

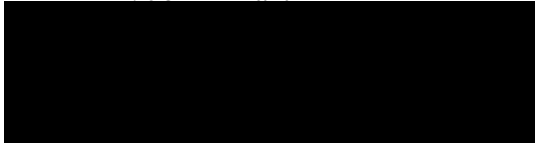


OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

KWAME RAOUL  
ATTORNEY GENERAL

December 9, 2024

*Via electronic mail*  
Mr. John Kraft



*Via electronic mail*  
Mr. Rick Verticchio  
Verticchio & Verticchio  
100 East Chestnut, P.O. Box 87  
Gillespie, Illinois 62033  
gillespie@verticchiolaw.com

RE: OMA Request for Review – 2019 PAC 56722

Dear Mr. Kraft and Mr. Verticchio:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2022)).

On February 6, 2019, Mr. John Kraft submitted a Request for Review alleging that the City of Benld (City) City Council (Council) violated OMA during its January 21, 2019, meeting. Specifically, Mr. Kraft alleged that the Council improperly entered into an 80-minute closed session pursuant to section 2(c)(11) of OMA<sup>1</sup> in order to "receive a briefing from Representatives of HMG on the results of a feasibility study referencing the City's water supply and contracts/construction related to it."<sup>2</sup> He asserted that the Council cited a potential for litigation if the City cancelled its current contract with the City of Gillespie.

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

<sup>2</sup>E-mail from John Kraft to AG PAC (February 6, 2019).

500 South 2nd Street  
Springfield, Illinois 62701  
(217) 782-1090 • Fax: (217) 782-7046

115 South LaSalle Street  
Chicago, Illinois 60603  
(312) 814-3000 • Fax: (312) 814-3806

1745 Innovation Drive, Suite C  
Carbondale, Illinois 62903  
(618) 529-6400 • Fax: (618) 529-6416

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On February 26, 2019, this office sent a copy of the Request for Review to the Council and asked it to provide copies of the open and closed session minutes and the closed session verbatim recording of the Council's January 21, 2019, meeting. This office also asked the Council to provide a written answer to Mr. Kraft's allegation that the section 2(c)(11) exception did not authorize the Council's closed session discussion. The Council did not respond to this office. On May 29, 2019, this office again forwarded a copy of the Request for Review and inquiry letter to the Council and requested a response. On June 10, 2019, the Council provided this office with its written response. On June 13, 2019, this office forwarded the Council's response to Mr. Kraft; he replied on June 18, 2019.

### 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 2022). Accordingly, OMA requires that all meetings of a public body remain open to the public unless an exception in section 2(c) of OMA is properly invoked. 5 ILCS 120/2(a), (c) (West 2023 Supp.). The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2023 Supp.).

Section 2(c)(11) of OMA permits a public body to close a meeting 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.)

Where a public body provides no information that litigation has been filed, it "must (1) find that the litigation is probable or imminent and (2) record and enter into the minutes the basis for that finding." *Henry v. Anderson*, 356 Ill. App. 3d 952, 956-57 (2005). These requirements "prevent public bodies from using the distant possibility of litigation as pretext for closing their meetings to the public." *Henry*, 356 Ill. App. at 956-57. "In the absence of reasonable, specifically identified grounds to believe that litigation was close at hand or more likely than not to ensue, the mere possibility that a lawsuit might be filed does not constitute 'probable' or 'imminent' litigation within the scope of section 2(c)(11) of OMA." Ill. Att'y Gen. Pub. Acc. Op. No. 16-007, issued September 13, 2016, at 8.

In its response to this office, the Council acknowledged that "[t]he suggestion of an Open Meetings violation \* \* \* for a period of 80 minutes the City Council was in closed session and received information from representatives of HMG, is technically correct, however,

that discussion was intertwined with the legal issues" related to the City's water source for which it sought legal advice.<sup>3</sup> The Council's attorney explained:

Our office had been previously requested to review the Contract that had been entered into by the City of Benld with the City of Gillespie in April of 1984 that had a stated term of 40 years and therefore will not expire until 2024, unless agreed to be extended by the parties. That contract was an important factor in the City's decision as to whether an alternate water source from the City of Gillespie needs to be considered and therefore our office was requested to provide an opinion as the effect of the 1984 water contract with the City of Gillespie. The other parties [in] attendance of the Executive Session were representatives of the engineering firm of HMG, who are the City's designated engineers, who had put together a proposal as to possible alternate water sources and that \* \* \* proposal was going to be affected by both the legal issue concerning the City of Gillespie and potential other legal issues related to alternate water sources including the KaHo Public Water District[.]<sup>[4]</sup>

Further, the Council claimed that it did not take any action during closed session nor in its return to the open session "in relation to the legal issues discussed or as connected for an alternate water source for the City of Benld."<sup>5</sup>

In reply to the Council's June 10, 2019, answer, Mr. Kraft stated that the Council's response did not demonstrate that the City faced any potential, threatened, or imminent litigation concerns.

There is no indication that litigation was probable or imminent at the time of the January 21, 2019, meeting. The Council, along with its attorneys and designated engineering firm, discussed the City's current contractual obligations to the City of Gillespie and whether the City should seek out possible alternate water sources. Although the Council's discussion partly involved legal issues concerning a contractual matter, the Council did not assert or demonstrate that at the time of the meeting, it was more likely than not, litigation would ensue. The Council's

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<sup>3</sup>Letter from Rick Verticchio, Verticchio & Verticchio, to S. Piya Mukherjee, Assistant Attorney General, Public Access Bureau (June 10, 2019), at 2.

<sup>4</sup>Letter from Rick Verticchio, Verticchio & Verticchio, to S. Piya Mukherjee, Assistant Attorney General, Public Access Bureau (June 10, 2019), at 1-2.

<sup>5</sup>Letter from Rick Verticchio, Verticchio & Verticchio, to S. Piya Mukherjee, Assistant Attorney General, Public Access Bureau (June 10, 2019), at 2.

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response shows that the Council was still considering all its available options rather than anticipating a probable lawsuit. As the Council had not yet approved an action that would interfere with its contractual obligations to the City of Gillespie, there was, at most, a mere possibility of legal action affecting the City at the time of the meeting. Therefore, the section 2(c)(11) exception did not authorize the Council's closed session discussion.

In accordance with the conclusions expressed in this determination, this office requests that the Council vote to make available for public inspection a copy of the verbatim recording and the minutes of the closed session portion of its January 21, 2019, meeting.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, you may contact me by mail at the Chicago address listed on the first page of this letter or by e-mail at [c.lucentemccullough@ilag.gov](mailto:c.lucentemccullough@ilag.gov). This letter serves to close this file.

Very truly yours,

*Christina Lucente-McCullough*

CHRISTINA LUCENTE-MCCULLOUGH  
Assistant Attorney General  
Public Access Bureau

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