OPEN MEETINGS ACT WORKSHOP

AUGUST 8, 2015
9:00 AM – 11:00 AM

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THE ILLINOIS OPEN MEETINGS ACT (OMA)

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I. INTRODUCTION

The Illinois Open Meetings Act, 5 ILCS 120/1, *et seq.*, generally requires that all meetings of government bodies be open to the public. There are a number of exceptions to the general rule, pursuant to which certain meetings or portions of meetings may be closed to the public. The Open Meetings Act also sets out notice and minute taking requirements for meetings of public bodies.

II. THE OMA

A. Who Must Comply?

The Open Meetings Act applies to "public bodies," including all legislative, executive, administrative, or advisory bodies of the state, counties, townships, cities, villages, and other government corporations and all subsidiary bodies of such entities (5 ILCS 120/1.02), including the following:

- City Councils and Village Boards of Trustees
- Library, School, and Park Boards
- Township and County Boards
- Plan Commissions and Zoning Boards of Appeals
- Board of Fire and Police Commissioners

In addition, the term "public body" includes all subsidiary bodies of government bodies, including committees, so the provisions of the OMA regarding notice, agendas, etc., also apply to committees, even if they consist of less than a majority of a quorum of the public body. The Public Access Counselor ruled that it violated the OMA for a public body to take action on a matter referred to it by a committee earlier that same day, since the agenda for the public body's regular meeting contained no mention of the specific action to be taken based on the results of the earlier committee meeting.

To determine whether an entity is a subsidiary body of a government corporation, the courts look to (i) whether the entity has legal existence independent of government resolution, (ii) the nature of the functions performed, and (iii) the degree of governmental control over the entity.

The Open Meetings Act does <u>not</u> apply to the following:

- Staff meetings (unless a majority of a quorum of a public body attends a staff meeting and public business is discussed),
- Political rallies,
- News conferences held by individual public officials,
- Internal committees not formally appointed by, or accountable to, a public body.

B. What "Meetings" are Covered?

For purposes of the Open Meetings Act, a "meeting" is any gathering, whether conducted in person or by video or audio conference, telephone call, electronic means (including, e-mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication of a *majority of a quorum* of the members of a public body held for the purpose of discussing public business or, for a five-member public body, a *quorum* of the members of a public body held for the purpose of discussing public business. For a five-member public body, three members of the body constitute a *quorum*.

Because the definition of "meeting" includes communication through remote telephonic or electronic media, including any means of "contemporaneous interactive communication," government officials should be aware that emails and text messages sent contemporaneously between a sufficient number of officials could constitute a public meeting under the OMA. That may even be true when those messages are sent from the officials' personal cell phones, from personal home computers or from personal email accounts. (See Section entitled "Electronic Communications and Social Media," below, for further discussion.)

C. What is a Quorum?

A "quorum" is a majority of the corporate authorities, namely, the council or board of trustees and the mayor or president. So, for a seven-member board, four members would constitute a quorum. Any actions taken by a council without a quorum are void. A quorum must be present not only to begin a meeting, and also at the time of a roll call vote on any proposition. If less than a quorum remains at a meeting, any business conducted by those remaining may be questioned.

In order to have a government meeting, a quorum of members of the public body must be physically present at the location of the open meeting. If a member comes into a meeting after it is called to order, the minutes at that point in the record should state "Member Jones entered the meeting and took his seat at 9:00 P.M." If a member departs from the meeting, the minutes should state "Member Jones left the meeting at 10:00 P.M.

In the absence of a quorum, the members present may adjourn the meeting or may compel the attendance of the absentees under whatever penalties the board may prescribe by ordinance, including a fine for failure to attend. In that case, the members present will merely remain at the government building until the latecomers are rounded up or will return in an hour if the meeting has been adjourned to that time to permit a search for the remaining members. The penalty, in order to be effective, must have been in force before the absence.

In the alternative, the members present can merely assemble and declare no legal meeting. If the transaction of business is imperative before the next regular meeting, an emergency special meeting may be called and the proof thereof properly recorded. This procedure should be used only in the face of a compelling emergency since a special meeting may be called on 48 hours' notice and the members who constitute less than a quorum also have the option to adjourn the meeting to another time.

D. Discussion of Public Business.

The Open Meetings Act applies only to gatherings held for the purpose of discussing public business. Not all communications between members of public bodies will trigger open meetings requirements. The rationale is that public business should be conducted in the public. Members of a public body can gather together (and even speak to each other) in social settings, provided the topic of conversation does not stray into public business. As noted previously, it is the content of the conversation, not the forum or medium by which that conversation takes place, that will trigger compliance with open meetings laws.

E. Electronic Participation in Meetings.

A quorum of the public body must be physically present at the location of an open meeting. If a quorum of members of a public body is physically present at the meeting, a majority of the public body may allow a member of that body to attend the meeting by video or audio conference if the absent member is unable to physically attend for one of the following reasons: (i) personal illness or disability, (ii) employment purposes or the business of the public body, or (iii) a family or other emergency. An absence caused by a vacation does not qualify for a request to participate electronically. If a member wishes to attend a meeting by video or audio conference, he or she must notify the recording secretary or clerk of the public body before the meeting unless advance notice is impractical. A government body may not invoke remote participation unless it has previously adopted an ordinance or rule allowing for remote participation.

If a government body has adopted such an ordinance or rule, a majority of the public body may allow a member to attend a meeting via video or audio conference only if such attendance fully complies with the rules of the public body. These rules must conform to the OMA requirements, and may further limit the ability of members to attend meetings by means other than physical presence. The public body's rules may also require more notice than is required by the Act. Public bodies which choose to permit remote participation must develop rules addressing attendance by remote means. We recommend that government bodies work with their attorneys to draft a remote attendance policy that satisfies the requirements of the OMA and accommodates the government body's needs.

F. Notices of Meetings

Government bodies must give public notice of all meetings, whether open or closed to the public. The notice requirements in the Open Meetings Act are in addition to – rather than substituting for – any other notice requirements established by law.

1. Notice of Annual Schedule of Regular Meetings

A schedule for the dates for regular meetings must be established and approved by the public body on an annual basis. A government body must give public notice of its annual schedule of regular meetings at the beginning of each calendar or fiscal year, listing the dates, times and places of such meetings. This annual notice must include the meetings of regularly scheduled committees or subcommittees of the board or council, as well as meetings of any formally created advisory groups.

The annual notice must be posted in the principal office of the government body or, if no such office exists, at the building in which the meeting is held. The annual notice, as well as changes in the schedule of regular meetings, must also be sent to any news medium that has filed an annual request for such notice, and must be posted on the government body's website, if the website is maintained by full-time staff.

2. Notice of Regular Meetings

Public notice of regular meetings must be posted at the government body's principal office or, if no office exists, at the building in which the meeting is to be held.

3. Notice of Special Meetings

A special meeting must be called by the requisite number of members of the governing body, as established by statute or ordinance. Public notice of a special meeting, except an emergency meeting, along with an agenda for the meeting, must be given at least 48 hours before the meeting by posting of the notice at the principal office of the governmental body and furnishing the notice and agenda to the registered news media. If the government body maintains a website, the notice must also be posted on the website.

However, unlike regular meetings, special meetings require specific notice. Special meetings may be called for any legal purpose, but the notice must be issued and served on behalf of the government body by an official sufficiently in advance of the meeting as the ordinance and statutes provide. The notice of a special meeting must state the purposes for which the special meeting is called. No business may be transacted at the special meeting except that for which it is called, as set out in the notice, in part because the Open Meetings Act protects the rights of the press and the public to be notified of the business of the government body. Even if all members of the legislative body waive notice of the particular matter to be discussed, the intervening rights of the public and the press to such notice may not be waived.

It not sufficient to list "other business" on a special meeting agenda. That phrase gives the press or public no notice of the specific matter that will be discussed. On the other hand, at a regular meeting or an adjourned regular meeting and consistent with rules of the council and state statutes, any matter may be brought up and discussed. The item, however, may not be acted upon if it was not listed, at least in a general way, on the agenda.

A matter that is frequently neglected is the entry of proof of notice of the special meeting in the minutes of the government body. If the giving of the notice is not made a matter of record and any action taken at the special meeting is attacked, the serving of notice must be established by proof outside the record. If proof of notice is stated in the record, it may not be attacked collaterally and this potential difficulty is avoided. Such proof of notice should contain the certificate of the person or persons who delivered the notices to the members of the corporate authorities and should specify in each case who received the notice or whether it was merely left at the council or board member's home.

A regular or special meeting may be adjourned to a later date. Any subject may be considered at a reconvened regular meeting that might have been considered at the original regular meeting. No subject may be considered at any reconvened special meeting that might not have been considered at the original special meeting.

4. Notice of Reconvened Meetings

If a meeting was commenced and is to reconvene, a government body does not have to give notice of a reconvened meeting if the meeting was open to the public and (1) it is to be reconvened within 24 hours, or (2) an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda.

5. Notice of Emergency Meetings

If a "bona fide" emergency requires the calling of an emergency meeting, a government body must give notice of the emergency meeting as soon as practicable. Prior to holding an emergency meeting, a government body must give notice to any news medium that has filed an annual request for notice under the Open Meetings Act. An agenda must accompany the notice. Notice of the emergency meeting must also be posted at the principal office of the governmental body.

6. Notice of Rescheduled Meetings

Similarly, public notice of a rescheduled regular meeting, along with an agenda for the meeting, must be given at least 48 hours before the meeting by posting the notice at the principal office of the governmental body and furnishing the notice and agenda to the registered news media.

7. Notice of a Changed Meeting Date

If a government body changes one regular meeting date, it does not have to publish the change in a newspaper, although it must post a notice and an agenda for the meeting. However, if a government body or committee changes all of its regular meeting dates, for example, from the second Tuesday of each month to the second Thursday of each month, the government body must publish notice of the change in a newspaper of general circulation in the area at least 10 days prior to the date such change takes effect. In the case of a local governmental unit with a population of less than 500 in which no newspaper is published, this notice may be posted in at least three prominent places within the governmental unit. Additionally, a copy of the notice must be sent to all registered news media and the government body must post the notice, at least 10 days in advance, in the government body's principal office or, if no such office exists, at the building in which the meeting is to be held.

8. Notice by Publication

When a publication in a newspaper is required and there is no newspaper published in the county where a government body is located, notice by publication must be given in a secular newspaper located in an adjoining county having general circulation within the government body. The law also provides that, wherever notice is required by law to be published in a newspaper, the

newspaper publishing the notice shall, at no additional cost to government, place the notice on a statewide website established and maintained as a joint venture by a majority of Illinois newspapers as a repository for the notices.

9. Distribution of Notices to Media

A government body must supply copies of the notice of its regular meetings, and of the notice of any special, emergency, rescheduled or reconvened meetings, to any news medium outlet (known as “registered news medium”), that has filed an annual request for such notice. In addition, any registered news medium that has given the public body an address or telephone number within the government body’s jurisdiction must be given notice of all special, emergency, rescheduled, or reconvened meetings in the same manner as is given to members of the governing body.

10. Requirement to Post Notices and Agendas on Website

A government body with a website maintained by its full-time staff must post notices and agendas for its regular meetings on its website. Regular meeting notices and agendas posted on the public website must remain posted until the regular meeting is concluded. In addition to posting the agendas, such government bodies must also post notice on its website of all meetings of the governing body of the public body. The notice of the annual schedule of meetings shall remain on the website until a new public notice of the schedule of regular meetings is approved. The failure of a public body to post on its website notice of any meeting or the agenda of any meeting shall not invalidate any meeting or any actions taken at a meeting.

In addition, government bodies with full-time staff maintaining their websites must post regular meeting minutes on the website within 10 days after they are approved. They must remain posted on the website for at least 60 days after their initial posting.

G. Agenda

It is important that the agenda, furnished along with a meeting notice, be as complete as possible. The agenda should list special items and topics to be discussed and acted upon at a regular meeting. The council or board, at a regular meeting, is free to consider any matter that may legally come before it, but it may not act on a matter which is not on its agenda. The courts have also permitted a governmental body to discuss any specific matter which is closely related to a general topic listed on an agenda or notice.

Government bodies must also have an agenda for each special, rescheduled or reconvened meeting. The validity of any action taken by the public body which is germane to a subject on the agenda will not be affected by other errors or omissions in the agenda. The Act does not appear to require an agenda for emergency meetings. It would be a good policy, however, to prepare agendas for such meetings, especially if action is expected to be taken.

Public bodies must identify the "general subject matter" of any ordinance or resolution to be voted on at a meeting on the agenda. This language is not a significant change from existing law

established by the Illinois appellate court's ruling in *Rice v. Adams County* requiring agendas to provide "sufficient advance notice to the people" of the action to be taken at a meeting.

One issue that comes up is whether government bodies may discuss items inadvertently left-off the agenda, or that might come up during the meeting. The OMA does authorize governments to engage in discussions of items not listed on a regular meeting agenda, so long as they do not take final action.

Public bodies must make notices and agendas continuously available for public review during the entire 48-hour period before a meeting. This may create problems for public bodies that post their agendas and notices inside their principal office, such as a city or village hall, if that office is not continuously open to the public for the 48-hour period prior to a meeting.

Public bodies have three options for complying with the 48-hour continuous posting requirement of subsection 2.02(c):

- Post and maintain notices and agendas inside the principal office or meeting place, provided it remains open to the public the entire 48-hour period before a meeting; or
- Post and maintain notices and agendas outside the principal office or meeting place; or
- For public bodies that maintain a website, post and maintain notices and agendas on the public body's website in order to satisfy the requirement for continuous posting.

H. Minutes

Section 2.06 of the Open Meetings Act requires government bodies, and their committees, to keep written minutes of all their open and closed meetings. The minutes of the meeting must include: (1) the date, time and place of the meeting; (2) the members of the public body recorded as either present or absent and whether the members were physically present or present by means of video or audio conference; and (3) a summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken.

The minutes should generally consist of a record of what took place and nothing else. Motions should be included in full. Other items, such as ordinances, should appear with their full descriptive titles. The minutes should also show all votes and roll calls. Essentially, the minutes should be prepared so that someone reading them 10 years after the meeting would understand the substance of the matters discussed and the action taken on them.

Speeches, discussions, or statements should not be copied into the minutes, except when the council rules provide for statements explaining votes, when the council may so order in exceptional cases, or when such information is necessary to understand what took place at the meeting. Full texts of communications, reports, etc., should not be included except in unusual instances when the council instructs the clerk to include them.

Open meeting minutes must be approved within 30 days after that meeting or at the public body's second subsequent regular meeting, whichever is later. Open meeting minutes must be made

available for public inspection within 10 days after the minutes are approved by the governing body. A government body with a full-time staff maintaining its website must post its regular meeting minutes on the website within 10 days after they are approved. They must remain posted on the website for at least 60 days after their initial posting.

Public bodies must also keep minutes of their closed meetings. Government bodies should review closed session minutes relatively quickly in a subsequent closed session to determine whether their content is accurate while people may still remember what occurred at the initial closed session. The Open Meetings Act does not specify a timeline within which closed session minutes must be approved for content or for release to the public, although they must be reviewed at least semi-annually to determine whether they may be released to the public. At meetings where closed session minutes are being reviewed, the board must make a determination: (1) that the need for confidentiality still exists as to all or part of those minutes or (2) that the minutes or portions thereof no longer require confidential treatment and are available for public inspection. The board must report its determination in open session.

A government body's failure to strictly comply with this semi-annual review of minutes does not make the minutes open to the public or available in judicial proceedings (except proceedings to enforce the Open Meetings Act) provided that the government body conducts a review within 60 days of the discovery of its failure and reports in an open meeting whether keeping the minutes in confidence remains necessary.

The discussion of which minutes should be released may be discussed in closed session. Many communities use an ordinance or resolution to establish a more permanent record of the action.

In addition to keeping minutes of closed sessions, a government body must keep a verbatim record of all closed meetings in the form of an audio or video recording. The government body must keep the tapes of the closed session for at least 18 months. After 18 months, the government body may destroy the recordings of the closed session without notification to or the approval of a records commission or the state archivist under the Local Records Act or the State Records Act if: (1) the governing board approves the destruction of a particular recording; and (2) the public body approved appropriate written minutes of the closed meeting; and (3) if there is no court order or investigation warranting the preservation of the recordings. Once the minutes of a closed session are approved and 18 months have passed, the tape of the meeting may be erased, even if the minutes have not been made public.

If the public body has not yet released the recording, the closed session recording is not subject to disclosure under the Freedom of Information Act, nor is it open for public inspection or subject to discovery in legal proceedings. However, the recording may be subject to discovery or court review if a lawsuit is brought to enforce the OMA. In the case of a criminal proceeding, the court may conduct an examination in order to determine what portions, if any, must be made available to the parties for use as evidence in the prosecution.

I. Recording.

Any person may record the proceedings of a public meeting by tape, film or other means. The governmental body holding the meeting may prescribe reasonable rules to govern the right to

make such recordings, but the right to record the meeting may not be eliminated by local rules. These rules should be written and duly adopted by the governmental body. In an informal opinion issued in 2000, the Illinois Attorney General's office analyzed a government body's procedural rules for recording meetings and found most of them unreasonable because they hindered or thwarted the "ability of a person to exercise the right to record a public meeting without an obvious concomitant benefit to the public body." The Attorney General's Public Access Counselor has also ruled that a public body may not require people to provide advance notice to the public body when they plan on recording one of its public meetings. However, the right to record may be suspended in certain proceedings involving witnesses, so check those rules if such a situation arises.

J. Convenient and Open.

All public meetings must be held at specified times and places that are convenient to the public. Meetings that start at a reasonable time may run late without violating the OMA. No public meetings shall be held on legal holidays unless the regular meeting day falls on that holiday. Meetings should be held only in places that are customarily open and accessible to the public.

As a matter of good practice, meetings should be scheduled in a larger space if discussion or final actions on controversial items or topics of great public interest are part of the agenda. Bear in mind, a larger room may be deemed unacceptable if it is inaccessible to regular attendees.

K. Public Comment

Section 2.06(g) of the OMA involves the public's right to speak during governmental meetings. This section states that, "Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." All public bodies therefore must develop a procedural rule that allows the public to have the ability to address the public body. While this amendment permits the public to have an opportunity to address public officials, it does not require the public officials to engage in a debate, to make themselves available for abusive or harassing behavior by a member of the public, or to provide on-the-spot answers to members of the public on the topics that are raised by the public.

While the language of this new law does not expressly require that such an opportunity be provided at an open meeting, the PAC has interpreted this law to require every public body at every meeting subject to the OMA to provide the opportunity for public comment. *See* the Appendix for an article recently published in the Illinois Municipal Review summarizing advisory PAC opinions regarding this OMA requirement.

Since this law applies to meetings of all public bodies, the responsibility to establish "rules" regarding public comment also applies to committees and other subsidiary bodies. While the right to speak during a public meeting cannot be completely eliminated by local rules, reasonable time limits for each speaker and other reasonable limitations applied equally to all people are permitted. However, the PAC has advised that a public body cannot require a person to disclose his or her address in order to speak during public comment nor can a public body require registration five days in advance of the meeting in order to speak during public comment. People who engage in disruptive or violent behavior may be removed from public meetings.

L. Closed Meetings

While the public policy undergirding the OMA is to increase governmental transparency through the conduct of open meetings, there are several statutory exceptions permitting public bodies to conduct meetings that are closed to the public in certain, narrow circumstances. Even so, given the Act's purposes, the exceptions are strictly construed. Meetings or portions of meetings may be closed only under the circumstances expressly stated in the OMA. A public body may hold a meeting closed to the public only if:

(1) The subject to be discussed at that meeting is one of the enumerated exceptions listed in Section 2(c) of the Act; and

(2) A majority of a quorum at a meeting open to the public has voted to have a closed meeting; and

(3) Proper notice was given for the meeting at which the vote was taken, but the subject of going into closed session does not need to be on the agenda; and

(4) The vote of each member on the question of holding the meeting closed is recorded and entered in the minutes of the open meeting.

(5) The motion to hold the closed session and the minutes contain a citation to the specific exception authorizing the closing of the meeting to the public; and

(6) The closed session must be recorded in its entirety, and such tape must be maintained for at least 18 months following the closed session as discussed above.

Only those topics specified in the motion to go into a closed meeting may be discussed at the closed session. Closed sessions authorized by a proper vote may take place as part of a properly noticed regular, special or emergency meeting open to the public without the need for any further notice or an indication in the agenda that a closed session will be held during the course of the meeting. After all, in some cases the need for the closed session may not become apparent until during a meeting.

M. Exceptions Allowing Closed Meetings

The following list is a compilation of some of the more common statutory exceptions that may be considered in closed sessions (the entire list is found in Section 2(c) of the OMA):

(1) Collective negotiating matters between public employers and their employees or representatives;

(2) The purchase or lease of real property for the use of the public body is being considered, including meetings held for the purpose of discussing whether a particular parcel should be acquired, or where the public body is considering the setting of a price for sale or lease of its property. These discussions must involve a specific piece of property, rather than just the general idea of buying land or selling land in a particular area;

(3) Litigation when an action against, affecting, or on behalf of the particular body has been filed and is pending in a court or administrative tribunal, or when the public body finds that such an action is probable or imminent, in which case the basis for such a finding must be recorded and entered into the minutes of the closed meeting. Where prospective litigation is concerned, there must be a real case or controversy involved rather than a policy or philosophical debate over a matter that, if not handled properly, could result in litigation;

(4) The appointment, employment, compensation, discipline, performance, or dismissal of specific employees, including the public body's legal counsel, or to hear testimony on a complaint lodged against an employee to determine its validity.

(5) The appointment of a person to fill a public office or vacancy in a public office where the body has the appointing authority, and to consider removal from office where the body has the equivalent power. However, when nominees for appointment to a public office are discussed in closed session, the final action of voting on the actual nomination or appointment must take place in a public meeting following the closed session.

(6) Meetings to establish reserves or settle claims as provided in the Local Government and Governmental Employees Tort Immunity Act, if the disposition of a claim or potential claim otherwise might be prejudiced, or to discuss information regarding or from an insurer or self-insurance pool of which the government is a member;

(7) Meetings to review closed session minutes, including the semi-annual review of closed session minutes pursuant to Section 2.06 of the OMA;

(8) Meetings to discuss self-evaluation, practices and procedures, or professional ethics when meeting with a representative of a statewide association of which the body is a member; and

(9) Meetings to consider security procedures and the use of personnel and equipment to respond to an actual, threatened, or reasonably potential danger to the safety of employees and public property. Public bodies may now also hold closed meetings to discuss threats or danger to the security of the public itself.

N. Required Local Training on the Open Meetings Act

All members of a public body subject to the Open Meetings Act must complete the online OMA training program designed by the Public Access Counselor. The training program, like a similar one developed for training regarding the Freedom of Information Act, is composed of a series of multiple choice questions, and is available on the attorney general's website: http://illinoisattorneygeneral.gov.

O. Enforcement of the Open Meetings Act

"Any person," or the state's attorney in the affected county, who believes that the OMA has not been or will not be complied with may bring an action to enforce the Act within either 60 days of the challenged meeting or within 60 days of the discovery of the violation by the state's attorney. Failure to file a civil suit within the statutory limitations period constitutes a waiver.

The court may also order equitable relief, including issuing a writ of mandamus requiring that a meeting be open to the public, granting an injunction against future violations of the OMA, ordering the public body to make available to the public such portion of the minutes of a meeting as is not authorized to be kept confidential under the Act, or by declaring null and void any final action taken at a closed session in violation of the Act. Courts have generally been unwilling to invalidate acts of a government body for mere technical, formalistic violations of the Open Meetings Act, such as defective notice.

At least one case has ruled that the OMA does not offer any remedy or even provide a cause of action against a member of a public body who discloses information discussed or revealed during a closed session, thus making punishment of such acts by the governing bodies difficult, although not impossible. If this happens and the government body is confident that sufficient evidence is available, it should consider either an application to the local state's attorney for a malfeasance prosecution or pursue a civil lawsuit seeking an injunction against the member who is leaking confidential information.

In addition to any civil action taken, the state's attorney may bring criminal proceedings against any person who violates any of the provisions of the Act. Upon conviction, a person is guilty of a class C misdemeanor, and may be fined up to $1,500.00 and be imprisoned for up to 30 days.

P. The Public Access Counselor ("PAC")

Prior to the establishment of the Office of the Public Access Counselor ("PAC") in the Attorney General's Office, enforcement of the OMA was left to state's attorneys in the various counties, private citizens and other entities. Many of the private lawsuits were brought by newspapers and other media outlets that felt that government bodies were not strictly complying with the Act's requirements. A great deal of pressure was put on the legislature to find a quicker, and perhaps less complicated, way of enforcing the Act. After months of discussions and much urging from the attorney general, the legislature granted extraordinary new powers over local government affairs to a centralized location in the attorney general's office.

A person who believes a violation of the Act by a public body has occurred is allowed to file a request for review with the PAC. That request must come not later than 60 days after the alleged violation. The request for review must be in writing, must be signed by the requester, and must include a summary of the facts supporting the allegation. Upon receipt of the request for review, the PAC determines whether further action is warranted. If the request for review seems frivolous, the PAC may simply reject it. If further action is warranted, the PAC may instruct the public body to furnish additional documents and information so the PAC may perform a complete analysis of the circumstances.

III. ELECTRONIC COMMUNICATIONS AND SOCIAL MEDIA

Electronic communications such as email, text messaging, instant messaging, and social media communications have opened up new possibilities for local governments to communicate with each other and the public, but officials must be aware of the growing number of legal issues associated with these electronic communications including a growing number of complaints by

the media and citizens that public business is being conducted in secret, rather than in the public eye.

As a result, the concept of "gathering" has greatly expanded over the years to encompass all manner of modern communication media, including video and audio conferences, telephone calls, e-mails, instant messaging, chat rooms, or any other form of "contemporaneous interactive communication." Most state amendments to the definition of a "meeting" over the years have had the effect of broadening the definitions in accordance with technological advances. These changes in the laws emphasize substance over form and force public officials to be mindful of the content of their communications with a majority of a quorum of the public body, whether that communication takes place in city hall, over a prearranged cup of coffee, or in a preplanned internet chat room.

Specifically, Illinois defines a meeting as:

> any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication," held for the purpose of discussing public business.

Under this definition, any communications would constitute a meeting no matter what ingenious method officials had chosen in an effort to avoid public view. The key to this language is whether the conduct or activity is "contemporaneous interactive communication."

The critical inquiry may often be how quickly the board members respond to one another. The quicker the response, the more likely a court will find the e-mail exchange to be a "contemporaneous" communication subject to compliance with open meetings requirements. Instant or exceedingly prompt e-mail responses start to resemble a typical conversation, not unlike a multiparty telephone call, which would result in a violation of open meetings laws, unless properly noticed up in advance. A wise and cautious board member will pause for at least a few minutes and stretch or run an errand before responding to a newly arrived e-mail from a fellow board member. In the absence of case law or extensive commentary on the subject, public officials should be cautioned that the longer the pause between call and response, the less likely a court will be to find that the e-mail chain constituted contemporaneous interactive communication. Communications that take place over social media platforms also have the potential to run afoul of open meeting laws. Without realizing it, tweeting, messaging, and blogging may constitute a "meeting" under the Illinois Open Meeting Act.

To sum up, there are a lot of questions regarding electronic communications in the context of open meeting laws. There are, however, a number of commonsense measures that a governmental entity should take to ensure compliance. First, the entity should understand that Illinois includes electronic communication in the definition of a meeting. It is also sound advice to check if the PAC or any courts have issued opinions that can better inform the entity's use of social media. Members of governmental bodies who are using electronic devices or social media to communicate with other members should make sure they are not using the social media sites to deliberate, ask questions of each other, or engage in simultaneous exchanges with each other regarding the business of the entity.

APPENDIX

The PAC Says ... 10 Guidelines from the PAC on the OMA's Public Comment Requirement[1]

By Julie Tappendorf, Ancel Glink Diamond Bush DiCianni & Krafthefer, P.C.

THE LAW

On January 1, 2011, P.A. 96-1473 became effective, amending the Open Meetings Act to add a new section 2.06(g), as follows:

> (g) Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.

Only 21 words, yet this law has created quite a flurry of activity in the Public Access Counselor's office of the Attorney General since it was enacted. Thirty-five PAC opinions, all non-binding, cite to this section of the OMA. Although advisory only, these opinions do give public bodies a view into how the PAC broadly and expansively interprets and applies this law.

1. The PAC says…public comment must be provided at all meetings

It is interesting to note that when HB 5483 was introduced, it did not even address public comment. Through several amendments, the language and focus of this bill changed substantially. House Amendment No. 1 added a new requirement of a public comment period "at meetings subject to this Act," implying that there needed to be a public comment period at every open meeting. As you can see above, the meeting language was gone by the time the final bill was enacted into law.

Given that the legislature affirmatively eliminated language requiring public comment at all meetings and added language authorizing a public body to adopt rules, one might reasonably interpret that change to mean that public bodies could adopt rules to identify at which meetings the public would be allowed to address the body (e.g., allow public comment at regular but not special meetings). It is the PAC's position, however, that section 2.06(g) "requires public participation at each meeting." As a result, the PAC found a public body in violation of the OMA where it allowed public comment at all regular meetings, but not at a special meeting. (2011 PAC 12459.) Similarly, an electoral board violated the OMA when it adjourned a special meeting without providing public comment. (2012 PAC 18348.)

2. The PAC says…the public comment requirement applies to subsidiary bodies

According to the PAC, committees and other subsidiary bodies also must provide public comment at all of their meetings. So, an ad hoc committee of a ZBA violated the OMA by failing to allow the public to address the committee at one of its meetings. (2011 PAC 12839.)

[1] Reprinted from the Illinois Municipal Review Magazine, September 2014 edition

Similarly, a finance committee of a city council violated the OMA by failing to provide an opportunity for public comment during a committee meeting. In the PAC's view, section 2.06(g) confers "a right on members of the public to address public bodies, including subsidiary public bodies such as committees…" (2013 PAC 25020.)

3. The PAC says…each public body (including subsidiary bodies) must establish rules

Section 2.06(g) provides an opportunity for public comment "under the rules established and recorded by the public body." The question is whether each public body is statutorily obligated to establish rules on public comment or is merely authorized to establish rules if it desires to place limits on public comment? The PAC takes the former position.

In one of its first opinions, the PAC stated that "[t]he Illinois appellate courts have not yet considered the specific restrictions and regulations that public bodies can impose but the amendment clearly contemplates that public bodies have the duty to establish rules providing for public comment." (2011 PAC 12740.) Based on that opinion, the PAC found a school board (2011 PAC 13082), a park board (2011 PAC 13208), a ZBA (2011 PAC 12839), and a city council finance committee (2013 PAC 25020) in violation of section 2.06(g) simply because they failed to establish written rules on public comment at meetings.

Having a long-standing practice of allowing public comment at meetings is not enough to satisfy this requirement. (2011 PAC 13208.) Moreover, each individual public body (including subsidiary bodies) must, according to the PAC, establish its own public comment rules. So, the fact that a city council enacted public comment rules did not relieve the finance committee of that same city council from its own obligation to establish rules to govern its committee meetings. (2013 PAC 25020.)

4. The PAC says…a public body can establish time limits for public comment

In each PAC opinion involving a challenge to a public body's time limits on public comment, the PAC upheld those limits. Thus, a rule allowing a total of 30 minutes for public comment and limiting each speaker to two minutes is reasonable. (2011 PAC 12740.) Similarly, a rule limiting the time for each speaker to three minutes and providing only one opportunity to speak per speaker is also reasonable. (2011 PAC 17388.)

However, having a long standing practice of setting time limits for public comment is not sufficient. Although the PAC acknowledged that a two minute per speaker time limit appeared reasonable, a school board violated the OMA by not having established written rules on time limits. (2011 PAC 13082; 2011 PAC 12768.)

The PAC's view on time limits is consistent with the district court's ruling in Rana Enterprises, Inc. v. City of Aurora, 630 F. Supp. 912 (N.D. Ill. 2009). Aurora had adopted rules for public comment during city council meetings, including a three-minute time limit and relevancy requirement which constrained comment to items on the agenda. The city's rules were challenged under the First Amendment, and the court upheld the rules as content-neutral and reasonable time, place, and manner restrictions.

5. The PAC says…a public body can limit comments to topics germane to the agenda

A public body can also limit the topic of public comment to matters "germane" to the agenda, at least at special meetings. In 2012 PAC 20198, the PAC found no OMA violation where a park board restricted public comment at a special meeting, holding that "it is reasonable for a public body to limit public comment to subjects that are germane to items on the agenda, particularly with respect to a special meeting which is limited to the subjects for which it was called." It is not clear whether the PAC would extend its opinion to regular meetings. According to the Rana court, a rule that speakers limit their public comment to topics on the agenda does not violate the First Amendment.

6. The PAC says…a public body can establish and enforce rules on decorum

"While a public body must ensure the citizen's right to speak at a meeting, it also is invested with authority to proscribe reasonable rules to govern meeting decorum and procedure." (2012 PAC 18294.) Thus, the PAC found no OMA violation where a public body enforced its decorum rules to interrupt or even remove a speaker from a meeting. For example, a village board did not violate the OMA when board members interrupted members of the public to ask questions. (2011 PAC 13910 and 2012 PAC 20198.) A board could also prohibit a speaker from reading a letter during public comment, where a copy had already been provided to the board. (2011 PAC 12909.)

Removal of a person from a meeting for threatening the mayor and disrupting the board meeting was also not a violation of the OMA. (2011 PAC 17370 and 2011 PAC 18356.) Similarly, interrupting a speaker and threatening to remove him for swearing during a public meeting is not a "restriction on public comment if the purpose of the interruption was to ask a question or impose some level of decorum." (2013 PAC 24172.) The PAC cautioned, however, that "removal of an individual from a public meeting is not something that should be done lightly, but rather should only occur when clearly necessary to permit a public body to effectively conduct its business." (2011 PAC 17370.)

7. The PAC says…public comment can be provided at any point in the meeting

The OMA does not guarantee a member of the public the right to speak at any point during a meeting of his or her choosing. A school board's policy of allowing public comment only at the end of the meeting after agenda items were voted on was not a violation of the OMA because section 2.06(g) does not obligate a public body to place public comment at a particular point in the meeting. (2012 PAC 18434.) Similarly, a policy that allowed comment at the beginning and end of a meetings, but not during agenda items, was reasonable. (2011 PAC 13082.)

The PAC cautioned, however, that although 2.06(g) is silent as to when public comment must be provided on an agenda, ideally a public body would allow members of the public the opportunity to express their views before any proposed action.

8. The PAC says…public officials are not obligated to respond to comments

In a number of opinions, the PAC acknowledged that although section 2.06(g) provides an opportunity to the public to speak, it does not obligate a member of a public body to respond to comments or answer questions. (2011 PAC 12309, 2011 PAC 17388, 2012 PAC 20198.) Section 2.06(g) "does not govern how or whether the public body responds to such comments." (2013 PAC 26928.)

9. The PAC says…section 2.06(g) does not address members of a public body

In a couple of opinions, members of public bodies filed requests for review alleging they were not given adequate opportunity to speak at a meeting. The PAC's position is that section 2.06(g) is intended to ensure the rights of citizens to address public bodies, and does not address the conduct of the meeting by the head of the public body with respect to other members of the public body, so these were dismissed. (2012 PAC 21773 and 2013 PAC 26167.)

10. The PAC says…there is no violation if there is no request to speak

In order to establish a violation of section 2.06(g), the PAC must be presented with evidence that a member of the public was denied the right to address the public body at its meeting. (2013 PAC 24047 and 2013 PAC 24048.) So, even where public comment is not listed on a meeting agenda and no public comment is heard at that meeting, there is no violation unless a person is actually denied the right to speak. (2011 PAC 17388.) A public body is not obligated to solicit public comment, so where no one had filed a request for public comment before a township board meeting, there could be no violation. (2012 PAC 20482.)

CONCLUSION

Although the PAC opinions are advisory only, they do provide some guidance on how the PAC interprets 2.06(g), as well as a roadmap of how the PAC might decide similar requests for review in the future. There are two key pieces of advice that all public bodies should take from these opinions.

First, the PAC's position is clear that every meeting of every public body (including subsidiary bodies) must include an opportunity for public comment. Allowing public comment at regular but not special meetings, or excluding public comment at committee meetings, would constitute a violation of section 2.06(g) in the PAC's opinion.

Second, the PAC interprets section 2.06(g) to impose an affirmative obligation on every public body (including subsidiary bodies) to establish written rules for public comment at meetings. Having a long-standing policy on public comment is not enough to meet this obligation, at least not for the PAC. A municipality would be well-advised to consult with its municipal attorney to ensure that its governing board and all subsidiary bodies and committees have established written rules to govern public comment at their meetings.

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Clients turn to Julie for her advice on the crucial day-to-day issues faced by local governments and her expertise in social media and land use matters.

Julie focuses her practice on local government and land use matters, counseling clients on elections, FOIA, open meetings, ethics, and social media issues. She regularly attends board and commission meetings on behalf of the firm's government clients. She has prepared and updated policies on records retention, electronic communications, and social media. She has been actively advising clients on how to address new laws relating to concealed carry and medical marijuana. She has experience negotiating annexation and development agreements, drafting zoning and other development regulations, and negotiating economic development projects. She also represents clients in land use disputes in state and federal courts.

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- Prepare administrative policies relating to FOIA, social media, electronic communications, medical marijuana, concealed carry, other personnel issues, and the conduct of zoning hearings
- Comprehensive rewrite of zoning, subdivision, sign, and other development regulations
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- Successfully defended a municipality against a developer's equal protection challenge to the municipality's denial of a rezoning application for a student housing development
- Negotiated a settlement to enforce an agreement involving a mixed-use downtown development
- Successfully defended a municipality in an action by property owners challenging the annexation of certain property, affirmed by the Illinois appellate court

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- Social Media & Local Governments
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- Development by Agreement (Minnesota City Attorneys Conference, 2014)
- Guns, Drugs & E-Cigarettes (ILCMA, 2014)
- Municipalities and the First Amendment (IICLE, 2013)
- A DIY Guide to Drafting Ordinances & Resolutions - Minus the Hourly Rate (IML, 2012)
- Vacant Properties: Minimizing the Impacts and Maximizing the Opportunities (ILCMA 2011)

Publications

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- Social Media & Local Governments: Navigating the New Public Square (ABA, 2013)
- The PAC Says…10 Guidelines from the PAC on the OMA's Public Comment Requirement (IML Review, Sept. 2014)
- Development by Agreement: A Tool Kit for Developers and Local Governments (ABA, 2012)
- Planning and Control of Land Development: Cases and Materials, 9th Edition (LexisNexis, 2011)
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- Municipal Annexation Handbook, Ancel Glink Library
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- Subdivisions, Subdivision Controls, and Drainage (IICLE Municipal Law Handbook, 2011)