



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

September 13, 2016

PUBLIC ACCESS OPINION 16-007
(Request for Review 2016 PAC 42395)

OPEN MEETINGS ACT:
Discussion of Legal Matters
Under the Exception for Pending,
Probable, or Imminent Litigation

Ms. Carolyn Bartelli
5224 Riverview Drive
Lisle, Illinois 60532

The Honorable Joseph Broda
Mayor
Village of Lisle
925 Burlington Avenue
Lisle, Illinois 60532

Dear Ms. Bartelli and Mayor Broda:

This is a binding opinion issued by the Attorney General pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2015 Supp.)). For the reasons discussed below, this office concludes that the Board of Trustees of the Village of Lisle (Board) violated section 2(a) of OMA (5 ILCS 120/2(a) (West 2015 Supp.)) at its June 6, 2016, meeting by: (1) closing a portion of the meeting to discuss "Pending/Imminent Litigation" without recording or entering into the closed session minutes its basis for finding that litigation was probable or imminent; and (2) discussing the mere possibility that opponents of a bond sale might seek an injunction or initiate other legal action against the Board without reasonable grounds to believe that a lawsuit was more likely than not to be instituted or that such an occurrence was close at hand.

BACKGROUND

On June 14, 2016, Ms. Carolyn Bartelli submitted a Request for Review to the Public Access Counselor alleging that the Board violated OMA during its June 6, 2016, meeting by improperly discussing certain subjects in closed session pursuant to the exception for "Pending/Imminent Litigation."¹ Ms. Bartelli explained that after the Board's attorney announced at a May 31, 2016, special meeting that he had determined that "no valid petition had been submitted for a backdoor referendum[]"² concerning the sale of certain bonds, "some citizens in the group who had circulated petitions [seeking a referendum on the bond issue] mentioned that the Village attorney had left the citizen group with no other choice but to file a lawsuit."³ She stated, however, that the bond sale was cancelled before the June 6, 2016, meeting, and added:

At the June 6, 2016 meeting, I made it very clear that the group [which had circulated petitions seeking the referendum] would not be taking any legal action against the Village regarding the petition dispute as we did not want the residents of the village to foot the Village's additional legal costs when the Board could simply put the referendum on the ballot voluntarily.

With no known pending or imminent litigation, the Board still went into closed session. I am concerned that the discussion held in closed session was with regard to the bond sale and the validity of the petitions for a backdoor referendum and exceeded the scope of the exemption to the Open Meetings Act.⁴

¹E-mail from Carolyn Bartelli to the Public Access Counselor, Office of the Illinois Attorney General (June 14, 2016).

²Section 3(c) of the Local Government Debt Reform Act (30 ILCS 350/3(c) (West 2014)) defines a "[b]ackdoor referendum" as:

the submission of a public question to the voters of a governmental unit, initiated by a petition of voters, residents or property owners of such governmental unit, to determine whether an action by the governing body of such governmental unit shall be effective, adopted or rejected.

³E-mail from Carolyn Bartelli to the Public Access Counselor, Office of the Illinois Attorney General (June 14, 2016).

⁴E-mail from Carolyn Bartelli to the Public Access Counselor, Office of the Illinois Attorney General (June 14, 2016).

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On June 22, 2016, the Public Access Bureau sent a copy of the Request for Review to the Village's Mayor and asked the Board to provide a written response to the allegation in the Request for Review together with copies of the verbatim recording of the closed session portion of the June 6, 2016, meeting and the meeting minutes or draft minutes.⁵ In a letter dated July 15, 2016, counsel for the Village of Lisle furnished those materials and asserted in his written response that the Board properly entered closed session to discuss a "possible injunction and other legal action that had been threatened to overturn the Village Board's decision to refinance certain bonds."⁶ On July 20, 2016, this office sent a copy of that response to Ms. Bartelli.⁷ On July 25, 2016, Ms. Bartelli submitted a reply to the Village's response and contended that the Board was not authorized to enter closed session to discuss "possible" litigation that was not imminent or probable.⁸

On August 12, 2016, this office extended the time within which to issue a binding opinion by 21 business days pursuant to section 3.5(e) of OMA.⁹

ANALYSIS

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2014). Section 2(a) of OMA provides that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." Such exceptions "are in derogation of the requirement that public bodies meet in the open, and therefore, the exceptions are to be *strictly construed, extending only to subjects clearly within their scope.*" (Emphasis added.) 5 ILCS 120/2(b) (West 2015 Supp.).

Section 2(c)(11) of OMA (5 ILCS 120/2(c)(11) (West 2015 Supp.)) permits a public body to enter into closed session to discuss "[l]itigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or

⁵Letter from Steve Silverman, Assistant Bureau Chief, Public Access Bureau, Office of the Attorney General, to the Honorable Joseph Broda, Mayor, Village of Lisle (June 22, 2016).

⁶Letter from Robert K. Bush, Ancel Glink Diamond Bush DiCianni & Krathefer, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau (July 15, 2016), at 2.

⁷Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General, to Carolyn Bartelli (July 20, 2016).

⁸E-mail from Carolyn Bartelli to Steve Silverman (July 25, 2016).

⁹Letter from Steve Silverman, Bureau Chief, Public Access Bureau, Office of the Attorney General to Carolyn Bartelli and The Honorable Joseph Broda, Mayor, Village of Lisle (August 12, 2016).

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." In *Henry v. Anderson*, 356 Ill. App. 3d 952, 953 (4th Dist. 2005), the Illinois Appellate Court analyzed this exception in considering whether a school board violated OMA by announcing that it was closing a meeting to discuss "potential" litigation without making a finding that litigation was "probable" or "imminent." During the meeting, the school board approved an agenda that referred to an executive session for "*potential litigation*," but then cited "*a contested litigation matter*" in the subsequent motion to enter closed session. (Emphasis in original.) *Henry*, 356 Ill. App. 3d at 954. The court characterized the section 2(c)(11) exception as "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. *Evidently, the legislature intended to prevent public bodies from using the distant possibility of litigation as a pretext for closing their meetings to the public.* (Emphasis added.) *Henry*, 356 Ill. App. 3d at 956-57.

The court then concluded that the school board violated OMA by entering closed session without clarifying whether the "litigation" to be discussed was pending or "by failing to state, on the record, (1) a finding that litigation was probable or imminent and (2) a basis for such a finding." *Henry*, 356 Ill. App. 3d at 957.

Attorney General Hartigan analyzed an earlier but substantively identical version of section 2(c)(11) of OMA in connection with a city council's closed session discussion related to the possibility of litigation in the event that a proposed annexation was approved. Ill. Att'y Gen. Op. No. 83-026, issued December 23, 1983.¹⁰ Based on judicial definitions of "probable" and "imminent," he stated that "[f]or litigation to be probable or imminent, warranting the

¹⁰At the time of the issuance of opinion No. 83-026, section 2 of OMA excepted from the open meeting requirements:

meetings held to discuss litigation when an action against or on behalf of the particular public body has been filed and is pending in a court or administrative tribunal, or when the public body finds that such an action is probable or imminent, in which case the basis for such a finding shall be recorded and entered into the minutes of the closed meeting in accordance with Section 2.06. Ill. Rev. Stat. 1981, ch. 102, par. 42(h).

closing of a meeting, 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." Ill. Att'y Gen. Op. No. 83-026, at 10. Indeed, "[t]he fact that the public body *may* become a party to judicial proceedings because of the action it takes does not permit it to utilize the litigation exception to conduct its deliberations in closed sessions." (Emphasis added.) Ill. Att'y Gen. Op. No. 83-026, at 12. Because it was undisputed that an attorney who represented annexation opponents declared that litigation was not being contemplated and because litigation over the annexation could not be probable or imminent until the city council approved the annexation, Attorney General Hartigan concluded that the city council improperly entered closed session under the litigation exception. Ill. Att'y Gen. Op. No. 83-026, at 11-13. Further, he opined that "if the possibility of a lawsuit over the annexation" influenced the city council's decision on whether to annex the property, that "matter should have been discussed in an open meeting since it goes to the merits of the question rather than to the litigation itself. * * * [T]he only matters which may lawfully be discussed at the closed meeting are the *strategies, posture, theories, and consequences of the litigation itself*." (Emphasis added.) Ill. Att'y Gen. Op. No. 83-026, at 13-14.

Here, the meeting at issue followed a May 31, 2016, special meeting during which several members of the public addressed the Board concerning a proposed resolution to issue new bonds for the Benedictine Sports Complex Facilities.¹¹ After the Village attorney advised that a petition seeking a referendum on the bond issue was inadequate,¹² Ms. Bartelli stated that the Board was "ignoring the residents who hoped to have a voice in the process[.]" and that "the Village is forcing a lawsuit and it may be the course of action they have to take."¹³ The Board then held a roll call vote and approved the resolution to issue bonds.¹⁴

The agenda of the Board's June 6, 2016, regular meeting listed an executive session for "Pending/Imminent Litigation."¹⁵ During the public comment portion of that meeting, Ms. Bartelli addressed the Board to clarify that her group did not want the Village to incur additional legal expenses that would have to be paid by Village taxpayers and therefore

¹¹Village of Lisle Board of Trustees, Special Meeting, May 31, 2016, Minutes 2-4.

¹²Village of Lisle Board of Trustees, Special Meeting, May 31, 2016, Minutes 3.

¹³Village of Lisle Board of Trustees, Special Meeting, May 31, 2016, Minutes 4.

¹⁴Village of Lisle Board of Trustees, Special Meeting, May 31, 2016, Minutes 4-5.

¹⁵Village of Lisle Board of Trustees, Regular Meeting, Agenda Item VIII. A., Pending/Imminent Litigation (June 6, 2016).

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was "not proceeding with a lawsuit. So I wanted to make it clear that if this is in fact the pending or imminent litigation, there is none on our part."¹⁶ Following public comment, the Board approved a motion to enter closed session "to discuss pending, imminent litigation."¹⁷

In her Request for Review, Ms. Bartelli contended that the Board entered into closed session despite "no known pending or imminent litigation[.]"¹⁸ The Board's response to this office stated, in pertinent part:

The Village Board's discussion in closed session was limited to a discussion of a possible injunction and other legal action that had been threatened to overturn the Village Board's decision to refinance certain bonds. ***The Village Board did not rely on threats made by the citizen's group at the May 31, 2016 meeting to go into closed session.*** Instead, the Village Board relied on the following to support its reasons for going into closed session:

During the course of the closed session it was specifically commented upon that the Board was not there to consider any alleged threat made by Ms. Bartelli. Rather, the Board had serious concerns about other challenges which might be brought formally against the Village to stop the sale of bonds to refinance certain Village debt. The Village had adopted bond ordinances which called for the issuance of alternate revenue bonds. Under Illinois law, the issuance of alternative revenue bonds are subject to a backdoor referendum. A number of residents had submitted papers with signatures to the Village Clerk. There were and are a number of reasons why these papers failed to meet the thresholds sufficient to constitute a valid petition seeking a referendum on the alternate revenue bonds. * * * Bond Counsel, Chapman and Cutler, has expressed significant concerns over even these substantively flawed papers sufficient to give the Village the opinion it could not authorize the sale of the refunding bonds until and unless the

¹⁶Village of Lisle Board of Trustees Meeting, Regular Meeting, June 6, 2016, Video File, available at <https://www.youtube.com/watch?v=MkPk9mJFnRM&feature=youtu.be>, (32:53-33:03).

¹⁷Village of Lisle Board of Trustees Meeting, Regular Meeting, June 6, 2016, Video File, available at <https://www.youtube.com/watch?v=MkPk9mJFnRM&feature=youtu.be>, (35:50-36:15).

¹⁸E-mail from Carolyn Bartelli to the Public Access Counselor, Office of the Illinois Attorney General (June 14, 2016).

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potential for litigation over the referendum petitions was resolved. This was the topic for which we went into closed session, which was identified in the closed session and which was the primary subject of the closed session conversation.^[19] (Emphasis added.)

This office has reviewed the minutes and the verbatim recording of the Board's June 6, 2016, closed session discussion. In its closed session minutes, the Board used the generic term "Probable/Imminent Litigation" to reference the section 2(c)(11) exception.²⁰ The Board did not record or enter into the closed session minutes a specific basis for finding that litigation was probable or imminent, which is required by section 2(c)(11).

The majority of the closed session discussion concerned the possibility that litigation would be filed by opponents of the bond sale.²¹ In its response to this office, the Board described the closed session discussion as concerning "a possible injunction and other legal action that had been threatened to overturn the Village Board's decision to refinance certain bonds." Although Ms. Bartelli had suggested that such litigation might be filed when she addressed the Board at its May 31, 2016, special meeting, she expressly stated during the public comment portion of the subsequent June 6, 2016, meeting – before the Board entered closed session – that litigation was not being contemplated and would not be filed. The Board's response to this office notes that "[d]uring the course of the closed session it was specifically commented upon that the Board was not there to consider any alleged threat made by Ms. Bartelli."²² Instead, the Board stated that it "had serious concerns about other challenges which might be brought formally against the Village to stop the sale of bonds to refinance certain Village debt." The Board also stated that its bond counsel expressed concerns over "the potential for litigation over the referendum petitions."²³

¹⁹Letter from Robert K. Bush, Ancel Glink Diamond Bush DiCianni & Krathefer, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau (July 15, 2016), at 2.

²⁰Village of Lisle Board of Trustees, Meeting, June 6, 2016, Executive Session Minutes, 1

²¹The June 6, 2016, agenda and the Board's motion to close the meeting included "pending," as well as "probable or imminent" litigation. A very brief portion of the closed session discussion concerned a separate, earlier Request for Review pending before the Public Access Counselor. Because Ms. Bartelli expressed concern only with regard to the Board's reliance on the earlier statements of the group of citizens who circulated petitions for a backdoor referendum, we have limited this office's review to the specific issue set out in Ms. Bartelli's June 14, 2016, correspondence.

²²Letter from Robert K. Bush, Ancel Glink Diamond Bush DiCianni & Krathefer, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau (July 15, 2016), at 2.

²³Letter from Robert K. Bush, Ancel Glink Diamond Bush DiCianni & Krathefer, to Steve Silverman, Assistant Bureau Chief, Public Access Bureau (July 15, 2016), at 2.

Without further detail, however, the Board has not identified any facts demonstrating that it had reasonable grounds to believe that litigation to stop the bond sale or over the referendum petitions was "probable" or "imminent" at the time of the June 6, 2016, meeting. Narrowly construed, as OMA requires it to be, the section 2(c)(11) exception does not permit a public body to enter closed session to discuss the possibility of litigation merely because it has taken action that generated public opposition, such as a backdoor referendum effort. In the absence of reasonable, specifically identified grounds to believe that litigation was close at hand or more likely than not to ensue, the mere possibility that a lawsuit might be filed does not constitute "probable" or "imminent" litigation within the scope of section 2(c)(11) of OMA. Moreover, the minutes of the June 6, 2016, meeting indicate that although the bonds had been expected to be auctioned earlier in the day, the "sale did not happen, the Board and Bond Counsel have postponed the sale to ensure everything was in proper order."²⁴ The decision by bond counsel to hold off on approving the issuance of bonds until "potential" litigation was resolved does not change this analysis. Accordingly, this office concludes that the Board's closed session discussion concerning the possibility of future litigation violated section 2(a) of OMA.

FINDINGS AND CONCLUSIONS

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

1) On June 6, 2016, the Village of Lisle Board of Trustees closed a portion of its meeting to the public to discuss "Pending/Imminent Litigation."

2) On June 14, 2016, Ms. Carolyn Bartelli submitted a Request for Review to the Public Access Counselor alleging that the Board's June 6, 2016, closed session discussion was improper because the discussion did not involve either pending or imminent litigation.

3) On June 22, 2016, the Public Access Bureau sent a copy of the Request for Review to the Village's Mayor and asked the Board to provide a written response to the allegation in the Request for Review together with copies of the verbatim recording of the closed session portion of the June 6, 2016, meeting and the meeting minutes or draft minutes.

4) By letter dated July 15, 2016, counsel for the Village of Lisle furnished the requested materials and asserted in his written response that the Board properly entered into closed session to discuss a "possible injunction and other legal action that had been threatened to overturn the Village Board's decision to refinance certain bonds."

²⁴Village of Lisle Board of Trustees, Regular Meeting, June 6, 2016, Minutes 6.

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5) On July 20, 2016, this office sent a copy of that response to Ms. Bartelli. On July 25, 2016, Ms. Bartelli submitted a reply contending that the Board was not authorized to enter closed session to discuss "possible" litigation that was neither probable nor imminent.

6) On August 12, 2016, this office extended the time within which to issue a binding opinion by 21 business days, to September 13, 2016, pursuant to section 3.5(e) of OMA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

7) Section 2(a) of OMA requires that all meetings of public bodies be open to the public unless the subject of the meeting is covered by one of the limited exceptions enumerated in section 2(c). Section 2(c)(11) permits a public body to close a portion of a meeting to discuss "[l]itigation, 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."

8) If there is no litigation pending, then a public body must have reasonable grounds to believe that litigation is more likely than not to be instituted or that such an occurrence is close at hand in order to properly discuss a matter in a closed meeting pursuant to section 2(c)(11) of OMA.

9) At the time of June 6, 2016, meeting, the Board did not have reasonable grounds to find that an injunction or other legal action related to the Board's decision to issue new bonds for the Benedictine Sports Complex Facilities was probable or imminent. Accordingly, the Board violated section 2(a) of OMA by discussing the mere possibility of litigation in a closed session.

In accordance with these findings of fact and conclusions of law, the Board is directed to remedy this violation by disclosing to Ms. Bartelli and making publicly available that portion of the closed session verbatim recording of its June 6, 2016, meeting related to the bond sale. The Board is also directed to conduct its future meetings in full compliance with OMA. As required by section 3.5(e) of OMA, the Board shall either take necessary action as soon as practical to comply with the directives of this opinion or shall initiate administrative review under section 7.5 of OMA. 5 ILCS 120/7.5 (West 2014).

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 2014). 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

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within 35 days of the date of this decision, naming the Attorney General of Illinois and Ms. Carolyn Bartelli as defendants. *See* 5 ILCS 120/7.5 (West 2014).

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL

By:


Michael J. Luke
Counsel to the Attorney General

cc: Mr. Robert K. Bush
Ancel, Glink, Diamond,
Bush, DiCianni & Krathefer, P.C.
140 South Dearborn Street, Suite 600
Chicago, Illinois 60603

CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 16-007) upon:

Ms. Carolyn Bartelli
5224 Riverview Drive
Lisle, Illinois 60532
carolyn_bartelli@yahoo.com

The Honorable Joseph Broda
Mayor
Village of Lisle
925 Burlington Avenue
Lisle, Illinois 60532
jbroda@villageoflisle.org

Mr. Robert K. Bush
Ancel, Glink, Diamond,
Bush, DiCianni & Krathefer, P.C.
140 South Dearborn Street, Suite 600
Chicago, Illinois 60603
rbush@ancelglink.com

by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on September 13, 2016.



SARAH L. PRATT
Public Access Counselor

SARAH L. PRATT
Public Access Counselor
500 South Second Street
Springfield, Illinois 62706
(217) 785-5526