



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

April 12, 2016

Via electronic mail

Mr. Kent Southers
4340 Lilac Lane
Mt. Vernon, Illinois 62864
southers3@msn.com

Via electronic mail

The Honorable Mary Jane Chesley
Mayor
City of Mt. Vernon
1100 Main Street
Mt. Vernon, Illinois 62864
mayorchesley@mvn.net

RE: OMA Requests for Review – 2015 PAC 34426 and 34427

Dear Mr. Southers and Mayor Chesley:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2014)). For the reasons that follow, there is insufficient evidence from which to conclude that the Mt. Vernon City Council (City Council) violated OMA by holding improper meetings regarding the proposed sale of the City's municipal water and sewer system.

On March 23, 2015,¹ our office received two Requests for Review submitted by Mr. Kent Southers regarding City Council members' consideration of the sale of the municipal water and sewer system to a private company. The proposed sale first became public at a special meeting held by the City Council on February 3, 2015. Mr. Southers alleged that a committee of City Council members, as well as the City Council as a whole, held meetings concerning the possible sale of the water and sewer system before February 3, 2015, without complying with the requirements of OMA. He also alleged that the City Council failed to conduct timely reviews of

¹The Requests for Review were submitted via e-mail after close of business on Friday, March 20, 2015.

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closed session minutes to determine whether the need for confidentiality still exists. On April 3, 2015, our office forwarded copies of the Requests for Review to the City Council and requested that it provide a detailed response to the allegations, as well as relevant minutes and recordings. On April 10, 2015, the City Council responded.

This office forwarded the City Council's response to Mr. Southers, and he replied on May 12, 2015. On May 26, 2015, we asked the City Council to respond to the specific allegation that it had created an advisory committee consisting of two City Council members to consider the possible sale. In particular, we requested records relating to the purpose and content of any meetings about the proposed sale, including e-mails among City Council members, and any records, including e-mails among City Council members, relating to two City Council members' involvement with the possible sale of the water and sewer system. On June 15, 2015, the City Council provided affidavits from the two City Council members involved with the potential sale and the former City Manager, as well as e-mails responsive to our request.

DETERMINATION

Committee of City Council Members

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2014)) provides that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." Section 1.02 of OMA (5 ILCS 120/1.02 (West 2014)) defines a "public body" as "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*[" (Emphasis added.)

Mr. Southers alleged that the City Council created a committee of two City Council members to consider the possible sale of the City's water and sewer systems. The minutes of the February 3, 2015, special meeting of the City Council reflect that Councilman David Wood stated that "[t]he Mayor, acting as the overseer of this effort, appointed Dennis [McEnaney] and I as a committee of two. The City Manager, Councilman McEnaney and I met with three [water] companies in the initial informational and due diligence meetings."²

The City Council provided affidavits from Councilman McEnaney and Councilman Wood that stated they "misspoke" at the February 3, 2015, City Council meeting

²Mt. Vernon City Council, Special Meeting, February 3, 2015, Minutes 5.

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when describing their efforts in connection with the possible sale as a "committee of two."³ Councilman McEnaney described the City Manager as the person first suggesting the possibility of a sale after a water company had contacted him.⁴ Councilman McEnaney stated that he then sought Councilman Wood's involvement because of his financial expertise.⁵ In their affidavits, both City Council members denied that the City Council or the Mayor had appointed them or requested that they be involved with the possible sale.⁶ The former City Manager described his role in the process in his affidavit as follows:

I, as City Manager, represented the City, scheduled and conducted all of the meetings with Illinois American and the other water companies, and made recommendations on all matters. No Council member, and in particular Councilman Wood or Councilman McEnaney, served as [a] member of any committee nor gave advice as a member of any committee or participated as a member of any committee of the Mayor or of the Council. Councilman Wood and Councilman McEnaney acted as individual Council members on their own initiative because of their individual interest in the sale of the City's water and sewer systems to a private company.⁷

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. An "advisory body," for purposes of OMA, is an entity that has defined responsibilities and is a formal part of the structure of the public body that it advises. *Board of Regents v. Reynard*, 292 Ill. App. 3d 968, 977-78 (4th Dist. 1997). In contrast, OMA is not "intended to open to the public the deliberations of merely informal advisory committees who discuss internal" affairs of a public body. *Pope v. Parkinson*, 48 Ill. App. 3d 797, 800 (4th Dist. 1977). Factors to consider in determining whether a group constitutes an advisory body under OMA include:

[w]ho appoints the members of the entity, the formality of their appointment, and whether they are paid for their tenure; the entity's

³Affidavit of Dennis McEnaney, ¶ 10; Affidavit of David Wood, ¶ 7.

⁴Affidavit of Dennis McEnaney, ¶ 2.

⁵Affidavit of Dennis McEnaney, ¶ 5.

⁶Affidavit of Dennis McEnaney, ¶ 9; Affidavit of David Wood, ¶ 7.

⁷Affidavit of Ronald Neibert, ¶ 16.

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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 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.

Similarly, courts have considered three primary factors in determining whether a group is a "subsidiary body" of a public body under OMA: "(1) whether the entity has a legal existence independent of government resolution; (2) the nature of functions performed by the entity; and (3) the degree of governmental control over the entity." *Hopf v. Topcorp, Inc.*, 256 Ill. App. 3d 887, 892 (1st Dist. 1993).

The language used by the City Council members to describe a "committee of two" engaging in public business initially suggests the type of more formally appointed "advisory" or "subsidiary" body that would ordinarily be subject to OMA. The group included two City Council members, who are part of the principal public body. The process of the group's meetings with water companies resulted in the selection of one company, the Illinois American Water Company (Illinois American), with which the City began to negotiate a contract for the sale of the water systems prior to presenting the plan to the public. However, the City Council has disclaimed that any committee was formally appointed, and asserted that the two Council members "acted on their own initiative with regard to matters relating to the possible sale of the City's water and sewer systems."⁸ The two City Council members submitted sworn statements asserting that the statement about the "committee of two" at the February 3, 2015, special meeting was inaccurate. The former City Manager has stated that he, and not the City Council members who were involved in the discussions with water companies, was responsible for advising and recommending actions relating to the sale.

After careful review of the available information in light of the relevant factors, the evidence does not clearly establish that the water sale group constituted an "advisory body" or "subsidiary body" of the City Council that would have been subject to OMA. Moreover, at the time of the filing of the Requests for Review on March 23, 2015, the Public Access Bureau's authority was limited to review of any meetings occurring within 60 days of those filings (*see* 5

⁸Letter from Mayor Mary Jane Chesley, City of Mt. Vernon, to Neil P. Olson, Assistant Attorney General, Public Access Bureau (April 10, 2015).

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ILCS 120/3.5(a) (West 2014))⁹, by which time the planned sale had been public for more than six weeks. Almost all of the planned gatherings described by the City Council at which two or more of the members of the water sale group were present occurred on or before January 8, 2015 (when the group met with Illinois American), which precedes the statutory 60-day review period.

Nevertheless, OMA states that "[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." 5 ILCS 120/1 (West 2014). Therefore, any description of the "individual" interests by the Council members in the sale of the water and sewer system is inconsistent with the express purposes of OMA; whether in a formal or informal role, the City Council members' participation in the process was premised on their membership on the City Council and the interests of the City. The consideration of the sale of the municipal water and sewer system was unquestionably a significant matter of public interest. We urge the City Council to refrain from any similar collective participation by its members in the transaction of public business without complying with the requirements of OMA.

Meetings of the City Council

Section 1.02 of OMA (5 ILCS 120/1.02 (West 2014)) defines a "meeting" as:

[A]ny gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, *for a 5-member public body, a quorum of the members of a public body* held for the purpose of discussing public business.

Accordingly, *for a 5-member public body, 3 members of the body constitute a quorum* and the affirmative vote of 3 members is necessary to adopt any motion, resolution, or ordinance, unless a greater number is otherwise required. (Emphases added.)

Mr. Southers also alleged that the City Council itself violated OMA by holding meetings regarding the possible sale of the City of Mount Vernon water and wastewater systems

⁹Effective August 19, 2015, OMA was amended to permit a person using reasonable diligence to submit a Request for Review up to two years after an alleged violation. Public Act 99-402, effective August 19, 2015 (amending 5 ILCS 120/3.5(a) (West 2014)).

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that were not properly noticed or recorded. The City Council is a 5-member public body, and therefore under section 1.02 of OMA, a gathering of three members for the purpose of discussing public business would constitute a "meeting" of the Council. In its April 10, 2015, response to this office, the City Council described planned gatherings relating to the sale dating back to September, 2014, but none involved more than two Council members. Therefore, based on the available evidence, we are unable to conclude that the City Council violated OMA by holding gatherings of a majority of its quorum without public notice.

Semi-Annual Review of Closed Session Minutes

Section 2.06(d) of OMA (5 ILCS 120/2.06(d) (West 2014)) provides:

Each public body shall periodically, but no less than semi-annually, meet to review minutes of all closed meetings. At such meetings a determination shall be made, and reported in an open session that (1) the need for confidentiality still exists as to all or part of those minutes or (2) that the minutes or portions thereof no longer require confidential treatment and are available for public inspection.

Mr. Southers alleged that the City Council violated OMA by failing to conduct semi-annual reviews of closed session minutes as required by section 2.06(d) to determine whether the need for confidentiality of those minutes still exists. The City Council responded that during the processing of a Freedom of Information Act request, "it was discovered on March 11, 2015 that executive session minutes after 2008 did not appear upon the City of Mt. Vernon website; upon the discovery, at the City Manager's direction, all executive session minutes from the date of the last minutes appearing on the website were immediately assembled" and placed on a City Council agenda.¹⁰ The City Council approved the release of these closed session minutes, which covered executive sessions prior to March 23, 2015, at its April 6, 2015, regular meeting. In light of the City Council's review and release of these minutes, no further remedial action is required. However, the City Council must continue its review of closed session meetings, no less than semi-annually, as required by section 2.06(d) of OMA.

¹⁰Letter from Mayor Mary Jane Chesley, City of Mt. Vernon, to Neil P. Olson, Assistant Attorney General, Public Access Bureau (April 10, 2015), at 3.

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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter will serve to close this matter. If you have any questions, please contact me at (217) 782-9078.

Very truly yours,



NEIL P. OLSON
Assistant Attorney General
Public Access Bureau

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