



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

April 26, 2024

Via electronic mail

[REDACTED]

Via electronic mail

The Honorable Jennifer Konen
Village President
Village of Sugar Grove
10 South Municipal Drive
Sugar Grove, Illinois 60554
jkonen@sugargroveil.gov

RE: OMA Request for Review – 2024 PAC 80076

Dear [REDACTED] and Ms. Konen:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2022)). For the reasons that follow, the Public Access Bureau concludes that the Village of Sugar Grove (Village) Board of Trustees (Board) held an improper closed session discussion during its February 6, 2024, meeting.

On February 8, 2024, [REDACTED], who is a member of the Board, submitted a Request for Review concerning the closed session portion of the Board's February 6, 2024, meeting. The Village Board entered closed session under the exception—to the general requirement that public bodies conduct public business openly—in section 2(c)(11) of OMA.¹ That exception authorizes public bodies to hold closed session discussions concerning litigation that is pending or "probable or imminent[.]" [REDACTED] alleged that the Village President presented in closed session a resolution to request that the State's Attorney file a *writ of quo warranto* to remove [REDACTED] from the Board by declaring his office vacant. He asserted:

¹5 ILCS 120/2(c)(11) (West 2022), as amended by Public Act 103-311, effective July 28, 2023.

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There was no need to go to executive session. I had not mentioned anything about litigation. They used the premise of Potential Litigation to call the executive session so that the Village President could push her agenda to have me removed from office. The resolution should have been brought up under regular business, discussed if the board members wished to do so, then voted on.

Therefore, with no threat of litigation, no executive session should have been called and the resolution to pass the Writ of Quo Warranto should be invalidated due to the illegal executive session.^[2]

On February 13, 2024, this office sent a copy of the Request for Review to the Board and asked it provide copies of the open and closed session minutes and the closed session verbatim recording of the Board's February 6, 2024, meeting. This office also asked the Board to provide a written answer to ██████████' allegation that the section 2(c)(11) exception did not authorize the Board's closed session discussion. On February 14, 2024, the Board responded and provided this office with the requested materials. On February 20, 2024, this office forwarded the Board's response to ██████████; he replied on February 21, 2024.

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 2022). Accordingly, 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 2022), as amended by Public Act 103-311, effective July 28, 2023. The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2022), as amended by Public Act 103-311, effective July 28, 2023.

Section 2(c)(11) of OMA permits a public body to close 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.** (Emphasis added.)

²E-mail from ██████████ to Public Access [Bureau, Office of the Attorney General] (February 8, 2024).

Where a public body provides no information that litigation has been filed, it "must (1) find that the litigation is probable or imminent and (2) record and enter into the minutes the basis for that finding." *Henry v. Anderson*, 356 Ill. App. 3d 952, 956-57 (2005). These requirements "prevent public bodies from using the distant possibility of litigation as pretext for closing their meetings to the public." *Henry*, 356 Ill. App. at 956-57. "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." Ill. Att'y Gen. Pub. Acc. Op. No. 16-007, issued September 13, 2016, at 8.

In its response to this office, the Board confirmed that it entered closed session to discuss a resolution to request a petition for a *writ of quo warranto* declaring the office held by ██████████ as Village Trustee to be vacant. The Board's brief explanation stated that the Village Attorney advised the Board to enter closed session "under exception 2(c)(11) to discuss probable litigation. A quo warranto action is a court proceeding. A quo warranto action must be taken or refused by the State's Attorney before an individual can take action."³

In reply to that answer, ██████████ disputed the Board's claim that there was pending or probable litigation, asserting that no lawsuits, including any *quo warranto* action, had been filed at the time of the meeting. He further argued:

The code section that the Village quotes in their letter, 2(c)(11) to discuss probable litigation requires that there be probable or imminent litigation. There was no probable or imminent litigation as required under the Open Meetings Act. Second, the Village President did not present any documents or statements that indicated litigation was probable. Therefore, there was no valid reason to go into executive session.^[4]

Following the closed session, the Board returned to open session and voted to approve a resolution requesting that the Kane County State's Attorney (State's Attorney) file a petition for *writ of quo warranto* to declare ██████████' Office vacant based a provision of the Municipal Code that provides:

³Letter from Scott Koeppel, Village Administrator, Village of Sugar Grove, to Matthew G. Goodman, Assistant Attorney General, Public Access Bureau, Office of the Illinois Attorney General (February 14, 2024).

⁴E-mail from ██████████ to Matthew [Goodman, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 21, 2024).

An admission of guilt of a criminal offense that upon conviction would disqualify the municipal officer from holding the office, in the form of a written agreement with State or federal prosecutors to plead guilty to a felony, bribery, perjury, or other infamous crime under State or federal law, constitutes a resignation from that office, effective on the date the plea agreement is made. For purposes of this Section, a conviction for an offense that disqualifies a municipal officer from holding that office occurs on the date of the return of a guilty verdict or, in the case of a trial by the court, on the entry of a finding of guilt. 65 ILCS 5/3.1-10-50(c)(2) (West 2022)

Before the vote, the Village President read a statement asserting that ██████████ vacated his office by entering into a deferred prosecution "agreement that calls for an admission under oath to the elements of a charge relating to forging public documents[.]"⁵ On March 20, 2024, the State's Attorney responded to the Board's request. In a letter sent to the Village President, the State's Attorney rejected that interpretation of the Municipal Code provision and declined to file a petition for *writ of quo warranto*: "[T]he record reflects that ██████████ did not plead guilty to any offense in open court before a judge, nor did he accept a guilty plea or the terms of any guilty plea agreement after appropriate admonishments. Without more, my office has no legal basis to bring a *Quo Warranto* action against ██████████ at this time."⁶

Based on our review of the relevant materials, this office concludes that at the time of the February 6, 2024, meeting, the Board did not have a sufficient basis to believe that litigation was probable or imminent as required to enter closed session pursuant to section 2(c)(11) of OMA. A *quo warranto* petition must be brought by the Office of the Attorney General or the county State's Attorney's Office, unless those offices refuse or fail to bring the suit, in which case an individual may file. 735 ILCS 5/18-102 (West 2022). Although the Board discussed its reasons for requesting the *quo warranto* petition, the closed session discussion illustrates that the Board understood there were competing arguments as to whether ██████████ had vacated his office and that the decision to file the petition rested with the State's Attorney. There is no indication that the Board had reasonable grounds to believe the State's Attorney was more likely than not to file the petition as it would have if, for example, the State's Attorney had been consulted beforehand and signaled agreement with the Board's interpretation of section 3.1-10-50(c)(2) of the Municipal Code. Indeed, the State's Attorney subsequently disagreed with that interpretation and denied the request to file the petition. Even if the Board had a good faith basis to believe ██████████ had vacated his office under the Municipal Code, any related legal

⁵Village of Sugar Grove Board of Trustees, Meeting, February 6, 2024, Draft Minutes 7.

⁶Letter from Jamie L. Mosser, Kane County State's Attorney, to Jennifer Konen, President, Village of Sugar Grove (March 20, 2024), at 2.

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action by the State's Attorney was a mere *possibility* at the time of the meeting. Because there was not a likelihood that litigation affecting the Board was probable or imminent, this office concludes that the Board improperly entered closed session pursuant to section 2(c)(11) of OMA.

In accordance with the conclusions expressed in this determination, this office requests that the Board vote to make available for public inspection a copy of the verbatim recording and the minutes of the closed session portion of its February 6, 2024, meeting.⁷ 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 matthew.goodman@ilag.gov.

Very truly yours,

████████████████████
MATT GOODMAN
Assistant Attorney General
Public Access Bureau

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██████████ requests that this office invalidate the resolution passed at the February 6, 2024, meeting due to the Board's improper closed discussion. Although this office finds the Board's discussion fell outside of the scope of the section 2(c)(11) exception, the appropriate remedy is not to invalidate the resolution properly adopted during open session, but disclosure of the closed session verbatim recording and closed session minutes.