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September 11, 2015

The Honorable Katharine Hamilton
Chairman, Board of Trustees
Community College District 502
425 Fawell Blvd.
Glen Ellyn, IL 60137-6599

Dear Chairwoman Hamilton:

I have your letter of August 21, 2015, wherein you express your concerns regarding the state of the contractual relationship between the College of DuPage and Dr. Robert Breuder in light of a determination letter issued by the Attorney General which concluded that the then-Board of Trustees violated the Open Meetings Act (the Act) when it approved the third of four addenda to Dr. Brueder's employment contract. Under Illinois law, the former Board's violation of the Act on July 12, 2011 does not, by itself, render its approval of the third addendum null and void.

By way of background, on July 24, 2015, the Attorney General issued a determination letter which concluded that the College of DuPage's Board of Trustee's violated the Open Meeting Act's public recital requirement when it did not adequately inform the public of the business it was conducting by stating that it was extending Dr. Brueder's contract or by discussing any of the terms of the extension during its July 12, 2011 meeting. The Attorney General, however found that the notice of the meeting itself, including its agenda, complied with the Act. In your letter, you requested that I "elicit a biding interpretation of the Attorney General's opinion, and thus its applicability to [the College's] pending employment issues [with Dr. Brueder]." Under Section 3.5(d) of the Act, the Attorney General has the sole discretion whether to issue a binding opinion and "[t]he decision not to issue a binding opinion shall not be reviewable." In this instance, the Attorney General elected to address the violation by issuing an advisory opinion to the College under Section 3.5(h) of the Act admonishing the Board "to comply with the [Act's] public recital requirement in the future." Thus, in as much as the Attorney General is concerned, your Board is not required to take any additional action to remedy the violation committed by the previous Board.

The fact that the Attorney General concluded that a violation of the Open Meetings Act occurred does not mean that the third addendum is void. Actions taken in violation of the

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Act are merely voidable – that is, capable of being voided – and then only in the most extreme of cases. Section 3(c) of the Open Meetings Act sets forth the available remedies a court may impose for violation of the Act:

> "…having due regard for orderly administration and the public interest, as well as for the interests of the parties, to grant such relief as it deems appropriate, including granting a relief by mandamus requiring that a meeting be open to the public, granting an injunction against future violations of this Act, ordering the public body to make available to the public such portion of the minutes of a meeting as is not authorized to be kept confidential under this Act, or declaring null and void any final action taken at a closed meeting in violation of this Act." 5 ILCS 120/3(c).

As a practical matter, the only sanction which could impact the validity of the third addendum is a judicial declaration that the Board's violation rendered its action null and void. However this sanction does not appear to be available because the Board's violation occurred during an open, rather than a closed meeting.

In 1995, former Illinois Attorney General Jim Ryan in a formal, published opinion analyzed the legislative history of the portion of the Act that authorizes voiding of governmental actions:

> Prior to its amendment by Public Act 82-378, effective January 1, 1982, the Act contained no provision authorizing the invalidation of actions taken by public bodies at or subsequent to meetings that were held in violation of the Act. (See, Ill. Rev. Stat. 1979 ch. 102, par. 41 et seq.) Consequently, in *Board of Education of Community Unit School Dist. No. 300 v. County Board of School Trustees* (1978), 60 Ill.App.3d 415, 420-21, the court refused to reverse orders granting a petition for detachment and annexation, where evidence with respect to the petition had been discussed in a closed session by two county boards of school trustees before they voted to grant the petition in open session. The court declared that nothing in the Act or in case law mandated the invalidation of public action allegedly taken during closed proceedings, and declined to construe the Act to do so in the absence of a clear legislative mandate or judicial precedent. Thereafter, the General Assembly amended section 3, expressly granting the courts the authority to declare null and void any final action taken at a closed meeting in violation of the Act. The debates of the General Assembly with respect to that amendment strongly indicate a legislative intention that final actions of a public body could be invalidated by a court only when taken at a closed session. (Remarks of Representatives Reilly and Katz, May 20, 1981, House Debate on House Bill No. 411, at 4 and 29; Remarks of Senator Bruce, June 19, 1981, Senate Debate on House Bill No. 411, at 21; Remarks of Representatives Reilly and Bluthardt, June 28, 1981, House Debate on

> House Bill No. 411, at 4-5.) Ill. Att'y Gen. Op. No. 95-004 at 13-14 (July 14, 1995).

Attorney General Ryan noted that the debates of the General Assembly "strongly" signaled its legislative intention that voidance was a remedy available only for violations which occurred in closed sessions. The transcripts of the debates themselves reveal just how strong that intention was. Prior to its initial passage by the House of Representatives, the sponsor of the bill which created this provision, Representative Jim Reilly, told his colleagues that "[this bill] clarifies that action taken in closed session and only that action taken in closed session can be voided." 82nd Ill. Gen. Assem., House Proceedings, May 20, 1981, p. 31 (statements of Representative Reilly). Moments later, Representative Harold Katz asked Representative Reilly the following question:

> "Would I be correct in assuming that the prohibition invalidates only actions taken in secret and that it would not invalidate any actions taken in a public meeting that is open with regard, for example, to an ordinance or approval of a contract or a bond issue even if at an earlier stage a closed meeting had in fact, been held where this matter had been unlawfully discussed?"

In response to his colleague, Representative Reilly responded "That is correct. The intent is to invalidate only final action improperly taken in secret." 82nd Ill. Gen. Assem., House Proceedings, May 20, 1981, p. 33-34 (statements of Representative Katz and Representative Reilly).

One month later, after the measure had passed the Senate with amendments, HB 411 returned to the House. During the House's final debate prior to its approval of HB 411, Representative Edward Bluthardt asked Representative Reilly whether the failure of a public body to keep minutes of an open meeting could lead to nullification. Representative Reilly responded

> "No, because in the hypothetical you've given me this is an open meeting *** and the only things that can be nullified in court are actions that are taken in closed meetings." 82nd Ill. Gen. Assem., House Proceedings, June 28, 1981, p. 145 (statements of Representative Bluthardt and Representative Reilly).

These excerpts strongly support Attorney General Ryan's analysis. Moreover, as recently as 2004, the Attorney General's Guide to the Open Meetings Act reflected the office's position that the language of the voidability provision refers only to final actions taken in closed meetings held in violation of the Act. *See Guide to the Illinois Open Meetings Act*, Lisa Madigan, Attorney General, State of Illinois revised 8/2004. The Illinois Supreme Court affords opinions of the Attorney General great deference:

> While Attorney General opinions are not binding on the courts, a well-reasoned opinion of the Attorney General is entitled to considerable weight,

> especially in a matter of first impression in Illinois. *Bonaguro v. County Officers Electoral Board*, 158 Ill.2d 391, 399, 199 Ill.Dec. 659, 634 N.E.2d 712 (1994).

The first case to address the voidability provision of Section 3(c) was *Williamson v. Doyle,* 112 Ill. App.3d. 293 (1st Dist. 1983). Though *Williamson* involved a violation which occurred *prior* to the effective date of the 1981 amendments, the court did discuss the new legislation concluding that "the statute permitting the court to declare the action void refers by its terms only to a "closed session." *Id.* at 390. *Williamson* was later cited by the First District in 1999 in support of the same proposition. *See Chicago School Reform Board of Trustees v. Martin,* 309 Ill.App.3d. 924, 936 (1st. Dist. 1999) ("...nullification...is...not supported by the Open Meetings Act").

Though the General Assembly intended to afford courts a broader range of remedies than the four it provided when it preceded them with the term "including," its use of the term "closed" to modify "meetings" is significant as well. A construction which concludes that a court possesses the power to void actions taken at open as well as closed meetings effectively renders the General Assembly's use of the word "closed" meaningless. The Illinois Supreme Court has held that when interpreting a statute "[w]e must construe the statute so that each word, clause, and sentence, if possible, is given a reasonable meaning and not rendered superfluous [citation], avoiding an interpretation which would render any portion of the statute meaningless or void [citation]." *Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 232 (2001).

As further evidence that Attorney General Ryan's analysis was correct, earlier this spring, the Illinois House of Representatives approved House Bill 248, as amended, by a 112-0-0 vote. The bill amends Section 3(c) of the Act by adding language specifically authorizing a court to declare null and void a final action taken at an *open* meeting. To help fully understand the reasoning behind this bill, my office submitted a Freedom of Information Act (FOIA) Request to the Clerk of the House of Representatives on August 31, 2015 requesting a copy of the audio recording of the March 3, 2015 hearing that the House Judiciary – Civil Committee conducted on HB 248. The Clerk's office promptly complied with our request and we received a disc with the recording on Tuesday following the holiday weekend.

During the legislation's consideration in the House Judiciary – Civil Committee, the bill's sponsor, Representative Dwight Kay, testified that the sole purpose of the bill was to authorize courts to invalidate actions taken in open sessions which violate the Act. He further testified that recent events at the College of DuPage, in part, precipitated his filing of the legislation and significantly, in response to a question from Representative Ann Williams (a former Assistant Attorney General and the office's former legislative director), stated that a court was "prohibited" from invalidating an action which occurred during an open meeting. 99th Ill. Gen. Assem., House Judiciary Civil Committee Proceedings, March

3, 3015 (Audio Recording of Testimony by Representative Dwight Kay on House Bill No. 248).

In addition to Representative Kay, two representatives of a non-profit organization which promotes transparency in government testified in support of HB 248, both noting that courts could not void actions taken in open session under existing law. One of these proponents, Kirk Allen, while discussing the Board's approval of Dr. Brueder's original contract in 2008, noted that

> "When we look at what happened at College of DuPage, Dr. Breuder's contract started in 2008. The only thing that was on the agenda was 'Appoint the President.' There was nothing in the Board packet, there was no contract, nothing. When they made the motion, it wasn't to appoint the president. It was to approve an employment agreement. None of that was on the agenda. It was a violation of Section 2(e). They didn't recite it. There's no way to overturn that because it happened in open session." 99th Ill. Gen. Assem., House Judiciary Civil Committee Proceedings, March 3, 3015 (Audio Recording of Testimony by Mr. Kirk Allen, Edgar County Watchdogs on House Bill No. 248).

Later when discussing the third addendum to Dr. Breuder's contract approved by the Board at its July 12, 2011 meeting, Mr. Allen told the committee that "...there's no way to nullify those actions the way it is right now." *Id.*

The action by the House of Representatives in approving HB 248 is illustrative of the clear intention of one of the General Assembly's chambers to change the statute. Our Supreme Court has found that a subsequent amendment to a statute may be an appropriate source for discerning legislative intent. *People v. Bratcher*, 63 Ill.2d 534 (1976). Though a bill's passage by one chamber does not constitute a subsequent amendment, the language of HB 248, the testimony at the March 3, 2015 committee meeting, the holdings of the appellate court, and the decisive action of the Illinois House support the conclusion of Attorney General Ryan, as well as my own, that the statute permitting the court to declare an action null and void refers by its terms only to a closed meeting.

I have also reviewed several cases, the holdings of which have been suggested stand for the opposite proposition – that the court may also invalidate actions taken in open meetings. For example, the court in *Gerwin v. Livingston County Board*, 345 Ill App.3d. 352 (4th Dist. 2003) invalidated actions taken by the Livingston County Board at a meeting it convened in a room unreasonably small to accommodate the public. Similarly in *Reddell v. Giglio*, 238 Ill.App.3d. 141 (1st Dist. 1992), a case decided prior to Attorney General Ryan's opinion, the court addressed the propriety of an action by a township board to appoint officers to alleged vacancies during a special meeting. The court held that notice of the meeting was "so deficient in essence it amounted to no agenda at all." In *Rice v*

Board of Trustees of Adams County, Illinois, 326 Ill.App.3d 1120 (4th Dist. 2002) the Fourth District invalidated a County Board's approval of an enhanced pension plan which was not included on the meeting's agenda. Finally, *Feret v. Schillerstrom* 363 Ill.App.3d. 534 (2nd Dist. 2006) involved the reversal of a lower court's dismissal of a citizen's complaint that an item of business was not on an agenda. Each of these instances involved a public body's failure to convene a meeting in a location accessible to the public or provide the public with advance notice of contemplated action – in *Livingston County* it was through the County's selection of an inconvenient meeting room and in the other cases by completely omitting the relevant item from the agenda. Thus, the courts apparently concluded that these meetings though superficially open, were not actually open to the extent the Act required. Significantly, none reached the conclusion that any meeting in which any violation of the Act occurs constitutes a closed meeting.

Even if voidance was an available remedy for this type of violation, and under Illinois law it is not, voidance is inappropriate for this violation. A key consideration is that the Attorney General specifically concluded in her determination letter that the College provided adequate notice of the meeting and of the business before it under the version of the Act that was in effect at the time. This is significant because the line of cases which may stand for the proposition that a court could declare void actions taken in open meetings all involved meetings which were convened with deficient notice or were otherwise akin to a closed meeting. The Open Meetings Act does not specify the degree of detail that must be included in a public body's "public recital of the nature of the matter being considered" preceding final action on a matter before the public body for consideration. Illinois courts have also not addressed the matter. At the time of the Board's violation, the Attorney General's Public Access Counselor had not issued any binding determination letters addressing the recital requirement. In fact, the Attorney General issued her first binding determination interpreting that provision in May 2013, almost two years after COD's violation. *Ill. Att'y Gen. Pub. Acc. Op. 13-007*, issued May 21, 2013.

I have reviewed copies of every binding and non-binding determination letter issued by the Attorney General's Public Access Bureau that analyzed the Open Meeting Act's public recital requirement, which I obtained earlier this month pursuant to a FOIA request. Though the vast majority of these opinions were advisory, the Attorney General has never – not even once – invalidated or sought the invalidation of a public body's actions due to its violation of the recital requirement so long as the action occurred in an open meeting. In nearly all of the instances where the Attorney General concluded a public body violated the public recital requirement, her directive, as is the case here, was that the public body in question comply with the requirement in the future. In the few cases where the Attorney General requested or required a more substantial remedy, she simply directed the public body to either ratify or reconsider its action in compliance with the Act – though in all of these instances, the interval between the violation and a determination the violation occurred was a few weeks or at most a few months.

It has been more than four years and with two elections intervening since the Board's violation occurred, during which time the third addendum enjoyed, at least until July 24, 2015, a presumption of validity. Given the nature of the Board's violation, the near-total absence of guidance available to it at the time, and the manner in which the Attorney General has treated similar violations, the only appropriate remedy for the Board's conduct is the admonishment it received from the Attorney General. Any sanction greater than that would be disproportionate to the violation, and in the case of voidability, grossly disproportionate. *See Chicago School Reform Board of Trustees v. Martin*, 309 Ill.App.3d. 924, 936 ("...nullification...is too extreme and not supported by the Open Meetings Act"). For these reasons, the law does not support judicial invalidation of the third addendum due to the Open Meetings Act violation on July 12, 2011.

You have also suggested that the Attorney General's determination implicates the validity of extensions or reappointments made to Dr. Breuder's contract under Paragraph F of his initial 2008 contract – a provision that subsequent addenda did not disturb. Paragraph F provides:

> On or before April 1, 2010, and April 1 of each year thereafter, the term of this Agreement will be automatically extended for an additional one (1) year period unless either party provides to the other, prior to the 15th day of March of such Agreement year, written notice of his or its intention to terminate this Agreement at the end of the then-current Agreement term which expires no earlier than June 30, 2012, but may be extended as provided in this Agreement. The President will notify in writing the Chairperson of the Board by February 1 of each such year that failure of the Board to give the President notice of intent to extend the Agreement will extend this Agreement one (1) additional year. The failure of the President to give the written reminder notice to the Chairperson of the Board waives the obligation of the Board hereunder to give its written notice of intent by March 15. The Board's notice need not be acted upon publicly, but authorization to give such notice will be recorded in the closed session minutes of the Board.

As I read Paragraph F, after April 1, 2010, and on April 1 in each following year, the term of Dr. Brueder's contract will extend by one additional year unless either party gives notice to the other of his or its intent to terminate. In the absence of any action by Dr. Brueder or by the Board to terminate the contract the contract's term would extend by an additional year. If Dr. Brueder had failed to "remind" the Board of this provision each year, his failure would not have prevented the contract's extension; rather it would have given the Board additional time to decide whether it wanted to take action to prevent the contract's extension.

I do have serious concerns about language in Paragraph F which essentially contemplates the Board taking final action in a closed session to decide whether to extend Dr. Brueder's

contract and to provide him with notice of termination. If the Board reached a consensus to permit Dr. Brueder's contract to renew in a closed session, its decision *not* to act would constitute the taking of a final action in a closed session and thus violate the Open Meetings Act. Though a court could declare such an action null and void because it occurred during a closed session, that remedy would be of little use for this type of violation; a court could not remedy a violation by transforming the Board's decision to *not* terminate Dr. Brueder's contract into an action that achieved the opposite result. In the absence of activity by the Board (or by Dr. Brueder) to the contrary, Dr. Brueder's contract would have extended for an additional year every April 1. As you may be aware, the Illinois General Assembly is in the process of preventing situations like this from occurring in the future and has recently sent the Governor HB 3593 which it specifically tailored to address the problems created by Paragraph F-style contract extensions.

In closing, it is my opinion that the former Board's violation of the Open Meeting Act in July 2011 does not impact the validity of the third addendum to Dr. Brueder's contract. I also do not believe that the provisions of Paragraph F, in and of themselves, constitute a violation of the Act. This opinion, however, is limited exclusively to the potential impact of the Attorney General's determination letter on the third addendum and to the consistency of Paragraph F's language with the Open Meeting Act. Please do not construe this opinion as addressing or otherwise impacting the sufficiency of any other argument or legal theory that the Board may wish to assert in order to determine the validity of Dr. Brueder's contract or any subsequent addenda thereto.

Sincerely,

Robert B. Berlin
State's Attorney

cc: Dr. Joseph Collins
Mr. Timothy Elliott, Esq.