

# Letting the Sunshine In: School Board Meetings and Records



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The Illinois Compiled Statutes contain two major pieces of legislation designed to provide public access to units of local government in Illinois. These “sunshine laws” are:

- The Illinois Open Meetings Act (5 ILCS 120/1 et seq.), which provides public access to the meetings of public bodies; and
- The Illinois Freedom of Information Act (5 ILCS 140/1 et seq.), which ensures public access to records assembled, gathered, produced, and disseminated by public bodies.

This document is intended as a practical guide for school boards and administrators in dealing with the myriad provisions of these two important laws.



Revised October 2021

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# The Illinois Open Meetings Act Introduction

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All school board members should be familiar with the requirements of the Open Meetings Act (OMA). As noted below in the section entitled “The Public Access Counselor’s Duties,” each public body must designate an employee(s) to receive electronic training provided by the Public Access Counselor (PAC) on a yearly basis and each elected or appointed board member must complete the electronic curriculum within (90) days of taking the oath of office.

Of course, a document of this nature cannot possibly answer all questions that can arise under OMA. Accordingly, as virtually all meetings of school board members are subject to OMA, public officials should consult with their school attorneys when necessary in order to be certain that they are fully complying with OMA.

All Illinois school boards are subject to OMA.<sup>1</sup> OMA makes it public policy that (a) public bodies shall act and deliberate openly, (b) citizens shall be given advance notice of, and the right to attend, all meetings, and (c) the citizen’s right to know shall be protected. Meetings are to be open and OMA’s limited exceptions allowing closed sessions are to be “strictly construed.”

A meeting is defined as “...any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business.” A “quorum” is the number of assembled members that is necessary for a decision-making body to be legally competent to transact business.<sup>2</sup> Under the School Code, a “majority of the full membership of the board of education shall constitute a quorum.”

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

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

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

<sup>2</sup> 59 Am. Jur. 2d *Parliamentary Law* § 9 (2002).

# What OMA Covers

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## Bodies Covered

OMA applies to all meetings of public bodies (except, interestingly enough, the General Assembly). Public bodies as defined in OMA include:

- 1) School boards; and
- 2) Committees and subcommittees of school boards.

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

## Gatherings Covered

OMA defines a meeting as “. . . any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a five-member public body, a quorum of the members of a public body held for the purpose of discussing public business.” This definition eliminates the confusion which can arise when two school board members bump into one another on a street corner and proceed to discuss school business.

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

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

Similarly, if three members of a seven member committee meet to discuss whether a particular issue should be brought up at the full committee hearing, but the three are never technically in the room at the same time, this would still be “contemporaneous communication” and subject to the requirements of OMA. Contemporaneous interactive communication does not require the simultaneous, continuous, and uninterrupted majority of quorum because, as the attorney general noted, the act of alternating out legislators or playing “legislative musical chairs” would subvert the intent and spirit of OMA.

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

## Discussion of Public Business

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

The definition of meeting also requires that the gathering of a majority of a quorum be held for the *purpose* of discussing public business. In other words, there must be an intent to discuss public business before the gathering becomes a meeting covered by OMA.<sup>3</sup> To violate OMA, the gathering and discussions must be designed to discuss or reach an accord with regard to public business, be a collective discussion and exchange of facts preliminary to a final decision, and be an examining or weighing of reasons for or against a course of action.<sup>4</sup> The legislature added this intent language so that public officials would not have to fear violating OMA if they unintentionally discussed public business by some or all of the members of a public body at a social event or attend community functions.

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

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

However, the Illinois Attorney General’s written explanations of OMA stated that:

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

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

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<sup>3</sup> *People ex rel. Defanis v. Barr*, 78 Ill. App. 3d 842, 847 (4th Dist. 1979).

<sup>4</sup> *Nabhani v. Colianese*, 552 F. Supp. 657, 661 (N.D. Ill. 1982), citing *People ex rel. Defanis v. Barr*, 83 Ill. 2d 191, 210 (1980); See also, Op.Ill.Att’y.Gen. No. S-726 at 125 (March 22, 1974), citing *Sacramento Newspaper Guild v. Sacramento Co. Bd. of Super.*, 263 Cal.App.2d 41, 69 Cal.Rptr. 480, 485 (1968).

## Meetings Not Covered

One court<sup>5</sup> has held that meetings or conferences of administrators, teachers, or other employees are not covered by OMA because the participants do not adopt any resolutions and meet only for the purpose of promoting “good staff work.” The school board president or another member of the board may attend such a staff meeting without bringing it within the coverage of OMA. However, if a majority of a quorum of the public body attends such a staff meeting at which public business is discussed, the meeting would then come within OMA and would have to be open to the public.

By the same token, an “internal” committee which is not formally appointed by or accountable to any public body, by its very nature, does not conduct deliberations which fall within the scope of OMA.<sup>6</sup> Finally, a federal district judge has ruled that a “political rally” is not a meeting under OMA, even though all the board members were there and discussed public business.<sup>7</sup>

## Meeting Times and Places

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OMA requires all public meetings to be held at specified times and places which are convenient and open to the public. Therefore, a public body cannot schedule a meeting to be held at midnight or at 5:00 a.m.; however, if a meeting called at a convenient time extends into the early morning hours, it would be a proper and legal meeting. A public body can also not hold a public meeting in a private residence because it would not be “convenient” or “open to the public,” as citizens could reasonably be deterred from attending the meeting or feel uncomfortable going to a private residence.<sup>8</sup> Also, a public body cannot properly schedule a meeting to be held outside of its corporate boundaries. A meeting outside of its corporate boundaries, depending upon how far outside it was, would probably be “inconvenient” to the public, and there is a serious legal question as to whether a public body has jurisdiction to meet and act outside of its corporate limits. For instance, the PAC determined that holding a special board meeting on a weekday morning at the board’s attorney’s office, which was located 26 miles from its usual meeting location, was not convenient and open to the public.<sup>9</sup>

In addition, no meeting is to be held on a legal holiday unless a public body’s regular meeting day falls on such a holiday. Simply stated, a public body cannot schedule a special meeting to take place on Christmas Day, New Year’s Day, Thanksgiving, or any other legal holiday. OMA does not define legal holidays or the source of such days. However, a list of “legal holidays” is set out in the Bank Holiday Act.<sup>10</sup>

## Notice Requirements

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The notice provisions of OMA establish somewhat different requirements for different types of meetings. These include regular, special, emergency, rescheduled, and reconvened meetings.

### Regular Meetings

OMA requires each public body to give public notice of its schedule of dates, times, and places for regular meetings at the beginning of each calendar or fiscal year and to make the schedule generally available. Sections 10-6 and 10-16 of The School Code (105 ILCS 5/10-6 and 105 ILCS

<sup>5</sup> *People ex rel. Cooper v. Carson*, 28 Ill.App.3d 569 (2d Dist. 1975).

<sup>6</sup> *Pope v. Parkinson*, 48 Ill.App.3d 797 (4th Dist. 1977).

<sup>7</sup> *Nabhani v. Coglianese*, 552 F.Supp. 657 (N.D. Ill. 1982).

<sup>8</sup> Ill. Att’y Gen. Pub. Acc. Op. No. 12-008 (issued April 4, 2012).

<sup>9</sup> Ill. Att’y Gen. Pub. Acc. Op. No. 13-014 (issued September 5, 2013).

<sup>10</sup> 205 ILCS 630/17(a).

5/10-16) require each school board, at its organizational meeting following each biennial election of members, to set the time and place for the board's regular meetings. If the schedule established at the organizational meeting represents a change from the original schedule, then public notice of the changed schedule must be published. Any change in the regular meeting schedule requires special public notice of 10 days' public notice by publication in newspaper of general circulation.

In addition, an agenda of each regular meeting must be prepared and posted at both the principal office of the public body and at the location where the meeting will be held. The agenda must be posted continuously for at least 48 hours in advance of the meeting. A public body that has a website maintained by full-time staff must also post the agenda of the regular meetings of the board on its website. The agenda must remain posted on the website until the regular meeting is concluded. Furthermore, even though OMA provides that "[t]he requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda", an Illinois Appellate Court has held that OMA does preclude actions from being taken on items that are not specifically set forth in the agenda.<sup>11</sup> While you may be able to "consider" (i.e. discuss) items not included on the agenda, the *Rice* case prohibits final action on items not posted on the agenda. Taking final action on an item not on the agenda could invalidate that action down the road.<sup>12</sup>

Section 2.02(c) of OMA further provides, in pertinent part: "[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." The degree of specificity required under Section 2.02(c) has recently been analyzed by the PAC. In a non-binding opinion, the PAC opined that the "general subject matter" signifies that a meeting agenda must set forth the main element(s) rather than the specific details of an item on which the public body intends to take final action.<sup>13</sup> The PAC opined that this includes the general subject matter description of a code or policy, as they found that a City listing "Consider and act on Ordinance 19-11 to Amend Section 33-4-4 (F)" on its agenda was not sufficiently detailed, as it did not refer to the City Code or the general subject matter of permit application fees.<sup>14</sup> The PAC additionally found that the availability of the Code online did not cure the violation.

Be advised that a public body is under no obligation to take final action on a matter just because the item appears on an agenda. Instead, a public body may decide, for example, that additional information or discussion is necessary, and consequently postpone or cancel consideration of a resolution. Keeping that in mind, a public body is permitted to amend an agenda within 48 hours of a meeting if it is to remove an item from that agenda.<sup>15</sup>

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<sup>11</sup> *Rice v. Board of Trustees of Adams County*, 326 Ill.App.3d 1120 (4th Dist. 2002).

<sup>12</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 13-002 (issued April 16, 2013).

<sup>13</sup> Ill. Att'y Gen. PAC Req. Rev. Ltr. 42283 (issued March 1, 2017). See also Ill. Att'y Gen. PAC Req. Rev. Ltr. 45567 (issued February 16, 2017) (determining that an agenda set forth the general subject matter of a city council's vote to appoint a city manager despite not specifying the length of his contract); Ill. Att'y Gen. PAC Req. Rev. Ltr. 41412 (issued October 18, 2016) (determining that an agenda set forth the general subject matter of the Drug Utilization Review Board's votes to approve certain drug therapies despite not identifying the names of the drugs).

<sup>14</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 19-012 (issued November 13, 2019).

<sup>15</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 14-003 (issued May 5, 2014).

## **Organizational Meetings**

The School Code mandates that within 28 days following the election of school board members an organizational meeting of the board must be held.<sup>16</sup> At this meeting, responsibility is transferred from the “old” board to the “new” board, and the new board organizes by electing its officers and establishing the date, time, and location of regular board meetings. The organizational meeting may be held at a regularly scheduled meeting if one falls within 28 days after the election or at a rescheduled regular or special meeting for which proper notice has been given.

## **Rescheduled Meetings**

Public notice of a rescheduled regular meeting must be given at least 48 hours beforehand, and the notice must include the agenda for the meeting. For example, if members of the board plan to attend an out-of-town convention on their regular meeting date and wish to reschedule, the board must give at least 48 hours’ notice and the notice of the rescheduled meeting must contain a copy of the agenda. No newspaper publication is required.

## **Special Meetings**

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

Public notice of special meetings, except a meeting held in the event of a bona fide emergency, must be given at least 48 hours before such special meeting, and the notice must include the agenda for the special meeting. The actions of the public body, while not required to be specifically detailed in the notice, should be “closely related” to those matters set forth in the agenda for the special meeting.<sup>17</sup>

## **Emergency Meetings**

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

## **Reconvened Meetings**

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

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<sup>16</sup> 105 ILCS 5/10-16.

<sup>17</sup> *Argo High School Council of Local 571 v. Argo Community High School District No. 217*, 163 Ill. App.3d 578 (1st Dist. 1987).



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

Should it appear at the reconvened meeting that still another meeting date is needed before the next regular meeting; a reconvened meeting may again be adjourned to another date in a similar manner. Obviously, no regular meeting should be reconvened on a date beyond the next regular meeting. The minutes of the original meeting should show the action taken by the board adjourning to a definite date, time, and place.

## **Methods of Public Notice**

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### **Special, Emergency, Rescheduled or Reconvened Meetings**

Public notice is accomplished by posting a copy of the notice at the main office of the school district, or if there is none, then at the building in which the meeting is to be held. The notice should also be published on the school district's website if the district has one. Also, the school board must supply copies of the notices of all of its meetings to any news medium that has filed an annual request for such service.

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

## **Change in Regular Meeting Schedule**

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If the school board makes a change in its regular meeting dates (for example, a change from the first and third Mondays to the first and third Wednesdays), it must give a least 10 days' notice of such change by publishing a notice in a newspaper of general circulation in the school district. If the school board operates in an area with a population of less than 500 in which no newspaper is published, the 10 days' notice may be given by posting a notice of the change in at least 3 prominent places within the governmental unit. In either case, the notice of the change must also be posted at the main office of the school district, or if no such office exists, then at the building in which the meeting is to be held. Notice must also be given to the news media which have filed an annual request for notice.

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

## **Electronic Attendance**

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### **A. Electronic Attendance with a Physical Quorum of Members Present**

The definition of meeting includes "video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means or contemporaneous interactive communication." OMA permits participation and voting by other members of a public body by audio and video conference provided that the number of

public body members necessary to constitute a quorum must be physically present at the open meeting. The law also requires that a quorum of members of a public body without statewide jurisdiction be physically present at a closed meeting and permits participation by other members by video or audio conference at the closed meeting.

OMA is permissive regarding electronic attendance and not mandatory. A school board may allow board members to attend meetings subject to OMA electronically rather than physically, but it is not required to do so.<sup>18</sup> However, if a school board decides to allow its board members to attend meetings electronically, at a minimum it must adopt procedural rules to conform to the requirements and restrictions of OMA. In addition, the school board member wanting to attend the meeting electronically rather than physically can only do so if (1) the board member is ill or disabled; (2) the board member is unable to physically attend because of employment or official business of the public body; or (3) the board member has a family or other emergency.<sup>19</sup>

## **B. Electronic Attendance During a Public Health Disaster**

The Open Meetings Act was amended in 2020 during the COVID-19 pandemic to legally allow for remote meetings during public health disasters.<sup>20</sup> A public body may meet remotely and establish a quorum with remote attendance if (1) a disaster declaration has been issued by the Governor or Director of the Illinois Department of Public Health under the Illinois Emergency Management Agency Act which covers the jurisdiction of the public body; and (2) the head of the public body determines that an in-person meeting is not practical or prudent because of a disaster. Although not specifically required by OMA, it is advisable for the head of the public body to include this determination in writing on the public body's published notice and agenda for the remote meeting and to record it in the meeting minutes. If a remote meeting is held under the disaster exception, the following steps must be taken:

- All members of the public body participating in the public meeting, regardless of their physical location, shall announce their attendance and confirm that they can hear one another and can hear all discussion.
- For open meetings, steps must be made to ensure that members of the public can contemporaneously hear all of the discussions at the meetings and votes. If in-person attendance by the public at the regular meeting location is not feasible due to the disaster, the public body must make and provide proper notice of alternative arrangements, such as by offering a telephone number or a web-based link.

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<sup>18</sup> 5 ILCS 120/7(e)

<sup>19</sup> 5 ILCS 120/7(b). Prior to Public Act 94-1058, Illinois Law was vague on the issue of electronic attendance of public meetings, but case law and an attorney general opinion approved such attendance. Attorney General Opinion, No. 82-041 articulated a policy where telephone conference calls held by a majority of a quorum of a public body for the purpose of discussing public business were meetings under the Act and, therefore, all notice and public accessibility requirements of the Act must be complied with before holding such conferences. The subsequent and relevant Illinois appellate court opinions followed the Attorney General's rationale. In *Scott v. Illinois State Police Merit Board*, the appellate court determined that it is proper to conduct a closed meeting, pursuant to one of the exceptions, by way of a teleconference call, provided that there is compliance with the Act. 222 Ill. App. 3d 496 (1st Dist.1991). In *Freedom Oil Co. v. Pollution Control Bd.*, 275 Ill. App. 3d 508 (4th Dist.1995), the Court found that although there was no specific statutory authority for the Board to conduct its meetings by telephone meetings by telephone conference, such a telephone conference meeting fell within the Board's specific authority to conduct meetings. In addition, the Court determined that a telephone conference qualifies as an open meeting despite the fact that a quorum was not physically present in the same room so long as all the requirements of the Open Meetings Act were followed. However, the Court opined that if the Board intended to conduct some of its meetings by telephone conference in the future, better practice would dictate it should have rules in place for the procedures to be followed. See, *People ex rel. Graf v. Village of Lake Bluff*, 321 Ill.App.3d 897 (2nd Dist. 2001).

<sup>20</sup> 5 ILCS 120/7(e)

- An audio or video recording must be made of any remote open meeting and be made available to the public.
- All votes must be by roll call so that the specific votes can be identified to a specific official.
- Either a member of the public body, legal counsel, or the chief administrative official of the public body have to be physically present at the regular meeting location of the public body, unless not feasible due to the disaster.

The steps listed above are in addition to the other requirements of OMA which remain in full force effect, such as notice and agenda posting, opportunity for public comment, and maintenance of meeting minutes.

## Email Communications and Texting

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Although there are presently no Illinois cases or binding Illinois Attorney General Opinions directly addressing the issue of email messages or text messages, and the application of OMA to such messages, the attorney general did issue a non-binding opinion for a request to review on February 23, 2011, that addressed this topic. In that case, the complaint alleged that school board members violated OMA by engaging in a “meeting” via emails. The PAC determined that the emails were not in fact a meeting, and in so holding discussed when email discussions may fall within the definition of a meeting. The PAC stated that whether email conversations are a meeting depend on the substance of the communication and whether the communications rise to the level of a deliberative discussion of business of a public body. Simply sharing information and casual commentary or remarks about public business are not enough to constitute a meeting. There needs to be more evidence of deliberation or discussion that is directed at reaching a decision on a public matter via email. Therefore, the PAC held that because the emails in question were not deliberative, the school board had not violated OMA.

Given this opinion and the recent change in legislation, it would seem reasonable that the courts and the attorney general would agree with the following:

When email messages or text messages by, between, and among members of a public body are used in place of letters and such email messages do not involve deliberations, debate, decision making, or consensus on a matter of public business, such communications should not involve a violation of OMA.

A series of email messages or instant messages among a majority of a quorum of the members of a board of education for the purpose of discussing public business would result in a violation of OMA.

Participation by a majority of a quorum of the members of a board of education in a “group text or chat,” “chat room” or on “Google chat” for the purpose of discussing public business would constitute a meeting covered by OMA and a violation of OMA.

No violation of OMA would occur where an electronic communication occurred between less than a majority of a quorum. Of particular concern would be the “reply all” function that could easily include a majority of a quorum and could become instantaneous communication.

Emails merely conveying information and not requiring a response (especially if containing a message to the recipients not to reply) or other merely “one-way” messages should not be a violation unless it was shown they were a subterfuge intended to circumvent the provisions of OMA.

In the state of Washington, the exchange of email messages may constitute a “meeting” within the meaning of Washington’s Open Public Meetings Act (OPMA). However, the mere use or passive receipt of email does not automatically constitute a meeting and that the OPMA is not implicated when members of a public agency’s governing body receive information about upcoming issues or communicate amongst themselves about matters unrelated to the governing body’s business via email. Courts in Washington view whether an email exchange involving members of a school board qualifies as a meeting as an issue of fact when determining if summary judgment is appropriate.<sup>21</sup>

## Public Participation at Meetings

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### Public Participation at Meetings

Section 2.06(g) of OMA states that members of the public must have an opportunity to address the public body during an open meeting. Section 5/10-16 of the School Code also requires that school boards afford time at open meetings for members of the public to comment or ask questions of the board. These statutory provisions give the public the right to speak at a school board meeting. However, this right is subject to reasonable rules that are established and recorded by the public body. Most public bodies include a “Citizens Concerns” or “Public Comment” section on the agenda, and it is typically placed at the beginning or end of the meeting.

The PAC and the courts have given some guidance as to what are “reasonable rules” of the public body. A public body may adopt reasonable “time, manner, and place” regulations which are necessary to further a significant public interest.<sup>22</sup> A public body may establish time limits, both for an individual speaker and for public comment as a whole.<sup>23</sup> For example, each person wishing to speak can have three minutes, but that public comment shall not exceed one hour. Another reasonable requirement is limiting public comment to certain subject, such as only subjects on the agenda or only related to the business of the public body.<sup>24</sup> However, a public body cannot require a member of the public to provide their address before speaking,<sup>25</sup> and cannot restrict public comment to only residents.<sup>26</sup> A public body cannot require a five-day sign in requirement.<sup>27</sup> However, in general, requiring the public to sign in immediately before a meeting would be a reasonable regulation. A public body also cannot require a member of the public to make a public comment concerning the performance of a specific employee in closed session rather than open session.<sup>28</sup>

A school board should adopt rules for public comment and make sure they are recorded in its policy manual.<sup>29</sup>

Finally, the Empowering Public Participation Act (5 ILCS 850/), enacted in 2021, prohibits law enforcement agencies from conducting background checks on a person for the sole reason that

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<sup>21</sup> *Wood v. Battle Ground Sch. Dist.*, 107 Wash.App. 550 (Wash. Ct. App. 2001).

<sup>22</sup> *I.A. Rana v. City of Aurora*, 630 F. Supp. 2d 912, 922 (N.D. Ill. 2009).

<sup>23</sup> *Id.* at 924.

<sup>24</sup> *Id.*

<sup>25</sup> Ill Att’y Gen. Pub. Acc. Op. No. 14-009 (issued Sept. 4, 2014).

<sup>26</sup> Ill. Att’y Gen. Pub. Acc. Op. No. 19-009 (issued October 1, 2019).

<sup>27</sup> Ill Att’y Gen. Pub. Acc. Op. No. 14-012 (issued Sept. 30, 2014).

<sup>28</sup> Ill Att’y Gen. Pub. Acc. Op. No 21-009 (issued Sept. 21, 2021).

<sup>29</sup> Ill. Att’y Gen. Pub. Acc. Op. No. 19-002 (issued January 9, 2019) (While a rule establishing a 15-minute cap for public comment was established by the School Board through its Welcome Handout and through its general practice, it could not be enforced to limit public comment where the rule was never formally approved and recorded in its Board Policy).

the person speaks at an open meeting of a public body, unless (1) there is a reasonable suspicion of criminal conduct, (2) reasonable suspicion of a threat to security for the premises where the meeting is to occur, (3) for the protection of public officials and others attending the meeting, or (4) the person speaking at the open meeting is also under consideration for appointment to a government position by the public body.

### Recording of Meetings

Under OMA, any person may record the proceedings at any public meeting by tape, film, or other means. OMA allows public bodies to prescribe reasonable rules governing the right to record. A school board wishing to ensure that recording is handled without disrupting its meetings should adopt “reasonable rules” controlling such activities as part of its policy manual. However, if a witness at any meeting required to be open refuses to testify on the grounds he may not be compelled to testify if any portion of his testimony is to be broadcast or televised or if motion pictures are to be taken of him while testifying, the public body shall prohibit such recording during the testimony of the witness.

An example of a rule that has been found to be unreasonable by the PAC is requiring a member of the public to give the public body advance notice of his or her intent to record an open meeting. The PAC has held that the public body in question failed to provide any evidence or justification that advance notice of recording was reasonably necessary to protect the integrity of the meeting, student privacy, or the safety of those in attendance.<sup>30</sup>

## Voting and Taking Final Action

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There are rules and limitations for taking final action at public meetings. As discussed above, all items where final action may be taken must be listed on the agenda. Final action can only occur at an open public meeting. Without the public vote, no final action can occur.<sup>31</sup> So even if a public body comes to an agreement or consensus in closed session on an item, it cannot be treated as final until it is voted on in an open session. Finally, prior to taking final action, the public body must provide 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 degree of specificity of the public recital requirement has been addressed by the Illinois Supreme Court. In *Board of Education of Springfield School District No. 186 v. Attorney General*,<sup>32</sup> the Illinois Supreme Court held that Section 2(e) requires the public body to announce the nature of the matter under consideration with sufficient detail to identify the particular transaction or issues, but it need not provide an explanation of its terms or its significance. At issue in the District 186 case was a separation agreement and release with the current superintendent. The Court found that the dollar amount being provided to the superintendent was not required as part of the public recital. It was sufficient that the public body identified the parties involved (the superintendent and district) and the nature of the agreement (separation). In contrast, the Illinois Appellate Court found in *Allen v. Clark County Park District Board of Commissioners*, that the public body did not provide sufficient information before taking final action.<sup>33</sup> There, the agenda listed only “Board Approval of Lease

<sup>30</sup> Ill. Att’y Gen. Pub. Acc. Op. No. 12-010 (issued June 5, 2012); Ill. Att’y Gen. Pub. Acc. Op. No.16-014 (issued December 28, 2016).

<sup>31</sup> *Board of Educ. Of Springfield Sch. Dist. No. 186 v. Attorney General*, 2017 IL 120343 (Ill. 2017).

<sup>32</sup> *Id.*

<sup>33</sup> 409 Ill. Dec. 324 (4th Dist. 2016).

Rates” and “Board Approval of Revised Covenants.”<sup>34</sup> At the meeting, the “recital” included only a request for a motion to approve the lease rates “that came from appraisal” and a motion to “accept the revised covenants.”<sup>35</sup> In that situation, the public body provided the general nature of the items, lease rates and revised covenants, but provided no details to sufficiently inform the public about the business of these items, such as what type of property was being leased or which existing covenants were being revised. Similarly, the PAC found that a school district did not provide sufficient information before approving a Notice to Remedy.<sup>36</sup> The District approved a resolution “authorizing a Notice to Remedy to be served to the teacher named therein.” The PAC found that the District violated OMA by not identifying the teacher who was to be served with the Notice to Remedy.

## Closed Meetings

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

The exceptions authorize or allow, but do not require, closed meetings to discuss a subject covered by an exception. No final action is allowed in closed meetings. Those exceptions which apply to schools are the following subjects:

- 1) The appointment, employment, compensation, discipline, performance, or dismissal of specific employees, specific individuals who serve as independent contractors in an educational setting or specific volunteers of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee, a specific individual who serves as independent contractors in an educational setting or a volunteer of the public body or against legal counsel for the public body to determine its validity. However, a public body may not properly discuss budgetary matters in closed session under this exception, even if budgetary matters may directly or indirectly affect its employees. The underlying budget discussions leading to the discussion of a specific employee cannot be held in closed session.<sup>37</sup> Additionally, the public body cannot use this exception to discuss elected officials or occupants of public office.<sup>38</sup>
- 2) Collective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees.
- 3) The selection of a person to fill a public office, as defined in this Act, including a vacancy in a public office, when the public body is given power to appoint under law or ordinance, or the discipline, performance, or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance.
- 4) Evidence or testimony presented in an open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body, as defined in this Act, provided that the

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<sup>34</sup> *Id.* at 326.

<sup>35</sup> *Id.*

<sup>36</sup> Ill. Att’y Gen. Op. No. 19-004 (issued May 17, 2019).

<sup>37</sup> Ill. Att’y Gen. Pub. Acc. Op. No 15-003 (issued March 20, 2015); Ill. Att’y Gen. Pub. Acc. Op. No 16-013 (issued December 23, 2016). However, a meeting to consider an increase in compensation to a specific employee of a public body that is subject to the Local Government Wage Increase Transparency Act may not be closed and shall be open to the public and posted and held in accordance with this Act. *See also* Ill Att’y Gen. Pub. Acc. Op. No 18-012 (issued October 2, 2018).

<sup>38</sup> Ill. Att’y Gen. Pub. Acc. Op. No 18-015 (issued October 30, 2018); Ill. Att’y Gen. Pub. Acc. Op. No. 17-013, (issued November 21, 2017).

body prepares and makes available for public inspection a written decision setting forth its determinative reasoning.

- 5) The purchase or lease of real property for the use of the public body, including meetings held for the purpose of discussing whether a particular parcel should be acquired.
- 6) The setting of a price for sale or lease of property owned by the public body. This is a narrow exception and does not encompass general discussions about whether to dispose of public property.<sup>39</sup>
- 7) The sale or purchase of securities, investments, or investment contracts. This exception shall not apply to the investment of assets or income of funds deposited into the Illinois Prepaid Tuition Trust Fund.
- 8) Security procedures, school building safety and security, and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff, the public, or public property.
- 9) Student disciplinary cases.
- 10) The placement of individual students in special education programs and other matters relating to individual students.
- 11) 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. Probable or imminent means there must be reasonable grounds to believe that a lawsuit is more likely than not to be instituted or that such an occurrence is close at hand.<sup>40</sup> Finally, boards must be careful to only discuss the strategies, postures, theories, and consequences of the litigation and not discuss the underlying decision or course of action that could potentially give rise to litigation.<sup>41</sup>
- 12) The establishment of reserves or settlement of claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if otherwise the disposition of a claim or potential claim might be prejudiced, or the review or discussion of claims, loss or risk management information, records, data, advice or communications from or with respect to any insurer of the public body or any intergovernmental risk management association or self-insurance pool of which the public body is a member.
- 13) 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.
- 14) Discussion of minutes of meetings lawfully closed under this Act, whether for purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06.”

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<sup>39</sup> *Id.*

<sup>40</sup> Ill. Att’y Gen. Op. No. 21-003 (issued March 4, 2021); *The City of Bloomington, Illinois v. Kwame Raoul and Jason Chambers*, 2021 IL App (4<sup>th</sup>) 190539 (April 26, 2021)

<sup>41</sup> *Id.*

- 15) Meetings between internal 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.<sup>2</sup>Procedures for Closed Meetings

## Procedures for Closed Meetings

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

An appropriate motion, for example, would be, "I move that the board go into closed meeting to discuss collective negotiating matters pursuant to Section 2(c)(2) of the Open Meetings Act" or "I move that the board hold a closed meeting to discuss pending or probable or imminent litigation." Note that the motion need not identify the specific items to be discussed, such as the name of the lawsuit, but it must identify the statutory exception that allows the particular closed meeting.

No additional notice is required to close a meeting where the vote to close is taken at a public meeting for which proper notice has been given. In fact, the closed session items do not need to be on the agenda.

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

Note that at a closed meeting the only topics allowed to be discussed are those which are both (a) covered by one of the exceptions, and (b) specified in the vote to hold the closed meeting. In other words, topics not covered by an exception and topics not specifically included in the exception(s) identified in the vote at the open meeting may not be discussed, even though the closed meeting is otherwise proper. For instance, even if a school board properly closed a meeting to discuss setting the sale price of land owned by the district, if the discussion shifts to the general financial state of the district, the meeting needs to be stopped and brought back into open session.<sup>42</sup>

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

## Minutes

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All public bodies, including committees and commissions, must keep written minutes of all their meetings, whether open or closed. OMA prescribes the following minimum requirements for such minutes:

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<sup>42</sup> *Id.*



- 1) The date, time, and place of the meeting;
- 2) The members recorded as either present or absent and whether the members were physically present or present by means of video or audio conference; and
- 3) A summary of the discussion on all matters proposed, deliberated, or decided, and a record of any votes taken.

In addition:

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

In calling for a “summary of discussion on all matters proposed, deliberated or decided,” OMA appears to require that the minutes reflect what discussion occurred and not merely list the topics that were discussed. However, because OMA requires only a summary and not a verbatim account, it appears that only general comments need be included, not quotations.

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

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

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

Minutes must be approved by the public body within 30 days of the meeting or at the public body’s second subsequent regular meeting, whichever is later. Committee meeting minutes need only be approved by the committee and not by the full school board.

All public bodies, including committees and commissions, must also keep a verbatim record of their closed meetings in the form of an audio or video recording. It is recommended that the school board should assign the steps necessary to record the meetings to specific officials, either in board policy and/or board procedure, rather than informal practice. (See Appendix A). These steps should not only include the procedure for recording the meetings, but also for labeling the recording and storing it in a secured and locked location to protect against any disclosure of confidential information. Unless the public body determines that the verbatim recording no longer requires confidential treatment or otherwise consents to disclosure, these recordings shall not be open to public inspection or subject to discovery in any administrative or judicial proceeding other than those seeking to enforce this OMA. In a case brought to enforce OMA, the court, if the judge believes it necessary, must conduct an in camera examination to determine whether there has been a violation of OMA. The record may also be subject to review by the PAC. The verbatim record of closed meetings is not required to be reviewed and may be destroyed no less than 18 months after the completion of the meeting recorded, but only after:

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

## **Closed Meeting Minutes**

The keeping of minutes of closed meetings is required but potentially hazardous. For example, if a school board holds a closed meeting to discuss settlement proposals relative to a matter of pending litigation and records in the minutes the amount it would like to settle for along with the highest amount it is willing to pay, it would be damaging to the district if a copy of such minutes were somehow to get into the hands of the opposing attorney. This is an area where a summary of discussions, rather than verbatim minutes, would be beneficial. Therefore, in such a situation the board president should stress the importance of the confidentiality of such minutes to the members and persuade them that under no circumstances are the contents of the minutes or what was discussed at the closed meeting to be divulged to anyone. This is of particular importance with regard to minutes that involve any student as the disclosure of any information identifiable to a specific student may constitute a violation of federal and State law protecting student records.

Access to the minutes of closed meetings may, however, be provided to duly elected officials or appointed officials filling a vacancy of an elected office in the public body's main office or official storage location, and in the presence of a records secretary, an administrative official of the public body, or any elected official of the public body.

## **Public Inspection**

The minutes of open meetings must be made available for public inspection within 10 days after the school board has approved them. If a school district has a website, the minutes of regular open meetings must be posted on the website within 10 days of the approval of the minutes, and those minutes must remain posted on the website for at least 60 days after their initial posting. Committee meeting minutes should be kept separately, as they are approved by the committee and not by the full school board.

Minutes of closed meetings need not be made available for public inspection until if, and after the public body determines that it is no longer necessary to keep them confidential in order to protect the public interests or the privacy of an individual. It may be that minutes of a closed meeting are never approved for public inspection.

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

OMA requires public bodies to meet to review minutes of all closed sessions every six (6) months or as soon thereafter as is practicable, taking into account the nature and meeting schedule of the public body. OMA states that ad hoc committees shall review closed session minutes at the later of (1) six (6) months from the date of the last review of closed session minutes or (2) at the next scheduled meeting of the ad hoc committee. At such meetings, a determination must be made and reported in an open session that:

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

These semi-annual review meetings should be conducted in closed session. It would be advisable for the school board to adopt a written resolution at the public portion of the meeting stating that the review has been conducted and listing by meeting date which, if any, of the closed meeting minutes are now available for public inspection and that the remainder of the minutes still requires confidential treatment. When a public body, such as a committee with a specific

purpose, is dissolved, disbanded, eliminated, or consolidated by executive action, legislative action or referendum and its functions and responsibility are assumed by a specific unit of local government, that unit of local government shall review the closed meeting minutes of that defunct public body.

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

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Individuals who violate OMA may be tried in criminal court. Conviction is a Class C misdemeanor, which is punishable by a \$1,500 fine and/or 30 days in jail.

When a public body fails to comply with OMA, or if there is probable cause to believe that it failed to comply, any person, including the state’s attorney, may, within 60 days of the alleged illegal meeting, institute a civil suit in the proper circuit court. OMA also extends this time limitation for the state’s attorney by providing that, if facts concerning the meeting are not discovered within the 60-day period, action must be taken “within 60 days of the discovery of a violation by the state’s attorney.” OMA also extends this time limitation to “within 60 days of the decision by the Attorney General” when a person first elects to file a request for review under Section 3.5.

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

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

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

In a civil action brought to enforce this OMA, the court may conduct a private examination of the verbatim recording of a closed meeting if the judge finds it appropriate to determine whether there was a violation of this OMA.

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

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

At least one court has emphasized that its authority does not include invalidating actions taken at open public meetings.<sup>43</sup>

### **Attorney's Fees**

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

## **The Public Access Counselor**

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The Office of Public Access Counselor (PAC) is an office within the Office of the Illinois Attorney General. The attorney general appoints the PAC, who is an attorney licensed to practice in Illinois. The Office of the PAC consists of the PAC, assistant attorneys general, and other staff that the attorney general deems necessary.<sup>44</sup>

### **The Public Access Counselor's Duties**

In regard to OMA, the Illinois Attorney General, through the PAC, has the following powers:

- 1) To establish and administer a program to provide free training for public officials and to educate the public on the rights of the public and the responsibilities of public bodies under OMA. In this regard, every public body shall designate employees, officers, or members to receive training on compliance with OMA. Each public body shall submit a list of designated employees, officers, or members to the PAC. Whenever a public body designates a new employee, officer, or member to receive this training, that person must successfully complete an electronic training curriculum, developed and administered by the PAC, within 30 days after that designation and thereafter must successfully complete an annual training program. Elected or appointed members of a public body must also complete the electronic training curriculum within 90 days of taking the oath of office or assuming responsibilities as a member of the public body. The elected or appointed official must then file a certificate of completion with the public body.
- 2) To prepare and distribute interpretive or educational materials and programs;
- 3) To resolve disputes involving a potential violation of OMA in response to a request for review initiated by an aggrieved party, by mediating or otherwise informally resolving the dispute or by issuing a binding opinion; except that the Illinois Attorney General may not issue an opinion concerning a specific matter with respect to which a lawsuit has been filed;
- 4) To issue advisory opinions with respect to OMA, either in response to a request for review or otherwise. In this regard, a review may be initiated upon receipt of a written request from the head of the public body or its attorney. The request must contain sufficient accurate facts from which a determination can be made. The PAC may request additional information from the public body in order to facilitate the review (5 ILCS 120/3.5(h));

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<sup>43</sup> *Bd. of Educ. of Waukegan Cmty. Unit Sch. Dist. 60 v. Illinois State Charter Sch. Comm'n*, 2018 IL App (1st) 162084, ¶¶ 125-129.

<sup>44</sup> 15 ILCS 205/7(b).

- 5) To respond to informal inquiries made by the public and public bodies;
- 6) To conduct research on compliance issues;
- 7) To make recommendations to the General Assembly concerning ways to improve public access to the processes of government;
- 8) To develop and make available on the Illinois Attorney General's website, or by other means, an electronic OMA training curriculum for employees, officers, and members designated by public bodies; and
- 9) To promulgate rules to implement the above powers.

## **The Complaint Process**

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A person who believes that a violation of OMA by a public body has occurred may file a request for review with the PAC not later than 60 days after the alleged violation. If facts concerning the violation are not discovered within the 60 day period, but are discovered at a later date, not exceeding two years after the alleged violation, by a person utilizing reasonable diligence, the request for review may be made within 60 days of the discovery of the alleged violation. The request for review must be in writing, signed by the requester, and include a summary of the facts supporting the allegation.

Upon receipt of a request for review, the PAC shall determine whether further action is warranted. If the PAC determined from the request for review that the alleged violation is unfounded, the PAC shall so advise the requester and the public body and no further action shall be undertaken. In all other cases, the PAC shall forward a copy of the request for review to the public body within seven working days. The PAC shall specify the records or other documents that the public body shall furnish to facilitate the review. Within seven working days after receipt of the request for review, the public body shall provide copies of the records requested and shall otherwise fully cooperate with the PAC. If a public body fails to furnish specified records or, if otherwise necessary, the Illinois Attorney General may issue a subpoena to any person or public body having knowledge of or records pertaining to an alleged violation of OMA. For purposes of conducting a thorough review, the PAC has the same right to examine a verbatim recording of a meeting closed to the public or the minutes of a closed meeting as does a court in a civil action brought to enforce OMA.

Within seven working days after it receives a copy of a request for review and request for production of records from the PAC, the public body may, but is not required to, answer the allegations of the request for review. The answer may take the form of a letter, brief, or memorandum. Upon request, the public body may also furnish the PAC with a redacted copy of the answer excluding specific references to any matters at issue. The PAC shall forward a copy of the answer or redacted answer if furnished, to the person submitting the request for review. The requester may, but is not required to, respond in writing to the answer within seven working days and shall provide a copy of the response to the public body. In addition to the request for review, and the answer and the response thereto, if any, a requester or a public body may furnish affidavits and records concerning any matter germane to the review.

Unless the PAC extends the time by no more than 21 business days, by sending written notice to the requester and public body that includes a statement of the reasons for the extension in the notice, or decides to address the matter without the issuance of a binding opinion, the PAC, through the Illinois Attorney General, shall examine the issues and the records, shall make findings of fact and conclusions of law, and shall issue to the requester and the public body an opinion within 60 days after initiating review. The opinion shall be binding upon both the requester and the public body, subject to administrative review. The Illinois Attorney General has the authority to file an action in the circuit court of Cook or Sangamon County for injunctive or other relief to compel compliance with a binding opinion, to prevent a violation of OMA, or for such other relief as may be required.

In responding to any written request, the Illinois Attorney General may exercise his or her discretion and choose to resolve a request for review by mediation or by a means other than the issuance of a binding opinion. In this regard, the decision not to issue a binding opinion is not reviewable.

Upon receipt of a binding opinion concluding that a violation of this OMA has occurred, the public body shall either take necessary action as soon as practical to comply with the directive of the opinion or shall initiate administrative review to challenge the opinion. If the opinion concludes that no violation of OMA has occurred, the requester may initiate administrative review.

If the requester files suit, with respect to the same alleged violation that is the subject of a pending request for review, the requester shall notify the PAC, and the PAC shall take no further action with respect to the request for review and shall so notify the public body.

Records that are obtained by the PAC from a public body for purposes of addressing a request for review may not be disclosed to the public, including the requester, by the PAC. Those records, while in the possession of the PAC, shall be exempt from disclosure by the PAC under the Freedom of Information Act (FOIA).

### **Administrative Review**

A binding opinion issued by the Illinois Attorney General (PAC) shall be considered a final decision of an administrative agency, for purposes of administrative review under the Administrative Review Law.<sup>45</sup> An action for administrative review of a binding opinion of the Illinois Attorney General (PAC) shall be commenced in Cook or Sangamon County. As with the Illinois Attorney General's ability to file suit to enforce OMA in either Cook or Sangamon County, this limitation on the counties in which the action may be brought is obviously to make the litigation easier on the Illinois Attorney General's Office, which maintains active offices in both Chicago and Springfield.

### **The "Safe Harbor"**

A public body that relies in good faith on an advisory opinion of the Illinois Attorney General (PAC) in complying with the requirements of OMA is not liable for penalties under OMA, so long as the facts upon which the opinion is based have been fully and fairly disclosed to the PAC.

## **CONCLUSION**

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As indicated previously, the intent of OMA is to have public business conducted openly in order to allow members of the public to be informed citizens and watchdogs for the public good. Certainly, such is a praise-worthy goal for which all public officials should strive. The exceptions listed in OMA were included in recognition of the fact that in certain circumstances it is not in the best interests of the public to have particular matters discussed openly. The exceptions further recognize that certain discussions regarding individuals should first be conducted in private in order to protect the individual's right to privacy.

## **SPECIAL ISSUES**

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### **May a school board hold a meeting via telephone conference call?**

Yes, provided that the number of public body members necessary to constitute a quorum are physically present at the open meeting. In addition, all members must be able to hear each other

<sup>45</sup> 735 ILCS 5/3-101 *et seq.*

and hear the public, and the public must be able to hear all discussions. An unpublicized conference call among a majority of a school board quorum would be in violation of OMA.

The Illinois Attorney General opined in November 1982 (No. 82-041) that telephone conference calls held by a majority of a quorum of a public body for the purpose of discussing public business are meetings under OMA and, therefore, all notice and public accessibility requirements of OMA must be complied with before holding such conferences. It is also proper to conduct a closed meeting, pursuant to one of the exceptions, by way of a telephone conference call, provided that there is compliance with other requirements of OMA.<sup>46</sup>

### **Can one member of a school board participate in a public school board meeting via telephone or video conference?**

If the board has adopted a policy to conform to the requirements and restrictions of OMA to allow such participation, it is permissible. Board members may also attend via remote means during a public health disaster, as described in the Electronic Attendance section, on pg. \_\_ above.

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

One of the continuing problems of closed meetings is how to control disclosure of confidential information by individual board members. There is nothing in the law giving a school board the power to censure or otherwise levy sanctions on one of its members for any reason. The attorney general issued an opinion to this effect in January 1991 (No. 91-001).<sup>47</sup>

On the other hand, there appears to be nothing in the law that could prevent school board members from expressing their feelings by adopting a resolution of censure – although such a resolution would have no legal effect (and perhaps no practical effect, either). However, in one case the court held that by sanctioning a park commissioner for her purported release of closed session material without discussing her behavior with her in closed session first, the commission violated their own sanction policy and denied her due process.<sup>48</sup>

Fortunately, a board cannot be sued by someone who claims he or she was injured merely by such a disclosure. In one case, the court found that there is nothing in OMA that provides a cause of action against a public body for disclosing information from a closed meeting.<sup>49</sup> However, there are various other imperatives for maintaining confidentiality of information, including the privacy rights bestowed by the Illinois School Student Records Act, the confidentiality rights regarding medical records under HIPPA, and the constitutional liberty interests of employees. Information impugning the character of a student or employee that is divulged from a closed meeting could provide the basis for legal action if traceable to an individual board member or the board as a whole.

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<sup>46</sup> *Scott v. Illinois State Police Merit Board*, 222 Ill.App.3d 496 (1st Dist. 1991).

<sup>47</sup> But see *Earnest v. Board of Education of Jasper Community Unit School District*, 371 F.Supp.3d 459 (S.D.Ill. 2019) (finding a board could limit a board member's access to confidential board packet information after the member improperly disclosed student information to a third party; however, the board member was still able to participate in the vast majority of votes, even without access to the confidential information).

<sup>48</sup> *Nelson v. Crystal Lake Park District*, 342 Ill.App.3d 917 (2nd Dist. 2003).

<sup>49</sup> *Swanson v. Board of Police Commissioners*, 197 Ill.App.3d 592 (2nd Dist. 1990), *cert. den.*, 133

### **May a school board hold a closed meeting to discuss “personnel matters?”**

No. Many school districts frequently adopt a motion to go into a closed (executive) meeting to “discuss personnel matters”—such a motion is insufficient under OMA.<sup>50</sup> For example, a proper motion would be to go into a closed meeting to discuss the “employment” or “dismissal” of an individual employee (see pg. 13, exception 1). The attorney general has further stated that this exception covers only discussions relating to specific individuals and does not include a class of employees or officers or an “across the board” pay raise.<sup>51</sup> However, an across the board pay raise may be allowed under Section 2(c)(2) of OMA, which does allow a closed meeting to consider “salary schedules” for different classes of employees, as well as the collective bargaining exception. It is important to make sure you cite the correct exemption to ensure that you comply with OMA.<sup>52</sup>

It is proper under this exception to meet in closed session to discuss the evidence relating to an employee’s suspension from duty.<sup>53</sup> Also, a public body may discuss the reasons for the dismissal of an employee in a closed session and such discussions or knowledge is not therefore suspect or irrelevant.<sup>54</sup>

It is proper for a school district to review an employee’s personnel file in closed session. A personnel file has been defined by Illinois courts as a file including documents such as a resume or application, an employment contract, policies signed by the employee, payroll information, emergency contact information, training records, performance evaluations, and disciplinary records.<sup>55</sup>

It is not proper to discuss the evaluation approach or process for employees, even if that new process for evaluating will affect a specific employee.<sup>56</sup>

### **Can the public body take action on items not on the agenda of the regular meeting?**

No. OMA permits the discussion during regular meetings of items not specifically set forth on the agenda. OMA, however, does not permit the taking of a vote or final action on items or topics not listed on the agenda. It is important to note that at a special or emergency meeting, unlike a regular agenda, a public body cannot even discuss items that did not appear on the agenda for the special or emergency meeting.

### **Is a public body required to provide members of the public with a copy of its “board packet” at a public meeting or before a public meeting?**

No. At the time of an open meeting, a public body is not required to disseminate or provide the public with copies of its “board packet” or reference information. Likewise, the only record requirement before a meeting is an agenda, not the entire board packet. It is important to note, however, that information contained within a “board packet” is subject to the Freedom of Information Act and a member of the public can request copies of that material through FOIA.

<sup>50</sup> *But see Gosnell v. Hogan*, 179 Ill. App. 3d 161 (5th Dist. 1989).

<sup>51</sup> Ill. Atty. Gen. Op. S-726 (1974); Ill. Att’y Gen. Pub. Acc. Op. No. 16-013 (issued December 23, 2016).

<sup>52</sup> In Pub. Acc. Op. No. 16.013 the public body did not cite Section 2(c)(2) as the basis for closed session, so the PAC found that the public body could not rely on it in the Request for Review.

<sup>53</sup> *Scott v. Illinois State Police Merit Board*, 222 Ill. App. 3d 496 (1st Dist. 1991).

<sup>54</sup> *Verticchio v. Divernon Community Unit School District*, 198 Ill. App. 3d 202 (4th Dist. 1990).

<sup>55</sup> *Copley Press, Inc. v. Bd. of Ed. for Peoria School Dist. No 150*, 359 Ill. App. 3d 321, 324 (3rd Dist. 2005).

<sup>56</sup> Ill. Att’y Gen. Op. No. 20-004 (issued June 2, 2020).



### Who can attend a “closed” session?

Only the members of the public body and others who are directly involved in the matter which is the basis for the closed meeting may attend the meeting. For example, witnesses giving testimony regarding a complaint against an employee may attend a meeting that is closed for purposes of discussing discipline of an employee.

## THE ILLINOIS FREEDOM OF INFORMATION ACT

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### An Overview of the Laws Governing Illinois School Records

The Illinois Freedom of Information Act (FOIA) is one of at least five state laws regulating school records and public access thereto:

- 1) FOIA<sup>57</sup> makes all school records open to public inspection and copying except where (a) other statutes expressly forbid public access; (b) a requested record falls under one of the exemptions provided by FOIA, or (c) the requested record was created prior to July 1, 1984 and falls under the purview of the Local Records Act.<sup>58</sup>
- 2) The Local Records Act<sup>59</sup> governs the preservation and disposal of school records and requires public access to financial records created prior to July 1, 1984.
- 3) The Illinois School Student Records Act<sup>60</sup> protects the privacy of individual students by strictly limiting disclosure of their school records. It also provides students and their parents with the right to inspect and to challenge the contents of those records.
- 4) The Illinois Personnel Records Review Act<sup>61</sup> provides an employee access and the right to challenge material in his/her personnel records, and prohibits public access without permission of the employee.
- 5) The Open Meetings Act<sup>62</sup> provides that the minutes of school board meetings must be made available for public inspection within 10 days after the board has approved them. The minutes of closed meetings need not be made available for inspection until the board declares there is no longer a reason to keep them confidential.

Prior to July 1, 1984, when the FOIA became effective, the Local Records Act was the primary statute governing the records of local governments. The Local Records Act still controls the preservation and disposal of records and provides public access to financial records created prior to FOIA effective date.

Today, FOIA is by far the most comprehensive statute governing government records and the most cumbersome for school officials to implement.

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<sup>57</sup> 5 ILCS 140/1 *et seq.*

<sup>58</sup> The Local Records Act governs public access to financial records created before July 1, 1984 and the FOIA governs financial records – as well as other records – created after that date. Which law, if any, governs public access to non-financial records created prior to July 1, 1984 is subject to dispute. The Illinois Attorney General has concluded that the FOIA applies.

<sup>59</sup> 50 ILCS 205/1 *et seq.*

<sup>60</sup> 105 ILCS 10/1 *et seq.*

<sup>61</sup> 820 ILCS 40/0.01 *et seq.*

<sup>62</sup> 5 ILCS 120/1 *et seq.*

## The Local Records Act

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Section 3a of the Local Records Act requires all records and reports “of the obligation, receipt, and use of public funds” to be kept at the school district’s official place of business and made available for “public inspection during regular office hours except when in immediate use by persons exercising official duties which require the use of those records.” Section 3a also allows the school district to require a 24-hour advance written notice of the request to inspect, including a list of the records to be inspected. Section 3a also limits such disclosure where it would constitute an invasion of any person’s right to privacy.

Section 15 of the Local Records Act provides that Section 3a of the Act as it relates to the inspection of records “shall apply only as to records and reports prepared or received prior to” July 1, 1984.

Section 3c of the Local Records Act added provisions regarding severance agreements due to sexual harassment and sexual discrimination. It requires school districts to post and make available for inspection and copying to news media within 72 hours of approval all severance agreements entered into with an employee or contractor because the employee or contractor was found to have engaged in sexual harassment or sexual discrimination. Further, all severance agreements that meet this standard must include the full name and title of the person receiving payment, the amount of the payment, a statement that the employee or contractor was found to have engaged in sexual harassment or sexual discrimination and the date, time, and location of the meeting at which the school board approved the settlement agreement. School districts can withhold such agreements for limited purposes, such as interference with law enforcement or administrative or other legal proceedings or if release would result in the direct or indirect disclosure of the identity of the complainant or endanger the life or physical safety of the complainant.

Section 20 of the Local Records Act also includes a requirement to publicly post on a school district’s website email addresses for school board members, or at minimum, a uniform single email address for the school board.

The remaining provisions of the Local Records Act regarding such matters as disposal and preservation of records, etc., still retain their status as law and are not affected by FOIA.

## The Freedom of Information Act – What It Requires

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### Coverage of FOIA

School boards and all of their committees and subcommittees come within the coverage of FOIA. The definition of the words “public records” is very broad and includes, but is not limited to: all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information, and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body. As such, the analysis of a record is (1) does it relate to the transaction of public business and (2) was it “prepared by or for, or having been or being used by, received by, in the *possession* of, or under the control of any public body.”<sup>63</sup>

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<sup>63</sup> *City of Danville v. Madigan*, 2018 IL App (4th) 170182, ¶19; *Better Government Association v. City of Chicago*, 2020 IL App (1st) 190038, ¶14.

Note, however, that an individual alderman/trustee is not included in the definition of a “public body” under the Act and, therefore, the personal records of an alderman/trustee/board member are not subject to inspection and copying under the Act,<sup>64</sup> except in a few circumstances discussed below. The same concept presumably applies to an individual school board member. However, a recent Illinois Appellate Court decision eroded this concept by finding that the City of Chicago Mayor’s, an elected official, communications on her personal device were subject to FOIA.<sup>65</sup> The Court stated that since the Mayor and Director of the Chicago Department of Public Health can individually bind their public bodies, those officials can function as public bodies without the need for an official meeting and therefore, the *City of Champaign* analysis does not apply.<sup>66</sup>

Email communications which have been prepared, or have been or are being used, received, possessed or under the control of a public body are treated as public records under the Act. This includes all emails and other electronic communications pertaining to public business sent to or from an individual board member’s personal electronic device during an official public meeting.<sup>67</sup> Also, if the school board were to issue electronic devices to its board members, any communication pertaining to public business would be “under the control” of the board and subject to disclosure, regardless of where or when the communication occurred. Finally, any email or electronic message pertaining to the transaction of public business sent between what amounts to a quorum of board members would constitute a public record subject to inspection and copying under the Act. Further emails between the superintendent and a board member or members pertaining to board business would be subject to FOIA. In a recent decision, the Appellate Court went as far as to just presume that communications pertaining to public business by elected officials are prepared for or eventually used by the public body.<sup>68</sup> The crucial distinction is whether the communication concerns the transaction of public business, and not whether the communication was sent from a private or public email account or device.<sup>69</sup>

“Personal” or “private” emails sent or received by school employees on a school’s computers should not be considered public records under the Act because they were not made or received pursuant to any law or ordinance or in connection with the official business of the school and, therefore, do not come under the control of the school.<sup>70</sup>

It is important for affected public officials to be conversant with the types of records that must be provided upon request and those that are exempt.

## Intent of FOIA

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### Section 1 of FOIA indicates that:

Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the state of Illinois 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 as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed

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<sup>64</sup> *Quinn v. Stone*, 211 Ill.App.3d 809 (1st Dist. 1991), *cert. den.*, 141 Ill.2d 559 (Ill. 1991).

<sup>65</sup> *Better Government Association v. City of Chicago*, 2020 IL App (1st) 190038, ¶19.

<sup>66</sup> *Id.*

<sup>67</sup> *City of Champaign v. Madigan*, 992 N.E.2d 629 (4th Dist. 2013).

<sup>68</sup> *Better Government Association v. City of Chicago*, 2020 IL App (1st) 190038, ¶19.

<sup>69</sup> Ill. Att’y Gen. Pub. Acc. Op. No. 16-006 (issued August 9, 2016).

<sup>70</sup> *State of Florida v. City of Clearwater*, 863 So.2d 149 (Fla. 2003).

political judgments, and monitoring government to ensure that it is being conducted in the public interest.

. . . It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with the Act.

However, Section 1 also indicates what purposes the Act is *not* intended to cover or impose:

This Act is not intended to cause an unwarranted invasion of personal privacy, nor to allow the requests of a commercial enterprise to unduly burden public resources, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to access to information.

This Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, state, or federal laws.

In other words, the Act does not require a public body to prepare and keep any new records (however, the furnishing of records located in two different places does not constitute the creation of a new record.)<sup>71</sup> The Act does not require a public body to prepare answers to questions,<sup>72</sup> or to interpret or advise requesters as to the meaning or significance of the public records.<sup>73</sup> A public body is not required to prepare its records in a new format merely to accommodate a request for certain information.<sup>74</sup>

Note that the Act says it is not intended to further the interests of a commercial enterprise. Although the legislative intent is not entirely clear on what this exception means, particularly in light of the addition of Section 3.1 to the Act, public bodies used to be able to refuse to give out information to a business when the only interest the business would have is to use the list for marketing purposes (e.g., a mass mailing to potential customers) or to expand its business.<sup>75</sup> However, the ability of public bodies to do that now is foreclosed by the legislature's inclusion of commercial requests in Public Act 96-542. Now, a public body must respond to a request for records to be used for a commercial purpose within 21 working days after receipt. The response must provide the requester an estimate of the time to provide the records and the fees to be charged, and the public body may require the person to pay in full before copying the requested documents. Alternatively, the public body can deny the request pursuant to one or more of the exemptions set out in this Act, notify the requester that the request is unduly burdensome, and extend an opportunity to the requester to attempt to reduce the request to manageable proportions, the opportunity to confer with the public body, or provide the records requested.

In carving out exceptions, Section 1 of the Act goes on to emphasize that these are "limited exceptions" to the general right of the public to know, and that the Act should be construed in such a manner. Moreover, FOIA pertains only to the availability of information and does not in any way protect the use of the information once received.<sup>76</sup>

The Act further provides in part that if a lawsuit is filed, the court must on motion of the plaintiff order the public body to provide an index of the public records to which access has been denied. The index must include certain specified information. Also, the Act makes it easy for the plaintiff to

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<sup>71</sup> *Hamer v. Lentz*, 132 Ill.2d 49 (Ill. 1989).

<sup>72</sup> *Kenyon v. Garrels*, 184 Ill.App.3d 28 (4th Dist. 1989).

<sup>73</sup> 5 ILCS 140/3.3.

<sup>74</sup> *See Healey v. Teachers Retirement System*, 200 Ill.App.3d 240 (4th Dist. 1990), *cert. den.* 135 Ill.2d 556 (Ill. 1990).

<sup>75</sup> *Zientara v. Long Creek Township*, 211 Ill.App.3d 226 (4th Dist. 1999).

<sup>76</sup> *Zientara v. Long Creek Township*, 211 Ill.App.3d 226 (4th Dist. 1999).

obtain an award of attorney's fees against the public body. However, an attorney proceeding pro se (on the attorney's own behalf and not on behalf of a client) in an action under the Act is not entitled to an award of fees under the Act.<sup>77</sup>

Finally, the Act is to be construed as the exclusive statute on freedom of information unless another state statute creates any additional restrictions on disclosure of information (e.g., provisions relating to juvenile court proceedings and the School Student Records Act) or creates additional obligations for disclosure.

## Presumption of Disclosure

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There is a presumption that all records in the custody of a public body are open to inspection and copying. A public body that asserts that a record is exempt from disclosure has the burden of proving the exemption by clear and convincing evidence.

## Inspection and Copying

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Section 3 of the Act requires public bodies to make available to any person for inspection or copying all public records except for those records expressly made exempt by Section 7 of the Act. If the person requesting a public record submits a written request, the public body must promptly provide such person with a copy of the public record requested (a certified copy must be provided if requested). Also, a public body may not make a unilateral determination to provide a requester with an opportunity to inspect public records when the requestor has expressly sought copies of those records.<sup>78</sup> A public body may not require that a request be submitted on a standard form or require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver. All requests received must be forwarded immediately to the district's designated Freedom of Information Officer or designee.

The public body must comply with a request, extend the time for response, or deny the request within five business days after its receipt. If the written request is denied, the denial must be by letter. Failure to comply with a written request, extend the time for response, or deny a request within five business days after its receipt shall be considered a denial of the request. A public body that fails to respond to a request within the requisite periods set forth in the Act, but thereafter provides the requester with copies of the requested public records may not impose a fee for such copies.

One court found that even though a public body is late in responding to a request for records, once it produces all the records, the merits of a plaintiff's claim for relief in the form of production of information become moot.<sup>79</sup>

In the event the public body cannot fill the request within this five-business-day period, it may obtain an additional five business days if it can meet one of the following seven reasons:

- 1) The requested records are stored in whole or in part at another location;
- 2) The request requires the collection of a substantial number of records;
- 3) The request is couched in categorical terms and requires an extensive search;

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<sup>77</sup> *Hamer v. Lentz*, 132 Ill.2d 49 (Ill. 1989).

<sup>78</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 10-001 (issued March 29, 2010); Ill. Att'y Gen. Pub. Acc. Op. No. 11-007 (issued December 21, 2011).

<sup>79</sup> *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill.App.3d 778 (1st Dist. 1999).

- 4) The public body has failed to locate the requested records in its initial attempt and the search is continuing;
- 5) The requested records require examination and evaluation by a competent person in order to determine which, if any, are exempt under Section 7 of the Act;
- 6) It would unduly burden or interfere with the operations of the public body to fill the request within the initial five working days;
- 7) There is a need for consultation with another public body which has a substantial interest in the determination or in the subject matter of the request.

It must be remembered, however, that the maximum time available to fill a written request is 10 business days, except in the situation of a voluminous or commercial request or a recurrent requestor, discussed below. Whenever a public body extends the time by the additional five business days for one of the seven stated reasons, it must send a letter within the initial five-day period to the person making the request, stating the reason(s) for the delay and the date by which the records will be made available or the request denied. However, the public body can always reach an agreement with the requestor to have additional time to respond.

When responding to FOIA requests, a public body must conduct a reasonable search of its records. Requestors will often challenge the sufficiency of a search, especially if the public body determines that there are no responsive records to the request. A public body should be prepared to detail the search it conducted, including the terms it used and databases searched. Searches must be reasonably calculated to discover all responsive records. According to the Attorney General's Office, this can include searching known aliases, nicknames, or misspellings.<sup>80</sup>

## Records Maintained Online

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A public body is no longer required to copy records that are published and maintained on the public body's website. Public bodies merely need to notify the requestor that the public record is available online and direct the requestor to the website where the record can be reasonably accessed. Requestors can resubmit a FOIA request for the record if they are unable to reasonably access the record online and must explain the inability to reasonably access the online record in their resubmitted FOIA request. If the requestor was unable to access the record online, the public body shall make the requested record available for inspection or copying.

## Burdensome Requests

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In cases where a person makes a request for all records falling within a category, the public body must fill the request unless to do so would unduly burden the public body and there is no way to narrow the request. In order to deny such a request, the burden on the public body must outweigh the public interest in the information sought. In addition, before a public body can rely upon this "burden" exemption, it must allow the person making the request an opportunity to confer with it in an effort to narrow the request to one that can be filled. The opportunity to confer can include discussing and explaining the requestor how documents are maintained and categorized.<sup>81</sup> Once again, if the public body relies upon this "burden" exemption, it must notify the requesting party, specify the reason(s) why it would be unduly burdensome for the public body to comply with the request, and give the requestor an opportunity to narrow. The ultimate

<sup>80</sup> Ill. Att'y Gen Pub. Acc. Op. No. 16-006 (issued August 9, 2017).

<sup>81</sup> Ill. Att'y Gen Op. 21-001, issued January 26, 2021.

standard the public body will have to meet is that compliance must be unduly burdensome, there must be no way to narrow the request, and the burden on the public body must outweigh the public interest in the information.<sup>82</sup> As evidenced by court decisions, there will be situations where the public interest in the information mandates the public body to respond to clearly burdensome requests.<sup>83</sup>

Repeated requests for the same public records by the same person shall be deemed unduly burdensome. In one case, the court found that if one generally requests recorded information, that person may not request the same recorded information “soon thereafter,” even if the person making the request asks for the recorded information in a different format.<sup>84</sup>

## Voluminous Requests

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Public Act 98-1129, effective December 3, 2014, gives public bodies additional time to respond to “voluminous” FOIA requests. A voluminous request is defined as:

A request that (i) includes more than five (5) individual requests for more than five (5) different categories of records or a combination of individual requests that total requests for more than five (5) different categories of records in a period of twenty (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.

The definition takes into consideration requests from a single requester over a period of time thus a requester cannot circumvent the definition by breaking voluminous requests into multiple smaller requests. Note that if a request for a single record such as a report exceeds 500 pages, it is not voluminous. However, multiple records, such as several reports, that collectively exceed 500 pages are considered voluminous.

As with commercial requests and recurrent requestors, voluminous requests do not apply to requests made by news media and non-profit, scientific, or academic organizations if the principal purpose of the request is (1) to access and disseminate information concerning news and current or passing events; (2) for articles of opinion or features of interest to the public; or (3) for the purpose of academic, scientific, or public research or education.

If a request is determined to be a “voluminous request” by the public body, the public body must notify the requester within five business days that the request is being treated as a voluminous request and provide the requestor 10 business days to amend his or her request in such a way that the public body will no longer treat the request as a voluminous request. The requester is under no obligation to modify the request, however.

The initial five day notification must inform the requestor: 1) that the public body is treating the request as a voluminous request; 2) the reasons why the public body is treating the request as a voluminous request; 3) that the requestor has 10 business days to amend the request in such a way that the public body will no longer treat the request as a voluminous request; 4) that if the requestor does not respond within 10 business days or if the request continues to be a voluminous request even after an attempted amendment, the public body will respond to the request and assess

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<sup>82</sup> *Nat'l Assn of Criminal Defense Lawyers v Chicago Police Dept*, 399 Ill. App. 3d 1, 15 (1st Dist. 2010).

<sup>83</sup> *Tyronne Greer v. Board of Education of the City of Chicago*, 2021 IL App (1st) 200429 (1st Dist. 2021) (found that reviewing 28,000 pages of records was not unduly burdensome in light of the significant public interest in releasing records containing racial discrimination).

<sup>84</sup> *AFSCME v. County of Cook*, 136 Ill.2d 334 (Ill. 1990).

any fees the public body may charge under FOIA; 5) that the public body has five business days after the receipt of the requestor's response or the last day for the requestor to amend his or her request, whichever is earlier, to respond to the request; 6) that the public body may extend its time to respond up to an additional 10 business days; 7) that the requestor has a right to a review of the public body's determination by the PAC and provide the contact information of the PAC; and 8) if the requestor fails to accept or collect the responsive records, the public body may still charge the requestor applicable fees and the requestor's failure to pay the fees will be considered a debt due and owed to the public body.

If the request continues to be voluminous or the requestor fails to respond to the public body's initial notification, the public body shall respond to the voluminous request within five business days after it receives the requestor's response; or the final day for the requestor to respond to the initial notification.

The public body's response to the voluminous request needs to contain a denial of the request, provide the records requested, notify the requester that the request is unduly burdensome, and extend an opportunity to the requester to attempt to reduce the request to manageable portions, extend the time to respond by 10 business days, or provide an estimate for the fees to be charged. The public body may require the requester to pay the fees in full before copying the requested documents.

## Rules and Regulations

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A public body may adopt rules and regulations, in conformity with the Act, setting forth the times and places where records will be made available and the persons from whom such records may be obtained. It is advisable for a public body to adopt rules and regulations that provide, among other things, that the actual cost of retrieval and review of records prepared or received prior to July 1, 1984, shall be charged in addition to the cost of reproducing and certifying them. Examples of impermissible rules would be to require that FOIA requests be submitted by mail.<sup>85</sup> If a request for records is denied, the public body must notify the requester in writing of the decision to deny the request, the reason for the denial, including a detailed factual basis for the application of any exemption claimed, and the names and titles or positions of each person responsible for the denial. The public body must also inform such person of the right to review by the PAC, give the address and phone number for the PAC and inform such person of his right to judicial review under Section 11 of the Act.

## School District Directories

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Section 4 of the Act requires every public body to prepare, prominently display at each of its offices, make available for public inspection and copying, and mail out if requested, each of the following two directories:

- 1) A brief description of the public body, including (a) a short summary of its purpose, (b) a block diagram of its functional subdivisions, (c) the total amount of its operating budget, (d) the number and location of all of its separate offices, (e) the approximate number of full and part-time employees, and (f) the identification and membership of all boards, commissions and committees which operate in an advisory capacity relative to the operation of the public body, or which exercise control over its policies or procedures, or to which the public body is required to report and be answerable for its operations.

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<sup>85</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 12-004 (issued January 26, 2012).



- 2) A brief description of how public records may be requested, a directory designating the Freedom of Information officer or officers, the address where requests for public records should be directed, and any fees permitted to be charged to the public under Section 6 of the Act.

If the public body maintains a website, it must also post this information on the website.

## Cataloging of Public Records

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Public bodies must list (catalog) all types or categories of records under their control which were prepared or received after July 1, 1984. Records prepared or received prior to July 1, 1984 need not be listed. However, once such a list has been prepared, it will, in all likelihood, also cover all records under a public body's control prior to July 1, 1984. This list of records must be made available to the public for inspection and copying, must be "reasonably" current, and must be "reasonably" detailed in order to assist the public in obtaining access to public records.

Additionally, Freedom of Information officer(s) must develop a list of documents or categories of records that the public body will immediately disclose upon request.

In the event the public body has stored its records in computers, it must provide the public with a description of how such records may be obtained in a form comprehensible to persons lacking knowledge of computer language or printout formats. The definition of "public records" includes computer tapes within its scope and computer tapes must be made available to the public.<sup>86</sup>

## Fees and Costs

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A public body is allowed to charge fees only to reimburse its actual cost for reproducing and certifying public records and for the use by the public of equipment of the public body to copy records. Inspection of records must be free of charge. With the exception of commercial and voluminous requests, the public body is not allowed to charge for any staff time necessary to retrieve or review the records. Therefore, all salary costs associated with filling requests for public records must be absorbed by the public body. The allowable fees must be charged according to a standard scale of fees and such fee scale must be made public.

The first fifty pages for black and white, letter or legal sized copies must be provided at no charge. The remaining black and white copying charges are capped at 15 cents per page. For copies in color or in a size other than letter or legal, the public body may not charge more than its actual cost for reproducing the records. For electronic records, a public body may only charge for the actual cost of purchasing the recording medium, such as a disc or tape, but cannot charge for the costs of the search for or review of the records, or for the personnel costs associated with producing the records, except as noted below with regards to voluminous requests. Finally, the cost for certifying a copy of a record is capped at one dollar (\$1.00). Note that a public body is not permitted to charge a requester for the cost of preparing duplicate records of the documents provided to the requester in the public body's files.<sup>87</sup>

It is a violation under the Act for a person to knowingly obtain a public record for a commercial purpose without disclosing that it is for a commercial purpose if the public body requests such information.

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<sup>86</sup> *AFSCME v. County of Cook*, 136 Ill.2d 334 (Ill. 1990).

<sup>87</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 10-002 (issued April 27, 2010).

If a requester asks for a document that is maintained in an electronic format, the public body is required to furnish it in the electronic format specified by the requester, if feasible. If not feasible, the public body is to furnish it in the form in which it is maintained by the public body, or in paper format, at the option of the person making the request. The statutory fee applicable to providing paper copies cannot be charged for records furnished in electronic format.

Records are to be furnished without charge or at a reduced charge, as determined by the public body, if the person making the request states the specific purpose for the request and indicates that a waiver or reduction of the fee is in the public interest. A waiver or reduction of the fee is in the public interest if the principal purpose of the request is to obtain information regarding the health, safety, and welfare or the legal rights of the general public and is not for the principal purpose of personal or commercial benefit. The words “commercial benefit” do not apply to requests made by news media when the principal purpose of the request is to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public. In setting the amount of waiver or reduction, the public body may take into consideration the number of records requested and the cost of copying them. For commercial and voluminous requests for electronic records, a public body may charge a fee of up to \$10 per hour spent by personnel in searching for and retrieving a requested record or examining a requested record for necessary redactions. No fees shall be charged for the first eight hours spent by personnel searching for or retrieving a requested record.

If a public body knowingly charges a fee which exceeds its actual cost of reproduction and certification, such excessive fee is considered to be a denial of access to public records for the purpose of judicial review.

In those instances where someone such as an insurance company or an attorney requests a report and also requests “special service” beyond the requirements of the Act, such as that it be mailed within 24 or 48 hours, it should be legally permissible to charge a flat fee of \$5 or \$10 for such “special service.” If such a flat fee is to be charged, the preferred procedure would be to require the requester to submit a written request for “special service” and a statement that the requestor consents to the charge (e.g. \$5 or \$10) for such “special service.”

A public body must provide an estimate of fees to be charged to a recurrent requester and may also require that the recurrent requester pay such fees in full before copying the requested documents.

As mentioned above, a public body may charge fees for producing electronic records for voluminous requests. If a voluminous request is for electronic records and those records are in a portable document format (PDF), the public body may charge up to \$20 for not more than 80 megabytes of data, up to \$40 for more than 80 megabytes but not more than 160 megabytes of data, and up to \$100 for more than 160 megabytes of data. For voluminous requests for electronic records in all other file formats, the public body may charge up to \$20 for not more than two megabytes of data, up to \$40 for more than two but not more than four megabytes of data, and up to \$100 for more than 4 megabytes of data. If the responsive electronic records are in both a portable document format and not in a portable document format, the public body may separate the fees and charge the requester under both fee scales. These fees can still be charged even if the requester fails to accept or collect the records. If a public body imposes this type of fee for a voluminous request, it must provide the requester with an accounting of all fees, costs, and personnel hours in connection with the request. Additionally, if a requester does not pay a fee charged related to his or her FOIA request, the debt shall be considered a debt due and owed to the public body and may be collected like any other debt.

## Freedom of Information Officers

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A public body must designate one or more officials or employees to act as Freedom of Information officer(s). Unless the public records are furnished immediately, Freedom of Information Officers shall receive all requests submitted to the public body under the Act, ensure that the public body responds to requests in a timely fashion, and issue responses under the Act. The Freedom of Information officer(s) are to develop a list of documents or categories of records that will be immediately disclosed by the public body, upon request. Following the receipt of any record request, Freedom of Information officers must:

- 1) Note the date of receipt by the public body.
- 2) Compute the timeline for a response and make that notation on the written request.
- 3) Maintain a copy of the written request, including all documents submitted with the request, until the request is complied with or denied.
- 4) Maintain a file for all original written requests, a copy of the response, a record of any written communication with the requester, and a copy of “other communications.”

The designated Freedom of Information Officers must successfully complete an annual FOIA electronic training course prepared by the PAC of the Illinois Office of the Attorney General. New Freedom of Information officers (designated after January 1, 2010) must complete the training course within 30 days after assuming the position. Completing the training curriculum within the required time is a prerequisite for the Freedom of Information Officer to continue in that position.

## Exemptions from Public Inspection

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Under Section 7(1) of the Act, if any public record that is exempt from disclosure under Section 7 contains any material which is not exempt, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. For example, if the public body has a pre-printed form which includes both exempt and non-exempt material, the public body would give the entire pre-printed form, including all pre-printed material even if it was located where the exempt material was originally inserted, and delete from it the exempt information. In the past it would have been permissible to give only the portion where the non-exempt information was contained.<sup>88</sup>

While reading and interpreting the exemptions contained in Section 7, it is important to remember that Section 1 specifically indicates that the Act is not intended to violate individual privacy or to allow the requests of a commercial enterprise to unduly burden public resources. Any school district claiming an exemption under Section 7 has the burden of proving the information sought to be protected falls within one of the exemptions.<sup>89</sup>

Section 7 contains a rather long list of exemptions (as well as exceptions to the exemptions) and it is not the intent of this chapter to cover or merely repeat each and every exemption and exception. However, some of the more important exemptions and exceptions applicable to school districts are highlighted below:

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<sup>88</sup> *Staske v. Champaign*, 183 Ill.App.3d 1 (4th Dist. 1989), *cert. den.*, 127 Ill.2d 642 (Ill. 1989).

<sup>89</sup> *Wayne County Press, Inc., v. Isle*, 263 Ill.App.3d 511 (5th Dist. 1994).

- 1) Information specifically prohibited from disclosure by federal or state law, e.g., certain student records or records relating to juvenile court proceedings. State law does not encompass local municipal or school district ordinances.<sup>90</sup>

It's important to note that this exemption does not apply when the federal or state statute is silent or ambiguous in regard to the disclosure of public documents.<sup>91</sup>

- 2) Private information, unless disclosure is required by another provision of the Act, a state or federal law or court orders. Private information includes a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, personal email addresses, home addresses, and personal license plates.

While FOIA does not explicitly define a "biometric identifier," the PAC has defined the term as something that refers to the measurement and analysis of a unique physical or behavioral characteristic that identifies a person.<sup>92</sup> This would include records such as a fingerprint or a voice pattern, but not a photograph that appears on a public employee's identification card. Courts have also found that "personal financial information" can extend to names, if the name will reveal information about personal finances, such as scholarship or financial assistance qualification.<sup>93</sup> Also, while a district employee's personal mailing address or email address would fall under this exemption, that same employee's official, public mailing and email address would not be exempt from disclosure.

- 3) Personal information that, if disclosed, would constitute a "clearly unwarranted invasion of personal privacy," unless disclosure is consented to in writing by the individual whose privacy is being invaded. Section 7 further states that disclosure of information that "bears on the public duties" of public employees and officials shall not be considered an invasion of personal privacy. The recent amendments to the Act define an unwarranted invasion of personal privacy to mean the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. Usually an entire document or report will not be exempt under this exemption, rather certain information in documents can be redacted to protect the privacy of an individual.

In determining whether this exemption applies, the PAC and the courts must determine whether the subject's right to privacy outweighs any legitimate public interest in obtaining the information. Both the PAC and the courts tend to favor disclosure when an issue arises, especially in recent years regarding information used in police investigations. There is a strong public interest in information that sheds light on the manner in which law enforcement officials perform their public duties.<sup>94</sup>

The courts and the PAC have repeatedly held that general information about their public body's employees is subject to disclosure under the Act. This includes information such as name, gender, ethnicity, race, etc. Additionally, information that "bears on" a public employee's public duties also must be disclosed under the Act. This has been interpreted to include the following: information contained in public employee's resume and job application that relates to his/her qualifications for public employment, employment

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<sup>90</sup> *City of Chicago v. Janssen Pharmaceuticals*, 2017 IL App (1st) 150870.

<sup>91</sup> *Better Government Ass'n v. Zaruba*, 21 N.E.3d 516 (2nd Dist. 2014).

<sup>92</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 14-008 (issued August 19, 2014).

<sup>93</sup> *Timpone v. Illinois Student Assistance Commission*, 2019 IL App (1st) 181115, ¶26-41.

<sup>94</sup> Ill. Att'y Pub. Acc. Op. No. 12-006 (issued March 16, 2012).

contracts,<sup>95</sup> timesheets, day off requests,<sup>96</sup> sick time, personal time, days off, administrative evaluations of employees, student evaluations of teachers (with student information redacted), complaint letters against employees that would not expose the identity of the complainant, documents related to the dismissal of an employee, details of a settlement agreement between the public body and a former employee.

The Illinois Appellate Court has held that a newspaper's request for student information from a school district falls squarely within an exemption from disclosure under FOIA for personal information contained in student files.<sup>97</sup> The data requested in that case was information relating to students such as free or reduced lunch eligibility, receipt of financial aid, medical status, guardianship status, special education status, and bilingual status. The court held that such information was private and confidential. Whether the student would be identifiable and whether the newspaper would improperly use the information was irrelevant under the exemption. Similarly, a newspaper's request for the statements of witnesses involved in an investigation of sexual misconduct of a school coach was also properly denied by the university.<sup>98</sup> The information was exempt from disclosure entirely because the statements contained highly personal information that would allow the students involved to be identified by the contents of the statement even if their names were redacted.

Other examples of what the courts and the PAC have determined are subject to redaction under this exemption include: names and addresses of enrolled students and their parents, names of minors, other student information (including ID numbers, ethnicity, languages spoken), dates of birth, handwritten signatures, marital status, documents regarding an employee's intent to take maternity leave, handwritten notes on timesheets, GPAs and test scores (either of a student or an employee), medical information, insurance policy information, personal appointments on employee's calendar, explanation for an employee requesting time off, the name of someone reporting teacher misconduct who asked to remain anonymous, and information regarding a public employee's past salary from a private employer listed on the employee's employment application.

- 4) Records in the possession of any public body created in the course of administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for law enforcement proceedings, but only to the extent disclosure would:
  - a. Interfere with pending or reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency that is the recipient of the request;
  - b. Interfere with active administrative proceedings conducted by the public body that is the recipient of the request;
  - c. Create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing;
  - d. Unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source or persons filing complaints with or providing information to administrative, investigative, law enforcement, and penal agencies; provided, however, traffic accident reports, rescue reports, and identification of

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<sup>95</sup> *Stern v. Wheaton-Warrenville Community Unit Sch. Dist.* 200, 233 Ill.2d 396 (Ill. 2009).

<sup>96</sup> Ill. Att'y Pub. Acc Op. No. 21-005 (issued June 2, 2021)

<sup>97</sup> *Tribune Co. v. Bd. of Ed.*, 332 Ill. App.3d 60 (1st Dist. 2002).

<sup>98</sup> *State-Journal Register v. University of Illinois Springfield*, 994 N.E.2d 705 (4th Dist. 2013).

witnesses to traffic accidents may be released, except in a case where there is an ongoing criminal investigation conducted by the agency that is the recipient of the request;

- 5) Preliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion thereof shall not be exempt when the record is publicly cited and identified by the head of the public body. Citing by the head of the public body can include heads of departments, not just the head elected official.

This exception protects the opinions that public officials form while creating government policy. It does not protect factual material or final decisions of the public body. When considering if a document is covered, look to see if it is both predecisional, occurring prior to the adoption of an agency policy and deliberative, something related to the process by which policies or decisions are formulated.<sup>99</sup> A recent decision also suggests that the record has to relate to an underlying *substantive* government policy or action.<sup>100</sup> The purpose of this exemption is to protect the communications process and encourage a frank and open dialogue on matters of governmental concern in order to make an informed policy decision.

Communications with parties representing independent interests cannot be characterized as intra-agency communications. Therefore, communications between a public body and a third party, like a not-for-profit organization, would not be covered under this exemption. However, documents created by a consultants hired by the public body that the public body relies on in a decision making process are considered exempt because the consultant does not represent an interest of its own, or the interest of another client, when it advises the public body that hires it.<sup>101</sup>

In addition to documents that are clearly recommendations, drafts, or notes, some documents considered exempt under this section include: internal investigation deliberations, hiring criteria form, discussions on proposed policy changes, communications discussing or scoring bids, communications discussing how to address a controversy, including strategies for addressing the public, and documents prepared by a consultant that a public body uses in its decision making process.

Examples of documents not considered exempt under this section include: EEOC complaints, interview schedules, list of bidders, statistical information, lists of employees with misconduct complaints,<sup>102</sup> information on an employment application and resume that is purely factual,<sup>103</sup> and unsigned agreements that have affected subsequent board actions.

- 6) Trade secrets or commercial or financial information obtained from a person or business where the trade secrets or commercial or financial information are furnished under a claim that they are proprietary, privileged, or confidential, and that disclosure of the trade secrets or commercial or financial information would cause competitive harm to the person or business, and only insofar as the claim directly applies to the records requested. It is

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<sup>99</sup> *Chicago Tribune Co. v Cook County Assessor's Office*, 2018 IL App (1st) 170455, ¶28; *Fisher v. Office of the Attorney General*, 2021 IL App (1st) 200225, ¶27.

<sup>100</sup> *Chicago Pub. Media v. Cook Cty. Off. of the President*, 2021 IL App (1st) 200888

<sup>101</sup> *Harwood v. McDonough*, 344 Ill. App. 3d 242 (1st Dist. 2003); *Fisher v. Office of the Attorney General*, 2021 IL App (1st) 200225.

<sup>102</sup> *Kalven v. City of Chicago*, 7 N.E.3d 741 (1st Dist. 2014).

<sup>103</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 14-015 (issued November 25, 2014).

important to note that this exception only applies if information is furnished under a claim that it is proprietary and the release of the information would cause competitive harm.

A trade secret must include information that (1) would either inflict substantial competitive harm or (2) make it more difficult for the public body to induce people to submit similar information in the future.<sup>104</sup> In order to show substantial competitive harm resulting from disclosure of information alleged to be exempt from FOIA as trade secrets or commercial or financial information, the agency resisting request for disclosure must show by specific factual or evidentiary material that (1) person or entity from which information was obtained actually faces competition, and (2) substantial harm to competitive position would likely result from disclosure of information in agency's records.<sup>105</sup> The PAC has determined that records documenting the publicly funded cost of services purchased by a public body and financial terms of lease agreements do not fall under the scope of this exemption.<sup>106</sup>

- 7) Proposals and bids for any contract, grant, or agreement, until an award or final selection is made. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made.
- 8) Valuable formulae, computer geographic systems, designs, drawings, and research data obtained or produced by any public body when disclosure could reasonably be expected to produce private gain or public loss. The exemption for "computer geographic systems" provided in this paragraph does not extend to requests made by news media as defined in Section 2 of this Act when the requested information is not otherwise exempt and the only purpose of the request is to access and disseminate information regarding the health, safety, welfare, or legal rights of the general public. The PAC has determined that financial terms and other basic terms of a lease are not "valuable formulae" under this exemption.<sup>107</sup>
- 9) The following information relating to educational matters:
  - a. Test questions, scoring keys, and other examination data used to administer an academic examination.
  - b. Information received by a primary or secondary school, college, or university under its procedures for the evaluation of faculty members by their academic peers;
  - c. Information concerning a school or university's adjudication of student disciplinary cases but only to the extent that disclosure would unavoidably reveal the identity of the student; and
  - d. Course materials or research materials used by faculty members.
- 10) Architects' plans, engineers' technical submissions, and other construction related technical documents for projects not constructed or developed in whole or in part with public funds and the same for projects constructed or developed with public funds, including but not limited to power generating and distribution stations and other transmission and distribution facilities, water treatment facilities, airport facilities, sports stadiums, convention centers, and all government owned, operated, or occupied buildings, but only to the extent that disclosure would compromise security.

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<sup>104</sup> *Bluestar Energy Services, Inc. v. Illinois Commerce Commission*, 871 N.E.2d 880 (1st Dist. 2007).

<sup>105</sup> *Cooper v. Department of Lottery*, 640 N.E.2d 1299 (1st Dist. 1994).

<sup>106</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 14-005 (issued June 30, 2014); Ill. Att'y Gen. Pub. Acc. Op. No. 14-016 (issued December 2, 2014); Ill. Att'y Gen. Pub. Acc. Op. No. 15-002 (issued January 23, 2015).

<sup>107</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 14-016 (issued December 2, 2014).

- 11) Minutes of meetings of public bodies closed to the public as provided in the Open Meetings Act until the public body makes the minutes available to the public under Section 2.06 of the Open Meetings Act.
- 12) Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies.

Communications protected by attorney-client privilege are within the scope of this exemption. In order to assert this exemption a public body must show that (1) a statement originated in confidence that it would not be disclosed; (2) it was made to an attorney acting in his legal capacity for the purpose of securing legal advice or services; and (3) it remained confidential. The exemption applies both to communications from the public body to its attorney and from the attorney to the public body. Typical documents that would be exempted under this section would be memorandum, letters, emails, or other records prepared by counsel to the public body containing legal advice and analysis, as well as any related attachments.

However, attorney billing invoices are generally not exempt under this section. Billing invoices usually contain general descriptions of services performed, such as holding a telephone conference, exchanging emails, or drafting or revising a memo. To the extent that individual billing entries include detailed descriptions of legal services that reveal privileged information, those descriptions may be redacted from the invoices. However, general descriptions of tasks that an attorney performed would not reveal privileged information and may not be withheld. Similarly, the dates on which services were performed, the attorneys' initials, the time spent on the tasks described, and the amounts billed do not disclose privileged material and must also be produced.<sup>108</sup>

- 13) Records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed.

Records relating to an internal investigation of misconduct that do not result in a formal adjudication proceeding do not relate to an "adjudication" within the meaning of this exemption and are not exempt.<sup>109</sup> The Illinois Appellate Court has distinguished an adjudication from an investigation in determining whether a school board's motion for dismissal of an employee constituted an adjudicatory dismissal order even though the employee elected his right to a hearing under section 24-12 of the School Code.<sup>110</sup> In that case, the court emphasized that investigative activities which precede final determination are not components of an adjudication. The function of investigating is distinct from the function of adjudication. A hearing officer during an adjudicatory proceeding hears and weighs evidence, while the school board simply investigates and gathers the evidence. The *Spangler* court determined that the legislature intended to leave the function of investigating and charging to the local school board and all adjudicatory functions were placed with a hearing officer.<sup>111</sup> The PAC relied on this distinction to determine that any factual records that exist independently of any internal investigation do not become

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<sup>108</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 14-002 (issued April 15, 2014).

<sup>109</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 13-011 (issued June 11, 2013).

<sup>110</sup> *Bd of Educ. of Cmty. Consol. School Dist. No. 54 v. Spangler*, 328 Ill. App. 3d 747 (1st Dist. 2002).

<sup>111</sup> *Id.* at 757.



“adjudicatory” simply because they are relied upon by the public body during the course of its investigation into the misconduct of one of its employees.<sup>112</sup>

- 14) Administrative or technical information associated with automated data processing operations, including but not limited to software, operating protocols, computer program abstracts, file layouts, source listings, object modules, load modules, user guides, documentation pertaining to all logical and physical design of computerized systems, employee manuals, and any other information that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt under this Section.
- 15) Records relating to collective bargaining matters but not including the final contract or agreement which is entered into.
- 16) Test questions, scoring keys, and other examination data used to determine the qualifications of an applicant for a license or employment. This exemption applies to all types of testing including academic, physical, or psychological testing.<sup>113</sup>
- 17) The records, documents and information relating to real estate purchase negotiations until those negotiations have been completed or otherwise terminated. With regard to a parcel involved in a pending or actually and reasonably contemplated eminent domain proceeding under the Eminent Domain Act, records, documents, and information relating to that parcel shall be exempt except as may be allowed under discovery rules adopted by the Illinois Supreme Court. The records, documents, and information relating to a real estate sale shall be exempt until a sale is consummated. Merely contemplating entering into negotiations for the purchase of land would not be enough to be considered a “real estate purchase negotiation.” For this exemption to apply, the public body needs to have more than site analysis and evaluation activity of a parcel; it needs a plan for acquiring a specific site.<sup>114</sup>
- 18) Certain information relating to an intergovernmental risk management association, self-insurance pool, or jointly self-administered health and accident cooperative or pool. This includes any insurance or self-insurance claims, loss or risk management information, records, data, advice, or communications. This exemption does not include settlement amounts when the settlements are paid by a public body’s governmental risk self-insurance pool.<sup>115</sup>
- 19) Information that would disclose or might lead to the disclosure of secret or confidential information, codes, algorithms, programs, or private keys intended to be used to create electronic signatures under the Uniform Electronic Transaction Act.
- 20) Vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community’s population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public. The PAC has interpreted this exemption to be applicable to assessments, measures, policies, and plans designed to address potential attacks targeted at the destruction or contamination of a community’s population or infrastructure—i.e. a school. However, this

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<sup>112</sup> Ill. Att’y Gen. Pub. Acc. Op. No. 13-011 (issued June 11, 2013); *see also Kalven v. City of Chicago*, 7 N.E.3d 741 (1st Dist. 2014)(holding that information contained in police complaint registers are not exempt from disclosure because they are not adjudications but merely an effort to gather facts).

<sup>113</sup> *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762 (1st Dist. 2009).

<sup>114</sup> *Osran v. Bus*, 226 Ill. App. 3d. 704 (2nd Dist. 1992).

<sup>115</sup> Ill. Att’y Gen. Pub. Acc. Op. No. 11-004 (issued April 15, 2011).

exemption does not generally exempt “details pertaining to the mobilization or deployment of personnel or equipment.” Rather, it only exempts such information to the extent that the disclosure “would constitute a clear and present danger to the health or safety of the community,” and “only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the [particular types of measures identified in the first sentence of the definition] or the safety of the personnel who implement them or the public.”<sup>116</sup> As a reminder, portions of a safety or response plan that are not exempt, would need to be produced and a public body would need to redact the exempt portions.<sup>117</sup> Finally, the burden for proving this subsection is different, and a public body only has to show that there is a reasonable expectation that the release will pose a security risk.<sup>118</sup>

- 21) Information about students exempted from disclosure under Sections 10-20.38 or 34-18.29 of the School Code, and information about undergraduate students enrolled at an institution of higher education exempted from disclosure under Section 25 of the Illinois Credit Card Marketing Act of 2009.
- 22) The names, addresses, or other personal information of persons who are minors and are also participants and registrants in programs of park districts, forest preserve districts, conservation districts, recreation agencies, and special recreation associations.
- 23) The names, addresses, or other personal information of participants and registrants in programs of park districts, forest preserve districts, conservation districts, recreation agencies, and special recreation associations where such programs are targeted primarily to minors.
- 24) The report submitted to the State Board of Education by the School Security and Standards Task Force under item (8) of subsection (d) of Section 2-3.160 of the School Code and any information contained in that report.
- 25) A public body’s credit card numbers, debit card numbers, bank account numbers, Federal Employer Identification Number, security code numbers, passwords, and similar account information, the disclosure of which could result in identity theft or impersonation or defrauding of a governmental entity or a person.
- 26) Records concerning the work of the threat assessment team of a school district pursuant to Section 45 of the School Safety Drill Act.

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<sup>116</sup> Ill. Att’y Gen. Pub. Acc. Op. No. 11-002 (issued February 25, 2011).

<sup>117</sup> *Labs v. City of Chicago Mayor’s Office*, 2021 IL App (1st) 192083.

<sup>118</sup> *Sun-Times v. Chicago Transit Auth.*, 2021 IL App (1st) 192028.

## Additional Statutory Exemptions

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Section 7.5 of the amended Act compiles various exemptions to disclosure found in statutes other than the Act and provides that to the extent provided for by the statutes the information is exempt from inspection and copying. Below are the statutory exemptions that may relate to school districts:

- 1) All information determined to be confidential under Section 4002 of the Technology Advancement and Development Act.
- 2) Library circulation and order records identifying library users with specific materials under the Library Records Confidentiality Act.
- 3) Information and records held by the Department of Public Health and its authorized representatives relating to known or suspected cases of sexually transmissible disease or any information the disclosure of which is restricted under the Illinois Sexually Transmissible Disease Control Act.
- 4) Information the disclosure of which is exempted under Section 30 of the Radon Industry Licensing Act.
- 5) Firm performance evaluations under Section 55 of the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act.
- 6) Information the disclosure of which is restricted and exempted under Section 50 of the Illinois Prepaid Tuition Act.
- 7) Information the disclosure of which is restricted and exempted under the State Officials and Employees Ethics Act, and records of any lawfully created state or local inspector general's office that would be exempt if created or obtained by an executive inspector general's office under that Act.
- 8) Information contained in a local emergency energy plan submitted to a municipality in accordance with a local emergency energy plan ordinance that is adopted under Section 11-21.5-5 of the Illinois Municipal Code.
- 9) Information prohibited from being disclosed by the Personnel Records Review Act (820 ILCS 40) (PRRA). Section 11 of the PRRA provides that "this Act shall not be construed to diminish a right of access to records already otherwise provided by law, provided that disclosure of performance evaluations under FOIA shall be prohibited. Although section 8 of the PRRA directs an employer to delete "disciplinary reports, letters of reprimand, or other record information," the PRRA does not prohibit disclosure of any records other than performance evaluations. No provision of the PRRA prohibits a public body from disclosing resumes or employment applications."<sup>119</sup>
- 10) Information prohibited from being disclosed by the Illinois School Student Records Act (105 ILCS 10/1 *et seq.*). The Illinois Supreme Court determined that this exemption does not prohibit the disclosure of masked and scrambled student records where the individual identifying information was deleted.<sup>120</sup> Based on that decision, the PAC determined that a school district was required to release raw data of ITBS math scores for every fourth grader in the district because the students' names and information could be de-identified, which according to Bowie would not make the information a student record.<sup>121</sup>

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<sup>119</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 14-015 (issued November 25, 2014).

<sup>120</sup> *Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill. 2d 373 (Ill. 1989).

<sup>121</sup> Ill. Att'y Gen Op. No. 12-014 (2012).

- 11) All identified or de-identified health information in the form of health data or medical records contained in, stored in, submitted to, transferred by, or released from the Illinois Health Information Exchange, and identified or de-identified health information in the form of health data and medical records of the Illinois Health Information Exchange in the possession of the Illinois Health Information Exchange Authority due to its administration of the Illinois Health Information Exchange.
- 12) Information which is exempted from disclosure under section 5-1014.3 of the Counties Code or Section 8-11-21 of the Illinois Municipal Code.
- 13) Information exempt under Section 70 of the Higher Education Student Assistance Act, which exempts the personal identity and address of a scholarship, grant, or other financial assistance applicant or recipient under a non-discretionary program administered by the Commission, including, but not limited to, the Monetary Award Program under Section 35 of this Act, where eligibility data is obtained from FAFSA or is otherwise protected from disclosure by law.
- 14) Information or data reported by an employer to the Department of Human Rights pursuant to Section 2-108 of the Illinois Human Rights Act, which applies to settlements and adverse judgments based on allegations of sexual harassment or unlawful discrimination.
- 15) Information that is exempt from disclosure under Section 16.8 of the State Treasurer Act, which covers the Illinois Higher Education Savings Program.
- 16) Information prohibited from being disclosed under the Illinois Educational Labor Relations Act, which includes employees' personal information (home address, including zip code, date of birth, email address and phone numbers), information personally identifying employee membership or membership status in a union, and emails or other communications between a labor organization and its members.

## Documents in the Possession of Contracting Parties

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Section 7(2) of the Act which provides that public records shall also include those records in the possession of a party with whom a public agency has contracted to perform a governmental function on behalf of a public body and are not otherwise exempt from disclosure. Governmental function is defined as “a government agency’s conduct that is expressly or impliedly mandated or authorized by constitution, statute, or other law and that is carried out for the benefit of the general public.”<sup>122</sup> Section 11(j) provides for civil penalties to be imposed “upon the public body.” Thus, the public entity must ensure that the private party who contracts with a public agency to perform a governmental function complies with the requirements of the Act. It is important to note that the Illinois Supreme Court has ruled that the Illinois High School Association does not perform governmental functions for school districts pursuant to Section 7(2) of FOIA.<sup>123</sup>

## Settlement and Severance Agreements

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Settlement and severance agreements are unquestionably public records under FOIA. Section 2.20 of FOIA expressly provides that “all settlement and severance agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under section 7 of may be redacted.”

<sup>122</sup> *Better Government Association v. Illinois High School Administration*, 2017 IL 121124, ¶63 (Ill. 2017).

<sup>123</sup> *Id.* at ¶64.

The legislative history of Senate Bill 189 (which, as Public Act 96-542, effective January 1, 2010, added section 2.20 to FOIA), reflects that the General Assembly intended to severely limit, if not to prohibit altogether, the practice of public bodies incorporating restrictions in settlement agreements in order to avoid being required to disclose the terms of the settlement agreements under FOIA. Further, the legislative history of House Bill 303 (which was enacted by Public Act 99-468) amended Section 2.20 to explicitly state that severance agreements are subject to disclosure, even if they contain confidentiality provisions.

Settlement agreements contain terms and conditions relating to the payment of funds by or on behalf of a public body to a party in exchange for their release of an alleged or potential claim against the public body or its employee. Similarly, severance agreements are the mutual agreements between a public body and an employee for the employee's resignation in exchange for payment by the public body. Article VIII, Section 1(c) of the Illinois Constitution of 1970 provides that "records of the obligation, receipt, and use of public funds of the state, units of local government, and school districts are public records available for inspection by the public according to law." The legislature determined that the public has a right to know the purposes for which public funds are expended, including the identity of those who receive the funds. Even assuming that the disclosure of these documents would constitute an invasion of the complainant's privacy under section 7(1)(c) of FOIA, in view of the countervailing interest of the public in information concerning the use of public funds, the invasion of privacy would not be "unwarranted."

Even if the settlement or severance agreement contained a nondisclosure agreement, the record would still need to be disclosed under FOIA. This is because the confidentiality provisions in the settlement or severance agreements entered into by public bodies are contrary to the specific language of section 2.20 and the legislative intent underlying that section.<sup>124</sup>

## Denials of Requests for Records

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In the event that requested disclosure of public records is denied, each public body must notify the requester in writing of:

- 1) The decision to deny the request;
- 2) The reasons for the denial, including a detailed factual basis for the application of any exemption(s) claimed;
- 3) The names and titles or positions of "each person responsible for the denial;" (whether this is more inclusive than merely the person or persons who actually make the decision to deny is unclear); and
- 4) The requester's right to review by the PAC; to include the address and phone number for the PAC, and the requester's right to judicial review under Section 11 of the Act. Any person denied access to inspect a copy of public records may file suit for injunctive or declaratory relief.

If the request is denied on the basis of one or more of the exemptions contained in Section 7 of the Act, the notice of denial must specify the exemption(s) claimed to authorize the denial and the specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority.

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<sup>124</sup> Ill. Att'y Gen. Pub. Acc. Op. No. 14-004 (issued May 9, 2014).

Copies of all notices of denials must be retained in a single central office file that is open to the public and indexed according to the type of exemption asserted (i.e., as listed in Section 7) and to the extent feasible, according to the type of records requested, (e.g., board meeting minutes, preliminary investigative reports, etc.).

A person making a request for public records is deemed to have exhausted his or her administrative remedies if the public body fails to act within the time periods provided in Section 3 of the Act.

Finally, it must be remembered that Section 10-16 of the School Code requires the superintendent to report to the board at each regular meeting any requests made of the district under FOIA and the status of the district's response.

## **The Role of the Public Access Counselor**

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Whenever a person's request to inspect or copy a public record is denied by a public body, that person may file a request for review with the PAC (a position established in the Office of the Attorney General effective as of January 1, 2010) not later than 60 days after the date of the final denial. The request for review must be: 1) in writing, 2) signed by the requester, and must include: 3) a copy of the request for access to records and any responses from the public body. *See 15 ILCS 205/7 for more on the PAC.*

A person whose request to inspect or copy a public record is made for a commercial purpose may not file a request for review with the PAC, except for the limited purpose of reviewing whether the public body properly determined that the request was made for a commercial purpose. Similarly, a person whose request was treated as a voluminous request may only file a review with the PAC for the purpose of reviewing whether the public body properly determined that the request was a voluminous request.

Upon receipt of a request for review, the PAC must determine whether further action is required. Should the PAC determine that the alleged violation is unfounded, he or she must advise both the requester and the public body and no further action may be taken. In all other cases, the PAC must forward a copy of the request for review to the public body within seven business days after receipt and must specify the records or other documents that the public body must furnish. Within seven business days after receipt of the request for review from the PAC, the public body must provide copies of the requested records and fully cooperate with the PAC.

In the event the public body fails to provide the specified records, the attorney general may issue a subpoena to any person or public body having knowledge of or records pertaining to a request for review of a denial of access to records under the Act. To the extent that records or documents produced by a public body contain information that the public body claims is exempt from disclosure under Section 7 of the Act, then the PAC may not further disclose that information.

Within seven business days after a public body receives a copy of a request for review and for production of records from the PAC the public body may, but it is not required to, answer the allegations of the request for review. If the public body decides to answer, the answer may be by letter, brief, or memorandum. If there is an answer by the public body, then the PAC must forward a copy of the answer to the person submitting the request for review, with any alleged confidential information redacted from the copy. Then the requester may, but is not required to, respond in writing to the answer within seven working days and must supply a copy of the response to the public body.

If the PAC does not extend the time by no more than 30 business days by sending written notice to the requester and the public body that includes a statement of the reasons for the extension in

the notice, or decides not to issue a binding opinion, the attorney general must examine the issues and the records, and must make findings of fact and conclusions of law. The attorney general must also issue to the requester and the public body an opinion in response to the request for review within 60 days after its receipt. The opinion is binding upon both the requester and the public body, and is subject to administrative review under Section 11.5 of the Act. The attorney general has the option to resolve a request for review by mediation or by means other than the issuance of a binding opinion. Any decision not to issue a binding opinion is not reviewable.

If a public body receives a binding opinion concluding that it violated the Act, the public body must either take immediate necessary action to comply with the directive of the opinion or it must initiate administrative review under Section 11.5 of the Act. On the other hand, if the opinion concludes that no violation has occurred, the requester may initiate administrative review. If the public body fails to comply with the PAC's binding opinion or initiate administrative review within 35 days, then the requestor can file suit under Section 11 of FOIA. In the circumstance of a public body failing to comply with a binding opinion, there will be a rebuttable presumption that the public body willfully and intentionally failed to comply with FOIA, increasing the risk for penalties. The public body will have to rebut this presumption by showing that it is making a good faith effort to comply with the binding opinion, but that compliance was possible within the 35 day time frame.

If a public body discloses records in accordance with the attorney general's opinion, the public body is immune from all liabilities by reason of such disclosure, and it is not liable for penalties under the Act.

In the event that a requester files suit under Section 11 with respect to the same denial that is the subject of a pending request for review, the requester must notify the PAC, and the PAC may not take any further action with respect to the request for review and must so notify the public body.

Finally, the attorney general may also issue advisory opinions to public bodies regarding compliance with the Act. Furthermore, a review may be initiated upon receipt of a written request from the head of the public body or its attorney, which the request must contain sufficient accurate facts from which a determination can be made. The PAC may request additional information from the public body in order to assist in the review. Any public body that relies in good faith on an advisory opinion of the attorney general in responding to a request is not liable for penalties under the Act, so long as the facts upon which the opinion is based have been fully and fairly disclosed to the PAC.

## **Enforcement of the Act**

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FOIA provides for civil remedies for enforcement of the Act. As noted above, any person denied access to inspect or copy any public record may file a suit for injunctive or declaratory relief. At the time of this writing, no time limit is provided as to when a suit may be brought.

If the court determines the Act was violated, it may enjoin withholding of the records and order disclosure, and the burden is on the public body to establish that its refusal was legitimate. Any public body that asserts that a record is exempt from disclosure has the burden of proving that it is exempt by "clear and convincing evidence." In the event of non-compliance with its order, the court may enforce the order through its contempt-of-court powers.

If a person seeking the right to inspect or receive a copy of a public record "prevails" in a proceeding under the Act, the court must award such person reasonable attorney's fees and costs. As to any such proceeding filed on or after January 1, 2010, in determining what amount of attorney's fees is reasonable, the court must consider the degree to which the relief obtained relates to the relief sought. One issue that has come up with regards to whether to grant attorneys' fees to a

party is when the public body willingly turns over the requested document to the requestor who has already initiated a court proceeding but the court has not ordered the public body to turn over the record. In that scenario, the First Appellate District granted attorneys' fees because it reasoned that the language of the 2010 Amendment to FOIA that changed §11(i) from "substantially prevailed" to "prevailed" was made to ensure plaintiffs could receive attorneys' fees no matter how slight their success.<sup>125</sup> The Second Appellate District, however, did not award attorneys' fees because it believed the legislature's intent with the 2010 amendment was to not award attorneys' fees without a court order to disclose the records sought.<sup>126</sup>

At least one court has determined that a not-for-profit organization that employs a salaried attorney is not entitled to attorneys' fees even if it "prevails" in its FOIA suit against a public body. In that case, the court opined that there was no need to award additional attorneys' fees because the organization was not required to spend additional funds for the purpose of pursuing FOIA requests and the employees who represented the organization had no expectation of receiving additional fees for performing the work.<sup>127</sup>

In addition to attorneys' fees, a public body may be subject to civil penalties if the court finds that the public body willfully and intentionally violated FOIA, or otherwise acted in bad faith. At least two appellate courts have held that this requires that the public body violate FOIA deliberately, by design, or with a dishonest purpose.<sup>128</sup> Section 11 of the Act states that any penalties shall be not less than \$2,500 and not more than \$5,000 for each violation of FOIA. Additionally, the court can charge \$1,000 for each day beyond 30 days the public body does not provide or comply with a court order to provide records, assuming that the public body did not file an appeal or otherwise receive an order from the court for additional time.

No corresponding right for a school district to recover attorneys' fees is included under the Act. The refusal by a school district to furnish a lost record is not a violation of the Act and such refusal does not entitle the plaintiff to an award of attorney's fees.<sup>129</sup>

Finally, a binding opinion issued by the attorney general is considered a final decision of an administrative agency, for purposes of administrative review under the Administrative Review Act (735 ILCS 5/Art. III). An action for review of a binding opinion of the attorney general must be commenced in Cook or Sangamon County. No advisory opinion issued to a public body is to be considered a final decision of the attorney general for purposes of administrative review.

## Similarities and Differences to Federal FOIA

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The Illinois Act is modeled after the Federal Freedom of Information Act (FFOIA)<sup>130</sup> and shares several key provisions with the Federal Act, including exemptions from disclosure relating to personal privacy, investigatory records, and trade secrets. The legislative history of the Illinois Act clearly indicates that the Act's sponsors intended that interpretations of the FFOIA by federal courts will serve as a guide to understanding the provisions of the Illinois Act.

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<sup>125</sup> *Uptown People's Law Center v. Dept. of Corrections*, 7 N.E.3d 102 (1st Dist. 2014).

<sup>126</sup> *Rock River Times v. Rockford Public School Dist.* 205,977 N.E.2d 1216 (2nd Dist. 2012).

<sup>127</sup> *Uptown*.

<sup>128</sup> *Peery v. Madison County State's Attorney's Office*, 2020 IL App (5th) 190016-U; *Williams v. Bruscato*, 2021 IL App (2d) 190971.

<sup>129</sup> *Workmann v. Illinois State Board of Education*, 229 Ill.App.3d 459 (2nd Dist. 1992).

<sup>130</sup> 5 U.S.C. 552 (1976).



Also, other states have adopted acts similar to the Illinois Act. Thus, by examining judicial treatment and interpretation of similar provisions in the Federal Act and other state acts, it is possible to gain some insight into the intent of the Illinois Act and how Illinois courts might rule thereon.

For instance, to determine what constitutes a public record, federal courts have pointed out that mere possession of a record by an agency official does not cause the record to become an agency record subject to disclosure. Rather, there must be some nexus between the record and the agency's work in order for the record to become an "agency record." Note, however, that the Illinois definition of public records is very liberal and is not limited to records required to be kept by law. Illinois courts have kept with the spirit of the federal "nexus" test by declaring that to be "public record" the communication must pertain to the transaction of public business. However, it is broader than the federal test in that to be a public record the communication must have been either; 1) prepared by a public body; 2) prepared for a public body; 3) used by a public body; 4) received by a public body; 5) possessed by a public body; or 6) controlled by a public body.<sup>131</sup>

Both the FFOIA and the Illinois act contain several similar exemptions from disclosure. One such similarity is for information that would constitute a "clearly unwarranted invasion of personal privacy." This provision has been interpreted by federal courts as requiring a balancing of the public interest served by disclosure against the potential invasion of personal privacy. Both the United States Supreme Court and Illinois courts have held that the "personal privacy" exemption is not applicable to corporations under FFOIA and Illinois FOIA, respectively.<sup>132</sup> Illinois has also adopted the same balancing test.<sup>133</sup> However, the federal courts only apply that balancing test once it has been determined that the information sought is similar to "personnel," "medical," or "similar" files.<sup>134</sup> No such test is currently employed by the Illinois courts.

Also regarding the personal privacy exemption, a federal court held that the disclosure of public employees' names and home addresses violates the Privacy Act, stating that federal employees have privacy interests in their names and home addresses that must be protected and that the relevant public interest in disclosure, though not nothing, is outweighed.<sup>135</sup> Similarly, other courts around the country, including Illinois, have found that records containing a detailed synopsis of an individual's career, family relationship and financial status represent the type of information that the exemption was intended to protect.<sup>136</sup> However, because Illinois does not have a Privacy Act akin to the federal Act, the names of public employees are discoverable but their addresses are exempt from disclosure.

Regarding the names and addresses of members of the public who are not public employees, a federal appellate court has upheld the Federal Trade Commission's refusal to disclose the names and addresses of those individuals who had filed complaints with the Commission about "cramming" – the shady practice of putting bogus charges on a person's bill. After weighting the public's interest in knowing the names of the customers against the customers' privacy interests, the court held that "compelling disclosure of the identity of consumers' complaints about cramming would not further

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<sup>131</sup> *City of Champaign v. Madigan*, 992 N.E.2d 629 (4th Dist. 2013).

<sup>132</sup> *FCC v. AT & T Inc.*, 562 U.S. 397 (2011); *Robertson ; Ferguson v. Kelly*, 455 F.Supp. 324 (N.D.Ill.1978).

<sup>133</sup> *Margolis v. Director, Illinois Department of Revenue*, 180 Ill.App.3d 1084 (1st Dist. 1989), *cert. den.* 126 Ill.2d 560 (1989); and *Blumenfeld, Ltd. v. Department of Professional Regulation*, 263 Ill.App.3d 981 (1st Dist. 1993).

<sup>134</sup> *See e.g. Cook v. National Archives & Records Admin.*, 758 F.3d 168 (2nd Cir. 2014); *Prudential Locations LLC v. U.S. Dept. of Housing and Urban Development*, 739 F.3d 424 (9th Cir. 2013).

<sup>135</sup> *Columbia Packing Co., Inc. v. U.S. Dept. of Agriculture*, 417 F.Supp. 651 (D. Mass. 1976); *see also, Bahlman v. Brier*, 462 N.Y.S.2d 381 (N.Y.Sup.Ct. 1983) and *Blumenfeld, Ltd. v. Department of Professional Regulation*, 263 Ill. App.3d 981 (1st Dist. 1993).

<sup>136</sup> *The Lakin Law Firm, P.C. v. Federal Trade Commission*, 352 F.3d 1122 (7th Cir. 2003).

the core purpose [“to expose what the government is doing, not what its private citizens are up to”] of FOIA.”<sup>137</sup>

Based on how Illinois courts have interpreted this exemption thus far, it is highly likely that a similar conclusion would be reached under Illinois FOIA. In fact, one Illinois court has held that the names and addresses of persons who have previously made requests under FOIA are not subject to disclosure to a subsequent individual requesting such information under FOIA, and thus the names and addresses were properly redacted.<sup>138</sup>

A second exemption from disclosure found in both the Federal and Illinois Acts relates to trade secrets. For information to fall within this exemption, it must be shown that it is: (a) commercial or financial; (b) obtained from a person; and (c) privileged or confidential.<sup>139</sup> In one case, a Florida federal court held that the factors to be considered by an agency in exercising its discretion in applying this exemption are whether disclosure would aid the agency in performing its functions, whether harm to producers and the public would result from release of the information, and whether alternatives to full disclosure could serve the public equally well.<sup>140</sup> State courts also have interpreted similar provisions.<sup>141</sup>

Illinois courts, on the other hand, have interpreted “trade secret” similarly and opined it must include information that (1) would either inflict substantial competitive harm or (2) make it more difficult for the public body to induce people to submit similar information in the future.<sup>142</sup> In order to show substantial competitive harm resulting from disclosure of information alleged to be exempt from the Illinois FOIA as trade secrets or commercial or financial information, the agency resisting request for disclosure must show by specific factual or evidentiary material that (1) person or entity from which information was obtained actually faces competition, and (2) substantial harm to a competitive position would likely result from disclosure of information in agency’s records.<sup>143</sup>

A third exemption appearing in the Illinois Act as well as the Federal Act and similar state acts is the exemption for “preliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed, or policies or actions are formulated ...” Similar to Illinois, the United States Supreme Court has held that this exception is intended to encourage frank and open dialogue on matters of governmental concern in order to make an informed policy decision, which would be available for public review.<sup>144</sup> Other cases related to preliminary materials are as follows:

- A court placed the burden of proof on the Department of Corrections to show that a preliminary draft regarding the drugs to be used for lethal injections under the Illinois death penalty statute was exempt from disclosure;<sup>145</sup>
- A county sheriff’s opinionated letter to the city regarding plaintiff’s liquor license application was ruled exempt;<sup>146</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> *Chicago Alliance for Neighborhood Safety v. The City of Chicago*, 348 Ill.App.3d 188 (1st Dist. 2004).

<sup>139</sup> *National Park and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *Consumers Union of U.S. v. Veterans Administration*, 301 F.Supp. 796 (S.D.N.Y. 1969).

<sup>140</sup> *Doctors Hospital of Sarasota, Inc. v. Califano*, 455 F.Supp 476 (M.D. Fla. 1978).

<sup>141</sup> *See Belth v. Insurance Dept. of New York*, 406 N.Y.S.2d 649 (N.Y.Sup.Ct. 1977); *Uribe v. Howie*, 19 Cal.App.3d 194 (Cal.Ct.App. 1971).

<sup>142</sup> *Bluestar Energy Services, Inc. v. Illinois Commerce Commission*, 871 N.E.2d 880 (1st Dist. 2007).

<sup>143</sup> *Cooper v. Department of Lottery*, 640 N.E.2d 1299 (1st Dist. 1994).

<sup>144</sup> *N.L.R.B. v. Sears*, 421 U.S. 132 (1975).

<sup>145</sup> *Hoffman v. Illinois Department of Corrections*, 158 Ill.App.3d 473 (1st Dist. 1987).

<sup>146</sup> *Carrigan v. Harkrader*, 146 Ill.App.3d 535 (3rd Dist. 1986), *cert. den.*, 113 Ill.2d 558 (Ill. 1986).

- A staff analysis of an arbitrator was ruled exempt;<sup>147</sup>
- Arrest records and traffic tickets were ruled not exempt;<sup>148</sup>
- Police “use of force” forms were found exempt;<sup>149</sup> However, in Illinois, police “complaint registers” have been found to be non-exempt because they are only an attempt to ascertain facts versus stating preliminary opinions of public employees.<sup>150</sup>
- Correspondence with consultants was ruled exempt.<sup>151</sup>

The state and federal Acts also exempt from disclosure investigatory records compiled for administrative law enforcement purposes where disclosure would interfere with pending or reasonable contemplated enforcement proceedings.<sup>152</sup> A request seeking work attendance and sick leave records for a public agency’s assistant bureau chief in order to substantiate a “tip” that the official had been taking unaccrued sick leave and improperly using sick leave time to take paid vacations was proper and the records were held to not be exempt under the FFOIA.<sup>153</sup>

Finally, the U.S. Supreme Court recently opined on pre-decisional documents under FFOIA. The U.S. Supreme Court recognized that a document is not final solely because nothing else follows it but rather, one must look at whether the document or communication communicates a policy on which the agency has settled.<sup>154</sup> The analysis is whether the public body treats the document as its final view on a policy matter. In this case, the court found that the Fish and Wildlife Service’s draft biological opinion that it sent to the EPA was pre-decisional.

It is likely that Illinois courts would agree with federal courts that this type of information was not exempt under FOIA. However, while the Illinois FOIA has a similar exemption related to investigatory records, the records in this scenario would be non-exempt based on the privacy exemption. The Illinois PAC has determined that similar records related to the amount of time a public employee is at work or not directly “bears on the public duties” of that employee, and thus would not be an unwarranted invasion of privacy and subject to disclosure under Illinois FOIA. The records would not be exempt under the investigatory records exemption because, according to the PAC, records relating to an internal investigation of misconduct that do not result in a formal adjudication proceeding do not relate to an “adjudication” within the meaning of this exemption and are not exempt.<sup>155</sup> Furthermore, any factual records that exist independently of any internal investigation do not become “adjudicatory” simply because they are relied upon by the public body during the course of its investigation into the misconduct of one of its employees.<sup>156</sup>

Due to several similar provisions in Illinois FOIA and FFOIA, some situations require a determination of whether the Illinois FOIA or FFOIA applies. For example, a newspaper publisher’s claim against a state university’s board of trustees, seeking release of the university’s admission records under the Illinois’ FOIA, arose under state law, thereby precluding a federal court’s subject-matter jurisdiction over the action. In this case, the publisher’s request for information did not depend on

<sup>147</sup> *Kheel v. Ravitch*, 462 N.Y.S.2d 182 (N.Y.Sup.Ct. 1982).

<sup>148</sup> *Johnson Newspaper Corp. v. Stainkamp*, 463 N.Y.S.2d 122 (N.Y.Sup.Ct. 1983).

<sup>149</sup> *Gannett Co. Inc. v. James*, 447 N.Y.S.2d 781 (N.Y.Sup.Ct. 1982).

<sup>150</sup> *Kalven v. City of Chicago*, 7 N.E.3d 741 (1st Dist. 2014).

<sup>151</sup> *Sea Crest Const. Corp. v. Stubing*, 442 N.Y.S.2d 130 (N.Y.Sup.Ct. 1981); *Harwood v. McDonough*, 344 Ill. App. 3d 242 (2003); *Fischer v. Office of Illinois Attorney General by Rao*, 2021 IL App (1st) 200225.

<sup>152</sup> See e.g., *Moorfield v. U.S. Secret Service*, 611 F.2d 1021 (5th Cir. 1980), cert. den. 449 U.S. 909 (1980); *Griffith Laboratories U.S.A. v. Metropolitan Sanitary District*, 168 Ill.App.3d 341 (1988)

<sup>153</sup> *Dobronski v. Federal Communications Commission*, 17 F.2d 273 (9th Cir. 1994)

<sup>154</sup> *United States Fish and Wildlife v. Sierra Club*, 141 S. Ct. 777 (March 4, 2021).

<sup>155</sup> Ill. Att’y Gen. Pub. Acc. Op. No. 13-011 (issued June 11, 2013).

<sup>156</sup> *Id.*

“even a smidgeon” of federal law, no federal agency’s decision had been contested, and the university’s potential defenses under the Illinois Family Educational Rights and Privacy Act (FERPA) and state FOIA arose under questions of state law.<sup>157</sup>

One question that will have to be resolved in Illinois law is whether the motive of the person making the request can be considered.<sup>158</sup> The only discussion of the motivation of the requester by the courts with regards to the Illinois law has been when it comes to fees and awarding attorneys’ fees after litigation when the request was made for commercial purposes.<sup>159</sup> However, the U.S. Supreme Court has stated that “the identity of the requesting party has no bearing on the merits of his or her FOIA request.”<sup>160</sup>

## Complying With FOIA

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### Initial Preparations

In order to comply with the FOIA, school districts must do the following:

- Develop rules and regulations, which involve a number of important local decisions;
- Maintain directories required by the Act; and
- Catalog and index school district records.

## District Rules and Regulations

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FOIA authorizes school districts to adopt rules and regulations that are in conformity with the Act, setting forth the times and places where records will be made available and the persons from whom such records may be obtained. It is essential that such rules and regulations be written and adopted, because there are some important decisions each district must make.

It is suggested that the school board’s policy regarding FOIA should be general and authorize the superintendent to draw up rules and regulations that specify in some detail the procedures for compliance. The school board must also designate the individual or individuals who will serve as the Freedom of Information Officer or Officers.

Here are some major items that should be included in the rules and regulations:

- 1) Designate the Freedom of Information Officers – those individuals who will handle requests for records. Each district probably will want to designate two or more individuals who will receive and process requests for records.
- 2) Establish times when records may be requested, such as during normal office hours.
- 3) Establish the place where requests may be made, presumably the central administrative office.
- 4) Set forth the time deadlines for handling requests. Because these rules will serve as a guide for staff members dealing with requests for records, statutory deadlines should be recited in the rules.

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<sup>157</sup> *Chicago Tribune Co. v. Board of Trustees of University of Illinois*, 680 F.3d 1001 (7th Cir. 2012).

<sup>158</sup> See e.g., *Goodstein v. Shaw*, 463 N.Y.S.2d 162 (N.Y.Sup.Ct. 1983); *News-Press Publishing Co., Inc. v. Good*, 388 So.2d 276 (Fla.App. 1980); *Warden v. Bennett*, 340 So.2d 977 (Fla.App. 1976); *Williams v. I.R.S.*, 345 F.Supp 591 (D.C.Del. 1972).

<sup>159</sup> See e.g. *Rockford Police Benev. and Protective Ass’n, Unit No. 6 v. Morrissey*, 398 Ill. App. 3d 145 (2nd Dist. 2010).

<sup>160</sup> *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

- 5) Set forth the choice of responses that can be made to a request for records.
  - a. Immediately grant the request whenever possible. For example, a request to examine the current district budget probably can be accommodated on the spot.
  - b. Grant the request within five business days.
  - c. Delay granting the request for five additional business days. A written response is required with this option, so the required content for such a response should be made a part of the rules (see Appendix B).
  - d. Deny the request. Again, a written response is required for this option, and the content of such a response should be made part of the rules (see Appendix C).
- 6) A schedule of fees for copying. The rules should make it clear that the fees are based on actual costs. Costs incurred in retrieving the documents cannot be charged.
- 7) The right of a person who is denied access to a public record to file a request for review with the PAC.
- 8) Procedures for retaining denials of requests for records. All notices of denials must be retained, indexed, and made available for public inspection. The rules, therefore, should state where these notices will be kept and how they will be indexed. An index might begin with the types of school district records that are automatically exempt under the Act, such as student records, staff evaluation records, and minutes of closed meetings.

## Preparing Directories

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As explained earlier, each district must develop and publicize two directories - one describing the district and one describing how citizens may obtain public records. These directories should be updated as necessary and should be included in the list of records maintained by the district (see below).

Copies of both directories must be prominently displayed at the board of education office and at each school office. They also must be available for copying and mailed out upon request. Sample directories are provided in Appendix F and Appendix G.

## Cataloging and Indexing of Public Records

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The Act requires that public bodies list all types or categories of records under their control which are prepared or received after July 1, 1984. The Act calls for a catalog of “all types or categories of records” under the school district’s “control.”

Note that the Act requires the list to be by “type” or “category” of records and not listing every individual record. Suggested below are different types or categories that a school district might establish to cover the records that it has under its control and which are subject to inspection under the Act unless an exemption applies. This list is by no means meant to be exhaustive and is merely for reference or descriptive purposes. Obviously, the number of types or categories will vary from school district to school district.

The type of records is meant to be a broad general category and the category is a sub-part of the type. For example, one type of record is a financial record. Under “financial records” may be the following categories: (a) budgets; (b) levy resolution; and certificate of tax levy; (c) audit; (d) bills; (e) receipts for revenue; (f) vouchers; (g) cancelled checks; (h) water bills; (i) sewer bills; (j)

real estate tax receipts; (k) salary schedules; (l) utility bills; (m) etc. This gives you examples of categories that could be listed under the general type “financial record.”

Other general types could include, the following: 1) administrative memoranda; 2) board minutes; 3) board resolutions; 4) correspondence received by school district; 5) correspondence from school district; 6) bidding specifications; 7) board policies; 8) administrative rules and regulations; 9) personnel code; 10) personnel files; 11) office equipment; 12) insurance; 13) capital equipment; 14) real estate; 15) legal notices; 16) newspaper articles; 17) consulting contracts; 18) contracts for capital equipment; 19) contracts for office supplies; 20) contracts for maintenance and repairs; 21) professional consultant contracts; 22) pension fund records; 23) hospitalization records; 24) worker’s compensation records; 25) training records; 26) official bonds; etc. Again, this list is not meant to be exhaustive.

While you need not catalog your records to the same degree as you list expenses in your annual budget, such may be used as a convenient starting point for determining what categories and types of records you may wish to list. Another good source for ideas in cataloging would be the suggested school record retention schedule usually available from the local record commission or the regional superintendent of education. You also should rely on your past experience by reviewing the records you currently have on hand and dividing them into meaningful categories.

There is a great deal of latitude in determining what the categories or types of records will be and what the list would contain. Keep in mind the statutory mandate that the list must be “reasonably current” and must be “reasonably detailed” in order to assist individuals in obtaining access to public records.

Finally, note that the catalog need not cover records prepared or received prior to July 1, 1984. Thus, if a particular type or category of record has been discontinued prior to the effective date of the Act, it should not be included in the listing. The catalog of records must be available for public inspection and copying.

## **Responding to Requests**

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A school district is in compliance with FOIA when it has 1) designated and trained Freedom of Information Officers, 2) established rules and regulations for responding to requests for records, 3) created and have on display at each office the two directories required by the Act, and 4) established a catalog of records received or prepared after July 1, 1984. Let’s assume that Anytown School District 1 meets these requirements and then let’s suppose that the following written request is hand-delivered to the district office on June 1.

June 1, 2021

Mrs. Alice Rose  
Secretary Board of Education  
School District 1  
Anytown, Illinois

Dear Mrs. Rose:

May I please inspect and have copies of the following School District records:

1. Certified copy of the minutes of the school board meeting held on April 15, 2012
2. Standardized reading scores of all fifth grade students in the District.
3. School board policy on student testing.
4. The names, salaries, titles, and dates of employment of all past and present employees of the district during the past five years.

Sincerely,  
Robin Jones

Mrs. Rose or the staff member receiving the request should immediately deliver the request to the district's Freedom of Information Officer. It should then be explained to Mrs. Jones that the district's Freedom of Information Officer will get back to her within the next five business days either with the requested records and/or with an appropriate response. The person receiving the request may want to take Mrs. Jones's telephone number so that she can be contacted when the records are ready for her to pick up or email address or otherwise find out if she wants the records mailed or emailed (and obtain the necessary information).

Next, the district's Freedom of Information Officer should examine each item requested and prepare a response to the request:

Item 1: So long as the board meeting on April 15 was open to the public, item number 1 can be easily furnished to Mrs. Jones within the next five business days (assuming the minutes have been approved by the school board). If the minutes have been posted on the district's website, the response letter can direct Mrs. Jones to the website. If, however, part of the meeting was closed, only the minutes of the open part of the meeting may be given to Mrs. Jones. Reference to the minutes of the closed meeting should be included in the response letter with a statement that access to those minutes is denied.

If the minutes requested have not been approved, the Freedom of Information Officer may deny the request until the minutes have been approved. She would, of course, notify Mrs. Jones of the delay and the reason within five business days of June 1.

Item 2: The reading scores of fifth grade students might at first glance appear to be exempt from disclosure based on the Illinois School Student Records Act. However, the PAC has determined that de-identified student test scores of all the students in a particular grade were subject to disclosure. So, if the district possesses a record that lists the standardized testing reading scores of the fifth grade students in the district, then the record would have to be disclosed to Mrs. Jones once all identifying information about the students was deleted or redacted.

Item 3: The board policy should be given to Mrs. Jones within five business days of June 1.

Item 4: This information falls within the Act's definition of "public records" and must generally be furnished to Mrs. Jones. If the school district employs any number of employees, however, such

request could require the collection of a large number of records and, therefore, meet one of the seven reasons which would allow an additional five business days to fill the request. Additionally, it must be determined if the District maintains a record containing all of the requested information. The District is not required to create a new record or answer questions for Mrs. Jones.

After making this determination and copying the records which are readily available (i.e., the board minutes and the policy), Mrs. Jones can be contacted to come and pay any fee due and pick them up. Because some of the records are to be denied and others to be delayed, thereby requiring a written response, the Freedom of Information Officer could send the following reply.

June 3, 2021

Dear Mrs. Jones:

In accordance with your written request for school district records received on June 1, 2021, the following items are available for you to pick up at the board of education office:

1. Certified copy of the minutes of the board of education meeting held on April 15, 2021. I call to your attention that a portion of this meeting was closed to the public to discuss the dismissal of an employee. The minutes of this closed portion of the meeting are permitted to be kept confidential by the Illinois Open Meetings Act and the Illinois Freedom of Information Act and are not included with the minutes being furnished to you for that reason. There is a one dollar charge for certification of the board minutes.
2. Board Policy Number 234 on Student Testing. These records consist of six pages.
3. Your request for the reading scores of individual fifth grade students in the district is hereby granted in part and denied in part. You will be provided with a list of the raw data of the reading scores of the fifth grade students in the district. However, we have not identified the names of the students to whom the scores belong. Identifying individual students' scores would make the information student records, which are exempt from disclosure under the Illinois School Student Records Act and the Federal Family Educational and Privacy Rights Act. Section 7(a) of the Illinois Freedom of Information Act exempts from inspection and copying information which is specifically prohibited from disclosure by federal or state law. Additionally, this information is exempt pursuant to section 7(1)(c) of FOIA as an unwarranted invasion of personal privacy. An unwarranted invasion of personal privacy is "the disclosure of information that is highly personal or objectionable to a reasonable person in which the subject's rights to privacy outweighs any legitimate public interest in obtaining the information." 5 ILCS 140/7(1)(c). The minor students' privacy interests in remaining anonymous outweigh any legitimate public interest in knowing who they are. Accordingly, this information is exempt from disclosure.

Finally, your request for the names, salaries, titles, and dates of employment of all past and present district employees for the past five years cannot be filled within five business days of June 1, 2021. Because the district normally employs between 150 and 200 employees, this request requires the collection of a large number of records, most all of which are stored in the board offices. These records will be made available to you no later than Tuesday, June 15, 2010. I will notify you prior to that date of the fee for these records.



The undersigned, as the district's Freedom of Information Officer, is responsible for the denial of both the minutes of the closed portion of the April 15, 2015 board meeting and the names of the students associated with the test scores. You are hereby further notified that you have the right to appeal this decision to the State of Illinois Public Access Counselor, PAC, at the Office of the Illinois Attorney General. You may file your request by writing to:

[Name of Public Access Counselor]  
Public Access Counselor  
Office of the Illinois Attorney General  
500 South 2nd Street  
Springfield, Illinois 62706  
Fax: (217) 782-1396  
[publicaccess@atg.state.il.us](mailto:publicaccess@atg.state.il.us)

If you chose to file a request for review with the PAC, you must do so within 60 calendar days of the date of this partial denial letter. Please note that you must include a copy of the original FOIA request and this partial denial letter when filing a request for review with the PAC. You also have a right to judicial review of your partial denial by filing suit in the appropriate Illinois court, pursuant to section 11 of FOIA.

Very truly yours,  
Freedom of Information Officer  
School District #1

Except in cases where records are furnished immediately, upon receiving a request for a public record, the Freedom of Information Officer must:

- 1) Note the date the public body receives the written request;
- 2) Compute the day on which the period of or response will expire and make a notation of that date on the written request;
- 3) Maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been complied with or denied; and
- 4) Create a file for the retention of the original request, a copy of the response, a record of written communications with the requester, and a copy of other communications.

## **Some Questions and Answers about FOIA**

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### **What is a "public body" covered by the FOIA?**

Public body means all legislative, executive, administrative, or advisory bodies of the state, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts, and all 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. "Public Body" does not include a child death review team or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act.

While there is substantial doubt as to what constitutes a subsidiary body, clear examples would be committees or bodies established by action of the school board. For example, Section 10-

22.31 of the School Code (105 ILCS 5/10-22.31), which authorizes joint agreements for the provision of special education services, authorizes the designation of a governing body under the joint agreement. Such governing body, in the author's opinion, is clearly a subsidiary body under both FOIA and the Open Meeting Act. Also, all subcommittees of a board of education and all committees established by such a board are subject to the Act. A committee, however, which is not established by the board and does not report to the board, but which is established to advise a school or district's administrators, probably is not subject to the Act.

### **What about records kept by individual school officials or employees?**

The Act does not require disclosure of personal material belonging to officials or employees. However, the Act does cover records and materials that officials and employees must prepare or maintain as part of their official duties. As a practical guide, if the school board or superintendent has authority to compel another official or employee to disclose the records in question, they are probably covered by the Act and subject to disclosure.

### **Which public records must be made available?**

The term "public records" means all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information, and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

Although the Act provides numerous exemptions from disclosure, none of those exemptions is based on the form a record might take. Exemptions are based on content. Note that a district is not required to create new records to comply with requests for information. The Act applies to existing records or to records that might become established by law or by the school board or superintendent. Compiling information already in a school district's possession in a new format to make the information available for inspection and copying does not constitute creating a new record. That being said, a school district might find that creating a record may be advantageous to the public body by making it more efficient, and FOIA requests themselves might show public bodies better ways to organize their records.

### **Who may request records?**

Any individual, corporation, partnership, firm, organization, or association, acting individually or as a group.

### **Must requests for records be submitted in writing?**

Yes, unless the district chooses to honor oral requests. Records may be requested in person and the district may honor an oral request or it may require that the request be put in writing. It may not be possible to fill a request while the party waits. Moreover, the five-day time limit and the appeal procedures are tied to written requests. Therefore, it is advisable to reduce an oral request to writing, either by a form that the requesting person fills out or by a memorandum completed by a staff member (see Appendix E). However, although the law allows for the district to require that a request be put in writing, the law states that no person can be required to submit a request using a particular form.

### **When is a request for records “unduly burdensome?”**

A “burdensome” request would be one requiring more than 10 business days to fill. In such cases, the district must invoke the additional five days by notifying the requesting party by letter and by citing one of the seven reasons provided in the Act, and asking the requestor to narrow his or her request. An “unduly burdensome” request would probably be one that is so broad or general that district employees cannot reasonably comply without disrupting the work of the district or without excessive cost. Court decisions interpreting the Federal Freedom of Information Act have tried to apply a balancing test, weighing the burden of the request against the public’s need to see the records. The Illinois law requires the district to extend the requesting person an opportunity to reduce the request to manageable size or confer with the public body about the request. If that fails, the request may be denied as being “unduly burdensome.” Repeated requests for the same records by the same person can likewise be considered unduly burdensome.

### **Who is considered a recurrent requester?**

A recurrent requestor is a person who has submitted 50 requests or more in the past 12 months, 15 requests within the past 30 days or seven requests within a seven day period. However, requests made by the media and non-profit, scientific, or academic organizations for the purpose of research or education, or disseminating information through the news or opinion articles cannot be considered a recurrent request or a recurrent requestor. It is important to note that each of the requests must come from the same person. For instance, if a Mr. Smith makes 10 requests within 30 days, and his wife makes five requests in the same 30 days, they may not be treated as one person and classified as “recurrent requesters.” Further, an enumerated request, such as the example of Ms. Jones above, would only be one request and not four requests under FOIA.

### **What is a voluminous request?**

Under a new Subsection 2(h) of FOIA, a “voluminous request” is defined by any of the following criteria: 1) a request that asks for more than five different categories of records; 2) a combination of requests submitted within a period of 20 business days that asks for more than five different categories of records; or 3) a request that requires the compilation of more than 500 letter or legal-sized pages of public records, unless a single requested record exceeds 500 pages. However, a single document that happens to exceed 500 pages would not make a request “voluminous.”

### **How should a district make public records “available for inspection?”**

Providing the requesting party with the exact location of the requested records is probably sufficient under the Act. That means the Freedom of Information Officer would have to first find the exact location, which might be a binder or a file drawer. In order to preserve the integrity of its records, the district should pull the records, identify, and itemize them, and provide the records for inspection under staff supervision. However, if a person requests that the records be copied, the district may not make a unilateral determination to only provide a requester with an opportunity to inspect the records.

Records stored electronically are another matter. To make them “available for inspection” probably will mean setting up whatever equipment is necessary, such as a computer, tape player, or micro-film viewer.

### **What if the requested record is on a computer file, film, audio or video tape, or some form other than on paper?**

If the information meets the legal definition of a public record and is not exempt under Section 7 of the Act, the district must find a way to provide for inspection and, if requested in writing, to provide a copy. Keep in mind that the requesting person may be required to pay a copying fee based on the actual cost of reproduction. Reproduction of a tape or a film would probably be more substantial than reproducing a paper record. Also keep in mind that some documents in the form of film, tapes, books, and computer software are protected by copyrights or patents and are, therefore, exempted from copying under Section 7. Finally, the Act requires the district to help individuals understand how information may be obtained from computerized records and how to comprehend computer print outs. When a person requests a copy of a record maintained in an electronic format, the district must furnish it in the electronic format specified by the requester, if feasible. If it is not feasible to furnish the public records in the specified electronic format, then the district must furnish it in the format in which it is maintained by the district, or in paper format at the option of the requester. The district may charge the requester for the actual cost of purchasing the recording medium, whether disc, diskette, tape, or other medium. The district may not charge the requester for the costs of any search for and review of the records or other personnel costs associated with reproducing the records.

### **What is meant by “copying?”**

Where a request is submitted in writing, the district is obligated to provide a duplicate copy of the record. Also, where requested, the district must certify the copy as being an accurate reproduction of the original record. The Act also states that records must “be made available for copying,” presumably relating to individuals who request records in person. It would probably be unwise to turn original records over to anyone other than a responsible employee or to permit inspection of an original record without the supervision of a responsible employee. On the other hand, the district probably would err in requiring a fee for copying where the individual merely wants to “inspect.”

This may be the best reason for getting all requests in writing or reducing requests to writing. The Freedom of Information Officer must determine the volume of records desired and whether the person wants copies or merely wants to inspect. Presumably, the district is under no obligation to provide copies where the request is not in writing, but it would not appear to make sense to not provide copies. By getting the request in writing, the district can invoke the five-day time period if necessary for large requests. This is certainly preferable to turning records over to private citizens to make their own copies. Keep in mind also that a citizen might ask to see numerous records and then (a) request copies of a few pages or (b) make hand-written notes from the records. Individual needs must be determined at the outset.

### **What is a “certified copy?”**

In filling a written request for a certified copy of a record, the district is required to certify that the copy is a true reproduction of the original. This can be accomplished by indicating on the copy or on an attached form that, “I hereby certify this to be a true and correct copy of a record maintained by School District No. \_\_\_\_\_, County of \_\_\_\_\_, State of Illinois.” This statement would be accompanied by a date and signature of the board of education secretary or the secretary’s designated representative.

# Appendix A

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## Policy

### Verbatim Records of Closed Meetings

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

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

# Appendix B

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## Sample Form for Extending Time for Disclosure

Dear (individual involved):

We have been unable to fill your request dated requesting:

(the records requested)

For the reason or reasons checked below:

- The requested records are stored in another location.
- The request requires the collection of a substantial number of records.
- The request is categorical in nature and requires an extensive search.
- We have failed to locate the requested records in our initial attempt and the search is continuing.
- The requested records require examination by a competent person in order to determine which, if any, are exempt under Section 7 of the Act.
- It would unduly burden or interfere with the operations of this school district to fill the request within the initial five business days.
- There is a need for consultation with another public body which has a substantial interest in the determination or in the subject matter of the request.

With respect to the records you have requested, such records will be available to you by \* \_\_\_\_\_ or we will make a decision denying your request by such date. Such date will be within five additional business days from \*\* \_\_\_\_\_.

School District No.: \_\_\_\_\_

By: \_\_\_\_\_

Freedom of Information Officer

Date: \_\_\_\_\_

\* Here insert the date of the tenth business day after the request for records was received.

\*\* Here insert the date of the fifth business day after the request for records was received.

# Appendix C

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## Sample Form for Denial Letter

Dear **[individual involved]**:

You are hereby notified that your request for the disclosure of:

**[records requested]**

is hereby denied and the reason for such denial is as follows:

**[reason for denial, citing the exemptions under the Act]\***

This decision to deny disclosure of the records requested has been made by \_\_\_\_\_, FOIA Officer for the \_\_\_\_\_ School District.

You are hereby further notified that you have the right to appeal this decision to the state of Illinois Public Access Counselor, PAC, who may be contacted within 60 days of this notice at the Office of the Illinois Attorney General. You may file your request by writing to:

**[Name of Public Access Counselor]**  
Public Access Counselor  
Office of the Illinois Attorney General  
500 South 2nd Street  
Springfield, Illinois 62706 Fax: (217) 782-1396  
[publicaccess@atg.state.il.us](mailto:publicaccess@atg.state.il.us)

If you chose to file a request for review with the PAC, you must do so within 60 calendar days of the date of this partial denial letter. Please note that you must include a copy of the original FOIA request and this partial denial letter when filing a request for review with the PAC. You also have a right to judicial review of your partial denial by filing suit in the appropriate Illinois court, pursuant to Section 11 of FOIA.

School District No.: \_\_\_\_\_

By: \_\_\_\_\_  
Freedom of Information Officer

Date: \_\_\_\_\_

\*A school district that finds itself having to deny access to exempt records frequently may want to print a form either that lists here all of the exemptions applicable under the Act. The employee handling the request can then simply check the appropriate exemption being involved in each situation.

# Appendix D

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## Sample Letter of Disclosure with Redaction of Exempt Material

Dear [individual involved]:

You are hereby notified that your request for the disclosure of:

**[records requested]**

is hereby granted in part and denied in part.

Pursuant to your written request of \_\_\_\_\_ date \_\_\_\_\_, enclosed you will find redacted copies of the records you have requested. Please note that pursuant to Section 7(1) of the Freedom of Information Act, certain material originally contained in such records has been redacted **[insert reason for denial, citing the exemptions under the Act]**.

This decision to partially deny disclosure of the records requested has been made by \_\_\_\_\_, FOIA Officer for the \_\_\_\_\_ School District.

You are hereby further notified that you have the right to appeal this decision to the state of Illinois Public Access Counselor, PAC, who may be contacted within 60 days of this notice at the Office of the Illinois Attorney General. You may file your request by writing to:

**[Name of Public Access Counselor]**  
Public Access Counselor  
Office of the Illinois Attorney General  
500 South 2nd Street  
Springfield, Illinois 62706 Fax: (217) 782-1396  
[publicaccess@atg.state.il.us](mailto:publicaccess@atg.state.il.us)

If you chose to file a request for review with the PAC, you must do so within 60 calendar days of the date of this partial denial letter. Please note that you must include a copy of the original FOIA request and this partial denial letter when filing a request for review with the PAC. You also have a right to judicial review of your partial denial by filing suit in the appropriate Illinois court, pursuant to Section 11 of FOIA.

By: \_\_\_\_\_

Freedom of Information Officer

Date: \_\_\_\_\_



# Appendix E

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## Sample Employee Memorandum Regarding Oral Request for Records

On the day of \_\_\_\_\_, 20\_\_\_\_, at the hour of \_\_\_\_\_ .m., the following individual(s) appeared in person at the office of the Board of Education and asked to inspect the following records:

Individual(s) making the request:

**[here insert names]**

Records sought to be inspected:

**[here insert records requested]**

The above records were presented to such individual(s) for inspection at \_\_\_\_\_ .m. on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_ , except for:

**[here insert any records not presented]**

The reason(s) for not providing the above records (or portion of records) was:

**[here insert reason – such as the fact that the records were exempt records, or that they could not be immediately located and a search would continue, or that no such records existed]**

Of the records requested, copies of the below records were provided to or made by the individual(s) making the request:

**[here insert records copied]**

Date and Time of Memorandum: \_\_\_\_\_

Signature of Employee: \_\_\_\_\_

Title of Employee: \_\_\_\_\_

Witness: \_\_\_\_\_

# Appendix F

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## Sample School District Information Directory Community Unit School District No. 1

Community Unit School District No. 1 is a school district located in Anytown, One County, Illinois. The district is organized under the laws of the state of Illinois for the purpose of providing its residents with schools for grades K-12 for the education of all eligible persons in the district.

The district operates the following schools (all located in Anytown):

- 1) Main Street School, for grades K-6, located at 111 W. Main Street.
- 2) Central School, for grades K-6, located at 15 N. Pembroke Street.
- 3) Liberty Junior High School, for grades 7-8, located at 15 E. Liberty Drive.
- 4) Westbrook High School, for grades 9-12, located at 25 S. Rock Road.

and maintains its administrative office at 25 S. Rock Road in Anytown.

The district is governed by a seven-member board of education. The board's office is located in Westbrook High School, 25 S. Rock Road, Anytown, Room Number 106. Current members of the board of education are:

- 1) Alexander Jones, President
- 2) Robert Doe, Vice President
- 3) William Cone, Secretary
- 4) Martha Redd
- 5) Alice Fox
- 6) Michael Washburn
- 7) Frederick Higgins

Members of committees of the school board are as follows:

Committees	Member	Title
------------	--------	-------

**(here list the members of all committees of the Board.)**

The approximate amount of the operating budget of the district is \$3,126,500.00. The district currently employs 178 full and part-time employees.

## Appendix G

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### Sample School District Records Directory Community Unit School District No. 1

Any person requesting records of Community Unit School District No. 1 may make such a request in writing, at the board of education office in Westbrook High School, 25 South Rock Road, Anytown, Room Number 106. Such request should be made to the district's Freedom of Information Officers, Mr. William Cone, school board secretary, at such address; and if he is not present, such request may be made to Mrs. Alice Rose, administrative secretary.

Alternatively, any person may mail, fax, or email a written request to either Mr. Cone or Mrs. Rose specifying in particular the records requested to be disclosed and copied. All written requests should be addressed to the board of education office at the above address or at [insert email address and fax number]. If you desire that any records be certified, you must indicate that in your request and specify which records must be certified.

The fees for copies of records are as follows:

First 50 pages of black and white, letter or legal sized copies are at no cost

\*15 cents per page (actual cost) if school district employee copies records

\*12 cents per page (actual cost) if individual requesting records makes copies using school district's equipment

\*8 cents per page (actual cost) if individual requesting records makes copies using his or her own equipment

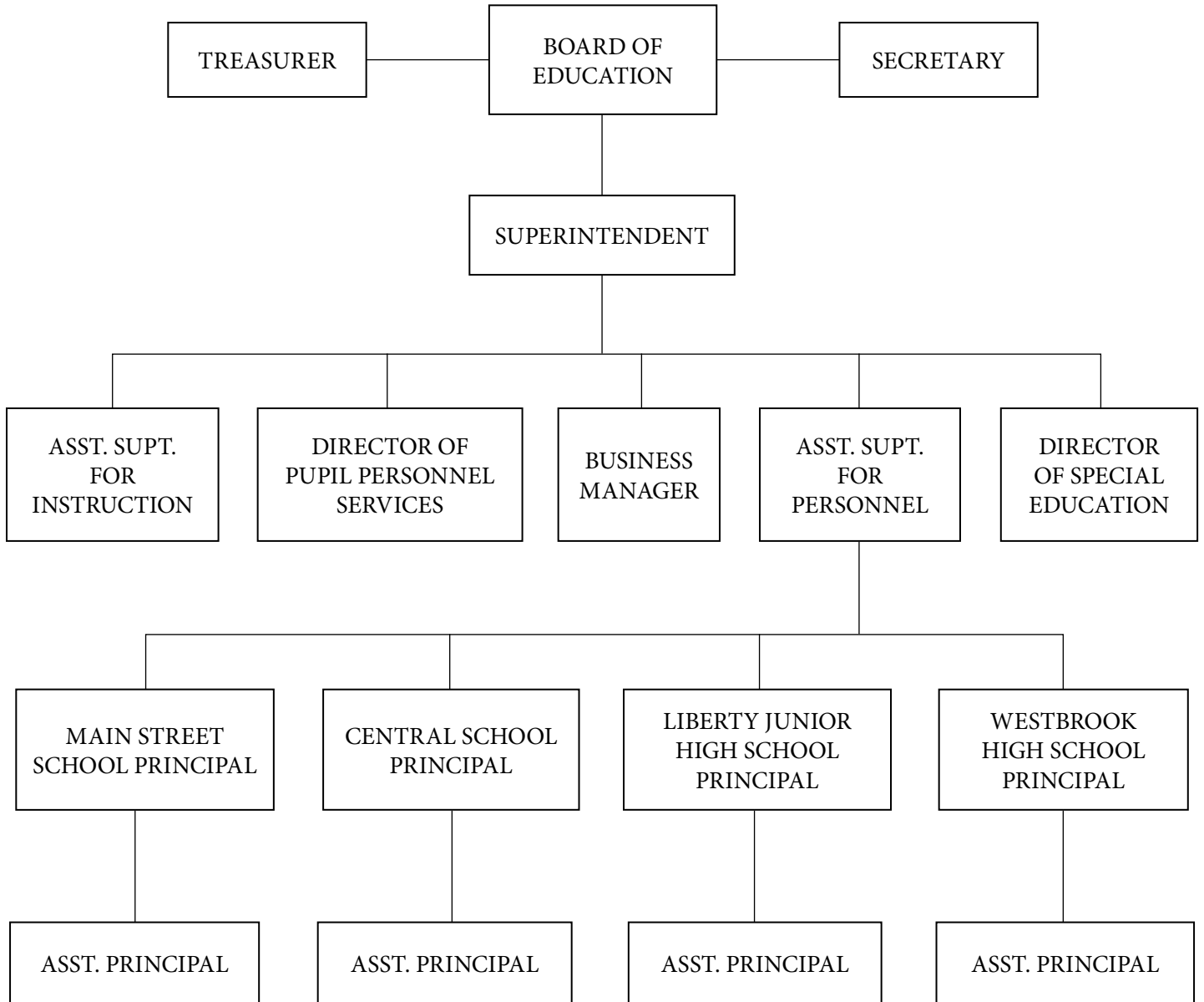
\$1 per certificate (actual cost) if the copies are to be certified

\* Each school district must establish fees based on its own calculations of actual cost but may not exceed 15 cents per page.

This directory must be "prominently" displayed at the school district's main office and at each school. It also must be available for public inspection and copying and mailed to persons requesting it.

The block of the functional subdivisions  
of the school district is as follows:

**Sample Block Diagram of Functional Subdivisions**



# Appendix H

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## Electronic Attendance Request

I hereby request to electronically attend the meeting of the \_\_\_\_\_ School Board on \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_p.m.

I am eligible to participate electronically because of [check one]:

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

During the meeting, I will be at the following location: \_\_\_\_\_

and reachable at the following phone number: \_\_\_\_\_

\_\_\_\_\_  
Signature of Member

\_\_\_\_\_  
Date

OR

Request received by     phone     email     fax     other

\_\_\_\_\_  
Signature of [Clerk][Recording Secretary]

\_\_\_\_\_  
Date

# Appendix I

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## Sample Resolution

### Please Review This Matter with Your Local Attorney

[RESOLUTION] NO.

A [RESOLUTION] DEFINING MEETING AND ADOPTING  
PROCEDURES FOR ELECTRONIC ATTENDANCE AT MEETINGS

WHEREAS, on January 1, 2007, Public Act 94-1058, amending the Open Meetings Act, took effect and amended the definition of a “meeting” to mean “Any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business,” and it permits attendance of members of the public body at public meetings by a means other than physical presence, provided a quorum of the members are physically present at the meeting location;

WHEREAS, to permit attendance by a means other than physical presence, the [Governmental Unit] must adopt rules that conform to the requirements and restrictions of the Open Meetings Act, 5 ILCS 120/7;

WHEREAS, the corporate authorities of the [Governmental Unit] desire to permit attendance of members of the public body by means other than physical presence in compliance with the Open Meetings Act;

WHEREAS, the corporate authorities of the [Governmental Unit] find that it is necessary that any existing resolutions or policies be amended to conform with the term “meeting” to include electronic gatherings as defined in Section 120/1.02 of the Open Meetings Act.

NOW, THEREFORE, BE IT [ORDAINED] [RESOLVED] by the Board of Education of School District No. \_\_\_\_\_, \_\_\_\_\_ County, Illinois as follows:

Section I. Recitals. The preliminary paragraphs set forth above are incorporated herein as part of this Resolution.

Section 2. Electronic Attendance at Meetings Rules. The Board of Education hereby adopts the Electronic Attendance at Meetings Rules, attached hereto, that permits a member of the public body to attend any meeting of a public body as defined in the Open Meetings Act via electronic means.

Section 3. Effective Date. This [Resolution] shall be in full force and effect after its passage and approval.

Section 4. Severability. In the event that any section, clause, provision, or part of this Resolution shall be found and determined to be invalid by a court of competent jurisdiction, all valid parts that are severable from the invalid parts shall remain in full force and effect.

AYES: \_\_\_\_\_

NAYS: \_\_\_\_\_

ABSENT: \_\_\_\_\_

APPROVED by the School Board President and attested by the Clerk, on this \_\_\_\_\_  
day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
SCHOOL BOARD PRESIDENT

ATTEST:

\_\_\_\_\_  
SECRETARY

## ELECTRONIC ATTENDANCE AT MEETINGS RULES

### Section 1. Rules Statement.

It is the decision of the Board of Education of School District No. \_\_\_\_\_, \_\_\_\_\_ County, Illinois that any member of the Board may attend any open or closed meeting of the board via electronic means (such as by telephone, video, or internet connection) provided that such attendance is in compliance with these rules and any applicable laws.

### Section 2. Prerequisites. A member of the board may attend a meeting electronically if the member meets the following conditions:

- a. The member should notify the [clerk] [recording secretary] at least [duration of time] before the meeting, unless impractical, so that necessary communications equipment can be arranged. Inability to make the necessary technical arrangements will result in denial of a request for remote attendance.
- b. The member must assert one of the following three reasons why he or she is unable to physically attend the meeting,
  - 1) The member cannot attend because of personal illness or disability; or
  - 2) The member cannot attend because of employment purposes or the business of the [local government entity]; or
  - 3) The member cannot attend because of a family or other emergency.

### Section 3. Authorization to Participate.

- a. The [clerk] [recording secretary], after receiving the electronic attendance request, shall inform the board of the request for electronic attendance.
- b. After establishing that there is a quorum is physically present at a meeting where a member of the [board] desires to attend electronically, the presiding officer shall state that (i) a notice was received by a member of the [board] in accordance with these rules, and (ii) the member will be deemed authorized to attend the meeting electronically unless a motion objecting to the member's electronic attendance is made, seconded, and approved by two-thirds of the members of the [board] physically present at the meeting. If no such motion is made and seconded or if any such motion fails to achieve the required vote by the members of the [board] physically present at the meeting, then the request by the member to attend the meeting electronically shall be deemed approved by the [board] and the presiding officer shall declare the requesting member present. After such declaration by the presiding officer, the question of a member's electronic attendance may not be reconsidered.

### Section 4. Adequate Equipment Required.

The member participating electronically and other members of the [board] must be able to communicate effectively, and members of the audience must be able to hear all communications at the meeting site. Before allowing electronic



attendance at any meeting, the [board] shall provide equipment adequate to accomplish this objective at the meeting site.

**Section 5.** Minutes. Any member attending electronically shall be considered an off-site attendee and counted as present electronically for that meeting if the member is allowed to attend. The meeting minutes shall also reflect and state specifically whether each member is physically present or present by electronic means.

**Section 6.** Rights of Remote Member. A member permitted to attend electronically will be able to express his or her comments during the meeting and participate in the same capacity as those members physically present, subject to all general meeting guidelines and procedures previously adopted and adhered to. The member attending electronically shall be heard, considered, and counted as to any vote taken. Accordingly, the name of any member attending electronically shall be called during any vote taken, and his or her vote counted and recorded by the [clerk] [recording secretary] and placed in the minutes for the corresponding meeting. A member attending electronically may leave a meeting and return as is the case of any member, provided the member attending electronically shall announce his or her leaving and returning.

**Section 7.** (Optional) [Committees, Boards and Commissions. These rules shall apply to all committees, boards, and commissions established by authority of the [board of education].

These rules are effective this \_\_\_\_\_ day of, 20\_\_\_\_.

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[SCHOOL BOARD PRESIDENT]

ATTEST:

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[Secretary]

# Appendix J

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**Written Request for Inspection or Copying of Public Records**  
[This form is optional. Request may be made in writing by  
personal delivery, mail, fax, email, or other means.]

FOIA OFFICER

\_\_\_\_\_ School District

1. Name of person making request: \_\_\_\_\_
2. Address of person making request: \_\_\_\_\_
3. Telephone number of person making request: \_\_\_\_\_
4. Email address of person making request: \_\_\_\_\_
5. Date of request: \_\_\_\_\_
6. Is request for commercial purposes? (yes/no) (if yes, see Appendix M) It is a violation of the Freedom of Information Act for a person to knowingly obtain a public record for commercial purposes without disclosing that it is for a commercial purpose.
7. Are you requesting a fee waiver (yes/no)? If yes, state reason:  
\_\_\_\_\_

Describe in detail below the public records you are requesting and state whether you wish to inspect and/or copy such records. Also, please state whether such public records are to be certified. If you wish to receive the records in a specific electronic format, please describe.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. How do you want to receive these records?  Email  Mail  Pick Up

The school district will respond to the above request within five working days from the above date unless one or more of the seven reasons for an extension of time provided for in Section 3(e) of the Act are invoked by the school district.

\_\_\_\_\_  
Signature of person making request  
[ROUTING OF REQUEST - FOR OFFICE USE ONLY]

FOR COMPLETION BY FOIA OFFICER:

Date Received: \_\_\_\_\_  
Date Response time expires: \_\_\_\_\_  
Copy of Request and attachments filed: \_\_\_\_\_  
File folder # for this request: \_\_\_\_\_  
And date created: \_\_\_\_\_

## Appendix K

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### Notice to Meet and Confer to Reduce Categorical Request to Manageable Proportions

Dear (individual involved):

You are hereby notified that your written request dated \_\_\_\_\_ calling for all records falling within \_\_\_\_\_ has been determined to be unduly burdensome pursuant to Section 3(g) (category of records requested) of the Freedom of Information Act, that there is no way to narrow your request and that the burden on the school district outweighs the public interest in the information requested.

We hereby extend to you an opportunity to meet and confer with the undersigned in an attempt to reduce your request to manageable proportions. Please call me at \_\_\_\_\_ between the hours of \_\_\_\_\_ and \_\_\_\_\_ in order to schedule a conference.

Dated: \_\_\_\_\_

\_\_\_\_\_  
FOIA Officer

## Appendix L

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### Denial Letter – Unduly Burdensome

Dear (individual involved):

You are hereby notified that your request for all the school district's financial records is hereby denied because to comply with your request would be unduly burdensome for the following reason(s):

**(set forth why it would be unduly burdensome, such as this is a repeated request for the same records by the same person).**

After meeting and conferring with you on the day of , 20 , we were unable to reduce your request to manageable proportions and it appears from your explanation as to why you are requesting these records, that the burden on the school district outweighs the public interest in the information being sought.

**[OR]**

After extending you the opportunity to narrow your request or to meet and confer to narrow your request on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, you never narrowed your request.

(NAME OF SCHOOL DISTRICT)

By: \_\_\_\_\_

FOIA Officer

# Appendix M

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## Response to Request for Records to be Used for a Commercial Purpose

The undersigned has determined you have informed us that your request for school district records, received \_\_\_\_\_, 20\_\_\_, is a request for a commercial purpose.

Accordingly, I provide you with the following information:

- I estimate that the records sought can be ready for you within \_\_\_\_ days of the date of this notice. The copying charge is estimated as \$ \_\_. Please remit this amount. Copying will not proceed until payment is received.
- The request is denied because the records are exempt under Section of the Freedom of Information Act.
- The request in its current form is unduly burdensome. Please contact me for discussion as to whether we can reduce the request to manageable proportions.
- The records you requested are ready for pick up/attached.

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FOIA Officer

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School District

## Appendix N

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### Safe Harbor Letter

Notice to Public Access Counselor requesting advisory opinion on release of information.

Dear Public Access Counselor:

The undersigned is the school board president or school board attorney for the School District. We are in receipt of the attached request received on the date noted, and request an advisory opinion on the inspection of the records in said request.

The facts associated with such request are as follows:

[OR]

I believe the following records are exempt from disclosure based upon the following facts:

---

Sincerely,

cc. Requester

# Appendix O

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## **Resolution      Setting      Forth      Provisions      for      Compliance with the Illinois Freedom of Information Act**

WHEREAS, the Freedom of Information Act took effect on July 1, 1984 (5 ILCS 140/1 *et seq.*) and was substantially amended by PA 96-0542 effective January 1, 2010; and

WHEREAS, such Act is intended to provide the public with greater access to the records of public bodies; and

WHEREAS, it is necessary for the \_\_\_\_\_ School District to establish practices and procedures ensuring its full compliance with said Act, so that the public policy stated therein can be carried out effectively and efficiently with respect to the records of the school district.

BE IT RESOLVED by the Board of Education of School District No. \_\_\_\_\_, \_\_\_\_\_ County, Illinois, as follows:

SECTION 1: The \_\_\_\_\_ and \_\_\_\_\_ are hereby designated as the FOIA Officer to whom all initial requests for access to the records of the school district are to be referred. Such requests are to be made at the administrative offices of the school district at \_\_\_\_\_, Illinois, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. In the event that the \_\_\_\_\_ is not available during the times described above, the \_\_\_\_\_ is designated as the Deputy FOIA Officer to whom such initial requests are to be made. Except in instances when records are furnished immediately, the FOIA Officer, or his designees, shall receive requests submitted to the school district under the Freedom of Information Act, ensure that the school district responds to requests in a timely fashion, and issue responses under the Act. The FOIA Officer shall develop a list of documents or categories of records that the school district shall immediately disclose upon request.

SECTION 2: Upon receiving a request for a public record, the FOIA Officer shall:

- 1) note the date the school district receives the written request;
- 2) compute the day on which the period for response will expire and make a notation of that date on the written request;
- 3) maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been complied with or denied; and
- 4) create a file for the retention of the original request, a copy of the response, a record of written communications with the requester, and a copy of other communications.

SECTION 3: The FOIA Officers and Deputy FOIA Officer shall successfully complete an annual training program. Whenever a new Freedom of Information Officer is designated by the school district, that person shall successfully complete the electronic training curriculum developed by the Public Access Counselor of the state of Illinois within 30 days after assuming the position.

SECTION 4: Any records which are the subject of a request under the Freedom of Information Act shall be retrieved from such place as they are stored, by the FOIA Officer, or by an employee of the school district acting under the direction of the FOIA Officer. In no event shall records be retrieved by the party requesting them or by any person who is not employed by the School District.

SECTION 5: If copies of records are requested, the fees for such copies, whether certified or not, shall be as determined from time to time by the FOIA Officer pursuant to Section 6(b) of the Freedom of Information Act. The school board secretary shall maintain a written schedule of current fees in the administrative offices. The fees so charged shall reflect the actual cost of copying the records, and the cost of certifying copies, if certification is requested.

SECTION 6: In the event that a request to inspect school district records is denied by the FOIA Officer, the denial may be appealed to the Public Access Counselor of the state of Illinois.

SECTION 7: The superintendent shall prepare: (a) a School District Information Directory; (b) a block diagram of the functional subdivisions of the school district; (c) a School District Records Directory; and (d) a Records Catalogue, all of which shall be as required by the Act. This information shall be posted on the school district's website and available in the office of each school.

SECTION 8: THIS RESOLUTION shall be in full force and effect immediately upon its passage and approval as required by law.

PASSED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by the School Board of the School District of \_\_\_\_\_, County of \_\_\_\_\_, Illinois, by a roll call vote as follows:

AYES: \_\_\_\_\_ NAYS: \_\_\_\_\_ ABSENT: \_\_\_\_\_

APPROVED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by the President of the \_\_\_\_\_ School District of \_\_\_\_\_, County of \_\_\_\_\_, Illinois.

\_\_\_\_\_  
School Board President

ATTEST:

\_\_\_\_\_  
School Board Secretary



