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SPRINGFIELD

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FILE NO. 80-024

MEETINGS:
Open Meetings Act

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

Dear Mr. Roberts:

I have your letter wherein you request my opinion on the following matters as applied to a municipal corporation subject to "AN ACT in relation to meetings" [the Open Meetings Act] (Ill. Rev. Stat. 1979, ch. 102, par. 41 et seq.):

"1. Is notice required to be given of meetings which may be closed to the public under the 'exceptions' in Section 2 of the Act?

2. How are the terms 'pending', 'threatened' and 'contemplated' defined as applied to meetings held with legal counsel to consider court proceedings against or on behalf of a municipal corporation?

3. In considering the 'Acquisition of real property':

(a) what portions of a meeting, if any, may be closed when the topic of consideration is the negotiation of a lease:

i. where a municipal corporation is lessor?

ii. where a municipal corporation is lessee?

(b) what portions of a meeting, if any, may be closed when the topic of consideration is the sale of real property by a municipal corporation?

(c) what portions of a meeting, if any, may be closed when the topic of consideration is the purchase of real property by a municipal corporation?

(d) what portions of a meeting, if any, may be closed when the topic of consideration is the lease of real property by a municipal corporation (as lessor) with a provision that at the end of the term of the leasehold all improvements made on the leasehold property become the property of lessor?

4. May a public body meet in closed session:

(a) to negotiate collectively with employee representatives (union or non-union) over salaries, wages, terms of employment, working conditions and other such matters?

(b) to consider its negotiating response as regards those collective negotiating topics described in (a) above?"

Your first question concerns the applicability of the notice requirements found in section 2.02 of the Act (Ill. Rev. Stat. 1979, ch. 102, par. 42.02) to those meetings which may be closed to the public based upon a section 2 exception to application of the Act. (Ill. Rev. Stat. 1979, ch. 102, par. 42.)

Section 2 of the Act provides in pertinent part that:

"All meetings of any legislative, executive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing

> including but not limited to committees and sub-committees which are supported in whole or in part by tax revenue, or which expend tax revenue, shall be public meetings except for * * *.
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> * * *
>
> (Emphasis added.)

Thereafter, the provision lists those circumstances where a particular meeting of a public body, which is otherwise subject to the Act, need not be public.

Section 2.02 of the Act provides in pertinent part that:

> "Public notice of all meetings required by this Act to be public shall be given as follows:
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> * * *
>
> (Emphasis added.)

Thereafter, the provision specifies precisely in what manner notice shall be given. Because section 2.02, as indicated above, does not require that notice be given of meetings that are not required to be public, it is my opinion that those meetings which are excepted, under section 2, from application of the Act, are not public meetings and public notice thereof is not required. However, no other business may be discussed, considered, or acted upon at such closed meetings.

Your second question concerns how broadly the section 2(c) exception to application of the Act is read with reference to meetings held with legal counsel to consider court proceedings which are "pending", "threatened" or "contemplated" against or on behalf of a municipal corporation.

Because your question is phrased in general terms, it will be necessary for me to respond in general terms.

Section 2 of the Act provides in pertinent part that:

> "All meetings * * * shall be public meetings except for * * * (c) meetings where the acquisition of real property is being considered, or where a pending court proceeding against or on behalf of the particular governmental unit is being considered, but no other portion of such meetings may be closed to the public * * *.
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> * * *
>
> (Emphasis added.)

Thus, it is clear that a meeting held with legal counsel to consider a "pending" court proceeding against or on behalf of the particular governmental unit, need not be open. The term "pending" was discussed in People ex rel. Hopf v. Barger (1975), 30 Ill. App. 3d 525, 536-37. The court stated that within the meaning of the Open Meetings Act:

> " * * * 'pending' cannot be reasonably interpreted to include preliminary discussion with an attorney to secure advice on either the bringing of suit or the defense of a suit which is either threatened or likely to be brought against the city. 'Pending' is defined in Black's Law Dictionary (4th ed. 1951) as '[b]egun, but not yet completed.' The 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.'
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> * * *
>
> (Emphasis added.)

The court in Barger, recognizing that advance consultations between a governing body and its attorney on "prospective" litigation is not a "meeting" as contemplated by the Act, concluded that:

> " * * * [T]he legislature did not intend that consultations between the governing body and its attorney must always be conducted openly, when this could result in the public being placed at a litigious disadvantage. We conclude that advance consultation with its attorney is not a 'meeting' of the governmental body as contemplated in the Act and thus is not covered by the Act. This interpretation gives to legal consultation on prospective litigation the same limited confidentiality that is given under the Act to pending litigation. See Sacramento Newspaper Guild v. Sacramento County Board of Supervisors (1968), 263 Cal. App. 2d 41, 55-57, 69 Cal Rptr. 480, 490-491. See also Times Publishing Co. v. Williams (Fla. App. 1969), 222 So. 2d 470, 476-477; Channel 10, Inc. v. Independent School District No. 709 (1974), 298 Minn. 306, 215 N.W.2d 814, 825-826.
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> This does not mean, of course, that consultations by a governing body with an attorney in private may be used as a device to thwart the liberal implementation of the policy that the decision-making process is to be open and that confidentiality is to be strictly limited. The balance between the two must always be resolved in the public interest on a case-by-case basis.
>
> * * * "

(Emphasis added.)

However, despite the above broad dictum of the Barger case, section 2(c) of the Act specifically exempts only meetings where a "pending court proceeding" is being considered. Because the court in Barger did not define "prospective litigation", I cannot attribute a meaning to that term. Consequently, until a case arises presenting facts on which a court holds that a meeting to consider "contemplated" or "threatened" litigation is not a meeting within the Act or that "contemplated" or "threatened" litigation is synonymous with "prospective"

litigation, I have no basis for equating those terms or commenting as to their definition with reference to the Act.

Moreover, the Appellate Court in Barger, as indicated above, emphasized the need to preserve the liberal policy of the Act and to resolve issues in "the public interest on a case-by-case basis". Consequently, and in the absence of specific facts, I cannot determine whether or not the type of meeting in question is excepted by or not subject to the Act.

Your third question concerns the construction of section 2(c) of the Act with reference to "the acquisition of real property" exception to general application of the Act. Section 2(c) provides in pertinent part that:

> "All meetings * * * shall be public meetings except for * * * (c) meetings where the acquisition of real property is being considered, but no other portion of such meeting may be closed to the public * * *.
>
> * * *"

(Emphasis added.)

For purposes of organization, I will address parts (b) and (c) of question 3 before answering part (a). In parts (b) and (c) you ask respectively what portions of a meeting may be closed when the topic under consideration is the sale or the purchase of real property by a municipal corporation.

Section 2(c), by its own terms, specifically provides for the exception from application of the Act of meetings where the acquisition of real property is considered.

Prior to 1967, section 2(c) of the Act provided for closed meetings to consider the "acquisition or sale of real property". The authority to close meetings to discuss the sale of real property was specifically eliminated by House Bill 476, approved July 24, 1967 (Laws 1967, p. 1960). Consequently, no portion of a meeting may be closed when the topic under consideration is the sale of real property by a municipal corporation.

Section 2(c) of the Act, as indicated above, clearly provides that only that portion of a meeting where the acquisition of real property is considered may be closed. However, in that closed meeting, or portion thereof, it appears that the municipal corporation may take final action concerning the acquisition of the real property. In paragraph 2 of section 2, which provides for closed sessions for certain stated purposes, the following provision is specifically inserted:

" * * * but no final action may be taken at a closed session. * * *" (Emphasis added.)

No such restriction is stated for subdivision (c) or any other subdivisions in the first paragraph of section 2.

In questions 3(a)(i) and (ii) of your letter, also relevant to the section 2(c) exception, you inquire what portions of a meeting, if any, may be closed when the topic under consideration is the negotiation of a lease where a municipal corporation is the lessor or when the municipal corporation is the lessee.

It has been long settled in Illinois that a lease, being an interest in land, is in the nature of real property. (People v. Hardt (1946), 329 Ill. App. 153, 158; Urban Investment and Development Co. v. Rothschild and Co. (1975), 25 Ill. App. 3d 546, 550; Sanitary Dist. of Chicago v. Monasse (1942), 380 Ill. 27, 32-33.) Consequently, in a situation where a municipal corporation is a lessee, it occupies the position of a purchaser of an interest in land for a specified rent or compensation. Therefore, as discussed above, the municipal corporation, as a lessee, may consider the negotiation of a lease in a closed meeting and take any necessary final action thereon.

Conversely, when the municipal corporation occupies the position of a lessor, or seller of an interest in real property, no portion of the meeting may be in closed session.

In question 3(d) of your letter, you ask what portions of a meeting, if any, may be closed where the leasing of real property by a municipal corporation, as lessor, is under consideration, and where the lease provides that at the end of the term, all improvements on the property become the property of the lessor. As stated above, generally where the municipal corporation is the lessor, the transaction is in the nature of a sale of real property and no portion of any meeting concerning the lease may be closed. I see no reason why the same principle should not apply here. Such a provision, as part of the lease agreement between parties, properly evinces an intent on their part that any improvements made become a permanent part of the realty. (Isham v. Cudlip (1962), 33 Ill. App. 2d 254, 265.)

And as part of the leasehold agreement, the included provision may be viewed as a part of the agreed upon compensation given by the lessee in consideration for the sale of an interest in land by the municipal corporation.

Finally, in question 4 of your letter, your inquiries relate to the exception found in subsection (a) of section 2 of the Act. (Ill. Rev. Stat. 1979, ch. 102, par. 42(a).) Subsection 2(a) provides in pertinent part that:

> "All meetings * * * shall be public meetings except for (a) collective negotiating matters between public employers and their employees or representatives * * *.
>
> * * *"

(Emphasis added.)

Firstly, you inquire whether a public body otherwise subject to the Act may meet in a closed session to negotiate collectively with employee representatives (union or non-union) over salaries, wages, terms of employment, working conditions and other such matters.

Generally, wages, hours and other terms and conditions of employment are proper subjects for collective bargaining, as well as any other subject with respect to which the parties may have chosen to bargain. (Fibreboard Paper Products Corp. v. NLRB (1964), 85 S. Ct. 398, 402; NLRB v. Local 264 Laborer's Int'l Union (1976), 529 F. 2d 778, 785.) Thus, it appears that "collective negotiating matters" which may be discussed between a public body and its employees or their representatives encompasses a broad scope of subjects, including those to which

you have specifically referred. Consequently, in answer to your first question, section 2(a), by its own terms, excepts from application of the Act those meetings wherein matters properly the subject of collective negotiation between public employers and employees or their representatives are discussed.

Secondly, you inquire whether a public body may meet unilaterally to consider its negotiating response to the collective negotiating topics described above. Because you have posed the question in general terms, again I must qualify my response by cautioning that the answer could vary depending upon the particular facts of the situation.

The 2(a) collective negotiating exception provides that a public body may meet in closed session for the purpose of discussing "collective negotiating matters between public employers and their employees or representatives". Thus, it appears from the language that a public body may meet privately to discuss collective negotiating matters and that the application of the provision is not limited solely to those meetings which take place between the public employer and its employees. Consequently, it appears that as a general rule and in the absence of specific facts, a public body may meet privately to consider a collective negotiating response. Moreover, the fact that the Illinois legislature has specifically provided an exception for collective negotiating matters indicates a recognition of the view that the very nature of meaningful collective bargaining requires that certain phases of the negotiating process

must be conducted privately. (Wichkam, Let the Sun Shine In! Open-Meetings Legislation Can Be Our Key to Closed Doors in State and Local Government, 68 Nw. U.L. Rev. 460, 492 (1973); Edwards, The Emerging Duty to Bargain in the Public Sector, 71 Mich. L. Rev. 885, 902 (1973).) Effective collective negotiation with public employees is clearly in the public interest and necessary to aid in the conduct of the people's business. Consequently, it is my opinion that, as a general rule, a public body may meet unilaterally in a closed session to discuss its negotiating response to the topics described above.

Very truly yours,

ATTORNEY GENERAL