OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 14, 2017

Via electronic mail
Mr. John Kraft
[redacted]
john@illinoisleaks.com

Via electronic mail
Ms. Lorna K. Geiler
Meyer Capel
306 West Church Street
Champaign, Illinois 61820
lgeiler@meyercapel.com

RE: OMA Request for Review – 2015 PAC 47429

Dear Mr. Kraft and Ms. Geiler:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). For the reasons discussed below, the Public Access Bureau concludes that the Parkland College (College) Board of Trustees (Board) violated OMA by failing to provide the public with at least 48 hours advance notice of a meeting in the absence of a *bona fide* emergency. However, this office also concludes that the Board's closed session discussion during the meeting was authorized by exceptions to the general requirement that public bodies conduct public business openly.

On April 18, 2017, Mr. John Kraft submitted a Request for Review stating that the Board held an emergency meeting on April 17, 2017, in which it discussed in closed session "'personnel issues'" and "'potential litigation'" related to an alleged conflict of interest on the part of a College professor, Ms. Rochelle Harden, who had recently been elected as a Board trustee. Mr. Kraft disputed that those topics were "legitimate emergencies"[1] and questioned whether OMA authorized the Board to discuss the matter in closed session.

[1]E-mail from John Kraft to AG PAC [Attorney General Public Access Counselor] (April 18, 2017).

On April 24, 2017, the Public Access Bureau sent a copy of the Request for Review to the Board and asked it to provide a copy of the April 17, 2017, meeting minutes (draft form, if necessary) and the verbatim recording of the closed session discussion together with a detailed explanation of the applicability of the specific exceptions in section 2(c) of OMA (5 ILCS 120/2(c) (West 2016)) that the Board cited as its bases for closing the meeting. This office also asked the Board to provide a copy of any notice and agenda that was posted for the April 17, 2017, meeting and a written response clarifying when the notice and agenda was posted. If the notice and agenda was not posted at least 48 hours before the April 17, 2017, meeting commenced, we asked the Board to provide a detailed explanation of how the meeting was held in the event of a "bona fide emergency."[2] On May 1, 2017, this office received those materials from the Board; on May 18, 2017, Mr. Kraft replied to the Board's written response.

ANALYSIS

Emergency Meeting

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 anyway." 5 ILCS 120/1 (West 2016). Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2016)) provides that "[p]ublic 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[.]" (Emphasis added.)

The Board's response to this office stated that the Board posted an agenda for the April 17, 2017, meeting at about 10:34 a.m. on April 17, 2017. The Board stated it was justified in holding an emergency meeting because earlier that day, Professor Harden had responded to the Board's concerns that it is illegal to simultaneously serve as a College employee and a Board trustee by advising that she would neither resign her faculty position nor decline to serve as a trustee. The Board further asserted that that it needed to expeditiously discuss whether to terminate Professor Harden or to file a lawsuit, partly because the College as a whole and individual Board members potentially could have faced criminal penalties if there was a violation of one of the statutes that, according to the counsel for the Board, prohibited Professor Harden from holding both positions:

[2]Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to the Honorable Dana Trimble, Chair, Parkland College, Board of Trustees (April 24, 2017), at 2.

> The Board and the College had to determine what action needed to be taken to address this dilemma and if it needed to be taken before the April 26th meeting when Ms. Harden was sworn in as Trustee. The applicable statutes and case law seemed clear that simultaneous service was illegal and the Board was faced with a number of issues that needed prompt attention. * * *
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> Since there was concern that could impact each Trustee individually, they needed to have the opportunity to question counsel and obtain guidance with the highest Board participation possible. The only day on which all Board members could participate was April 17, 2017. Even that involved a Trustee rushing from the airport after returning to Champaign to make the meeting, albeit slightly late.[3]

The Board added that the prospect of Professor Harden simultaneously serving as a professor and Board member raised liability concerns and questions about whether certain actions taken by the Board could be void or voidable. In his reply, Mr. Kraft disputed that an emergency meeting was necessary. He asserted that the Board could have simply addressed the issue at its April 26, 2016, meeting, or scheduled and provided proper notice for a special meeting:

> The college had ample time to figure out a course of action from the moment they knew this Professor had submitted her petitions to be place[d] on the ballot. Now they claim it was an emergency because she would not bend to their demands, even though there were 9 days between the so-called emergency meeting and the swearing in of the newly elected trustees. This left plenty of time to have a Special meeting – if it was even required at all.[4]

It is undisputed that the Board did not provide at least 48 hours advance notice of its April 17, 2017, meeting as required by section 2.02(a) of OMA unless the meeting is "held in

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[3]Letter from Lorna K. Geiler, Meyer Capel, to Steve Silverman, Bureau Chief, Office of the Attorney General (April 28, 2017), at 2.

[4]E-mail from John Kraft to Public Access [Bureau, Office of the Attorney General] (May 18, 2017).

the event of a bona fide emergency." OMA does not define the phrase *bona fide* emergency, and no Illinois appellate court has addressed the issue of what constitutes a *bona fide* emergency, for purposes of section 2.02(a). An "emergency" is defined as "an ***unforeseen*** combination of circumstances or the resulting state that calls for ***immediate*** action." (Emphasis added.) Webster's Third New International Dictionary, 741 (1993).

Based on this definition, the Public Access Bureau has previously 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* emergency. (Emphasis added.) Ill. Att'y Gen. PAC Req. Rev. Ltr. 23656, issued May 31, 2013, at 4. In that matter, this office rejected a public body's assertion that an account deficit that could have resulted in the public body failing to meet payroll constituted a "*bona fide* emergency" under section 2.02(a), partly because the "situation that precipitated" the meeting "was clearly foreseeable." Ill. Att'y Gen. PAC Req. Rev. Ltr. 23656, at 4; *see also River Road Neighborhood Ass'n v. South Texas Sports*, 720 S.W.2d 551, 557 (Tex. App. 1986) ("The mere necessity for quick action does not constitute an emergency where the situation calling for such action is one which reasonably should have been anticipated.").

The Board's response to this office appears to assert that the need for a meeting to address how to respond to Professor Harden serving as both a trustee and a professor could not have been anticipated until she advised the Board in an April 17, 2017, e-mail that she rejected its legal concerns. However, that outcome was clearly possible, if not likely, because a week earlier, in a news media article, it was reported that Professor Harden had publicly rejected "the argument that state law bars her from being both a faculty member and trustee at the same college[ ]": "'I think it's completely resolved,' Harden said of the legal questions surrounding her serving as a Parkland trustee. 'Obviously, if they intend to take it to court, I'm certainly ready for that fight. But I consider it as much as resolved, and a non-issue entirely.'"[5] Professor Harden acknowledged in another news media article[6] that she subsequently met with the College about its concerns on April 12, 2017, and the Board's response to this office contended that "[u]ntil receipt of her April 17, 2017 email, the Board and the College administration were all hopeful that she would make an appropriate decision." Still, Professor Harden's subsequent decision to refuse to either resign as a professor or agree to give up her newly elected position on the Board cannot reasonably be construed as unforeseen in light of her previous public comments.

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[5]Jim Meadows, *Parkland College's First African-American Trustee Faces Questions Due To Faculty Position*, WILL/Illinois Public Media (April 10, 2017), https://will.illinois.edu/news/story/parkland-colleges-first-african-american-trustee-faces-questions-due-to-her

[6]Tom Kacich, *UPDATED: Harden troubled by board's decision* (April 18, 2017, 8:49 AM), http://www.news-gazette.com/news/local/2017-04-18/updated-harden-troubled-boards-decision.html

Moreover, the Board has not demonstrated that its apparent scheduling conflicts transformed the matter into a "*bona-fide* emergency" for purposes of section 2.02(a) of OMA. The Board asserts, without explanation, that April 17, 2017, was the only day all Board members could participate in a meeting between the time Professor Harden advised that she intended to serve as both a trustee and a professor and when she was scheduled to be sworn in as a trustee. It is unclear whether it was actually not possible for the Board to meet at another time during that nine-day period after providing the public with 48 hours advance notice of the meeting or whether it simply would have been inconvenient for one or more trustees. In the absence of evidence that Professor Harden's potential conflict of interest was an unforeseen circumstance that had to be addressed immediately because the Board had no viable alternative that would have enabled it to hold a meeting for which 48 hours advance notice could have been provided, this office is unable to conclude that the April 17, 2017, meeting was held in the event of a *bona fide* emergency. Accordingly, the Board violated section 2.02(a) of OMA by failing to provide sufficient advance notice for that meeting. This violation, however, did not significantly deprive the public of an opportunity to observe the Board conduct public business because – as discussed below – the purpose of the meeting was to consider in closed session a matter that the Board was permitted to discuss in closed session under the exceptions that it cited to close the meeting. Therefore, no remedial action is required.

Sections 2(c)(1) and 2(c)(11) of OMA

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 2016). Section 2(a) of OMA (5 ILCS 120/2(a) (West 2016)) 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." Those "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 2016).

The minutes of the Board's April 17, 2017, meeting indicate that the Board entered closed session pursuant to the section 2(c)(1) and 2(c)(11) (5 LCS 120/2(c)(1), (c)(11) (West 2016)) exceptions to OMA's general requirement that public bodies openly conduct public business. Section 2(c)(1) permits a public body to close a meeting to discuss "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body[;]" section 2(c)(11) applies to: "Litigation, 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, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting." The requirement that a public body document the basis for finding litigation is probable or imminent is "intended to prevent public bodies from using the

distant possibility of litigation as a pretext for closing their meetings to the public. Henry, 356 Ill. App. 3d 952, 957 (4th Dist. 2005). Further, the scope of section 2(c)(11) is 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 13-14; Ill. Att'y Gen. Pub. Acc. Op. No. 16-007, issued September 13, 2016, at 5.

The Board's response to this office asserted: "The meeting itself was properly closed because the Board was required to consider whether or not it would direct Administration to terminate Ms. Harden, or alternatively whether or not it would bring litigation against Ms. Harden."[7] Based on this office's review of the verbatim recording of the closed session, portions of the discussion pertained to the performance of individual employees, including whether to terminate Professor Harden. The remaining portions of the discussion focused on whether or not to file a lawsuit and the potential consequences of doing so. It is clear that this was not discussed as a remote possibility but rather as the primary option under consideration by the Board. Indeed, the Board filed a complaint for declaratory judgment the day after Ms. Harden was sworn-in as a trustee.[8] Because the closed session directly concerned both the performance and possible termination of a specific employee and imminent litigation, this office concludes that the Board's discussion was within the scope of the section 2(c)(1) and 2(c)(11) exceptions under which it closed the meeting.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (217) 782-9054. This letter serves to close this file.

Very truly yours,

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STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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[7]Letter from Lorna K. Geiler, Meyer Capel, to Steve Silverman, Bureau Chief, Office of the Attorney General (April 28, 2017), at 3.

[8]Tom Kacich, *New Parkland trustee denies conflict of interest in court filing* (May 27, 2017, 7:00 AM), http://www.news-gazette.com/news/local/2017-05-27/new-parkland-trustee-denies-conflict-interest-court-filing.html