

Legal Updates on Records Retention, OMA, and Required Website Postings

Illinois Association of School Business Officials
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Part 1 - OMA

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Who Must Comply

Public bodies, including all legislative, executive, administrative, or advisory bodies of the state, counties, townships, cities, villages, and other municipal corporations and subsidiary bodies of those entities

What Meetings are Covered?

“any gathering, whether in person or by video or electronic conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous communication, of a majority of a quorum of the members of the public body held for the purpose of discussing public business”

Electronic Participation

- Must have adopted a written procedure
- Absence may only relate to illness, business or emergency; not vacation
- Approval required to authorize remote attendance
- Quorum must be *physically* present



Notice and Agenda

- Annual notice of all regular board meetings must be provided and posted on website (if applicable)
- Agendas must be posted no later than 48 hours before a meeting and be continuously available for public review during the entire 48 hour period
- Agendas must be provided to news media (if requested) and posted on website (if applicable)

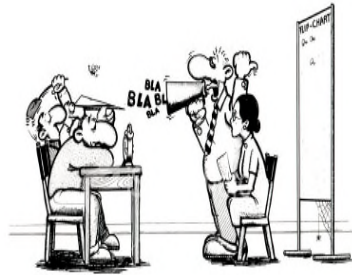
Content of Agenda

- Agenda must provide a reasonable description of the items to be considered
- Agenda must be posted in advance of meeting
- Agendas must set forth the general subject matter of any resolution or ordinance that will be the subject of final action

Open and Convenient to the Public

- Holidays are ok for regular meetings, but not special meetings
- Adequate space for public
- 26 miles away from main office too far?

Right to Public Comment



- “Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.” 5 ILCS 120/2.06(g).
- Public comment can be limited, but only by previously adopted written policies

The PAC Says...

1. Public comment must be provided at all meetings
2. The public comment requirement applies to subsidiary bodies
3. Each public body (subsidiary bodies) must establish rules
4. A public body can establish time limits for public comment
5. A public body can limit comments to topics germane to the agenda
6. A public body can establish and enforce rules on decorum
7. Public comment can be provided at any point in the meeting
8. Public officials are not obligated to respond to comments
9. Section 2.06(g) does not address members of a public body
10. There is no violation if there is no request to speak

The PAC Says...cont.

1. Public body cannot refuse to allow a person to speak during public comment for failure to disclose address.
2. Public body cannot require person to register 5 days in advance of meeting to speak during public comment

Closing a Meeting to the Public

- Only certain topics may be discussed
- Motion required to go into closed session
- Must describe applicable exemption
- Must take minutes and record the closed session

What Topics Are We Required to Discuss in Closed Sessions?

OMA exceptions *authorize*, but do not require, closing meeting to discuss any of the 25 permitted subjects

What Are the Rules About Recording Closed Sessions?

- Section 2.06 of the Open Meetings Act requires audio or video recording of all closed sessions.
- Closed session tapes are *usually* not disclosable under FOIA.

What Can We Do About a Board Member Who Leaks Closed Session Materials to the Press?

- Attempt to censure the board member
- Seek an injunction

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Can We Criticize the Performance of an Employee in Closed Session?

Yes, it is permissible to discuss the hiring, discipline, performance or dismissal of specific employees in closed session.



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Can We Discuss Litigation in Closed Session?

- Yes, a public body can go into closed session to discuss a lawsuit that is filed and pending against the public body.
- A public body can also go into closed session to discuss a lawsuit that is imminent or threatened – must make a finding in closed session.

OMA Training

All members of public bodies subject to the OMA must complete the online training.

E-mail: Friend or Foe?



- If the e-mail exchanges are contemporaneous, they may constitute an improper meeting
- Avoid repeated use of "reply to all"

Enforcement

- PAC Request for Review
- Appeal to Circuit Court

Public Act 99-402

- PA 99-402 modified the existing 60 day limitation period to file a complaint with the Public Access Counselor of the Attorney General's office alleging a violation of the OMA. Currently, an individual has 60 days from the date of the alleged violation to file a complaint. Under the new bill, an individual would have 60 days from the date that they discovered the violation (but no later than 2 years after the alleged violation) to file a complaint with the PAC.

Recent PAC opinions

- PAC Op. 15-007. PAC found a finance committee of a county board in violation of the OMA because merely citing “personnel” in the motion to go into closed session was insufficient.
- PAC Op. 15-005. PAC determined that the Village of Blue Mound violated OMA when it discussed a police services contract in closed session and voted to approve that contract in open session without the item being listed on the agenda.
- 2015 PAC 35101. Public body did not violate the OMA when a school district board did not allow a member of the public to comment on a specific topic and removed the individual from the meeting.

Part 2 – Website Posting

General Website Posting Requirements

1. Annual Meeting Schedule.
2. Meeting Notices
3. Meeting Agendas
4. Meeting Minutes
5. Employee Compensation Package
6. Information About the Public Body
7. Email Addresses for Elected Officials

New Email Posting Requirement

- Units of local government must post on their websites a single, uniform email address that members of the public can use to electronically communicate with their elected officials, unless the officials have individual email addresses for that purpose. [P.A. 98-0930](#). The email address must be "hyperlinked" and easily accessed from the public body's home page.
- The posting requirement does not apply to a government's social media sites such as Facebook, just to the public body's website.
- Effective January 1, 2015, and local governments have 90 days after the effective date to comply with the new posting requirement.

Special School Code Website Posting Requirements

- 105 ILCS 5/1A-9 – Notice to parents regarding rights under Children's Privacy Protection and Parental Empowerment Act
- 105 ILCS 5/2-3.25g – Notice of public hearing regarding drivers education fees and contracts with outside drivers facilities
- 105 ILCS 5/2-3.162 - Disciplinary strategies plan (if required)
- 105 ILCS 5/10-17a – SBOE school district and school report cards
- 105 ILCS 5/34-235 – Notice of emergency resulting in school closing
- 105 ILCS 5/10-16a – Names of school board members who have completed leadership training

Special School Code Website Posting Requirements

- 105 ILCS 5/17-1.2 & 105 ILCS 5/34-43a - Annual budget
- 105 ILCS 5/34-220 - Financial transparency information, including an annual capital expenditure report, list of school properties, and list of all lease agreements
- 105 ILCS 5/17-1.1 - Shared service and fiscal efficiency report
- 105 ILCS 5/10-20.44 – A list of all contracts over \$25,000 and all collective bargaining contracts and annual report to SBOE
- 105 ILCS 5/34-18.38 - Administrator and teacher salary and benefits report

Special School Code Website Posting Requirements

- 105 ILCS 5/27-23.6 - Anti-bias education policies, if adopted
- 105 ILCS 5/27-23.7 - Bullying prevention policy and implementation
- 105 ILCS 5/34-18.22 - Unfilled teaching positions list
- 105 ILCS 5/34-205 - Space utilization standards for each facility
- 105 ILCS 5/34-210 - Educational Facility Master Plan
- 105 ILCS 5/10-17 - Statement of affairs (if applicable)

Part 3 – Social Media

Take Home Tips

1. Gov't social media is probably a public record
2. Be careful not to “censor” comments
3. Employees will behave badly on social media
4. Adopt a social media policy to set guidelines for comments, records retention, OMA, FOIA, employee usage
5. Train, train, train

Open Meetings Act

Will social media interactions and communications by your government officials be considered “meetings” subject to OMA?

TAKE HOME TIP: In Illinois, “electronic communications” appear to include social media communications.

Freedom of Information Act

Is information on your social media sites (posted by you and others) subject to release under FOIA?

TAKE HOME TIP: Like OMA, “electronic communications” seem to include social media content.

Records Retention

Are communications and other information posted on your sites subject to local record retention laws?

TAKE HOME TIP: The Illinois State Archivist just published guidelines for government agencies on what content on social media may be subject to records retention laws.

First Amendment

- Are postings on government social media sites protected by the First Amendment?
- Is a government social media site a “public forum” or government speech?

TAKE HOME TIP: Don't be South Pittsburg.

DON'T - South Pittsburgh Example

Town commissioner's defense of South Pittsburgh's comment policy which prohibits all negative comments on the town's social media sites:

"The first thing everyone wants to say is, 'I can't post anything on Facebook.' Well, you can. Just not [anything] that sheds a negative light on any person, entity, board, or things of that nature."

DO - Comment Policy

The policy should identify the type of content that is not allowed and will be subject to removal.

TAKE HOME TIP: Make sure your comment policy/TOS (or a link to that policy) is posted on your social media sites.

BONUS TAKE HOME TIP: Be specific.

THIS: Discriminatory or racist comments will be removed.

NOT THIS: Criticism of the City will not be tolerated.

Copyright Issues

- Does the government have permission to use content posted on its social media sites (i.e., photos and videos)?
- There is no blanket government exception to copyright laws.

TAKE HOME TIP: Create your own content (i.e., take and use your own photos)

Use of Citizen Photos

- **Typical Photo Release**

Photos and videos are periodically taken of people participating in government programs and activities. All persons registering for government programs/activities, or using government property thereby agree that any photograph or videotape taken by the government may be used by the government for promotional purposes including its promotional videotapes, brochures, flyers, and other publications without additional prior notice or permission and without compensation to the participant.

- **So, what is missing?**

Employees Behaving Badly

- So many examples...

“I wish I could get fired...”

“I wish I could get fired some days, it would be easier to be at home than to have to go through this.”



Sometimes, wishes do come true.

Discipline

Employers can discipline for:

- Excessive use of social media at work
- Disclosure of confidential information
- Making false statements about employer

Protected vs. not protected activities:

- Protected concerted activities among co-workers - protected
- Matters of public concern – protected for public employees
- Individual gripes and personal attacks – not protected

Purpose of a Social Media Policy

- Social media policies are important to:
 - Govern the administration, monitoring, and retention of site content
 - Set ground rules for public input and comments
 - Establish policies for employee use of social media

TAKE HOME TIP: Draft your purpose statement first – all of the substantive policies should further your purpose.

Ex: The purpose of the City's Facebook page is to disseminate information to City residents and others about City activities and events.

Approval and Administration

- An administrator should be appointed to oversee and supervise the government's social media sites.
- The administrator should be trained on the policy and his or her responsibilities.

TAKE HOME TIP: The intern should not be in charge of your social media sites.

Employee Usage Policy

- Establish clear guidelines and boundaries for employee social media activities.
- Communicate whether social media use at work will be banned or minimal use allowed.
- Inform employees if you will monitor their use.

TAKE HOME TIP: Zero tolerance policies are difficult to enforce. Be careful of unequal enforcement. Also, be careful of violating free speech and labor protections.

Employee Training

- Employee training is important, particularly because technology changes so quickly.

TAKE HOME TIP: Have employees sign an acknowledgment that they (1) read the policy and (2) received training.

Questions

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