

2010 Township Officials of Illinois Annual Education Conference

Township Board Practices and Procedures

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QUESTIONS AND ANSWERS - TOWNSHIP BOARD PRACTICES AND PROCEDURES

1. Q: Does the public have a legal right to speak at Township Board meetings?

A: Until recently, the answer was no. While most Illinois Townships allow members of the audience to speak during one or more parts of a meeting, there was no specific right for the public to verbally address the Board (except during public hearings). However, on August 23, 2010, Public Act 96-1473 was enacted, amending Section 2.06 of the Open Meetings Act to provide that “any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.” While the language is somewhat vague as to where and when that opportunity must be provided, it is likely that the General Assembly intended this to require public bodies to provide an opportunity for public comment at at least some meetings open to the public. This Act will become effective on January 1, 2011. We recommend that all public bodies consider enacting or modifying existing rules regarding public comment to comply with this new law.

2. Q: Jerry Smith, who represents the loyal opposition, recently came to one of our meetings and video taped it. He then put embarrassing parts on YouTube. Can he do that?

A: Yes. Anyone has the right to audio or video record a public meeting as long as he or she follows reasonable regulations as to the location of the equipment and non-interference with the meeting. If people are able to distort what you say by running snippets that are unrepresentative of your position, there is little you can do about it. In an extreme case where, for example, tapes are spliced to completely misstate your position, you may have a cause of action for slander.

But, since you are a public official, you must prove that the slander was not only false, but also malicious rather than just a poor attempt at humor.

3. Q: In the middle of a Township Board meeting discussion, a Trustee “tweeted” that she was going to vote against the contract being discussed. Two of the other Board members have Twitter accounts, and they both saw the Trustee’s “tweet” during the Board’s discussion. Later, all of the Board members who are on Twitter voted against the contract. Did the Trustee’s actions in tweeting during the meeting, or the vote, violate the Open Meetings Act?

A: No. The Open Meetings Act requires meetings to be open to the public. The Act does not yet prohibit notes from being passed between officials at a meeting, nor electronic communications between officials during a meeting. Similarly, the Trustee could have stated at the meeting how she was going to vote, or held up a sign stating how she intended to vote, and such would not be a violation of the Open Meetings Act.

4. Q: Does a Trustee violate the Open Meetings Act if he e-mails his position on an upcoming vote to the other Board members?

A: No. The Open Meetings Act prohibits contemporary electronic communication. Unless a majority of a quorum is involved in a chat room or communicates by e-mail every few minutes to replicate a multi-party conversation, a single e-mail should not be problematic.

5. Q: Can a public body secretly monitor or review employees' e-mail and Internet use on the employer's computers?

A: Under some circumstances, yes, but not always. The legal issues are (1) whether the employee has a "reasonable expectation of privacy" in his or her use of the computer and (2) whether the employer's "search" is reasonable under the particular circumstances. A written policy stating that employees' use of office equipment is subject to audit and monitoring by the employer will help to diminish an employee's expectation of privacy, but may not nullify it completely. The U.S. Supreme Court recently held (*City of Ontario v. Quon*) that a search of employee text messages was reasonable even though the employee had a reasonable expectation of privacy. Employers should seek legal advice before searching an employee's property or communications on the employer's premises or equipment. For more information, please see our Fall 2010 newsletter.

6. Q: Can a Township remove comments posted on its government-sponsored Facebook page that it finds objectionable?

A: It depends. The removal of posted comments might implicate the First Amendment if a social media site sponsored by a governmental entity is considered a public forum. While governments can probably remove content that is offensive, vulgar, denigrating, and completely out of context, content that is simply politically unfavorable or negative in the context of the conversation should be allowed to remain. Some communities have avoided this issue entirely by disabling the comment portion of a government networking site. For more information, consult the recent article on social networking by governmental bodies in Ancel Glink's Fall 2010 newsletter.

7. Q: Can a Trustee demand to see any of the books, records and papers of any agent, employee or officer of the Township?

A: It depends. A string of recent cases and Attorney General's decisions in Illinois and in other States indicate that Trustees should be able to see documents that are needed to assist them in making legislative decisions. Township employees or officers are not required to stop what they are doing and spend all of their time answering inquiries from Trustees. Elected officials also have the ability to file Freedom of Information Act Requests just like any other citizens.

8. Q: Can a Trustee who misses a closed session ask to listen to the tape recording of the closed session or see the minutes?

A: Yes, if the Trustee would have been legally able to participate in the meeting had he or she been present and there would have been no conflict. The normal keeper of the tapes can utilize security measures to assure that the tape will not be altered, such as having someone present while the tape is being reviewed.

9. Q: Must the Township's contract for the construction of a new town hall require compliance with the Prevailing Wage Act?

A: Yes. The Act (820 ILCS 130/4) requires that the Township cause to be inserted in the project specifications and the contract a stipulation to the effect that not less than the prevailing rate of wages as found by the public body or Department of Labor or determined by the court on review shall be paid to all laborers, workers and mechanics performing work under the contract. The fact that the Act does not apply to professional services does not excuse the Township from requiring compliance where the Act does apply. Moreover, engineers occasionally hire subcontractors that do perform work that is subject to the Act and, in that

instance, the Act requires the term be present in both the contract and the subcontract.

10. Q: The steel subcontractor making the grab bars for our new building claims that the Prevailing Wage Act does not apply to it because it has no employees but only owners who do the work. What should the Township do about the certified payrolls?

A: Get that position in writing from the contractor and put it in the file.

11. Q: Can a member of the public successfully challenge the passage of a controversial matter by a Township at the end of a meeting that extended to 1:30 a.m.?

A: No. So long as the meeting began at a reasonable time and the actual conduct of business, including the controversial matter, extended to that time, its passage at a late hour will not invalidate the action. There are, however, ways to shorten meetings.

12. Q: One of our Trustees is going to be in Bora Bora on his honeymoon during an important vote. He would like to participate in the Board meeting via video conference. We have adopted an electronic participation ordinance. Can he participate in the meeting just for this vote?

A: No. Section 7 of the Open Meetings Act specifies that (a) If a quorum of the members of the 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 other means if the member is prevented from physically attending because of: (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency. "Other means" is by video or audio conference. A personal vacation or honeymoon does not constitute an appropriate absence. If a member wishes to attend a meeting by other means, the member must notify the recording secretary or clerk of the public body before the meeting unless advance notice is impractical. A majority of the public body may allow a member to attend a meeting by other means only in accordance with and to the extent allowed by rules adopted by the public body in accordance with the Act.

13. Q: When does a public body have to approve and release minutes of its open meetings?

A: Pursuant to Public Act 96-1743, as of January 1, 2011, a public body must approve minutes of open meetings within 30 days after the meeting, or at the public body's second subsequent regular meeting, whichever is later. Prior to the new law, there was no deadline for approval of minutes of open meetings. Approved minutes must be available to the public, and posted on the website, if applicable, within 10 days after their approval (prior to Public Act 96-173, it was 7 days).

14. Q: Our office is getting cluttered and we want to go through and start pitching records that are over five years old. Can we do that?

A: Not unless destruction is authorized in accordance with the Local Records Act, 50 ILCS 205/1. Section 10 of that Act provides that documents which fall within the definition of "public records" (which includes anything pertaining to the business of the governmental unit), may be discarded only after review and approval of the Local Records Commission, a State agency. Information about the LRC is available on the State of Illinois web site, the Illinois State Archives, in the office of the Secretary of State. To obtain approval to destroy local records, the head of the governmental unit must apply to the Commission, listing all of the documents to be discarded.

15. Q: Do some Township officials need to take oaths of office?

A: Yes. Before entering upon the duties of their respective offices, every person elected or appointed to hold the office of Supervisor, Clerk, Assessor, Trustee, Highway Commissioner, or Collector, is required to take and subscribe to the oath or affirmation required by the Illinois Constitution. 60 ILCS 1/55-10. Within eight days after the oath or affirmation is taken and subscribed, it must be filed in the office of the Township Clerk or Clerk of the Multi-Township Board, as the case may be, and the County Clerk. 60 ILCS 1/55-10.

16. Q: Must an oath of office be sworn to at a public meeting?

A: No. The commencement of these Township offices requires the taking of an oath or making an affirmation. This action can, however, be taken before any person authorized to give oaths, such as a notary public.

17. Q: Our Township is having budget issues. May we lower the salary of the current Supervisor?

A: No, the Constitution provides that the salary of elected officials cannot be increased or decreased during their term. Salaries must be fixed at least 180 days before the beginning of the terms of office.

18. Q: Can a Township Board go into closed session to discuss whether it wishes to construct a town hall?

A: No. When a governmental body goes into closed session to discuss the acquisition of land, it may only do so after it has specific sites in mind and then only for the purpose of setting prices which it will authorize its representative to offer for the parcel. The purpose of the closed session is only to allow the Township's representative to engage in a negotiation process without giving away the maximum price which might be paid.

19. Q: What is the process for constructing a town hall?

A: It is a complicated process involving various statutory provisions governing different aspects of the project, such as engineering, bidding, and construction contracts. Any time that a contract is estimated to cost more than \$20,000, competitive bidding must be considered. If your Township is considering the construction of a new town hall, or any other large public works project, it is best to consult your attorney.

20. Q: If the Township Supervisor doesn't like the way a meeting is going, can she simply adjourn the meeting and walk out?

A: The Supervisor may walk out at any time, but unless her departure causes the loss of a quorum in attendance, the meeting can go on with the remaining Trustees choosing a presiding officer.

21. Q: Our Supervisor got very angry at a Board meeting and stormed out of the meeting saying "I don't need this aggravation. You won't see me again." We selected one of the Trustees as the presiding officer. Has the Supervisor resigned?

A: Not officially. Illinois law now requires an elected official to resign in writing. The Supervisor may be back at the next meeting. If she continues to be absent from meetings, the Board may hold a hearing, with notice to the Supervisor, and conclude that she has abandoned her office. If she really intended to resign, someone who is a notary should go over to her house with a letter of resignation, and ask her to sign and notarize it.

22. Q: One of our trustees just resigned. How do we fill the vacancy in office?

A: The remaining members of the Township Board must fill the vacancy within 60 days with a person of the same political party as the person vacating the office. The appointee must establish his or her political party affiliation by showing his or her voting record in party primary elections. If the vacancy is not filled within 60 days, then a special town meeting of the electors must be called to select a replacement 60 ILCS 1/35-35; 60 ILCS 1/60-5.

23. Q: May two Trustees call a special meeting?

A: Yes. A special meeting may only be effectively called by the Supervisor, or by any two Board members.

24. Q: Do all Board meetings have to be held at the Township Hall?

A: No. Many Townships do not even have Township halls or formal meeting places. Governmental bodies in Illinois are given broad discretion as to the frequency, time, and place of their meetings. Meetings must be noticed in accordance with the Open Meetings Act, and they must be conducted at a time and place that is convenient for the public to attend. Occasionally, governmental bodies may wish to meet outside of the Township boundaries to gain access to better facilities or to a larger meeting room. If properly noticed, Townships can also hold open session retreats outside of the township.

25. Q: May local governments hold joint public meetings?

A: Yes, so long as the meetings are properly publicly noticed with posted agendas and the meeting is held in a place convenient to citizens of both governments, this is proper.

26. Q: If a Township wants to go into closed session to discuss probable or imminent litigation, do any special requirements apply?

A: Yes. At the open meeting, the motion to go into closed session need only provide that the subject to be discussed is probable or imminent litigation. In every closed session called for this purpose, someone needs to state for the record the nature of the probable or imminent litigation along with the reason why the governmental body feels that litigation is either probable or imminent. A governmental body may not go into closed session to simply discuss an issue which may be so

controversial that someone may feel that litigation could be contemplated by the presumed opponents.

27. Q: What is the earliest possible time we can erase the tape of a closed session meeting?

A: Eighteen months, provided that certain conditions have been met, including that the minutes of that meeting have been approved for content and the destruction has been approved by the Township Board. The Open Meetings Act requires that minutes be taken of all meetings, whether open or closed to the public. Minutes of closed meetings should be approved for content in closed session. Every six months, the corporate authorities are required to review the minutes of closed session meetings which have not previously been released to the public to determine whether the minutes still need to be kept in confidence or whether such minutes, or portions thereof, no longer require confidential treatment and should be available for public inspection. That determination should be formalized by resolution in open session. (5 ILCS 120/2.06(c)). Governments are also required to record closed sessions on audio or video tape. The tapes can be erased after 18 months if the written minutes of the meeting have been approved for content, the destruction has been approved by the Township Board, and there has been no lawsuit filed to contest the validity of the closed session. The tapes may also be available for discovery in a federal court suit, having nothing to do with the open meetings issue. In that case, the Township will be entitled to the attorney-client privilege for comments made by the attorney or relating to strategy.

28. Q: The Township Administrator would like to work on a local Mayor's re-election campaign. Is this legal?

A: Yes, as long as he or she does not perform such work on paid Township time. Employees of local governments (including Townships) are permitted to work for candidates running for election to office, including an office of the governmental unit which employs them, but not while they are "on the clock." Township employees may not be required to work for candidates during compensated time. The "State Officials and Employees Ethics Act," 5 ILCS 430-15, which local governments must make applicable to their employees, sets out "Prohibited Political Activities." Employees may not engage in these political activities during any hours for which they are receiving compensation. No employee may be rewarded for engaging in political activities for a candidate. The law does not prohibit employees from engaging in political activity voluntarily off duty, without governmental compensation.

Specific prohibitions include the following:

- (a) No officer or employee shall intentionally perform any prohibited political activity during any compensated time.
- (b) No officer or employee shall intentionally use any property or resource of the governmental entity in connection with any prohibited political activity.
- (c) No officer or employee shall intentionally require any other officer or employee to perform any prohibited political activity (i) as part of that officer or employee's duties, (ii) as a condition of employment, or (iii) during any compensated time off (such as holidays, vacation or personal time off).
- (d) No officer or employee shall be required at any time to participate in any prohibited political activity in consideration for that officer or employee being awarded additional compensation or any benefit, whether in the form of a salary adjustment, bonus, compensatory time off, continued employment or otherwise, nor shall any officer or employee be awarded additional compensation or any benefit in consideration for his or her participation in any prohibited political activity.

29. Q: Our Township FOIA officers are very confused about the new FOIA requirements. Where can we get more information about FOIA?

A: Perhaps Ancel Glink can help. However, there is also training available on the Illinois Attorney General's website at <http://foia.ilattorneygeneral.net>.