



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

May 28, 2013

PUBLIC ACCESS OPINION 13-008
(Request for Review 2013 PAC 23545)

OPEN MEETINGS ACT:
Requirement to Record and Enter
Into Closed Meeting Minutes
Basis for Finding that Litigation
is Probable or Imminent.

Ms. Sheree Kozel-La Ha
Executive Director
Homer Township Public Library District
14320 West 151st Street
Homer Glen, Illinois 60491

Ms. Kate Hall
Library Director
New Lenox Public Library District
120 Veterans Parkway
New Lenox, Illinois 60451

Dear Ms. Kozel-La Ha and Ms. Hall:

This binding opinion is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2010)). For the reasons discussed below, this office concludes that at its January 21, 2013, regular meeting, the New Lenox Public Library District Board of Trustees (Board) properly discussed probable or imminent litigation in closed session, but violated OMA by failing to record and enter into the closed meeting minutes its basis for asserting that a portion of the meeting could properly be closed to the public pursuant to section

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2(c)(11) of OMA (5 ILCS 120/2(c)(11) (West 2011 Supp.), as amended by Public Acts 97-813, effective July 13, 2012; 97-876, effective August 1, 2012).

BACKGROUND

On February 27, 2013, the Public Access Bureau received a Request for Review in which Ms. Sheree Kozel-La Ha alleged that on January 21, 2013, the Board improperly closed a meeting to the public pursuant to section 2(c)(11) of OMA. Section 2(c)(11) permits a public body to discuss in closed session:

Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, *or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.* (Emphasis added.)

Ms. Kozel-La Ha contends that there was no threat of probable or imminent litigation sufficient to justify the Board's decision to discuss a payment dispute between the New Lenox Public Library District and the Illinois Library Employee Benefit Plan (ILEBP) in a meeting that was closed to the public.¹ Ms. Kozel-La Ha also serves as Board President of the ILEBP.²

On March 8, 2013, the Public Access Bureau forwarded a copy of the Request for Review to the President of the Board and asked the Board to provide a written response to the allegation in the Request for Review, together with copies of the January 21, 2013, meeting agenda, the closed session minutes, and the verbatim recording of the closed session discussion.³

On March 18, 2013, Ms. Kate Hall, Library Director of the New Lenox Public Library, responded on behalf of the Board by providing the requested information along with a memorandum explaining that the meeting was closed to discuss "thrice threatened litigation," by the ILEBP in connection with the ILEBP's payments for claims by New Lenox Library

¹OMA Request for Review By Public Access Counselor (PAC) form filed by Sheree Kozel-La Ha (February 27, 2013).

²Letter from Sheree Kozel-La Ha, Library Director and ILEBP Board President, to Shari L. West (March 26, 2013).

³Letter from Shari L. West, Assistant Attorney General, Public Access Bureau, to Louis J. Broccoli, President, New Lenox Public Library District Board of Trustees (March 8, 2013).

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employees.⁴ Ms. Hall provided this office with copies of three letters that ILEBP sent to the Board stating that it would file a lawsuit or pursue legal action unless the Board reimbursed the ILEBP for certain claims payments. One letter, dated December 3, 2012, was from Ms. Kozel-La Ha in her capacity as ILEBP President.⁵ The two remaining letters, dated October 2, 2012,⁶ and December 17, 2012,⁷ were sent by the ILEBP's attorney. On March 22, 2013, this office forwarded a copy of the Board's response to Ms. Kozel-La Ha.⁸ She replied in a letter dated March 26, 2013, which was e-mailed to this office on March 28, 2013.⁹ On April 26, 2013, this office properly extended the time within which to issue a binding opinion by 21 business days pursuant to section 3.5(e) of OMA.¹⁰

ANALYSIS

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2011 Supp.), as amended by Public Acts 97-813, effective July 13, 2012; 97-876, effective August 1, 2012) provides that all meetings of public bodies "shall be open to the public" unless the subject of the meeting falls within one of the exceptions set out in subsection 2(c) of OMA (5 ILCS 120/2(c) (West 2011 Supp.), as amended by Public Act 97-813, effective July 13, 2012; 97-876, effective August 1, 2012) and the meeting is closed in accordance with the provisions of section 2a of OMA (5 ILCS 120/2a (West 2010)). Pursuant to section 2(b) of OMA (5 ILCS 120/2(b) (West 2011 Supp.) as amended by Public Acts 97-813, effective July 13, 2012; 97-876, effective August 1, 2012), "the [statutory] exceptions are to be strictly construed, extending only to subjects clearly within their scope."

⁴Memorandum from Kate Hall, Library Director, New Lenox Public Library District, to Shari L. West (March 18, 2012).

⁵Letter from Ms. Sheree Kozel-La Ha, President, Illinois Library Employee Benefit Plan, to Kate Hall, Director, New Lenox Public Library (December 3, 2012).

⁶Letter from Phillip B. Lenzini, Kavanagh, Scully, Sudow, White & Frederick, P.C., to Kate Hall, Director, New Lenox Public Library (October 2, 2012).

⁷Letter from Phillip B. Lenzini, Kavanagh, Scully, Sudow, White & Frederick, P.C., to Board of Library Trustees and Kate Hall, Director, New Lenox Public Library (December 17, 2012).

⁸Letter from Shari L. West, Assistant Attorney General, Public Access Bureau, to Sheree Kozel-La Ha (March 22, 2013).

⁹Letter from Sheree Kozel-La Ha, Library Director and ILEBP Board President, to Shari L. West, (March 26, 2013).

¹⁰Letter from Shari L. West, Assistant Attorney General, Public Access Bureau, to Sheree Kozel-La Ha and Kate Hall, Library Director (April 26, 2013).

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In order to close a portion of a meeting under section 2(c)(11) of OMA, "there must be reasonable grounds to believe that a lawsuit is more likely than not to be instituted or that such an occurrence is close at hand." 1983 Ill. Att'y Gen. Op. 82, 88. Such determinations "must be made by examining the surrounding circumstances in light of logic, experience, and reason." 1983 Ill. Att'y Gen. Op. at 88. Further, "the only matters which may lawfully be discussed at the closed meeting are the strategies, posture, theories, and consequences of the litigation itself." 1983 Ill. Att'y Gen. Op. at 89. Section 2(c)(11) may not be "utilized to conduct deliberations on the merits of a matter under consideration regardless of how sensitive or controversial the subject matter may be." 1983 Ill. Att'y Gen. Op. at 88. Thus, it is not permissible for a public body to discuss taking an action or to make a decision in a closed session simply because of the possibility that such a decision could ultimately provoke litigation; virtually any discretionary action that a public body contemplates carries such a risk.

Although Ms. Kozel-La Ha asserted that the meeting was improperly closed because litigation between ILEBP and the District was neither pending nor imminent, under the plain language of section 2(c)(11) of OMA the Board was required to find only that litigation was probable or imminent in order to properly enter closed session. Prior to its closed session discussion, the Board had received three letters from ILEBP, two of which were sent by the ILEBP's attorney and expressly referenced the filing of a lawsuit. In his October 2, 2012, letter, the attorney stated: "I will make clear that if the Benefit Plan is left with no other choice or option, they [sic] will bring suit against the New Lenox Public Library District and you directly in the event the New Lenox Library does not promptly submit payment."¹¹ His December 17, 2012, letter similarly stated:

Due to your prior delays in making reimbursement payments requested for claims paid for your covered employees and retirees, I will make clear here that if the Benefit Plan is left with no other choice or option, they [sic] will bring suit against the New Lenox Public Library District and you directly in the event the New Lenox Library does not promptly submit payment. * * * [I]f * * * [the Board] does not honor their obligations, then that will be our next step.¹²

¹¹Letter from Phillip B. Lenzini, Kavanagh, Scully, Sudow, White & Frederick, P.C., to Kate Hall, Director, New Lenox Public Library (October 2, 2012).

¹²Letter from Phillip B. Lenzini, Kavanagh, Scully, Sudow, White & Frederick, P.C., to Board of Trustees and Kate Hall, Director, New Lenox Public Library (December 17, 2012).

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This office finds that the Board's receipt of letters sent over the signature of ILEBP's attorney, which specifically threatened litigation, provided a reasonable basis for the Board to conclude that the filing of a lawsuit affecting the District was probable or imminent. Accordingly, the Board's decision to close a portion of its January 21, 2013, regular meeting pursuant to section 2(c)(11) of OMA was not improper. Moreover, the verbatim recording of the closed session reflects that the Board's discussion concerned strategies, postures, theories and possible consequences of the potential litigation, all of which are matters that may be lawfully discussed in closed session.

In order to satisfy the requirements of section 2(c)(11) of OMA, however, the Board was required to record and enter into the closed session minutes an explanation of its basis for finding litigation to be probable or imminent. "This requirement is mandatory and exists to ensure that there is a reasonable and justifiable basis to act in derogation of the clearly enunciated public policy of this State." 1983 Ill. Att'y Gen. Op. at 86. The Board's closed session minutes do not contain an explanation of its basis for finding that litigation was probable. Although these minutes include a reference to one of the ILEBP's letters, this reference was insufficient. As the court determined in *Henry v. Anderson*, 356 Ill. App. 3d 952 (4th Dist. 2005):

[T]he litigation exception is a forked path. If the litigation has been filed and is pending, the public body need only announce that in the proposed closed meeting, it will discuss litigation that has been filed and is pending. If the litigation has not yet been filed, the public body must (1) find that the litigation is probable or imminent and (2) record and enter into the minutes the basis for that finding. *Henry*, 356 Ill. App. 3d at 956-957.

Accordingly, we find that although the Board did have a reasonable basis supporting its conclusion that litigation was probable or imminent, the Board violated section 2(c)(11) of OMA by failing to record and enter into the closed session minutes an adequate explanation of that basis.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the arguments of the parties, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) During a regular meeting on January 21, 2013, the Board entered closed session to discuss threatened litigation by ILEBP against the Board to recoup ILEBP's payments for claims submitted by New Lenox Library District employees. The Board closed the meeting

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under section 2(c)(11) of OMA, which permits a public body to discuss in closed session "[l]itigation, * * * when the public body finds that an action [against, affecting or on behalf of the particular public body] is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting."

2) On February 27, 2013, the Public Access Bureau received Ms. Kozel-La Ha's Request for Review alleging that the Board violated OMA by entering closed session when litigation was not pending or imminent. Ms. Kozel-La Ha's Request for Review was timely filed and otherwise complies with the requirements of section 3.5(a) of OMA. The Public Access Counselor extended the time to issue a binding opinion by 21 business days. Therefore, the Attorney General may properly issue a binding opinion with respect to Ms. Kozel-La Ha's Request for Review.

3) On March 18, 2013, the Board responded to Ms. Kozel-La Ha's Request for Review, asserting that it believed litigation was probable or imminent based on a letter from Ms. Kozel-La Ha and two letters from ILEBP's attorney threatening litigation.

4) Based on the Board's receipt of letters from ILEBP's attorney declaring that ILEBP would bring suit if the Board did not promptly submit the requested payment, the Board's determination that litigation was probable or imminent was reasonable. Therefore, the decision to close a portion of the January 21, 2013, meeting pursuant to 2(c)(11) was proper.

5) During the closed session, the Board discussed strategies, postures, theories, and consequences of the threatened litigation. Those topics were properly discussed in closed session under section 2(c)(11) of OMA.

6) Although the Board had a reasonable basis for finding that a lawsuit was probable or imminent and, thus, for closing a portion of the meeting to discuss the threatened litigation, the Board violated section 2(c)(11) of OMA by failing to record and enter an adequate explanation of the basis for that finding into the closed session minutes of the January 21, 2013, meeting.

In accordance with these findings of fact and conclusions of law, the Board is directed to conduct its future meetings in full compliance with OMA. In particular, when closing a portion of a meeting to discuss probable or imminent litigation, the Board is directed to record and enter into the closed session minutes an explanation of the reasons for finding that litigation is probable or imminent, as specifically required by section 2(c)(11) of OMA. With respect to the January 21, 2013, closed session, the Board is directed to amend its closed session minutes to include an adequate explanation of its reasons for such closure. As required by section 3.5(e) of OMA, the Board shall either take necessary action as soon as practical to comply with the

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directives of this opinion or shall initiate administrative review under section 7.5 of OMA (5 ILCS 120/7.5 (West 2010)).

This opinion shall be considered a final decision of an administrative agency for the purpose of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2010). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision, naming the Attorney General of Illinois and Ms. Sheree Kozel-La Ha as defendants. *See* 5 ILCS 120/7.5 (West 2010).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By: 
Michael J. Luke
Counsel to the Attorney General