



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

September 6, 2019

Via electronic mail

Mr. William Thompson
President, Western Illinois University Chapter
University Professionals of Illinois
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Via electronic mail

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RE: OMA Request for Review – 2019 PAC 57385

Dear Mr. Thompson and Ms. Duvall:

This determination letter 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 that follow, the Public Access Bureau concludes that the Board of Trustees (Board) of Western Illinois University (University) improperly discussed certain matters during the closed session portions of its March 22, 2018, April 30, 2018, and May 18, 2018, meetings.

On March 24, 2019, this office received a Request for Review from Mr. William Thompson, on behalf of the Western Illinois University Chapter of the University Professionals of Illinois, alleging improper closed session discussions by the Board during its March 22, 2018, April 30, 2018, and May 18, 2018, meetings. Specifically, Mr. Thompson stated that he had recently listened to the recordings of portions of the closed session meetings held by the Board in June 2018, and reported that during those meetings, the Board discussed plans for layoffs and budget reductions at an "advanced stage of completion" which left the "strong impression that

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the Trustees had discussed these matters of public interest elsewhere, out of view of the public, and for some time[.]”¹ Mr. Thompson therefore sought this office's review of the three closed session meetings held before those June 2018, meetings.² Mr. Thompson stated that his Request for Review was timely filed, despite being submitted more than 60 days after the date of the alleged violations, because he only discovered the potential violations after the release of the other closed session recordings, which the Board had previously maintained as confidential.³ This office concludes that because these alleged violations occurred in closed session, they could not have been discovered within 60 days by a person using reasonable diligence. Mr. Thompson discovered the alleged violations within two years of the meetings, and filed this Request for Review within 60 days of his discovery. Therefore, Mr. Thompson filed his Request for Review within the statutory time limitation. *See* 5 ILCS 120/3.5(a) (West 2018).⁴

On April 5, 2019, this office forwarded a copy of the Request for Review to the Board and asked it to provide this office with copies of the closed session minutes and closed session verbatim recordings of the three meetings listed in the Request for Review for this office's review, together with a written response to Mr. Thompson's allegations. On May 14, 2019, the Board provided this office with all requested materials, and also submitted a confidential response letter for this office's review.⁵ On May 22, 2019, this office sent a copy of the Board's non-confidential response to Mr. Thompson; he replied the same day.

¹Letter from William A. Thompson, President, Western Illinois Chapter, of the University Professionals of Illinois, Local 4100, to Public Access Counselor (March 24, 2019).

²The Public Access Bureau has previously reviewed the closed sessions of several of the Board's other 2018 meetings. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 55782, issued April 16, 2019 (reviewing June 1, 2018, and June 7, 2018, meetings); Ill. Att'y Gen. Pub. Acc. Op. No. 18-012, issued October 2, 2018 (reviewing June 28, 2018, meeting); Ill. Att'y Gen. PAC Req. Rev. Ltr. 55642, 55739, issued April 11, 2019 (reviewing July 12, 2018, meeting).

³The Board made the recording of portions of its June 1, 2018, and June 7, 2018, closed session meeting available to Mr. Thompson (and the general public) on or about March 1, 2019.

⁴Section 3.5(a) of OMA provides: "If facts concerning the violation are not discovered within the 60-day period, but are discovered at a later date, not exceeding 2 years after the alleged violation, by a person utilizing reasonable diligence, the request for review may be made within 60 days of the discovery of the alleged violation."

⁵5 ILCS 120/3.5(c) (West 2018) ("[T]he public body may also furnish the Public Access Counselor with a redacted copy of the answer excluding specific references to any matters at issue. The Public Access Counselor shall forward a copy of the answer or redacted answer, if furnished, to the person submitting the request for review.").

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DETERMINATION

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 2018). Section 2(a) of OMA (5 ILCS 120/2(a) (West 2017 Supp.)) 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." The section 2(c) 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." 5 ILCS 120/2(b) (West 2017 Supp.)).

In its response to this office, the Board acknowledged that some parts of each of the three closed sessions under review contained discussions that were not authorized under any of the exceptions listed in section 2(c) of OMA. Those parts are:

March 22, 2018 meeting:

- 6:53-11:35
- 22:18-39:55
- 1:39:39-2:36:00

April 30, 2018 meeting (part one):

- 1:17:01-1:49:12
- 1:49:33-1:53:21
- 1:53:22-2:05:50

April 30, 2018 meeting (part two):

- 1:44-1:19:50
- 1:25:28-1:25:51
- 1:26:35-1:36:22
- 1:37:03-1:38:33
- 2:01:06-2:02:55

May 18, 2018 meeting:

- 40:59-45:50
- 49:48-50:16
- 53:36-1:10:00
- 1:12:05-1:13:09
- 1:13:27-1:13:49
- 1:15:11-1:16:07
- 1:16:11-1:17:08

- 1:20:40-1:21:07
- 1:53:50-1:55:42
- 2:08:47-2:17:09
- 2:17:34-2:23:39

The Board has argued that all the remaining discussions were authorized by sections 2(c)(1), 2(c)(2), or 2(c)(11) of OMA (5 ILCS 140/2(c)(1), (c)(2), (c)(11) (West 2017 Supp)).

Section 2(c)(1) of OMA

Section 2(c)(1) of OMA permits a public body to discuss in closed session "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity." In construing this exception, the Attorney General has concluded 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)." Ill. Att'y Gen. Pub. Acc. Op. No. 16-013, issued December 23, 2016, at 4. Rather, "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. 16-013, at 5 (quoting Ill. Att'y Gen. Pub. Acc. Op. No. 12-011, issued July 11, 2012, at 3).

The Board asserted that specific discussions held during the closed session on March 22, 2018, the second part of the closed session on April 30, 2018, and the closed session on May 18, 2018, fall within the scope of section 2(c)(1) of OMA. Based on this office's confidential review of the closed session verbatim recordings of each of those meetings, the Board extensively discussed the relative merits or conduct of several individual employees during most of the time periods listed in its response letter. Those discussions were properly held in closed session.

However, although the Board argued that the entirety of its discussion on March 22, 2018, from 2:36:01-3:25:20 fell within the scope of section 2(c)(1), our review of that discussion indicates that portions of it strayed from issues related to the individual employee at issue to general issues concerning the University. Specifically, from minutes 2:58:42 through 3:01:50, and 3:04:26 through 3:09:15 of the recording, the Board's discussion exceeded the scope of section 2(c)(1). Additionally, the Board argued that its conversation in the second part of the April 30, 2018, meeting, from 1:25:51-1:26:35 concerned two individual employees, but this section of the verbatim recording is indecipherable, as several individuals are speaking at once.

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The Board's confidential response to this office did not provide sufficient detail about this discussion to allow us to determine whether it falls within the scope of section 2(c)(1) of OMA.

Section 2(c)(2) of OMA

The Board also argued that specific portions of the closed session on March 22, 2018, the first part of the closed session on April 30, 2018, and the closed session on May 18, 2018, were permissible under section 2(c)(2) of OMA because they concerned contract deliberations with a union. Section 2(c)(c) allows discussion in closed session of "[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." By creating the section 2(c)(2) exception, the General Assembly recognized "that the very nature of meaningful collective bargaining requires that certain phases of the negotiating process must be conducted privately." Ill. Att'y Gen. Op. No. 80-024, issued August 12, 1980, at 10-11.

Based on our review of the closed session recordings, the Board discussed the University's ongoing collective bargaining negotiations with unions representing University employees and faculty. We agree with the Board as to each of the segments of the closed sessions that it asserted were within the scope of section 2(c)(2) of OMA; accordingly, the Board did not violate OMA by discussing those matters in closed session.

Section 2(c)(11) of OMA

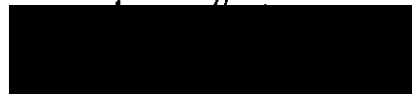
Section 2(c)(11) of OMA authorizes a public body to close a meeting to discuss "[l]itigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal[.]" The Attorney General has construed the scope of this exception as limited to "the strategies, posture, theories, and consequences of the litigation itself." Ill. Att'y Gen. Op. No. 83-026, issued December 23, 1983, at 14. The Board argued that a three minute and 19 second discussion during the March 22, 2018, closed session meeting fell within the scope of section 2(c)(11). This office has reviewed that segment of the recording, which confirms that the Board discussed matters related to the "strategies, posture, theories, and consequences of" litigation current pending against the University. Accordingly, the Board did not violate OMA by discussing those matters during closed session on March 22, 2018.

To remedy the improper closed session discussions to which the Board admitted, as well as the discussions that we determined were not authorized by section 2(c)(1) of OMA, this office requests that the Board vote to disclose those portions of the March 22, 2018, April 30, 2018, and May 18, 2018, closed sessions recordings, to the extent that it has not already done so.

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The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. Please contact me at (312) 814-6437 or the Chicago address listed on the first page of this letter if you have questions. This correspondence serves to close this matter.

Very truly yours,

A solid black rectangular box used to redact the signature of Leah Bartelt.

LEAH BARTELT
Assistant Attorney General
Public Access Bureau

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