

RESOLUTION NO. 17-03

**RESOLUTION RELATIVE TO THE DESIGNATION OF
PERSONS TO RECEIVE TRAINING ON COMPLIANCE WITH THE
OPEN MEETINGS ACT AND THE FREEDOM OF INFORMATION ACT
AND THE DESIGNATION OF FREEDOM OF INFORMATION OFFICERS**

WHEREAS, in 2017, the Morton Grove-Niles Water Commission ("MGNWC" or "Commission") was established by the Village of Morton Grove, a home rule Illinois municipal corporation ("Morton Grove"), and the Village of Niles, a home rule Illinois municipal corporation ("Niles"), by the adoption of ordinances pursuant to Division 135 of Article 11 of the Illinois Municipal Code (65 ILCS 5/11-135-1, *et seq.*) ("Division 135"). The establishing ordinances are Morton Grove Ordinance 17-5, which was adopted on March 13, 2017, and Niles Ordinance No. 2017-19, which was adopted on March 14, 2017. In order to accomplish the objectives set forth in the above-referenced Ordinances, Morton Grove and Niles also approved, under those same Ordinances, an intergovernmental agreement entitled, "Intergovernmental Agreement For The Establishment And Operation Of The Morton Grove-Niles Water Commission And For The Purchase And Sale Of Water To The Commission For Commission Use And To Commission Wholesale Water Customers" (the "IGA"), to provide for the governance and operation of the MGNWC and to create the Board of Commissioners of the Morton Grove-Niles Water Commission ("MGNWC Board") to govern the MGNWC; and

WHEREAS, Section 1.05(a) of the Open Meetings Act (5 ILCS 120/1.05(a)) and Section 3.5 of the Freedom of Information Act (5 ILCS 140/3.5) require that the MGNWC designate employees, officers or members of the public body to receive training on compliance with the provisions of the Open Meetings Act and also to designate one or more officials or employees to act as its Freedom of Information Officers on behalf of the public body; and

WHEREAS, the Board of Commissioners of the MGNWC find that it is necessary to pass this Resolution in order to comply with the requirements of the Open Meetings Act and the Freedom of Information Act as set forth above.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE MORTON GROVE-NILES WATER COMMISSION, COOK COUNTY, ILLINOIS, AS FOLLOWS:

SECTION 1: Each Whereas paragraph above is incorporated by reference into this Section 1 and made a part hereof as material and operative provisions of this Resolution.

SECTION 2: The Board of Commissioners shall designate from time to time such employees, officers or members, as they deem necessary, to receive training on compliance with the provisions of the Open Meetings Act, as required by that Act.

SECTION 3: The Board of Commissioners shall designate, from time to time, such officials or employees of the MGNWC, as they deem necessary, as Freedom of Information Officers. The MGNWC's Freedom of Information Officers shall perform those duties as are required by the Freedom of Information Act of such officers and shall comply with the training requirements for such officers as required by that Act.

Exhibit "A"

**Board of Commissioners of the Morton Grove-Niles Water Commission's
Designation Sheet of Initial Personnel
Who Shall Serve As Freedom Of Information Officers And
Who Shall Receive Training On Compliance With The Provisions
Of The Open Meetings Act and The Freedom of Information Act**

(attached)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

CERTIFICATE

I, _____, Secretary of the Morton Grove-Niles Water Commission, Cook County, State of Illinois, certify that the annexed and foregoing is a true and correct copy of that certain Resolution now on file in my office, entitled:

RESOLUTION NO. 17-__

RESOLUTION RELATIVE TO THE DESIGNATION OF
PERSONS TO RECEIVE TRAINING ON COMPLIANCE WITH THE
OPEN MEETINGS ACT AND THE FREEDOM OF INFORMATION ACT
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which Resolution was passed by the Board of Commissioners of the Morton Grove-Niles Water Commission at a Regular Meeting held on the ____ day of _____, 2017, at which meeting a quorum was present.

I further certify that the vote on the question of the passage of said Resolution by the Board of Commissioners of the Morton Grove-Niles Water Commission was taken by Ayes and Nays and recorded in the minutes of the Board of Commissioners of the Morton Grove-Niles Water Commission, and that the result of said vote was as follows, to-wit:

AYES: _____

NAYS: _____

ABSENT: _____

I do further certify that the original Resolution, of which the foregoing is a true copy, is entrusted to my care for safekeeping, and that I am the lawful keeper of the same.

IN WITNESS WHEREOF, I have hereunto set my hand this ____ day of _____, 2017.

_____, Secretary

[SEAL]

contiguous to the Mississippi River with populations of more than 250,000 but less than 300,000. "Public body" includes the Health Facilities Planning Board. "Public body" does not include a child death review team established under the Child Death Review Team Act or an ethics commission, ethics officer, or ultimate jurisdictional authority acting under the State Gift Ban Act as provided by Section 80 of that Act.

"Employee" means a person employed by a public body whose relationship with the public body constitutes an employer-employee relationship under the usual common law rules, and who is not an independent contractor.

"Public office" means a position created by or under the Constitution or laws of this State, the occupant of which is charged with the exercise of some portion of the sovereign power of this State. The term "public office" shall include members of the public body, but it shall not include organizational positions filled by members thereof, whether established by law or by a public body itself, that exist to assist the body in the conduct of its business.

"Quasi-adjudicative body" means an administrative body charged by law or ordinance with the responsibility to conduct hearings, receive evidence or testimony and make determinations based thereon, but does not include local electoral boards when such bodies are considering petition challenges.

III. OPEN MEETINGS (SECTION 2)

A. General

All meetings of public bodies shall be open to the public unless an exception in subsection 2(c) applies and the meeting is closed in accordance with Section 2(a).

The exceptions contained in subsection 2(c) are contrary to the requirement that public bodies meet in the open, and therefore, **the exceptions are to be strictly construed**, extending only to subjects clearly within their scope. **The exceptions authorize but do not require the holding of a closed meeting to discuss a subject included within an enumerated exception.**

All meetings required by this Act to be public shall be held at specified times and places which are convenient and open to the public. **No meeting required by this Act to be public shall be held on a legal holiday unless the regular meeting day falls on that holiday.** (5 ILCS 120/ 2.01)

B. Notice Requirements (Section 2.02–2.03)

Public notice of all meetings, whether open or closed to the public, shall be given by every public body as follows:

- Public notice of the schedule of regular meetings at the beginning of each calendar or fiscal year shall be given and shall state the regular dates, times, and places of such meetings.
- **An agenda for each regular meeting shall be posted** at the principal office of the public body and at the location where the meeting is to be held **at least 48 hours in advance** of the holding of the meeting. **NOTE: There is a 48 hour**

maintained on the website until the regular meeting is concluded. Any notice of an annual schedule of meetings shall remain posted on the website until a new notice of the schedule of regular meetings is approved.

The Open Meetings Act states specifically that the failure to post on the website either the above notices or agenda "shall not invalidate any meeting or any actions taken at a meeting." Note that the term "public body" is defined in the Act to include boards, committees, commissions, etc. See, 5 ILCS 120/2.02(b).

If a municipality has a website which is maintained by its full-time staff, the minutes of any regular meeting of the public body that is open to the public must be posted on the website within seven (7) days of the approval of the minutes by the public body. Such minutes shall remain posted on the website for at least sixty (60) days after they are initially posted. [Public Act 94-0028]

NOTE: The Fourth District Illinois Appellate Court issued a very narrow (and arguably incorrect) ruling that "the consideration of" an agenda item means only deliberations and discussion, and not the taking of official action. See Rice v. Bd. of Trustees of Adams County, 326 Ill.App.3d 1120 (4th Dist. 2002). The Court declared a resolution, which was added to the agenda during the meeting and favorably acted upon, to be null and void because it was beyond the power of the board to act on an item that had not been listed on the agenda. Thus, action items should be listed on the agenda. Non action items can be added to the agenda during the course of a meeting but the officials should only deliberate and discuss the items, unless an emergency situation arises (e.g., failure to list the pay and benefits warrant) which requires action on a matter that is not listed in the agenda. If a board takes action on an item not listed on an agenda, one method of curing any potential challenge to that approval under the Rice case is for the officials to ratify the item at their next meeting by having it properly listed as an action item and voting to ratify the prior approval. There is no Illinois court decision to support this method but it serves as one practical solution. Another solution is to call an emergency meeting in accordance with the Open Meetings Act and then vote on the item. This method has its own drawback: depending on the nature of the item at issue, the board may not have proper grounds to hold an emergency meeting.

Action and non actions items cannot be added to the agenda of a special meeting. Only items listed on the agenda can be considered or acted upon at a special meeting.

In 2013, the Open Meetings Act was amended to require more specific content be included by the public body on an agenda: "the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting" must be contained in the agenda. This means that the **agendas of a public body must include a sufficient description of each action being taken** (i.e., adequate detail must be included within the titles of the resolutions and ordinances and motions) **so that the public will understand the action being taken** by the public body when it votes on the item. See, 5 ILCS 120/2.02(c).

IV. CLOSED MEETINGS OR EXECUTIVE SESSIONS (SECTION 2a)

A. Required Vote

A public body may hold a meeting closed to the public, or close a portion of a meeting to the public, upon a **majority vote of a quorum present**, taken at a meeting open to the public for which notice has been given as required by this Act.

defined in this Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning. (5 ILCS 120/2(c)(4)).

- (5) The **purchase or lease of real property for the use of the public body**, including meetings held for the purpose of discussing whether a particular parcel should be acquired. (5 ILCS 120/2(c)(5)).
- (6) The **setting of a price for sale or lease of property owned by the public body**. (5 ILCS 120/2(c)(6)).
- (7) The sale or purchase of securities, investments, or investment contracts. (5 ILCS 120/2(c)(7)).
- (8) **Security procedures, school building safety and security**, and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff or public property. (5 ILCS 120/2(c)(8)).
- (9) Student disciplinary cases. (5 ILCS 120/2(c)(9)).
- (10) The placement of individual students in special education programs and other matters relating to individual students. (5 ILCS 120/2(c)(10)).
- (11) **Litigation, when an action** against, affecting or on behalf of the particular public body has been filed and **is pending** before a court or administrative tribunal, or **when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting**. (5 ILCS 120/2(c)(11)).
- (12) The **establishment of reserves or settlement of claims** as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if otherwise the disposition of a claim or potential claim might be prejudiced, or the **review or discussion of claims, loss or risk management information, records, data, advice or communications from or with respect to any insurer of the public body or any intergovernmental risk management association or self insurance pool** of which the public body is a member. (5 ILCS 120/2(c)(12)).
- (13) Conciliation of complaints of discrimination in the sale or rental of housing, when closed meetings are authorized by the law or ordinance prescribing fair housing practices and creating a commission or administrative agency for their enforcement. (5 ILCS 120/2(c)(13)).
- (14) Informant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, when discussed by a public body with criminal investigatory responsibilities. (5 ILCS 120/2(c)(14)).
- (15) Professional ethics or performance when considered by an advisory body appointed to advise a licensing or regulatory agency on matters germane to the advisory body's field of competence. (5 ILCS 120/2(c)(15)).

generally accepted auditing standards of the United States of America. (5 ILCS 120/2(c)(29)).

- (29) Those meetings or portions of meetings of a fatality review team or the Illinois Fatality Review Team Advisory Council during which a review of the death of an eligible adult in which abuse or neglect is suspected, alleged, or substantiated is conducted pursuant to Section 15 of the Adult Protective Services Act. (5 ILCS 120/2(c)(30)).
- (30) Meetings and deliberations for decisions of the Concealed Carry Licensing Review Board under the Firearm Concealed Carry Act. (5 ILCS 120/2(c)(31)).
- (31) Meetings between the Regional Transportation Authority Board and its Service Boards when the discussion involves review by the Regional Transportation Authority Board of employment contracts under Section 28d of the Metropolitan Transit Authority Act and Sections 3A.18 and 3B.26 of the Regional Transportation Authority Act. (5 ILCS 120/2(c)(32)).
- (32) Those meeting or portions of meetings of the advisory committee and peer review subcommittee created under Section 320 of the Illinois Controlled Substances Act during which specific controlled substance prescriber, dispenser, or patient information is discussed. (5 ILCS 120/2(c)(33)).

NOTE: Under the Act, it is not a requirement that the agenda list an executive session or an executive session exception for the board/commission/committee to pass a proper motion to conduct an executive session during one of its meetings. See, 5 ILCS 120/2(a).

C. Recording of Meeting by Public (Section 2.05)

Per Illinois statute¹ **any person may record the proceedings at meetings required to be open by this Act by tape, film or other means.**

The public body conducting the meeting shall prescribe reasonable rules to govern the right to make such recordings.

If a witness at any meeting required to be open by this Act which is conducted by a commission, administrative agency or other tribunal, refuses to testify on the grounds that he may not be compelled to testify if any portion of his testimony is to be broadcast or televised or if motion pictures are to be taken of him while he is testifying, the public body conducting the meeting shall prohibit such recording during the testimony of the witness.

D. Recordkeeping (Section 2.06)

All public bodies must keep written minutes of all their meetings, whether open or closed. Such minutes shall include, but need not be limited to:

¹ See 735 ILCS 5/8-701 [Broadcast or Television Testimony Statute]

- (2) Employment purposes or the business of the public body; or
- (3) Family or other emergency.

The Act also requires that village officials who wish to attend a meeting electronically must give prior notice to the board's clerk unless advance notice is impractical.

The Act permits municipalities to adopt rules that govern meeting attendance via electronic means and such rules may be more restrictive than the Act's provisions.

Meeting minutes must also reflect whether a member is present physically or electronically, regardless of whether any members are attending electronically.

This amendment to the Act arose out of a 1995 Illinois Appellate Court decision that upheld the Illinois Pollution Control Board's determination that the Board had established a quorum through the electronic attendance at its meeting by one of its board members. Freedom Oil Company v. Illinois Pollution Control Board, 275 Ill.App.3d 508 (4th Dist. 1995). Although that case dealt with a public body with state-wide jurisdiction, the Court's opinion was widely interpreted also to allow local governments to establish a quorum with one or more board members attending meetings through the use of telephone conference-calling or other electronic means. The fact that the Court made positive comments in its opinion about the regulations regarding non-physical attendance of board meetings established by the Pollution Control Board suggested that if local governmental bodies established such regulations, they too could establish a quorum and take action with one or more board members not being physically present at a meeting.

V. TRAINING (SECTION 1.05)

In 2011, the Open Meetings Act was amended to add a training requirement for elected and appointed officials and certain employees of public bodies.

Pursuant to Section 1.05 (b) of Open Meetings Act, each elected and appointed member of a public body subject to OMA was required to successfully complete the electronic training between January 1, 2012, and January 1, 2013. Those persons who become members of a public body after January 1, 2012, are required complete the electronic training not later than 90 days after the member takes the oath of office or otherwise assume responsibilities as a member of a public body. A member who completes the training and files a copy of the certificate of completion with the public body is not required to subsequently complete this training under subsection (b).

Pursuant to Section 1.05 of Open Meetings Act, all "OMA Designees" must successfully complete the electronic training on an annual basis. When a public body designates an additional employee, officer or member to receive this training, that person must successfully complete the electronic training within 30 days after that designation.

The Public Access Counselor in the Illinois Attorney General's Office was responsible for developing the training programs, which are available on-line at the Illinois Attorney General's website.

B. Penalty (Section 4)

Any person violating any of the provisions of this Act shall be guilty of a Class C Misdemeanor.

[Class C Misdemeanor = fine not exceed \$1,500.00 and jail time up to 30 days]

VIII. QUESTIONS AND ANSWERS

1. What constitutes a "meeting" under the Act?

The general statutory definition under the Open Meetings Act is that a meeting is defined as "**...any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business.**"

The Open Meetings Act was amended by Public Act 95-245, effective August 17, 2007, to change the definition of "meeting" in the Open Meetings Act for "**a five-member public body**" so that a **gathering for the purpose of discussing public business of a quorum (three members)** rather than a majority of a quorum (two members) of a five-member public body **constitutes a "meeting."** In addition, **an affirmative vote of three members of a five-member public body is now "necessary to adopt any motion, resolution, or ordinance unless a greater number is otherwise required."** As such, two members of a five-member public body can now discuss the business of the public body at any time, without having to comply with the notice and agenda requirements of the Open Meetings Act, and not, by such action, violate the Open Meetings Act. **This legislation impacts commission form local governments and public bodies that utilize five-member commissions and committees.**

When considering whether a "meeting" must comply with the Open Meeting Act notice and agenda requirements, aldermen and trustee committee meetings or subsidiary board and commission meetings (e.g. zoning boards, boards of fire and police commissioners, fire and police pension boards, water review commission, etc.) or meetings of other covered public bodies must follow the same rules as noted above: the threshold for determining whether a meeting must be held in compliance with the Open Meetings Act turns on the number of members of that committee, commission or subsidiary body and whether a majority of a quorum is present at the gathering, or, in the case of a five-member board/committee/commission, whether three of five members attend the gathering to discuss the public body's business.

The "meeting" definition requires that the gathering be held for the purpose of discussing public business. In other words, **there must be an intent to discuss public business** before the gathering will be held to be a meeting covered by the Act. The Legislature added this intent language so that public officials would not have to fear violating the Act if they unintentionally discussed public business by some or all of the members of a public body at a social event. However, if public officials gather together at a social event with the intent of evading the Act, they will be in violation of the Act.

On the other hand, if three members of a five-member public body or at least a majority of a quorum of another public body come together at a social event with no intent to evade the Act and not for the purpose or with the intent of discussing public business, but their conversation leads to a casual, chance or informal discussion of public business, those

member of a city council or board of trustees may attend such a staff meeting without bringing it within the coverage of the Act. However, if a majority of a quorum of a public body attends such a staff meeting at which public business is discussed, the meeting would then come within the Act and would have to be open to the public.

3. What if an item is not contained in the agenda—can it be considered? Can it be acted upon by the public body?

The requirement of a regular meeting agenda does not preclude the consideration of items not specifically set forth in the agenda. The public body can consider items raised under the new business portion of the agenda, by motion, it can amend the agenda to add items, and until a Fourth District Appellate Court decision (In The Matter of Bruce A. Rice v. County of Adams, et al., 326 Ill.App.3d 1120 (4th Dist. 2002)), there was no controversy about whether the public could take final action on such newly added items. Based on the Rice decision, the public body should not take final action on a matter added to an agenda at the public meeting, unless the matter arises as an emergency issue that requires immediate action because the approval can be challenged and may be declared void. The Rice decision states that the Act limits a public body to "consideration of a newly added matters and that 'consideration' does not constitute final action." A Cook County Circuit Court decision takes the opposite view. Until this matter is resolved by the First District Appellate Court or the Supreme Court, our position is to not take final action on a matter added to the agenda at an open meeting. If an emergency exists that requires immediate action on a matter added to the agenda (e.g., passage of a tax levy ordinance, payment of an insurance premium), the matter can be ratified by the officials at their next meeting, provided that the matter is properly listed on the agenda as an action item.

4. Can an official participate at a public meeting by telephone conference or videoconference if he or she cannot be physically present at the meeting?

Yes, as long as a quorum of the board is physically present at the location of the meeting and the absent official is prevented from attending physically by: (1) personal illness or disability; (2) employment purposes or the business of the public body; or (3) a family or other emergency. Also, the Act requires village officials who wish to attend a meeting electronically to give prior notice to the board's clerk unless advance notice is impractical. See, P.A. 94-1058 and pages 9 and 10 above; See also, Attorney General Opinion No. 82-041 dated November 10, 1982 (telephone conference calls held by a majority of a quorum of a public body for the purpose of discussing public business were considered meetings under the Act and, therefore, all notice and public accessibility requirements of the Act must be complied with before holding such conferences); Scott v. Illinois State Police Merit Board, 222 Ill. App. 3d 496 (1991) (attendance at a closed session via teleconference is allowable); and Freedom Oil Co. v. Pollution Control Bd., 275 Ill. App. 3d 508 (1995)(telephone conference meeting fell within the Board's specific authority to conduct meetings and a telephone conference qualifies as an open meeting despite the fact that a quorum was not physically present in the same room so long as all the requirements of the Open Meetings Act were followed.

REMEMBER: Meeting minutes must also reflect whether a member is present physically or electronically, regardless of whether any members are attending electronically.

NOTE: The use of electronic means of communication (email or cell phones) among municipal officials has not been addressed by Illinois courts yet, but the same rules apply: elected and appointed officials must take care that a majority of a quorum not gather for

A public body must include "the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting" on the agenda. This means that the agendas of a public body must include a sufficient description of each action being taken (i.e., adequate detail must be included within the titles of the resolutions and ordinances and motions) so that the public will understand the action being taken by the public body when it votes on the item. See, 5 ILCS 120/2.02(c). Set forth below are several examples as guidance:

"Resolution Approving Purchase of Truck". This agenda item does NOT comply with the agenda content requirement of the Open Meetings Act.

"Resolution Approving Purchase of Ford F250 Truck from Main Street Ford Dealer of Happyville, Illinois in the Amount of \$20,000". This agenda item complies with the agenda content requirement of the Open Meetings Act.

Example of Use of a Descriptive Summary Statement Enclosed in Parentheses that complies with the agenda content requirement of the Open Meetings Act:

Ordinance Approving a Redevelopment Agreement, PDQ TIF District Economic Incentives and Land Conveyance To Be Entered Into Between XYZ Development Company and the Village of KTJville in Regard to the 123 Lake Street Property (Agreement approves the rezoning of the developer's property located at 123 Lake Street from C-1 to C-2, approves certain TIF economic incentives in the amount of \$125,000 for purposes of reimbursement to the developer of environmental remediation activities, demolition activities and installation of certain off-site and on-site public utilities to serve the property, and approves the land conveyance of 125 Lake Street from the Village to the Developer for \$50,000)

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THE FREEDOM OF INFORMATION ACT
5 ILCS 140/1 et seq.

I. POLICY OF THE FREEDOM OF INFORMATION ACT (SECTION 1)

The Illinois Freedom of Information Act, ("FOIA") states that the policy of the State of Illinois is to provide full and complete information regarding the affairs of government, and that it "is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act."

II. PRESUMPTION OF OPENNESS (SECTION 1.2)

FOIA has a presumption in favor of openness with regard to public records. The presumption states that all "records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt."

III. KEY DEFINITIONS (SECTION 2)

A "public body" includes all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof. See, 5 ILCS 140/2(a).

"Public records" are all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body. See, 5 ILCS 140/2(c).

"Private information" means unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person. See, 5 ILCS 140/2(c-5).

"Commercial purpose" means the use of any part of a public record or records, or information derived from public records, in any form for sale, resale, or solicitation or advertisement for sales or services. For purposes of this definition, requests made by news media and non-profit, scientific or academic organizations shall not be considered to be made for a "commercial purpose" when the principal purpose of the request is (i) to access and disseminate information concerning news and current or passing events, (ii) for articles of opinion or features of interest to the public, or (iii) for the purpose of academic, scientific or public research or education. See, 5 ILCS 140/2(c-10).

"Recurrent requester" (See, 5 ILCS 140/2(g)) means a person that, in the 12 months immediately preceding the request, had submitted to the same public body:

- B. Certified payroll records submitted pursuant to Section 5(a)(2) of the Prevailing Wage Act, except that contractors' employees' addresses, telephone numbers, and social security numbers must be redacted by the public body prior to disclosure (Section 2.10);
- C. The following information from arrest records must be released within seventy-two (72) hours of the arrest: name, age, address, and photograph, when and if available; information detailing any charges relating to the arrest; the time and location of the arrest; the name of the investigating or arresting law enforcement agency; if the individual is incarcerated, the amount of any bail or bond; and if the individual is incarcerated, the time and date that the individual was received into, discharged from, or transferred from the arresting agency's custody (Section 2.15(a)). Note that certain of this information may be withheld if it is determined that disclosure would: interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement agency; endanger the life or physical safety of law enforcement or correctional personnel or any other person; or compromise the security of any correctional facility (Section 2.15(c)).
- D. The following information from criminal history records: court records that are public; (records that are otherwise available under State or local law; and records in which the requesting party is the individual identified (Section 2.15(b)).
- E. Settlement agreements and severance agreements entered into by or on behalf of a public body (Section 2.20).

V. INSPECTION AND COPYING OF RECORDS (SECTION 3)

Except as otherwise exempted in FOIA or other State or Federal laws, all public records must be made available by a public body for inspection and copying upon written request. A public body may, but is not required to, accept oral FOIA requests. A public body may not unilaterally decide to provide a requester with an opportunity to inspect public records when the requester has expressly sought copies of those records. A public body may not require that a request be submitted on a standard form or require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver. See, 5 ILCS 140/3, 7, 7.5 and 8.5.

FOIA requires that a public body respond to requests under the Act within five (5) business days. A public body's response to a request may be extended for an additional five (5) business days if the responsive public records are stored in another location, if there are numerous responsive records, if the request is categorical in nature, and so on. The complete denial or partial of a request must be made in writing.

A. Records Maintained Online.

A public body is no longer required to copy records that are published and maintained on the public body's website. Public bodies merely need to notify the requestor that the public record is available online and direct the requestor to the website where the record can be reasonably accessed. Requestors can re-submit a FOIA request for the record if they are unable to reasonably access the record online and must state his or her inability to reasonably access the online record in their resubmitted FOIA request. If the requestor was unable to

The public body's response to a voluminous request shall contain one of the following:

- Denial of the request;
- Provide the records requested;
- Notify the requestor that the request is unduly burdensome and extend an opportunity to the requestor to attempt to reduce the request to manageable portions;
- Extend the time to respond by ten (10) business days; or
- Provide an estimate of the fees to be charged. **The public body may require the requestor to pay the fees in full before copying the requested documents.**

A. Fees for Voluminous Requests

A public body may charge up to \$10 for each hour (after the initial eight (8) hours) spent by personnel searching for requested records, retrieving requested records and/or examining the requested records for necessary redactions.¹

- A public body may charge fees for producing electronic records:
- PDFs: up to \$20 for up to 80 MB of data; up to \$40 for 80MB – 160 MB of data; up to \$100 for more than 160 MB of data.
- All other electronic records: up to \$20 for up to 2 MB of data; up to \$40 for up to 4 MB of data, and up to \$100 for more than 4MB of data.

The public body may require the requestor to pay for the cost of copying the records before it copies the records.

The fees a public body may charge under Section 6 of FOIA, can be still be charged even if the requestor fails to accept or collect the records.

If a requester does not pay a fee charged pursuant to Section 6 of FOIA, the debt shall be considered a debt due and owing to the public body and may be collected in accordance with applicable law.

The public body must provide an accounting of all costs, fees and personnel hours in connection to the voluminous request for public records.

IX. FOIA OFFICERS (SECTION 3.5)

FOIA requires public bodies to appoint a Freedom of Information officer or officers, who must develop a list of documents or categories of records that the public body shall immediately disclose upon request, note the date the public body receives a written FOIA request, compute the day on which the period for response will expire and make a notation of that date on the written request, maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been complied with or denied, and create a file for the retention of the original request, a copy of the response, a record of written

¹ Section 6(a) of FOIA now states that "If a request is not a request for a commercial purpose or a voluminous request, a public body may not charge the requestor for the costs of any search for and review of the records and other personnel costs associated with producing the records." However, Section 6(f) which sets forth the costs for searching and retrieving records still contains the limitation that "the provisions of this subsection (f) apply only to commercial requests."

of the search for or review of the records, or for the personnel costs associated with producing the records.

Documents must be furnished without charge or at a reduced charge, as determined by the public body, if the person requesting the documents states the specific purpose for the request and indicates that a waiver or reduction of the fee is in the public interest. Waiver or reduction of the fee is in the public interest if the principal purpose of the request is to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public and is not for the principal purpose of personal or commercial benefit.

For commercial requests, a public body may charge up to \$10 for each hour spent by personnel in searching for and retrieving a requested record, after the first 8 hours. A public body may charge the actual cost of retrieving and transporting public records from an off-site storage facility when the public records are maintained by a third-party storage company under contract with the public body. If a public body imposes an hourly fee or a retrieval and transport fee, it must provide an accounting of all fees, costs, and personnel hours in connection with the request to the commercial requester.

XII. EXEMPTIONS (SECTIONS 7 and 7.5)

When a public body receives a proper request for information, it must comply with that request unless one of the narrow statutory exemptions set forth in FOIA applies. Under Section 7 of FOIA, if any public record that is exempt from disclosure under Section 7 contains any material which is not exempt, the public body may redact the exempt information and then make the remaining information available for inspection and copying. For example, if the public body has a pre-printed form which includes both exempt and non-exempt material, the public body would have to give the entire pre-printed form, including all pre-printed material even if it was located where the exempt material was originally inserted, and redact from it the exempt information.

Section 7 contains a rather long list of exemptions (as well as exceptions to the exemptions) and it is not the intent of this section to cover or merely repeat each and every exemption and exception thereto. However, we would like to highlight some of the more important exemptions and exceptions under Section 7(1) of the Act, including:

1. Information specifically prohibited from disclosure by federal or State law, or rules and regulations adopted under federal or State law.
2. Private information, unless disclosure is required by another provision of the Act, a State or federal law or a court order. Private information includes a person's social security number, drivers license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, personal email addresses, home addresses and personal license plates.
3. Personal information that, if disclosed, would constitute a "clearly unwarranted invasion of personal privacy," unless disclosure is consented to in writing by the individual whose privacy is being invaded. Section 7 further states that disclosure of information that "bears on the public duties" of public employees and officials shall not be considered an invasion of personal privacy.

12. Minutes of meetings allowed to be kept confidential under the Illinois Open Meetings Act
13. Certain limited communications with the attorney for the public body (seek his or her advice as to what may or may not be included), as well as materials prepared for a criminal, civil or administrative proceeding upon the request of the attorney and also materials prepared for an internal audit.
14. Records relating to a public body's adjudication of employee grievances or disciplinary cases; however this exemption shall not extend to the final outcome of cases in which discipline is imposed.
15. Certain administrative or technical information associated with automated data processing.
16. Records relating to collective bargaining matters but not including the final contract or agreement which is entered into.
17. Test questions, scoring keys, and other examination data used to determine the qualifications of an applicant for a license or employment. (e.g., tests for applicants for the police or fire departments)
18. Records regarding real estate (purchases and sales) negotiations up until the time the negotiations are concluded.
19. Certain information relating to an intergovernmental risk management association, self-insurance pool or jointly self-administered health and accident cooperative or pool. This includes any insurance or self insurance claims, loss or risk management information, records, data, advice or communications.
20. Information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of a public body responsible for the regulation or supervision of financial institutions or insurance companies, unless disclosure is otherwise required by State law.
21. Information that would disclose or might lead to the disclosure of secret or confidential information, codes, algorithms, programs, or private keys intended to be used to create electronic or digital signatures under the Electronic Commerce Security Act.
22. Vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public.
23. Maps and other records regarding the location or security of a utility's generation, transmission, distribution, storage, gathering, treatment, or switching facilities.
24. Information contained in or related to proposals, bids, or negotiations related to electric power procurement under Section 1-75 of the Illinois Power Agency Act and Section 16-

6. Firm performance evaluations under Section 55 of the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act.
7. Information the disclosure of which is restricted and exempted under Section 50 of the Illinois Prepaid Tuition Act.
8. Information the disclosure of which is restricted and exempted under the State Officials and Employees Ethics Act, and records of any lawfully created State or local inspector general's office that would be exempt if created or obtained by an Executive Inspector General's office under that Act.
9. Information contained in a local emergency energy plan submitted to a municipality in accordance with a local emergency energy plan ordinance that is adopted under Section 11-21.5-5 of the Illinois Municipal Code.
10. Information and data concerning the distribution of surcharge moneys collected and remitted by wireless carriers under the Wireless Emergency Telephone Safety Act.
11. Law enforcement officer identification information or driver identification information compiled by a law enforcement agency or the Department of Transportation under Section 11-212 of the Illinois Vehicle Code.
12. Records and information provided to a residential health care facility resident sexual assault and death review team or the Executive Council under the Abuse Prevention Review Team Act.
13. Information provided to the predatory lending database created pursuant to Article 3 of the Residential Real Property Disclosure Act, except to the extent authorized under that Article.
14. Defense budgets and petitions for certification of compensation and expenses for court appointed trial counsel as provided under Sections 10 and 15 of the Capital Crimes Litigation Act. This subsection (n) shall apply until the conclusion of the trial of the case, even if the prosecution chooses not to pursue the death penalty prior to trial or sentencing.
15. Information that is prohibited from being disclosed under Section 4 of the Illinois Health and Hazardous Substances Registry Act.
16. Security portions of system safety program plans, investigation reports, surveys, schedules, lists, data, or information compiled, collected, or prepared by or for the Regional Transportation Authority under Section 2.11 of the Regional Transportation Authority Act or the St. Clair County Transit District under the Bi-State Transit Safety Act.
17. Information prohibited from being disclosed by the Personnel Records Review Act.
18. Information prohibited from being disclosed by the Illinois School Student Records Act.
19. Information the disclosure of which is restricted under Section 5-108 of the Public Utilities Act.

5. the address and phone number for the PAC; and
6. the person's right to judicial review under Section 11 of FOIA.

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

Copies of all notices of denials must be retained in a single central office file that is open to the public and indexed according to the type of exemption asserted (i.e., as listed in Section 7) and to the extent feasible, according to the type of records requested, (e.g., criminal records, preliminary investigative reports, etc.). By maintaining office files containing copies of denials in each public body department, a public body complies with the statute. Duncan Publishing, Inc. v. City of Chicago, 304 Ill. App. 3d 778, 709 N.E.2d 1281 (1st Dist. 1999), *app'l den.* 185 Ill. 2d 622 (1999).

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

XIV. PUBLIC ACCESS COUNSELOR (SECTIONS 9.5 and 11.5)

FOIA creates a new position within the Illinois Attorney General's Office: Public Access Counselor (the "PAC"). This position has responsibility of reviewing denials of FOIA requests by a public body upon the filing of a request for review.

The PAC may, in response to a request for review, issue a nonbinding or binding opinion. Upon receipt of a binding opinion concluding that a violation of FOIA has occurred, the public body must either take immediate necessary action to comply with the directive of the opinion or initiate an administrative review action challenging the binding opinion.

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

A binding opinion issued by the PAC shall be considered a final decision of an administrative agency, for purposes of administrative review under the Illinois Administrative Review Law. An action for administrative review of a binding opinion must be filed in Cook or Sangamon County. An advisory opinion issued to a public body shall not be considered a final decision of the PAC.

XV. JUDICIAL REVIEW OF FOIA RESPONSES (SECTION 11)

A requester who is denied access to public records may file a lawsuit against the public body for injunctive or declaratory relief. The court hearing the lawsuit may enter an order

The initial time to respond to a FOIA request is five (5) business days, except for those requests which are made for a commercial purpose, in which case the initial time to respond is twenty-one (21) business days. The time allowed for an extension to respond to a FOIA request is five (5) business days. The time to respond to voluminous requests may be extended as well. (See Section 3.6).

6. What is a commercial purpose under the Act?

FOIA defines a commercial purpose as the use of any part of a public record "in any form for sale, resale, or solicitation or advertisement for sales or services." Requests made by the news media and non-profit agencies, as well as any scientific or academic organizations, are not considered made for commercial purposes when the principal purpose of the request is: (1) to access and disseminate information concerning news and current or passing events; (2) for articles of opinion or features of interest to the public; or (3) for the purpose of academic, scientific, or public research or education. (See Section 2(c-10))

7. How does a commercial purpose designation change a public body's responsibilities under FOIA?

Commercial requests are processed on a different timeline than other requests. Within twenty-one (21) working days after receiving a commercial request, the public body must do one of four things: (1) provide the public records; (2) deny the request due to exemptions; (3) treat the request as unduly burdensome; or (4) provide an estimate of the time required to provide the public records requested and an estimate of the fees to be charged, which the public body can require to be paid before copying. A public body must comply with a request within a reasonable period, considering the size and complexity of the request, and giving priority to public records requested for non-commercial purposes. (See Section 3.1)

8. How does one request a review of a public body's actions regarding FOIA?

A person who believes there was an improper denial of a FOIA request, has sixty (60) days from said violation or denial to file a request for review with the Public Access Counselor. (See Section 9.5(a))

9. What is the Public Access Counselor?

FOIA creates a Public Access Counselor ("PAC") as a part of the Attorney General's Office. The PAC has the authority to review and determine whether documents should have been disclosed under FOIA. The PAC may also issue advisory opinions to guide public bodies. (See Section 9.5)

10. Can the PAC issue binding opinions?

Yes, the PAC can issue binding opinions to resolve disputes and may sue to enforce the binding opinions. The PAC has sixty (60) days after the request for review to issue a binding opinion, unless a request for an extension of thirty (30) business days is given. The binding opinion must make findings of fact and conclusions of law and must be issued to the requester and the public body. The binding opinion is subject to administrative review by either the requester or the public body. (See Section 9.5(f))

personal privacy, which would be objectionable to a reasonable person. Additionally, any information prohibited from being disclosed under the Personnel Records Review Act, 820 ILCS 40/1 *et seq.*, is exempt under the Act. On the other hand, a recent Illinois Supreme Court decision, *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396 (2009), held that an employment contract that was included in a personnel file was not exempt under the former FOIA. This decision may indicate that courts will be unwilling to find information in a personnel file exempt from disclosure. However, it should be noted that although employee grievances or disciplinary cases are exempt under FOIA, this exemption does not extend to the final outcome of cases in which discipline was imposed.

Pursuant to Section 7.5(q) of FOIA, any disciplinary actions that occurred more than four (4) years ago are prohibited from disclosure pursuant to the Illinois Personnel Records Review Act, 820 ILCS 40/8. Section 8 of the Illinois Personnel Records Review Act explicitly states that "an employer shall review a personnel record before releasing information to a third party and ... delete disciplinary reports, letters of reprimand and other records of disciplinary action which are more than four (4) years old." 820 ILCS 40/8.

17. What are the requirements for disclosure of arrest reports?

A local public body must furnish an arrest report no later than seventy-two (72) hours after the arrest. Details relative to the individual involved in the arrest must be given, as well as any other information detailing the charge, and, if applicable, discharge of the individual. However, it should be noted that information on an arrest report "may be withheld if it is determined that disclosure would: (i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement agency; (ii) endanger the life or physical safety of law enforcement or correctional personnel or any other person; or (iii) compromise the security of any correctional facility." (See Section 2.15)

18. Are settlement agreements and/or severance agreements public records under the Act?

FOIA states that "all settlement and severance agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public." (See Section 2.20)

19. Are e-mails sent or received by employees of the public body public records under the Act?

E-mail communications which have been prepared, or have been or are being used, received, possessed or under the control of a public body are treated as public records under the Act. "Personal" or "private" e-mails sent or received by public body employees on devices belonging to the public body should not be considered public records under the Act because they are not made or received pursuant to any law or ordinance or in connection with the official business of the public body. See *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, 992 N.E.2d 629 (Ill. App. Ct. 2013).

20. How can a public body use the personal privacy or preliminary draft exemptions?

Public Act 97-579, which went into effect August 26, 2011, changed the procedure for a public body's use of the personal privacy or preliminary draft exemptions to be the same as that

later assert that the request is unduly burdensome or to charge for copying. Additionally, FOIA establishes stiff civil penalties for FOIA violations. Courts may impose civil penalties between \$2,500.00 and \$5,000.00 against public bodies that willfully and intentionally fail to comply with FOIA or otherwise act in bad faith. Finally, FOIA states that courts "shall" award attorney's fees to requesters who prevail in a FOIA claim brought forth in circuit court. (See Section 11(j))

27. What is required of reports that Municipalities submit to the Illinois Department of Revenue.

In regards to 7.5 FOIA exemption regarding reports submitted to the Illinois Department of Revenue still exists. Pursuant to 5 ILCS 140/7.5(x) Information which is exempted from disclosure under Section 5-1014.3 of the Counties Code or Section 8-11-21 of the Illinois Municipal Code.

County Code 55 ILCS 5/5-1014.3(e) states that the Department and the county shall redact the sales figures, the amount of sales tax collected, and the amount of sales tax rebated prior to disclosure of information contained in a report required by this Section or the Freedom of Information Act. The information redacted shall be exempt from the provisions of the Freedom of Information Act.

The Illinois municipal code also states that the Department and the municipality shall redact the sales figures, the amount of sales tax collected and the amount of sales tax rebated prior to disclosure of information contained in a report required by this Section or the Freedom of Information Act. The information redacted shall be exempt from the provisions of the Freedom of Information Act. 65 ILCS 5/8-11-21(e)

STATUTES TO BE AWARE OF

1. The Freedom of Information Act - 5 ILCS 140/1 *et seq.* [Only Civil Remedies]
2. The Personnel Review Records Act - 820 ILCS 40/1 *et seq.*
3. The Illinois Power Agency Act – 20 ILCS 3855/1-75
4. The Public Utilities Act – 220 ILCS 5/16-111.5 and 5-108
5. The School Code – 105 ILCS 5/10-20.38 and 34-18.29
6. The Illinois Credit Card Marketing Act – 110 ILCS 26/25
7. The Public Aid Code – 305 ILCS 5/11-9 and 11-8
8. The Technology Advancement and Development Act – 20 ILCS 70/1 *et seq.*
9. The Library Confidentiality Act – 75 ILCS 70/1 *et seq.*
10. The Illinois Sexually Transmissible Disease Control Act – 410 ILCS 325/1 *et seq.*
11. The Radon Industry Licensing Act – 420 ILCS 44/30