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Alert

Modifications to the Illinois Open Meetings Act That Affect All Public Bodies

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Recent legislative actions have modified the requirements of the Illinois Open Meetings Act that affect all public bodies. Discussed here are the two chief elements of Public Act 86-1473, the issues raised by the new law, and a suggested method for implementing any changes necessary to comply with the new law until the issues are addressed by the Legislature or by court decisions.



The New Law on Addressing Public Officials

1. Amendment of Open Meetings Act Regarding Public Comments

As a matter of practice, many cities, villages and towns have typically included a place for public comments on the agenda at meetings of their corporate authorities. Whether at the beginning, middle or end of a meeting, people with something to say have frequently been given the opportunity to speak to their elected officials. Yet, outside of mandated public hearings, public bodies have not had an obligation to hear from the public, and the public's right has only been to hear and observe. When the public was given the right to address a public body, it has occurred as a policy choice consistent with good representative government.

Now, the Illinois Open Meetings Act has been amended to establish the public's opportunity to address public officials as a matter of right. The new law is Subsection 2.06(g) of the Open Meetings Act. 5 ILCS 120/2.06(g). Unfortunately, the single-sentence amendment – included in Public Act 96-1473, which became effective January 1, 2011 – is confusing. The 21-word sentence states “Any person shall be permitted

an opportunity to address public officials under the rules established and recorded by the public body.”

2. The Interpretive Issues

The confusion with the language of the new law raises a number of issues. These are briefly discussed below.

Who Is a “Public Official”?

The first series of questions arises from the term “public officials” in the new law. The Open Meetings Act does not specify the “public officials” that a person must be permitted an opportunity to address. Most people may think immediately that “public officials” means elected officials, and of course it does. But elected officials are not the only public officials. Under some Illinois laws, the term “public official” is defined much more broadly, and may include persons elected or appointed to a state or local government office, 10 ILCS 5/9-1.11 (Election Code), 720 ILCS 5/12-9 (Criminal Code), or even “any officer *or employee* of the state or any agency thereof, including state political subdivisions, municipal corporations, park districts, forest preserve districts, educational institutions and schools.” 775 ILCS 5/5-101C (Human Rights Act) (emphasis added).

The absence of a definition of “public official” specifically for the Open Meetings Act makes it difficult to determine which public officials a person must have the opportunity to address under the new law, and how broadly the term “public official” is to be interpreted. Although the new law amends the Open Meetings Act, there is no useful legislative history regarding the law to define the scope of the term “public officials,” so it could conceivably be construed narrowly to be limited to elected public officials serving as the corporate authorities, or broadly to cover all persons serving on any public bodies (including subsidiary public bodies) or as employees of a local government.

To Which Public Bodies Does the New Law Apply?

Because the new law charges “the public body” with the task of establishing and recording rules governing the opportunity to address public officials, there is a need to determine to which public bodies the new law applies. There is no limitation in the new law, so presumably it applies to all public bodies. Although such a broad application of the new law does not preclude the corporate authorities of a local government from establishing a single set of rules for itself and its subsidiary bodies, it does suggest that the right to address public officials must be made available through all public bodies, including subsidiary bodies of a unit of government.

Does the New Law Apply Only to Meetings?

Another question is whether the new law’s mandate applies only to meetings of public officials. If the analysis of this question is limited simply to reading the words of the new law, then the answer is “no,” because the new law says nothing about a meeting. The plain language of the new law is that it neither requires that the opportunity to address public officials to be at a public meeting nor limits that opportunity only to public meetings.

As noted above, the context of the new law also is confusing. It is an amendment to the Open Meetings Act, which governs meetings. It was not included in a section of that Act related to the conduct of meetings, however, but instead was tacked onto the end of Section 2.06, which relates to meeting minutes and verbatim records of closed meetings. 5 ILCS 120/2.06. Plainly, it would have been a clearer statement of the new law’s purpose – had the Legislature meant to apply the new law only to meetings – to place the new law in its own section or in Section 2 or Section 2.01 of the Act, each of which deals directly with how meetings must be conducted.

Common sense suggests: (a) that the Legislature intended the new law to require public comment periods at meetings of public bodies, but also (b) that opportunities to address public officials may be provided in other contexts in a manner that satisfies the new law.

What Constitutes the “Opportunity to Address”?

Although the new law states that the public shall have the “opportunity to address” public officials, Webster’s dictionary defines the verb “address” both as “to communicate directly” and “to speak or write directly to.” Conceivably, the “opportunity to address” could be limited to written communications, but the context of the new law in the Open Meetings Act strongly suggests that the opportunity must include the right to speak to public officials. Importantly, the new law is limited to the public’s right to “address” public officials; it does not impose an obligation on public officials to respond to such members of the public on the matters communicated.

At What Meetings, and How Often, Must Public Comments Be Provided?

Assuming the new law requires a public comment period at a public body’s meetings, two questions immediately arise: (1) which meetings and (2) how often? As to the first question, it seems nearly certain the new law will be interpreted to require public comments at the meetings of city councils, boards of trustees, boards of commissioners, and other governing bodies. This is the traditional opportunity for interested persons to address their public officials and the Legislature surely intended the new law to codify that tradition. Because the new law is broadly written, as well as the fact that subsidiary bodies of a local government also are “public bodies” under the Open Meetings Act as discussed above, it is safe to assume that meetings of all public bodies must include the opportunity to address public officials.

It is unclear, however, whether the opportunity must be provided at each meeting of a public body, or whether the opportunity can be confined to specific meetings. Presuming that the underlying purpose of the new law is to allow the public an opportunity to address matters both generally concerning to the citizenry as well as matters that may be considered imminently by the public body, it would seem that the safest course is to make available the opportunity to address public officials during all regular meetings of a public body and, as well, at any other meetings where final action on a matter may be considered by the public body.

But will it be a violation if a council or board conducts two business meetings each month and allows public comment at only one of those meetings? Or if a council or board meets twice a month and once more each month in committees, will it be a violation if that council or board does not allow public comment during the committee meetings? These questions, which reflect common practices, cannot yet be answered.

Rules Established and Recorded by the Public Body

The new law authorizes public bodies to establish rules governing the opportunity to address public officials. Rules like those typically are understood to relate to when people may speak, for how long they may speak, and, sometimes, on what topics they may speak.

The rules must be “established and recorded by the public body.” To avoid any claim of noncompliance with the new law, the rules should be approved in writing either by the corporate authorities of the local government (if a single set of rules are established for the corporate authorities and all subsidiary bodies) or by each separate public body. It also could be that the corporate authorities can establish a general set of rules to ensure compliance with the new law, but then allow the subsidiary bodies to supplement those rules to better accommodate their typical proceedings.

It is also not clear what it means to “record” the rules. Compliance with the new law would be assured by recording the rules in the minutes of a meeting of the corporate authorities or other public body. At a minimum, the approved rules should be kept in the office of the clerk or chief executive or administrative official and made readily available to the public.

3. Suggestions for Compliance

Although any law may be susceptible to more than one interpretation, the new requirement for an opportunity to address public officials in PA 96-1473 provides fertile ground for multiple interpretations. The challenge for now is to interpret and apply the law reasonably to ensure compliance in a manner that minimizes any unsettling results. Reasonableness suggests that opportunities for public comment must be regular and convenient, but may be managed so that they do not prevent the public officials from conducting their business efficiently and effectively.

We recommend that each local government adopt a resolution establishing rules regarding the opportunity for the public to address public officials (the “Basic Rules”). Those Basic Rules will apply to the corporate authorities and to all subsidiary bodies of the local government. Having a single set of Basic Rules will provide some assurance that each of the public bodies of the local government will comply with the new law. The Basic Rules may provide for customization by the individual subsidiary bodies, so long as the customization conforms to the Basic Rules. The Basic Rules should contain the following elements:

- **An agenda item for the public to address the public body.** A “public comment” period should be included on the agenda for each meeting of every public body.¹ This practice will assure compliance with the new law and can be managed with an ordered set of rules to ensure that the activities of the public body are not unduly disrupted. Public comment during that dedicated period can be confined to non-agenda items if the public will have an opportunity later to address specific matters on the agenda. If that dedicated period will be the only opportunity to address the public body, then ideally it should be early on the agenda so that the public comments can be made before action is taken on a matter later on the agenda that may be the subject of public comments.
- **A written policy regarding the public comment period.** One section of the Basic Rules should set forth matters such as the total amount of time that will be devoted

to public comments at a meeting, the amount of time that will be allotted to each person wishing to speak, what a person must do to exercise the opportunity to comment (such as a sign-up sheet or even pre-registration), and what procedure the public body will use to extend the public comment period if desired (such as a decision of the chairperson or a vote of the members of the public body). The Basic Rules also could set reasonable limitations regarding what may be said during the public comment period, such as limiting comments to matters within the purview of the particular public body (so a citizen does not address the Board of Fire and Police Commissioners on zoning matters), or identifying improper areas of comment (such as *ad hominem* attacks on individuals or explicit political endorsements), or precluding certain manners of speech (such as profanity).²

- **Specific rules for addressing public officials in writing.** Because the scope of “public officials” under the new law is unclear and conceivably could extend to employees of the public body who do not regularly attend a public meeting, we suggest that the Basic Rules create a specific process for addressing public officials in writing. Having this “in-writing” process will ensure that the opportunity to “communicate directly” with a public official is not frustrated because the particular public official does not attend a public meeting. The in-writing process also becomes a reasonable alternative for the public when the Basic Rules for public comments at a meeting set limits on time and topics. At a minimum, the in-writing process in the Basic Rules should advise the public of the right to make such written comments, how to make such comments (such as by letter or email), and where or to whom such comments should be addressed.
- **Administrative provisions.** The Basic Rules should include standards relating to: (1) the availability of the Basic Rules, whether in writing, on a website, or other format, and (2) supplementation by subsidiary bodies in a manner not inconsistent with the Basic Rules.

Reasonableness will be the key to success in fashioning the Basic Rules, but we believe that the suggestions above will establish a path for compliance with the new law without disrupting public business.

If the new law is revised, or is interpreted to be less (or more) broad than the new law currently reads on its face, then a local government may revisit its Basic Rules to determine whether those rules have created the appropriate opportunities for the public to address its public officials.

New Rules Regarding Approval of Meeting Minutes

Public Act 96-1473 also amended the Open Meetings Act by establishing new rules regarding the review and approval of meeting minutes. Formerly, the Open Meetings Act presumed the approval of minutes and established a time within which approved minutes would be made available to the public. 5 ILCS 120/2.06(b). Under PA 96-1473, Section 2.06(b) has been amended to set specific time limits on approval of minutes: “A public body shall approve the minutes of its open meeting within 30 days after that meeting or at the public body’s second subsequent regular meeting, whichever is later.”

The law also requires that approved minutes be made available to the public within seven (formerly 10) days after approval. Note that the new law does not establish a specific time for approval of closed session minutes, but Section 2.06(c) does require the approval of closed session minutes before any verbatim minutes (that is, recordings) of closed sessions may be destroyed.

There is some ambiguity with respect to public bodies that do not meet regularly and are not scheduled to meet within 30 days after a prior meeting. For those bodies, we recommend that the next meeting (even if a special meeting) include the minutes of the prior meeting on the agenda for review and approval.

Please contact either of us or your regular Holland & Knight attorney with any questions or for further assistance on these matters.

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¹ There may be reason for excluding a public comment period at some meetings, such as a meeting held for the exclusive purpose of conducting a hearing of some sort, because the hearing itself is the opportunity to address the public officials. Otherwise, however, an ordered set of public comment rules should ensure that the public comment portion of a meeting will not unduly disrupt the activities of a public body.

² To the extent that rules are contemplated regarding the topics that may be addressed, care should be taken to avoid improper limitation on free speech and related first amendment rights to petition government. These concerns can be addressed in part by establishing “manner” regulations for addressing public officials that are covered in the written public comment section discussed below.

About the Authors

Mark E. Burkland is a member of the firm’s National Land Use and Government Specialty Team. He represents public bodies at the state and local levels in all relevant areas of legal services including general corporate counseling, environmental matters, zoning, development, personnel and contracts. He has extensive experience in the field of government law and works with many of the firm’s public sector clients, including the Chicago Public Schools and numerous municipal and special district clients. He is Village Attorney for the Village of La Grange and serves as general counsel to the Park District of Oak Park.

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Illinois Real Estate and Local Government Practice

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