



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

KWAME RAOUL  
ATTORNEY GENERAL

January 30, 2023

*Via electronic mail*

*Via electronic mail*

Mr. Brian Day  
Corporation Counsel  
Town of Normal  
11 Uptown Circle  
Normal, Illinois 61761  
bday@normal.org

RE: OMA Request for Review – 2022 PAC 73545

Dear [REDACTED] and Mr. Day:

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 explained below, the Public Access Bureau concludes that the Town of Normal (Town) Town Council (Council) did not hold an improper closed session discussion during its September 9, 2022, special meeting.

In a Request for Review submitted on September 16, 2022, [REDACTED] a member of the Council, alleged that the Council violated OMA during its September 9, 2022, special meeting by improperly discussing a matter in closed session that was outside the scope of the OMA exception that the Council cited as its basis for closing the meeting. Specifically, [REDACTED] asserted that the Council's discussion regarding a then-pending lawsuit concerning a petition to place a referendum on the November 8, 2022, ballot<sup>1</sup> did not fall within the scope of

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<sup>1</sup>*Siracuse v. Dullard*, Docket No. 22-MR141 (Circuit Court, McLean County). At the time of the Council's special meeting it appears this case was pending before the McLean County Circuit Court.

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the pending litigation exception found in section 2(c)(11) of OMA<sup>2</sup> because neither the Town nor the Council were named parties to the lawsuit; he also alleged that the outcome of the litigation would not affect either entity.<sup>3</sup>

On October 7, 2022, the Public Access Bureau sent a copy of the Request for Review to the Council and asked that it provide this office with copies of the closed session verbatim recording and closed session minutes from its September 9, 2022, special meeting for this office's confidential review. This office also asked the Council to address in writing ██████████ ██████████ allegation that section 2(c)(11) of OMA did not authorize the Council's closed session discussion. On October 18, 2022, counsel for the Council provided this office with those materials, which included an affidavit from the Town's Manager. On October 19, 2022, this office forwarded the Council's written answer to ██████████; he replied on October 27, 2022.

#### DETERMINATION

"The Open Meetings Act provides that public agencies exist to aid in the conduct of the people's business, and that the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly." *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989).

As an initial matter, ██████████'s Request for Review, and reply, asked this office to review whether certain actions taken by Town employees and officials constituted improper electioneering. The Public Access Counselor's authority, however, is limited to resolving disputes concerning the Freedom of Information Act (FOIA)<sup>4</sup> and OMA. 15 ILCS 205/7(c) (West 2020). The Illinois Election Code<sup>5</sup>—not FOIA or OMA—governs the election process. Therefore, the Public Access Counselor does not have authority to review those alleged violations.

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<sup>2</sup>5 ILCS 120/2(c)(11) (West 2021 Supp.), as amended by Public Act 102-813, effective May 13, 2022.

<sup>3</sup>It is undisputed that ██████████ was not present for the open portion of the September 9, 2022, special meeting nor the closed session discussion. An affidavit from the Town's Manager indicated that ██████████ was given the opportunity to listen to the verbatim recording of the closed session on September 14, 2022, in the administrative conference room in city hall, but ceased listening to the recording after approximately four minutes. ██████████ confirmed in his reply that he did not listen to complete closed session recording.

<sup>4</sup>5 ILCS 140/1, *et seq.* (West 2020).

<sup>5</sup>10 ILCS 5/1-1, *et seq.* (West 2020).

Section 2(a) of OMA<sup>6</sup> 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.<sup>7</sup> The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2020).

Section 2(c)(11) of OMA permits public bodies 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.) The Illinois Appellate Court has held that when a lawsuit involving a public body has been filed, and is pending before a court, the public body may hold closed meetings to discuss the pending lawsuit and issues which are related to that litigation. *See Allied Asphalt Paving Co. v. Village of Hillside*, 314 Ill. App. 3d 138, 147 (1st Dist. 2000) (finding village was entitled to hold closed meeting to consider seeking a particular legal action in relation to pending litigation). Additionally, "once the litigation exception is properly invoked, the only matters which may lawfully be discussed at the closed meeting are the strategies, posture, theories, and consequences of the litigation itself." Ill. Att'y Gen. Op. No. 83-026, at 14; *see also City of Bloomington v. Raoul*, 2021 IL App (4th) 190539, ¶¶ 35-37, 184 N.E.3d 366, 372 (2021) (noting a city council's discussion of ways by which to terminate an intergovernmental agreement, financial aspects of doing so, and how to handle inquiries and criticism from their constituents, were not within the scope of the litigation exception).

According to the background information provided by both parties, a resident of the Town filed a petition (Petitioner) pursuant to section 3.1-25-80 of the Illinois Municipal Code (Code)<sup>8</sup> seeking to have a binding referendum placed on the November 8, 2022, ballot on the public policy question "[s]hall the town be divided into 6 districts with one trustee elected from each district?" An objection to that petition was filed by another resident (Objector) arguing that the petition was not authorized by the cited portion of the Code because that provision applies only to villages, not towns. On August 30, 2022, the Town's Electoral Board (Electoral Board) issued an order ruling that the referendum would not be placed on the ballot because the cited portion of Code was not applicable to the Town.<sup>9</sup> On September 2, 2022, the

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<sup>6</sup>5 ILCS 120/2(a) (West 2020).

<sup>7</sup>5 ILCS 120/2(c) (West 2021 Supp.), as amended by Public Act 102-813, effective May 13, 2022.

<sup>8</sup>65 ILCS 3.1-25-80) (West 2020).

<sup>9</sup>Normal Town Council Electoral Board, Findings, Decision, and Order No. 2022-01, issued August 30, 2022.

Petitioner filed a lawsuit in the McLean County Circuit Court (Circuit Court) seeking judicial review of the Electoral Board's decision.<sup>10</sup> The parties named by the Petitioner in the appeal were the Objector and the McLean County Clerk, as a nominal party.<sup>11</sup> On September 9, 2022, the Council held a special meeting to discuss this pending lawsuit in closed session. On September 20, 2022, the Circuit Court issued a ruling, which affirmed the Electoral Board's decision and denied the petition for judicial review of that decision.

In its response in this matter, the Council stated the September 9, 2022, closed session was held to "discuss intervening or otherwise participating in the pending case about [the Town's] form of government"<sup>12</sup> which it asserted falls within the scope of the 2(c)(11) of OMA exception. The Council indicated that at the time of the special meeting, it was unclear whether the Objector would defend the appeal because he had not yet filed an appearance.<sup>13</sup> The Council also argued that if the Objector did not appear or did not "vigorously defend the appeal[,]"<sup>14</sup> the Town's form of government could have been determined based on a technicality, which could have broadly affected the Town's operations, beyond the limited issue of whether the referendum should be placed on the ballot. The Council's response further stated the Petitioner's appeal asked "a judge to make a determination about a fundamental characteristic of the Town's government[,]" noting that "[a] judicial ruling that the Town is not a town would affect the Town."<sup>15</sup> The Council also argued that "[a] decision whether to intervene in a pending case is a typical and routine litigation activity [and] is the kind of decision that the litigation exemptions in OMA were created for."<sup>16</sup> Further, the Council's response to this office argued that its closed session discussion did not exceed the scope of 2(c)(11) because the discussion consisted of

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<sup>10</sup>*Siracuse v. Dullard*, Docket No. 22-MR141 (Circuit Court, McLean County).

<sup>11</sup>*Siracuse v. Dullard*, Docket No. 22-MR141 (Circuit Court, McLean County).

<sup>12</sup>Letter from Brian Day, Corporation Counsel, Town of Normal, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (October 18, 2022), at 2.

<sup>13</sup>Council's response indicated that the Objector's attorney filed an appearance in the pending lawsuit after the September 9, 2022, closed session discussion, and therefore, the Town did not take further steps to participate in the litigation.

<sup>14</sup>Letter from Brian Day, Corporation Counsel, Town of Normal, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (October 18, 2022), at 4.

<sup>15</sup>Letter from Brian Day, Corporation Counsel, Town of Normal, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (October 18, 2022), at 3.

<sup>16</sup>Letter from Brian Day, Corporation Counsel, Town of Normal, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (October 18, 2022), at 5.

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"strategies, posture, theories, and consequences of the pending litigation or probable litigation that the Town looked at instituting[.]"<sup>17</sup>

In his reply, ██████████ reiterated his contention that section 2(c)(11) of OMA is inapplicable to the closed session discussion because the then-pending litigation did not impact the Town. Specifically, he asserted that "[i]n the Circuit Court's ruling, Judge Kording went out of his way to clarify that the courts cannot make findings that would have impacted [the Town] without [the Town] being a party and allowed to respond. Any litigation affecting [the Town] would require some future unknown party to file suit against the [T]own."<sup>18</sup> He also asserted that if the court permitted voters to consider the referendum, the outcome would have been advisory rather than binding, so there was no imminent risk of litigation concerning the Town's form of government.

A transcript of the Circuit Court's oral ruling provided to this office shows that the court stated it would be inappropriate to determine whether the Town was in compliance with section 3.1-25-95 of the Municipal Code,<sup>19</sup> which identifies the specific officers that shall be elected to four-year terms in incorporated towns, because the Town was not party to the case. The court also declined a request to declare that the Town's identity as an incorporated town was not correct. The court, however, went on to determine that the Town would not have abandoned its status as a town if it was not in compliance with section 3.1-25-95 of the Municipal Code and that the referendum provision in section 3.1-25-80 for districting of villages did not apply to the Town. The court held that because the Town remained an incorporated Town, the Electoral Board did not err by finding that the disputed referendum was not authorized by the Municipal Code and therefore could not appear on the ballot.

The plain language of section 2(c)(11) of OMA permits a public body to enter closed session to discuss litigation when an action "affecting \* \* \* the particular public body has been filed and is pending before a court[.]" The issues addressed in the judicial review of the Electoral Board's decision—the Town's status as an incorporated town and whether voters could consider a referendum concerning the Town's form of government—unequivocally affected the Town even if the referendum would have been non-binding and despite the court declining to determine whether the Town was in compliance with section 3.1-25-95 of the Municipal Code. Further, this office's review of the closed session materials, including the verbatim recording of

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<sup>17</sup>Letter from Brian Day, Corporation Counsel, Town of Normal, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (October 18, 2022), at 5.

<sup>18</sup>Letter from ██████████ to [Shannon] Barnaby, [Assistant Attorney General], [Public Access Bureau] (October 27, 2022), at [1].

<sup>19</sup>65 ILCS 5/3.1-25-95 (West 2020).

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the closed session discussion, confirmed that the discussion focused on whether the Town would intervene in the lawsuit, the possible approaches to its involvement in the litigation, the legal theories, defenses, and claims involved, as well as the potential consequences of those options. Accordingly, this office concludes that the Council's discussion was within the scope of the section 2(c)(11) exception under which it closed the meeting.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have questions, my e-mail address is [shannon.barnaby@ilag.gov](mailto:shannon.barnaby@ilag.gov).

Very truly yours,

[REDACTED]  
SHANNON BARNABY  
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