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October 29, 2020

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Albert Barker, Jr.
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RE: City of Forest Park's Failure to Provide Access to Public Meetings

Dear Mr. Williams and Mr. Barker:

Thank you for Mr. Williams' October 21, 2020 response on behalf of the City of Forest Park ("the City") to our October 8, 2020 letter outlining the City's violation of the Open Meetings Act (OMA) on, without limitation, August 17, September 21, and October 5, 2020. As described below, still further violations occurred on October 19, 2020.

For reasons we will explain, the City's response does not fully address the public access concerns we raised in our October 8th letter. Moreover, the fact that after receiving our letter, the City was able to provide functioning (though still less-than-ideal) audio and video streaming for its October 26, 2020 special-called City Council meeting begs the question of why the City did not make such technological improvements months earlier rather than electing to conduct core City governance activities away from public view. From this it appears that the City's failure to comply with the OMA for the four City Council meetings that occurred from August 17 to October 19, 2020 was a matter of deliberate indifference, as would support assessment of civil penalties pursuant to O.C.G.A. § 50-14-6.

Insufficiency of the City's October 21st Response

Mr. Williams' October 21st response on behalf of the City asserts, "We proudly report that the City has been able to [] provide public access to meetings." This statement is belied by the fact that only two days prior, on October 19th, the City had cancelled its regularly scheduled City Council meeting after 15 minutes because in the words of Councilmember Kimberly James, "it wasn't open enough to the public." See Exhibit 1. Indeed, members of the public and the press

were not allowed to attend this meeting in person, there was no public video feed for remote observation, and the audio feed was difficult-to-impossible to hear. See Exhibit 1.

With respect to the October 19th City Council meeting, inadequate public access was not the only OMA violation. There were also deficiencies with posting the notice and agenda for this meeting. The OMA requires public agencies to post meeting notices one week in advance of regularly scheduled meetings, O.C.G.A. § 50-14-1(d)(1), and to post agendas “as far in advance of the meeting as reasonably possible . . . and . . . at a minimum, at some time during the two-week period immediately prior to the meeting.” O.C.G.A. § 50-14-1(e)(1). It is our understanding that the City typically posts online the notice and agenda for its regularly-scheduled Monday evening Council meetings by close-of-business on the preceding Friday. See Exhibit 2. However, for the October 19th Council meeting, the City first tried to post the notice and agenda around 10:30 a.m. on the day of the meeting, but the link was broken. See Exhibit 3. The link was fixed such that members of the public could actually see the document by shortly after 11 a.m. See Exhibit 4. This was less than one hour before the noon deadline indicated on the notice for citizens to submit public comment. See Exhibit 5. Clayton Crescent journalist Robin Kemp asked the City Clerk if there would be an extension on the comment submission period, but never received word that an extension had been granted. This sequence of events involving the notice and agenda does not comply with either the letter or the spirit of the OMA.

As detailed in our October 8th letter, the same failure to provide access to City Council meetings on October 19th had occurred in Forest Park for months prior. This constituted serial violations of the OMA.¹ Yet the City took no corrective action until receiving our October 8th letter.

Many issues of public concern were discussed at these inaccessible City Council meetings that occurred in August, September, and October 2020, including without limitation, deliberation over how the City should spend over \$1 million in funding from the Georgia CARES Act intended to be used for COVID-19 relief.² The public and press had a right to be privy to such discussions. *See Berg v. Hunter*, 854 F.2d 238, 243 (7th Cir. 1988) (“In an age of ever dwindling public resources, mounting deficits, and demand for greater accountability by public officials, charges of inequitable allocation or misuse of public funds implicates matters of substantial public importance.”) (Internal citation omitted). Yet the public’s access to these City Council meetings was an afterthought, at best.

In contrast, the City had the wherewithal and resources around the same time — in late September 2020 — to purchase fully functioning audio-visual technology for its new broadcasting communications hub to promote its own public relations. See Exhibit 6. This only further

¹ The Georgia Court of Appeals recognized in 2001 — long before sophisticated live streaming technology was as accessible and ubiquitous as it is today — that virtual public meetings are still subject to the requirements of the OMA. *See Claxton Enter. v. Evans Cnty. Bd. of Comm’rs*, 249 Ga.App. 870, 875 (2001).

² *CARES Act, Coronavirus Relief Fund*, GOVERNOR’S OFF. OF PLAN. & BUDGET, <https://opb.georgia.gov/CARESact>.

highlights the City’s deliberate indifference in failing to prioritize the technology necessary for effective public access to its City Council meetings from August to October 2020.³ It is therefore inaccurate for Mr. Williams to represent that the City had “proudly” been providing access to meetings because it simply is not true.

Also on October 19th, the City arbitrarily excluded Clayton Crescent reporter Robin Kemp from physical attendance at its regularly scheduled City Council meeting for the third meeting in row. See Exhibit 1. Mr. Williams’ October 21st letter asserts that Ms. Kemp was excluded from two prior City Council meetings for health-related reasons, and he would likely say the same regarding her exclusion on October 19th. However, this alleged justification is pretext as evidenced by the fact that the City had deemed it safe for the Mayor, Councilmembers, City Manager, City Attorney, multiple other City officials and staff, and persons with business before the Council to all meet in person, with no mandatory mask-wearing.⁴ Only Ms. Kemp — who provides both essential and critical news coverage of city governance and who on all relevant occasions was wearing a mask — was physically excluded. This is arbitrary and discriminatory viewpoint-based line-drawing at its worst. Footnote 3 of Mr. Williams’ letter describes this arbitrary line-drawing whereby the City allowed “non-employees with items on the council agenda . . . to make in-person presentations to the Council” while excluding Ms. Kemp and possibly other citizens wanting to attend for the equally important purpose — codified by the OMA, no less — of keeping an eye on their local government officials and holding them accountable. See *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1331 (10th Cir. 2007) (“[S]peech reporting the illicit or improper activities of a government entity or its agents is obviously a matter of great public import.”).

³ Courts have found that public agencies violated the OMA when officials knew what proper access to meetings required, but failed to provide it. In *Gerwin v. Livingston Cnty. Bd.*, 345 Ill.App.3d 352, 362 (2003), the court held that plaintiffs pled an OMA violation when they alleged “that the board knew, at least a week before the . . . meeting, that the boardroom would be too small for the numbers of citizens who wished to attend” and “that larger, alternative venues were available.” Similarly here, the City of Forest Park knew that it needed to provide remote access to its City Council meetings, but failed to promptly take corrective action once they realized the access was ineffective (i.e., no video feed and inaudible audio streaming). On the other hand, courts have declined to find OMA violations when officials knew that they could not accommodate everyone desiring to attend a public meeting, but “every effort was made to allow those who could not gain entrance to listen to the proceedings” and the meeting was broadcast over the radio “and “received extensive media coverage.” *Gutierrez v. City of Albuquerque*, 96 N.M. 398, 399, 401 (1981) (emphasis added). Here, the City of Forest Park made only minimal effort to provide remote access, failed to act when it realized the access was ineffective, and repeatedly excluded the one member of the local media attempting to cover the meetings.

⁴ The accusation that Ms. Kemp “willfully endangered the City’s staff by sneaking into City facilities without authorization and without COVID-19 safety screening” grossly misrepresents the facts. Ms. Kemp has never “snuck” into Forest Park City Council meetings. Every time she has tried to attend a public meeting in-person since the pandemic began, she did so by entering the Chambers front door, wearing a mask, and identifying herself as a reporter either verbally and/or by wearing visible press identification.

By denying Ms. Kemp both physical and effective remote access to City Council meetings on, without limitation, August 17, September 21, October 5, and October 19, the City interfered with the news media's vital role of informing the public of events that citizens are unable to attend or monitor themselves. *See State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 81 (1987) ("Practical realities dictate that very few of our citizens have the ability to be personally present during the conduct of government business. If we are to have an informed public, the media must serve as the eyes and ears of that public. . . . [I]f the media is denied access to the affairs of government, the public for all practical purposes is denied access as well.").

Incomplete Improvements Implemented for the First Time on October 26, 2020

At the October 26, 2020 special-called City Council meeting, the City for the first time, and after months of deliberate indifference, provided functioning audio and visual live-streaming of the meeting. While this represented a significant improvement over prior meetings where there was effectively no public access, the video feed is far from comparable to in-person attendance. This is because the video feed is static, capturing only one camera view that does not show all Councilmembers' seats, nor the City staff who are present at the meeting, nor the full audience. It is therefore impossible to see from the live-streaming everyone who is in physical attendance and, at times, the single camera view prevents the remote observer from seeing who is speaking during the meeting.

Additionally, the October 26th City Council meeting did not allow for any in-person attendance by the public and the press. Mr. Williams' October 21st response states that the City is contemplating re-opening in January 2021, and at that time providing the public with limited physical access to City Council meetings on a neutral basis. However, the idea that the City will not reopen until January is perplexing, given that Mayor Butler previously stated, "The City reopened June 29th, 2020."⁵ The inconsistency between Mayor Butler's July 1, 2020 statement and Mr. Williams' October 21, 2020 letter indicates that the City is treating its events as open — or not — based on ad hoc, discretionary decisions and the Mayor's whim. This is unacceptable, particularly when it comes to the public having access to core governmental functions such as City Council meetings.

Moreover, as noted above, if a room full of people — some not wearing masks — are deemed safe to meet in person (i.e., the Mayor, Councilmembers, City Attorney, City Manager, City staff and other officials, and people with an item on the agenda), it is arbitrary and discriminatory to exclude members of the public who have a statutory right to be present under the OMA. Understanding that perhaps not all members of the public who wish to attend may be accommodated given the need for social distancing, it stands to reason that a few seats can and should be reserved for this purpose, and allocated on a viewpoint neutral basis for masked members of the public. Further, it would be reasonable, and perhaps necessary in order to accommodate public access, for individuals with agenda items before the Council to rotate into the room when

⁵ Email from Mayor Angelyne Butler to Robin Kemp on July 1, 2020 at 3:18 p.m., attached as Exhibit 7.

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it is their turn to speak, and to then rotate out of the room, rather than occupying a seat for the entire meeting.

In sum, Forest Park failed to update its audiovisual streaming capabilities to allow the press and the public access to its City Council meetings for months, while at the same time arbitrarily excluding the press and members of the public from physical attendance. The City has now improved its streaming capability, but it is still not comparable to in-person attendance. Meanwhile, unjustified physical exclusion of the public and the press from City Council meetings continues, with no end in sight save for a vague reference to "re-opening" access in January 2021. To resolve the foregoing access issues and the legal claims arising therefrom, we propose that the City agree in writing to do the following:

- (1) Improve the audio-visual remote access to City Council meetings by providing as many different camera feeds as necessary to capture the entire meeting room and all participants and attendees;
- (2) Continue providing improved audio-visual remote access to City Council meetings for as long as in-person attendance is limited;
- (3) Immediately provide some limited number of seats at City Council meetings for in-person attendance by members of the public and the press to be allocated on a non-discriminatory, viewpoint neutral basis;
- (4) Spell out in the written agreement how the limited number of seats for in-person attendance by members of the public and the press will be allocated and how this system will be communicated to the public; and
- (5) Compensate Ms. Kemp in accordance with § 50-14-6 of the OMA for the violations she experienced, without limitation, on August 17, September 21, October 5, and October 19, 2020.

We appreciate your prompt attention to the matters outlined above and would be glad to hold a discussion by telephone or Zoom if desired. We look forward to your reply no later than November 6, 2020.

Sincerely,

Clare Norins

Clare Norins
Samantha C. Hamilton
Taran Harmon-Walker

Cc. Derek Bauer