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STATE OF ILLINOIS
SPRINGFIELD

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FILE NO. S-1501

MEETINGS:
Tape Recordings

Honorable Dennis P. Ryan
State's Attorney, Lake County
County Building
Waukegan, Illinois 60085

Dear Mr. Ryan:

I have your letter wherein you inquire whether members of the public may be prevented from recording public meetings of the board of trustees of a public library district and whether said board may meet in closed session with its attorney to discuss a petition for a referendum to reduce the district's tax rate. For the following reasons, it is my opinion that both actions constitute violations of "AN ACT to revise the law in relation to meetings" (Ill. Rev. Stat. 1979, ch. 102, par. 41 et seq.), hereinafter referred to as the Open Meetings Act.

Section 2.05 of the Act (Ill. Rev. Stat. 1979, ch. 102, par. 42.05) provides:

> "Subject to the provisions of 'An Act in relation to the rights of witnesses at proceedings conducted by a court, commission, administrative agency or other tribunal in this State which are televised or broadcast or at which motions pictures are taken', approved July 14, 1953, as amended, the proceedings at meetings required to be open by this Act may be recorded by any representative of any news medium as defined in 'An Act concerning disclosure of the sources of information obtained by certain persons in the news media', approved September 23, 1971, by tape, film or other means. The authority holding the meeting shall prescribe reasonable rules to govern the right to make such recordings.
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> If a witness at any meeting required to be open by this Act which is conducted by a commission, administrative agency or other tribunal, refuses to testify on the grounds that he may not be compelled to testify if any portion of his testimony is to be broadcast or televised or if motion pictures are to be taken of him while he is testifying, the authority holding the meeting shall prohibit such recording during the testimony of the witness. Nothing in this Section shall be construed to extend the right to refuse to testify at any meeting not subject to the provisions of 'An Act in relation to the rights of witnesses at proceedings conducted by a court, commission, administrative agency or other tribunal in this State which are televised or broadcast or at which motion pictures are taken', approved July 14, 1953, as amended."

This provision was enacted approximately two years after I advised, in opinion No. S-867, issued February 4, 1975, that a governmental body may not prevent the tape recording of a public meeting. (1975 Ill. Att'y Gen. Op. 17, 20.) In that opinion, I specifically discussed the right of a private individual to bring an electronic recording device to a public meeting.

The issue thus raised is whether in enacting a provision which specifically grants representatives of the news media the right to record a public meeting, the General Assembly meant to grant a public body the authority to prevent the tape recording of a public meeting by any other person.

There is no language in section 2.05 which shows any intent on the part of the General Assembly to change the law or which limits the right of any individual to record a meeting; and there is no provision in the Open Meetings Act or other statute which grants a public body the authority to prevent recording (other than to preserve decorum and prevent interference with the proceedings). Section 2.05 only makes the right to record by news media representatives explicit and makes clear that the public body has authority to prohibit recordings if requested by certain witnesses.

Section 2.05 was added by Public Act 80-862 (H.B. 796) which also added paragraph (e) to section 14-3 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 14-3), which exempts "[r]ecording the proceedings of any meeting required to be open * * *" from the criminal provisions relating to eavesdropping. This provision applies to all recordings, not just those by representatives of the news media.

The interpretation that by adding section 2.05 the General Assembly did not intend to limit the right of any individual to record a meeting is confirmed by the debates.

In the Senate debates concerning House Bill 796, Senator Nimrod stated:

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* * *

> * * * What this bill does is it provides for the confirmation to put in legislative language the Attorney General's opinion that this particular right is implicit. * * * And putting this into the law, of course, only allows them to enforce the right that they already have. * * *
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> I just want to state, Senator Donnewald, that I have in my hand here from the Journal Courier in Jacksonville on May 17th, the most recent dates that are involved, that there was a physical removal of a television crew from a hearing and in opposition to the right which they already have and I would hope that all this bill does is put the Attorney General's opinion into Statutes. * * *" (Emphasis added.) (Illinois Senate Debates, June 27, 1977, at 111, 112.)

Secondly, you inquire as to the extent to which the attorney-client privilege may be asserted as a basis for conducting deliberations of a public body in a closed session. The inquiry is based on a set of facts which you related as follows:

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* * *

> The taxpayer's association circulated a petition under §162a of the Revenue Act (Ill. Rev. Stat. (1977), Ch. 120, [par.] 643a), which requested that a referendum be conducted on a question of public policy relating to the reduction of the maximum tax rate of the library district. The petition was presented to the secretary of the district's board. At the first meeting of the board subsequent to the presentation of the petition, the board met in closed session for the purpose of consulting 'privately with the attorney in order that he might explain to the board the petition itself and the statutory basis for it'. According to the statement of the president of the board of trustees the sole matter discussed during the closed session was the attorney's 'advice

> on the legal background of the petitioner's action and on the library board's available options in considering the position', including responses by the attorney to 'individual board members' questions on the matter'."

As you noted in your letter:

> " * * *
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> * * *[T]he Open Meetings Act does not contain any exception for discussions between attorney and client except as they relate to pending litigation. However, in People ex rel. Hopf v. Barger, 332 N.E. 649 (2nd Dist. 1975), the Appellate Court stated in dicta that advance legal consultation between a public body and its attorney on prospective litigation, does not constitute a 'meeting' of the governmental body as contemplated in the Act and thus is not covered by the Act. * * *
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> * * * "

The court in Barger suggested two reasons for the need to allow a public body to consult with its attorney in limited circumstances concerning prospective litigation:

> (1) It would not be in the public interest to require a public body to discuss foreseeable litigation with its attorney in an open meeting because it would give a potential private adversary a litigious advantage over the public.
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> (2) Closed sessions between a public body and its attorney are sometimes necessary to preserve the confidentiality of confidential information which the public body must relate to its attorney in order for him to do a professional job.

From the facts as you stated them in your letter and quoted above, I see nothing which indicates a legitimate reason for closing the meeting. No litigation was pending or reasonably foreseeable and no confidential information was

discussed. The library board is required to place the proposition for lowering the tax rate limit on the ballot if technical requirements are met. If these requirements are met, the board has no option. The petition itself and the statutory basis for it are public knowledge.

It is impossible to state precisely the extent to which the attorney-client privilege may be asserted as a basis for conducting deliberations of a public body in a closed session. The court in Barger, in recognizing in dicta that advance consultations between a public body and its attorney are not subject to the Open Meetings Act, stated at page 538:

> " * * *
>
> This does not mean, of course, that consultations by a governing body with an attorney in private may be used as a device to thwart the liberal implementation of the policy that the decision-making process is to be open and that confidentiality is to be strictly limited. The balance between the two must always be resolved in the public interest on a case-by-case basis.
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> * * * "

(People ex rel. Hopf v. Barger (1975), 30 Ill. App. 3d 525, 538.)

The court in the Barger case did not find sufficient reason to justify closing the meeting. I do not find sufficient reason to close the meeting on the facts you present.

Very truly yours,

ATTORNEY GENERAL