OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

November 5, 2012

PUBLIC ACCESS OPINION 12-013
(Request for Review 2012 PAC 20863)

OPEN MEETINGS ACT:
Improper Discussion of Proposed Ordinance in Closed Session; Requirement to Recite and Record Basis for Finding that Litigation is Probable or Imminent; Requirement to Record Closed Sessions; Taking Final Action at Closed Session Prohibited.

Mr. Dale Wojtkowski
13932 County Highway 12
Venedy, Illinois 62214

The Honorable David Meyer
Chairman, Washington County Board
101 East St. Louis Street
Nashville, Illinois 62263

Dear Mr. Wojtkowski and Mr. Meyer:

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 that follow, this office concludes that on June 25, 2012, the Finance Committee of the Washington County Board (Finance Committee) violated the requirements of OMA by improperly discussing an ordinance authorizing a coal company to build and operate a landfill in a meeting that was closed to the public pursuant to section 2(c)(11) of OMA (5 ILCS 120/2(c)(11) (West 2011 Supp.)). On that date, the Finance Committee also violated the provisions of OMA by failing to publicly recite and record in the closed session minutes its basis for determining that litigation was probable or

imminent and by failing to create and maintain a verbatim recording of the closed session discussion. The Finance Committee also appears to have taken a final action during the closed session, which is not allowed under OMA.

BACKGROUND

On August 7, 2012, the Public Access Bureau received a Request for Review in which Mr. Dale Wojtkowski alleged that on June 25, 2012,[1] the Finance Committee improperly discussed plans for a landfill for the disposal of coal ash in a meeting that was closed to the public pursuant to section 2(c)(11) of OMA, which permits a public body to hold a closed meeting to discuss "probable or imminent" litigation affecting the public body. On August 16, 2012, the Public Access Bureau forwarded a copy of the Request for Review to the Chairman of the County Board and requested:

> [A] written response to the allegation that the Board held a discussion pursuant to the section 2(c)(11) exception which is not within the scope of that exception. In your response, please clarify whether the matters discussed in closed session concern pending litigation, or litigation which the Board found to be probable or imminent; if the Board found litigation to be probable or imminent, please provide a detailed factual basis to support that finding. In addition, please provide a copy of the June 25, 2012, agenda and closed session minutes together with a copy of the verbatim recording of the closed session discussion.[2]

On August 29, 2012, the Washington County State's Attorney responded on behalf of the Finance Committee by providing copies of the agenda, as well as minutes of both the open and closed sessions of the June 25, 2012, meeting. In addition, the State's Attorney furnished for this office's review a copy of a letter from Prairie State Generating Company, LLC (PSGC) in which PSGC expressed its concerns about the legality of an amendment to the Washington County Sanitary Landfill ordinance and requested an opportunity to meet with the County Board in closed session. This letter further stated that "[i]f we are unable to resolve this

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[1]The Request for Review also alleged that the Finance Committee improperly discussed plans for a coal ash landfill in closed session on June 7, 2012. However, the Public Access Bureau is unable to review that allegation because we received Mr. Wojtkowski's Request for Review more than 60 days after that alleged violation. 5 ILCS 120/3.5(a) (West 2010) ("A person who believes that a violation of this Act by a public body has occurred may file a request for review with the Public Access Counselor established in the Office of the Attorney General not later than 60 days after the alleged violation").

[2]Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to David Meyer, Board Chairman, Washington County Board (August 16, 2012).

matter, PSGC will proceed to file an appropriate legal action against Washington County seeking judicial review of this matter."[3] The State's Attorney's response to the allegations in the Request for Review asserted that the Finance Committee found litigation to be probable or imminent "based upon the probable litigation specifically referred to in the letter from PSGC dated March 28, 2012. The discussion concerned PSGC's proposal for resolving the matter prior to filing suit."[4] In her response, the State's Attorney also noted that, "[w]hen I requested the verbatim recording of the closed session, it was brought to my attention that committee meetings are not being recorded. There is no recording to provide."[5]

On September 12, 2012, this office forwarded a copy of the County's response to Mr. Wojtkowski.[6] He replied in a letter dated September 19, 2012.

On October 4, 2012, this office properly extended the time to issue a binding opinion pursuant to section 3.5(e) of OMA.

ANALYSIS

Section 2(c)(11) of OMA

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."

Section 2(c)(11) of OMA permits a public body to discuss in closed session:

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[3]Letter from Peter DeQuattro, President and Chief Executive Officer, Prairie State Generating Company, to David Meyer, Washington County Board Chairman (March 28, 2012).

[4]Letter from Julie Kozuszek, Washington County State's Attorney, to Steve Silverman, Assistant Attorney General, Public Access Bureau (August 29, 2012).

[5]Letter from Julie Kozuszek, Washington County State's Attorney, to Steve Silverman, Assistant Attorney General, Public Access Bureau (August 29, 2012).

[6]Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Dale Wojtkowski (September 12, 2012).

> 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.)

In *Henry v. Anderson* 356 Ill. App. 3d 952, 957 (4th Dist. 2005), the Appellate Court held that before closing a meeting under section 2(c)(11) to discuss probable or imminent litigation, a public body must publicly announce on the record "(1) a finding that litigation was probable or imminent and (2) a basis for such a finding." The requirement that a public body must disclose the requisite finding and record it in the closed session minutes is "intended to prevent public bodies from using the distant possibility of litigation as a pretext for closing their meetings to the public." *Henry*, 356 Ill. App. 3d at 957; *see also* 1983 Ill. Att'y Gen. Op. No. 83-026, issued December 23, 1983, at 6 ("if litigation is not pending, the public body must make and record a finding that litigation is probable or imminent as a prerequisite to closing a meeting to the public under the exception. This requirement is mandatory and exists to ensure that there is a reasonable and justifiable basis" to close the meeting).

For a public body to rely on section 2(c)(11) of OMA to close 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." 1983 Ill. Att'y Gen. Op. No. 83-026, issued December 23, 1983, at 10. Such determinations must be made "by examining the surrounding circumstances in light of logic, experience, and reason." Ill. Att'y Gen. Op. No. 83-026, issued December 23, 1983, at 10. Further, "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, issued December 23, 1983, at 14. 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." Ill. Att'y Gen. Op. No. 83-026, issued December 23, 1983, at 12. Thus, 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.

Although PSGC sent a letter to the Chairman of the County Board which suggested that a lawsuit would be filed if the parties could not reach an agreement, it does not appear that, at the time when it held its closed session discussion, the Finance Committee had a reasonable basis to believe that a lawsuit was imminent or more likely than not to be filed. In its March 28, 2012, letter, PSGC states: "PSGC has determined that *unless* Washington County

properly addresses legal defects in the Ordinance, PSGC *may be left with no alternative* except to file suit against Washington County seeking judicial relief." (Emphasis added.) Notably, the letter was sent by the President of PSGC, not an attorney representing PSGC. In addition, PGSC's letter was sent almost three months prior to the Finance Committee's June 25, 2012, meeting without the commencement of an action, which seems to raise a question about the litigation being "imminent." Thus, under these specific circumstances, it does not appear to have been reasonable for the Finance Committee to enter closed session pursuant to section 2(c)(11) of OMA.

Even if it had a reasonable basis to believe that litigation was more likely than not to be filed or was imminent, however, the Finance Committee did not discuss the possible litigation in the closed session. The materials submitted by the County do not assert or indicate that the County Board discussed the strategies, posture, theories, and consequences of imminent or probable litigation, which could have been properly discussed in closed session. Instead, the closed session minutes indicate that the Finance Committee discussed the substance of the issues relating to the possible litigation – a proposed ordinance and hosting agreement that would authorize PSGC to operate a landfill to dispose of coal ash. According to the minutes, the Finance Committee invited representatives of PSGC to join the discussion. Further, the Finance Committee agreed to recommend approval of the ordinance and hosting agreement to the full County Board, if PSGC would host an informational meeting about the ash pile.[7]

Although PSGC's letter suggested meeting with the County Board in closed session under section 2(c)(11) to resolve their differences, this proposal, and even PSGC's stated intention to file suit if an agreement on the ordinance was not reached, does not permit the Finance Committee to discuss subjects other than litigation in a session closed pursuant to section 2(c)(11). The County's response to the allegations in the Request for Review noted that "the [closed session] discussions concerned PSGC's ***proposal for resolving the matter prior to filing suit.***"[8] (Emphasis added.) PSGC's proposal consisted of its proposed version of an ordinance and hosting agreement. But even if PSGC offered its version of an ordinance and hosting agreement as part of its effort to avoid litigation and the Finance Committee decided to consider the ordinance and hosting agreement to avoid litigation, that does not permit the Finance Committee to discuss the merits of the ordinance and hosting agreement in a closed session. Accordingly, this office concludes that the Finance Committee improperly discussed the ordinance and hosting agreement, which are matters of significant public interest, in a closed session.

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[7]Washington County Board Finance Committee, Closed Session Meeting, June 25, 2012, Minutes.

Additional OMA Violations

Our conclusion that the Finance Committee violated section 2(a) of OMA by discussing the proposed ordinance and hosting agreement in a closed meeting essentially resolves this Request for Review. However, our review of this matter also raised additional OMA concerns relating to the closed session on June 25, 2012, that should be addressed.

First, even assuming, *arguendo*, that discussion of the proposed ordinance and hosting agreement in a closed session would have been proper under section 2(c)(11), the Finance Committee did not fulfill that section's requirements for going into a closed session. The minutes of the open session of the June 25, 2012, meeting indicate that the Finance Committee unanimously voted to enter into a closed session pursuant to section 2(c)(11).[9] The open session minutes do not indicate that the Finance Committee publicly articulated any basis for the finding that litigation was probable or imminent. And the basis of such a finding is not recorded in the closed session minutes as expressly required by section 2(c)(11). The failure to articulate and record this basis in the minutes of the closed session violated section 2(c)(11) of OMA.

Second, the Finance Committee violated section 2.06(a) of OMA (5 ILCS 120/2.06(a) (West 2010)) by failing to create and maintain a verbatim recording of its June 25, 2012, closed session discussion. Section 2.06(a) provides that "[a]ll public bodies shall keep * * * a verbatim record of all their closed meetings in the form of an audio or video recording[.]" Given the burden of proof on the public body to establish that it complied with OMA in conducting the closed session, the failure of the Finance Committee to prepare a verbatim recording as required by law, may have worked to the detriment of the Finance Committee.

The third issue concerns whether the Finance Committee took a final action in the closed session. Section 2(e) of OMA (5 ILCS 120/2(e) (West 2011 Supp.), as amended by Public Acts 97-813, effective July 13, 2012; 97-876, effective August 1, 2012) provides that "[n]o final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted."

The closed session minutes of the June 25, 2012, meeting indicate that the Finance Committee decided to recommend approval of the ordinance and hosting agreement to

[9]The Finance Committee also cited section 2(c)(6) of OMA (5 ILCS 120/2(c)(6) (West 2011 Supp.)), which allows discussion of the setting of a price for sale or lease of property owned by the public body in closed session. The Finance Committee discussed a separate issue in closed session pursuant to section 2(c)(6), the propriety of which Mr. Wojtkowski did not dispute in his Request for Review. Therefore, this binding opinion does not address that portion of the closed session discussion.

the full County Board. After reviewing those minutes, this office requested from the State's Attorney clarification as to "whether the Finance Committee recommended that the County Board approve the proposed ordinance and hosting agreement and whether a vote on whether to do so was taken in open session[.]"[10]

On October 12, 2012, the State's Attorney responded on behalf of the Finance Committee by stating, in pertinent part:

> It does not appear that any formal recommendation was acted upon by the Finance Committee or made to the full County Board * * *. Washington County Board Committees often proceed in this manner, however, coming to a general implied consensus without objection rather than taking formal action. It is not uncommon that a recommendation would be inferred and not overtly stated. It is my understanding that the Finance Committee anticipated a decision by the entire Board, but that the committee had no reason to object to the approval of the ordinance and the hosting agreement. In this case, no action was taken by the Finance Committee in either open or closed session to make a recommendation to the full Board.[11]

Based on this explanation and the closed session minutes, it appears that the Finance Committee informally agreed during the closed session either to recommend passage of the proposed ordinance and hosting agreement, or at least not to oppose the proposed ordinance and hosting agreement. By doing so, the Finance Committee implicitly recommended that the full County Board approve the agreement, which it subsequently did at its June 26, 2012, special meeting. The open session meeting minutes indicate that the Finance Committee, after returning to open session on June 25, 2012, voted to adjourn the meeting without publicly deliberating on these matters or taking any action. Accordingly, this office notes that when such a consensus is reached in a closed session, even if it is reached informally, as a practical matter, that consensus constitutes a final action. Because no final action may be taken in closed session, in order to comply with the requirements of OMA, the Finance Committee must discuss and vote on such an agreement in an open meeting.

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[10]Letter from Steve Silverman, Assistant Attorney General, Public Access Bureau, to Julie Kozuszek, State's Attorney, Washington County (October 4, 2012).

[11]Letter from Julie Kozuszek, Washington County State's Attorney, to Steve Silverman, Assistant Attorney General (October 12, 2012).

FINDINGS AND CONCLUSIONS

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

1) On June 25, 2012, the Finance Committee of the Washington County Board discussed in a closed session a proposed ordinance and hosting agreement relating to a landfill for the disposal of coal ash. The Finance Committee cited section 2(c)(11) of OMA as its basis for holding a closed meeting. Section 2(c)(11) of OMA 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 August 7, 2012, the Public Access Bureau received Mr. Dale Wojtkowski's' Request for Review alleging that the Finance Committee violated the Open Meetings Act by discussing that matter in a closed session. Mr. Wojtkowski's Request for Review was timely filed and otherwise complies with the requirements of section 3.5(a) of OMA.

3) Pursuant to section 3.5(e) of OMA, the Attorney General extended the time to issue a binding opinion by 21 business days, until November 6, 2012. Therefore, the Attorney General may properly issue a binding opinion with respect to Mr. Wojtkowski's Request for Review.

4) By discussing in closed session a proposed ordinance and hosting agreement that did not concern or probable or imminent litigation within the scope of section 2(c)(11), the Finance Committee violated section 2(a) of OMA, which requires all meetings to be open to the public unless excepted in section 2(c).

5) By failing to disclose and record in the closed session minutes its basis for finding that litigation was probable or imminent, the Finance Committee violated section 2(c)(11) of OMA.

6) By failing to make an audio or video recording of the June 25, 2012, closed session discussion, the Finance Committee violated section 2.06(a) of OMA, which provides that "[a]ll public bodies shall keep * * * a verbatim record of all their closed meetings in the form of an audio or video recording."

7) Reaching an agreement in closed session not to oppose the proposed ordinance and hosting agreement is a final action which a public body must discuss and vote on in an open meeting after informing the public of the nature of the action being taken.

In accordance with these findings of fact and conclusions of law, the Finance Committee is directed to: 1) release to Mr. Wojtkowski and make available for inspection and copying the portions of the June 25, 2012, closed session minutes which pertain to the proposed ordinance; 2) record all future closed session discussions; and 3) conduct its future meetings in full compliance with OMA. As required by section 3.5(e) of OMA, the Finance Committee 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 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 Mr. Dale Wojtkowski 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