OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

March 22, 2021

Via electronic mail
[redacted]

Via electronic mail
Mr. Donald J. Storino
City Attorney, City of Elmhurst
Storino, Ramello & Durkin
9501 West Devon Avenue
Rosemont, Illinois 60018
dstorino@srd-law.com

RE: OMA Request for Review – 2018 PAC 53629

Dear [redacted] and Mr. Storino:

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 discussed below, the Public Access Bureau concludes that the Elmhurst City Council ("City Council") violated the public recital requirement of section 2(e) of OMA[1] in connection with its May 7, 2018, and May 21, 2018, meetings.

On June 16, 2018, [redacted] submitted a Request for Review to the Public Access Bureau via e-mail alleging that the City Council violated OMA in connection with its May 7, 2018, and May 21, 2018, meetings by failing to publicly recite each item on the consent agenda before final action was taken. [redacted] specifically alleged:

[1]5 ILCS 120/2(e) (West 2016), as amended by Public Acts 100-201, effective August 18, 2017; 100-465, effective August 31, 2017).

> It seems to be longstanding practice for the Council to use a "consent agenda" to vote on multiple items at the same time. I do not contest this process, as it helps the Council work more efficiently by consolidating several matters into a single motion. However, before the Council votes to approve the consent agenda, it must precede that action with "a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted", in accordance with section 2(e) of the OMA. Although the items on the consent agenda are posted on the meeting agenda, they are not read aloud during the meeting.
>
> The requirement to publish a meeting agenda is distinct from the requirement to precede final action with a public recital. It is possible that a member of the public may attend the meeting without having read the meeting agenda. Therefore, those who attend the meeting must be informed of the business being conducted as part of the consent agenda.[2]

In his Request for Review, [redacted] included the website links to each meeting's agenda and minutes as well as links to the YouTube recording of each meeting. He further detailed the City Council's allegedly insufficient public recital as follows:

> [At the May 7, 2018 meeting] The Mayor presented the consent agenda to the Council for approval, and asked if any alderman wished to pull items off the consent agenda. Items 7.6, 7.7, and 7.8 were removed at the request of aldermen. The Mayor then said, "I will now entertain a motion to approve the consent agenda, minus item 7.6, item 7.7, and item 7.8." A roll call vote was conducted, and the Council approved the motion unanimously.
>
> There was no public recital of the matters being considered in the consent agenda. Furthermore, when items 7.6, 7.7, and 7.8 were removed from the consent agenda, there was no public recital of the nature of the matters being removed from the consent agenda. After the consent agenda (minus items 7.6, 7.7, and 7.8) was

[2]Letter from [redacted] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (June 16, 2018), at [1].

> approved, the City Clerk subsequently conducted a public recital only for items 7.6, 7.7, and 7.8.
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> * * *
>
> [At the May 21, 2018 meeting] The Mayor presented the consent agenda to the Council for approval, and asked if any alderman wished to pull items off the consent agenda. Items 5.10 and 5.18 were removed at the request of an alderman. The Mayor then said, "I'll entertain a motion to approve the consent agenda, minus items 5.10 and 5.18." A roll call vote was conducted, and the Council approved the motion unanimously.
>
> There was no public recital of the matters being considered in the consent agenda. Furthermore, when items 5.10 and 5.18 were removed from the consent agenda, there was no public recital of the nature of the matters being removed from the consent agenda. After the consent agenda (minus items 5.10 and 5.18) was approved, the City Clerk subsequently conducted a public recital only for items 5.10 and 5.18.[3]

On June 21, 2018, the Public Access Bureau forwarded a copy of the Request for Review to Mayor Steven Morley, requesting a detailed written response to the allegations raised by [redacted] Request for Review. A second request for that information was sent to Mayor Morley on July 12, 2018. On July 25, 2018, this office received the City Council's response to the Request for Review and forwarded that response to [redacted], who did not submit a reply.

ANALYSIS

Section 1 of OMA (5 ILCS 120/1 (West 2018)) declares that "[i]t is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business." Section 2(e) of OMA provides: "No final 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."

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[3]Letter from [redacted] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (June 16, 2018), at [1-2].

In *Board of Education of Springfield School District No. 186 v. Attorney General*, 2017 IL 120343, ¶39, 77 N.E.3d 625, 633 (2017), the Illinois Supreme Court decided that final action must be preceded by a public recital during the same meeting at which action is taken. The Court explained that "[t]he language of section 2(e) does not mention an explanation, the significance of the action being considered, or the attendees' understanding. Rather, the plain meaning of the phrase 'public recital of the nature of the matter being considered' is that the public body must state the essence of the matter under consideration, its character, or its identity." *Springfield School District*, 2017 IL 120343, ¶46, 77 N.E.3d at 633-34. The Court further advised that "while the 'nature of the matter' may be recited in nonspecific terms (the approval of a loan, a contract, a purchase, a policy, or a resolution), 'other information' is necessary to inform the public of the specific item of business (the purpose of the loan, the subject of the contract, the type of property being purchased, the title of the policy, or the purpose of the resolution)." *Springfield School District*, 2017 IL 120343, ¶50, 77 N.E.3d at 634. The Court rejected as "time consuming and impractical[ ] * * * any suggestion that a public recital of 'key terms' is required[,]" stating that "[a] public body may choose to provide such information in its recital at the open meeting but is not compelled to do so by section 2(e)." *Springfield School District*, 2017 IL 120343, ¶61, 77 N.E.3d at 635-36. Rather, the Court held, "the recital must announce the nature of the matter under consideration, with sufficient detail to identify the particular transaction or issue, but need not provide an explanation of its terms or its significance." *Springfield School District*, 2017 IL 120343, ¶64, 77 N.E.3d at 636.

In its answer to this office, the City Council did not dispute [redacted] summary of the City Council meeting or deny that it failed to specifically announce the individual items on the consent agendas before the votes. The City Council suggested, and this office agrees, that this is a matter of first impression. The City Council asserted that requiring public recital of individual consent agenda items

> would appear to be contrary to the legislative intent of the omnibus procedures provided in 65 ILCS 5/3.1-40-40 allowing for the efficient conduct of municipal business of multiple matters at one time. In the case of the City Council's May 7, 2018, consent agenda, assuming [redacted] position is correct, this would represent an articulation of 30 individual items one right after the other without discussion before a motion to approve could be entertained. Such a procedure would seem to frustrate the legislative intent of the omnibus procedures provided in 65 ILCS 5/3.1-40-40.[4]

[4]Letter from Donald Storino, Storino Ramello & Durkin, to Matt Hartman, Assistant Attorney General, Office of the Illinois Attorney General, Public Access Bureau (July 25, 2018), at 3.

This office's review of the relevant portions of the video recordings of the City Council's May 7, 2018, and May 21, 2018, meetings confirmed that the City Council's discussion and vote on the consent agendas align with the descriptions [redacted] and the City Council provided to this office. At each meeting, the Mayor asked if any aldermen wished to pull items off the consent agenda and then entertained a motion to approve the consent agenda minus the pulled items. After a motion had been made and seconded, roll call votes were taken on each consent agenda without any recital of the individual items contained thereon. Each consent agenda contained a combination of over two dozen items including minutes, accounts payable, reappointments, referrals, reports, ordinances, and resolutions.[5] In addition to the consent agendas, the May 7, 2018 and May 21, 2018, agendas each contained a "Reports & Recommendations" item (featuring reports of Mayor Morley and City Manager Grabowski) and a "Resolutions" item (with only one resolution listed for consideration).[6] The May 21, 2018, agenda also contained an "Ordinances" item, with two ordinances specified for consideration.[7]

Under the Illinois Supreme Court's analysis in *Springfield School District*, this office must determine whether the City Council adequately identified the nature of the matter under consideration and the details sufficient to identify the particular issue. The City Council did not identify either the nature of the matters under consideration (the approval of minutes, reports, ordinances, and resolutions) or any details sufficient to identify the particular (and varied) issues presented. In addition, the consent agendas each included an extensive number of items (30 on the May 7, 2018, agenda (including 5 ordinances and 9 resolutions) and 28 on the May 21, 2018, agenda (including 10 ordinances and 2 resolutions)). Conducting the City Council's substantive business via consent agenda, without any public recital, is contrary to the public policy underlying OMA: that the people have a right to be informed as to the conduct of their business.

This office appreciates the City Council's contention that requiring public recital would seemingly frustrate the legislative intent of the omnibus procedures provided in section 3.1-40-40 of the Municipal Code (65 ILCS 5/3.1-40-40 (West 2018)), which allows for the efficient conduct of multiple matters of municipal business at one time. That provision, however, deals specifically with voting:

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[5]Elmhurst City Council May 7, 2018, and May 21, 2018, meeting agendas, *available at* https://go.boarddocs.com/il/coe/Board.nsf/Public.

[6]Elmhurst City Council May 7, 2018, and May 21, 2018, meeting agendas, *available at* https://go.boarddocs.com/il/coe/Board.nsf/Public.

[7]Elmhurst City Council May 21, 2018, meeting agenda, *available at* https://go.boarddocs.com/il/coe/Board.nsf/Public.

> Sec. 3.1-40-40. Vote required. The passage of all ordinances for whatever purpose, and of any resolution or motion (i) to create any liability against a city or (ii) for the expenditure or appropriation of its money shall require the concurrence of a majority of all members then holding office on the city council, including the mayor, unless otherwise expressly provided by this Code or any other Act governing the passage of any ordinance, resolution, or motion. * * * In addition, the corporate authorities at any meeting may by unanimous consent take a single vote by yeas and nays on the several questions of the passage of any 2 or more of the designated ordinances, orders, resolutions, or motions placed together for voting purposes in a single group. The single vote shall be entered separately in the journal under the designation "omnibus vote", and in that event the clerk may enter the words "omnibus vote" or "consent agenda" in the journal in each case instead of entering the names of the members of city council voting "yea" and those voting "nay" on the passage of each of the designated ordinances, orders, resolutions, and motions included in the omnibus group or consent agenda. The taking of a single or omnibus vote and the entries of the words "omnibus vote" or "consent agenda" in the journal shall be a sufficient compliance with the requirements of this Section to all intents and purposes and with like effect as if the vote in each case had been taken separately by yeas and nays on the question of the passage of each ordinance, order, resolution, and motion included in the omnibus group and separately recorded in the journal. Likewise, the yeas and nays shall be taken upon the question of the passage of any other resolution or motion at the request of any alderman and shall be recorded in the journal.[8]

While section 3.1-40-40 clearly authorizes municipalities to utilize consent agendas and conduct omnibus votes to run meetings more efficiently, it makes no mention of exempting municipalities from compliance with section 2(e) of OMA. If the General Assembly had intended to carve out such an exception for consent agendas, it would have done so expressly. In

[8] 65 ILCS 5/3.1-40-40 (West 2018).

light of the public policy underlying OMA,[9] and the Illinois Supreme Court's analysis in *Springfield School District*, this office concludes that section 2(e) of OMA requires a public recital of each item in a consent agenda before a vote. As the Court emphasized, the recital merely must identify each transaction or issue a public body is acting upon; a description of the significance or key terms of each item is not required. *Springfield School District*, 2017 IL 120343, ¶64, 77 N.E.3d at 636.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have questions, you may contact me at 217-782-9054, sborland@atg.state.il.us, or the Springfield address on the first page. This letter serves to close this matter.

Very truly yours,

[redacted]

SUZANNE DENNIS BORLAND
Assistant Attorney General
Public Access Bureau

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[9]*See* Ill. Att'y Gen. Req. Rev. 65194, issued January 8, 2021, at 8 (encouraging public bodies to provide additional details in public recitals to better inform the public of the business being conducted when practical, which would significantly enhance the public's understanding of actions under consideration.)