

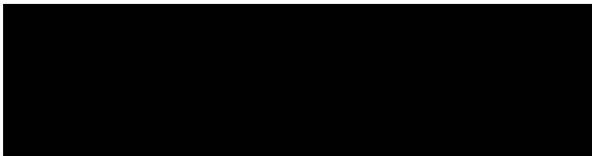


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

July 5, 2022

Via electronic mail



Via electronic mail

The Honorable Scott M. Levin
Mayor
City of Elmhurst
City Hall
209 North York Street
Elmhurst, Illinois 60126
Scott.levin@elmhurst.org

RE: OMA Request for Review – 2021 PAC C-0014/2021 PAC 68363¹

Dear [REDACTED] and Mr. Levin:

This determination 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 explained below, the Public Access Bureau concludes that the City of Elmhurst (City) City Council (Council) violated OMA during its November 23, 2020, special meeting by discussing matters in closed session that were not authorized by the exception that the Council relied on to close the meeting

BACKGROUND

On April 18, 2021, [REDACTED] submitted a Request for Review to the Public Access Bureau alleging that the Council violated OMA during the closed session portion of its November 23, 2020, special meeting when it discussed matters beyond the scope of the closed

¹Because of the breach to the Attorney General's Office's computer network, this office initially opened this Request for Review under a temporary file number. Please note the permanent file number as indicated.

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session exception that the Council cited as its basis for closing the meeting. On May 11, 2021, this office forwarded a copy of the Request for Review to the Council and asked it to respond to [REDACTED] allegations and to provide copies of the meeting minutes and the verbatim recordings of the closed special meeting. On May 20, 2021, this office received the Council's written response and the requested materials, along with a redacted version of the written response suitable for distribution to [REDACTED]. On May 25, 2021, this office forwarded the redacted copy of the Council's response to [REDACTED] with an opportunity to reply. On May 26, 2021, he submitted his reply.

DETERMINATION

Time Limit for Requests for Review

Section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2020)) provides, in pertinent part:

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 60 days after the alleged OMA violation. If facts concerning the violation are not discovered within the 60-day period, but are discovered at a later date, not exceeding 2 years after the alleged violation, by a person utilizing reasonable diligence, the request for review may be made within 60 days of the discovery of the alleged violation.** The request for review must be in writing, must be signed by the requester, and must include a summary of the facts supporting the allegation. (Emphasis added.)

[REDACTED] asserted that his Request for Review was timely filed despite being submitted more than 60 days after the date of the alleged violation. He stated that he only discovered the violation after reading an article in the local paper, *The Patch*, published on April 13, 2021. That article described a closed Council meeting in "late November" in which the Council discussed the terms of a conditional use permit issued to the Elmhurst Extended Care Center (EECC).³ From that article [REDACTED] surmised that the discussion occurred at the November 23, 2020, special meeting, the agenda for which stated the basis of the closed

²"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." 5 ILCS 120/3.5(c) (West 2020).

³David Giuliani, *Elmhurst Nursing Home Project Questioned*, THE PATCH, April 13, 2021, <https://patch.com/illinois/elmhurst/elmhurst-nursing-home-project-questioned>

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meeting: "Executive Session for the Purpose of Discussing: Pending/Probable Litigation pursuant to the Open Meetings Act[.]"⁴ Because the alleged violation occurred in closed session, it does not appear that [REDACTED] could have learned material facts concerning the alleged violation at the November 23, 2020, meeting until information concerning that matter was reported in *The Patch*. [REDACTED] initially submitted this Request for Review on April 15, 2021, and then again on April 18, 2021, both within 60 days of his discovery of information about the closed session.⁵ Accordingly, this Request for Review was filed within the time limits set out in section 3.5(a) of OMA, and this office has authority to review [REDACTED] allegations concerning the November 23, 2020, meeting.

Section 2(c)(11) of OMA

The intent of OMA is "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 2020)) 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 (5 ILCS 120/2(c) (West 2020)) and the meeting is closed in accordance with section 2a (5 ILCS 120/2a (West 2020)).

Section 2(c)(11) provides an exception for:

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.

5 ILCS 120/2(c)(11) (West 2020). The section 2(c) 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 2020).

⁴Letter from [REDACTED] to Sarah Pratt, Public Access Counselor, Office of the Attorney General, (April 15, 2021).

⁵[REDACTED] initially attempted to file his Request for Review via electronic mail on April 15, 2021. However, due to the breach to the Attorney General's Office computer network, his e-mail was rejected. Thereafter, he submitted his Request for Review via U.S. Postal Service on April 18, 2021. This copy was received by this office on April 29, 2021.

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[REDACTED] alleges that the Council's discussion at the closed session portion of the November 23, 2020, meeting exceeded the scope of section 2(c)(11): "[L]itigation may be discussed in closed session only when it is "filed" and "pending", or "when the public body finds that an action is probable or imminent[.]"⁶ In its response to the Request for Review, the Council did not assert that the discussion at the November 23, 2020, closed session concerned litigation that was filed or pending at the time of the meeting.

Although section 2(c)(11) of OMA permits public bodies to discuss "probable or imminent" litigation in closed session, "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[.]" and such a determination must be made "by examining the surrounding circumstances in light of logic, experience, and reason." Ill. Att'y Gen. Op. No. 26, issued December 23, 1983, at 10. In *Henry v. Anderson*, 356 Ill. App. 3d at 956-57, the Illinois Appellate Court strictly construed the section 2(c)(11) exception, stating:

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 pretext for closing their meetings to the public.

The Attorney General analyzed the section 2(c)(11) exception at length in Ill. Att'y Gen. Pub. Acc. Op. No. 16-007, issued September 13, 2016, concluding:

[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, 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.^{7]}

In its response to this office, the Council argued that it properly invoked section 2(c)(11) to hold its November 23, 2020, meeting because litigation concerning the permit for

⁶Letter from [REDACTED] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (April 15, 2021) at 2.

⁷Ill. Att'y Gen. Pub. Acc. Op. No. 16-007, at 8.

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EECC was probable or imminent. The Council explained that the City had previously granted EECC a conditional use permit for the expansion and improvement of an existing health care facility and that on November 20, 2020, EECC's attorney submitted a letter to the Council requesting an extension of that permit. Under the terms of the conditional use permit, the Council could grant the extension if it made a determination that EECC's project was "substantially under way." EECC's attorney informed the Council that a denial of the extension would amount to a revocation of the permit. The Council asserted to this office that:

Sometime following the November 20, 2020, letter, the City attorney had a conversation with [EECC] Attorney [Scott] Day as to EECC's intent to pursue litigation in the event that the City did not determine that EECC's monetary expenditures did not show that EECC was "substantially under way" with the conditional use permit as provided by City ordinance. Attorney Day informed the City attorney at the time that EECC would pursue litigation against the City in the event that the City determined that EECC was not "substantially underway" as that would result in the City revoking EECC's conditional use permit. Attorney Day indicated that Attorney Tom Geselbracht had been retained by EECC for purposes of litigation. Contemporaneous with these discussions, City attorney Storino had discussions with City staff regarding whether the City should pursue litigation against EECC related to EECC's lack of performance of the conditional use.^[8]

The Council provided a description of the discussion held during the closed session meeting in the confidential portion of its response to this office. In his reply, [REDACTED] argued that a discussion of the permit itself, rather than litigation, would be improper under section 2(c)(11) of OMA, and quoted an e-mail he had attached to his Request for Review sent by the City Manager to a member of the Council in February 2021, purportedly describing the closed session meeting at issue in this matter. The e-mail stated that the Council spoke of the EECC conditional use permit during its November 23, 2020, closed session, and noted that "[a] majority of Aldermen concurred with the City Attorney that EECC met the standard of 'substantially under way[.]'"⁹

⁸Letter from Storino Ramello and Durkin by Donald J. Storino to Grace Angelos, Assistant Attorney General, State of Illinois, Public Access Bureau (May 20, 2021) at 2.

⁹E-mail from James Grabowski, Elmhurst City Manager, to Alderman Bram (February 16, 2021), attached to Letter from [REDACTED] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (April 15, 2021).

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Attorney General Hartigan analyzed an earlier but substantially 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. He found that the city council appeared to have "acted prematurely in closing the meeting on the basis of the litigation exception in that litigation over the annexation could not have been probable or imminent until the * * * city council voted to adopt the annexation ordinance." Ill. Att'y Gen. Op. No. 83-026 at 13. Similarly, the Attorney General concluded that a closed session discussion concerning the merits of a landfill ordinance and hosting agreement was not proper under section 2(c)(11) of OMA even when the public body had previously received a letter discussing the possibility of litigation brought against it relating to the landfill ordinance. Ill. Att'y Gen. Pub. Acc. Op. No. 12-013, issued November 5, 2012, at 4-5. In that matter, the corporation had written to the public body "suggesting that a lawsuit would be filed if the parties could not reach an agreement" concerning the legality of an amendment to a landfill ordinance, and the public body discussed in closed session the corporation's proposal for resolving the matter prior to filing suit. Ill. Att'y Gen. Pub. Acc. Op. No. 12-013, issued November 5, 2012, at 5. There, the Attorney General concluded that "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." Finally, even once the litigation exception is properly invoked, the only matters which may lawfully be discussed at the closed meeting are the "strategies, postures, theories, and consequences of the litigation itself." Ill. Att'y Gen. Op. No. 83-026 at 14. *See City of Bloomington v. Raoul*, 2021 IL App (4th) 190539, ¶36, 184 N.E.3d 366, 372 (finding closed session discussion exceeded scope of section 2(c)(11) because "[a]bsent from the closed session was any discussion of legal theories, defenses, claims, or possible approaches to litigation").


Although the conversation described by the Council between the City Attorney and EECC's attorney signaled that a lawsuit could possibly be forthcoming, that litigation hinged on the question of whether EECC's project was "substantially under way." Litigation could have become "probable or imminent," but only in the event the City first determined that the project was not "substantially under way" and revoked the permit. Similarly, although the Council stated that the City Attorney had "discussions with City staff regarding whether the City should pursue litigation against EECC," at the time of the November 23, 2020, meeting, there is no indication that the City had reached the conclusion that EECC's project was not "substantially under way," which would have prompted a determination of what legal action the City should take with respect to the EECC permit. As discussed above, this office has previously determined that discussions on the merits of an underlying issue cannot be held in closed session pursuant to section 2(c)(11) even if one of the possible conclusions of those discussions may result in litigation. *See also City of Bloomington*, 2021 IL App (4th) 190539, ¶36, 184 N.E.3d 366, 372 (closed session discussion of "Option A, Option B, and other options to terminate the agreement" were not authorized under section 2(c)(11) of OMA).


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This office's review of the verbatim recording confirms that the Council had to resolve an underlying issue before litigation, whether it be brought by EECC or the City, could be imminent or probable. Although this office is not permitted to describe in detail the discussion that occurred at the November 23, 2020, closed session, it is apparent that the portion of the meeting pertaining to EECC centered on EECC and the conditional use permit rather than "strategies, posture, theories, and consequences" of probable or imminent litigation. Because there was no "imminent" or "probable" litigation at the time of that meeting and because the Council's discussions during the November 23, 2020, closed meeting concerned the merits of an underlying issue, this office concludes that the Council violated section 2(a) of OMA.

To remedy this violation, this office asks the Council to vote to disclose the closed session minutes and verbatim recording of the portion of the November 23, 2020, special meeting relating to EECC and then provide  with copies of those materials.

The Public Access Counselor has determined that resolution of these matters does not require the issuance of a binding opinion. These files are closed. Please contact me at (773) 590-7071 or the Chicago address listed on the first page if you have any questions.

Very truly yours,


GRACE ANGELOS
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
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