

**Office of Rick Amato
DeKalb County State's Attorney**

DeKalb County Courthouse
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August 27, 2021

Via E-Mail to mayor@sandwich.il.us
Mayor Todd Latham
Mayor and City Clerk's Office
144 E. Railroad St.
Sandwich, IL 60548

Mayor Latham,

On August 24, 2021, WSPY contacted our office in regard to your August 23, 2021 meeting. They expressed their concerns with an item on your agenda, and the subsequent vote on it. They have since provided us with audio of the meeting and the agenda for review. I am contacting you because I agree that the matter was not handled correctly, and that you acted in violation of the Open Meetings Act. On your agenda you listed the following item:

- “d. Motion to authorize Mayor to execute “Settlement Agreement in Compromise of Pending Litigation”.

Initially, I must address the rather vague description of this item, which a Court would likely find as not properly providing *the general subject matter* on the item being voted upon. As you are no doubt aware, OMA states under 5 ILCS 120/2.02(c) that “[a]ny agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting.” While some may argue that a strict reading of this compels only an “ordinance or resolution” to be described, that would ignore the intent of our legislature to have the public informed of the business being conducted. This would be in line with the purpose of OMA, described by our legislature as follows:

“It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business.” 5 ILCS 120/1.

In accordance with this, it would be expected that when a public body places an item on the agenda, that they do so in a manner so as to inform the public as to what is being voted on. The general subject matter is what is being called for, and the listed item contains no actual "subject matter" regarding the agreement or litigation. You did not provide what litigation it was related to, how much the settlement was for, or who it was with. The tact taken is obviously done in violation of OMA's policy, if not its mandates, and for the purpose of avoiding disclosing to Sandwich citizens as to what you were voting on.

Additionally, I am especially concerned with the second part of this item's consideration, which was done using a vocal qualification that apparently would be the basis for not providing a document under FOIA. I will not address whether you would be correct in withholding that document (as you did in August 26, 2002 correspondence to WSPY), and leave it to the Illinois PAC. Instead, I will focus on the meeting problem alone. When a public body is taking final action on something posted in the agenda, they still must provide a public recital of what they are voting on. 5 ILCS 120/2(e) provides that "final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." 5 ILCS 120/2(e). (Emphasis added).

Your recitation was completely devoid of information as to the actual business being conducted. There is no means by which the public would know what was being considered in this vote. This was not done accidentally. This was evident by your attempt to utilize the Freedom of Information Act's 5 ILCS 140/7(1)(f) exemption for preliminary drafts. FOIA exemptions, whether properly understood or not, are not authority to withhold informing the public what is being agreed to prior to a vote. Your pre-vote qualification as to this issue was a clear admission as to the improper action about to be taken, and demonstrates the body acted purposely in hiding information from the public.

This office is very concerned with this action as it is the latest in a line of events within Sandwich to frustrate providing the public information. Over the last few years, we have had multiple complaints as to Sandwich's failures in adhering to OMA and have asked that such behavior be corrected. In regard to one of those complaints, we partially addressed the city's failure to properly list an item on the agenda or recite the action taken. (See February 27, 2020 and April 10, 2020 correspondence to Mayor and City Clerk's Office). We have also asked you to perform further training, which is apparently not helping. It is unfortunate to again see this occurring. Not only that, but to be occurring in a manner that demonstrates purposive subterfuge.

As before, we ask that the City of Sandwich strive to be open with its constituents and demonstrate a willingness to ensure that the Open Meetings Act is being adhered to. One step I am asking you to take in this direction is to attend the next course on OMA being offered by the Attorney General, which is a webinar entitled 'Open Meetings Act – Better Understanding and Compliance' on one of the following dates:

Wednesday, September 1, 2021 10:00 a.m. – 12:00 p.m. <u>Register by: Friday, August 27, 2021</u>	Thursday, September 16, 2021 10:00 a.m. – 12:00 p.m. <u>Register by: Friday, September 10, 2021</u>
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To attend one of these two dates, please send an RSVP via email with your name, title, public body and email address to Special.Events@ilag.gov. Be sure to indicate your preferred date(s) and session(s). You may also direct questions in advance to this email address. Please contact Theresa Geary at 1-866-376-7215 (TTY: 1-800-964-3013) or Special.Events@ilag.gov with any requests for reasonable accommodations. I

would ask that you register for this webinar and that you provide my office evidence of this within the next week.

Finally, it must be considered that this office has had to intercede on Sandwich OMA issues multiple times. Yet, there has been a demonstrated lack of interest in erring on the side of openness. This is further demonstrated by the recent events described and the apparent refusal to provide the secret voted upon settlement agreement in response to a FOIA request by WSPY. Because of this, we are copying this letter to the Attorney General's PAC, so they can determine what action they believe is appropriate¹. Since these matters are indelibly intertwined, the most efficient approach to minimize costs to the DeKalb County taxpayers (who have to absorb the costs of your actions) would entail the Attorney General opining as to the entirety of your course of action. It is our hope that you will consider their review of the matter with some sense of gravity.

Please do not hesitate to contact me should you have any questions or wish to discuss the matter further.

Very truly yours,



Rick Amato
DeKalb County State's Attorney

cc: Illinois Attorney General PAC (paccess@atg.state.il.us)
Nelson Multimedia, Inc (larry.nelson@nelsonmultimedia.com)

Encl. Agenda from 8/23/21 Sandwich City Council Meeting
Audio of the vote on the undisclosed settlement agreement
Correspondence denying WSPY FOIA request

¹ It is this office's expectation that WSPY will seek the PAC to review the August 26, 2021 FOIA denial and provide the necessary information for such to occur.

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August 31, 2021

Richard D. Amato
DeKalb County State's Attorney
133 West State Street, #106
Sycamore, IL 60178

Re: City of Sandwich
Our File No. 13827.000221

Dear Mr. Amato,

As I am certain you know, we represent the City of Sandwich and have for many years. We received a copy of your August 27, 2021, letter to Mayor Todd Latham regarding alleged OMA violations. Since you did not copy us on your correspondence, we were not aware of such accusations until our client provided us with your letter. It is clear to us that we interpret the law and the requirements of the Open Meetings Act differently, and we want to take this opportunity to respond.

We must first address your statement that the City did not provide the general subject matter of the item up for a vote, as instructed in 5 ILCS 120/2.02(c). You admit that this section only addresses an "ordinance or resolution," and you provide no case law or even Attorney General Opinions that indicate subsection (c) of Section 2.02 would apply to anything other than ordinances and resolutions. We have found nothing that supports your conclusions and would ask that you provide such a citation if you are aware of one. Instead, we found the opinion of the Illinois Supreme Court in *Board of Education of Springfield School District No. 186 v. Attorney General*, 2017 IL 120343 (2017), in which the Attorney General's Office makes many of the same arguments that you assert in your letter regarding intent and the amount of detail necessary to comply with the statute. The Court rejected these same arguments, and I would suggest that you read this opinion carefully. After a thorough review, it is clear that the City of Sandwich has met the standards of this case (such standards being provided by the Supreme Court) and the City has indeed complied with the Open Meetings Act.

You suggest in your letter that one should not "ignore the intent of our legislature," and yet, as a general principle of law, one cannot look to the legislature's intent in a statute unless the statute is found to be ambiguous. There is no ambiguity in either section of the statute you have cited; therefore, it is improper to infer intent when none is required. Agenda items regarding

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ordinances or resolutions only require a statement of the general subject matter. In this case, the City's action was not an ordinance or resolution that required more detail. Even assuming for the sake of argument that subsection (c) would apply to this item, you have suggested that the City must provide in the agenda "what litigation it is related to, how much the settlement was for, or who it was with." When you read the *Board of Education* case, however, you will learn that none of this information is necessary to produce a sufficient agenda item, even for a resolution or ordinance.

You also cite to 5 ILCS 120/2(e) as a basis of an alleged violation of OMA, because the City did not "publicly recite" the details of the agreement at the meeting. However, in the *Board of Education* case, the Court rejected the Attorney General's argument that a verbal recitation is required. The Court held that "[t]he language of section 2(e) does not mention an explanation, the significance of the action being considered, or the attendees' understanding. Rather, the plain meaning of the phrase 'public recital of the nature of the matter being considered' is that the public body must state the essence of the matter under consideration, its character, or its identity." 2017 IL 120343 ¶46. (Emphasis added) Under section 2(e), the City was required to recite the "nature of the matter," which may be described in nonspecific terms, and "other information" to inform the public of the type of business addressed. *Id.* at ¶50. The City complied with the requirements described by the Illinois Supreme Court by stating the nature of the matter (authorization of the mayor to sign a settlement agreement) and other information to inform the public (the purpose of such agreement being to compromise in pending litigation). Importantly, the *Board of Education* case makes clear that the City "need not provide an explanation of its terms or its significance." *Id.* at ¶64. Based on the foregoing, the City provided adequate information to comply with the requirements of the statute as outlined by the Illinois Supreme Court.

Further, your letter mentioned and attached a FOIA denial letter dated August 26, 2021, which you allege was a denial under 5 ILCS 140/7(1)(f), the preliminary draft exemption. We would like to bring to your attention the typographical error in the City's "Answer," which states as written, "Your request is denied inasmuch as the City does have draft(s) versions of the Settlement Agreement(s)." However, the response was intended to state that "the City does *not* have draft(s)..." We apologize for the mistake and the confusion this has caused and would like to further reiterate that the City does not have draft versions of any settlement agreements; therefore, there are no records responsive to WSPY's request for drafts.

Finally, our office and the City of Sandwich do not appreciate the accusation that the City did anything to purposefully violate a state statute. The City makes every effort to be transparent to the complainant here in particular, and while mistakes may happen, there is never any malicious intent by the City of Sandwich and its staff. The City only has one matter that is in pending litigation. WSPY and anyone who reads its website or listens to its radio station knows this, and they know exactly what case is at issue. Whenever the City Council moved to go into closed session, citing pending litigation, WSPY never failed to report that it was to address this particular matter. It is disingenuous at best for WSPY to now claim it did not know what "pending

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litigation" this settlement agreement pertained to when it has followed and reported on it every time "pending litigation" has been noted on the agenda or otherwise brought up at recent meetings. This complaint is nothing but an attempt to aggravate matters for the City while the City works toward resolving litigation on behalf of the citizens of Sandwich.

Finally, in the future, please do not disregard the fact that our office represents the City of Sandwich and, at a minimum, we should receive any communications you send to our client. As an attorney, I know you understand the requirements our profession places on us when communicating with a represented party. Going forward, we would also appreciate an opportunity to discuss any potential issues or concerns you may have so as to avoid some of the misunderstandings that have obviously occurred in this matter.

Sincerely,

FOSTER, BUICK, CONKLIN & LUNDGREN, LLC

By: 
Jessica A. Harrill, Attorney

JAH/jfd

c.c.: Mayor Todd Latham
City Clerk, Denise Li
WSPY
David J. Berault, Chief Civil Assistant
PAC

