

An illustration of the Illinois State Capitol building, featuring its iconic green domes and classical architectural details. A white dove is shown in flight in the upper right corner of the sky. The building is rendered in a sketchy, hand-drawn style with flat colors.

UPDATE
OPEN MEETINGS ACT
FREEDOM OF INFORMATION ACT
STATE OFFICIALS AND EMPLOYEES ETHICS ACT

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OPEN MEETINGS ACT

5 ILCS 120/1

- Statutory and case law updates since June 1, 2016



What is a Meeting

- Any gathering, in person by video, telephone call, Email, text message, snap chat, even Facebook
- Of a majority of a quorum
- Held for the purpose of discussing public business

REQUIRED FOR A MEETING

- Physical presence of quorum at a meeting
- **Except** “a public body with statewide jurisdiction” may hold a simultaneous meeting by video conference if the meeting is held at one of its offices and one or more other locations.
Section 2.01 and 7(d)

PARTICIPATION BY PHONE

- A majority of members present may allow participation by phone if the member is prevented from physically attending because of:
 - (i) personal illness or disability;
 - (ii) employment purposes or the business of the public body; or
 - (iii) a family or other emergency



CLOSED MEETINGS



LIMITED SUBJECT MATTER

- The appointment, employment, compensation, discipline, performance, or dismissal of specific employees including hearing testimony or a complaint lodged against an employee to determine its validity. Section 2(c)(1).
- Evidence or testimony presented in open hearing, or in closed hearing, to a quasi-adjudicative body, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning. Section 2(c)(4).
- Litigation, when an action against, has been filed and **is pending** before a court or administrative tribunal, or when the public body finds that an action is **probable or imminent**. Section 2(c)(11)

PROCEDURES OF CLOSED MEETINGS

- May schedule closed meetings
- May vote to close a portion of meeting
- No final action may be taken in closed meeting
- Final action must be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted

BOARD OF EDUCATION OF SPRINGFIELD v. ATTORNEY GENERAL OF ILLINOIS, 2017 IL 120343 (JAN 20, 2017).

- Public Access opinion finding Board of Education violated Open Meetings Act by actions taken at a closed meeting
- Closed meeting included discussion of termination of school superintendent, six members signed separation agreement at closed meeting
- Included on agenda at subsequent open meeting and agenda posted on the website and included a link to the resolution and separation agreement
- At public meeting resolution announced and discussed, and a vote was taken.

- Court looked to the meaning of Section 2(e) of OMA which provides that: No final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted.
- Court found that the agenda posting alone is not sufficient to fulfill the public recital requirement. ¶ 35. Public recital must occur at the open meeting. ¶ 39.
- Court found that: the plain meaning of the phrase “public recital of the nature of the matter being considered” is that the public body must state the essence of the matter under consideration, its character, or its identity. ¶ 46.

- In sum, Court found under section 2(e), a public recital must take place at the open meeting before the matter is voted upon; the recital must announce the nature of the matter under consideration, with sufficient detail to identify the particular transaction or issue, but need not provide an explanation of its terms or its significance. ¶ 64.
- In this case the public recital was sufficient as it included the general nature of the matter under consideration and included sufficient detail to the particulars to meet the public recital requirements of the OMA. ¶ 83
- Court goes on to find that OMA contains no bar to holding a preliminary vote at closed meeting and notes that absent a preliminary vote, there would be no need to bring to Board for final action. ¶ 73, 74

BREUDER v. BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 501, DUPAGE, 2017 WL 839487 (MARCH 3, 2017)

- Federal case on appeal
- College president's employment contract obligated community college board to vote on termination actions "exclusively during closed sessions"
- Argued contract void because violates OMA.
- Court found that this falls within the exception under Section 2(c)(1) and therefore does not violate the OMA

PUBLIC ACCESS OPINIONS ON CLOSED MEETINGS

- City of Bloomington violated OMA by holding a closed meeting to discuss an item under the “pending” litigation exception. PAC found that the city council did not have “reasonable grounds to believe that a lawsuit was more likely than not to be instituted or was close at hand” Public Access Opinion 17-4 at 7.
- Village of Caseyville violated the OMA by voting to amend and accept a settlement agreement under “Old Business”. The agenda did not include any information regarding the subject matter of the settlement. Public Access Opinion 16-15.

NOTICE AND PARTICIPATION



- Each calendar year public notice of regularly scheduled meetings (Open or Closed)
- Agenda must be posted at the office and location as well as on website 48 hours before
- Any person must be allowed an opportunity to address the public body
- Any person may record the proceedings by tape, film or other means, under reasonable rules
- Norridge School District violated OMA by prohibiting recording of an open meeting. Norridge required notification in advance of the meeting to record the meeting; however, no compelling reason for advance notice was cited nor was it alleged that advance notice was necessary to prevent disruptions or avoid a safety hazard. PAC found that the Norridge did not meet its burden to demonstrate that advance notice was reasonable. Public Access Opinion 16-14

PUBLIC ACTS EFFECTIVE SINCE JUNE 1, 2016

- P.A.99-515 eff. 6-30-216, added access to verbatim recordings of closed meetings to certain public officials.
- P.A. 99-714 eff 8-5-16, allows a person to take action to circuit court if Attorney General decides to settle violation without a binding opinion by Public Access Counselor
- P.A. 99-687 eff. 1-1-17, added additional language to Section 2(c)(17) that allows discussion in closed meetings of health care professionals recruitment, credentialing, discipline, or peer review. Language includes discussion of matters protected under Patient Safety and Quality Improvement Act of 2005

FOIA

FREEDOM OF INFORMATION ACT

5 ILCS 140

STATUTORY AND CASE LAW UPDATES
SINCE JUNE 1, 2016



Public Records

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

WHAT ARE PUBLIC DOCUMENTS

- **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.
- This includes any documents **pertaining to the transaction of public business** on private devices

CITY OF CHAMPAIGN V. MADIGAN, 2013 IL APP (4TH) 120662 (JULY 16, 2013)

- Public Access Opinion, relying on Champaign (PAC 16-6, August 9, 2016)
- Private emails that pertaining to transaction of public business ARE public documents.
- Interpreting the definition of "public records" in FOIA to exclude communications pertaining to the transaction of public business which were sent from or received on personal email accounts of public officials and public employees would be contrary to the General Assembly' s intent of ensuring public access to full and complete information regarding the affairs of government.



"to qualify as a 'public record' under [section 2(c) of] FOIA, a communication must (1) 'pertain[] to the transaction of public business' and have either been (2) prepared by, (3) prepared for, (4) used by (5) received by, (6) possessed by, or(7) controlled by a public body."

The court stated that if a communication pertaining to public business was sent to and received by members of a city council on personal electronic devices during a city council meeting when the individual "members were functioning collectively as the public body,' then the communication is a 'public record' and thus subject to FOIA." City of Champaign, 2013 IL App (4th) 120662, ¶ 42, (July 16, 2013).

The court added: " to hold otherwise would allow members of a public body, convened as the public body, to subvert the Open Meetings Act [] and FOIA requirements simply by communicating about city business during a city council meeting on a personal electronic device." City of Champaign, 2013 IL App (4th) 120662, ¶ 43

- Chicago Police Department (CPD) received a request for emails regarding a shooting by CPD officers.
- CPD provided over 500 emails from the CPD email system, but not personal email accounts.



E-mail!

PAC FINDINGS:

When an individual public employee such as a CPD officer acts in an official capacity, he or she transacts public business as a member of a municipal police department, which clearly is a public body subject to the requirements of FOIA.

- CPD's interpretation would undercut the principle that public bodies act through their employees, by excluding from the definition of "public records" communications sent or received by employees of a public body on personal devices or accounts, regardless of whether the communications pertain to the transaction of public business. Such an interpretation erroneously focuses not on the content of a communication but on the method by which it is transmitted. Public Access Opinion 16-6 at 7

HANDLING REQUESTS

- Respond in 5 working days and may extend response time
- Response must be in writing
- If applying an exemption, must include a detailed factual basis for the application of any exemption claimed
- The names and titles or positions of each person responsible for the denial and
- Notice of the right to review by the Public Access Counselor and provide the address and phone number for the Public Access Counselor.

APPLYING EXEMPTIONS

- Denial under Section 7 of this Act, must include specification of the exemption claimed and the specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority.
- The burden is on the governmental agency to prove that specific documents fit within one of the statutory exemptions. To meet this burden the agency must provide a detailed justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing. Public Access Opinion 17-1 (March 14, 2017)

SECTION 7.1(c)

- Section 7.1(c) exempts personal information that would “constitute a clearly unwarranted invasion of personal privacy”.
- PAC determined that redacting the names of employees of a private contractor for the city was not proper under this exception. Public Access Opinion 17-10 (July 25, 2017).



SECTION 7.1 (a) and (g) Exempt Material Protected By Federal Or State Law Or Rule, Trade Secrets, And Commercial Or Financial Information.

- City of Chicago v. Janssen Pharmaceuticals, Inc., 2017 IL App (1st) 150870 (March 31, 2017). Court held that city ordinance is not “state law” such that Section 7.1(a) would protect disclosure of information. Court further held that absent a showing of competitive harm, the documents are not exempt under Section 7.1 (g). City of Chicago, ¶29
- Better Government Association of Illinois v. Rosemont, 2017 IL App (1st) 161957 (June 27, 2017). Rosemont argued that details of contracts could be redacted. Court disagreed that Section 7.1(g) allowed the redaction. Rosemont ¶27. Court also held Rosemont could not create restrictions on public access to documents by ordinance. Rosemont, ¶34.

DOCUMENTS HELD BY THIRD PARTY

- Better Government Association v. Illinois High School Association, 2017 IL 121124 (May 18, 2017). At issue is whether the Illinois High School Association (IHSA) is a public body and if not should documents be held by IHSA be considered public documents. The court examined whether IHSA was a subsidiary of a public body and looked to cases on the OMA to make its determination. BGA, ¶25. The Court found that IHSA is not created, controlled, or funded by government. BGA, ¶55. Therefore, the Court found IHSA is not a public body as defined by FOIA and that the requested records are not the public records of District. BGA, ¶67

Chicago Tribune

Chicago Tribune v. College of Du Page, 2017 IL App (2d) 160274 (May 9, 2017)

Tribune sought information on subpoenas and College of DuPage asserted could only produce what had and could not require College of DuPage Foundation to provide. Foundation also argued was not a public body governed by FOIA.

Court found that Foundation was performing a governmental function. Tribune ¶49.

Court also stated where all the elements are satisfied, section 7(2) plainly provides that the record at issue “shall be considered a public record of the public body, for purposes of [FOIA].” Therefore, even though the public body might not physically possess records sought in a FOIA request, under section 7(2) it must attempt to obtain them if they directly relate to a governmental function that the public body has delegated to a third party pursuant to a contract. Tribune, ¶57

PUBLIC ACTS EFFECTIVE SINCE JUNE 1, 2016

- P.A. 99-478 eff. 6-1-2016, added definition of severance agreement and then included severance agreements along with settlements in Section 2.20 of FOIA as a public document
- P.A. 99-586 eff. 1-1-2017, allows enforcement of binding PAC opinions and includes penalties of up to \$1,000 a day against public body for noncompliance
- P.A. 99-776, eff. 8-12-16, excepts from disclosure certain information required by the Condominium and Common Interest Community Ombudsperson Act
- P.A. 100-20, eff. 7-1-17, nonsubstantive clean up of Section 7.5
- P.A. 100-26, eff. 8-4-17, limits access to records by prisoners and inmates



STATE OFFICIALS AND EMPLOYEES ETHICS ACT

5 ILCS 430/1

EXECUTIVE ETHICS COMMISSION DECISIONS

- State employee use of State issued equipment to either watch pornography at his workplace or exchange sexually explicit emails. Employees failed to cooperate with the Office of Executive Inspector General (OEIG) during investigation. Commission levied a \$1,000 fine for obstructing the investigation in both cases. Hickey v. Schweitzer, No. 17-EEC-001 (Jan. 19, 2017); Hickey v. Spresser, No. 17-EEC-002 (Jan. 19, 2017)
- Prohibited political activities results in \$1,000 fine. Hickey v. Slusser, No. 16-EEC-006 (March 27, 2017); Hickey v. Winburn, No. 16-EEC-007 (May 25, 2017)

EX PARTE COMMUNICATIONS UNDER ADMINISTRATIVE PROCEDURE ACT

- any written or oral communication by any person, **during the rulemaking period**, that provides or requests information of a material nature or makes a material argument regarding potential action concerning a state agency's general, emergency, or preemptory rulemaking that is communicated to the head of the agency or an employee of the agency and is:
- not made in a public forum;
- not a statement limited to matters of procedure and practice; and
- not a statement made by a state employee to fellow employees of the same board or agency.

EX PARTE COMMUNICATIONS UNDER EXECUTIVE ETHICS ACT

- any written or oral communication by any person that imparts or requests information of a material nature or makes a material argument concerning regulatory, quasi-adjudicatory, investment, or licensing matters pending **before or under consideration** by a state agency that is:
- not made in a public forum;
- not a statement limited to matters of procedure and practice; and
- not a statement made by a state employee to fellow employees of the same board or agency.

GIFT BAN

- No gift from a prohibited source (does not include a relative or provided on basis of personal friendship)
- Executive Order removed exception for food, refreshments under \$75 and the \$100 exception
- Employees may accept if it is *de minimis*
- What does that mean?

QUESTIONS

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