# Illinois Official Reports

## Appellate Court

***International Ass'n of Fire Fighters Local 4646 v. Village of Oak Brook*, 2024 IL App (3d) 220466**

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| Appellate Court Caption | INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 4646, Plaintiff-Appellee, v. THE VILLAGE OF OAK BROOK, Defendant-Appellant. |
| District & No. | Third District<br>No. 3-22-0466 |
| Filed | January 3, 2024 |
| Decision Under Review | Appeal from the Circuit Court of Du Page County, No. 21-MR-284; the Hon. James D. Orel, Judge, presiding. |
| Judgment | Affirmed in part and vacated in part.<br>Cause remanded. |
| Counsel on Appeal | Ericka J. Thomas, of Ottosen Dinolfo Hasenbalg & Castaldo, Ltd., of Naperville, for appellant.<br><br>Keith A. Karlson, Raymond G. Garza, and MaryKate Hresil, of Karlson Garza McQueary LLC, of Bolingbrook, for appellee. |

Panel JUSTICE BRENNAN delivered the judgment of the court, with opinion.
Justices McDade and Albrecht concurred in the judgment and opinion.

## OPINION

¶ 1 The International Association of Fire Fighters Local 4646 (Union) sued the Village of Oak Brook (Village) on the ground that the Village held a closed meeting in violation of the Open Meetings Act (Act) (5 ILCS 120/1 *et seq.* (West 2020)) and denied its request for records pertaining to that meeting in violation of the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2020)). The Union filed a motion for summary judgment on both claims, which the trial court granted, ordering that the Village disclose the requested records. The court also denied the Village's request to redact portions of the records sought by the Union on the ground those portions contained privileged attorney-client communications. Finally, the court ordered that the Village pay reasonable attorney fees to the Union. The Village appeals all three rulings. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings.

¶ 2 I. BACKGROUND

¶ 3 On December 8, 2020, the Village conducted a public hearing to consider its proposed 2021 budget in accordance with the Act (5 ILCS 120/1 *et seq.* (West 2020)). By a vote of 6 to 0, the Village trustees voted to close a portion of the meeting, purportedly to discuss subjects described in subsections (c)(2) and (c)(11) of section 2 of the Act. *Id.* § 2(c)(2) ("[c]ollective negotiating matters" exception); *id.* § 2(c)(11) ("probable or imminent" litigation exception).[1] The closed session lasted slightly less than three hours and included, among others, the Village's regular attorney and its labor counsel. After resuming the open session, the Village adopted its 2021 budget.

¶ 4 The Union, a labor organization and the certified representative of Village firefighters, filed a complaint against the Village that it later amended. In the amended complaint, the Union asserted (1) the Village illegally entered into a closed session at the December 8, 2020, hearing, (2) on January 20, 2021, the Union submitted a request, pursuant to FOIA (5 ILCS 140/1 *et seq.* (West 2020)), for disclosure of (a) the complete video and audio recording of the Village's closed session and (b) all documents discussed and reviewed at the closed session, and (3) on January 27, 2021, the Village denied the Union's FOIA request pursuant to various FOIA exemptions (*id.* § 7(1)(f), (i), (*l*), (m), (p)).

¶ 5 The Union also asserted it had filed a request for review with the Public Access Bureau of the Illinois Attorney General's Office (PAB), which obtained from the Village the closed session recording and minutes. The PAB then issued a nonbinding determination that the Village held its closed session in violation of the Act, which the Union attached to its amended complaint. In reaching its determination, the PAB considered whether the Village satisfied the

[1]The Village also cited subsection (c)(1) (pertaining to employment actions directed at specific employees) but later abandoned this rationale.

collective-negotiating-matters exception or the probable-or-imminent-litigation exception in holding its closed session. Regarding the first exception, the PAB concluded:

> "[B]ecause the [Village] was neither engaged in collective bargaining with the Village's public safety unions nor imminently slated to begin collective bargaining when it voted to adjourn to closed session on December 8, 2020, the aspects of the [Village's] closed session budgetary discussion that touched on the anticipated union opposition to eliminating PSI and refusing to pay cost of living increases were not authorized by the section 2(c)(2) exception."

Regarding the second exception, the PAB concluded:

> "The question of whether litigation is probable or imminent under section 2(c)(11) of [the Act] necessarily concerns the state of affairs at the time a public body votes to enter closed session. A rule that would permit a public body to close a meeting whenever it wishes to discuss a decision that could potentially give rise to litigation would give a public body essentially unfettered discretion to privately deliberate about any remotely controversial subject. This boundless construction clearly runs afoul of the strict construction required by section 2(b) of [the Act]. Thus, it is immaterial that the unions filed grievances and pursued arbitration after the Board voted against paying the cost-of-living increases set forth in the collective bargaining agreements upon its return from closed session on December 8, 2020. Raising the possibility that a public body will be sued by its employee unions if it breaches their contracts does not equate to a discussion of 'probable or imminent' litigation under the section 2(c)(11) exception. The [Village] demonstrated neither that litigation was probable or imminent at the time it voted to enter closed session on December 8, 2020, nor that it made and recorded in the closed session minutes a finding that litigation was probable or imminent."

The PAB also found that, even if the Village had satisfied either exception in some respects, the Village failed to limit its discussion to those topics contained in the exceptions.

¶ 6 The amended complaint alleged counts for violation of the Act and FOIA. Pursuant to section 3(c) of the Act (5 ILCS 120/3(c) (West 2020)) and section 11(d) of FOIA (5 ILCS 140/11(d) (West 2020)), the Union sought disclosure of the complete video and audio recording of the Village's closed session, all documents discussed and reviewed at the closed session, and the closed session minutes. The Union also requested the court order that the Village pay the Union's reasonable attorney fees and costs and impose a statutory civil penalty under FOIA. See 5 ILCS 120/3(d) (West 2020); 5 ILCS 140/11(i) (West 2020).

¶ 7 A. Motion for Summary Judgment

¶ 8 The Union subsequently filed a motion for summary judgment, arguing that subsections (c)(2) and (c)(11) of section 2 of the Act did not apply and, thus, the Village did not satisfy an exception permitting it to hold a closed session. Further, it argued the FOIA exemptions asserted by the Village did not apply rendering its denial of the Union's disclosure request a violation of FOIA.

¶ 9 The Village filed a response arguing as follows. The Village and the Union were parties to a collective bargaining agreement (CBA) during the relevant time period. The Village's finances and tax revenues were significantly affected in 2020 by the COVID-19 pandemic.

Because of the revenue impact, the Village approached the Union (and other bargaining units) during 2020 to request mid-year bargaining and concessions, but the Union refused to bargain. Due to the refusal of these bargaining units to engage in mid-year bargaining, the Village determined it needed to make budget cuts for 2021 and had its counsel prepare two alternative budgets (Budget A and Budget B). Budget A included "drastic and controversial" cuts, while Budget B was "less severe."

¶ 10 One key difference relevant here was that Budget A would terminate the Village's contract with Paramedic Services of Illinois (PSI). As a consequence of this cut, Village firefighters would be required to provide paramedic services in addition to firefighting services. Also, under the CBA, the staffing level for Village firefighters was tied to the PSI contract, such that terminating the PSI contract would enable the Village to lay off Union members. According to the Village, it properly held a closed session to discuss the consequences of choosing Budget A, as that choice would impact collective bargaining issues and lead to probable litigation. See 5 ILCS 120/2(c)(2), (11) (West 2020). To that end, Village trustees discussed potential legal challenges the Union could pursue based on its budget decision and, according to the Village, received privileged advice from its counsel.

¶ 11 Notably, the Village did not contend that one budget proposal was more likely to be chosen than the other, and it did not discuss any aspects of Budget B that could have implicated collective negotiating matters or lead to probable or imminent litigation. In addition, the Village argued—without citation to authority—that, by virtue of its request to engage in mid-term negotiations and the Union's refusal, the Village was "granted" the right to meet in a closed session to consider how to respond to the Union's refusal.

¶ 12 Regarding FOIA, the Village argued that the requested records fell within various exemptions from disclosure under section 7. See 5 ILCS 140/7(1)(f), (i), (*l*), (m), (p) (West 2020). Rather than articulate how each cited exemption applied, the Village asserted that if the court determined the Village had properly held a closed session, then all requested documents would automatically be exempt under subsection (1)(*l*). See *id.* § 7(1)(*l*) (exempting "[m]inutes of meetings of public bodies closed to the public as provided in the [Act] until the public body makes the minutes available to the public under Section 2.06 of the [Act]"). Thus, the Village asserted that its FOIA exemption argument depended on its claim that the subjects of its closed session fell within exceptions under the Act, such that the two claims would succeed or fail in tandem.

¶ 13 The parties also filed a joint stipulation of facts, and the Village submitted to the trial court a copy of the closed session recording and minutes under seal.

¶ 14 B. Summary Judgment Ruling

¶ 15 The matter proceeding to oral argument on March 15, 2022, during which counsel for the Village argued that the recording contained privileged attorney-client communications. Counsel for the Union countered that the Act contains no exception for attorney-client privilege, thus the privilege did not apply.

¶ 16 Following argument, the trial court made several findings. The court indicated it reviewed the closed session recording and discussed several cases, including *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 72 (discussing the purpose of collective bargaining), *City of Bloomington v. Raoul*, 2021 IL App (4th) 190539, ¶¶ 36-37 (discussing the probable-or-

imminent-litigation exception under the Act), and *Henry v. Anderson*, 356 Ill. App. 3d 952, 956-57 (2005) (same). It found as follows:

> "What we have here and what's uncontroverted is we have the fact that—and it was stated in [the Village's] pleading—that there was no active contract negotiations proceeding. And in the course of my reviewing proceedings, it appears that sometime in mid 2020 there was a request for the Firefighters Union to come to the table as well as the other unions and that was rejected. And as of December 8th of 2020 when this meeting was held, there was no collective bargaining proceeding at that point.
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> * * *
>
> Unfortunately, I have to say the case here as to what I saw and heard on the meeting mirrors [the facts of *Henry v. Anderson*]. We have a wide ranging of discussions in this meeting. We have clearly an admission. There's no collective bargaining that's in the midst of this meeting. And, in fact, there is talk in the meeting of trying to bring the unions to the table. But clearly, there was no collective bargaining. That's clear.
>
> As to the *Bloomington* case and what I saw and heard in this case and what has been admitted, there certainly was no litigation pending at the time of this meeting in December. And, clearly, it wasn't till an hour and twenty minutes the first time the word litigation was ever mentioned. It was mentioned several times in passing. In citing what is required under the *City of Bloomington* case, there was no discussion of legal theories, defenses, claims or possible approaches to litigation. It was just a throw-away comment here or there. So, clearly, the [subsection (c)(11)] exception was not present in this meeting.
>
> So for those reasons, I am granting the Firefighter Union's motion or action, however you want to describe it. I find that neither [subsections (c)(2)] nor [(c)(11)] exception applied to this meeting."

The court also indicated it wanted to further consider whether any statements made during the closed session were protected by the attorney-client privilege.

¶ 17 C. Attorney-Client Privilege

¶ 18 Following oral argument, the Village filed a supplemental response regarding attorney-client privilege, arguing the closed session minutes and recording should be redacted to exclude any privileged communications. The trial court subsequently entered a written order granting the Union's motion for summary judgment, finding the Village violated the Act and FOIA. The court ordered that the Village disclose the written minutes of the closed session to the Union, as well as a PowerPoint presentation used during the session. The court reserved ruling on whether any portions of the closed session recording were protected by attorney-client privilege, pending additional briefing. Last, the court set a deadline for the Union to file a fee petition, noting it "may" award reasonable attorney fees under the Act (see 5 ILCS 120/3(d) (West 2020)) and "shall" award the same under FOIA (see 5 ILCS 140/11(i) (West 2020)).

¶ 19 The Union filed a response to the Village's attorney-client privilege arguments, asserting that the Act contains no exception for attorney-client privilege and that the Village failed to present sufficient evidence to establish which statements, if any, were protected.

¶ 20 At a May 17, 2022, hearing, the trial court found the closed session recording contained privileged communications. The court reiterated it had reviewed the closed session recording *in camera* and observed communications between counsel for the Village and its representatives. The court also noted the Village had the burden of establishing which statements were privileged, however, and it had not filed a privilege log. The court granted the Village seven days to submit a privilege log. The Village filed a proposed privilege log on May 27, 2022, and subsequently filed a revised privilege log.

¶ 21 The trial court gave its oral ruling on July 20, 2022, denying the Village's request to redact portions of the closed session recording and ordering that the entire video, audio, and transcript be disclosed. The court appeared to retreat from its earlier position that privileged communications were not subject to disclosure, explaining that

> "since there was no viable exception since the statute is clear and the case law is clear as to what's required that everything is required to be open to the public through [the Act], with the exception of those exceptions, there was no basis for this closed session; therefore, that which was discussed in private and in executive session should have been discussed in open session.
>
> Therefore, the statements of counsel also should have been made in open session. *So, I have no other alternative but to deny any attorney-client privilege* and order that the entire transcript and proceeding be tendered, as per my prior ruling." (Emphasis added.)

The court also entered a written order requiring the Village to produce an unredacted copy of the closed session recording.

¶ 22 D. Attorney Fees

¶ 23 In its fee petition, the Union requested a fee award under FOIA, consisting of (1) $33,250 in attorney fees—including $29,450 for work already completed and an additional $3800 for an estimated eight hours needed to litigate the fee petition—and (2) $409.93 for costs. The Village filed a response, arguing the fees sought were excessive.

¶ 24 The trial court conducted a fee-petition hearing on September 29, 2022,[2] after which the Union filed an "unopposed motion for clarification." The motion stated that "[o]n September 29, 2022, the Court issued an oral ruling from the bench regarding Plaintiff's fee petition" and indicated that the parties jointly requested a hearing to clarify its earlier ruling. Following a hearing on October 26, 2022, the trial court awarded the Union $17,862.50 in attorney fees and $352.91 in costs, for a total of $18,215.41, "[f]or the reasons stated on the record in open court on September 29, 2022 and October 26, 2022."[3] The court stated it would award the Union five hours' worth of attorney fees in relation to the fee petition, less than the Union sought.

¶ 25 The Village timely appealed.

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[2]The record contains no transcript from the September 29, 2022, hearing.

[3]Comments in the transcript from this hearing also suggest that, at the earlier fee-petition hearing, the court discounted the rate or hours (or both) sought by the Union, thus reducing the attorney fees award for work already completed.

¶ 26 II. ANALYSIS

¶ 27 The Village renews the arguments it made in opposition to the Union's motion for summary judgment and contends that the trial court erred when it granted summary judgment on the Union's claims both under the Act and FOIA. It also argues that the court erred when it denied its request to redact privileged portions of the closed session recording. Finally, the Village claims the court abused its discretion when it awarded the Union attorney fees and costs. We begin with the summary judgment ruling.

¶ 28 A. Summary Judgment

¶ 29 1. Standard of Review

¶ 30 A movant is entitled to summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2020). "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." (Internal quotation marks omitted.) *Monson v. City of Danville*, 2018 IL 122486, ¶ 12. We review a trial court's order granting summary judgment *de novo*. *Id.*

¶ 31 Central to this appeal is whether the Village satisfied either of two exceptions in the Act, which calls for interpretation of the Act. This is a question of law we review *de novo*. *Id.* ¶ 14. Our primary objective is to ascertain and effectuate the intent of the legislature, and the most reliable indicator of that intent is the text's plain and ordinary meaning. *Id.* Words and phrases must be considered in light of other relevant provisions, rather than considered in isolation. *Id.* Moreover, when the Act involves an ambiguous term, we may defer to the construction of the statute given by the Office of the Attorney General. See 5 ILCS 120/3.5 (West 2020) (authorizing the Office of the Attorney General to review claims for violation of the Act); *Illinois Landowners Alliance, NFP v. Illinois Commerce Comm'n*, 2017 IL 121302, ¶ 46 ("[E]ven when review is *de novo*, an agency's construction of the law may be afforded substantial weight and deference if the meaning of the terms used in a statute is doubtful or uncertain" because "agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent.").

¶ 32 Given the Village's concession that its claim to an exemption under FOIA would succeed or fail together with its claim that its discussions fell within exceptions under the Act, our resolution of the Act claim will also resolve the FOIA claim.

¶ 33 2. Open Meetings Act

¶ 34 Section 2 of the Act 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." 5 ILCS 120/2(a) (West 2020); see also *id.* § 2a (requiring a majority vote of a quorum present to close a portion of an open meeting). Two exceptions under section 2(c) are at issue in this appeal: the collective-negotiating-matters exception (*id.* § 2(c)(2)) and the litigation exception (*id.* § 2(c)(11)). "[T]he exceptions are to be strictly construed, extending only to subjects clearly

within their scope." *Id.* § 2(b); see also *id.* § 1(2) ("The provisions for exceptions to the open meeting requirements shall be strictly construed against closed meetings.").

¶ 35 Under section 2(c)(2), a public body may hold a closed meeting to discuss "[c]ollective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees." *Id.* § 2(c)(2). Under subsection (c)(11), a public body may hold a closed meeting to discuss litigation in two circumstances: (1) when an action has been filed and is pending, or, as is claimed here, (2) "when the public body finds that an action is probable or imminent." *Id.* § 2(c)(11). When a public body finds that an action is probable or imminent, "the basis for the finding shall be recorded and entered into the minutes of the closed meeting." *Id.* Discussions about the "potential" for future litigation or of "plausible" litigation cannot satisfy the exception for probable or imminent litigation. *City of Bloomington*, 2021 IL App (4th) 190539, ¶ 35 (discussing plausible litigation); *Henry*, 356 Ill. App. 3d at 957 (discussing "potential" litigation).

¶ 36 Even if a meeting is lawfully closed, a public body violates the Act when it considers topics beyond the scope of the topics that justified the closed meeting. 5 ILCS 120/2a (West 2020) ("Only topics specified in the vote to close under this Section may be considered during the closed meeting."); *City of Bloomington*, 2021 IL App (4th) 190539, ¶ 35 ("We find 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."). When the litigation exception justifies a closed meeting, relevant topics include discussions about legal theories, claims, or defenses, or possible approaches to litigation. See *id.* ¶ 36.

¶ 37 3. The Trial Court Did Not Err

¶ 38 The Village first argues that the trial court erred when it granted the Union's motion for summary judgment on its Act claim. The Village contends its closed session complied with the Act because it satisfied two exceptions under section 2(c) as follows. First, it conducted the closed session to consider "[c]ollective negotiating matters" between the Village and the Union. 5 ILCS 120/2(c)(2) (West 2020). Second, it conducted the closed session to consider "probable or imminent" litigation. *Id.* § 2(c)(11).

¶ 39 a. The Village Did Not Discuss Collective Negotiating Matters

¶ 40 The Village concedes that it was not in active negotiations with a collective bargaining unit when it conducted its closed meeting. Rather, citing an opinion by the Office of the Illinois Attorney General, the Village contends it could conduct its closed meeting to discuss its "response to issues such as wages, hours, and other terms and conditions of employment." See 1980 Ill. Att'y Gen. Op. No. 80-024, at 10, https://illinoisattorneygeneral.gov/opinions/opinion-archive (last visited Dec. 28, 2023) [https://perma.cc/9F74-KUY5]. The opinion addressed the question "whether a public body may meet unilaterally to consider its negotiating response to the collective negotiating topics" including "salaries, wages, terms of employment, working conditions and other such matters." *Id.* at 9-10. The Illinois Attorney General answered the question as follows:

> "[I]t appears from the language that a public body may meet privately to discuss collective negotiating *matters* and that the application of the provision is not limited solely to those meetings which take place *between* the public employer and its

> employees. ***. Moreover, the fact that the Illinois legislature has specifically provided an exception for collective negotiating matters indicates a recognition of the view that the very nature of meaningful collective bargaining requires that certain phases of the negotiating process must be conducted privately. ***. Consequently, it is my opinion that, as a general rule, a public body may meet unilaterally in a closed session to discuss its negotiating response to the topics described above." (Emphases in original.) *Id.* at 10-11.

Here, the Village argues it conducted its closed meeting to discuss two alternate budget proposals and how each proposal might impact collective bargaining issues or lead to litigation. One of the proposals (Budget A) would have terminated the Village's contract with PSI, which would then eliminate the CBA's minimum staffing level for firefighters and require firefighters to perform paramedic services. These consequences would necessarily affect wages, hours, and other terms of employment. Thus, the Village asserts it conducted its closed meeting to address collective negotiating matters.

¶ 41 While the cited Attorney General opinion supports the notion that the Village could hold a closed session to unilaterally discuss matters pertaining to an *active* negotiation, it does not support holding a closed session to discuss matters pertaining to an *anticipated or hypothetical* negotiation. Assuming *arguendo* that "[c]ollective negotiating matters" is an ambiguous term, guidance from the Office of the Attorney General otherwise refutes the Village's construction. See 2015 Ill. Att'y Gen. Pub. Access Op. 15-007, at 7, https://foiapac.ilag.gov/content/pdf/opinions/2015/15-007.pdf (last visited Dec. 28, 2023) [https://perma.cc/2H2E-RNFU] (rejecting argument that discussion of a proposed hiring freeze involved collective negotiating matters, explaining that "[t]he section 2(c)(2) exception does not encompass a discussion of unilateral budgetary actions that would affect members of collective bargaining units outside of *active or imminent* collective bargaining." (Emphasis added.)). The purpose of the Village's closed session was to choose one of two budget proposals, and the possibility of future negotiations was merely a factor it considered. The purpose was *not* to discuss a *response* to collective negotiating topics. There was no purported collective negotiating demand by the bargaining unit, and as the Village makes clear, the Union indeed *refused* to engage in mid-term bargaining.

¶ 42 Taken to its logical conclusion, the Village's argument would lead to an untenable end-run around the Act. The CBA between the Village and the Union provides that the Village, "*in its discretion*, shall determine whether layoffs are necessary." (Emphasis added.) If a budget discussion could lead the Village to determine that layoffs are necessary, then the Village asserts it could conduct a closed meeting to discuss budgetary changes so long as it discusses whether the Union might demand collective negotiations in response. Such an interpretation of section 2(c)(2) plainly violates the command that "[t]he provisions for exceptions to the open meeting requirements shall be strictly construed against closed meetings." 5 ILCS 120/1 (West 2020); accord 2015 Ill. Att'y Gen. Pub. Access Op. 15-007, at 6-7.

¶ 43 Because there was no active or imminent collective bargaining when the Village held its closed session, we conclude the Village did not satisfy the collective-negotiating-matters exception.

¶ 44 b. The Village Did Not Discuss Probable or Imminent Litigation

¶ 45 The Village also claims its closed meeting was necessary to discuss "probable or imminent" litigation in that, under Budget A, the Village would renege on its contractual obligations to fund wage increases, including obligations contained in the Union CBA. Indeed, the Village asserts that it knew a decision to adopt Budget A "would most definitely lead to litigation because it was breaching the contract." The Village asserts that, by requesting mid-term negotiations and threatening to breach the CBA (by virtue of choosing Budget A), it could unilaterally invoke the probable-or-imminent-litigation exception. Indeed, that the Union later filed suit in response to the chosen budget demonstrates that litigation was probable and imminent when it held the closed session.

¶ 46 In support, the Village cites the 1983 Illinois Attorney General opinion, No. 83-206. See 1983 Ill. Att'y Gen. Op. 83-206, https://illinoisattorneygeneral.gov/opinions/opinion-archive (last visited Dec. 28, 2023) [https://perma.cc/87L8-HFUS]. There, the Attorney General considered whether a city council meeting to discuss the possible legal consequences of an action under consideration—the annexation of real property—was lawfully closed under the probable-or-imminent-litigation exception. The request for opinion indicated that, prior to the city council closing the meeting, an attorney representing the fire protection district that served the property orally addressed the council to oppose the annexation. The attorney clarified that litigation was not then being contemplated. The Attorney General explained that

> " 'probable or imminent' is a definite standard with definite legal implications, and a determination that litigation is probable or imminent must be made by examining the surrounding circumstances in light of logic, experience, and reason. For 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." *Id.* at 10.

The Attorney General further explained that the possibility of litigation presented a question of fact and, under the circumstances presented, the city council had insufficient ground to reasonably believe that litigation was probable or imminent. *Id.* at 11.

¶ 47 Again, the opinion cited does not support the Village's argument because the Village failed to argue that it had reasonable ground to believe a lawsuit was more likely than not *at the time it entered the closed session*. First, the Village made no argument that, prior to entering the closed session, the Union intended to file suit. Second, and more crucially, the Village argued that it closed its meeting *before* choosing Budget A. The very purpose of closing the meeting was to choose between Budget A and Budget B. The Village offered no facts in support that choosing Budget A was more probable than choosing Budget B or that choosing Budget B would have been likely to result in litigation. Accordingly, the Village had no discernable basis to conclude that a lawsuit was more likely than not. *Cf. City of Bloomington*, 2021 IL App (4th) 190539, ¶¶ 22, 35 (concluding (1) the exception for "probable or imminent" litigation was not ambiguous and (2) the discussion of two hypothetical options for terminating an existing intergovernmental agreement—a joint resolution or unilateral termination—did not involve probable or imminent litigation). That the Union filed suit after the Village chose Budget A has no bearing on whether litigation was probable or imminent before the Village chose Budget A over Budget B. Accordingly, we conclude that the Village did not satisfy the probable-or-imminent-litigation exception.

¶ 48 The trial court did not err when it granted the Union's motion for summary judgment with respect to its Act claim. Given the Village's concession that whether it complied with FOIA depends on whether it complied with the Act, we further conclude the trial court did not err when it granted the Union's motion for summary judgment with respect to its FOIA claim.

¶ 49 B. Attorney-Client Privilege

¶ 50 The Village next argues the trial court erred when it denied its request to redact portions of the closed session minutes and recording on the ground those portions contained privileged attorney-client communications. The Union sought disclosure of the closed session recording, transcript, and minutes under section 3(c) of the Act and under section 11(d) of FOIA. It essentially argued that, because the Act contains no attorney-client-privilege exception, there was no basis to withhold purportedly privileged statements. The trial court ultimately agreed, construing the Act and FOIA as requiring disclosure of the complete closed session recording and transcript. We review the trial court's interpretation of the Act and FOIA *de novo*. *City of Danville*, 2018 IL 122486, ¶ 14.

¶ 51 For the following reasons, we conclude that neither the Act nor FOIA required the trial court to order disclosure of privileged attorney-client communications. Accordingly, the trial court erred when it concluded it was required to order that the Village disclose the closed session recording and transcript without regard to whether they contained privileged communications.

¶ 52 1. The Act Does Not Require the Court to Compel Disclosure of Privileged Attorney-Client Communications

¶ 53 The plain language of section 3(c) does not require a trial court to order the disclosure of privileged attorney-client communications. Section 3(c) of the Act provides that, after finding noncompliance,

> "[t]he 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." (Emphasis added.) 5 ILCS 120/3(c) (West 2020).

That a trial court "may grant such relief as it deems appropriate" plainly vests it with discretion *not* to provide the precise remedy a plaintiff requests. Accordingly, section 3(c) did not require the trial court to order the disclosure of privileged attorney-client communications.

¶ 54 2. Privileged Communications Are Exempt From Disclosure Under FOIA

¶ 55 The only other possible basis for the trial court's conclusion that it was required to order disclosure of privileged communications was FOIA. Section 11(d) of FOIA provides that a trial court "shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records *improperly withheld* from the person

seeking access." (Emphasis added.) 5 ILCS 140/11(d) (West 2020). Section 1.2 of FOIA provides that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." *Id.* § 1.2. Nevertheless, "[c]ommunications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation" are exempt from disclosure. *Id.* § 7(1)(m). The Illinois Supreme Court has described this provision as "the attorney-client exemption" under section 7 of FOIA. *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 470 (2003) (citing an earlier version of FOIA). Accordingly, if the attorney-client communications contained in a closed session recording and transcript would not be subject to discovery in the Act litigation, they are exempt from disclosure under section 7 of FOIA.

¶ 56 As a general rule, privileged attorney-client communications are not subject to disclosure in discovery. The essential elements for establishing attorney-client privilege are as follows:

> "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except [if] the protection be waived." (Internal quotation marks omitted.) *People v. Radojcic*, 2013 IL 114197, ¶ 40.

The attorney's advice to the client is also protected. *Id.* As a departure from the general duty to disclose, the privilege "must be strictly confined within its narrowest possible limits." (Internal quotation marks omitted.) *Id.* ¶ 41.

¶ 57 As the attorney-client privilege is not limited to specific contexts, we begin with the presumption that the privilege applies to discovery in the Act litigation. That section 2 of the Act contains no express exception for the privilege does not undermine this presumption. Indeed, the appellate court has previously suggested that the privilege applies with full force when a public body consults with its attorneys. See *People ex rel. Hopf v. Barger*, 30 Ill. App. 3d 525, 538 (1975) (concluding "the legislature did not intend that consultations between the governing body and its attorney must always be conducted openly, when this could result in the public being placed at a litigious disadvantage"; thus, "advance consultation with its attorney is not a 'meeting' of the governmental body as contemplated in the Act and thus is not covered by the Act").

¶ 58 Further, the statutory scheme of the Act reinforces that the privilege applies for two reasons. First, a prevailing Act plaintiff has no absolute right under the Act to access privileged attorney-client communications, as explained above. Second, as a logical corollary to the conclusion that the Act does not require a trial court to compel disclosure of privileged attorney-client communications, the same would not be subject to disclosure to the plaintiff in discovery. This is confirmed by section 2.06(e), which limits a plaintiff's access to privileged information contained in the minutes of a closed meeting. Section 2.06(e) provides, in relevant part,

> "Unless the public body has made a determination that the verbatim recording no longer requires confidential treatment or otherwise consents to disclosure, the verbatim record of a meeting closed to the public shall not be open for public inspection or subject to discovery in any administrative or judicial proceeding other than one brought to enforce this Act. *In the case of a civil action brought to enforce this Act, the court, if the judge believes such an examination is necessary, must conduct such in camera examination of the verbatim record as it finds appropriate in order to determine whether there has*

> *been a violation of this Act*. *** Any such initial inspection must be held in camera. *If the court determines that a complaint or suit brought for noncompliance under this Act is valid it may, for the purposes of discovery, redact from the minutes of the meeting closed to the public any information deemed to qualify under the attorney-client privilege*. The provisions of this subsection do not supersede the privacy or confidentiality provisions of State or federal law." (Emphases added.) 5 ILCS 120/2.06(e) (West 2020).

Section 2.06(e) thus provides that, in discovery, the trial court may limit a plaintiff's access to the record of a closed meeting by redacting portions of the minutes to remove privileged attorney-client information. *Id.* The statutory scheme of the Act is inconsistent with a plaintiff's absolute right to access privileged information at any time. Accordingly, privileged attorney-client communications contained in the records of a closed meeting (the recording and the transcript) "would not be subject to discovery in litigation" and are exempt from disclosure under FOIA. 5 ILCS 140/7(1)(m) (West 2020).

¶ 59 3. The Trial Court's Interpretation of the Act and FOIA Was Error

¶ 60 The trial court concluded that, because the Act contains no attorney-client-privilege exception, the court had "no other alternative but to deny any attorney-client privilege and order that the entire transcript and proceeding be tendered." It therefore declined to conduct an attorney-client-privilege analysis. We hold the court erred when it failed to recognize it had discretion not to order that the Village disclose privileged communications. The court had discretion not to order disclosure of the entire closed session recording and transcript under section 3(c) of the Act, and its authority to order disclosure of the same under FOIA extended only to records "improperly withheld"—those not exempt from disclosure. The court erred in construing the Act and FOIA as requiring disclosure of all closed session communications without respect to the attorney-client privilege. See *Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶ 63 (noting the attorney-client privilege is available to municipalities); *Barger*, 30 Ill. App. 3d at 538 (concluding advance consultation with counsel is not a "meeting" under the Act). We thus vacate that portion of the judgment.

¶ 61 Since the Village asserted that the records of its closed session contained exempt privileged communications, the trial court was obligated to determine whether the privilege applied to the records. Section 11(f) of FOIA provides the relevant procedure for evaluating an assertion that parts of records may be withheld:

> "In any action considered by the court, the court shall consider the matter *de novo*, and shall conduct such in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of [FOIA]. The burden shall be on the public body to establish that its refusal to permit public inspection or copying is in accordance with the provisions of [FOIA]. Any public body that asserts that a record is exempt from disclosure has the burden of proving that it is exempt by clear and convincing evidence." 5 ILCS 140/11(f) (West 2020).

On remand, the trial court should determine whether the Village met its burden of proving any of its communications were exempt under FOIA.

¶ 62 C. Attorney Fees Award

¶ 63 The Village last argues that the trial court abused its discretion when it awarded attorney fees in that the court failed to exercise discretion at all. We disagree.

¶ 64 In its fee petition, the Union sought a total attorney fees award of $33,250. The trial court awarded the Union $17,862.50 in attorney fees and $352.91 in costs. That the court awarded approximately half the amount the Union sought in attorney fees is evidence the court did exercise discretion.

¶ 65 Moreover, our ability to review the Village's claim is hindered by its failure to provide a sufficiently complete record. We cannot say whether the trial court abused its discretion because the record indicates that an initial fee-petition hearing was held, but the same was not made part of the record. Indeed, in the transcript of October 26, 2022, the court referred back to the initial fee-petition hearing in reaching its judgment. See *supra* ¶ 24 n.3.

> "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

We presume the court entered its judgment in conformity with the law and thus reject the Village's argument.

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated, we affirm the judgment of the circuit court of Du Page County in part, vacate in part, and remand for further proceedings.

¶ 68 Affirmed in part and vacated in part.

¶ 69 Cause remanded.