
**VILLAGE OF SUGAR GROVE
BOARD REPORT**

TO: VILLAGE PRESIDENT & BOARD OF TRUSTEES
FROM: BRENT EICHELBERGER, VILLAGE ADMINISTRATOR
ALISON MURPHY, SENIOR MANAGEMENT ANALYST
SUBJECT: DISCUSSION: OPEN MEETINGS ACT
AGENDA: MAY 21, 2019 REGULAR BOARD MEETING
DATE: MAY 17, 2019

ISSUE

Discussion of the Open Meetings Act.

DISCUSSION

At the May 7, 2019 Village Board meeting, the topic of how Board members can discuss topics of interest that were not currently before the Board was raised. Village Attorney Laura Julien stated that her firm had prepared Village of Sugar Grove New Board Member Training Materials that includes a section on the Open Meetings Act requirements and its practical implications.

Laura will be at the May 17, 2019 Board meeting to answer any questions Board members may have after reviewing the materials.

COST

There are no costs associated with this discussion.

RECOMMENDATION

That the Board review the materials provided by Village Attorney Laura Julien and discuss at the May 17, 2019 Board meeting.

Village of Sugar Grove New Board Member Training Materials



Materials Prepared and Presented By:



MICKEY, WILSON, WEILER,
RENZI & ANDERSSON, P.C.

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Open Meetings Act

The following is intended as an outline of the Open Meetings Act (“OMA”) [5 ILCS 120/Open Meetings Act]. As a preliminary matter, for purposes of OMA, a “public body” is defined to include all committees of the Village Board. As such, any committee must conduct all meetings in conformance with OMA in the same manner as the Village Board. Therefore, as used herein, the term “Board” would encompass not only the Village Board, but any committee of the Board.

I. SCOPE

OMA establishes that it is the public policy of the State of Illinois that all citizens shall have the right to know the actions of public bodies, and therefore the meetings of all public bodies shall be open, with open deliberation, and advance notice of all meetings to citizens, who shall have a right to attend.

A. Bodies covered.

1. Village Board. When a majority of a quorum attends. For a seven-member board, a quorum is established when four members are present. Therefore, three members shall constitute a majority of a quorum.
2. Committees and Sub-Committees. When a majority of a quorum of the whole committee attends, whether or not any board members are also members of the committee.

B. Exceptions. Meetings of staff members or other employees of the Village are not covered by OMA. The attendance of a Board officer or member will not, by itself, bring the meeting under OMA’s regulations. However, if a majority of a quorum of the public body (or a majority of a quorum of a committee) attends, and public business is discussed, then the meeting would come under purview of OMA.

C. Gatherings. OMA 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. (Thus, two Village board members, of a seven-member board, could see each other and discuss public business and not be in violation of OMA. On the other hand, if those two board members were members of a five-member committee, then even such a chance meeting could be in violation of OMA.)

D. Public Business. OMA does not define public business. It would be safe to assume that any matter relating to business of the Village and which is or reasonably could come before the board for action would be considered public business.

E. Intent. OMA requires that gathering to be held for the purpose of discussing public business. This intent requirement was added to avoid violating OMA by an inadvertent conversation at a social event. Clearly, using a social event to avoid OMA would be a violation, and the Attorney General has stated that even unintended conversations could convert a social event into a meeting which must then comply with all the requirements of OMA.

F. Electronic Communications. OMA was amended to make clear that electronic communication could be considered a meeting. With rapidly advancing technology, there has been much discussion on what type of communication is permitted among Board members. Undoubtedly, technology is a wonderful advancement that speeds communication and allows for rapid exchanges of information. However, when that same convenience and speed allows dialogue and interaction to take place for public bodies, that convenience may create a violation of the spirit and the letter of OMA.

Unfortunately, there are no clear answers to this subject but there is much debate going on about it. Generally, the debate centers upon the "asynchronous" nature of email, and most recently, text messages. As noted above, the statute makes a reference to "contemporaneous interactive communication." Most consider instant messaging or chat rooms to be clear violations of OMA, but a few do not consider email to be a violation because there is a time lag. Given current internet speeds, however, email can sometimes be nearly as fast as an instant message.

We would suggest that the acid test is whether a Board is able, via use of email and the "reply to all" button, to engage in a dialogue about a given subject, in very near to "real time" speed. If so, we suggest that a violation might be present. Engaging in that activity effectively would enable the Board to debate an issue without ever being gathered and without the public ever being present.

An analogy would be telephone conferences and letters. Clearly a telephone conference with a majority of a quorum of the Board would violate OMA. Also, a letter writing exchange via regular mail, would not since it is not contemporaneous. The test then appears to be the speed at which the exchange takes place (telephone - instantly, mail - many days). Email, of course is somewhere in between. If every Board member has high speed and is present in front of their computer at the time of the exchange, the exchange could be virtually "real time." If they are not so present, there could be small to large delays. With the rise in the use of smart phones, it is becoming increasingly more common for such messages to be received almost instantly. Thus, a potential violation via email would appear to be very fact intensive and, in many instances, difficult to defend.

For this reason, it is necessary to exercise due care to make sure that accidental violations do not occur. This will not only ensure that the requirements of OMA are complied with, but also avoid the “appearance of impropriety,” which is a critical element for most elected officials.

This is not to say that the administration should refrain from disseminating information to board members via email (i.e. they can send it to all board members). A Board can receive information, just as if they were all hearing the same television show, or other medium. However, board members should stay away from copying all other members on replies. The goal here is to avoid creating a quasi-dialogue or conversation. Email may not be as fast as an “in person” conversation, but sometimes it can get pretty close.

If a board member replies to one person on the board (not replying to all) there would not appear to be a violation as only one other person is seeing the response. If you send to all (Blind cc) there would not appear to be a violation as long as no responses to your email are received (and you aren't responding to someone else's broadcast email). However, since board members often have each other's emails it would be very easy for a “conversation” to develop nonetheless.

Also, even if the “reply to all” function is not used, a conversation could still develop if Board members instead, “forward” the same email comments to each other member separately or in smaller “group emails.” In other words, if a method is used that allows a majority of a quorum to see each other's thoughts and responses (regardless of how they do it-reply to all, separate or grouped messages) and it allows each member to air their thoughts to the others, without the public being able to be present, such a method would appear to violate the spirit of OMA, if not the letter of the law. Such use of email should therefore be avoided.

A rule of thumb might be called the “**one shot rule.**” *On any given subject, the first person to send an email gets to “send to all.” However, no one who gets that email may “reply to all.” So, if an administrator sends an email to all board members, then the administration got the “first shot” and no “reply to all” should be made. If, however, any board member has an issue to alert the rest of the board to, they get the first shot, and then no other board member can “reply to all” to that first email. The rule may be overcautious, but it is better to avoid even the appearance of impropriety on these matters.*

II. TRAINING

Each elected or appointed member of a public body must also complete the electronic training curriculum developed and administered by the Office of the Illinois Attorney General Public Access Counselor (“PAC”). For new members of a public body, the training should be completed within 90 days after taking the oath of office or otherwise assuming their position.

III. MEETING TIMES AND PLACES

OMA requires all public meetings to be held at times and places convenient and open to the public. No meeting is to be held on a legal holiday unless the regular meeting date falls on such holiday.

IV. NOTICE

A. Type of meeting.

1. **Regular meeting.** The public body must give notice of its schedule of dates, times, and places for regular meetings at the beginning of each calendar or fiscal year and make the schedule generally available. (This would generally be done at the board's organizational meeting). The agenda for each regular meeting must be made available (and posted) at least 48 hours prior to the meeting. The posting must be at the principal office of the Village and at the building where the meeting is to be held.

2. **Rescheduled meeting.** Notice of a rescheduled regular meeting must be given at least 48 hours in advance, and the notice must include the agenda for the meeting. No newspaper publication is required.

3. **Special meeting.** A special meeting may be called by the board president or by any three members of the board. Notice must be written and delivered to each board member at least 48 hours in advance if mailed, or at least 48 hours in advance if delivered in person. The notice must contain the agenda and the meeting is restricted to agenda items or items reasonably related thereto. Public notice is required at least 48 hours in advance (unless the meeting is for a bona fide emergency).

4. **Emergency meeting.** Notice of an emergency meeting must be given as soon as practical, but in any event, prior to the meeting.

5. **Reconvened meeting.** A majority of members present at a regular or special meeting may adjourn and reconvene the meeting at another time. Any action which could have been taken at the original meeting can be taken at the reconvened meeting. Public notice of the reconvened meeting must be given 48 hours in advance and the notice must include the agenda unless the meeting is to be reconvened within 24 hours or an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda.

V. METHOD OF NOTICE

A. **Change of Regular Meetings.** If the regular meeting schedule is changed, at least 10 days' notice of the change must be published in a newspaper of general circulation. The notice must also be posted at the principal office of the Village, and supplied to the media which have filed a request. If one regular meeting is changed (rescheduled) then the board needs only to give

48-hour notice and include the agenda for the rescheduled meeting. This notice need only be posted and sent to the media, and does not need to be published.

B. Other meetings. For special, emergency, rescheduled or reconvened meetings notice is accomplished by posting a copy of the notice at the Village and supplying a copy to the media. If the any media has given the Village an address or phone number, then they must receive the same notice as given to board members.

VI. CLOSED MEETINGS

A. Statutory Exceptions to Open Meetings. The exceptions to the requirement for open meetings are specific in the statute and OMA indicates that the exceptions allowing closed meetings are to be "strictly construed, extending only to subjects clearly within their scope." It should be kept in mind that the exceptions, for the most part, allow, but do not require, closed meetings to discuss the subject of the exception, and no final action is allowed in a closed meeting. Some of the exceptions are:

1. Meetings on collective negotiating matters between the Village and its employees, or deliberations concerning salary schedules for one or more classes of employees.

2. Meetings where the purchase or lease of real property is being considered or where the setting of the price for sale or lease of real estate owned by the Village is being considered.

3. Meetings 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."

4. Meetings to discuss the appointment, employment and dismissal of employees. You may also discuss the compensation, discipline and performance of specific employees in closed session as well as hear testimony on a complaint lodged against an employee.

5. Meetings to discuss the discipline, performance or removal of a member of a public body when that body has the power to remove the member.

6. Meetings to consider the appointment of a member to fill a vacancy when the public body has the power to fill such vacancy.

7. Meetings to establish reserves or settle claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if otherwise the disposition of the claim might be prejudiced. You can also discuss claims, loss or risk management information,

records, data, advice, or communications from or with any insurer or risk management association if you are a member.

8. Meetings to consider sale or purchase of securities, investments or investment contracts.

9. Meetings to consider informant sources, or the hiring or assignment of undercover personnel related to criminal investigations.

10. 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 the subject matter was otherwise appropriate for the closed meeting (e.g. employee dismissal). You act as a quasi-adjudicative body when you are an administrative body charged by law with the responsibility to conduct hearings, receive evidence or testimony and make determinations based thereon.

11. 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.

12. Meetings for the discussion of minutes of closed meetings. This can be for the approval of such minutes or to review them on a semi-annual basis as required by OMA.

B. Procedure.

1. There must be a motion made at an open meeting. The closed meeting may be held the same day or in the future. The open meeting must have a quorum and a majority of those present must vote in favor of the motion.

2. The motion must specify the specific statutory exception authorizing the closed meeting.

3. The minutes must contain the vote of each member (i.e. roll call vote) and identify the specific exception.

4. More than one closed meeting may be scheduled in a single vote provided:

- a. each meeting involves the same particular matters, and
- b. the meetings will be held no more than three months from the day the vote is taken.

5. Once a closed meeting occurs, the board may discuss only topics which are both (a) covered by a statutory exception, and (b) specified in the vote to hold the closed meeting.

VII. MINUTES

The board, as well as all committees, must keep written minutes of all meetings, whether open or closed.

A. Open meetings. All minutes must contain:

1. the date, time and place of the meeting;
2. the members recorded as present or absent;
3. a summary of the discussion on all matters proposed, deliberated or decided, and a record of the votes taken. The requirement of a "summary" would indicate that not just the topics discussed need to be included but that the minutes should reflect the discussion which took place. This does not mean a verbatim account, but at least general comments should be covered. Any person may record the proceeding of a public meeting.

B. Closed meetings. The minutes of closed meetings must contain all of the items noted in VI. A. above, but also:

1. the minutes (in open session) must show the vote of each member and identify the specific exception allowing the closed meeting;
2. if the closed meeting is on probable or imminent litigation, the basis for the finding that it is probable or imminent must be contained in the closed meeting minutes.
3. there must also be kept a verbatim record of all closed meetings in the form of an audio or video recording. Recorded minutes (but not the written minutes) may be destroyed not less than 18 months after completion of the meeting provided the Board approves the destruction and has approved the written minutes of said meeting.

C. Public inspection.

1. **Open meetings.** Minutes of an open meeting must be approved within 30 days after the meeting or at the second subsequent regular meeting of the body. The minutes of open meetings must be made available for public inspection within ten days after they have been approved by the board, and must be posted on the Village's website within 10 days after their approval. Committee meetings minutes should be approved by the committee only, kept separately, and are also to be made available within ten days after approval.

2. **Closed meetings.** Minutes of closed meetings need not be produced for public inspection until after the board has determined that it is no longer necessary to keep them confidential. They should be kept separately. The verbatim recording is not available except in an action to enforce the Open Meetings Act, in which case the recording is reviewed by the court.

OMA requires the board to review these minutes not less than semi-annually to determine whether there still exists a need of confidentiality or whether the minutes, or a portion thereof, may be made available to the public. The findings from this meeting must be reported in an open meeting.

VIII. VIOLATIONS OF OMA

If anyone believes there has been a violation of the OMA, they may file a request for review by the PAC. Upon review, the PAC determines if further action is required. If so, the PAC, within seven days, forwards a copy of the review request to the public body and specifies what records or documents the public body must furnish to the PAC, within seven days, which documents can include the tape-recorded verbatim transcript of a closed session. The public body may, but is not required to, file with the PAC an answer to the request for review. This answer is also provided by the PAC to the requesting party who may, but is not required to, file a response. In addition to certain other provisions, the Attorney General examines the matter and issues an opinion within 60 days after the review is initiated. That opinion is binding unless either party files a court action for administrative review. The Attorney General is also given the authority, in his or her discretion, to resolve a request for review by mediation or some other means other than the issuance of a binding opinion. It should be noted that filing a request for review is available to the public in addition to the option of filing a suit for a violation as previously provided in OMA.

OMA also allows the Attorney General to issue advisory opinions to public bodies regarding compliance. If the public body relies in good faith on the advisory opinion in complying with the requirements of OMA, then it is not liable for the penalties for violations which are otherwise provided for.

If an individual violates OMA such person may be found guilty of a Class C misdemeanor which carries a \$500 fine and/or 30 days in jail. If the board violates the OMA, such violations may be enjoined and any final action taken may be voided in a civil proceeding.

IX. COMMON MISCONCEPTIONS REGARDING OMA

A. A public body cannot discuss items if they aren't listed on the agenda.

FALSE. A public body cannot act on an item not listed on the agenda as an action item, but is free to discuss any topics or items even if not listed on the agenda. In other words, discussion is not limited to an item listed on the agenda.

B. A public body can take action in closed session. FALSE. A public body can discuss qualified items in closed session, but may not take action. Rather, the public body must come out of closed session and back into open session to take action on an item discussed in closed session. The item being acted upon must also be listed on the agenda as an action item.

C. A public body is limited to their regularly scheduled board meetings to discuss or take action on items. FALSE. A public body may call a special meeting by posting an agenda at least 48 hours in advance in the same manner as regular meetings, and may do so in between their regularly scheduled board meetings.

D. A public body cannot go into closed session unless it is specifically listed on the agenda. FALSE. A public body can always go into closed session even if it is not listed on the agenda, as long as the proper procedure is followed and the public body has a legal basis for doing so under OMA.

E. It is appropriate to cite merely to “personnel” when stating the reason for moving into closed session. FALSE. The public body is permitted under OMA to move into closed session to discuss “appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body” (emphasis added) and it is not sufficient merely to cite to “personnel” as the basis for closed session.

Freedom of Information Act

What is the Freedom of Information Act?

The Freedom of Information Act (“FOIA”) is a law that establishes that it is a fundamental right for the public to have access to complete information regarding the affairs of the government. As such, it further creates the obligation for a public body to provide public records, when requested, as expediently and efficiently as possible. [5 ILCS 140/Freedom of Information Act].

What is a public body?

A public body, for purposes of FOIA, is “all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, **villages**, incorporated towns, school districts, and **other municipal corporations**, boards, bureaus, committees, or commissions of this State, **any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof** and a School Finance Authority created under Article 1E of the School Code.” (Emphasis added). [5 ILCS 140/2(a)].

What is a public record?

The general rule is that **all records** in the custody or possession of a public body are presumed to be public records, and therefore should be open to inspection or copying.

Under the Illinois FOIA statute, a public record is defined as “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 used by, received by, in the possession of, or under the control of any public body.” [5 ILCS 140/2(c)].

The Local Records Act further provides that “records” are: “reports and records of the obligation, receipt, and use of public funds of the units of local government and school districts, including certified audits, management letters and other audit reports made by the Auditor General, County Auditors, other officers or by licensed Certified Public Accountants permitted to perform audits under the Illinois Public Accounting Act and presented to the corporate authorities or boards of the units of local government, are public records available for inspection by the public.” [50 ILCS 205].

As you can see, this list is extremely comprehensive. **While there are limited exceptions, public actors should operate under the assumption that all records (including electronic correspondence) are open to the public.**

With the rapid growth of technology, this is becoming increasingly more important to understand. Most recently, questions have arisen regarding e-mail communications and text messages. This issue of whether text messages are subject to FOIA was recently examined in *City of Champaign v. Madigan*, 2013 IL App. (4th) 120662. The question presented in that case was whether text messages sent during a public meeting from a private device were required to be produced.

In its discussion, the court acknowledged a few main points that are worth noting. Specifically, it identified that FOIA's preamble acknowledges that "technology may advance at a rate that outpaces its ability to address those advances legislatively." Addressing the substantive issues as to what type of messages may be subject to FOIA, the court established that electronic communications would be considered public records where they: (1) relate to public business; and (2) were prepared by a public body, for a public body, used by a public body, received by a public body, possessed by a public body, or controlled by a public body.

The first prong sets a standard that is fairly easy to meet, in that if the matter is one of public concern, it would likely be considered public business. The second prong, however, is more nuanced. Although it is clear that no single individual constitutes the "public body," individuals can take certain actions (such as forwarding the message along to a quorum of the board or texting during a public meeting) so as to bring it into that standard. Following this analysis, the court explicitly noted "**a communication to an individual city council member's publicly issued electronic device would be subject to FOIA because such a device would be "under the control of the public body."** Accordingly, so long as the inquiry pertains to a public matter, we believe the texts located on the publicly issued device would be subject to FOIA.

The question also becomes a little more complex when evaluating whether a message sent from a privately-owned device would be subject to the same requirements. Again, if the device is being used in such a manner that the messages constitute "discussing public business" by "the public body" it most likely would be subject to FOIA. While again, an individual Board member would not be considered a "public body" it may arise to that level if: the communication is received by a quorum of members (of either the Board or a subcommittee thereof), the communication was sent during a meeting of the public body, or the communication is forwarded to a publicly issued device or e-mail account (thereby bringing it under the control of the public body).

Who can request a public record?

Anyone (individuals, corporations, media outlets, etc.) may submit a request for information under FOIA. The request may also be made anonymously and the requester need not submit a reason for their request.

How must this request be made?

Even though a municipality may have its own standard form for purposes of convenience, it must also accept any request that is in writing (including those submitted electronically or via fax). These requests should be immediately delivered to the FOIA compliance officer, as there are strict timeframes for review.

What public records are exempt from disclosure?

The general rule is that all persons are entitled to “full and complete information regarding the affairs of government and the official acts and policies of those who represent them.”

However, there are limited exceptions to this rule. Records containing “**private information**” (unique identifiers, such as social security numbers, driver’s license numbers, employee identification numbers, biometric identifiers, personal finance information, passwords, or other access codes, medical records, home/private telephone numbers, home addresses) may be withheld. [5 ILCS 140/2(c-5)]. Records containing “**personal information**” (a record that would constitute a clearly unwarranted invasion of personal privacy that is highly personal or objectionable to a reasonable person and the right to privacy outweighs any legitimate public interest) may also be withheld if it meets this standard. [5 ILCS 140/7(c)].

Other valid reasons for denial include, but are not limited to, the following categories: **law enforcement/administrative enforcement** (created for law enforcement purposes, to the extent disclosure would interfere with a pending/active proceeding...); **correctional institutions**; **preliminary drafts** (preliminary drafts, notes recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated/ unless cited by the head of the public body); **trade secrets and commercial information**; **proposals and bids** (for contract, grant, agreement if disclosure would frustrate procurement or provide an unfair advantage); **research data**; **educational examination data**; **architects and engineers** (for projects not developed with public funds or if disclosure would compromise security); **closed meeting minutes** (minutes from executive session, however, these minutes may eventually be open to the public); **communications with attorney/auditor** (that would not be subject to discovery); **employee grievances or disciplinary cases** (final outcome is not exempt with discipline is imposed); **data processing operations**; **collective bargaining negotiations**; **employee examination data**; **real estate** (records relating to real estate negotiations, until negotiations end); **proprietary insurance information**; **regulation procedures for financial institutions**; **electronic security**; **security threats**; **power generator maps and records**; **public utility documentation** (relating to proposals, bids, negotiations); information about students; student records (information about students and covered by the Illinois School Student Records Act).

There are additional statutory exemptions under Section 7.5, many of which would not be applicable here. However, it is worth noting that information prohibited from being disclosed by the **Personnel Records Review Act** may not be provided under FOIA. [5 ILCS 140/7.5(q)].

Please keep in mind that these exemptions are to be construed very narrowly, as the presumption is that all information in the possession of a public body is open to the public. Denials to a FOIA request made pursuant to one of these exemptions must be specific and cite both the exemption and a summary of the factual and legal basis for denial.

Are there any other reasons for denying a FOIA request?

Yes. A public body may deny a request if an individual duplicates their request (i.e. the same person is asking for same exact records and their request is unchanged and identical) may be denied as unduly burdensome.

A public body may also deny a request as “unduly burdensome” if there is no way that the public body can narrow the request and the burden on the public body outweighs the public interest in the information. However, prior to invoking this as a basis for denial, the requester must be alerted and provided an opportunity to amend the request.

What happens if there is a challenge to a FOIA response?

Effective in 2010, Illinois FOIA law was strengthened. Specifically, the Public Access Counselor (“PAC”) position with the Office of the Illinois Attorney General was made permanent. It was thereby granted the authority to review FOIA challenges and render binding decisions on alleged FOIA violations. [S.B. 189; Public Act 096-0542].

Generally, a FOIA response must be rendered within 5 business days of receipt. However, the public body may request an additional 5 days under certain circumstances.

The requester has 60 calendar days from the date of an alleged violation to file a petition for review with the PAC. Upon receipt, the PAC may: (1) decide no further action is necessary; (2) request more information from the public body; or (3) may try to resolve the dispute. If the PAC seeks to issue a binding opinion, it has 60 calendar days from receipt of the request to do so.

What are the penalties for violating FOIA?

If the violation is deemed “willful,” “intentional,” or in “bad faith,” there is a mandatory civil penalty of \$2,500 - \$5,000, as well as any reasonable attorney fees and costs.

In conclusion, FOIA is a highly nuanced statutory provision. Accordingly, it is a very important area of law for public entities to be aware of, as its implications transcend into all areas of municipal operations. **As a rule of thumb, public actors should be aware that the statute favors transparency and public access to information.**

What are some common misconceptions about FOIA?

1. FOIA requests must be submitted on a standard form used by the public body or they can be ignored – FALSE. A FOIA request need not be submitted on a public body’s “standard” form and need not be labeled “FOIA request.” If the public body can

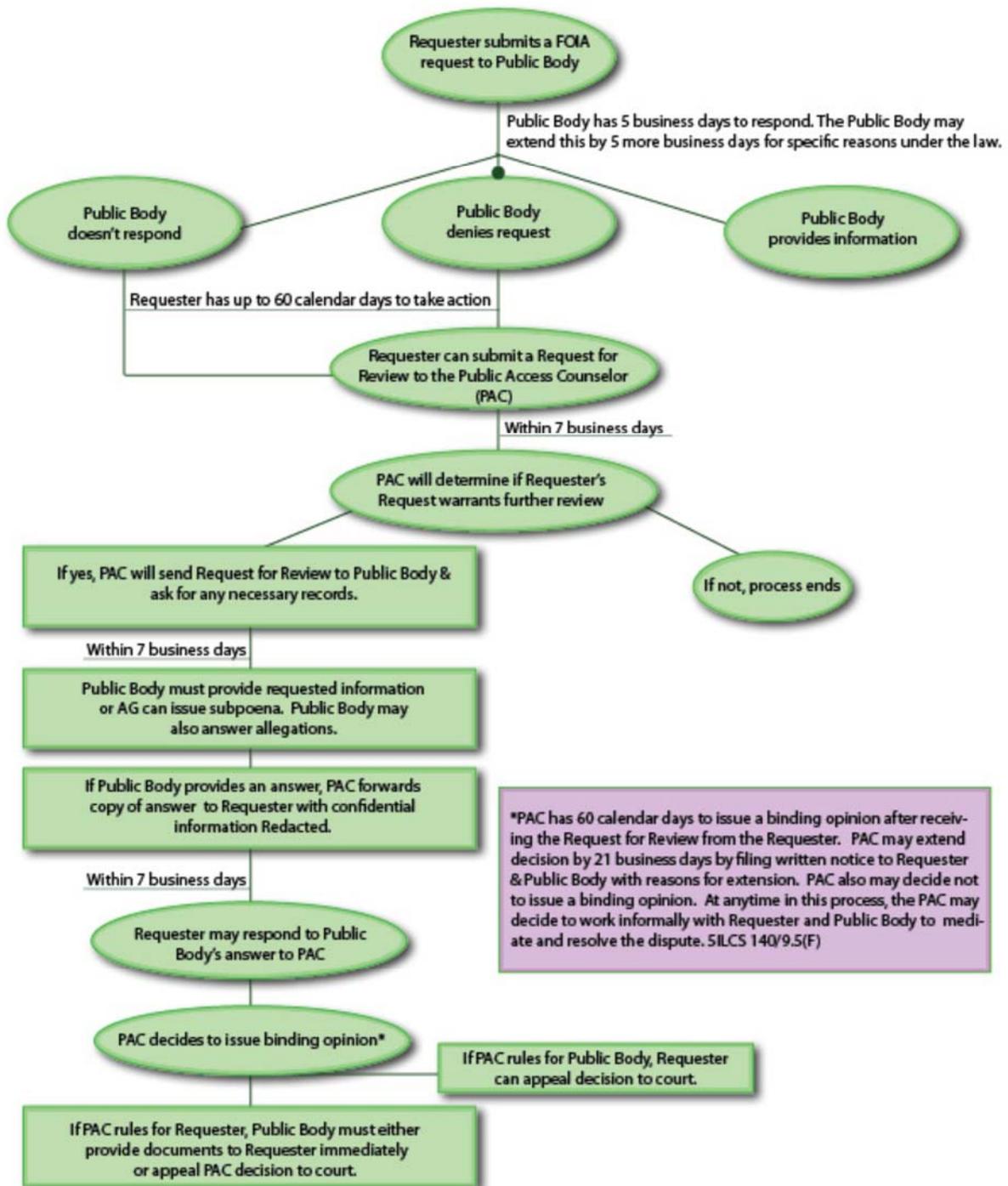
reasonably understand the request to be made pursuant to FOIA, it should treat it as such and respond accordingly.

2. If the document requested does not exist, the public body should create it so that it can respond to the request – FALSE. Public bodies are not required to create records to meet the request, rather, the public body is only required to disclose those public records in existence at the time of the request, provided that an exemption does not apply.

3. Since the public body is not in actual possession of the records, but rather records are maintained by a third-party agency contracted to do work for the public body, they are not subject to FOIA – FALSE. Public records not in the possession of a public body, but in the possession of a third party may still qualify as records requiring disclosure pursuant to a FOIA request (5 ILCS 140/7(2)).

4. A public body should explain the public records it discloses pursuant to a FOIA request – FALSE. A public body is not required under FOIA to explain public records it discloses. Likewise, a public body is not required to explain why responsive documents do not exist. It is sufficient to respond to such a request by stating something to the effect of “no such documents exist that are responsive to this request.”

PAC Request For Review Process Under FOIA



Local Records Act

What is the Local Records Act?

The Local Records Act (“LRA”) is a law that establishes the record keeping and retention procedures for local records. [50 ILCS 205/1, *et seq.*]

Who does the Local Records Act apply to?

The LRA applies to “agencies,” which includes “any court, and all parts, boards, departments, bureaus and commissions of any county, **municipal corporation**, or political subdivision.” [50 ILCS 205/3]

What is a public record under the Local Records Act?

The general rule is that **all records** in the custody or possession of a public body are presumed to be public records.

Under the LRA, a public record is defined as “...any book, paper, map, photograph, born-digital electronic material, digitized electronic material, electronic material with a combination of digitized and born-digital material, or other official documentary material, regardless of physical form or characteristics, made, produced, executed or received by any agency or officer pursuant to law or in connection with the transaction of public business and preserved or appropriate for preservation by such agency or officer, or any successor thereof, as evidence of the organization, function, policies, decisions, procedures, or other activities thereof, or because of the informational data contained therein...” [50 ILCS 205/3].

What are the Village’s obligations under the Local Records Act?

Subject to certain exemptions, **all public records made or received by, or under the authority of, or coming into the custody, control or possession of any officer or agency must be retained**. Such records shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law. **It is important to note that this retention requirement applies, even if the record is contained on one’s personal electronic device.** For example, if a board member uses a personal email account to conduct public business, a public record has been created and must be retained in accordance with the provisions of this Act. [50 ILCS 205/4].

The Act establishes specific procedures for retention and disposition. The general rule is that no public record shall be disposed of by any officer or agency unless it has first obtained the written approval of the appropriate Local Records Commission (“LRC”). [50 ILCS 205/7]. However, non-record materials or materials not included in the definition of records may be destroyed without prior approval. Obtaining approval from the LRC is an involved process that includes the following steps:

How to Obtain Approval from the Local Records Commission to Destroy Records:

A. Meet with a records archivist from the LRC and work together to submit an “Application for Authority to Dispose of Local Records” to the appropriate LRC prior to the destruction of any record.

B. After the Application has been approved by the LRC, it will become the Village’s Records Retention Schedule.

C. Submit a Local Records Disposal Certificate to the LRC for the records that the Village wishes to destroy, and wait for an approved copy to be returned. Note that the Certificate must be submitted to the Local Records Commission authorizing the destruction of records at least thirty (30) days before the date the agency wishes to dispose of the records. If the Village wishes to destroy additional records at a later date, it must submit new Certificates for those records.

D. After the Village receives the approved Certificate from the LRC, it may dispose of the records according to the retention schedule listed on the Application for Authority to Dispose of Local Records provided no litigation is pending or anticipated, and providing all audit requirements have been met.

What are the penalties for violating the Local Records Act?

Any person who knowingly, without lawful authority and with the intent to defraud any party, public officer, or entity, alters, destroys, defaces, removes, or conceals any public record commits a Class 4 felony. [50 ILCS 205/4].

Gift Ban Act and Prohibited Political Activities Act

I. OVERVIEW

The purpose of this chapter is to familiarize the Village with two important regulations impacting public officials (as well as public employees). While the statute uses the term “state officials,” relevant provisions also apply to municipal bodies. [5 ILCS 430/70-5, *et. seq.*].

II. PROHIBITED GIFTS (GIFT BAN ACT)

A. What is the Gift Ban Act?

This statute bans accepting (or soliciting) gifts from a “prohibited source.” Be advised that this provision also extends the prohibition to a spouse and/or other immediate family member who resides with the public employee or officer. [5 ILCS 430/1-5].

Specifically, public officials may not solicit or accept gifts from “any person or entity who: (1) is seeking official action by the member or officer, (2) does business or seeks to do business with the member or officer, (3) conducts activities regulated by the member or officer, (4) has interests that may be affected by the performance or non-performance of the official duties of the member, officer, or employee, (5) is a lobbyist, (6) or is an agent of an individual who qualifies as such. [5 ILCS 430/1-5].

In sum, public employees and public officials should not accept gifts in cases where there is impropriety, there is the potential for impropriety, or there is the potential for the appearance of impropriety.

B. What is considered a “gift” under the Act?

The statute recognizes “gift” as including any “gratuity, discount, entertainment, hospitality, loan, forbearance, or other tangible or intangible item having monetary value....” Gift is broadly defined and accordingly, public employees and officials should critically evaluate any such offer under this provision. [5 ILCS 430/1-5].

Almost anything of value falls within the parameters of this provision. However, there are limited exceptions. Gifts do not include:

- Opportunities, benefits, services, generally available to the public;
- Anything for which fair market value is paid;
- Lawful contributions under the Election Code or associated with fund-raising;
- Educational materials;
- Travel for a business-related meeting;
- Gift from a relative (father, mother, son, daughter, brother, sister, etc.);

- Anything provided on the basis of personal friendship (unless there is a reasonable belief, under the circumstances, that the gift was provided because of the official position or employment and not because of the friendship);
- Food/drink not in excess of \$75 on a single day, if consumed on premises or catered (if a spouse or family member living with the official attends the event, they are also limited to \$75, to be calculated separately);
- Food/refreshment/lodging/transportation resulting from outside business, unrelated to position, and customarily provided to others in similar circumstances;
- Intra- or inter- governmental gifts;
- Bequests and other transfers at death; a
- Any item from any one prohibited source having cumulative value of less than \$100/calendar year. [5 ILCS 430/10-15].

As a general rule, things that are available to the public at large, or things for which fair market value is paid, would likely not constitute a gift. However, public officials should be wary of soliciting or accepting anything that could be perceived as being tendered to them due to their position. **Again, in an effort to ensure a transparent and ethical government, it is critical to avoid even the mere appearance of impropriety.** It is therefore always advisable to err on the side of caution in such circumstances. Additionally, the municipality may adopt regulations more restrictive than those set forth by statute.

C. How can I avoid violating the Act?

If the situation arises in which the Board member or public employee perceives a conflict, the issue can be rectified by:

- Taking reasonable action to return the prohibited gift to the prohibited source
- Give the gift (or an amount equal in value) to a recognized 501(c)(3) organization.

In either case, this action should be documented and reported.

D. What are the consequences of violating the Act?

In the case that the Gift Ban Act is violated, the following adverse actions may be imposed:

- Intentional violations may result in a fine of \$1,001 - \$5,000 for a “business offense”
- Intentional false reports alleging a violation is a Class A misdemeanor
- Any person who violates the Act or intentionally obstructs or interferes with an investigation may be fined up to \$5,000 by an ethics commission

[5 ILCS 430/50-5 (c)-(e)].

III. PROHIBITED POLITICAL ACTIVITIES UNDER THE PUBLIC OFFICER PROHIBITED ACTIVITIES ACT [5 ILCS 430/1-1 *ET SEQ.*] AND THE ELECTION CODE [10 ILCS 5/9-25.1]

A. Who is prohibited from engaging in political activities?

The **Public Officers Prohibited Activities Act** prohibits governmental actors (both public employees and officers) from engaging in political activities during compensated or working time. This includes, but is not limited to, using governmental property (example: computer, printer, fax, copier) in furtherance of campaigning or other political endeavors. For purposes of this provision, municipal “officer” applies to both elected and appointed officials, regardless of compensation. [5 ILCS 430/5-15]. This prohibition does not prohibit any such individual from engaging in such activities using their own resources on their own time.

B. What is considered “prohibited political activity” under these Acts?

“Prohibited political activity” includes:

- Participating in or conducting any prohibited political activity during any compensated time (other than vacation, personal, or compensatory time off);
- Misappropriating any property of the public entity or resources by engaging in any prohibited political activity;
- Being pressured to participate in any such political activities as a condition of employment;
- Receiving additional employment rewards or compensation for participating in or conducting prohibited political activities; or
- Using other public employees or resources for a political use.

The Act further defines “prohibited political activity” by listing at least 15 specific activities that it regulates in accordance with the general prohibitions above. Those most probably applicable to a village can be summarized as follows:

- Preparing for, organizing, or participating in a political meeting, rally, or other political event;
- Soliciting contributions, including the buying or selling of tickets for any political fundraiser or event;
- Soliciting, planning the solicitation of, or preparing any document or report regarding anything of value intended as a campaign contribution;
- Planning, conducting, or participating in a public opinion poll in connection with a campaign for elective office, on behalf of a political organization, or for or against any referendum question;
- Surveying or gathering information from potential or actual voters in an election to determine probable outcome for or against any referendum question;
- Assisting at the polls on election day on behalf of any candidate or for or against any referendum question;

- Soliciting votes on behalf of a candidate or for or against any referendum question or helping in an effort to get voters to the polls;
- Initiating, preparing, circulating, reviewing, or filing any petition on behalf of a candidate or for or against any referendum question;
- Making contributions on behalf of a candidate;
- Distributing, preparing, or mailing campaign literature, campaign signs, or other campaign material on behalf of a candidate or for or against any referendum question;
- Campaigning for any elective office or for or against any referendum question; or
- Managing or working on a campaign for elective office or for or against any referendum question.

The Election Code also establishes certain restrictions on the political activities of elected officials. The pertinent provision of the Election Code states:

No public funds shall be used to urge any elector to vote for or against any candidate or proposition, or be appropriated for political or campaign purposes to any candidate or political organization. This section shall not prohibit the use of public funds for dissemination of factual information relative to any proposition appearing on an election ballot....

In its literal application it means the Village cannot appropriate money to support or oppose the passage of a referendum or the election of a board member (or candidate for any other elective office). The board can participate in the dissemination of factual information, but it should be carefully reviewed to make sure the presentation is not in fact advocating a particular proposition or candidate. In its broader context, the Election Code has been argued to prohibit the board from granting anything of economic benefit to one side or the other. Thus, allowing a referendum committee to use Village equipment (e.g. copier or printing, phone systems, or mailings) may be subject to an attack. Access to a Village building for a meeting, however, is probably permissible so long as the access is comparable to that allowed for other public groups, and on the same basis. That would include, however, access by any group opposed to a referendum.

C. When is this issue likely to come up?

In the context of Village Boards, this issue often comes up with regard to board elections or referenda.

It is important to keep in mind that a public official or employee does not lose their freedom of speech or right to support or oppose a proposition or candidate. They are merely regulated as to when and under what circumstances they may exercise those rights. Looking back to the prohibitions we see that they cannot engage in the prohibited political activities during compensated or working time (which excludes vacation, personal or compensatory time off). Thus, activities taken before or after work, and away from the workplace, are permitted. Board members are not compensated, and while the Ethics Act does not directly address that question, it is clear that they are subject to the Act. The general recommendation we give therefore is that board members should also not engage in any prohibited political activity at any time while on

Village property or while they are performing any board function, activity, or carrying out any duty on behalf of the Village.

Because of the very nature of election campaigns, it would be impossible for us to review every possible factual situation. When a board member is engaging in political activities covered by the Act, such as sending out campaign literature, it is important that he or she refrain from using any Village title, such as board member or board president. Again, because of the nature of political campaigns, you should assume someone will be examining your conduct.

In summary, for Village board members, it is important that any such political activities be away from Village property. That is, board members should not engage in any of the prohibited political activities while on Village property or while performing any functions or duties of a Village board member. Again, please make sure you contact us if in doubt about any contemplated actions.

Conflicts of Interest

I. TYPES OF CONFLICTS

A. Direct Conflicts

Generally, public officials may not have a personal pecuniary interest in contracts with the public body they serve. A violation of this statute is a Class 4 felony, punishable by up to three years in prison and a fine of up to \$10,000. The Public Officer Prohibited Activities Act provides:

No person holding any office, either by election or appointment under the laws or Constitution of this State, may be in any manner financially interested directly in his own name or indirectly in the name of any other person, association, trust, or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as an agent or otherwise, any person, association, trust, or corporation with respect to any application or bid for any contract or work in regard to which such officer may be called upon to vote. Nor may any such officer take or receive, or offer to take or receive, either directly or indirectly, any money or other things of value as a gift or bribe or means of influencing his vote or action in his official character. (50 ILCS 105/3)

There are certain, very limited exceptions to this rule.

B. Indirect Conflicts

Indirect conflicts occur when the Board member may not have a direct interest in the matter being voted upon, but they stand to benefit indirectly nonetheless. Examples of this may include situations where the Board member is an employee of an entity conducting business with the Village, but does not stand to directly gain from the action being voted upon. Another example may be an instance where a Board member is an employee of another governmental entity that is entering into an agreement with the Village. It is always prudent to err on the side of caution in these circumstances and to not engage in deliberations and/or votes where there is even an appearance of impropriety.

II. ADDRESSING CONFLICTS OF INTEREST:

A. Abstention – Does not vote on the question, but still may participate in its consideration

Distinguish: Affirmative vote of majority vs. Concurrence of the majority

Prosser Rule – In every instance where an alderman or trustee is present and did not vote, their vote must be counted as an “aye” or “nay” vote

Effect: If affirmative vote is required, nothing less than a majority of “aye” votes will suffice (abstention will count as “nay”)

If concurrence is required, failure of trustee to vote will be counted as concurrence with the majority who did vote (abstention will count with whichever side has the most votes)

B. Recusal – Does not vote on the question and does not participate in the decision-making process

Effect: Vote will not be counted toward the total.

C. Leave Room – Avoids any appearance of asserting undue influence, regardless of whether or not the individual votes on the matter

Effect: Vote will not be counted toward the total.

Freedom of Information Act and Open Meetings Act Hypotheticals

Scenario One

- a. You have a seven-member Board of Trustees. You receive a FOIA request asking for all e-mail correspondence between Board Member 1 and Board Member 2 that were transmitted over the Village's server. Must you produce those documents?
- b. Same scenario as above, except the request is for copies of all e-mail correspondence between Board Member 1 and Board Member 2 sent either through the Village's server or through their personal devices. Must you produce those documents?
- c. Same scenario as above, but the request is changed to "all e-mail correspondence between Board Member 1 and Board Member 2 relating in any way to the business of the Village communicated over their personal devices or systems." Must you produce those documents?
- d. Does the answer change if the request is for e-mails among Board Members 1, 2 and 3?

Scenario Two

- a. As a member of your Board of Trustees, you have received hundreds of e-mails on your personal e-mail account that have been addressed and sent by one member of the Board to you and the remaining Board members. They are marked "personal and confidential – not for public dissemination. **DO NOT REPLY.**" Each e-mail provides details of the author's self-appointed, unauthorized secret investigation of the performance of each member of the Village (mostly the author's ex-spouse). Can you delete these e-mails?
- b. If not, can you forward these documents to the Village asking that they be kept on the Village's server and then delete them from your personal system?

Scenario Three

- a. You are a member of a seven-member Board. You have a business trip that requires you to be 1500 miles from Village Hall. The business portion of your trip extends from June 1st to June 3rd. You have decided to extend that trip into a family vacation in the same location as your business meetings. Your vacation will extend until June 7th. Your Board Meeting is June 4th. Can you attend the meeting by telephone?

- b. If your Board Meeting is June 6th can you attend the meeting by telephone?
- c. Only two other Board Members have attended the meeting. You are present by telephone. Do you have a quorum?
- d. There is a critical issue on the agenda that must be decided. Can you vote via telephone?

Scenario Four

- a. You are a member of a seven-member Board of Trustees that is considering adding an Assistant Village Manager to its administrative team. Your collective bargaining agreement is about to expire and you know that spending money on new, non-bargaining unit positions is an incendiary topic. A fellow board member cautions that discussions of this personnel matter is, in the interest of community peace and harmony, best discussed in closed session. Can you discuss this in closed session under the exemption concerning the appointment of employees?
- b. What about under the exemption covering collective bargaining or salary schedules?

Scenario Five

- a. You have a person in your community who is genuinely concerned about the welfare of each member of the Village staff and of the Board of Trustees and consequently has made FOIA requests on Monday, Wednesday, and Friday of each week. Each of the requests requires the production of no less than 150 pages of documents. This has been going on for the past three months. Your FOIA officer has requested a mental health leave of absence and your treasurer has pointed out that you have no policy regarding charges to the requester. Can you charge the requester for the copies?

General Rule regarding Fees [Section 140/6]:

Fees shall be imposed according to a standard scale of fees, established and made public by the body imposing them [Section 140/6(b)]

1. Paper → First 50 pages (standard size, black and white = free) – thereafter up to 15 cents/page
2. Color or unique sizing → Actual cost of production
3. Electronic → Actual cost of device
4. Personnel Time → Cannot charge if the request is not for a commercial purpose and is not a voluminous request
5. Certifying a record → May not exceed \$1

Is the person a recurrent requester?

Under FOIA, a recurrent requester means a person that, in the 12 months immediately preceding the request, has submitted to the public body: (1) a minimum of 50 requests for records; (2) a minimum of 15 requests for records within a 30-day period; or (3) a minimum of 7 requests within a 7 day period (does not include news media and non-profit, scientific, or academic organizations for certain purposes).

Is the request a voluminous request?

Does it include more than 5 individual requests for more than 5 different categories of records or a combination of individual requests that total requests for more than 5 different categories of records in a period of 20 business days; or (ii) requires the compilation of more than 500 letter or legal-sized pages of public records unless a single requested record exceeds 500 pages. "Single requested record" may include, but is not limited to, one report, form, e-mail, letter, memorandum, book, map, microfilm, tape, or recording.

If voluminous:

1. Electronic → If for electronic records and not in PDF format, may charge up to \$20 for 2 mb of data, \$40 for 4 mb data, and \$100 for more than 4 mb data. If records are in PDF format, \$20 for 80 mb of data, \$40 for 80-160 mb data, and \$100 for more than 160 mb data. If in both formats, request may be split and charges applied accordingly.

If fees imposed, public body must provide an accounting of all fees, costs, and personnel hours associated with the request

- b. If not, what do you have to do to recoup the costs of compliance?
- c. If so, how much do you charge?
- d. You have received information that proves the requester is using the documents for no other purpose other than to heat her house. Under this circumstance, can you avoid compliance?