



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 6, 2017

PUBLIC ACCESS OPINION 17-004
(Request for Review 2017 PAC 46720)

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

The Honorable Jason Chambers
McLean County State's Attorney
104 West Front Street
P.O. Box 2400
Bloomington, Illinois 61702-2400

The Honorable Tari Renner
Mayor
City of Bloomington
109 East Olive Street
Bloomington, Illinois 61701

Dear Mr. Chambers and Mr. Renner:

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 City Council of the City of Bloomington (City Council) violated section 2(a) of OMA (5 ILCS 120/2(a) (West 2015 Supp.)), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016; 99-687, effective January 1, 2017) at its February 20, 2017, meeting. During this meeting, the City Council improperly discussed in closed session matters related to an intergovernmental agreement that were not authorized by section 2(c)(11) of OMA (5 ILCS 120/2(c)(11) (West 2015 Supp.)), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016; 99-687, effective January 1, 2017), which permits the discussion in closed session of

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pending, probable, or imminent litigation, and which the City Council had cited as its basis for closing the meeting to the public.

BACKGROUND

On February 28, 2017, McLean County State's Attorney Jason Chambers submitted a letter to the Public Access Bureau stating "[m]y office has received questions from citizens as to whether or not the City [of Bloomington] has again improperly entered closed session to discuss a matter. * * * I believe it prudent to refer these concerns and this matter to your attention."¹ By an e-mail dated March 6, 2017, Mr. Chambers confirmed that he wished to file a Request for Review concerning the City of Bloomington's (City) use of the litigation exception found in section 2(c)(11) of OMA.² Mr. Chambers alleged that the City Council violated OMA during its February 20, 2017, meeting³ by improperly discussing the City's continued participation in an intergovernmental agreement with the Town of Normal (Town) in closed session, pursuant to the exception for "pending or probable" litigation.⁴ The agreement, known as the "Metro-Zone Master Agreement," (Agreement) provides "for the sharing of revenues and expenditures in a designated commercial and industrial area of the two communities."⁵ Mr. Chambers' letter dated February 28, 2017, stated that last night (February 27, 2017), the City Council terminated the Agreement, and that prompted inquiries to his office because a local news station had reported the previous week after the City's closed session "[t]here is no current court case. And Bloomington Mayor Tari Renner said he doubts there will be a lawsuit."⁶ In his Request for Review, Mr. Chambers questioned whether it was appropriate for the City Council to hold a closed session concerning this matter if no lawsuit was pending

¹Letter from Jason Chambers, McLean County State's Attorney, to Christopher R. Boggs, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 28, 2017).

²E-mail from Jason Chambers to Public Access (March 6, 2017).

³Mr. Chambers' letter dated February 28, 2017, did not give the meeting date but referred to a news story that ran during the previous week and discussed "the executive session of the Bloomington Council Monday evening," referring to the February 20, 2017, City Council meeting.

⁴Letter from Jason Chambers, McLean County State's Attorney, to Christopher R. Boggs, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 28, 2017).

⁵Letter from Jeffrey R. Jurgens, Sorling Northrup Attorneys, to Leah [Bartelt], Assistant Attorney General, Office of the Attorney General, Public Access Bureau (March 21, 2017), at 1; *see also* Contract for the purpose of a Metro-Zone Master Agreement, City of Bloomington, Town of Normal (January 20, 1986).

⁶Letter from Jason Chambers, McLean County State's Attorney, to Christopher R. Boggs, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 28, 2017), at 1-2.

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and the Mayor did not anticipate that a lawsuit would be filed against the City.⁷ Mr. Chambers also pointed out that "the City of Bloomington went into closed session last week based on imminent litigation before it took any substantive action on the [Agreement]" and asked whether the City Council's closed session included an improper discussion of the pros and cons of terminating the Agreement.⁸

On March 13, 2017, the Public Access Bureau sent a copy of the Request for Review to Mayor Renner, as the head of the City Council, and asked for a written response to the allegations contained therein together with copies of the verbatim recording of the February 20, 2017, closed session meeting and the meeting minutes or draft minutes.⁹ In a letter dated March 21, 2017, counsel for the City furnished copies of the closed session verbatim recording and draft minutes and a written response asserting that the City Council "properly discussed the Metro Zone in closed session as probable litigation."¹⁰ The City's response was marked confidential, but the City also provided a redacted version of the response letter for distribution to Mr. Chambers, pursuant to section 3.5(c) of OMA (5 ILCS 120/3.5(c) (West 2015 Supp.)).¹¹ On March 24, 2017, this office forwarded a copy of the City Council's redacted response letter to Mr. Chambers.¹² He did not reply.

On May 5, 2017, this office extended the time within which to issue a binding opinion by 21 business days pursuant to section 3.5(e) of OMA.¹³

⁷Letter from Jason Chambers, McLean County State's Attorney, to Christopher R. Boggs, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 28, 2017), at 2.

⁸Letter from Jason Chambers, McLean County State's Attorney, to Christopher R. Boggs, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (February 28, 2017), at 3.

⁹Letter from Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to The Honorable Tari Renner, Mayor, City of Bloomington (March 13, 2017).

¹⁰Letter from Jeffrey R. Jurgens, Sorling Northrup Attorneys, to Leah [Bartelt], Assistant Attorney General, Office of the Attorney General, Public Access Bureau (March 21, 2017), at 3.

¹¹Section 3.5(c) of OMA provides, in relevant part: "Upon request, the public body may also furnish the Public Access Counselor with a redacted copy of the answer excluding specific references to any matters at issue. The Public Access Counselor shall forward a copy of the answer or redacted answer, if furnished, to the person submitting the request for review."

¹²Letter from Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Jason Chambers, McLean County State's Attorney (March 24, 2017).

¹³Letter from Leah Bartelt, Assistant Attorney General, Public Access Bureau, Office of the Attorney General, to Jason Chambers, McLean County State's Attorney, The Honorable Tari Renner, Mayor, City of Bloomington, and Jeffrey R. Jurgens, Corporation Counsel, City of Bloomington (May 5, 2017).

On May 9, 2017, counsel for the City provided this office with the approved closed session minutes of the City Council's February 20, 2017, meeting.¹⁴

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.), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016; 99-687, effective January 1, 2017.

Section 2(c)(11) of OMA 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 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." 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.

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

¹⁴E-mail from Jeff R. Jurgens to Leah Bartelt (May 9, 2017).

Gen. Op. No. 83-026, issued December 23, 1983.¹⁵ Based on judicial definitions of "probable" and "imminent," he concluded that "[f]or litigation to be probable or imminent, warranting the 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 closed the meeting to the public under the litigation exception. Ill. Att'y Gen. Op. No. 83-026, at 11-13; *see generally* Ill. Att'y Gen. Pub. Acc. Op. No. 16-007, issued September 13, 2016, at 8 ("[T]he 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[.]").

Attorney General Hartigan also addressed the limitations on the content of any closed session discussion pursuant to section 2(c)(11), and expressly rejected an interpretation that would permit a public body's attorney to advise the members of their legal rights as well as the pros and cons of the matter in closed session:

[T]he litigation exception 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. [Citation.] Section 2 of the Act clearly provides that the only meetings which may be closed on the basis of the litigation exception are those meetings held *to discuss litigation*.

* * *

¹⁵At 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).

[C]onsultations between the public body and its attorney concerning the potential legal impact and the legal ramifications of an item under consideration must be done publicly unless pending, probable, or imminent litigation is ***the subject matter of the consultations***. Consequently, once the litigation exception is properly invoked, the 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 12-14.

Applying this reasoning to the closed session at issue in Opinion 83-026, Attorney General Hartigan explained 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." Ill. Att'y Gen. Op. No. 83-026, at 13, *see generally* Ill. Att'y Gen. Pub. Acc. Op. No. 12-013, issued November 5, 2012, at 4 ("even if there are reasonable grounds to believe that litigation is probable or imminent, it is not permissible for a public body to use the closed session to discuss taking an action or to make a decision on the underlying issue that is likely to be the subject of the litigation.").

Here, the City Council asserted that its closed session discussions concerning the Agreement were permitted by section 2(c)(11) of OMA because litigation concerning that matter was "probable," although not pending. The City Council further explained that the Agreement "does not have a defined term and the City has maintained that Illinois law allows it to be terminated unilaterally. [The Town] disagrees and has further claimed equitable remedies would require the continued sharing of revenue even if the agreement is terminated."¹⁶ The City Council furnished this office with a lengthy additional explanation of the basis for its finding that litigation was probable and responded to the allegation in the Request for Review concerning the Mayor's public comments on his opinion about the likelihood of litigation. The City Council also argued that the discussion during the closed session was limited to matters pertaining to the litigation itself and not the pros and cons of terminating the Agreement. Because the City Council provided the additional information and argument to the Public Access Counselor confidentially, sections 3.5(c) and 3.5(g) of OMA (5 ILCS 120/3.5(c), (g) (West 2015 Supp.)) preclude this office from discussing that information in this opinion.

The meeting minutes and verbatim recording indicate that the City Council complied with the section 2(c)(11) requirement to record and enter into the closed session

¹⁶Letter from Jeffrey R. Jurgens, Sorling Northrup Attorneys, to Leah Bartelt, Assistant Attorney General, Office of the Attorney General, Public Access Bureau, at 2-3 (March 21, 2017).

minutes a specific basis for finding that litigation was probable. Based on the City Council's response, it was not unreasonable for the City Council to believe that termination of the Agreement could at some point result in litigation. At the time of the closed session discussion, however, concerns about the Agreement by both parties had been ongoing for some time and the City Council had not yet taken definitive action to alter or terminate the Agreement. Thus, it does not appear that the City Council had reasonable grounds to believe that a lawsuit was more likely than not to be instituted or was close at hand. Additionally, even if the City Council's finding that litigation was "probable or imminent" was reasonable, the closed session discussion did not focus on litigation, as required by the 2(c)(11) exception. This office concludes that the February 20, 2017, closed session discussion focused not on the "strategies, posture, theories, and consequences" of any probable litigation, but rather on the City Council's course of action with respect to the Agreement. Because the discussion primarily concerned what course of action to take related to the termination of the Agreement, this office concludes that the City Council's February 20, 2017, closed session was not authorized by section 2(c)(11) of OMA and therefore 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 February 20, 2017, the City of Bloomington City Council closed a portion of its meeting to the public to discuss "probable litigation."
- 2) On February 28, 2017, Mr. Jason Chambers, State's Attorney for McLean County, submitted a letter to the Public Access Bureau referring citizen complaints that alleged that the Board's February 20, 2017, closed session discussion was improper because litigation was not probable. On March 6, 2017, Mr. Chambers confirmed by e-mail that he wished his letter to be treated as a Request for Review.
- 3) On March 13, 2017, the Public Access Bureau sent a copy of the Request for Review to the City's Mayor and asked the City Council to provide a written response to the allegation in the Request for Review together with copies of the verbatim recording of the February 20, 2017, closed session meeting and the meeting minutes or draft minutes.
- 4) By letter dated March 21, 2017, counsel for the City furnished the requested materials and asserted in his written response that the City Council properly entered into closed session to discuss a "dispute between the City of Bloomington and Town of Normal regarding a 30-year old intergovernmental agreement" referred to as the Metro-Zone Master Agreement. The City Council furnished additional information and argument to this office confidentially.

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5) On March 24, 2017, this office sent a redacted copy of the City Council's response to Mr. Chambers.

6) On May 5, 2017, this office extended the time within which to issue a binding opinion by 21 business days, to June 6, 2017, 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) Under the section 2(c)(11) exception, the public body must confine its closed session discussion to the litigation itself. Section 2(c)(11) does not authorize a public body to discuss in closed session taking an action or making a decision on the underlying issue that is likely to be the subject of the litigation.

10) Rather than discussing the strategies, posture, theories, and consequences of pending, probable, or imminent litigation, the City Council's February 20, 2017, closed session discussion focused on its course of action with respect to the Metro-Zone Master Agreement. Accordingly, the Board violated section 2(a) of OMA by discussing matters outside the scope of section 2(c)(11) of OMA.

In accordance with these findings of fact and conclusions of law, the City Council is directed to remedy this violation by disclosing to Mr. Chambers and making publicly available the closed session verbatim recording of its February 20, 2017, meeting. As required by section 3.5(e) of OMA, the City Council 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).

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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 within 35 days of the date of this decision, naming the Attorney General of Illinois and Mr. Jason Chambers 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: *Via electronic mail*
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CERTIFICATE OF SERVICE

Neil P. Olson, Deputy Public Access Counselor, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 17-004) upon:

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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 June 6, 2017.



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