OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 20, 2017

Via electronic mail
[redacted]

Via electronic mail
Mr. Steven M. Richart
Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP
3030 Salt Creek Lane, Suite 202
Arlington Heights, Illinois 60005
srichart@hlerk.com

RE: OMA Request for Review – 2017 PAC 48046

Dear [redacted] and Mr. Richart:

This determination letter 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 that follow, the Public Access Bureau concludes that the Board of Education (Board) of Nauvoo-Colusa Community Unit School District No. 325 (District) did not properly post notice of its May 15, 2017, meeting at the location of the meeting, but did not violate OMA in connection with posting notice on the District's website.

BACKGROUND

On May 24, 2017, [redacted] submitted a Request for Review to the Public Access Bureau alleging that the Board did not post the agenda for its May 15, 2017, meeting "at any publicly accessible location 48-hours prior to the meeting."[1] [redacted] stated that he visited the school building where the meeting was to be held on May 15, 2017, and found

[1]OMA – Request for review by Public Access Counselor (PAC) submitted by [redacted] (May 24, 2017).

no agenda posted at the entry doors of the school. He further stated that when he complained to the District about the lack of a properly posted agenda in advance of the meeting, the District informed him that the agenda had been posted in the principal's office on May 13, 2017. [redacted] alleged that the agenda was not publicly accessible at that location because May 13th fell on a Saturday, and the building was locked. He also alleged that the agenda was not posted on the District's website until the afternoon of May 15, 2017. In addition, [redacted] alleged that not all members of the Board had completed the requisite OMA training. Further, he alleged, in pertinent part:

> The Superintendent participates in the meeting as a member of the School Board, although he is not. He sits at the table with other members of the Board, and speaks privately with the School Board President in a low voice, not audible to the public. It is my contention that he should not be seated with the Board, and that all comments he makes should be during public comment portions of the meeting, or when specifically giving a report specified on the meeting agenda.[2]

On June 1, 2017, this office forwarded a copy of the Request for Review to the Board and asked it to provide a written response to [redacted] allegations. This office also asked the Board whether the District's website was maintained by a full-time District staff member and asked for copies of the agenda and minutes. On June 16, 2017, this office received the requested materials. On June 19, 2017, this office forwarded a copy of the Board's response to [redacted] he replied on June 26, 2017. [redacted] maintained that the agenda "was not posted 48 hours in advance in a publicly available location."[3] He also reiterated his claim that the Board President and superintendent improperly engaged in private conversations during the meeting. On August 10, 2017, this office asked the Board to provide a supplemental response clarifying each Board member's start date and the dates on which each of the members had completed the OMA training. This office also requested copies of any certificates of completion. On August 22, 2017, the Board provided the requested supplemental response.

DETERMINATION

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." 5 ILCS 120/1 (West 2016). "The Open Meetings Act provides that

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[2]OMA – Request for review by Public Access Counselor (PAC) submitted by [redacted] (May 24, 2017).

[3]Letter from [redacted] to Teresa Lim, Assistant Attorney General (June 26, 2017).

public agencies exist to aid in the conduct of the people's business, and that the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly." *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989).

OMA Training

As a preliminary matter, section 1.05(b) of OMA (5 ILCS 120/1.05(b) (West 2016)) contains the requirements for members of public bodies to complete the electronic OMA training program developed by the Public Access Counselor. It provides, in pertinent part:

> Except as otherwise provided in this Section, each elected or appointed member of a public body subject to this Act who becomes such a member after the effective date of this amendatory Act of the 97th General Assembly shall successfully complete the electronic training curriculum developed and administered by the Public Access Counselor. For these members, the training must be completed not later than the 90th day after the date the member:
>
> (1) takes the oath of office, if the member is required to take an oath of office to assume the person's duties as a member of the public body; or
>
> (2) otherwise assumes responsibilities as a member of the public body, if the member is not required to take an oath of office to assume the person's duties as a member of the governmental body.
>
> Each member successfully completing the electronic training curriculum shall file a copy of the certificate of completion with the public body.
>
> * * *
>
> The failure of one or more members of a public body to complete the training required by this Section does not affect the validity of an action taken by the public body.
>
> An elected or appointed member of a public body subject to this Act who has successfully completed the training required under this subsection (b) and filed a copy of the certificate of

> completion with the public body is not required to subsequently complete the training required under this subsection (b).

In addition, section 1.05(c) of OMA (5 ILCS 120/1.05(c) (West 2016)) permits elected school board members to complete certain alternative training courses to satisfy the OMA training requirement:

> An elected school board member may satisfy the training requirements of this Section by participating in a course of training sponsored or conducted by an organization created under Article 23 of the School Code. The course of training shall include, but not be limited to, instruction in:
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> (1) the general background of the legal requirements for open meetings;
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> (2) the applicability of this Act to public bodies;
>
> (3) procedures and requirements regarding quorums, notice, and record-keeping under this Act;
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> (4) procedures and requirements for holding an open meeting and for holding a closed meeting under this Act; and
>
> (5) penalties and other consequences for failing to comply with this Act.
>
> If an organization created under Article 23 of the School Code provides a course of training under this subsection (c), it must provide a certificate of course completion to each school board member who successfully completes that course of training.

In response to this office's question about whether members of the Board had satisfied the OMA training requirements, the Board stated that "most of the Board members had undergone Professional Development Leadership Training, PERA [Performance Evaluation Reform Act] Training and other IASB [Illinois Association of School Boards] trainings during which OMA was discussed[,]" and that they had mistakenly believed that those trainings fulfilled the OMA training requirement.[4] The response further stated that "[u]pon discovering that the

[4]E-mail from Steven M. Richart, Attorney, Hodges Loizzi Eisenhammer Rodick & Kohn LLP, to Teresa Lim (August 21, 2017).

previous trainings did not cover OMA certification, all Board members promptly took the training and became OMA-compliant."[5] The Board provided the start dates of each of the Board members and the dates on which they had completed the electronic OMA training curriculum. Additionally, the Board provided copies of the members' certificates of completion of the curriculum. This office has compared the start dates with the training completion dates and determined that five members had not completed the OMA training within 90 days of taking the oath of office or otherwise assuming responsibilities as a Board member. At this time, however, the OMA certificates of completion indicate that all members have completed the required OMA training. OMA provides no penalty for the failure to complete training within the statutory timeframe.

Posting of Agenda

Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2016)) provides, in pertinent part:

> An 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. A public body that has a website that the **full-time staff** of the public body maintains shall also post on its website the agenda of any regular meetings of the governing body of that public body. (Emphasis added.)

Section 2.02(c) of OMA (5 ILCS 120/2.02(c) (West 2016)) further provides:

> The public body conducting a public meeting shall ensure that at least one copy of any requested notice and agenda for the meeting is **continuously available** for public review during the entire 48-hour period preceding the meeting. Posting of the notice and agenda on a website that is maintained by the public body satisfies the requirement for continuous posting under this subsection (c). (Emphasis added.)

In its response to this office, the Board stated that on May 13, 2017, at 2:45pm, the District's secretary had posted the agenda outside the principal's office, which is in the same

[5]E-mail from Steven M. Richart, Attorney, Hodges Loizzi Eisenhammer Rodick & Kohn LLP, to Teresa Lim (August 21, 2017).

building where the meeting was held. Addressing the accessibility of the posting, the Board asserted, in pertinent part:

> [redacted] correctly asserts that the agenda, despite being physically posted, wasn't publicly available during the full 48 hours prior to the meeting because it was inside a locked building. It is an interesting question whether the District complied with the requirements of Section 2.02(c) in this instance, as Section 2.02(c) states, "The public body conducting a public meeting shall ensure that at least one copy of any *requested* notice or agenda for the meeting is continuously available for public review during the entire 48-hour period preceding the meeting." 5 ILCS 120/2.02(c) (emphasis added). In this case, no one requested the agenda until the morning of the meeting, at which time the agenda was promptly posted.[6]

Additionally, according to the Board, a part-time consultant maintains the District's website, so the Board has no duty to post agendas on the District's website. The Board stated that the agenda was nonetheless posted on the District's website on the date of the meeting in this instance. Under the plain language of section 2.02(a), only public bodies that have a website maintained by a full-time staff member are required to post an agenda on their website 48 hours in advance of a meeting. This office has not received evidence contradicting the Board's assertion that a part-time consultant maintains the District's website. Accordingly, this office concludes that the Board was not required to post the May 15, 2017, meeting agenda on the District's website 48 hours before the meeting.

The Board acknowledged, however, that the agenda was not continuously available during the 48 hours preceding the meeting because the building in which the agenda was posted was locked. While OMA does not specify where exactly at the location of a meeting an agenda must be posted, the public policy underlying OMA is to provide "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." 5 ILCS 120/1 (West 2016). In order to ensure a full 48 hours of public notice before meetings, this office has stated that a public body "should post meeting notices in a location where they may be continuously viewable from the outside of [the building where the meeting is being held], such as on or near the front door or facing outward from a window." *See, e.g.,* Ill. Att'y Gen. PAC Req. Rev. Ltr. 29886, issued September 16, 2014, at 2-3. Under the

[6]Letter from Steven M. Richart, Hodges, Loizzi, Eisenhammer, Rodick & Kohn, LLP, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (June 16, 2017), at 2.

plain language of section 2.02(c), a public body may also satisfy the "continuously available" requirement by posting a copy of the notice and agenda on its website.

Although the Board asserted that the agenda was promptly posted once requested by [redacted] in compliance with section 2.02(c), which refers to "any **requested** notice or agenda" (emphasis added), the meaning of the term "requested" is ambiguous in the context of the requirement that an agenda be posted at least 48 hours in advance of a meeting. However, the House debate on House Bill No. 4687, which added section 2.02(c) to OMA as part of Public Act 97-827, effective January 1, 2013, indicates that the General Assembly intended this provision to apply to all meetings for which 48 hours advance notice is required.[7] In discussing the bill, State Representative Sandy Pihos noted, in pertinent part: "House Bill 4687, what that does is it requires a **full** 48-hour posting for a public meeting, and that has mitigated some of the opposition." (Emphasis added.) Remarks of Rep. Pihos, March 8, 2012, House Debate on House Bill No. 4687, at 69. Further, Representative Pihos confirmed the intent that a public body would not violate the "continuously available" requirement if it posted the notice and agenda on its website and the internet went down due to circumstances beyond the public body's control. *See* Remarks of Rep. Pihos, March 8, 2012, House Debate on House Bill No. 4687, at 70.

The addition of section 2.02(c) to OMA came less than three years after the court in *In re Foxfield Subdivision*, 396 Ill. App. 3d 989, 993 (2d Dist. 2009) analyzed the claim that a village board violated OMA by posting the agenda for a meeting inside the village hall, which was only open for seven hours per day. The court favorably cited a decision in which the Texas Supreme Court held that although notice for a meeting "was not continuously available[,]" having "an 'open door' policy" would be cost prohibitive for many municipalities. *See Foxfield*, 396 Ill. App. 3d at 993 (quoting *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 768 (Tex. 1991)). The court in *Foxfield* concluded: "Based on a plain reading of our Open Meetings Act, it is clear that the legislature does not require that an agenda be posted in a specific place so that it is publicly accessible for 48 continuous hours before the meeting." *Foxfield*, 396 Ill. App. 3d at 994. Given the manner in which the phrases "continuously available" and "entire 48-hour period" in section 2.02(c) of OMA mirror the phrases "continuously available" and "48 continuous hours" in *Foxfield*, it appears that the General Assembly intended the addition of section 2.02(c) to correct *Foxfield*'s conclusion on agenda accessibility. *See, e.g., Collins v. Board of Trustees of Firemen's Annuity & Benefit Fund of Chicago*, 155 Ill. 2d 103, 111 (1993) ("An amendment that contradicts a recent interpretation of a statute is an indication that such interpretation was incorrect and that the amendment was enacted to clarify the legislature's original intent.").

[7]Section 2.02(a) provides exceptions from the 48-hour advance notice requirement for meetings held in the event of a bona fide emergency, rescheduled regular meetings, and reconvened meetings.

In contrast, the Board did not point to any authority for the claim that the "continuously available" requirement was not triggered until [redacted] requested the agenda for the meeting. Further, the Board did not support its claim that it complied with section 2.02(c) by posting the agenda on its website upon [redacted] request. Because the public policy and legislative history behind section 2.02(c) of OMA indicate that the General Assembly intended for the public to be able to view the agenda for an open meeting for a full 48 hours in advance of the meeting, this office concludes that the Board failed to provide sufficient advance notice of its May 15, 2017, meeting.

Nevertheless, the Board stated that it "will post its agendas on the windows of the entry doors * * * to ensure the public has continuous access to the agenda during the 48 hours prior to each meeting, whether or not such agenda is requested."[8] Although it is not required to post its meeting agendas on the District website 48 hours prior to its meetings, the Board also stated that it plans to do so. In light of these measures, this office has determined that no additional remedial action is required.

Superintendent's Participation in Meetings

Section 1.2 of OMA (5 ILCS 120/1.2 (West 2016)) defines a "meeting" as any gathering, whether in person or by video or audio conference, telephone call, electronic means * * * 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[.]" Section 2.06(g) of OMA (5 ILCS 120/2.06(g) (West 2016)) provides that "[a]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body."

In this case, [redacted] allegation that the school superintendent improperly engaged in private conversation with the Board president during the May 15, 2017, meeting does not set forth facts from which this office can conclude that the Board violated the requirements of OMA.[9] No provision of OMA prohibits a private conversation between a Board member and the superintendent or one-on-one communications involving less than a majority of a quorum of the Board. *See* Ill. Att'y Gen. PAC Req. Rev. Ltr. 30157, issued July 7, 2014, at 2 (the "allegation that Board members individually communicated with each other or with the Board's attorney [during an open meeting] does not set forth facts from which this office could conclude

[8]Letter from [redacted], Hodges, Loizzi, Eisenhammer, Rodick & Kohn, LLP, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (June 16, 2017), at 2.

[9]The Public Access Counselor's authority to resolve disputes is limited to alleged violations of OMA and the Freedom of Information Act (5 ILCS 140/1 *et seq.* (West 2016)). *See* 15 ILCS 205/7(c)(3) (West 2016).

that a majority of a quorum of the Board engaged in private, contemporaneous, interactive communications" such that this office could conclude that an improper private meeting was held). Similarly, no provision of OMA requires that members of a school board be seated separately from the school superintendent. While [redacted] contended that all comments made by the superintendent should be made during the public comment period of a meeting or when providing a report as listed on an agenda, OMA does not contain such a requirement. Section 2.06(g) requires that members of the public be given an opportunity to address public officials during a meeting, but does not prohibit an individual from making private comments to a public official. Nonetheless, the Board president may wish to consider whether private discussions with the superintendent during open meetings contravene the spirit of OMA.

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,

[redacted]

TERESA LIM
Assistant Attorney General
Public Access Bureau

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