OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

May 16, 2022

Via electronic mail
The Honorable Rick Amato
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133 West State Street
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Via electronic mail
The Honorable Todd Latham
Mayor
City of Sandwich
144 East Railroad Street
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RE: OMA Request for Review – 2021-PAC-C-0303 (2022 PAC 71154)

Dear Mr. Amato and Mr. Latham:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)). For the reasons that follow, the Public Access Bureau concludes that the City Council (Council) of the City of Sandwich (City) violated the public recital requirements of OMA during its August 23, 2021, meeting.

BACKGROUND

On August 27, 2021, Mr. Rick Amato and Mr. David Berault, on behalf of the DeKalb County State's Attorney's Office (State's Attorney's Office), submitted a Request for Review to the Public Access Bureau alleging that the Council violated section 2(e) of OMA (5 ILCS 120/2(e) (West 2020), as amended by Public Act 102-558, effective August 20, 2021) at its August 23, 2021, meeting by failing to recite with sufficient detail the nature of a matter under

consideration before the Council took final action. The State's Attorney's Office explained that the Council voted to authorize the execution of a settlement agreement and provided this office with a copy of a verbatim recording of the portion of the meeting pertaining to that vote. The State's Attorney's Office contended that the "recitation was completely devoid of information as to the actual business being conducted[,]" and that the public could not discern "what was being considered in this vote."[1] The State's Attorney's Office also contended that the meeting's agenda lacked information about the settlement agreement in violation of section 2.02(c) of OMA (5 ILCS 120/2.02(c) (West 2020)). In particular, the State's Attorney's Office asserted that "the listed item contains no actual 'subject matter' regarding the agreement or litigation" and "did not provide what litigation it was related to, how much the settlement was for, or who it was with."[2]

On September 9, 2021, this office forwarded a copy of the Request for Review to the Council and asked it to provide this office with copies of its August 23, 2021, meeting agenda and minutes, together with a written response to the State's Attorney's Office's OMA allegations. This office also asked the Council to provide a copy of a verbatim recording of the open session, if available. On September 17, 2021, and September 20, 2021, this office received the requested materials. On September 23, 2021, this office forwarded a copy of the Council's response to the State's Attorney's Office. The State's Attorney's Office replied on September 24, 2021.

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 2020). "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).

Sufficiency of Meeting Agenda

Section 2.02(c) of OMA provides that "[a]ny agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting." OMA does not contain a definition of "general subject matter." However, the Senate debate on House Bill No. 4687, which, as Public Act 97-827, effective

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[1]Letter from Rick Amato, DeKalb County State's Attorney, Office of DeKalb County State's Attorney, to Todd Latham, Mayor, Mayor and City Clerk's Office (August 27, 2021), at 2.

[2]Letter from Rick Amato, DeKalb County State's Attorney, Office of DeKalb County State's Attorney, to Todd Latham, Mayor, Mayor and City Clerk's Office (August 27, 2021), at 2.

January 1, 2013, added section 2.02(c) of OMA, indicates that the General Assembly intended this provision to ensure that agendas provide general notice of all matters upon which a public body would be taking final action:

> [T]here was just no real requirement as to how specific they needed to be to the public of what they were going to discuss that would be final action. And this just says that you have to have a * * * **general notice** if you're going to have and take final action, **as to generally what's going to be discussed so that – that people who follow their units of local government know what they're going to be acting upon**. (Emphasis added.) Remarks of Sen. Dillard, May 16, 2012, Senate Debate on House Bill No. 4687, at 47.

The Public Access Bureau has determined that "the General Assembly's use of the term 'general subject matter' signifies that a meeting agenda must set forth the main element(s), rather than the specific details, of an item on which the public body intends to take final action." Ill. Att'y Gen. PAC Req. Rev. Ltr. 45667, issued February 16, 2017, at 4-5 (determining that voting to sign a new city administrator to a five-year contract under the agenda item "Appointment of the City Administrator" did not violate section 2.02(c) of OMA).

In its response to this office, the Council denied that it violated section 2.02(c) with respect to its August 23, 2021, meeting agenda. The meeting agenda provided, in relevant part:

> **Mayor's Report:** Todd Latham
>
> * * *
>
> d. Motion to authorize Mayor to execute "Settlement Agreement in Compromise of Pending Litigation".[3]

The Council argued that section 2.02(c) "only addresses an 'ordinance or resolution'" and that the settlement agreement at issue was not part of an ordinance or resolution.[4] It further argued that it had provided sufficient information regarding the settlement agreement in accordance with the Illinois Supreme Court's decision in *Board of Education of Springfield School District No. 186 v.*

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[3]City of Sandwich City Council, Agenda, Mayor's Report, Item d (August 23, 2021).

[4]Letter from Jessica A. Harrill, Foster, Buick, Conklin & Lundgren, LLC, to Teresa Lim, Assistant Attorney General, Public Access Bureau (September 20, 2021), at 1.

Attorney General of Illinois, 2017 IL 120343, 77 N.E.3d 625 (2017). The Council asserted that it was not required to include any additional detail in its agenda.

In reply to that answer, the State's Attorney's Office maintained that the agenda failed to provide any information about the settlement agreement that the Council voted upon at the meeting. The State's Attorney's Office highlighted that the agenda considered by the Court in *Springfield School District* contained specific details about the separation agreement that was the subject of a resolution voted on by the school board. The agenda included the name of the school district employee at issue and a link to the resolution; the resolution also provided a link to the separation agreement itself. In contrast to that agenda, the State's Attorney's Office argued: "The present scenario contained no parties to the agreement * * *, no accompanying resolution, no links to agreements – it contained no hint as to the purpose behind what was being signed."[5]

As a threshold matter, the Council asserts that section 2.02(c) is inapplicable to this matter because the motion to authorize the mayor to execute the settlement agreement was not a resolution or ordinance. Black's Law Dictionary defines "resolution," in pertinent part, as: "Formal action by a corporate board of directors or other corporate body authorizing a particular act, transaction, or appointment." Black's Law Dictionary (10th ed. 2014), *available at* Westlaw BLACKS. Even if the Council did not label the proposed course of action on the settlement agreement as a "resolution," it voted to authorize a transaction by the mayor and therefore took final action on a "resolution" under the plain meaning of that word. Accordingly, the requirements of section 2.02(c) applied to the action taken on the settlement agreement.

Based on this office's review, the Council's August 23, 2021, meeting agenda set forth—minimally—the general subject matter of the issue that was the subject of final action. The agenda provided the main elements of the issue—Council authorization for the mayor to execute a settlement agreement. While more details in the agenda, such as the parties to the pending litigation or the topic of the underlying dispute, would have better informed the public of the settlement agreement under consideration, section 2.02(c) does not require those details. *See Springfield School District*, 2017 IL 120343, ¶33, 77 N.E.3d at 632 (noting that the posted agenda "set forth the general subject matter—approval of a resolution regarding a separation agreement" as well as specific details regarding the agreement, such as the specific "employee with whom the agreement had been negotiated" and "a link to the full text of the agreement itself."). Accordingly, this office concludes that the Council's agenda item concerning the settlement agreement satisfied the minimum requirements of section 2.02(c) of OMA. This office, however, encourages the Council to provide additional information about similar agenda

[5]Letter from Rick Amato, DeKalb County State's Attorney, Office of DeKalb County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau (September 24, 2021), at 3.

items in the future in accordance with the spirit of the General Assembly's intent 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." 5 ILCS 120/1 (West 2020).

Public Recital of Final Action

Section 2(e) of OMA provides that "[n]o 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."

As the parties highlighted, the Illinois Supreme Court considered whether a school board met the public recital requirements of section 2(e) in *Springfield School District No. 186*, 2017 IL 120343, 77 N.E.3d 625. The Court held that "under section 2(e) of the Open Meetings Act, a public recital must take place at the open meeting before the matter is voted upon; 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 that case, a school board's recital of a separation agreement with its superintendent consisted of the school board president stating that the board was considering an agenda item for "approval of a resolution regarding the separation agreement[ ]" as well as reading the text of the resolution itself: "The Board President recommends that the Board of Education of Springfield School District No. 186 vote to approve the separation agreement and release between Dr. Walter Milton, Jr., and the Board of Education." *Springfield School District*, 2017 IL 120343, ¶81, 77 N.E.3d at 638. The Court concluded that the school board's public recital was sufficient: "The board president recited the general nature of the matter under consideration—a separation agreement and release—and specific detail sufficient to identify the particular transaction—the separation agreement was between Dr. Milton and the Board." *Springfield School District*, 2017 IL 120343, ¶83, 77 N.E.3d at 638.

In *Springfield School District*, the Supreme Court distinguished a recent Appellate Court decision in *Allen v. Clark County Park District Board of Commissioners*, in which the Appellate Court had concluded, in anticipation of the Supreme Court's establishment of a legal standard for a public recital, that "[w]hatever the standard might be for a public recital, the Board failed to meet it in this case." *Allen*, 2016 IL App (4th) 150963, ¶31, 67 N.E.3d 536, 541 (2016). As explained by the Supreme Court, the presiding officer of the public body in *Allen* had "publicly recited the general nature of the two matters being considered: lease rates and revised covenants. He did not, however, provide sufficient other information to inform the public of the specific business being conducted: What type of real or personal property was being leased? What existing covenants were being revised?" *Springfield School District*, 2017 IL 120343, ¶79, 77 N.E.3d at 638. The Court indicated that a public recital must include such information to

satisfy the requirements of section 2(e) of OMA. *Springfield School District*, 2017 IL 120343, ¶¶79, 81, 77 N.E.3d at 638.

The Council argued that its public recital before the vote on the settlement agreement satisfied the requirements of section 2(e), asserting that *Springfield School District* established that it was not required to explain the settlement agreement's terms or its significance. Citing to that case, the Council argued, in relevant part:

> Under section 2(e), the City was required to recite the "nature of the matter," which may be described in nonspecific terms, and "other information" to inform the public of the type of business addressed. [Citation.] The City complied with the requirements described by the Illinois Supreme Court by stating the nature of the matter (authorization of the mayor to sign a settlement agreement) and other information to inform the public (the purpose of such agreement being to compromise in pending litigation).[6]

Additionally, the Council stated that it had only one pending litigation matter. The Council contended that "WSPY and anyone who reads its website or listens to its radio station knows this, and they know exactly what case is at issue."[7]

The State's Attorney's Office disputed the Council's claim that it had provided adequate information in its public recital:

> All the public was told is that a settlement agreement was being voted on. The subject, type, purpose, etc. are complete unknowns. The generalization regarding it being for ongoing litigation is an assumed element, which does not make the public aware of anything. Was the settlement regarding a police matter? A zoning dispute? An exploding zeppelin? Was this for millions of dollars of tax payer funds? Apparently, that is not the public's business in Sandwich.[8]

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[6]Letter from Jessica A. Harrill, Foster, Buick, Conklin & Lundgren, LLC, to Teresa Lim, Assistant Attorney General, Public Access Bureau (September 20, 2021), at 2.

[7]Letter from Jessica A. Harrill, Foster, Buick, Conklin & Lundgren, LLC, to Teresa Lim, Assistant Attorney General, Public Access Bureau (September 20, 2021), at 3.

[8]Letter from Rick Amato, DeKalb County State's Attorney, Office of DeKalb County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau (September 24, 2021), at 3.

This office has reviewed the verbatim recording of the portion of the meeting pertaining to the settlement agreement. Addressing the settlement agreement as part of the "Mayor's Report," Mayor Latham stated:

> All right, item d. Before we have, move on to item d, I'm going to make a statement on behalf of the City. Before the Council votes, I'll make the following statement: until the agreement is executed by all parties, the City will have no comment as the agreement is not final. Once the agreement has been executed, the City intends to issue a statement. I ask the Council to, uh, move that, uh, you authorize the mayor to execute a settlement agreement in the compromise of pending litigation. Is there a motion to approve the settlement agreement that the mayor would authorize and sign?[9]

The recording reflects that Alderman Whitecotton subsequently made the motion, which was seconded by Alderwoman Johnson. The Council then voted unanimously to approve the motion.

Having reviewed the verbatim recording and the parties' arguments, this office concludes that the Council's public recital failed to meet the requirements of section 2(e). The Council informed the public of the "general nature of the matter being considered" by stating that the mayor sought Council authorization to execute a settlement agreement in connection with pending litigation, but it did not provide adequate "other information" necessary to identify the specific item of business or particular transaction upon which it was acting. The Council did not identify the individual or entity that was the subject of the settlement agreement, nor did it provide any information about the litigation to which it pertained, such as the general nature of the underlying dispute. Although the Council contended it had only one litigation matter pending and that the matter had been the subject of media reports, the requirement to provide an adequate public recital under section 2(e) of OMA is applicable regardless of whether the subject of final action may have been previously disseminated to the public in news reporting. The Council's recital that the settlement agreement was "in compromise of pending litigation" does not in any way identify the particular transaction at issue. Accordingly, this office concludes that the Council violated section 2(e) of OMA.

It appears that the settlement agreement at issue in this matter has already been executed, so no meaningful action can be taken at this time to remedy the Council's violation of section 2(e). This office reminds the Council to provide the public with sufficient detail to identify a transaction before voting on the matter, regardless of whether it is labeled a

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[9]Sandwich City Council, Meeting, August 23, 2021, Audio File (on file with author).

"resolution" or "ordinance." Additional details may, for instance, include information about the particular parties to pending litigation and the underlying dispute. The Council should be mindful of its obligation to conduct its future meetings in full compliance with 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,

TERESA LIM
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
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