



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

Lisa Madigan  
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July 23, 2012

Mr. Tom Glass  
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Naperville, Illinois 60540

Ms. Margo Ely, City Attorney  
City of Naperville  
P.O. Box 3020  
400 S. Eagle Street  
Naperville, Illinois 60540

RE: Open Meetings Act Request for Review – 2012 PAC 18348

Dear Mr. Glass and Ms. Ely:

We have received a Request for Review pursuant to section 3.5 of the Open Meetings Act (OMA) (5 ILCS 120/3.5 (West 2010)) in which Mr. Tom Glass alleges that the Municipal Officers Electoral Board of the City of Naperville (Board) violated the requirements of OMA in connection with its January 12, 2012, meeting. Specifically, the Request for Review alleges that the Board "met at an undisclosed time" before the meeting and that it did not provide an opportunity for public comment during the meeting.<sup>1</sup> Mr. Glass also alleges that Board members "conferred in advance, behind closed doors to" reach the final decision that it announced at the meeting.<sup>2</sup>

The Board initially met on January 3, 2012, pursuant to section 10-9 of the Election Code<sup>3</sup> (10 ILCS 5/10-9 (West 2010)) to consider a City resident's objection to a petition to place an advisory referendum concerning the installation of smart meters on the ballot for the March 20, 2012, primary election. The Board re-convened the meeting on January 6,

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<sup>1</sup>E-mail from Tom Glass to Public Access Bureau, Office of the Attorney General (January 31, 2012).

<sup>2</sup>E-mail from Tom Glass to Steve Silverman, Assistant Attorney General, Public Access Bureau (February 10, 2012).

<sup>3</sup>Section 10-9 of the Election Code designates municipal officers as electoral boards to hear objections to petitions seeking to submit public questions to a referendum under section 10-8 of the Election Code (10 ILCS 5/10-8 (West 2010)).

Mr. Tom Glass  
Ms. Margo Ely  
July 23, 2012  
Page 2

2012, January 9, 2012, and January 10, 2012, to consider evidence, testimony, and arguments by the objector and a group supporting the referendum. The objector submitted certified voter registration records to document the addresses at which individuals who signed the petition are registered to vote. In its response to the allegations in the Request for Review, the Board stated that each of the three Board members had individually reviewed the voter registration records with an attorney for the City in the City's Legal Library between January 10, 2012, and January 11, 2012. "At no time was there more than one Board member present in the Legal Library when the records were reviewed."<sup>4</sup> Attorneys for the City then drafted and circulated draft decisions to the members of the Board.<sup>5</sup> "Prior to the Electoral Board meeting on January 12 at 1:00 p.m., the Board's attorney reviewed the written decision with each Electoral Board member individually and obtained their signatures."<sup>6</sup> The Board then reconvened and voted during the meeting to approve that written decision and sustain the objection based on the finding that the petition contained an insufficient number of valid signatures. In his reply to the Board's response to the allegations, counsel for Mr. Glass asserted that the "final decision was \* \* \* made in secret. Repeating the ruling at a final, short public hearing does not change the fact that the original substantive ruling had already been made behind closed doors in clear violation of the OMA."<sup>7</sup>

## DETERMINATION

As a threshold matter, we note that pursuant to section 10-9 of the Election Code, hearings of the Board must be conducted openly. *See* 5 ILCS 120/2(a) (West 2010), as amended by Public Acts 96-1235, effective January 1, 2011; 97-318, effective January 1, 2012; 97-452, effective August 19, 2011). Although section 2(c)(4) of OMA (5 ILCS 120/2(c)(4) (West 2010), as amended by Public Acts 96-1235, effective January 1, 2011; 97-318, effective January 1, 2012; 97-452, effective August 19, 2011) does provide an exception to the openness requirement for deliberation of "[e]vidence or testimony presented in open hearing \* \* \* to a quasi-adjudicative body, as defined in this Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning," the definition of "[q]uasi-adjudicative body" expressly excludes "local electoral boards when such bodies are

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<sup>4</sup>Letter from Margo Ely, City Attorney, City of Naperville, to Steve Silverman, Assistant Attorney General, Public Access Bureau, (February 15, 2012).

<sup>5</sup>Letter from Margo Ely, City Attorney, City of Naperville, to Steve Silverman, Assistant Attorney General, Public Access Bureau, (February 15, 2012).

<sup>6</sup>Letter from Margo Ely, City Attorney, City of Naperville, to Steve Silverman, Assistant Attorney General, Public Access Bureau, (March 20, 2012).

<sup>7</sup>Letter from Doug E. Ibendahl, attorney for Tom Glass, to Sara Gadola Gallagher and Steve Silverman, Assistant Attorneys General, Public Access Bureau (March 29, 2012).

Mr. Tom Glass  
Ms. Margo Ely  
July 23, 2012  
Page 3

considering petition challenges." 5 ILCS 120/2(d) (West 2010), as amended by Public Acts 96-1235, effective January 1, 2011; 97-318, effective January 1, 2012; 97-452, effective August 19, 2011). Therefore, in this instance the Board members would not have been able to meet in a closed session pursuant to section 2(c)(4) of OMA to consider or deliberate upon the evidence presented.

### **Undisclosed Meeting Allegation**

Section 2 of OMA (5 ILCS 120/2 (West 2010)) provides that "all 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 (5 ILCS 120/1.02 (West 2010) defines a "public 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.

The allegation that the Board held an undisclosed, private meeting before issuing its decision at the January 12, 2012, meeting is based on speculation that is unsupported by facts. The available information indicates that members of the Board individually reviewed voter registration records and consulted with attorneys before the meeting. No evidence provided to the Public Access Bureau indicates that two or more members of the Board held a contemporaneous interactive discussion concerning the referendum or any other matter between the conclusion of the January 10, 2012, meeting and the beginning of the January 12, 2012, meeting. Accordingly, we do not find that the Board held a private, undisclosed meeting in violation of OMA.

### **Deliberations and Final Action**

OMA is intended to ensure that the actions of public bodies be taken openly and that their *deliberations be conducted openly*. (Emphasis added.) 5 ILCS 140/1 (West 2010)); *see also People ex rel Hopf v. Barger*, 30 Ill. App. 3d 525, 536 (2<sup>nd</sup> Dist. 1975) ("The clear intention of the legislature expressed in the Act favors, of course, open Deliberation, as well as open action"). Section 2(e) of OMA (5 ILCS 120/2(e) (West. 2010), as amended by Public Acts 97-333, effective August 12, 2011; 97-452, effective August 19, 2011) requires that any "[f]inal

Mr. Tom Glass  
Ms. Margo Ely  
July 23, 2012  
Page 4

action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

We have reviewed a video recording of the January 12, 2012, meeting. The meeting begins with one of the Board members explaining his view of the evidence and the parties' arguments before announcing that "the written decision and order of the Board concludes that this advisory referendum cannot be placed on the ballot by law." The two other Board members then explain why they agree with that decision. The Board then voted to approve the written decision that had been signed by the Board members prior to the meeting, and adjourned without permitting any opportunity for public comment.

Based on our review of the materials submitted by the parties, the Board merely announced its final decision at the January 12, 2012, meeting without openly deliberating. Most notably, the Board has acknowledged that each of the Board members individually signed the final decision before the meeting commenced. Rather than deliberating during the *meeting*, Board members simply recited the reasoning behind a decision that had already been finalized in written form. In response to the allegations in the Request for Review,<sup>8</sup> the Board explained that the written decision was prepared before the meeting because section 10-10 of the Election Code (10 ILCS 5/10-10 (West 2010)) provides that a "copy of the decision shall be served upon the parties to the proceedings in open proceedings before the electoral board." However, the Board could have discussed the draft of the written decision during the meeting and then signed it, or amended it and signed it, after voting to approve it. Instead, the Board members effectively took final action by signing the written decision before the meeting. Accordingly, we conclude that the Board violated section 2(e) as well as the intent of OMA articulated in section 1 by reaching a final decision before the meeting at which it was announced and by failing to openly deliberate during the meeting.

### **Public Comment and Agenda**

We also note that section 1 of OMA provides that 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." (Emphasis added.) Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2010)) provides that "[a]n 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 meeting." Section 2.02(a) further provides, in pertinent part:

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<sup>8</sup>Letter from Margo Ely, City Attorney, City of Naperville, to Steve Silverman, Assistant Attorney General, Public Access Bureau, (March 20, 2012).

Mr. Tom Glass  
Ms. Margo Ely  
July 23, 2012  
Page 5

Public notice of any special meeting except a meeting held in the event of a bona fide emergency, or of any rescheduled regular meeting, or of any reconvened meeting, shall be given at least 48 hours before such meeting, which notice shall also include the agenda for the special, rescheduled, or reconvened meeting[.] \* \* \*  
The requirement of public notice of reconvened meetings does not apply to any case where the meeting was open to the public and (1) it is to be reconvened within 24 hours, or (2) an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda.

The Illinois Appellate Court has held that all matters on which a public body intends to take action must be specifically listed in the agenda for that meeting, with detail sufficient to notify the public that the body may take action on such items. *Rice v. Bd. of Trustees of Adams County*, 326 Ill. App. 3d 1120, 1123 (4<sup>th</sup> Dist. 2002) (action item described as "new business" in public body's agenda did not provide sufficient notice to the public of matters to be voted on at the meeting); *see also People ex rel. Redell v. Giglio*, 238 Ill. App. 3d 141 (1<sup>st</sup> Dist. 1992) (reference to "all other matters pertaining to the function" of the public body was "too generic to give notice of any action by the Board and, in essence, amounted to no agenda at all").

The Board provided the Public Access Bureau with a copy of the notice posted for the reconvened January 12, 2012, meeting as well as the notices for the January 6, 2012, January 9, 2012, and January 10, 2012 meetings. These notices identify the time and place of the meetings, but contain no agenda items. Thus, the public was not provided with proper notice that the Board would consider taking final action by voting on the objection to the petition at its January 12, 2012, meeting. The video recording of the meeting shows that the Board adjourned without providing an opportunity for public comment as required by section 2.06(g) of OMA<sup>9</sup> (5 ILCS 120/2.06(g) (West 2010)). Accordingly, we conclude that the Board violated section 2.02(a) by failing to provide advance notice that action would be taken on the objection to the petition, and violated section 2.06(g) by failing to provide an opportunity for public comment at the January 12, 2012, meeting.

Because the primary election was held on March 20, 2012, there is no remedial action that the Board can take to address these violations at this late date. However, we caution the Board to comply with all requirements of OMA in the future.

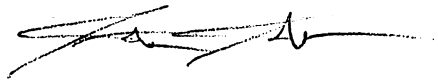
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<sup>9</sup>Section 2.06 of OMA provides "[a]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body."

Mr. Tom Glass  
Ms. Margo Ely  
July 23, 2012  
Page 6

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any question, please contact me at (312) 814-6756. This letter shall serve to close this matter.

Very truly yours,



STEVE SILVERMAN  
Assistant Attorney General  
Public Access Bureau

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cc: Mr. Doug E. Ibendahl  
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