

NOTICE

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3-99-0533

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2000

THE WILL COUNTY BOARD,	) Appeal from the Circuit Court
	) of the 12 <sup>th</sup> Judicial District,
Plaintiff-Appellee,	) Will County, Illinois
	)
v.	) No. 99 CH 618
	)
KATHLEEN KONICKI,	)
	) The Honorable William R. Penn,
Defendant-Appellant.	) Presiding Judge

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ORDER

**"Not To Be Published"**

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The defendant-appellant, Kathleen Konicki (Konicki), appeals from the Will County circuit court's June 8, 1999, entry of a preliminary injunction order enjoining her from disclosing the contents of any written or oral privileged communication or information between the Will County Board (Board), of which she is a member, and any of its attorneys regarding a siting application submitted by Waste Management, Inc. On review, we must determine whether the circuit court abused its discretion when it enjoined Konicki from disclosing in a Pollution Control Board (PCB) proceeding, or disclosing to those petitioning the PCB, communications between the Will County Board and its attorneys in meetings which she attended as a board member. Because we conclude that the circuit court's entry of the preliminary injunction imposed an unconstitutional prior restraint on Konicki's first amendment rights, we vacate the preliminary injunction.

## FACTS

On August 14, 1998, Waste Management, Inc. (WMI) filed with the Will County Board a request for siting location approval for the Prairie View Recycling and Disposal Facility in unincorporated Will County. The site is bordered on three sides by the Midewin National Tallgrass Prairie and is proximate to the Abraham Lincoln National Veterans Cemetery. The Will County Board has 27 members, each of whom are elected to four-year terms. The Board appointed three of its members to sit as a "siting committee" for the purpose of conducting the public hearings on the application as the Environmental Protection Act (415 ILCS 39.2 (West 1993)) (Act) requires. The siting committee held public hearings on WMI's application in November and December, 1998.

Joseph Mikan, Chairman of the Board's Executive Committee testified in the preliminary injunction hearing that on January 21, 1999, after a Board meeting, he and other Board members met with legal counsel. He testified that it was their first meeting with counsel regarding the siting application and that counsel "shared some of their opinions on how [the Board needed] to proceed and gave us advice." Mikan testified that attorneys Christine Zeman and Dennis Walsh advised the Board throughout the siting process for the purpose of deciding and voting on WMI's application.

Christine Zeman testified that, in January, 1999, Will County State's Attorney James Glasgow retained her as an acting assistant state's attorney to provide legal advice to the Board in its deliberations on the siting application. She testified that her

"dealings were through Mr. Philip Mock, the chief of the civil division." She further testified that, on January 21, 1999, she, Glasgow and Mock met informally after the regular Board meeting with Mikan, and the Board leadership. According to Zeman, they began to discuss how the Board could conduct its duties under the Act and the Will County Siting Ordinance for Pollution Control Facilities.

On February 24, 1999, the Will County circuit court concluded that the Board, sitting as a quasi-adjudicative body, could meet in closed session to review the hearing records. Therefore, it denied a petition for a temporary restraining order filed by Midwest Suburban Publishing, Inc., publisher of the Daily Southtown newspaper, and the Illinois Press Association seeking to prevent the closed meeting. Zeman testified that she attended both the open and closed sessions of the February 25, 1999, meeting. Zeman testified that Konicki revealed privileged communication from that meeting. However, when Konicki attempted to elicit the communications she had revealed, the circuit court sustained Board counsel's objections on the basis that the communications were confidential.

Zeman testified that she and the Board met in several open meetings, informal meetings and one closed meeting. Attorney Helsten attended the public hearings and open meetings. Zeman testified that she authored three memoranda of law addressing procedure, options, the record and the law on the criteria involved dated January 28, February 12 and February 24, 1999. She recalled

that she labeled the memorandums "confidential attorney/client privilege." Zeman also testified that she could not recall any privileged communication from the January 21, 1999, meeting that Konicki had revealed.

On March 4, 1999, in an open meeting, the Board voted to grant WMI's siting application. Konicki had attended each meeting and voted against granting the application.

Subsequently, Konicki filed a petition for review of the Board's decision with the Illinois Pollution Control Board (PCB) pursuant to section 40.1 of the Environmental Protection Act (415 ILCS 5/40.1 (West 1993)). In her petition, Konicki alleged, *inter alia*, that the Board's siting process was fundamentally unfair, in that: (1) the Board considered evidence outside of the public record in a meeting closed to the public; (2) the Board conducted the closed meeting in such a fashion that it may have violated the Open Meetings Act; (3) Board counsel Charles Helsten participated in the public hearings as counsel for Will County's Waste Services Division, a landfill proponent, after acting in an advisory capacity to the Board and participating in Board executive sessions; (4) Glasgow informed the Board after the public hearings that Helsten represented Waste Services, a proponent of the siting application; (5) on Helsten's recommendation, Glasgow recommended to the Board that it accept Zeman to represent it as acting assistant state's attorney in the siting process; (4) WMI paid Helsten's fees through Waste Services; (5) Board counsel Mock attended the public hearings while acting in an advisory capacity

to the Board and participating in the ultimate decision-making process; (6) after close of the public hearing and the public comment session, Waste Services presented its report (Olson Report) in which it recommended that the Board approve WMI's application and impugning the credibility of experts opposing the application; (7) Zeman advised the siting committee that it did not need to draft its own report or recommendation but, instead, could adopt the Olson Report; (8) the siting committee adopted the Olson report without debate or discussion; (9) Zeman also advised the Board that the Olson Report was a good report that it should adopt, and vouched for the integrity of WMI's experts; (10) the Board adopted the Olson report.

The Sierra Club, Midewin Tallgrass Prairie Alliance, Audubon Council of Illinois, and the Illinois Audubon Society also filed a petition for review, as did Land and Lakes Company. Konicki joined with the Sierra Club in making document requests and propounding interrogatories to the Board and Waste Management. On May 20, 1999, the PCB dismissed Konicki's petition. Thereafter, in its answers to the Board's interrogatories, the Sierra Club indicated that it intended to call Konicki as a witness regarding the Board's consideration of the siting application and the Board's understanding of the role of its counsel in the siting matter.

On May 26, 1999, the Board filed an emergency motion for a temporary restraining order and preliminary injunction in the Will County circuit court asking it to enjoin Konicki from revealing privileged attorney-client communication that she had been privy to

as a Board member. It also filed a verified complaint for injunctive relief requesting that the circuit court temporarily and permanently enjoin Konicki from revealing to the Sierra Club or any other person or entity other than Board members or its attorneys, under subpoena or otherwise, the contents of any information or communication between the Board and its attorneys regarding legal advice concerning WMI's siting application. The Board identified the privileged communications as those occurring in the January 21 and February 25, 1999, meetings, and "on any other dates" that Board members sought such legal advice. The Board attached as an exhibit a privilege log identifying 22 documents it claimed were privileged. The log also claimed a privilege under the Open Meetings Act for the minutes of the Board's closed executive session.

On May 27, 1999, the circuit court entered a temporary restraining order against Konicki and on May 28, 1999, in response to Konicki's motion to vacate the order, entered another order specifying that the temporary restraining order would remain in effect until June 7, 1999. On June 4, 1999, this court denied Konicki's motion to stay the temporary restraining order. On June 8, after a hearing, the circuit court granted a preliminary injunction in which it concluded that (1) the Board presented sufficient facts on which to base its findings and from which it appeared that Konicki was committing or about to commit the complained of acts; (2) the Board had demonstrated a need for immediate equitable relief in the form of a preliminary injunction

to maintain the *status quo* until it held a full trial on the merits; (3) the Board had no adequate remedy at law to protect its rights and interests and had or would suffer irreparable injury if it did not award injunctive relief; (4) the Board had shown a probability of success on the merits; and, (5) the equities showed that the Board was entitled to a preliminary injunction.

Pending further order of the court, but not beyond the conclusion of a full trial on the merits for permanent injunctive relief which it scheduled for September 21, 1999, the circuit court enjoined Konicki from communicating to any person or entity other than Board members, the contents of any written or oral privileged communications or information between the Board and/or its members and any of its attorneys, namely, Dennis G. Walsh, Christine Zeman, Charles Helsten, Phil Mock, and James Glasgow. The circuit court enjoined Konicki from divulging the contents of privileged communication, including, but not limited to: (1) privileged communications made at the Board meetings on January 21, 1999, and February 25, 1999; (2) the meetings' minutes; (3) the contents of written memoranda from Walsh and Zeman to Board members dated January 28, 1999, February 12, 1999, and February 24, 1999. Further, the circuit court enjoined Konicki from disclosing the above communication in any written document or in any testimony, whether or not under subpoena, connected to her petition for review before the PCB. Konicki appealed the circuit court's grant of the preliminary injunction pursuant to Supreme Court Rule 307(a)(1) (155 Ill. 2d R. 307(a)(1)).

## ANALYSIS

Konicki argues that the attorney client privilege does not give rise to an independent cause of action but is instead a rule of evidence, the issue should have been addressed in the PCB hearing, and inasmuch as the matter was already before the PCB, the Board had an adequate remedy at law. According to Konicki, the Board was not at risk of irreparable harm because it could have brought a motion *in limine* before the PCB to have the communications excluded. Konicki further asserts that the Board does not own the privilege it asserts and, moreover, the communications at issue were not privileged. According to Konicki, the Board did not present proof that she breached the privilege, and the Board, itself, put the communications at issue. She maintains that the public has an interest in knowing what occurred in the Board meetings. Konicki argues that the injunction harmed her more than the Board would have been harmed if the circuit court had denied the injunction. She contends that the injunction effectively granted the Board full relief and stripped her of her free speech rights. She argues that the injunction is an unconstitutional prior restraint on her speech. She also contends that it is unconstitutionally vague because it does not specify the communications that are privileged, and it is overbroad because it does not limit her communications only to the PCB or the other petitioners, but enjoins her communication indiscriminately across time, place, and manner.

The Board responds that it hired attorneys to advise it on the

siting application and its communications with its attorneys on the matter are privileged. The Board argues that it, not the individual Board members, owns the privilege, but Konicki nevertheless repeatedly threatened to disclose the communications to the Sierra Club. The Board maintains that it has a right to remain on equal strategic footing with its adversary, which it cannot do if its communications are not protected. Further, disclosure of the communications will moot any subsequent review because the information will already be public. The Board maintains that the injunction does not harm Konicki because she did not, in any event, have a right to disclose privileged communication. The Board contends that without the injunction, it might fear that any of its discussions may be disclosed and, therefore, act without deliberation and debate, harming the public interest. The Board argues that the injunction is not an unconstitutional prior restraint on Konicki's speech because she does not have a first amendment right to divulge privileged and confidential communication. According to the Board, the communication Konicki threatens to disclose took place in a legal closed meeting and, therefore, is confidential and privileged. Further, it argues that the injunction is not unconstitutionally vague because it specifies the communication that Konicki may not divulge and is not overbroad because it affects only the parties to the proceedings and not any other third parties.

It is within the circuit court's discretion to "grant or refuse to grant a preliminary injunction and its determination will

not be overturned on review absent a showing of the abuse of discretion." Midtown Petroleum, Inc. v. Gowen, 243 Ill. App. 3d 63, 68, 611 N.E.2d 1221, 1225 (1993). To establish entitlement to a preliminary injunction, the party seeking the injunction must demonstrate that: (1) it possesses a certain and clearly ascertainable right which needs protection; (2) it will suffer irreparable harm without the protection of the injunction; (3) there is no adequate remedy at law for its injuries; (4) it is substantially likely to succeed on the merits; and (5) in the absence of preliminary relief, it will suffer greater harm without the injunction than the opposing party will suffer if it is issued. Schweikert v. Powers, 245 Ill. App. 3d 281, 288, 613 N.E.2d 403, 409 (1993).

First, does the Board possess a certain and clearly ascertainable right which needs protection? In the instant case, does the Board have a right, under a claim of privilege arising out of either attorney-client communications or the Open Meetings Act (5 ILCS 120/1 et seq. (West 1995)) to prevent one of its members from communicating with her constituents regarding a matter under adjudication? The circuit court found that the Board does have such a right and entered an injunction restraining such communication. For the following reasons, we disagree and vacate the injunction.

A prior restraint is defined as a "predetermined judicial prohibition restraining specified expression." Nebraska Press Association v. Stuart, 427 U.S. 539, 559, 49 L. Ed.2d 683, 697-98,

96 S. Ct. 2791, 2802 (1976). Prior restraints are "the most serious and least tolerable infringement on First Amendment rights." Nebraska Press, 427 U.S. at 559, 49 L. Ed.2d at 697, 96 S. Ct. at 2802. A prior restraint is not unconstitutional *per se*; however, there is a heavy presumption against its validity. Kemner v. Monsanto, 112 Ill. 2d 223, 243, 492 N.E.2d 1327, 1336 (1986). In the context of pending judicial proceedings, a judicial order restraining speech will not be held invalid as a prior restraint if it is: (1) necessary to obviate a 'serious and imminent' threat of impending harm, which (2) cannot adequately be addressed by other, less restrictive means." In re J.S., 267 Ill. App. 3d 145, 148, 640 N.E.2d 1379, 1382 (1994) quoting In re A Minor, 127 Ill.2d 247, 264-65, 537 N.E.2d 292 (1989).

The attorney-client privilege is not absolute, but must be balanced against the "public interest in obtaining disclosure of every man's evidence. (Citations.)" Taylor v. Taylor, 45 Ill. App. 3d 352, 354-55, 359 N.E.2d 820, 821 (1977). There is no general formula to be applied; instead, the court must analyze the circumstances of each particular case, balancing the policy considerations which underlie these two principles. Taylor, 45 Ill. App. 3d at 354-55, 359 N.E.2d at 821. Attorney-client privilege is an evidentiary privilege which provides limited protection to communications between attorney and client by prohibiting their unauthorized disclosure in a judicial proceeding. In re Marriage of Decker, 153 Ill.2d 298, 312, 606 N.E.2d 1094, 1101(1992). See also McDonald's Corp. v. Levine, 108 Ill. App. 3d

732, 439 N.E.2d 475 (1982, (the invasion of attorney-client privilege is not a recognized cause of action; it is a rule of evidence, not a substantive right.) Its purpose is to allow free and open communication with an attorney without fear of compelled disclosure of the information communicated. Decker, 153 Ill. 2d at 313, 606 N.E.2d at 1101. The privilege is to be strictly construed as an exception to the general duty to disclose. People ex rel. Hopf v. Barger, 30 Ill. App. 3d 525, 535, 332 N.E.2d 649, 658 (1975).

The Board points out that governmental entities possess attorney-client privilege. In re Information to Discipline Certain Attorneys of the Sanitary District of Chicago, 351 Ill. 206, 268, 184 N.E. 332, 357 (1933). The Board also relies on Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 120, 432 N.E.2d 250, 257-58 (1982) to support its argument that it "owns" the attorney-client privilege and, therefore, Konicki may not divulge such communications. In Bucyrus, the defendant-appellant claimed that a report prepared by one of its employees was exempt from discovery under attorney-client privilege. Our supreme court concluded that under the "control group" theory, communications by one of the corporation's decisionmakers is so protected. Bucyrus, 89 Ill. 2d at 120, 442 N.E.2d at 258. However, in this case, the issue is not whether the Board is protected by attorney-client privilege. The issue is whether the circuit court may intervene in the PCB's administrative process to determine what evidence may be admitted in its review of the Board's siting determination.

The Board also argues that Konicki has threatened to disclose information she learned in a meeting closed under the Open Meeting Act and which, therefore, is privileged and confidential. We note that, under the Open Meeting Act, the Board may meet in closed session to review the evidence received in the hearings on the siting application. 5 ILCS 120/2(c)(4) (West 1995). It may also meet in closed session with its attorneys to discuss pending, probable or imminent litigation. 5 ILCS 120/2(c)(11) (West 1995). As discussed in Hopf, 30 Ill. App. 3d 525, 537-38, 332 N.E.2d 649, 659-60 (1975), a governing body is not required, in all circumstances, to consult with its attorney in an open meeting. However, "consultations with an attorney in private may be used as a device to thwart the liberal implementation of the policy that the decision-making process is to be open and that confidentiality is to be strictly limited." Hopf, 30 Ill. App. 3d at 538, 332 N.E.2d at 660. Tellingly, the Open Meeting Act does not provide any mechanism for sanctioning a member of a body who divulges the substance of the deliberations of such a meeting. See 1991 Op. Atty. Gen. 91-001 (January 1991) (there is no provision in the constitution or the Open Meetings Act which expressly authorizes public bodies to sanction their members for revealing what went on during a closed meeting, and there is clearly no constitutional provision from which one may imply such powers.) Further, although under the Open Meetings Act, the Board is not required to make public the minutes from its closed meetings, it must review the minutes at least semi-annually to determine whether confidentiality

remains necessary. 5 ILCS 120/23.06(b), (c) (West 1995). We believe that this provision indicates that the information is not forever and in all circumstances shielded. It also, together with the lack of sanctioning power, indicates the limited extent of confidentiality afforded to bodies covered by the Open Meetings Act.

The circuit court, in ruling from the bench, concluded:

"It truly is a novel case. \*\*\*. "[T]he defendant, by her own admission in open court, has indicated that she has a right to disclose as a member of a public body confidential information between that public body and its counsel.

And while the Court recognizes that to be a rule of evidence, this Court believes, as a Court of general jurisdiction, equity jurisdiction, that it has jurisdiction over persons and the subject matter before this Court."

In Kurtzworth v. Illinois Racing Board, 92 Ill. App. 3d 564, 415 N.E.2d 1290 (1981), the fifth district addressed the issue of whether the circuit court may intervene in an administrative hearing to supply provisional or ancillary relief in the form of an injunction when it is not ruling on the merits of the cause of action. After a lengthy analysis of the issue, the court concluded:

"[A] rule has emerged which recognizes that when the proper circumstances are presented it, a court exercising traditional and inherent chancery powers may intervene in the administrative process by furnishing the provisional

relief of a preliminary injunction which will serve to maintain the *status quo* pending the completion of the administrative hearing process and rendition of the final order of the administrative agency. \*\*\* It is best \*\*\* to say that the decision whether to intervene by preliminary injunction lies within the sound discretion of the court and that that discretion encompasses consideration of the peculiar facts of each case, the traditional powers of courts of chancery, precedent, matters of public policy and public concern, and statutes. Matters of principal concern will generally involve the availability of adequate alternative relief, the necessity to prevent irreparable injury or irretrievable loss and the deprivation of some constitutional right without due process of law." Kurtzworth, 92 Ill. App. 3d at 584-85, 415 N.E.2d at 1305.

The Board has presented, and we have discovered, no case in which the judiciary has seen fit to restrain an elected official's speech in an adjudicative proceeding pending in another forum through the issuance of an injunction based on a claim of attorney-client privilege, an evidentiary privilege which provides limited protection. The Board does not seek to preserve the *status quo* pending the completion of the administrative hearing but, rather, seeks to circumscribe the administrative hearing. In review of the Board's decision to grant WMI's siting application, the PCB must determine whether the Board's hearings on the matter

were fundamentally fair. 415 ILCS 5/40.1 (West 1996)). In so doing, the PCB, an administrative body, "possesses broad discretion in conducting its hearings; however, this discretion must be exercised judiciously and not arbitrarily." Village of South Elgin v. Pollution Control Board, 64 Ill. App. 3d 565, 568, 381 N.E.2d 778, 780 (1978). The Board has presented no evidence that the PCB has not or will not judiciously exercise its discretion.

Further, the United States Supreme Court has instructed, "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." Wood v. Georgia, 370 U.S. 375, 395, 8 L. Ed. 2d 569, 583, 82 S. Ct. 1364, 1375 (1962). In considering the peculiar facts of this case, we are not persuaded that the Board has a protectible right to silence its own members such that the circuit court may enjoin one of its members from testifying in another adjudicative forum. We believe that, rather than enjoin Konicki's speech, the issue of what evidence should be admitted adequately can be and should be decided in the PCB proceedings. The interests involved compel us to conclude that the circuit court abused its discretion; therefore, we vacate the circuit court's order.

#### CONCLUSION

In sum, we conclude that the circuit court's entry of the preliminary injunction imposed an unconstitutional prior restraint on Konicki's first amendment rights; accordingly, the circuit

court abused its discretion and we vacate the preliminary injunction.

Vacated.

KOEHLER, J., with SLATER, P.J., and BRESLIN, J., concurring.