OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Kwame Raoul
ATTORNEY GENERAL

February 19, 2019

Via electronic mail
[redacted]

Via electronic mail
Mr. Steven M. Richart
Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP
OBO Jasper County Community Unit School District No. 1
3030 Salt Creek Lane, Suite 202
Arlington Heights, Illinois 60005
srichart@hlerk.com

RE: OMA Request for Review – 2018 PAC 52345

Dear [redacted] and Mr. Richart:

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 that follow, the Public Access Bureau concludes that the Board of Education (Board) of Jasper County Community Unit School District No. 1 (District) did not violate the requirements of OMA in connection with certain closed session verbatim recordings, as alleged by [redacted]

On March 23, 2018, [redacted] submitted this Request for Review alleging that on March 14, 2018, the Board violated section 2.06(e) of OMA (5 ILCS 120/2.06(e) (West 2016)) by failing to provide a Board member with access to certain closed session verbatim recordings. [redacted] further alleged that the Board: (1) failed to maintain closed session verbatim recordings at its main office or its official storage location, (2) copied or otherwise removed closed session verbatim recordings without a majority vote or court order, and (3) allowed unsupervised access to closed session verbatim recordings to the District's information technology (IT) employee, attorney, and superintendent.

On March 29, 2018, this office sent a copy of the Request for Review to the Board and asked it to provide a written answer to [redacted] allegations. In particular, this office asked the Board to address whether one of its members requested access to closed session verbatim recordings and whether the Board provided access in accordance with section 2.06(e) of OMA. This office also asked whether the Board has maintained the closed session verbatim recordings in accordance with section 2.06(e) of OMA, and to provide this office with any written policies or procedures for the maintenance and handling of its closed session verbatim recordings.

On April 10, 2018, the Board submitted both a complete version of its written answer and a partially redacted version for this office to forward to [redacted];[1] the Board also furnished an affidavit from its Records Secretary, Ms. Janet Benefeil, for this office's confidential review. On April 11, 2018, this office forwarded a copy of the redacted answer to [redacted] On April 12, 2018, [redacted] submitted a reply.

DETERMINATION

"The Open Meetings Act provides that 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).

As a preliminary matter, the Board's response asserts that "[redacted] does not have standing to bring this Request for Review because he is not the aggrieved party."[2] Unlike the requirements for Public Access Counselor review under the Freedom of Information Act (FOIA), which provides in section 9.5(a) (5 ILCS 140/9.5(a) (West 2016)) that "[a] person whose request to inspect or copy a public records is denied" may file a request for review, OMA provides that "[a] person who believes that a violation of this Act by a public body has occurred may file a request for review with the Public Access Counselor[.]" Thus, [redacted] does have "standing" to bring this complaint and this office has the authority to review his allegations.

Section 2.06(e) of OMA provides, in pertinent part:

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[1]Section 3.5(c) of OMA (5 ILCS 120/3.5(c) (West 2016)) provides that "[u]pon request, the public body may also furnish the Public Access Counselor with a redacted copy of the answer excluding specific references to any matters at issue."

[2]Letter from Steven M. Richart, Hodges Loizzi Eisenhammer Rodick & Kohn LLP, to Neil Neil Olson, Assistant Attorney General, Public Access Bureu, Office of the Attorney general, (April 10, 2018) at 1.

> Unless the public body has made a determination that the verbatim recording no longer requires confidential treatment or otherwise consents to disclosure, the verbatim record of a meeting closed to the public shall not be open for public inspection or subject to discovery in any administrative or judicial proceeding other than one brought to enforce this Act. * * * ***Access to verbatim recordings shall be provided to duly elected officials or appointed officials filling a vacancy of an elected office in a public body, and access shall be granted in the public body's main office or official storage location, in the presence of a records secretary, an administrative official of the public body, or any elected official of the public body. No verbatim recordings shall be recorded or removed from the public body's main office or official storage location, except by vote of the public body or by court order.*** (Emphasis added.)

The General Assembly added the language emphasized above to section 2.06(e) of OMA by enacting Public Act 99-515, effective June 30, 2016. The House sponsor of the bill, Representative Jeanne Ives, described the purpose of the legislation as follows:

> Ives: This is a very simple Bill. It passed out of committee unanimously. It essentially says that if you're a newly elected official, you * * * have access to closed session meetings of all the previous boards. Remarks of Rep. Ives, April 14, 2016, House Debate on House Bill No. 4630, at 103.

The Senate debate on House Bill 4630 further illustrates the intent of the legislation:

> Senator M. Murphy: * * * Does the bill change the confidentiality and purpose of verbatim recordings?
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> * * *
>
> Senator Connelly: No, it does not, Senator Murphy. It doesn't change the Act's intent for confidentiality. It does, however, add an additional purpose for which the verbatim recording may be used. Current law provides that the Attorney General Public Access Counselor and/or a court of law are able to examine whether a violation of [OMA] has occurred when one is alleged.

> And with – with enacting this legislation, duly elected officials may review those verbatim recordings as well. Remarks of Sen. Murphy and Sen. Connelly, May 26, 2016, Senate Debate on House Bill No. 4630, at 81.

Board Member's Access to Closed Session Verbatim Recordings

In the non-confidential version of its answer, the Board explained that one of its members, Mr. Jed Earnest, had recently made several requests to listen to various closed session verbatim recordings. According to the Board, "Mr. Earnest was informed that he may listen to the recordings. All that he needs to do is schedule a time to meet with the Superintendent in the District's main office so the recordings can be ready and they can listen to the recordings together pursuant to Section 2.06(e)." The Board further described its handling of Mr. Earnest's requests as follows:

> After making his first request, Mr. Earnest listened to the requested recording in accordance with section 2.06(e). On March 14, 2018, Mr. Earnest went to the District office to listen to the September 22, 2016, closed session recording, as was previously scheduled between him and the Superintendent. On that same day, he requested to also listen to the August 2016 closed session recording. Superintendent Johnson was not able to listen to the recordings with Mr. Earnest due to scheduling conflicts and the recordings not being ready. Accordingly, Superintendent Johnson asked Mr. Earnest to make an appointment to come back to the District office to listen to the August 2016 recording. Superintendent Johnson is in the process of scheduling times with Mr. Earnest for when he may come to the office to listen to this recording and the other requested recordings.[3]

[redacted] replied:

> In a text message about the August 26, 2016 closed session recording, on March 14, 2018 at approximately 2:25 p.m., from Mr. Johnson to Mr. Earn[e]st, Mr. Johnson stated that "***I will have Aaron pull it and I will send it to our attorneys for them to review***

[3]Letter from Steven M. Richart, Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP, to Neil Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 10, 2018), at 2.

once that is completed I can work with you on a time to listen to it with me." (Emphasis in original.)[4]

[redacted] additionally argued: "Nothing in the statute authorizes anyone * * * to force a board member to be at the whim of a board's attorney or at the whim of the employee of the board, before said board member can listen to the recordings."[5]

The Board's response to this office confirmed that Mr. Earnest accessed a requested closed session verbatim recording during a scheduled appointment with Superintendent Johnson. In addition, the Board asserted that, at the time of its response to this office, Mr. Earnest and Superintendent Johnson were in the process of scheduling a second appointment to access a separate referenced recording. The plain language of section 2.06(e) does not address the specific timing of access by a Board member, but, contrary to [redacted] argument, does provide that access shall be granted in the presence of an administrative official of the public body or certain other personnel. Thus, section 2.06(e) necessarily contemplates that a closed session verbatim recording may not be immediately available to a Board member, as arrangements must be made for appropriate oversight. This office has not received any evidence that Mr. Earnest was denied the opportunity to access any closed session verbatim recordings within the meaning of section 2.06(e), whether through outright refusal or a delay so unreasonable that it effectively constituted a denial. Therefore, this office concludes that the Board did not violate section 2.06(e) of OMA with respect to Mr. Earnest's access to closed session verbatim recordings on or around March 24, 2018.

Copying, Removing, or Allowing Unsupervised Access to Closed Session Verbatim Recordings

In response to [redacted] allegations concerning the extent to which the Board maintains the confidentiality and file integrity of its closed session verbatim recordings, the Board asserted that it "properly stores the closed session recordings[,]" and provided this office with confidential information in that regard.[6] The Board also asserted: "Section 2.06(e) only addresses the right of Access for the public and board members; access by a public body's employees and attorneys is not addressed by Section 2.06(e)."[7] [redacted] replied that, based on

[4]E-mail from [redacted] to [Public Access Bureau] (April 12, 2018). [redacted] did not provide this office with a copy of the e-mail that he referenced.

[5]E-mail from [redacted] to [Public Access Bureau] (April 12, 2018).

[6]Letter from Steven M. Richart, Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP, to Neil Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 10, 2018), at 2.

[7]Letter from Steven M. Richart, Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP, to Neil Olson, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 10, 2018), at 2.

the text message referenced above, "at least one copy [of the closed session verbatim recording Mr. Earnest asked to review on March 14, 2018,] was made, without appropriate authority, and delivered to the district's attorney. Nothing in the statute authorizes copies to be [made] or for the board attorney to review any closed session recordings without a majority board vote or a Court Order."[8] [redacted] alleged that the text message shows both that the recording was improperly removed from the Board's official storage location and that an IT employee, the District's attorney, and the District's superintendent had unauthorized access to it.

In construing a statutory provision such as section 2.06(e) of OMA, the primary goal is to ascertain and give effect to the intent of the General Assembly. *Wisnasky-Bettorf v. Pierce*, 2012 IL 111253, ¶16, 965 N.E.2d 1103, 1106 (2012). Legislative intent is best evidenced by the language used in the statute, and if the statutory language is clear and unambiguous, it must be given effect as written. *Blum v. Koster*, 235 Ill. 2d. 21, 29 (2009). "On the other hand, when statutory language is susceptible to more than one reasonable interpretation, it is appropriate to resort to other aids of construction to determine legislative intent." *Veterans Assistance Comm'n of Grundy County v. Count Board of Grundy County*, 2016 IL App (3d) 130969, ¶45, 50 N.E.3d 121, 129 (2016). "We view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." *People v. Gutman*, 2011 IL 110338, ¶12, 959 N.E.2d 621, 624 (2011). A reviewing body "presumes that the legislature did not intend to create absurd, inconvenient, or unjust results." *People v. Hunter*, 2013 IL 114100, ¶13, 986 N.E.2d 1185, 1189 (2013).

The plain language of the opening sentence of section 2.06(e) of OMA makes clear that the provision prohibits *public* inspection of a closed session verbatim recording that a public body has not elected to disclose. Thus, on its face, section 2.06(e) of OMA does not restrict limited access by appropriate school personnel to facilitate a board member's request. As noted above, the plain language of section 2.06(e) also expressly allows a records secretary, an administrative official of the public body, or any elected official of the public body to listen to the closed session verbatim recording with the board member who has requested access, further signaling that section 2.06(e) of OMA is not aimed at prohibiting disclosure to appropriate school personnel involved in facilitating access to a recording. Moreover, even if the language of section 2.06(e) could be construed as restricting access of school personnel to closed session recordings, the legislative history set out above demonstrates that the intent of Public Act 99-515 was to ensure that newly elected or appointed members of public bodies have access to past closed session verbatim recordings and minutes, rather than to prevent an IT employee from

[8]E-mail from [redacted] to [Public Access Bureau] (April 12, 2018).

facilitating a board member's review. Construing the enacted provision as a whole, it is also more reasonable to infer that the prohibition on recording or removing closed session verbatim recordings was intended to apply to elected or appointed officials who have the statutory right to access them, rather than to infer that the General Assembly's intent was to prohibit a public body from providing a closed session verbatim recording to its attorney for the purpose of securing legal advice. Therefore, [redacted] allegations that the Board violated OMA by allegedly copying the recording for a District attorney and by allowing access to an IT employee and the District's superintendent are unavailing.

With respect to [redacted] allegation that the Board improperly removed one or more closed session verbatim recordings from the District's main office or official storage location, the Board's confidential affidavit set forth information sufficient to demonstrate that the Board did not violate the requirements of section 2.06(e) of OMA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, please contact me at (217) 785-7438 or at cboggs@atg.state.il.us.

Very truly yours,

[redacted]

CHRISTOPHER R. BOGGS
Supervising Attorney
Public Access Bureau

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