

Memorandum

Date: May 6, 2022

To: Our Local Government Clients

From: Elrod Friedman LLP

Re: Newly Elected Officials Orientation Packet: Open Meetings Act and Ethics

Attached are comprehensive materials prepared by our Firm covering key legal topics that you encounter in your role as an elected official.

The Open Meetings Act

A. Overview of the Open Meetings Act.

The Illinois Open Meetings Act, 5 ILCS 120/1 *et seq.*, generally requires that all meetings of municipal bodies be open to the public. There are exceptions to this general rule, pursuant to which certain meetings or portions of meetings may be closed to the public. The Open Meetings Act also sets out notice and minute taking requirements for meetings of public bodies. Just as with the Freedom of Information Act, the Attorney General's Public Access Counselor has the authority to review possible violations of the Open Meetings Act.

1. **Purpose.** To ensure that public bodies deliberate and act openly.
2. **Applicability.** All meetings of all public bodies (subject to the exceptions listed below).
 - (a) **Meetings.** A gathering of a majority of a quorum for the purpose of discussing public business. 5 ILCS 120/1.02.
 - (i) **Gathering.** A gathering may occur either in person, by telephone, electronic chat, or other means of contemporaneous communications. Meetings of public bodies may be conducted by audio or video conference, provided that the public is able to hear such conference by means of a speaker phone or other device and all rules governing electronic attendance are followed.
 - (ii) **Majority of a Quorum.** A "quorum" is the minimum number of members required to take action on behalf of the public body. The number of members constituting a "*majority of a quorum*" depends on the number of members of the public body.
 - 9-member public bodies - When a public body consists of nine members, a quorum of that body is five members. Therefore, a majority of that quorum is three members
 - 7-member public bodies - When a public body consists of seven members, a quorum of that body is four members. Therefore, a majority of that quorum is three members.
 - 5-member public bodies - When a public body consists of five members, a quorum of that body is three members. Therefore, a majority of that quorum is two members.

The Open Meetings Act was amended in 2007 to provide that two members of a five-member board may talk about public business outside of a meeting even though a quorum for a five-member board is three members and two is a majority of that quorum. However, this exception does not apply to boards with less than five members.

- (iii) **Public Business.** The Open Meetings Act applies only to gatherings held for the purpose of discussing public business. The Open Meetings Act does not apply to purely social or to political gatherings.
- (b) **Public Bodies.** The Open Meetings Act applies to all legislative, executive, administrative, and advisory bodies of the State. It also applies to all political subdivisions of the states, including counties, townships, cities, villages, other municipal corporations, and all subsidiary bodies of such entities (5 ILCS 120/1.02), including city councils, boards of trustees, boards of commissioners, zoning boards of appeals, plan commissions, police and fire pension boards, boards of fire and police commissioners, and standing committees.

To determine whether an entity is a subsidiary body of a municipal corporation, the courts look to (i) whether the entity has a legal existence independent of government resolution, (ii) the nature of the functions performed, and (iii) the degree of governmental control over the entity. *Hopf v. Topcorp, Inc.*, 628 N.E.2d 311, 314 -15 (1st Dist. 1993).

The Open Meetings Act does not apply to the following types of gatherings:

- (i) staff meetings (unless a majority of a quorum of a public body attends the staff meeting and public business is discussed);
- (ii) informal committees not formally appointed by, or accountable to, any public body.

B. Locations of Meetings.

The Open Meetings Act provides that all meetings required by the Open Meetings Act to be open to the public shall be held in “places which are convenient and open to the public.” 5 ILCS 120/2.01. Public bodies have latitude on where to hold their public meetings, but the location must be reasonably convenient for the public to attend.

Meetings in a private residence may not be reasonably convenient or accessible to the public to satisfy the requirements of the Open Meetings Act. *Public Access Opinion 12-008 - Whiteside School District No. 115.*

C. Notices of Meetings.

The Open Meetings Act requires that a public body must provide advanced notice of its meetings, whether the meetings are open or closed. 5 ILCS 120/2.02.

1. **Timing of Notice.** 5 ILCS 120/2.02(a).

- (a) **Regular Meetings.** At the beginning of each calendar or fiscal year, every public body must give notice of the date, time, and place of its regular meetings. In addition, the public body must post the agenda for each regular meeting at least 48 hours prior to the meeting at the public body’s principal office and at the location of the meeting.

(b) **Special Meetings, Rescheduled Regular Meetings, and Reconvened Meetings.**

(i) Notice of special meetings, rescheduled regular meetings, and reconvened meetings must be given at least 48 hours in advance of such meetings. However, the requirement of public notice of reconvened meetings does not apply to any case in which the meeting was open to the public and:

- the meeting is 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. 5 ILCS 120/2.02(a).

(ii) Notices for special meetings, rescheduled regular meetings, and reconvened meetings must include an agenda. Errors and omissions in agenda will not affect validity of actions taken, but a “catch-all” category, such as agenda items titled “other business,” on a special meeting agenda is generally invalid.

(c) **Emergency Meetings.** Notice of emergency meetings shall be given as soon as practicable before holding the meeting to any news medium that has filed an annual request for notice. 5 ILCS 120/2.02(a).

2. **Manner of Posting of Notice.** 5 ILCS 120/2.02(a) and (b).

(a) **Posting at Principal Office.** If the public body has a principal office (such as a city or village hall), then the notice must be posted at that office. If the public body has no principal office, then the notice shall be posted at the building in which the meeting is to be held. In addition, a schedule of the regular meetings must be made available to the public.

(b) **News Media.** The public body must provide a copy of the notice of its regular meetings and the notice of any special, emergency, rescheduled, or reconvened meetings to any news medium that has made an annual request for such notices. Notices of special, emergency, rescheduled, or reconvened meetings shall be given to news media in the same manner as such notices are given to members of the public body.

(c) **Websites.** If a public body has a website that is maintained by the full-time staff of the public body, then the public body must post the notices and agendas for its meetings on its website.

3. **Agendas.** 5 ILCS 120/2.02(a).

(a) **Posting of Agenda.** Section 2.02 of the Open Meetings Act requires public bodies to post agendas for each regular meeting at the principal office of the public body and at the location of the meeting at least 48 hours in advance of the meeting. In addition, if a public body has a website maintained by the public body’s full-time staff, the public body must post

the agenda on the website.

- (b) **Consideration of Items Not Listed on Agenda.** Section 2.02 further provides that the agenda requirement “shall not preclude the consideration of items not specifically set forth in the agenda.” See 5 ILCS 120/2.02(a). However, a public body is precluded from taking final action on items not listed on the agenda. *Rice v. Board of Trustees of Adams County*, 765 N.E.2d (4th Dist. 2002). Accordingly, City councils, village boards, county boards, and other public bodies should ensure that all items the public body desires to vote on at a meeting are specifically identified on that meeting’s agenda prior to the meeting. General descriptions on an agenda of items that do not specifically identify the type of final action the public body may take may be insufficient to satisfy the requirements of the Open Meetings Act. See *Public Access Opinion 12-002 - Chicago Park District* (holding that the District could use an agenda item titled “Communications and reports - Committee on Programs and Recreation” to take final action on raising fees).
- (c) **Sufficiency of Agenda and Public Recitals.** Section 2.02(c) of the Open Meetings Act requires that “[a]ny agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting.” 5 ILCS 120/2.02(c). Further, Section 2(e) of the Open Meetings Act requires that “[n]o final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted.” The Illinois Supreme Court has ruled that these requirements, when read together, do not require that every action taken by the Board of Trustees must be explained in detail to the public (e.g. the “key terms” of an agreement considered by the Board). *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343 (Ill. 2017). In general, an agenda posting including the type of agreement or relief being approved and the party that will benefit from such approval is sufficient to satisfy these provisions of the Open Meetings Act.

D. Public Comment.

The Open Meetings Act was amended in 2011 to add a requirement that “[a]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.” 5 ILCS 120/2.06(g). As indicated in this provision, a public body can define the manner and extent of public comments in its rules. See *City of Champaign v. Williams*, 13 Ill. App. 3d 418, 420-21 (4th Dist. 1973) (rules preventing disturbance of assemblage are enforceable, but mere attendance without creating noise or engaging in disruptive conduct did not constitute a disturbance under the rule does not create a disturbance even if such attendance is objected to by the chair).

1. **Scope of Public Comment.** Notwithstanding the requirement that all persons who attend a public meeting open to the public have the right to address the public body, the meeting still takes on the status of a “limited public forum.” The public body can place limitations on the scope of the forum. See *Collinson v. Gott*, 895 F.2d 994, 999 (4th Cir. 1990) (Phillips, J., concurrence) (there is “considerable

latitude ... in imposing subject matter restrictions on scheduled public meeting discussions”), *citing City of Madison Joint School Dist. No. 8 v. Wisconsin Employ. Rel. Comm’n*, 429 U.S. 167, 175 n. 8 (“Plainly ... may confine... meetings to a specified subject matter...”); *Vergara v. City of Waukegan*, 590 F. Supp. 2d 1024, 1036 (N.D. Ill. 2008) (the “audience time” portion of the City Council meeting held a designated public forum).

2. Rules Relating to Public Comment. The 2011 amendment offers no direction with respect to the rules that public bodies may adopt to regulate public comment. Courts, however, have favorably reviewed various types of public comment rules that are consistent with constitutional requirements. Some examples include:
 - (a) Public comment rules requiring the speaker (a) to sign up on a master list, (b) limit comments two minutes, (c) confine remarks to the re- organization of county government, and (d) “avoid discussion of personalities.” See *Collinson v. Gott*, 895 F.2d 994, 996 (4th Cir. 1990)(Phillips, J., concurrence).
 - (b) Rules prohibiting speakers from using “obscene or profane language, physical violence or threats thereof, or other loud and boisterous behavior which the presiding officer ...shall determine is intended as a disruption of the meeting and a failure to comply with any lawful decision or order of the presiding officer....” *Jones v. City of Key West*, 679 F. Supp. 1547, 1551 (S.D. Fla. 1988) (court found rules constitutional, but their implementation unconstitutional; plaintiff awarded \$31,500.00).
 - (c) Courts have further observed that regulations requiring “that speakers stay on the topic of discussion and speak within their allotted time” are constitutionally acceptable. *Thompson v. Huntington*, 69 F. Supp. 2d 1071, 1076 (S.D. Ind. 1999). While a government may not “regulate speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction [...] content-based restraints are permitted, so long as they are designed to confine the forum to the limited and legitimate purpose for which it was created.” *Galena v. Leone*, No. 10-1914 (3d Cir. April 13, 2011).
 - (d) Note however, that the PAC issued a binding opinion in 2014 finding that requiring a person to disclose their home address as a condition of providing comment violated the Open Meetings Act on the grounds that the Act does not require such disclosure and doing so could have a chilling effect on public speech. *Public Access Opinion 14-009*.

E. Minutes.

1. Keeping of Minutes. The Open Meetings Act requires that minutes be kept of all meetings of public bodies, whether open or closed. The minutes must include the date, time, and place of the meeting, the members of the public body present and absent, a summary of the discussion on all matters proposed, deliberated, or decided, and a record of votes taken. 5 ILCS 120/2.06.
2. Approval of Minutes. A public body is required to approve the minutes of an open

meeting within 30 days after the meeting or at the public body's second subsequent regular meeting, whichever is later. Within ten days after minutes are approved by the public body, minutes of all open meetings are required to be made available for public inspection. Minutes of closed meetings are required to be made available to the public only after the public body determines that it is no longer necessary to keep such minutes confidential. If a public body has a website that is maintained by the full-time staff of the public body, then the public body must post the minutes of regular meetings of its governing body on the website no later than ten days after approval. 5 ILCS 120/2.06.

3. Recordings Made by Third-Parties. The Open Meetings Act provides that any person may tape, film, or otherwise record any meeting open to the public unless a witness does not want his testimony before the public body to be televised. If a witness does not want his or her testimony televised, then the public body may prohibit taping, filming, or recording during the testimony. 5 ILCS 120/2.05. Public bodies may impose reasonable rules to govern third parties' rights to make recordings of open meetings. *Public Access Opinion 12-010 - Lake County Board of Review.*

F. Exceptions to Open Meetings Requirement (Closed Sessions).

A meeting, or a portion of a meeting, may be closed to the public upon a majority roll call vote of a quorum present at a meeting open to the public that was properly noticed. (See Appendix A quick reference sheet titled "Appropriate Closed Session Topics")

The motion to close a meeting must state the specific exception(s) of the Open Meetings Act that authorize the public body to discuss the item on the agenda at issue in a closed session. 5 ILCS 120/2a. This statement does not need to reference the specific statutory basis for the executive session so long as the basis is ascertainable from the motion to close a meeting. See *Harvey v. Anderson et al.*, No. 4-04-0867 (4th Dist. 2005).

Meetings or portions thereof relating to the topics listed below may be closed to the public. Note that the exceptions are to be narrowly construed. *People ex rel. Ryan v. Village of Villa Park*, 570 N.E.2d 882, 885 (2d Dist. 1991).

1. Employment/Appointment Issues.

- (a) Appointment, employment, compensation, discipline, performance, and dismissal of individual employees.
- (b) Testimony relating to complaints lodged against individual employees.
- (c) Collective negotiations and salary schedules for classes of employees (applies only to pending collective bargaining negotiations).
- (d) Appointment of members to fill public offices (but only if the public body has power to appoint).
- (e) Discipline or removal of public officers (but only if the public body has the power to remove).

2. Legal Matters.

- (a) Evidence or testimony in public or closed hearing when a written decision is subsequently made available.
- (b) Litigation that is pending in court affecting or on behalf of the public body
- (c) Probable or imminent litigation affecting or on behalf of the public body.

Note - If a public body enters into closed session to discuss probable or imminent litigation, the public body is required to record and enter into the minutes the basis for the finding that litigation is probable or imminent. 5 ILCS 120.2(c)(11); see also *Public Access Opinion 12-013 - Washington County*.

- (d) Establishment of reserves or settlement of claims (if the disposition of claims or potential claims otherwise would be prejudiced) and communications with any insurer of the public body.
- (e) Discussion of minutes of meetings lawfully closed under OMA for the purposes of approval or semi-annual review of the body.

3. Business Matters.

- (a) Purchase or lease of real property for use by the public body.
- (b) Setting a price for the sale or lease of real property owned by the public body.
 - (i) Note - Public bodies can only discuss the setting of a price, and not issues generally related to the sale or development of a property, such as potential zoning or uses for the property. *February 26, 2013 Public Access Letter 2012 PAC 21961 - City of Elmhurst*.
- (c) Selling or purchasing securities, investments, or investment contracts. (Note that this exception does not apply to the issuance of bonds by a public body.)
- (d) Matters involving the operation of a municipal utility, municipal power agency or municipal natural gas agency specific to (i) contracts relating the purchase, sale or delivery of electricity or natural gas, or (ii) the results of load forecast studies.
- (e) Meetings between internal and or external auditors and governmental audit committees, finance committees, and their equivalents, when the discussion involves internal control weaknesses, identification of potential fraud risk areas, known or suspected frauds, and fraud interviews conducted in accordance with generally accepted auditing standards of the United States of America.

4. Security/Criminal Matters.

- (a) Emergency security procedures.
- (b) Informants, undercover personnel or equipment, and criminal investigations (only when the public body has criminal investigatory responsibilities).
- (c) Deliberations of the Prisoner Review Board.

5. School Matters.

- (a) Student discipline.
- (b) Matters relating to individual students, including the placement of individual students in special education programs.

6. Health Care Matters.

- (a) Recruitment, credentialing, discipline, or formal peer review of physicians and other health care professionals (only when the public body operates a hospital).
- (b) Applications received under the Experimental Organ Transplantation Procedures Act.
- (c) Operations of the State Emergency Medical Services Disciplinary Review Board.
- (d) Meetings of an independent team of experts under Brian's Law.
- (e) Meetings of a residential health care facility resident sexual assault and death review team under the Abuse Prevention Review Team Act.
- (f) Meetings of a mortality review team under the Juvenile Justice Mortality Review Team Act.
- (g) Confidential information discussed with a fatality review team under the Elder Abuse and Neglect Act.

7. Miscellaneous Matters.

- (a) Conciliation of complaints relating to housing discrimination (only when closed meetings regarding fair housing practices are authorized by law or ordinance and a committee or agency is created for enforcement of such practices).
- (b) Professional ethics or performance (only when the public body has been appointed to advise a licensing or regulatory agency).
- (c) Self-evaluation, practices and procedures, and professional ethics (only when the meeting is with a statewide association of which the public body

is a member).

- (d) Matters classified as confidential or continued confidential by the State Employees Suggestion Award Board.
- (e) Correspondence and records (i) that may not be disclosed under Section 11-9 of the Public Aid Code or (ii) that pertain to appeals under Section 11-8 of the Public Aid Code.

G. Recording Closed Sessions.

The Open Meetings Act requires written minutes of closed sessions just as it does for open sessions. All public bodies must create a verbatim recording of any closed meetings, in the form of an audio or video recording. 5 ILCS 120/2.06(a).

1. Verbatim Record Requirements.

- (a) Verbatim recordings of closed meeting may be kept in the form of an audio or video recording. 5 ILCS 120/2.06(a).
- (b) Eighteen months after the closed meeting, the public body may destroy the verbatim recording if the public body approves the destruction of the recording and has approved the written minutes of the closed meeting. 5 ILCS 120/2.06(c).

2. Protections From Disclosure.

- (a) Verbatim recordings are exempt from production under the Local Records Act, the State Records Act, and the Illinois Freedom of Information Act. See 5 ILCS 140/7(a) & (m). Further, the verbatim recording is not subject to public inspection or to discovery unless a court determines otherwise.
- (b) A court may conduct an *in camera* review of the verbatim recording in cases brought to enforce the Open Meetings Act and in criminal proceedings. Any portion of the verbatim recording released may be redacted to protect the attorney-client privilege.
- (c) The Public Access Counselor has the same right to examine a verbatim recording as a court would, but is not permitted to disclose the recording to the public. 5 ILCS 120/3.5(b) and (g).
- (d) In a non-home rule municipality, a public body may not sanction one of its members for disclosing information or issues discussed in a closed meeting. 1991 Ill. Att'y Gen. Op. 1. Similarly, no cause of action exists against a public body for disclosing information from a closed meeting. *Swanson v. Board of Police Commissioners*, 555 N.E.2d 35, 47 (2d Dist. 1990).

3. Creating and Maintaining a Verbatim Recording.

- (a) Each verbatim recording should be properly labeled and immediately

catalogued in a safe storage area at the conclusion of the meeting.

- (b) Recording should commence as soon as the closed session convenes, with the presiding officer stating the purpose for the closed session, and identifying everyone in attendance.
- (c) Control of the verbatim recording should rest with the member of the public body responsible for preparing the minutes of the meeting. For instance, in city council or village board meetings, the city or village clerk should be the individual responsible for ensuring that the closed meeting are properly recorded.
- (d) Due to its confidential nature, access to the verbatim recording should be limited to as few individuals as possible, and should only be approved by majority vote of the corporate authorities.

H. Electronic Communications.

1. Remote Participation.

Pre-2020 Pandemic. The General Assembly amended the Open Meetings Act in 2009 to address electronic communications, adding a new Section 7 which allows members of the public body to attend meetings via audio or video conference in the following circumstances:

- personal illness or disability;
- employment purposes or the business of the public body; or
- a family or other emergency.

5 ILCS 120/7. Electronic attendance is only allowed if (i) a quorum of the public body will be physically present at the meeting and (ii) a majority of the members of the public body approve of the electronic attendance. Section 7 requires the public body to adopt rules consistent with the section before a member may be allowed to attend a meeting electronically.

2020 COVID-19 Legislation. In June, 2020, the State adopted new rules allowing remote participation without any physical presence by any member of the public body.

2. Social Media/E-mails

In light of the purpose of the Open Meetings Act (the open deliberation and action of public bodies) and the risk of criminal penalties for its violation, we urge restraint when using any electronic communications outside the context of a public meeting for exchanging views on public issues among members of a public body. We also offer the following rules of thumb:

- Avoid chat rooms.
- If members of a public body wish to discuss matters of public business

informally via e-mail, then the e-mail messages should be confined to fewer than a majority of a quorum of the public body's membership. Thus, for a seven-member board, not more than two members of the public body should be exchanging such e-mails.

- If e-mail is used to distribute information to members of the public body, be sure to limit any replies to the original sender of the e-mail. Do not "reply to all."

I. Training.

Every public body is required to designate specific employees, officers, or members to successfully complete the electronic Open Meetings Act training offered by the Illinois Attorney General's Public Access Counselor.

In addition, every elected or appointed official of a public body that is subject to the Open Meetings Act and who was elected or appointed prior to January 1, 2012 was required to successfully complete the electronic Open Meetings Act training offered by the Illinois Attorney General's Public Access Counselor prior to January 1, 2013.

Every elected or appointed official of a public body that is subject to the Open Meetings Act must successfully complete the electronic OMA training within 90 days of taking the oath of office or assuming the responsibilities of their office.

The Illinois Attorney General's Public Access Counselor's Open Meetings Act Training is at: <http://foia.ilattorneygeneral.net>.

Once the training is completed, the elected or appointed official is required to file a copy of the certificate of completion with the public body. 5 ILCS 120/1.05.

J. Enforcement.

1. **Civil.** Any person (including the State's Attorney of the relevant county) may sue a public body for failure to comply with the Open Meetings Act. 5 ILCS 120/3. Note that the term "any person" has been held to include public bodies. *Paxson v. Board of Education of School District No. 87*, 658 N.E.2d 1309, 1314 (1st Dist. 1995). If the PAC is reviewing an alleged violation of the Open Meetings Act at the time the complainant files a suit in circuit court, the PAC's review is stayed. A person cannot seek punitive damages for violations of the Open Meetings Act. *Parker v. Nichting*, 966 N.E.2d 63 (Ill. 3d. 2012).
2. **Criminal.** A violation of the Open Meetings Act is a Class C Misdemeanor, punishable by a fine of up to \$1,500 and imprisonment for up to 30 days. 5 ILCS 120/4; 730 ILCS 5/5-9-1; 730 ILCS 5/5-8-3.
3. **Review by Public Access Counselor.** 5 ILCS 120/3.5.
 - (a) **Request for Review.** Any person who believes that a violation of the OMA has occurred may, no later than 60 days after the alleged violation, ask the PAC to review the alleged violation.

- (b) **Review by PAC.** The PAC then reviews the request to determine if further action is necessary. If the PAC determines further action is necessary, it may request additional records or documents from the public body. The PAC has the power to subpoena records.
 - (c) **Opinion/Determination.** The PAC is obligated to issue either a binding opinion or a case-specific determination on the request for review within 60 days (with the possibility of one 21-day extension).
4. **Administrative Review of PAC Decision.** A binding opinion is considered a final decision of the PAC and is reviewable in circuit court under the Administrative Review Law. 5 ILCS 120/11.5.

K. Posting of Information About Employees Compensation Packages

The Open Meetings Act also requires Illinois Municipal Retirement Fund (IMRF) employers, including municipalities, to post notice of any employee's "total compensation package" at least six days in advance of its approval whenever that package would provide for a total yearly compensation of \$150,000 or more. The "total compensation package" includes all payments of salary, health insurance, housing allowance, vehicle allowance, clothing allowance, bonuses, loans, and vacation and sick days granted. 5 ILCS 120/7.3(b). In addition, each IMRF employer, within six days after approving its annual budget, must post notice of the total compensation package of any employee whose total yearly compensation exceeds \$75,000. 5 ILCS 120/7.3(a).

The notices may be posted on the employer's website or at its principal office. If the employer has a website, but chooses to post the notices at its office, the website must have directions on how to access the information.

APPENDIX A

Quick Reference Sheet for Commonly Used Closed Session Topics

- **Personnel**

Appointment/employment/compensation of an employee. 5 ILCS 120/2(c)(1).

Discipline/dismissal of an employee. 5 ILCS 120/2(c)(1).

Hearing complaints against an employee. 5 ILCS 120/2(c)(1).

Collective bargaining negotiations. 5 ILCS 120/2(c)(2).

Appointments to public offices (if the body has power to adopt). 5 ILCS 120/2(c)(3).

Discipline/removal of officers (if the body has power to remove). 5 ILCS 120/2(c)(3).

- **Litigation**

Pending litigation against, affecting, or on behalf of public body. 5 ILCS 120/2(c)(11).

Probable or imminent litigation against, affecting, or on behalf of public body. 5 ILCS 120/2(c)(1).

- **Property**

Purchase/lease of real property for use by public body. 5 ILCS 120/2(c)(5).

Setting price for sale/lease of real property owned by public body. 5 ILCS 120/2(c)(6).

- **Securities**

Selling/purchasing securities, investments, or investment contracts (does not apply to issuance of bonds). 5 ILCS 120/2(c)(7).

- **Emergency Security Procedures.** 5 ILCS 120/2(c)(8).

- **Investigations** (if public body has investigatory responsibilities). 5 ILCS 120/2(c)(14).

- **Closed Meeting Minutes.** 5 ILCS 120/2(c)(21).

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

Illinois statutes and the common law establish ethical standards for local government officials. These materials outline common ethical issues that may arise relating to (1) conflicts of interest, (2) prohibited political activities and gifts, (3) public contracting, and disclosure of economic interests.

Aside from the statutory and common law ethical standards that have developed in Illinois, many local governments must establish their own local ethics ordinances. Many local ethics ordinances are generally consistent with state law, but they may also establish more stringent ethical standards. See 5 ILCS 430/70-5.

I. Conflicts of Interest

A. Public Officer Prohibited Activities Act, 50 ILCS 105/0.01 *et seq.*

1. Application. All elected or appointed officials, except those serving on advisory panels or commissions. 50 ILCS 105/3(a).
2. General prohibitions:
 - (a) Interests in Contracts. A public official cannot have a direct or indirect interest in any contract or work where the official may be called upon to act or vote on the award of such contract or work. 50 ILCS 105/3(a).
 - (b) Representation. A public official cannot represent any person, association, trust, or corporation on any application or bid for any contract or work where the official may be called upon to act or vote on the award of such contract or work. 50 ILCS 105/3(a).
 - (c) Influences. A public official cannot directly or indirectly take money or any other thing of value as a gift, bribe, or means of influencing his or her vote or action. 50 ILCS 105/3(a).
3. Exemptions from general prohibitions
 - (a) Small contracts (more than \$1,500 and less than \$25,000 annual aggregate). Members of the governing body of a public entity may provide materials, merchandise, property, services, or labor to the public entity if all of the following conditions are satisfied:
 - (i) the interested member owns less than a 7.5% share; and
 - (ii) the interested member publicly discloses the interest prior to or during deliberations on the proposed contract; and
 - (iii) the interested member abstains from voting on the award of the contract; and
 - (iv) the contract is approved by a majority vote of those members presently holding office; and

- (v) the contract is awarded by a sealed bidding procedure.
- (b) Smaller contracts (\$2,000 or less and less than \$4,000 annual aggregate). Members of the governing body of a public entity may provide materials, merchandise, property, services, or labor to the public entity if all of the following conditions are satisfied:
- (i) the interested member publicly discloses the interest prior to or during deliberations on the proposed contract; and
 - (ii) the interested member abstains from voting; and
 - (iii) the contract is approved by a majority vote of the governing body of the public entity.
- (c) Minor Interests (less than 1% share). Members of the governing body of a public entity may provide materials, merchandise, property, services, or labor to the public entity if all of the following conditions are satisfied:
- (i) the interested member owns less than a 1% share; and
 - (ii) the interested member publicly discloses the interest prior to or during deliberations on the proposed contract; and
 - (iii) the interested member abstains from voting; and
 - (iv) the contract is approved by a majority vote of the governing body of the public entity. 50 ILCS 105/3(b-5).
- (d) Public utilities. Members of the governing body of a public entity may approve utility service contracts with a public utility of which the member is an officer, employee, or holder of an ownership interest of 7½% or less. 50 ILCS 105/3(c).
- (e) Public companies (direct interests). Members of the governing body of a public entity may approve contracts with a public company (a company whose stock is traded on a nationally recognized securities market) of which the member is an employee or holder of an ownership interest of 1% or less in the member's own name if all of the following conditions are satisfied:
- (i) the interested member publicly discloses that he or she is an employee or holds an interest of 1% or less in the company before deliberations concerning the proposed award of the contract; and
 - (ii) the interested member refrains from evaluating, negotiating, recommending, approving, deliberating, or otherwise participating in the negotiation, approval, or award of the contract; and
 - (iii) the interested member abstains from voting; and
 - (iv) the contract is approved by a majority vote of those members

presently holding office. 50 ILCS 105/3(e).

- (f) Public companies (indirect interests). Members of the governing body of a public entity may approve contracts with a public company (a company whose stock is traded on a nationally recognized securities market) of which the member holds an ownership interest of 1% or less if the ownership interest is held not in the member's own name but through a mutual fund. 50 ILCS 105/3(e).
- (g) Local banks. Members of the governing body of a public entity may approve contracts with a local financial institution of which the member is a director, officer, employee, or holder of an ownership interest of less than 7½% if all of the following conditions are satisfied:
 - (i) the interested member publicly discloses the interest during deliberations; and
 - (ii) the interested member does not participate in deliberations; and
 - (iii) the interested member does not vote on the award of the contract; and
 - (iv) the contract is approved at a regularly scheduled meeting by a majority vote of those members presently holding office. 50 ILCS 105/3.2.
- (h) Not-for-profit corporations. A municipal officer may sit on the board of a not-for-profit corporation that has an interest in a contract with a municipality. However the municipal official may not vote on matters involving that not-for-profit corporation unless all of the following conditions are satisfied:
 - (i) The interested officer is appointed by the governing body of the municipality to represent the interests of the municipality on the not-for-profit corporations' board; and
 - (ii) The interested officer receives no compensation for membership on the not-for-profit corporation's board, except for reimbursement of expenses incurred as a result of membership on the not-for-profit board. 50 ILCS 105/3(f).

4. Penalties for violation include:

- (a) Criminal penalties including up to three years in prison and a fine of up to \$25,000.00. 50 ILCS 105/4; 730 ILCS 5/5-8-1(a)(7); 730 ILCS 5/5- 9-1(a)(1).
- (b) Forfeiture of office or official position. 50 ILCS 105/4.

5. To avoid violating the Act, an officer with a prohibited interest must either resign or divest the interest. Recusal is not enough.

B. Municipal Code - Conflict of Interest Statute, 65 ILCS 5/3.1-55-10.

1. Application. Municipal officers. 65 ILCS 5/3.1-55-10(a).
2. General Prohibitions.
 - (a) Interests in contracts. A municipal officer cannot have a direct or indirect interest in any contract, work, or business of the municipality; or the sale of any article, whenever the cost of such contract, work, business, or article is paid either from the treasury of the municipality or by assessment. 65 ILCS 5/3.1-55-10(a).
 - (b) Purchase of property. A municipal officer cannot have a direct or indirect interest in the purchase of any property that:
 - (i) belongs to the municipality;
 - (ii) is sold for taxes or assessments; or
 - (iii) is sold by virtue of legal process at the suit of the municipality. 65 ILCS 5/3.1-55-10(a).

The Municipal Conflict of Interest Statute allows for exemptions identical to those set forth in the Public Officer Prohibited Activities Act. 65 ILCS 5/3.1- 55-10(a); 65 ILCS 5/3.1-55-10(b)(1); 65 ILCS 5/3.1-55-10(b)(2); 65 ILCS 5/3.1-55-10(b-5); 65 ILCS 5/3.1-55-10(c); 65 ILCS 5/3.1-55-10(e); 65 ILCS 5/3.1-55-10(g).

3. Penalties for violation include:
 - (a) Criminal penalties including up to three years in prison *and* a fine of up to \$25,000.00. 50 ILCS 105/4; 730 ILCS 5/5-8-1(a)(7); 730 ILCS 5/5- 9-1(a)(1).
 - (b) Forfeiture of office or official position. 50 ILCS 105/4.
4. To avoid violating the Act, an officer with a prohibited interest must either resign or divest the interest. Recusal is not enough.

C. Criminal Code - Official Misconduct Statute, 720 ILCS 5/33-3.

1. Application. All public officers and employees. 720 ILCS 5/33-3.
2. General Prohibitions. A public officer or employee is guilty of misconduct where, in an official capacity, he or she:
 - (a) intentionally or recklessly fails to perform a mandatory duty; or
 - (b) knowingly performs an act that he or she is forbidden by law to perform; or
 - (c) performs an act in excess of his or her authority with the intent to obtain personal advantage for himself or herself or for another; or

- (d) solicits or knowingly accepts a fee or reward not authorized by law. 720 ILCS 5/33-3.
- 3. Solicitation misconduct. An employee of a chief executive officer of a local government commits solicitation misconduct when he or she knowingly solicits or receives campaign contributions from a person engaged in a business or activity over which that person has regulatory authority. 720 ILCS 5/33-3.2.
- 4. Penalties for violation include
 - (a) Criminal penalties including 2 to 5 years in prison *and* a fine of up to \$25,000. 720 ILCS 5/33-3; 730 ILCS 5/5-8-1(a)(6); 730 ILCS 5/5-9-1(a)(1).
 - (b) Forfeiture of office or employment. 720 ILCS 5/33-3.2(d), 720 ILCS 5/33-3.

D. Common Law Conflicts of Interest.

1. Overview.

Although the Prohibited Activities Act and the Municipal Conflict of Interest Act codified the common law conflict of interest doctrine, *see People v. Simkins*, 45 Ill. App. 3d 202 (5th Dist. 1977), there remain vestiges of the common law conflict doctrine that have independent force. *See, e.g., Geneva Residential Ass'n, Ltd. v. City of Geneva*, 77 Ill. App. 3d 744 (2d Dist. 1979); *Athey v. City of Peru*, 22 Ill. App. 3d 363 (3d Dist. 1974); 96 Ill. Atty. Gen. Op. 11 (1996); 93 Ill. Atty. Gen. Op. 10 (1993).

2. General Prohibitions.

The common law conflict of interest doctrine appears to be broader than its statutory counterparts, although most analyses of the doctrine are from the Attorney General rather than the courts.¹ The Attorney General has opined that a common law conflict may arise whenever official action could result in a personal advantage or disadvantage to the interested official. 96 Ill. Atty. Gen. Op. 11 (1996).

A mere allegation or speculation of a conflict of interest is typically not enough. *Athey*, 22 Ill. App. 3d at 370 (zoning commission chairman had business relationship with zoning applicant); *Geneva Residential*, 77 Ill. App. 3d at 756-57. Courts might take a sterner look at a situation where a public official is the actual applicant or has a clear financial interest in an application before the public body.

A common law conflict does not disqualify an official from his or her office or carry any criminal penalties, and the conflict can be resolved by having the official:

- (a) publicly disclose the conflict before or during deliberations,

¹ The Attorney General's opinion is not legally binding, although courts do give considerable weight to those opinions as persuasive authority.

(b) refrain from evaluating, negotiating, recommending, approving, deliberating, or participating in any governmental action related to the matter, and

(c) abstain from voting on the matter. See 92 Ill. Atty. Gen. Op. 26 (1992).

3. Office Incompatibility.

One person may be prohibited from holding two public offices that are “incompatible.” See *People v. Claar*, 293 Ill.App.3d 211 (1997), citing *People v. Haas*, 145 Ill. App. 283 (1908). Incompatibility may arise:

(a) where the written law of a statute specifically prohibits the occupant of either one of the offices in question from holding the other, and

(b) where the duties of either office are such that the holder of the office cannot always properly and fully, faithfully perform all the duties of the other office. *Id.* Incompatibility is determined on a case-by-case basis.

II. Gifts And Prohibited Political Activities

The State Officials and Employees Ethics Act, codified at 5 ILCS 430/1-1 *et seq.*, contains (i) gift ban regulations and (ii) prohibitions against involvement in political activity by government officials and employees.

A. Gift Ban Regulations

1. General Prohibitions. No government official or employee may intentionally solicit or accept any gift from a prohibited source. The gift ban also applies to the spouse of the official or employee and any immediate family members living with the official or employee.

(a) A “*gift*” is defined as “any gratuity, discount, entertainment, hospitality, loan, forbearance, or other tangible or intangible item having monetary value including, but not limited to, cash, food and drink, and honoraria for speaking engagements related to or attributable to government employment or the official position of an employee, member, or officer.” 5 ILCS 430/1-5.

(b) A “*prohibited source*” includes:

(i) any person or entity that is seeking official action by a member, officer, or employee of a local government;

(ii) any person or entity that conducts activities regulated by local government, or that does business or seeks to do business by or with a member or officer of a local government;

(iii) any person or entity that has interests that may be substantially affected by the performance or non-performance of an officer’s or employee’s official duties; and

(iv) any registered lobbyist. 5 ILCS 430/1-5.

2. Exceptions. The following are not prohibited gifts:

- (a) Opportunities, benefits, and services that are available on the same conditions as for the general public.
- (b) Anything for which the officer or employee pays the market value or anything not used and promptly disposed of as prescribed by the Gift Ban Act.
- (c) A contribution, as defined in Article 9 of the Illinois Election Code, 10 ILCS 5/9, that is lawfully made under that Code or under the State Officials and Employees Ethics Act, or activities associated with a fundraising event in support of a political organization or candidate.
- (d) Educational materials and missions.
- (e) Travel expenses for a meeting to discuss municipal business.
- (f) A gift from a relative of an officer or employee.
- (g) Anything provided by an individual on the basis of a personal friendship unless the officer or employee has reason to believe that, under the circumstances, the gift was provided because of the official position or employment of the officer or employee and not because of the personal friendship.
- (h) Food or refreshments not exceeding \$75.00 per person in value on a single calendar day.
- (i) Food, refreshments, lodging, transportation, and other benefits resulting from the outside activities that are not connected to the duties of the officer or employee.
- (j) Intra-office and inter-office gifts.
- (k) Bequests, inheritances, and other transfers at death.
- (l) Any item or items from any one prohibited source during any calendar year having a cumulative total value of less than \$100.00.

3. Disposition of Gifts. Under the Ethics Act, an officer or employee that is a recipient of a gift that is given in violation of this Act does not violate the Act if he or she either:

- (a) Returns the item to the donor, or
- (b) Gives the item or an amount equal to its value to an appropriate charity that is exempt from income taxation under Section 501(c)3 of the Internal Revenue Code. 5 ILCS 430/10-30.

B. Prohibited Political Activities.

1. General Prohibitions. No government officer or employee may:
 - (a) participate in prohibited activities during compensated time,
 - (b) misappropriate any government property or resources for a prohibited political activity,
 - (c) require any employee to participate in prohibited political activities as part of a condition of employment, during compensated time off, or as a condition of receiving any compensation or benefit, or
 - (d) award any additional compensation or benefit to an employee for the employee's participation in a prohibited political activity.

The Ethics Act does not prohibit activities that are otherwise appropriate for employees to participate in or activities that are undertaken on a voluntary basis as permitted by law.

2. Definitions.
 - (a) "Prohibited political activities" include:
 - (i) preparing for, organizing, or participating in any political meeting, rally, demonstration, or other political event;
 - (ii) soliciting contributions, including those generated by ticket sales for political events;
 - (iii) soliciting, planning the solicitation of, or preparing any document or report regarding any thing of value intended as a campaign contribution;
 - (iv) planning, conducting, or participating in a public opinion poll in connection with a campaign for elective office or on behalf of a political organization for political purposes or for or against any referendum question;
 - (v) surveying or gathering information from potential or actual voters in an election to determine probable vote outcome in connection with a campaign for elective office or on behalf of a political organization for political purposes or for or against any referendum question;
 - (vi) assisting at the polls on election day on behalf of any political organization or candidate for elective office or for or against any referendum question;
 - (vii) soliciting votes on behalf of a candidate for elective office or a political organization or for or against any referendum question or helping in an effort to get voters to the polls;

- (viii) initiating for circulation, preparing, circulating, reviewing, or filing any petition on behalf of a candidate for elective office or for or against any referendum question;
- (ix) making contributions on behalf of any candidate for elective office in that capacity or in connection with a campaign for elective office;
- (x) preparing or reviewing responses to candidate questionnaires in connection with a campaign for elective office or on behalf of a political organization for political purposes;
- (xi) distributing, preparing for distribution, or mailing campaign literature, campaign signs, or other campaign material on behalf of any candidate for elective office or for or against any referendum question;
- (xii) campaigning for any elective office or for or against any referendum question;
- (xiii) managing or working on a campaign for elective office or for or against any referendum question;
- (xiv) serving as a delegate, alternate, or proxy to a political party convention; and
- (xv) participating in any recount or challenge to the outcome of any election, except to the extent that under subsection (d) of Section 6 of Article IV of the Illinois Constitution each house of the General Assembly shall judge the elections, returns, and qualifications of its members.

III. Public Contracts

A. Overview. Article 33E of the Criminal Code of 1961 prohibits certain acts that have the effect of interfering with public contracts. 720 ILCS 5/33E-1 *et seq.* Article 33E was enacted to assure that the best price for the best quality of goods, services, and construction paid for by public monies is obtained.

B. Application. Article 33E applies to *all* contracts for goods, services, or construction let to any person *with or without competitive bidding* by any unit of local government. 720 ILCS 5/33E-2.

C. General Prohibitions.

1. During Bidding and Award - All Contracts.

- (a) A public official or employee cannot convey, outside of the normal process, information concerning contract specifications, other than publicly disseminated clarifications, or the identity of certain subcontractors. 720 ILCS 5/33E-6.
- (b) A public official or employee cannot inform a bidder or someone offering a

contract that the bid or offer will be accepted only if specified individuals are included as subcontractors. 720 ILCS 5/33E-6.

- (c) A public official cannot award a contract based on criteria not publicly disseminated via any applicable solicitation for contracts procedure. 720 ILCS 5/33E-6.

2. During Bidding and Award - Competitively Bid Contracts.

- (a) A public official or employee cannot open a sealed bid at a time other than the time designated or outside the presence of witnesses required by statute or ordinance. 720 ILCS 5/33E-5.
- (b) A public official or employee cannot disclose to interested parties any information related to the terms of a sealed bid or any bidder's responsiveness to a request for bids, except as provided by law or as necessary to the performance of duties relating to the bid, *unless* such disclosure is also made generally available to the public. 720 ILCS 5/33E-5.

3. During Contract Administration.

- (a) A public official or employee cannot approve change orders that *increase or decrease* the contract price by \$10,000 or more, or the time of completion by 30 days or more, without first obtaining a *written determination* from the governing body of the unit of local government. 720 ILCS 5/33E-9.

D. Penalties. A public official or employee who violates Article 33E is subject to criminal penalties including up to five years in prison *and* a fine of up to \$25,000.

IV. Disclosure of Economic Interests

A. Overview.

The Illinois Governmental Ethics Act, 5 ILCS 420/4A-101 *et seq.*, is designed to reveal conflicts of interest between the public trust and private gain by requiring the disclosure of financial interests related to public employment.

B. Who Must Disclose.

1. Elected officials of a unit of local government.
2. Candidates for nomination or election to office in a unit of local government.
3. Appointed members of the governing board of a unit of local government.
4. Appointed members of a zoning board, plan commission, or county board of review.
5. Appointed members of a board or commission of a unit of local government who have the authority to authorize the expenditure of public funds and do not function

in a solely advisory capacity.

6. Employees of a unit of local government (not independent contractors) who:
 - (a) serve as head of a department or other administrative unit or who exercise similar authority; or
 - (b) have direct responsibility over the formulation, negotiation, issuance, or execution of contracts in the amount of \$1,000 or more; or
 - (c) have non-ministerial authority to approve licenses and permits; or
 - (d) adjudicate, arbitrate, decide, or review any judicial or administrative proceeding; or
 - (e) issue or promulgate rules and regulations; or
 - (f) have supervisory authority for 20 or more employees. 5 ILCS 420/4A- 101

C. What to Disclose and Where to File.

A verified statement of economic interest must be filed in the form required by the Illinois Governmental Ethics Act. 5 ILCS 420/4A-103. The statement must be filed with the Clerk of the County where the principal office of the unit of local government is located. 5 ILCS 420/4A-106.

D. When to File.

1. Prior to the date by which candidates for elective office can qualify for nomination, election, or retention, unless a statement of economic interest in relation to the same unit of local government was filed within a year preceding qualification. 5 ILCS 420/4A-105.
2. At the time of initial appointment or employment, unless appointed or employed after May 1. 5 ILCS 420/4A-105.
3. By May 1 of each year, unless a statement of economic interest in relation to the same unit of local government was already filed in the same year. 5 ILCS 420/4A-105.

E. Failure to File.

Failure to file may result in ineligibility for, or forfeiture of, the office or position of employment if filed after May 31 and penalties of \$100 per day. 5 ILCS 420/4A-105; 5 ILCS 420/4A-107.