CITIZEN ADVOCACY CENTER's
Journalist's Guide to the Illinois
Open Meetings Act and Free Speech

While a handful of concerned citizens may attend local government meetings, often times, the primary attendees are journalists. Due to their consistent presence at government meetings, journalists play a central role in monitoring and reporting on government activity.

When members of the public avail themselves of the opportunity to express a viewpoint on a public issue, the true meaning of democracy is realized and speakers are entitled to the protections of the First Amendment. Municipal governments, school districts, park districts, county boards, forest preserve districts, and local government entities regularly make decisions that impact all those who live in the community on a personal level – and those decisions often garner passionate community responses.

When members of the public show up, speak out and organize community campaigns, it can sometimes create a contentious environment. Whether it is accurately reporting government activity or reporting on how the public responds to government decisions, it is vitally important that journalists know how public bodies are required to keep meetings open as well as understand and recognize improper restrictions placed on speakers.

I. The Illinois Open Meetings Act and Potential Problems

The Illinois Open Meetings Act (the Act) states that, "[i]t is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. . . .[I]t is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1

The Act requires public bodies to hold open meetings, provide the public with adequate notice of meeting times, and keep records of public meetings. The Act also allows the public body, under limited circumstances, to close meetings to discuss specific issues.

A. What is a Meeting?

There are three requirements to trigger a "meeting" under the Open Meetings Act:

- There must be a *gathering* of public officials, which can be in person or electronically;
- There must be a *majority of a quorum* of a public body present. However, with a five person board, three public officials are necessary to trigger the Act; and
- Who come together of the *purpose of discussing public business*.

Synopsis of number of public officials that trigger the Act:

- 14 member board: 8 is a quorum, 5 is a majority of a quorum;
- 10 member board: 6 is a quorum, 4 is a majority of a quorum;
- 7 member board: 4 is a quorum, 3 is a majority of a quorum; and
- *5 member board: 3 is a quorum, 3 board members needed to to trigger Act* (pursuant to a recent revision of the Act addressing only five-member boards).

B. What is a Public Body?

Public bodies include **all "legislative, executive, administrative, or advisory bodies of the state"** along with agencies, committees, boards, municipalities, city councils, village boards, and school districts, including, but not limited to, any subsidiary body or subcommittee supported by or expending tax revenue.

The General Assembly and its committees and commissions are exempt from the Act, but the Illinois Constitution requires that legislative meetings be open to the public unless two-thirds of the members vote to close a meeting.

Journalist Red Flag:

- Non-profit organizations, even those that are supported 100% by tax dollars, are not public bodies subject to the OMA.

- When determining if an *advisory body* is subject to the OMA, identify who convened the body and who the body responds to. If it was set up by an administrator like a village manager or a school superintendent, and recommendations from the advisory body go to that same administrator, then the body IS NOT subject to the Act. If the school board convened the body and the recommendations go directly to the public body, it IS a public body subject to the OMA.

C. What Does it Mean to be Open?

Public Notice

Public bodies must give notice of regularly scheduled meetings by posting a schedule of their regular dates, times, and places of meetings. Notice must be given:

- At the beginning of each calendar or fiscal year by posting a copy at the principal office of the body holding the meeting and at the location of the meeting;
- To the public as well as any news medium that files an annual request; and
- On the website of the public body, however, failure to post notice online will NOT invalidate any action taken at the meeting.

Permanent Changes

If there are any permanent changes to regularly scheduled meetings, the public body must give notice at least 10 days before the meeting by publication in a newspaper of general circulation. The public body may post notice of any changes at the principal office of the body holding the meeting or, if no such office exists, at the building where the meeting will be held.

Special Meetings

For special meetings, public bodies must give at least 48 hours notice. Notice must be posted at the place where the meeting usually takes place and delivered to any news medium that files an annual request. Special meetings include a rescheduled regular meeting or a reconvened regular meeting. The notice provision for special meetings does not apply to an open meeting that is reconvened within 24 hours.

Emergency Meetings

Notice of an emergency meeting shall be given as soon as practicable prior to the holding of the meeting.

Agendas

- Agendas must be posted at least 48 hours prior to the meeting. The agendas must sufficiently inform the public as to what final action the public body may take.
- A general heading, such as "New Business" without any underlining description of business to be conducted is not considered sufficient notice to the public.
- If the public body maintains a website, they must post agendas online and the agendas must remain online until the meeting has concluded.

Journalist Red Flag:

Taking Final Action Without Proper Notice

- Public bodies may introduce or discuss items not specifically listed on a posted agenda but they may not vote on such items.

- If the public body votes on an item not listed on the agenda, regardless of what kind of public body it is, a violation of the Act has occurred due to the lack of notice.

Location of Meetings: Reasonable Accessibility

- All required public meetings must be held at specified times and places which are convenient and open to the public. The “convenience” requirement is not a rule of absolute accessibility, but of *reasonable* accessibility. For example, public bodies can hold meetings at 7 a.m. during the weekday even though attendance will be low because it is during the work day.

Location of Meetings: Accommodating Large Crowds

- If the public body is aware that a controversial meeting or meeting with significant public interest is going to take place and suspects that the usual space is too small to accommodate the number of citizens who wish to attend a meeting, the public body must find an alternative location. If an alternative, larger venue is available and the public body refuses to change location, a violation of the Act has occurred based on the public's inability to attend the meeting. *Gerwin v. Livingston County Board*, 802 N.E.2d 410 (Ill. App. Ct. 4th Dist., 2003)

Public's Right to Record

Any person may record the proceedings at an open meeting by film, tape, or other means. However, the public body holding the meeting may prescribe reasonable rules to govern the recording and a person giving testimony at a public hearing may request that their testimony NOT be recorded.

Public Bodies Recording Closed Sessions

All public bodies must record all of their closed meetings in the form of an audio or video recording. The recordings are not available for public inspection or a court proceeding unless the public body finds there is no need for confidentiality.

If a member of the public believes that an inappropriate topic has been discussed in closed session, an action filed in court with a motion for an *in camera review* may be brought. This means that a judge will listen to the recording in private and determine if the court should mandate a release of the recording.
Recordings of closed sessions must be retained for a minimum of 18 months and may be destroyed after that time if the public body votes to destroy the recordings and creates minutes of the closed meeting.

Minutes

All public bodies must keep written minutes of their meetings, whether open or closed. The written minutes must include the date, time, and place of the meeting; whether the members of the public body were present or absent; whether members were physically or electronically present; and a "summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken." 5 ILCS 120/ 2.06(a)(3).

Journalist Red Flag:

- Minutes are to be made available within 7 days of the public body's approval of such minutes. If the public body maintains a website, minutes must be posted online and remain online for at least 60 days. Public bodies DO NOT have to provide draft minutes of meetings.

- Public bodies must review minutes or recordings from closed meetings at least every six months to make a determination in open session of whether those minutes or recordings still require confidentiality.

E. Closed Sessions

Public bodies may hold closed meetings provided that they state a legally sufficient reason in an open session for holding a closed session. A majority of a quorum present during an open session must also vote to close the meeting. While the Act allows public bodies to convene in closed session, public bodies are not required to go into closed session. The Act allows public bodies to convene in closed session for the following reason:

Employment Matters

- The appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee or legal counsel to determine its validity.

- 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.

- The selection of a person to fill a public office, including a vacancy in a public office.

Land/Investment Deals

- The purchase or lease of real property for the use of the public body.

- The setting of a price for sale or lease of property owned by the public body.

- The sale or purchase of securities, investments, or investment contracts.

Security Matters

- Security procedures and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff, the public or public property.

- Informant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, when discussed by a public body with criminal investigatory responsibilities.

Student Records

- Student disciplinary cases.

- The placement of individual students in special education programs and other matters relating to individual students.

Litigation/Legal Claims

- 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.

- The establishment of reserves or settlement of claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if 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, intergovernmental risk management association or self insurance pool of which the public body is a member.

- Evidence or testimony in an open hearing, or in a closed hearing where specifically authorized by law, to a quasi-adjudicative body, as defined in the Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning.

Other Exceptions

- Conciliation of complaints of discrimination in the sale or rental of housing, when closed meetings are authorized by law or ordinance prescribing fair housing practices and creating a commission or administrative agency for their enforcement.

- Professional ethics or performance when considered by an advisory body appointed to advise a licensing or regulatory agency on matters germane to the advisory body's field of competence.

- 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.

- The recruitment, credentialing, discipline or formal peer review of physicians or other health care professionals for a hospital, or other institution providing medical care operated by the public body.

- Deliberations for decisions of the Prisoner Review Board.

- Review or discussion of applications received under the Experimental Organ Transplantation Procedures Act.

- The classification and discussion of matters classified as confidential or continued confidential by the State Employees Suggestion Award Board.

- Discussion of minutes of meetings lawfully closed under this Act whether for purposes of approval of the minutes or semi-annual review of the minutes.

- Deliberations for decisions of the State Emergency Medical Services Disciplinary Review Board.

- The operation by a municipality of a municipal utility or the operation of a municipal power agency or municipal natural gas agency when the discussion involves (i) contracts relating to the purchase, sale or delivery of electricity or natural gas or (ii) the results or conclusions of load forecast studies

- The records and meetings of death review teams and their executive council as specified in the Abuse Prevention Review Team Act.

Journalist Red Flag:

A public body may only *discuss* issues in closed session. In order to take any official action on any issue discussed in closed session, the public body must reconvene to vote in open session.

F. Enforcement

The Attorney General Public Access Counselor

The Illinois Attorney General has created the office of the Public Access Counselor. This office acts as a resource for journalists and citizens alike in addressing open meeting questions. While they lack enforcement capacity, they are an excellent resource for determining if a violation has occurred and to act as an intermediary in resolving disputes.

Office of the Public Access Counselor
500 S. Second St.
Springfield, IL 62705
Phone: (217) 524-1503
Facsimile: (217) 785-2551

State's Attorney

The State's Attorney in the county in which the violation has occurred also has the capacity to file charges against the public body. The State's Attorney may bring an action within 60 days of discovery of the violation.

Individuals

Any individual may bring an action in the local circuit court to enforce the terms of the Act within 60 days after the meeting during which the violation has occurred. The court may assess attorneys' fees against the losing party.

G. Remedies

Upon finding a violation of the Open Meetings Act, a court may prescribe various remedies. For example, the court may, as fairness and justice require:

- Open the closed meeting to the public;
- Issue an injunction to prevent future violations;
- Make public any matter held confidential during a wrongfully closed session;
- Void any final action taken during a wrongfully closed session; or
- Impose fines.

II. The First Amendment and Recognizing Free Speech Issues

A. Where is Free Speech Protected?

There are two types of public forums: traditional and dedicated.

Traditional public forums are public places where speech is traditionally allowed without regulation from the government, such as parks, sidewalks, and streets.

Dedicated public forums are places where speech has not been previously allowed but then proactively opened up by a government entity. While a government entity may not be required to allow the public to speak in such a location, once the government entity opens up the forum for speech, a *limited or dedicated public forum* has been created and the speaker enjoys the full protection of the First Amendment.

For example, neither the Federal nor Illinois Constitution requires local governments to allow public comment at meetings. When public comment is allowed, the forum has been converted to a *limited or dedicated public forum* and free speech protections under the U.S. Constitution apply.

However, while the content of speech may not be restricted the government may limit speech to certain issues. For example, regardless of a public body allowing for general public comment opportunities at a meeting, they may also allow for public comment restricted to certain agenda items. In these cases, the government entity is allowed to *restrict comment to a particular agenda item, but may not restrict viewpoints expressed in relation to a particular agenda item.*

B. What Speech is Protected?

While most speech is protected under the First Amendment, there are certain well-defined and narrow categories of speech that the First Amendment does not protect. These restrictions include obscene language, fighting words, and defamatory statements.

Obscenity

In order for words spoken during a public comment period to be defined as obscene, all of the following factors must be present:

- Language that the average person, using the standards of the community in which the expression is made, would find that it appeals to a morbid or shameful interest in sex;
- Language that depicts or describes sexual conduct in a patently offensive manner; and
- Language that lacks serious literary, artistic, political, or scientific value.

For example, an individual's comments during a public comment portion of a city council meeting describing a sexual act in graphic detail will be considered obscenity, however, merely using an explicative during a public comment would almost certainly be protected by the First Amendment.

Fighting Words

Fighting words are words whose very utterance inflict injury or tend to incite an immediate breach of the peace. Words only constitute fighting words if spoken *face to face* and directed at an individual or a small group. Fighting words are legally defined as having such little social value that any value the words might have is overshadowed by the government's interest in prohibiting them. For practical purposes, the fighting words doctrine has been very narrowly defined by the courts.

For example, after a city council meeting, an angry member of the public confronts the mayor over a public issue and uses a litany of profanity. The mayor tries to remain calm but the string of profanity goes on for a good 20 –

30 seconds. The individual is then arrested and charged with disorderly conduct. First Amendment cases interpreting cursing have regularly found that such language usually does not constitute fighting words, however government entities try to argue that the individual was not arrested for speech, but rather for conduct surrounding speech. (Pointing and waiving arms in aggressive manner.)

Defamation

Defamation is any factually inaccurate statement that injures another person's reputation or good name.

Defaming a public official:

When the subject of a defamatory statement is a private person or entity, that person or entity may prevail in a defamation suit by proving that the communication was made carelessly or negligently. When the comments are about public officials, the bar is set considerably higher for what constitutes defamation.

A speaker who has made comments against a public official will only be liable for defamation if it is shown that the statement was made with malice. This means that it must be proven that that the speaker either knew a statement they stated was false or that the speaker made the statement with reckless disregard for whether the statement was true or not. If a speaker has valid reasons to believe that a statement regarding a public official is true, that statement is not defamation. Also, in all cases, truth is an absolute defense to a charge of defamation.

Even though defamation is not considered protected speech, federal courts have held that public bodies *may not* implement policies that prohibit defamatory statements. A federal court held that school board policies barring criticism of board members, even when speakers refrained from identifying specific members, was unconstitutional and that "the board could not censor speech even if speech was, or might be, defamatory." *Baca v. Moreno Valley School District,* 936 F.Supp. 719, (E.D. Ca. 1996). This means that if a person is going to say something defamatory during public comment, the public body cannot be proactive and restrict the person from making the comments. It would be the responsibility of the defamed public official(s) to later file their own lawsuit.

Public officials defaming citizens during a public meeting:

The Illinois Appellate Court has held that all comments made by a public official at legislative or judicial proceedings are absolutely privileged. This means that anything said by a government official during the course of a legislative meeting (*i.e.*, local government meeting) or judicial proceeding cannot be considered defamatory. However, comments made before or after the meeting may not be privileged.

C. What Regulations can be Placed on Protected Speech?

Time, Place, and Manner Restrictions

A public body may implement time, place, and manner regulations that are legally valid as long as it 1) furthers an important governmental interest that is unrelated to the suppression of free speech and 2) does not burden speech more than is necessary to further the governmental interest. Most time, place, manner restrictions are put in place to ensure that public meetings run smoothly and efficiently. For example, limiting public comment to 5 minutes or allocating public comment periods to the beginning or end of meetings are legitimate restrictions.

Content Neutral Regulations

Time, place and manner restrictions must be content neutral and applied in a content neutral manner. This means that the phrasing of the restriction must regulate all expression equally, without regard to its content and that the restriction must be applied in a content neutral manner. For example, a school board president cannot enforce a time limit against one speaker who opposes a school board action and then decide not to enforce it against another who supports the school board action.

Even when a public body has a regulation that appears neutral on its face, a court will likely strike down the regulation if it is determined that discrimination may result because one government official can arbitrarily decide who is governed by the regulation. For example, a town may require a permit for groups that want to have a parade or hang a temporary banner from public property. However, the town is not allowed to arbitrarily discriminate among permit applications. They cannot say that only "charities and civic groups" may be granted a permit, if the ordinance does not define "charities" or "civic groups" and the decision is left to the unfettered discretion of an administrator to decide which groups qualify.

Content Based Regulations

When speech is protected by the First Amendment, the government generally has no power to restrict it because of its message. However, a government entity may restrict the speech where there is a "compelling state interest."

Compelling State Interest:

The government only has a compelling state interest in prohibiting the content of speech if there would be the intent of the speaker to cause "a clear and present danger of a substantive evil that rises far above public inconvenience, annoyance, or unrest." In practicality, this means that unless the words spoken during a public comment period has a substantial capacity to propel people into taking some kind of immediate action, or resulting in some kind of evil that the public body is attempting to prevent, the speech can not be censored.

For example, a speaker who gives a public comment clearly meant to entice the audience to violence and is likely to do so, could be subject to speech regulations. On the other hand, a speaker who makes a controversial speech that is not meant to lead to violence cannot be censored. If violence resulted because of the speech, the government must deal with the situation by curtailing the audience rather than by stopping the speaker's speech.

Taking the above into consideration, there are two important legal criteria that must be met in order for a public body to restrict the content of speech:

1. The regulation of the content of speech must be to further a compelling state interest that is unrelated to the suppression of expression. This means that there must be a more compelling reason to restrict the content of speech rather than the efficiency of a government meeting; and

2. The regulation of the content of speech must also be narrowly tailored to the furtherance of that interest.

D. Strategic Lawsuits Against Public Participation lawsuits

SLAPP suits are Strategic Lawsuits Against Public Participation and are a recent development in chilling public participation in government meetings. The sole purpose of the SLAPP is to dissuade the public from utilizing their First Amendment freedoms to affect public policy decision-making. More often than not, a SLAPP suit is filed by a developer against a citizen or citizen group who speaks out at government hearings or to government officials about environmental or zoning issues, and is based on an alleged interference with a business interest.

SLAPP suits, or even the threat of a SLAPP, are very effective in chilling public participation. SLAPP suits result in the citizen or citizen group redirecting their focus, resources, and energy to defend a meritless suit in the legal setting rather than addressing a public policy issue in a community forum.

While Illinois has enacted anti-SLAPP legislation to protect citizens who participate in the democratic process, the threat of SLAPP suits are very real to citizen activists and SLAPP actions are something that journalists should be able to readily recognize.

Journalist Red Flag:

Current examples of SLAPP actions include:

Wayne Township Homeowners Association:

After attending a forest preserve public hearing and giving public comment opposing the sale of forest preserve land for commercial development, the homeowners association was served with a lawsuit by the prospective developer for $110 million. The Citizen Advocacy Center successfully defended the homeowners association, stating that the citizens were engaged in constitutionally protected free speech.

Village of Island Lake:

Citizen Greg Katchka attended a Village Board meeting wearing a tee shirt with a Marine sniper on it with a statement, "don't run you will only die tired." Mr. Katchka while wearing this shirt gave a public comment criticizing a government policy. Six weeks later, Mr. Katchka was arrested for disorderly conduct. Two Village public officials stated that they felt threatened by Mr. Katchka at the Board meeting because of his tee shirt and hand gestures during public comment. This is a clear SLAPP example, as the public officials' complaint was for the purpose the intimidating Mr. Katchka to not attend and speak out at meetings. The Lake County State's Attorney eventually dropped the charges.

E. Questionable Public Comment Policies

Monitoring public comment policies, especially when vocal and organized citizen groups are involved in a community issue, is an important aspect of reporting on community events. It is important to identify:

1) The existence of any time, place, manner regulation prior to community activity; and
2) The specifics of the policy as they relate to chilling speech.

Current Examples of questionable public comment policies:

Village of Deer Park

Policy Language	Commentary
Any person may address the village board on matters pertaining to village business which is not scheduled to be discussed under another agenda item.	This is appropriate language to convert a nontraditional public forum into a dedicated or limited public forum
Disrespectful , insulting, satirical, or offensive comments directed at any individual public official are not permitted.	This is problematic language as it may be vague and overbroad regarding what may be considered disrespectful, insulting, satirical, or offensive comments.
The village president can cut off comments deemed to be inappropriate.	This language is also problematic due to the "unfettered discretion" given to the village president.
All public comments or questions shall be directed to the village president who may refer the matter to another official for response.	

Village of Hinsdale

Policy Language	Commentary
The opportunity to speak to the Village Board pursuant to the Citizens' Petitions portions of a Village Board meeting agenda is provided for those who wish to comment on an agenda item or Village of Hinsdale issue. The Village Board appreciates hearing from our residents and your thoughts and questions are valued.	This is appropriate language to convert a nontraditional public forum into a dedicated or limited public forum.
The Village Board strives to make the best decisions for the Village and public input is very helpful. Respect for the duties of the Village Board and for the democratic process will be adhered to - in this regard, civility and a sense of decorum will be strictly followed.	
Comments shall be limited to the Citizens' Petitions portions of the agenda. The initial Citizens' Petitions shall be limited to items specifically on the agenda. The Citizens' Petitions at the end of the meeting shall be open to any relevant subject matters. Outbursts from the audience, applause, or other types of disturbances or disruptions will not be tolerated	This language is an appropriate time, place, manner restriction.
After verbal warnings, a person disturbing a meeting may be asked to leave the meeting room or be physically removed if the person does not leave voluntarily pursuant to Sections 1-6-5 and 5-3-4 of the Village Code of Hinsdale. In addition, a person disturbing a meeting is subject to the issuance of a citation.	
All speakers must address their comments to the Village President. Speakers shall be courteous and should not make statements that are personally disrespectful to members of the Village Board. Foul, abusive, or inappropriate language, display or other materials are prohibited.	Problematic language as it is vague and overbroad regarding what may be considered personally disrespectful, inappropriate, four or abusive. Also problematic is that displays are a form of political speech. For example, if a citizen gives a public comment wearing a tee shirt that says "vote yes to keep open space," that is a "display" prohibited by the local policy.

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 The Citizen Advocacy Center, a nonpartisan, 501(c)(3), non-profit organization is dedicated to building democracy for the 21st Century by strengthening the public's capabilities, resources, and institutions for better self-governance. If you are interested in more information about the Center, becoming a volunteer, or making a tax-deductible contribution to the Center, please feel free to contact us at 182 N. York Rd., Elmhurst, Illinois 60126. Phone: (630) 833-4080 Fax: (630) 833-4083 Email: cac@citizenadvocacycenter.org Website: www.citizenadvocacycenter.org