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FILE NO. S-867

COUNTIES:
Right of Individuals to Mechanically Record Proceedings of County Board Meetings

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Honorable Omer T. Shawler
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Marshall, Illinois 62441

Dear Mr. Shawler:

I am in receipt of your letter in which you state:

"Question has arisen as to the matter of whether a private individual may bring an electronic recording device to a public meeting, such as the meeting of the County Board, and record all proceedings and discussion at such a public meeting."

The question you pose is one that has not previously been dealt with in Illinois either by the courts or by my office. It is an important question and one that will become more so in the coming years. With the advent of smaller, more convenient,

and more efficient recording devices it has become feasible to record the proceedings of public meetings without disrupting the meeting.

What is really at issue is whether the county board may, within the powers granted to it by law, prohibit an individual from bringing a recording device to a public meeting. It is well established in Illinois that a county board, with the exception of a home rule unit, can exercise only such powers as are expressly given by law or as arise by necessary implication from powers granted by law. (Ashton v. Cook County, 384 Ill. 287 (1944); Ill. Const., art. VII, sec. 7.) Prior opinions of the Attorney General have stated that a county board may, in the absence of statutory direction, adopt rules governing procedure. (1965 Op. Atty. Gen., 144; 1969 Op. Atty. Gen., 77.) As these opinions note, procedural rules are not laws as such, but are merely regulations governing the conduct of meetings.

There is no statute dealing specifically with the use of recording devices at county board meetings. For the reasons set forth below, the absence of such a specific statute does not mean that prohibiting tape recorders is within the power of a

county board on the ground that such a rule would be procedural only.

Illinois has enacted "AN ACT in relation to meetings." (Ill. Rev. Stat. 1973, ch. 102, par. 41 et seq.) Section 1 of that Act sets forth the public policy of the State:

> "[T]hat 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."

The Illinois "Open Meetings Act" was originally enacted in 1957 and although amended in 1965 and 1967 the public policy expressed in the original legislation has remained unchanged. At last count thirty-five states had enacted in one form or another open-meetings legislation. (Wickham, Let the Sun Shine In! Open Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government, 68 N.W. U.L. Rev. 480 (1973).) Only one State court has been called upon to determine whether such legislation can be interpreted to allow the tape-recording of an open meeting. In Nevens v. City of Chino, 44 Cal. Rptr. 50, 233 Cal. App. 2d 775 (1965), the court was called upon to interpret California's

open meeting legislation, the Ralph M. Brown Act (California Gov. Code, sec. 54950 - 54958, 1972). The Brown Act, although more detailed than the legislation in Illinois, contains language in its public policy sections similar to that of the Illinois statute. The California Act provides:

> "In enacting this chapter, the Legislature finds and declares that the public commissions, 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 the law that their actions be taken openly and that their deliberations be conducted openly."

In Nevens the court held that a city council resolution prohibiting tape recorders in the council chambers during council proceedings is an unreasonable deprivation of the means to make an accurate record of what transpires in a public meeting and interferes with an individual's right as a private citizen to keep a record of what takes place at public meetings. In so holding the court stated that:

> "[T]he plaintiff says that his machine is silent and unobtrusive and that it does not interfere in any way with the meetings of the council; it is not claimed that he uses electricity of the city, or that he interferes with the auditory rights of other citizens. The court can take judicial notice that there have been developed

> during recent years more than one variety of noiseless tape recorder. The action of the city council is too arbitrary and capricious, too restrictive and unreasonable. [Citations] It bars what clearly should be permitted in making an accurate record of what takes place at such meetings.
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> Accuracy in reporting the transactions of a public governing body should never be penalized, particularly in a democracy, where truth is often said to be supreme. Governmental measures based upon police power should always be well defined and reasonably exercised. And here reason is down-graded. If a shorthand record of such a meeting is more accurate than long hand notes, then the use of shorthand is to be approved [Citation]; and if the making of a tape record is a still better method of memorializing the acts of a public body it should be encouraged.
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> As no one is harmed, the use of a silent tape recorder operated exclusively by the person interested in making such a record must be permitted. * * *"

The California decision is, of course, not binding upon Illinois courts. However, it is my opinion that the principles enunciated and the holding therein are applicable in Illinois. To hold otherwise would be neither logical nor consistent with the policy of the Illinois Meetings Act.

As early as 1958, one year after the enactment of the Open Meetings Act, the then Attorney General held that the minutes of the public meetings were public records and therefore available

for public inspection. (1958 Op. Atty. Gen., 286.) More recently, the argument that public records may be viewed but not copied, was rejected by the Illinois Appellate Court. (People ex rel. Gibson v. Peller, 34 Ill. App. 2d 372.) The court in Gibson dealt with the claim by members of a Board of Education that although records could be inspected by citizens there was no right to make copies of the records. The plaintiffs claimed the right to make copies under both the common law and the authority of the State Records Act, (Ill. Rev. Stat. 1973, ch. 116, par. 43.1 et seq.). The court agreed and held that:

> "The right of relators to reproduce the public records is not solely dependent upon statutory authority. There exists at common law the right to reproduce, copy and photograph public records as an incident to the common law right to inspect and use public records. Good public policy requires liberality in the right to examine public records. In 76 CJS, Records, p 133, the author states: 'The right of access to, and inspection of, public records is not entirely a matter of statute. The right exists at common law, and in the absence of a controlling statute, such right is still governed by the common law.... all authorities are agreed that at common law a person may inspect public records ... or make copies or memoranda thereof.' In Clay v. Ballard, 87 Va 787, 790, 13 SE 262, 263, the court said that at common law the right to

> inspect includes the right to copy. See also Fuller v. State, 154 Fla 368, 17 So2d 607; State ex rel. Colescott v. King, 154 Ind 621, 57 NE 535.
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> Defendants say that relators have the right to look, examine and inspect with the naked eye the public records and copy by hand these public records, but that they have no right to photograph the records. This argument cannot be sustained by logic or common knowledge. Modern photography is accurate, harmless, noiseless and time saving. It does nothing more than capture that which is seen with the naked eye. Neither defendants nor the public can be harmed by the reproduction of the records exactly as they exist. The fact that more modern methods of copying are devised should not lessen the basic right given under the common law. The State Records Act declares the public policy relating to public records in the State of Illinois. It does not abrogate the common law."

In light of the above authority, prohibiting the tape recording of an open meeting would create an anomalous situation. Any minutes of the meeting would be available for copying, but a more efficient and accurate method of copying, such as tape recording the original proceeding would not. Where comprehensive minutes are not kept there is an even greater reason for allowing tape recording; such recording would be the only accurate means for ascertaining how or why the public officials acted as

they did. If open meeting legislation is to have any meaning it is essential that the public be granted the right to acquire a record of what transpired at such open meetings.

Therefore, I am of the opinion that a governmental body, such as a county board, may not prevent the tape recording of a meeting that qualifies as such under the Illinois Open Meetings Act. I must emphasize, however, that such tape recordings should not be allowed to interfere with the overall decorum and proceeding of the meeting. Governmental bodies should adopt procedural guidelines so that recording may be done in such a manner so as not to interfere with the proceedings as they occur.

Very truly yours,

A T T O R N E Y G E N E R A L