

A Public Safety Law Firm

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REIMER DOBROVOLNY & KARLSON LLC

Open Meetings Act & FOIA

Keith Karlson and Brian LaBardi

15 Spinning Wheel Road, Suite 310

Hinsdale, Illinois 60521

Phone: 630-654-9547

Fax: 630-654-9676

www.rdklaborlaw.com

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Basics of the Open Meetings Act

5 ILCS 120/1 et seq.

- All meetings of public bodies shall be open to the public.
- A “meeting” is any gathering (in person, video, audio, telephone, or by other electronic means (email) allowing for contemporaneous communication) of a majority of a quorum of members of a public body for the purpose of discussing public business.
- For five member public bodies such as pension boards, a majority of a quorum is three members. 5 ILCS 120/1.02
- Electronic attendance 5 ILCS 120/7.
- Public body must adopt rules allowing for electronic attendance.
- A quorum must be physically present at the location of the meeting.
- Board must vote to approve electronic attendance at the meeting.
- The member must be prevented from physically attending because of:
 - 1) personal illness or disability;
 - 2) employment purposes or the business of the public body; or
 - 3) a family or other emergency.

Exceptions & Closed Sessions

5 ILCS 120/2

Most common exceptions in a pension board context are:

- Appointment, employment, compensation, performance, or dismissal of specific employees of the public body. (Must be employer/employee relationship, not independent contractor). 5 ILCS 120/2(d).
- Deliberate evidence or testimony presented to the board provided the board makes available a written decision setting forth its determinative reasoning.
- Litigation that is either probable or imminent provided the public body states its basis for finding an action is probable or imminent.
- Discussion of prior closed session minutes in conjunction with an annual review to determine whether they should remain closed.

Closed Session Procedures

5 ILCS 120/2a

- A motion should be made and seconded to go into closed session explicitly stating the applicable exemption.
- A roll call vote must be taken on the motion.
- An audio or video recording must be made of the closed session.
- No final action may be taken in closed session.
- To resume open session, the board should open the room and conduct a roll call vote to return to open session.

Minutes

5 ILCS 120/2.06

- Public body must keep written minutes of all meeting and closed sessions.
- Minutes of open meetings must be approved within 30 days after the meeting OR at the second subsequent regular meeting whichever is later. A public body that maintains a website with its own full time staff shall also post the approved minutes on the website of the public body within 10 days after approval.
- Minutes of closed meetings are made available to the public only after the public body determines the need for confidentiality no longer exists. It must review closed session minutes at least semi-annually and make a determination as to whether closed session minutes should remained sealed or be released.
- The verbatim recording of a closed session may be destroyed 18 months after the completion of the meeting recorded but only after the public body 1) approved destruction of a particular recording and 2) minutes of the meeting are approved.
- At a minimum, the minutes must include:
 - Date, time, and place of meeting.
 - Members of the public body present or absent.
 - A summary of discussions on all matters proposed, deliberated, or decided and a record of any votes taken.

Public Notice & Meeting Agendas

5 ILCS 120/2.02

- Public notice of the schedule of regular meetings must be given at the beginning of each calendar or fiscal year including the dates, times, and places of meetings.
- Agendas must be posted at least 48 hours prior to the meeting at both the principal office of the public body and the location of the meeting.
- Agendas must be posted in such a manner as to be continuously available for the entire 48 hour period. (Posting on a website maintained and controlled by the public body satisfies this requirement).
- The agenda posted must set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting.
- The agendas items should provide sufficient advance notice to the public of the action to be taken at a regular meeting. See *In re Foxfield Subdivision*, 396 Ill.App.3d 989 (2d Dist. 2009) and *Rice v. Bd. of Trustees of Adams County*, 326 Ill.App.3d 989 (4th Dist. 2002).
- Each agenda should include an item for public comment.

Training Requirements

5 ILCS 120/1.05

- All elected or appointment members of a public body must complete the Open Meetings Act training available on the Attorney General's website within 90 days of taking office.
- Each public body must appoint an Open Meetings Act designee. The designee must complete the training on an annual basis.

Enforcement

5 ILCS 120/3

- Any person, including the State's Attorney in a county where the public body operates may file suit for failure to comply with the Open Meetings Act.
- Any person who believes a violation of the Act has occurred can request review with the Public Access Counselor (PAC) of the Attorney General's Office.
- Violations of the Act can be a Class C misdemeanor. 5 ILCS 120/4.

Recent PAC Opinions on the Open Meetings Act

- Closed Sessions: For a public body to close a meeting for the probable or imminent litigation exception of 2(c)(11), there must be reasonable grounds to believe it is more likely than not that a lawsuit will be filed. Such determinations are made by examining the surrounding circumstances. The only matters that may be discussed are strategy, posture, theory, and consequences of the litigation. PAC Opinion 12-013.
- No “final action” may be taken in closed session. Reaching a consensus in closed session with no further action taken in open session violates this provision of the OMA. PAC Opinion 12-013.
- Coming to an consensus in closed session may violate the OMA. PAC Opinion 12-013 but compare with *Jewell v. Bd. of Education, DuQuoin Comm. School Dist.*, 312 N.E.2d 659 (5th Dist. 1974). Be sure to formalize any decision made in closed session upon return to open session.
- Signing an agreement in closed session even while recognizing it still must be approved in open session violates the OMA. PAC Opinion 13-007.
- A public body must adequately inform the public of the nature of the action being taken prior to a vote in open session. Discussion in closed session followed by an open session vote on the matter discussed without additional information violates the OMA. PAC Opinions 13-007 and 13-010.
- Agendas: Agenda items may be removed from a posted agenda within 48 hours of the meeting. PAC Opinion 14-003.
- Public Comment: Public body cannot require a person making public comment to state their address as a condition of speaking. PAC Opinion 14-009.

Freedom of Information Act

5 ILCS 140/1 et seq.

A Brief Overview of the FOIA

- Strong presumption all records held by a public body are subject to the FOIA.

What Records are Subject to the FOIA?

- Records (regardless of form) pertaining to the transaction of public business used, received, or in the possession of a public body. 5 ILCS 140/2(c).
- Records not in the possession of a public body but in the possession of a party with whom the public body has contracted to perform a governmental function. 5 ILCS 140/7(2).

FOIA Officers

5 ILCS 140/3.5

- Every public body must appoint at least one FOIA Officer.
- The FOIA Officer must complete the FOIA training available on the Attorney General's website within 30 days of appointment and annually thereafter.
- The FOIA Officer shall:
 - Receive and respond to FOIA requests.
 - Develop a list of documents or categories of records the public body will disclose immediately upon request.
 - Keep copies of all FOIA requests received and responses.

Receipt of FOIA Requests

- FOIA requests can be made in writing by hand delivery, mail, fax, or other means available to the public body (email).
- The public body may require requests be reduced to writing but cannot require a specific form.
- Requests do not need to be made to the FOIA Officer. They can be made to an employee or official of the public body and are deemed received on that date NOT the date of receipt by the FOIA Officer.

Time for Response

5 ILCS 140/3

- Public body has 5 business days to respond.
- Time may be extended for an additional 5 business days but only for enumerated reasons:
 - Requested records are stored offsite.
 - The request requires collection of a substantial number of specified records.
 - The request is couched in categorical terms and will require an extensive search.
 - Records were not located in a routine search and additional efforts are being made to locate them.
 - Records require examination to determine if they are exempt from disclosure under Section 7 of the FOIA.
 - Request cannot be complied with in 5 days without unduly burdening or interfering with operation of the public body.
 - Need to consult another public body having an interest in the subject matter of the request.

Time for Response Continued

- Public body and requestor may agree to an extension for more than 5 days.
- Failure to respond or extend time within 5 business days of request constitutes a denial of the request. PAC Opinion 13-001.
- Requests made for “commercial purpose” (use for sale, re-sale or solicitation) may be respond to within 21 business days. Requests from news media, non-profit, and academic organizations are excluded. 5 ILCS 140/2(c-10) and 3.1.
- Requests from “recurrent requestors” (as defined by number of requests sent) also may be responded to within 21 business days but the requestor must notify the requestor within 5 days that it is treating the request as such. 5 ILCS 140/3.2.

Denial of FOIA Requests

“Unduly Burdensome”

- Requests calling for all records falling within a category may be denied as unduly burdensome if there is no way to narrow the request and the burden on the public body outweighs the public’s interest in the information. 5 ILCS 140/3(g).
- Prior to invoking this exemption, the public body must contact the requestor in an effort to reduce the request to manageable proportions.
- If the public body denies a request as unduly burdensome, it must state specific reasons why compliance would be unduly burdensome.
- Failure to timely respond to a request or failure to respond after requesting the 5 day extension will preclude a public body from later claiming the request is “unduly burdensome” under this Section.

Denial of FOIA Requests

Common Exemptions

5 ILCS 140/7

- Any FOIA exemption claimed must include a detailed factual basis for application of the exemption and citation to legal authority.
- The denial must inform the requestor of the right to have the denial reviewed by the Public Access Counselor at the Attorney General's Office providing the address and phone number. It must also inform the requestor of their ability to seek judicial review of any denial. (See form responses available on the Attorney General's website).
- Information subject to exemption can be redacted but the remainder of the non-exempt record shall be produced.

Denial of FOIA Requests

Common Exemptions Continued

- Private information” – unique identifiers, social security number, driver’s license number, employee I.D. number, biometric identifiers, personal financial information, passwords, medical records, home or personal telephone numbers, personal email addresses, home addresses, personal license plates. 5 ILCS 140/2(c-5).
- Information prohibited from disclosure by federal or state law. (i.e. Personnel Records Review Act, HIPPA).
- Personal information the disclosure of which would constitute an unwarranted invasion of personal privacy (highly personal or objectionable to a reasonable person in which the right to privacy outweighs the public interest.

Denial of FOIA Requests

Common Exemptions Continued

- Preliminary drafts, notes, recommendations, memoranda in which opinion are expressed. Except, they shall not be exempt when publically cited and identified by the public body.
- Trade secret/proprietary financial information.
- Proposals for contracts/agreements until an award is made.
- Closed meeting minutes.
- Communication between a public body and attorney representing the public body not subject to discovery in litigation or material prepared by the public body in anticipation of civil or administrative proceeding at the request of the attorney.
- Records relating to adjudication of employee grievances or disciplinary case except for the final outcome in cases where discipline is imposed.

Penalties and Attorney's Fees

- Civil penalties of \$2,500 - \$5,000 per occurrence for willful violations.
- Attorney's fees shall be awarded to requestor who prevails in action originating in circuit court for denial of FOIA request.

Fees

5 ILCS 140/6

- No charge for the first 50 pages of black and white copiers. Fees may not exceed 15 cents per page thereafter.
- If the request seeks a copy of a record stored in an electronic format, the body must provide the record in the format requested if feasible. May charge the actual costs of the media on which it is produced.
- The public body may not charge any fee for costs related to searching for the requested record(s), reviewing the records, or any other personnel costs associated with reproduction of the records.

Fees Continued

- Commercial Requests
- Does not apply to news media or other non-profit requests.
- Public body may charge \$10.00 per hour for costs of any search and review of records but first 8 hours are free.
- Voluminous requests - Public body may charge for electronic data reproduced in response to request pursuant to sliding scale based on the amount/type of data itemized in the statute at 5 ILCS 140/6(a-5).
- Failure to respond in a timely fashion pursuant to Section 3 of the FOIA precludes the public body from assessing any fees. 5 ILCS 140/3(d) & (f).

FOIA Denial and Review

Option #1:

- Review with the PAC. 5 ILCS 140/9.5
- If any part of a FOIA request is denied by a public body, within 60 days the requestor may appeal to the Public Access Counselor (PAC) at the Attorney General's Office.
- The PAC will review information from the requestor and public body and may seek supplemental information from both parties. The PAC may choose to informally adjudicate the matter with an informal opinion or mediation. The PAC also has the ability to issue binding opinions subject to administrative review in the courts however, any action to review a binding PAC opinion must be brought in either Cook or Sangamon County.
- Prevailing party cannot collect attorney fees utilizing this method of review.

FOIA Denial and Review Continued

Option #2:

- Injunctive or declaratory relief in the circuit court.
5 ILCS 140/11
- A requestor whose FOIA request is denied may also choose to file suit in the circuit court for injunctive or declaratory relief.
- Public body has the burden of showing its denial is proper by clear and convincing evidence.
- Prevailing party shall be awarded reasonable attorneys' fees.

Recent FOIA Decisions and PAC Opinions

- Invoices for legal services are subject to FOIA with any attorney/client privileged information redacted. Generic descriptions of services provided and time/fee information must be provided. PAC Opinion 12-005 & 14-002.
- Records created for internal investigation that did not result in an adjudicatory proceeding are subject to FOIA. PAC Opinion 13-011.
- Public records held by third party contractors performing work on behalf of public body are subject to FOIA. PAC Opinion 13-012 and 13-018.
- Settlement agreements are specifically subject to FOIA. Only private information may be redacted. PAC Opinion 14-004.

Recent FOIA Decisions and PAC Opinions Continued

- Photographs of former auxiliary deputy sheriff are not exempt from FOIA as “biometric identifier”. PAC Opinion 14-008.
- Electronic records must be produced in the format maintained by the public body if requested. This means data cannot be “locked”. *Fagel v. The Department of Transportation*, 2013 IL App (1st) 121841.
- Text messages sent between city council members during a meeting on personal cell phones are subject to the FOIA. But, no attorney fees for actions indicated before the PAC as opposed to circuit court. *City of Champaign v. Madigan*, 2013 IL App (4th) 120662.
- Lists of police officer misconduct complaints and citizen complaint register is subject to FOIA and not exempt as discipline records. *Kalven v. City of Chicago et al.*, 2014 IL App (1st) 121846.
- Public bodies do not need to create records to respond to FOIA request. *Chicago Tribune Co. v. Dept. of Financial & Prof. Regulation, et al.*, 2014 IL App (4th) 130427.

Recent FOIA Decisions and PAC Opinions Continued

- Request to Attorney General involving over 9,200 potentially responsive records that would have to be reviewed to determine whether information contained therein should be redacted was properly denied as unduly burdensome when the requestor refused to narrow his request. *Shehadeh v. Madigan*, 2013 IL App (4th) 120742.
- Public body is required to conduct a reasonable search tailored to the nature of the request. The search for records must be reasonably calculated to uncover all relevant documents and cannot be limited to only one record system if others are likely to contain requested information. PAC Opinion 14-007 & 14-010.
- Request for records disclosing vehicles and persons subject to LEADS inquiries not subject to FOIA as information prohibited from disclosure by law. *Better Government Assoc. v. Zaruba*, 2014 IL App (2d) 140071.
- Governor Rauner's appointment calendar is a public record subject to FOIA and cannot be redacted pursuant to Sec. 7. PAC Opinion 15-008.