



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

Lisa Madigan  
ATTORNEY GENERAL

October 6, 2017

*Via electronic mail*



*Via electronic mail*

Mr. James A. Petrungaro  
Scariano, Himes and Petrarca CHTD.  
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Chicago, Illinois 60601-6702  
jpetrungaro@edlawyer.com

RE: OMA Request for Review – 2017 PAC 46638

Dear [REDACTED] and Mr. Petrungaro:

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 Board of Education of Oak Grove School District 68 (Board) violated OMA during its February 28, 2017, meeting by improperly discussing in closed session certain matters that were not authorized by the exception for pending, probable, or imminent litigation<sup>1</sup> under which the Board closed the meeting to the public.

In her Request for Review, [REDACTED] described the following at the Board's February 28, 2017, meeting:

When Board member Amy Franz and Ken LaCross asked for clarification on what the kindergarten day would look like under one of the proposed options, Board Vice President, Lane Hasler, stated the Board needed to go into Executive session to further discuss Kindergarten programming. This was following several public comments and a discussion (with opposing views)

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<sup>1</sup>Section 2(c)(11) of OMA (5 ILCS 120/2(c)(11) (West 2016).

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from the Board regarding the agenda item "2017-18 Kindergarten Structure" (link to agenda is below for your reference). The item was motioned to be tabled "until after Executive[]" and the remaining agenda items were discussed. The Board then went into closed [session] and upon coming out motioned for a "Special" meeting the following week for the agenda item referenced above and adjourned the meeting.<sup>[2]</sup>

We construed the Request for Review as alleging that the Board's closed session discussion was not authorized by any of the exceptions to the general requirement that public bodies conduct public business openly. See 5 ILCS 120/2(a), (c) (West 2016).

On March 8, 2017, this office sent a copy of the Request for Review to the Board and asked it to provide copies of the verbatim recording and any minutes of the closed session portion of the February 28, 2017, meeting. We also asked the Board to provide a written response to ██████████ allegation that identifies the specific exception in section 2(c) of OMA that the Board publicly cited as authorizing discussion of kindergarten programming in closed session. On March 24, 2017, counsel for the Board furnished the recording, draft minutes, and a written response, a portion of which was provided confidentially. On April 4, 2017, this office sent ██████████ a copy of the Board's response with confidential information redacted;<sup>3</sup> she did not reply. On July 17, 2017, counsel for the Board furnished this office with the subsequently approved open and closed session minutes of the February 28, 2017, meeting.

#### 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). Section 2(a) of OMA provides that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." Those "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." 5 ILCS 120/2(b) (West 2016); see also *Henry v. Anderson*, 356 Ill. App. 3d 952, 957 (4th Dist. 2005) (strictly construing section 2(c)(11)).

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<sup>2</sup>E-mail from ██████████ to Public Access [Bureau, Office of the Attorney General (March 1, 2017).

<sup>3</sup>Section 3.5(c) of OMA (5 ILCS 120/3.5(c) (West 2016)) permits a public body to provide the Public Access Counselor with a copy of its response with confidential information redacted for forwarding to the requester.

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Section 2(c)(11) permits a public body to enter closed session to discuss litigation "[w]hen 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 such litigation is "probable or imminent[.]" Section 2(c)(11) requires that "when the public body finds that an action is probable or imminent \* \* \* the basis for the finding shall be recorded and entered into the minutes of the closed meeting." In *Henry*, 356 Ill. App. 3d at 953, the Illinois Appellate Court analyzed this exception in considering whether a school board violated OMA by announcing that it was closing a meeting to discuss "potential" litigation without making a finding that litigation was "probable" or "imminent." During the meeting, the school board approved an agenda that referred to an executive session for "*potential litigation*," but then cited "*a contested litigation matter*" in the subsequent motion to enter closed session. (Emphasis in original.) *Henry*, 356 Ill. App. 3d at 954. The court characterized the section 2(c)(11) exception as "a forked path[:]"

If the litigation has been filed and is pending, the public body need only announce that in the proposed closed meeting, it will discuss litigation that has been filed and is pending. 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 a pretext for closing their meetings to the public* *Henry*, 356 Ill. App. 3d at 956-57.

In order for a public body to find litigation is probable or imminent, "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"; such a determination 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.

The Board's response to this office documented that on January 17, 2017, two individuals—at least one of whom is licensed as an attorney in Illinois—sent an e-mail requesting a meeting with the Board president and the District superintendent "to discuss the merits of 'legal arguments'" in connection with an issue that has resulted in lawsuits or threats of lawsuits against other school districts; the e-mail indicated that the Board could also face a legal challenge if the issue was not resolved.<sup>4</sup> The Board's response stated that this "threat of a legal challenge" prompted the Board president to ask the District superintendent to obtain a legal

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<sup>4</sup>Letter from James A. Petrunaro, On Behalf of the Board of Education, Oak Grove School District 68, to Office of the Attorney General, State of Illinois, Public Access Bureau, Steve Silverman, Bureau Chief (March 24, 2017), at 2.

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opinion from the Board's attorney.<sup>5</sup> According to the response, the Board president and District superintendent subsequently met with the two individuals, who "stressed during the meeting that they wanted to meet with the Board President and Superintendent privately on the possibility of a legal challenge or lawsuit in order to afford the Board of Education an opportunity to consider the seriousness of their position without first publicly announcing an imminent lawsuit Board of Education[.]"<sup>6</sup> After that discussion, the response stated, the Board held a special meeting in which it entered closed session to discuss probable or imminent litigation pursuant to section 2(c)(11) of OMA, and discussed kindergarten programming in open session later than night during its regular meeting.

The minutes of the Board's February 28, 2017, meeting show that that the Board also discussed kindergarten programming in open session during that meeting, and then entered closed session to discuss probable or imminent litigation and other unrelated matters. Because the District provided additional information confidentially concerning its belief that litigation was probable or imminent, section 3.5(c) of OMA (5 ILCS 120/3.5(c) (West 2016)) precludes this office from discussing that reasoning in this determination. Based on the available information, however, it appears that at the time of its February 28, 2017, meeting, the Board had a reasonable basis to believe that litigation was more likely than not to ensue if the Board did not resolve the issue that was the subject of the closed session discussion. Therefore, this office cannot conclude that the District violated OMA by improperly entering closed session pursuant to section 2(c)(11) of OMA.

However, the scope of section 2(c)(11) is limited to "the strategies, posture, theories, and consequences of the litigation itself." Ill. Att'y Gen. Op. No. 83-026, at 14. "[E]ven 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." Ill. Att'y Gen. Pub. Acc. Op. No. 12-013, issued November 5, 2012, at 4. The litigation exception does not allow a public body to conduct deliberations on the merits of a matter under consideration because of the possibility that it may become a party to a judicial proceeding, "regardless of how sensitive or controversial the subject matter may be." Ill. Att'y Gen. Op. No. 83-026, at 12.

This office has reviewed the verbatim recording and minutes of the Board's February 28, 2017, closed session. Although discrete portions of the closed session discussion

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<sup>5</sup>Letter from James A. Petrunaro, On Behalf of the Board of Education, Oak Grove School District 68, to Office of the Attorney General, State of Illinois, Public Access Bureau, Steve Silverman, Bureau Chief (March 24, 2017), at 2.

<sup>6</sup>Letter from James A. Petrunaro, On Behalf of the Board of Education, Oak Grove School District 68, to Office of the Attorney General, State of Illinois, Public Access Bureau, Steve Silverman, Bureau Chief (March 24, 2017), at 2.

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directly concerned litigation matters such as the likelihood of litigation and the potential consequences of litigation, much of the discussion involved how to address the underlying issue. As described above, the scope of section 2(c)(11) extends is limited to issues such as litigation strategy that relate to the pending, probable, or imminent litigation itself—the exception does not authorize a public body to deliberate on the merits of the underlying matter. Accordingly, this office concludes that the Board's closed session discussion exceeded the scope of the section 2(c)(11) exception. To remedy this violation, this office requests that the Board disclose to [REDACTED] and make publicly available the portions of the closed session minutes that concern the merits of the underlying matter.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have questions, please contact me at (312) 814-6756 or [ssilverman@atg.state.il.us](mailto:ssilverman@atg.state.il.us). This file is closed.

Very truly yours

[REDACTED]  
STEVE SILVERMAN  
Bureau Chief  
Public Access Bureau

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Attachment

cc: *Via electronic mail*

[REDACTED]