

# School Board Meetings

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## Requirements of the Illinois Open Meetings Act

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# Letting the Sunshine in: School Board Meetings

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The Illinois Open Meetings Act (5 ILCS 120/1 et seq.) provides public access to the meetings of public bodies. This pamphlet is intended as a practical guide for school boards and administrators in dealing with the myriad provisions of the Act.

The Illinois Freedom of Information Act is covered in a separate pamphlet available on the Web site of the Illinois Association of School Boards.

## Thank You . . .

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# Summary of Changes Since the Last Revision

Here are the substantive changes to the Open Meetings Act since this booklet was last revised in 2005.

- A public body that has a Web site that is maintained by the full time staff of the public body shall post on its Web site the agenda of any regular meeting. This posting shall remain on the Web site until the regular meeting is concluded. Notice of any special meeting shall also be posted on the Web site. (Public Act 94-0028)
- The minutes of any regular meeting open to the public must be posted on the Web site within seven days of the approval of the minutes and shall remain posted for at least 60 days. (Public Act 94-0028)
- Voting to hold a closed session meeting requires a citation to the specific statutory exception.
- The requirement that meetings be held in a convenient location may require change in ordinary venue when the public body is aware that the normal venue will be too small for the number of citizens that wish to attend.
- Minutes of closed session meetings may be discoverable in a civil suit to enforce the Act based on a determination by the court.
- There have been several significant changes to the Act regarding electronic attendance at meetings and email communications. (Public Act 94-1058)

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# The Illinois Open Meetings Act

All Illinois school boards are subject to the Open Meetings Act<sup>1</sup>. The Act makes it public policy that (a) public bodies shall act and deliberate openly, (b) citizens shall be given advance notice of, and the right to attend, all meetings (and to comment at such meetings per a separate provision of the Illinois School Code<sup>2</sup>), and (c) the citizen's right to know shall be protected.

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

- 1) States that meetings of public agencies, including school boards and their subordinate committees, must be open to the public; makes exceptions for certain specified matters which may be discussed in closed session.
- 2) Requires that meetings shall be at specified times and places convenient to the public.
- 3) Prohibits public meetings on legal holidays unless the regular meeting day falls on a holiday.
- 4) Requires notice of all meetings to be given to (a) the general public and (b) certain news media.
- 5) Requires preparation of a schedule of regular meetings. Requires publication of a change in regular meeting dates.
- 6) Requires preparation of minutes of all open and closed meetings.
- 7) Requires a verbatim record of all closed meetings in the form of an audio or video recording.
- 8) Provides both civil and criminal remedies for violations.

## What the Act Covers

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

- school boards
- committees and subcommittees of school boards.

The creation of committees does not circumvent the Act, but each committee is subject to and governed by the

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

**Gatherings covered** – The Open Meetings Act defines a meeting as “. . . any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business.” This definition eliminates the confusion which can arise when two school board members bump into one another on a street corner and proceed to discuss school business.

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

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

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

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

The definition of meeting also requires that the gathering of a majority of a quorum be held for the *purpose* of discussing public business. In other words, there must be an intent to discuss public business before the gathering becomes a meeting covered by the Act. The legislature

<sup>1</sup> 5 ILCS 120/1 et seq.

<sup>2</sup> 105 ILCS 5/10-6

added this intent language so that public officials would not have to fear violating the Act if they unintentionally discussed public business by some or all of the members of a public body at a social event.

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

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

However, the Illinois Attorney General in a written explanation of the Act has stated that:

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

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

**Meetings not covered** – One court<sup>3</sup> has held that meetings or conferences of administrators, teachers or other employees are not covered by the Act because the participants do not adopt any resolutions and meet only for the purpose of promoting “good staff work.” The school

board president or another member of the board may attend such a staff meeting without bringing it within the coverage of the Act. However, if a majority of a quorum of the public body attends such a staff meeting at which public business is discussed, the meeting would then come within the Act and would have to be open to the public.

By the same token, an “internal” committee which is not formally appointed by or accountable to any public body, by its very nature, does not conduct deliberations which fall within the scope of the Act.<sup>4</sup> Finally, a Federal District Judge has ruled that a “political rally” is not a meeting under the Act, even though all the board members were there and discussed public business.<sup>5</sup>

## Meeting Times and Places

The Open Meetings Act requires all public meetings to be held at specified times and places which are convenient and open to the public. Therefore, a public body cannot schedule a meeting to be held at midnight or in the “wee” hours of the morning; however, if a meeting called at a convenient time extends into the early morning hours, it would be a proper and legal meeting. Also, a public body cannot, except in very rare circumstances, properly schedule a meeting to be held outside of its corporate boundaries. A meeting outside of its corporate boundaries, depending upon how far outside it was, would probably be “inconvenient” to the public, and there is a serious legal question as to whether a public body has jurisdiction to meet and act outside of its corporate limits.

Although the Act does not specifically define the term “convenient,” one court has noted that where a public body knew in advance that its normal meeting venue would be too small for the numbers of citizens wishing to attend a meeting, where alternative, larger venues were available, and where the public body refused to move the venue to make attendance inconvenient, a violation of the Act may be present.<sup>6</sup>

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

## Notice Requirements

The notice provisions of the Open Meetings Act establish somewhat different requirements for different types of

<sup>3</sup> *People ex rel. Cooper v. Carson*, 28 Ill. App. 3d 569 (1975) cert. den. 83 Ill. 2d 210, 328 N.E. 2d 675

<sup>4</sup> *Pope v. Parkinson*, 48 Ill. App. 3d 797, 363 N.E. 2d 438 (1977)

<sup>5</sup> *Nabhani v. Coghaneese*, 552 F. Supp. 657 (N.E. Ill., 1982)

<sup>6</sup> *Gerwin v. Livingston County Board*, 345 Ill. App. 3d 352 (4th Dist. 2003)

<sup>7</sup> 205 ILCS 630/17(a)

meetings. These include regular, special and reconvened meetings.

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

In addition, an agenda of each regular meeting must be prepared and posted at both the principal office of the public body and at the location where the meeting will be held. The agenda must be posted at least 48 hours in advance of the meeting. If the public body has a Web site maintained by its full time staff, the agenda for any regular meeting must be posted on the Web site as well. This posting shall remain on the Web site until the meeting is concluded. It should be noted that the failure of a public body to post the proper notice or agenda on the Web site shall not invalidate any meeting or action taken at such meeting.

Furthermore, even though the Act provides that “[t]he requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda,” an Illinois Appellate Court has held that the Act does preclude actions from being taken on items that are not specifically set forth in the agenda.<sup>8</sup> While you may be able to “consider” items not included on the agenda (i.e. discuss), the *Rice* case prohibits final action on items not posted on the agenda.

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

**Rescheduled meetings** — Public Notice of a rescheduled regular meeting must be given at least 48 hours beforehand, and the notice must include the agenda for the meeting. For example, if members of the board plan to attend an out-of-town convention on their regular meeting date and wish to reschedule, the board must give at

least 48 hours notice and the notice of the rescheduled meeting must contain a copy of the agenda. No newspaper publication is required.

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

*Public notice* of special meetings, except a meeting held in the event of a bona fide emergency, must be given at least 48 hours before such special meeting, and the notice must include the agenda for the special meeting. If the public body has a Web site maintained by its full time staff, notice of the special meeting must also be posted on the Web site. The actions of the public body, while not required to be specifically detailed in the notice, should be “closely related” to those matters set forth in the agenda for the special meeting.<sup>9</sup>

**Emergency meetings** – Notice of a special meeting held in an emergency must be given as soon as practicable, but in any event prior to holding of the meeting, to any news medium which has filed an annual request for notice under the provisions of the Act. For example, if a school district were hit by a tornado or flash flood, the board would not have to delay meeting until 48 hours after posting notice of a special meeting, but could notify the news media and meet immediately in order to decide upon a course of action and then give notice as soon as practicable to the public. Of course, the same restrictions and exceptions apply to such emergency meetings being open or closed.

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

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

Should it appear at the reconvened meeting that still another meeting date is needed before the next regular meeting, a reconvened meeting may again be adjourned to

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

<sup>9</sup> *Argo High School Council of Local 571 v. Argo Community High School District No. 217*, 163 Ill. App. 3d 578,516 N.E. 2d 834 (1987)

another date in a similar manner. Obviously, no regular meeting should be reconvened on a date beyond the next regular meeting.

The minutes of the original meeting should show the action taken by the board adjourning to a definite date, time and place.

### Methods of Public Notice

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

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

**Change in regular meeting schedule** – If the school board makes a change in its regular meeting dates (for example, a change from the first and third Mondays to the first and third Wednesdays), it must give a least 10 days' notice of such change by publishing a notice in a newspaper of general circulation in the school district. Notice of a change in meeting dates must also be posted at the principal office of the school district or at the place of the meetings and must be supplied to those news media which have filed annual requests.

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

**Web site postings** – Where the school board has a Web site maintained by full-time staff, notice of all meetings of the board, including its schedule of regular meetings, shall be posted on the Web site. Notice of the board's schedule of regular meetings shall remain posted on the Web site until a new public notice of the schedule is approved.

The Open Meetings Act also provides: "The failure of a public body to post on its Web site notice of any meeting or the agenda of any meeting shall not invalidate any meeting or any actions taken at a meeting."

### Recording of Meetings

Under the Open Meetings Act, any person may record the proceedings at any public meeting by tape, film, or other means. The Act allows public bodies to prescribe rea-

sonable rules governing the right to record. A school board wishing to ensure that recording is handled without disrupting its meetings should adopt "reasonable rules" controlling such activities as part of its policy manual.

### Closed Meetings

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

The exceptions authorize or allow, but do not require, closed meetings to discuss a subject covered by an exception. No final action is allowed in closed meetings.

Those exceptions which apply to schools are the following:

- 1) meetings on collective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees;
- 2) meetings held to discuss the appointment, employment and dismissal of employees of the public body or legal counsel of the public body. Public bodies may also discuss the compensation, discipline and performance of specific employees or legal counsel in closed sessions. The Act also permits closed meetings to hear testimony on a complaint lodged against an employee or legal counsel to determine its validity;
- 3) meetings where the purchase or lease of real property for the use of the public body is being considered, including discussions of whether a particular parcel of property should be acquired;
- 4) meetings where the setting of the price for sale or lease of real estate owned by the public body is being considered;
- 5) meetings held to discuss litigation "when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting;"
- 6) meetings to consider 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;
- 7) meetings to consider professional ethics or performance when considered by an advisory body appointed to advise a licensing or regulatory agency on matters germane to the advisory body's field of competence;
- 8) student disciplinary cases;
- 9) the placement of individual students in special edu-

cation programs and “other matters” relating to individual students;

10) meetings to establish reserves or settle 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 body or any inter-governmental risk management association or self insurance pool of which the public body is a member;

11) meetings to consider sale or purchase of securities, investments or investment contracts;

12) meetings to consider security procedures and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff, the public, or public property;

13) meetings to consider informant sources, hiring and assignment of undercover personnel or equipment related to criminal investigations;

14) meetings to hear 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; (A quasi-adjudicative body is defined as “meaning an administrative body charged by law or ordinance with the responsibility to conduct hearings, receive evidence or testimony and make determinations based thereon.”)

15) meetings to consider self evaluation, practices and procedures or professional ethics when meeting with a representative of a statewide association of which the public body is a member;

16) meetings for the discussion of minutes of closed meetings – whether to consider approval of closed meeting minutes or to review them on a semi-annual basis as required by the Act.

## Procedures for Closed Meetings

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

An appropriate motion, for example, would be “I move that the Board go into closed meeting to discuss collective negotiating matters” or “I move that the Board hold a

closed meeting to discuss pending or probable or imminent litigation.” Note that the motion need not identify the specific items to be discussed, such as the name of the lawsuit that is to be discussed, but it must cite the specific statutory exception that allows the particular closed meeting—e.g. “pending litigation,” not 5 ILCS 120 (2) (c) (ii).

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

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

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

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

## Minutes

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

- 1) the date, time and place of the meeting;
  - 2) the members recorded as either present or absent;
- and
- 3) a summary of the discussion on all matters proposed, deliberated or decided, and a record of any votes taken.

In addition:

- 4) On a motion to go into a closed meeting, the minutes must contain the vote of each member and must identify the specific exception allowing such closed meeting.
- 5) If there is a closed meeting on “probable or imminent litigation,” the basis for the finding that the matter discussed was a matter of probable or imminent litigation must be specified in the minutes of the closed meeting.

In calling for a “summary of discussion on all matters proposed, deliberated or decided,” the Open Meetings Act appears to require that the minutes reflect what discussion occurred and not merely list the topics that were discussed. However, because the Act requires only a summary

and not a verbatim account, it appears that only general comments need be included, not quotations.

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

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

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

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

**Closed meeting minutes** – The keeping of minutes of closed meetings is required but potentially hazardous. For example, if a school board holds a closed meeting to discuss settlement proposals relative to a matter of pending litigation and records in the minutes the amount it would like to settle for along with the highest amount it is willing to pay, it would be damaging to the district if a copy of such minutes were somehow to get into the hands of the opposing attorney. Therefore, in such a situation the board president should stress the importance of the confidentiality of such minutes to the members and persuade them that under no circumstances are the contents of the minutes or what was discussed at the closed meeting to be divulged to anyone.

In addition, in the event of a civil action brought to enforce the Act, the court may conduct an *in camera* exam-

ination of the verbatim recording as it finds appropriate in order to determine whether there has been a violation of the Act. Should the court determine a complaint for non-compliance under the Act is valid, it may, for the purposes of discovery, redact from the closed meeting minutes any information protected by the attorney-client privilege.

**Public Inspection** – The minutes of open meetings must be made available for public inspection within seven days after the school board has approved them, usually at the next meeting of the board. Committee meeting minutes should be kept separately and need only be approved by the committee and not by the full school board.

If the school board has a Web site maintained by its full-time staff, the minutes of any regular meeting must be posted on the Web site within seven days of the approval of the minutes. Such minutes shall remain posted on the Web site for at least 60 days after they are initially posted.

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

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

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

- 1) the need for confidentiality still exists as to all or parts of those minutes, or
- 2) the minutes or portions thereof no longer require confidential treatment and are available for public inspection.

These semi-annual review meetings should be conducted in closed session. It would be advisable for the school board to adopt a written resolution at the public portion of the meeting, stating that the review has been conducted and listing by meeting date which, if any, of the closed meeting minutes are now available for public inspection.

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

- 1) the public body approves the destruction of a particular recording; and
- 2) the public body approves minutes of the closed meeting that meet the written minutes requirements as set forth in the Act.

## **Enforcement – the Effect of Non-compliance**

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

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

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

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

- 1) the issuance of a writ of mandamus requiring that a meeting be open to the public;
- 2) the issuance of an injunction against future violations of the Act;
- 3) ordering the public body to make available to the public any portion of the minutes of a meeting as is not authorized to be kept confidential under the Act; or
- 4) declaring null and void any final action taken at a closed meeting in violation of the Act.

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

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

which are clearly open to the public and in full compliance with the Act.

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

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

## **Some Special Issues**

### **May a school board hold a meeting via electronic means?**

Public Act 94-1058, effective January 1, 2007, amends the Open Meetings Act to deal with electronic attendance at public meetings. Prior to this amendment, the Illinois Attorney General had opined in November, 1982 (No. 82-041) that telephone conference calls held by a majority of a quorum of a public body for the purpose of discussing public business are meetings under the Act and, therefore, all notice and public accessibility requirements of the Act must be complied with before holding such conferences. Also, one court held it proper to conduct a closed meeting, pursuant to one of the exceptions, by way of a telephone conference call, provided that there is compliance with other requirements of the Act.<sup>10</sup> Finally, another court specifically allowed a public body to establish a quorum through electronic attendance.<sup>11</sup>

Public Act 94-1058 changes the law developed by the courts. The amendment changes the definition of meeting under the Act to include 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."

Moreover, the amendment adds a further requirement that a quorum of members of the public body be physically present at the location of any open or closed meeting. This requirement prohibits establishing a quorum through electronic attendance. Electronic attendance by members is permitted only in the event they are prevented from attending physically by either personal illness or disability,

<sup>10</sup> *Scott v. Illinois State Police Merit Board*, 222 Ill. App. 3d 496, 584 N.E. 2d 199 (1991)

<sup>11</sup> *Freedom Oil Company v. Illinois Pollution Control Board*, 275 Ill. App. 3d 508 (4th Dist 1995).

employment purposes or the business of the public body, or a family or other emergency.

These members who wish to attend a meeting electronically must give prior notice to the recording secretary if practical, and meeting minutes must reflect whether a member is present physically or electronically, regardless of whether any members attend electronically. Before members can attend electronically, public bodies must adopt rules to govern electronic attendance at meetings, which may be more restrictive than the provisions of the Act.

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

Requirements of the Act would be met if the voice of the absent board member is made audible to everyone in the meeting room and if the voices of other board members and the public are audible to the absent board member.

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

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

On the other hand, there appears to be nothing in the law that could prevent school board members from expressing their feelings by adopting a resolution of censure – although such a resolution would have no legal effect (and perhaps no practical effect, either). However, in one case the court held that by sanctioning a park commissioner for her purported release of closed session material without discussing her behavior with her in closed session first, the commission violated their own sanction policy and denied her due process.<sup>12</sup>

Fortunately, a board cannot be sued by someone who

claims he or she was injured merely by such a disclosure. In one case, the court found that there is nothing in the Open Meetings Act that provides a cause of action against a public body for disclosing information from a closed meeting.<sup>13</sup> However, there are various other imperatives for maintaining confidentiality of information, including the privacy rights bestowed by the Student Records Act and the constitutional liberty interests of employees. Information impugning the character of a student or employee that is divulged from a closed meeting could provide the basis for legal action if traceable to an individual board member or the board as a whole.

**Does the Open Meetings Act apply to e-mail communications?**

Although there are presently no Illinois cases or Illinois Attorney General opinions directly addressing the issue of e-mail messages and the application of the Open Meetings Act to such messages, it would seem reasonable, especially given the amendments made to the Act by Public Act 94-1058 detailed above, that the courts and the Attorney General would agree with the following:

- 1) When e-mail messages by, between and among members of a public body are used in place of letters and such e-mail messages do not involve deliberations, debate, decision making, or consensus on a matter of public business, such communications should not involve a violation of the Open Meetings Act.
- 2) E-mail messages sent to members of a public body via a distribution list where each recipient replies individually to the sender and the sender does not summarize or share those replies should not involve a violation of the Open Meetings Act.
- 3) A series of e-mail messages among the members of a public body for the purpose of discussing public business, where each member replies to the full group and an e-mail discussion ensues among all members of the group would result in a violation of the Open Meetings Act.

<sup>12</sup> *Nelson v. Crystal Lake Park District*, 342 Ill. App. 3d 917, 796 N.E. 2d 646 (2nd Dist. 2003).

<sup>13</sup> *Swanson v. Board of Police Commissioners*, 197 Ill. App. 3d 592, 555 N.E. 2d 35 (1990), cert. den., 133 Ill. 2d 874 (1990)

# Appendix A

## Policy

### Verbatim Records of Closed Meetings

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

1. A verbatim record of all closed meetings of the **[insert name of governmental entity]** shall be kept in the form of an audio/video **[pick one]** recording. The **[insert name of governmental entity]** shall provide the recording device and only one recording device will be allowed. Individuals shall not be allowed to bring their own recording devices to closed meetings.
2. The **[insert name of designated party, most likely the Clerk or Secretary, whichever is applicable]**, or his or her designee if he or she is unavailable, will be responsible for operating the recording device for all closed meetings of the Board of **[insert name of governmental entity]**. Each committee of the Board of **[insert name of governmental entity]** shall designate in writing the individual responsible for recording closed meetings and submit such designation to the **[Clerk/Secretary]** of the **[insert name of governmental entity]**.
3. The **[Clerk/Secretary, whichever is applicable]** shall maintain the audio/video **[pick one]** tapes in a safe and secure location under lock and key. Access to non-released tapes shall be limited to **[fill in names or titles of persons allowed access]** unless otherwise directed in writing by the governing body of **[insert name of governmental entity]**. Individuals allowed access shall sign a log indicating the date and time they listened to a particular tape. Individuals allowed access shall listen to a tape only under supervision. No copies of any non-released tape shall be made.
4. The verbatim record of a closed meeting may be destroyed eighteen (18) months after the completion of the meeting if the Board of **[insert name of governmental entity]** approves the destruction of the particular recording and if it approves written minutes for the particular closed meeting that contain the following, as required by Section 2.06 of the Open Meetings Act:
  - (1) the date, time and place of the meeting;
  - (2) the members of the public body recorded as either present or absent; and
  - (3) a summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken.
5. The **[insert name of designated party]** shall, on a periodic basis, but not less frequently than quarterly, inspect the recordings to check their quality and completeness, and report on any problems to the Board of **[insert name of governmental entity]**.
6. Unless the Board of **[insert name of governmental entity]** has determined that a recording no longer requires confidential treatment, or otherwise consents to disclosure, the verbatim recordings of closed meetings made pursuant to Paragraph 1 above shall not be either open for public inspection or subject to discovery in any administrative proceeding other than one brought to enforce the provisions of the Open Meetings Act. In a civil action brought to enforce the provisions of the Open Meetings Act, a recording will be made available to the court for in camera examination for the purpose of determining whether a violation of the Open Meetings Act exists. In the case of a criminal proceeding, a recording will be made available to the court for in camera examination for the purpose of determining what portion, if any, must be made available to the parties for use as evidence in the prosecution.