



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 23, 2016

PUBLIC ACCESS OPINION 16-013
(Request for Review 2016 PAC 44249)

OPEN MEETINGS ACT:
Improper Discussion of Salary
Increases for City Employees
in a Closed Meeting

Mr. David Porter
Publisher, *Lebanon Advertiser*
P.O. Box 126
Lebanon, Illinois 62254

The Honorable Rich Wilken
Mayor, City of Lebanon
City Hall
312 West St. Louis Street
Lebanon, Illinois 62254

Dear Mr. Porter and Mr. Wilken:

This is a binding opinion issued by the Attorney General pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2015 Supp.)). For the reasons discussed below, this office concludes that the Lebanon City Council (City Council) violated section 2(a) of OMA (5 ILCS 120/2(a) (West 2015 Supp.)), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016) by closing a portion of its September 26, 2016, meeting to discuss an across-the-board pay raise for City employees.

BACKGROUND

On September 26, 2016, Mr. David Porter, on behalf of the *Lebanon Advertiser*, submitted a Request for Review to the Public Access Counselor alleging that at a City Council meeting earlier that evening, the City Council entered closed session to discuss a pay raise for

Mr. David Porter
The Honorable Rich Wilken
December 23, 2016
Page 2

City employees, and then took final action to approve a two percent across-the-board raise after returning to open session. Mr. Porter alleged that the "closed session was improper in that it dealt with across-the-board raises and not individual employees."¹

On September 30, 2016, the Public Access Bureau sent a copy of the Request for Review to the City's mayor and asked that the City Council provide a written response identifying the specific exception in section 2(c) of OMA (5 ILCS 120/2(c) (West 2015 Supp.), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016) that the City Council publicly cited and identified as its basis for entering closed session during the September 26, 2016, meeting and explaining its applicability to the content of the closed session discussion. The City Council was also asked to provide copies of the agenda, open and closed session minutes, and verbatim recording of the closed session portion of that meeting for this office's confidential review.²

Enclosed with his October 13, 2016, response letter to this office, counsel for the City furnished copies of the requested agenda and open session minutes. In addition, counsel provided a written response stating that the City Council entered into closed session pursuant to section 2(c)(1) of OMA (5 ILCS 120/2(c)(1) (West 2015 Supp.), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016). The response asserted that the City Council properly discussed a cost-of-living pay increase for non-union City employees in closed session under section 2(c)(1) and also asserted that such a discussion would have been proper under section 2(c)(2) of OMA (5 ILCS 120/2(c)(2) (West 2015 Supp.), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016), as well.³ On October 18, 2016, the Public Access Bureau forwarded a copy of the City Council's response to Mr. Porter.⁴ Mr. Porter replied to the City's response on October 24, 2016. He asserted that the City Council was not permitted to discuss an across-the-board pay raise for non-union employees under either of the asserted exceptions, and that the applicability of section 2(c)(2) "is immaterial

¹E-mail from David Porter, Publisher, Lebanon Advertiser, to Public Access [Bureau] (September 26, 2016).

²Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to The Honorable Rich Wilken, Mayor, City of Lebanon (September 30, 2016).

³Letter from Duane C. Clarke, Attorney for the City of Lebanon, Bruckert, Gruenke & Long, P.C., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (October 13, 2016).

⁴Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to David Porter, Publisher, *Lebanon Advertiser* (October 18, 2016).

Mr. David Porter
The Honorable Rich Wilken
December 23, 2016
Page 3

to the City's position because that exemption was not cited at the Sept. 26, 2016, Lebanon City Council meeting."⁵

On October 27, 2016, counsel for the City sent this office copies of the closed session minutes and the closed session verbatim recording from the meeting in question.⁶

On November 21, 2016, this office extended the time within which to issue a binding opinion by 21 business days pursuant to section 3.5(e) of OMA.⁷

ANALYSIS

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2014). Section 2(a) of OMA 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." Such exceptions "are in derogation of the requirement that public bodies meet in the open, and therefore, the exceptions *are to be strictly construed, extending only to subjects clearly within their scope.*" (Emphasis added.) 5 ILCS 120/2(b) (West 2015 Supp.), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016. Section 2a of OMA (5 ILCS 120/2a (West 2014)) further provides that "[t]he vote of each member on the question of holding a meeting closed to the public and a citation to the specific exception contained in Section 2 of this Act which authorizes the closing of the meeting to the public shall be publicly disclosed at the time of the vote and shall be recorded and entered into the minutes of the meeting."

⁵Letter from David Porter, Publisher, *Lebanon Advertiser*, to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (October 24, 2016), at 1. Mr. Porter's reply also notes that the agenda item referencing the cost-of-living increase ("Consider COLA for employees (non-union)," Lebanon City Council, Agenda Item Personnel 1 (September 27, 2016)) did not explain the acronym "COLA" and that the City Council skipped that item during the open portion of the meeting, apparently alleging that the City Council failed to provide proper advance notice of its final action to approve a pay raise. At the time that he filed his Request for Review, Mr. Porter did not allege that the City Council failed to provide sufficient advance notice of its final action on the pay raise, therefore, that issue is outside the scope of this review.

⁶Letter from Duane C. Clarke, Attorney for City of Lebanon, Bruckert, Gruenke & Long, P.C., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (October 27, 2016).

⁷Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to David Porter, Publisher, *Lebanon Advertiser*, and Duane C. Clarke, Bruckert, Gruenke & Long, P.C. (November 21, 2016).

Section 2(c)(1) of OMA

The open session minutes of the City Council's September 26, 2016, meeting indicate that the City Council approved a motion to enter "into closed session pursuant to 5 ILCS 120/2(c)(1) of the OMA to discuss and consider information regarding the appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the City[.]"⁸ The text of this motion is taken essentially verbatim from section 2(c)(1) of OMA, which allows a public body to discuss in closed session: "The appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body[.] "

Citing *People v. Board of Education of District 170*, 40 Ill. App. 3d 819 (2d Dist. 1976), the City Council's response to this office asserts that the section 2(c)(1) exception authorized the closed session discussion at issue in this matter because the discussion "was limited in scope to compensation and specifically to non-union City employees, as opposed to all City employees in general[.]"⁹ In *Board of Education of District 170*, 40 Ill. App. 3d at 823, the Illinois Appellate Court held that a general discussion of a "wage and salary report" of employees who were not represented by a union was permissible under a prior provision of OMA that allowed public bodies to enter closed session "to consider information regarding appointment, employment or dismissal of an employee or officer or to hear testimony on a complaint lodged against an employee or officer to determine its validity[.]" See Ill. Rev. Stat. 1973, ch. 102, par. 42. The General Assembly later amended the Act by, among other things, eliminating the above provision and replacing it with an exception limited to "[t]he appointment, employment, compensation, discipline, performance, or dismissal of *specific employees* of the public body[.]" (Emphasis added.) See Public Act 88-621, effective January 1, 1995 (adding 5 ILCS 120/2(c)(1)). The amended language referencing "specific employees" signifies that the General Assembly did not intend to permit public bodies to hold general discussions concerning categories of employees in closed session pursuant to section 2(c)(1). Because section 2(c)(1) is substantially narrower than the provision construed by the court in *Board of Education of District 170*, the appellate court's decision in that case is not dispositive of the issue under consideration here.

Section 2(c)(1) of OMA permits public bodies to discuss employment-related topics such as the performance, discipline, and dismissal of a specific employee (*Copley Press, Inc. v. Board of Education for Peoria School District No. 150*, 359 Ill. App. 3d 321, 325 (3rd Dist. 2005)) or the reclassification of a specific employee (*Henry v. Anderson*, 356 Ill. App. 3d

⁸Lebanon City Council, Meeting, September 26, 2016, Minutes 2-3.

⁹Letter from Duane C. Clarke, Attorney for City of Lebanon, Bruckert, Gruenke & Long, P.C., to Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General (October 13, 2016), at 1.

Mr. David Porter
The Honorable Rich Wilken
December 23, 2016
Page 5

952, 957 (4th Dist. 2005)) in closed session. Based on its language, this office has determined that section 2(c)(1) of OMA "is intended to permit public bodies to candidly discuss the relative merits of individual employees, or the conduct of individual employees." Ill. Att'y Gen. Pub. Acc. Op. No. 12-011, issued July 11, 2012, at 3. Further, this office has concluded that a public body may not properly discuss budgetary matters in a meeting closed to the public pursuant to section 2(c)(1), even if the budgetary matters may directly or indirectly affect its employees: "To the extent that a public body is required to discuss the relative merits of individual employees as a result of its fiscal decisions, such discussions may properly be closed to the public under section 2(c)(1) of OMA. ***The underlying budgetary discussions leading to those decisions, however, may not be closed to the public.***" (Emphasis added.) Ill. Att'y Gen. Pub. Acc. Op. No. 12-011, at 3.

The verbatim recording of the relevant portion of the City Council's September 26, 2016, closed session reflects that the City Council discussed an across-the-board pay raise for City employees and the impact of such a pay raise on its budget.¹⁰ No individual employees were identified or discussed during this portion of the closed session. Because the City Council's discussion involved a general budgetary discussion related to the compensation of a range of employees, rather than any specific employee or employees, this office concludes that the City Council violated OMA by discussing in closed session matters outside the scope of section 2(c)(1).

Section 2(c)(2) of OMA

The City Council's response to this office also asserted that its closed session discussion would have been permissible under section 2(c)(2) of OMA, even though the City Council neither publicly disclosed this exception at the time of its vote to close the September 26, 2016, meeting nor recorded it in the meeting minutes as expressly required by section 2a of OMA. Section 2(c)(2) of OMA permits a public body to enter closed session to discuss "[c]ollective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees." This office agrees with Mr. Porter that because the City Council did not cite this exception at the time it was closing the meeting as required by the law, section 2(c)(2) is not relevant to the propriety of the September 26, 2016, closed session.

¹⁰The recording shows that the City Council also discussed an unrelated matter concerning a specific employee that is not at issue in this matter.

Mr. David Porter
The Honorable Rich Wilken
December 23, 2016
Page 6

FINDINGS AND CONCLUSIONS

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

1) On September 26, 2016, the Lebanon City Council closed a portion of its meeting "pursuant to 5 ILCS 120/2(c)(1) of the OMA to discuss and consider information regarding the appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the City[.]"

2) On September 26, 2016, Mr. David Porter, on behalf of the *Lebanon Advertiser*, submitted a Request for Review to the Public Access Counselor alleging that the City Council's closed session discussion of a pay raise for City employees was improper because it was not limited to individual employees.

3) On September 30, 2016, the Public Access Bureau sent a copy of the Request for Review to the City's mayor and asked that the City Council provide a written response to the allegation in the Request for Review, together with copies of the verbatim recording of the closed session portion of the September 26, 2016, meeting as well as the meeting agenda and the open session and closed session meeting minutes.

4) By letter dated October 13, 2016, counsel for the City furnished copies of the agenda and open session minutes and asserted in his written response that the City Council properly entered closed session pursuant to section 2(c)(1) to discuss a cost of living increase for non-union City employees.

5) On October 18, 2016, this office sent a copy of that response to Mr. Porter. On October 24, 2016, Mr. Porter submitted a reply disputing that section 2(c)(1) authorized the City Council to discuss a pay raise for non-union City employees in closed session.

6) By letter dated October 27, 2016, counsel for the City provided this office with a copy of the verbatim recording and closed session minutes of the September 26, 2016, meeting.

7) On November 21, 2016, this office extended the time within which to issue a binding opinion by 21 business days, to December 27, 2016, pursuant to section 3.5(e) of OMA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) Section 2(a) of OMA requires that all meetings of public bodies be open to the public unless the subject of the meeting is covered by one of the limited exceptions enumerated in section 2(c). Section 2(c)(1) permits a public body to close a portion of a meeting to discuss

Mr. David Porter
The Honorable Rich Wilken
December 23, 2016
Page 7

"[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body[.]."

9) Based on its plain language, section 2(c)(1) applies to discussions concerning *specific* employees. This exception does not permit a public body to discuss in closed session budgetary matters concerning broad categories of employees. Therefore, the City Council violated section 2(a) of OMA by improperly discussing an across-the-board pay raise for City employees and its impact on the City's budget pursuant to section 2(c)(1) of OMA.


In accordance with these findings of fact and conclusions of law, the City Council is directed to remedy this violation by disclosing to Mr. Porter and making publicly available that portion of the closed session verbatim recording of its September 26, 2016, meeting related to an across-the-board pay raise for non-union City employees. The City Council is also directed to conduct its future meetings in full compliance with OMA. As required by section 3.5(e) of OMA, the City Council shall either take necessary action as soon as practical to comply with the directives of this opinion or initiate administrative review under section 7.5 of OMA. 5 ILCS 120/7.5 (West 2014).

This opinion shall be considered a final decision of an administrative agency for the purpose of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2014). An aggrieved party may obtain judicial review of the decision 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 Mr. David Porter as defendants. *See* 5 ILCS 120/7.5 (West 2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:


Michael J. Luke
Counsel to the Attorney General

cc: Mr. Duane C. Clarke
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CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 16-013) upon:

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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on December 23, 2016.


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