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July 12, 2019

To: UCCI Membership

Re: Public Recital Inquiry

Issue:

Whether it is permissible after returning to open session from a closed session to simply “make a motion as discussed in closed session” or does the motion have to be more specific.

Analysis:

The Illinois Supreme Court recently address the public recital requirements of the Open Meeting Act (“the OMA”)¹ in *Board of Education of Springfield School District 186 v. Attorney General of Illinois*.² There, the Supreme Court clarified the public recital standard under the OMA in addressing the issue of whether a board violates the OMA by signing an agreement in closed session prior to taking a vote on the agreement in open session.

In that case, the school board entered closed session, commonly referred to as executive session, during its February 4, 2013 meeting.³ During that closed session, board members signed a separation agreement with the district’s then-superintendent.⁴ The superintendent had already signed the agreement during a prior closed meeting.⁵ No further action was taken to approve the agreement

¹ 5 ILCS 120/1 *et seq.*

² *Board of Education of Springfield School District 186 v. Attorney General of Illinois*, 2017 IL 120343.

³ *Springfield School District*, 2017 IL 120343, ¶¶ 5, 6.

⁴ *Id.*

⁵ *Id.* at ¶ 5.

during that session. When the agenda for the next meeting on March 5, 2013 was posted on the district's website, it listed the approval of the separation agreement as an agenda item and contained link to a copy of the agreement itself containing the signature of Dr. Milton, dated "1/31/13," and the undated signatures of six of the seven board members.⁶ During that next meeting, the board president introduced the agenda item by stating the following:

"I have item 9.1, approval of a resolution regarding the separation agreement. The board president recommends that the Board of Education of Springfield School District No. 186 vote to approve the separation agreement and release between Dr. Walter Milton, Jr., and the Board of Education."⁷

The board then voted to approve the separation agreement during open session.⁸ The previously signed agreement was then dated March 5, 2013.⁹

A local reporter requested that the Public Access Counselor in the Office of the Illinois Attorney General (the "AG") review the board's actions for potential OMA violations.¹⁰ Following an investigation, the AG issued a binding opinion finding the board's actions violated the OMA. Specifically, the AG found: (1) the board members' signing of the agreement at the February 4, 2013 closed session constituted the taking of a final action in violation of section 2(e) of the Act; (2) even if it was permissible to ratify that action by a vote at an open meeting, the board violated section 2(e) of the Act at the open meeting by failing to "adequately inform the public of the nature of the matter under consideration or the business being conducted"; (3) the board failed to create and maintain verbatim recordings of three closed sessions, violating section 2.06(a) of the Act; and (4) the board

⁶ *Springfield School District*, 2017 IL 120343, ¶ 8.

⁷ *Id.* at ¶ ¶ 9.

⁸ *Id.* at ¶ 11.

⁹ *Id.*

¹⁰ *Id.* at ¶ 7.

failed to summarize discussions of the separation agreement in the minutes of five closed meetings, in violation of section 2.06(e)(3) of the Act.¹¹

The board sought administrative review of the AG's opinion with the circuit court, which reversed the AG's conclusion that the board violated section 2(e) of the Act by unlawfully taking final action on the separation agreement at a closed session, finding that final action was taken at the March 5, 2013 open meeting.¹²

Thereafter, a second binding AG opinion was issued finding the board violated section 2(e) of the Open Meetings Act "by voting to approve the separation agreement during its March 5, 2013, meeting without adequately informing the public of the business being conducted," because "the Board's posting of the separation agreement on its website did not constitute a public recital during an open meeting" as required by section 2(e).¹³

On review, the circuit court again reversed the AG's opinion, concluding that the website posting of the agenda adequately informed the public of the nature of the business that was to be conducted at the March 5, 2013, open meeting.¹⁴

On appeal, the appellate court affirmed the judgment of the circuit court, stating that the undated signing of the settlement agreement at the closed meeting did not violate section 2(e)'s prohibition on taking final action at a closed meeting.¹⁵ According to the appellate court, the link on the website together with the board president's introduction of the agreement was an adequate public recital.¹⁶

¹¹ *Springfield School District*, 2017 IL 120343, ¶ 12.

¹² *Id.* at ¶ 13.

¹³ *Id.* at ¶ 15.

¹⁴ *Id.* at ¶ 17.

¹⁵ *Id.* at ¶ 18.

¹⁶ *Id.* at ¶ 18.

The AG appealed to the Supreme Court. At issue was (1) whether the public recital required by section 2(e) of the OMA must include an explanation of the significance of the contemplated action and (2) whether, in this case, the Board violated section 2(e) by failing to satisfy the public recital requirement at the open meeting at which the Board voted to approve the agreement.¹⁷ The Court also addressed the issue of whether final action was taken during the closed session.¹⁸

With regards to the final action issue, section 2(e) of the OMA provides that “No final action may be taken at a closed meeting. Final 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.”¹⁹ The Supreme Court agreed with the Appellate Court’s finding that the board did not violate the OMA by signing the separation agreement in closed session because that conduct did not constitute a final action.²⁰ Rather, the final action occurred when the board voted to approve the separation agreement during the open session of a subsequent board meeting.²¹ According to the Court, the OMA does not bar a public body from taking a preliminary vote at a closed meeting reasoning that the “final action” is actually the board’s vote in open session.²² Thus, the Court found that the preliminary signature of the agreement before the vote in open session did not constitute final action.

With regards to the public recital issue, section 2(e) of the OMA requires final action by a public body to 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.”²³ According to the AG’s

¹⁷ *Springfield School District*, 2017 IL 120343, ¶ 20.

¹⁸ *Id.* at ¶ 74.

¹⁹ 5 ILCS 120/2(e)

²⁰ *Springfield School District*, 2017 IL 120343, ¶ 74 (“Without the public vote, no final action has occurred.”).

²¹ *Id.* at ¶ 76.

²² *Id.* at ¶ 73. (“the statute contains no bar to a public body’s taking a preliminary vote at a closed meeting”).

²³ 5 ILCS 120/2(e).

argument, section 2(e) required the board to not only to recite the nature of the matter being considered, but also explain the significance of the matter.²⁴ The AG also argued for a case-by-case analysis of whether the “key terms” of the matter have been publicly recited for section 2(e) purposes.²⁵

The Supreme Court rejected the AG’s approach. Instead, the Court held that a public body must recite the nature of the matter under consideration with sufficient detail to identify the particular transaction or issue, but need not provide an explanation of its key terms or its significance.²⁶ According to the Court, “while the ‘nature of the matter’ may be recited in nonspecific terms (the approval of a loan, a contract, a purchase, a policy, or a resolution), ‘other information’ is necessary to inform the public of the specific item of business (the purpose of the loan, the subject of the contract, the type of property being purchased, the title of the policy, or the purpose of the resolution).”²⁷

Applying the law to the facts of the underlying case, the Court concluded the board president’s recital was sufficient to announce the nature of the item under consideration with adequate detail to identify the particular issue.²⁸ Specifically, the Court found that the school board president recited the general nature of the matter under consideration (*i.e.*, a separation agreement and release) and specific detail sufficient to identify the particular transaction (*i.e.*, the separation agreement was between Dr. Milton and the school board).²⁹ According to the Court’s reasoning, this was sufficient to serve the purpose of the public recital requirement.³⁰ As a result, it was unnecessary for the board president to publicly read the 16 pages of the agreement and its several addenda or to enumerate “key points” of the agreement, which was one of separate “Roll Call Action Items” on the agenda for the March 5,

²⁴ *Springfield School District*, 2017 IL 120343, ¶ 28.

²⁵ *Id.* at ¶ 49.

²⁶ *Id.* at ¶¶ 61, 64.

²⁷ *Id.* at ¶ 50.

²⁸ *Id.* at ¶ 83.

²⁹ *Id.*

³⁰ *Id.*

2013, meeting.³¹

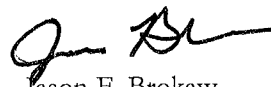
Conclusion:

In sum, it is the opinion of this office that the Supreme Court's Opinion in *Board of Education of Springfield School District 186 v. Attorney General of Illinois*³² instructs that a public body need not read the entire agreement aloud or recite its key terms prior to taking a public vote after approving it in executive session. Although the key terms of a board action are not required to be recited, county boards (as public bodies) must make a public recital of the general nature of the matter under consideration, with sufficient detail to identify the particular transaction or issue, before to taking any final action on the matter to avoid violating section 2(e) of the OMA.³³ Therefore, a board may not simply come out of a closed session and "make a motion as discussed in closed session." Rather, it must make a motion or introduce an item in such a way that advises of the nature of the matter being considered and provides other specific information that will inform the public of the business being conducted. Put simply, there must be enough information so that the public has a general understanding of what it is the public body is doing and/or voting on.

At the request and direction of UCCI this opinion was prepared by

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Herman G. Bodewes


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³¹ *Springfield School District*, 2017 IL 120343, ¶ 83.

³² 2017 IL 120343.

³³ 5 ILCS 120/2(e).