



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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June 17, 2020

Via electronic mail

Mr. Christopher Hansen
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Via electronic mail

Mr. James L. Simon
City Attorney
City of Urbana
Legal Division
400 South Vine Street
Urbana, Illinois 61801
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RE: OMA Request for Review – 2020 PAC 63073

Dear Mr. Hansen and Mr. Simon:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2018)). For the reasons explained below, the Public Access Bureau is unable to conclude that the City Council of the City of Urbana (City) violated OMA in connection with its March 23, 2020, meeting.

In his Request for Review, Mr. Hansen alleged that the City Council held a meeting on March 23, 2020, by video conference that was not sufficiently accessible to the public. He further alleged that the agenda for the meeting was not timely posted and that the public was not permitted to record the meeting or provide verbal public comment.

On May 27, 2020, this office sent a copy of the Request for Review to the City Council and requested a written response to the allegations that the City's meeting had violated OMA. On June 1, 2020, the City Council submitted a written response along with a link to the agenda, minutes, and video of the meeting; Mr. Hansen replied to that response on June 11, 2020.

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DETERMINATION

Section 1 of OMA (5 ILCS 120/1 *et seq.* (West 2018)) provides 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 of OMA further provides that members of the public have "the right to attend all meetings at which any business of a public body is discussed or acted upon in any way."

Sections 2.01 and 2.06(g) of OMA

Section 2.01 of OMA (5 ILCS 120/2.01 (West 2018)) provides, in relevant part, that "[a]ll meetings required by this Act to be public shall be held at specified times and places which are convenient and open to the public." Section 2.06(g) (5 ILCS 120/2.06(g) (West 2018)) provides: "Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." The meaning of these provisions must be considered in conjunction with the Governor of Illinois' disaster proclamations concerning the COVID-19 pandemic, which both relax the physical attendance requirements of OMA for members of public bodies and require members of the public to generally remain in their homes.

Specifically, on March 9, 2020, pursuant to his authority under section 7 of the Illinois Emergency Management Agency Act (IEMA Act) (20 ILCS 3305/7 (West 2018)), the Governor "declare[d] all counties in the State of Illinois as a disaster area" in response to the outbreak of COVID-19. The Disaster Proclamation became effective immediately on March 9, 2020, to "remain in effect for 30 days." Subsequent Disaster Proclamations have extended the exercise of emergency powers through the end of June 2020.

The Governor also issued a series of executive orders for coping with the disaster. On March 16, 2020, the Governor issued Executive Order 2020-07, which provides, in relevant part:

During the duration of the Gubernatorial Disaster Proclamation, the provisions of the Open Meetings Act, 5 ILCS 120, requiring or relating to in-person attendance by members of a public body are suspended. Specifically, (1) the requirement in 5 ILCS 120/2.01 that "members of a public body must be physically present" is suspended; and (2) the conditions in 5 ILCS 120/7 limiting when remote participation is permitted are suspended. * * * When a meeting is necessary, public bodies are encouraged to provide video, audio, and/or telephonic access to meetings to ensure members of the public may monitor the meeting, and to update

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their websites and social media feeds to keep the public fully apprised of any modifications to their meeting schedules or the format of their meetings due to COVID-19[.]^[1]

Because of the rapid spread of COVID-19 throughout the State of Illinois, on March 20, 2020, the Governor issued Executive Order No. 2020-10. Among other things, that Order provides that, subject to certain limited exceptions, as of 5:00 p.m. on March 21, 2020, "all individuals currently living within the State of Illinois are required to stay at home or at their place of residence except as allowed in this Executive Order[.]" and that "[a]ll businesses and operations in the State, except Essential Businesses and Operations, * * * are required to cease all activities within the State except Minimum Basic Operations[.]"² The Stay at Home Order also prohibits "[a]ll public and private gatherings of any number of people occurring outside a single household or living unit" and "[p]ursuant to current guidance from the CDC, any gathering of more than **ten** people"³ (emphasis in original), unless allowed by the Order. The intent of the Order is "to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the greatest extent possible."⁴ The "stay at home" directive was in effect at the time of the City Council's March 23, 2020, meeting.

In light of these provisions, public bodies such as the City Council recently have been using various forms of technology to conduct meetings without the physical presence of their members or members of the public. This office issued guidance advising public bodies to "utilize the availability of remote participation to help curb the spread of COVID-19."⁵ In accordance with the executive orders and the guidance, the Public Access Bureau has held that a public body is "not obligated to permit in-person attendance by members of the public so long as it facilitated sufficient remote attendance." Ill. Att'y Gen. PAC Req. Rev. Ltr. 63027, issued May 26, 2020, at 3.

¹Executive Order 2020-07, §6, issued March 16, 2020, at 3.

²Executive Order No. 2020-10, §1(2), issued March 20, 2020.

³Executive Order No. 2020-10, §1(3), issued March 20, 2020.

⁴Executive Order No. 2020-10, §16, issued March 20, 2020.

⁵Guidance to Public Bodies on the Open Meetings Act and the Freedom of Information Act during the COVID-19 Pandemic, at 4 (updated April 9, 2020), http://foia.ilattorneygeneral.net/pdf/OMA_FOIA_Guide.pdf.

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Mr. Hansen's Request for Review asserted that the March 23, 2020, meeting did not comply with the "open" and "convenient" requirement in section 2.01 of OMA because he had difficulty maintaining a connection to the Zoom video conference and because he was not permitted to attend the meeting in person. In its answer to this office, the City Council acknowledged that when the City's local access television channel linked to the Zoom video conference, there were difficulties connecting to the video conference prior to the start of the meeting; however, those issues had been resolved before the meeting convened. The City Council stated that Mr. Hansen came to the City building on the evening of the meeting, but was denied entry because the building was closed to the public. In reply, Mr. Hansen appeared to assert that he should have been able to attend the meeting in person as the number of people present in the meeting room was below the number specified in the executive order. He did not, however, contest the City Council's assertion that the video conference was freely accessible once the meeting had started.

The Public Access Bureau has reviewed the agenda, minutes, and recording of the March 23, 2020, City Council meeting. The agenda includes the following note in connection with the item for public participation: "*Due to the Governor's Stay at Home order, the Urbana City Council Chambers will not be open to the public during this Council Meeting. For those wishing to provide public input, please email your statement to CityCouncil@urbanaininois.us by 7:00 pm Monday evening March 23, 2020. Your statement will be read into the record per council public input rules."⁶ The agenda also contains separate instructions, titled "Public Input and Viewing for Urbana City Council Meeting (Monday, March 23, 2020)[,]" for participating in the meeting by telephone or Zoom video conference. The agenda and instructions clearly and unambiguously stated that members of the public could attend the meeting online but not in person, the reason obviously being the pandemic. Under the particular, unprecedented circumstances of the COVID-19 pandemic, and pursuant to the Governor's emergency "stay at home" orders, a public body may fulfill the "convenient and open to the public" requirement by providing legitimate means for members of the public to access the meeting remotely. Because it is undisputed that the public could access the meeting by telephone, livestream, or Zoom video conference, we conclude that the Board did not violate section 2.01 of OMA by not allowing members to attend the meeting in person.

With respect to public comment, Mr. Hansen acknowledged that the agenda stated that the public would be permitted to comment at the meeting by e-mail. However, he asserted that instructions for public participation at the March 23, 2020, meeting also indicated that the public would be able to speak by telephone or the Zoom video conference during the time for public input. Mr. Hansen stated that, at the beginning of meeting, the mayor informed those

⁶City of Urbana, Agenda Item D, *Public Input and Presentations (March 23, 2020).

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attending that public comment would be taken by e-mail as a result of technical difficulties. In his Request for Review, Mr. Hansen contended that no technical difficulties with audible public comment existed. Instead, he asserted that the mayor and the City Council had decided in advance of the meeting to disallow verbal public comment and instead offer public comment solely by e-mail. In its answer to this office, the City Council explained that it did not provide for verbal public comment by the public because the mayor, as host of the Zoom video conference, did not have a monitor or other equipment to mute and unmute participants. The City Council stated that without such equipment, the mayor "was not able to control the meeting so she could allow members of the public to provide audible public comment through Zoom."⁷ The City Council asserted that the technical difficulties with the Zoom video conference "did not deny any member of the public from their statutory right to provide public comment. As it turned out, no public comment was received by e-mail."⁸ Mr. Hansen contested that assertion noting that the staff controlling the audio were able to "selectively mute and unmute the members of the City Council."⁹ In his reply, Mr. Hansen argued that "'speaking' to the Council is the only public input option provided which is consistent with the long-held public input rules of the Council."¹⁰ Mr. Hansen further asserted that he was unable to provide public comment as a result of the City Council's decision to accept comments by e-mail only.

Section 2.06(g) of OMA permits a person to provide public comment to the City Council in accordance with the rules established and recorded by the City. As noted above, the agenda for the City Council's March 23, 2020, meeting indicated that public input would be accommodated by e-mail statements that would be read into the record in accordance with the City's rules for public input.¹¹ The agenda also referred to other methods of public input identified in the instructions. The crux of Mr. Hansen's allegation concerning public comment is that unavailability of the methods of public input other than e-mail violates section 2.06(g) of OMA. This office addressed the same allegation in an earlier Request for Review:

⁷Letter from James L. Simon, City Attorney, City of Urbana, to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 1, 2020), at 5.

⁸Letter from James L. Simon, City Attorney, City of Urbana, to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 1, 2020), at 5.

⁹Letter from Christopher Hansen to [Matt] Hartman, Assistant Attorney General, Public Access Bureau (June 2, 2020), at 3.

¹⁰Letter from Christopher Hansen to [Matt] Hartman, Assistant Attorney General, Public Access Bureau (June 2, 2020), at 2.

¹¹See Urbana, IL, Code § 2-4 (2019).

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No provision of OMA sets out guidelines concerning public comment during public health emergencies that preclude public bodies from physically convening meetings. It would be illogical to construe OMA as prohibiting a public body from meeting remotely during public health emergencies because the limitations of meeting in such a format interfere with the public body's ability to allow public comment in full accordance with its established and recorded rules. *See Phoenix Bond & Indemnity Co.*, 194 Ill. 2d 99, 107 (2000) (A statute should not be construed in a way that would defeat its purpose "or yield an absurd or unjust result."). Although you assert that the Board has technology that could have been used to enable members of the public to verbally address the Board during the March 20, 2020, meeting, this office is unable to conclude that the Board acted unreasonably under the circumstances. Allowing public comment to be submitted via e-mail and read aloud enabled the public to address the substance of their comments to the Board. Ill. Att'y Gen. PAC Req. Rev. Ltr. 62252, issued April 2, 2020, at 3.

This office reiterates that conclusion in this matter. Here, the agenda requested that the public submit comments to the City Council by 7:00 p.m., and the mayor stated that the public could continue to submit comments during the meeting in light of the unavailability of verbal comments. Mr. Hansen did not submit a written comment that was rejected by the City Council, and the available information indicates that such a comment from Mr. Hansen during the meeting would have been accepted and read into the record. In the absence of evidence that Mr. Hansen or any other individual attempted to exercise his or her statutory right to address the City Council at its March 23, 2020, meeting and was prohibited from doing so, this office is unable to conclude that the City Council violated section 2.06(g) of OMA.

However, the Public Access Counselor is also charged with providing advice concerning OMA to public bodies and members of the public. 15 ILCS 205/7(a), (c) (West 2018). To that end, this office has issued guidance during the COVID-19 pandemic that recommends public bodies provide "multiple alternative means for the public to comment, such as, telephone or video-conference capabilities, in addition to the submission of emailed or written comments."¹² If the City Council has the technological capability to provide members of the public with an opportunity to verbally comment during remote meetings in a manner that

¹²Office of the Attorney General, Public Access Counselor, Guidance to Public Bodies on the Open Meetings Act and the Freedom of Information Act during the COVID-19 Pandemic (April 9, 2020), available at http://foia.ilattorneygeneral.net/pdf/OMA_FOIA_Guide.pdf

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would not entail a significant risk of disruption, this office encourages it to provide such an option.

Section 2.05 of OMA

Section 2.05 of OMA (5 ILCS 120/2.05 (West 2018)) provides: "Subject to the provisions of Section 8-701 of the Code of Civil Procedure, any person may record the proceedings at meetings required to be open by this Act by tape, film or other means. The authority holding the meeting shall prescribe reasonable rules to govern the right to make such recordings." The Attorney General has issued a binding opinion which concluded that a public body may limit the right of the public to record an open meeting only pursuant to prescribed rules the public body has adopted and then only to the extent that those rules are designed to prevent disruptions or avoid safety hazards, and do not unduly interfere with the right to record. *See Ill. Att'y Gen. Pub. Acc. Op. No. 12-010, issued June 5, 2012, at 4 (concluding that a rule that requires a person wishing to record an open meeting to provide advance notice is invalid).*

Mr. Hansen alleged that the City Council violated section 2.05 when "[t]he City Clerk and/or Jason Liggett and/or whomever handled the settings of the Zoom conferencing app, had disabled the option to allow audio/video recording by attendees."¹³ Mr. Hansen's Request for Review does not allege that he or any other person was prohibited from recording the meeting by some other method, only that the City Council did not permit him to record the meeting using a feature of the video conferencing application that the City used to hold the meeting. Section 2.05 of OMA does not require a public body to furnish the public with a particular means by which to record a meeting. Accordingly, this office concludes City Council did not violate section 2.05 of OMA by failing to make the recording feature of its video conferencing application available to Mr. Hansen. Consistent with the spirit of OMA, however, this office strongly encourages the City Council to adjust any settings needed to enable members of the public to record meetings and save copies of recordings to their computers.

Section 2.02(a) of OMA

Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2018)) provides, in pertinent part:

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

¹³Letter from Christopher Hansen to [Sarah] Pratt, Public Access Counselor, Office of the Attorney General (May 20, 2020), at 4.

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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.

Section 2.02(c) of OMA (5 ILCS 120/2.02(c) (West 2018)) further provides:

Any agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting. The public body conducting a public meeting shall ensure that at least one copy of any requested notice and agenda for the meeting is continuously available for public review during the entire 48-hour period preceding the meeting. Posting of the notice and agenda on a website that is maintained by the public body satisfies the requirement for continuous posting under this subsection (c). If a notice or agenda is not continuously available for the full 48-hour period due to actions outside of the control of the public body, then that lack of availability does not invalidate any meeting or action taken at a meeting.

The Public Access Bureau has previously determined that a public body "should post meeting notices in a location where they may be continuously viewable from the outside of [the building where the meeting is being held], such as on or near the front door or facing outward from a window." Ill. Att'y Gen. PAC Req. Rev. Ltr. 29886, issued September 16, 2014, at 2-3; *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 48574, issued August 22, 2017.

In his Request for Review, Mr. Hansen alleged that the City's posted agenda for the March 23, 2020, meeting at 7:00 p.m. did not comply with section 2.02(a) of OMA because "[t]he agenda for this meeting appears to have been created on March 21, 7:34pm, which is less than 48 hours before the meeting."¹⁴ The City Council responded by stating that "[t]he agenda was posted on the City's website and on the two bulletin boards customarily used for posting City Council meeting agendas at about 5:00 p.m. on Friday March 20, 2020 – more than 72 hours before the start of the meeting."¹⁵ The City Council stated that it made corrections to the instructions for participating remotely after the agenda was posted, but those corrections were

¹⁴Letter from Christopher Hansen to [Sarah] Pratt, Public Access Counselor, Office of the Attorney General (May 20, 2020), at 1.

¹⁵Letter from James L. Simon, City Attorney, City of Urbana, to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 1, 2020), at 3-4.

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posted "around 6:30 p.m. on Saturday, March 21, 2020 – again, within the time required by OMA Section 2.02(a)."¹⁶ In reply, Mr. Hansen admitted that he did not know exactly when the agenda was posted, but asserted that given the file creation date and time, it was not possible that the agenda was posted at least 48 hours before the meeting. Mr. Hansen also appeared to assert that the agenda was not continuously available for the 48 hours before the meeting because the locations where the agendas were physically posted were not accessible to the public due to the closure of the building.

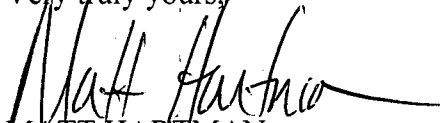
The available information is that copies of the agenda were posted at the location of the meeting and on the City's website on March 20, 2020, which is more than 48 hours before the meeting. Mr. Hansen's assertion that the agenda was not timely posted to the website is based on his review of the document properties of the copy of the agenda that is available on the City's website. Although this office was able to verify Mr. Hansen's claim that the document was created and last modified on March 21, 2020, at 7:34 p.m., that fact alone does not establish that the agenda for the March 23, 2020, meeting was not posted to the website or continuously available for public review in the 48 hours before the meeting. Mr. Hansen has not alleged that he viewed the City's website at any point during the 48 hours before the meeting and observed that no agenda had been posted. Rather, the City Council's response explained that on the evening of March 21, 2020, it was uploading to the website corrected remote access instructions, which were attached to the agenda. Thus, even though a modified copy of the agenda was created on March 21, 2020, at 7:34 p.m., the agenda was posted to the City's website on March 20, 2020. There is no indication that, at any time during the 48 hour period, an agenda that provided the public with advance notice of the date, time, and business to be conducted was not posted to the City's website or not available for continuous review by the public. To the extent that the agenda's instructions for accessing the meeting were corrected slightly less than 48 hours before the meeting commenced, there is no indication that any individual who wished to attend the meeting remotely was unable to do so because of the corrections. Accordingly, under these circumstances, this office is unable to conclude from the available information that the District failed to provide proper notice of its March 23, 2020, meeting.

¹⁶Letter from James L. Simon, City Attorney, City of Urbana, to Matt Hartman, Assistant Attorney General, Public Access Bureau (June 1, 2020), at 4.

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This file is closed. If you have questions, you may contact me at (217) 782-9054.
or mhartman@atg.state.il.us.

Very truly yours,


MATT HARTMAN
Assistant Attorney General
Public Access Bureau

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