



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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December 9, 2020

Via electronic mail

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Via electronic mail

The Honorable Jorge Torres
President, Board of Education
Lyons School District 103
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RE: OMA Requests for Review – 2020 PAC 62998; 2020 PAC 63002

Dear Mr. Silver and Mr. Torres:

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 (Board) of Lyons School District 103 (School District) provided the public with reasonable access to its March 17, 2020, March 18, 2020, March 24, 2020, April 22, 2020, and April 28, 2020, meetings.

BACKGROUND

On May 14, 2020, Mr. Benjamin Silver submitted Requests for Review alleging that the Board improperly restricted the public's access to its regular meetings held on March 24, 2020, and April 28, 2020; its special meetings held on March 18, 2020, and April 22, 2020; and its emergency meeting held on March 17, 2020. He contended that those meetings failed to be open and convenient to the public in violation of section 2.01 of OMA (5 ILCS 120/2.01 (West

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 2

2018)). Mr. Silver stated that the Board limited physical attendance at the meetings to a maximum of ten people in response to the Governor's executive orders concerning the COVID-19 pandemic. He contended, however, that the Board restricted the public's access by prioritizing those ten slots to the Board's seven trustees and three staff members, followed by members of the media, and, lastly, to members of the public. Mr. Silver asserted: "A member of the press or public cannot know for sure if they will be allowed to enter the meeting until the start of the meeting when it is clear whether or not the ten spots are occupied by members of the Board and staff."¹ He further contended that the agendas did not inform the public of the 10-person limit and that "the Board has failed to post this information in a place where any member of the public could reasonably find it."² According to Mr. Silver, this new policy limiting in-person attendance was posted in the "News and Announcements" section of the School District's website rather than the "'Board Book' where agendas and minutes can usually be found."³

Mr. Silver also asserted that the Board did not broadcast or record the meetings and, as a result, the public could not observe the Board's deliberations or participate in public comment. He contended that the Board violated sections 2(e), 2.05, and 2.06(g) of OMA in that: (1) The public could not "determine if the items for final action were even fully disclosed to the members and staff in the room prior to a vote[,]"; (2) the Board issued "no additional guidance to members of the public wishing to record a meeting"; and (3) "[t]he agendas for both the March 17 emergency meeting and March 18 special meeting [did] not include any opportunity for public comment."⁴ He further argued that the Board improperly "voted on a resolution to limit public comment to emailed statements of no more than 200 words. This is far short of the three minute limit in the Board's Policy Manual, as the average adult speaks about 150 words per minute."⁵ Additionally, Mr. Silver questioned when the agenda for the Board's March 17, 2020, meeting was posted online and at the School District office or meeting location. He alleged that the meeting, which he stated was held solely by telephone, failed to meet the notice and agenda

¹Letter from Ben Silver to Sarah Pratt, Public Access Counselor, Office of the Attorney General (May 14, 2020).

²Letter from Ben Silver to Sarah Pratt, Public Access Counselor, Office of the Attorney General (May 14, 2020).

³Letter from Ben Silver to Sarah Pratt, Public Access Counselor, Office of the Attorney General (May 14, 2020).

⁴Letter from Ben Silver to Sarah Pratt, Public Access Counselor, Office of the Attorney General (May 14, 2020).

⁵Letter from Ben Silver to Sarah Pratt, Public Access Counselor, Office of the Attorney General (May 14, 2020).

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 3

requirements of OMA. Mr. Silver provided this office with copies of that meeting's agenda and a resolution that was the subject of action at that meeting.

On May 22, 2020, this office forwarded copies of the Requests for Review to the Board and asked it to respond in writing to Mr. Silver's allegations. This office also asked the Board to provide copies of the meeting agendas, minutes, and any Board rules or policies governing public comment that were in effect at the time of the meetings. Having received no response, this office sent additional correspondence to the Board on June 24, 2020, again asking it to respond. On August 26, 2020, this office received the requested materials, including both a complete version of its written response for this office's confidential review and a redacted version for this office to forward to Mr. Silver.⁶ That same day, this office forwarded a copy of the Board's redacted response to Mr. Silver; he submitted a reply on September 4, 2020.

DETERMINATION

On March 9, 2020, pursuant to his authority under section 7 of the Illinois Emergency Management Agency Act (20 ILCS 3305/7 (West 2018)), the Governor of Illinois "declare[d] all counties in the State of Illinois as a disaster area" in response to the outbreak of COVID-19.⁷ The Disaster proclamation became effective immediately on March 9, 2020, to "remain in effect for 30 days."⁸ The Governor subsequently issued a series of executive orders for coping with the disaster. Relevant to the meetings at issue, the Governor issued Executive Order 2020-07⁹ on March 16, 2020, suspending OMA's provisions requiring or relating to in-person attendance by public body members, though meetings were still required to be open to the public. The Governor also issued Executive Order No. 2020-10 on March 20, 2020 (Stay at Home Order). Among other things, that Order provided that, subject to certain limited exceptions, as of 5:00 p.m. on March 21, 2020, "[a]ll businesses and operations in the State, except Essential Businesses and Operations, * * * are required to cease all activities within the State except Minimum Basic Operations[.]"¹⁰ The Stay at Home Order also prohibited "[a]ll public and private gatherings of any number of people occurring outside a single household or living unit" and "[p]ursuant to current guidance from the CDC, any gathering of more than ten

⁶See 5 ILCS 120/3.5(c) (West 2018) ("The Public Access Counselor shall forward a copy of the answer or redacted answer, if furnished, to the person submitting the request for review. The requester may, but is not required to, respond in writing to the answer within 7 working days and shall provide a copy of the response to the public body.").

⁷Gubernatorial Disaster Proclamation, issued March 9, 2020, at 2.

⁸Gubernatorial Disaster Proclamation, issued March 9, 2020, at 3.

⁹Executive Order 2020-07, §6, issued March 16, 2020, at 3.

¹⁰Executive Order No. 2020-10, §1(2), issued March 20, 2020.

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 4

people"¹¹ (emphasis in original), unless allowed by the Order. On April 1, 2020, the Governor issued a second Disaster Proclamation¹² and extended the applicability of several executive orders through April 30, 2020, including the Stay at Home Order.¹³

No provision of OMA in effect at the time of the meetings at issue provided guidelines for making remote meetings reasonably accessible or for providing an opportunity for public comment during public health emergencies such as the COVID-19 pandemic, although, as discussed further below, legislation concerning remote meetings was enacted on June 12, 2020.

Notice of March 17, 2020, Emergency Meeting

Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2018)) provides:

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[.] * * * Notice of an emergency meeting shall be given as soon as practicable, but in any event prior to the holding of such meeting, to any news medium which has filed an annual request for notice under subsection (b) of this Section.¹⁴

OMA does not define the phrase "bona fide emergency." However, the Public Access Bureau has previously examined the plain meaning of a "bona fide emergency" and determined that "unanticipated circumstances requiring immediate action that would justify providing less than 48 hours' notice []" are necessary for a meeting to qualify as one held in the event of a bona fide

¹¹Executive Order No. 2020-10, §1(3), issued March 20, 2020.

¹²Gubernatorial Disaster Proclamation, issued April 1, 2020.

¹³Executive Order No. 2020-18, Part 1, issued April 1, 2020.

¹⁴Section 2.02(b) of OMA (5 ILCS 120/2.02(b) (West 2018)) further provides, in pertinent part:

The body shall supply copies of the notice of its regular meetings, and of the notice of any special, emergency, rescheduled or reconvened meeting, to any news medium that has filed an annual request for such notice. Any such news medium shall also be given the same notice of all special, emergency, rescheduled or reconvened meetings in the same manner as is given to members of the body provided such news medium has given the public body an address or telephone number within the territorial jurisdiction of the public body at which such notice may be given.

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 5

emergency." Ill. Att'y Gen. PAC Req. Rev. Ltr. 23656, issued May 31, 2013, at 4.

In its redacted response to this office, the Board asserted that "[d]ue to the changing pandemic scenario, Executive Orders and Presidential and CDC guidance/recommendations, an emergency meeting was called on March 17, 2020 to address the manner in which meetings would be conducted, in particular to the special meeting scheduled for March 18, 2020."¹⁵ The Board asserted that it posted notice of the meeting in the "News and Announcements" section of the School District's website prior to the meeting, and that it also provided notice to the news media. According to the Board, "[o]n the date of posting, March 17, 2020, the posting would have been prominently displayed on the District's Home webpage; news items are displayed chronologically as can be seen from the face of the District's Home webpage."¹⁶ The Board stated that it voted unanimously at the meeting to approve a resolution governing Board meetings during the pandemic.

This office's review of the March 17, 2020, meeting agenda and minutes confirmed that the Board considered and voted on only one item: "Resolution Authorizing Modifications to Lyons School District 103 Board of Education Meetings Occurring During the COVID-19 Pandemic [(Resolution)]."¹⁷ This office has previously determined that a public body did not violate section 2.02(a) by providing less than 48 hours' notice of a meeting held on March 12, 2020, concerning an emergency declaration for the COVID-19 pandemic because the emergency was bona fide. Ill. Att'y Gen. PAC Req. Rev. Ltr. 62712, issued June 8, 2020, at 4. In that matter, this office observed that "public bodies across the State were taking swift measures to react to the COVID-19 pandemic in light of its rapid spread and devastating impact. The uncertainty and severity involved in the pandemic presented unanticipated circumstances warranting immediate action." Ill. Att'y Gen. PAC Req. Rev. Ltr. 62712, at 4. Here, the Board has similarly illustrated that the changing circumstances surrounding the COVID-19 pandemic as of March 17, 2020, constituted a bona fide emergency necessitating immediate action. Further, the agenda and minutes reflect that the meeting was limited to addressing one resolution pertaining to the pandemic. It is undisputed that the agenda was posted as a news item on the School District's website. OMA does not specify where on a public body's website that a meeting notice and agenda must be posted. In addition, this office has not received any facts supporting the allegations that the agenda may not have been posted on the website until after the

¹⁵Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 2.

¹⁶Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 3-4.

¹⁷Board of Education, Lyons Elementary School District No. 103, Emergency Meeting Notice, Agenda Item IV, Action Item (March 17, 2020).

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 6

meeting began and that the agenda may not have been posted at the meeting location or the School District's principal office. Accordingly, this office concludes that the Board did not violate OMA by holding an emergency meeting on March 17, 2020, with less than 48 hours' advance notice.

Convenient and Open Meetings

Section 2.01 of OMA (5 ILCS 120/2.01 (West 2018)) requires all public meetings to be "held at specified times and places which are convenient and open to the public." The concept of public convenience implies "a rule of reasonableness, not 'absolute accessibility' but 'reasonable accessibility.'" *Gerwin v. Livingston Co. Board*, 345 Ill. App. 3d 352, 362 (4th Dist. 2003). In addition, section 2(e) of OMA (5 ILCS 120/2(e) (West 2018)) provides that "[n]o action may be taken at a closed meeting. Final 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."

The Board argued that its emergency meeting was sufficiently open and convenient under the standards set forth in *Gerwin v. Livingston County Board*, 345 Ill. App. 3d 352 (4th Dist. 2003). Specifically, the Board argued that the meetings were open and reasonably accessible to the public under the circumstances of the pandemic. With regard to the March 17, 2020, meeting, the Board confirmed that the meeting was held remotely, but argued that "[g]iven that a *bonafide* emergency requires little to no notice of a meeting, it logically follows that public access may not be practical or feasible in certain emergency situations."¹⁸ (Emphasis in original.) As to the remaining meetings, the Board acknowledged that it had placed a ten-person limit on in-person attendance and prioritized those spots. However, the Board contended that it had acted in accordance with health recommendations from the President and Centers for Disease Control and Prevention (CDC), as well as the Governor's Executive Orders, at the time of the meetings. The Board noted that members of the news media were exempted from the Shelter in Place Order whereas members of the general public were not. The Board asserted that it "properly anticipated that the news media was an essential service and must have priority access to a Board meeting."¹⁹ Additionally, the Board provided this office with copies of news articles pertaining to the meetings and asserted: "While not all members of the public could attend the meeting in person due to the COVID-19 pandemic, member or members of the public, the news media, did attend the March 18, April 22, and April 28, 2020, Board Meetings and

¹⁸Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 4.

¹⁹Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 9.

wrote articles about same."²⁰ The Board further argued that "a remote access method determination could not happen overnight" and that it needed time to investigate remote technology options "for suitability and security."²¹ The Board also denied that it had taken final actions in closed meetings and failed to publicly recite the nature of the matters that were considered at the meetings. The Board reiterated that members of the public were not completely excluded from the meetings, but acknowledged that it imposed attendance limitations because of the pandemic. Citing *Gosnell v. Hogan*, 179 Ill. App. 3d 161 (5th Dist. 1989), the Board asserted that the measures it took were sufficient because they substantially complied with the requirements of OMA.

In reply to that answer, Mr. Silver argued that "[t]he *Gosnell* court did not apply substantial compliance to various facets of the Open Meetings Act as the Board has claimed, but only applied substantial compliance to the use of statutory exceptions to the Act, which are not at issue here."²² He also argued that the Board failed to show that the meetings were convenient to the public under the court's analysis in *Gerwin*, emphasizing that the 10 slots could have easily been filled by the Board's seven members and "regularly-attending staff, including the superintendent, board recording secretary, and district lawyer."²³ He further contended that the agendas for the March 18, 2020, and March 24, 2020, meetings made no mention of the attendance restrictions, while the agendas for the April 22, 2020, and April 28, 2020, meetings only noted that access was restricted pursuant to the Resolution. Thus, he maintained that members of the public did not know if they would be permitted entrance into the meeting unless they went to the meeting or had specifically reviewed the Resolution. He maintained that the meetings were effectively closed to the public as a result of the 10-person limit and lack of remote attendance options.

In addressing the meaning of "convenient" for purposes of section 2.01 of OMA, the *Gerwin* court stated that "[a] meeting can be open in the sense that no one is prohibited from attending it, but it can be held in such an ill-suited, unaccommodating, unadvantageous place that members of the public, as a practical matter, would be deterred from attending it." *Gerwin*, 345 Ill. App. 3d at 361. Still, the court found that "[i]t would be unreasonable to suppose the legislature intended * * * that public bodies hold their meetings 'at such locations as are

²⁰Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 5.

²¹Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 7.

²²Letter from Ben Silver, Citizen Advocacy Center, to [Teresa] Lim (September 4, 2020), at 2.

²³Letter from Ben Silver, Citizen Advocacy Center, to [Teresa] Lim (September 4, 2020), at 5.

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 8

sufficient to accommodate *all* interested members of the public, such that they may see and hear all proceedings in reasonable comfort and safety.'" (Emphasis in original.) *Gerwin*, 345 Ill. App. 3d at 361. Accordingly, the court construed section 2.01 as requiring "not 'absolute accessibility' but 'reasonable accessibility.'" *Gerwin*, 345 Ill. App. 3d at 362, quoting *State ex rel. Badke v. Village Board of the Village of Greendale*, 173 Wis. 2d 553, 579, 494 N.W.2d 408, 418 (Wis. 1993).

As noted above, the Board passed a resolution to authorize modifications to its meetings during the pandemic. Among its provisions, the Resolution provided that "[n]o more than 10 persons may be admitted to the Lyons Board of Education Meetings."²⁴ The Resolution further provided:

The first persons to be admitted to the Lyons Board of Education Meeting will be its Board Members choosing to attend in person, Superintendent Rivera, the Board Secretary, and the Board Attorney. If the 10-person maximum is not met, the next person(s) to be admitted shall be one member of the Associated or Local Press. * * * Thereafter, if the 10-person maximum is not met, members of the public shall be admitted. Admittance will be determined by which member of the public emails Charline Latronica at latronicac@sd103.com.^[25]

Additionally, the Resolution provided that "[p]ersons desiring to know if action was taken on an agenda item by the Lyons School District Board of Education may contact Charline Latronica * * * the following day or thereafter."²⁶

This office has reviewed the agenda of the March 17, 2020, meeting. The agenda stated that an emergency meeting of the Board "will be held remotely[.]" but provided no information on how the public could attend that meeting.²⁷ Although section 2.02(a) provides that a public body may hold a meeting in the event of a bona fide emergency with less than 48 hours'

²⁴Resolution Authorizing Modifications to Lyons School District 103 Board of Education Meetings Occurring During the COVID-19 Pandemic, Section B, 2 (adopted March 17, 2020).

²⁵Resolution Authorizing Modifications to Lyons School District 103 Board of Education Meetings Occurring During the COVID-19 Pandemic, Section B, 3 (adopted March 17, 2020).

²⁶Resolution Authorizing Modifications to Lyons School District 103 Board of Education Meetings Occurring During the COVID-19 Pandemic, Section B, 7 (adopted March 17, 2020)

²⁷Board of Education, Lyons Elementary School District No. 103 (March 17, 2020).

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 9

advance public notice, it does not waive the general requirement that meetings be open to the public. Similarly, Executive Order 2020-07 suspended OMA's provisions requiring or relating to in-person attendance by public body members, but still required meetings to be open to the public. Here, members of the public who observed the posting in the News and Announcement section of the School District's website concerning the emergency meeting would not have known how to attend the meeting by reviewing that posting. The agenda indicated that the March 17, 2020, meeting was to be conducted remotely but did not inform the public of any option to attend remotely or in person. Accordingly, this office is unable to conclude that the meeting was "convenient and open to the public" in accordance with section 2.01 of OMA.

Based on this office's review of the agendas for the remaining meetings, the agendas provided information about the meeting modifications to varying degrees. The March 18, 2020, meeting agenda made no mention of meeting modifications, while the March 24, 2020, meeting agenda provided: "Public comment shall occur only in the manner prescribed by Section B, Paragraph 4 of the Resolution * * * adopted on March 17, 2020."²⁸ The April 22, 2020, and April 28, 2020, meeting agendas stated that those meetings "will be conducted in accordance with the Resolution" passed by the Board, and provided instructions on how to submit public comments by e-mail.²⁹ None of the agendas included a copy of the Resolution that was approved by the Board on March 17, 2020.

This office has previously examined situations in which a public body restricted or prioritized in-person attendance due to the COVID-19 pandemic and Governor's Executive Orders in effect from March through April 2020. In those circumstances, this office determined that a public body may fulfill the "convenient and open to the public" requirement by providing alternative means for members of the public to access a meeting, such as by offering an audio or video conference of the meeting and providing information in its agendas on how to access those remote options. *See, for example*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 63027, issued May 26, 2020, at 4 (taking no further action on a request for review where the public body provided the public with access to a meeting via a virtual meeting program); Ill. Att'y Gen. PAC Req. Rev. Ltr. 64497, issued September 3, 2020, at 3 (concluding that it was "not unreasonable for a zoning board to give priority for physical attendance to individuals, such as petitioners and county officials, who may have to take actions that cannot be accomplished remotely given the limits of technology" where remote attendance was also offered to all members of the public via Zoom). In contrast, this office determined that a public body failed to meet the "convenient and open to the public" requirement where it conducted a meeting electronically, but did not provide written notice of options for the public to attend that remote meeting. *See* Ill. Att'y Gen. PAC Req. Rev.

²⁸Board of Education, Lyons Elementary School District No. 103 (March 24, 2020).

²⁹Board of Education, Lyons Elementary School District No. 103 (April 22, 2020); Board of Education, Lyons Elementary School District No. 103 (April 28, 2020).

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 10

Ltr. 63534, issued July 14, 2020, at 4 (concluding that a commission did not provide reasonable access to two meetings that were conducted electronically where the commission did not provide written public notice of options for accessing those meetings remotely).

In this matter, the Board's Resolution restricted in-person attendance at Board meetings to 10 persons and provided other modifications in response to the COVID-19 pandemic. This office recognizes the difficult circumstances presented in holding meetings during a public health emergency with the requirement to provide public access to the meetings. Nonetheless, the Resolution is vague as to the number of members of the public who could attend at meeting given the unspecified number of Board members and staff who might already be present. Further, the agendas simply referred to the Resolution without explaining the relevant restrictions on attendance. As Mr. Silver highlighted, a member of the public would then have to locate and review the Resolution posted in a different section of the School District's website in order to learn of the specific meeting modifications. Although the Board explained that it was still investigating remote technologies for suitability and security, members of the public had significantly limited options to observe the Board's deliberations and actions at the meetings at issue. In the absence of any remote options or recordings made of the complete meetings, less than 10 members of the public could observe the Board's discussions, assuming that some Board members and staff attended in person. Indeed, the minutes for the meetings reflect that most Board members attended in person, while a few attended remotely. Further, by the April 28, 2020, meeting, the Board had approximately a month to review possible remote attendance options for the public. While the public could review news articles that were posted about the meetings, those articles highlighted certain matters discussed at the meetings rather than provided full accounts of all deliberations and actions of the Board. The Resolution only provided that the public could later inquire as to whether any actions had been taken. Because the Board limited public attendance to 10 persons at its March 18, 2020, March 24, 2020, April 22, 2020, and April 28, 2020, meetings and because the Board did not provide the public with any alternative options to participate in or observe those meetings, this office is unable to conclude that the Board provided reasonable access to the meetings in accordance with section 2.01 of OMA. There is no indication, however, that the Board violated section 2(e) by improperly taking final action. Failing to provide sufficient access to open meetings under section 2.01 does not transform those meetings into closed sessions, which are governed by the procedural requirements of section 2a of OMA (5 ILCS 120/2a (West 2018)) and limited to discussions of certain topics that the General Assembly has excepted from the general requirement that public bodies conduct public business openly. *See* 5 ILCS 120/2(c) (West 2018).

Public Comment

Section 2.06(g) of OMA (5 ILCS 120/2.06(g) (2018)) further provides that "[a]ny person shall be permitted an opportunity to address public officials under the rules established

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 11

and recorded by the public body." The Resolution stated: "A person desiring to make public comment may email public comment to Charline Latronica * * * by 4:00 p.m. on the day of the board meeting."³⁰ The Resolution further provided that "[e]mailed public comment is limited to 200 words."³¹

The Board argued that the rules in the Resolution "concerning public comment during the pandemic provided an opportunity for the public to make public comment at special and regular meetings."³² With regard to the meetings held on March 24, 2020, April 22, 2020, and April 28, 2020, the Board asserted that the meeting agendas provided information about how to submit a public comment. As to the other two earlier meetings, the Board asserted: "For the March 18, 2020 special meeting, its agenda was posted prior to the emergency meeting called on March 17, 2020 and the adoption of [the Resolution]. As such, the March 18, 2020 agenda could not have included information or instructions as to the making of public comment via electronic mail."³³ The Board nonetheless noted that members of the public submitted public comments via e-mail at the March 18, 2020, meeting and directed this office to that meeting's minutes. Additionally, the Board argued that "the restrictions put in place by the Board during the pandemic situation for public comment at special and regular board meetings, were reasonable, time, place, and manner restrictions."³⁴

Mr. Silver argued that the only reason that some members of the public submitted comments by e-mail for the March 18, 2020, meeting was "because an individual member of the Board posted instructions on social media, reaching only the audience that follows her social media."³⁵ He further disputed the Board's claim that the rules in the Resolution governing public comment during the pandemic were narrowly tailored to meet a significant government interest. He asserted: "The Board claims that prohibiting public comment at an emergency meeting and

³⁰Resolution Authorizing Modifications to Lyons School District 103 Board of Education Meetings Occurring During the COVID-19 Pandemic, Section B, 4 (adopted March 17, 2020).

³¹Resolution Authorizing Modifications to Lyons School District 103 Board of Education Meetings Occurring During the COVID-19 Pandemic, Section B, 4 (adopted March 17, 2020).

³²Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 8.

³³Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 8.

³⁴Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 8.

³⁵Letter from Ben Silver, Citizen Advocacy Center, to [Teresa] Lim (September 4, 2020), at 10.

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 12

limiting comment to only regular and special meetings meets the government interest 'to take action in an emergency.' The Board fails to provide any reason that public comment would impede that interest."³⁶ He further argued that the Board failed to explain the governmental interest for the 200-word limit on written submissions, and that the rule was not established and recorded.

As noted above, the March 17, 2020, meeting agenda provided no instructions for members of the public to participate remotely. Mr. Silver contended that only a select group of members of the public were aware of the option to submit comments by e-mail with respect to the March 18, 2020, meeting. The March 24, 2020, meeting agenda simply stated that public comments would occur in accordance with the Resolution. Similar to the restriction on in-person attendance, a member of the public would again have to locate and review the Resolution in order to learn of the modifications made to public comment, specifically the option to submit public comments by e-mail. Because the Board limited public attendance at the meeting to a maximum of 10 persons, and because the agendas did not clearly identify the alternative option of providing public comment by e-mail, the Board improperly restricted the ability of the public to address members of the Board. Accordingly, this office concludes that the Board failed to provide a reasonable opportunity for public comment at its March 17, 2020, March 18, 2020, and March 24, 2020, meetings in accordance with section 2.06(g).

In contrast, the Board's April 22, 2020, and April 28, 2020, meeting agendas specified that members of the public could submit public comments by e-mail and provided an e-mail address in which to send the comments. Although Mr. Silver argued that the 200-word limit improperly restricted public comment, he did not provide specific facts suggesting that he or another member of the public submitted a written comment containing more than 200 words, and the Board enforced a rule to limit those comments. The minutes for the two meetings document that the Board read aloud submitted comments; this office has not received information to indicate that the Board failed to read aloud those comments in full. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 43028, issued July 22, 2016, at 2 (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). Accordingly, this office is unable to conclude that the Board violated section 2.06(g) in connection with its April 22, 2020, and April 28, 2020, meetings.

Recording of Meetings

Section 2.05 of OMA (5 ILCS 120/2.05 (West 2018)) permits any person to record a meeting "required to be open by this Act by tape, film or other means." The Attorney

³⁶Letter from Ben Silver, Citizen Advocacy Center, to [Teresa] Lim (September 4, 2020), at 8.

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 13

General has issued a binding opinion which concluded that a public body may limit the right of the public to record an open meeting only pursuant to prescribed rules the public body has adopted and then only to the extent that those rules are designed to prevent disruptions or avoid safety hazards, and do not unduly interfere with the right to record. *See* Ill. Att'y Gen. Pub. Acc. Op. No. 12-010, issued June 5, 2012 (concluding that a rule that requires a person wishing to record an open meeting to provide advance notice is invalid).

The Board asserted that it was unaware of any members of the public who attempted to record any of the meetings, but were unable to do so. Specifically, the Board asserted: "As far as the Board or District knows, the public in attendance at these meetings, such as the news reporters could have or did record the meeting(s). They were not prevented from doing so."³⁷ The Board further argued that, pursuant to its Board rules, "any member of the public could have directed a special request to the Superintendent to facilitate recording the meeting(s) due to the inability to attend the meeting in person due to the pandemic."³⁸ In reply, Mr. Silver argued: "The Public Access Counselor has issued two binding opinions determining that rules requiring an advance request to record violate the Act."³⁹

In this matter, Mr. Silver did not allege that he or another member of the public attempted to record one of the meetings at issue, but was prohibited from doing so due to the 10-person limit or other enforced rule. For instance, he did not allege that upon arriving at a meeting, he requested to record the meeting but was turned away. Under the circumstances of the pandemic, it is not unreasonable for a public body to make alternative arrangements to allow the recording of a meeting, while addressing the safety hazards posed by the spread of COVID-19, particularly in confined spaces. Here, the Board indicated that it would have assisted in facilitating the recording of a meeting in light of its meeting modifications upon being alerted of such desire. Because there is no indication that a member of the public attempted to record a particular meeting but was prevented from doing so, this office is unable to conclude that the Board violated section 2.05 of OMA.

In its response to this office, the Board stated that it now provides the public with contemporaneous access to its meetings in accordance with section 7(e) of OMA, which went into effect on June 12, 2020. That provision imposes certain requirements for meetings that are held remotely because of a public health emergency, such as the COVID-19 pandemic. Among

³⁷Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 9.

³⁸Letter from Leslie Quade Kennedy, Odelson, Sterk, Murphey, Frazier & McGrath, Ltd, to Teresa Lim, Assistant Attorney General, Public Access Bureau (August 26, 2020), at 9.

³⁹Letter from Ben Silver, Citizen Advocacy Center, to [Teresa] Lim (September 4, 2020), at 7.

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 14

other things, section 7(e)(4) of OMA (5 ILCS 120/7(e)(4) (West 2018), as amended by Public Act 101-640, effective June 12, 2020) provides that if:

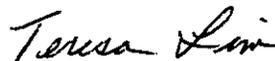
attendance at the regular meeting location is not feasible due to the disaster, * * * the public body must make alternative arrangements and provide notice pursuant to this Section of such alternative arrangements in a manner to allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes, such as by offering a telephone number or web-based link[.]

Based on this office's review of the posted agendas of the Board's June 23, 2020, and June 30, 2020, meetings, it appears that the Board now provides a telephone number and PIN, as well as a Google Meets link, for members of the public to attend its meetings remotely. The agendas also provide information on how the public may submit comments by e-mail. Because the Board appears to adhere to the requirements of section 7(e)(4), no remedial action is required.

This office notes, however, that section 7(e)(9) of OMA (5 ILCS 120/7(e)(9) (West 2018), as amended by Public Act 101-640, effective June 12, 2020) further requires public bodies to keep verbatim audio or video recording of remote meetings and make them available to the public unless they are closed session recordings that OMA prohibits from being disclosed.

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,



D.L.

TERESA LIM
Assistant Attorney General
Public Access Bureau

Mr. Benjamin Silver
The Honorable Jorge Torres
December 9, 2020
Page 15

cc: *Via electronic mail*
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