
Closed Sessions of Public Bodies to Discuss Pending Litigation Must Identify the Litigation

By Mark W. McInerney / Aug 16, 2018

Section 8(e) of the Open Meetings Act, MCL §15.268(e), provides that a public body, such as a school board or city council, may move into closed session “to consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body.” This provision thus requires that only specific pending litigation be discussed; hypothetical or potential litigation are not sufficient. But must the public body, in moving to go into closed session, identify the pending litigation?

The statute does not say, and this question has been debated for some time. The Michigan Court of Appeals has now answered the question: a motion to go into closed session to discuss pending litigation must identify the litigation being discussed.

In *Vermilya v Delta College Board of Trustees*, decided on July 31, 2018, the trustees voted to go into closed session “for the purpose of discussing specific pending litigation with legal counsel.” A citizen challenged the board’s failure to identify the litigation. While acknowledging that the statute does not expressly contain such a requirement, the Court of Appeals concluded that construction of the Open Meetings Act as a whole required identification of the litigation. The Court focused on the term “specific pending litigation,” concluding that the word “specific” would be redundant if it were not intended to require that the litigation be identified. The Court also noted that to the extent the statute was ambiguous, it should be construed to further the purpose of OMA – government accountability.

While an appeal to the Michigan Supreme Court, and perhaps a different decision is possible, the decision by the Court of Appeals’ is binding until it is reversed by the Supreme Court. Boards of education, city councils, and other governing bodies should now ensure that, when they move into closed session to discuss pending litigation, they identify the litigation involved by name. The requirement that closed sessions may take place only after a 2/3 vote of all then-serving members of the Board or governing body remains unchanged.

If you have questions about this or other Open Meetings Act issues, please contact [Mark McInerney](#) at (313) 965-8383 or another member of Clark Hill’s Education and Municipal Law Practice Group.