ROBERT B. BERLIN
STATE'S ATTORNEY
DUPAGE COUNTY, ILLINOIS

September 11, 2015

Mr. Adam Andrzejewski
Chairman, American Transparency
200 S. Frontage Rd., Suite 304
Burr Ridge, IL 60527

Dear Mr. Andrzejwski:

Thank you for your detailed memorandum of July 30, 2015, wherein you provided me with "notice to review" various matters involving the Open Meetings Act, 5 ILCS 120/5 *et. seq.*, as it pertains to the relationship between the College of DuPage and its president, Dr. Robert Brueder. You have asked that I exercise my purview under Section 3(a) of the Open Meetings Act (the Act) to determine whether violations of the Act occurred, and if they did, to prosecute the violations to the fullest extent of the law. I have reviewed your memorandum as well as the attachments you provided at great length as well as the Act itself and the appellate court opinions and opinions of the Attorney General which have interpreted it over the years. This letter summarizes both my findings of law with respect to my duties under the Act as well as the remedies which the Act makes available to me.

Before deciding to initiate any litigation, whether civil or criminal, I must conclude first that someone has broken the law or caused some injury and then determine whether I may still bring the action within the period prescribed by law. As a practical matter, I must also consider the likely outcome of the action and the appropriateness of the available remedies to redress the wrongdoing I am alleging.

For ease of reference, I will summarize your allegations against the College's Board of Trustees as follows:

A. November 18, 2008: You inquire whether a discrepancy existing between the agenda item "Appointment of College President" and the minutes of the meeting which characterize the action as approving "the employment agreement" between the College and Dr. Brueder is a violation of the Open Meetings Act.
B. November 18, 2008: You inquire whether the failure of the meeting minutes to reflect the recital of a final action item violated the Open Meetings Act.
C. April 16, 2009: You inquire whether the fact the agenda lists "President's Contract" is on the agenda only as a discussion item barred final action at that meeting.

D. April 16, 2009: You inquire whether the Board of Trustees improperly conducted a "lame-duck" meeting in light of the results of the April 7, 2009 election.
E. June 22, 2010: You again inquire whether the failure of the meeting minutes to reflect the recital of a final action item violated the Open Meetings Act.
F. January 24, 2011: As before, you inquire whether the failure of the meeting minutes to reflect the recital of a final action item violated the Open Meetings Act.
G. July 12, 2011: You request that I prosecute "to the fullest extent of the law" the violation of the Open Meetings Act identified by the Public Access Counselor in its determination letter dated July 24, 2015 on file 2011 PAC 16114.
H. January 11, 2012: You request review of the legality of a "contract extension," which you believe was conferred by "extra-ordinary means."
I. January 14, 2013: You request review of the legality of a "contract extension," which you believe was conferred by "extra-ordinary means."
J. January 11, 2014: You request review of the legality of a "contract extension," which you believe was conferred by "extra-ordinary means."

While I will address each of your specific allegations, I believe it is useful to begin my analysis with a discussion of both the time frame in which I may bring an action as well as the remedies the law makes available to me to redress violations of the Act.

Time to Commence Litigation

Criminal Prosecution

The Open Meetings Act authorizes the State's Attorney to prosecute some violations of the Act as criminal offenses. Specifically, Section 4 of the Act provides that these violations – including those which you have alleged – are Class C misdemeanors. A Class C misdemeanor is a criminal offense which a court may punish an offender with a sentence of up to 30 days in the county jail and a fine of up to $1,500. A court may also place an offender under a conditional sentence of court supervision, conditional discharge or probation for up to two years. See 730 ILCS 5/5-4.5-65, 5-4.5-70.

The most recent potential violation you have identified allegedly occurred in early 2014. Under Section 3-5(b) of the Criminal Code of 2012, I must commence a prosecution of a misdemeanor offense within eighteen months of its commission – not its discovery. 720 ILCS 5/3-5(b). Thus, the statute of limitations bars the criminal prosecution of the conduct you've identified, including the failure of the Board to recite the matter on which it was voting in July 2011 (Item G above).

Civil Litigation

Section 3(a) of the Act authorizes any person to bring a civil action in the appropriate circuit court when there is probable cause to believe that a public body has failed to, or is about to fail to, comply with its provisions. 5 ILCS 120/3(a). That Section further provides that a person who seeks to remedy a violation that has already occurred must bring his or her suit within 60 days of the

violation. The most recent alleged violation of the Open Meetings Act occurred in early 2014 – well outside the ordinary 60-day period to bring a complaint.

You have suggested that a window exists for me to ask a court to invalidate actions by the College of DuPage's Board of Trustees which violates the Open Meetings Act. Section 3(a) of the Act authorizes a State's Attorney to "bring a civil action in the circuit court for the judicial circuit in which the alleged noncompliance has occurred... within 60 days of the meeting alleged to be in violation of this Act, or, if facts concerning the meeting are not discovered within the 60-day period, within 60 days of the discovery of a violation by the State's Attorney." *Id.*

Our Appellate Court has suggested that the time period does not begin to run until such time as the State's Attorney discovers that a violation has occurred. *Safanda v. Zoning Bd. Of Appeals of City of Geneva,* 2013 Ill.App.3d 687 at 691 (2nd Dist. 1990). Though the Second District's ultimate holding in *Safanda* was rejected by a federal court, the Northern District nonetheless reasoned that the *State's Attorney* must find a violation for the extended limitations period to apply. *See Asllani v. Board of Educ. of City of Chicago,* 845 F.Supp. 1209, 1226 (N.D. Ill. 1993). The First District Appellate Court noted that this construction permitted a

> person who is aggrieved by an allegedly improper action to notify the State's Attorney's even after 45 days of the meeting and to request the State's Attorney to file suit *ex relatione*, or upon relation. On the other hand, to allow that same person to file suit in his or her own name solely upon notification to the State's Attorney would, no doubt, condone dilatory practices. In fact, it would confer upon persons other than the State's Attorney the opportunity to delay filing an action *ad infinitum* by simply not notifying the State's Attorney of the alleged violation until some future date. *Paxson v. Bd. of Educ. of Sch. Dist. No. 87, Cook County, Ill.,* 276 Ill. App. 3d 912, 924, (1st Dist. 1995)

Thus, the *Paxson* Court implicitly recognized the State's Attorney's special ability to commence an action when others could not as well as the State's Attorney's responsibility to exercise that power appropriately. The General Assembly's choice of 60 days, rather than a longer period, strikes a balance between the right of the public to open and transparent government against the need for finality and certainty in governmental decisions. "The voidance of governmental actions is indeed a powerful and drastic remedy that carries with it the enormous potential for upsetting the stability of government." *Paxson,* 276 Ill. App. 3d 912 at 924. In fact, prior to 1994 the relevant time period to bring an action was only 45 days. *See* Public Act 88-621. Absent a finite period of time to commence a review, any governmental action, whether it be an appointment of a public official or the issuance of a contract could forever be open to collateral attack based on an alleged violation of the Open Meetings Act. Though it is true that the General Assembly afforded State's Attorneys an opportunity to bring an action within 60 days of their discovery of a violation, this provision exists in order to remedy situations in which violations were not immediately apparent – for example, when a public body takes action during a closed meeting or during improperly convened "secret" meetings – instances where the public could not have reasonably known or

learned what was happening. *See Paxson* 276 Ill. App. 3d 912, 923 n. 7. "...it is doubtful that the State's Attorney will be immediately aware of each and every meeting that does not comply with the requirements of the Act."

While I may rely on the Attorney General's relatively recent conclusion that an Open Meeting Act violation occurred in mid-2011 as the basis to initiate litigation in late-2015, before doing so, I must also consider the ends which I could reasonably expect to achieve through such litigation. Absent a sufficient remedy to achieve those ends, I cannot ethically initiate litigation. *See* IL S.Ct. Rules of Prof. Conduct, Rule 3.3.

Available Remedies

Section 3(c) of the Open Meetings Act sets forth the available remedies a court may impose for violation of the Act:

> "...having due regard for orderly administration and the public interest, as well as for the interests of the parties, to grant such relief as it deems appropriate, including granting a relief by mandamus requiring that a meeting be open to the public, granting an injunction against future violations of this Act, ordering the public body to make available to the public such portion of the minutes of a meeting as is not authorized to be kept confidential under this Act, or declaring null and void any final action taken at a closed meeting in violation of this Act." 5 ILCS 120/3(c).

The remedies of mandamus and injunction exist to restrain future violations of the Act rather than to sanction previous conduct. Thus, even assuming a court would conclude that my action were timely, it could only apply these remedies against the College and its current Board of Trustees, not the trustees who you have alleged violated the Act previously. In light of the substantial turnover of the Board in the *two* consolidated elections that followed the College's July 2011 Open Meetings Act violation, I do not believe that either remedy is appropriate – particularly given the new board majority's public statements concerning the activities of its predecessors as well as its retention of new legal counsel. Rather, I believe the new Board should have the opportunity to comply with the Act absent unnecessary litigation and judicial oversight.

The statute also provides that a court may impose two remedies to cure a past violation of the Act: the first, to compel the release of minutes of meetings which the Act does not authorize to be confidential, and the second, to declare null and void any final action taken at a *closed* meeting in violation of this Act. Because there is no suggestion in your letter that the College is improperly withholding meeting minutes, I will address only the second curative remedy – voidance of the action.

In 1995, former Illinois Attorney General Jim Ryan in a formal, published opinion analyzed the legislative history of the portion of the Act that authorizes voiding of governmental actions:

> Prior to its amendment by Public Act 82-378, effective January 1, 1982, the Act contained no provision authorizing the invalidation of actions taken by public

> bodies at or subsequent to meetings that were held in violation of the Act. (See, Ill. Rev. Stat. 1979 ch. 102, par. 41 et seq.) Consequently, in *Board of Education of Community Unit School Dist. No. 300 v. County Board of School Trustees* (1978), 60 Ill.App.3d 415, 420-21, the court refused to reverse orders granting a petition for detachment and annexation, where evidence with respect to the petition had been discussed in a closed session by two county boards of school trustees before they voted to grant the petition in open session. The court declared that nothing in the Act or in case law mandated the invalidation of public action allegedly taken during closed proceedings, and declined to construe the Act to do so in the absence of a clear legislative mandate or judicial precedent. Thereafter, the General Assembly amended section 3, expressly granting the courts the authority to declare null and void any final action taken at a closed meeting in violation of the Act. The debates of the General Assembly with respect to that amendment strongly indicate a legislative intention that final actions of a public body could be invalidated by a court only when taken at a closed session. (Remarks of Representatives Reilly and Katz, May 20, 1981, House Debate on House Bill No. 411, at 4 and 29; Remarks of Senator Bruce, June 19, 1981, Senate Debate on House Bill No. 411, at 21; Remarks of Representatives Reilly and Bluthardt, June 28, 1981, House Debate on House Bill No. 411, at 4-5.) Ill. Att'y Gen. Op. No. 95-004 at 13-14 (July 14, 1995).

Attorney General Ryan noted that the debates of the General Assembly "strongly" signaled its legislative intention that voidance was a remedy available only for violations which occurred in closed sessions. The transcripts of the debates themselves reveal just how strong that intention was. Prior to its initial passage by the House of Representatives, the sponsor of the bill which created this provision, Representative Jim Reilly, told his colleagues that "[this bill] clarifies that action taken in closed session and only that action taken in closed session can be voided." 82nd Ill. Gen. Assem., House Proceedings, May 20, 1981, p. 31 (statements of Representative Reilly). Moments later, Representative Harold Katz asked Representative Reilly the following question:

> "Would I be correct in assuming that the prohibition invalidates only actions taken in secret and that it would not invalidate any actions taken in a public meeting that is open with regard, for example, to an ordinance or approval of a contract or a bond issue even if at an earlier stage a closed meeting had in fact, been held where this matter had been unlawfully discussed?"

In response to his colleague, Representative Reilly responded "That is correct. The intent is to invalidate only final action improperly taken in secret." 82nd Ill. Gen. Assem., House Proceedings, May 20, 1981, p. 33-34 (statements of Representative Katz and Representative Reilly).

One month later, after the measure had passed the Senate with amendments, HB 411 returned to the House. During the House's final debate prior to its approval of HB 411, Representative Edward Bluthardt asked Representative Reilly whether the failure of a public body to keep minutes of an open meeting could lead to nullification. Representative Reilly responded

> "No, because in the hypothetical you've given me this is an open meeting *** and the only things that can be nullified in court are actions that are taken in closed meetings." 82nd Ill. Gen. Assem., House Proceedings, June 28, 1981, p. 145 (statements of Representative Bluthardt and Representative Reilly).

These excerpts strongly support Attorney General Ryan's analysis. Moreover, as recently as 2004, the Attorney General's Guide to the Open Meetings Act reflected the office's position that the language of the voidability provision refers only to final actions taken in closed meetings held in violation of the Act. *See Guide to the Illinois Open Meetings Act*, Lisa Madigan, Attorney General, State of Illinois revised 8/2004. The Illinois Supreme Court affords opinions of the Attorney General great deference:

> While Attorney General opinions are not binding on the courts, a well-reasoned opinion of the Attorney General is entitled to considerable weight, especially in a matter of first impression in Illinois. *Bonaguro v. County Officers Electoral Board*, 158 Ill.2d 391, 399, 199 Ill.Dec. 659, 634 N.E.2d 712 (1994).

The first case to address the voidability provision of Section 3(c) was *Williamson v. Doyle,* 112 Ill. App.3d. 293 (1st Dist. 1983). Though *Williamson* involved a violation which occurred *prior* to the effective date of the 1981 amendments, the court did discuss the new legislation, concluding that "the statute permitting the court to declare the action void refers by its terms only to a "closed session." *Id.* at 390. *Williamson* was later cited by the First District in 1999 in support of the same proposition. *See Chicago School Reform Board of Trustees v. Martin,* 309 Ill.App.3d. 924, 936 (1st. Dist. 1999) ("...nullification...is...not supported by the Open Meetings Act").

Though the General Assembly intended to afford courts a broader range of remedies than the four it provided when it preceded them with the term "including," its use of the term "closed" to modify "meetings" is significant as well. A construction which concludes that a court possesses the power to void actions taken at open as well as closed meetings effectively renders the General Assembly's use of the word "closed" meaningless. The Illinois Supreme Court has held that when interpreting a statute "[w]e must construe the statute so that each word, clause, and sentence, if possible, is given a reasonable meaning and not rendered superfluous [citation], avoiding an interpretation which would render any portion of the statute meaningless or void [citation]." *Sylvester v. Indus. Comm'n*, 197 Ill. 2d 225, 232 (2001).

As further evidence that Attorney General Ryan's analysis was correct, earlier this spring, the Illinois House of Representatives approved House Bill 248, as amended, by a 112-0-0 vote. I have attached a copy of this legislation in the form that it passed the House for your review. The bill amends Section 3(c) of the Act by adding language specifically authorizing a court to declare null and void a final action taken at an *open* meeting. To help fully understand the reasoning behind this bill, my office submitted a Freedom of Information Act (FOIA) Request to the Clerk of the House of Representatives on August 31, 2015 requesting a copy of the audio recording of the March 3, 2015 hearing that the House Judiciary – Civil Committee conducted on HB 248. The

Clerk's office promptly complied with our request and we received a disc with the recording on Tuesday following the holiday weekend.

During the legislation's consideration in the House Judiciary – Civil Committee, the bill's sponsor, Representative Dwight Kay, testified that the sole purpose of the bill was to authorize courts to invalidate actions taken in open sessions which violate the Act. He further testified that recent events at the College of DuPage, in part, precipitated his filing of the legislation and significantly, in response to a question from Representative Ann Williams (a former Assistant Attorney General and the office's former legislative director), stated that a court was "prohibited" from invalidating an action which occurred during an open meeting. 99th Ill. Gen. Assem., House Judiciary Civil Committee Proceedings, March 3, 3015. (Audio Recording of Testimony by Representative Dwight Kay on House Bill No. 248).

In addition to Representative Kay, two representatives of a non-profit organization which promotes transparency in government testified in support of HB 248, both noting that courts could not void actions taken in open session under existing law. One of these proponents, Kirk Allen, while discussing the same violation you have alleged in Item A, testified

> "When we look at what happened at College of DuPage, Dr. Breuder's contract started in 2008. The only thing that was on the agenda was 'Appoint the President.' There was nothing in the Board packet, there was no contract, nothing. When they made the motion, it wasn't to appoint the president. It was to approve an employment agreement. None of that was on the agenda. It was a violation of Section 2(e). They didn't recite it. There's no way to overturn that because it happened in open session." 99th Ill. Gen. Assem., House Judiciary Civil Committee Proceedings, March 3, 3015. (Audio Recording of Testimony by Mr. Kirk Allen, Edgar County Watchdogs on House Bill No. 248).

Later when discussing the third addendum to Dr. Breuder's contract approved by the Board at its July 12, 2011 meeting, Mr. Allen told the committee that "...there's no way to nullify those actions the way it is right now." *Id.*

The action by the House of Representatives in approving HB 248 is illustrative of the clear intention of one of the General Assembly's chambers to change the statute. Our Supreme Court has found that a subsequent amendment to a statute may be an appropriate source for discerning legislative intent. *People v. Bratcher*, 63 Ill.2d 534 (1976). Though a bill's passage by one chamber does not constitute a subsequent amendment, the language of HB 248, the testimony at the March 3, 2015 committee meeting, the holdings of the appellate court, and the decisive action of the Illinois House support the conclusion of Attorney General Ryan, as well as my own, that the statute permitting the court to declare an action null and void refers by its terms only to a closed meeting.

I have also reviewed several cases, the holdings of which have been suggested stand for the opposite proposition – that the court may invalidate actions even taken in open meeting. For

example, the court in *Gerwin v. Livingston County Board*, 345 Ill App.3d. 352 (4th Dist. 2003) invalidated actions taken by the Livingston County Board at a meeting it convened in a room unreasonably small to accommodate the public. Similarly in *Reddell v. Giglio,* 238 Ill.App.3d. 141 (1st Dist. 1992), a case decided prior to Attorney General Ryan's opinion, the court addressed the propriety of an action by a township board to appoint officers to alleged vacancies during a special meeting. The court held that notice of the meeting was "so deficient in essence it amounted to no agenda at all." In *Rice v Board of Trustees of Adams County, Illinois,* 326 Ill.App.3d 1120 (4th Dist. 2002) the Fourth District invalidated a County Board's approval of an enhanced pension plan which was not included on the meeting's agenda. Finally, *Feret v. Schillerstrom* 363 Ill.App.3d. 534 (2nd Dist. 2006) involved the reversal of a lower court's dismissal of a citizen's complaint that an item of business was not on an agenda. Each of these instances involved a public body's failure to convene a meeting in a location accessible to the public or provide the public with advance notice of contemplated action – in *Livingston County* it was through the County's selection of an inconvenient meeting room and in the other cases by completely omitting the relevant item from the agenda. Thus, the courts apparently concluded that these meetings though superficially open, were not actually open to the extent the Act required. Significantly, none reached the conclusion that any meeting in which any violation of the Act occurs constitutes a closed meeting.

Analysis

Beginning first with Item A on the list of potential violations you requested I examine, I find no support for the proposition that the College of DuPage violated the Open Meetings Act when it took action to approve Dr. Brueder's contract under an agenda item labeled "Appointment of a President." While it is preferable for terminology used in minutes to reflect terms used in meeting agendas, there is no legal requirement for public bodies to do so. A discrepancy between the terms "appointment of a president" when used on an agenda and "approving an employment agreement" when that item of business is addressed in minutes of the same meeting does not create any basis of confusion. Certainly, approving a contract providing for the compensation of the President is germane to the appointment of the President. Moreover, the version of the OMA which was in effect at the time contained less stringent requirements for the content of agenda items than are in place today. The agenda item "appointment of a president" reasonably placed the public on notice that the Board intended to take actions necessary to implement the president's appointment, including approving the terms of his appointment.

In your memorandum, you appear to assert that the Attorney General determined that the failure of a public body to reflect in its minutes that it complied with the public recital requirement of Section 2(e) of the Act constitutes a violation of the Act in and of itself. This appears to be the basis for your allegation of violations in Items B, E, and F. I have reviewed the Attorney General's determination letter carefully and find no support for this position. Section 2.06(a) of the Act provides for the minimum content of the minutes as follows:

> All public bodies shall keep written minutes of all their meetings, whether open or closed, and a verbatim record of all their closed meetings in the form of an audio

> or video recording. Minutes shall include, but need not be limited to: (1) the date, time and place of the meeting; (2) the members of the public body recorded as either present or absent and whether the members were physically present or present by means of video or audio conference; and (3) a summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken. 5 ILCS 120/2.06(a).

Nothing in the Attorney General's determination nor the Act itself requires that minutes reflect that the public body complied with the recital requirement. Though it would be useful for a public body to note in its minutes when it has complied with a procedural requirement of the Act, the Act itself does not require that level of detail – and the absence of that detail from the minutes does not give rise to the inference that a recital did not occur. However, even *if* the Board failed to recite these items before taking final action, they were included on their respective meeting agendas and considered at an open meeting. As I will explain in greater detail, voiding these actions based on the recital violation is not permitted under existing law.

In Item C, you allege that the Board's agenda for its April 16, 2009 meeting lists "President's Contract" only as a discussion item. However, the term "discussion item" does not appear on that agenda for any item of business, and the agenda contains other business items including approvals of resolutions and of the agenda itself which were not on the consent calendar. I am unclear as to why the public would have expected that the Board intended the "President's Contract" to be an item only for discussion rather than action. Moreover, the minutes of the meeting which you also provided indicate that the Board took action on the president's contract under that agenda item and not under the consent agenda. Given former Trustee Wessel's request, which I will discuss in the following paragraph, it is unlikely that Dr. Brueder's contract would have received the unanimous support of the trustees ordinarily required to approve an item of business on a consent agenda. Accordingly, this is not a violation of the Open Meetings Act.

In Item D, you raise an issue unrelated to the Open Meetings Act – rather it pertains to the proper composition of the College of DuPage's Board of Trustees. As you and then-Trustee Wessel observed, the April 9, 2009 Consolidated General Election substantially altered the composition of the Board of Trustees. However, as Trustee Wessel noted in her statement reflected in the Board's minutes, the results of that election were unofficial as of April 16. Section 3-7 (b) of the Public Community Colleges Act provides in relevant part:

> The term of members elected in 1985 and thereafter shall be from the date the member is officially determined to be elected to the board by a canvass conducted pursuant to the Election Code, to the date that the winner of the seat is officially determined by the canvass conducted pursuant to the Election Code the next time the seat on the board is to be filled by election. 110 ILCS 805/3-7(b).

The DuPage County Election Commission completed its canvass of the 2009 Consolidated Election on April 28, 2009. Thus these "lame duck" trustees were still empowered to carry out the duties of their office on April 16, 2009.

Item G pertains to the Attorney General's recent determination that the College violated the Open Meetings Act when the Board failed to publicly recite the business item pertaining to the President's contract during the July 12, 2011. I agree with the analysis and similarly conclude that the Board violated the Open Meetings Act.

You have asked that I prosecute this violation to the fullest extent of the law. As I noted earlier, the statute of limitations bars any criminal prosecution for this violation of the Act and even if it did not, the nature of the violation itself complicates the charging decision. Though all seven trustees voted in favor of the motion that does not mean that all or some of them *willfully* violated the Act. Absent a willful violation, there is no criminal liability.

The civil remedy most akin to a prosecution to the fullest extent of the law is a judicial determination that the Board's action was null and void. Assuming that voidance was an available remedy for this type of violation, and under Illinois law it is not, it is not appropriate in this instance. As an initial matter, it is important to remember that the Attorney General specifically concluded that the College provided adequate notice of the meeting and of the business before it under the version of the Act that was in effect at the time. *Ill. Att'y Gen. Public Access Counselor Determination Letter, 2011 PAC 16114*, issued July 24, 2015. This is a significant consideration since the line of cases which may stand for the proposition that a court could declare void actions taken in open meetings all involved meetings which were convened with deficient notice or were otherwise akin to a closed meeting. The Open Meetings Act does not specify the degree of detail that must be included in a public body's "public recital of the nature of the matter being considered" preceding final action on a matter before the public body for consideration. Illinois courts have also not addressed the matter. At the time of the Board's violation, the Attorney General's Public Access Counselor had not issued any binding determination letters addressing the recital requirement. In fact, the Attorney General issued her first binding determination interpreting that provision in May 2013, almost two years after COD's violation. *Ill. Att'y Gen. Pub. Acc. Op. 13-007*, issued May 21, 2013.

On August 12, 2015, and at my direction, my staff contacted the Attorney General's Office and requested

> copies of any and all binding and non-binding determination letters issued by the Attorney General' s Public Access Bureau wherein the Public Access Bureau analyzed the Open Meeting Act's "public recital" requirement contained in Section 2(e) of the Act – regardless of whether the Attorney General concluded that a violation of that provision occurred.

The Attorney General provided the final records responsive to our request on September 2. In all, the Attorney General's Office furnished us with more than 30 of its Public Access opinions addressing the OMA's public recital requirement. Though the vast majority of these opinions were advisory, the Attorney General has never – not even once – invalidated or sought the invalidation of a public body's actions due to its violation of the recital requirement so long as the action occurred in an open meeting. In nearly all of the instances where the Attorney General concluded

a public body violated the public recital requirement, her directive was that the public body in question comply with the requirement in the future. In the few cases where the Attorney General requested or required a more substantial remedy, she simply directed the public body to either ratify or reconsider its action in compliance with the Act – though in all of these instances, the interval between the violation and a determination the violation occurred was a few weeks or at most a few months. Here, more than four years and two intervening elections have occurred since the violation during which time the Board's approval of the third addendum has enjoyed, at least until July 24, 2015, a presumption of validity. Given the nature of the Board's violation, the near-total absence of guidance available to it at the time, and the manner in which the Attorney General has treated similar violations, the only appropriate remedy for the Board's conduct is the admonishment it received from the Attorney General. Any sanction greater than that would be disproportionate to the violation, and in the case of voidability, grossly disproportionate. *See Chicago School Reform Board of Trustees v. Martin*, 309 Ill.App.3d. 924, 936 ("...nullification...is too extreme and not supported by the Open Meetings Act").

Finally, with respect to the remaining items, H, I, and J, Paragraph F in the Employment Agreement titled "REAPPOINTMENT" the contract dated November 18, 2008 provides:

> On or before April 1, 2010, and April 1 of each year thereafter, the term of this Agreement will be automatically extended for an additional one (1) year period unless either party provides to the other, prior to the 15th day of March of such Agreement year, written notice of his or its intention to terminate this Agreement at the end of the then-current Agreement term which expires no earlier than June 30, 2012, but may be extended as provided in this Agreement. The President will notify in writing the Chairperson of the Board by February 1 of each such year that failure of the Board to give the President notice of intent to extend the Agreement will extend this Agreement one (1) additional year. The failure of the President to give the written reminder notice to the Chairperson of the Board waives the obligation of the Board hereunder to give its written notice of intent by March 15. The Board's notice need not be acted upon publicly, but authorization to give such notice will be recorded in the closed session minutes of the Board.

Simply put, this provision provides that after April 1, 2010, and on April 1 in each following year, the term of the contract will extend by one additional year unless either party gives notice to the other of his or its intent to terminate. In the absence of any action by the President or by the Board to terminate the contract the contract's term extends by an additional year. If the President fails to "remind" the Board of this provision each year, his failure does not prevent the contract's extension; rather it gives the Board additional time to decide whether it wants to take action to prevent the contract's extension.

You have provided three letters from Dr. Brueder to then-Chairman Carlin and then-Chairman Birt which satisfied Dr. Brueder's obligation to remind the Board of the extension provision. Assuming these letters are genuine, Dr. Brueder in sending them ensured that if the Board were to provide him with notice of its intent not to extend his contract it would need to do so by March 15. Had he

failed to provide that notice, the Board could have provided him with notice as late as March 31 to prevent the extension. There is no evidence that either party sought to prevent the contract extension in any year until 2014. While I do have serious concerns about the language in Paragraph F that purports to permit the Board to take action in a closed meeting, there is no evidence that the Board ever did so. If the Board reached a consensus to permit the President's contract to renew in a closed session, its decision *not* to act would constitute the taking of a final action in a closed session and thus violate the Open Meetings Act. Though a court could declare such an action null and void because it occurred during a closed session, that remedy would be of little use in this case; a court could not remedy a violation by transforming the Board's decision to *not* terminate Dr. Brueder's contract into an action that achieved the opposite result. In the absence of any activity by the Board, the President's contract would have still extended for an additional year as it apparently did in each of the three instances you cited. As you may be aware, the Illinois General Assembly is in the process of preventing situations like this from occurring in the future and has recently sent the Governor HB 3593 which it specifically tailored to address the problems created by Paragraph F-style contract extensions.

Conclusion

For the reasons I've set forth in this letter, I am satisfied that the admonition provided by the Attorney General in her determination letter of July 24, 2015 is sufficient to sanction the College for the Open Meetings Act violation committed by its former Board in 2011 and to place its new Board on notice as to its responsibilities under the Act. In its current form, the Open Meetings Act provides no legitimate or ethical basis for me to take more significant action for that violation or for any of the other potential violations you have identified. Based on the actions the new Board has taken thus far as well, I am confident that they are aware of their obligations under the Act and will act appropriately so as to avoid future violations.

Sincerely,

Robert B. Berlin
State's Attorney

Enclosure

AN ACT concerning government.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Open Meetings Act is amended by changing Section 3 as follows:

(5 ILCS 120/3) (from Ch. 102, par. 43)

Sec. 3. (a) Where the provisions of this Act are not complied with, or where there is probable cause to believe that the provisions of this Act will not be complied with, any person, including the State's Attorney of the county in which such noncompliance may occur, may bring a civil action in the circuit court for the judicial circuit in which the alleged noncompliance has occurred or is about to occur, or in which the affected public body has its principal office, prior to or within 60 days of the meeting alleged to be in violation of this Act or, if facts concerning the meeting are not discovered within the 60-day period, within 60 days of the discovery of a violation by the State's Attorney.

Records that are obtained by a State's Attorney from a public body for purposes of reviewing whether the public body has complied with this Act may not be disclosed to the public. Those records, while in the possession of the State's Attorney, are exempt from disclosure under the Freedom of Information

Act.

(b) In deciding such a case the court may examine in camera any portion of the minutes of a meeting at which a violation of the Act is alleged to have occurred, and may take such additional evidence as it deems necessary.

(c) The court, having due regard for orderly administration and the public interest, as well as for the interests of the parties, may grant such relief as it deems appropriate, including granting a relief by mandamus requiring that a meeting be open to the public, granting an injunction against future violations of this Act, ordering the public body to make available to the public such portion of the minutes of a meeting as is not authorized to be kept confidential under this Act, ~~or~~ declaring null and void any final action taken at a closed meeting in violation of this Act, or declaring null and void a final action taken at an open meeting in violation of this Act, but only if a civil action alleging the violation is commenced within 60 days of that meeting and the alleged violation is directly and substantially related to that final action.

(d) The court may assess against any party, except a State's Attorney, reasonable attorney's fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with this Section, provided that costs may be assessed against any private party or parties bringing an action pursuant to this

Section only upon the court's determination that the action is malicious or frivolous in nature.

(Source: P.A. 96-542, eff. 1-1-10.)

Section 99. Effective date. This Act takes effect upon becoming law.