



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

This publication is meant to be a hands-on guide for student journalists. The purpose is to outline the basic requirements that public bodies must adhere to when making policy decisions and the First Amendment rights of those who seek to have their voice heard during government meetings.

Student journalism programs, while declining in numbers, play a unique role in high schools. Journalism programs provide a hands-on civic engagement opportunity that builds the capacity of student reporters and editors to observe, think and write critically about the environment in which students spend a majority of their day and on issues that students care about. For those who read the student papers, it also provides an opportunity for civic engagement as student papers are an avenue by which students keep informed on issues that affect them on a daily basis.

Student journalism programs that embrace and seek to advance true pedagogical goals of such programs have a unique opportunity to build journalism skills as well as general citizenship skills through knowing how to effectively gather, compile, analyze, and disseminate public information. Educating students about how government bodies must conduct their business in the light of day and knowing what the First Amendment rights are of people who speak out at government meetings is crucial to reporting on government.

While a handful of concerned citizens may attend local government meetings, often times, the primary attendees are journalists. Student journalists who report on government meetings, can play a key role in keeping the public, and students, informed on issues that concern them.

I. The Illinois Open Meetings Act and Potential Problems

The Illinois Open Meetings Act is a law that mandates that government decision must be made in the open, subject to a few exceptions. When members of the public show up, speak out and organize community campaigns, it can sometimes create a contentious environment. It is important for student journalists to know how public bodies are

required to keep meetings open as well as understand and recognize improper restrictions placed on speakers.

The Illinois Open Meetings Act (OMA) 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 OMA 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?

In order to have a meeting that falls under the OMA, the following must be present:

- 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; and
- Who come together of the *purpose of discussing public business*.

Summary of “majority of a quorum” for different government body sizes:

- 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 trigger Act (Exception to rule that only applies to five member board!)

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.

Student Journalist Red Flag:

Non-profit organizations are not subject to the OMA.

What about “Advisory Bodies”? For example, school district creates an advisory body to determine if a referenda is needed to increase school funding. Is the body subject to the OMA?

An advisory committee is subject to the OMA depending on who the committee is responsive to. If the committee was set up by the district superintendent and is responsive to that individual only, the committee is exempt from the OMA. If the school board convened the body and the recommendations go directly to the public body, it IS a public body subject to the Act.

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. The calendar has to be posted at the principal office holding the meeting and at the meeting location;
- 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 of votes the public body may take.
- If the public body maintains a website, they must post agendas online and the agendas must remain online until the meeting has concluded.

Student Journalist Red Flag:

Taking a Vote Without Public Notice

Public bodies may discuss items NOT specifically listed on an agenda but 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 OMA.

Location of Meetings: Reasonable Accessibility

All public meetings must be held at specified times and places which are convenient and open to the public. The definition of convenience is one of *reasonable* accessibility.

Example: Can a public body hold a meeting at 7 a.m. during the weekday even though attendance will be low because it is during the daytime of the week?

Answer: Yes – Reasonable does not mean that everyone has to be accommodated.

D. Recording Public Meetings

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.

Student Journalist Red Flag:

Example: In October 2008, Park District in Downers Grove holds meeting on controversial issue. Local paper sends photographer to take pictures. Park District refuses to allow photographer to take picture during meeting, and asks photographer to wait until the meeting is over.

Violation?: Yes! The OMA is explicit in stating that the public has a right to record the meeting. Asking the photographer to infringe on the right granted by the OMA to record government proceedings.

Public Bodies Recording Closed Sessions

All public bodies must record closed meetings in the form of an audio or video recording. Closed session 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).

Student Journalist Red Flag:

Minutes have to be made available within 7 days of approval. 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.

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Accommodating Large Crowds

Example: School Board has controversial issue on the agenda that involves cutting AP programs. School Board knows that large members of the public will attend school board meeting but does not want to move meeting location to a larger room. Is this an OMA violation?

Answer: Yes. If the public body is aware that a meeting has significant public interest and suspects that the usual space is too small to accommodate the public who attend, the public body must find an alternative location. If an alternative 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)

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 following are the broad categories for when a meeting may be closed. If you have a specific question about whether a meeting can be validly closed, contact the Center

- Employment Matters
- Land/Investment Deals
- Security Matters
- Student Records
- Litigation/Legal Claims

Student Journalist Red Flag:

A public body may only *discuss* issues in closed session. The vote on issues discussed in closed session has to happen in a public forum.

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 OMA 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 OMA 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

The right to free speech a core value in our democratic society. While most public bodies in Illinois are not required to provide the members of the public an opportunity to speak at public meetings, when public bodies allow for public comment, all rights of the First Amendment kick in.

Student Journalist Red Flag:

School Boards in Illinois are the only public bodies that **MUST** allow members of the public an opportunity to address the board in open session.

A. A Primer on Protected Free Speech

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

Traditional public forums are public places where speech is traditionally allowed without government regulation. Examples are 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. Once the government entity decides to opens up a previously restricted environment to the public, a *limited or dedicated public forum* has been created and the speaker enjoys the full protection of the First Amendment.

Student Journalist Red Flag:

Example: A City Council meeting does not have to allow members of the public to speak. However, once the city council allows the public to speak, the forum has been converted to a *limited or dedicated public forum* and free speech protections under the U.S. Constitution apply. Under a limited or dedicated public forum the city council may implement speech limits to certain issues on the agenda, *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

All of the following factors must be present to label something as obscene language:

- 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.

Example:

Obscenity: An individual makes a public comment describing a sexual act in graphic detail during a city council meeting.

Not Obscenity: 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 are directed at an individual or a small group. They are words that, legally defined, have such little social value that any value the words might have is overshadowed by the government's interest in prohibiting them.

Chaplinsky v. New Hampshire For practical purposes, the fighting words doctrine has been very narrowly defined by the courts.

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.

Answer: 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. 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.

Defaming a public official:

When the comments are about public officials, the bar is set considerably higher for determining 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.*

Malice is determined if the speaker knew a statement 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.

Example: Can a school board institute a policy stating that comments made during public comment can not be "defamatory" in nature?

Answer: No! Even though defamation is not protected speech, federal courts have held that public bodies *may not* implement policies that prohibit defamatory statements. A federal court held "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).

Public Officials Defaming Citizens During 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 d 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.

Example: Can a school board limit public comments by the public to three minutes at the beginning of the board meeting?

Answer: Yes, a time limit for public comment is a legitimate restriction.

Example: Can a school board only allow for public comment at the END of the meeting rather than at the beginning of the meeting?

Answer: Yes, this is a place restriction that is legitimate.

Example: Can a school board only allow one minute to one person and three minutes to another because they do not like some of the speakers?

Answer: No! This would be restricting speech based on what the person is going to say and is impermissible. See below.

Content Neutral Regulations

Time, place and manner restrictions must be content neutral and applied in a content neutral manner. This means that the restriction must regulate all expression equally, without regard to its content and that the restriction must be applied in a content neutral manner.

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.

Example: City requires permits for groups that want to hang a temporary banner from public property. Citizen group applies for permit to hang banner and mayor denies permit based on his dislike for the group.

Answer: A city 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 if there would be the intent 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 must further a compelling state interest that is unrelated to the suppression of expression. This means that a more compelling reason than the efficiency of a government meeting is necessary ; and
2. The regulation must be narrowly tailored to the furtherance of that interest.

D. Strategic Lawsuits Against Public Participation, or SLAPP suits

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. 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 are something that student journalists should be able to readily recognize.

Student 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. Monitoring 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.

Listed below are two examples as of 11/08 of public comment policies that pose First Amendment problems:

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
<p>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.</p>	<p>This is appropriate language to convert a nontraditional public forum into a dedicated or limited public forum.</p>
<p>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.</p>	
<p>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</p>	<p>This language is an appropriate time, place, manner restriction.</p>
<p>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.</p>	
<p>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.</p>	<p>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.</p>

Funding for this brochure was made available by a grant from the McCormick Foundation.

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