products" such as PEL studies that involve the public to inform environmental review processes).

¹⁸See 23 CFR pt. 450.212(b)(2) (2024) and 23 CFR pt. 450.318(b)(2) (2024) (requiring public review and opportunity to comment).

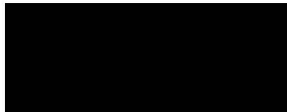
¹⁹E-mail from Bill Morris to Barbara [Klipp] (undated).

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Under the particular facts and circumstances presented in this matter, the Public Access Bureau is unable to conclude that the CAG is a public body subject to OMA. This office notes that although Ms. Klipp contends that adhering to OMA would make it possible for more members of the public to stay informed about the project, IDOT has posted on the website for the Study extensive information about both the first meeting of the CAG on May 9, 2024, and the second meeting of the CAG on August 28, 2024.²⁰ Additionally, IDOT has committed to hold at least three public information meetings about the project, where attendees from the public are offered an opportunity to provide feedback. While not equivalent to OMA compliance, the publicly posted materials and public outreach give a significant degree of public insight into the CAG's activities.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this file. If you have any questions, please contact me at joshua.jones@ilag.gov or (773) 590-7951.

Very truly yours,



JOSHUA M. JONES
Deputy Bureau Chief
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²⁰Illinois Department of Transportation, IL 120 Study, IL60 to Almond Road, Community Advisory Group, <https://il120study.com/advisory-group/> (last visited September 16, 2024).