



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

October 25, 2021

Via electronic mail

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████████████████████

Via electronic mail

Mr. Todd Faulkner
Franczek
300 South Wacker Drive, Suite 3400
Chicago, Illinois 60606
jtf@franczek.com

RE: OMA Request for Review – 2019 PAC 58651

Dear ██████████ and Mr. Faulkner:

This determination letter is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)). For the reasons that follow, the Public Access Bureau concludes that the Board of Education (Board) of Elmhurst Community Unit School District 205 (District) improperly discussed certain matters in closed session during its April 23, 2019, meeting, and failed to make a finding that litigation was probable or imminent.

On June 21, 2019, ██████████ submitted a Request for Review to the Public Access Bureau alleging that during its closed session on April 23, 2019, the Board improperly discussed an intergovernmental agreement (IGA) between the District and the City of Elmhurst (City). Noting that the Board went into closed session pursuant to sections 2(c)(5), 2(c)(6), and 2(c)(11) of OMA (5 ILCS 120/2(c)(5), (c)(6), (c)(11) (West 2018)), ██████████ claimed that the section 2(c)(11) exception was inapplicable because "it does not appear that the School District has explicitly threatened litigation, nor does it appear that litigation is filed, pending, probable, or imminent."¹ He acknowledged, however, that Board President Kara Caforio publicly stated that the Board would explore avenues other than continued negotiation with the City to recoup the

¹Letter from ██████████ to Sarah Pratt, Public Access Counselor, Office of the Attorney General (June 21, 2019).

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money the Board believed the District was owed. He further acknowledged that during the Elmhurst City Council's May 6, 2019, meeting, the City's mayor stated that the District was planning to sue the City. Yet, he argued, even if litigation was properly determined to be probable or imminent, the Board did not limit its closed session discussion to the strategies, postures, theories, and consequences of the litigation as required.

██████████ further argued that the IGA contained provisions that are unrelated to the sale, purchase, or lease of property under sections 2(c)(5) and 2(c)(6), such as payments the City believed were due from the District for a 2004 tax increment financing (TIF) agreement. He claimed that the Board's closed session discussion concerned aspects of the IGA that are unrelated to the reasons for entering closed session, such as stormwater risk management, expanding or reconfiguring schools, and facility needs. ██████████ enclosed a copy of the minutes of the meeting, a *Pioneer Press* article about the meeting,² and the City's April 19, 2019, response to the District's March 29, 2019, proposed version of the IGA.

On June 28, 2019, the Public Access Bureau sent a copy of the Request for Review to the Board and asked it to provide this office with copies of its April 23, 2019, agenda, open and closed session minutes (in draft form if necessary), and closed session verbatim recording for this office's confidential review, together with a written response to the allegation that it improperly discussed the IGA during closed session. On August 13, 2019, counsel for the Board provided this office with those materials, including two versions of its written answer: a complete version for this office's confidential review, and a redacted version for forwarding to ██████████³ ██████████ did not submit a reply.

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 2020).

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2018)) provides that all meetings of a public body shall be open to the public unless the subject of the meeting falls within one of the exceptions set out in section 2(c) of OMA. The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2018).

²Graydon Megan, *Outgoing Elmhurst District 205 Board rejects agreement with city on stormwater plan*, PIONEER PRESS (May 6, 2019, 4:55 p.m.), <https://www.chicagotribune.com/suburbs/elmhurst/ct-dob-elmhurst-jackson-york-stormwater-tl-0509-story.html>.

³See 5 ILCS 120/3.5(c) (West 2018) ("The Public Access Counselor shall forward a copy of the answer or redacted answer, if furnished, to the person submitting the request for review.").

Sections 2(c)(5), 2(c)(6), and 2(c)(11) of OMA allow a public body to enter into closed session to consider:

(5) The purchase or lease of real property for the use of the public body, including meetings held for the purpose of discussing whether a particular parcel should be acquired.

(6) The setting of a price for sale or lease of property owned by the public body.

* * *

(11) 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.

In its non-confidential response in this matter, the Board argued that it properly entered closed session on April 23, 2019, under these three exceptions to the requirement to discuss public business openly. The Board's counsel stated that the IGA under consideration "was the culmination of nine months of negotiations between the City and the District following the District's threat to sue the City over the City's failure to pay millions of dollars to the District" under the aforementioned 2004 TIF agreement.⁴ He explained that the proposed IGA involved various tradeoffs, including the District's conveyance of easements to the City for stormwater management projects, the City's agreement to make certain land improvements, lawsuit waivers for both parties for certain matters, and TIF payments from the City to the District. The District argued that the City's payments and commitments "are all a part of the consideration, or 'sale price', of the easements to be granted to the City."⁵ The Board explained that it "viewed the City's April 19 response as a substantial regression from positions taken in the months which led

⁴Letter from Todd Faulkner, Franczek, to Josh Jones, Assistant Attorney General, Public Access Bureau (August 8, 2019), at 1.

⁵Letter from Todd Faulkner, Franczek, to Josh Jones, Assistant Attorney General, Public Access Bureau (August 8, 2019), at 2.

up to the District's March 29 proposed version of the IGA[," and disputes remained over various matters.⁶

Addressing its use of the section 2(c)(11) exception, the Board asserted that "[a]t the outset of the closed session, the probable or imminent finding was cryptically made by reference to the prior threats to sue the City and is reflected in the relevant portions of the minutes of the closed session."⁷ This office's review of the closed session verbatim recording confirmed that the Board did not make a finding that litigation was probable or imminent. On that basis alone, the Board did not adhere to section 2(c)(11) of OMA. *See Henry v. Anderson*, 356 Ill. App. 3d 952, 957 (4th Dist. 2005) (holding that "the board violated the Act by failing to state, on the record, (1) a finding that litigation was probable or imminent and (2) a basis for such a finding.").

According to the Board's attorney, "[t]he primary focus of the Board's closed session discussion on April 23 was the Board's response to the City's April 19 draft of the IGA. Interwoven in that discussion were all, or virtually all, of the elements of the IGA and the bringing of a lawsuit."⁸ This office's review of the closed session verbatim recording confirmed that the IGA was the focus of the closed session discussion, but, as discussed further below, there is no closed session exception or set of exceptions that could encompass all the various aspects of negotiating the IGA. Counsel for the Board also argued that Board President Caforio's statement after the closed session about exploring other ways to press its claims for the TIF money from the District "was a politically polite way of stating that the Board would litigate its claims against the City with respect to the TIF issues."⁹ The Board's attorney further argued:

In summary, probable litigation, the sale price of real estate, and the acquisition of a specific parcel of real estate were interwoven together in a discussion which fell squarely within the scope of Sections 2(c)(5), (6), and (11) of the Act. There should be no doubt that the Board properly discussed the litigation and the IGA in closed session. Any other conclusion would, contrary to

⁶Letter from Todd Faulkner, Franczek, to Josh Jones, Assistant Attorney General, Public Access Bureau (August 8, 2019), at 2.

⁷Letter from Todd Faulkner, Franczek, to Josh Jones, Assistant Attorney General, Public Access Bureau (August 8, 2019), at 2.

⁸Letter from Todd Faulkner, Franczek, to Josh Jones, Assistant Attorney General, Public Access Bureau (August 8, 2019), at 3.

⁹Letter from Todd Faulkner, Franczek, to Josh Jones, Assistant Attorney General, Public Access Bureau (August 8, 2019), at 3.

sound public policy, severely shackle the ability of a public body to threaten litigation and negotiation of a settlement agreement to avoid that litigation.^[10]

In addition, the Board asked this office to consider the Circuit Court of Sangamon County's reversal of Binding Opinion 17-004,¹¹ in which this office concluded that the City of Bloomington City Council held an improper closed session discussion under section 2(c)(11) about terminating its IGA with the Town of Normal because it did not have reasonable grounds to believe litigation was probable or imminent. In the time since the Board's response, however, the Illinois Appellate Court in *City of Bloomington v. Raoul*, 2021 IL App (4th) 190539, ___ N.E.3d ___ (2021) overturned the circuit court's decision. The Illinois Appellate Court agreed with this office that the City Council "did not reasonably believe that litigation was probable or imminent[,]" and that even if it did, "[a]bsent from the closed session was any discussion of legal theories, defenses, claims, or possible approaches to litigation." *City of Bloomington*, 2021 IL App (4th) 190539, ¶¶30, 36, ___ N.E.3d ___.

Similarly, here, the closed session verbatim recording reflects that the Board did not have reasonable grounds to believe litigation was probable or imminent. Crucially, the April 23, 2019, meeting marked the end of the tenure of three departing Board members and no relevant agenda item authorized the Board to take action concerning the IGA that evening. A threat of litigation at some point in the future is insufficient to demonstrate that litigation is in fact probable or imminent under the circumstances. The Board's closed session discussion does not evince that the "probable or imminent" threshold had yet been reached, given the next steps the Board discussed. Moreover, the closed session contained little to no discussion of legal theories, defenses, claims, or possible approaches to litigation. Thus, the section 2(c)(11) exception did not authorize the Board's April 23, 2019, closed session discussion.

Sections 2(c)(5) and 2(c)(6) also did not authorize the entire closed session discussion. In particular, the clear and unambiguous language of section 2(c)(6) of OMA restricts a public body from discussing the sale of public property in closed session other than to set a price. Section 2(c)(5) of OMA is broader in scope, allowing closed session discussions concerning issues involved in the purchase or lease of real property for the use of the public body, but neither exception authorizes general discussions regarding the sale of public property. *See Ill. Att'y Gen. Pub. Acc. Op. No. 15-003*, issued March 19, 2015, at 5 (section 2(c)(6) of OMA does "not extend to the discussion of general issues concerning the disposal of publicly-owned property."). Although the Board analogized this matter to a previous Request for Review

¹⁰Letter from Todd Faulkner, Franczek, to Josh Jones, Assistant Attorney General, Public Access Bureau (August 8, 2019), at 3.

¹¹Ill. Att'y Gen. Pub. Acc. Op. No. 17-004, issued June 6, 2017.

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(2014 PAC 30925) for the proposition that "there are numerous factors and discussion points that go into a board's decision regarding property all of which are appropriate in closed session so long as they relate back to the permitted closed session topic[,]"¹² the Board's April 23, 2019, closed session discussion did not all relate back to the setting of a price for the sale of real property or the purchase of real property. Additionally, the Board's closed session discussion did not include valuation of real property owned by the District, or a price the District would offer or accept for that property. The Board did briefly discuss, however, the purchase or lease of real property, as allowed under section 2(c)(5). Thus, while that portion of the Board's April 23, 2019, closed session discussion was not improper, the Board did not properly confine the rest of its discussion to the exceptions in OMA for property purchases, sales, or leases.

Accordingly, this office concludes that the Board improperly discussed matters outside the scope of the exceptions relied upon to close its April 23, 2019, meeting. To remedy this violation, this office asks that the Board vote to release the relevant portions of the April 23, 2019, closed session verbatim recording and minutes, except for the discrete portion of the closed session verbatim recording concerning a potential property acquisition.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. Please contact me at the Chicago address listed on the first page of this letter if you have questions.

Very truly yours,

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JOSHUA M. JONES
Deputy Bureau Chief
Public Access Bureau

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¹²Letter from Todd Faulkner, Franczek, to Josh Jones, Assistant Attorney General, Public Access Bureau (August 8, 2019), at 3.