



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

May 18, 2018

Via electronic mail

Mr. Kirk Allen
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Via electronic mail

Ms. Laura Morask
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Maine Township
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Via electronic mail

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RE: OMA Request for Review – 2017 PAC 50999

Dear Mr. Allen, Ms. Morask, and Mr. Dowd:

This determination letter is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). For the reasons that follow, the Public Access Bureau concludes that the Board of Trustees (Board) of Maine Township (Township) did not follow the proper procedure for approving the destruction of a closed session verbatim recording during its November 28, 2017, meeting.

BACKGROUND

On December 27, 2017, Mr. Kirk Allen submitted a Request for Review to the Public Access Bureau alleging that the Board violated section 2.06(c) of OMA (5 ILCS

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120/2.06(c) (West 2016)) during its November 28, 2017, meeting when only two members of the Board, rather than a majority of the Board, voted to destroy the Board's March 22, 2016, closed session verbatim recording. Section 2.06(c) of OMA provides:

(c) The verbatim record may be destroyed without notification to or the approval of a records commission or the State Archivist under the Local Records Act or the State Records Act no less than 18 months after the completion of the meeting recorded but only after:

- (1) the *public body* approves the destruction of a particular recording; and
- (2) the public body approves minutes of the closed meeting that meet the written minutes requirements of subsection (a) of this Section. (Emphasis added.)

Specifically, Mr. Allen asserted that three members of the Board abstained from voting, while the two remaining members and the Township Clerk (Clerk) voted on the matter. Mr. Allen referenced section 80-5(a) of the Township Code (60 ILCS 1/80-5(a) (West 2016)), which provides that a "township board shall consist of the supervisor and 4 other members elected at large from the township[.]" The provision further states that "[t]he township clerk shall be the clerk of the township board but not a voting member, except that in the case of a tie vote to fill a vacancy in a township office, the clerk shall be entitled to cast one vote." 60 ILCS 1/80-5(a) (West 2016). Mr. Allen argued, in pertinent part:

[T]he public body did not approve the destruction but rather two board members and the Clerk, who has no vote on such a matter because he has no vote and is not a member of the public body. With only two members of the public body voting it is clear they did not have a majority vote to destroy the record in question.⁽¹⁾

On January 4, 2018, this office forwarded a copy of the Request for Review to the Board and asked it to respond in writing to the allegation that a majority of its members did not vote to destroy the relevant closed session verbatim recording. In addition, this office asked the Board to provide copies of the meeting agenda, minutes, and any video/audio recording of the open session portion of the November 28, 2017, meeting. On January 22, 2018, this office received the Board's written response and a copy of the November 28, 2017, meeting minutes;

¹E-mail from Kirk Allen to Public Access [Bureau] (December 27, 2017).

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the Board also provided links to the Township's website where copies of the meeting agenda and a video recording of the meeting were posted. On January 29, 2018, this office forwarded a copy of the Board's response to Mr. Allen. On February 1, 2018, Mr. Allen replied by maintaining that the Board did not take a majority vote to destroy the closed session verbatim recording.

DETERMINATION

It is "the public policy of this State that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." 5 ILCS 120/1 (West 2016). "The Open Meetings Act provides that public agencies exist to aid in the conduct of the people's business, and that the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly." *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989).

Section 1.02 of OMA (5 ILCS 120/1.02 (West 2016)) 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[.]" (Emphasis added.) Section 1.02 of OMA further provides that "*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." (Emphasis added.) As Mr. Allen highlighted, section 2.06(c) of OMA provides that a public body may destroy a closed session verbatim recording after 18 months have passed since the holding of the closed session, provided that the public body first approves the destruction of the particular recording and approves written minutes of the closed session that meet the minutes requirements of section 2.06(a) of OMA (5 ILCS 120/2.06(a) (West 2016)).

In its response to this office, the Board confirmed that its members consist of a supervisor and four trustees, all of whom are authorized to vote on Board matters. The Board also confirmed that three trustees abstained from voting on destroying the verbatim recording; the remaining trustee, Township Supervisor (Supervisor), and Clerk voted to release the corresponding closed session minutes and destroy the verbatim recording. With regard to the Clerk's vote, the Board asserted: "Including the Clerk (who was a Trustee at the time that the closed session in question was held), was a result of a mistaken belief that the Clerk in this case could provide the vote which would meet the 3 vote threshold required by OMA and the Township Code."² **The Board acknowledged that it destroyed the verbatim recording of the**

²Letter from Daniel J. Dowd, Dowd, Dowd & Mertes, Ltd., to Teresa Lim, Assistant Attorney General, Public Access Bureau (January 22, 2018), at 1-2.

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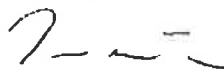
closed session, but stated that in the future the Township would "retain audio cassettes of special meetings indefinitely in order to ensure that it [sic] will be available to the public after the minutes of a closed session are released for public inspection."³

In this case, the Board acknowledged that it is comprised of five members and that only two of those members, one trustee and the Supervisor, voted on the motion to authorize the destruction of the verbatim recording at issue. The meeting minutes confirm that the Clerk cast the third vote to approve that motion, while the three other Board members abstained.⁴ The Board did not dispute that the Clerk was not a Board member at the time of the Board's November 28, 2017, meeting. Because only two members of the five-member Board voted to authorize the destruction of the March 22, 2016, closed session verbatim recording, the Board did not properly approve that motion. Accordingly, this office concludes that the Board violated OMA by destroying the recording without three of the five Board members affirmatively voting to approve the motion to authorize the destruction of the recording.

Because the closed session verbatim recording has been destroyed, the Board cannot correct the matter by re-voting on the issue. However, the Board has indicated that it is taking remedial measures for future meetings and will begin preserving closed session verbatim recordings of special meetings indefinitely. This office reminds the Board that all of its votes and actions, including those taken at regular meetings, must comply with the requirements of OMA.

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 the Chicago address listed on the first page of this letter.

Very truly yours,



TERESA LIM
Assistant Attorney General
Public Access Bureau

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³Letter from Daniel J. Dowd, Dowd, Dowd & Mertes, Ltd., to Teresa Lim, Assistant Attorney General, Public Access Bureau (January 22, 2018), at 2.

⁴Maine Township Board, Meeting, November 28, 2017, Minutes 4-5.