JIM RYAN
ATTORNEY GENERAL
STATE OF ILLINOIS

January 31, 1996

FILE NO. 96-005

MEETINGS:
Discussion of Future Appointments

MUNICIPALITIES:
Nature of Municipal Council

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Honorable Dave Neal
State's Attorney, Grundy County
111 East Washington
Morris, Illinois 60450

Dear Mr. Neal:

I have your letter wherein you inquire whether a meeting which was attended by the re-elected mayor, a re-elected commissioner and three newly elected, but unsworn, commissioners of a village under the commission form of government, held to discuss the appointment of village officials for the next term by the village council, violated the Open Meetings Act (5 ILCS 120/1 et seq. (West 1994)). For the reasons hereinafter stated, it is my opinion that the meeting in question was violative of the Act.

A municipality that operates under the commission form of government is governed by a council comprised of a mayor and four commissioners. (65 ILCS 5/4-5-1 (West 1994).) According to your letter, at the 1995 municipal election three new

commissioners were elected to the council, and two incumbents, the mayor and another commissioner, were re-elected. The meeting in question was held after the election but before the new council members began their terms. You state further that they met to discuss certain appointments to city offices that could be made only after the new council members assumed office. No notice satisfying the requirements of the Open Meetings Act was given, and no members of the public were present.

Section 2 of the Open Meetings Act (5 ILCS 120/2 (West 1994)) requires that all but certain, specified meetings of public bodies be open to the public. The Act includes a requirement that public notice be given of all meetings, whether open or closed to the public. (5 ILCS 120/2.02 (West 1994).) Section 1.02 of the Act (5 ILCS 120/1.02 (West 1994)) provides:

> "For the purposes of this Act:
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> 'Meeting' means any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business.
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> * * * "

The council and its members possess and exercise executive, administrative and legislative powers of the municipality. (See 65 ILCS 5/4-5-2 (West 1994).) Thus, the council is clearly a public body, for purposes of the Act. (See 5 ILCS 120/1.02 (West 1994).) A quorum of the council is three members (65 ILCS 5/4-5-12 (West 1994)), and two constitute a

majority of a quorum. Clearly, the persons who were newly elected to the council but were not yet sworn in were not members of the council; consequently, had only they gathered, there would have been no violation of the Act. The gathering was, however, attended by two persons who were members of the council at the time of the meeting. Therefore, under the statutory definition, the gathering constituted a "meeting", for purposes of the Act, if it was held for the purpose of discussing public business of the council.

By law, the council has wide-ranging power to create and discontinue offices and to appoint and discharge officers. (See 65 ILCS 5/4-5-4 through 4-5-9 (West 1994).) Thus, the appointment of municipal officers is a matter of public business of the council.

It has been suggested that, since the appointments discussed were not to be made until after the new members of the council were seated, the appointments were not the public business of the council of which the two incumbents were members and, therefore, there was no "meeting" for purposes of the Open Meetings Act. The village is not governed, however, by a series of separately elected councils, but by a single council of which the membership changes from time to time. It is generally accepted principle that a municipal council is a continuing body regardless of changes in personnel. (E.g., Rogers v. City of Concord (N.H. 1962), 178 A.2d 509, 511; Humphrey v. City of

Youngstown (Ohio App. 1955), 143 N.E.2d 321, 326; Denio v. City of Huntington Beach (Cal. 1943), 140 P.2d 392, 397.) Application of this principle leads to the conclusion that the appointment of officers is the business of the council of which the two incumbents were members, notwithstanding the fact that the appointments would not be made until after the newly elected members were seated.

Application of the principle in this context, however, is not without question. In Roti v. Washington (1983), 114 Ill. App. 3d 958, 970, the court recognized that a city council is a continuing body, but also that an entirely new city council was elected every four years. The court described the "continuing body concept" as follows:

> " * * *
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> * * * The continuing body concept serves as the useful legal fiction needed to accomplish such desirable public policy considerations as protecting the contract rights of persons who had contracted with the previous municipal body, sustaining the existence of a body that can act during periods of transition and affirming the ability of one city council to act upon the uncompleted business of a previous council. [citations omitted]" Roti v. Washington (1983), 114 Ill. App. 3d at 969.

The court rejected the contention that, because the city council was a continuing body, a rule of procedure adopted by one city

council could effectively prevent a later city council from making changes in the council's rules of order without the concurrence of two-thirds of the members of the council. The court expressed concern that the action of one council could effectively bind future councils in perpetuity and held that this result contravened the statute (Ill. Rev. Stat. 1981, ch. 24, par. 3-11-11) providing that the city council is to "determine its own rules of proceeding". Roti v. Washington, 114 Ill. App. 3d at 969-70.

Although Roti v. Washington could be viewed as support for the proposition that the appointment of new village officers is not the public business of the "old" council, the situation addressed therein is clearly distinguishable from the one you have presented. The court in Roti v. Washington rejected an argument based upon the continuing body principle where to accept the argument could have frustrated the legislative intent and the will of a majority of those elected to the city council. Unlike the situation in Roti v. Washington, application of the principle in this context would not contravene any statute or limit the options of the "new" council. The policy of the Act is that the deliberations of public bodies be conducted openly. (5 ILCS 120/1 (West 1994).) This policy is best effectuated by applying the continuing body principle in this context.

Therefore, it is my opinion that, because a village council is a single, continuing body and not a succession of different councils, the matter of the appointment of village officers is public business of the village council even when discussed before the commencement of the terms of the newly elected council members who will participate in making the appointments. Therefore, it is also my opinion that when a majority of a quorum of incumbent council members were present at a meeting at which the making of appointments to village offices for the next term was discussed, and the meeting was held without notice or an opportunity for the public to attend, the Open Meetings Act was violated.

I would further note that although the subject of appointments of municipal officers might properly have been discussed in a meeting closed to the public under subsection 2(c)(3) of the Act, which authorizes a public body to consider the selection of a person to fill a public office in a closed meeting, the council members did not comply with the provisions of the Act in this regard. Specifically, under section 2a of the Act (5 ILCS 120/2a (West 1994)), a meeting of a public body can be closed to the public only upon a majority vote of a quorum present, taken at a meeting which is open to the public for which notice has been given as required by the Act. Clearly, since no notice of the meeting in question was given, and there was apparently no attempt to comply with the other requirements of

subsection 2a, this meeting was not closed in accordance with law. The mere fact that the topic of the discussion is one which might properly be discussed in a closed meeting does not excuse compliance with the pertinent provisions of the Open Meetings Act.

Sincerely,

JAMES E. RYAN
Attorney General