



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 5, 2018

Via electronic mail

Mr. Stan Zegel
Executive Director
Citizen Participation Institute
director@citizenparticipation.org

The Honorable Cathy Terrill
Chairperson
DuPage County Election Commission
421 North County Farm Road
Wheaton, Illinois 60187

Via electronic mail

Mr. Sean Conway
Attorney for DuPage County Election Commission
Bond, Dickson & Conway
400 South Knoll Street, Unit C
Wheaton, Illinois 60187
seanconway@bond-dickson.com

RE: OMA Request for Review – 2018 PAC 52493

Dear Mr. Zegel, Chairperson Terrill, and Mr. Conway:

This determination letter is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). For the reasons that follow, the Public Access Bureau concludes that the DuPage County Election Commission (Commission) did not hold an improper closed session discussion during its April 3, 2018, special meeting with the exception of one discrete portion of the discussion.

BACKGROUND

On April 4, 2018, Mr. Stan Zegel submitted a Request for Review to the Public Access Bureau alleging that the Commission violated OMA during its April 3, 2018, special meeting by improperly discussing certain matters in closed session that were outside the scope of

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the specific exceptions in OMA that the Commission cited as its basis for closing the meeting. Mr. Zegel provided this office with a copy of the meeting agenda,¹ which listed three exceptions to the general requirement that public bodies conduct public business openly. Specifically, the agenda indicated that the Commission intended to enter closed session to perform a bi-annual review of its closed session minutes pursuant to section 2(c)(21) of OMA (5 ILCS 120/2(c)(21) (West 2017 Supp.)), and to discuss personnel issues and pending or probable litigation pursuant to sections 2(c)(1) and 2(c)(11) of OMA, respectively (5 ILCS 120/2(c)(1), (c)(11) (West 2017 Supp.)). Mr. Zegel questioned the Commission's reliance on the latter two exceptions. In particular, he questioned whether the Commission closed the meeting to discuss specific employee matters and whether the Commission faced any probable litigation. According to Mr. Zegel, the closed session was held in connection with problems that occurred during the March 20, 2018, primary election resulting from defective materials supplied by a vendor. Mr. Zegel contended that it was "way too early in the process of dealing with the vendor to be preparing a lawsuit," and that the section 2(c)(11) exception "[did] not allow [the Commission] to discuss with their attorney options for redress from the vendor."²

On April 13, 2018, this office forwarded a copy of the Request for Review to the Commission and asked it to provide this office with copies of the April 3, 2018, meeting agenda, open and closed session minutes, and closed session verbatim recording for this office's confidential review, together with a written response to Mr. Zegel's allegations. In particular, this office asked the Commission to provide a detailed explanation for the applicability of sections 2(c)(1) and 2(c)(11) of OMA to the content of the closed session discussion. On April 27, 2018, the Commission provided this office with those materials, including both a complete version of its written response for this office's confidential review and a redacted version for this office to forward to Mr. Zegel.³ This office also received copies of additional documents for this office's confidential review. On May 3, 2018, this office forwarded a copy of the Commission's redacted response to Mr. Zegel; he replied on May 14, 2018. Mr. Zegel maintained that it was premature for the Commission to discuss litigation against the vendor and that the closed session was merely held to discuss possible litigation.

¹DuPage County Election Commission, Agenda Item e, Executive Session (April 3, 2018).

²E-mail from Stan Zegel, Executive Director, [Citizen Participation Institute], to Public Access Counselor (April 4, 2018).

³See 5 ILCS 120/3.5(c) (West 2016) ("The Public Access Counselor shall forward a copy of the [public body's] answer or redacted answer, if furnished, to the person submitting the request for review.")

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DETERMINATION

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 2016). Accordingly, section 2(a) of OMA requires that all meetings of a public body remain open to the public unless an exception in section 2(c) of OMA is properly invoked. 5 ILCS 120/2(a), (c) (West 2017 Supp.). The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2017 Supp.).

In its response to this office, the Commission confirmed that it had contracted with a vendor, Liberty Systems, LLC, to provide election kits and supplies for each county polling site, and that certain materials furnished by this vendor were found to be defective during the March 20, 2018, primary election. Addressing the April 3, 2018, meeting, the Commission stated that "[p]robable litigation against the Vendor was the sole topic of discussion at the closed session."⁴ This office's review of the closed session verbatim recording confirmed that the Commission neither performed a review of closed session minutes nor discussed personnel issues involving specific employees in the closed session. While the meeting agenda indicated the Commission's intent to discuss matters in closed session pursuant to the sections 2(c)(1) and 2(c)(21) exceptions, it appears that the Commission subsequently decided not to do so at the meeting. Accordingly, this office concludes that the Commission did not improperly discuss issues in closed session pursuant to sections 2(c)(1) and 2(c)(21) of OMA.

The remaining exception, section 2(c)(11), permits a public body to close a portion of a meeting to discuss:

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.

The requirement that litigation must be probable or imminent if not already pending is "intended to prevent public bodies from using the distant possibility of litigation as a pretext for closing their meetings to the public." *Henry v. Anderson*, 356 Ill. App. 3d 952, 957 (4th Dist. 2005). Further, the scope of section 2(c)(11) is limited to the "strategies, posture, theories, and

⁴Letter from Sean Conway, One of [the Attorneys for] DuPage County Election Commission, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 27, 2018), at 4.

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consequences of the litigation itself." Ill. Att'y Gen. Op. No. 83-026, issued December 23, 1983, at 13-14 (concluding that it was improper to discuss the merits of an annexation proposal in closed session because the possibility of a lawsuit over the annexation pertained to whether to proceed with the annexation rather than litigation itself); Ill. Att'y Gen. Pub. Acc. Op. No. 17-004, issued June 6, 2017, at 7 (closed session discussion that primarily concerned what course of action to take with respect to an agreement was not within the scope of section 2(c)(11)).

The Commission asserted that "as of April 3, 2018, there were reasonable grounds to believe that a lawsuit was more likely than not to be instituted by the Election Commission against the Vendor."⁵ According to the Commission, the contract with Liberty Systems "provides certain rights and remedies to the Election Commission in the event the Vendor breaches one or more of its obligations to provide the Election Commission with the Election Kits and supplies per the product specifications."⁶ The Commission argued that, because Liberty Systems failed to provide functional Ender Cards, it "had a ripe and valid claim for breach of contract against the Vendor and it was most certainly not too early to prepare a lawsuit[]" for monetary damages.⁷

This office has reviewed the complete version of the Commission's response, the closed session minutes and verbatim recording, and the additional documents provided confidentially. Based on a review of those materials, this office has determined that the Commission discussed litigation as probable and as the primary option under consideration rather than as a mere possibility at the time of the meeting. The closed session minutes reflect the Commission's discussion of claims that it could pursue against the vendor; the complete response and additional materials contain further details of those claims. The closed session recording similarly reveals the Commission discussing with its attorney the potential recovery of damages related to the defective Ender Cards and other possible consequences of filing legal action against Liberty Systems. Because the vast majority of the closed session concerned probable or imminent litigation at the time of the meeting, this office concludes that the Commission's discussion of that topic was within the scope of the section 2(c)(11) exception.

⁵Letter from Sean Conway, One [of the Attorneys for] DuPage County Election Commission, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 27, 2018), at 6.

⁶Letter from Sean Conway, One [of the Attorneys for] DuPage County Election Commission, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 27, 2018), at 2.

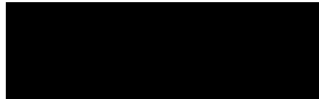
⁷Letter from Sean Conway, One [of the Attorneys for] DuPage County Election Commission, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (April 27, 2018), at 6.

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However, this office has determined that the Commission did not entirely limit its closed session discussion to probable litigation. A discrete portion of the closed session discussion concerned a matter that was separate and distinct from the topic of litigation. This discrete discussion began at approximately the 24:07 minute mark of the closed session recording and ended at approximately the 28:25 minute mark. Because that portion of the closed session discussion did not pertain to the strategies, posture, theories, and consequences of probable or imminent litigation, this office requests that the Commission disclose to Mr. Zegel and make publicly available that portion of the closed session recording.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,

A solid black rectangular redaction box covering the signature of Teresa Lim.

TERESA LIM
Assistant Attorney General
Public Access Bureau

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