



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

August 10, 2023

Via electronic mail

Via electronic mail

Mr. Richard Superfine
Legal Counsel
City of Chicago Board of Ethics
740 North Sedgwick
Chicago, Illinois 60654
richard.superfine@cityofchicago.org

RE: OMA Request for Review – 2022 PAC 74629

Dear [REDACTED] and Mr. Superfine:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA).¹ For the reasons that follow, the Public Access Bureau concludes that the City of Chicago Board of Ethics (Board) violated OMA at its November 14, 2022, meeting.

BACKGROUND

On December 14, 2022, [REDACTED] submitted a Request for Review alleging that the Board improperly discussed a "query report" in the closed session portion of its November 14, 2022, meeting. Specifically, [REDACTED] alleged that the report did not fall within the scope of the exceptions in section 2(c)(1) or 2(c)(4) of OMA² that the Board cited as its bases for entering closed session.

¹5 ILCS 120/3.5(e) (West 2022).

²5 ILCS 120/2(c)(1), (c)(4) (West 2022).

██████████
Mr. Richard Superfine
August 10, 2023
Page 2

On December 21, 2022, this office sent a copy of the Request for Review to the Board and asked it to provide a written answer and copies of the November 14, 2022, meeting agenda, open and closed session minutes, as well as the verbatim recording of the closed session. On January 20, 2023, the Board provided this office with the requested materials. On January 24, 2023, this office forwarded a copy of the Board's response to ██████████; he did not reply.

DETERMINATION

The intent of OMA is "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly."³ Section 2(a) of OMA⁴ provides that all meetings of a public body shall be open to the public unless the subject of discussion falls within one of the exceptions set out in subsection 2(c) of OMA.⁵

Section 2(c)(1) of OMA

Section 2(c)(1) of OMA permits a public body to hold a closed session to discuss, "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees" as well as specified independent contractors or volunteers and legal counsel of the public body.⁶

In its answer to this office, the Board asserted that section 2(c)(1) of OMA authorized the closed discussion of the "query report" on the grounds that "if the Board may confidentially consider a matter under the [City's Ethics] Ordinance for a City employee, then it may do the same for a City elected official."⁷ However, under section 2(b) of OMA, exceptions are to be "strictly construed, extending only to subjects clearly within their scope."⁸ The plain language of section 2(c)(1) of OMA is limited to "specific employees" and specified independent contractors or volunteers and legal counsel of a public body; it does not encompass elected officials. In a binding opinion, the Attorney General concluded that section 2(c)(1) does not

³5 ILCS 120/1 (West 2022).

⁴5 ILCS 120/2(a) (West 2022).

⁵5 ILCS 120/2(c) (West 2022).

⁶5 ILCS 120/2(c)(1) (West 2022).

⁷Letter from Richard Superfine, Legal Counsel, Board of Ethics, City of Chicago, to Victoria Frazier, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General, January 17, 2023, at 2.

⁸5 ILCS 120/2(b) (West 2022).

apply to elected officials. Ill. Att'y Gen. Pub. Acc. Op. No. 17-023, issued November 21, 2017, at 4 ("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."). Accordingly, the Board's reliance on section 2(c)(1) to discuss the "query report" during its November 14, 2022, closed session was improper.

Section 2(c)(4) of OMA

As noted above, the Board also cited 2(c)(4) of OMA⁹ as a basis for entering closed session during its November 14, 2022, meeting. Section 2(c)(4) of OMA allows a public body to discuss in a closed meeting, "[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." Section 2(d) of OMA defines quasi-adjudicative body as "an administrative body charged by law or ordinance with the responsibility to conduct hearings, receive evidence or testimony and make determinations based thereon, but does not include local electoral boards when such bodies are considering petition challenges."¹⁰

The Municipal Code (Code) of the City of Chicago (City) charges the Board with, among other things, the authority to conduct hearings, receive evidence, and issue opinions on whether certain conduct violated the City's ethics ordinances.¹¹ The Code also empowers the Board:

to render advisory opinions with respect to the provisions of this chapter based upon a real or hypothetical set of circumstances, when requested by an official or employee, or by a person who is personally and directly involved. Advisory opinions shall be made available to the public, but the identity of the person requesting the opinion and of any person whose conduct is involved in the set of circumstances described in the request for the opinion shall be confidential. The board shall indicate, in writing,

⁹Although the Board's answer to this office stated that 2(c)(4) was "not implicated here[.]" because this office has concluded that the closed session was not within the scope of 2(c)(1), we will also address whether it was within the scope of the other exception cited at the time of the meeting.

¹⁰5 ILCS 120/2(d) (West 2022).

¹¹Chicago Municipal Code §2-156-392.

those advisory opinions that have precedential value, and organize such opinions in a searchable database that is accessible from the board's website. This subsection shall not be construed to prohibit the executive director from issuing informal advisory opinions in accordance with rules promulgated by the board[.]^[12]

At its November 14, 2022, meeting, the Board entered into closed session, in part, to discuss a "query report" regarding "Case No. 22033.Q Action on behalf of relatives or domestic partners[.]"¹³ According to the Board's open session minutes, the query report was "an advisory opinion issued to an elected official by staff explaining how the official would recuse themselves from * * * action[s] or decision[s] involving their relative's future employer."¹⁴ A redacted version of the advisory opinion is posted to the Board's website, pursuant to the City's Code.¹⁵

In his Request for Review, ██████████ argues that section 2(c)(4) does not include discussions of advisory opinions:

Section 2(c)(4) covers only those cases filed before the Board in its quasi-adjudicative capacity. OMA provides that the Board acts in its quasi-adjudicative capacity only when it "conducts hearings, receive[s] evidence or testimony and make[s] determinations based thereon. [5 ILCS 120/2(d) (West 2022).]"

However, this matter is listed as a 'query report' rather than a 'complaint', therefore the Board was not conducting a hearing and receiving evidence or testimony. Furthermore, the minutes state that the Board was merely issuing an "advisory opinion", rather than making a formal "determination" based on evidence or testimony.^[16]

¹²Chicago Municipal Code §2-156-380(l).

¹³City of Chicago Board of Ethics, Agenda Item IX(C), Query Report (November 14, 2022).

¹⁴City of Chicago Board of Ethics, Meeting, November 14, 2022, Minutes 12.

¹⁵City of Chicago, Board of Ethics, Case No. 22033.Q / Employment Action on behalf of relatives or domestic partners (November 14, 2022), https://www.chicago.gov/content/dam/city/depts/ethics/general/AO_EmployRelatives/22033.Q.pdf.

¹⁶Letter from ██████████ to Leah Bartelt, Public Access Counselor, Office of the Attorney General (December 14, 2022), at 2.

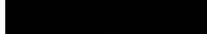
Black's Law Dictionary defines an "adjudication" as "[t]he legal process of resolving a dispute; the process of judicially deciding a case."¹⁷ This office's review of the November 14, 2022, meeting materials, including the closed session recording, confirmed that the Board discussed an advisory opinion rather than an adjudication. The City's Code indicates that the issuance of an advisory opinion is a separate process from an adjudication, which involves making a finding based on evidence.¹⁸ Black's Law Dictionary defines "evidence" as "something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact[.]"¹⁹ The November 14, 2022, closed session discussion did not include the consideration of "[e]vidence or testimony presented in" an open or closed hearing, as required by section 2(c)(4). Instead, the discussion consisted of the Board's and staff's opinions concerning the hypothetical scenario posed by the request for an advisory opinion.²⁰ Accordingly, the Board's discussion of the "query report" was beyond the scope of the section 2(c)(4) exception. To remedy this violation, this office requests the Board disclose the portions of the minutes and verbatim recording of its November 14, 2022, closed session that pertained to the "query report."

¹⁷Black's Law Dictionary 52 (11th ed. 2019).

¹⁸*Compare* Chicago Municipal Code §2-156-380(a-1) (giving the Board the power and duty to "issue a finding as to whether *evidence* shows that there is probable cause to believe that there has been a[n ethics] violation") (emphasis added), *with* Chicago Municipal Code §2-156-380(l) (giving the Board the power and duty "[t]o render advisory opinions * * * based upon a real or hypothetical set of circumstances") (emphasis added). *See also* Chicago Municipal Code §2-156-400 ("Adjudications conducted by and advisory opinions issued by * * * the board * * * shall be confidential").

¹⁹Black's Law Dictionary 697 (11th ed. 2019).

²⁰By contrast, this office has previously determined that sworn statements and staff advisory reports submitted in support of a complaint constitute "evidence or testimony" under section 2(c)(4) of OMA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 62578, issued July 23, 2020.


Mr. Richard Superfine
August 10, 2023
Page 6

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at victoria.frazier@ilag.gov.

Very truly yours,


VICTORIA FRAZIER
Assistant Attorney General
Public Access Bureau

74629 o 2c1 improper 2c4 improper mun