

FREEDOM OF INFORMATION ACT AND OPEN MEETINGS ACT

The Freedom of Information Act (FOIA) and the Open Meeting Act (OMA) are two statutes that place significant obligations on local governments. While the requirements of FOIA to copy and distribute public records to citizens and the requirements of the Open Meetings Act may seem at times onerous, these statutes on the whole benefit a local government and its officials by making the operations of government visible to anyone who cares to observe. The following questions introduce you to some of the requirements of FOIA and OMA and some common issues that arise.

1. Q: How should a municipality respond to requests for public records that are sent to the municipality by email?

A: The Freedom of Information Act does not address this issue directly. However, FOIA does authorize public bodies to adopt rules and regulations pertaining to the availability of public records and procedures for administration of requests for public records. Many communities have adopted FOIA policies and created form documents that make the Village Clerk's responsibilities more clear and the FOIA program easier to administer. A FOIA policy typically identifies the accepted methods for submitting requests for public documents. If you have a specific policy with respect to the method for submission of FOIA requests, it is recommended that this policy be followed on a consistent basis. Consequently, if your policy accepts FOIA requests only by personal delivery or mail, then that is the process that should be followed to avoid any allegation of unfair or discriminatory activities. If you receive a request that is submitted in a manner contrary to your FOIA policy, it is recommended that you respond in writing with a copy of the required form and policy (or summary of the applicable provision relating to approved methods for submission of FOIA requests).

Because this issue appears to be relatively new, you might consider amending your FOIA policy to address email requests (or if you do not have a policy, you might consider adopting one). Some public bodies have established policies that permit FOIA requests to be submitted by email and others do not – this is a policy decision for the public body to make.

2. Q: What do you do with minutes and tape recordings of closed session meetings?

A: The statutes require that minutes be taken of all meetings, whether open or closed to the public. Minutes of closed meetings should be approved 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 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

municipality will be entitled to the attorney-client privilege for comments made by the attorney or relating to strategy.

3. Q: What do you do if a citizen makes repeated requests for copies of voluminous documents?

A: Under the Freedom of Information Act, if a citizen makes repeated requests for copies of voluminous documents, the government can ask to meet with the individual to determine whether there is a way to shorten the requests. In addition, a governmental body can require an advance payment from a citizen where past experience has shown that copies of documents are requested but not picked up. A government can also reject a request as being overly burdensome – but it better be correct in its determination.

4. Q: If a governmental body goes into closed session and the audio taping machine does not work, what should it do?

A: Stop the meeting. The Open Meetings Act now requires all closed sessions to be audio or video recorded. For that reason, even if the closed session had been valid, the meeting would need to cease when the recording equipment did not work.

5. Q: A member of the zoning board consistently goes to the board's secretary after a meeting and tells her to write the minutes according to what he thinks was "meant to be said" at the meeting rather than what the secretary actually wrote in her notes. Is this proper procedure?

A: Not at all. An individual board member has no authority to tell the secretary what to write in the minutes. The chairperson of the board should tell the errant member to cut it out, and should tell the secretary to write the minutes according to what actually occurred at the meeting. A tape recording of the meeting would eliminate any doubt about what was actually said. Then, at the next meeting, when the minutes are presented for approval, the member who wants them changed can move to amend the minutes as he would like them to read. The full board then can decide whether to approve the amendment.

6. Q: As administrative assistant, I keep all of the board minutes, ordinances, board packets, etc. How long do I have to maintain the signed paper copies of the minutes? Right now I have the original signed copies in ring binders and I also print out and put them in a leather-bound book (without the signatures). What about the "board packets" themselves? The volume of paper is overwhelming.

A: Board minutes and ordinances with original signatures should be permanently maintained and properly indexed. You never know when it's going to be important to determine exactly what the board did in 1939, or why, 50 years from now, someone is going to want to be able to find the minutes of last week's meeting, but it will happen. Ring binders are OK for copies of the current year's minutes, to make them easily accessible, but the originals should be stored in fireproof file cabinets. State law requires that destruction of permanent public records must be approved by the State Librarian. The librarian will send a representative to visit your community and will work with you to produce a schedule for the destruction of records.

7. Q: Can a citizen bring a video-tape recorder to village board meetings?

A: Section 2.05 of the Open Meetings Act addresses the question of the public's right to record the proceedings of public meetings. While citizens can use tape, film or "other means," the public body may establish "reasonable" rules of procedure governing the use of such equipment and may also prohibit certain kinds of recordings if individuals who are testifying represent that they do not wish to be so recorded. These restrictions are reasonable since they do not interfere with a citizen's right to attend and, where allowed, participate in public meetings or to take notes of those meetings.

8. Q: What do you do if the Clerk is ill and cannot take the minutes?

A: An opinion by the Illinois Attorney General makes it clear that the Municipal Clerk is entitled to take minutes of the meetings of the corporate authorities. If the Clerk is ill and cannot take the minutes, and there is a Deputy Clerk, that individual should take the minutes. If the Clerk or Deputy Clerk is not present, then the council or board can and should appoint a recording secretary to take the minutes of the meeting. Clerks are also permitted to attend all meetings of the corporate authorities, both open and closed meetings. The Clerk can be barred from attendance at a closed meeting only when the matter being discussed is one in which the Clerk's position is adverse to that of the municipality, such as in litigation involving the Clerk.

9. Q: Can a public body hold a meeting with less than 48 hours' notice?

A: The meetings of all governing bodies and committees of public bodies in Illinois, other than regularly-scheduled meetings, require at least 48 hours prior notice. That notice is to be given by posting information about the meeting at the principal office of the governmental body and furnishing the notice and agenda to news media, which have registered with the municipality in the manner provided by statute. 5 ILCS 120/2.02. The one exception to the 48-hour notice requirement is when a meeting, otherwise requiring this notice, must be called in the case of an emergency. The statute does not describe the nature of the emergency, but the courts would be expected to liberally interpret this provision so long as one might reasonably believe that a meeting of this nature would be in the public interest and that a delay in the meeting time would be detrimental. Notice of an emergency meeting must be given as soon as practicable by posting and a reasonable effort must be made to contact registered news media. Like a special meeting, an emergency meeting can only be used to discuss and act upon the specific matter or matters which were mentioned in the notice of the meeting and the agenda. For a special meeting or an emergency meeting called for a specific purpose, the notice and the agenda can be quite similar.

The fact that a governmental body may meet on less than 48 hours' notice does not empower that body to take any other actions which are inconsistent with the lawful authority to act otherwise possessed by that body. The statutes relating to various governmental bodies would generally give a governmental unit, meeting under emergency conditions, the ability to take actions necessary to protect the interests of the governmental body. Sometimes, however, actions such as the ability to enter into contracts without public bidding require a greater than a majority vote. (See, for example, Act, §5/5-9-1, which allows municipal contracts to be entered into without bidding upon the vote of at least two-thirds of all the aldermen or trustees then holding office.)

10. Q: Can a City Clerk take part in discussions during a City Council meeting or during executive session? If a question is raised during a City Council meeting or during executive session and no one knows the answer but the City Clerk, can she answer the question(s)? Also, are there rules and regulations on how an Alderman should conduct himself/herself during a City Council meeting? Can an Alderman during a City Council meeting or during executive session call other Aldermen and the Mayor names? Can he or she conduct himself or herself in such a way as to scare the public by such actions? If so, what can the mayor do to prevent this from continuing?

A: State law provides that the corporate authorities of a municipality are composed of the Mayor or President and a council or board. The Clerk, while having important duties in the municipality, is not a member of the City Council or the Village Board, and has no inherent right to speak at any meetings of that body, whether in closed or open sessions. The Clerk, by statute, does have the right to attend all board or council meetings, and we have interpreted that direction to mean that the Clerk cannot be barred from attending any meeting, open or closed, of the council or board except in a situation where that body is appropriately discussing the performance of the clerk or where the clerk is the subject of the meeting, such as litigation by or against the Clerk. Having said that, in many smaller municipalities, the Clerk sometimes is one of only a few full-time employees of the governmental body in the municipal building on a regular basis, and can certainly be asked or can even volunteer the answer to questions. If the question of the Clerk's participation becomes an issue, the council or board can pass a procedural rule which indicates that, for example, the Clerk may address the board when called upon by the Mayor to do so.

The question of Aldermen or Trustees who are rambunctious or worse is a nightmare for every municipality. If the Alderman or Trustee violates some specific rule of the municipality, such as calling other Aldermen and the Mayor bad names, that person can be dealt with under the Act, §5/3.1-40-15. That provision provides: "The city council shall determine its own rules of proceedings and punish its members for disorderly conduct. With the concurrence of two-thirds of the aldermen then holding office, it may expel an alderman from a meeting, but not a second time for the same incident." This rule applies in Villages as well. The Council could also establish a set of rules by ordinance and prosecute an offending Alderman or Trustee, letting the circuit court decide whether a fine should be imposed. Ultimately, getting rid of a "bad Trustee or Alderman" or even a Mayor is a job for the electorate.

11. Q: Our Village routinely has a certified court reporter record every planning commission and zoning board meeting. Do we need to have a verbatim transcript of these meetings instead of regular minutes? The court reporter is very expensive.

A: Shortly after the Illinois Supreme Court issued its decision in the "Klaeren" case, in 2002, many municipalities became very concerned about keeping a verbatim record of hearings dealing with special uses. This was because, under the Klaeren ruling, all special use cases had to be reviewed in court only on the record which was created in the municipal hearing process. Thus, it was important to have a verbatim record. But that rule only applied to special use hearings. The ruling in Klaeren has now been reversed by new state legislation. Thus, it is not as important to have a verbatim transcript of what took place in the municipal hearing process. The minutes of the meeting can be prepared from the clerk's or secretary's notes, just as they are for a board meeting. However, some municipalities do feel that a full transcript is

helpful to the Aldermen or Trustees in reviewing the evidence presented at the hearing, and so are willing to pay for the cost of regularly using a court reporter and producing a transcript. Some municipalities only use a court reporter and have a transcript prepared in controversial or complicated cases. The production of a transcript for the use of the board or council as it makes its legislative decision may prevent an effort to re-hear the case at that final level.

12. Q: Are the invoices submitted by consulting attorneys to governmental bodies and their record of payments subject to the Freedom of Information Act?

A: One section of the Freedom of Information Act allows a government to withhold communications with its attorney which would not be subject to discovery in litigation. Another section exempts from disclosure any information which is specifically prohibited from disclosure by federal or state law. These sections can serve as the basis for withholding legal billing information in some, but not all circumstances. We believe that legal bills are generally subject to disclosure under FOIA, unless the records contain legal advice or reveal the substance of an attorney-client confidence. The courts have held that a client's fees are usually not considered a confidential communication protected by the attorney-client privilege, since the payment of fees is merely incidental to the attorney-client business relationship. If a request is made for a final version of attorney's fees submitted, even before paid, it is likely that a court would order such records to be turned over, once they were within the hands of the governmental body, but only after the government had been allowed to delete portions of the invoices which otherwise fit within exemptions of the Freedom of Information Act, such as privacy, active legal advice, or an attorney-client confidence. The dollar amounts paid by a governmental body to an attorney should always be subject to citizen inquiry. The Freedom of Information Act is not, however, designed to compel the compilation of data the governmental body does not ordinarily keep or to provide answers to questions posed by the inquirer. A copy of the invoice itself, with appropriate deletions, should satisfy the inquiry.

13. Q: Does an elected public official have the right to see records of that governmental body, or is it necessary to file a Freedom of Information Act request?

A: This question is frequently asked by elected officials who find themselves in the political minority, or who are lone or semi-lone wolf members of councils, boards or commissions. The question comes from Aldermen, Trustees, and Commissioners in municipalities and members of the legislative bodies of school districts, park districts, townships and even county boards. In most such cases, the records being sought are kept by the executive branch. In some cases, they are kept by an independent elected official such as a Clerk or an appointed official such as a secretary. When these officials are politically aligned, access to records by other officials who are viewed as political opponents can become a political football. In the municipal context, this issue is made difficult by the fact that, by statute, it is only the Mayor or President who is given the specific statutory power to "at all times...examine and inspect the books, records and papers of any agent, employee or officer of the municipality." Act, §5/3.1-35-20. Or it could be the executive officer who wants records in the custody of an independently-elected official such as a Clerk or Treasurer.

The issue has been addressed by both the judicial system and the Attorney General. In the case of *Ebert v. Thompson*, 282 Ill.App.3d 385, 387-388 (1st Dist. 1996), the Appellate Court found that

a public official is not required to file a FOIA request to obtain a record reasonably needed in the performance of his or her official duties. This case involved township officials.

The Attorney General has concluded that “while a member of a public body is not necessarily entitled to a particular document of a public body merely because they are members of that body, a board member cannot be denied access to information relevant to the exercise of his or her duties, including information that would not generally be subject to public disclosure.” Att’y.Gen.Op.32, 1996, Att’y.Gen.Op.36, 2001.

The current Attorney General, Lisa Madigan, supports these views and in a recent letter involving a school district, her office concluded that a member of a school board was entitled to a copy of a settlement agreement entered into between the school board and a private party. In that situation, the attorney for the school district concluded that the settlement agreement was a public record, but that the elected official was required to file an FOIA request to obtain that information. The office of the Attorney General agreed with the elected official, that the materials should be available upon a simple request, and pointed out that the opinions of the Attorney General are to be given considerable weight as interpretations of Illinois law.

The Appellate Court case, and the Attorney General’s Opinion are simply signposts in a legal trend around the country which began 10 or 15 years ago in which courts are prepared to enforce the rights of elected public officials to be able to access, because of their position, certain records which might not be available to the general public. Obviously, the courts will not support fishing expeditions by elected officials whose motivation is clearly political, but, where the action of the official or governmental body refusing access to the data seems itself to be politically motivated, the trend of the law is to require the information to be provided.

14. Q: Is the Clerk entitled to attend closed sessions?

A: Yes. By state law, the Clerk is entitled to attend all meetings of the board or council with the exception of those meetings which may specifically involve the performance of the Clerk, a criminal investigation involving the Clerk, or litigation when the Clerk is opposing the municipality. Any effort to bar the Clerk from a meeting should be discussed with the municipal attorney.

15. Q: Can an item be discussed and voted on if it does not appear on the agenda?

A: Any item can be DISCUSSED at a meeting, even if it was not on the published agenda. However, appellate court decisions have held that it is improper to VOTE on an item which is not on the agenda. We advise our clients not to vote on matters which do not appear on the agenda. If it is absolutely necessary to act on some matter, a special meeting or even an emergency meeting can be convened, on proper notice, with the crucial item, for action, being shown on the agenda.