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ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

December 23, 1983

FILE NO. 83-026

MEETINGS:
Litigation Exception of the
Illinois Open Meetings Act

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Honorable J. William Roberts
State's Attorney, Sangamon County
Room 404 County Building
Springfield, Illinois 62701

Dear Mr. Roberts:

I have your letter in which you inquire whether the Springfield city council lawfully closed a portion of its meeting of November 8, 1983, on the basis of the litigation exception contained in section 2 of the Open Meetings Act (Ill. Rev. Stat. 1981, ch. 102, par. 42(h)) [the Act]. For the reasons hereinafter stated, it is my opinion that the litigation exception was, in the circumstance in question, improperly invoked and improperly applied.

The following factual circumstances have been provided. At the regular meeting of the Springfield city council held November 8, 1983, the city council was considering the annexation of certain property to the city of Springfield. Either during the city council's deliberations or a few minutes prior to the deliberations on the annexation, an attorney representing the fire protection district which served the subject property filed an objection to the annexation; the minutes of the Springfield city council indicate that this attorney also orally addressed the council in opposition to the annexation on behalf of his client. Seeking the advice of the city attorney as to the legal ramifications of the annexation, including the potential exposure of the city to a lawsuit, a motion was made and seconded by members of the city council to close the meeting "in order to discuss pending, probable, or imminent litigation". During the debate on the motion to close the meeting, the attorney representing the fire protection district stated that litigation was not contemplated at that time. Furthermore, the annexation was not the subject of any pending litigation in any court or administrative tribunal. You have also advised that, during debate on the closing of the meeting, the city attorney advised that the purpose of the litigation exception in the Open Meetings Act was "to protect the attorney-client privilege and to allow legal counsel to advise members of public bodies of their legal rights as well

as the pros and cons of the matter without divulging certain strategies or theories to attorneys or persons of differing interests who might then sue the public at a significant litigious advantage". A television news reporter objected to closing the meeting, stating that there was no pending, imminent, or probable litigation at that juncture. The motion to close the meeting carried, and the city council then met in closed session for approximately ten minutes. After the adjournment of the closed meeting, the city council returned to open session and passed the annexation ordinance. On the basis of this factual background, you have requested my opinion concerning whether the litigation exception contained in section 2 of the Act was properly applied, and you have specifically asked the meaning of the terms "pending", "probable", and "imminent" as used in section 2.

The purpose of the Open Meetings Act is to promote public access to governmental decisions and decision-making so that the public may have a basic understanding of governmental action, and to ensure that the people's elected representatives will be responsive to their constituents. (People ex rel. Difanis v. Barr (1980), 83 Ill. 2d 191, 199; People ex rel. Hopf v. Barger (1975), 30 Ill. App. 3d 525, 536.) As one commentator has noted:

" * * *

> Our society firmly believes, on the one hand, that the right to participate in our democracy includes the right to be informed. The people can have no real power without factual knowledge of what their government is doing to and for them. To be well-informed, the public should have some access to the ongoing process of decision making; not only to what is done, but also to why it is done and what alternatives are considered and rejected. A truly democratic electorate vitally needs to know this information.
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> (Wickham, Let the Sun Shine In! Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government, 68 Nw. U.L. Rev. 480, 481 (1973).)

In accordance with this purpose, the General Assembly declared the policy of this State in section 1 of the Open Meetings Act (Ill. Rev. Stat. 1981, ch. 102, par. 41):

> "It is the public policy of this State that the public commissions, committees, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of this Act that their actions be taken openly and that their deliberations be conducted openly." (Emphasis added.)

The articulation of the public policy within a statute itself reflects the importance which the General Assembly placed upon the proper interpretation of the Act in order to effectuate its underlying purposes. (Accardi v. Mayor and City Council of the City of North Wildwood (N.J. Sup. Ct. 1976), 368 A.2d 416, 420.) Therefore, the Act must be read as favoring openness in

the meetings, deliberations, and actions of public bodies. People ex rel. Hopf v. Barger (1975), 30 Ill. App. 3d 525, 536.

It is, however, generally recognized that public bodies should be allowed to consider certain subject matter in closed meetings so that government may efficiently manage and administer its affairs. (People ex rel. Hopf v. Barger (1975), 30 Ill. App. 3d 525, 536.) Consequently, the General Assembly has provided certain exceptions to the general requirement of open meetings. (See Ill. Rev. Stat. 1981, ch. 102, par. 42.) Among the exceptions enumerated therein is the provision allowing closed meetings for the purpose of discussing litigation which is pending, probable, or imminent. Section 2 of the Act (Ill. Rev. Stat. 1981, ch. 102,. par. 42) provides in pertinent part:

> "All meetings of public bodies shall be public meetings except for * * * (h) meetings held to discuss litigation when an action against or on behalf of the particular public body has been filed and is pending in a court or administrative tribunal, or when the public body finds that such an action is probable or imminent, in which case the basis for such a finding shall be recorded and entered into the minutes of the closed meeting in accordance with Section 2.06.
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It is necessary to bear in mind, while examining this exception, that it and all other exceptions to the open meetings requirement must be strictly construed in favor of open

meetings. As the court in Illinois News Broadcasters Ass'n v. City of Springfield (1974), 22 Ill. App. 3d 226, 228, held:

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> * * * The plain language of the open meetings law says public bodies * * * must meet publicly unless they are authorized by statute to hold closed sessions in certain instances; the exceptions allowing closed meetings are few and must be narrowly construed because they derogate the general policy of open meetings.
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(Emphasis added.)

(See generally Annot., 38 A.L.R.3d 1070 (1971).) Consultations with the attorney for the public body may not be used as a device to thwart the liberal implementation of the Open Meetings Act. People ex rel. Hopf v. Barger (1975), 30 Ill. App. 3d 525, 538.

Although it is not critical to my analysis of the issues you have presented, I will first address the mandate of section 2 that the public body make a finding that litigation is probable or imminent. The Act clearly requires that, if litigation is not pending, the public body must make and record a finding that litigation is probable or imminent as a prerequisite to closing a meeting to the public under the exception. This requirement is mandatory and exists to ensure that there is a reasonable and justifiable basis to act in derogation of the clearly enunciated public policy of this

State. (See generally Caldwell v. Lambrow (N.J. Sup. Ct. 1978), 391 A.2d 590. See also Remarks of Representative Barkhausen, May 15, 1981, House Debate on House Bill No. 411, at 19, 20.) There is no indication in the information that you have provided or in the minutes of the open or closed portions of the November 8, 1983, meeting of the Springfield city council that a finding that litigation was probable or imminent was made or entered into the minutes as required by law. Although this procedure is significant, I have not considered the lack of such a finding in reaching my opinion; I mention this matter only to stress the importance of following the statutory procedure.

The litigation exception to the Open Meetings Act constitutes a recognition that communications between an attorney and client regarding the client's posture and strategy in pending, probable, or imminent litigation should be privileged and confidential. Furthermore, requiring open consultations by a public body with its attorney concerning litigation which was pending, probable, or imminent could result in an unwarranted "litigious advantage" to the public body's legal adversaries. (People ex rel. Hopf v. Barger (1975), 30 Ill. App. 3d 525, 537.) As the court stated in Sacramento Newspaper Guild v. Sacramento County Board of Supervisors (Cal. App. 1968), 69 Cal. Rptr. 480, 490:

" * * *

> * * * Public agencies are constantly embroiled in contract and eminent domain litigation and, with the expansion of public tort liability, in personal injury and property damage suits. Large-scale public services and projects expose public entities to potential tort liabilities dwarfing those of most private clients. Money actions by and against the public are as contentious as those involving private litigants. The most casual and naive observer can sense the financial stakes wrapped up in the conventionalities of a condemnation trial. Government should have no advantage in legal strife; neither should it be a second-class citizen. * * * 'Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. * * * There is a public entitlement to the effective aid of legal counsel in civil litigation. * * *

* * * "

While the General Assembly has recognized the general desirability of preserving confidentiality in litigation matters, it has balanced this interest against the competing interest of open meetings. Consequently, the General Assembly has strictly limited the exception on discussion of legal matters to those situations where litigation is pending, probable, or imminent.

Prior to the amendment of the Open Meetings Act in 1982 by Public Act 82-378, effective January 1, 1982, the litigation exception was limited to discussion of litigation which was actually pending. In People ex rel. Hopf v. Barger,

at page 537, the court defined "pending" as "begun, but not yet completed". The court held that "[t]he traditional concept of litigation begins in terms of 'notice, pleading, trial and appeal' (See In re Estate of Stith (1970), 45 Ill.2d 192, 194), and presumably it is at that point that the litigation is 'pending.'" In Public Act 82-378, however, the General Assembly broadened the litigation exception to cover those situations where it was clear that litigation was "probable" or "imminent". See Remarks of Representative Reilly, May 20, 1981, House Debate on House Bill No. 411, at 25. Since you have indicated that litigation had not been instituted in terms of "notice, pleading, trial and appeal", it is necessary to consider the terms "probable" and "imminent" as they are applied in the Open Meetings Act.

In Williams v. Walsh (1950), 341 Ill. App. 543, 548, the court defined the term "probable" as follows:

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> * * * '(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. . . .'
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> * * * "

In Caley v. Manicke (1961), 29 Ill. App. 2d 323, 330, the court held:

> " * * *
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> * * * To be probable, evidence must be viewed in the light of logic, experience and accepted assumptions concerning human behavior. * * *
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> * * * "

The word "imminent" has been judicially defined as follows:

> " * * *
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> * * * 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. * * *
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> * * * "
>
> Continental Illinois National Bank and Trust Co. of Chicago v. United States (7th Cir. 1974), 504 F.2d 586, 591.

On the basis of these definitions, it is clear that the condition of being "probable or imminent" is not an arbitrary standard allowing a public body to capriciously make a finding that litigation is probable or imminent. Rather, "probable or imminent" is a definite standard with definite legal implications, and a determination that litigation is probable or imminent must be made by examining the surrounding circumstances in light of logic, experience, and reason. For 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 an occurrence is close at hand.

Consequently, the question of whether litigation was probable or imminent is essentially a question of fact. Under the factual circumstances you have supplied me, however, it is my opinion that there were insufficient grounds for the Springfield city council to reasonably believe that litigation was likely to occur or that litigation was close at hand. The presence of an attorney representing a client who opposes the contemplated action of the public body does not, in and of itself, constitute a reasonable ground for belief that litigation is forthcoming. (See generally Caldwell v. Lambrow (N.J. Sup. Ct. 1978), 391 A.2d 590, 592.) Furthermore, you have stated that the attorney for the opponents to the annexation declared that litigation was not contemplated at that time. There is nothing in the background information provided me to contradict this statement.

As stated during the legislative debates over Public Act 82-378:

> " * * *
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> * * * It is not the intent of the legislature that a public body can meet in closed session simply because its attorney is present and on the mere assumption that something might emerge during the discussion involving 'potential litigation'.
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> (Remarks of Representative Reilly, May 20, 1981, House Debate on House Bill No. 411, at 3.)

The fact that the public body may become a party to judicial proceedings because of the action it takes does not permit it to utilize the litigation exception to conduct its deliberations in closed sessions. (See Caldwell v. Lambrow (N.J. Sup. Ct. 1978), 391 A.2d 590, 592; Sutter Sensible Planning, Inc. v. Sutter County Board of Supervisors (Cal. Ct. App. 1981), 176 Cal. Rptr. 342, 349.) Therefore, it is my opinion that, under the facts you have provided, litigation was not probable or imminent, and that the litigation exception of section 2 of the Open Meetings Act was improperly invoked.

Furthermore, it is my opinion that the litigation exception may not be utilized to conduct deliberations on the merits of a matter under consideration regardless of how sensitive or controversial the subject matter may be. (Accardi v. Mayor and Council of the City of North Wildwood (N.J. Sup. Ct. 1976), 386 A.2d 416, 421.) Section 2 of the Act clearly provides that the only meetings which may be closed on the basis of the litigation exception are those meetings held to discuss litigation. Also, section 2a of the Open Meetings Act (Ill. Rev. Stat. 1981, ch. 102, par. 42a) provides in pertinent part:

" * * *

> At any open meeting of a public body, for which proper notice under this Act has been given, the body may, without additional notice under Section 2.02, hold a closed session in

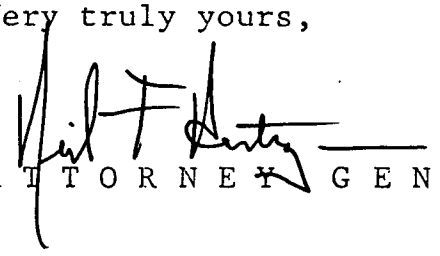
> accordance with this Act. Only topics specified in the vote to close under this Section may be considered during the closed meeting." (Emphasis added.)

Under the factual circumstances you have provided, the meeting of the Springfield city council was being held, inter alia, to deliberate and to take action upon the annexation of certain property. The city council closed the meeting prior to deciding the annexation question on the basis that litigation over the annexation was probable or imminent. It, therefore, appears that the city council acted prematurely in closing the meeting on the basis of the litigation exception in that litigation over the annexation could not have been probable or imminent until the Springfield city council voted to adopt the annexation ordinance. On the other hand, if the possibility of a lawsuit over the annexation was a factor in the city council's legislative determination on the annexation, this matter should have been discussed in an open meeting since it goes to the merits of the question rather than to the litigation itself. Also, as stated above, the Springfield city attorney at the November 8, 1983, meeting indicated that the litigation exception could be used to enable the public body attorney "to advise members of public bodies of their legal rights as well as the pros and cons of the matter". However, 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. Therefore, even if litigation was probable or imminent, the litigation exception of section 2 of the Open Meetings Act could not be utilized to discuss the "pros and cons", i.e., the merits, of the annexation.

It is, therefore, my opinion that the November 8, 1983, meeting of the Springfield city council was not properly closed to the public.

Very truly yours,



ATTORNEY GENERAL