Helpful Compliance Tips: Open Meetings Act & Freedom of Information Act

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Open Meetings Act ("OMA")
Freedom of Information Act ("FOIA")

- OMA - 5 ILCS 120 et seq.
- FOIA – 5 ILCS 140 et seq.
Legislative Intent:

- Ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.
- All citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way.
- Exceptions to the public's right to attend exist only in limited circumstances where the General Assembly has specifically determined that the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.
- Exceptions to the open meeting requirements shall be strictly construed against closed meetings.
Legislative Intent:

- Public access to full and complete information regarding the affairs of government.
- Fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible

Public Policy Declaration:

- All records in the custody or possession of a public body are presumed to be open to inspection or copying.
OMA & FOIA = Sunshine Laws

Hey, Mr. Government Official, what's going on under there?

Trust me, you don't need to know.

Cloak of Secrecy

The Public
OMA & FOIA = Sunshine Laws

- “Sunshine Laws” reference because goal is to “shine light” on to government actions to discourage corruption:
  - Conduct meetings “open” to the public
  - Transparency in discussing public business
  - Vote on “disclosed” agenda items.
  - Require preparation, retention and public access to meeting minutes to create a public record of discussions and actions by government officials
  - Documents available for public inspection and photocopying.
“Meeting” defined as any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business, except in the case of a “five-member public body.”
- Three members of seven member board = majority of quorum
- Five member board: a quorum exists where three members meet to discuss public business.

“Public body” includes townships, cities, villages, incorporated towns, school districts and other municipal corporations, boards and bureaus, and any subsidiary bodies supported by or which expend tax revenue.
- This means: all committees, commissions and boards and may include “ad hoc” committees.
Annual Regular Meeting Schedule
- Approve by resolution at beginning of each calendar or fiscal year
- Schedule contains all regular meeting dates, times and locations
- Make Schedule publically available

Public notice of any meeting, except a meeting held in the event of a bona fide emergency, or of any rescheduled regular meeting or any reconvened meeting, must be given at least 48 hours in advance of the meeting.

Notice of an emergency meeting must be given as soon as practicable.

The notice for any special, rescheduled, or reconvened meeting must include the agenda for the meeting.
Post notice of public meetings at:

- Principal office of the body holding the meeting and at the building in which the meeting is to be held (if different from principal office).
- Public body website, if maintained by full-time staff of the public body
- Notice of regular meetings posted on a public body's website must remain posted until the regular meeting is concluded.

Annual meeting schedule must remain on the website until new schedule is posted.

Change to regular meeting dates: at least 10 day notice of such change must be published in a newspaper of general circulation in the area in which the public body functions.

- For local governments with a population less than 500 in which no newspaper is published, 10 day notice may be posted in at least 3 prominent places within the governmental unit.

Notice of annual meeting schedule and schedule changes must be given to news media who file an annual request for meeting schedules.
All meetings shall be open to the public unless a “closed meeting” exception applies. 
- The exceptions authorize but do not require closed meetings.

All public meetings shall be held at specified times and places which are “convenient and open to the public.” 
- No public meeting can be held on a legal holiday unless the regular meeting day falls on that holiday.
FACTS:
- The KTJ Township Board decides to hold a special meeting approximately 26 miles away from its typical meeting location.
- The KTJ Township decides to hold a “retreat” as special meeting at a resort that is located outside of its corporate boundaries.

ISSUE: Are these meetings “convenient and open” to the public as required under Section 2.01 of the OMA?
Suggested Answers:

- A) Yes, both meetings are “convenient and open” to the public per the OMA.

- B) Maybe, depends the weather and traffic.

- C) No, both meetings are not “convenient and open” to the public per the OMA.
Correct Answer: C!
The Illinois Attorney General’s Public Access Counselor (PAC) issued a binding decision found that a public body’s special meeting, held approximately 26 miles away from the meeting’s typical location, was not “convenient and open” to the public as required under Section 2.01 of the OMA.

- A Fire Protection District had scheduled its board meeting 26 miles away from the typical firehouse meeting location.

The PAC cited *Gerwin v. Livingston County Bd.*, 345 Ill. App. 3d 352 (4th Dist. 2003), and determined that “open” and “convenient” are not synonymous.

The PAC found that 26 miles was far enough that it would deter the public from attending the meeting.

Specifically, the PAC noted that the court in Gerwin determined that a meeting can be open in the sense that no one is prohibited from attending, but it can be held in such an ill-suited, unaccommodating place that the public would be deterred from attending.

An Illinois Village Board decided to hold “retreat” at a Lake Geneva resort that was more than 30 miles from the Village.

Community members complained to the County State’s Attorney that holding this retreat in Wisconsin violated the OMA.

The County State’s Attorney agreed stating that per the OMA, meetings are to be held at times and places that are convenient to the public and this meeting proposed to be held in another state is not convenient.

In response to a threat of litigation, the Village Board agreed to hold the retreat locally.
OMA
Agenda Requirements
OMA
Agenda Requirements

- Regular meeting agendas must be posted at the principal office of the public body and at the location where the meeting is to be held at least 48 hours in advance of the meeting.
  - Agendas must remain posted until the regular meeting is concluded. (If removed by public within 48 hour window – meeting can still be held)
  - The failure to post an agenda on the website does not invalidate any meeting or any actions taken at the meeting.

- For action to be taken, an item must be listed in a properly posted meeting agenda (Rice court decision).
- At a regular meeting agenda, consideration of items not specifically set forth in the agenda is allowed.
- Only items listed on the special meeting agenda can be considered or acted upon.
Agenda Content (Sec. 2.02(c))

- General subject matter of any “resolution or ordinance that will be the subject of final action at the meeting” must be included and discussed.
- Evaluate whether the titles of resolutions and ordinances contain sufficient description that the public will understand the action being taken by the public body when it votes on the item.
KTJ Township’s Regular Meeting Agenda has the following item listed under “New Business”:

“Resolution Approving Purchase of Truck”

Does the content of this agenda item comply with the OMA?
Answer -- NO, Not OMA Compliant

Example of OMA Compliant Agenda Item:

- “Resolution Approving Purchase of Ford F250 Truck for the Township Highway Department from Main Street Ford Dealer of Klein-Thorpeville, Illinois in the Amount of $35,000 (Governmental Cooperative Pricing Program)”

- Use a descriptive statement in parentheses to better inform the public of details regarding agenda items.
  - See, Rice decision (i.e., agenda items must be listed on posted agenda to be acted upon)
Sections 2a and 2.06 of OMA:

- A closed meeting may be held when an exception applies and upon a majority vote of a quorum present at an open meeting.
- The vote of each member and the applicable exception must be publicly disclosed at the time of the vote, recorded, and entered into the meeting minutes.
- Only the topics specified in the vote may be considered during the closed meeting.
- Written minutes and an verbatim audio or video recording of the closed meeting must be prepared and maintained; the audio / video recording may be destroyed 18 months after the approval of the closed session minutes. Section 2.06 (c).
- Closed session minutes must be reviewed at least semi-annually for release or retention. Section 2.06 (d).
- No final action may be taken at a closed meeting.
Section 2(c) of OMA:

- 36 Exceptions to the OMA allow for a closed meeting and include (non-exhaustive list):
  - The appointment, employment, compensation, discipline, performance or dismissal of a specific employee or legal counsel.
  - Collective negotiating matters.
  - The selection of a person to fill a public office.
  - The purchase or lease of real property for the use of the public body.
  - The setting of a price for sale or lease of property owned by the public body.
  - Security procedures.
  - Pending litigation.
  - Imminent or probable litigation.
    - Public body must include the basis for use of this exception in its closed session minutes (e.g., threat of lawsuit).
  - The establishment of reserves or settlement of claims.
  - Semi-annual discussion of minutes of lawfully closed meetings for purposes of release or retention as confidential.
Example of proper motion to enter closed session:

- “I move that the Board recess the regular meeting and enter into a closed meeting session to discuss (insert here the language of the specific exception that allows the closed session, such as ‘the employment of a specific employee’).”

- Motion requires a “second” and a Roll Call Vote of the Board.
- **Motion can be considered and acted on any time** during a regular, special or emergency meeting.
- Motion **DOES NOT** have to be listed on the agenda.
- Exception **DOES NOT** have to be listed on the agenda, but does have to be clearly stated by motion-maker.
- It is advisable to list the call for a closed meeting and the specific exception(s) on the agenda.
Each elected or appointed member of a public body must successfully complete an OMA electronic training curriculum and file certificate with clerk within 90 days of oath or assuming responsibilities of the position.
- No need to re-take training in relation to same appointed / elected position.


Failure to complete the training: no affect on validity of actions taken by the public body.

“OMA Officers”: As of 2010, each public body is required to submit a list of designated employees, officers, or members to receive annual electronic OMA training curriculum.
- Each additional designated employee, officer, or member must successfully complete the electronic OMA training curriculum within 30 days after designation.
Federal regulations requires that elected officials and public employees participate in mandatory training, called “NIMS Training” (National Incident Management System)
- Promotes awareness of national framework for emergency incident response management practices
- Enhances cooperation and effectiveness of joint responses by different responding agencies and personnel to manage domestic incidents no matter what the cause, size or complexity.

Completion required to comply with certain federal grant procurement regulations.
Initially, just first responders (e.g., police, fire and public works personnel) were required to complete this training. Now elected officials must complete the training as well.

NIMS training courses available on-line at: http://training.fema.gov/IS/NIMS.asp
To Record Meetings

- Any person may record the proceedings at any meetings required to be open by the OMA by tape, film or other means.

- The public body conducting the meeting must prescribe reasonable rules to govern the right to make such recordings.

- If a witness at any meeting required to be open by the OMA, which is conducted by a commission, administrative agency, or other tribunal, refuses to testify on the grounds that they may not be compelled to testify if any portion of their testimony is to be broadcast or televised or if motion pictures are to be taken of them while they are testifying, the public body conducting the meeting must prohibit recording during the testimony of the witness.
Section 2.06(g) of the OMA

“[A]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.”

- Representative Renee Kosel stated that the amendment “requires that all the entities of government have public comment under their own rules and regulations and that people have the right to speak at meetings.” 96th Ill. Gen. Assem. House Proceedings, March 25, 2010 at 129.

- Illinois Attorney General in PAC Opinion 14-012, has embraced this entitlement declaring that “the public has a statutory right to address the Board, subject to only reasonable limitations necessary to further a significant governmental interest.”
  - Reasonable time limitations are allowed (e.g., 3 minutes per speaker per meeting; 30 minutes of public comment per meeting).

- Illinois Attorney General in PAC Opinion 14-009 (Request for Review 2014 PAC 29739) dated September 4, 2014) issued a binding opinion that prohibits a public body from requiring an individual to state an address as a condition of exercising his or her statutory right to speak during public comment.
Section 7 of OMA:

- Meeting Attendance via Telephonic or Other Means:
  - Officials can participate in public meetings through telephonic or other electronic means if the public body has adopted rules that govern such participation.
  - A quorum of members must be physically present at the location of the meeting.
    - Members attending by telephonic or other means are not counted for this purpose.
  - The member must be unable to attend because of:
    - Personal illness or disability; or
    - Employment purposes or the business of the public body; or
    - Family or other emergency.
  - Those attending electronically must give prior notice to the body’s clerk, unless impractical.
  - Minutes must always reflect whether a member is present physically or electronically.
2020 OMA Amendments: Remote Meeting Rules (Section 7 of OMA)

- Illinois Public Act 101-0640 (effective June 12, 2020)

Permits local governments to adopt new remote meeting rules to allow meetings where a quorum is not physically present, provided:

- Must comply with notice, agenda and meeting minute requirements of Section 2 of OMA
- Head of the public body, as defined in Section 2(e) of FOIA, must determine that an in-person meeting or a meeting conducted under OMA is not practical or prudent because of a disaster.
- All members of the public body participating in the meeting, wherever their physical location, shall be verified and must be able to hear one another and must be able to hear all discussion and testimony.
- For open meetings, members of the public present at the regular meeting location must be able to hear all discussion and testimony and all votes of the members of the public body.
- If physical attendance at the regular meeting location is not feasible due to the State of Emergency, the public body must make alternative arrangements and provide notice of such alternative communication arrangements in a manner that allows public access to contemporaneously hear all discussion, testimony, and roll call votes (e.g., telephone number or a web-based link)
- At least one member of the public body, chief legal counsel, or chief administrative officer must be physically present at the regular meeting location, unless unfeasible due to the State of Emergency.
- All votes shall be conducted by roll call, so each member's vote on each issue can be identified and recorded.
- Verbatim record of all remote access meetings in the form of an audio or video recording. Verbatim records made shall be made available to the public under, and are otherwise subject to, the provisions of Section 2.06 of the OMA.

See also, Governor Pritzker’s Disaster Proclamation dated April 30, 2020 (COVID-19 - Disaster Declaration and Remote Meeting Rules), as amended.
Sections 3 and 4 of OMA:

- Any person may bring a civil action for violation of the OMA within 60 days of the meeting alleged to be in violation, or the State’s Attorney may bring one within 60 days of their discovery of a violation.
- The court may grant any relief it finds appropriate.
  - Circuit Court will conduct an in-camera review of the minutes of the meeting.
  - Court may order, among other relief, that a meeting be open to the public, grant an injunction against future violations, order release of certain minutes, or declare final action in a closed session null and void.
  - The court may also assess attorney’s fees and litigation costs to the prevailing party.
- Any person found to violate any provision of the OMA is guilty of a Class C Misdemeanor.
- Punishment can include a fine of up to $1,500 and jail time up to 30 days.
At an open meeting of KTJ Township Board, an intergovernmental agreement is listed on the agenda. The full text of the agreement is posted at the meeting room and on the Township’s website for public viewing 48 hours in advance of the meeting. Before passing this agreement, what must be said about the agreement?
Suggested Answers:

A) The name of the agreement
   i.e. Intergovernmental Agreement between KTJ Township and Village of Klein-Thorpeville

B) Generally what the agreement involves
   i.e. Intergovernmental Agreement between KTJ Township and Village of Klein-Thorpeville regarding a joint right-of-way improvement program

C) Specific key terms of the agreement
   i.e. Intergovernmental Agreement between KTJ Township and Village of Klein-Thorpeville where KTJ Township will do and pay for northside ROW improvements a, b, c, while Klein-Thorpeville will do and pay for southside ROW improvements 1, 2, 3 in regard to the joint right-of-way improvement program

D) Nothing. Just hold it up and have Township Board members nod their heads.
Correct Answer: C!
Requires that public bodies publicly recite the key terms of agreements at public meetings before approving agreements

- i.e., if there is a specific amount of public money being spent as a term of the agreement or action is taken relative to a specific business or person

It did not matter that the agreement in this case was online for public viewing prior to the meeting
The agenda for the KTJ Township Board meeting is posted at the meeting room and on the Township website at least 48 hours before the meeting, in compliance with OMA. The Township Board is scheduled to take final actions on Agenda Items A, B & C. The day before the meeting, it becomes apparent that final action on Agenda Item C would not be appropriate and further discussion during a closed meeting session is necessary. An amended agenda with the necessary changes is then re-posted at the meeting room and on the website 25 hours before the open meeting.

Is this an OMA violation?
Suggested Answers:

- A) Yes. The strict 48 hour rule must be followed.
- B) Probably. Or at least someone will complain about it.
- C) No. The original agenda was fine and no new item was added.
Correct Answer: C!
In this case, the PAC sided with the public body by ruling that amending the agenda less than 48 hours before an open meeting to reflect a deleted item did not violate OMA.

- Public bodies are under no obligation to discuss certain items even if they are on the agenda.
  - The Council/Board could have left the original agenda up, and decided during the meeting to defer talking about the item until another time. Posting the amended agenda was viewed as a gesture of further transparency.

- Also, OMA does not require 48 hours notice for topics to be added to *closed meeting agendas* - so moving the topic to a closed meeting did not violate OMA.

- Also – per OMA – public bodies can convene a closed meeting any time during a open meeting – even if the matter is not listed on the agenda.
Another “Sunshine Law”

Transparency is the legislative policy and directive

It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible.

All records in the custody or possession of a public body are presumed to be open to inspection or copying.

A public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt.
Public body must designate one or more officials or employees to act as FOIA Officer(s) who typically respond to FOIA requests.
- Township Clerks and staff handle FOIA requests, not Board members

FOIA Officers must successfully complete an annual FOIA electronic training course prepared by the Illinois Attorney General’s Office, Public Access Counselor (“PAC”).

New FOIA Officers must complete the training course within 30 days after assuming the position.
“Public records" means

- all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, 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.
FOIA requires inspection and copying of public records, except for those exempted by the Act.

It does not require staff or officials to answer questions that are part of a document request or an oral request.

It does not require staff or officials to create a new record to comply with a request.

If the Record or part of the Record is Exempt: Exempt records should not be provided and exempt information must be redacted from the record before turnover or public inspection.

Non-exempt: Non-exempt records should be provided, subject to redaction of exempt information.
OFTEN USED EXEMPTIONS:

Law Exemption 7(1)(a).
- Information, which state or federal laws prohibit to be released (e.g., HIPPA, attorney-client privileged information or copyright protected record).
- The Personnel Records Review Act exempts all performance evaluations from FOIA (Public Act 96-1483).

Private information exemption 7(1)(b).
- Narrow category of “private information” exempt from disclosure, such as social security numbers, drivers license numbers, employee identification numbers, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers and personal email addresses, and home addresses and personal license plate numbers, except as otherwise provided by law.

Personal privacy exemption 7(1)(c).
- Exempt if disclosure would constitute “a clearly unwarranted invasion of personal privacy,” which means that disclosure of the information would be “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.”
OFTEN USED EXEMPTIONS:

- Preliminary draft/notes/opinion exemption. 7(1)(f).

- Trade secrets and commercial or financial information furnished under a claim of proprietary, privileged or confidential, and that disclosure would cause competitive harm. 7(1)(g).

- Bid documents exempt until an award or final selection is made. 7(1)(h).

- Plans – architects, engineering, technical. 7(1)(k).

- Closed session meeting minutes. 7(1)(l).

- Real Estate documents and information relating to negotiations until those negotiations have been completed or otherwise terminated. 7(1)(r)
Township officials and employees are considered agents of a public body

- Applies to all Township records, regardless if they were sent on a private data device or email account
- PAC 16-006 Opinion:
  - Employee emails that pertain to public business and are sent or received on private email accounts are “public records” under FOIA and must be searched and produced
  - Communications concerning personal matters that are unrelated to the transaction of public business are not public records under FOIA
  - Emails on private email accounts are subject to FOIA when they pertain to public business because holding otherwise would undercut the principle that public bodies act through their employees and “would exclude communications on personal devices from the definition of "public records" regardless of whether the communications pertain to the transaction of public business.”

- PAC stated that “the fact that a personal email account is used to send or receive public records does not transform all communications sent or received on that account, in particular those with no connection to the transaction of public business, into the public records that must be disclosed” under FOIA
Township officials (Supervisor, Clerk, Trustees, Assessor, etc.) and staff can be the subject of a FOIA request.

- May be compelled by a court to turn over records and documents (emails, texts, papers, etc.).
- Use of only public email address for public business email and communications significantly helps with responding to FOIA requests.

TIPS for officials to comply with FOIA:

- Do not use private communication devices and private email addresses to conduct public business.
- No chat rooms and no “reply to all” on public business emails: potential OMA violation exposed by FOIA.
Public body must either:
- Turnover responsive records or
- Turnover redacted version of responsive records or
- Issue written notice of denial stating the specific exemption claimed with detailed facts showing basis for the claimed exemption.

Notice must include names and positions of persons responsible for denial.

Notice must inform person of right to review by the PAC, provide the address and phone number of the Public Access Counselor and advise of right to judicial review.
Public Access Counselor

- Created as a part of the Attorney General’s Office.
- Review and determine whether documents should have been disclosed under FOIA.
- Review and determine whether a Public Body violated OMA.
- May also issue advisory opinions to guide public bodies.
Public body that is late in providing requested documents or an exemption notification waives its ability to later assert that the request is unduly burdensome or to charge for copying costs.

Courts may impose civil penalties between $2,500.00 and $5,000.00 against public bodies that willfully and intentionally fail to comply with the Act or otherwise act in bad faith.

The court “shall” award attorney’s fees to requesters who prevail in a FOIA claim brought forth in Circuit Court.
Social Media Usage = Area of Potential Liability Under OMA and FOIA Compliance Issues

Care should be exercised when choosing to maintain or participate in websites, social media or social networking platforms.

Do not use a public e-mail address to register for social media or other sites unless the purpose is directly related to your elected/appointed position and you have been authorized to do so.

Use in a manner that will not negatively reflect on the Township or its mission.

Avoid chat rooms or blogs where OMA violation(s) can arise.

Use of social media may create FOIA’able records.
OMA and FOIA
Social Media Don’ts

- Do not display the Township seal or other official logos, emblems or patches on personal social networking accounts.

- Do not discuss any Township related information or business that is not considered public information.

- Do not state or imply that you speak for the Township, for a Township Department or Township (a public body acts only as a collective body, not as individuals), unless you have been specifically authorized by the public body.

- Do not engage in on-line debate or dialogue regarding specific Township projects, issues, policies or plans.

- Do not engage in vulgar or abusive language, personal attacks of any kind, or offensive terms targeting individuals or groups.
Open issues exist regarding use of email that have not been addressed by the courts or the Legislature.

Most common issue: whether the use of email by officials, not in “real time” or contemporaneously like in an email chat room, but under normal circumstances (where there are delays of minutes, hours and days between email exchanges), can create a meeting subject to the requirements of OMA.

The Illinois Attorney General’s position is that the use of email by officials can, under certain circumstances, constitute a “meeting” and thus be a violation of OMA.
Email Usage - HELPFUL TIPS!

- Be careful when using email since email usage by elected or appointed officials serving together on a board, committee or commission can constitute a “meeting” and a violation of the OMA.

- Do not click on “Reply to All” or “Forward” if other elected or appointed officials are part of the email distribution list.

- Avoid email exchanges among the officials where the “business” of the board/committee/commission is discussed (e.g., email communications regarding agenda topics).

- The Illinois Attorney General will pursue sanctions against officials who try to subvert OMA via email.

- Email creates an electronic record of your communications so it is easy for the Illinois Attorney General to investigate your communications and those communications may be subject to public inspection per FOIA.
Repetitive “unintentional” violations of OMA are dealt with by the Illinois Attorney General just the same as intentional violations.

Use of email for meeting date/time confirmation and agenda and document distribution among officials and staff is OK.

No email voting by officials on items that should be voted on at a OMA-posted meeting.

Add the following REMINDER NOTE to emails that are transmitted to boards, committees and commissions where there is the potential for an Open Meetings Act violation to occur if the members respond to the email by discussing the topic in the email or the attachment(s) of the email:

- NOTE: DUE TO OMA COMPLIANCE RULES, PLEASE DO NOT RESPOND TO THIS EMAIL BY USING “REPLY TO ALL” AND DO NOT DISCUSS THIS MATTER(S) OUTSIDE OF A POSTED OPEN MEETING OR A CLOSED MEETING.
Questions?

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- Shareholder and Director of the law firm of Klein, Thorpe and Jenkins, Ltd.
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  - Bidding, contract and procurement laws
  - Intergovernmental agreements and P3s (public – private partnership arrangements)
  - Economic development, land use and zoning matters
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