OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 18, 2017

Via electronic mail
Mr. John Kraft
[redacted]
Paris, Illinois 61944
[redacted]

Via electronic mail
Ms. Diane Bartus Diestler
500 South Harrison Street
P.O. Box 305
Blandinsville, Illinois 61420
dbdiestler@gmail.com

RE: OMA Request for Review – 2016 PAC 44332

Dear Mr. Kraft and Ms. Diestler:

This determination 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 LaHarpe City Council (Council) violated OMA by discussing certain matters in closed session without making findings required by section 2(c)(11) of OMA (5 ILCS 120/2(c)(11) (West 2016)), and that its closed session discussion exceeded the scope of that exception to the general rule that public business be discussed openly.

On October 1, 2016, Mr. John Kraft filed this Request for Review alleging that the Council violated OMA at its September 26, 2016, meeting by discussing matters in a closed session that are not within the scope of the exceptions to openness in section 2(c) of OMA (5 ILCS 120/2(c) (West 2016)), namely "whether to not to issue a bill for water and sewer service to the Village Mayor[.]"[1] In support of this allegation, Mr. Kraft included a link to a YouTube video recording of the Council's discussion relating to water billing during the open session after the Council met in closed session. He also alleged that the Council failed to publicly disclose the

[1]E-mail from John Kraft to Public Access [Bureau] (October 1, 2016).

exception authorizing the closed session as required by section 2a of OMA (5 ILCS 120/2a (West 2016)).

On October 11, 2016, this office sent a copy of the Request for Review to the Council, and requested that it respond in writing to its allegations; we asked that it specifically address the matters discussed in the September 26, 2016, closed session and the legal and factual bases for closing the meeting under section 2(c) of OMA. In addition, this office requested copies of the meeting agenda, the minutes of the open and closed sessions, and the verbatim recording of the closed session.

On October 24, 2016, the Council submitted a written response in which it asserted, in relevant part, that the Council discussed a March 14, 2016, letter from an attorney representing Mayor Ryan Kienast and "the matters to be litigated" resulting from that letter during the September 26, 2016, executive session. It further explained that:

> It was contemplated that, after Executive Session, further action would be taken by the City Council regarding the March 2016 claim under Old Business Item No. 13 ('Discuss and take action that Ryan Kienast gets presented a bill for water/sewer owed for apartments.')[.]
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> On Page 3 of the Meeting Minutes, it states that, regarding Old Business Item 13, "[Alderman] Kraft made the motion to have the city attorney resolve the issue with the water bills per the discussion during executive session." The "issue with the water bills" was the litigation threatened by Mr. Kienast over the ordinance and the incorrect water bills.[2]

Part of the Council's response was redacted pursuant to section 3.5(c) of OMA (5 ILCS 120/3.5(c) (West 2016)). On October 25, 2016, this office forwarded a copy of that redacted response to Mr. Kraft. He replied on December 6, 2016, and argued "[i]f the City Council entered executive session claiming pending litigation, it was based on a letter delivered to them

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[2]Letter from Diane Bartus Diestler, Attorney at Law, to Shannon Barnaby, Assistant Attorney General, Public Access Bureau (October 24, 2016), at 2-3.

in Mid-March this year – more than 6 months had passed before this executive session, and the letter did not threaten litigation."[3]

On December 8, 2016, this office sent a second letter to the Council requesting information about its actions at its September 26, 2016, meeting. Specifically, this office requested that the City address whether it provided "a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted" as required by section 2(e) of OMA (5 ILCS 120/2(e) (West 2016)) when it voted on Item No. 13 of "Old Business" of the agenda, namely "[d]iscuss and take action that Ryan Kienast gets presented a bill for water/sewer owed for apartments," as well as whether that agenda item sets forth "the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting." 5 ILCS 120/2.02(c) (West 2016).

The City furnished a supplemental written response on December 19, 2016, and expanded on the discussion of the water bill issue in open session:

> During open session, the mayor read – nearly verbatim – Old Business Item No. 13 ("Discuss and take action that Ryan Kienast gets presented with a bill for water/sewer owed for apartments."). Then as the private citizen's videotape of the meeting indicates, before any vote was taken, [the city attorney] mentioned that there had been a discussion "on resolving the issue" during executive session and that there was going to be a motion on it. (In hindsight, it would have been more precise to have said that there had been discussion <u>on the claim</u> relating to that issue during executive session, which is what, in fact, had occurred.) Keep in mind that, up to that point, Mayor Kienast had no idea what the council had discussed about his claim during executive session, what evidence the City had, or what options they were considering to resolve it.
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> [The City attorney] had been asked to draft a settlement agreement and submit it to Mr. Kienast in the hope of settling his claims against the City and any claim the City had against him.

[3]E-mail from John Kraft to Neil Olson, [Assistant Attorney General], [Public Access Bureau] (December 6, 2016).

> If Mr. Kienast approves and returns a signed settlement agreement, the agreement will be placed on a meeting agenda for the city council's review, discussion, and action.[4]

Mr. Kraft submitted a reply to the Council's supplemental written response on January 1, 2017, in which he reiterated his assertion that litigation was not probable or imminent, and asserted that the underlying issue of the water bills was not a proper topic for a closed session.

DETERMINATION

OMA is intended "to ensure that the actions of public bodies be taken openly and that their ***deliberations be conducted openly***." (Emphasis added.) 5 ILCS 120/1 (West 2016). Section 2(a) of OMA (5 ILCS 120/2(a) (West 2016)) 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. The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2016)).

Section 2(c)(11) of OMA

Section 2(c)(11) permits a public body conduct a closed session meeting 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 v. Anderson*, 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. 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

[4]Letter from Diane Bartus Diestler, Attorney at Law, to Neil P. Olson, Deputy Public Access Counselor, Assistant Attorney General, Public Access Bureau (December 19, 2016), at 1-2.

prevent public bodies from using the distant possibility of litigation as a pretext for closing their meetings to the public.

The Council's meeting minutes indicate that it closed a portion of its September, 2016 meeting to discuss matters that included "pending/possible litigation."[5] It is undisputed that no litigation was pending at the time of the meeting. Therefore, in order to close a portion of the meeting under section 2(c)(11), litigation must have been "imminent" or "probable." However, the Council did not make a finding that the litigation at issue was "imminent" or "probable" as required by section 2(c)(11) and likewise did record a basis for such a finding into the closed session minutes. The lack of such a specific finding violated the requirements of section 2(c)(11) of OMA.

In order for the Council to have found litigation was 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 Council has provided information that an attorney representing the Mayor had written a letter to the City in March, 2016, disputing its water billing practices. The City has provided other information to this office about the course of communications with the Mayor and others about the issue on a confidential basis, and section 3.5(c) of OMA precludes this office from discussing it in this determination. Based on the available information, however, it appears that litigation was more likely than not if the issue was not resolved. Therefore, this office cannot conclude that the Council violated OMA by closing a portion of the meeting on the basis that litigation was "probable" or "imminent."

In addition, 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 merely because it may become a party to a judicial proceeding. Ill. Att'y Gen. Op. No. 83-026, at 12.

This office has reviewed the recording of the closed session. Although a small part of the discussion concerned the strategies and potential consequences of the litigation itself,

[5]LaHarpe City Council, Meeting, September 26, 2016, Minutes 2.

much of the discussion involved how to resolve the underlying issue about water billing. As described above, the scope of section 2(c)(11) extends only to the issues relating to the pending, probable, or imminent litigation itself. Accordingly, this office concludes that the discussion exceeded the scope permitted by section 2(c)(11) of OMA.

Section 2a of OMA

In order for a public body to properly close a portion of a meeting, there must be:

> a majority vote of a quorum present, taken at a meeting open to the public for which notice has been given as required by this Act. * * * The vote of each member on the question of holding a meeting closed to the public and a citation to the specific exception contained in section 2 of this Act which authorizes the closing of the meeting to the public shall be publicly disclosed at the time of the vote and shall be recorded and entered into the minutes of the meeting. 5 ILCS 120/2a (West 2016).

As described above, the meeting minutes indicate that the Council cited "pending/possible litigation" as a basis for closing the meeting. Although a citation to the specific statutory exception and would have been helpful, the reference to "litigation" was sufficient to satisfy the requirements of section 2a. *See Wyman v. Schweighart,* 385 Ill. App. 3d 1099, 1105 (4th Dist. 2008). Accordingly, there is insufficient evidence for this office to conclude that the Council's manner of closing the meeting violated section 2a of OMA.

Discussion in Open Session

Section 2.02(c) of OMA provides that "[a]ny agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be subject of final action at the meeting." Section 2(e) of OMA provides that "[f]inal action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." As the Council acknowledged in its supplemental response to this office, the discussion in open session did not convey the precise nature of what was discussed in closed session with respect to the Mayor's claim and proposed settlement.

Regardless of how the Council presented the proposed course of action in open session, the requirements of sections 2.02 and 2(e) apply only to a "final action" by the Council. OMA does not define "final action." However, in *Gosnell v. Hogan,* 179 Ill. App. 3d 161 (5th Dist. 1989), the plaintiff alleged that a school board impermissibly took final action in closed

session by making a request for mediation as an alternative to the negotiation it had been conducting with the secretaries' union. The court held:

> [T]he request for mediation was part of the process of reaching a final action with the secretaries union. Mediation, similar to negotiating, is not an end in itself, but rather, a means to an end. Negotiations and mediations are made up of many "unilateral" decisions, such as what to offer or counteroffer, and to hold that each of the unilateral strategical decisions that make up the constituent parts of a negotiation is in and of itself a final action is unreasonable. *Gosnell*, 179 Ill. App. 3d at 176.

See also Ill. Att'y Gen. PAC Req. Rev. Ltr. 32463, issued July 14, 2015, at 3 ("a component of a public body's process of reaching final action generally does not, itself, constitute final action").

As described by the Council, the proposed settlement had not been presented to the Mayor, and if he were to agree, "the agreement will be placed on a meeting agenda for the city council's review, discussion, and action."[6] Therefore, the vote authorizing the city attorney to present a settlement agreement was authorization to begin the process of negotiation, not a final action of the Council on the settlement agreement. Accordingly, this office does not conclude that the City Council's actions during the open session violated OMA.

In accordance with the conclusions of this letter, this office requests that the Council release the verbatim recording of the improper portion of the closed session discussion and the related portion of the closed session minutes to the public. The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter will close this file. Please contact me at (217) 782-9078 or nolson@atg.state.il.us if you have any questions.

Very truly yours,

NEIL P. OLSON
Deputy Public Access Counselor
Assistant Attorney General, Public Access Bureau

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[6]Letter from Diane Bartus Diestler, Attorney at Law, to Neil P. Olson, Deputy Public Access Counselor, Assistant Attorney General, Public Access Bureau (December 19, 2016), at 2.