

ILLINOIS POLLUTION CONTROL BOARD  
June 12, 2023

PROTECT WEST CHICAGO,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 23-107
	)	(Third-Party Pollution Control Facility
CITY OF WEST CHICAGO, WEST CHICAGO	)	Siting Appeal)
CITY COUNCIL and LAKESHORE	)	
RECYCLING SYSTEMS, LLC,	)	
	)	
Respondents.	)	
_____	)	
PEOPLE OPPOSING DUPAGE	)	
ENVIRONMENTAL RACISM,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 23-109
	)	(Third-Party Pollution Control Facility
CITY OF WEST CHICAGO and LAKESHORE	)	Siting Appeal)
RECYCLING SYSTEMS, LLC,	)	
	)	(Consolidated)
Respondents.	)	

**HEARING OFFICER ORDER**

On May 5, 2023, Protect West Chicago (PWC) served a request for documents as a part of discovery in this proceeding. On May 10, 2023, Lakeshore Recycling Systems LLC (Lakeshore) filed an objection to the request (ObjLS). On May 11, 2023, City of West Chicago (West Chicago) also filed an objection to PWC’s request for the production of documents and interrogatories (ObjWC). PWC filed a response to the objections on May 24, 2023. On June 1, 2023, West Chicago filed a motion for leave to file a reply and reply. I will first address WC’s objection based on the Open Meetings Act and then the objections to discovery on pre-filing contacts.

**Open Meetings Act Exemption**

West Chicago objects to the request by PWC for a copy of the audio recording of the West Chicago’s closed executive session held on February 27, 2023. ObjWC at 2. West Chicago argues that the Open Meetings Act (OMA) specifically prohibits release of the verbatim record of the meeting. ObjWC at 2, citing 5 ILCS 120/2.06(e) (2020).

PWC argues that because West Chicago is a party to the action, it is “unjust to afford the government the benefit of withholding relevant evidence”. Resp. at 6. PWC argues it is clear

that the closed meeting was about the siting application, but it is unclear who attended the closed meeting. *Id.* at 7. Also, PWC argues that the council waived any privilege from the closed meeting. *Id.* at 7-8.

OMA contemplates that there will be times when a group ordinarily subject to OMA requirements, will need to hold closed meetings. Those times are extremely limited and are regulated by OMA. A verbatim record of the meeting must be kept for 18 months and then only destroyed after approval of minutes and the public body. *See* 5 ILCS 120/2.06(c) (2020). The verbatim recording is not available to the public.

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(e) (2020).

There has been no action by West Chicago to disclose the recording, or to determine the recording should not remain confidential. Therefore, under the clear provisions of the OMA, the recording is not discoverable in this proceeding. The objection to providing the verbatim copy is sustained.

The Board notes that while PWC may have an argument regarding the conduct and content of the closed meeting, this is not the forum for that argument. The provisions of OMA are enforceable through the circuit court and the Public Access Counselor (5 ILCS 120/3, 3.5 (2022)).

### **Pre- Filing Contacts**

Both Lakeshore and West Chicago argue that many of the documents requested are items provided prior to the filing of the application, and are therefore, not relevant to this proceeding. Specifically, Lakeshore argues the documents are not relevant and the content is not *ex parte*. *See generally* ObjLS at 2-3. Lakeshore argues that the Board has consistently held the pre-filing contacts are not relevant to fundamental fairness, and to be *ex parte* the contact must occur post-filing of the application. ObjLS at 3, citing Stop the Mega-Dump v. Dekalb County, PCB 10-103 (Mar. 17, 2011); Residents Against a Polluted Environment v. LaSalle County, PCB 97-139, slip op at 7, (June 19, 1997); Residents Against a Polluted Environment v. LaSalle County, PCB 96-243, slip op. at 16 (Sept. 19, 1996). West Chicago echoes this argument. ObjWC at 3-4.

In contrast PWC, argues that the Board has allowed to hear new evidence of pre-filing contacts to review the fundamental fairness of the proceeding. Resp. at 9-10. PWC argues respondents' reliance on Stop the Mega Dump and Residents Against a Polluted Environment are misplaced. PWC asserts that evidence of pre-filing collusion is acceptable evidence, and subject to discovery. *Id.* at 10. PWC maintains that there is evidence of collusion in the pre-filing contacts in this proceeding, and therefore, discovery should be allowed. *Id.* at 11.

The purpose of discovery is to uncover all relevant information and information calculated to lead to relevant information. *See* 35 Ill. Adm. Code 101.616(a). On appeal of a municipality's decision to grant or deny a siting application, the Board generally confines itself to the record developed by the municipality. 415 ILCS 5/40.1(b) (2020). However, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record, including pre-filing contacts. *See* Land and Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 194 (3d Dist. 2000).

The Board does agree that contacts prior to the application being filed are not *ex parte*. As the Board stated in Stop the Mega-Dump:

The Board first observes that the courts have long held that County Board Members act in an adjudicatory manner in proceedings under Section 39.2. Were they acting as legislators, there would be no possibility of *ex parte* contacts, which by definition cannot occur in the legislative context. The prohibition against *ex parte* contacts is not intended to be a "gag order" on the decisionmaker. It exists primarily for the protection of the public, to ensure that each person has equal access to the "ears" of the decisionmakers, and each person is aware of all the information that is being placed before the decisionmakers for their consideration. PCB 10-103, slip op. at 45.

Further, the Board has affirmed local hearing officer orders that did not allow questioning regarding pre-filing contacts. The Board stated:

There is no authority for applying *ex parte* restrictions concerning pollution control facility siting prior to the filing of an application for siting approval. Because evidence of these contacts are not relevant to the siting criteria and are not indicative of impermissible pre-decisional bias of the siting authority, we find that the county hearing officer's failure to allow testimony concerning these allegations did not render the proceedings fundamentally unfair. PCB 96-243, slip op. at 16.

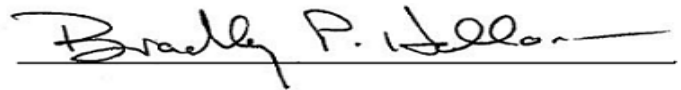
However, as PWC argues, the Board will hear evidence of pre-filing contacts that could establish collusion and bias. The Board agrees. Pre-filing contacts may be probative of prejudgment of adjudicative facts, which is an element to be considered in assessing a fundamental fairness allegation. American Bottom Conservancy (ABC) v. Village of Fairmont City, PCB 00-200, slip op. at 6 (Oct. 19, 2000). Further, the courts have indicated that fundamental fairness refers to the principles of adjudicative due process and a conflict of interest itself could be a disqualifying factor in a local siting proceeding if the bias violates standards of adjudicative due process. E & E Hauling v. PCB, 116 Ill. App. 3d 586, 596, 451 N.E.2d 555, 564 (2nd Dist. 1983), *aff'd* 107 Ill. 2d 33, 481 N.E.2d 664 (1985). The manner in which the hearing is conducted, the opportunity to be heard, whether *ex parte* contacts existed, prejudgment of adjudicative facts, and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. Hediger v. D & L Landfill, Inc., PCB 90-163, slip op. at 5 (Dec. 20, 1990). *See* Timber Creek Homes, Inc. v. Village of Round Lake Park et.al., PCB 14-199 (Apr. 3, 2014).

Based on a review of the case law and the parties' arguments, I sustain the objection to PWC Interrogatories 10, 11, and 12. It is unclear how responses to those interrogatories could provide evidence of bias or prejudice of facts. Because the OMA exemption does not allow for production of the closed meeting audio recording, the objection to PWC's request to produce #1 is sustained.

Also, because the objection was sustained to interrogatories 11 and 12, the objection PWC's request to produce 4 and 5 are also sustained. As to the remaining objections, I find the information being sought may assist in determining if West Chicago prejudged the application or had a bias. Therefore, those objections are overruled.

WC's reply is denied and was not needed to address the filed discovery objections, and therefore no material prejudice. *See* Section 101.500 (e) of the Board's procedural rules.

IT IS SO ORDERED

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath.

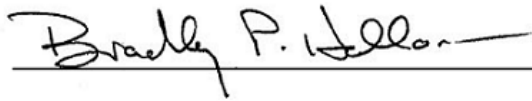
Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
60 E. Van Buren Street  
Suite 630  
Chicago, Illinois 60605  
312.814.8917  
[Brad.Halloran@illinois.gov](mailto:Brad.Halloran@illinois.gov)

## CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on June 12, 2023, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on June 12, 2023:

Don Brown  
Illinois Pollution Control Board  
60 E. Van Buren Street  
Suite 630  
Chicago, Illinois 60605



Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
60 E. Van Buren Street  
Suite 630  
Chicago, Illinois 60601  
312.814.8917

@ Consents to electronic service

SERVICE LIST

PCB 2023-107@  
Karen Donnelly  
Karen Donnelly Law LLC  
501 S. State St.  
Ottawa, IL 61350

PCB 2023-107@  
Robert A. Weinstock, Director  
Environment Advocacy Center  
Northwestern Pritzker School of Law  
375 E. Chicago Ave.  
Chicago, IL 60611

PCB 2023-107@  
Ricardo Meza  
Meza Law  
542 S. Dearborn, 10<sup>th</sup> Floor  
Chicago, IL 60605

PCB 2023-107@  
George Mueller  
Attorney at Law  
1S123 Gardener  
Winfield, IL 60190

PCB 2023-107@  
Dennis G. Walsh  
Klein, Thorpe & Jenkins, Ltd.  
20 N. Wacker Drive, Suite 1660  
Chicago, IL 60606

PCB 2023-109@  
Daniel W. Bourgault  
Klein, Thorpe & Jenkins, Ltd.  
20 N. Wacker Drive, Suite 1660  
Chicago, IL 60606