

LEGAL ALERT**AG Clarifies Basis for Closed Session for Probable or Imminent Litigation**

Following a complaint filed by a reporter about an alleged improper closed session, the Illinois Attorney General has concluded that the City of Bloomington violated the Open Meetings Act by going into closed session to discuss potential litigation when there was not a proper basis for concluding that litigation was probable or imminent under the Act. 2017 PAC 46720 (PAC Op. 17-004, June 6, 2017)

The City went into closed session to discuss the termination of an intergovernmental agreement involving revenue sharing from a designated commercial area, with an adjacent municipality, the Town of Normal. There was a longstanding disagreement between Bloomington and Normal officials about Bloomington's right to terminate the agreement. The City felt a decision to terminate could result in litigation. The Attorney General emphasized however that "the fact that the public body may become a party to judicial proceedings because of the action it takes" or "merely because it has taken action that generated public opposition", does not authorize a public body to utilize the litigation exception to conduct its deliberations in closed session, regardless of how sensitive or controversial the matter may be.

A more detailed summary of the decision is set forth herein.

A full copy of the PAC Opinion is available at:

[2017 PAC 46720 \(PAC Op. 17-004, June 6, 2017\)](#)

Authored By:

Scott F. Uhler

(312) 984-6421

sfuhler@ktjlaw.com

**Inside This Issue**

PAC Opinion 17-004.....1

Summary of Decision.....2-3



SUMMARY OF DECISION

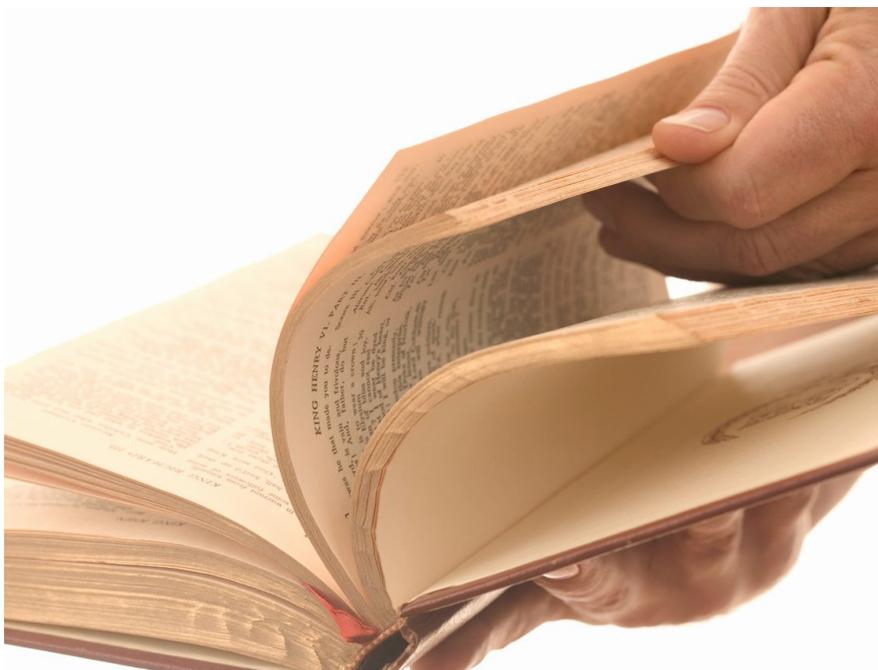
The City of Bloomington went into closed session to discuss the termination of an intergovernmental agreement involving revenue sharing from a designated commercial area, with an adjacent municipality, the Town of Normal. There was a longstanding dispute between Bloomington and Normal officials about Bloomington's assertion of a right to terminate the agreement. Bloomington had not taken any action to change or terminate the Agreement. Although the Bloomington Mayor had publicly stated that he "doubts there would be a lawsuit", the Bloomington City Council concluded, prior to making a decision, in its opinion that litigation regarding this issue was "probable" and then held a closed session to deliberate about it.

The Open Meetings Act authorizes a closed session when litigation has been filed or if the body properly finds that a legal action is probable or imminent. In its closed session, a public body must state on the record, the basis for its finding of probable or imminent litigation. Relying on its prior decisions the Attorney General concluded that to support a finding of probable or imminent litigation, "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", going on to note that "the fact that the public body may become a party to judicial proceedings because of the action it takes" or "merely because it has taken action that generated public opposition", does not authorize a public body to utilize the litigation exception to conduct its deliberations in closed session, regardless of how sensitive or controversial the matter may be.

The Attorney General stated that closed session under the litigation exception can only permit the discussion of litigation, not to discuss the merits of the matter under consideration, emphasizing:

"Consultations between the public body and its attorney concerning the potential legal impact and the legal ramifications of an item under consideration must be done publicly unless pending, probable or imminent litigation is ***the subject matter of the consultations***. Consequently, 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***." (Emphasis in the original) citing *Ill. Att'y Gen.Op.No.83-026*, at 12-14.

The Attorney General was careful to distinguish the decision making engaged in by a public body to discuss and decide whether or not to take an action because it could result in the



public body being sued (must be in open session), from the discussion of litigation itself (proper for closed session).

The Attorney General noted that it was not unreasonable for the Bloomington City Council to believe that terminating the Agreement could result in litigation sometime in the future. At the time of the meeting at issue, the disagreement between the parties was longstanding and Bloomington had not made a decision or taken any action to terminate or change the Intergovernmental Agreement. On that basis, the Attorney General concluded that there were no reasonable grounds to conclude that litigation was more likely than not to be initiated or was close at hand, since nothing had changed. The Attorney General further emphasized that the closed session discussion held by the City Council did not even address litigation, as required for closed session. In reviewing the closed session tapes, the Attorney General concluded that the closed session discussion did not focus on the "strategies, posture, theories, and consequences" of any probable litigation, but instead the City Council used the closed session to discuss its preferred course of action regarding the Agreement. On that basis, the Attorney General found that because the discussion of the City Council in closed session primarily concerned what course of action to take related to the termination of the Agreement, it concluded that the City violated the Open Meetings Act and the closed session was not authorized.

For any questions or comments you might have regarding this newsletter, please feel free to contact:

Chicago Office

20 N. Wacker Drive, Ste. 1660
Chicago, IL 60606

T: (312) 984-6400

F: (312) 984-6444

Orland Park Office

15010 S. Ravinia Ave., Ste. 10
Orland Park, IL 60462

T: (708) 349-3888

F: (708) 349-1506

www.ktjlaw.com

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