Gray Areas of FOIA and OMA
Hand-Out
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OMA Issue # 1 - What constitutes "final action" under the OMA? [Pat Lord]

Section 120/2(e) of the Illinois Open Meetings Act (5 ILCS 120/2(e)) ("Act") provides that:

> **(e) Final action.** No final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted.

While the OMA only specifies that final action may not be taken at closed meetings, the more accurate statement would be that the *only* place final action can be taken is at an open meeting.

In addition to sometimes inadvertently taking final action in closed session, public bodies sometimes also take final action outside the confines of either an open meeting or closed meeting. Which begs the question, what exactly is "final action"?

1. One obvious instance of a public body's taking final action outside an open meeting occurred when, after a regular meeting of a Village Board was canceled due to a lack of a quorum, the Board took action on payment of bills and two other items by an email vote. At the next public meeting of the Board, after the items it had approved by email had been acted upon, the Board ratified its decisions. The PAC found that the email votes were not preliminary votes "reflecting a tentative consensus", and the Board's decisions took effect prior to ratification. Therefore, the email votes constituted impermissible final action. 2018 PAC 55553 issued on October 3, 2019.

2. A far less obvious situation where the PAC found final action was taken in closed session pertained to the approval of closed session minutes. Acknowledging that it had not previously taken this position, the PAC determined that the approval of closed session minutes was a final action that public bodies are required to take in open session. Thus, while OMA exception 120/2(c)(21) authorizes a public body to discuss minutes of closed session meetings in closed session, the public body should vote to approve closed session minutes in an open meeting. 2018 PAC 55838 issued on September 13, 2019

Note: there is extensive discussion of what constitutes "final action" in this PAC determination, so it is well worth reading. It is included as attachment #3 to the "New PAC Opinions and Caselaw of Interest" included in the materials for the FOIA/OMA session of the Conference.

3. Another instance where the PAC found that final action took place outside an open meeting was when a complaint was made to the PAC that a Township Board held a private gathering and took final action to prohibit camping at a Township Park. The background, as explained to the PAC, was that the Township Supervisor advised Township Board members of involvement of police at the park due to problems occurring there. Four of the five Board members contacted the Township Supervisor and indicated that they wanted camping suspended until further notice. At their direction, camping was suspended. The PAC found no improper

meeting of the Board, but concluded that impermissible final action had been taken based on a collective decision made by the Board not taken at a public meeting. 2019 PAC 58555; 2019 PAC 58614; 2019 PAC 58615, issued on August 20, 2019.

4. Final action was found not to have been taken when (more than) a majority of a quorum of School Board members issued a joint email statement to the press regarding controversial statements made by another member of the Board, stating their belief in tolerance and acceptance, and making it clear that one member of the Board of Education did not speak for the whole. The PAC found that the Board's statement did not constitute final action since it consisted only of factual or philosophical statements and did not assert a new policy or decide a Board matter. The PAC went on to note that even if the opinions expressed in the statement could be considered relevant to Board policy, the opinion was merely an interim decision, and interim decisions do not constitute final action. 2018 PAC 53781, issued on January 31, 2019

5. Where the Marseilles City Council issued a letter signed by a majority of a quorum of Council members to the Chamber of Commerce advising the Chamber of the Council's decision to terminate the City's membership in the Chamber due to a lack of cooperation, the PAC found that the City Council took impermissible final action without discussion or a vote on its decision at any public meeting. 2017 PAC 50401 & 2017 PAC 50430, issued on February 5, 2018

6. A request was made to the PAC to determine whether a College Board had violated the OMA by asking a candidate for President of the University to reconsider applying for the position and allegedly selecting her for that position. The PAC found that the Board's reaching consensus in closed session to publicly voice its support of the candidate in question was part of a process of reaching final action, rather than final action itself.

There is some good language in this PAC opinion (citing *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 169 (5th Dist.1989)), stating that "negotiations and mediations are made up of many 'unilateral' decisions, such as what to offer or counteroffer, and to hold that each of the unilateral strategical decisions that make up the constituted parts of a negotiation is in and of itself a final action is unreasonable." 2018 PAC 54002, issued on October 22, 2018

7. Upholding the lower courts' reversal of Binding PAC Opinion 13-007, the Illinois Supreme Court held that no violation of the Open Meetings Act occurred when the Board of Education signed a separation agreement terminating the employment of the superintendent during a closed session since it returned to open session and voted in favor of the agreement. The Court noted that the OMA contains no bar to a public body's taking a preliminary vote at a closed meeting. The Court also made a point of stating that ***"...the public vote is not merely a ratification of a final action taken earlier in closed session, it is the final action. Without the public vote, no final action has occurred."*** *[Emphasis added] Board of Educ. Of Springfield School Dist. No. 186 v. Attorney General of Illinois*, 77 N.E.3d 625 at ¶¶72-74 (2017).
[Note: in addition to reversing Binding PAC Opinion 13-007, this IL Supreme Court decision also inherently reversed Binding PAC Opinion 12-013 which concluded that a consensus arrived at in closed session constituted final action.]

8. The Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago ("Board") went into closed session after presentation of evidence on employee's (plaintiff's) pension petition and then reconvened in open session where the Board voted to deny plaintiff a duty disability benefit. However, the Board never voted in open session on its *written* decision to deny plaintiff a duty disability benefit, which violated the OMA. The circuit court affirmed the Board's decision. The First District Appellate Court reversed the circuit's decision, vacated the Board's decision to deny the plaintiff a duty disability benefit, and remanded the case with instructions that the Board render a final administrative decision in accord with its decision . *Howe v. Retirement Bd. of Firemen's Annuity and Ben. Fund of Chicago*, 996 N.E.2d 664 (1st Dist. 2013).

9. Although an oral vote by an electoral board in open session took place by which the board sustained objections made to three candidates' petitions, the written decision was issued at a later date at a reconvened meeting at which only 1 of the 3 electoral board members was present. The other 2 members had pre-signed the decision. The court found that issuance of the signed written decision was the "final action" by the electoral board, and that such action was required to occur in an open meeting with a quorum present. Therefore, while noting that failure to meet the provisions of the OMA does not necessarily render an electoral board's proceedings null and void, the appellate court found that in this instance the purpose of the OMA had been undermined and the electoral board's actions could not be upheld; therefore the electoral board never issued a valid final order. *Lawrence v. Williams*, 988 N.E.2d 1039 (1st Dist. 2013).

10. There was no violation of the OMA when the Board of Education requested mediation to resolve impasse in contract negotiations with secretary's union because that decision was not "final action" under the Open Meetings Act that should have been discussed in open session. Rather, mediation was part of the process of reaching a final action with the union and is not an end, but a means to an end. *Gosnell v. Hogan*, 534 N.E.2d 434 (5th Dist. 1989).

11. There was no violation of the OMA when a School Board considered information regarding dismissal of an employee and drew up the signed findings in closed session because upon returning to open session, each board member publicly indicated his vote on the dismissal by acknowledging his signature on the findings. Thus, the Open Meetings Act does not prohibit a board from adjourning to closed session to draw up signed findings and then returning to open session to publicly record individual members' votes on the findings. *Grissom v. Board of Education of Buckley-Loda Community School District No. 8*, 388 N.E.2d 398 (1979).

12. There was no violation of the OMA when a School Board held a "general discussion" and reached a "tentative consensus" during a closed session concerning employee retention and salaries of non-union employees while collective bargaining negotiations were pending with its teachers' union because the Board subsequently approved an agreement during open meetings. The appellate court held that because the School Board was awaiting the teachers' union's response to a contract offer that could have a significant impact on the school district's budget, the school lacked sufficient information to make a final decision during the closed session. Thus, the Board did not take final action by generally discussing and reaching a tentative consensus on the retention and salaries of non-union employees in closed session. *People v. Board of Education of District 170 of Lee and Ogle Counties*, 40 Ill. App. 3d 819 (2d Dist.1976).

13. There was no violation of the OMA where a board went into closed session, was polled and found to unanimously agree not to rehire a teacher, entertained a motion to that effect, prepared the motion, and returned to open session where the motion was read and each member, by roll call, voted in favor of the motion. *Jewell v. Board of Education, DuQuoin Community Schools, Dist. No. 300*, 312 N.E.2d 659 (5th Dist. 1974).

"FINAL ACTION" - KEY TAKEAWAYS:

1. Final action must resolve a matter. So long as what is decided by the members of a public body is intermediate, preliminary, or tentative, it does not constitute final action.
2. Closed session votes, and even signing agreements, do not constitute final action where the public body adjourns afterwards to open session and takes final action there.
3. Deciding to go to mediation in closed session is an intermediate step that is part of a process and is therefore not final action. Likewise, extending an offer (subject to action taken at an open meeting) to resolve litigation is part of the process of reaching final action. (However, there is no clear answer as to whether a federal judge will accept the caveat "subject to action taken at an open meeting" during settlement negotiations where the parties are supposed to bring authority to settle a case.)
4. If it is necessary to take final action before a regular public meeting is scheduled, you can obviously (if there's time & a quorum) hold a special or emergency meeting. Alternatively, if you prepare in advance, the public body could consider delegating authority to staff to make time-sensitive decisions on certain matters (to the extent permitted by law); or (b) have the city manager, or other staff member in charge, *advise* the public body of an action they plan to take (instead of asking for a vote on the action) until a regular or special meeting is held at which time their action can be ratified.

OMA Issue # 2 - What constitutes contemporaneous and interactive communications under the OMA? [Pat Lord]

Section 1.02 of the Open Meetings Act 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 5-member public body, a quorum of the members of a public body **held for the purpose of discussing public business**." [Emphasis added]

Many members of public bodies are afraid to communicate with each other because they fear inadvertently violating the OMA. However, although contemporaneous interactive communication is not defined in the Open Meetings Act, nor have Illinois courts weighed in on a definition, the several PAC decisions that have addressed the issue are much more liberal than I think most public officials and practitioners would expect.

It is worth noting that the PAC opinions that discuss what constitutes "contemporaneous interactive communication" under the OMA also frequently end up needing to address what constitutes impermissible "final action". The concepts are often factually intertwined. Also, while a communication between a majority of a quorum of the members of a public entity may not be "contemporaneous and interactive communication" such that a meeting in violation of the OMA has occurred, such a communication *will* be subject to FOIA under *City of Champaign v. Lisa Madigan in her capacity as Attorney General of the State of Illinois*, 2013 IL App (4th) 120662.]

The following are summaries of PAC determinations on the issue of what constitutes contemporaneous interactive communication. [Note: the PAC determinations discussed below are included in materials provided electronically for the FOIA/OMA session of the Conference under "PAC Determination Letters".]

1. In the PAC determination discussed in #4 on page 2 of the "final decision" section above, where more than a majority of a quorum of School Board members issued a joint email statement to the press regarding controversial statements made by another member of the Board, the PAC also evaluated whether a majority of a quorum of the School Board conducted a meeting in violation of the OMA due to contemporaneous interactive communications. The PAC found no violation of the OMA where either (i) a majority of a quorum received the emails, but did not participate in any exchange, or (ii) a majority of a quorum did interact in one email string; however, the communications were not "contemporaneous" where the first two messages were sent only four minutes apart, but the third message was not sent for more than an hour and a half. 2018 PAC 53781, issued on January 31, 2019

2. A request was made to the PAC to determine whether a College Board had violated the OMA by asking a candidate for President of the University to reconsider applying for the position and allegedly selecting her for that position. Although there was an indication that the Chair of the Board had one-on-one communications with the Board members regarding the candidate in question, the PAC concluded that such communications were ***not*** contemporaneous interactive communications of a majority of a quorum of the Board occurring "in the same general time frame" (quoting John H. Brechin, E-*mail and the Open Meetings Act*, Illinois Bar Journal 94 ILBJ 666, 667 (2006). Further, the PAC found that the Board's consensus regarding the candidate in question was part of a process of reaching final action, rather than final action itself. 2018 PAC 54002, issued October 22, 2018 (This PAC determination was also discussed in #6 of the "Final Action" section above.)

3. A Request for Review was made to the PAC claiming that members of the City of Wood Dale City Council and City Manager had conducted public business regarding hiring an outside engineering firm via text messages. The text messages were sent using a group multimedia messaging service which allows a person to create a group conversation by sending a message to a group of people at the same time, and by allowing individuals within the group to see all text message responses from every member of the group. The PAC determined, as to one text message from the City Manager to the group, that a majority of a quorum of the City Council did not respond. As to a second group text message, while a majority of a quorum of the Council did respond and engage in discussion concerning city business, the messages were separated by more than an hour for some, and by more than a day for others. Therefore, the PAC concluded that the messages did not constitute "contemporaneous interactive communication" among a majority of a quorum of the Council. The PAC further concluded that the messages were **not** "**deliberative**", but were intended to be "**informational**" (though the PAC did add a gentle warning that the members of the city council should be mindful of the requirements of the OMA in engaging in such text communications.) 2018 PAC 53819, issued on November 29, 2018.

4. In the PAC determination discussed in #5 on page 2 of the "final decision" section above, where the Marseilles City Council issued a letter signed by a majority of a quorum of council members to the Chamber of Commerce advising the Chamber of the council's decision to terminate the city's membership in the Chamber, the PAC also evaluated whether majority of a quorum of the city council conducted a meeting in violation of the OMA due to contemporaneous interactive communications. In that case, the Mayor Pro Tem drafted the letter and asked the City Clerk to leave it in the mailboxes of the other Council members with the direction that if anyone had any comments on the letter, to get in touch with him. Various council members did make comments, but at no point were three or more council members part of a gathering of a quorum where contemporaneous interactive communication took place. So, while the PAC did end up determining that there was improper "Final Action", the PAC found insufficient evidence to conclude that a meeting had been conducted in violation of the OMA. 2017 PAC 50401 & 2017 PAC 50430, issued on February 5, 2018

5. An alleged violation of the OMA occurred when a Park District Board President sent an email to the entire Board regarding a vacant seat on the Board and the Executive Director's contract requesting input from the rest of the Board. The PAC concluded that there was no contemporaneous interactive communication where the responsive emails were separated by more than an hour in one instance and by more than two days in the other. 2016 PAC 39667, issued on February 18, 2016.

"CONTEMPORANEOUS AND INTERACTIVE" - KEY TAKEAWAYS:

1. Where email, text message, or other communications pertaining to public business take place between a majority of a quorum of the members of a public body within a short time frame (as in minutes), a "meeting" in violation of the OMA has likely occurred. Where less than a majority of a quorum is involved, or where the exchange is only informational and not deliberative, or where there is some time between the communications, it is unlikely that a violation of the OMA will be found to have occurred.

2. Although, the PAC determinations regarding what constitutes contemporaneous interactive communications between a majority of a quorum of a public body are fairly liberal, the difficulty is that there is no black and white rule that we can provide our clients to guarantee that they don't inadvertently trip an OMA landmine. And since violations of the OMA, or alleged violations of the OMA, present political downsides for elected officials, and could conceivably result in a Class C misdemeanor, it is a good idea to err on the side of caution.

FOIA Issue # 1 - When are email and text messages sent or received on personal devices or sent or received from private accounts subject to FOIA? How does the rule differ for: employees; and elected officials? [Jessica Harrill]

Elected Officials. *The City of Champaign v. Madigan* is the first case to really discuss and reach and decision regarding electronic communication of elected officials. In this case, the court held that communications sent/received on city council members' private cell phones might be subject to FOIA under certain circumstances. 2013 IL App (4th) 120662. *Ahmad v. City of Chicago* further explains the issue, holding that an alderman was not acting as a "public body" when he sent and received emails and texts to and from constituent related to public business. The court in *Ahmad* noted that FOIA only applies to public bodies, not public officials. The court also acknowledged the holding in the *Champaign* case that there are three situations where communications sent to/received by an elected official on a private device would be subject to FOIA: (1) when forwarded to a government account; (2) sent during a meeting of the public body; or (3) sent to a majority of the public body. Emails and texts are not subject to FOIA when only one alderman is involved. *Ahmad* made it clear that the "public body" is the legislative body as a whole, and not individual aldermen. Individual aldermen are not subject to FOIA's disclosure requirements except in one of the three limited circumstances discussed in the *Champaign* case. However, see PAC Request for Review 50558, which uses out of state interpretations of public records to determine that any communications pertaining to public business are subject to FOIA, no matter what device is used.

Employees. The *Champaign* case can continue to be applied to employees, but only to a certain degree. The case contains the proposition that work-related communications on a public employee's personal electronic device are public records subject to disclosure under the Act, the reasoning being that electronic communications that city officials sent to each other on their personal devices while conducting public business during a business meeting were subject to FOIA disclosure because such communications were prepared and sent by or for a public body. From this case, we can reasonably conclude that 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. In the PAC Opinion 16-006, this same reasoning was applied, stating that even though texts were sent from a private device, employee text messages that pertained to public business must be subject to FOIA. But see *Shehadeh v. Downey*, 2020 IL App (3d) 170158-U, which held that text messages and e-mails sent or received from the Sheriff's personal and work cell phones were exempt for security reasons under section 7(1)(e) and because such correspondence constitutes "private information" exempt from disclosure under section 7(1)(b). This case also argues that *Champaign* does not hold that any electronic communication sent or received from a public employee's personal or work-issued electronic device is subject to disclosure under FOIA, even where such communications are sent while the employee is working or where the communications relate to the employee's job functions.

REMEMBER: A different, but still very similar, analysis is applied to elected officials and employees. When it concerns texts and emails sent from an elected official's personal account or device, those messages are subject to FOIA if they are 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. When it concerns employees' texts and emails sent from that employee's personal accounts and devices, those are subject to FOIA if the employee is working in his/her capacity as a municipal employee engaging in public business and are related to that public business. However, the municipality must always keep in mind all exemptions that may be applicable to those messages and react accordingly.

FOIA Issue # 2 – FOIA Requests for juvenile law enforcement records. What is the scope of the confidentiality provisions in the Juvenile Court Act (JCA)? [Leah Bartelt]

Section 7.5(bb) of FOIA (5 ILCS 140/7.5(bb)) exempts from disclosure "[i]nformation which is or was prohibited from disclosure by the Juvenile Court Act of 1987."

Section 1-7(A) of JCA (705 ILCS 405/1-7(A)) states:

> (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[.] (Emphasis added.)

Section 1-7(A) then lists 17 categories of individual and entities who are permitted to obtain juvenile law enforcement records, including "[t]he minor who is the subject of the juvenile law enforcement record, his or her parents, guardian, and counsel." 705 ILCS 405/1-7(A)(0.05)

Section 1-3(8.2) of the JCA (705 ILCS 405/1-3(8.2)) defines "juvenile law enforcement record" to include:

> records of arrest, station adjustments, fingerprints, probation adjustments, the issuance of a notice to appear, or any other records or documents maintained by any law enforcement agency ***relating to a minor suspected of committing an offense***, and records maintained by a law enforcement agency ***that identifies a juvenile as a suspect*** in committing an offense, but does ***not*** include records identifying a juvenile as a ***victim, witness, or missing juvenile*** and any records created, maintained, or used for purposes of referral to programs relating to diversion as defined in subsection (6) of Section 5-105. (Emphasis added.)

Important notes:

- Although the general confidentiality provision in section 1-7(A) has long been in place, this section (and the related definitional section) were amended three times in 2018, including:
    - Adding reference in section 1-7(A) to "records of municipal ordinance violations."
    - Adding subsection 705 ILCS 405/1-7(A)(0.05) to expressly allow the minor who is the subject of the record, his or her parents, guardian and counsel to obtain records that would otherwise be confidential under the JCA.
    - Adding section 1-3(8.2) to define "juvenile law enforcement record."

Relevant Attorney General Binding Opinions and PAC determination letters:

- Binding Opinion 18-016, issued 11/14/18

  Section 1-7(A) of the JCA does not prohibit disclosure of a traffic accident report that documented that minors were present in one of the vehicles. The records did not indicate that the minors were investigated, arrested, or taken into custody in connection with the incident described in the report; therefore, section 1-7(A) does not prohibit its disclosure.

- Ill. Att'y Gen. PAC Req. Rev. Ltr. 52318, issued 3/30/18

  Sheriff's Office did not improperly deny request for records that concern the arrest of a minor. Because records fall within scope of section 1-7(A) and requester was not within one of the enumerated categories (requester asserted his property was damaged in connection with the incident), requester was not entitled to record

- Ill. Att'y Gen. PAC Req. Rev. Ltr. 55926, issued 12/26/18

  Police Department did not improperly deny request for investigation records related to a fatal car accident in which the Department investigated a minor driver. Requester was the law firm representing the decedent's family, which is not one of the enumerated categories of individuals permitted to obtain JCA-protected records.

- Ill. Att'y Gen. PAC Req. Rev. Ltr. 58028, issued 8/20/19

  Section 1-7(A) of the JCA does not prohibit disclosure of records related to an incident in which a minor was issued a traffic citation. Although minor driver was cited, sheriff's office did not demonstrate that the minor was investigated, arrested, or taken into custody, and the citation issued was not a record of a municipal ordinance violation.

Please note!

- Although the General Assembly amended section 1-7(A) of the JCA in 2018 to give the juvenile/parents/guardian/attorney the right to obtain juvenile law enforcement records and records of municipal ordinance violations, the General Assembly did not amend section 5-905(1) of the JCA (705 ILCS 405/5-905(1). That section states:

> (1) Inspection and copying of law enforcement records maintained by law enforcement agencies that relate to a minor who has been investigated, arrested, or taken into custody before his or her 18th birthday shall be restricted to the following and when necessary for the discharge of their official duties:
>
> * * *
>
> (c) The minor, the minor's parents or legal guardian and their attorneys, but only when the juvenile has been charged with an offense[.]

- We are not aware of any court decisions addressing this apparent conflict between section 1-7(A)(0.05) and section 5-905(1)(c), and the PAC has not yet had an opportunity to issue a determination on this question.

OMA Issue # 3 - What constitutes a "convenient" location for public meetings under the OMA? [Jessica Harrill]

Meetings shall be held at specified times and places which are convenient and open to the public. 5 ILCS 120/2.01. Any accommodation must be convenient to the public as a whole, not just to the members of the public who actually attend the meeting. Also, a public meeting may not be held on a legal holiday "unless the regular meeting day falls on that holiday." 5 ILCS 120/2.01.

"Convenient" pursuant to OMA does not require the board to hold meetings only during good weather. *In re Foxfield Subdivision*, 920 N.E.2d 1102 (2d Dist. 2009). In this case, the court held the Village Board did not violate the Open Meetings Act by holding meetings requiring members of the public to leave the building during a closed session wait in the parking lot on a cold and blustery night until being readmitted at 1:15 a.m. for discussion and consideration. The court additionally held that because the meeting began at a reasonable time (7:10 p.m.) and ran late, the meeting time was also reasonable.

The concept of public convenience implies a rule of reasonableness, not "absolute accessibility," but "reasonable accessibility." *Gerwin v. Livingston County Bd.*, 802 N.E.2d 410 (4th Dist. 2003). The court in this matter found that "a meeting can be open in the sense that no one is prohibited from attending it, but it can be held in such an ill-suited, unaccommodating, unadvantageous place that members of the public would be deterred from attending it." *Id.* The County Board was found to have violated the Open Meetings Act by holding a meeting for the expansion of a landfill in a small meeting room when the Board knew prior to the meeting that the room would be too small for the number of citizens wishing to attend, and larger venues had been available. When anticipating an increased turnout, a municipality should take all steps necessary to provide reasonable access, including additional seating, a larger venue, live streaming in another room (while still providing a chance to comment), etc.

If a meeting is held at a different location that the usual municipal meeting place, distance may also be a factor in choosing the new location. In PAC Opinion 13-014, it was determined that a special meeting approximately 26 miles from the ordinary meeting location was a violation of the Open Meetings Act. The PAC explained that because of the additional travel time necessary to attend a meeting at 9:00 a.m. on a weekday was likely to discourage attendance by citizens who might otherwise have attended the meeting. PAC 13-014. A private residence is also ill-suited for a public meeting and is thought to deter citizens from attending. PAC 12-008.

REMEMBER: This section is all about reasonableness. Did the meeting *start* at a reasonable time? Was the *location* reasonable? Is the meeting held at a *public* location? Did the municipality attempt to accommodate the *anticipated number* of people in attendance?

OMA Issue #4 - When can a majority of a quorum of a public body attend other meetings (e.g. a committee meeting of the public body, an HOA meeting, or a meeting of a Chamber of Commerce) without triggering the open meeting requirements of the OMA? [Pat Lord]

Local government attorneys frequently encounter situations where a majority of a quorum (or maybe even all) of the members of a public body they represent want to attend: (a) a meeting of the Chamber of Commerce where a specific matter of interest to the public body will be discussed; (b) a meeting of a committee of the public entity, such as the Plan Commission or the Historic Preservation Commission; or (c) a meeting of a homeowner's association or homeowners' association consortium.

Because of the possibility that a majority of a quorum of the public body who attend such meetings might unintentionally end up engaging in contemporaneous interactive communications about public business, which constitutes a meeting in violation of the Open Meetings Act, legal counsel for that public body has the unenviable task of trying to advise their clients as to what their options are. Those options might include: (i) recommending that less than a majority of a quorum attend the function; or (ii) advising that if a majority of a quorum does attend, they should refrain from speaking or responding to questions on matters of public business.

The courts and the PAC have weighed in on these issues, and once again, the findings are much less restrictive than you might imagine (except for the first example below…). The following is a summary of some of those opinions.

1. A properly noticed committee meeting of the Village Board's Committee for Economic Development, became an improperly un-noticed meeting of the Village Board, and a violation of the OMA, when a majority of the Village Board attended the Committee meeting and participated in the deliberation of public business. The PAC noted the following principles:

> -The requirements of OMA are not automatically triggered when a majority of a quorum or a quorum of a public body attends a gathering. See *University Professionals of Illinois v. Stukel*, 344 Ill. App. 3d 856,868 (1st Dist. 2003).
>
> -Whether a gathering falls within the definition of meeting as used in the OMA depends upon the facts of each situation.
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> -A gathering does not constitute a meeting under 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. Ill. 1982). 2019 PAC 48812, issued on December 6, 2019

2. A Request for Review was made to the PAC alleging that a majority of a quorum of the Evanston City Council attended a community meeting regarding public business involving the proposed financing of the Robert Crown Community Center, and did not comply with the

requirements of the OMA. The City argued that the aldermen in attendance were not there in their official capacity, but only as interested residents of the City.

The PAC cited a prior PAC opinion[1] for the proposition that "In theory, there is no absolute prohibition against the members of a public body attending an 'informational meeting' without triggering the application of the OMA, as long as the members do not make 'deliberational statements' or engage in 'unrecorded discussions' among themselves." The PAC also cited *Nabhani v. Coglianese* summarized in paragraph 9 below.

While one alderman assisted City staff in answering questions raised by the audience during the meeting, the PAC concluded that it did not appear that any other members of the City Council spoke, provided comments, or otherwise discussed public business. Therefore, the PAC had insufficient information upon which to conclude that the meeting constituted a meeting of the City Council. 2019 PAC 58228, issued on October 2, 2019

3. A Request for Review was made to the PAC alleging a violation of the OMA when a quorum of Village Board of Trustees attended a public forum concerning a referendum on whether to repeal the Village's home rule authority and discussed public business in violation of the OMA. The PAC determined that there was no violation of the OMA because although two Trustees spoke at the meeting, 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 of public business. 2018 PAC 51521 and 51896, issued on June 13, 2018

4. Requester complained that Village violated OMA when members of the public were required to sign up and pay a fee to attend a "State of the Village and City" event. The PAC found that there was no violation of OMA for the following reasons:

> - "Although the addresses do pertain to public business, there is no indication that a majority of a quorum of the members of the Village Board attended the event and engaged in contemporaneous interactive communications pertaining to public business."
>
> -There was no evidence that a majority of a quorum of the Board "…engaged in deliberative discussions of public business."
>
> - "The requirements of the OMA do not apply to a speech by an individual of a public body while attending an even held by a not-for-profit organization such as a chamber of commerce." 2018 PAC 52223, issued on April 3, 2018

5. A request for review was filed with PAC alleging that when the Village President and three members of the Board attended a Village public hearing pursuant to the TIF Act, they violated the OMA. The PAC noted that ***"…the mere exposure of a majority of a quorum of members to statements about public business, without evidence demonstrating member participation in a contemporaneous and interactive discussion about public business, was an insufficient basis upon which to find the public body held a meeting subject to OMA."*** Since

[1] 1974 Ill. Att'y Gen. Op. No. S-726, issued March 22, 1974, at 126.

there was no evidence of deliberative discussion on a course of action amount a majority of a quorum of Board members, there was no "meeting". 2017 PAC 47804, issued August 10, 2017

6. The physical presence of a majority of a quorum of city council members at a task force meeting in which the mayor gave brief opening remarks did not constitute a city council meeting in the absence of deliberative discussions among the City Council members. Ill. Att'y Gen. PAC Req. Rev. Ltr. 44159, issued on March 7, 2017

7. The PAC was unable to find that a Trustee Workshop convened by the Village Clerk and attended by a majority of a quorum of members of the Board constituted a meeting without any evidence that the members "collectively engaged" in deliberative discussions of public business. 2016 PAC 38142, issued on September 2, 2016

8. The PAC determined that there was insufficient evidence to find 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 comments period set aside for public comment and claimed that they were speaking as private citizens and did not participate in the Committee's deliberative discussions. [Citing a 2011 PAC Req. Rev. Ltr issued April 14, 2011 in which the PAC determined that the mere presence of a quorum of members of a public body at a committee of the public body does not convert the committee meeting into a meeting of the whole public body provided that discussion is confined to the public business of the committee.] 2013 PAC 24899, issued on May 21, 2015

9. *Nabhani v. Coglianese*, 552 F. Supp 657 (N.D. Ill. 1982). Plaintiff brought a case claiming violation of her constitutional rights to due process and equal protection under 42 U.S.C. Section 1983 when the members of a school board allegedly convened to discuss public business and denied her access to the meeting. Defendants responded that the gathering was a political rally, that no discussion was had regarding public business, and that they were acting as private citizens. Therefore, they had a right to exclude the plaintiff.

The court held that the threshold issue was whether a "meeting" had occurred, or a political rally. The court's analysis was based on the following:

(1) Was there an examination or weighing of reasons for, or against, a course of action?
(2) Was there an exchange of facts preliminary to a decision; and
(3) Was there an attempt to reach accord on a specific matter of public business?

In granting summary judgment to defendants, the court concluded that plaintiff had suspicions, but no facts, to support any of the factors above, and that based on the evidence before the court, the gathering in question was exclusively political in nature, and not a public meeting. *Nabhani*, 552 F. Supp. 657, 661.

ATTENDANCE AT OTHER MEETINGS - KEY TAKEAWAY:
If there is no contemporaneous interactive discussion about public business by a majority of a quorum of the members of the public body while attending another meeting or gathering, there is not a violation of the OMA. The determination will depend upon the facts of each situation.

FOIA # 3 - Redacting law enforcement records to protect the identities of individuals who file complaints with or provide information to law enforcement agencies.

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[.]"

Relevant case law:

- *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188 (1st Dist. 2004) (addressing prior version of section 7(1)(d)(iv))
    - "Section 7(1)(b)(v) does not state it exempts from disclosure names of people who provide information to a law enforcement agency only if those persons have a reasonable basis to believe their names are going to be kept confidential. Rather, the plain language of the statute states "information revealing the identity of persons who file complaints with or provide information to * * * law enforcement * * * agencies" is exempt from disclosure."
    - "For the reasons previously discussed, redaction of names and addresses of community liaisons was proper under section 7(1)(b)(v) "'as those persons are clearly providing information to law enforcement agencies[.]'"
- *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."

Also!

- Section 7(1)(d)(iv) contains an important limitation: "[E]xcept that the identities of witnesses to traffic accidents, traffic accident reports, or rescue reports shall be provided[.]"

- The Public Access Bureau has determined that "identities of witnesses" means witness names, and that this language in section 7(1)(d)(iv) does not prohibit a law enforcement agencies from redacting witness home and personal telephone numbers and home addresses pursuant to section 7(1)(b) of FOIA. *See e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 54174, issued 10/9/18.

OMA Issue #5 – How can a public body develop and enforce reasonable public participation rules for their meetings? Leah Bartelt

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."

Relevant Attorney General Binding Opinions and PAC determination letters:

- Ill. Att'y Gen. Pub. Acc. Op. No. 14-009, issued September 4, 2014, at 7 (public body may not require speakers to state their home addresses prior to speaking)

- Ill. Att'y Gen. Pub. Acc. Op. No.14-012, issued September 30, 2014 (public body may not require intended speakers to provide five days advance written notice to address body)

- Ill. Att'y Gen. PAC Req. Rev. Ltr. 39069, issued 4/5/16

  PAC determined that a city council violated section 2.06(g) when it silenced an individual because his comments violated its rule prohibiting "personal attacks against others" or "rude or slanderous remarks" during public comment. "On its face, this ordinance is susceptible to overbroad and arbitrary application to public statements that do not disrupt the Council's proceedings. For instance, whether a remark constitutes a 'personal attack' is an entirely subjective question that is necessarily dependent upon the listener's personal perspective. When criticism involves the conduct of present or former public officials in the performance of their public duties, significant latitude must be allowed. * * * The Council's rules are devoid of any criteria for determining when a comment is improper, thus vesting the presiding officer with unbridled discretion to limit or prohibit legitimate public criticism by ruling it 'out of order.'"

- Ill. Att'y Gen. PAC Req. Rev. Ltr. 49820, issued 1/31/19

  PAC determined that a Village Liquor Control Commission did not violate section 2.06(g) when it prohibited a speaker from discussing matters during public comment that were beyond the authority of the Commission. The Commission's rules for public comment limited discussion to "issues relevant to that specific … commission's agenda or topics that the specific commission has the authority, pursuant to the Village Code, to address." The Commission's enforcement of that rule against individuals who sought to discuss the Village's law firm and the Village's police and fire commission was not inconsistent with section 2.06(g).

- Ill. Att'y Gen. PAC Req. Rev. Ltr. 38037, issued 8/1/16

  A public comment rule which limits members of the public to only provide comments related to subjects listed on the agenda exceeds the scope of permissible rulemaking authorized by section 2.06(g). Because the public body itself is able to discuss matters concerning the business of the public body that are not specifically listed on the agenda, it is therefore unreasonable to prohibit members of the public from doing so.