

**STATE OF ILLINOIS  
ILLINOIS LABOR RELATIONS BOARD  
STATE PANEL**

International Union of Operating Engineers, )		
Local 150, )		
	)	
Charging Party, )		
	)	
and )		
	)	Case No. S-CA-13-197
City of Park Ridge, )		
	)	
Respondent. )		

City of Park Ridge, )		
	)	
Charging Party, )		
	)	
and )		
	)	Case No. S-CB-13-047
International Union of Operating Engineers, )		
Local 150, )		
	)	
Respondent. )		

**MOTION TO REVOKE SUBPOENA *DUCES TECUM***

The CITY OF PARK RIDGE, by and through its attorneys, hereby moves the Administrative Law Judge (“ALJ”) to revoke the subpoena *duces tecum* requested by the International Union of Operating Engineers Local 150 (“Local 150” or “Union”) in the above-captioned matters. As will be explained below, the subpoena should be revoked in its entirety due to prohibitions against disclosure found in the Illinois Open Meetings Act and the common law collective bargaining privilege.

**PROCEDURAL BACKGROUND**

On September 18, 2013, the Executive Director issued Complaints in the above-captioned matters, alleging that the City engaged in bad faith bargaining in violation of Sections

10(a)(7), (a)(4) and (a)(1) of the Illinois Public Labor Relations Act (“IPLRA” or “Act”). The Complaint against the Union alleges that Local 150 has engaged in similar bad faith bargaining in violation of Sections 10(b)(8), (b)(4) and (b)(1) of the IPLRA.

On May 30, 2014, the Union requested that the ALJ issue a subpoena *duces tecum* for certain City documents. On June 2, 2014, the subpoena was issued and served on the City in the late afternoon. The subpoena requested the following categories of documents:

1. All communications (memoranda, emails, etc.) between Park Ridge elected officials and/or staff regarding the negotiations [*sic*] and subsequent unfair labor practice charges between Park Ridge and IUOE, Local 150; and
2. All minutes and recordings of closed session [*sic*] of Park Ridge council meetings for the past 24 months.

The subpoena specified that the documents should be delivered to the Union’s Countryside office on or before June 9, 2014 before 5:00 p.m. The hearing in the above-captioned matters is scheduled to begin on June 17, 2014.<sup>1</sup>

## ARGUMENT

**A. Closed Session Recordings and Minutes are Exempt from Disclosure Under the Open Meetings Act.** The Illinois Open Meetings Act requires that a verbatim record be kept of all closed session meetings, along with written minutes of those same closed meetings:

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.

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<sup>1</sup> This motion to revoke is timely filed, *i.e.*, at least three days prior to the first day of hearing in the above-captioned matter. *See* 80 Ill. Admin. Code § 1200.90(c).

5 ILCS 120/2.06(a). At the same time, the Open Meetings Act flatly prohibits the disclosure of the verbatim record of any closed meetings held by a public body, even if requested as part of an unrelated administrative proceeding:

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.

5 ILCS 120/2.06(c) (emphasis added). By the same token, Section 2.06(f) prohibits the disclosure of closed session minutes:

Minutes of meetings closed to the public shall be available only after the public body determines that it is no longer necessary to protect the public interest or the privacy of an individual by keeping them confidential.

5 ILCS 120/2.06(f).

In light of these statutory provisions, the ALJ should revoke that part of the Union's subpoena *duces tecum* which seeks discovery of any record of the City Council's closed session meetings. In this case, the City Council has *not* made a determination that the verbatim recordings or minutes from those closed sessions "no longer require[ ] confidential treatment." 5 ILCS 120/2.06(c). Nor has the City Council consented to their disclosure as part of this proceeding (which obviously does not involve an enforcement action filed pursuant to the Open Meetings Act). *See id.* As a result, the plain language of the Open Meetings Act explicitly prohibits their disclosure in an "administrative proceeding" such as this. *See id.* The ALJ therefore should revoke the subpoena for the second category of documents requested by the Union.<sup>2</sup>

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<sup>2</sup> ALJ Hamburg-Gal revoked a similar subpoena *duces tecum* in *Village of Barrington Hills*, Case No. S-CA-13-161, which sought closed session audio recordings and minutes. Like Park Ridge, the Barrington Hills Village Board had not yet agreed to release the closed session documents to the general public. *See Exhibit A attached hereto.*

**B. The Requested Documents are Exempt from Disclosure Pursuant to the Common Law Collective Bargaining Privileges.** Alternatively, all of the requested documents (including both the verbatim recordings and closed session minutes from the City Council's closed meetings) are exempt from disclosure under the common law collective bargaining privilege recognized by the Illinois Supreme Court.<sup>3</sup> In this respect, subpoenas can be revoked based on the privileged nature of the underlying testimony and/or documentation. *See* 80 Ill. Admin. Code § 1200.90(c).

The Illinois Supreme Court in *Illinois Educational Labor Relations Bd. v. Homer Community Consolidated Dist. No. 208*, acknowledged the existence of a common law collective bargaining privilege with the following analysis:

[W]e find that there exists a strong public policy protecting the confidentiality of labor-negotiating strategy sessions. We find that this policy sufficiently satisfies that portion of the four-prong test for the establishment of a common law privilege which requires that “the opinion of the community . . . sedulously foster[s]” this privilege. Accordingly, we hold that some type of privilege is necessary to prevent disclosure of either party’s negotiating strategy during an unfair labor practice proceeding from the Illinois Educational Labor Relations Board.

132 Ill.2d 29, 39-40 (1989) (analogizing the common law collective bargaining privilege to the attorney-work product privilege). The Illinois Appellate Court for the First District extended this privilege to unfair labor practice proceedings held pursuant to the IPLRA. *See Illinois Labor Relations Bd. v. Chicago Transit Auth.*, 341 Ill. App. 3d 751 (1st Dist. 2003).

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<sup>3</sup> Based on the Union’s response to the City’s prior motion to revoke, the City assumes that the Union will claim that it wishes to review these documents in order to identify (among other things) the bargaining authority that the City Council may have conveyed to the City’s bargaining team. These communications are the epitome of the type of information for which the common law collective bargaining privilege was created. If, on the other hand, the Union claims that it simply wants to review documents that do not reveal the City’s bargaining authority and strategy, the City objects to the subpoena based on relevance. For example, communications dealing with the time, date and place of negotiations would shed no light on whether the parties achieved a “meeting of the minds” at the bargaining table.

Granted, the Illinois Supreme Court declared that this common law collective bargaining privilege is “qualified,” in the sense that the requesting party may be able under certain circumstances to demonstrate a “particularized need” for the documents that arguably might trump the privilege. *See id.* at 40. “Before determining whether to compel disclosure of materials qualified by the qualified privilege, the court must apply a balancing test to determine whether the need of the party seeking disclosure outweighs the adverse effect such disclosure would have on the policies underlying the privilege.” *Id.* at 42 (*quoting Equal Employment Opportunity Comm’n v. Univ. of Notre Dame Du Lac*, 715 F.2d 331, 338 (7th Cir. 1983)). As described by the Supreme Court, “a party’s need varies in proportion to the degree of access he has to other sources of information he seeks.” *Id.*

With this standard in mind, the Union cannot demonstrate a need to breach the collective bargaining privilege by inspecting documents circulated between and among Council members that relate to sensitive collective bargaining strategy discussions or the merits of unfair labor practice litigation. Likewise, the Union cannot demonstrate a need to inspect and/or observe audio recordings and/or minutes from the City’s closed sessions, where deliberations may have occurred regarding the successor contract negotiations with Local 150.

This is especially true in light of the legal posture of the above-captioned Complaint, where the underlying communications by and between the City Council and City management officials are not relevant for purposes of deciding whether the City violated Sections 10(a)(7), (a)(4) and (a)(1) of the IPLRA, and whether the Union violated Sections 10(b)(8), 10(b)(4) and 10(b)(1) of the IPLRA. As explained in previous submissions, the key evidence in this matter will focus on the parties’ communications and understandings at the bargaining table. Communications away from the bargaining table (in some cases months or years after the

bargaining sessions took place) simply have no bearing on the understandings that the parties reached at the bargaining table. Rather, the key evidence for both parties presumably will be witness testimony regarding “who said what to whom” at the bargaining table. As a result, the ALJ should revoke the subpoena *duces tecum* to the extent it seeks information protected by the common law collective bargaining privilege.

**C. The Subpoena is Overbroad, because it Potentially Requires the Disclosure of Attorney-Client Privileged Communications.** The first requested category of documents is also overbroad, in that it potentially requires the disclosure of attorney-client privileged communications between the City Council and the City’s attorneys (to the extent the attorneys were included in the written communications by and between the City Council and City staff members about negotiations and unfair labor practice charges). Such communications clearly are exempt from disclosure pursuant to the common law attorney-client privilege, which is available to municipal corporations. *See generally Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017 at ¶ 63.

Likewise, to the extent an attorney attended any of the City Council’s closed session meetings, recorded communications between that attorney and the City Council/Mayor likewise would be privileged. In this respect, the City’s Mayor and Aldermen are indisputably part of the so-called “control group” test for purposes of the attorney-client privilege. *See generally Consolidated Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 119-20 (1982) (finding privileged communications to include those “made by top management who have the ability to make a final decision”). The Illinois Municipal Code identifies a city mayor as the municipality’s “chief executive officer,” *see* 65 ILCS 5/3.1-15-10, and the trustees are responsible for passing legislation in the form of “ordinances, resolutions, and motions.” 65 ILCS 5/3.1-40-45. Based

on this statutory authority, there can be no question that the City Council and Mayor qualify for the municipality's "control group." By extension, closed session communications between the Mayor, Aldermen and the City's legal counsel are protected, because the communications "originated in a confidence that [they] would not be disclosed, [were] made to an attorney acting in his legal capacity for the purpose of securing legal advice or services, and remained confidential." *Consolidated Coal Co.*, 89 Ill.2d at 119. Thus, the subpoena should be revoked to the extent it seeks the disclosure of attorney-client privileged communications between the City Council, Mayor and the City's attorneys.

**D. If the ALJ Does not Revoke the Subpoena *Duces Tecum* Outright, a Circuit Court Must Perform an "In Camera" Review of the Privileged Documents.** If, by chance, the ALJ declines to revoke the subpoena *duces tecum* based on the foregoing arguments, the proper procedure for the Union to pursue in order to obtain the requested documents would be via a state court complaint filed by the Illinois Attorney General. As the First District Appellate Court explained in *Chicago Transit Auth.*, the Board's ALJs are barred from reviewing privileged documents in order to determine the applicability of a potential privilege. *See* 341 Ill. App. 3d at 758. Rather, based on the Illinois Supreme Court's guidance in *Homer* and the First District's guidance in *Chicago Transit Auth.*, the Attorney General must file a complaint in Illinois circuit court, after which a trial court judge would have to perform an *in camera* inspection of the privileged documents and/or audio recordings in order to determine which documents qualify for a privilege.

In light of this procedure, the ALJ has no authority to compel the disclosure of privileged documents unless and until the Attorney General has filed a complaint in state court, and a state

court judge has viewed the privileged documents “in camera” in order to determine whether they are disclosable to the Union.

**E. The Temporal Scope of the First Requested Category of Documents is Overbroad and Burdensome.** Alternatively, the scope of the subpoena for requested communications by and between City Council members and City staff is overbroad. In this respect, the subpoena provides no relevant time frame for the City-Union “negotiations.” The ALJ can take notice of the fact that the City and Union have had a collective bargaining relationship since at least 2006. *See* ILRB Case No. S-AC-06-005 (certifying Local 150 as the exclusive bargaining representative of the City’s public works employees). For obvious reasons, communications pre-dating the 2012 successor contract negotiations have no relevance for the pending unfair labor practice charge. Yet, that is exactly what the plain language of the above-captioned subpoena seeks. As a result, the subpoena should be revoked for this reason alone.

Even assuming that the ALJ limits the temporal scope of the subpoena, the City nevertheless would need several weeks in order to thoroughly search its electronic database for potentially responsive documents, and then, in turn, to review all of those documents in order to ensure that they do not inadvertently disclose communications privileged by the attorney-client privilege, the common law collective bargaining privilege, or some other applicable privilege that has yet to be identified. Such documents could potentially number in the hundreds, if not thousands. In this respect, the subpoena’s June 9, 2014 disclosure date is unduly burdensome and should be revoked for this reason alone.

**F. The Subpoena *Duces Tecum* is Invalid on its Face, because the Union Failed to Serve the Subpoena on the City at least Five Days “Before” the Production Date.** Finally, the Union’s subpoena is invalid on its face, because it was served less than five days before the

designated production date. As explained above, the subpoena was served on the City toward the close of the business on Monday, June 2, 2014. Yet, the subpoena designated Monday, June 9, as the production date.

Section 1200.90(b)(3) requires that subpoenas *duces tecum* be served on a party “at least . . . 5 days *before* the date on which the documents are to be produced.” 80 Ill. Admin. Code § 1200.90(b)(3) (emphasis added). The ILRB Rules further state that when a “time period prescribed under the Act or this Part is less than 7 days, intervening Saturdays, Sundays, or legal holidays shall not be included.” 80 Ill. Admin. Code § 1200.30(b). By the same token, the designated period of time begins to run the day *after* the act, event, or default.” 80 Ill. Admin. Code § 1200.30(a) (emphasis added).

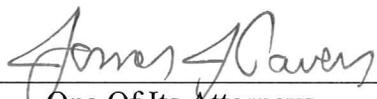
When this guidance in mind, the subpoena *duces tecum* was not served “at least 5 days before” the production date. Monday June 2, 2014 does not count toward the five-day period. Nor do the two intervening weekend days (June 7 and 8). After excluding these dates, only *four* days elapsed *after* the service date and *before* the production date. In other words, June 3, June 4, June 5, and June 6 are the only days that count toward the five day service requirement. Based on the plain language of Section 1200.90(b)(3) of the Board’s Rules, June 9 does not count toward this five-day period. In other words, June 9 does not fall “before” the production date, because it “is” the production date. Based on the unique language of Section 1200.90(b)(3), the subpoena *duces tecum* is invalid on its face, and should be revoked in its entirety.

\* \* \*

WHEREFORE, the City respectfully moves that the ALJ revoke the Union's subpoena *duces tecum* in its entirety.

Respectfully submitted,

**CITY OF PARK RIDGE**

By:  \_\_\_\_\_  
One Of Its Attorneys

James J. Powers  
Clark Baird Smith LLP  
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Rosemont, Illinois 60018  
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June 9, 2014

**James J. Powers**

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**From:** Hamburg-Gal, Anna <Anna.Hamburg-Gal@Illinois.gov>  
**Sent:** Wednesday, August 21, 2013 11:09 AM  
**To:** James J. Powers  
**Cc:** ted209@aol.com; 'Steve Calcaterra'; dwambach@burkelaw.com; glynch@burkelaw.com  
**Subject:** RE: Union's response to Barrington Hills' Motion for Summary Judgment

Dear Parties,

The Respondent's motion to quash the Union's subpoena duces tecum seeking minutes, recordings, and transcripts of Board meeting executive sessions for the dates listed below is granted.

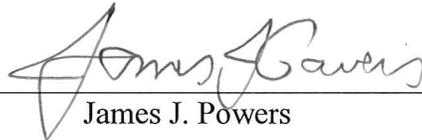
Anna Hamburg-Gal  
Administrative Law Judge  
Illinois Labor Relations Board  
160 N. LaSalle St., Suite S-400  
Chicago, IL 60601  
Direct Line: (312) 793-6380  
Fax: (312) 793-6989



**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he caused a true and correct copy of the foregoing Motion to Revoke Subpoena *Duces Tecum* to be served upon the following individual by facsimile, electronic and U.S. Mail on June 9, 2014:

Kenneth Edwards  
IUOE Local 150  
6200 Joliet Road  
Countryside, Illinois 60525-3992

  
James J. Powers

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**CLARK BAIRD SMITH LLP**  
 ATTORNEYS AT LAW  
 6133 N. RIVER ROAD, SUITE 1120, ROSEMONT, IL 60018  
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# Fax

<b>To:</b>	ALJ Heather Sidwell, ILRB	<b>From:</b>	James J. Powers
<b>Fax:</b>	312-793-6989	<b>Pages:</b>	13
<b>Phone:</b>		<b>Date:</b>	June 9, 2014
<b>Re:</b>	S-CA-13-197 and S-CB-13-047	<b>cc:</b>	Ken Edwards, IUOE Local 150 (Fax: 708-387-8830)

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<b>Phone:</b>		<b>Date:</b>	June 9, 2014
<b>Re:</b>	S-CA-13-197 and S-CB-13-047	<b>cc:</b>	Ken Edwards, IUOE Local 150 (Fax: 708-387-8830)

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