



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

April 27, 2023

Via electronic mail

Mr. John Kraft

john [REDACTED]

RE: OMA Request for Review – 2023 PAC 75590

Dear Mr. Kraft:

The Public Access Bureau has received the attached supplemental answer in response to your Request for Review from the City of Silvis (City). Additional information provided by the City has been withheld as required by section 3.5(g) of OMA (5 ILCS 120/3.5(g) (West 2020)). You may, but are not required to, reply in writing to the City's answer. If you choose to reply, you must submit your reply to this office within seven (7) working days of your receipt of this letter. 5 ILCS 120/3.5(c) (West 2020). Please also send a copy of any reply to Ms. Mary Dickson, Interim City Attorney. You may contact me at laura.harter@ilag.gov if you have questions. Thank you.

Very truly yours,

A handwritten signature in cursive script that reads "Laura S. Harter".

LAURA S. HARTER
Deputy Bureau Chief
Public Access Bureau

Attachment

cc: *Via electronic mail*

Ms. Mary Dickson
Bond, Dickson & Conway
400 South Knoll Street, Unit C
Wheaton, Illinois 60187
marydickson@bond-dickson.com



BOND, DICKSON & CONWAY

400 S. Knoll Street, Unit C, Wheaton, Illinois 60187 P 630.681.1000 F 630.681.1020

April 21, 2023

VIA E-MAIL TRANSMISSION ONLY

Laura Harter
Deputy Bureau Chief
Public Access Bureau
Illinois Attorney General's Office
500 South Second Street
Springfield, Illinois 62701

RE: OMA Request for Review – 2023 PAC 75590
Requester: Mr. John Kraft

Dear Ms. Harter:

Thank you for providing additional time for the City of Silvis to respond to the Request for Review referenced herein.

In his Request, Mr. Kraft alleges that the Council violated the OMA in connection with the Council's February 7, 2023 Closed Session meeting. Specifically, Mr. Kraft alleges that:

1. the Council entered Closed Session without a majority vote of the members present in Open Session;
2. the Council discussed the Mayor and City Clerk in Closed Session;
3. by improperly prohibiting the Mayor and Clerk from attending the Closed Session;
4. removing the verbatim recording of the Closed Session from its storage location; and
5. refusing to permit the Mayor to listen to the February 7, 2023 Closed Session recording.

Upon being afforded the opportunity to investigate the circumstances of the February 7, 2023 Closed Session meeting and to confer with the City Council, please be advised that as of April 18, 2023, the verbatim recording of the February 7, 2023 Closed Session is in the possession of the City Clerk for proper maintenance and storage as required by §2.06(f) of the OMA, and that the Mayor has been informed he has full access to listen to the recording at any time, in compliance with §2.06(f) of the OMA. These two issues arose from the advice of counsel present at the

meeting. Allison Wright, who was one of the attorneys present, taped the meeting on the Zoom platform. She refused to share the tape, which led to the filing of litigation captioned *City of Silvis et al. v. Allison Wright et al*, Case No. 2023 CH 7, in the Fourteenth Judicial Circuit Court, until ordered by the Court. A copy of the Order is attached hereto as Exhibit A. Ultimately, the recording was shared with a City Alderman, and provided to me as part of my investigation. You have a copy of the tape as well. Until this matter is resolved, the City requests that the recording retain its confidential status. Ms. Wright also provided the legal advice which led the Council to deny the Mayor access to the tape.

Points 4 and 5 of the Request are now voluntarily resolved.

As to the remaining points raised:

1. Required Vote to Enter Closed Session

The Requester alleges that the Council entered Closed Session without a majority vote of the members present in Open Session.

The OMA specifically permits a public body to hold a meeting closed to the public upon 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. For such purpose, the OMA provides that “[t]he 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.” §2a.

Review of the verbatim recording of the Open Session Committee of the Whole Meeting of February 7, 2023,¹ shows that a motion was made by Alderman Lohse and seconded by Alderman York to enter Closed Session, which motion was immediately clarified to note that only Aldermen were intended to be in the Closed Session, excluding the Mayor and City Clerk. The recording is silent as to any roll call or voice vote being taken on the motion. While the minutes of the February 7, 2023 Committee of the Whole meeting originally reflected this, the City Council has recently approved amendment to the minutes to provide that the City Council entered Closed Session on the “agreed upon ascension” of the Aldermen present. A copy of the approved Minutes from February 7, 2023 and March 21, 2023 Minutes are attached hereto as Exhibits B and C. As you can see, the March 21, 2023 minutes amend the February 7, 2023 Minutes to show that the Council voted to enter Closed Session by “ascension.” See Exhibit C, pp. 4-6. The agreement upon ascension is based on the fact that the motion was made, seconded and, thereafter a “nod of the heads” occurred, and no objection to entering Closed Session was voiced.

¹ A copy of the recording is available at <https://soundcloud.com/user-625882465/tracks>

The OMA does not require the vote of each member to be taken and recorded individually, however it does require that the public be informed of each member's vote. While a vote by ascension in such instance does not perfectly meet the requirements of the OMA, where it requires the vote of each member to be publicly disclosed at the time of the vote, which shall be recorded. *See Wyman v. Schweighart*, 385 Ill. App. 3d 1099, 904 N.E.2d 77, 82 (4th Dist. 2008), the vote meets the requirements of the OMA in that the Council members present are identified in the Minutes, and the agreement by the Council to meet in Closed Session was indicated by the "nod of the heads" and the fact that each of the Council members presented entered the Closed Session. In this regard, the Mayor is a non-voting member of the City Council, except in certain circumstances (*see* 65 ILCS 5/3.1-40-30), so whether he agreed to the ascension is not at issue.

2. Discussion of the Mayor and City Clerk in Closed Session

While the Requester raises the allegation that the Mayor and City Clerk were discussed in Closed Session in violation of the OMA, the proper allegation would instead be whether the City cited a legitimate basis under the OMA to enter Closed Session, wherein the Mayor and/or Clerk may have been discussed. Determination of whether the discussion of the Mayor and City Clerk in Closed Session, as alleged, was proper, requires an analysis of the exceptions cited for entry into Closed Session.

The OMA provides a list of exceptions allowing a public body to enter Closed Session. 5 ILCS 120/2(c). Two exceptions were cited² for purposes of the February 7, 2023 Closed Session:

- 2(c)(1) "The appointment, employment, compensation, discipline, performance, or dismissal of specific employees, specific individuals who serve as independent contractors in a park, recreational, or educational setting, or specific volunteers of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee, a specific individual who serves as an independent contractor in a park, recreational, or educational setting, or a volunteer of the public body or against legal counsel for the public body to determine its validity. However, a meeting to consider an increase in compensation to a specific employee of a public body that is subject to the Local Government Wage Increase Transparency Act may not be closed and shall be open to the public and posted and held in accordance with this Act."

and

- (2)(c)(11) 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

² The citation to the statutory section was not correct, however, the explanation in the minutes provides proper notice of the subject matter exception.

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.

a. Exception 2(c)(1)

Exception 2(c)(1) does not appear applicable here, as the discussion did not specifically involve the “appointment, employment, compensation, discipline, performance, or dismissal of specific employees, specific individuals who serve as independent contractors in a park, recreational, or educational setting, or specific volunteers of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee, a specific individual who serves as an independent contractor in a park, recreational, or educational setting, or a volunteer of the public body or against legal counsel for the public body to determine its validity.”

b. Exception 2(c)11

As is set forth in §2(c)(11), a public body may enter Closed Session to discuss filed, pending litigation; or when a 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.” This section has been characterized as a “forked path.” See *Henry v. Anderson*, 356 Ill. App. 3d 952, 827 N.E.2d 522 (4th Dist. 2005). If litigation has been filed and is pending, citing this section to enter Closed Session without any further recitation is proper. *Wyman v. Schweighart*, 385 Ill. App. 3d 1099, 904 N.E.2d 77, 80 (4th Dist. 2008), citing *Henry*. However, where litigation has not been filed and is not pending, the public body in Closed Session must announce that litigation is probable or imminent, and record and enter into the minutes the basis for the finding. *Id.* The finding and recording in the record is mandatory as a prerequisite to closing a meeting. See Ill. Atty Gen. Op. 82.

In review of the verbatim recording, it is clear that litigation was not pending at the time of the Closed Session. However, it is equally clear that Attorney Wright, based on her legal interpretation of claims communicated orally to her, provided a strong basis for the City Council to make the finding that litigation was probable or imminent, such that exception 2(c)(11) serves as a proper basis for the Closed Session.

For purposes of determining whether litigation is “probable” or “imminent” the Attorney General, in Ill. Atty. Gen. Op 82 provides definitions of the words (citations omitted), which are instructive here.

Probable has been defined as “*** (1) having more evidence for than against, supported by evidence strong enough to establish presumption, but not proof, of its truth;.... (3) Likely to be or become true or real; such as logically or actually may be or may happen, reasonably, but not certainly, to be believed or expected.....”
Imminent has been defined as “*** something which is threatening to happen at

once, something close at hand, something to happen upon the instant, close although not yet touching, and on the point of happening.***”

In the foregoing Opinion, the Attorney General concluded that for litigation to be probable or imminent, there must be reasonable grounds for the public body to believe “that a lawsuit is more likely than not to be instituted or that such an occurrence is close at hand.” *Id.*, *see also*, Ill. Atty Gen. PAC Opinion 17-004, where it was recognized that “[f]or litigation to be probable or imminent, warranting the closing of a meeting, there must be reasonable grounds to believe that a lawsuit is more likely than not to be instituted or that such occurrence is close at hand.” PAC Opinion 17-004, *quoting* Ill. Att’y Gen. Op. No. 83-026, at 10, issued December 23, 1983.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A similar issue regarding the invocation of §2(c)(11) to enter Closed Session for purposes of discussion of probable or imminent litigation was at issue in *City of Bloomington v. Raoul*, 2021 IL App (4th) 190539, 184 N.E. 3d 366 (2021). In *Bloomington*, the appellate court affirmed a binding opinion of the PAC, finding that members of the Bloomington City Council made no “finding” of the facts leading to a conclusion that litigation was probable or imminent, and that upon review of the verbatim recording of the Closed Session, the exception cited did not support the entry into Closed Session.

In *Bloomington*, the Court focused on the speculative nature of the possibility of litigation:

There was no litigation pending for Bloomington to invoke at the time of the meeting, and thus, that clause of the exception is inapplicable. Further, we find the council members did not reasonably believe that litigation was probable or imminent. For example, Bloomington's attorney advised the group that litigation “could be plausible.” The attorney did not know if Normal had a valid claim, as Normal had shared nothing with him. One council member noted there was “no

[REDACTED]

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clear cut road” to litigation. Yet another member characterized any possible litigation as a “minor issue.” More than one member surmised Normal's threat of a lawsuit could be a “negotiating tactic.” The Mayor told the press after the meeting he doubted Normal would file suit. Finally, the gist of the City Council's discussion described elsewhere herein was not of a group that thought litigation was probable or imminent. *Id.* at ¶30; 184 N.E.3d at 371-72.

In stark comparison to *Bloomington*, [REDACTED] was that the threat of litigation was very real, a fact the City Council believed, and the discussion centered on strategies to avoid, or respond to, the threat of litigation.

Against this background, the City Council's Closed Session on February 7, 2023 was proper under §2(c)(11).

The Requester also complains of the exclusion from Closed Session of the Mayor and the Clerk. This issue is not properly brought under the OMA, because the OMA does not address, for purposes of determining whether the Closed Session met the requirements of the OMA, the propriety of the exclusion of certain individuals from a Closed Session. In this regard, as well, there is no evidence in the recording of the February 7, 2023 Open Session that the Mayor or the Clerk objected to being excluded. Despite their exclusion, the Closed Session comported with OMA where a majority of a quorum of the body was present, a verbatim record was taken, and minutes of the Closed Session have been drafted and are awaiting approval. If, upon your review, a determination is made that a response to this issue raised by the Requester should be forthcoming, please let me know and I will provide a response.

Please do not hesitate to contact me via email, or by telephone (630) 681-1000 should you have any questions or concerns about this correspondence.

Very truly yours,

BOND, DICKSON & CONWAY



Mary E. Dickson
Interim City Attorney

MED/bms

Enclosures

cc: Matt Carter, Mayor
Keri-Lyn Krafthefer, Interim City Attorney