Town of Normal

February 28, 2019

Edie Steinberg, Esq.
Assistant Attorney General
Public Access Bureau
500 S. 2nd Street
Springfield, Illinois 62701

RE: OMA Request for Review – 2019 PAC 56747
Town of Normal Response

Dear AAG Steinberg:

This letter is in response to the request for review you sent to the Town dated February 20, 2019.

Karyn Smith filed a request for review, alleging that the Town's public comment rules violate §2.06(g) of the Open Meetings Act.[1] She complains about the Town's rule that public comments at a meeting must be germane to the agenda for that meeting.

The Town asserts that its public-comment rule is valid. The rule complies with the plain language of §2.06(g), with the legislative history of that statute, and with the stated intent of the legislative sponsors of that statute—all of which grant public bodies broad discretion in adopting public-comment rules.

1. 5 ILCS 120/2.06(g).

1. Ms. Smith's request for review is inaccurate.

In her request for review, Smith alleges conversations with the Town that never occurred.

The meeting at issue occurred on the evening of February 4, 2019. There were three email communications regarding this matter:

- On February 3, 2019 at 5:40 P.M., Smith emailed Pamela Reece, the City Manager, requesting to speak at the meeting on February 4, 2019 on a matter that was not germane to the agenda for that meeting.

- On February 3, 2019 at 6:13 P.M., a read receipt was automatically generated and sent to Smith when Reece opened Smith's email.

- On February 4, 2019 at 12:15 P.M., Reece emailed Smith notifying her of the Town's comment rule regarding germaneness of public comments and, instead, offered to notify the Mayor of her request if she chose to speak on an agenda item and suggested that Smith express her concerns regarding non-agenda items to the Council directly, via phone or email.

In response to this request for review, the Town IT Department reviewed the Town's email logs. No other email communications either to or from Smith were sent or received through the Town's email system on any relevant date. A report of all email communications between Smith and the Town is attached as Exhibit 1.

On pages four and five of her request for review, Smith attaches purported email communications with the Town. That attachment includes two emails that actually occurred between Smith and the Town—and two that didn't. It includes the 2/3 email from Smith to Reece, and it includes Reece's response from 2/4 at 12:15 P.M. It also includes two additional messages that were never delivered to the Town.

The first claims to have been sent at 4:05 P.M. on February 4th, but it does not indicate a recipient. That email asks the unknown recipient for suggestions. That email was never delivered to the Town.

The second message includes a salutation to Reece, and it requests that Reece "reserve a slot" for Smith at the meeting. That message does not contain any header and was never sent through the Town's email system. It was never delivered to Reece or anybody else with a Town email address.

These two additional messages are not formatted like normal emails. They do not contain any standard email headings with the sender, recipient, subject, and date. They appear to be pasted in to an existing email chain.

These uncommunicated messages do not belong in the request for review. To the extent that Smith alleges a violation because she was not allowed to address the Council despite having asked Reece to "reserve a slot," the allegation would be incorrect. Smith did not make that request.

2. The Town's germaneness rule.

The Town's public-comment rules require that "all public comments must be germane to the meeting agenda of the public body."[2]

The purpose of the germaneness rule is to effectively conduct Town business. Courts have long recognized that the effective and efficient conduct of public business is, in and of itself, a significant government interest.[3] At any given meeting, there may be limited time available for public comment, and allowing speakers to address items not under consideration by the Council will reduce the time available to other commenters to speak on agenda items. The germaneness rule is intended to direct public comment to those topics on which Council discussion or action is expected.

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2. The Town's public-comment rules are found at http://www.normal.org/854/Addressing-the-Council.
3. *See, e.g., White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

The Town's comment rules provide that the Mayor may suspend the germaneness rule (and other regulations) in order to provide additional comment as may be appropriate.

The Town provides alternate means for an individual to address public officials on any topic of the individual's choosing through written comment. The Town website provides the email addresses and phone numbers of the Mayor, Councilmembers, the City Manager, and the Deputy City Manager.[4] The website also sets forth the contact information of Department Heads, Supervisors, and other Town Staff.[5]

The germaneness rule—along with all of the Town's public-comment rules—is a legislative enactment. A local enactment is presumed valid, and the burden of establishing invalidity rests upon those who challenge it.[6]

3. The Town's germaneness rule complies with the Open Meetings Act.

3.1. The background of §2.06(g).

The Open Meetings Act contains only one sentence about addressing public officials: "Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body."[7] That is all that the Act has to say on the matter. To date, no court has interpreted the scope of this Section.[8]

Section 2.06(g) was passed by the General Assembly in 2010. The bill, House Bill 5483, was introduced by Representative Renée Kosel. After passing the House, the bill was sponsored

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4. Available at http://www.normal.org/index.aspx?NID=97.
5. *See generally*, http://www.normal.org/index.aspx?NID=8.
6. *Forest Pres. Dist. Loren & Gisela Brown Family Trust*, 323 Ill. App.3d 686, 692 (2 Dist. 2001).
7. 5 ILCS 120/2.06(g).
8. In *Roxana Cmty. Unit Sch. Dist. No. 1 v. EPA*, 2013 IL APP (4th) 120825, ¶58, the Fourth Dist. Appellate Court held that the Pollution Control Bd. violated §2.06(g)by not allowed any comments at a public quasi-judicial hearing, but nothing in that case examined the scope or application of the Board's rules, and it appears that the Board admitted a violation. *See id.* at ¶57.

in the Senate by Sen. Susan Garrett. Senator Garrett amended the bill. The amendment removed the requirement that the address had to occur at a public meeting. The Senate approved the amended version of the bill and sent it back to the House for concurrence with the amendment. The House concurred with the amended version. The Governor signed the bill in August of 2010, and the bill became effective on January 1, 2011.[9]

This statute advances two important policies. First, it lets the public know what the rules are, leading to a better understanding as to how to participate in the democratic process. Second, the rules help ensure a more consistent and equitable treatment between individuals, thus reducing the potential for constitutional violations.

3.2. The Text of §2.06(g) allows for the Town's rule.

Courts (and the Attorney General) must give statutory language its plain and ordinary meaning; they are not free to construe a statute in a manner that alters the plain meaning of the language adopted by the legislature.[10] The primary objective in interpreting a statute is to give effect to the legislative intent—and the best indicator of that legislative intent is the text of the statute, itself.[11]

If the text of the Open Meetings Act is unambiguous, then it must be applied as written. The Attorney General is not entitled to any deference in the interpretation of unambiguous text.[12] The Attorney General may not impose additional requirements beyond those imposed by the Open Meetings Act.[13]

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9. *See*, 96 HB5483 Bill Status, available at http://www.ilga.gov/legislation/billstatus.asp?DocNum=5483&GAID=10&GA=96&DocTypeID=HB&LegID=50537&SessionID=76.
10. *Murray v. Chicago Youth Center*, 224 Ill.2d 213, 235 (2007).
11. *Board of Educ. of Springfield Sch. Dist. No. 186 v. Attorney General*, 2017 IL 120343, ¶24.
12. *Id.* at ¶23.
13. *Id.* at ¶47 ("Because the Attorney General would read into this phrase additional requirements that are not supported by the text, we give no deference to her interpretation of this phrase").

A statute is ambiguous only if it is susceptible to more than one equally reasonable interpretation. In examining the statute, one must construe the statute so that no part is rendered meaningless or superfluous.[14]

The text of §2.06(g) is one sentence consisting of two clauses: (i) Any person shall be permitted an opportunity to address public officials (ii) under the rules established and recorded by the public body. The second clause is a prepositional phrase, which modifies the predicate ("shall be permitted") of the first clause. Therefore, the permission to address officials is dependent on the public body's rules. There is no other grammatically valid way to read this statute. Any other reading would require the interpreter to add, subtract, or rearrange the words of the sentence.

Under the text of §2.06(g), a public body may regulate the address of public officials—including comment at meetings—only in accordance with its adopted rules. Nothing in the text of this statute refers to "public comment." Nothing in the text of this statute mandates the forum or manner in which the address may be made. Nothing in the text of this statute limits the authority of a public body to enact rules. To impose limits or restrictions on the Town's ability to adopt rules would be to impose additional requirements beyond those imposed by the plain language of the statute. That would be improper.[15]

3.3. The legislative history of §2.06(g) validates the Town's rule.

The plain language of the §2.06(g) unambiguously allows the Town's rule. But on top of that, the Town's interpretation of §2.06 is validated by the statute's history.

The legislative history of §2.06(g) indicates that public bodies have extremely broad discretion in crafting rules for addressing officials.

First is the amendment to remove the requirement that "addressing public officials" meant comment at a meeting. As

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14. *Id.* at ¶25.
15. *Id.* at ¶47.

originally introduced, the legislation would have stated that the address to officials must occur at a public meeting.[16] But the General Assembly struck that requirement.[17] In doing so, the General Assembly expressly and purposefully removed the requirement that the address to public officials must occur at a public meeting. It would be inappropriate for the Attorney General to reinsert what the General Assembly purposefully omitted.

Not only did the General Assembly remove the public meeting requirement of §2.06(g), the bill's sponsors expressly stated that the purpose for this removal was to ensure that public bodies had the non-restricted ability to create rules. In explaining the removal, the House sponsor indicated that it "clarifies that *local governing bodies are able to create whatever rules they would like to create for open meeting comment.*"[18] This sentiment is echoed in the statement of the Senate sponsor, who stated that the statute "gives any person the opportunity to address public officials *as long as it is done according to the public body's rules.*"[19]

The General Assembly amended its legislation to clarify that §2.06(g) did not require public comment at meetings. The bill's sponsor stated that the intent was to ensure that local governments could create whatever public comment rules that they wanted. It is hard to get much clearer than that. Any restriction on the Town's authority to craft public comment rules would directly contravene the stated intent of the legislators who enacted the statute.

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16. 96 HB 5483, House Amendment No. 1
17. 96 HB 5483, Senate Amendment No. 2.
18. 96th General Assembly House of Representatives Transcription Debate, May 26, 2010, pg. 157 (Statement of Rep. Kosel)(emphasis added).
19. *Id.* at 119 (emphasis added).

3.4. Limiting public comment to agenda items is proper.

Courts have consistently and repeatedly held that comments at public meetings may be restricted over issues of germaneness and relevancy.[20]

In the case of *White v. Norwalk*, the Federal Appellate Court recognized that a city council meeting is not a free-for-all discussion forum; it is a governmental process with a governmental purpose.[21] Its ability to conduct business is—in and of itself—a significant government interest.[22]

Public bodies around the country have this requirement. It makes sense from several perspectives. First it helps the public body more efficiently and effectively address the business at hand. Second, because time for comments must necessarily be limited, germaneness requirements help assure that those who wish to discuss the business at hand are not bumped in favor of those who wish to discuss random and irrelevant issues. Finally, it helps foster democratic participation by preventing attendees of council meetings from expending unnecessary time on irrelevant matters.

Despite the courts' longstanding acceptance of germaneness requirements, the PAC questioned its validity in a nonbinding opinion.[23] That nonbinding opinion concedes that the PAC's position on this has been less than consistent. While the PAC used to believe that germaneness rules were appropriate,[24] it has now apparently changed its position because Section 2.02(a) of the Open Meetings Act allows public officials to discuss things that are not on the agenda—as long as the public

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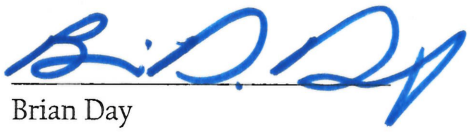
20. *See e.g., Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3d Cir. 2004)(*citing, Madison School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976); *White v. Norwalk*, 900 F.2d 1421, 1425 (9 Cir. 1990)).
21. *White*, 900 F.2d at 1425 (9 Cir. 1990).
22. *I.A. Rana Ensterprises, Inc. v. City of Aurora*, 630 F. Supp.2d 912, 923-25 (upholding city's comment restrictions for time, germaneness, and relevance).
23. *See*, 2016 PAC 45349 (Ill. Att'y Gen. PAC Req. Rev. Ltr. 45349, issued March 16, 2017)("non-binding opinion")
24. *See, e.g.*, 2015 PAC 37631.

body does not take any final action on them. But that nonbinding opinion fails to square the circle and connect §2.02 to public-comment requirements.

Nothing in §2.02 requires public bodies to consider matters outside of the agenda. Nothing in §2.02 gives the right of the general public to raise issues that are outside of the agenda. Nothing in §2.02 says anything at all about public comment. Just because public officials are able to talk about non-agenda items without violating OMA does not mandate that they are required to do so or to allow others to talk about non-agenda items at meetings. To interpret §2.02 as requiring public comment on non-agenda items would add additional requirements to the statute that are simply unsupported by its statute's text. Such an approach would be improper.[25] For this reason, the Town requests that the PAC and Attorney General affirm that the Town's actions were entirely proper.

Thank you for your consideration on this matter. I look forward to your response. If you have any questions or concerns, you can reach me at (309) 454-9507 or bday@normal.org.

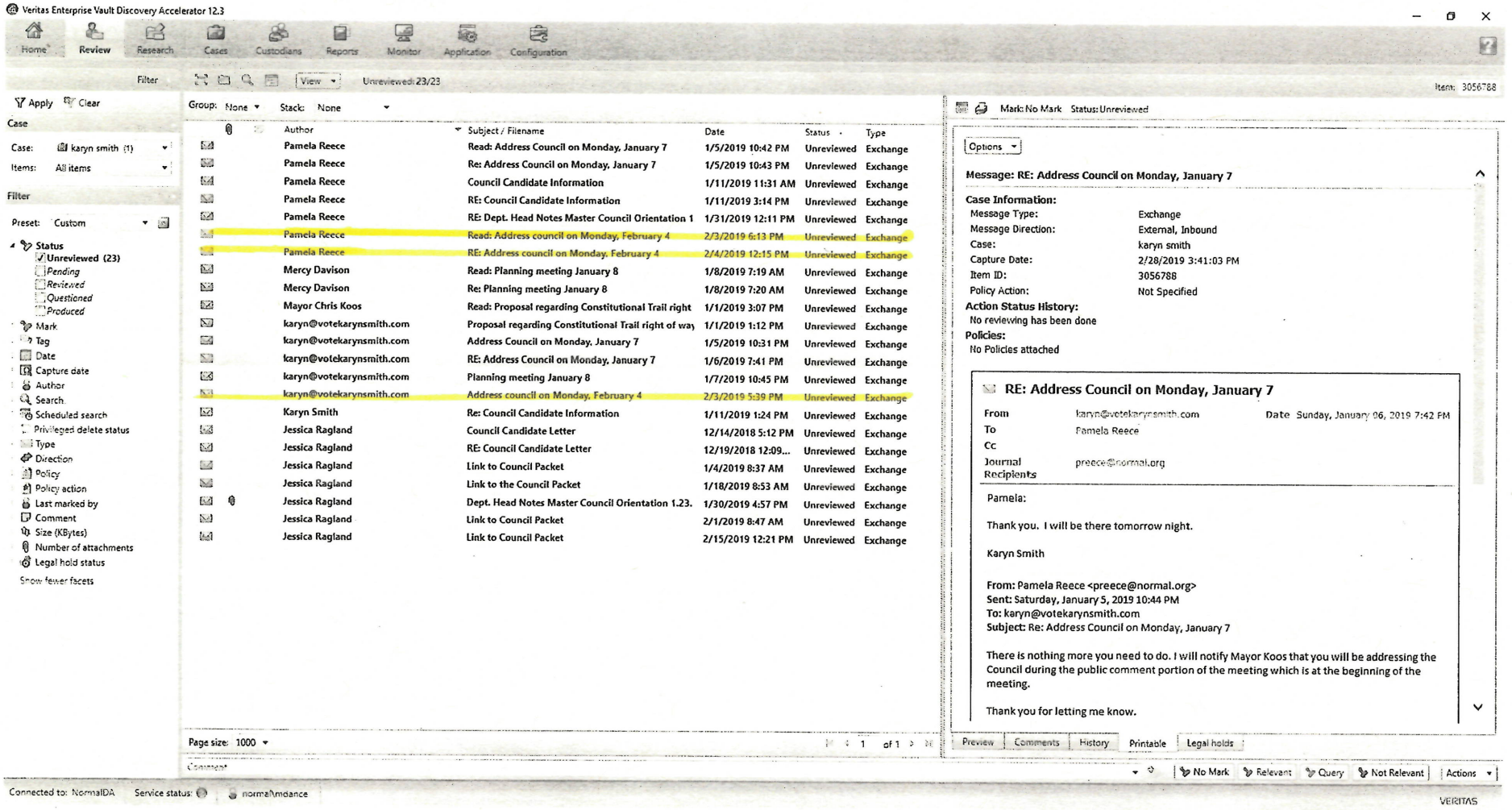
Yours sincerely;



Brian Day
Corporation Counsel

cc: Mayor
City Manager
Town Clerk

25. *See, supra*, Note 13.



Email between Smith and the Town from December 15, 2018 – February 15, 2019

Exhibit 1