



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

July 12, 2022

PUBLIC ACCESS OPINION 22-010
(Request for Review 2022 PAC 71177)

OPEN MEETINGS ACT:
Discussion in Closed Session of the
Appointment, Employment, Compensation,
or Performance of Specific Employees

Failure to Cite an Applicable Exception
Before Closing a Meeting to the Public;
Improper Closed Session Discussion of
Bids for a Student Transportation Contract

Mr. Jeff Egbert
Publisher
Perry County Weekly-Press
P.O. Box 411
Du Quoin, Illinois 62832

The Honorable Brian Rodely
President, Board of Education
Du Quoin Community Unit School District Number 300
845 East Jackson Street
Du Quoin, Illinois 62832

Dear Mr. Egbert and Mr. Rodely:

This binding opinion is issued by the Attorney General pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)). For the reasons discussed below, this office concludes that the Board of Education (Board) of Du Quoin Community Unit

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School District Number 300 (School District) violated section 2(a) of OMA¹ during one of the closed sessions that occurred at its April 7, 2022, special meeting. During that meeting, the Board held three closed sessions. This office concludes that the Board limited its discussion during the first and third closed sessions to topics within the scope of the exception in section 2(c)(1) of OMA² that the Board cited as its basis for entering closed session. Although information provided by the Board indicated that it entered its second closed session to discuss "[a]nticipated litigation" and "[c]riminal investigations[.]"³ this office concludes that the Board's discussion during that closed session addressed issues involving bids for a student transportation contract that were beyond the scope of any exceptions in OMA to the general requirement that public bodies conduct public business openly.

BACKGROUND

On April 11, 2022, Mr. Jeff Egbert, on behalf of the *Perry County Weekly-Press*, submitted a Request for Review to the Public Access Bureau seeking review of the three closed sessions held during the Board's April 7, 2022, special meeting.⁴ Mr. Egbert stated that the agenda for the April 7, 2022, special meeting listed two closed sessions to discuss the appointment, employment, compensation, and performance of specific employees. He stated that the additional closed session "was added after a failed vote and a tie vote on on [*sic*] bids for the district's transportation contract."⁵ He alleged that "two and/or possibly all three" closed sessions included discussion of the School District's student transportation contract or bus drivers.⁶ He noted that the bus drivers are employed by a third party contractor and are not

¹5 ILCS 120/2(a) (West 2020), as amended by Public Acts 102-520, effective August 20, 2022; 102-558, effective August 20, 2021; 102-237, effective January 1, 2022.

²5 ILCS 120/2(c)(1) (West 2020), as amended by Public Acts 102-520, effective August 20, 2022; 102-558, effective August 20, 2021; 102-237, effective January 1, 2022.

³Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022), at [1].

⁴E-mail from Jeff Egbert, Publisher, Perry County Weekly-Press, to Public Access [Bureau, Office of the Attorney General] (April 11, 2022).

⁵E-mail from Jeff Egbert, Publisher, Perry County Weekly-Press, to Public Access [Bureau, Office of the Attorney General] (April 11, 2022).

⁶E-mail from Jeff Egbert, Publisher, Perry County Weekly-Press, to Public Access [Bureau, Office of the Attorney General] (April 11, 2022).

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School District employees. He alleged, therefore, that any discussion of the bus drivers or the transportation contract bids should have occurred in open session.⁷

On April 19, 2022, the Public Access Bureau forwarded a copy of the Request for Review to Mr. Brian Rodely, the Board President. The Public Access Bureau also sent Mr. Rodely a letter asking for copies of the April 7, 2022, special meeting agenda, open and closed session minutes, and the closed session verbatim recordings for this office's confidential review.⁸ This office also asked for a copy of the recording of the April 7, 2022, open session, if one existed. In addition, this office requested a written response describing the Board's public recital, pursuant to section 2a of OMA,⁹ identifying the specific exception(s) in section 2(c) of OMA¹⁰ that the Board publicly cited as its basis for entering closed session during its April 7, 2022, special meeting. This office further asked the Board to explain how the cited exception, or any other exceptions listed in section 2(c) of OMA, applied to the Board's closed session discussions.¹¹ Later that day, the School District's superintendent sent an e-mail to this office confirming receipt of our correspondence and stating that he would respond within seven business days.¹²

On April 27, 2022, the School District's superintendent, on behalf of the Board, provided this office via e-mail with copies of the April 7, 2022, special meeting agenda, open session minutes, and closed session minutes.¹³ The superintendent also provided the Board's

⁷E-mail from Jeff Egbert, Publisher, Perry County Weekly-Press, to Public Access [Bureau, Office of the Attorney General] (April 11, 2022).

⁸Letter from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to The Honorable Brian Rodely, President, Board of Education, DuQuoin [*sic*] Community Unit School District No. 300 (April 19, 2022), at 2.

⁹5 ILCS 120/2a (West 2020).

¹⁰5 ILCS 120/2(c) (West 2020), as amended by Public Acts 102-520, effective August 20, 2022; 102-558, effective August 20, 2021; 102-237, effective January 1, 2022.

¹¹Letter from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to The Honorable Brian Rodely, President, Board of Education, DuQuoin [*sic*] Community Unit School District No. 300 (April 19, 2022), at 2.

¹²E-mail from [Matthew Hickam] to [Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General] (April 19, 2022).

¹³E-mail from [Matthew Hickam] to [Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General] (April 27, 2022).

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written answer, which described, in part, the content of the closed sessions under review.¹⁴ The superintendent also submitted, for this office's confidential review, two memoranda.¹⁵ Upon reviewing the Board's answer, an Assistant Attorney General (AAG) in the Public Access Bureau e-mailed the superintendent to confirm that this office may forward the Board's answer to Mr. Egbert, noting that if the Board believed any part of the answer to be confidential, it may submit a redacted copy for this office to forward to Mr. Egbert.¹⁶ On April 28, 2022, the superintendent submitted via e-mail¹⁷ a second version of the Board's answer to this office,¹⁸ with redactions made to certain matters at issue.¹⁹ The Board's answer confirmed that it entered closed session three times during its April 7, 2022, special meeting.²⁰ The answer asserted that the Board properly entered the first and third closed sessions to discuss the appointment, employment, compensation, and performance of specific employees.²¹ The Board acknowledged that it did not make a public recital of the applicable exception before entering its second closed session, but asserted that two exceptions applied to the discussion: "[a]nticipated litigation" and "[c]riminal investigations[.]"²²

¹⁴Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022).

¹⁵E-mail from [Matthew Hickam] to [Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General] (April 27, 2022).

¹⁶E-mail from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to [Matthew Hickam] (April 27, 2022).

¹⁷E-mail from [Matthew Hickam] to Laura [S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General] (April 28, 2022).

¹⁸Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022).

¹⁹5 ILCS 120/3.5(c) (West 2020) ("the public body may also furnish the Public Access Counselor with a redacted copy of the answer excluding specific references to any matters at issue.").

²⁰Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022).

²¹Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022), at 1-2.

²²Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022), at 2.

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On April 29, 2022, this office forwarded a copy of the Board's redacted answer to Mr. Egbert.²³ He did not reply other than to inform this office on May 6, 2022, that the Board uses two recorders, one for each side of the meeting room, to record its closed sessions, adding that he wanted to ensure that this office received all relevant tapes.²⁴ In response to that message, the School District's superintendent explained that there are two microphones feeding into the audio recorder, but only one tape recording for each closed session.²⁵

On May 2, 2022, this office received via the United States Postal Service three cassette tapes of the verbatim recordings of the Board's April 7, 2022, closed sessions and duplicate copies of the Board's written response materials: its confidential answer and attached confidential memoranda, and the agenda and open and closed session minutes from the April 7, 2022, special meeting.²⁶

On June 10, 2022, the Public Access Bureau properly extended the time within which to issue a binding opinion by 21 business days, to July 12, 2022, pursuant to section 3.5(e) of OMA.²⁷

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 2020). Section 2(a) of OMA 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

²³Letter from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Jeff Egbert, Publisher, Perry County Weekly-Press (April 29, 2022).

²⁴E-mail from Jeff Egbert to [Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General] (May 6, 2022).

²⁵E-mail from [Matthew Hickam] to [Jeff Egbert] (May 6, 2022).

²⁶Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022).

²⁷Letter from Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General, to Jeff Egbert, Publisher, Perry County Weekly-Press and The Honorable Brian Rodely, President, Board of Education, DuQuoin [*sic*] Community Unit School District No. 300 (June 10, 2022).

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strictly construed, extending only to subjects clearly within their scope."²⁸ Further, "[n]othing in [OMA] shall be construed to require that any meeting be closed to the public."²⁹

Section 2(c)(1) of OMA

The minutes of the Board's April 7, 2022, special meeting indicate that it publicly cited and identified section 2(c)(1) of OMA as its basis for closing its meeting at 6:02 p.m. and again at 8:52 p.m.³⁰ In its answer to this office, the Board stated that it entered closed session at 6:02 p.m. to discuss "a retirement request and the employment of two teaching positions."³¹ The Board stated that it entered closed session at 8:52 p.m. to discuss "the performance of members of the administrative team as it pertained to the student transportation bid process."³²

Section 2(c)(1) provides, in pertinent part, that a public body is permitted to discuss in closed session:

The appointment, employment, compensation, discipline, performance, or dismissal of specific employees, * * * of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee, * * * of the public body or against legal counsel for the public body to determine its validity.

In construing this section, the Attorney General has concluded that "language referencing 'specific employees' signifies that the General Assembly did not intend to permit public bodies to hold general discussions concerning categories of employees in closed session pursuant to section 2(c)(1)." Ill. Att'y Gen. Pub. Acc. Op. No. 16-013, issued December 23, 2016, at 4.

²⁸5 ILCS 120/2(b) (West 2020), as amended by Public Acts 102-520, effective August 20, 2022; 102-558, effective August 20, 2021; 102-237, effective January 1, 2022. (Emphasis added.)

²⁹5 ILCS 120/2a (West 2020).

³⁰Du Quoin Community Unit School District #300 Board of Education, Special Meeting, April 7, 2022, Minutes [1-2].

³¹Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022), at [1].

³²Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022), at [2].

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Rather, "section 2(c)(1) of OMA 'is intended to permit public bodies to candidly discuss the relative merits of individual employees, or the conduct of individual employees.'" Ill. Att'y Gen. Pub. Acc. Op. No. 16-013, at 5 (quoting Ill. Att'y Gen. Pub. Acc. Op. No. 12-011, issued July 11, 2012, at 3).

This office has reviewed the verbatim recordings of the 6:02 p.m. and 8:52 p.m. April 7, 2022, closed sessions furnished by the Board.³³ The Board's response to the Request for Review accurately described the discussions held during those closed sessions. The 6:02 p.m. session discussion focused on the retirement of one specific employee, and the hiring of two other specific employees. The 8:42 p.m. closed session discussion focused on two specific administrators' performances during the student transportation bid process. Because those discussions directly concerned the employment and performance of specific employees, section 2(c)(1) of OMA authorized the Board to hold the discussions in closed session. Accordingly, this office concludes that the Board's discussions of those matters did not violate OMA

Section 2(c)(11) of OMA

In its answer to this office, the Board asserted that its closed session discussion that began at 7:24 p.m. on April 7, 2022, falls within the scope of the exception for "[a]nticipated litigation[.]"³⁴ This office construes the Board's answer as citing section 2(c)(11) of OMA.³⁵ That exception permits a public body to enter 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 the section 2(c)(11) exception in considering whether a school board violated OMA by closing a meeting to discuss "potential" litigation without making a finding

³³Du Quoin Community Unit School District No. 300, Closed Meeting No. 1, April 7, 2022, Audio File (on file with Public Access Bureau, Office of the Attorney General); Du Quoin Community Unit School District No. 300, Closed Meeting No. 3, April 7, 2022, Audio File (on file with Public Access Bureau, Office of the Attorney General).

³⁴Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022), at [1].

³⁵ILCS 120/2(c)(11) (West 2020), as amended by Public Acts 102-520, effective August 20, 2022; 102-558, effective August 20, 2021; 102-237, effective January 1, 2022.

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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 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 opinion of the Attorney General 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, 1983.³⁶ 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[.]").

In *City of Bloomington v. Raoul*,³⁷ the Illinois Appellate Court affirmed a binding opinion by this office that found members of the Bloomington City Council had entered closed session without reasonable grounds to believe that litigation against the City of Normal

³⁶At 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).

³⁷*City of Bloomington v. Raoul*, 2021 IL App (4th) 190539, ¶¶ 30-31, 184 N.E.3d 366, 371-72 (2021) (affirming Ill. Att'y Gen. Pub. Acc. Op. No. 17-004, issued June 6, 2017).

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concerning the cities' intergovernmental agreement was probable or imminent. Illustrating the speculative nature of board's closed session discussion, the court explained:

For example, Bloomington's attorney advised the group that litigation "could be plausible." The attorney did not know if Normal had a valid claim, as Normal had shared nothing with him. One council member noted there was "no clear cut road" to litigation. Yet another member characterized any possible litigation as a "minor issue." More than one member surmised Normal's threat of a lawsuit could be a "negotiating tactic." The Mayor told the press after the meeting he doubted Normal would file suit. Finally, the gist of the City Council's discussion described elsewhere herein was not of a group that thought litigation was probable or imminent. *City of Bloomington*, 2021 IL App (4th) 190539, ¶30, 184 N.E.3d at 371-372.

The *City of Bloomington* court also concluded "that even if the City Council lawfully closed the meeting, the City Council violated the Act by failing to abide by the conditions that confined their discussion to probable or imminent litigation." *City of Bloomington*, 2021 IL App (4th) 190539, ¶35, 184 N.E.3d at 372. The court noted, "[a]bsent from the closed session was any discussion of legal theories, defenses, claims, or possible approaches to litigation. The commentary that did concern litigation related to (1) concern about the uncertainty of any outcome, (2) how to best avoid a lawsuit, and (3) whether Bloomington or Normal had or could use the threat of litigation in the course of negotiation." *City of Bloomington*, 2021 IL App (4th) 190539, ¶36, 184 N.E.3d at 372. The Court concluded that "[t]he only court the group seemed concerned with was the court of public opinion." *City of Bloomington*, 2021 IL App (4th) 190539, ¶37, 184 N.E.3d at 372.

Attorney General Hartigan also addressed the limited scope of any permissible 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. He explained,

consultations between the public body and its attorney concerning the potential legal impact and the legal ramifications of an item under consideration must be done publicly unless pending, probable, or imminent litigation is the subject matter of the consultations. Consequently, once the litigation exception is properly invoked, the only matters which may lawfully be

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discussed at the closed meeting are the **strategies, posture, theories, and consequences of the litigation itself.** (Emphasis added.) Ill. Att'y Gen. Op. No. 83-026, at 13-14.

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 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.").

Here, the Board contended that its closed session discussion concerning the student transportation bid was permitted by section 2(c)(11) of OMA because litigation was anticipated; the Board did not state that any litigation was pending. In its redacted answer, the Board explained that it called the 7:24 p.m. closed session in the context of the consideration of the awarding of the student transportation bid. In its redacted answer, the Board asserted that once in closed session, the Board members "noted their concerns" and that the Board's attorney, who participated in the session, "validated" their concerns.³⁸

This office's review of the verbatim recording of the Board's 7:24 p.m. closed session meeting revealed that the Board's discussion of its concerns did not focus on probable or imminent litigation.³⁹ Similar to the city council in *City of Bloomington*, the Board's discussion of litigation was speculative. Further, none of the materials the Board submitted to this office indicate that at the time of the April 7, 2022, special meeting, the Board had a reasonable basis to believe that litigation was more likely than not to occur. Moreover, even if there existed a reasonable basis to believe litigation was probable or imminent, the Board did not limit its discussion to the strategies, posture, theories, and consequences of the litigation. Rather, the Board's discussion primarily concerned what course of action to take in awarding a bid for the student transportation contract.

³⁸Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022), at [1-2].

³⁹Du Quoin Community Unit School District No. 300, Closed Meeting No. 2, April 7, 2022, Audio File (on file with Public Access Bureau, Office of the Attorney General).

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In addition, this office's review of the closed session minutes⁴⁰ confirmed that the Board did not determine or find that litigation concerning the student transportation bids was probable or imminent, or record such a finding in its minutes. The plain language of section 2(c)(11) required the Board to do so under these circumstances. The mere possibility of litigation concerning the bid process was an insufficient basis for the closed session discussion under section 2(c)(11). The 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.

Because the Board's 7:24 p.m. closed session discussion did not concern pending, probable, or imminent litigation, this office concludes that section 2(c)(11) of OMA did not authorize the discussion.

Section 2(c)(14) of OMA

In its answer to this office, the Board also indicated that its closed session discussion that began at 7:24 p.m. on April 7, 2022, falls within the scope of the exception for "[c]riminal investigations[.]"⁴¹ This office construes the Board's contention as referencing section 2(c)(14) of OMA⁴² because that is the only exception that references criminal investigations. That section permits public bodies to hold closed meetings to discuss "[i]nformant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, **when discussed by a public body with criminal investigatory responsibilities.**" (Emphasis added.)

Under the plain language of section 2(c)(14) of OMA, only public bodies with "criminal investigatory responsibilities" may enter closed session pursuant to section 2(c)(14) to discuss criminal investigations. The Board did not identify for this office any source of authority it has to conduct criminal investigations. Further, there are no provisions in Article 10 of the Illinois School Code (105 ILCS 5/10, *et seq.* (West 2020)), which describes the powers and duties of school boards of education, that authorize the Board to conduct criminal investigations.

⁴⁰Du Quoin Community Unit School District Number 300 Board of Education, Special Meeting, April 7, 2022, Closed Session Minutes [1].

⁴¹Letter from Matthew Hickam, Superintendent, Du Quoin Community Unit School District #300, to Laura S. Harter, Deputy Bureau Chief, Public Access Bureau, Office of the Attorney General (April 27, 2022), at 1.

⁴²5 ILCS 120/2(c)(14) (West 2020), as amended by Public Act 102-520, effective August 20, 2022; 102-558, effective August 20, 2021; 102-237, effective January 1, 2022.

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Further, even if the Board had authority to conduct criminal investigations, its 7:24 p.m. closed session did not include discussion of an ongoing, prior, or future criminal investigation.

Accordingly, this office concludes that section 2(c)(14) of OMA did not authorize the Board's 7:24 p.m. closed session discussion. Because neither that exception nor section 2(c)(11) permitted the Board to hold the discussion in closed session, the Board violated section 2(a) of OMA.

Section 2a of OMA

Section 2a of OMA⁴³ provides that "[t]he vote of each member on the question of holding a meeting closed to the public and **a citation to the specific exception contained in Section 2 of this Act which authorizes the closing of the meeting to the public** shall be publicly disclosed at the time of the vote and shall be recorded and entered into the minutes of the meeting." (Emphasis added.)

In its response to this office, the Board acknowledged that it did not cite a specific exception at the time it entered the 7:24 p.m. closed session. The minutes of the April 7, 2022, special meeting state only that a motion was made to enter closed session; the minutes do not state the basis for closing the meeting. Accordingly, the Board violated section 2a of OMA by failing to publicly disclose and record in the minutes that it entered into closed session pursuant to one of the exceptions enumerated in section 2(c) 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 April 7, 2022, the Board of Education of Du Quoin Community Unit School District Number 300 closed three portions of its special meeting to the public.

2) On April 11, 2022, Mr. Jeff Egbert, on behalf of the *Perry County Weekly-Press*, submitted a Request for Review to the Public Access Bureau alleging that the closed session portions of the Board's April 7, 2022, meeting involved improper discussions of pending bids for the School District's student transportation contract or the School District's bus drivers. Mr. Egbert's Request for Review was timely filed and otherwise complied with the requirements of section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2020)).

⁴³5 ILCS 120/2a (West 2020).

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3) On April 19, 2022, the Public Access Bureau forwarded a copy of the Request for Review to Mr. Brian Rodely, Board President, and asked the Board to provide copies of the agenda, open and closed session minutes, and the closed session verbatim recordings of its April 7, 2022, special meeting for this office's confidential review, along with a written answer to Mr. Egbert's OMA allegations. This office also requested a copy of a recording of its open session, if one existed.

4) On April 27, 2022, the School District's superintendent, on behalf of the Board, furnished the agenda, open and closed session minutes, confidential memoranda, and a confidential written answer. On April 28, 2022, the superintendent furnished the Board's redacted answer.

5) On April 29, 2022, this office sent a copy of the Board's redacted answer to Mr. Egbert. On May 6, 2022, Mr. Egbert sent this office a message about the Board's verbatim recording practices, but did not provide a substantive reply.

6) On May 2, 2022, this office received three cassette tapes of the verbatim recordings of the three closed sessions that occurred at the April 7, 2022, special meeting and duplicate copies of the written materials the Board provided to this office on April 27, 2022.

7) On June 10, 2022, the Public Access Bureau properly extended the time within which to issue a binding opinion by 21 business days, to July 12, 2022, 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).

9) Section 2(c)(1) of OMA permits a public body to enter closed session to discuss "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees[.]"

10) At 6:02 p.m. on April 7, 2022, the Board entered closed session pursuant to section 2(c)(1). The Board properly limited its discussion during that closed meeting to the appointment, employment, compensation, and performance of specific employees.

11) At 8:52 p.m. on April 7, 2022, the Board entered closed session pursuant to section 2(c)(1). The Board properly limited its discussion during that closed meeting to the performance of specific employees.

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12) 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."

13) 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.

14) The Board's 7:24 p.m. April 7, 2022, closed session discussion concerning the bids for the student transportation contract did not pertain to pending, probable, or imminent litigation. Section 2(c)(11) of OMA does not authorize a public body to discuss in closed session an underlying decision or course of action that could potentially give rise to litigation. Accordingly, the Board violated section 2(a) of OMA by discussing in closed session matters beyond the scope of section 2(c)(11) of OMA.

15) The Board 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).

16) The Board's closed session discussion held at 7:24 p.m. at its April 7, 2022, special meeting was not authorized by section 2(c)(14) of OMA because the Board does not have criminal investigatory responsibilities and because the discussion did not address an ongoing, prior or future criminal investigation.

17) The Board did not in open session cite a specific exception enumerated in section 2 as a basis for closing its April 7, 2022, special meeting at 7:24 p.m. Accordingly, the Board violated section 2a of OMA by failing to publicly disclose and enter into the minutes an exception authorizing it to close that portion of the April 7, 2022, special meeting.

In accordance with these findings of fact and conclusions of law, the Board is directed to remedy this violation by disclosing to Mr. Egbert and making publicly available the verbatim recording of the 7:24 p.m. closed session that occurred during the April 7, 2022, special meeting and the corresponding portion of the April 7, 2022, closed session minutes. As required by section 3.5(e) of OMA, the Board 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 2020).

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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 2020). 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. Jeff Egbert as defendants. *See* 5 ILCS 120/7.5 (West 2020).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By:



Nathalina Hudson
Chief of Staff

cc: *Via electronic mail*
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CERTIFICATE OF SERVICE

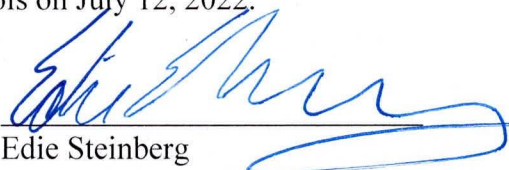
Eddie Steinberg, Senior Assistant Attorney General, Public Access Bureau, hereby certifies that she has served a copy of the foregoing Binding Opinion (Public Access Opinion 22-010) upon:

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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 Chicago, Illinois on July 12, 2022.



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