

GRAY AREAS OF FOIA AND OMA

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ILGL ANNUAL CONFERENCE



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OVERVIEW

- 1. Gray Areas of the OMA and FOIA – Discussion**
- 2. Hand-Out re: Gray Areas (hard copy)**
- 3. Hand-Out re: Other FOIA items of interest (electronic)**
- 4. FOIA Exemptions Updated (electronic)**
- 5. Electronic - PAC Determinations re: Gray Areas**

OMA #1 – WHAT CONSTITUTES

“FINAL ACTION”?

Hypothetical #1:

- It is discovered that an application for a fireworks permit for a charity event, which requires City Council approval under the city code, was not obtained.
- This is discovered the day before the charity event is scheduled.
- The City Manager calls each councilperson and asks if they will approve issuance of the Fireworks permit and states that the matter will be brought back for ratification at the next Council meeting (following the event).
- (5) councilman vote yes. 1 votes no because he's tired of organizations failing to seek permits in a timely manner. 3 councilmen can't be reached. Because a majority voted to issue the permit, the City Manager did so.

Has final action outside a public meeting, in violation of the OMA, occurred?

Yes, because a decision was made about public business by a majority of a quorum of the public body not at a public mtg.

OPTIONS TO AVOID THE OMA VIOLATION:

1. The City Manager notifies City Council members of the situation and his decision to issue the permit. He advises that he will bring the matter to the City Council for ratification at the next meeting. No action is taken by the members of the Council. (Though the action of the City Manager may be ultra vires...); or
2. The City Council delegates the authority to approve such permits by code; or
3. Call an emergency meeting.

Hypothetical #2:

- In closed session, a City Attorney explains a settlement demand in a federal Section 1983 civil rights case. The members of the City Council unanimously agree that the City Attorney should respond with an offer of judgment for half of the demand. The City Attorney submits the offer of judgment as authorized by the City Council, and it is accepted.
- Later the City Council takes action to approve the settlement at an open meeting.

➤ *Has the OMA been violated?*

PRELIMINARY NEGOTIATIONS ARE NOT FINAL ACTION.

- ❖ An argument could be made that since a Rule 68 offer of judgment (“OOJ”), if accepted, is enforceable, it constitutes “final action”.
- ❖ However, since the OOJ may not be accepted, it seems likely that most courts, and the PAC, would not find that issuance of an OOJ constitutes final action.

Takeaways:

- ✓ Preliminary, tentative, or consensus votes are not final action so long as final action is ultimately taken at an open meeting.
- ✓ Steps taken toward final action (e.g. agreeing to mediation, coming to a consensus on how much to offer to settle a case for, discussing viable candidates to fill an elected office vacancy) are part of the process to arrive at a final decision, but do not themselves constitute final decisions.
- ✓ If there's no time to call a special or emergency meeting, or if you can't obtain a quorum, consider having staff take the action instead of trying to do poll-vote of public body members. Ratify the decision at the next meeting.
- ✓ Consider codifying authority for staff to make certain decisions under certain circumstances (possibly subject to subsequent ratification). More likely to be helpful for home rule entities.

**“FINAL
ACTION”**

OMA #2 - WHAT CONSTITUTES “CONTEMPORANEOUS INTERACTIVE COMMUNICATION”?

A VIOLATION OF THE OMA OCCURS WHERE THERE IS A:

- Contemporaneous interactive communication
- Regarding public business
- By a majority of a quorum of the public body (or a quorum for 5 member boards).

We generally always know what public business is.

And what constitutes a majority of a quorum. But what is →→→→

A CONTEMPORANEOUS INTERACTIVE COMMUNICATION?

This hasn't been decided by an Illinois court.

The PAC has concluded that: Contemporaneous interactive communication occurs in *“the same general time frame, but is not necessarily simultaneous.”*

-Two aldermen responded to the City Manager's text message within the same general time frame as it was sent, but although it constituted a “contemporaneous interactive communication, since a majority of a quorum wasn't engaged, there was no OMA violation.

2018 PAC 54002, issued 10-22-18, citing John H. Brechin *“E-Mail and the Open Meetings Act, 94 ILBJ 666, 667(2006).*

-A Board did not engage in contemporaneous interactive communication where one trustee drafted a letter which was then edited by other trustees later at separate times. Ill. Att'y Gen. PAC Req. Rev. Ltr. 50318

More PAC determinations on what constitutes “contemporaneous”:

- The first 2 emails in an email chain were 4 minutes apart. A third message was sent more than an hour later. *The emails were determined to be not “contemporaneous”. 2018 PAC 53781*
- A complaint was made that a Board President of a Park District conducted business in violation of the OMA by emailing the entire board on 2 subjects: an open Board seat, and the Executive Director’s contract. Two Board members replied to the President’s email. (One responsive email came in an hour later. The other came in more than 2 days later.) Noting that the courts have not weighed in on how close in time electronic communications must be in order to be “contemporaneous”, the PAC concluded that given the significant time periods between the three emails, *they were not contemporaneous and interactive. 2016 PAC 39667*

Hypothetical:

A member of a City Council sends an email to the rest of the City Council and the City Manager expressing what she thinks her vote on an upcoming matter of City business will be and asking everyone else to let her know how what they're thinking.

Is there contemporaneous interactive communication



By sending the email?

If no one responds?

If one Council member responds to the email the next morning (copying all Council members) and another Council member responds to the communication the next afternoon (copying all Council members), and there are no further email communications?

If a majority of a quorum of Council members respond to the email within ten minutes of receiving it?

If the members individually indicate their vote on the issue by email and subsequently the matter is on an agenda for an open meeting where final action is taken?

CONTEMPORANEOUS INTERACTIVE

Takeaways:

- ✓ While members of public bodies should be cautious in how they email or text each other about matters of public business, most communications will likely not be found to be “contemporaneous” such that the OMA is violated unless:
 1. Emails/Text messages are sent to a majority of a quorum (or more) **and**;
 2. The Emails/Text messages are responded to quickly (within minutes, not hours) by a majority of a quorum.
- ✓ Simply sending information or ideas to other members of a public body is not a violation of the OMA unless a majority of a quorum replies within a short time frame & exchange ideas.

**FOIA #1-WHEN ARE EMAIL AND TEXT MESSAGES
SENT OR RECEIVED ON PERSONAL DEVICES, OR
SENT OR RECEIVED FROM PRIVATE ACCOUNTS,
SUBJECT TO FOIA FOR EMPLOYEES AND PUBLIC
OFFICIALS?**



Hypothetical #1:

- ❖ A police officer is involved in a shooting incident. It turns out the suspect he shot had a litany of felony convictions on his record. Within hours of the incident, the officer receives a number of text messages on his personal cell phone that express relief that the officer's injuries were not more serious. One officer jokingly tells him his injuries now give him "bragging rights." The next day, another colleague sends the officer an email on his personal account expressing outrage that the suspect was able to be out on the streets with his criminal record. The email ends with "the dirt bag deserved to die."
- ❖ Must these text messages be turned over if someone sends a FOIA request for communications regarding the shooting?

Hypothetical #2:

- ❖ City Council members routinely send e-mails to one another from their homes discussing their vote on various topics that will be before the Council at the next meeting. Since the e-mails are sent to and from their personal computers, there is no record of these communications at City Hall. However, the City Administrator knows that some Council members converse about public business via e-mail while at home.

- ❖ If the City receives a FOIA requesting any correspondence related to a topic the Council Members have discussed, does the City have to produce the e-mails? Does the response change if the communications were made through text messages on the Council Members personal cell phones?

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Takeaways

- ✓ Employees: texts and emails sent from an employee's personal accounts and devices are subject to FOIA if the employee is working in his/her capacity as a municipal employee engaging in public business. (But see *Shehadeh v. Downey*, 2020 IL App (3d) 170158-U, 2-5-2020).
- ✓ Elected Officials: texts and emails sent from a personal account or device are subject to FOIA if the message is forwarded to a government account, sent to a majority of the public body, or sent during a government meeting, and the message pertains to public business.

FOIA #2 – WHAT RECORDS ARE EXEMPT FROM FOIA PURSUANT TO THE JUVENILE COURT ACT?

Section 1-7(A) of JCA (amended 2018):

“(A) All *juvenile law enforcement* records which have not been expunged are *confidential* and may never be disclosed to the general public or otherwise made widely available. *Juvenile law enforcement* records may be obtained only under this Section and Section 1-8 and Part 9 of Article V of this Act, when their use is needed for good cause and with an order from the juvenile court, as required by those not authorized to retain them. Inspection, copying, *and disclosure* of *juvenile law enforcement records* maintained by law enforcement agencies or *records of municipal ordinance violations* maintained by any State, local, or municipal agency that relate *to a minor who has been investigated, arrested, or taken into custody* before his/her 18th birthday shall be restricted” to certain enumerated parties.

Hypothetical #1:

- ❖ A 17-year-old driver was arrested for driving while intoxicated after being involved in a fatal accident. The adult driver of the other vehicle was killed, and his adult passenger was injured.

- ❖ Your client's police department receives several FOIA requests for records related to this incident. Which persons or entities are entitled to obtain the records?
 - the press?
 - the minor's parents?
 - the other driver's insurance company?

Hypothetical #2:

- ❖ A 17-year-old driver was ticketed for failing to stop at a stop sign after being involved in a non-fatal accident. The other driver was injured but survived.
- ❖ Your client's police department receives several FOIA requests seeking copies of the citation and traffic accident report related to this incident. Which persons or entities are entitled to obtain the records?
 - the minor's parents?
 - the other driver's insurance company?

Hypothetical #3:

- ❖ A resident called the police to report that his car, which had been parked on his driveway, was keyed overnight. He alleges that the 17-year-old son of his next door neighbor damaged his car intentionally. An officer took statements from the complainant and the teen; ultimately, the Department did not arrest or cite the teen in connection with the incident.
- ❖ The complainant submits a FOIA request to obtain the reports related to the Department's investigation. How should the Department respond? What if the parents of the teen submit the FOIA?

FOIA #2 - WHAT RECORDS ARE EXEMPT FROM FOIA PURSUANT TO THE JUVENILE COURT ACT?

Takeaways:

- ✓ JCA confidentiality provisions relate to minors who were “investigated, arrested, or taken into custody” but does not include records identifying a juvenile as a victim, witness, or missing juvenile[.]
- ✓ 2018 amendment expressly allows the minor who is the subject of the record, his or her parent or guardian, or counsel, to obtain JCA-protected records.
- ✓ Helpful PAC determinations on amended section 1-7(A)
 - Ill. Att’y Gen. PAC Req. Rev. Ltr. 52318, issued 3/30/18 (properly denied when request was from victim, minor was arrested)
 - Ill. Att’y Gen. PAC Req. Rev. Ltr. 55926, issued 12/26/18 (properly denied when records related to vehicle accident in which minor driver was investigated)
 - Ill. Att’y Gen. PAC Req. Rev. Ltr. 58028, issued 8/20/19 (improperly denied when records related to minor who received traffic ticket but no investigation occurred)

WHAT CONSTITUTES A CONVENIENT LOCATION FOR PUBLIC MEETINGS UNDER THE OMA?

OMA #3



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Hypothetical #1:

❖ The members of City Council want to tour the site of a new County building for which the City helped provide funding and property. Is there any way to do this while complying with the OMA (other than doing the tour in groups that constitute less than a majority of a quorum)?

Hypothetical #2:

❖ If a Village Board has reason to know that it is anticipated that two hundred or more people are will attend a particular Board meeting, and the capacity of the Board room is 100, does the Board have an obligation to find an alternative site or to provide for alternative means of access?

WHAT CONSTITUTES A CONVENIENT LOCATION FOR PUBLIC MEETINGS UNDER THE OMA?

Takeaways

- ✓ Any accommodation must be convenient to the public as a whole, not just to the members of the public who actually attend the meeting.
- ✓ When anticipating an increased turnout, the municipality should take all steps necessary to provide reasonable access, including additional seating, a larger venue, live streaming in another room, etc.

OMA #4-ATTENDANCE OF PUBLIC BODY MEMBERS AT OTHER MEETINGS

Hypothetical #1

- ❖ All of the Trustees of a Village Board attend a Chamber of Commerce meeting.
- ❖ The stated purpose of the Chamber meeting is to discuss a controversial development scheduled for an upcoming City Council agenda.
- ❖ Only one Council member speaks. He states his opinion regarding his concerns with the development.
 - *Are the members of the City Council holding an un-noticed public meeting?*

PAC decisions (more liberal than you would expect):

»» OMA is not automatically triggered by the presence of a majority of a Quorum of a public body.

Each situation is fact specific.

2019 PAC 48812

»» There is a “meeting” under the OMA if a majority of a quorum of the public body engages in contemporaneous interactive communication pertaining to public business.

»» Attendance by a Village Board at an Economic Development Committee violated OMA where a majority of the Board attended and deliberated about public business.

2019 PAC 48812

»» The PAC found no violation of the OMA where two Trustees spoke at a meeting concerning a referendum on whether to repeal Village’s home rule status. They were responding to criticism, their comments were separated in time, and did not appear to be coordinated. At no time did 3 or more members of the Board engage in deliberative discussions about Board business.

2018 PAC 51521 and 51896

»» No violation of OMA where requester complained that members of the public were required to sign up and pay a fee to attend the State of the Village and City event where public business was discussed. There was no indication that a majority of a quorum engaged in contemporaneous interactive communications pertaining to public business. 2018 PAC 52223

»» Attendance at a Village TIF Act public hearing by a majority of a quorum of Board members did not result in a “meeting” of the Board since there was no evidence of deliberative discussion. 2017 PAC 47804

»» A gathering (in this case, a political gathering) does not constitute a meeting under the OMA if there is no “examining or weighing of reasons for or against a course of action, no exchange of facts preliminary to a decision, and no attempt to reach accord on a specific matter of public business. *Nabhani v. Coglianese*, 552 F. Supp. 657, 661 (N.D. IL. 1983)

- Though a majority of a quorum of City Council members were present at a task force meeting where the Mayor gave opening remarks, there was not a “meeting” of the Council where there were no deliberative discussions among the City Council members.

Ill. Att’y Gen. PAC Req. Rev. Ltr. 44159, issued March 7, 2017

- PAC found insufficient evidence that there was a violation of the OMA where a majority of a quorum of City Council members attended an Administration Committee meeting where the Council members spoke only during the public comment period and claimed they were speaking as private citizens, and did not participate in the Committee’s deliberative discussions. *2016 PAC 38142*

ATTENDANCE AT OTHER MEETINGS

Takeaways

- ✓ While the decisions are fairly reasonable and liberal, the bottom line is that whether or not an OMA violation exists when a majority of a quorum of a public body attends another meeting or function is always going to be a question of fact. Never a fun place to be.
- ✓ If a majority of a quorum of public officials decide to attend the same meeting (HOA meeting, Chamber meeting, Plan Commission meeting, etc.), they should avoid speaking on public business. They should definitely not exchange comments with other members of the public body or deliberate about possible actions.

FOIA #3 - SCOPE OF SECTION 7(1)(d)(IV) OF FOIA

Section 7(1)(d)(iv) allows the withholding of law enforcement records or information “but only to the extent that disclosure would:

- (iv) unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies; except that the identities of witnesses to traffic accidents, traffic accident reports, and rescue reports shall be provided by agencies of local government, except when disclosure would interfere with an active criminal investigation conducted by the agency that is the recipient of the request[.]”

Hypothetical:

❖ A police report pertaining to a domestic violence situation contains the names, addresses, telephone numbers, and statements of the victim, as well as the victim's sister and victim's best friend who were present when the incident occurred.

>What can be appropriately redacted from the police report?

FOIA #3 - SCOPE OF SECTION 7(1)(D)(IV) OF FOIA

Takeaways:

- ✓ Section 7(1)(d)(iv) may allow for the redaction of more than just names and identifiers but will depend on the circumstances described in the incident report
- ✓ **Relevant case law:**
 - *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188 (1st Dist. 2004): Names and addresses of beat meeting participants properly redacted because they provided information to police department (discussing prior version of this exemption).
 - *Copley Press, Inc. v. City of Springfield*, 266 Ill. App. 3d 421 (4th Dist. 1994): “Given the nature of the investigation and the relatively limited number of sources of information pertinent to that investigation within the ... community, it is readily apparent from an examination of the material in the file that the information provided by each individual interviewee would necessarily result in the disclosure of the identity of that source. For that reason, redaction of the file cannot be meaningfully accomplished.”

OMA #5 – PUBLIC COMMENT

Section 2.06(g) of OMA:

“Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.”

Hypothetical:

- ❖ A City Council establishes and records the following rules regulating public comment at its meetings:
 - (1) Comments may not include “personal attacks” concerning City officials or employees.
 - (2) Speakers must confine their comments to items on the agenda.
- ❖ Are these rules permissible restrictions on public comment?

OMA #5 - PUBLIC COMMENT

Takeaways:

- ✓ Content-based regulations on public comment, even if they are viewpoint neutral, create risk to the public body.
- ✓ Rules regulating time of each comment, and the total time for all comments, will allow public body to quickly move through comments and allow individuals to feel they have been heard by their elected officials.