

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>PROTECT WEST CHICAGO,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>PCB 23-107</b>
	)	<b>(Third-Party Pollution Control Facility</b>
<b>CITY OF WEST CHICAGO, WEST</b>	)	<b>Siting Appeal)</b>
<b>CHICAGO CITY COUNCIL and</b>	)	
<b>LAKESHORE RECYCLING SYSTEMS,</b>	)	
<b>LLC,</b>	)	
	)	
<b>Respondents.</b>	)	

<b>PEOPLE OPPOSING DUPAGE</b>	)	
<b>ENVIRONMENTAL RACISM,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>PCB 23-109</b>
	)	<b>(Third-Party Pollution Control Facility</b>
<b>CITY OF WEST CHICAGO and</b>	)	<b>Siting Appeal)</b>
<b>LAKESHORE RECYCLING SYSTEMS,</b>	)	
<b>LLC,</b>	)	<b>(Consolidated)</b>
	)	
<b>Respondents.</b>	)	

**RESPONDENT CITY OF WEST CHICAGO'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF ITS OBJECTION TO PETITIONER PROTECT WEST CHICAGO'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND FIRST SET OF INTERROGATORIES**

Now comes the Respondent, CITY OF WEST CHICAGO ("Respondent"), by and through Dennis G. Walsh and Daniel W. Bourgault of Klein Thorpe and Jenkins, Ltd., its attorneys, and for its Motion for Leave To File A Reply in Support of Its Objection to Petitioner, Protect West Chicago's ("PWC"), First Request for Production of Documents and First Set of Interrogatories, states and alleges as follows:

1. On May 5, 2023, PWC served the City written discovery. The City was served with thirteen (13) interrogatories and six (6) Requests to Produce Documents.

2. On May 11, 2023, in response to PWC's written discovery, the City objected to PWC interrogatories #s 10, 11 and 12 and to PWC Requests to Produce Documents #s 1, 2, 4 and 5.

3. PWC has responded to the City's Objection to its First Request for Production of Documents and First Set of Interrogatories. Relying on only two old cases (one of which is a Federal District court case involving a federal civil rights case and the federal common law) which do not provide any legal authority to support its argument, PWC in the Response suggests that the Pollution Control Board has the legal authority to ignore and circumvent an explicit state statute, which unequivocally shields from discovery in this proceeding, the executive session recording of the City of West Chicago.

4. PWC also suggests, without pointing to any evidence in the record to support it, that the majority of the residents in the City of West Chicago are Latino, and that by not translating the application into Spanish and by not supplying a Spanish language interpreter at the public hearing (neither of which the City has a legal obligation to do), the hearing was not fundamentally fair.

5. The Response also falsely suggests that the payment or non-payment of attorney's fees in a lawsuit against the City of West Chicago involving the Illinois Freedom of Information Act is somehow relevant to the issue of payments allowed under 415 ILCS 5/39.2(k) where the City may charge the applicant for siting review a reasonable fee to cover the reasonable and necessary costs incurred by the City in the siting review process. The two statutes simply have nothing to do with each other.

6. The arguments made in the Response are not warranted by law, grounded in facts, or brought in good faith.

7. The City of West Chicago has not had the opportunity to address any of these arguments.

8. The City of West Chicago should be granted leave to file the Reply attached hereto as Exhibit 1, therefore, to prevent material prejudice to the City of West Chicago and its Objection.

WHEREFORE, for all the reasons stated above, the City of West Chicago respectfully requests that the Board enter an Order:

- A. Granting the City of West Chicago leave to file the Reply attached hereto as Exhibit 1; and
- B. Providing such other and further relief as the Board deems appropriate.

Respectfully submitted,

CITY OF WEST CHICAGO

By: 

One of Respondent's Attorneys

Dennis G. Walsh  
Daniel W. Bourgault  
Klein, Thorpe and Jenkins, Ltd.  
15010 S. Ravinia – Suite 10  
Orland Park, Illinois 60462  
[dgwalsh@ktjlaw.com](mailto:dgwalsh@ktjlaw.com)  
[dwbourgault@ktjlaw.com](mailto:dwbourgault@ktjlaw.com)  
(312) 984-6400

# Exhibit 1

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>PROTECT WEST CHICAGO,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>PCB 23-107</b>
	)	<b>(Third-Party Pollution Control Facility</b>
<b>CITY OF WEST CHICAGO, WEST</b>	)	<b>Siting Appeal)</b>
<b>CHICAGO CITY COUNCIL and</b>	)	
<b>LAKESHORE RECYCLING SYSTEMS,</b>	)	
<b>LLC,</b>	)	
	)	
<b>Respondents.</b>	)	

<b>PEOPLE OPPOSING DUPAGE</b>	)	
<b>ENVIRONMENTAL RACISM,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>PCB 23-109</b>
	)	<b>(Third-Party Pollution Control Facility</b>
<b>CITY OF WEST CHICAGO and</b>	)	<b>Siting Appeal)</b>
<b>LAKESHORE RECYCLING SYSTEMS,</b>	)	
<b>LLC,</b>	)	<b>(Consolidated)</b>
	)	
<b>Respondents.</b>	)	

**RESPONDENT CITY OF WEST CHICAGO'S  
REPLY IN SUPPORT OF ITS OBJECTION TO PETITIONER  
PROTECT WEST CHICAGO'S FIRST REQUEST FOR PRODUCTION  
OF DOCUMENTS AND FIRST SET OF INTERROGATORIES**

Now comes the Respondent, CITY OF WEST CHICAGO ("Respondent"), by and through Dennis G. Walsh and Daniel W. Bourgault of Klein Thorpe and Jenkins, Ltd., its attorneys, and for its Reply in Support of Its Objection to Petitioner, Protect West Chicago's ("PWC"), First Request for Production of Documents and First Set of Interrogatories, states and alleges as follows:

**PWC'S RESPONSE REGARDING THE DISCOVERY  
OF THE CLOSED SESSION RECORDING OF THE  
CITY OF WEST CHICAGO MISSES THE POINT**

Regardless of its relevancy to this matter and regardless of whether the attorney client privilege applies to it, the closed session recording of the City of West Chicago held on February 27, 2023 is, as a matter of law, not discoverable in this Pollution Control Board proceeding because it is explicitly protected from such discovery by state statute and by the Board's own rules which excludes from discovery materials that are so protected. 35 Ill. Adm. Code 101.612.

In trying to persuade the Board that it should allow the discovery of the closed session recording, PWC cites to the 1998 Illinois Supreme Court decision of *Birkett v. City of Chicago*, 184 Ill.2d 521, 235 Ill. Dec. 435, 705 N.E.2d 48, 52 (Ill. 1998) which is a stark distinction from the case at bar. The facts and the law of that case have nothing to do with the current siting appeal pending before this Board. It does not, in any way, touch upon the Illinois state statute that bars the discovery of closed session recordings. *Birkett* did not involve a closed session of a public body, nor did it even tangentially touch upon the Illinois Open Meetings Act's discovery bar. What is instructive from *Birkett*, however, is the Illinois Supreme Court's acknowledgment that the great majority of privileges recognized in Illinois are statutory creations like that found in Section 2.06(e) of the Illinois Open Meetings Act. In *Birkett*, the plaintiff requested all documents concerning plans or discussions regarding alterations to increase O'Hare's capacity or concerning past, present, or proposed airport layout plans. The City objected to the request, claiming that such documents were immune from discovery under the "deliberative process privilege." In its analysis, the Supreme Court reasoned it is the business of the legislature, not the Court to adopt a deliberative process privilege. The Court held that the City had to produce the documents because there was no common law deliberative process privilege in this state and

instructed that “this court has repeatedly concluded that the extension of an existing privilege or establishment of a new one is a matter best deferred to the legislature.” Id. At 528. Of course, creating the 2.06(e) discovery privilege is exactly what the legislature intended and in fact did when it intentionally barred the discovery of closed session recordings in any administrative proceeding held in the state. In *Birkett*, the defendants were asking the Court to recognize a common law privilege, which the Court declined to do because it believed that is a job better left to the legislature. In this case, we are not asserting a common law privilege on which the legislature has remained silent; we are asserting a clearly stated statutory privilege which was purposely created by the Illinois General Assembly.

It is a fundamental rule of statutory construction that the plain language of a statute is the best indication of the intent of the legislature, and if that language is clear and unambiguous, which it is in this case, it must be given effect. PWC rightfully does not argue that the language of Section 2.06(e) is unclear or ambiguous, but instead urges this Board to ignore its legislative directive, which the Board has no legal authority to do.

PWC also brings the Board’s attention to the Federal District Court opinion in *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 235 F.R.D. 447 (N.D. Ill. 2006), which is a 2006 case in which a Federal District Court recognized that the Open Meetings Act expressly provides that closed session recordings are not subject to discovery, but, refused to extend the federal common law to encompass this state privilege in a case where the principal claim arose out of federal law (42 U.S.C. Section 1983 of the Civil Rights Act). *Kodish* is clearly distinguishable from our case because our case is not based on a federal statute, principle, or claim. The *Kodish* case is centered on the issue of whether this state law privilege should apply in the case where a federal civil rights claim is being asserted. In addition to the obvious dissimilarity of the facts and law

between that case and the one pending before this Board, the federal common law and for that matter, the Federal Rules of Evidence, are separate and distinct from the discovery rules of the Illinois Pollution Control Board.

The fact of the matter is that PWC has not and to put it concisely, cannot bring to the Board's attention, even one single Illinois state case or administrative proceeding in which the judge or administrative body has failed to follow the General Assembly's directive set forth in Section 2.06(e). Even if it could be argued that there was a conflict between the legislation and Illinois state case law, which there is not, it is axiomatic that legislation takes precedence over case law.

When it is all said and done, and with all due respect, the Illinois Pollution Control Board, which was established by the Illinois General Assembly when it enacted the Illinois Environmental Protection Act in 1970, simply does not have the legal authority to circumvent a subsequently enacted state statute, which unequivocally shields from discovery in this proceeding, the executive session recording of the City of West Chicago. A central ambition of statutory interpretation is to ensure that judges act as faithful agents of the legislature. The decision to provide a shield from discovery is, as our Supreme Court has taught many times in the past, a matter best deferred to the legislature, and the Illinois General Assembly has indeed spoken, plainly and definitively, on this issue. PWC's argument that the Illinois Pollution Control Board can ignore that and that the Board has the legal authority to order the production of the City of West Chicago's closed session recording is directly contrary to black letter law and one that must be rejected.



**PWC'S OTHER ARGUMENTS FARE NO BETTER**

With respect to the interrogatories and documents requested which relate to the decision of the City of West Chicago to provide or not to provide a Spanish interpreter, there literally is nothing in Illinois caselaw or the decisions or rules of the Illinois Pollution Control Board which requires that the City translate the application into Spanish, or any other language for that matter, or to provide a Spanish interpreter at the public hearing, and PWC's argument that the interrogatories or documents relating to that issue will somehow lead to the discovery of relevant information is an act of intellectual dishonesty and nothing short of pure sophistry. The same is true for information relating to the payment or the non-payment of attorney's fees in a case filed against the City of West Chicago involving an alleged violation of the Illinois Freedom of Information Act. The fees provision set forth under the Freedom of Information Act has absolutely nothing to do with and is mutually exclusive from the right of the City of West Chicago to charge an applicant for siting review under 415 ILCS 5/39.2(k), and PWC's suggestion in its Response that they are somehow intertwined is at best a fallacy.

Finally, the City of West Chicago stands on its objections with respect to the discovery relating to the pre-filing contacts.

WHEREFORE, Respondent, CITY OF WEST CHICAGO, respectfully requests that the Board strike the requests #1, #2, #4 and #5 contained in PWC's First Request for Production of Documents and PCW's Interrogatories # 10, #11 and #12.

Respectfully submitted,

CITY OF WEST CHICAGO

By: 

\_\_\_\_\_  
One of Respondent's Attorneys

Dennis G. Walsh  
Daniel W. Bourgault  
Klein, Thorpe and Jenkins, Ltd.  
15010 S. Ravinia – Suite 10  
Orland Park, Illinois 60462  
[dgwalsh@ktjlaw.com](mailto:dgwalsh@ktjlaw.com)  
[dwbourgault@ktjlaw.com](mailto:dwbourgault@ktjlaw.com)  
(312) 984-6400

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>PROTECT WEST CHICAGO,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>PCB 23-107</b>
	)	<b>(Third-Party Pollution Control Facility</b>
<b>CITY OF WEST CHICAGO, WEST</b>	)	<b>Siting Appeal)</b>
<b>CHICAGO CITY COUNCIL and</b>	)	
<b>LAKESHORE RECYCLING SYSTEMS,</b>	)	
<b>LLC,</b>	)	
	)	
<b>Respondents.</b>	)	

<b>PEOPLE OPPOSING DUPAGE</b>	)	
<b>ENVIRONMENTAL RACISM,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>PCB 23-109</b>
	)	<b>(Third-Party Pollution Control Facility</b>
<b>CITY OF WEST CHICAGO and</b>	)	<b>Siting Appeal)</b>
<b>LAKESHORE RECYCLING SYSTEMS,</b>	)	
<b>LLC,</b>	)	<b>(Consolidated)</b>
	)	
<b>Respondents.</b>	)	

**NOTICE OF FILING**

TO: See Attached Service List

**PLEASE TAKE NOTICE** that on June 1, 2023, the CITY OF WEST CHICAGO electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the Respondent City of West Chicago's Motion for Leave to File a Reply in Support of its Objection to Petitioner Protect West Chicago's First Request for Production of Documents and First Set of Interrogatories, a copy of which is hereby served upon you.

Respectfully submitted,

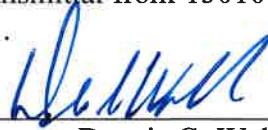
CITY OF WEST CHICAGO,  
Respondent

By:   
\_\_\_\_\_  
One of Respondent's Attorneys

Dennis G. Walsh  
Daniel W. Bourgault  
Klein, Thorpe and Jenkins, Ltd.  
15010 S. Ravinia – Suite 10  
Orland Park, Illinois 60462  
[dgwalsh@ktjlaw.com](mailto:dgwalsh@ktjlaw.com)  
[dwbourgault@ktjlaw.com](mailto:dwbourgault@ktjlaw.com)  
(708) 349-3888

AFFIDAVIT OF SERVICE

I, the undersigned, on oath state that I have served the Notice of Filing and Respondent City of West Chicago's Motion for Leave to File a Reply in Support of its Objection to Petitioner Protect West Chicago's First Request for Production of Documents and First Set of Interrogatories upon the following persons to be served via email transmittal from 15010 S. Ravinia – Suite 10, Orland Park, Illinois 60462, this 1st day of June, 2023.



\_\_\_\_\_  
Dennis G. Walsh  
Attorney for Respondent  
City of West Chicago

SERVICE LIST

Ricardo Meza  
Meza Law  
542 S. Dearborn, 10<sup>th</sup> Floor  
Chicago, IL 60605  
[rmeza@meza.law](mailto:rmeza@meza.law)

Bradley P. Halloran, Hearing Officer  
Illinois Pollution Control Board  
60 E. Van Buren St., Suite 630  
Chicago, IL 60605  
[Brad.Halloran@illinois.gov](mailto:Brad.Halloran@illinois.gov)

Robert A. Weinstock, Director  
Environmental Advocacy Center  
Northwestern Pritzker School of Law  
375 E. Chicago Avenue  
Chicago, IL 60611  
[Robert.weinstock@law.northwestern.edu](mailto:Robert.weinstock@law.northwestern.edu)

George Mueller  
Attorney at Law  
1S123 Gardener Way  
Winfield, IL 60190  
[George@muelleranderson.com](mailto:George@muelleranderson.com)

Karen Donnelly  
Attorney at Law  
501 State Street  
Ottawa, IL 61350  
[Donnellylaw501@gmail.com](mailto:Donnellylaw501@gmail.com)