



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

May 29, 2020

Via electronic mail

Mr. Theodore Wynnychenko
ted@wynnychenko.com

Via electronic mail

Mr. Brian P. Crowley
Franczek, P.C.
300 South Wacker Drive, Suite 3400
Chicago, Illinois 60606
bpc@franczek.com

RE: OMA Request for Review – 2020 PAC 62701

Dear Mr. Wynnychenko and Mr. Crowley:

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 Board of Education of New Trier Township High School District 203 (Board) improperly restricted Mr. Theodore Wynnychenko's statutory right to address the Board at its April 20, 2020, meeting.

In his Request for Review, Mr. Wynnychenko alleged that he wanted to submit a public comment for the Board's April 20, 2020, meeting, which was held remotely pursuant to an Executive Order issued by the Governor to stop the rapid spread of COVID-19 throughout the State,¹ but was unable to do so because the Board imposed a 2:00 p.m. deadline for submitting public comments. The meeting was scheduled to begin at 7:00 p.m. Mr. Wynnychenko also alleged that the Board violated OMA by limiting public comment to e-mail submissions to be read during that meeting, and by not providing a method for the public to verbally comment.

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

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On May 1, 2020, this office sent a copy of the Request for Review to the Board President and requested a written response to the allegation that the Board required the public to submit public comments five hours before its April 20, 2020, meeting commenced. On May 8, 2020, counsel for the Board submitted a written response along with a copy of the April 20, 2020, meeting agenda and the Board's rules governing public comment; Mr. Wynnychenko replied to that response on May 13, 2020.

DETERMINATION

Section 2.06(g) of OMA (5 ILCS 120/2.06(g) (West 2018)) provides that "[a]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." 5 ILCS 120/2.06(g) (West 2018)). This office notes that no Illinois reviewing court has interpreted this provision. The Public Access Bureau has consistently determined that a Request for Review must set forth facts demonstrating that a public body enforced its rules or guidelines to improperly restrict public comment in order to violate section 2.06(g) of OMA. *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 43028, issued July 22, 2016 (allegation that public comment rules violate OMA insufficient to merit further action absent facts indicating that any member of the public was improperly restricted from addressing public officials); Ill. Att'y Gen. PAC Req. Rev. Ltr. 42560, issued July 7, 2016 (same).

The agenda for the Board's April 20, 2020, meeting indicated that the meeting would commence at 7:00 p.m., and states, in pertinent part, "Guidelines for Public Comment: To submit a public comment, please email rustonl@nths.net by 2:00 p.m. by Monday April 20th."²

Mr. Wynnychenko's Request for Review stated that he considered submitting a public comment after discovering this guideline, "but did not, given the New Trier Board's prohibition, as it was after their 'published' deadline."³ The Board's response to this office stated that the Board did not have an opportunity to permit or prevent Mr. Wynnychenko from participating in public comment at the meeting because he did not submit a comment. The response further stated that the Board requested the submission of public comments by 2:00 p.m. in order to organize them and other Board materials before the Board's first remote meeting, but asserted that the "2:00 p.m. deadline was not firm, and the Board would have accepted public

²New Trier Township High School District 203 Board of Education, Regular Meeting (April 20, 2020).

³Letter from Theodore Wynnychenko to Sarah Pratt, Public Access Counselor, Public Access Bureau, Office of the Attorney General (April 22, 2020) at 1.

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comments up to the start of the meeting."⁴ In his reply, Mr. Wynnychenko characterized that explanation as "preposterous[,]"⁵ and suggested that countless other individuals may have been discouraged from submitting public comments because of the 2:00 p.m. time listed on the agenda, as he claimed to have been.

Although Mr. Wynnychenko inferred—perhaps not unreasonably—from the Board' written guideline that his public comments would be rejected if he submitted them less than five hours before the meeting commenced, the language of the guideline itself does not so state. The agenda requests that the public submit public comments by 2:00 p.m., but does not identify that time as a hard deadline or otherwise indicate that the Board would refuse to accept public comments submitted after 2:00 p.m. Mr. Wynnychenko did not submit a request to speak that was rejected by the Board, and the Board's response to this office indicated that his comment would have been accepted. In the absence of evidence that Mr. Wynnychenko or any other individual attempted to exercise his or her statutory right to address the Board at its April 20, 2020, meeting and was prohibited from doing so, this office is unable to conclude that the Board violated section 2.06(g) of OMA.

With respect to Mr. Wynnychenko's allegation that the Board violated OMA by limiting public comment to e-mail submissions and not providing a method for members of the public to verbally address the Board, this office addressed the same allegation in an earlier Request for Review:

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

⁴Letter from Brian P. Crowley, Franczek, to Steve Silverman, Bureau Chief, Public Access Bureau (May 8, 2020) at 2.

⁵ Letter from Theodore Wynnychenko to Sarah Pratt, Public Access Counselor, Public Access Bureau, Office of the Attorney General (May 13, 2020), at 2.

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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.

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."⁶ If the Board has the technological capability to provide members of the public with an opportunity to verbally comment during remote meetings in a manner that would not entail a significant risk of disruption, this office encourages it to provide such an option.

This file is closed. If you have questions, you may contact me at (312) 814-6756. or ssilverman@atg.state.il.us.

Very truly yours,



STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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⁶Office 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