



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

March 4, 2021

PUBLIC ACCESS OPINION 21-003
(Request for Review 2020 PAC 65927)

OPEN MEETINGS ACT:
Improper Discussion of Matters under
the Exception for Pending, Probable,
or Imminent Litigation

Mr. Eric Bradley
208 West Summer Street
Hillsboro, Illinois 62049

The Honorable Katie Duncan
Mayor
City of Hillsboro
447 South Main Street
Hillsboro, Illinois 62049

Dear Mr. Bradley and Ms. Duncan:

This is a binding opinion issued by the Attorney General pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2018)). For the reasons discussed below, this office concludes that the City Council (City Council) of the City of Hillsboro (City) violated section 2(a) of OMA (5 ILCS 120/2(a) (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019) at its November 24, 2020, meeting. During this meeting, the City Council improperly entered closed session to discuss issues involving a sanitary and storm sewer main pursuant to the exception in section 2(c)(11) of OMA (5 ILCS 120/2(c)(11) (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019). The City Council also failed to make the determination or "find," and then record in its closed session minutes that legal action concerning that matter was probable or imminent and the basis for such a finding, as required by section 2(c)(11).

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BACKGROUND

On December 3, 2020, Mr. Eric Bradley submitted a Request for Review to the Public Access Bureau alleging that during the City Council's November 24, 2020, meeting, the City Council had improperly entered closed session pursuant to section 2(c)(11) of OMA to discuss a sewer issue impacting certain properties in the City.¹ According to a newspaper article submitted by Mr. Bradley in support of his Request for Review, Mr. Bradley located a sanitary and storm sewer main for which the City appeared to have no easement under a parcel of residential property on Summer Street upon which Mr. Bradley planned to build a garage.² Noting that the City Council's agenda listed a closed session to discuss "possible litigation,"³ Mr. Bradley enclosed a copy of e-mail correspondence he had with City Mayor Katie Duncan the day before the meeting in question. In his e-mail to Mayor Duncan, Mr. Bradley asserted that he had followed the proper procedure to be placed on the agenda for the meeting,⁴ explaining that he had taken that step because a scheduled meeting among the other impacted homeowners, the City's Commissioner of Public Utilities, the City's attorney, and he had not occurred. Mr. Bradley stated: "I believe I am owed an explanation and * * * most certainly a resolution to our problem on Summer St."⁵ Mayor Duncan responded:

I'm aware you asked to be on the agenda and declined the request. This is not something that is going to be resolved soon and we won't necessarily have an update within 2 weeks as stated last meeting. We as a council will be discussing it with our attorney in closed session so there is no need to discuss during the

¹OMA – Request for Review by Public Access Counselor (PAC) form submitted by Eric Bradley, (dated December 2, 2020, and transmitted via e-mail on December 3, 2020).

²Ron Deabenderfer, *Hillsboro Council OKs Three Façade Grants*, THE JOURNAL-NEWS (Nov. 30, 2020, 12:03 a.m.) <https://www.thejournal-news.net/stories/hillsboro-council-oks-three-facade-grants,71877>.

³City of Hillsboro City Council, Meeting, Agenda Item 17, DISCUSSION/DECISION ON A MOTION TO APPROVE A "CLOSED SESSION" ON 5 ILCS 120/2(C)(11) "POSSIBLE LITIGATION" (November 24, 2020).

⁴To the extent that Mr. Bradley's Request for Review could be construed as alleging an OMA violation because his request to be placed on the agenda was denied, this office notes that OMA does not address the manner by which a meeting agenda is formulated. Thus, a public body does not violate OMA by denying a request by a member of the public for a dedicated agenda item.

⁵E-mail from Eric W Bradley, PLS, to Mayor Duncan (November 23, 2020).

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open meeting. I can not [sic] guarantee there will be a decision after that. We too are working on this.^[6]

Mr. Bradley further stated that a letter sent to him by Mayor Duncan on November 25, 2020, the day after the City Council's meeting, "address[ed] possible options available, none of which mention possible or pending litigation."⁷ Mr. Bradley enclosed a copy of that letter with his Request for Review; the letter does not mention legal action.⁸

On December 9, 2020, the Public Access Bureau sent a copy of the Request for Review to Mayor Duncan, as the head of the City Council. The Public Access Bureau also sent Mayor Duncan a letter asking for copies of the closed session verbatim recording and closed session minutes of the City Council's November 24, 2020, meeting for this office's confidential review and a detailed written response to the allegation that the closed session discussion was not authorized by the section 2(c)(11) exception.⁹ On December 17, 2020, counsel for the City provided the Public Access Bureau with a copy of the closed session minutes¹⁰ and a written response from Mayor Duncan on behalf of the City Council. The response asserted that the City Council had properly held the closed session discussion regarding the property issue with which Mr. Bradley was concerned¹¹ under section 2(c)(11) because it involved "possible or threatened litigation."¹²

On December 18, 2020, this office forwarded a copy of the City Council's response letter to Mr. Bradley.¹³ He did not reply in writing but during a telephone conversation

⁶E-mail from Katie [Duncan] to [Eric Bradley] (November 23, 2020).

⁷OMA – Request for Review by Public Access Counselor (PAC) form submitted by Eric Bradley (dated December 2, 2020, transmitted via e-mail on December 3, 2020).

⁸Letter from Katie Duncan, Mayor, City of Hillsboro, to Eric Bradley (November 25, 2020).

⁹Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to The Honorable Katie Duncan, Mayor, City of Hillsboro (December 9, 2020).

¹⁰Letter from Christopher B. Hantla, Law Offices of Hantla & Hantla, Ltd., to Joshua M. Jones, Office of the Attorney General (December 17, 2020).

¹¹This office notes that the City Council discussed other matters unrelated to Mr. Bradley during the closed session pursuant to section 2(c)(11). Those matters are outside the scope of this Request for Review.

¹²Letter from Katie Duncan, Mayor, City of Hillsboro, to Joshua M. Jones, Office of the Attorney General (December 14, 2020), at [1].

¹³Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Eric Bradley (December 18, 2020).

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with an Assistant Attorney General in the Public Access Bureau, Mr. Bradley stated that the only time he referred to the possibility of hiring an attorney was when he had a meeting scheduled with City officials and the City's attorney. Mr. Bradley asked them whether he should bring an attorney of his own; he stated that he did not receive a reply.¹⁴ On December 29, 2020, this office received from counsel for the City a flash drive containing a copy of a Zoom audio and video recording of the City Council's entire November 24, 2020, meeting.¹⁵ On January 25, 2021, the Public Access Bureau properly extended the time within which to issue a binding opinion by 21 business days, to March 4, 2021, pursuant to section 3.5(e) of OMA.¹⁶

ANALYSIS

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2018). Section 2(a) of OMA (5 ILCS 120/2(a) (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019) provides that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." Such exceptions "are in derogation of the requirement that public bodies meet in the open, and therefore, the exceptions are to be *strictly construed, extending only to subjects clearly within their scope.*" (Emphasis added.) 5 ILCS 120/2(b) (West 2018), as amended by Public Acts 101-031, effective June 28, 2019; 101-459, effective August 23, 2019.

Section 2(c)(11) of OMA permits a public body to enter into closed session to discuss "[l]itigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting." In *Henry v. Anderson*, 356 Ill. App. 3d 952, 953 (4th Dist. 2005), the Illinois Appellate Court analyzed this exception in considering whether a school board violated OMA by announcing that it was closing a meeting to discuss "potential" litigation without making a finding that litigation was "probable" or "imminent." The court found that "the legislature intended to prevent public bodies from using the distant possibility of litigation as a pretext for closing their meetings to the public[.]" holding

¹⁴Telephone conversation between Eric Bradley and Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (January 31, 2021).

¹⁵Letter from Christopher B. Hantla, Hantla & Hantla, Ltd., to Joshua M. Jones, Office of the Attorney General (December 17, 2020).

¹⁶Letter from Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Eric Bradley and Christopher B. Hantla, Hantla & Hantla, Ltd. (January 25, 2021).

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that "the board violated the Act by failing to state, on the record, (1) a finding that litigation was probable or imminent and (2) a basis for such a finding." *Henry*, 356 Ill. App. 3d at 957.

The meaning of "probable or imminent" was analyzed in an Attorney General Opinion of this office concerning a city council's closed session discussion related to the possibility of litigation in the event that the city council approved a proposed annexation. Ill. Att'y Gen. Op. No. 83-026, issued December 23, 1983.¹⁷ Based on judicial definitions of the terms "probable" and "imminent," Attorney General Hartigan concluded that "[f]or 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." Ill. Att'y Gen. Op. No. 83-026, at 10. Indeed, "[t]he 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." (Emphasis added.) Ill. Att'y Gen. Op. No. 83-026, at 12. Because an attorney for the annexation opponents declared that his clients were not contemplating a lawsuit and because litigation over the annexation could not be probable or imminent until the city council approved the annexation, Attorney General Hartigan concluded that the city council improperly closed the meeting to the public under the litigation exception. Ill. Att'y Gen. Op. No. 83-026, at 11-13; *see generally* Ill. Att'y Gen. Pub. Acc. Op. No. 16-007, issued September 13, 2016, at 8 ("[T]he section 2(c)(11) exception does not permit a public body to enter closed session to discuss the possibility of litigation merely because it has taken action that generated public opposition[.]").

Attorney General Hartigan also addressed the limited scope of the contents of any closed session discussion held pursuant to section 2(c)(11), advising 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. [Citation.]" Ill. Att'y Gen. Op. No. 83-026, at 12. Furthermore, "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." Ill. Att'y Gen. Op. No. 83-026, at 14. Applying this reasoning to the closed session at issue in Opinion 83-026, Attorney General Hartigan explained that "if the possibility of a lawsuit over the annexation" influenced the city

¹⁷At the time of the issuance of opinion No. 83-026, an earlier but substantively identical version of section 2(c)(11) of OMA excepted from the open meeting requirements:

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. Ill Rev. Stat. 1981, ch. 102, par. 42(h).

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council's decision on whether to annex the property, that "matter should have been discussed in an open meeting since it goes to the merits of the question rather than to the litigation itself." Ill. Att'y Gen. Op. No. 83-026, at 13; *see generally* Ill. Att'y Gen. Pub. Acc. Op. No. 12-013, issued November 5, 2012, at 4 ("[E]ven if there are reasonable grounds to believe that litigation is probable or imminent, it is not permissible for a public body to use the closed session to discuss taking an action or to make a decision on the underlying issue that is likely to be the subject of the litigation.").

In its response to this office regarding the current matter, the City Council asserted that it properly discussed "possible or threatened" litigation in closed session on November 24, 2020, pursuant to section 2(c)(11) of OMA because Mr. Bradley "had * * * previously told the Council in open session that he was going to retain an attorney if this was not resolved to his satisfaction."¹⁸ Mayor Duncan explained:

At an earlier meeting Mr. Bradley had demanded to know what actions had been taken in attempts to resolve the Sanitary and Storm Sewer issues which are under his property. The contents of the letter of November 25, 2020 describe those actions that were taken. The discussion relative to Mr. Bradley centered basically on the fact that since the letter which was going to be sent did not solve the issues of which he was complaining that there may [sic] a lawsuit filed by him as [sic] been previously threatened. The City attorney and I wanted to make sure that the Council understood this and that they were aware that could be a potential consequence of sending the letter dated November 25, 2020.^{19]}

This office's review of the Zoom recording of the City Council's November 24, 2020, meeting revealed that Mr. Bradley addressed the City Council during the public comment portion of the meeting, before the City Council adjourned to closed session.²⁰ Mr. Bradley's prepared remarks indicated that the City had made no progress on resolving the sewer main issues in the months since they arose, and he felt the City's communications about the matter had been inadequate. He asked: "To what degree has any progress been made, since we as

¹⁸Letter from Katie Duncan, Mayor, City of Hillsboro, to Joshua M. Jones, Office of the Attorney General (December 14, 2020), at [1].

¹⁹Letter from Katie Duncan, Mayor, City of Hillsboro, to Joshua M. Jones, Office of the Attorney General (December 14, 2020), at [1-2].

²⁰City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 33:50 (on file with Public Access Bureau, Office of the Attorney General).

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homeowners have never been informed?"²¹ Mr. Bradley stated: "I do understand the complexity of this problem probably more so than most, and that the solution will not happen overnight, which is why I am being so diligent. If a plan was put in place that would satisfy me as a homeowner, that would be acceptable, it would be progress."²² Mr. Bradley stated that he had not yet taken to social media with his concerns because he was trying to follow the proper process by communicating directly with City officials.²³ Mr. Bradley questioned how the City Council could be discussing the issue in closed session given the unknowns about the sewer-related infrastructure and any technical solutions that might be feasible, asking "how can the Council do anything until you have the facts necessary to have the discussion?"²⁴ Mr. Bradley concluded: "With this closed session, what does the City have to hide? Should the people of this town be concerned? Should we be concerned that a letter will be showing up at our homes, or even worse yet, legal action by the City against its citizens? We have continued to do our part, now do yours. Thank you."²⁵

Mayor Duncan and other members of the City Council then engaged Mr. Bradley in a short dialogue, which included the following exchanges:

Mayor Duncan: There's no point in us talking about [resolving the sewer main issues] in open session when we are going to be discussing the process in a closed session. Like you said it's not something that's gonna be fixed overnight. It's not something that's gonna be fixed in a month. So we're gonna continue to work on it the way that we can.

Mr. Bradley: I just would like to be informed throughout this process, which I was told early on that I would be. * * *

²¹City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 36:05-36:10 (on file with Public Access Bureau, Office of the Attorney General).

²²City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 36:25-36:42 (on file with Public Access Bureau, Office of the Attorney General).

²³City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 37:45-37:54 (on file with Public Access Bureau, Office of the Attorney General).

²⁴City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 38:02-38:28 (on file with Public Access Bureau, Office of the Attorney General).

²⁵City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 38:37-38:52 (on file with Public Access Bureau, Office of the Attorney General).

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Mayor Duncan: [W]e have to remember the 2022 budget is not until next May. So you're looking at a good six months.

Mr. Bradley: I understand that. I'm not asking for a solution overnight. I'm asking for progress. I'm asking for something to be put down on paper, pen and paper, that says "hey this is what we plan on doing."

Mayor Duncan: And I understand that and I'm just saying because I do remember you stating in one of your meetings, in one of these sessions, that well now I'm gonna have to find somewhere to—

Mr. Bradley: Correct!

Mayor Duncan: —store my boat for the winter. Well there's no way that you're gonna be able to get this fixed and get a garage built, so we all have time constraints.

Mr. Bradley: I understand that.

Mayor Duncan: Okay.

Mr. Bradley: At some point in time I'm going to have to move forward with filling in my backyard and look for different options. And if something happens to that storm sewer when I do that, how, what can I do at that point? I can't continue to just not move forward with progress on my end, not knowing where the City even stands. I mean it's been six months and I still have... I've gained nothing.

Mayor Duncan: Okay, okay well—

Mr. Bradley: Thank you.

Mayor Duncan: —we're going to discuss it, thanks.^[26]

²⁶City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 39:08-44:56 (on file with Public Access Bureau, Office of the Attorney General).

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The only mention of litigation by either party during this exchange was Mr. Bradley's question about whether residents of the City should be concerned that the City would take legal action against them.

Later in the meeting, Mayor Duncan read the agenda item²⁷ for a closed session discussion under section 2(c)(11) to discuss "possible litigation[.]"²⁸ A motion was made and seconded, but a member of the City Council interjected to seek clarification about the basis for entering closed session; he said "I know it's a closed session for litigation, but I'm not sure it is for possible litigation."²⁹ The City's attorney advised "[t]hat's what the statute says, possible or threatened litigation[.]"³⁰ and that "all that will be discussed in this closed session is issues relating to possible or threatened litigation."³¹ The City Council then took a unanimous vote to enter closed session.³²

In the November 25, 2020, letter to Mr. Bradley, which made no allusion to litigation, Mayor Duncan framed the issue as Mr. Bradley's "desire * * * to build a structure on or over what has been determined to be a sanitary and storm sewer in the backyard of a residence located on Summer Street."³³ Describing the situation as potentially unprecedented, Mayor Duncan listed "steps [that] have been taken/offered in an attempt to resolve above issues that

²⁷City of Hillsboro City Council, Meeting, Agenda Item 17, DISCUSSION/DECISION ON A MOTION TO APPROVE A "CLOSED SESSION" ON 5 ILCS 120/2(C)(11) "POSSIBLE LITIGATION" (November 24, 2020).

²⁸City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 59:48 (on file with Public Access Bureau, Office of the Attorney General).

²⁹City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 1:00:23-1:00:32 (on file with Public Access Bureau, Office of the Attorney General).

³⁰City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 1:00:43-1:01:23 (on file with Public Access Bureau, Office of the Attorney General).

³¹City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 1:00:43-1:01:23 (on file with Public Access Bureau, Office of the Attorney General).

³²City of Hillsboro City Council, Open Meeting, November 24, 2020, Audio File, at 1:01:28-1:01:38 (on file with Public Access Bureau, Office of the Attorney General).

³³Letter from Katie Duncan, Mayor, City of Hillsboro, to Eric Bradley (November 25, 2020), at [1].

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may come up before or after construction of a structure on this property."³⁴ Mayor Duncan first stated that the City had offered to split the cost of the estimated \$75,000 needed to relocate the sewers with the most immediately-impacted homeowners, but that given the responses from Mr. Bradley and his neighbors, this possibility was no longer being considered.³⁵ She next stated that the City was actively seeking grants from both State and Federal agencies to address storm and sanitary sewer and water line issues throughout the City.³⁶ Mayor Duncan's letter further indicated that the City sought guidance from the Illinois Municipal League.³⁷ Additionally, Mayor Duncan noted that the City Engineer and other water officials had found that there may be a product that could resolve the issue by reinforcing the integrity of the sewers, but that the City needed to undertake more research. Mayor Duncan stated that the City would share what it learned with Mr. Bradley and the other homeowners, acknowledging that this option was likely to involve cost-sharing.³⁸ Mayor Duncan concluded the letter as follows:

Despite statements which you have made to the contrary the City has diligently been working for a workable solution to this problem. Unfortunately, one has not yet been found that is feasible to the City with the funding that is available or that is acceptable to you and the other homeowners. The City remains committed to attempting to find a resolution to not only this problem, but also similar problems that we know exist throughout the City.

Thank you for your anticipated cooperation and patience as we work through these issues and attempt to find a workable solution for all parties.^[39]

[1]. ³⁴Letter from Katie Duncan, Mayor, City of Hillsboro, to Eric Bradley (November 25, 2020), at

[1]. ³⁵Letter from Katie Duncan, Mayor, City of Hillsboro, to Eric Bradley (November 25, 2020), at

[1]. ³⁶ Letter from Katie Duncan, Mayor, City of Hillsboro, to Eric Bradley (November 25, 2020), at

[1]. ³⁷ Letter from Katie Duncan, Mayor, City of Hillsboro, to Eric Bradley (November 25, 2020), at

[2]. ³⁸ Letter from Katie Duncan, Mayor, City of Hillsboro, to Eric Bradley (November 25, 2020), at

[2]. ³⁹Letter from Katie Duncan, Mayor, City of Hillsboro, to Eric Bradley (November 25, 2020), at

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Nothing in the letter suggests that the City considered litigation to be likely or close at hand.

None of the materials the City Council submitted to this office indicate that the City Council had reason to believe that litigation concerning the issue involving Mr. Bradley was "probable or imminent." Although the City Council cited "possible or threatened litigation" when voting to go into closed session and in its answer to this office, that is not the applicable legal standard.

In addition, this office's review of the closed session minutes⁴⁰ confirmed that the City Council did not undertake to determine or enter a finding that litigation concerning the sewer issue was *probable* or *imminent*, or record such a finding in its minutes. The plain language of section 2(c)(11) required the City Council to do so under these circumstances. Further, the November 23, 2020, e-mail exchange between Mr. Bradley and Mayor Duncan, Mr. Bradley's public comment and dialogue with the City Council during the November 24, 2020, meeting, and the November 25, 2020, letter from Mayor Duncan to Mr. Bradley all reflect that both parties were actively working to find a mutually agreeable resolution to the sewer issues impacting the properties. The remote possibility of litigation at some point in the future if such efforts were to break down was an insufficient basis for the closed session discussion under section 2(c)(11). In particular, the City Council's explanation, that sending the November 25, 2020, letter to Mr. Bradley could have resulted in him taking legal action because the letter did not resolve his concerns, did not justify closing the meeting to the public, as the section 2(c)(11) exception does not authorize closed session discussion of an underlying decision or course of action merely because it could potentially give rise to litigation at some point in the future.

Accordingly, because the sewer issues on Summer Street did not involve pending, probable, or imminent litigation, this office concludes that the City Council's November 24, 2020, closed session was not authorized by section 2(c)(11) of OMA and therefore violated section 2(a) of OMA.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the arguments presented, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On November 24, 2020, the City of Hillsboro City Council closed a portion of its meeting to the public under section 2(c)(11) of OMA to discuss "possible or threatened litigation" concerning Mr. Eric Bradley's desire to build a garage on a parcel of residential property over a storm and sanitary sewer main for which the City appeared to have no easement.

⁴⁰Hillsboro City Council, Special Meeting, November 24, 2020, Closed Session Minutes.

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2) On December 3, 2020, Mr. Eric Bradley submitted a Request for Review to the Public Access Bureau alleging that the City's Council's November 24, 2020, closed session discussion concerning the sewer issues impacting the property was improper because litigation related to that matter was not pending, probable, or imminent. Mr. Bradley's Request for Review was timely filed and otherwise complies with the requirements of section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2018)).

3) On December 9, 2020, the Public Access Bureau sent a copy of the Request for Review to Mayor Katie Duncan and asked the City Council to provide copies of the closed session verbatim recording and closed session minutes of its November 24, 2020, meeting for this office's confidential review, and a written answer to Mr. Bradley's OMA allegation.

4) On December 17, 2020, counsel for the City furnished the closed session minutes and a written answer from Mayor Duncan asserting that the City Council properly discussed "possible or threatened litigation" related to Mr. Bradley's concerns in closed session pursuant to the section 2(c)(11) exception.

5) On December 18, 2020, this office sent a copy of the City Council's answer to Mr. Bradley. He did not reply.

6) On December 29, 2020, this office received a flash drive from the City Council containing a Zoom audio and video recording of its entire November 24, 2020, meeting.

7) On January 25, 2021, the Public Access Bureau properly extended the time within which to issue a binding opinion by 21 business days, to March 4, 2021, pursuant to section 3.5(e) of OMA. Therefore, the Attorney General may properly issue a binding opinion with respect to this matter.

8) Section 2(a) of OMA requires that all meetings of public bodies be open to the public unless the subject of the meeting is covered by one of the limited exceptions enumerated in section 2(c). Section 2(c)(11) permits a public body to close a portion of a meeting to discuss "[l]itigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting."

9) If there is no litigation pending, then section 2(c)(11) authorizes a closed session discussion only when the public body has reasonable grounds to believe that litigation is more likely than not to be instituted or that such an occurrence is close at hand.

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10) The City Council's November 24, 2020, closed session discussion concerning the sewer issues on Summer Street did not pertain to pending, probable, or imminent litigation. In addressing the City Council before the closed session on November 24, 2020, Mr. Bradley's comments indicated his continued desire to work with the City towards a resolution. The City Council asserted that its plan to send Mr. Bradley a letter detailing the status of its efforts to address his concerns could result in him taking legal action because the letter did not resolve those concerns. Section 2(c)(11) of OMA, however, does not authorize closed session discussion of an underlying decision or course of action that could potentially give rise to litigation. Accordingly, the City Council violated section 2(a) of OMA by discussing in closed session matters outside the scope of section 2(c)(11) of OMA.

11) The City Council also failed to determine or find that litigation was probable or imminent or record and enter into the closed session minutes the basis for such a finding, as required by section 2(c)(11).

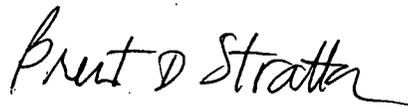
In accordance with these findings of fact and conclusions of law, the City Council is directed to remedy this violation by disclosing to Mr. Bradley and making publicly available the portion of the closed session verbatim recording of its November 24, 2020, meeting and the corresponding portion of the closed session minutes concerning Mr. Bradley and the sewer issues relating to the property on Summer Street. As required by section 3.5(e) of OMA, the City Council shall either take necessary action as soon as practical to comply with the directives of this opinion or shall initiate administrative review under section 7.5 of OMA. 5 ILCS 120/7.5 (West 2018).

This opinion shall be considered a final decision of an administrative agency for the purpose of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2018). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision, naming the Attorney General of Illinois and Mr. Eric Bradley as defendants. *See* 5 ILCS 120/7.5 (West 2018).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By:



Brent D. Stratton
Chief Deputy Attorney General

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cc: *Via electronic mail*
Mr. Christopher B. Hantla
Hantla & Hantla, Ltd.
Attorneys at Law
413 North State Street
P.O. Box 69
Litchfield, Illinois 62056
kit.hantla@hantlalaw.com

CERTIFICATE OF SERVICE

Sarah L. Pratt, Public Access Counselor, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 21-003) upon:

Mr. Eric Bradley
208 West Summer Street
Hillsboro, Illinois 62049
ericlayout@gmail.com

The Honorable Katie Duncan
Mayor
City of Hillsboro
447 South Main Street
Hillsboro, Illinois 62049
katie.duncan04@yahoo.com

Mr. Christopher B. Hantla
Hantla & Hantla, Ltd.
Attorneys at Law
413 North State Street
P.O. Box 69
Litchfield, Illinois 62056
kit.hantla@hantlalaw.com

by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Springfield, Illinois on March 4, 2021.


SARAH L. PRATT
Public Access Counselor

SARAH L. PRATT
Public Access Counselor
Office of the Attorney General
500 South Second Street
Springfield, Illinois 62701
(217) 557-0548