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School Board Meetings

Requirements of the Illinois Open Meetings Act

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and Julie E. Lewis

With special recognition to
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Letting the Sunshine in:

School Board Meetings

By James P. Bartley and Julie E. Lewis

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The Illinois Complied Statutes contain two major pieces of legislation designed to provide public access to units of local government in Illinois. These "sunshine laws" are:

- The Illinois Open Meetings Act (5 ILCS 120/1 et seq.), which provides public access to the meetings of public bodies;
- The Illinois Freedom of Information Act (5 ILCS 140/1 et seq.), which insures public access to records assembled, gathered, produced and disseminated by public bodies.

This pamphlet is intended as a practical guide for school boards and administrators in dealing with the myriad provisions of these two important laws.

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Summary of Changes Since the Last Revision

Here are the major substantive changes to the Open Meetings Act since this booklet was last revised.

- Creates "Public Access Counselor" in the Office of the Attorney General to review potential disputes, investigate complaints, and issue advisory/binding opinions. (Public Act 96-542)

- Every public body must designate employees, officers or members to receive training on compliance with this Act within six months after the effective date of the Act (1/1/2010), and thereafter must successfully complete an annual training program. (Public Act 96-542)

- Allows for a civil action to be brought in the circuit court for the judicial circuit in which the alleged noncompliance has occurred, or is about to occur, prior to or within 60 days of the meeting alleged to be in violation of the Act. (Public Act 96-542)

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THE ILLINOIS OPEN MEETINGS ACT

INTRODUCTION

All school board members should be familiar with the requirements of the Open Meetings Act. Of course, a pamphlet of this nature cannot possibly answer all questions that can arise under the Act. Accordingly, as virtually all meetings of school board members are subject to the Act, public officials should consult with their school attorneys when necessary in order to be certain that they are fully complying with the Act.

All Illinois school boards are subject to the Open Meetings Act.[1] The Act makes it public policy that (a) public bodies shall act and deliberate openly, (b) citizens shall be given advance notice of, and the right to attend, all meetings, and (c) the citizen's right to know shall be protected. Meetings are to be open and the Act's limited exceptions allowing closed sessions are to be "strictly construed."

A meeting is defined as "... **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 five-member public body, a quorum of the members of a public body held for the purpose of discussing public business." A "quorum" is the number of assembled members that is necessary for a decision-making body to be legally competent to transact business.[2] Under common law, a majority of a body constitutes a quorum.[3] This common-law rule has been followed in Illinois in the absence of clear statutory expression abrogating the common-law "majority of the members present" rule. This definition should eliminate the confusion which often existed under the prior Act as to whether a gathering of two or more public officials at which public business was discussed had to be open to the public.

The Open Meetings Law is expressly applicable to school boards and significantly supplements those provisions of The School Code relating to school board meetings. In addition to stating a general public policy on meetings of public bodies, the Open Meetings Law:

1) States that meetings of public agencies, including school boards and their subordinate committees, must be open to the public and makes limited exceptions for certain specified matters which may be discussed in closed session.

2) Requires that meetings shall be at specified times and places convenient to the public.

3) Prohibits public meetings on legal holidays unless the regular meeting day falls on a holiday.

4) Requires notice of all meetings to be given to (a) the general public and (b) certain news media.

5) Requires preparation of a schedule of regular meetings. Requires publication of a change in regular meeting dates.

6) Requires preparation of minutes of all open and closed meetings.

7) Requires a verbatim record of all closed meetings in the form of an audio or video recording.

8) Provides both civil and criminal remedies for violations.

WHAT THE ACT COVERS

Bodies Covered

The Open Meetings Act applies to all meetings of public bodies (except, interestingly enough, the General Assembly). Public bodies as defined in the Act include:

- school boards; and
- committees and subcommittees of school boards.

The creation of committees does not circumvent the Act. A committee or subcommittee of a public body is required to give notice of its meetings, keep minutes and comply with all other requirements of the Act. However, the Act does not apply to meetings or conferences of department heads, staff or employees. A citizens committee appointed to advise a school board is covered by the Act; a committee appointed to advise a superintendent or principal is not covered.

Gatherings Covered

The Open Meetings Act defines a meeting as "... 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

[1] 5 ILCS 120/1 *et seq.*

[2] 59 Am. Jur. 2d *Parliamentary Law* § 9 (2002)

[3] *Vill. of Oak Park v. Vill. of Oak Park Firefighters Pension Bd.*, 362 Ill. App. 3d 357, 368-369 (1st Dist. 2005); Am. Jur. 2d *Parliamentary Law* § 9 (2002)

public body held for the purpose of discussing public business or, for a five-member public body, a quorum of the members of a public body held for the purpose of discussing public business." This definition eliminates the confusion that can arise when two school board members bump into one another on a street corner and proceed to discuss school business.

For a seven-member board of education, four members constitute a quorum and three represent a majority of a quorum. Therefore, a discussion of public business among three members of a seven-member board of education is covered by the Act, while such a discussion between two members is not.

However, if those two board members happen to be members of a five-member school board committee, they would represent a majority of a quorum. If they intentionally gather at a street corner to discuss committee business, then the Act would apply and their street corner discussion would be illegal — unless they give public notice, keep minutes and meet all other requirements of the Act.

The Open Meetings Act applies equally to committees of public bodies, and a majority of a quorum is determined based upon the number of members of that committee and not the number of members of the school board.

Discussion of Public Business

Although the Act does not define "public business," one can assume the term refers to business of the particular public body. That is, school board members might discuss foreign affairs without violating the Act. School board business, on the other hand, would encompass anything that is pending before the board — and might include any issue that might reasonably come before the board in the foreseeable future.

The definition of meeting also requires that the gathering of a majority of a quorum be held for the *purpose* of discussing public business. In other words, there must be an intent to discuss public business before the gathering becomes a meeting covered by the Act. The legislature added this intent language so that public officials would not have to fear violating the Act if they unintentionally discussed public business by some or all of the members of a public body at a social event.

However, whether a discussion of public business by some or all of the members of a public body at a social event (dance, dinner, party, etc.) is covered by the Act, still depends upon the particular facts involved. If a majority of a quorum of a public body is present at a social event, and if they intended to gather there to discuss public business or if the purpose of attending this social event was to discuss public business, the actual gathering and discussion of public business would be a meeting covered by the Act. Unless the gathering is open to the public and all requirements of the Act are met, including notice and minutes, the public officials involved are in violation of the Act. It is not necessary that public officials meet at their official meeting place in order to have a meeting under the Act. Also, if public officials gather together at a social event with the intent of evading the Act, they will be in violation of the Act.

On the other hand, if a majority of a quorum of a public body comes together at a social event with no intent to evade the Act and not for the purpose or with the intent of discussing public business, a casual, chance or informal discussion of public business by such members of a public body should not be considered a meeting within the purview of the Act. After all, it is only natural for people with a common interest to discuss it when they are together.

However, the Illinois Attorney General in his written explanations of the Act has stated that:

"... although a gathering may not be held for the purpose of discussing public business at the outset, the gathering is subject to conversion to a meeting at any point. Thus, for example, at the point that a dinner party turns to a discussion of public business upon which the attention of the requisite number of public body members present is focused, the gathering becomes a 'meeting' for purposes of the Act."

Although this statement by the attorney general appears to ignore the clear intent language of the Act, school board members would be well advised to avoid discussions of public business at social events and, as if any such discussion might have inadvertently started, to end it promptly upon recognition that it involves public business.

Meetings Not Covered

One court[4] has held that meetings or conferences of administrators, teachers or other employees are not covered by the Act because the participants do not adopt any resolutions and meet only for the purpose of promoting "good staff work." The school board president or another member of the board may attend such a staff meeting without bringing it within the coverage of the Act. However, if a majority of a quorum of the public body attends such a staff meeting at which public business is discussed, the meeting would then come within the Act and would have to be open to the public.

By the same token, an "internal" committee which is not formally appointed by or accountable to any public body, by its very nature, does not conduct deliberations which fall within the scope of the Act.[5] Finally, a federal district judge has ruled that a "political rally" is not a meeting under the Act, even though all the board members were there and discussed public business.[6]

MEETING TIMES AND PLACES

The Open Meetings Act requires all public meetings to be held at specified times and places which are convenient

[4] *People ex rel. Cooper v. Carson*, 28 Ill.App.3d 569, 328 N.E.2d 675 (2nd Dist. 1975)

[5] *Pope v. Parkinson*, 48 Ill.App.3d 797, 363 N.E.2d 438 (4th Dist. 1977)

[6] *Nabhani v. Coglianese*, 552 F.Supp. 657 (N.D. Ill. 1982)

and open to the public. Therefore, a public body cannot schedule a meeting to be held at midnight or at 5 a.m.; however, if a meeting called at a convenient time extends into the early morning hours, it would be a proper and legal meeting. Also, a public body cannot properly schedule a meeting to be held outside of its corporate boundaries. A meeting outside of its corporate boundaries, depending upon how far outside it was, would probably be "inconvenient" to the public, and there is a serious legal question as to whether a public body has jurisdiction to meet and act outside of its corporate limits.

In addition, no meeting is to be held on a legal holiday unless a public body's regular meeting day falls on such a holiday. Simply stated, a public body cannot schedule a special meeting to take place on Christmas Day, New Year's Day, Thanksgiving or any other legal holiday. The Act does not define legal holidays or the source of such days. However, a list of "legal holidays" is set out in the Bank Holiday Act.[7]

NOTICE REQUIREMENTS

The notice provisions of the Open Meetings Act establish somewhat different requirements for different types of meetings. These include regular, special, emergency, rescheduled and reconvened meetings.

Regular Meetings

The Open Meetings Act requires each public body to give public notice of its schedule of dates, times and places for regular meetings at the beginning of each calendar or fiscal year and to make the schedule generally available. Sections 10-6 and 10-16 of The School Code (105 ILCS 5/10-6 and 105 ILCS 5/10-16) require each school board, at its organizational meeting following each biennial election of members, to set the time and place for the board's regular meetings. If the schedule established at the organizational meeting represents a change from the original schedule, then public notice must be published. Any change in the regular meeting schedule requires special public notice.

In addition, an agenda of each regular meeting must be prepared and posted at both the principal office of the public body and at the location where the meeting will be held. The agenda must be posted at least 48 hours in advance of the meeting. A public body that has a website that the full-time staff of the public body maintains must also post the agenda of the regular meetings of the board on its website. The agenda must remain posted on the website until the regular meeting is concluded. Furthermore, even though the Act provides that "[t]he requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda," an Illinois appellate court has held that the Act does preclude actions from being taken on items that are not specifically set forth in the agenda.[8] While you may be able to "consider" items not included (i.e. discuss) on the agenda, the *Rice* case prohibits final action on items not posted on the agenda.

Organizational Meetings

The School Code mandates that within 28 days following the election of school board members an organizational meeting of the board must be held.[9] At this meeting, responsibility is transferred from the "old" board to the "new" board, and the new board organizes by electing its officers and establishing the date, time and location of regular board meetings. The organizational meeting may be held at a regularly scheduled meeting if one falls within 28 days after the election or at a rescheduled regular or special meeting for which proper notice has been given.

Rescheduled Meetings

Public notice of a rescheduled regular meeting must be given at least 48 hours beforehand, and the notice must include the agenda for the meeting. For example, if members of the board plan to attend an out-of-town convention on their regular meeting date and wish to reschedule, the board must give at least 48 hours notice and the notice of the rescheduled meeting must contain a copy of the agenda. No newspaper publication is required.

Special Meetings

Special meetings may be called by the board president or by any three members of the board. Notice must be written and presented to each board member 48 hours before the meeting if delivered by mail — 24 hours if delivered in person. The notice must contain an agenda for the meeting and discussions are restricted to those items listed on the agenda or reasonably related thereto.

Public notice of special meetings, except a meeting held in the event of a bona fide emergency, must be given at least 48 hours before such special meeting, and the notice must include the agenda for the special meeting. The actions of the public body, while not required to be specifically detailed in the notice, should be "closely related" to those matters set forth in the agenda for the special meeting.[10]

Emergency Meetings

Notice of a special meeting held in an emergency must be given as soon as practicable, but in any event prior to holding of the meeting, to any news medium that has filed an annual request for notice under the provisions of the Act. For example, if a school district were to be hit by a tornado

[7] 205 ILCS 630/17(a)

[8] *Rice v. Board of Trustees of Adams County*, 326 Ill.App.3d 1120, 762 N.E.2d 1205 (4th Dist. 2002)

[9] 105 ILCS 5/10-16

[10] *Argo High School Council of Local 571 v. Argo Community High School District No. 217*, 163 Ill. App.3d 578, 516 N.E.2d 834 (1st Dist. 1987)

or flash flood, the board would not have to delay meeting until 48 hours after posting notice of a special meeting, but could notify the news media and meet immediately in order to decide upon a course of action and then give notice as soon as practicable to the public. Of course, the same restrictions and exceptions apply to such emergency meetings being open or closed.

Reconvened Meetings

When a school board finds its volume of business too great to finish at one meeting, the board can opt to adjourn and reconvene at a later date. By a majority vote of the board of education members present and voting at any regular or special meeting, the board may schedule and hold a reconvened meeting. Any action that could have properly been taken at the original meeting may be taken at the reconvened meeting.

Public notice of a reconvened meeting must be given at least 48 hours beforehand, and the notice must include the agenda. However, public notice is not required if the meeting is to reconvene within 24 hours, or if the date, time and place of the meeting are announced at the original meeting, and there is no change in the agenda.

Should it appear at the reconvened meeting that still another meeting date is needed before the next regular meeting, a reconvened meeting may again be adjourned to another date in a similar manner. Obviously, no regular meeting should be reconvened on a date beyond the next regular meeting. The minutes of the original meeting should show the action taken by the board adjourning to a definite date, time and place.

METHODS OF PUBLIC NOTICE

Special, Emergency, Rescheduled or Reconvened Meetings

Public notice is accomplished by posting a copy of the notice at the main office of the school district, or if there is none, then at the building in which the meeting is to be held. Also, the school board must supply copies of the notices of all of its meetings to any news medium that has filed an annual request for such service.

Also, any news medium that has given the school board an address or telephone number within the school district must receive the same notice of all special, emergency, rescheduled and reconvened meetings in the same manner as is given to members of the board.

Change in Regular Meeting Schedule

If the school board makes a change in its regular meeting dates (for example, a change from the first and third Mondays to the first and third Wednesdays), it must give a least 10 days' notice of such change by publishing a notice in a newspaper of general circulation in the school district. If the school board operates in an area with a population of less than 500 in which no newspaper is published, the 10 days' notice may be given by posting a notice of the change in at least three prominent places within the governmental unit. In either case, the notice of the change must also be posted at the main office of the school district, or if no such office exists, then at the building in which the meeting is to be held. Notice must also be given to those news media that have filed an annual request for notice.

On the other hand, if a public body merely changes (reschedules) one of its regular meetings, e.g., from September 7 to September 9, it need only give 48 hours notice of the changed (rescheduled) meeting date and include the agenda for the rescheduled meeting in said notice. The notice need only be posted and sent to the news media; it need not be published.

ELECTRONIC ATTENDANCE

As of January 1, 2007, the definition of "meeting" was amended by Public Act 94-1058 to include "video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means or contemporaneous interactive communication." The Act permits participation and voting by other members of a public body by audio and video conference provided that the number of public body members necessary to constitute a quorum must be physically present at the open meeting. The law also requires that a quorum of members of a public body without statewide jurisdiction be physically present at a closed meeting and permits participation by other members by video or audio conference at the closed meeting.

The Act is permissive regarding electronic attendance and not mandatory. Units of local government may allow its officials to attend meetings subject to the Act electronically rather than physically, but they are not required to do so.[11] However, if a unit of local government decides to allow its officials to attend meetings electronically, at a minimum it must adopt procedural rules to conform to the requirements and restrictions of the Open Meetings Act. In addition, the official wanting to attend the meeting electronically rather than physically can only do so if (1) the official is ill or disabled; (2) the official is unable to physically attend because of employment or official business of the public body; or (3) the official has a family or other emergency.[12]

E-MAIL COMMUNICATIONS AND INSTANT MESSAGING

Although there are presently no Illinois cases or Illinois attorney general opinions directly addressing the issue of e-mail messages or instant messages, and the application of the Open Meetings Act to such messages, given the recent

[11] 5 ILCS 120/7(c)

change in legislation it would seem reasonable that the courts and the Attorney General would agree with the following:

- When e-mail messages or instant messages by, between and among members of a public body are used in place of letters and such e-mail messages do not involve deliberations, debate, decision making, or consensus on a matter of public business, such communications should not involve a violation of the Open Meetings Act.

- A series of e-mail messages or instant messages among a majority of a quorum of the members of a board of education for the purpose of discussing public business would result in a violation of the Open Meetings Act.

- Participation by a majority of a quorum of the members of a board of education in a "chat room" for the purpose of discussing public business would constitute a meeting covered by the Open Meetings Act and a violation of the Act.

- No violation of the Open Meetings Act would occur where an electronic communication occurred between less than a majority of a quorum. Of particular concern would be the "reply all" function that could easily include a majority of a quorum and could become instantaneous communication.

- E-mails merely conveying information and not requiring a response (especially if containing a message to the recipients not to reply) or other merely "one-way" messages should not be a violation unless it was shown they were a subterfuge intended to circumvent the provisions of the Open Meetings Act.

In the state of Washington, the exchange of e-mail messages may constitute a "meeting" within the meaning of Washington's Open Public Meetings Act (OPMA). However, the mere use or passive receipt of e-mail does not automatically constitute a meeting and the OPMA is not implicated when members of a public agency's governing body receive information about upcoming issues or communicate amongst themselves about matters unrelated to the governing body's business via e-mail. Courts in Washington view whether an e-mail exchange involving members of a school board qualifies as a meeting as an issue of fact when determining if summary judgment is appropriate.[13]

RECORDING OF MEETINGS

Under the Open Meetings Act, any person may record the proceedings at any public meeting by tape, film or other means. The Act allows public bodies to prescribe reasonable rules governing the right to record. A school board wishing to ensure that recording is handled without disrupting its meetings should adopt "reasonable rules" controlling such activities as part of its policy manual. However, if a witness at any meeting required to be open refuses to testify on the grounds he may not be compelled 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, the public body shall prohibit such recording during the testimony of the witness.

CLOSED MEETINGS

Although the public policy stated in the Open Meetings Act is to have meetings conducted openly, there are several statutory exceptions. The Act indicates that the exceptions allowing closed meetings "are to be strictly construed, extending only to subjects clearly within their scope."

The exceptions authorize or allow, but do not require, closed meetings to discuss a subject covered by an exception. No final action is allowed in closed meetings. Those exceptions which apply to schools are the following: "A public body may hold closed meetings to consider the following subjects:

1) 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.

2) Collective negotiating matters between the public body and its employees or their representatives, or deliber-

[12] 5 ILCS 120/7(b); Prior to Public Act 94-1058 Illinois Law was vague on the issue of electronic attendance of public meetings, but case law and an attorney general opinion approved such attendance. Attorney General Opinion, No. 82-041 articulated a policy where telephone conference calls held by a majority of a quorum of a public body for the purpose of discussing public business were meetings under the Act and, therefore, all notice and public accessibility requirements of the Act must be complied with before holding such conferences.

The subsequent and relevant Illinois appellate court opinions followed the Attorney General's rationale. In *Scott v. Illinois State Police Merit Board,* the appellate court determined that it is proper to conduct a closed meeting, pursuant to one of the exceptions, by way of a teleconference call, provided that there is compliance with the Act. 222 Ill. App. 3d 496, 584 N.E.2d 199 (1st Dist.1991). In *Freedom Oil Co. v. Pollution Control Bd.*, 275 Ill. App. 3d 508, 655 N.E.2d 1184 (4th Dist.1995), the Court found that although there was no specific statutory authority for the Board to conduct its meetings by telephone meetings by telephone conference, such a telephone conference meeting fell within the Board's specific authority to conduct meetings. In addition, the Court determined that a telephone conference qualifies as an open meeting despite the fact that a quorum was not physically present in the same room so long as all the requirements of the Open Meetings Act were followed. However, the Court opined that if the Board intended to conduct some of its meetings by telephone conference in the future, better practice would dictate it should have rules in place for the procedures to be followed. *See, People ex rel. Graf v. Village of Lake Bluff,* 321 Ill.App.3d 897, 748 N.E.2d 801 (2nd Dist. 2001).

[13] *Wood v. Battle Ground Sch. Dist.,* 107 Wash.App. 550, 27 P.3d 1208 (Wash. Ct. App. 2001)

ations concerning salary schedules for one or more classes of employees.

3) The selection of a person to fill a public office, as defined in this 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.

4) Evidence or testimony presented in an 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) 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.

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

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

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.

9) Student disciplinary cases.

10) The placement of individual students in special education programs and other matters relating to individual students.

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.

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.

13) 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.

14) 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.

15) 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."

PROCEDURES FOR CLOSED MEETINGS

To conduct a closed meeting, a motion must be passed at an open meeting to hold a closed meeting, which may be held either on the same day or sometime in the future. A quorum is required at that open meeting, and a majority of those members present at the meeting must vote in favor of the motion. The motion must specify the specific exception which authorizes the closed meeting. The vote of each member and identification of the specific exception must be disclosed at the time of the vote and must be recorded and entered into the minutes of the meeting.

An appropriate motion, for example, would be "I move that the board go into closed meeting to discuss collective negotiating matters" or "I move that the board hold a closed meeting to discuss pending or probable or imminent litigation." Note that the motion need not identify the specific items to be discussed, such as the name of the lawsuit that is to be discussed, but it must identify the statutory exception that allows the particular closed meeting.

No additional notice is required to close a meeting where the vote to close is taken at a public meeting for which proper notice has been given.

To schedule a series of closed meetings, a single vote may be taken providing for the entire series, provided that (a) each meeting in such series involves the same particular matters and (b) the meetings are scheduled to be held within no more than three months of the day the vote is taken.

Note, of course, that at a closed meeting the only topics allowed to be discussed are those which are both (a) covered by one of the exceptions, and (b) specified in the vote to hold the closed meeting. In other words, topics not covered by an exception and topics not specifically included in the exception(s) identified in the vote at the open meeting may not be discussed, even though the closed meeting is otherwise proper.

Further, in conducting a closed meeting, the school board must comply with the Act's additional requirements regarding notice, the keeping of minutes, and the keeping of a verbatim record by either audio or video recording.

MINUTES

All public bodies, including committees and commissions, must keep written minutes of all their meetings, whether open or closed. The Open Meetings Act prescribes the following minimum requirements for such minutes:

1) the date, time and place of the meeting;

2) the members 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 the discussion on all matters proposed, deliberated or decided, and a record of any votes taken.

In addition:

4) On a motion to go into a closed meeting, the minutes must contain the vote of each member and must identify the specific exception allowing such closed meeting.

5) If there is a closed meeting on "probable or imminent litigation," the basis for the finding that the matter discussed was a matter of probable or imminent litigation must be specified in the minutes of the closed meeting.

In calling for a "summary of discussion on all matters proposed, deliberated or decided," the Open Meetings Act appears to require that the minutes reflect what discussion occurred and not merely list the topics that were discussed. However, because the Act requires only a summary and not a verbatim account, it appears that only general comments need be included, not quotations.

For example, if an attendance boundary matter was discussed, the minutes might reflect something like the following:

"The board next considered the proposed change in attendance boundaries. There were questions raised from the audience concerning the changes, including busing and the effect on students already attending particular schools. Several individuals in the audience said they were against the proposed changes; others said they were in favor of the proposed changes. Board members also expressed their viewpoints."

Also, note that a summary is required only when a matter is proposed, deliberated (rather than discussed) or decided. Accordingly, if only the audience discusses an issue (without any deliberation or decision by the board), it would appear that no summary is required.

All public bodies, including committees and commissions, must also keep a verbatim record of their closed meetings in the form of an audio or video recording. It is recommended that the school board should assign the steps necessary to record the meetings to specific officials, either in board policy and/or board procedure, rather than informal practice. (*See* Appendix A). These steps should not only include the procedure for recording the meetings, but also for labeling the recording and storing it in a secured and locked location to protect against any disclosure of confidential information. Unless the public body determines that the verbatim recording no longer requires confidential treatment or otherwise consents to disclosure, these recordings shall not be open to public inspection or subject to discovery in any administrative or judicial proceeding other than those seeking to enforce this Act. In a case brought to enforce the Act, the Court, if the judge believes it necessary, must conduct an *in camera* examination to determine whether there has been a violation of the Act. The record may also be subject to review by the Public Access Counselor.

Closed Meeting Minutes

The keeping of minutes of closed meetings is required but potentially hazardous. For example, if a school board holds a closed meeting to discuss settlement proposals relative to a matter of pending litigation and records in the minutes the amount it would like to settle for along with the highest amount it is willing to pay, it would be damaging to the district if a copy of such minutes were somehow to get into the hands of the opposing attorney. Therefore, in such a situation the board president should stress the importance of the confidentiality of such minutes to the members and persuade them that under no circumstances are the contents of the minutes or what was discussed at the closed meeting to be divulged to anyone. This is of particular importance with regard to minutes that involve any student as the disclosure of any information identifiable to a specific student may constitute a violation of federal and state law protecting student records.

Public Inspection

The minutes of open meetings must be made available for public inspection within seven days after the school board has approved them, usually at the next meeting of the board. Beginning July 1, 2006, if a school district has a website, the minutes of regular open meetings must be posted on the website within seven days of the approval of the minutes, and those minutes must remain posted on the website for at least 60 days after their initial posting. Committee meeting minutes should be kept separately and need only be approved by the committee and not by the full school board.

Minutes of closed meetings need not be made available for public inspection until after the public body determines that it is no longer necessary to keep them confidential in order to protect the public interests or the privacy of an individual.

It is recommended that the minutes of all closed meetings be kept in a separate volume or filing place from the minutes of the open meetings. Also, minutes of closed meetings can be approved at a subsequent closed meeting and need not be approved at an open meeting.

The Open Meetings Act requires public bodies to periodically, but no less than semi-annually, meet to review minutes of all closed sessions. At such meetings, a determination must be made and reported in an open session that:

1) the need for confidentiality still exists as to all or parts of those minutes, or

2) the minutes or portions thereof no longer require confidential treatment and are available for public inspection.

These semi-annual review meetings should be conducted in closed session. It would be advisable for the school board to adopt a written resolution at the public portion of the meeting, stating that the review has been conducted and

listing by meeting date which, if any, of the closed meeting minutes are now available for public inspection.

The verbatim record of closed meetings is not required to be reviewed and may be destroyed no less than 18 months after the completion of the meeting recorded, but only after:

1) the public body approves the destruction of a particular recording; and

2) the public body approves minutes of the closed meeting that meet the written minutes requirements as set forth in the Act.

ENFORCEMENT — THE EFFECT OF NON-COMPLIANCE

Individuals who violate the Open Meetings Act may be tried in criminal court. Conviction is a Class C misdemeanor, which is punishable by a $500 fine and/or 30 days in jail.

When a public body fails to comply with the Act, or if there is probable cause to believe that it failed to comply, any person, including the state's attorney, may, within 60 days of the alleged illegal meeting, institute a civil suit in the proper circuit court. The Act also extends this time limitation for the state's attorney by providing that, if facts concerning the meeting are not discovered within the 60-day period, action must be taken "within 60 days of the discovery of a violation by the state's attorney."

In deciding whether an alleged violation did, in fact, occur, the court may examine in private any portion of the minutes of a meeting at which a violation of the Act is alleged to have occurred, and may take such additional evidence as it deems necessary. If the evidence indicates no violation occurred, the court will honor the confidentiality of the closed meeting minutes.

However, if the court determines there was a violation, it may grant such relief as it deems appropriate, including:

1) the issuance of a writ of mandamus requiring that a meeting be open to the public;

2) the issuance of an injunction against future violations of the Act;

3) ordering the public body to make available to the public any portion of the minutes of a meeting as is not authorized to be kept confidential under the Act; or

4) declaring null and void any final action taken at a closed meeting in violation of the Act.

In a civil action brought to enforce this Act, the court, if the judge believes such an examination is necessary, must conduct a private examination of the verbatim recording of a closed meeting as it finds appropriate to determine whether there has been a violation of this Act.

The power of a court to declare null and void final action improperly taken at a closed meeting is potentially very serious. For example, if a school board were to adopt a general obligation bond resolution at a meeting that was later declared an illegal meeting and the court declared the adoption of the resolution null and void, the school district could not issue any bonds under that resolution. An even more serious situation would develop if a school district were to adopt its tax levy shortly before the filing deadline and a court, after the deadline, were to hold that the meeting was improperly held and nullify the passage of the tax levy resolution. In such a situation, the school district would lose a full year's tax revenues. All school districts, therefore, should be careful to adopt all resolutions and take final action on all important matters at meetings which are clearly open to the public and in full compliance with the Act.

Note, however, that the legislative history of the Open Meetings Act suggests no intent to invalidate final actions of a school board or other public body simply because of some technical violation (such as an improper notice) or because related matters were previously deliberated in a closed meeting.

Attorney's Fees

In addition, the court may assess reasonable attorney's fees and other costs against the school district where the party who files the suit "substantially" prevails. On the other hand, the court may award attorney's fees and costs to the school district against a private party filing such a suit only if the court determines that the action was brought with malice or was frivolous. Therefore, the likelihood of any such recovery by a school district, although possible in an unusual case, is not probable.

THE PUBLIC ACCESS COUNSELOR

Pursuant to Public Act 96-5420, effective January 1, 2010, the Office of Public Access Counselor (PAC) has been created within the Office of the Illinois Attorney General, with said PAC to be an attorney licensed to practice in Illinois.[14]

The Public Access Counselor's Duties

In regard to the Act, the Illinois attorney general, through the PAC, has the following powers:

1) To establish and administer a program to provide free training for public officials and to educate the public on the rights of the public and the responsibilities of public bodies under the Act. In this regard, every public body shall designate employees, officers or members to receive training on compliance with the Act. Each public body shall submit a list of designated employees, officers or members to the PAC. On or before June 30, 2010, the designated employees, officers and members must successfully complete an electronic training curriculum, developed and administered by the PAC, and thereafter must successfully complete an annual training program. Whenever a public body desig-

[14] 15 ILCS 205/7(b)

nates an additional employee, officer or member to receive this training, that person must successfully complete the electronic training curriculum within 30 days after that designation (5 ILCS 120/1.05);

2) To prepare and distribute interpretive or educational materials and programs;

3) To resolve disputes involving a potential violation of the Act in response to a request for review initiated by an aggrieved party, by mediating or otherwise informally resolving the dispute or by issuing a binding opinion; except that the Illinois Attorney General may not issue an opinion concerning a specific matter with respect to which a lawsuit has been filed;

4) To issue advisory opinions with respect to the Act, either in response to a request for review or otherwise. In this regard, a review may be initiated upon receipt of a written request from the head of the public body or its attorney. The request must contain sufficient accurate facts from which a determination can be made. The PAC may request additional information from the public body in order to facilitate the review (5 ILCS 120/3.5(h));

5) To respond to informal inquiries made by the public and public bodies;

6) To conduct research on compliance issues;

7) To make recommendations to the General Assembly concerning ways to improve public access to the processes of government;

8) To develop and make available on the Illinois attorney general's website, or by other means, an electronic Open Meetings Act training curriculum for employees, officers and members designated by public bodies; and

9) To promulgate rules to implement these powers.

THE COMPLAINT PROCESS

A person who believes that a violation of the Act by a public body has occurred may file a request for review with the PAC not later than 60 days after the alleged violation. The request for review must be in writing, must be signed by the requester, and must include a summary of the facts supporting the allegation.

Upon receipt of a request for review, the PAC shall determine whether further action is warranted. If the PAC determined from the request for review that the alleged violation is unfounded, the PAC shall so advise the requester and the public body and no further action shall be undertaken. In all other cases, the PAC shall forward a copy of the request for review to the public body within seven working days. The PAC shall specify the records or other documents that the public body shall furnish to facilitate the review. Within seven working days after receipt of the request for review, the public body shall provide copies of the records requested and shall otherwise fully cooperate with the PAC. If a public body fails to furnish specified records or, if otherwise necessary, the Illinois Attorney General may issue a subpoena to any person or public body having knowledge of or records pertaining to an alleged violation of the Act. For purposes of conducting a thorough review, the PAC has the same right to examine a verbatim recording of a meeting closed to the public or the minutes of a closed meeting as does a court in a civil action brought to enforce the Act.

Within seven working days 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. Upon request, the public body may also furnish the PAC with a redacted copy of the answer excluding specific references to any matters at issue. The PAC shall forward a copy of the answer or redacted answer if furnished, to the person submitting the request for review. The requester may, but is not required to, respond in writing to the answer within seven working days and shall provide a copy of the response to the public body. In addition to the request for review, and the answer and the response thereto, if any, a requester or a public body may furnish affidavits and records concerning any matter germane to the review.

Unless the PAC extends the time by no more than 21 business days, by sending written notice to the requester and public body that includes a statement of the reasons for the extension in the notice, or decides to address the matter without the issuance of a binding opinion, the PAC, through the Illinois attorney general, shall examine the issues and the records, shall make findings of fact and conclusions of law, and shall issue to the requester and the public body an opinion within 60 days after initiating review. The opinion shall be binding upon both the requester and the public body, subject to administrative review. The Illinois attorney general has the authority to file an action in the circuit court of Cook or Sangamon County for injunctive or other relief to compel compliance with a binding opinion, to prevent a violation of the Act, or for such other relief as may be required.

In responding to any written request, the Illinois attorney general may exercise his or her discretion and choose to resolve a request for review by mediation or by a means other than the issuance of a binding opinion. In this regard, the decision not to issue a binding opinion is not reviewable.

Upon receipt of a binding opinion concluding that a violation of this Act has occurred, the public body shall either take necessary action as soon as practical to comply with the directive of the opinion or shall initiate administrative review to challenge the opinion. If the opinion concludes that no violation of the Act has occurred, the requester may initiate administrative review.

If the requester files suit, with respect to the same

alleged violation that is the subject of a pending request for review, the requester shall notify the PAC, and the PAC shall take no further action with respect to the request for review and shall so notify the public body.

Records that are obtained by the Public Access Counselor from a public body for purposes of addressing a request for review may not be disclosed to the public, including the requester, by the PAC. Those records, while in the possession of the PAC, shall be exempt from disclosure by the PAC under the Freedom of Information Act.

Administrative Review

A binding opinion issued by the Illinois Attorney General (PAC) shall be considered a final decision of an administrative agency, for purposes of administrative review under the Administrative Review Law.[15] An action for administrative review of a binding opinion of the Illinois Attorney General (PAC) shall be commenced in Cook or Sangamon County. As with the Illinois attorney general's ability to file suit to enforce the Act in either Cook or Sangamon County, this limitation on the counties in which the action may be brought is obviously to make the litigation easier on the Illinois attorney general's office, which maintains active offices in both Chicago and Springfield.

The "Safe Harbor"

A public body that relies in good faith on an advisory opinion of the Illinois Attorney General (PAC) in complying with the requirements of the Act is not liable for penalties under the Act, so long as the facts upon which the opinion is based have been fully and fairly disclosed to the PAC.

CONCLUSION

As indicated previously, the intent of the Act is to have public business conducted openly in order that the members of the public can be informed citizens and watchdogs for the public good. Certainly, such is a praise-worthy goal for which all public officials should strive. The exceptions listed in the Act were included in recognition of the fact that in certain circumstances it is not in the best interests of the public to have particular matters discussed openly. The exceptions further recognize that certain discussions regarding individuals should first be conducted in private in order to protect the individual's right to privacy.

SPECIAL ISSUES

May a school board hold a meeting via telephone conference call?

Yes, provided that the number of public body members necessary to constitute a quorum are physically present at the open meeting. In addition, all members must be able to hear each other and hear the public, and the public must be able to hear all discussions. An unpublicized conference call among a majority of a school board quorum would be in violation of the Act.

The Illinois attorney general opined in November 1982 (No. 82-041) that telephone conference calls held by a majority of a quorum of a public body for the purpose of discussing public business are meetings under the Act and, therefore, all notice and public accessibility requirements of the Act must be complied with before holding such conferences. It is also proper to conduct a closed meeting, pursuant to one of the exceptions, by way of a telephone conference call, provided that there is compliance with other requirements of the Act.[16]

Can one member of a school board participate in a public school board meeting via telephone?

If the board has adopted procedures to conform to the requirements and restrictions of the Act to allow such participation, it is permissible.

May a school board censure one of its members for disclosing confidential information from a closed meeting?

One of the continuing problems of closed meetings is how to control disclosure of confidential information by individual board members. There is nothing in the law giving a school board the power to censure or otherwise levy sanctions on one of its members for any reason. The attorney general issued an opinion to this effect in January 1991 (No. 91-001).

On the other hand, there appears to be nothing in the law that could prevent school board members from expressing their feelings by adopting a resolution of censure — although such a resolution would have no legal effect (and perhaps no practical effect, either). However, in one case the court held that by sanctioning a park commissioner for her purported release of closed session material without discussing her behavior with her in closed session first, the commission violated its own sanction policy and denied her due process.[17]

Fortunately, a board cannot be sued by someone who claims he or she was injured merely by such a disclosure. In one case, the court found that there is nothing in the Open Meetings Act that provides a cause of action against a public body for disclosing information from a closed meeting.[18] However, there are various other imperatives for maintaining confidentiality of information, including the privacy

[15] 735 ILCS 5/3-101 *et seq.*

[16] *Scott v. Illinois State Police Merit Board,* 222 Ill.App.3d 496, 584 N.E.2d 199 (1st Dist. 1991)

[17] *Nelson v. Crystal Lake Park District,* 342 Ill.App.3d 17, 796 N.E.2d 646 (2nd Dist. 2003)

[18] *Swanson v. Board of Police Commissioners,* 197 Ill.App.3d 592, 555 N.E.2d 35 (2nd Dist. 1990), cert. den., 133 Ill.2d 574, 561 N.E.2d 708 (Ill. 1990)

rights bestowed by the Student Records Act and the constitutional liberty interests of employees. Information impugning the character of a student or employee that is divulged from a closed meeting could provide the basis for legal action if traceable to an individual board member or the board as a whole.

May a school board hold a closed meeting to discuss "personnel matters"?

Many school districts frequently adopt a motion to go into a closed (executive) meeting to "discuss personnel matters" — such a motion is insufficient under the Act.[19] For example, a proper motion would be a motion to go into a closed meeting to discuss, for example, the "employment" or "dismissal" of an individual employee, etc. (*See*, exception 1 listed above). The attorney general has further stated that this exception covers only discussions relating to specific individuals and does not include a class of employees or officers.[20] (*But see* exception 1 which does allow a closed meeting to consider "salary schedules" for different classes of employees, as well as the collective bargaining exception.)

It is proper under this exception to meet in closed session to discuss the evidence relating to an employee's suspension from duty.[21] Also, a public body may discuss the reasons for the dismissal of an employee in a closed session and such discussions or knowledge are not therefore suspect or irrelevant.[22]

It is proper for a school district to review an employee's personnel file in closed session. A personnel file has been defined by Illinois courts as a file including documents such as a resume or application, an employment contract, policies signed by the employee, payroll information, emergency contact information, training records, performance evaluations and disciplinary records.[23]

19 *Gosnell v. Hogan,* 179 Ill. App. 3d 161, 534 N.E.2d 434 (5th Dist. 1989)

20 Ill. Atty. Gen. Op. S-726 (1974)

21 *Scott v. Illinois State Police Merit Board,* 222 Ill. App. 3d 496, 584 N.E.2d 199 (1st Dist. 1991)

22 *Verticchio v. Divernon Community Unit School District,* 198 Ill. App. 3d 202, 555 N.E.2d 738 (4th Dist. 1990)

23 *Copley Press, Inc. v. Bd. of Ed. for Peoria School Dist. No 150,* 359 Ill. App. 3d 321, 324 (3d Dist. 2005)

Appendix A

Policy
Verbatim Records of Closed Meetings

Pursuant to Public Act 93-0523, the **[insert name of governmental entity]** adopts the following policy concerning verbatim records of closed meetings:

1. A verbatim record of all closed meetings of the **[insert name of governmental entity]** shall be kept in the form of an audio/video **[pick one]** recording. The **[insert name of governmental entity]** shall provide the recording device and only one recording device will be allowed. Individuals shall not be allowed to bring their own recording device to closed meetings.

2. The **[insert name of designated party, most likely the clerk or secretary, whichever is applicable]**, or his or her designee if he or she is unavailable, will be responsible for operating the recording device for all closed meetings of the board of **[insert name of governmental entity]**. Each committee of the Board of **[insert name of governmental entity]** shall designate in writing the individual responsible for recording closed meetings and submit such designation to the **[Clerk/Secretary]** of the **[insert name of governmental entity]**.

3. The **[clerk/secretary, whichever is applicable]**, shall maintain the audio/video **[pick one]** tapes in a safe and secure location under lock and key. Access to non-released tapes shall be limited to **[fill in names or titles of persons allowed access]** unless otherwise directed in writing by the governing body of **[insert name of governmental entity]**. Individuals allowed access shall sign a log indicating the date and time they listened to a particular tape. Individuals allowed access shall listen to a tape only under supervision. No copies of any non-released tape shall be made.

4. The verbatim record of a closed meeting may be destroyed eighteen (18) months after the completion of the meeting if the board of **[insert name of governmental entity]** approves the destruction of the particular recording and if it approves written minutes for the particular closed meeting that contain the following, as required by Section 2.06 of the Open Meetings Act:

   (1) the date, time and place of the meeting;

   (2) the members of the public body recorded as either present or absent; and

   (3) a summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken.

5. The **[insert name of designated party]** shall, on a periodic basis, but not less frequently than quarterly, inspect the recordings to check their quality and completeness, and report on any problems to the board of **[insert name of governmental entity]**.

6. Unless the board of **[insert name of governmental entity]** has determined that a recording no longer requires confidential treatment, or otherwise consents to disclosure, the verbatim recordings of closed meetings made pursuant to Paragraph 1 above shall not be either open for public inspection or subject to discovery in any administrative proceeding other than one brought to enforce the provisions of the Open Meetings Act. In a civil action brought to enforce the provisions of the Open Meetings Act, a recording will be made available to the court for *in camera* examination for the purpose of determining whether a violation of the Open Meetings Act exists. A recording will be made available to the Public Access Counselor when required by law. In the case of a criminal proceeding, a recording will be made available to the court for *in camera* examination for the purpose of determining what portion, if any, must be made available to the parties for use as evidence in the prosecution.