



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 24, 2013

PUBLIC ACCESS OPINION 13-016
(Request for Review 2013 PAC 25078)

OPEN MEETINGS ACT:
Duty to Inform the Public of
the Nature of the Business
under Consideration Prior to
Taking Final Action

Ms. Brenda Schory
Staff Writer
Kane County Chronicle
333 North Randall Road, Suite 2
St. Charles, Illinois 60174

Mr. Mark Grosso
President, Board of Education
Geneva Community Unit School District No. 304
227 North Fourth Street
Geneva, Illinois 60134

Dear Ms. Schory and Mr. Grosso:

This is a binding opinion issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2012)). For the reasons that follow, this office concludes that at a meeting held on June 24, 2013, the Board of Education of Geneva Community Unit School District No. 304 (Board) violated the requirements of OMA by taking final action on a matter without sufficiently informing the public of the nature of that action.

BACKGROUND

On June 26, 2013, Ms. Brenda Schory submitted a Request for Review on behalf of the *Kane County Chronicle* stating that on June 24, 2013, the Board held a closed meeting to

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conduct a dismissal hearing. Ms. Schory alleged that "[a]fter about 90 minutes, the meeting was reconvened in open session and board members voted to recommend the dismissal of an employee identified only as 'employee A' in direct violation of the Open Meetings Act[.]"¹

On July 9, 2013, the Public Access Bureau sent a copy of Ms. Schory's Request for Review to the Board and asked for a written response to the allegations, as well as a copy of the agenda, minutes, and any video or audio recordings of the open portions of the meeting. Counsel for the Board, Mr. Richard T. Petesch, responded in a letter dated July 18, 2013, and furnished copies of the agenda and draft minutes of the June 24, 2013, regular meeting, as well as a video recording of the first open portion of the meeting. Mr. Petesch explained that the videographers are dismissed when the Board enters closed session, therefore, the open portions of the meeting occurring after closed sessions are not recorded.² Consequently, the portion of the open session at which the dismissal was considered was not captured on video.³ The Board's response, however, noted that its vote to recommend the dismissal of the employee constituted final action under OMA. The Board explains its view that "in the instances of personnel who might be terminated from their employment for cause, the Board believes that the privacy interests of the individual employees outweigh the public's right to their identity."⁴

On July 23, 2013, this office forwarded the Board's response to Ms. Schory. Ms. Schory replied on July 25, 2013, stating, "[a]s a public entity, District 304 does not have the legal right to withhold the names of those whom are fired for cause when voting to do so at a public meeting."⁵

¹E-mail from Brenda Schory, Staff Writer, *Kane County Chronicle*, to Sara[h] Pratt, Public Access Counselor, Illinois Attorney General (June 26, 2013). Ms. Schory also alleged a violation of the Freedom of Information Act which was addressed in a separate Request for Review. See Ill. Att'y Gen. PAC Req. Rev. Ltr. 25230, issued July 19, 2013.

²Letter from Richard T. Petesch, Whitt Law LLC, to Rob Olmstead, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (July 18, 2013).

³Although OMA does not require a public body to audio- or video-record an open meeting, this office requested a copy of any recording of the open meeting that may have been made in order to aid our determination in this matter.

⁴Letter from Richard T. Petesch, Whitt Law LLC, to Rob Olmstead, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (July 18, 2013).

⁵E-mail from Brenda Schory, Staff Writer, *Kane County Chronicle*, to Mark Grosso, Board President, Geneva District 304, and Richard Petesch, Whitt Law; carbon copy to Rob Olmstead, Assistant Illinois Attorney General, Public Access Bureau, Esther Seitz, Attorney at Craven Law, and Kathy Gresey, Editor, *Kane County Chronicle* (July 25, 2013).

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On August 19, 2013, the Public Access Bureau extended the time to issue a binding opinion by 21 business days, to September 24, 2013, pursuant to section 3.5(e) of OMA.⁶

ANALYSIS

Section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2012) permits a public body to hold closed meetings to consider "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body[.]" The agenda for the June 24, 2013, meeting properly included the following items:

13. EXECUTIVE SESSION TO CONSIDER MATTERS PERTAINING TO THE APPOINTMENT, EMPLOYMENT, COMPENSATION, DISCIPLINE, PERFORMANCE, OR DISMISSAL OF SPECIFIC EMPLOYEES OF THE PUBLIC BODY [5 ILCS 120/2(c)(1); AND PENDING LITIGATION [5 ILCS 120/2(c)(11)]

14. ACTION POSSIBLE FOLLOWING EXECUTIVE SESSION

The Board's draft minutes indicate that after the Board reconvened from its closed session, a motion was made "to approve the recommendation for dismissal of Employee A due to performance concerns" and that the motion passed.⁷ The issue posed for determination by this office is whether it was permissible for the Board to take final action to dismiss a public employee without identifying that individual by name.

The General Assembly has declared:

[i]t is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. 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

⁶Letter from Rob Olmstead, Assistant Attorney General, Public Access Bureau, to Brenda Schory, Staff Writer, *Kane County Chronicle*, and Richard T. Petesch, Whitt Law LLC (August 19, 2013).

⁷Geneva Community Unit School District Number 304 Board of Education, Meeting, June 24, 2013, Draft Minutes 6.

public bodies be taken openly and that their deliberations be conducted openly. 5 ILCS 120/1 (West 2012).

Under section 2(e) of OMA (5 ILCS 120/2(e) (West 2012)), "[f]inal 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." (Emphasis added.) *See, Simonis v. Countryside Fire Protection District*, 173 Ill. App. 3d 418, 424 (1988) (stating "the Act allows a public body to *consider* disciplinary matters in a closed session *so long as its final action is taken at an open meeting*"). (Emphasis added.) Thus, although a public body is permitted to discuss the performance or shortcomings of a specific employee in a meeting closed to the public, it must take any final action concerning that employee in an open meeting. Moreover, the public body must provide the public with sufficient information to understand the effect of its action before it votes to discipline or dismiss the employee.

Because the employee whose termination was recommended was identified only as "Employee A," the public was deprived of any meaningful information concerning the practical effect of the Board's decision. Although the public could know the general nature of the matter being considered from the motion, without being informed of the identity of the employee who was the subject of the action the public could not determine whether the Board was dismissing a support staff, a teacher, a principal, or the superintendent of the District. By declining to identify the subject of the dismissal by name, the Board did not fully comply with the requirements of section 2(e) of OMA that it "inform the public of the business being conducted."

This conclusion finds support in both the majority and dissenting opinions in *Haight v. Bd. of Ed. of Cmty. Unit Sch. Dist. No. 205, Knox and Warren Counties*, 29 Ill. App. 3d 48 (3rd Dist. 1975). In *Haight*, the underlying issue was whether a resolution adopted by the board to send a notice of dismissal to the plaintiff teacher constituted a valid final action to dismiss her. The majority affirmed the dismissal, holding that the amended minutes of the school board meeting accurately reflected that the board had taken final action to dismiss the teacher by name during an open meeting of the board. *Haight*, 29 Ill. App. 3d at 49-50. Justice Barry, however, dissented from that opinion, stating that the manifest weight of the evidence showed that the teacher's name had *not* been referenced in the resolution, as was required, and that the amended minutes were therefore inaccurate in that regard. He noted that there was testimony that the name of the teacher (and another affected employee) had been left out of the resolution and the original minutes to avoid embarrassment, to which he responded:

However laudable the Board's motives here in concealing identities 'to save embarrassment,' the legislature has clearly opted for the overriding policy of accountability. It is not our

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prerogative, or the Board's, to reject the importance of that public interest, or to exempt school boards from the express application of the Act. *Haight*, 29 Ill. App. 3d at 54-55.

Although the court's majority and dissenting opinions reach differing conclusions based on the interpretation of the underlying facts, they are in agreement that OMA requires that the teacher's name be included in the board's final action to dismiss her.

On behalf of the Board, Mr. Petesch explained the Board's belief that the privacy interests of individual employees who are dismissed for cause outweigh the public's right to learn the employee's identity. While that view is understandable, *Haight* establishes that OMA does not permit a board to decline to reveal the identity of employees who are dismissed from public service in order to avoid embarrassment. The public is entitled to information regarding the performance of public employees, particularly when their performance falls so far below accepted standards as to warrant discipline or discharge. Section 2(e) of OMA ensures that the public has access to that information.

FINDINGS AND CONCLUSIONS

After full review and giving due consideration to the arguments of the parties, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

- 1) During an open meeting on June 24, 2013, the Board of Education of Geneva Community Unit School District No. 304 voted to dismiss an employee identified only as "Employee A."
- 2) On June 26, 2013, the Public Access Bureau received Ms. Brenda Schory's Request for Review alleging that the Board violated the Open Meetings Act by not identifying the employee by name before it took final action to dismiss the employee. Ms. Schory'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 2012)). The Attorney General extended the time to issue a binding opinion by 21 business days, until September 24, 2013. Therefore, the Attorney General may properly issue a binding opinion with respect to Ms. Schory's Request for Review.
- 3) The vote by the Board to dismiss "Employee A" constituted final action under OMA. However, by declining to identify the employee being terminated from employment, the Board failed to adequately inform the public of the nature of the business being conducted, in violation of section 2(e) of OMA.

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In accordance with these findings of fact and conclusions of law, the Board is directed to take immediate and appropriate action to comply with this opinion by reconsidering its June 24, 2013, final action, and by preceding any resulting final action with a public recital of the nature of the matter being considered and other information, including the name of the employee, that will inform the public of the business being conducted.

This opinion shall be considered a final decision of an administrative agency for the purposes of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2012). As required by section 3.5(e) of OMA, the Board shall 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). Judicial review of this decision may be obtained 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. Brenda Schory as defendants. *See* 5 ILCS 120/7.5 (West 2012).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:



Michael J. Luke
Counsel to the Attorney General

cc: Mr. Richard T. Petesch
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