THE ILLINOIS OPEN MEETINGS ACT

Presented by:

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OPEN MEETINGS ACT
[5 ILCS 120/1 *et seq.*]

Introduction

The Open Meetings Act, 5 ILCS 120, was enacted to protect the citizens' right to know the actions and reasoning of public body decisions. The people have a right to be informed as to the conduct of a public body, since the purpose of a public body is to assist the people. Therefore, the statute fosters open meetings and is to be strictly construed against closed meetings. The statute reads "In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1.

Although the best known features of the Act may pertain to "closed sessions," in fact the Act is likely to be far more important to local governments because it is the primary source of the rules and requirements for *all* meetings, notifications, and manner of conducting them. Therefore the Open Meetings Act is pervasive in its impact and critical to follow, even where a public body seldom or never goes into closed session.

This article outlines the Act in a practical manner instead of following its codified order. It begins with applicability, continues to the specific procedural requirements, discusses the closed session procedures, outlines the effects of non-compliance, and ends with more recent electronic attendance issues including telephone and email "meetings."

A. Applicability

Section 2a of the Act states that "All *meetings* of *public bodies* shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a." 5 ILCS 120/2(a) (emphasis added). In regards to applicability, the key words in that provision are "meetings" and "public bodies," because without a meeting or a public body, the Act does not apply. Thus, before diving into the procedural requirements, we must first consider whether the Open Meetings Act applies to a particular entity and for a specific occasion.

1. What Qualifies as a Public Body and What Does Not?

The Open Meetings Act contains a broad definition of "public body," but there are some notable exclusions which include entities typically considered to be a public body. Section 1.02 of the Act defines a "public body:"

> "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. "Public body" includes tourism boards and convention or civic center boards located in counties that are contiguous to the Mississippi River with populations of more than 250,000 but less than 300,000. "Public body" includes the Health Facilities Planning Board. "Public body" does not include a child death review team or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act or an ethics commission acting under the State Officials and Employees Ethics Act.

The beginning of the "public body" definition appears all-encompassing, including governmental bodies of an executive, legislative, administrative or advisory nature, or an ancillary

of those entities, which expends tax revenue or is supported fully or partially by tax revenue, but it does not include all governmental bodies. The General Assembly and commissions or committees thereof are excluded from the Act. In order to clarify or ensure applicability, Section 1.02 explicitly lists some particular entities to be included or excluded under the Act.

So, how does the broad definition apply to those not specifically enumerated within the list itself? Obviously School Boards, City Councils, Village Boards, Library Boards, and other governing bodies of local governmental units, as well as committees and subcommittees composed by the Boards and made up of their members, fall under the statute's general language. But the question becomes more difficult with those organizations which do not directly control a governmental entity and are merely a subsidiary body. In order to resolve this dilemma, the courts have constructed a number of factors to consider: who appointed the members of the entity, the procedure for their appointment, the compensation for their duties, the assigned duties in the by-laws or authorizing statute, resolution or ordinance; whether it is an advisory or investigative unit; whether it is controlled by the government or any other public body; the body's budget; its role within the larger organization; and the impact of its actions. Meetings of public body employees to discuss how to enhance their performance, including advice for the public body, are not considered public body meetings even if the groups are referred to as committees. Private entities

receiving a majority of their revenue from the public and conducting business primarily with governmental entities are not subsidiary bodies falling under the Act. Even if a public body appoints the members of an organization, so long as the public body does not exert control over the group, they will likely not be considered a subsidiary body.

Simply referring to a group of individuals as a "board," "bureau," or "committee" does not qualify it as a "public body." Similarly, merely labeling a group as an "entity" does not exempt it from the Act's application. Therefore, all of the aforementioned factors must be considered when deciding whether the Open Meetings Act applies to a "body" and it is always best to err on the side of caution.

2. What Constitutes a Meeting?

Prior to January 1, 2007, the definition of a "meeting" (also found in Section 1.02) simply stated "any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business." With the amendment by P.A. 94-1058, now the definition includes "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…"

First, within this definition, "gathering" generally calls to mind a collection of individuals grouped together in close proximity for a specific purpose. With the newly amended portion of the statute, it is clear that the close proximity aspect no

longer applies, because a gathering may now occur even though the individuals involved are miles apart. This definition is further convoluted by including the phrase "or other means of contemporaneous interactive communication" after emails, because emails typically are not considered contemporaneous. Therefore, emails may or may not constitute "meetings" unless they involve a sufficient number of people (i.e. a "majority of a quorum" of the body), involve the discussion of public business, and the distribution is such that a receiving party responds relatively quickly. The definition does not provide a specific guideline for time between responses other than its use of the word "contemporaneous," which by definition means at the same time. Therefore, to ascertain a time frame, we turn to "interactive communication" which is most closely associated with a conversation.

In the case of other electronic communication (i.e. telephone conferences, or "chat" sessions), the rate of communication is comparable to the speed of a normal conversation (which may include reasonable pauses), then those are almost certain to be considered a gathering. Emailing may or may not be "interactive" and "contemporaneous" and the critical problem for email is that it may only be "after the fact" when the determination could be made. By then it is too late, to have complied with the notice, agenda and minutes requirements for all meetings. Therefore in order to avoid having a "meeting" by emails (whether unintended or not) the best practice is to include a warning note on any email sent, to warn the recipients

NOT to reply, or certainly not to use the "reply all" feature of most email software to avoid any potential violation of the Act.

After establishing that there is a public body gathering, then we must determine whether there is a quorum present and whether the purpose of the gathering is to discuss public business. A quorum is usually a majority of the members of a body unless established by applicable law or by-laws. A majority of a quorum would be the next whole number over half of a quorum. For example, if there is a body consisting of nine members, then a quorum of nine is five and so a majority of a quorum is three. Therefore if three members were to "gather" then they could be considered as "meeting" for purposes of the Act. It is also wise to be cautious when a committee of a board meets, because the majority of the quorum only applies to that committee. So if it is a thirteen member board with a six member committee, then a meeting of only three members of the committee not four would be required for a majority of a quorum of that committee. Recently the Act has been amended by P.A. 95-0245, to apply in the case of 5 member public bodies, in an effort to avoid the problem which existed where no two members of the body could talk about public business without violating the Act, since the quorum was three and the two would be a majority of that. Essentially P.A. 95-0245 has again changed the definition of "meeting" in the case of 5 member public bodies to apply in the event a quorum (not a "majority of a quorum") gathers. It also requires that at a minimum three affirmative votes are required for adoption of motions, resolutions or ordinances.

Unfortunately, when P.A. 94-1058 was adopted, and the new provisions regarding "electronic attendance" were established, the amendment also introduced the requirement that an actual quorum of members of a public body (with less than statewide jurisdiction) must be physically present at the location for a meeting. If a quorum is physically present, a member may participate by telephone, video or audio conference if permitted by the rules of the public body, and vote on current business, however they do not count towards the quorum required.

The formality or social environment of a meeting is inconsequential. It is more important what is discussed rather than where it is discussed. Meetings at a restaurant, a member's home, or over the phone, have all constituted public meetings where a quorum was physically present and public business was discussed. In 1967, the General Assembly removed the term "official" before "meetings" to include informal gatherings.

B. Notices and Procedural Requirements

Once it has been determined that the Act applies to a particular entity and situation, then the procedural requirements must be followed. Sections 2.02-2.03 contain the formalities that must be followed including scheduling, posting agendas, and providing public notice on websites, newspapers, and at the principal office or meeting place of the public body.

> § 2.02. Public notice of all meetings, whether open or closed to the public, shall be given as follows:
> (a) Every public body shall give public notice of the schedule of regular meetings at the beginning of each calendar or fiscal year and shall state the regular dates, times, and places of such meetings. An agenda for each regular meeting shall be posted at the principal office of the public body and at the location where

the meeting is to be held at least 48 hours in advance of the holding of the meeting. A public body that has a website that the full-time staff of the public body maintains shall also post on its website the agenda of any regular meetings of the governing body of that public body. Any agenda of a regular meeting that is posted on a public body's website shall remain posted on the website until the regular meeting is concluded. The requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda. Public notice of any special meeting except a meeting held in the event of a bona fide emergency, or of any rescheduled regular meeting, or of any reconvened meeting, shall be given at least 48 hours before such meeting, which notice shall also include the agenda for the special, rescheduled, or reconvened meeting, but the validity of any action taken by the public body which is germane to a subject on the agenda shall not be affected by other errors or omissions in the agenda. The requirement of public notice of reconvened meetings does not apply to any case where the meeting was open to the public and (1) it is to be reconvened within 24 hours, or (2) an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda. Notice of an emergency meeting shall be given as soon as practicable, but in any event prior to the holding of such meeting, to any news medium which has filed an annual request for notice under subsection (b) of this Section.

(b) Public notice shall be given by posting a copy of the notice at the principal office of the body holding the meeting or, if no such office exists, at the building in which the meeting is to be held. In addition, a public body that has a website that the full-time staff of the public body maintains shall post notice on its website of all meetings of the governing body of the public body. Any notice of an annual schedule of meetings shall remain on the website until a new public notice of the schedule of regular meetings is approved. Any notice of a regular meeting that is posted on a public body's website shall remain posted on the website until the regular meeting is concluded. The body shall supply copies of the notice of its regular meetings, and of the notice of any special, emergency, rescheduled or reconvened meeting, to any news medium that has filed an annual request for such notice. Any such news medium shall also be given the same notice of all special, emergency, rescheduled or reconvened meetings in the same manner as is given to members of the body provided such news medium has given the public body an address or telephone number within the territorial jurisdiction of the public body at which such notice may be given. The failure of a public body to post on its website notice of any meeting or the agenda of any meeting shall not invalidate any meeting or any actions taken at a meeting.

§ 2.03. Schedule of Meetings. In addition to the notice required by Section 2.02, each body subject to this Act must, at the beginning of each calendar or fiscal year, prepare and make available a schedule of all its regular meetings for such calendar or fiscal year, listing the times and places of such meetings.
If a change is made in regular meeting dates, at least 10 days'

notice of such change shall be given by publication in a newspaper of general circulation in the area in which such body functions. However, in the case of bodies of local governmental units with a population of less than 500 in which no newspaper is published, such 10 days' notice may be given by posting a notice of such change in at least 3 prominent places within the governmental unit. Notice of such change shall also be posted at the principal office of the public body or, if no such office exists, at the building in which the meeting is to be held. Notice of such change shall also be supplied to those news media which have filed an annual request for notice as provided in paragraph (b) of Section 2.02.

As the Act states, notice must be provided for all meetings of the public body, whether they are open or closed. Notice of the schedules of meetings for a calendar year including the dates, times, and places of all regularly scheduled meetings must be provided. Notice can be posted at the principal office of the public body, where the meeting will be held, and on the public body's website. The degree of notice required depends upon the type of meeting: regular, special, reconvened, or emergency (discussed below).

1. Types of Meetings

a. Regular Meetings. For regular meetings, a public body must follow the regular notice requirements above, post an agenda for the meeting at the main office of the public body, and post an agenda at the location of the meeting at least 48 hours before the meeting begins. If the public body has a website maintained by a full time employee, (as distinct from a contractor, vendor or part-time employee) the agenda must be posted there as well (though failure to do so does not invalidate the meeting or action taken).

b. Special Meetings. When a meeting occurs outside of the

regular meeting schedule, then it is a special meeting. A special meeting, by its definition, is not required to comply with the annual meetings calendar, however notice with an agenda must be posted at the location of the meeting and at the public body's principal office at least 48 hours in advance of the meeting.

c. Reconvened Meetings. Reconvened meeting requirements must be followed when a public body meets at its regularly scheduled time and reschedules the meeting to restart within 24 hours. So long as the reconvened meetings is to occur within 24 hours of the convened meeting open to the public, then the public body can declare the date, time, and place of the reconvened meeting without having to post a new public notice. The reconvened meeting agenda must mirror that of the regularly scheduled meeting.

d. Emergency Meetings. The first aspect of emergency meetings to keep in mind is that there must be a *bona fide* emergency justifying the meeting. A frivolous excuse for avoiding proper procedure will be scrutinized. With just cause, an emergency meeting may be held without 48 hours advance notice. However, notice still must be provided before the emergency meeting to any news medium that has formally requested the annual schedule of meetings.

2. News Media Notification

A public body must supply copies of the notices of its regular, special, emergency or rescheduled meetings to any news

medium that filed an annual written request for such notice. Also, if a news medium is within the territorial jurisdiction of the public body and has given the public body an address or telephone number, notice of all meetings shall be given to such news medium in the same manner as is given to the members of the body. If a change is made in regular meeting dates, the public body must give at least 10 days notice of such change in a newspaper of general circulation in the area in which the body takes action. If there is a body of local government in a town with less than 500 people and no newspaper is published, then posting notice in 3 prominent places within the governmental unit is sufficient in place of the 10 days notice.

3. Agenda Requirements

An agenda must be posted 48 hours in advance at the principal office of the public body, if applicable, and at the location where the meeting will be held. Controversy surrounds the required amount of detail within an agenda. Particularly confusing is the statute's language that "a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda." (Section 2.02). Illinois courts nonetheless have held that without providing some specific listing on the agenda, an item may be "considered" (i.e. debate and deliberation) but that such "consideration" does not mean that any action (i.e. final action or vote) can be completed. In other words, only a discussion can occur if an item is not listed on the meeting's agenda. These courts have reasoned that the meeting agenda performs a "notice function" to the public,

signifying, at least to some extent the business of the public body to be conducted at the meeting.

C. Closed or Executive Sessions

All meetings are to be open to the public unless expressly excepted in the list of permissible topics. Section 2(b) sets forth the limited construction of the exceptions. It states that the enumerated exceptions in part 2(c) detract from the overall purpose of the Act in being open, and therefore "the exceptions are to be strictly construed, extending only to subjects clearly within their scope." Moreover the listed exceptions are merely authorizing closure and are not requirements for holding meetings on such topics in a closed setting. Presently there are twenty-four total exceptions all referring to specific topics that a body may take up in a closed session. Some of them are very specific such as the establishment of reserves or settlement of claims under the Government Tort Immunity Act, while others are more general such as the setting of a price for sale or lease of property owned by the public body. It is important to note that in all circumstances, no final action may be taken at a closed meeting. Below is a discussion of some of the more relevant exceptions and those found to be ambiguous.

As a general matter, *any* properly convened meeting of the public body can, if an exception applies for the topic, be moved into a closed session, whether or not it is so listed on the agenda. While it is common for the agendas (as a "courtesy") to indicate if a closed session is planned at a meeting, that is not required, and the absence of such an indication does not prevent

an otherwise proper closed session from being convened.

1. Purpose

Although the overall purpose of the Act is to promote openness, the General Assembly realized that certain public body discussions and deliberations would be compromised if prohibited from ever entering into a closed session. Therefore, the Act currently has 24-items listed of topics which were deemed to be proper or appropriate for discussion in a closed meeting.

2. Permissible Topics

The first exception, and one of the most commonly used, is "The appointment, employment compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel, including hearing testimony on a complaint lodged against an employee or against legal counsel to determine its validity." This exception, frequently referred to as the "personnel" exception, allows the discussion of a particular employee of the body or its legal counsel in closed session.

The second exception is "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." This exception is somewhat similar to the first, but it allows the discussion of an entire class of employees as opposed to a particular employee under the first exception.

The third exception further broadens the discussion of "personnel" to include "The selection of a person to fill a public office, as defined in the Open Meetings Act, 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." This exception permits the discussion of filling a position or other such managerial actions for a public body whose responsibility it is to do so.

Another exception is "evidence or testimony presented in open hearing, or in closed hearing specifically authorized by law, to a quasi-adjudicative body, as defined in the Open Meetings Act, provided that the body prepares and makes available for inspection a written decision setting forth its determinative reasoning." Thus, this exception allows a body to review, in closed session, evidence from an adjudicative body charged by law with the responsibility to conduct hearings and receive testimony.

Section 2(c)(5) allows for a closed meeting in "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." The courts have limited this exception to discussions calculating the exact terms of an offer to purchase a particular piece of real estate, to discuss the seller's terms, or to consider a plan for acquiring specific real estate. The next exception 2(c)(6) is similar, allowing the "setting of a price for sale or lease of property owned by the body," but courts have somewhat limited this closed discussion to specific price setting, except in a recent case from the

Appellate Court, Second District, where a lease was involved, and a somewhat broader view of pertinent lease terms involved with the lease in its entirety was allowed.

Section 2(c)(11) states "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." Thus, this exception applies to commenced litigation, and presumably, though not clearly stated, such "litigation-like" matters as administrative reviews and arbitrations. For matters that are likely to be litigated in the near future, special note must be made in the minutes of the closed session of the basis for that conclusion, such as receipt of correspondence from someone threatening or stating an intent to sue the public body, or perhaps a recommendation from the body's attorney proposing the filing of a lawsuit on its behalf.

Three other pertinent exceptions are worthy of note here: Section 2(c)(15) "Professional ethics or performance when considered by an advisory body, appointed to advise a licensing or regulatory agency on matters germane to the advisory body's field of competence," Section 2(c)(16) which states that "Self evaluation, practices and procedures or professional ethics, when meeting with a representative of a statewide association of which the public body is a member," and Section 2(c)(21) "Discussion of minutes of meetings lawfully closed under this Act, whether for

purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06."

3. Attendees

All members of the public body involved have a right to attend a closed session. Moreover, anyone the public body invites or allows to attend the closed session is permitted to attend a closed meeting. This usually includes a clerk or whoever is responsible for taking minutes, as well as staff members or the attorney for the public body depending on the particular issues being addressed. Of course no member of the general public has a right to be present, unless the public body specifically allows it in order to conduct their business on the topic for the closed session.

4. Procedure for Convening in Closed Sessions

As stated infra, there must be a bona fide reason for holding a closed meeting. In addition, there are specific requirements to initiate a closed session as set forth in Section 2a,

> A public body may hold a meeting closed to the public, or close a portion of a meeting to the public, upon a majority vote of a quorum present, taken at a meeting open to the public for which notice has been given as required by this Act. A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, provided each meeting in such series involves the same particular matters and is scheduled to be held within no more than 3 months of the vote. The vote of each member on the question of holding a meeting closed to the public and a citation to the specific exception contained in Section 2 of this Act which authorizes the closing of the meeting to the public shall be publicly disclosed at the time of the vote and shall be recorded and entered into the minutes of the meeting. Nothing in this Section or this Act shall be construed to require that any meeting be closed to the public.
> At any open meeting of a public body for which proper notice under this Act has been given, the body may, without additional

> notice under Section 2.02, hold a closed meeting in accordance with this Act. Only topics specified in the vote to close under this Section may be considered during the closed meeting.

First of all, there must be a quorum present and a majority of that body must vote in an open meeting for the closed session to occur. This vote can be taken in regards to a series of future closed meetings, portions of meetings, or a single meeting so long as each topic justifying the closed meeting is all that is discussed. The voting of each member must be recorded and there also must be a citation to the particular section of the Act authorizing such closed session.

5. Record Keeping/Minutes Requirements

All public bodies must keep written minutes of all open or closed meetings and a "verbatim record," usually an audio or video recording, must be made of all closed meetings. Section 2.06 sets forth the required steps for recording minutes properly, "Minutes shall include, but not be limited to; (1) the date, time and place of the meeting; (2) the members of the public body recorded as either present or absent and whether the members were physically present or present by means of video or audio conference; (3) a summary of discussion on all matters proposed, deliberated, or decided and a record of any votes taken."

After the public body approves the minutes from an open meeting, they must be presented to the public within 7 days of such approval. Bodies that maintain a website with a full time employee, must post such minutes within 7 days as well and leave the minutes posted for 60 days after the initial posting. The

"verbatim record" from a closed meeting must be preserved for a minimum of 18 months from the time of the recorded meeting. Then, it may be destroyed if the public body approves the destruction of the particular meeting recording, and the public body approves the minutes of the closed meeting that meet the written minutes requirements set forth above.

6. Record of Voting

A record of any vote taken must be recorded in the meeting minutes. Further, the vote of each member for or against a closed meeting, and a citation to the Act authorizing such closed meeting must be publicly disclosed, recorded, and entered into the minutes at the time of the vote. It is often said that no voting can be done in a closed session, though that is not actually correct. Since a "record of any vote taken" must be made in the meeting minutes, including closed session minutes, there is the clear implication that voting may occur in a closed session. However, since "no final action" may be taken in closed session, and a vote on such "final action" must be in public, many advisors or board members interpret this (somewhat incorrectly) as no voting can be done in closed session at all.

7. Final Action in Public and Explanation of Action

Section 2(e) says: "No final action may be taken at a closed meeting." That section goes on to state: "Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." Therefore, if a body is in closed session and decides that some action is necessary to be taken,

then it must proceed to open session to take such final action. When the action is taken in open session, the explanation of that action must be given when the open session commences. For example, if a school board meets in a closed session and deliberates about a new Spanish teacher being hired, then before the final action to hire can be taken, it must begin an open session. In this open session, the board must explain, either in its motion or the discussion pertaining thereto, the business it is considering before it begins to vote on hiring the new teacher.

D. Effects of Non-compliance

Section 3 outlines the enforcement measures upon non-compliance with the Act's provisions. Where the Act's provisions are not followed or there is probable cause to believe that the provisions of the Act will not be complied with, any person may bring a civil action within 60 days in the circuit court in the jurisdiction where the violation has or is expected to occur. The courts can collect any evidence they deem necessary to the investigation, including the minutes recorded. The courts have a number of enforcement and penalization options upon a successful suit for a violation of the Act. The court can grant an order requiring an open meeting, grant an injunction against future violations of the Act, order the body to make public the portions of the minutes that are not to be kept confidential, or declare null and void any final action taken in a closed meeting which violates the Act. In addition to these remedies, the local State's Attorney may charge a public body in violation of the Act

with a Class C Misdemeanor (5 ILCS 120/4) and of course under the most recent changes (see part H below) a complaint may be filed with the Public Access Counselor in the Attorney General's office.

E. Biannual Review of Executive Session Minutes

Each body shall periodically, but no less than bi-annually, review all closed meeting minutes. Usually, this task is delegated for the initial review work to a committee, an individual board member, staff member or even the attorney, to review and prepare a memo recommending action of some type. At this periodic review, "a determination shall be made, and reported in open session that (1) the need for confidentiality still exists as to all or part of those minutes or (2) that the minutes or portions thereof no longer require confidential treatment and are available for public inspection." The Act provides a grace period of 60 days from the discovery of its failure for the body to comply with the bi-annual review requirement. The Act does not require the release of closed session minutes, it requires the semi-annual review, which in turn may or may not lead to a release.

F. Public Attendance, Tapings and Public Comment

All open meetings are to be held at times and places which are "convenient and open" to the public. The public bodies may not hold a meeting on a legal holiday unless the regularly scheduled meeting day falls on that holiday. The purpose of this requirement is to prohibit secret deliberation. Courts have held that the size and location of the meeting place must accommodate

the expected public attendees. If a meeting is held in an inconvenient setting, it may violate the Act. Therefore, it is best to overestimate attendance when planning an open meeting.

Section 2.05 governs the recording of meetings and stipulates "any person may record the proceedings at meetings required to be open by this Act by tape, film, or other means. The authority holding the meeting shall prescribe the rules to govern the right to make such recordings." But such rules cannot be so oppressive, restrictive, or unreasonable as to deprive the public of their right to record the open meeting. However, if a witness refuses to testify on the grounds that he doesn't want his testimony to be broadcast, then the authority holding the meeting can prohibit recording during the testimony of that witness.

G. Electronic Issues

The Open Meetings Act was amended in 2007 to allow participation by telephone or electronic means. First of all, there must be a quorum of the members of the public body physically present. Then, a majority of the public body may allow a member of that body to attend the meeting by other means (typically telephone, video or audio conference) if the member is prevented from physically attending. The statute provides three bona fide reasons for a physical absence; "(i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency." The "satellite" member should notify the public body's clerk or secretary before the meeting, unless advance notice is

impractical. Lastly, the public body must adopt rules allowing such non-physical means of attendance, in their bylaws for example, which are *at least* as restrictive as the Act itself.

As stated above, in order to determine whether a particular method of communication is sufficiently contemporaneous and interactive, the speed of a normal conversation may be a guide. Emails which receive no response for a few hours or a day will not likely be a "meeting." Whereas, instant messaging and chat boards likely constitute a "gathering." A telephone conference has been and with the new amendments will almost always constitute a "meeting" under the Act's expanded definition. Therefore, consider carefully the rate of conversation when determining whether a meeting must comply with the formal requirements of the Open Meetings Act. Another good determinant, is the subject of such emails or phone conversations, and whether those topics are indeed a substitute for an actual convened meeting. For instance, it is unlikely that telephone calls or emails looking for the best time to schedule a meeting, and the availability of members to attend such, will be the type of "gathering" to discuss "public business" that would be held a violation of the Act. However, similar telephone calls and emails to decide whether to give the superintendent a 5% or 4% raise in salary, would almost certainly be viewed as a violation, since it appears to be a substitute for actually convening a meeting to discuss that topic.

H. Changes made by P.A. 96-542 to the Open Meetings Act.

The Act establishes that "[e]very public body shall designate employees, officers, or members to receive training" on the Open Meetings Act. The names of those designated must be submitted to the Public Access Counselor ("PAC"), and within 6 months after the effective date of the Act which was January 1, 2010 (so by June 30, 2010), and they must "successfully complete" an electronic curriculum designed and administered by the PAC. Once certified, those individuals must then complete annual training programs. Any new members added to the designated list, must successfully complete the certification within 30 days.

The other major change P.A. 96-542 makes to the Open Meetings Act is that if any person believes there has been a violation of the Act, that person has 60 days to file a Request for Review to the PAC. The request must be in writing, signed by the requester, and include a summary of the facts. If the PAC determines further action is warranted the PAC shall forward a copy of the request to the public body within 7 working days and specify the records to be furnished. Within 7 working days after receipt of the request, the public body shall provide copies of the records. If the public body fails to comply, or if otherwise necessary, the Attorney General may issue subpoenas to anyone having knowledge of the violation. **When conducting a review, the PAC has the same right to examine the required "verbatim recording" of a meeting closed to the public or minutes of a closed meeting as does a court.**

After receiving a copy of a request for review and

production of records, a public body may answer the allegations in the form of a letter, brief, or memorandum. The PAC shall then forward a copy of the answer or redacted answer to the requester. A requester or public body may furnish affidavits and records concerning any matter germane to the review.

Within 60 days of the request, the PAC will issue a binding opinion. If the parties disagree with the opinion, that binding opinion is subject to administrative review. Importantly, all the public records that have been provided to the PAC during its review process are exempt from disclosure under FOIA while in the possession of the PAC. In situations where the public body is unclear as to the proper procedure, the PAC may issue advisory opinions, and any good faith reliance on such opinion relieves any liability by the public body under the Open Meetings Act.

When responding to any written request, the AG may resolve the matter through mediation or by a means other than issuing a binding order. The decision to not issue a binding order is not reviewable. If a binding order concludes a violation has occurred, the public body shall either comply as soon as practical or initiate administrative review. If no violation is found, the requester may seek administrative review. If the requester files a civil suit with respect to the same alleged violation of Open Meetings Act, then the PAC shall be notified by requester and PAC shall take no further review action and must notify the public body.

The AG may issue advisory opinions to public bodies regarding compliance with the Open Meetings Act. A written

request for review may be initiated by the public body or its attorney and must contain specific facts. The PAC can request additional information. If a public body relies in good faith on the advisory opinion, then it is not liable for penalties under the Open Meetings Act, so long as the facts have been fully and fairly disclosed to the PAC.

Any binding opinions issued by the AG shall be considered a final decision of the administrative agency, and advisory opinions issued to a public body shall not be considered a final decision of the AG. All actions for administrative review of binding opinions shall be commenced in Cook or Sangamon Counties.

Conclusion

The Open Meetings Act is a pervasive set of rules for the operation of all public bodies to whom it applies, and specifically as to the conduct of their meetings, whether open or closed. It can be a trap for the unwary, and it is frequently being amended by the Legislature, interpreted by the Attorney General and, construed by the courts, so it presents an ever changing landscape. While the penalties can be severe, the potential criminal penalties are actually seldom used. Instead, there are the numerous examples of alleged violations, which because of the high public profile, are at least embarrassing if not actually damaging to the public body, its members and employees. Great care should be given in efforts to comply and to stay abreast of developments in the Act so the business of the body and the public it serves is successfully conducted.

MINUTES OF CLOSED MEETING

_______________________ **LIBRARY**

DATE: **TIME:**

PLACE OF MEETING:

MEMBERS PRESENT: **MEMBERS ABSENT:**

VOTE ON CLOSING: **MEMBERS AYE:**

MEMBERS NAY:

NON-MEMBERS IN ATTENDANCE:

APPLICABLE STATUTORY SECTION:
[See reverse for numbers, include any applicable ones] ____________

SUBJECT MATTER DISCUSSED:
[Description of all matters proposed, discussed or decided]

RECORD OF ANY VOTE TAKEN: [No final action may be taken in closed session]
Specify movants and record tallies:

____
Secretary

EXCEPTIONS PERMITTING CLOSED SESSIONS:*

Citation to Section

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

2(c)(2) 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.

2(c)(3) The selection of a person to fill a public office, as defined in the Open Meetings Act, 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.

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

2(c)(5) The purchase or lease of real property for the use of the public body.

2(c)(6) The setting of a price for sale or lease of property owned by the public body.

2(c)(7) The sale or purchase of securities, investments, or investment contracts.

2(c)(8) 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.

2(c)(11) 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.

2(c)(12) 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.

2(c)(15) Professional ethics or performance when considered by an advisory body appointed to advise a licensing or regulatory agency on matters germane to the advisory body's field of competence.

2(c)(16) Self evaluation, practices and procedures or professional ethics, when meeting with a representative of a statewide association of which the public body is a member.

2(c)(21) Discussion of minutes of meetings lawfully closed under the Open Meetings Act, 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 the Open Meetings Act.

* The exceptions listed are those applicable to public libraries in the words of the statute. Other exceptions may apply to other forms of governmental bodies. Although stricken by statutory amendment, we believe a constitutional exception continues to exist permitting closed session to consult with an attorney on privileged matters.

Model Rules in the event the H.B. 5483 becomes law:

PUBLIC LIBRARY

Public Participation at Library Board Meetings and Petitions to the Board

At each regular and special open meeting, the members of the public and Library employees may comment on or ask questions of the Board, subject to reasonable constraints.

The individuals appearing before the Board are expected to follow these guidelines:

1. Address the Board only at the appropriate times as indicated on the agenda and when recognized by the Board President.
2. Identify oneself by full name and address, and be brief. Ordinarily, such comments shall be limited to 5 minutes. In unusual circumstances, and when the person has given advance notice of the need to speak for a longer period of time, such person may be allowed to speak for more than 5 minutes.
3. The Board President may shorten or lengthen a person's opportunity to speak. The President may also deny the opportunity to speak to a person who has previously addressed the Board on the same subject within the past 2 months.
4. No more than 20 minutes shall be allowed to each subject under discussion, except with unanimous consent of the Board.
5. The Board President shall have the authority to determine procedural matters regarding public participation not otherwise defined in Board policy.

Petitions or written correspondence to the Board shall be presented to the Board at the next regularly scheduled Board meeting.