Open Meetings Act

[The following materials were developed by the Office of the Attorney General for the State of Illinois and are available at http://foia.ilattorneygeneral.net/. They are current through August 20, 2011.]

In 2009, the General Assembly enacted significant changes to the Open Meetings Act. These changes, enacted as Public Act 96-542, effective January 1, 2010, require every public body to designate one or more officials or employees to receive training on compliance with the Open Meetings Act (5 ILCS 120/1 et seq.) (referred to in this training as "OMA").

Each public body is required to submit a list of one or more officials or employees designated to receive OMA training to the Public Access Counselor in the Attorney General's Office. Within six months of their designation, each designee must successfully complete an initial electronic training curriculum, and then must complete an annual electronic training program. The Public Access Counselor (referred to in this training as the "PAC") is responsible for developing these training programs and providing them for free.

No training program, no matter how complete, can cover every circumstance that you may encounter. The goal of this program is to familiarize you with the general principles of the Open Meetings Act, and to acquaint you with the statutory provisions that you will need to consult in complying with the Act. For additional information including "Frequently Asked Questions", the "Public Access Counselor Guide" and other helpful informational materials, please visit the Attorney General's website at www.illinoisattorneygeneral.gov.

Throughout this program, you will be prompted to answer questions concerning a short hypothetical situation. At any time during the program, you may click on the link to OMA to help you answer the questions or better understand the problem. You must complete each section of the OMA training program. The program will not allow you to jump forward through sections you have not viewed. However, you may go back through the program to review information you have already seen and then return to your previous point. Once you have completed the OMA training program by studying and answering the questions concerning each hypothetical, you will be able to print a certificate showing your successful completion of the training. Please keep this certificate for your records.

When you have completed this training, you will have a working understanding of:

- the public policy of the State of Illinois regarding meetings of public bodies;
- the definition of a "public body," for purposes of OMA;
- the definition of a "meeting," for purposes of OMA;
- how OMA applies to electronic gatherings;
- what matters can properly be discussed in a closed meeting, and how to properly hold a closed meeting;
- how and when a notice of a meeting must be given;
- when minutes and verbatim recordings of a meeting are required;
- how OMA is enforced; and
- the role of the PAC with respect to OMA.

Public Policy

It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. The General Assembly has declared that it is the intention of OMA to ensure that the actions of public bodies are taken openly and that their deliberations are conducted openly. (5 ILCS 120/1).

Advance notice of public meetings is a part of this public policy, as is the principle that exceptions to allow closed meetings are to be interpreted narrowly.

Public Bodies

OMA applies to all "public bodies" as defined in the Act. The definition of "public body" includes: "all legislative, executive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, except the General Assembly and committees or commissions thereof." (5 ILCS 120/1.02).

OMA clearly covers meetings of various subgroups, such as committees, subcommittees and advisory bodies of public bodies, whether or not they spend or use tax revenue.

OMA, however, applies only to public bodies. It does not apply to private, not-for-profit corporations, even if such corporations administer programs funded primarily by governmental agencies and are required to comply with government regulations, as long as the boards of directors and employees of such corporations are free from direct governmental control.

<u>Examples of Public Bodies</u>

The courts of the State of Illinois have provided several examples of what they consider a "public body." For example, the Supreme Court of Illinois has concluded that OMA is applicable to a "political caucus" of city council members, because: "[OMA] states that '[a]ll meetings of any legislative, executive, administrative or advisory bodies * * * and any subsidiary bodies of any of the foregoing including but not limited to committees or subcommittees * * * shall be public meetings * * *.' (Emphasis added.) (Ill. Rev. Stat. 1977, ch. 102, par. 42.) We interpret the foregoing to mean that the Act was intended to apply to more than meetings of full bodies or duly constituted committees. Thus, 'body' must necessarily be interpreted to mean an informal gathering of [at least a majority of a quorum] of a legally constituted public body." People ex rel. Difanis v. Barr, 83 Ill. 2d 191, 201 (1980) (emphasis added).

In a case regarding Springfield's advisory Human Relations Commission, the Illinois appellate court stated: "The plain language of [OMA] says public bodies, including advisory bodies to home rule units such as the Springfield Human Relations Commission, must meet publicly unless they are authorized by statute to hold closed sessions in certain instances." I.N.B.A. v. Springfield, 22 Ill. App. 3d 226, 228 (5th Dist. 1974).

The Illinois appellate court has also held that a university athletic council, appointed by the university senate to advise the president of the university and a committee of the university senate, is subject to OMA. In reaching its decision, the court concluded that the university senate, as a creature of the Board of Regents, was a subsidiary body for purposes of OMA. The council was

therefore subject to OMA because it was a subsidiary body of the senate, which is a public body. Board of Regents v. Reynard, 292 Ill. App. 3d 968, 978 (4th Dist. 1997).

What is a "Meeting"?

A "meeting" includes 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, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business.

With respect to 5-member public bodies, 3 members of the body constitute a quorum and the affirmative vote of 3 members is necessary to adopt any motion, resolution, or ordinance, unless a greater number is otherwise required. (5 ILCS 120/1.02)

Put simply, the definition of OMA has three parts. A "meeting" to which OMA applies is:

- a gathering;
- consisting of a majority of a quorum (or a quorum, in the case of 5-member bodies) of the members of a public body;
- held to discuss public business.

Because each subsidiary body of a public body is a separate public body under OMA, the Act is applicable any time there is a gathering of a majority of a quorum of the members of the subsidiary body held for the purpose of discussing public business. Whether OMA's requirements are applicable is not determined by the total number of members of the principal public body, but by the number of members of the subsidiary body.

Public meetings must be held at times and places convenient and open to the public. A public meeting may not be held on a legal holiday "unless the regular meeting day falls on that holiday." (5 ILCS 120/2.01).

What is a "Gathering"?

When OMA was first enacted in 1957, the term "gathering" generally meant several people physically coming together at a common location. However, advances in technology now allow people to "gather" from remote locations through the use of telephones, audio- and video-conferencing and the Internet, among other media.

OMA exists to ensure that the actions of public bodies are taken openly and that their deliberations are conducted openly. Electronic gatherings outside the public view cannot be used to circumvent this policy.

To end any lingering doubt as to whether OMA applies equally to electronic communications, effective January 1, 2007, the General Assembly amended the definition of "meeting" by adding specific references to audio- and video-conferences, telephone calls, electronic means including electronic mail, electronic chat, and instant messaging, or other means of "contemporaneous interactive communication." (5 ILCS 120/1.02).

This amendment does not mean that a public body cannot properly use electronic means to conduct a meeting. However, such meetings must comply with all other requirements of OMA, including advance notice and an opportunity for the public to be present, and also statutory limitations on the circumstances in which members of a public body may participate electronically, which will be discussed later in this training.

What is a “Majority of a Quorum”?

The definition of “meeting” applies only when at least a majority of a quorum of the public body is gathered.

The term “quorum” refers to the minimum number of members of a public body that must be present at a meeting to take official action. Unless the law otherwise provides, a quorum of a public body is a majority of the total number of members of the body. A “majority of a quorum” is the smallest number of members of a public body able to control action when a bare quorum is present.

A majority of a quorum is a sliding figure, easily computed, that increases with the size of the public body. For example, if a public body has seven members, a quorum of that body is four, and a majority of the quorum is three. Therefore, three is the smallest number of members of the body to which the term “meeting” applies. If a public body has 29 members (as some county boards do), a quorum would be 15 and a majority of the quorum eight. Thus, up to seven members of the county board could gather to discuss public business without that gathering constituting a “meeting” of the board.

As previously noted, because OMA applies separately to committees and other subgroups of public bodies, the number of members of the committee or subgroup, not the number of members of the principal body, will determine whether OMA applies. Thus, although two members of a seven-member board can discuss board business in compliance with OMA's requirements, those two members cannot meet privately to discuss committee business if they are members of a committee with only three members.

Special Rule for Public Bodies with Five Members

OMA was amended in 2007 to specifically define a “meeting” for five-member public bodies as a gathering of a quorum (rather than a majority of a quorum) of the members of the public body held for the purpose of discussing public business. A quorum of a five-member public body is ordinarily three members. Prior to the amendment, the general definition of a meeting effectively precluded two members of a five-member body from discussing public business except in a meeting complying with all OMA requirements, because those two members constituted a majority of a quorum of the body. The amendment, however, also raised the number of votes necessary to conduct business to three. Thus, two members can no longer control business if only three members of the five-member body are present, since any action requires a minimum of three affirmative votes.

What is “Discussing Public Business”?

The third part of the definition of “meeting” refers to gatherings “held for the purpose of discussing public business.”

OMA does not apply to purely social gatherings. The mere presence of at least a majority of a quorum of a public body's members at a gathering is not sufficient to make the gathering a

"meeting," for purposes of OMA. What determines whether a gathering is a "meeting" is what the public body members gather for and what they do once they have gathered.

Although a gathering may not be planned with the intent of discussing public business at its outset, the gathering may become a "meeting" at any point. For example, if at least a majority of a quorum of the members of a public body are present at a dinner party, and the conversation turns to a deliberative discussion of public business upon which their attention is focused, the gathering becomes a "meeting" for purposes of OMA. Unless all requirements of OMA have been complied with (which is unlikely in the case of a social gathering), this constitutes a violation of the Act.

The phrase "discussing public business" refers to an exchange of views and ideas among public body members on any item germane to the affairs of their public body. It is not directed at casual remarks, but at discussions that are deliberative in nature. As set forth in the public policy statement, OMA extends to gatherings for deliberation as well as gatherings for the taking of action. A deliberation in this context is a discussion aimed primarily at reaching a decision on a matter of concern to the public body, regardless of whether the discussion will result in the taking of action, will set policy or is preliminary to either. The discussion need not be aimed at reaching an immediate decision to be considered a deliberative discussion of public business.

Examples of a Meeting to Discuss Public Business

The following are examples of gatherings to which the Attorney General has concluded that OMA applies because of the discussion of public business:

- A gathering of a majority of a quorum of current members of a village board with newly elected members who have not yet taken office to discuss future appointments of village officials. Ill. Att'y Gen. Op. No. 96-005, issued January 31, 1996.
- A gathering called by a State legislator involving a majority of a quorum of the members of two county boards. Although characterized as informational, the meeting became subject to OMA with respect to the participation of the two boards when they engaged in deliberative discussions pertaining to the business of the boards. Ill. Att'y Gen. Op. No. 95-004, issued July 14, 1995.
- A meeting of a mayor, city council and representatives of a not-for-profit corporation formed to promote downtown redevelopment. Even though no formal action was taken, because the meeting "was specifically designed for the purpose of discussing city or public business," it "was a deliberation coming within the meaning of that term" in OMA. Ill. Att'y Gen. Op. No. S-729, issued April 2, 1974.

If you would like to review the opinions of the Attorney General, they are available on the Attorney General's website at: www.illinoisattorneygeneral.gov/opinions/index.html.

Electronic Attendance

In addition to amending the definition of "meeting" to clearly apply to electronic gatherings, effective January 1, 2007, the General Assembly also amended OMA to address how and under what circumstances a public body can allow a member or members to attend a meeting electronically. (5 ILCS 120/7).

First, before permitting a member to attend electronically, a public body must adopt and have in place rules allowing for members to attend electronically. The rules must conform to the

requirements and restrictions of OMA, may further limit the extent to which attendance by other means is allowed, and may provide for the giving of additional notice to the public or further facilitate public access to meetings.

If a public body has not adopted appropriate rules, it cannot permit a member to attend electronically.

Second, if a public body has adopted rules permitting electronic attendance, then a quorum of the members of a public body must be physically present at the location where the meeting is to be conducted. If a quorum is present, a majority of the public body may allow a member of that body to attend the meeting by "other means," but only if the member is prevented from physically attending because of one of the following reasons:

- personal illness or disability;
- employment purposes or the business of the public body; or
- a family or other emergency.

"Other means" of attendance means by video or audio conference. The term does not extend, for example, to communication via e-mail or instant messaging.

Please note that a public body is not obligated to adopt rules allowing its members to participate electronically. The decision to allow or not allow electronic participation is made at the discretion of the public body.

The limitations on electronic attendance do not apply to:

- closed meetings of public bodies with statewide jurisdiction; or
- open or closed meetings of State advisory boards or bodies that do not have authority to make binding recommendations or determinations or to take any other substantive action.

State advisory boards or bodies and public bodies with statewide jurisdiction, however, may permit members to attend meetings by other means only in accordance with and to the extent allowed by specific procedural rules that have been adopted by the body.

Closed Meetings

OMA requires that all meetings of public bodies be open to the public unless a meeting falls within one or more of the exceptions contained in the Act. The exceptions to OMA are limited in number and are very specific. If the subject to be discussed by a public body is covered by one of the statutory exceptions, then the public body may, at its discretion, close the meeting or a portion of the meeting to the public by following the statutory requirements. However, public bodies are not required to close any meeting to the public.

Because these exceptions are contrary to the general requirement that meetings be open to the public, they are to be "strictly construed," which means that they will only apply to situations that are clearly within their scope. Thus, discussion in a closed meeting under an exception must be limited in scope to the specific exception(s) authorizing the closed meeting.

For example, one of the statutory exceptions allows a public body to hold a closed meeting for "the setting of a price for sale or lease of property owned by the public body." (5 ILCS 120/2(c)(6)). Under this exception, a public body may not hold a closed meeting to discuss whether to sell or

lease the property, or whether to accept an offer for its purchase. Those are matters that are beyond the scope of the exception, which authorizes holding a closed meeting only for the purpose of setting a price for the property.

The taking of any "final action" at a closed meeting is prohibited. Final action taken at a closed meeting may be voided by a court. Before taking final action, a public body must disclose to the public the substance of the action that is being taken, whether that action has been discussed in an open or a closed meeting.

Procedures for Closing Meetings

Subsection 2(a) of OMA (5 ILCS 120/2(a)) requires that a public body vote on whether to close a meeting to the public, and, at the time of the vote, cite the specific exception authorizing the closing and record that citation in the minutes of the meeting. Additional notice is not required prior to holding a closed meeting when such meeting is part of an open meeting for which proper notice has been given. Accordingly, it is not necessary that a public body note its intention to close a portion of a meeting on its agenda. Indeed, a public body can decide to close a portion of a meeting to the public during the course of an open meeting.

The Illinois appellate court has recently interpreted subsection 2(a) to require that the public body clearly describe the substance of the applicable section, if not the actual statutory citation. However, the court noted that a specific citation to the statute itself would have been helpful to the court in determining whether OMA had been violated. Henry v. Anderson, 356 Ill. App. 3d 952 (4th Dist. 2005). Therefore, it is strongly recommended that a public body note the exception it is relying upon by reference to its statutory citation when closing any portion of its meeting.

A public body may, upon a majority vote of a quorum present, vote to close a meeting or to hold a closed meeting at a specified future date. The vote must be taken at an open meeting. Although additional notice is not required prior to holding a closed meeting when such meeting is part of an open meeting for which proper notice has been given, separate notice is required for all other closed meetings. The vote of each member on the question of holding a closed meeting, as well as a citation to the exception authorizing the closed meeting, must be publicly disclosed at the time of the vote and recorded and entered in the minutes of the meeting at which the vote is taken. Discussion in a closed meeting is limited to those matters covered by the exception specified in the vote to close; no item not expressly addressed in the open meeting vote and covered by a specific exception may be discussed in closed session.

A public body may close a series of meetings by a single vote as long as each meeting in the series involves the same particular matter and is scheduled to be held within three months of the vote. This language is designed specifically to deal with meetings involving ongoing negotiations. For example, should a public body need to conduct a series of meetings on a particular topic, it only needs to take one vote prior to the first closed meeting and then it can hold subsequent closed meetings without taking an additional vote if those meetings will be held within three months of the vote. All subsequent meetings, however, must comply with the notice requirements to be discussed in a later section of this training.

Exceptions

The statutory exceptions can be grouped under the following six general headings:

- Employment/Appointment Matters

- Legal Matters
- Business Matters
- Security/Criminal Matters
- School Matters
- Miscellaneous Exceptions

Remember, however, that not every matter or meeting that concerns a subject within the scope of these general headings is exempt -- only those that clearly fall within the scope of a specific exception may be closed to the public.

Employment/Appointment Matters

Public bodies may hold closed meetings to consider the following topics:

- "The appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity." (5 ILCS 120/2(c)(1)).

For purposes of OMA, "employee" is defined to include "a person employed by a public body whose relationship... constitutes an employer-employee relationship under the usual common law rules, and who is not an independent contractor." (5 ILCS 120/2(d)). Accordingly, this exception does not authorize a public body to hold a closed meeting to discuss independent contractors, other than legal counsel.

Further, it is important to note that this exception is appropriately used only with respect to discussions concerning specific employees and not with respect to classes of employees or other employment or personnel concerns. For example, this exception cannot be used to close a meeting to discuss budgetary decisions even if those decisions will have a direct impact on personnel.

Public bodies may hold closed meetings to consider the following topics:

> "Collective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees." (5 ILCS 120/2(c)(2)).

This exception does not authorize a public body to hold a closed meeting to conduct unilateral deliberations on the extension of bargaining rights to a federation or other representative group. Ill. Att'y Gen. Op. No. S-1490, issued May 12, 1980.

The exception does, however, authorize a public body to hold closed unilateral meetings to discuss its negotiating response when collective bargaining negotiations are ongoing.

Public bodies may hold closed meetings to consider the following topics:

- "The selection of a person to fill a public office... including a vacancy in a public office, when the public body is given power to appoint under law or ordinance, or the discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance." (5 ILCS 120/2(c)(3)).

For purposes of this exception, “public office” means: “a position created by or under the Constitution or laws of this State, the occupant of which is charged with the exercise of some portion of the sovereign power of this State. The term 'public office' shall include members of the public body, but it shall not include organizational positions filled by members thereof, whether established by law or by a public body itself, that exist to assist the body in the conduct of its business.” (5 ILCS 120/2(d)).

Because the selection of a president, chair or other officer, or the committee structure of the body, concerns “organizational positions,” these matters cannot be discussed in a closed meeting. See Ill. Att'y Gen. Op. No. 03-006, issued August 18, 2003, concluding that a county board's “committee on committees” could not properly hold a closed meeting to consider appointment of county board members or other persons to other committees created by the county board.

Legal Matters

The following subjects may be discussed in a closed meeting:

- “Evidence or testimony presented in open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body, as defined in this Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning.” (5 ILCS 120/2(c)(4)).

A quasi-adjudicative body is “an administrative body charged by law or ordinance with the responsibility to conduct hearings, receive evidence or testimony and make determinations based thereon....” (5 ILCS 120/2(d)). Electoral boards considering petition challenges are excluded from the definition of “quasi-adjudicative body.”

The purpose of this exception is to allow bodies that function like a court, such as the Pollution Control Board or the Workers' Compensation Commission, or a county board or city council when deciding on a zoning change, to close a meeting to evaluate the evidence and testimony presented to them. It promotes free discussion on issues such as the credibility of witnesses. If a public body utilizes this exception, the public body must provide a written opinion setting forth the basis for its determination on the matters reviewed under the exception.

The following subject may also be discussed in a closed meeting:

- “Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.” (5 ILCS 120/2(c)(11)).

This exception does not authorize the closing of a meeting merely because an attorney is present and/or legal issues are to be discussed. Litigation must be probable, imminent or pending before the exception can be used. The phrase “probable or imminent” means “likely to occur.” See Ill. Att'y Gen. Op. No. 83-026, issued December 23, 1983.

The term “litigation” does not encompass deliberations of a public body acting in a quasi-judicial capacity on matters before it for decision.

This exception has been described as “a forked path”. If the litigation has been filed and is pending, the public body need only announce that in the proposed closed meeting, it will discuss litigation that has been filed and is pending. If the litigation has not yet been filed, the public body

must: (1) find that the litigation is probable or imminent; and (2) record and enter into the minutes the basis for that finding. Evidently, the legislature intended to prevent public bodies from using the distant possibility of litigation as a pretext for closing their meetings to the public." Henry v. Anderson, 356 Ill. App. 3d 952, 956 (4th Dist. 2005).

The following matters are also covered by exceptions:

- "Deliberations for decisions of the Prisoner Review Board." (5 ILCS 120/2(c)(18)).
- "The establishment of reserves or settlement of claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if otherwise the disposition of a claim or potential claim might be prejudiced, or the review or discussion of claims, loss or risk management information, records, data, advice or communications from or with respect to any insurer of the public body or any intergovernmental risk management association or self insurance pool of which the public body is a member." (5 ILCS 120/2(c)(12)).

Business Matters

A meeting may be closed to discuss the following:

- "The purchase or lease of real property for the use of the public body, including meetings held for the purpose of discussing whether a particular parcel should be acquired." (5 ILCS 120/2(c)(5)).
- "The setting of a price for sale or lease of property owned by the public body." (5 ILCS 120/2(c)(6)).
- "The sale or purchase of securities, investments, or investment contracts." (5 ILCS 120/2(c)(7)). Please note that this exception is not intended to apply to issuance of bonds by a public body, for that process extends to issues much broader than the mere sale of securities, and therefore is required to be considered openly.
- "The operation by a municipality of a municipal utility or the operation of a municipal power agency or municipal natural gas agency when the discussion involves: (i) contracts relating to the purchase, sale, or delivery of electricity or natural gas; or (ii) the results or conclusions of load forecast studies." (5 ILCS 120/2(c)(23)).

Security/Criminal Matters

Meetings to discuss the following subjects may be closed:

- "Security procedures and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff, the public, or public property." (5 ILCS 12/2(c)(8)).
- "Informant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, when discussed by a public body with criminal investigatory responsibilities." (5 ILCS 120/2(c)(14)).

School Matters

Meetings on the following subjects may be closed:

- "Student disciplinary cases." (5 ILCS 120/2(c)(9)).
- "The placement of individual students in special education programs and other matters relating to individual students." (5 ILCS 120/2(c)(10)).

Miscellaneous Exceptions

There are several exceptions that are applicable only to specialized public bodies (such as the State Employees Suggestion Award Board or the State Emergency Medical Services Disciplinary Review Board) or to specific actions which public bodies do not widely undertake (for example, the conciliation of complaints of discrimination in the sale or rental of housing or the recruitment, credentialing, discipline or formal peer review of physicians or other health care professionals for a hospital, or other institution providing medical care, that is operated by the public body).

Although it is not necessary to discuss these exceptions at length, you should review them to determine whether any are applicable to the public body you represent.

Review of Minutes of Closed Meetings

A closed meeting can be held for:

- Discussion of minutes of meetings lawfully closed under OMA, whether for purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06 of OMA.

This exception applies in two circumstances: first, a public body may close a meeting to review and approve the minutes of a previous meeting that was properly closed to the public; second, no less than twice yearly, a public body must meet to review minutes of all closed meetings to determine whether the need for confidentiality still exists as to all or part of those minutes, or whether the minutes or portions thereof should be made available for public inspection.

Disclosure of Matters Discussed in Closed Meetings

A public body cannot sanction one of its members for disclosing information or issues discussed in a closed meeting of that body. The possibility of imposing such sanctions "would only serve as an obstacle to the effective enforcement of the Act, and a shield behind which opponents of open government could hide." Ill. Att'y Gen. Op. No. 91-001, issued January 31, 1991. Further, the appellate court has noted that "there is nothing in the Act that provides a cause of action against a public body for disclosing information from a closed meeting." Swanson v. Board of Police Commissioners, 197 Ill. App. 3d 592, 609 (2nd Dist. 1990).

Nonetheless, members of a public body should deal very carefully with confidential information that may be brought before the body in the course of a closed meeting. Reasons for maintaining the confidentiality of certain information will likely exist if the matter was proper for discussion in a closed meeting. For example, information which is damaging to the reputation of an employee if divulged publicly could conceivably provide the basis for legal action against an individual board member or the board as a whole.

Public Taping and Filming

OMA provides that "any person may record the proceedings at meetings required to be open by this Act by tape, film or other means," although "[t]he authority holding the meeting shall prescribe

reasonable rules to govern the right to make such recordings." (5 ILCS 120/2.05). Rules concerning taping and filming should be limited to those necessary to preserve the overall decorum and proceeding of the meeting. Ill. Att'y Gen. Op. No. S-867, issued February 4, 1975. It is not appropriate for public bodies to create rules "on the spot." Rather, rules should be written and published after appropriate public notice and deliberation.

The Attorney General's office has concluded that a rule that prohibits the placement of video- or tape-recording equipment where it would obstruct the public from seeing or hearing the proceedings is a reasonable rule intended to preserve the decorum of the proceedings. On the other hand, the Attorney General's office has also concluded that rules prohibiting the public from using a public body's electrical outlet, swiveling or refocusing a recording device during a meeting, or turning a recording device on or off during the course of a meeting, were unreasonable and unenforceable. Ill. Att'y Gen. Inf. Op. No. I-94-007, issued January 27, 1997; Ill. Att'y Gen. Inf. Op. No. I-00-015, issued April 5, 2000.

There is one exception to the general principle that members of the public may record proceedings of an open meeting. If a witness at an open meeting conducted by a commission, administrative agency or other tribunal refuses to testify if any portion of his testimony is to be broadcast or televised or if motion pictures are to be taken of him while testifying, then the authority holding the meeting shall prohibit such recording during the testimony of the witness. This exception is applicable to quasi-judicial proceedings only.

Minutes and Other Records of Meetings

Section 2.06 of OMA requires a public body to keep minutes of all meetings, whether open or closed to the public. Minutes must include, at a minimum: "(1) the date, time and place of the meeting; (2) the members of the 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." (5 ILCS 120/2.06(a)).

To comply with these requirements, a public body must enter into its minutes a summary of all discussion held by the body on items brought before the meeting. The minutes must include sufficient data so that either the body or a court examining its minutes will be able to ascertain what, in fact, was discussed, the substance of that discussion, and what, if any, action was taken.

Subsection 2.06(b) of OMA requires that minutes of open meetings be made available for public inspection within ten days of the approval of the minutes by the public body. Further, if a public body has a website that is maintained by the full-time staff of the body, it shall post its open meeting minutes on the website within ten days of the approval of such minutes. Minutes must remain posted on the website for at least 60 days after their initial posting.

Minutes of closed meetings are available only after a determination by the public body that it is no longer necessary to protect the public interest or the privacy of an individual by keeping them confidential. (5 ILCS 120/2.06(f)). Further, minutes of closed meetings are exempt from inspection under the Freedom of Information Act "until the public body makes the minutes available to the public." (5 ILCS 140/7(i)(l)).

Verbatim Recordings of Closed Meetings

In addition to minutes, a public body must also keep a verbatim record of any closed meeting in the form of a video or audio recording. The purpose of this provision is: (1) to ensure that public bodies keep accurate records of their proceedings for their own protection; and (2) to provide a record for a court to examine when it is trying to ascertain whether a violation of the Act has occurred. To comply with the verbatim recording provision, the public body must record the entire closed meeting.

The verbatim record of a closed meeting must be kept by the public body for a minimum of 18 months after the meeting and can be destroyed after the expiration of that period of time, but only if: (1) the public body approves the destruction; (2) the public body approves written minutes of the closed meeting concerned; and (3) there is no legal action pending concerning the meeting. (5 ILCS 120/2.06(c)). Verbatim records of closed meetings are exempt from disclosure under the Freedom of Information Act.

In a legal action brought to enforce the provisions of OMA, the court may conduct an "in-camera" examination of the verbatim recording. "In camera" simply means that the judge reviews the recording in private. Minutes or verbatim recordings of closed meetings or portions thereof may be made available by court order if the court determines that the meeting to which the minutes or recordings pertain was closed in violation of OMA.

Public Participation

As of January 1, 2011, OMA requires that "[a]ny 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)). Until this change, OMA contained no provision allowing public participation in public body meetings.

The new language requires that public bodies give members of the public an opportunity to speak at public meetings. The public body should set forth rules governing how public comments are to occur at these meetings and it is allowed to impose reasonable limits to commenting. Specific rules might include:

Reasonable time limits on the length of each comment. Wright v. Anthony, 733 F.2d 575, 577 (8th Cir. 1984). [5 minutes held reasonable -- JLH]

- Allowing public comment to be limited to subjects on the meeting's agenda. White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990).
- Allowing the public body to cut off a comment if it is irrelevant, repetitious, or disruptive. Id. at 1425-26.
- Setting aside a specific portion of the meeting for public comments.

Public bodies may not make rules that prohibit comments based on the viewpoint expressed by the comment.

Finally, public bodies should publish these rules so that people know how they can address the public body.

Public Notice of Time and Place of Meetings

As was noted at the beginning of this training, advance notice is a part of the public policy requiring public bodies to conduct business openly. Several different types of notice are required.

First, all public bodies are required to give public notice, at the beginning of each calendar or fiscal year, of the dates, times and places of their regular meetings to be held during the year. This schedule must list the times and places of all regular meetings. (5 ILCS 120/2.03). The schedule of regular meetings must be "available" to the public, presumably at the principal office of the public body. Furthermore, if a public body has a website maintained by its full-time staff, it must post notice of its annual schedule of meetings on the website and the schedule must remain on the website until a new public notice of the schedule of regular meetings is approved. (5 ILCS 120/2.02).

If a change is made in the regular meeting schedule, notice of the change must be given at least 10 days in advance by posting a notice at the public body's office or at the place of meeting and sending a notice to each news medium that filed an annual request to receive such notice. Also, notice of the change must be published "in a newspaper of general circulation in the area." If the population served by the public body is less than 500 and there is no newspaper published there, the 10 days' notice may be given by posting a notice in three prominent places within the area served. (5 ILCS 120/2.03). This requirement, however, appears to relate to a permanent change in the regular meeting schedule, and not to the rescheduling of a single meeting, which may be done with 48 hours' notice and without publication in a newspaper.

The Act requires that notice of a meeting be given in two ways: (1) by posting a notice at the public body's principal office or, if it has no office, at the building in which the meeting will be held, and (2) by sending a notice to each news medium that has filed an annual request for notice. Such news media providing a local address or telephone number for notice are entitled to notice of special, emergency, rescheduled or reconvened meetings given in the same manner as it is given to members of the public body. (5 ILCS 120/2.02(b)). An agenda for each regular meeting must be posted at least 48 hours in advance of the meeting at the principal office of the public body and at the location where the meeting is to be held. (5 ILCS 120/2.02(a)).

Furthermore, if a public body has a website maintained by its full-time staff, it must post notice of all its meetings and the agenda of each regular meeting on its website. Any notice or agenda of a regular meeting must remain on the website at least until the meeting is concluded.

Public notice of any special, rescheduled or reconvened meeting must be given at least 48 hours in advance except that public notice is not necessary for a meeting to be reconvened within 24 hours, or if the time and place of the reconvened meeting was announced at the original meeting and there is no change in the agenda. Notice of a meeting held in the event of a bona fide emergency need not be given 48 hours prior to such meeting. Notice in such a circumstance shall, however, be given as soon as practicable, and in any event prior to the holding of such meeting, to any news medium that has filed an annual request for notice. An agenda must be included in the notice for any special, rescheduled or reconvened meeting.

Agendas and Final Action

OMA does not define what must be contained in an agenda. It does provide, however, that "consideration" of items that are not on a regular meeting agenda is not precluded by OMA.

Therefore, public bodies may properly include “old business” and “new business” items on an agenda.

In a very important decision, however, the Illinois appellate court held that in this context, “consideration” of an item of new business or old business at a regular meeting is limited to deliberation and discussion, and does not include the taking of action, i.e., voting, on such item. Rice v. Board of Trustees of Adams County, Illinois, 326 Ill. App. 3d 1120 (4th Dist. 2002). In other words, a public body generally cannot take final action on an item that is not expressly referenced on the posted agenda.

However, in a recent case, Petitioners of the Foxfield Subdivision v. Village of Campton Hills, 396 Ill. App. 3d 989 (2nd Dist. 2009), the Illinois appellate court concluded that the village could properly take action to annex a parcel of property at a special meeting under an agenda item titled “Discussion and consideration of potential annexation of property.” The court stated:

> “Our Open Meetings Act does not require that an agenda be specifically detailed or that it be tailored to reach those specific individuals whose private interests are most likely to be affected by the actions of the public body. It requires only that the action taken at a special meeting be germane to the agenda listed in the notice. We do not find that anything more is required under the Open Meetings Act... We conclude that the Board's action of annexing the [subject] parcel was closely related or germane to the agenda listed in the notice and that the notice sufficiently informed the public, within the meaning of the Open Meetings Act.”

Although the agenda item did not specifically reference the taking of action on an annexation, it did refer to a potential annexation, thus providing the public with a general description of the purpose of the meeting, whereas in the Rice case the “new business” item did not.

Enforcement

Under OMA, if a person believes that a violation of OMA has occurred, the person has two options:

- to file a Request for Review with the PAC, or
- to file a civil action in circuit court.

This section will outline both of these options.

Enforcement - The Public Access Counselor

Public Act 96-542, effective January 1, 2010, codified the Office of Public Access Counselor (PAC) in the Office of the Attorney General. The primary function of the PAC is to resolve disputes involving possible violations of the Freedom of Information Act or the Open Meetings Act in response to Requests for Review by an aggrieved party, by mediating or otherwise informally resolving the dispute or by issuing a binding opinion. The PAC may also issue advisory (non-binding) opinions with respect to the Open Meetings Act and the Freedom of Information Act either in response to a Request for Review or otherwise, and may respond to informal inquiries made by the public and public bodies.

A person who believes that a violation of OMA has occurred may file a Request for Review with the Public Access Counselor not later than 60 days after the date of the alleged violation. The

Request for Review must be made in writing, must be signed by the requester, and must include a summary of the facts supporting the claim that a violation has occurred.

Unless the PAC determines that a complaint is unfounded, the PAC shall forward a copy of the Request for Review to the public body within 7 working days after receipt and shall specify the records or other documents that the public body must furnish to facilitate the review. Within 7 working days after receipt of the Request for Review, the public body shall provide copies of records requested and shall otherwise fully cooperate with the PAC.

If a public body fails to furnish the specified records for review, or if it is otherwise necessary, the Attorney General may issue a subpoena to any person or public body having knowledge of or records pertaining to a Request for Review of the alleged violation of OMA.

After it receives a copy of a Request for Review and request for production of records from the PAC, the public body may, but is not required to, answer the allegations of the Request for Review. The answer may take the form of a letter, brief, or memorandum. If the public body submits a response to the allegations, the PAC shall forward a copy of the answer to the person submitting the Request for Review, although references to specific, confidential matters at issue may be redacted from the copy. The requester may, but is not required to, respond in writing to the answer and shall provide a copy of the response to the public body.

The PAC may decide to work to resolve the issue informally with the requester and the public body, without issuing a binding opinion. If the PAC decides to issue a binding opinion, the PAC will examine the issues and the records, make findings of fact and conclusions of law, and issue an opinion in response to the Request for Review within 60 days after its receipt. The PAC may, however, extend the time for issuing an opinion by no more than 21 business days. The opinion shall be binding upon both the requester and the public body, subject to judicial review.

If the PAC issues a binding opinion concluding that the public body has violated OMA, the public body shall either take necessary action immediately to comply with the directive of the opinion or shall initiate judicial review. If the opinion concludes that no violation of OMA has occurred, the requester may initiate judicial review of the PAC's opinion.

For purposes of judicial review, a binding opinion issued by the PAC is considered a final decision of an administrative agency, which is reviewable under the Administrative Review Law.

Judicial Enforcement - Civil Actions

The other option for a person who believes that a violation of OMA has occurred is to file a civil action in court.

Subsection 3(a) of OMA (5 ILCS 120/3) authorizes any person, including the State's Attorney of the county in which the violation may have occurred, to bring a civil action for the enforcement of the Act within 60 days after a meeting alleged to have been held in violation of OMA. However, if facts concerning the meeting are not discovered within that period, a State's Attorney may still institute enforcement proceedings within 60 days of the discovery of a violation.

In addition to reviewing other evidence, a court in a civil action may examine in camera any portion of the minutes of a closed meeting at which a violation of OMA is alleged to have occurred. A court may also review the verbatim recording of a closed meeting. If OMA was violated, a court may grant such relief as it deems appropriate, including:

- issuing a writ of mandamus requiring that a meeting be open to the public;
- granting an injunction against future violations of OMA;
- ordering the public body to make available for public inspection the minutes of an improperly closed meeting; and
- declaring null and void any final action taken at a closed meeting in violation of the Act.

The court is not required to void an action, however, particularly when the voiding of the action is deemed not to be in the public interest.

Subsection 3(d) of OMA (5 ILCS 120/3(d)) authorizes the court to assess against any party, except a State's Attorney, reasonable attorney's fees and costs incurred by any other party who "substantially prevails" in a civil enforcement action. Assessment of fees against a private party, however, calls for an additional determination that the action brought by such party was "frivolous or malicious" in nature. If an action is not brought in good faith, then a private party faces the possibility of having to bear legal costs of the public body as well as his or her own.

The determination of which party has substantially prevailed for purposes of section 3 is one to be made by the court. The phrase "substantially prevails" is used to make it clear that absolute success on the merits is not a necessary prerequisite to the awarding of attorney's fees and costs.

Judicial Enforcement - Criminal Actions

Public officials who violate OMA are also subject to criminal penalties.

A criminal action can only be initiated by a State's Attorney. In such an action, the court may conduct an in-camera examination of the verbatim record of a closed meeting alleged to be in violation of OMA to determine what portions, if any, must be made available to the parties for use in the prosecution. (5 ILCS 120/2.06(e)). Violation of OMA is a Class C misdemeanor, which is punishable by a fine of up to $1500 and imprisonment for up to 30 days. (5 ILCS 120/4).