OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

November 4, 2022

Via electronic mail
Mr. John Kraft
Edgar County Watchdogs
P.O. Box 124
Paris, Illinois 61944
john@illinoisleaks.com

Via electronic mail
The Honorable Bryon Coffman
Chairman, Shelby County Board
301 East Main Street P.O. Box 230
Shelbyville, Illinois 62565
bcoffman@shelbycounty-il.gov

RE: FOIA Request for Review – 2022 PAC 73429

Dear Mr. Kraft and Mr. Coffman:

This determination letter 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 set forth below, the Public Access Bureau concludes that the Shelby County Board (Board) did not violate OMA in connection with notice of a final action taken at its September 8, 2022, meeting.

BACKGROUND

On September 9, 2022, Mr. John Kraft submitted a Request for Review to the Public Access Bureau alleging that the Board violated OMA during its September 8, 2022, meeting when it took final action to appoint Mr. Dale Wetherell as the acting County Highway Engineer. In support of his allegation, referencing the Illinois Department of Transportation (IDOT), Mr. Kraft claimed:

> The Shelby County Board listed item number 8 on its agenda with this exact language: *"Discussion and vote on the Resolution to Request consent from IDOT (Form BLR 02130) to appoint Dale Wetherell as acting County Highway Engineer."*
>
> What they actually voted on, as described by the chairman, was the above agenda item **AND** the actual appointment of Dale Wetherell as acting County Highway Engineer and the appointment being automatic upon approval of IDOT.
>
> The plain language of the agenda item leads the public to believe the board was only going to ask IDOT for permission to appoint – not to actually appoint. (Emphasis in original.)[1]

Mr. Kraft thus alleged a violation of section 2.02(c) of OMA (5 ILCS 120/2.02(c) (West 2020)).

On October 13, 2022, this office forwarded a copy of the Request for Review to the Board and asked it to provide a written response to Mr. Kraft's OMA allegations. In particular, this office asked the Board to address the appointment process and whether Mr. Wetherell was appointed at the September 8, 2022, meeting or whether his appointment occurred at a later date after the Board received the consent from IDOT. On October 21, 2022, this office received a response from the Shelby County State's Attorney on behalf of the Board. On October 25, 2022, this office forwarded a copy of the Board's response to Mr. Kraft; he replied that same day.

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).

Section 2.02(c) of OMA provides, in pertinent part: "Any 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." (Emphasis added.) OMA does not contain a definition of "general subject matter." However, the Senate debate on House Bill No. 4687,

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[1]E-mail from John Kraft, Edgar County Watchdogs, to AG PAC (September 9, 2022).

which, as Public Act 97-827, effective 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. Remarks of Sen. Dillard, May 16, 2012, Senate Debate on House Bill No. 4687, at 47.

The Public Access Bureau has previously 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); *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 68059, issued April 19, 2022, at 4 (agenda item "present bills for review/approval" described general subject matter of public body's vote to raise maximum payment for two recurring bills). In contrast, this office concluded in another binding opinion that the agenda item "Communications and Reports: Committee on Programs and Recreation" failed to set forth the general subject matter of a vote to increase museum admission fees. Ill. Att'y Gen. Pub. Acc. Op. No. 13-002, issued April 16, 2013, at 5.

Here, the Board listed as part of item eight on its agenda that it would hold discussion and a vote on the resolution to request consent from IDOT to appoint Mr. Wetherell as acting County Highway Engineer.[2] State's Attorney Nichole Kroncke responded to this office's inquiry letter by stating:

> It is the position of the Shelby County Board that the September 8, 2022 meeting agenda sufficiently described the action that was to be taken. The Board voted to approve IDOT's consent to appoint Mr. Dale Wetherell as acting county engineer. The appointment * * * was not finalized until September 26, 2022

[2]Shelby County Board, Agenda Item 8, Discussion and vote on the Resolution to Request consent from IDOT (Form BLR 02130) to appoint Dale Wetherell as acting County Highway Engineer (September 8, 2022).

> when the Regional Engineer, Department of Transportation signed the resolution 2022-53.[3]

State's Attorney Kroncke enclosed a letter from IDOT to the Shelby County Clerk dated September 26, 2022, stating that the resolution was approved.[4] She also provided the enclosure to that letter—the resolution itself—which is on IDOT form BLR 02130 (as the agenda item stated).[5] The resolution cites as its statutory basis section 5-204 of the Illinois Highway Code (605 ILCS 5/5-204 (West 2020)), which provides, in relevant part: "Whenever the office of county superintendent of highways is vacant, the county board may with the consent in writing of [IDOT] appoint any competent person as acting county superintendent of highways until the vacancy is filled in the manner provided in Section 5-201." The language of the resolution appears somewhat contradictory, indicating that "the County Board must request and receive consent of [IDOT] **before appointing** an Acting County Engineer," and that because of an emergency the Board "**did on 09/08/22, appoint** Dale Wetherell as Acting County Engineer."[6] (Emphasis added.)

In his reply, Mr. Kraft acknowledged that the Board explained before its vote on the agenda item during its September 8, 2022, meeting that the appointment was contingent on IDOT's approval. Nonetheless, he argued that "[t]he agenda item was to 'request consent from IDOT' not to 'approve IDOT's consent' nor to actually appoint Wetherell pending IDOT's approval."[7]

Because the effective date of Mr. Wetherell's appointment appeared unclear from the language of the resolution, this office requested clarification and the State's Attorney replied that "Mr. Wetherell assumed the duties of acting county engineer when IDOT consented / approved on September 26, 2022."[8] This office's review of the open session recording of the discussion and vote also confirmed that the Board explained the two alternative outcomes of its

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[3]"County superintendent of highways" means the same thing as "county engineer." 605 ILCS 5/5-201 (West 2020).

[4]Letter from Jeffrey P. Myers, P.E., Region Four Engineer, Illinois Department of Transportation, to Jessica Fox, Shelby County Clerk (September 26, 2022).

[5]Shelby County, Ill., Resolution no. 2022-53 (filed September 26, 2022).

[6]Shelby County, Ill., Resolution no. 2022-53 (filed September 26, 2022).

[7]E-mail from John Kraft to PAC (October 25, 2022).

[8]E-mail from Nichole Kroncke, Shelby County State's Attorney, to Matthew Goodman (November 3, 2022).

vote on the resolution: if IDOT consented, Mr. Wetherell's appointment would be effective, but if IDOT denied consent, his appointment would fail.[9] Likewise, the letter from IDOT to the Shelby County Clerk dated September 26, 2022, substantiates these alternative possibilities.

The materials provided to this office indicate that the actual action the Board took at the September 8, 2022, meeting was the adoption of a resolution requesting IDOT's consent to the appointment of Mr. Wetherell as acting County Highway Engineer. The Board did not take final action to appoint Mr. Wetherell at the meeting because his appointment did not become effective and he did not assume the duties of acting county engineer until IDOT consented on September 26, 2022. While the agenda item could have been clearer that the appointment required IDOT's consent to take effect, it notified the public that the Board was seeking IDOT's consent to appoint Mr. Wetherell. At the time of the meeting, requesting IDOT's consent was the extent to which the Board could act in furtherance of the appointment, and the agenda clearly stated that the Board would consider doing so. This is not a situation where a public body posted insufficient detail for the public to ascertain the general subject matter of a possible final action. *See*, *for example*, Ill. Att'y Gen. Pub. Acc. Op. No. 19-012, issued November 13, 2019, at 6 (merely listing the number of an ordinance without identifying any subject matter violated section 2.02(c) of OMA). Rather, the public had notice and the opportunity to object to or to support Mr. Wetherell's potential appointment. Accordingly, this office concludes that the Board did not violate section 2.02(c) of OMA because the September 8, 2022, agenda provided the general subject matter of the to the action it took to request consent to appoint Mr. Wetherell as acting County Highway Engineer.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. Please contact me at (773) 590-6840 or matthew.goodman@ilag.gov if you have questions or would like to discuss this matter.

Very truly yours,

[redacted]

MATT GOODMAN
Assistant Attorney General
Public Access Bureau

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[9]Shelby County Board, Open Meeting, September 8, 2022, Audio File, at 4:15 (on file with Public Access Bureau, Office of the Attorney General).

cc: *Via electronic mail*
The Honorable Nichole Kroncke
Shelby County State's Attorney
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Shelbyville, Illinois 62565
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