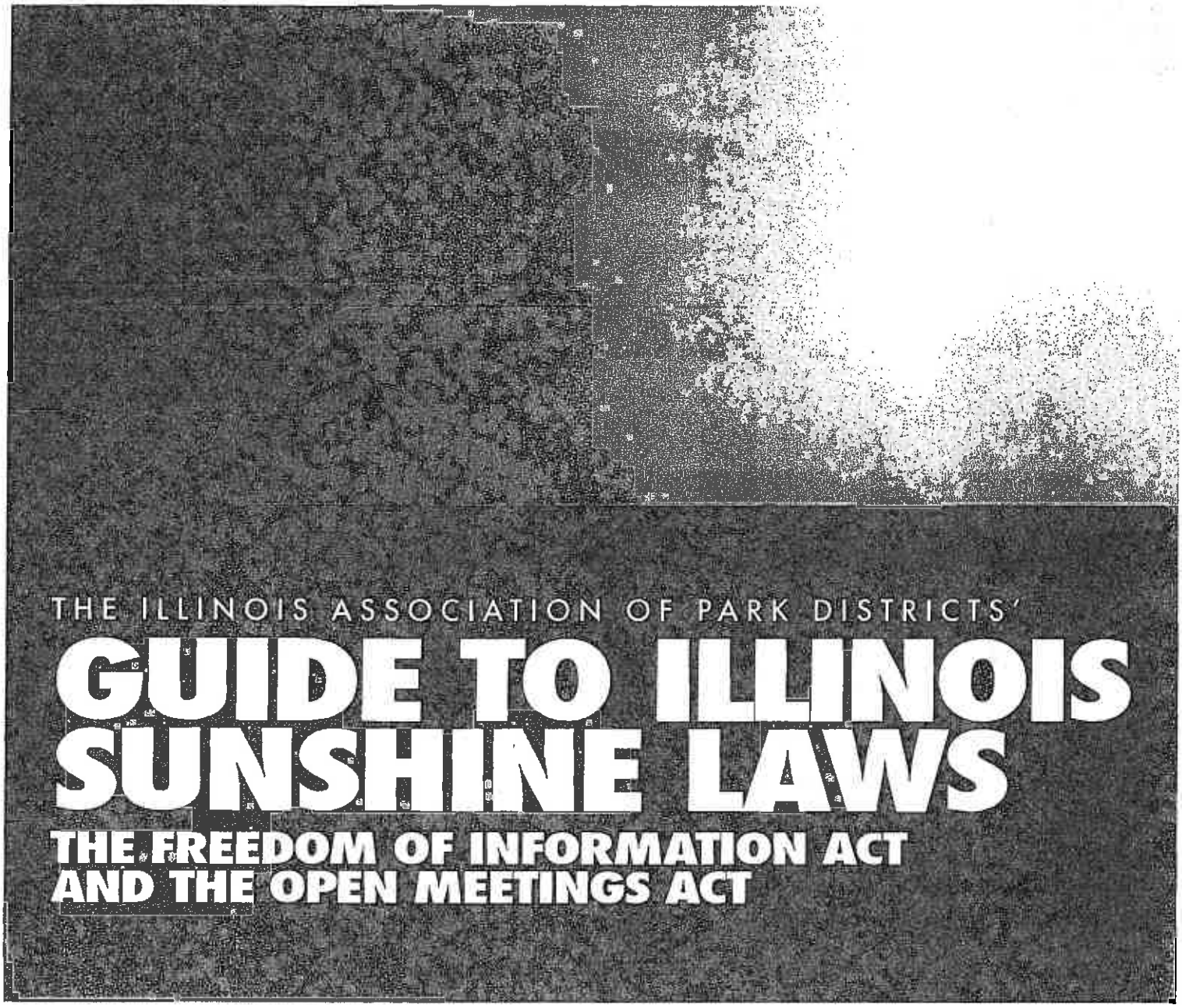

THE ILLINOIS ASSOCIATION OF PARK DISTRICTS'

GUIDE TO ILLINOIS SUNSHINE LAWS

THE FREEDOM OF INFORMATION ACT AND THE OPEN MEETINGS ACT

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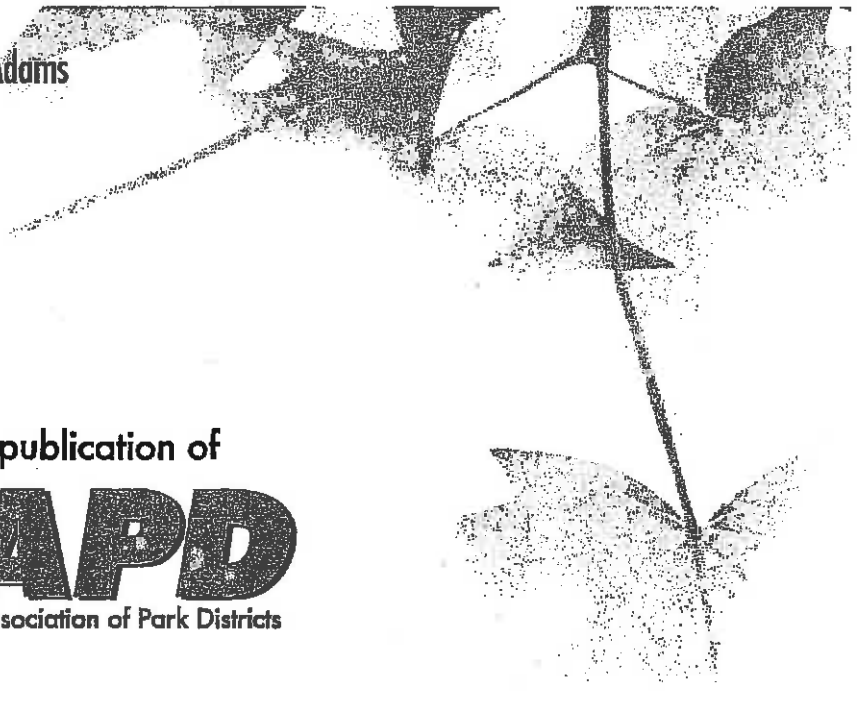

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Introduction

The balance between openness and day-to-day park district functioning is not always an easy one. There is a necessity for transparency in government due to state law, increasing scrutiny from the media and the public, and the current political environment of suspicion regarding the actions of government on all levels.

This handbook provides assistance to park district boards and management in dealing with the everyday applications of the "Sunshine laws." The Freedom of Information Act is intended to ensure public access to records created and received by local government units, subject to certain exemptions. The Open Meetings Act provides access to meetings of public officials and the decisions they make on behalf of the electorate. Together these two pieces of legislation are considered the "Sunshine laws" of Illinois.

The Illinois Constitution guarantees the public the right to access certain public records. "Reports and records of the obligation, receipt and use of public funds of the state, units of local government and school districts are public records available for inspection by the public according to law." Illinois Constitution of 1970, Article VIII, Section 1(c).

Public Act 96-542, which took effect January 1, 2010, contained extensive changes to the Freedom of Information Act and the Open Meetings Act, and created the office of the Public Access Counselor within the Illinois Attorney General's Office. There have been several subsequent amendments to both acts. This handbook offers guidance on the implementation, interpretation and effect of these changes, as well as the previously existing provisions of the statutes.

Chapter 1 of this guide contains a description of the Open Meetings Act along with Attorney General Opinions and court case interpretations. Chapter 2 contains a description of the Freedom of Information Act along with Public Access Counselor decisions and case law. Chapter 3, FOIA and Confidentiality Requirements, provides information on what records cannot be released under FOIA, as they are confidential under a statute or regulation. Endnotes are listed at the end of each chapter. Finally, an appendix of forms has been added for easy use by park districts.

Throughout this guide, the symbol shown at the left will signify a "hot tip" or suggested "best practice."

Please note that this handbook is not intended to provide legal advice. You should consult with your attorney on all legal questions. Also, please check the State of Illinois's website: http://www.ilga.gov/legislation/ilcs/ilcs.asp for the most current version of the statutes. The Public Access Counselor's website also contains some useful information at http://foia.ilattorneygeneral.net.

Contents

Chapter 1 – Open Meetings Act (5 ILCS 120/1, *et seq.*)

I. The Purpose of the Act

The purpose of the Open Meetings Act (OMA) is to ensure that all governmental deliberations and actions are conducted openly.[1]

Until 1995, the courts generally held that "substantial compliance" with the Act was sufficient. For example, matters that were "germane" or "closely related" to the posted agenda for a closed session could be considered.[2] With the passage of P.A. 88-621 (effective January 1, 1995), the "substantial compliance test" was legislatively overruled. Today, any exceptions to the open meeting requirement are strictly construed against closed meetings per Section 1 of the OMA: "The provisions for exceptions to the open meeting requirements shall be strictly construed against closed meetings."

II. All Public Bodies Are Subject to the Act

In the past, park districts may have taken the position that only the actual park board meetings were subject to the OMA. However, the OMA applies to virtually all public bodies and formal committees of these bodies except the General Assembly and the court system. Advisory bodies, such as committees and citizen advisory boards appointed by the park board, are subject to the Act.[3] Not only are the formal park board meetings covered, but also covered are, for example, board study sessions, workshop meetings and budget committee meetings. The Park district can require affiliates such as athletic groups to conduct open meetings as a condition of any agreement with the Park district.

Even private corporations which are primarily government funded may be covered by the Act. The important inquiry is whether the operations of the not-for-profit entity are controlled by public or private interests. In *Carroll v. Paddock*, 199 Ill.2d 16, 764 N.E.2d 1118 (2002), the Supreme Court identified the various factors that may be used to determine whether an agency is a public body. They include: the purpose for which the body was organized; whether the Board of Directors is selected by governmental officials; whether the body is subject to local ordinances regarding the conduct of its business; and whether the body improves or affects the public interest.

An example of a private corporation not subject to OMA is a drug rehabilitation organization receiving public funding, where no unit of government exercised control over the appointments to its Board, or any other internal operations of the corporation.[4] An example of a private corporation found to be subject to OMA is a for-profit corporation created to purchase land for Evanston-Tech Park.[5]

III. Definition of a Meeting

"Meeting" means any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business. 5 ILCS 120/1.02. A quorum is the number of assembled members that is necessary for the public body to be legally competent to transact business.[6] A seven-person board therefore requires four for a

quorum to exist and three for a meeting to legally proceed. Effective August 17, 2007, Public Act 95-245 created an exception that defined a "meeting" for a five-member public body as a quorum (three members), rather than a majority of a quorum (two members).

A. Special Rules for Five-Member Boards

For a five-member Park Board, three members constitute a quorum. Since the adoption of Public Act 95-245, the affirmative vote of three members of the entire board is necessary to adopt any motion, resolution or ordinance, unless a greater number is otherwise required. The Public Act resolved the problem facing five-member Park Boards, when two members talking constituted a violation of the Act. The trade-off for this amendment was the requirement that board action now requires three affirmative votes. This rule applies to all five-member bodies, including committees.

To avoid problems with OMA and sub-committees or advisory groups, a minimum of five members is recommended.

B. Types of Meetings Covered By the Act:

1. Committee meetings - a majority of the members of a committee is a quorum. *Atty. Gen. Opinion*, No. 82-030.

2. Social gatherings, unofficial or informal meetings if public business is discussed.

3. Telephonic conferences per Section 7 of OMA. See Section VI.E. below for further discussion of the requirements for remote participation at meetings.

4. Political meetings, such as party caucuses and legislative receptions, may be within the scope of the Act if public business issues are discussed.[7] However, in *Nabhani v. Coghanese*, 552 F.Supp. 657 (N.D. Ill. 1982), the Court held that a political rally is not a meeting.

5. Electronic mail, electronic chat and instant messaging between a majority of a quorum of the members of a public body held for the purpose of discussing public business. The dangers of e-mails are discussed further in Section III.D below.

C. Meetings Not Covered By the Act:

Staff meetings are not considered meetings under the OMA, unless a majority of a quorum of the Park Board or committee attend.[8]

Discussions of Board members that are not public business related, such as social gatherings.

D. Can E-mail Communications Constitute a Meeting?

1. Recent 2010 amendments to OMA redefine the term "meeting" to mean "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." Thus, e-mail communications, blogging or Facebook communications may be subject to the Open Meetings Act. Unfortunately, future case law will be needed to interpret the precise scope of the recent amendments with respect to e-mail "meetings".

2. Test to Determine if E-mail Communications Constitute a Meeting:

   The intent of the amendment to the definition of a "meeting" appears to focus on "contemporaneous interactive communication" among a majority of a quorum of the members of the public body. The relevant inquiry is then:

   a. Is a majority of a quorum of the public body engaged in the communication?

   b. Is there a series of contemporaneous or close in time messages and responses among the public officials on the topic of public business?

      No - If a single message is sent to multiple parties and does not solicit a response, a meeting may not have occurred since it is not "interactive communication".

      Maybe - If a single message is sent to multiple parties and does solicit a response, (1) a meeting may occur if "interactive" responses are sent to multiple parties or (2) a meeting arguably may not occur if the responses were sent only to the message originator.

   If the answer to items a. and b. is "yes", then, it is likely that a meeting as defined by OMA is occurring.

To avoid unintentional internet "meetings" via e-mail, if an e-mail is sent to multiple parties soliciting their response, the message originator should specify that responses should be returned to the originator only and not copied to other recipients. Alternatively, if there is a significant gap in time between the messages, they might not be considered "contemporaneous" communications and therefore not a meeting under OMA.

IV. Public Notice and Agenda of Meetings

A. Regular Meetings

1. Annual Notice - 5 ILCS 120/2.03

At the beginning of each calendar or fiscal year, each public body covered by the Act must give public notice of the schedule of its regular meetings and must state the regular dates, times and places of these meetings. A permanent change in the regular meeting date (i.e. from the first Monday of the month to the second Monday of the month) may be made only after publication with at least 10 days' notice. However, only 48 hours' notice is required for a single rescheduled meeting.

2. Posting of Agenda – 5 ILCS 120/2.02

Regular meeting agendas must be posted at the park district's principal office, or if there is none, at the meeting site, at least 48 hours prior to the meeting. The agenda must also be posted on the Park district's website at least 48 hours before the meeting and until the meeting is concluded if the website is maintained by full-time staff of the Park district.

If the website is not maintained by full-time employees, then it need not be posted on the website. ***See*** **Section IV.E. for further discussion of website posting.**

3. Notice to Media - 5 ILCS 120/2.02

Notice of meetings must be provided to any media that have filed an annual request to receive such notice.

There is no definition in the Act for "media." However, there is case law that indicates that the average local self-described investigatory blogger is not considered a journalist who would be able to demand notice.[9]

4. Agenda Must Be Specific - 5 ILCS 120/2.02

If an item is not specifically identified on the regular agenda (but only generically under the heading of "new business"), the public body may consider and discuss the item. However, if it acts on the item, there is an Open Meetings Act violation.[10] If the Park Board wishes to act on a real estate purchase, for example, while it is not necessary to list the specific address, the purchase of property should be listed on the agenda.

5. Notice of Closed Session - 5 ILCS 120/2.02

Although Section 2.02(a) provides that at any open meeting, for which proper notice has been given, the public body may hold a closed session without additional notice as an agenda item, best practice is to list a closed session and the reason for the closed session on the agenda.

Posting and notice requirements do not apply to meetings reconvened within 24 hours or where the time and place of the reconvened meeting is announced at the original meeting and there is no change in agenda.

B. Special Meetings

From time to time, special meetings are needed. For instance, if an issue has arisen and needs resolution long before the next regularly scheduled meeting, a special meeting may be necessary. An example is the hiring of an executive director.

1. Public notice of special meetings must be given at least 48 hours before such special meeting, and the notice must include the agenda for the special meeting.[11]

2. The posting methods are the same as for regular meetings, but notice of the meeting must be posted in addition to the agenda. Notice must be provided to media that have requested notice of park district meetings.

C. Emergency Meetings

There is an exception in OMA for *bona fide* emergency meetings. Best efforts for notice must be made, including notifying the news media of the meeting.

D. Meetings on Holidays

Any type of meeting (whether regular, special, rescheduled or reconvened) can be held on a holiday, but only if the holiday coincides with a regular meeting date. 5 ILCS 120/2.01.[12]

E. Website Posting

Every unit of local government that has a website maintained by the *full-time staff* of the public body must routinely post three items on the website:

1. The agenda of any regular meeting of the governing body. The agenda must remain on the website until the meeting is concluded.

Regular committee meeting agendas of the park district should also be posted.

2. Notice of all meetings of the governing body (whether regular or special meetings) must be posted on the website. The annual meeting schedule must remain on the website until a new annual meeting schedule is approved.

The failure to post notice of the meeting or the agenda on the website does not invalidate the meeting or any actions taken at the meeting. 5 ILCS 120/2.02(b).

3. The minutes of the governing body's regular meetings must be posted within 7 days after approval of the minutes by the governing body. The minutes must remain posted on the website for not less than 60 days.

Because of the burden that constantly updating the website may impose, a smaller park district may consider having an outside contractor, a volunteer or part-time staff member maintain the website, which would eliminate the posting requirement.

F. Posting of Employee Total Compensation Packages

Public Act 97-609, effective 1-1-12 added Section 7.3 to the OMA. It requires that:

1. Within 6 business days after a park district participating in the Illinois Municipal Retirement Fund approves a budget, that park district must post on its website the total compensation package for each employee having a total compensation package that exceeds $75,000 per year. If the park district does not maintain a website, the park district must post a physical copy of this information at the principal office of the park district. If a park district maintains a website, it may choose to post a physical copy of this information at the principal office of the park district in lieu of posting the information directly on the website; however, the park district must post directions on the website on how to access that information.

2. At least 6 days before a park district participating in the Illinois Municipal Retirement Fund approves an employee's total compensation package that is equal to or in excess of $150,000 per year, the park district must post on its website the total compensation package for that employee. If the park district does not maintain a website, the park district shall post a physical copy of this information at the principal office of the park district.

If a park district maintains a website, it may choose to post a physical copy of this information at the principal office of the park district in lieu of posting the information directly on the website; however, the park district must post directions on the website on how to access that information.

3. For the purposes of this Section, "total compensation package" means payment by the park district to the employee for salary, health insurance, a housing allowance, a vehicle allowance, a clothing allowance, bonuses, loans, vacation days granted, and sick days granted.

V. Location of Meetings

A meeting may be conducted at any venue. However, an open meeting in an inconvenient place can violate the Open Meetings Act.[13]

"'Convenient' means 'suited to personal comfort or to easy performance' or 'affording accommodation or advantage.'"[14] Under the plain and ordinary meanings of the terms, section 2.01 requires a locale that is not only "open," but "convenient to the public."[15] In *Gerwin v. Livingston County Board,* 345 Ill.App.3d 352, 354-56, 802 N.E.2d 410 (4th Dist. 2002), the Court found an Open Meetings Act violation when citizens were unable to attend the county board meeting for the expansion of a landfill due to the small size of the meeting room, *i.e.,* inconvenient. The citizens who filed the complaint alleged that the board knew that the meeting room would be too small for the number of citizens who wanted to attend, that larger venues were available and that the board chairman resolutely refused to hold the meeting in a larger venue to make attendance by the public inconvenient.

In *In re Petition to Disconnect,* 396 Ill. App.3d 989, 920 N.E.2d 1102 (2nd Dist. 2009), the petitioners contended that they were inconvenienced when they left the meeting during the closed session and had to wait until the "wee hours" of the morning to attend the open session. The Court found that the legislature does not "specify how far a public agency must go in accommodating members of the public who wish to attend public meetings" and stated it would not interpret the statute so as to produce an absurd result.

VI. Conduct of Open Meetings

A. Recording by the Public

Pursuant to Section 2.05 of OMA, any person may record the open meeting by tape, video or other means subject to reasonable rules of the public body.

Rules of procedure for meetings should include directions regarding recording so that it is not disruptive to the meeting. For example, leaving the audience area and approaching Board members should be prohibited.

B. Required Accommodations to Persons with Disabilities

Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §12101, *et seq.*) requires park districts to make their public meetings accessible to persons with disabilities. 42 U.S.C. §12132 provides that "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." This includes both physical accessibility of the meeting site (*i.e.* ramps, elevator, sufficient door width), as well as interpreters or other accommodations for hearing impaired persons. Local governments are not, however, required to take any actions that will result in a fundamental alteration or in undue financial and administrative burdens. 28 C.F.R. §§35.160-35.164 28 C.F.R. §35.130(f) provides that the person requesting the accommodation cannot be charged a fee. Requiring reasonable notice to the park district of the need for an accommodation is permissible.

It is advisable to include on meeting agendas and notices the amount of time required for notice to the park district of the need for accommodation under ADA (more than 48 hours is not recommended), along with a contact person name and phone number (including a TDD number for hearing impaired persons).

C. Conducting a Closed Session

Certain highly sensitive information can be discussed in closed session. To maintain confidentiality, the President should regularly reiterate the importance of confidentiality of such discussions and minutes. The closed-meeting minutes should be kept separate from the open meeting minutes and in a secured location.

The Open Meetings Act requires Park District Boards to follow specific procedures for a closed (also known as "executive" session).

1. The requirements to enter into closed session.

Section 2(a) of the Open Meetings Act provides that a public body may hold a meeting closed to the public, or close a portion of a meeting to the public. It requires a majority vote of a quorum present, at an open meeting after proper notice.

The vote on whether to close the meeting and the specific exception contained in Section 2(c) of OMA authorizing the closing of the meeting to the public must be publicly disclosed at the time of the vote and recorded into the minutes of the meeting. For example, a motion to "hold a closed meeting to discuss pending litigation" is sufficient but additionally citing to 5 ILCS 120/2(c)(11) is encouraged. However, the

actual name of the case to be discussed need not be revealed in open session. [For a list of exceptions, see Section VII of this chapter.]

A single vote may be taken to set up a series of meetings, portions of which are proposed to be closed to the public, provided each meeting involves the same particular matters and is scheduled to be held within no more than 3 months of the vote.

A roll call vote should be taken on the motion to enter into closed session. Specific findings need to be made on the record during closed session as to the exception under OMA that permits the park board to go into closed session (*I.e.* dismissal of employees pursuant to 5 ILCS 120/2(c)1)). *See* Appendix for script of how to go into executive session.

2. No final action is allowed in closed session.

Final action may not be taken in closed session.[16] Final actions should only occur in open session. A final action can be ratified at a subsequent open meeting.[17] Private deliberation may not necessarily render a decision null and void. In *Board of Education of Community Unit School District No. 337 v. Board of Education of Community Unit School District No. 338*, 269 Ill. App.3d 1020, 647 N.E.2d 1019 (3rd Dist. 1995), the Board adjourned to deliberate in private after the close of evidence of two hearings the Board conducted. The Board then reconvened and voted in open forum. The Court held that although this procedure may have been in violation of the Open Meetings Act, it does not render the proceedings null and void.[18] The Court further stated that although "we do not condone violations of the Open Meetings Act, we are unwilling to remand on the basis of this error." *Board of Education,* 269 Ill.App.3d at 1031.

3. Two exceptions allow binding direction in closed session -- land acquisition or litigation.

It is permissible for the Board to provide binding directions for land acquisition or pending or probably litigation in closed session. However, any final action, such as approval of a real estate contract or settlement agreement, must be taken in the open meeting.

D. Regulating Public Comment

1. The Board must establish rules for public comment.

Section 2.06(g) of the OMA provides that any person shall be permitted an opportunity to address public officials at meetings subject to this Act under the rules established and recorded by the public body.

Sample Procedural Rules for Allowing the Public to Address the Board and a Sample Ordinance Establishing Regulations for Public Participation During Park Board Meetings are located in the Appendix.

2. First Amendment considerations.

The major constraint on a park district's ability to regulate public comments comes from the need to avoid infringing on First Amendment protected speech. Any limitation that is made, whether from meeting procedure or the decision to remove a particular citizen from a particular public meeting, must not violate a citizen's First Amendment rights. When a clearly established First Amendment right is violated, public officials may not claim qualified immunity and therefore could be subject to liability.[19]

A park district board meeting is typically classified as a designated limited public forum because members of the community are only permitted to speak for a designated time period during the public comments section.[20] When a limited forum such as a public meeting is created by a government entity, some restrictions on speech are allowed out of practical necessity:

> For the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end ... The State may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest and leave ample alternative channels of communication. *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983) (emphasis added).

Overall, any restrictions placed on speech in public meetings must not discriminate against speech on the basis of viewpoint and must be reasonable in light of the purpose served by the forum.[21]

A common preventative strategy for avoiding disruptions in meetings that has been found to satisfy the content-neutral requirement is the creation of a policy that restricts the subject matter available for comment. The Supreme Court has made it clear that, "'[p]lainly, public bodies may confine their meetings to specified subject matter.'"[22]

If a body, however, fails to justify a restriction placed on citizens' speech with a content-neutral reason, the court may find a First Amendment violation. In *Vergara v. City of Waukegan*, 590 F.Supp.2d 1024, 1037 (N.D. Ill. 2008), the court found that Waukegan violated the plaintiff's First Amendment rights when they prohibited him from speaking at a City

Council meeting. The plaintiff approached the microphone during "audience time" at a council meeting, and he was informed that he may not speak until he apologized to the community liaison officer who he confronted previously with an objection to a recently passed towing ordinance.

E. Electronic Participation of Board Members is Allowed at Board Meetings

Electronic participation in meetings is permitted by Section 7 of OMA under certain circumstances:

1. A quorum of the public body must still be physically present at the location of the open meeting.

2. If the meeting is a closed session, a quorum of the public body must be physically present and other members not physically present may participate by audio or video conference.

3. The public body may allow a member to attend a meeting by electronic means (i.e., audio or video conference) if the member cannot attend due to: (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency. These are the only reasons permitted by statute for a member to participate by electronic means.

4. If a member wishes to attend a meeting by electronic means, the member must notify the recording secretary or clerk of the public body before the meeting unless advance notice is impractical.

5. A majority of the public body must vote to allow a member to attend a meeting by electronic means in accordance with the rules adopted by the public body. The rules may limit the extent to which attendance by electronic means is allowed and may provide for additional notice to the public.

6. The minutes of the meeting must reflect whether the members were present physically or by electronic means.

The Park Board must have adopted rules if they intend to allow electronic participation at Board meetings. A Sample Ordinance Establishing Regulations for Electronic Attendance at Park Board Meetings is included in the Appendix.

VII. Exceptions to Open Meeting Requirements

Most of the work of the Park District Board occurs in open session meeting before the public. However, sometimes business simply must be conducted in a protected setting.

In general, closed meetings (also referred to as "executive sessions") are only allowed in specific limited situations. The exceptions are strictly construed because OMA establishes the public policy favoring open meetings. All final action must take place in open session. 5 ILCS 120/2(e). The exceptions authorize, but do not require, a closed meeting to discuss a topic covered by a particular exception.

The following is a list of the principal exceptions to the open meetings requirement contained in 5 ILCS 120/2(c):

A. The lease or purchase of specific real property for the use of the public body is being considered. 5 ILCS 120/2(c)(5). The setting of the price for sale or lease of real property owned by the park district is being considered. 5 ILCS 120/2(c)(6). The exemption is limited to closed sessions where sales or purchase price is discussed.[23] The discussion of subleasing issues, whether they are "material" or "peripheral" to the subject matter of the lease is also protected.[24] The real estate acquisition exemption only applies if public agencies are discussing formulating the terms of an offer to purchase specific real estate or discussing the seller's terms, or if it is considering strategy for obtaining specific real estate.[25]

B. Discussion of pending, probable or imminent litigation by or against the park district or an employee. 5 ILCS 120/2(c)(11).

The case must be pending before a court or administrative tribunal, or alternately, the Park Board must find that an action is "probable or imminent". The basis for such a finding shall be recorded and entered into the minutes of the closed meeting. The minutes of the closed session must reflect the basis for the conclusion that litigation is probable or imminent. An example of insufficient findings is *Henry v. Anderson*, 356 Ill.App.3d 952, 827 N.E.2d 522 (4th Dist. 2005), where the Board President only stated that the Board would discuss "potential litigation". This was found to be a violation of the OMA. No finding was made that litigation was pending, probable or imminent. An example of sufficient findings is *Wyman v. Schweighart,* 385 Ill.App.3d 1099, 904 N.E.2d 77 (4th Dist. 2008), in which the failure to state in the motion to go into closed session that litigation was pending was not a violation of OMA when it had already been mentioned in open session that there would be a discussion of a pending lawsuit.

Of all of the exceptions, Boards most often mishandle this exception the most by failing to make the probable or imminent finding.

C. Discussion of the appointment, employment, compensation, discipline, performance and dismissal of specific employees or legal counsel 5 ILCS 120/2(c)(1).

1. The Act permits closed meetings to hear testimony on a complaint lodged against an employee.

2. Personnel decisions/dismissals

   a) OMA permits discussion among Board Members regarding termination of an employee in closed session.[26]

   b) The vote to dismiss must be taken in open session.

   c) Reclassification of an employee may be discussed in closed session.[27]

3. Personnel decisions/salaries and appointments

   a) The review of salaries of administrators and other personnel not covered by agreements is permitted under OMA.[28]

   b) Discussion of a superintendent's salary report for employees not in a collective bargaining unit and personnel retention is permissible.[29]

   c) Discussion of the selection of a person to fill a vacancy can be conducted in closed session, but the appointment must be approved in open session. The appointment of an individual to the Board was held invalid where notice of a special meeting of the Board did not specifically state that the question of an appointment of an individual to the Board would be considered.[30]

   d) Discussion of the discipline, performance or removal of a public official when the public body has the power to remove the occupant is permitted under Open Meetings Act.

D. Consideration of the appointment of a member to fill a vacancy on any public body but only by the public body which has the power to appoint. 5 ILCS 120/2(c)(3).

E. Establishing reserves or the 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 to review or discuss claims, loss or risk management information, records, data, advice, or communications from or with respect to any insurer of the local public entity or any intergovernmental risk management association or self-insurance pool of which the local government is a member. 5 ILCS 120/2(c)(12).

F. Consideration of the sale or purchase of securities, investments or investment contracts. 5 ILCS 120/2(c)(7).

G. Consideration of security procedures to respond to actual, threatened or reasonably potential danger to safety of employees, the public or public property. 5 ILCS 120/2(c)(8).

H. Hearing evidence or testimony presented to a quasi-adjudicative body provided the body prepares and makes available for public inspection a written decision and provided that the subject matter was otherwise appropriate (*e.g.* an employee dismissal) for the closed meeting. 5 ILCS 120/2(c)(4).

A quasi-adjudicative body is defined under Section 2(d) as "an administrative body charged by law or ordinance with the responsibility to conduct hearings, receive evidence or testimony and make determinations based thereon".

I. Consideration of self-evaluation, practices and procedures or professional ethics when meeting with a representative of a statewide association (such as IAPD) of which the pubic body is a member. 5 ILCS 120/2(c)(16).

J. Approval of closed meeting minutes or to review them on a semi-annual basis as required by the Act. 5 ILCS 120/2(c)(21).

This is an item that often gets missed. The Board may want to designate the same two meetings (i.e. January and July) each year.

See Section VIII for the requirements for review and withholding of closed session minutes.

K. Meetings of an ethics commission, ethics officer or ultimate jurisdictional authority acting under the State Officials and Employees Ethics Act (5 ILCS 430/1-1, *et seq.).* 5 ILCS 120/2(c)(4).

L. Collective bargaining matters between the park district and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees. 5 ILCS 120/2(c)(2).

M. Meetings between internal or external auditors and governmental audit committees, finance committees and their equivalents, when the discussion involves internal control weaknesses, identification of potential fraud risk areas, known or suspected frauds, and fraud interviews conducted in accordance with generally accepted auditing standards of the U.S. 5 ILCS 120/2(c)(28) (new - Public Act 097-0318, effective 1-1-2012)

VIII. Minutes of Meetings

A. Meeting Minutes

All public bodies are required to keep written minutes of all meetings pursuant to Section 2.06(a) of the Open Meetings Act. The minutes of the meeting must include, as a minimum:

1. The date, time and place of the meeting;

2. The members of the public body recorded as either present or absent;

3. A summary of discussion (i.e. several sentences describing material points made in the discussion) on all matters proposed, deliberated or decided. Restating the topic is not a summary of the discussion; and

4. A record of any votes taken.

B. Approval of Minutes

A public body must approve the minutes of its open meeting within 30 days after that meeting or at the public body's second subsequent regular meeting, whichever is later. The minutes of a meeting open to the public shall be available for public inspection within 10 days after the approval of such minutes by the public body. A public body that has a website maintained by its full-time employees shall post the minutes of an open meeting on the park district website within 10 days of the approval of the minutes. They shall remain posted on the website for at least 60 days after their initial posting.

C. Requirements for Closed Session Minutes

1. Recording the session

Closed sessions require a verbatim record in the form of an audio or video recording. The verbatim record may be destroyed 18 months after the completion of the meeting recorded but only after:

a. the public body approves the destruction of a particular recording; and

b. the public body approves minutes of the closed meeting that meet the written minutes requirements of the Act.

2. Review of closed session minutes

At least every six months, the Board must review its closed session minutes and determine whether the minutes should be released to the public. The question is whether there is still a need to maintain confidentiality to protect the public interest or the privacy of an individual. The determination must be presented in open session by means of a motion or resolution. The failure of a public body to strictly comply with the semi-annual review of closed session written minutes does not cause the written minutes or the electronic recording to become public. However, the Board must within 60 days of discovering its failure to strictly comply, review the closed session minutes and thereafter report in open session that either (1) the need for confidentiality still exists as to all or part of the minutes or verbatim record, or (2) that the minutes or recordings or portions thereof no longer require confidential treatment and are available for public inspection. 5 ILCS 120/2.06(d).

A sample Resolution Regarding Review and Release of Closed Session Minutes is included in the Appendix.

D. Closed Session Minutes are not discoverable under state law, but are discoverable under federal law. Closed session minutes are exempt from disclosure under FOIA until the public body makes the minutes available to the public pursuant to Section 2.06 of the Open Meetings Act. See Chapter 2, Section IX.A.h.

Generally closed session minutes are not open to public inspection or discovery in any administrative or judicial proceeding other than one to enforce the Act.[31] If a plaintiff seeks to enforce the Act, the court typically conducts an *in camera* review of the closed session minutes. Should the court determine that the public body's closed session did not comply with the Act, it may order the release of the closed session minutes, with appropriate redactions for information subject to attorney-client privilege. However, under federal law, closed session minutes are discoverable.[32]

IX. Judicial Remedies for Violations

Of concern to public officials is that "any person violating any of the provisions of this Act shall be guilty of a Class C misdemeanor." 5 ILCS 120/4. Further, in the event of a violation of the Act, the following remedies may be available for enforcement:

A. Court Action by State's Attorney or Private Individual

The State's Attorney or a private citizen may seek any or all of the following remedies from the Court for a violation of the Open Meetings Act:

1. Mandamus, whereby the court orders the Park Board to take certain actions.

2. Injunction against future violations.

3. Requiring public disclosure of minutes.

4. Voiding final action taken at a closed session.

5. Assessing attorney's fees and costs against the public body.

The State's Attorney may sue to enforce the Act within 60 days after "discovery" of a closed meeting in violation of the Act. With respect to private individuals, suit must be brought within 60 days after the meeting has occurred.[32] The "discovery" rule does not apply to individuals, who must file suit within 60 days of the actual violation.[33] However, the Court in *Safanda v. Zoning Board of*

Appeals, 203 Ill.App.3d 687, 561 N.E.2d 412 (2nd Dist. 1990) held that the discovery provision did apply to private citizens.

B. Complaints to the Public Access Counselor of the Illinois Attorney General's Office

A person who believes a violation of the Open Meetings Act has occurred has 60 days from the alleged violation to file a written request for review to the Public Access Counselor (PAC). Upon receiving a request for review, the PAC determines whether further action is warranted. If the PAC determines that the allegation is unfounded, then the PAC notifies the requester and public body and takes no further action.

If the PAC determines that review is warranted, the PAC forwards, within seven working days after receipt, the request to the public body for specific information. The public body must furnish copies of the requested records to the PAC within seven working days and fully cooperate.

The Attorney General has the power to subpoena any person or public body having knowledge or records pertaining to the alleged violation. 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. Within the same seven working days, the public body may answer the allegations in a letter, brief or memorandum. The answer, which may be redacted if necessary, is given to the requester, and they may respond within seven working days.

Because the public body's appeal of the Public Access Counselor's binding opinion is under administrative review, the public body will not be able to submit to the court any information or arguments not presented to the PAC. Attorney advice in responding to inquiries from the PAC is crucial in ensuring a full and complete record for the court to review.

The PAC shall issue a binding opinion within 60 days after receiving the request for review unless it decides to address the matter without the issuance of a binding opinion or the PAC notifies the requester and the public body that it needs a 21-business day extension. The binding opinion makes findings of fact and conclusions of law and is issued to the requester and public body.

A binding opinion issued by the Attorney General is considered final for purposes of administrative review. To challenge a binding opinion, an action for administrative review must be filed in Cook or Sangamon County.

It should be noted that the Attorney General has discretion to choose to resolve a request for review by mediation or other means. The decision by the PAC to use mediation is not reviewable. If the requester files a civil suit with respect to the same alleged violation of the Act, then the PAC takes no further review action and notifies the public body. The public records provided to the PAC during the review process are exempt from disclosure under FOIA while they are

in the possession of the PAC. The Attorney General/PAC may also issue advisory opinions regarding OMA to a public body when requested in writing by the head of the public body or its attorney. The public body's good-faith reliance on the advisory opinion excuses it from liability under the Act.[34]

C. Court Decisions Regarding Open Meetings Act Violations

1. If First Amendment rights are implicated during the public comment portion of an open meeting, public officials are only entitled to qualified immunity in a Section 1983 lawsuit.[35]

2. *De minimis* violations of the Act have been held not to warrant nullification of actions taken at such meetings.[36]

3. According to the Illinois Attorney General in Opinion No. 91-001, members of a public body itself cannot sanction a member for publicly disclosing information discussed in closed session.[37] However, if a member of the public body violates the confidentiality of the closed session, the matter could possibly be referred to the State's Attorney under the official misconduct statute (65 ILCS 5/3.1-55-15).

X. Designation of Open Meetings Act Officer and Training

Section 1.05 of OMA requires a public body to designate employees, officers or members to receive annual training on Open Meetings Act compliance by sending a list of those individuals to the Public Access Counselor (PAC). The training must occur through an electronic training curriculum developed by the PAC.

Best practice is to designate such persons by motion or resolution. A sample Resolution Designating Persons to Receive Open Meetings Act Training is included in the Appendix.

In addition to the above requirement, Public Act 97-0504, effective January 1, 2012, requires all elected or appointed members of park boards to successfully complete electronic training on the Open Meetings Act by January 1, 2013, and persons elected or appointed after the Act takes effect to do so within 90 days of taking office. The commissioners must file a certificate of completion with the park district. Commissioners are not required to take subsequent training.

Endnotes

1. *People ex rel. Hopf v. Barger*, 30 Ill.App.3d 525, 536, 332 N.E.2d 649 (2nd Dist. 1975).

2. *Local 571 v. Argo Community High School District 187*, 163 Ill.App.3d 578, 583, 516 N.E.2d 834 (1st Dist. 1987); *Gosnell v. Hogan*, 179 Ill.App.3d 161, 534 N.E.2d 434 (5th Dist. 1989).

3. *Board of Regents v. Reynard*, 292 Ill.App.3d 968, 979, 686 N.E.2d 1222 (4th Dist. 1997); *University Professionals of Illinois v. Stukel*, 344 Ill.App.3d 856, 801 N.E.2d 1054 (1st Dist. 2003).

4. *Rockford Newspapers v. Northern Illinois Council on Alcoholism and Drug Dependence*, 64 Ill.App.3d 94, 96-7, 380 N.E.2d 1192 (2nd Dist. 1978).

5. *Hopf v. Topcorp, Inc.*, 170 Ill.App.3d 85, 527 N.E.2d 1 (1st Dist. 1988).

6. *Village of Oak Park v. Village of Oak Park Pension Board*, 362 Ill.App.3d 357, 367, 839 N.E.2d 558 (1st Dist. 2005).

7. *People ex rel. Difanis v. Barr*, 83 Ill.2d 191, 202, 414 N.E.2d 731 (1980); *People ex rel. Hopf, supra.*

8. *People ex rel. Cooper v. Carlson*, 28 Ill.App.3d 569, 572, 328 N.E.2d 675 (2nd Dist. 1975).

9. *Too Much Media LLC v. Shellee Hale*, ___ N.J. ____ 2011, A-7-10, June 7, 2011.

10. *Rice v. Board of Trustees of Adams County*, 326 Ill.App.3d 1120, 762 N.E.2d 1205 (4th Dist. 2002). *See also, Feret v. Schillerstrom*, 363 Ill.App.3d 534, 844 N.E.2d 447 (2nd Dist. 2006) (passage of resolution not appearing on the agenda was a violation).

11. 5 ILCS 120/2.02

12. *See* also *Local 571 v. Argo Com. High School District 21*, 163 Ill. App.3d 578, 580, 516 N.E.2d 834 (1st Dist. 1987).

13. *Gerwin v. Livingston County Board*, 345 Ill. App.3d 352, 362-3, 802 N.E.2d 410 (4th Dist. 2003), appeal denied 208 Ill.2d 536 (2003). *In re Petition to Disconnect Certain Territory Commonly Known as the Foxfield Subdivision and Adjoining Properties from the Village of Campton Hills*, 396 Ill. App.3d 989, 920 N.E.2d 1102 (2nd Dist. 2009).

14. *Gerwin*, 345 Ill. App. 3d 352, 361.

15. *Gerwin*, 345 Ill. App. 3d 352, 361.

16. *Williamson v. Dole*, 112 Ill.App.3d 293, 300, 445 N.E.2d 385 (1st Dist. 1985); *Gosnell v. Hogan*, 179 Ill. App.3d 161, 534 N.E.2d 434 (5th Dist. 1989).

17. *Lindsey v. Board of Ed. of the City of Chicago,* 127 Ill.App.3d 413, 468 N.E.2d 1019 (1st Dist. 1984).

18. *Betts v. Department of Registration & Education,* 103 Ill. App.3d 654, 431 N.E.2d 1112 (1st Dist. 1981); *Board of Education of Community Unit School District No. 300 v. County Board of School Trustees,* 60 Ill. App.3d 415, 376 N.E.2d 1054 (2nd Dist. 1978).

19. *Hansen v. Bennett,* 948 F.2d 397, 404 (7th Cir. 1991) quoting *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

20. *See Vergara v. City of Waukegan,* 590 F.Supp.2d 1024, 1037 (N.D. Ill. 2008) (indicating that the "audience time" during the Waukegan City Council Meetings is considered a designated public forum).

21. *Good News Club v. Milford Central School,* 533 U.S. 98, 106-7 (2001).

22. *City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n,* 429 U.S. 167, 175 n. 8 (1976). *White v. City of Norwalk,* 900 F.2d 1421, 1424 (9th Cir. 1990) (upholding a city ordinance which proscribed detailed rules of decorum for public participation in city council meetings); *Lowery v. Jefferson Cty. Bd. of Educ.,* 586 F.3d 427, 430-31 (6th Cir. 2009) (upholding the Board of Education policy that limited individual public comments at board meetings to five minutes and allowing the board to enforce the requirement that these appearances not be frivolous, repetitive or harassing).

23. *Board of Education v. Sikorski,* 214 Ill.App.3d 945, 574 N.E.2d 736 (1st Dist. 1991).

24. *Galena Gazette Publications, Inc. v. County of Jo Daviess,* 375 Ill. App.3d 338, 872 N.E.2d 1049 (2nd Dist. 2007).

25. *People ex rel. Ryan v. Village of Villa Park,* 212 Ill.App.3d 187, 193, 570 N.E.2d 882 (2nd Dist. 1991).

26. *Verticchio v. Divernon Community Unit S.D. No. 13,* 198 Ill.App.3d 202, 206, 555 N.E.2d 738 (4th Dist. 1990).

27. *Henry v. Anderson,* 356 Ill.App.3d 952, 956, 827 N.E.2d 522 (4th Dist. 2005).

28. *Local 571 v. Argo Com. High School District 187,* 163 Ill.App.3d 578, 516 N.E.2d 834 (1st Dist. 1987).

29. *People v. Board of Ed. of District 170,* 40 Ill.App.3d 819, 823, 353 N.E.2d 147 (2nd Dist. 1976).

30. *People ex rel. Redell v. Giglio,* 238 Ill.App.3d 141, 146, 606 N.E.2d 128 (1st Dist. 1992).

31. 5 ILCS 120/2.06(e).

32. *Chicago School Reform Board of Trustees v. Martin,* 309 Ill.App.3d 924, 934, 723 N.E.2d 731 (1st Dist. 1999).

33. *Paxson v. Board of Education,* 276 Ill.App.3d 912, 921-2, 658 N.E.2d 1309 (1st Dist. 1995).

34. 5 ILCS 120/3.5(h).

35. *Hansen v. Bennett,* 948 F.2d 397 (7th Cir. 1991).

36. *People ex rel. Graf v. Village of Lake Bluff,* 321 Ill.App.3d 897, 908, 748 N.E.2d 801 (2nd Dist. 2001) (telephonic participation by trustee); *Chicago School Reform Board of Trustees v. Martin,* 309 Ill.App.3d 924, 723 N.E.2d 731 (1st Dist. 1999).

37. See *also, Swanson v. Board of Police Com'rs.,* 197 Ill.App.3d 592, 609, 555 N.E.2d 35 (2nd Dist. 1990) (no cause of action against public body for disclosing information from closed sessions).

Chapter 2 - Freedom of Information Act (5 ILCS 140/1, *et seq.*)

I. Purpose of the Act

The intention of the Freedom of Information Act is to promote transparency and access to records.

A. Full and Complete Information is to be Provided to the Public

The goal is to ensure that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act.

B. The Freedom of Information Act is a "Primary Duty" of Public Bodies

Section 1 of the Freedom of Information Act ("FOIA") states that providing records is a "primary duty" of public bodies and that the Act should be construed to that end, fiscal obligations notwithstanding. In addition, public records shall be made available unless a specific exemption furthers public policy. Section 1.2 provides that all records are presumed to be open to inspection and copying and any exemption used to deny a request must be proven by "clear and convincing" evidence. Clear and convincing evidence is a high standard.

The goals or motivations of the person requesting information are generally not relevant. However, where privacy rights are at issue, the courts may consider whether the requester seeks to use the information for commercial purposes.[1]

C. Public Records Subject to the Freedom of Information Act

The Act applies to records relating to the business of governmental bodies, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body. Records relating to public funds are public records subject to copying and inspection. Under Section 2.10, certified payroll records submitted under the Prevailing Wage Act are public records, but redaction of employees' addresses, telephone numbers and social security numbers is required. Settlement agreements are now public records subject to disclosure. 5 ILCS 140/2.20.

Although certain private exempt information *may* be redacted from settlement agreement provided in response to a FOIA exemption [5 ILCS 140/2.20], other statutes *require* redaction of certain information from settlement agreements, including social security numbers [5 ILCS 179/ Identity Protection Act]. Also, private information such as a home address and phone number should be redacted under the private information FOIA exemption [5 ILCS 140/7(1)(b)].

The law change in 2010 essentially removed a Board's ability to have a confidentiality provision in the settlement agreement.

FOIA does not apply to corporations which receive some public funding but are controlled by private interests.[2] For example, whether Park District Foundations are subject to FOIA depends on the degree of control exercised by the Park District over the Foundation. Control is determined by such factors as whether the Park Board appoints the Foundation Board members, and whether the Park District supplies funding or staff support for the foundation.

II. Definition of Public Records

A. A Very Broad Definition

"Public records" encompasses almost everything. Public records include but not are limited to records, reports, forms, writings, letters, papers, recordings, documentary materials, administrative manuals, procedural rules, final opinions and orders made in the adjudication of cases, statements and interpretations of policy which a public body adopts, final planning policies, factual and inspection reports, financial data and minutes of public meetings. Electronic records such as e-mail are public records. Generally, drafts of documents are not public records. The definition of "public record" includes electronic communications. Per Public Access Opinion No. 11-006, electronic records relating to public business are public records, even if the records are on privately owned equipment or private electronic accounts.

Should elected officials ever use e-mail?

- **Yes, but sparingly. An elected official should assume that whatever is written <u>is</u> a public record, <u>could be</u> reviewed by the Public Access Counselor, and <u>could be</u> subject to release.**
- **Use the telephone for any highly sensitive communication, such as personnel issues.**
- **The use of official e-mail addresses rather than personal e-mail addresses is to be promoted.**

B. What is a Final Policy Versus a Draft?

Drafts are generally not subject to public inspection. Whether a policy is "final" is a matter for judicial interpretation and is not bound by the public body's characterization.[3]

C. Legal Bills Are Public Records

Documents itemizing legal fees are public records.[4] However, a description of legal services provided may be exempt as subject to the attorney/client privilege.

D. You Do Not Have to Create a Public Record

The public body is not required to create a record which does not otherwise exist.[5] However, the mere fact that the information is located in two different ledgers does not result in the creation of a new document.[6] Masking and/or scrambling a record is not considered preparation of a new record.[7]

III. Exempt and Non-Exempt Records

A. An Express Exemption Is Required

Unless information falls within an express statutory exemption, it must be disclosed under FOIA. The exemptions in the Act are construed and applied narrowly. Public policy favors disclosure.[8] However, if another statute prohibits disclosure of the public record in issue, examination of the record may be denied.[9] Importantly, the Park district bears the burden of establishing that the record is exempt. 5 ILCS 140/11(f).[10]

B. Redaction of Exempt Materials from Records Is Required

Non-exempt information must be provided where exempt information can be masked or redacted.[11] However, non-exempt information which is "inextricably intertwined" with exempt information may be exempt.

C. Use of Exemptions is Not Required Under FOIA

Generally, the public body has the discretion to invoke exemptions or not. The exemptions do not prohibit the dissemination of information; but rather, are cases where disclosure is not required.[12]

CAUTION: Other statutes may REQUIRE a record not be disclosed, such as the Juvenile Court Records Act. ***See*** **Chapter 3.**

IV. Freedom of Information Act Officers

A. Designation of Freedom of Information Act Officers

Each park district must designate one or more officials or employees to act as a Freedom of Information Act Officer. The FOIA officer or his or her designee must receive requests submitted to the public body (unless the records are furnished immediately).

We recommend that the park board designate more than one FOIA Officer, that they are from different departments, and that care be taken to ensure that not all FOIA Officers are out of the office for an extended period at the same time.

A sample Resolution designating the FOIA Officers is included in the Appendix.

B. Freedom of Information Act Officer's Responsibilities

The FOIA officer, or his or her designee, is responsible for:

- Receiving FOIA requests
- Ensuring timely responses to FOIA requests
- Issuing responses
- Developing a list of documents or categories of records that the Park district shall "immediately disclose upon request"

FOIA officer's duties upon receiving requests are:

- Note the date the public body receives the written request
- Compute the day on which the period for response will expire and make a notation of that date on the written request
- Maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been complied with or denied
- Create a file for the retention of the original request, a copy of the response, a record of written communications with the requester and a copy of other communications.

Sample FOIA Response Forms and W-2 Form Redaction Exemptions are included in the Appendix for use by FOIA Officers.

C. Mandatory Freedom of Information Act Officer Training

All FOIA officers must successfully complete an annual electronic training curriculum provided by the Public Access Counselor. New FOIA officers must complete the curriculum within 30 days after assuming the position. The Park district must make available a directory of its FOIA officers and their addresses. If the public body maintains a website, it must post all of the information required by Section 4 of FOIA on that site.

V. Inspection and Copying of Records

A. Freedom of Information Act Request Requirements

FOIA requires requests for inspection or copies to be made in writing and be directed to the public body. A public body may **not** require that a request be submitted on a standard form or require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver. A park district may choose to respond to an oral request. Any request must be immediately forwarded to the FOIA officer or designee. If a public body fails to respond to a FOIA request within the time permitted, then the public body may not charge copying fees or treat the request as unduly burdensome.

Although the Park district may respond to an oral request, we recommend you require requests to be in writing to avoid a misunderstanding as to what information or documents were requested and to verify that the Park district properly responded to the FOIA.

Please note that a simple informal e-mail must be treated as a FOIA request.

Repeated requests from the same person are deemed to be unduly burdensome if "the same records that are unchanged or identical to records previously provided" are being requested. Further, Section 3.3 provides that FOIA is not intended to compel public bodies to interpret or advise requesters as to the meaning or significance of the public records.

The Park Board may adopt rules and regulations, in conformity with FOIA, setting forth the times and places where records will be made available and the persons from whom such records may be obtained.

B. Response Time Frames – Noncommercial Requests

1. The public body must generally comply with the request within five business days per 5 ILCS 140/3(c), or 21 business days for recurrent requesters per 5 ILCS 140/3.2 (new – P.A. 97-579 effective 8-26-11). A recurrent requester is defined as a person who, in the 12 months immediately preceding the request, has submitted to the same public body (i) a minimum of 50 requests for records, (ii) a minimum of 15 requests for records within a 30-day period, or (iii) a minimum of 7 requests for records within a 7-day period, but does not include requests made by news media and non-profit, scientific or academic organizations when the principal purpose of the requests is (i) to access and disseminate information concerning news and current or passing events, (ii) for articles of opinion or features of interest to the public or (iii) for

the purpose of academic, scientific, or public research or education. 5 ILCS 140/2(g).

2. Exceptions allowing an additional five working days:

   a. The requested records are stored in another location;

   b. The request requires the collection of a large number of records;

   c. The request is categorical in nature and requires an extensive search;

   d. The public body has failed to locate the requested records in its initial attempt and the search is continuing;

   e. The requested records require examination by a competent person in order to determine which, if any, are exempt under Section 7 of the Act;

   f. It would unduly burden or interfere with the operations of the public body to fill the request within the initial five working days;

   or

   g. There is a need for consultation with another public body which has a substantial interest in the determination or in the subject matter of the request.

3. FOIA limits the overall time to respond to a maximum of 10 working days, except the requester and public body may mutually agree to further extend the time period for response.

4. Requests for all records falling within a category:

   a. The public body must fill the request unless to do so would unduly burden the public body and there is no way to narrow the request;

   b. The burden on the public body must outweigh the public interest in the information sought; and

   c. A public body must allow the person making the request an opportunity to confer with it in an effort to narrow the request to one that can be filled.

5. Expenditure of labor and computer time does not render request "unduly burdensome". *Bowie v. Evanston Com. Consol. School District 65,* 168 Ill.App.3d 101, 522 N.E.2d 669 (1st Dist. 1988).

6. Section 2.15 requires the disclosure of arrest reports within 72 hours, including the name and address of the arrestee.

7. Time Frame for Recurrent Requesters

The response to a frequent requester shall (i) provide to the requester an estimate of the time required by the park district to provide the records requested and an estimate of the fees to be charged, which the park district may require the person to pay in full before copying the requested documents, (ii) deny the request pursuant to one or more of the exemptions set out in FOIA, (iii) notify the requester that the request is unduly burdensome and extend an opportunity to the requester to attempt to reduce the request to manageable proportions, or (iv) provide the records requested. Within 5 business days after receiving a request from a recurrent requester, as defined in subsection (g) of Section 2, the park district shall notify the requester (i) that the park district is treating the request as a request under subsection (g) of Section 2, (ii) of the reasons why the park district is treating the request as a request under subsection (g) of Section 2, and (iii) that the public body will send an initial response within 21 business days after receipt in accordance with subsection (a) of Section 3.2. The park district shall also notify the requester of the proposed responses that can be asserted pursuant to subsection (a) of Section 3.2(see above). Unless the records are exempt from disclosure, a park district shall comply with a request within a reasonable period considering the size and complexity of the request. 5 ILCS 140/3.2.

C. Response Time Frame – Commercial Requests

"Commercial purpose" is defined in the Act as the use of the information for sale, resale or for solicitation for sales. Pursuant to Section 3.1 of FOIA, within 21 working days after receiving a commercial request, the Park district must do one of four things:

(i) provide the documents;

(ii) deny the request due to exemptions;

(iii) treat the request as unduly burdensome under subsection (g) of Section 3 [formerly subsection (f)]; or

(iv) provide an estimate of the time required to provide the records requested and an estimate of the fees to be charged which can be required to be paid before copying.

The public body may require that the fees be paid up front before copying. A public body must comply with a request within a reasonable period considering the size and complexity of the request, and giving priority to records requested for non-commercial purposes.

Section 3.1(c) provides that it is a violation of the Freedom of Information Act for a person to knowingly obtain a public record for a commercial purpose without disclosing that it is for a commercial purpose if asked to do so by the public body.

Section 9(c) of FOIA provides that any person making a request for public records is deemed to have exhausted his or her administrative remedies with respect to that request if the public body fails to act within the time periods provided in Section 3 of the Act.

D. Required Form in Which Records Are to be Provided

A public body must supply the record in the medium identified by the requester, if the record is available in that medium. Section 6(a) of FOIA provides that when a person requests a copy of a record maintained in an electronic format, the public body shall furnish it in the electronic format specified by the requester, if feasible. If it is not feasible to furnish the public records in the specified electronic format, then the public body shall furnish it in the format in which it is maintained by the public body, or in paper format at the option of the requester. In *DesPain v. City of Collinsville*, 382 Ill. App.3d 572, 888 N.E.2d 163 (5th Dist. 2008), the court held that a requestor was entitled to listen to the original audiotapes of a city council meeting.

VI. Park District Directories

Section 4 of FOIA requires that each public body shall prominently display at each of its administrative or regional offices, make available for inspection and copying, and send through the mail if requested, each of the following:

A. A brief description of the public body, including:

1. a short summary of its purpose;

2. a block diagram of its functional subdivision;

3. the approximate amount of its operating budget;

4. the number and location of all of its separate offices;

5. the approximate number of full and part-time employees; and

6. the identification and membership of all boards, commissions and committees.

B. A brief description of how and from whom (title and address of employees) public records may be requested and any fees permitted to be charged to the public under Section 6 of the Act.

C. A public body that maintains a website shall also post this information on its website.

VII. List of Records

A. For records created on or after July 1, 1984, a list of records must be made available to the public for inspection and copying, must be "reasonably" current, and must be "reasonably" detailed in order to assist the public in obtaining access to public records.

B. In the event the public body has stored its records in computers, it must provide the public with a description of how such records may be obtained in a form comprehensible to persons lacking knowledge of computer language or printout formats.

C. Copies of notices of denials of FOIA requests must also be maintained, but may be maintained by department.[13]

VIII. Fees and Costs

The public body may not charge fees for the first 50 pages of black and white, letter- or legal-sized copies, and the fee for black and white, letter- or legal-sized copies may not exceed $0.15 per page. The fee for color or irregular-sized copies may not exceed the actual cost for reproducing the records. The fee for certification may not exceed $1. In general, a public body is allowed to charge fees only to reimburse its actual cost for reproducing and certifying public records, and for the use by the public of equipment of the public body to copy records; it is not allowed to charge for any staff time necessary to retrieve, review or copy the records. For example, the charge for making a CD is the cost of the blank CD only.

The public body may reduce or waive fees. Excessive fees are considered a denial, such as charging more for color copies than the cost to reproduce them.

A public body may charge a commercial requester up to $10 per hour for each hour spent by personnel in searching for and retrieving FOIA requested records, after the first 8 hours spent. A public body may also charge the commercial requester the actual cost of retrieving records from a third-party contracted off-site storage facility. An accounting of the fees must be provided to the requester. 5 ILCS 140/6(f) (effective 8-26-11).

IX. Exemptions from Inspection and Copying Requirement

A. Section 7(1) Exemptions

There are a number of exemptions under 5 ILCS 140/7(1). The following is a list of frequently cited exceptions:

(a) Information specifically prohibited from disclosure by federal or state law or rules and regulations implementing federal or state law. *See* Chapter 3.

Information prohibited from disclosure by state law is generally exempt. This exemption does not apply to a judicial gag order entered pursuant to a settlement agreement by parties to litigation.[14] The recipient of a federal grand jury subpoena, acting as a public official for the State of Illinois, may not refuse a request to disclose the subpoena document under FOIA.[15]

(b) Private information, as now narrowly defined in Section 2 of FOIA, is exempt unless its disclosure is required by another provision of FOIA, a different state or federal law or a court order. FOIA defines "private information" as unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers (fingerprints, DNA, etc.), personal financial information, passwords or other access codes, medical records, home or personal telephone numbers and personal e-mail addresses. As of this writing, the PAC is requiring that public bodies cite the exemption for deleting a person's date of birth from records as Section 7(1)(c), personal information, rather than 7(1)(b), private information, because date of birth is not specifically listed in the definition of private information. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person. All birth date deletions must be sent to the PAC for review and required by Section 9.5(b) of FOIA.

(c) Unwarranted invasion of personal privacy is defined as the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information.

(1) What constitutes the unwarranted invasion of privacy under Section 7(1)(c) *Lieber* balancing test:

Even if information falls within a specific exemption, the court must still make an independent determination as to whether disclosure would amount to 'a clearly unwarranted invasion of personal privacy,' taking into account (1) the plaintiff's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative

means of obtaining the requested information. *Lieber v. Board of Trustees,* 176 Ill.2d 401, 408-409, 680 N.E.2d 374 (1997).

(2) Personnel Files:

The previous exemption under FOIA for personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applications for such positions has been eliminated. However, Section 11 of the Personnel Record Review Act (820 ILCS 40/11) was amended effective December 1, 2010, to provide that disclosure of performance evaluations under the Freedom of Information Act shall be prohibited.

Performance evaluations placed in a Superintendent's file along with a contract buy-out letter were held by the court to be exempt from disclosure.[16] However, under current FOIA provisions, only the performance evaluations would be exempt.

(d) Law enforcement records are exempt. This applies only if disclosure would interfere with investigations or law enforcement proceedings that are conducted by the agency that receives the request.

(e) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed or policies or actions are formulated are exempt, except that a specific record or relevant portion thereof shall not be exempt when the record is publicly cited and identified by the head of the public body.

What constitutes preliminary drafts under Section 7(1)(f):

1. Building investigation reports which were preliminary were not subject to public disclosure.[17]

2. A recommendation expressing the sheriff's opinions concerning the issuance of a liquor license was held to be exempt.[18]

3. The final report prepared by consultant for the Department of Commerce and Community Affairs was pre-decisional material used in the deliberative process. It was therefore "preliminary" material and exempt from disclosure.[19]

(f) Trade secrets and other proprietary information are exempt only if it is furnished under a claim that it is proprietary, privileged or confidential, and that disclosure would cause competitive harm to the person or business, and only insofar as the claim directly applies to the records requested.

What does and does not constitute trade secrets and proprietary information under Section 7(1)(g):

1. A report submitted by a consulting firm for marketing and a report regarding sales by individual sales agents were not exempt under this section.[20]

2. Illinois Department of Insurance records consisting of corrective orders or insurance company's risk-based capital plans were not exempt under the provisions of the Insurance Code.[21]

3. Commercial and financial information that were disclosed confidentially to the governmental body were exempt from disclosure.[22]

The park district may want to note in its RFP's that information contained in responses to RFP's will be disclosed unless the proposer marks it confidential, and it can be held as permitted by law.

(g) Proposals and bids for any contract, grant or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body, until an award or final selection is made. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made.

(h) Minutes of meetings of public bodies closed to the public as provided in the Open Meetings Act until the public body makes the minutes available to the public under Section 2.06 of the Open Meetings Act.

(i) Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation (attorney/client privileged communications), and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies.

Documents submitted in conjunction with a request for an Attorney General's opinion may be exempt from disclosure under some circumstances but a public agency's conclusory affidavits were insufficient to meet agency's burden of proof.[23]

(j) Records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed.

(k) Records relating to collective negotiating matters between public bodies and their employees or representatives, except that any final contract or agreement shall be subject to inspection and copying.

(l) The records, documents and information relating to real estate purchase negotiations until those negotiations have been completed or otherwise terminated. With regard to a parcel involved in a pending or actually and reasonably contemplated eminent domain proceeding under the Eminent Domain Act, records, documents and information relating to that parcel shall be exempt except as may be allowed under discovery rules adopted by the Illinois Supreme Court. The records, documents and information relating to a real estate sale shall be exempt until a sale is consummated.

Records and documents relating to real estate purchase negotiations, a parcel of land to be acquired by eminent domain or a real estate sale are generally exempt. However, to fall within the exemption, a site must be specifically identified and be the subject matter of actual negotiations.[24]

(m) Any and all proprietary information and records related to the operation of an intergovernmental risk management association or self-insurance pool or jointly self-administered health and accident cooperative or pool. Insurance or self-insurance (including any intergovernmental risk management association or self-insurance pool) claims, loss or risk management information, records, data, advice or communications.

See recent Public Access Opinion 11-004.

(n) Vulnerability assessments, security measures and response policies or plans that are designed to identify, prevent or respond to potential attacks upon a community's population or systems, facilities or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public. Information exempt under this item may include such things as details pertaining to the mobilization or deployment of personnel or equipment, to the operation of communication systems or protocols or to tactical operations.

Former (w) was deleted - There is no longer an exemption for information related solely to the internal personnel rules and practices of a public body.

Public Act 097-0385, effective 8-15-11, restores the exemptions for minors participating in park district programs:

(dd) The names, addresses or other personal information of persons who are minors and are also participants and registrants in programs of park districts, forest preserve districts, conservation districts, recreation agencies and special recreation associations.

(ee) The names, addresses or other personal information of participants and registrants in programs of park districts, forest preserve districts, conservation districts, recreation agencies and special recreation associations where such programs are targeted primarily to minors.

B. Section 7.5. Statutory Exemptions

The new Section 7.5 contains exemptions that are granted by other statutes, but is NOT a comprehensive list of confidentiality statutes which take precedence over FOIA. Relevant exemptions include:

(a) All information determined to be confidential under Section 4002 of the Technology Advancement and Development Act.

(b) Firm performance evaluations under Section 55 of the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act.

Please note this relates to state projects, not local government selection statutes.

(c) Information the disclosure of which is exempted under the State Officials and Employees Ethics Act, and records of any lawfully created State or local inspector general's office that would be exempt if created or obtained by an Executive Inspector General's office under that Act.

(d) Law enforcement officer identification information or driver identification information compiled by a law enforcement agency or the Department of Transportation under Section 11-212 of the Illinois Vehicle Code.

(e) Information that is prohibited from being disclosed under Section 4 of the Illinois Health and Hazardous Substances Registry Act.

(f) Information prohibited from being disclosed by the Personnel Records Review Act.

X. Denial of Request for Records

A. Content of the Denial

A denial must be in writing to the person requesting information, containing:

1. The decision to deny;

2. The reasons for the denial including a detailed factual basis for the application of any exemption claimed;

3. The names and titles of each person responsible for the denial;

4. The person's right to review by the Public Access Counselor and the address and phone number for the Public Access Counselor AND the person's right to judicial review; and

5. If request denied on the basis of an exemption, the notice of denial must specify the exemption.

The public body has the burden of proving, through a detailed justification, which records in question fall within the exemption that it has claimed.[25]

A response to a FOIA that no such records exist is NOT a denial and should not be listed in the response as a denial. *See* the sample FOIA Response at the end of this chapter.

XI. Review of a Denial by the Public Access Counselor

A. Time Frame to Request Review by the PAC

Under Section 9.5 of FOIA, a person whose request to inspect or copy a public record is denied may, within 60 days, file a written request for review with the PAC.

B. The PAC Review Process

Once a request for a FOIA denial review is filed in writing to the PAC, the PAC will determine if further action is warranted. If the allegation is unfounded, they notify requester and public body no further action shall be taken by the PAC. If warranted to review, then PAC forwards within 7 business days after receipt the request to the public body for specific records. The public body shall furnish copies of the requested records within 7 business days and fully cooperate. The Attorney General has subpoena powers with respect to any person or public body having knowledge of or records pertaining to the denial review. The PAC may not disclose records of the public body as part of the review process to the extent that the public body claims that those records are exempt to the extent

claimed. Within the same 7 business days, the public body may answer the allegations in a letter, brief or memorandum. The answer (may be redacted if necessary) is given to the requester, and they may respond within 7 working days.

Because the public body's appeal of the Public Access Counselor's binding opinion is under administrative review, the public body will not be able to submit to the court any information or arguments not presented to the PAC. Attorney advice in responding to inquiries from the PAC is crucial in ensuring a full and complete record for the court to review.

C. The PAC's Response Time Frame

The PAC shall issue a binding opinion within 60 days after the request for review unless a request for extension of 21 business days is noticed. The binding opinion shall make findings of fact and conclusions of law and shall be issued to the requester and public body. The binding opinion is subject to administrative review by either party. A binding opinion issued by the Attorney General shall be considered final for purpose of administrative review. An action for administrative review of a binding opinion shall be commenced in Cook or Sangamon County.

D. The PAC May Use Alternate Resolution Processes

The Attorney General has discretion to choose to resolve a request for review by mediation or other means. The decision not to issue an opinion is not reviewable. If a violation occurred, the public body shall comply with the directive or initiate administrative review proceedings.

E. Immunity for Public Bodies

A public body that discloses records in accordance with a binding opinion of the Attorney General is immune from all liability and is not liable for penalties under FOIA.

F. A Civil Suit Terminates the PAC's Review

If the requester files a civil suit with respect to the same denial, then the PAC takes no further review action and notifies the public body.

G. Advisory Opinions by the PAC/Attorney General

The Attorney General may issue advisory opinions with regard to FOIA compliance when requested in writing from the head of the public body or its attorney. Reliance on the advisory opinion in good faith excuses liability for penalties under FOIA.

XII. Judicial Remedies

A. Types of Actions

A requestor may proceed directly to court to challenge a denial by a public body. The requestor may seek injunctive relief and declaratory relief. Any public body that denies a record has the burden of proving that it is exempt by clear and convincing evidence. There is no specific statute of limitations for the requester's filing of such an action under FOIA.

Judicial relief must be sought from the public body itself, not the individual whose records are sought.[26]

B. Attorney's Fees Must Be Awarded to a Prevailing Requestor

The court is required to award attorney's fees to the person seeking records that prevails in court. The court is to consider the degree to which the relief obtained relates to the relief sought in determining the amount of fees awarded.

If the court determines a public body willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith, the court shall impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence.

An award of attorney fees under the Act will not be disturbed absent an abuse of discretion.[27]

If the records are not sought under the Act, attorney's fees may not be awarded.[28] .An attorney may not represent himself and obtain fees.[29] Pro se litigants are not entitled to attorney's fees.[30]

If the public body fails to provide the records in a timely manner, the requester may bring suit. Production of the records can moot the substantive claim, but attorney's fees may still be awarded if the requester has "substantially prevailed" in the litigation.[31]

XIII. Relationship Between the Freedom of Information Act and Other Causes of Action

A. Liability of the Requestor for Use of Information Obtained under FOIA

FOIA only pertains to the availability of information. The use of the information by the requester may result in an adverse action being brought against the requestor.[32]

B. Is Material Exempt from FOIA Exempt from Discovery in a Court Action?

There is a relationship between the exemptions under the Act and discovery requests in civil proceedings. A limited privilege from discovery may parallel FOIA's exemptions; however, the governing legal tests may require discovery disclosure even when FOIA's exemptions apply.[33]

Endnotes

1. *Blumenfeld v. Department of Professional Regulation*, 263 Ill.App.3d 981, 636 N.E.2d 594 (1st Dist. 1993).

2. *Hopf v. Topcorp, Inc.*, 256 Ill.App.3d 887, 897, 628 N.E.2d 311 (1st Dist. 1993).

3. *Hoffman v. Illinois Dept. of Corrections*, 158 Ill.App.3d 473, 476, 511 N.E.2d 759 (1st Dist. 1987).

4. *Kenyon v. Garrels*, 184 Ill.App.3d 28, 32, 540 N.E.2d 11 (4th Dist. 1989).

5. *Kenyon, supra; Workmann v. Illinois State Bd. of Education*, 229 Ill.App.3d 459, 464, 593 N.E.2d 141 (2nd Dist. 1992) (records which have been lost).

6. *Hamer v. Lentz*, 132 Ill.2d 49, 547 N.E.2d 191 (1989).

7. *Bowie v. Evanston Com. Consol. School District 65*, 168 Ill.App.3d 101, 522 N.E.2d 669 (1st Dist. 1988).

8. *Illinois Education Association v. Illinois State Board of Education*, 204 Ill.2d 456, 463, 791 N.E.2d 522 (2003).

9. *Kibort v. Westrom*, 371 Ill.App.3d 247, 257-8, 862 N.E.2d 609 (2nd Dist. 2007) (election ballots, ballot box tapes and poll signature cards).

10. *Southern Illinoisan v. Illinois Dept. of Public Health*, 218 Ill.2d 390, 413, 844 N.E.2d 1 (2006).

11. *Bowie v. Evanston Com. Consol. School District 65*, 168 Ill.App.3d 101, 522 N.E.2d 669 (1st Dist. 1988); *Family Life League v. Department of Public Aid*, 112 Ill.2d 449, 493 N.E.2d 1054 (1986); *Hamer v. Lentz*, 132 Ill.2d 49, 547 N.E.2d 191 (1989). *Carter v. Meek*, 322 Ill.App.3d 266, 750 N.E.2d 242 (5th Dist. 2001). *National Assoc. Of Crim. v. Chicago Police*, 399 Ill. App.3d 1, 924 N.E.2d 564 (1st Dist. 2010).

12. *Roehrborn v. Lambert*, 277 Ill.App.3d 181, 186, 660 N.E.2d 180 (1st Dist. 1995).

13. *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill.App.3d 778, 709 N.E.2d 1281 (1st Dist. 1999).

14. *Carbondale Convention Center v. City of Carbondale*, 245 Ill.App.3d 474, 478, 614 N.E.2d 539 (5th Dist. 1993).

15. *Better Gov't. Assoc. v. Blagojevich*, 386 Ill. App.3d 808, 899 N.E.2d 382 (4th Dist. 2008).

16. *Copley Press, Inc. v. Board of Education for Peoria School District No. 150*, 359 Ill.App.3d 321, 834 N.E.2d 558 (3rd Dist. 2005).

17. *Lopez v. FitzGerald*, 76 Ill.2d 107, 116, 390 N.E.2d 835 (1979).

18. *Carrigan v. Harkrader*, 146 Ill.App.3d 535, 538, 496 N.E.2d 1213 (3rd Dist. 1986).

19. *Harwood v. McDonough*, 344 Ill.App.3d 242, 248, 799 N.E.2d 859 (1st Dist. 2003).

20. *Cooper v. Department of the Lottery*, 266 Ill.App.3d 1007, 640 N.E.2d 1299 (1st Dist. 1994).

21. *Goodrich Corporation v. Clark*, 361 Ill.App.3d 1033, 837 N.E.2d 953 (4th Dist. 2005).

22. *Bluestar Energy Services, Inc. v. Illinois Commerce Commission*, 374 Ill. App.3d 990, 997, 871 N.E.2d 880 (1st Dist. 2007).

23. *Illinois Educational Association v. Illinois State Board of Education*, 204 Ill.2d 456, 791 N.E.2d 522 (2003).

24. *Osran v. Bus*, 226 Ill.App.3d 704, 589 N.E.2d 1027 (2nd Dist. 1992).

25. *Illinois Educational Association v. Illinois State Board of Education*, 204 Ill.2d 456, 792 N.E.2d 522 (2003).

26. *Quinn v. Stone*, 211 Ill.App.3d 809, 811-2, 570 N.E.2d 676 (1st Dist. 1991).

27. *Lieber v. Board of Trustees of Southern Illinois University*, 316 Ill.App.3d 266, 269, 736 N.E.2d 213 (5th Dist. 2000*), affirmed in part, after remand*, 349 Ill.App.3d 431, 812 N.E.2d 27 (5th Dist. 2004); *Callinan v. Prisoner Review Board*, 371 Ill.App.3d 272, 862 N.E.2d 1165 (3rd Dist. 2007); *Chicago Alliance For Neighborhood Safety v. City of Chicago*, 348 Ill.App.3d 188, 808 N.E.2d 56 (1st Dist. 2004).

28. *Ebert v. Thompson*, 282 Ill.App.3d 385, 388-9, 668 N.E.2d 184 (1st Dist. 1996) (town trustee sought access to township records by virtue of her office).

29. *Hamer v. Lentz, supra.* 132 Ill.2d 49, 63, 547 N.E.2d 191 (1989).

30. *Brazas v. Ramsey*, 291 Ill.App.3d 104, 110, 682 N.E.2d 476 (2nd Dist. 1997).

31. *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill.App.3d 778, 787, 709 N.E.2d 1281 (1st Dist. 1999).

32. *Zientara v. Long Creek Township*, 211 Ill.App.3d 226, 569 N.E.2d 1299 (4th Dist. 1991).

33. *People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48 (1998); (no deliberation process privilege in Illinois; advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies

are formulated must be disclosed during pre-trial discovery). *In Re Marriage of Daniels*, 240 Ill.App.3d 314, 607 N.E.2d 1255 (1st Dist. 1992). *Education Labor Rel. Bd. v. District No. 208*, 132 Ill.2d 29, 547 N.E.2d 182 (1989) (materials which relate to collective bargaining matters are exempt under the Act, but the trial court must conduct an *in camera* inspection to determine whether the materials are privileged from discovery).

Chapter 3 - FOIA and Confidentiality Requirements

The following is a summary of various state and federal statutes and regulations that **REQUIRE** certain public records be kept confidential. These statutes take precedence over FOIA, and should be cited as exempt from FOIA pursuant to Sec. 7(1)(a), information specifically prohibited from disclosure by federal or state law or rules and regulations implementing federal or state law.

HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) PUB. LAW NO. 104-191, §§ 262,264: 45 C.F.R. §§160-164

Who Must Follow This Law. Entities that must follow the Privacy Rule are called covered entities. Covered entities include:

Health Plans, including health insurance companies, HMOs, company health plans and certain government programs that pay for health care, such as Medicare and Medicaid.

Protected Health Information. The Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral. The Privacy Rule calls this information "protected health information (PHI)."

"Individually identifiable health information" is information, including demographic data, that relates to:

- the individual's past, present or future physical or mental health or condition,
- the provision of health care to the individual, or
- the past, present or future payment for the provision of health care to the individual (such as employees' health insurance contribution payments),

and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual. Individually identifiable health information includes many common identifiers (e.g., name, address, birth date, Social Security Number).

Authorization. A covered entity must obtain the individual's written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations or otherwise permitted or required by the Privacy Rule.

ABUSED AND NEGLECTED CHILD REPORTING ACT (325 ILCS 5/)

325 ILCS 5/11

All records concerning reports of child abuse and neglect or records concerning referrals under this Act and all records generated as a result of such reports or referrals shall be confidential and shall not be disclosed except as specifically authorized by this Act or other applicable law. It is a Class A misdemeanor to permit, assist or encourage the unauthorized release of any information contained in such reports, referrals or records.

Nothing contained in this Section prevents the sharing or disclosure of records relating or pertaining to the death of a minor under the care of or receiving services from the Department of Children and Family Services and under the jurisdiction of the juvenile court with the juvenile court, the State's Attorney, and the minor's attorney.

325 ILCS 5/4

Persons required to report; privileged communications; transmitting false report. Any physician, resident, intern, hospital, hospital administrator and personnel engaged in examination, care and treatment of persons, surgeon, dentist, dentist hygienist, osteopath, chiropractor, podiatrist, physician assistant, substance abuse treatment personnel, funeral home director or employee, coroner, medical examiner, emergency medical technician, acupuncturist, crisis line or hotline personnel, school personnel (including administrators and both certified and non-certified school employees), educational advocate assigned to a child pursuant to the School Code, member of a school board or the Chicago Board of Education or the governing body of a private school (but only to the extent required in accordance with other provisions of this Section expressly concerning the duty of school board members to report suspected child abuse), truant officers, social worker, social services administrator, domestic violence program personnel, registered nurse, licensed practical nurse, genetic counselor, respiratory care practitioner, advanced practice nurse, home health aide, director or staff assistant of a nursery school or a child day care center, recreational program or facility personnel, law enforcement officer, licensed professional counselor, licensed clinical professional counselor, registered psychologist and assistants working under the direct supervision of a psychologist, psychiatrist, or field personnel of the Department of Healthcare and Family Services, Juvenile Justice, Public Health, Human Services (acting as successor to the Department of Mental Health and Developmental Disabilities, Rehabilitation Services or Public Aid), Corrections, Human Rights, or Children and Family Services, supervisor and administrator of general assistance under the Illinois Public Aid Code, probation officer, animal control officer or Illinois Department of Agriculture Bureau of Animal Health and Welfare field investigator, or any other foster parent, homemaker or child care worker having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child shall immediately report or cause a report to be made to the Department.

Any person who knowingly and willfully violates any provision of this Section other than a second or subsequent violation of transmitting a false report as described in the preceding paragraph is guilty of a Class A misdemeanor for a first violation and a Class 4 felony for a second or subsequent violation; except that if the person acted as part of a plan or scheme having as its object the prevention of discovery of an abused or neglected child by lawful authorities for the purpose of protecting or insulating any person or entity from arrest or prosecution, the person is guilty of a Class 4 felony for a first offense and a Class 3 felony for a second or subsequent offense (regardless of whether the second or subsequent offense involves any of the same facts or persons as the first or other prior offense).

PERSONNEL RECORD REVIEW ACT (820 ILCS 40/)

820 ILCS 40/7

(1) An employer or former employer shall not divulge a disciplinary report, letter of reprimand or other disciplinary action to a third party, to a party who is not a part of the employer's organization or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this Section.

(2) The written notice to the employee shall be by first-class mail to the employee's last known address and shall be mailed on or before the day the information is divulged.

(3) This Section shall not apply if:

(a) the employee has specifically waived written notice as part of a written, signed employment application with another employer;

(b) the disclosure is ordered to a party in a legal action or arbitration; or

(c) information is requested by a government agency as a result of a claim or complaint by an employee, or as a result of a criminal investigation by such agency.

820 ILCS 40/8

An employer shall review a personnel record before releasing information to a third party and, except when the release is ordered to a party in a legal action or arbitration, delete disciplinary reports, letters of reprimand or other records of disciplinary action which are more than 4 years old.

820 ILCS 40/11

Public Act 096-1483, which became effective December 1, 2010, amended Sec. 11 of the Personnel Record Review Act to provide that "This Act shall not be construed to diminish a right of access to records already otherwise provided by

law, provided that disclosure of performance evaluations under the Freedom of Information Act shall be prohibited." [new portion underlined]

Public Act 096-1483 is NOT an amendment to FOIA; it is a PROHIBITION of disclosure under FOIA. Any FOIA request for an employee's performance evaluation should be denied pursuant to 5 ILCS 140/7(1)(a) "Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law."

Great care needs to be taken to comply with Public Act 096-1483, as the Personnel Record Review Act carries both criminal and civil penalties for violating the Act, and in some circumstances attorney's fees. 820 ILCS 40/12 provides:

(a) The Director of Labor or his authorized representative shall administer and enforce the provisions of this Act. The Director of Labor may issue rules and regulations necessary to administer and enforce the provisions of this Act.

(b) If an employee alleges that he or she has been denied his or her rights under this Act, he or she may file a complaint with the Department of Labor. The Department shall investigate the complaint and shall have authority to request the issuance of a search warrant or subpoena to inspect the files of the employer, if necessary. The Department shall attempt to resolve the complaint by conference, conciliation or persuasion. If the complaint is not so resolved and the Department finds the employer has violated the Act, the Department may commence an action in the circuit court to enforce the provisions of this Act including an action to compel compliance. The circuit court for the county in which the complainant resides, in which the complainant is employed or in which the personnel record is maintained shall have jurisdiction in such actions.

(c) If an employer violates this Act, an employee may commence an action in the circuit court to enforce the provisions of this Act, including actions to compel compliance, where efforts to resolve the employee's complaint concerning such violation by conference, conciliation or persuasion pursuant to subsection (b) have failed and the Department has not commenced an action in circuit court to redress such violation. The circuit court for the county in which the complainant resides, in which the complainant is employed or in which the personnel record is maintained shall have jurisdiction in such actions.

(d) Failure to comply with an order of the court may be punished as contempt. In addition, the court shall award an employee prevailing in an action pursuant to this Act the following damages:

(1) Actual damages plus costs.

(2) For a willful and knowing violation of this Act, $200 plus costs, reasonable attorney's fees and actual damages.

(e) Any employer or his agent who violates the provisions of this Act is guilty of a petty offense.

(f) Any employer or his agent, or the officer or agent of any private employer, who discharges or in any other manner discriminates against any employee because that employee has made a complaint to his employer, or to the Director or his authorized representative, or because that employee has caused to be instituted or is about to cause to be instituted any proceeding under or related to this Act, or because that employee has testified or is about to testify in an investigation or proceeding under this Act, is guilty of a petty offense.

820 CS 40/12

(c) If an employer violates this Act, an employee may commence an action in the circuit court to enforce the provisions of this Act, including actions to compel compliance, where efforts to resolve the employee's complaint concerning such violation by conference, conciliation or persuasion pursuant to subsection (b) have failed and the Department has not commenced an action in circuit court to redress such violation. The circuit court for the county in which the complainant resides, in which the complainant is employed or in which the personnel record is maintained shall have jurisdiction in such actions.

(d) Failure to comply with an order of the court may be punished as contempt. In addition, the court shall award an employee prevailing in an action pursuant to this Act the following damages:

(1) Actual damages plus costs.

(2) For a willful and knowing violation of this Act, $200 plus costs, reasonable attorney's fees and actual damages.

(e) Any employer or his agent who violates the provisions of this Act is guilty of a petty offense.

(f) Any employer or his agent, or the officer or agent of any private employer, who discharges or in any other manner discriminates against any employee because that employee has made a complaint to his employer, or to the Director or his authorized representative, or because that employee has caused to be instituted or is about to cause to be instituted any proceeding under or related to this Act, or because that employee has testified or is about to testify in an investigation or proceeding under this Act, is guilty of a petty offense.

Although FOIA provides an exemption for personal identifiers, the public body is not required under FOIA to assert an exemption. This Act generally **prohibits local governments from disclosing, using or collecting social security numbers**, and more specifically prohibits local governments from publicly displaying, printing on cards required to access services, require non-encrypted transmittal over the Internet, print it on any mailing to the individual unless otherwise required to do so and if required cannot be visible on the envelope.

Section 15. Public inspection and copying of documents. Notwithstanding any other provision of this Act to the contrary, a person or State or local government agency must comply with the provisions of any other State law with respect to allowing the public inspection and copying of information or documents containing all or any portion of an individual's social security number. A person or State or local government agency must redact social security numbers from the information or documents before allowing the public inspection or copying of the information or documents.

Section 30. Embedded social security numbers. Beginning December 31, 2009, no person or State or local government agency may encode or embed a social security number in or on a card or document, including, but not limited to, using a bar code, chip, magnetic strip, RFID technology or other technology, in place of removing the social security number as required by this Act.

Section 35. Identity-protection policy; local government.

(a) Each local government agency must draft and approve an identity-protection policy within 12 months after the effective date of this Act. [June 1, 2011] The policy must do all of the following:

(1) Identify this Act.

(2) Require all employees of the local government agency identified as having access to social security numbers in the course of performing their duties to be trained to protect the confidentiality of social security numbers. Training should include instructions on the proper handling of information that contains social security numbers from the time of collection through the destruction of the information.

(3) Direct that only employees who are required to use or handle information or documents that contain social security numbers have access to such information or documents.

(4) Require that social security numbers requested from an individual be provided in a manner that makes the social security number easily redacted if required to be released as part of a public records request.

(5) Require that, when collecting a social security number or upon request by the individual, a statement of the purpose or purposes for which the agency is collecting and using the social security number be provided.

(b) Each local government agency must file a written copy of its privacy policy with the governing board of the unit of local government within 30 days after approval of the policy. Each local government agency must advise its employees of the existence of the policy and make a copy of the policy available to each of its employees and must also make its privacy policy available to any member of the public, upon request. If a local government agency amends its privacy policy, then that agency must file a written copy of the amended policy with the appropriate entity and must also advise its employees of the existence of the amended policy and make a copy of the amended policy available to each of its employees.

(c) Each local government agency must implement the components of its identity-protection policy that are necessary to meet the requirements of this Act within 12 months after the date the identity-protection policy is approved. This subsection (c) shall not affect the requirements of Section 10 of this Act.

Section 45. Violation. Any person who intentionally violates the prohibitions in Section 10 of this Act is guilty of a Class B misdemeanor.

FAIR CREDIT REPORTING ACT, 15 U.S.C. § 1681, *et seq.*

On October 31, 2007, a number of federal agencies jointly issued final rules and guidelines as required by the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). The final rules require a creditor that holds any consumer account, or other account for which there is a reasonably foreseeable risk of identity theft, to develop and implement an Identity Theft Prevention Program for combating identity theft in connection with new and existing accounts. 15 U.S.C. § 1691a, subsection (e) defines "creditor" as any person who regularly extends, renews or continues credit, and subsection (f) defines "person" to include a government or governmental subdivision or agency. If you provide services to customers and bill for those services, you are a creditor subject to FACT Act regulations.

The final rules became effective January 1, 2008, and covered creditors were originally to comply with the rules by November 1, 2008. **The Federal Trade Commission suspended enforcement of the new "Red Flags Rule" several times, most recently on May 28, 2010, the FTC announced that at the request of several members of Congress, the Federal Trade Commission is further delaying enforcement of the "Red Flags" Rule through December 31, 2010, while Congress considers legislation that would affect the scope of entities covered by the Rule.** The FTC previously announced in October 2009 that at the request of certain members of

Congress, it was delaying enforcement of the Rule until June 1, 2010, for the specific purpose of allowing Congress sufficient time to finalize legislation that would limit the scope of businesses covered by the Rule. At the time of the October 2009 announcement, the House of Representatives had already unanimously approved HR 3763, a bill that would exempt from the coverage of the Red Flags Rule any health care, accounting or legal practice with 20 or fewer employees, as well as certain other businesses. The Senate has not yet passed similar legislation.

FREEDOM OF INFORMATION ACT, 5 ILCS 140/

5 ILCS 140/2.10
***Requires* redaction of employees' addresses, telephone numbers and social security numbers** from certified payroll records submitted under the Prevailing Wage Act.

5 ILCS 140/7(1)(b)
Although FOIA now explicitly provides that **settlement agreements** are public records provided that information exempt from disclosure under Section 7 of this Act may be redacted [5 ILCS 140/2.20], various statutes require redaction of certain information from settlement agreements, such as social security numbers [5 ILCS 179/ Identity Protection Act]. Also, private information such as a home address and phone number should be redacted under the private information FOIA exemption

5 ILCS 140/2.15(d)
Arrest reports and criminal history records – The information required to be provided under this provision does not include information subject to the confidentiality provisions for arrest records of the Juvenile Court Act of 1987.

JUVENILE COURT ACT OF 1987 (705 ILCS 405/)

The Juvenile Court Act provides for the maintenance of law enforcement records relating to the arrest of minors. Such records are confidential, not available to the general public and must be maintained separately from other law enforcement records. Release of these records, both under FOIA and in response to a civil subpoena, is to be determined by the presiding juvenile court judge.

The Juvenile Court Act provides that a civil subpoena is NOT a court order authorizing release of juvenile law enforcement records. Any release of such records not authorized by the Juvenile Court Act needs to be accompanied by an order of the presiding juvenile court judge. We recommend that you contact your attorney to review any such subpoenas or orders.

The following are relevant excerpts from the Juvenile Court Act.

705 ILCS 405/1-7

Section 1-7. Confidentiality of law enforcement records.

(A) Inspection and copying of law enforcement records maintained by law enforcement agencies that relate to a minor who has been arrested or taken into custody before his or her 17th birthday shall be restricted to the following:

[Any local, State or federal law enforcement officers, Prosecutors, probation officers, Department of Children and Family Services child protection investigators, school officials]

(C) The records of law enforcement officers, or of an independent agency created by ordinance and charged by a unit of local government with the duty of investigating the conduct of law enforcement officers, concerning all minors under 17 years of age must be maintained separate from the records of arrests and may not be open to public inspection or their contents disclosed to the public except by order of the court presiding over matters pursuant to this Act or when the institution of criminal proceedings has been permitted or required under Section 5-805 or such a person has been convicted of a crime and is the subject of pre-sentence investigation or proceedings on an application for probation or when provided by law. For purposes of obtaining documents pursuant to this Section, *a civil subpoena is not an order of the court.*

(E) Law enforcement officers, and personnel of an independent agency created by ordinance and charged by a unit of local government with the duty of investigating the conduct of law enforcement officers, may not disclose the identity of any minor in releasing information to the general public as to the arrest, investigation or disposition of any case involving a minor.

705 ILCS 405/1-8

Section 1-8. Confidentiality and accessibility of juvenile court records.

(A) Inspection and copying of juvenile court records relating to a minor who is the subject of a proceeding under this Act shall be restricted to the following:

(1) The minor who is the subject of record, his parents, guardian and counsel.

(2) Law enforcement officers and law enforcement agencies when such information is essential to executing an arrest or search warrant or other compulsory process, or to conducting an ongoing investigation or relating to a minor who has been adjudicated delinquent and there has been a previous finding that the act which constitutes the previous offense was committed in furtherance of criminal activities by a criminal street gang.

705 ILCS 405/5-905

Section 5-905. Law enforcement records.

(1) Law Enforcement Records. Inspection and copying of law enforcement records maintained by law enforcement agencies that relate to a minor who has been arrested or taken into custody before his or her 17th birthday shall be restricted to the following and when necessary for the discharge of their official duties:

> [Judges, law enforcement officers, probation officers or prosecutors; the minor, the minor's parents or legal guardian and their attorneys, officials of the Department of Children and Family Services or the Department of Human Services, school officials]

(5) The records of law enforcement officers, or of an independent agency created by ordinance and charged by a unit of local government with the duty of investigating the conduct of law enforcement officers, concerning all minors under 17 years of age must be maintained separate from the records of adults and may not be open to public inspection or their contents disclosed to the public except by order of the court or when the institution of criminal proceedings has been permitted under Section 5-130 or 5-805 or required under Section 5-130 or 5-805 or such a person has been convicted of a crime and is the subject of pre-sentence investigation or when provided by law.

(6) Except as otherwise provided in this subsection (6), law enforcement officers, and personnel of an independent agency created by ordinance and charged by a unit of local government with the duty of investigating the conduct of law enforcement officers, may not disclose the identity of any minor in releasing information to the general public as to the arrest, investigation or disposition of any case involving a minor.

APPENDIX

Sample Ordinance Establishing Regulations for Commissioners' Electronic Attendance at Park Board Meetings

Sample Procedural Rules for Allowing the Public to Address the Board

Sample Ordinance Establishing Regulations for Public Participation During Park Board Meetings

Sample Resolution Regarding Review and Release of Closed Session Minutes

Sample Resolution Designating Persons to Receive OMA Training

Sample Resolution Designating FOIA Officer(s)

FOIA Request Response

Sample Public Records Certification

W-2 Form Redaction Exemptions

Binding Opinions Issued by the Public Access Counselor

How to Go Into Executive Session

Sample Ordinance Establishing Regulations

for Commissioners' Electronic Attendance at Park Board Meetings

ORDINANCE NO. _____

ORDINANCE ESTABLISHING REGULATIONS FOR ELECTRONIC ATTENDANCE AT PARK BOARD MEETINGS

WHEREAS, effective January 1, 2007, pursuant to P.A. 94-1058, the Open Meetings Act (5 ILCS 120/1 *et seq.*) has been revised to permit electronic attendance at meetings of public bodies; and

WHEREAS, the Board of Park Commissioners of the _____ Park District, _____ County, Illinois (the "Park District"), believes and hereby declares that it is in the best interests of the Park District to allow electronic attendance by Park Commissioners at Park Board meetings, subject to certain conditions; and

WHEREAS, before electronic attendance may be permitted, procedural rules must be adopted by the Board of Park Commissioners;

NOW, THEREFORE, BE IT ORDAINED BY THE PRESIDENT AND BOARD OF PARK COMMISSIONERS OF THE _____ PARK DISTRICT, _____ COUNTY, ILLINOIS, AS FOLLOWS:

SECTION ONE: The foregoing recitals shall be, and they are hereby incorporated herein as if fully set forth within this Section One.

SECTION TWO: The following regulations shall apply to electronic attendance at meetings of the Board of Park Commissioners of the _____ Park District (the "Board"):

1. If a quorum of the members of the Board is physically present as required by Section 2.01 of the Open Meetings Act (5 ICLS 120/2.01), the Board may allow a physically absent Park Commissioner to attend a Park District Board meeting by other means if the Park Commissioner is prevented from physically attending because of: (a) personal illness or disability; (b) employment purposes or the business of the public body; or (c) a family or other emergency; provided no Park Commissioner may attend a Board meeting by other means more than ____ times in any calendar year. [The limitation on number of meetings is not required by statute, but many Park Districts wish to limit the number, which is permissible under the statutes]

2. "Other means," as used in these regulations, shall mean by video or audio conference.

3. If a Park Commissioner wishes to attend a meeting by other means, the Park Commissioner must notify the recording secretary of the Park District within ___ hours before the meeting unless advance notice is impractical.

4. Park Commissioners may participate by other means at either an open meeting or a closed meeting of the Board.

5. Written minutes of all Board meetings, whether open or closed, shall include whether the Park Commissioners were physically present or present by means of audio or video conference.

6. As the first item of business, the Park Commissioners who are physically in attendance at a Park Board meeting shall determine, by majority vote, whether a Park Commissioner who is not physically in attendance may participate in that meeting by other means.

SECTION THREE: Any and all policies, resolutions or ordinances of the Park District which may conflict with this ordinance shall be, and they are hereby, repealed.

SECTION FOUR: This ordinance shall be in full force and effect from and after its passage and approval in the manner provided by law.

PASSED THIS _____ day of _____, 20__.

AYES:

NAYS:

ABSENT:

APPROVED THIS _____ day of _____, 20__.

ATTEST:

_____ _____

President, Board of Park Commissioners Secretary, Board of Park Commissioners

Sample Procedural Rules for Allowing the Public to Address the Board

Public participation at village meetings is encouraged. A period of time at each regular meeting of the Village Board shall be made available for public comments. A citizen shall be permitted to speak upon being recognized by the Chairperson. The citizen shall stand (if possible), state his/her name and address prior to making comments, and limit speaking to no more than five (5) minutes, unless additional time is granted by the Chairperson. Should comments of a personal or derogatory nature be expressed, the Chair may immediately terminate the opportunity to speak.

No person who is not a Board Member shall address the Board without the consent of the majority of the members present, subject to the following rules and regulations:

A. Public participation on non-agenda items shall be limited to thirty (30) minutes of the meeting; however, the Board may extend the time for the non-agenda public portion upon motion.

B. Consent shall not be required to address the Board during the public portion of the meeting.

C. Requests to address the Board shall be limited to formal meetings.

D. The subject of comment of the public directed to the Board on agenda items shall be restricted to residents first and then non-residents.

E. After the termination of the public portion of the meeting, no person shall be allowed to address the Board except in response to a specific request or question from the Board.

Sample Ordinance Establishing Regulations

for Public Participation During Park Board Meetings

ORDINANCE NO. _____

ORDINANCE ESTABLISHING REGULATIONS FOR PUBLIC PARTICIPATION DURING PARK BOARD MEETINGS

WHEREAS, the Board of Park Commissioners of the _____ Park District, ____ County, Illinois (the "Park District"), believes and hereby declares that it is in the best interests of the Park District to encourage public participation during Park Board meetings but to impose certain rules in order to ensure that such participation does not disrupt such meetings;

NOW, THEREFORE, BE IT ORDAINED BY THE PRESIDENT AND BOARD OF PARK COMMISSIONERS OF THE _____ PARK DISTRICT, _____ COUNTY, ILLINOIS, AS FOLLOWS:

SECTION ONE: The foregoing recitals shall be, and they are hereby incorporated herein as if fully set forth within this Section One.

SECTION TWO: The following rules shall apply to public participation at meetings of the Board of Park Commissioners of the _____ Park District (the "Board"):

1. Public participation at Park Board meetings is encouraged. A period of time at each regular meeting of the Park Board shall be made available for public comments and shall be designated on each agenda as "COMMENTS FROM THE PUBLIC."

2. A person shall be permitted to speak upon being recognized by the Chairperson. The person shall stand (if possible), state his/her name and address prior to making comments, and limit speaking to no more than three (3) minutes, unless additional time is granted by the Chairperson. Each person will be permitted to speak only once.

3. All speakers shall address their comments to the Chairperson. The Chairperson may request that the appropriate member of the Park Board or staff respond to the comment.

4. The Chairperson shall preserve order and decorum. The Chairperson shall decide all questions of order.

5. When addressing the Park Board, members, administrative officers and other persons permitted to speak shall confine their remarks to the matter at hand and avoid personal remarks, the impugning of motives and merely contentious statements. If any person indulges in such remarks or otherwise engages in conduct injurious to the harmony of the Park Board and the meeting, the Chairperson may immediately terminate the opportunity to speak. This decision is at the discretion of the Chairperson or upon the affirmative vote of two-thirds ($^2/_3$) of the park board commissioners present. Any

person, except a member of the Board, who engages in disorderly conduct during a meeting may be ejected from the meeting upon motion passed by a majority of the Board present.

SECTION THREE: The following shall be posted on the Park District's website and posted by the door of the meeting:

CITIZENS' GUIDE TO ADDRESSING THE PARK BOARD:

Anyone wishing to speak under the agenda item entitled, "Comments from the Public" shall adhere to the following guidelines:

1. A person shall be permitted to speak upon being recognized by the Chairperson. Please stand (if possible), announce your name and address before commencing. All comments under COMMENTS FROM THE PUBLIC are limited three (3) minutes, and each person shall only be permitted to speak once.

2. All speakers shall address their comments to the Chairperson. The Chairperson may request that the appropriate member of the Park Board or staff respond to the comment.

3. The Chairperson shall preserve order and decorum. The Chairperson shall decide all questions of order.

4. When addressing the Park Board, members, administrative officers and other persons permitted to speak shall confine their remarks to the matter at hand and avoid personal remarks, the impugning of motives and merely contentious statements. If any person indulges in such remarks or otherwise engages in conduct injurious to the harmony of the Park Board and the meeting, the Chairperson may immediately terminate the opportunity to speak. This decision is at the discretion of the Chairperson or upon the affirmative vote of two-thirds ($^2/_3$) of the park board commissioners present. Any person, except a member of the Board, who engages in disorderly conduct during a meeting may be ejected from the meeting upon motion passed by a majority of the Board present.

5. Please do not repeat comments that have already been made by others.

SECTION FOUR: Any and all policies, resolutions or ordinances of the Park District which may conflict with this ordinance shall be, and they are hereby, repealed.

SECTION FIVE: This ordinance shall be in full force and effect from and after its passage and approval in the manner provided by law.

PASSED THIS _____ day of _____, 20__.

AYES:

NAYS:

ABSENT:

APPROVED THIS _____ day of _____, 20__.

ATTEST:

_____ _____

President, Board of Park Commissioners Secretary, Board of Park Commissioners

Sample Resolution Regarding Review and Release of Closed Session Minutes

RESOLUTION NO. _____

RESOLUTION AUTHORIZING RELEASE OF CERTAIN EXECUTIVE SESSION MINUTES

WHEREAS, pursuant to 5 ILCS 120/2.06(d), Board of Commissioners have met and reviewed the minutes of all meetings of the Board of Commissioners that had been closed to the public; and

WHEREAS, the Board of Commissioners hereby find and declare that the minutes for executive sessions held on certain dates no longer require confidential treatment;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF PARK COMMISSIONERS OF THE _____ PARK DISTRICT, _____ COUNTY, ILLINOIS, AS FOLLOWS:

SECTION ONE: The recitals set forth hereinabove shall be and they are hereby incorporated as if said recitals were fully set forth within this Section One.

SECTION TWO: The Board of Commissioners find and hereby declare that executive session minutes or parts thereof of the following dates no longer require confidential treatment and can be released at this time:

[list dates of minutes and if partial, which portion can be released]

SECTION THREE: The Board of Commissioners find and hereby declare that the executive session minutes or parts thereof for the following dates cannot be released at this time because it remains necessary to protect the public interest or the privacy of an individual to keep said minutes confidential:

[list dates of minutes and if partial, which portion cannot be released]

SECTION FOUR: Any and all policies or resolutions of the _____ Park District in conflict with the provisions of this resolution shall be and are hereby repealed.

SECTION FOUR: This resolution shall be in full force and effect from and after its passage and approval in the manner provided by law.

PASSED THIS _____ day of _____, 20__.

AYES:

NAYS:

ABSENT:

APPROVED THIS _____ day of _____, 20__.

ATTEST:

_____ _____

President, Board of Park Commissioners Secretary, Board of Park Commissioners

Sample Resolution Designating Persons to Receive OMA Training

RESOLUTION NO. _____
RESOLUTION DESIGNATING PERSONS TO RECEIVE ILLINOIS OPEN MEETINGS ACT TRAINING

WHEREAS, the Open Meetings Act requires a public body to designate one or more employees, officers or members to receive electronic training on compliance with the Act, and said persons are to complete said training on an annual basis; and

WHEREAS, the Board of Park Commissioners of the _____ Park District hereby finds and declares that it is in best interests of the Park District to designate such persons;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF PARK COMMISSIONERS OF THE _____ PARK DISTRICT, _____ COUNTY, ILLINOIS, AS FOLLOWS:

SECTION ONE: _____, _____, and _____ are hereby designated to receive training on compliance with the Open Meetings Act officers for the _____ Park District.

SECTION TWO: All policies and resolutions of the Park District which conflict with the provisions of this resolution shall be and are hereby repealed to the extent of such conflict.

SECTION THREE: This resolution shall be in full force and effect from and after its passage and approval in the manner provided by law.

PASSED THIS _____ day of _____, 20__.

AYES:

NAYS:

ABSENT:

APPROVED THIS _____ day of _____, 20__.

ATTEST:

_____ _____
President, Board of Park Commissioners Secretary, Board of Park Commissioners

Sample Resolution Designating FOIA Officer(s)

RESOLUTION NO. _____
RESOLUTION DESIGNATING FREEDOM OF INFORMATION OFFICERS

WHEREAS the Freedom of Information Act (5 ILCS 140/3.5) requires a public body to designate one or more Freedom of Information officer or officers; and

WHEREAS, the Board of Park Commissioners of the _____ Park District hereby finds and declares that it is in best interests of the Park District to designate Freedom of Information officers as set forth herein below;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF PARK COMMISSIONERS OF _____ PARK DISTRICT, _____ COUNTY, ILLINOIS, AS FOLLOWS:

SECTION ONE:
_____ are hereby designated Freedom of Information officers for the _____ Park District. The names, titles and contact information for the FOIA Officer(s) shall be posted on District's website and the District administrative office.

SECTION TWO: All policies and resolutions of the Park District that conflict with the provisions of this resolution shall be and are hereby repealed to the extent of such conflict.

SECTION THREE: This resolution shall be in full force and effect from and after its passage and approval in the manner provided by law.

PASSED THIS _____ day of _____, 20__.

AYES:

NAYS:

ABSENT:

APPROVED THIS _____ day of _____, 20__.

ATTEST:

_____ _____
President, Board of Park Commissioners Secretary, Board of Park Commissioners

Sample FOIA Request Response

FOIA REQUEST RESPONSE

The request of _____ dated _____ is:

[ ] APPROVED -or- [ ] APPROVED IN PART
The following records are available at _____
[ ] for inspection -or- [ ] for pick up upon payment of copying fees of $ _____, or have been provided by email:

_____
[first 50 pages of request are free, copying fee for subsequent pages not to exceed $.15 per black and white 8-1/2" x 11" or 8-1/2" x 14" copies]

[ ] DENIED/DENIED IN PART [IF PARTIAL, LIST RECORDS DENIED]:
_____

REASON FOR DENIAL:

[ ] Records are exempt under Section 7 ___ of the Act for the following reason:
_____

[ ] Request is unduly burdensome and compliance will burden the operations of the public body. The request is unduly burdensome because: _____
_____, and will burden operations of the public body as follows: _____.

You were given an opportunity to confer with the public body in an attempt to reduce the request to manageable proportions on _____. Choose one:
[ ] You did not respond.
[ ] The conference did not result in a reduction of the request to manageable proportions.
[ ] Other: _____
[specify]

YOU HAVE A RIGHT TO APPEAL A DENIAL IN WRITING TO: Public Access Counselor, Illinois Attorney General's Office, 500 S. Second Street, Springfield, IL 62705; telephone: 217-558-0486; E-mail: publicaccess@atg.state.il.us. Commercial requesters may only file a request for review with the Public Access Counselor for the limited purpose of reviewing whether your request was properly determined to be for a commercial purpose. 5 ILCS 140/9.59b).
Pursuant to 5 ILCS 140/11 any person denied access to inspect or copy any public record by the public body may file suit in circuit court for injunctive or declaratory relief.

If you choose to file a Request for Review with the PAC, you must do so within 60 calendar days of the date of this denial letter. 5 ILCS 140/9.5(a). Please note that you must include a copy of your original FOIA request and this denial letter when filing a Request for Review with the PAC.

[ ] NO SUCH RECORDS EXIST

[ ] RESPONSE TO REQUEST IS DELAYED/DELAYED IN PART FOR NOT MORE THAN 5 ADDITIONAL WORKING DAYS

[for commercial requests the additional reasonable time to respond is _____]

IF DELAY IS PARTIAL, LIST RECORDS DELAYED:

_____

[check all applicable]:

( ) the requested records are stored in whole or in part at other locations than the office having charge of the requested records.

( ) the request requires the collection of a substantial number of specified records;

( ) the request is couched in categorical terms and requires an extensive search for the records responsive to it.

( ) the requested records have not been located in the course of routine search and additional efforts are being made to locate them.

( ) the requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are exempt from disclosure under Section 7 of the Act or should be revealed only with appropriate deletions.

( ) the request for records cannot be complied with within the time limits prescribed without unduly burdening or interfering with the operations of the public body;

( ) there is a need for consultation, which shall be conducted with all practicable speed, with another public body or among two or more components of the public body having a substantial interest in the determination or in the subject matter of the request.

[ ] RESPONSE IS DETERMINED TO BE FROM A RECURRENT REQUESTOR (to be provided in 5 business days)

Within 21 business days of the date of your request, you will be provided with: (1) an estimate of the time required to provide the pubic records requested and an estimate of the fees to be charged, which you will be required to pay in full before copying the documents, (2) a denial pursuant to one of the applicable exemptions under FOIA, (3) notification that your request is unduly burdensome and extend an opportunity to you to attempt to reduce the request to manageable proportions, or (4) the records will be provided.

Records were: Sent/Faxed/Emailed [choose one] to requester on _____, 20___.

By: _____

FOIA Officer

_____

Date Request Received: _____

Format in which Response is Requested: _____

Response Due: _____ [make notation of that date on the written request]

File No. _____ [include in file the original request, a copy of the response, a record of written communications with the requester and a copy of other communications]

Response Date: _____ [must be within 5 working days of receipt of the request, except must be within 21 days for a commercial request]

Sample Public Records Certification

CERTIFICATION

STATE OF ILLINOIS)
) SS.
COUNTY OF ____)

I, the undersigned, do hereby certify that I am the duly qualified and acting _____ [title] of the _____ Park District, _____ County, Illinois (the "District"), and as such official I am the keeper of the records and files of the District.

I further certify that the foregoing constitutes a full, true and complete copy of:
_____ [name of document]
as contained in the files of the _____ Park District.

IN WITNESS WHEREOF I hereunto affix my official signature at _____, Illinois, this ___ day of _____, 20__.

_____
(Signature)

_____ (SEAL)
(Title)

W-2 Form Redaction Exemptions

W-2 Form	Exempt/Not Exempt	Basis for Exemption - Cite in FOIA Response
a – Employee's Soc. Sec. No.	Exempt	Private information §7(1)(b); §2(c)(5);
b – Employer ID (EIN)	Not Exempt	None
c – Employer's name, address and ZIP Code	Not Exempt	None
d – Control number	Exempt	This refers to the employee's identification number and therefore is exempt under §7(1)(b), §2(c)(5).
e – Employee's name, address and ZIP Code	Name not exempt; address and ZIP are exempt	Employee's address is private information under §7(1)(b); §2(c-5)
1 – Wages, tips & other comp.	Not Exempt	None
2 – Federal tax withheld	Exempt	Personal financial information is private information §7(1)(b); §2(c-5)
3 – Social Security wages	Not Exempt	None
4 – Social Security tax withheld	Not Exempt	None
5 – Medicare wages & tips	Not Exempt	None
6 – Medicare tax withheld	Not Exempt	None
7 – Social Security tips	Exempt	Personal financial information is private information §7(1)(b); §2(c-5)
8 – Allocated tips	Exempt	Personal financial information is private information §7(1)(b); §2(c-5)
9 – Advance EIC payment	Exempt	Personal financial information is private information §7(1)(b); §2(c-5)
10 – Dependent care benefits	Exempt	Personal financial information is private information §7(1)(b); §2(c-5);
11 – Nonqualified plans	Exempt	Personal financial information is private information §7(1)(b); §2(c-5)

W-2 Form	Exempt/Not Exempt	Basis for Exemption - Cite in FOIA Response
12 – Code	Exempt	Personal financial information is private information §7(1)(b); §2(c-5)
13 – Statutory employee; retirement plan; third-party sick pay	Exempt	Personal financial information is private information §7(1)(b); §2(c-5)
14 – Retirement	Exempt	Personal financial information is private information §7(1)(b); §2(c-5)
15 – State Employer's state ID	Not Exempt	None
16 – State wages, tips, etc.	Not Exempt	None
17 – State income tax	Not Exempt	Personal financial information is private information §7(1)(b); §2(c-5)
18 – Local wages, tips, etc.	Not Exempt	None
19 – Local income tax	Exempt	Personal financial information is private information §7(1)(b); §2(c-5)
20 – Locality name	Not Exempt	None

Binding Opinions Issued by The Public Access Counselor

PUBLIC ACCESS OPINION 10-001 (Request for Review 2010 PAC 5688) (March 29, 2010)
FREEDOM OF INFORMATION ACT: Duty of Public Body to Furnish Copies – The opinion stated that a public body does not comply with FOIA by providing a copy machine during limited hours and advising requestors they must make their own copies. This public body had no full-time staff members,

PUBLIC ACCESS OPINION 10-002 (Request for Review 2010 PAC 5745) (April 27, 2010)
FREEDOM OF INFORMATION ACT: No Authority for Public Body to Charge for Copies for Its Files – The opinion stated that the public body could not charge the requestor for the un-redacted copy of the response it is required to maintain under FOIA.

PUBLIC ACCESS OPINION 10-003 (Request for Review 2010 PAC 8890, 9217) (October 22, 2010)
FREEDOM OF INFORMATION ACT: Autopsy Reports – The opinion stated that all information from an autopsy report except post-mortem photographs must be disclosed.

PUBLIC ACCESS OPINION 10-004 (Request for Review 2010 PAC 10658) (December 29, 2010)
FREEDOM OF INFORMATION ACT: Settlement Agreements – The opinion stated that a settlement agreement obtained by and in the custody of the public body's insurance company (IRMA) was a public record of the public body and must be disclosed, subject to redactions of material exempt under FOIA.

PUBLIC ACCESS OPINION 11-001 (Request for Review 2010 PAC 10242) (February 18, 2011)
FREEDOM OF INFORMATION ACT: Section 2.15 of FOIA Requires Disclosure of Arrest Reports.

PUBLIC ACCESS OPINION 11-002 (Request for Review 2010 PAC 11568) (February 25, 2011)
FREEDOM OF INFORMATION ACT: FOIA request for the current sum of the number of sworn officers assigned to each police district was denied under Sec. 7(1)(v) of FOIA, in that it could undermine the effectiveness of the City's security measures of the safety of the personnel who implemented them, and would be a clear and present danger to the health and safety of the community. The Attorney General found that the public body had failed to demonstrate how the disclosure of the information requested could reasonably be expected to jeopardize the effectiveness of any security measures or the safety of personnel who implemented them, and the information must be disclosed.

PUBLIC ACCESS OPINION 11-003 (Request for Review – 2011 PAC 12170) (April 1, 2011) FREEDOM OF INFORMATION ACT: A subsequent FOIA request cannot be deemed "unduly burdensome" unless the public body has either previously disclosed the requested materials or properly denied the request.

PUBLIC ACCESS OPINION 11-004 (Request for Review 2011 PAC 12406) (April 15, 2011) FREEDOM OF INFORMATION ACT: Under Section 2.20 of FOIA, settlement agreements entered into by an intergovernmental risk management association or self-insurance pool on behalf of a public body are subject to disclosure. Section 7(1)(s) does not exempt from disclosure the amount of funds expended to settle a claim.

PUBLIC ACCESS OPINION 11-005 (Request for Review 2011 PAC 11946) (April 18, 2011) FREEDOM OF INFORMATION ACT: Section 7(1)(s) Exemption—Nerve Conduction Velocity Test results obtained with respect to workers' compensation claims are not exempt from disclosure.

PUBLIC ACCESS OPINION 11-006 (Request for Review 2011 PAC 15916) (November 15, 2011) FREEDOM OF INFORMATION ACT: Electronic records relating to the transaction of public business are "public records" subject to disclosure under section 2(c) of FOIA, notwithstanding that they are generated on public officials' private equipment and/or maintained on personal electronic accounts.

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About The Authors

For more than 30 years, the attorneys of the Tressler LLP law firm have concentrated their practice in the representation of local governmental entities. The firm has donated the authors' knowledge and expertise in preparing this handbook to give Illinois park districts' commissioners and management a greater understanding of the recent changes to Illinois' "Sunshine laws" – the Freedom of Information Act and the Open Meetings Act – and their everyday application.

Kathleen Elliott, a partner in Tressler's Bolingbrook office, focuses her practice on local government law, zoning, development, land use law, real estate and litigation. Kathie's more than 30 years' experience as a local government attorney includes advising local governments with regard to the conduct of public meetings, compliance with and staff training for the Freedom of Information Act and Open Meetings Act, ethics and conflict of interest, as well as presentations. Kathie is the co-author of the Municipal Litigation chapter of the Illinois Municipal Law Series and co-author of the "Variations, Special Uses and Appeals from Administrative Decisions" chapter of Illinois Land Use Law published by the Illinois Institute for Continuing Legal Education.

John M. O'Driscoll, a partner in Tressler's Bolingbrook office, handles a wide variety local government litigation and counseling issues for park districts and other local governments, including breach of contract, construction problems, employment disputes, internet defamation, ordinance violations and "Sunshine law" compliance. John has been selected for inclusion in 2008, 2009, 2010 and 2011 Illinois Super Lawyers Rising Stars®. In 2010, John received the Illinois Association of Defense Trial Counsel's President's Award for his exceptional service, dedication and significant contributions.

Steven B. Adams, a partner in Tressler's Chicago office, has provided comprehensive general counsel services for a number of Chicago-area municipalities, school districts, park districts and other Illinois units of government for more than 25 years. Steve's practice regularly includes providing advice on a wide range of Sunshine Law/transparency matters, including Open Meetings Act and Freedom of Information Act issues for his clients. Steve's practice includes complex capital projects, regulatory/compliance issues for government clients, public-private partnerships, and large-scale real estate and construction. Steve is an avid speaker and regularly addresses organizations such as the Illinois Association of Park Districts and the Illinois Park and Recreation Association.

About the Illinois Association of Park Districts

The Illinois Association of Park Districts (IAPD) is a non-profit research and education organization that serves park districts, forest preserves, conservation and recreation agencies. The association advances these agencies, their citizen board members and professional staff in their ability to provide outstanding park and recreation opportunities, preserve natural resources and improve the quality of life for all people in Illinois.

Headquartered in Springfield, IAPD was established in 1928 and is the oldest and most successful state association for parks, recreation and conservation in America. The association serves more than 2,100 elected park, recreation and forest preserve district board members who govern more than 470 agencies employing 40,000 individuals.

IAPD strives to improve Illinois' quality of life through park districts, forest preserves, conservation and recreation agencies by establishing grants and other new revenue streams for park land, facilities and services; educating the public about the positive effects parks and recreation have on communities; and meeting the problem of decreasing open space in Illinois.

Visit us online at www.ilparks.org for the latest news from IAPD, including exclusive member benefits such as the IAPD knowledge center, legal section, membership directory and fast-breaking advocacy information.