

# **ICCCFO Legal Topics: Open Meetings Act and Conflicts of Interest Statutes**

October 14, 2015

# Open Meetings Act

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# Overview and Policy of Illinois Open Meetings Act

- “Sec. 1. Policy. It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.”
- ”’Meeting’ means any gathering, whether in person or by video or audio conference, telephone call, electronic means... 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...”

# Open Meetings Requirements

- All meetings of public bodies are required to be open, with certain limited statutory exceptions.
- Public meetings must be “held at specified times and places which are convenient and open to the public” and cannot be held on a legal holiday unless the regular meeting day falls on that holiday.
- Public notice of the schedule of regular meetings must be given at the beginning of each calendar or fiscal year with the regular dates, times, and places of such meetings.

# Agenda Requirements

- Agendas must be continuously 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 meeting.
- If the public body has a maintained website, agendas and notices must be posted and remain posted until the meeting concludes (or for schedule of meetings until such new schedule is posted).
- Agendas must “set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting.”
- Continuous posting requirement – at least 48 hours.

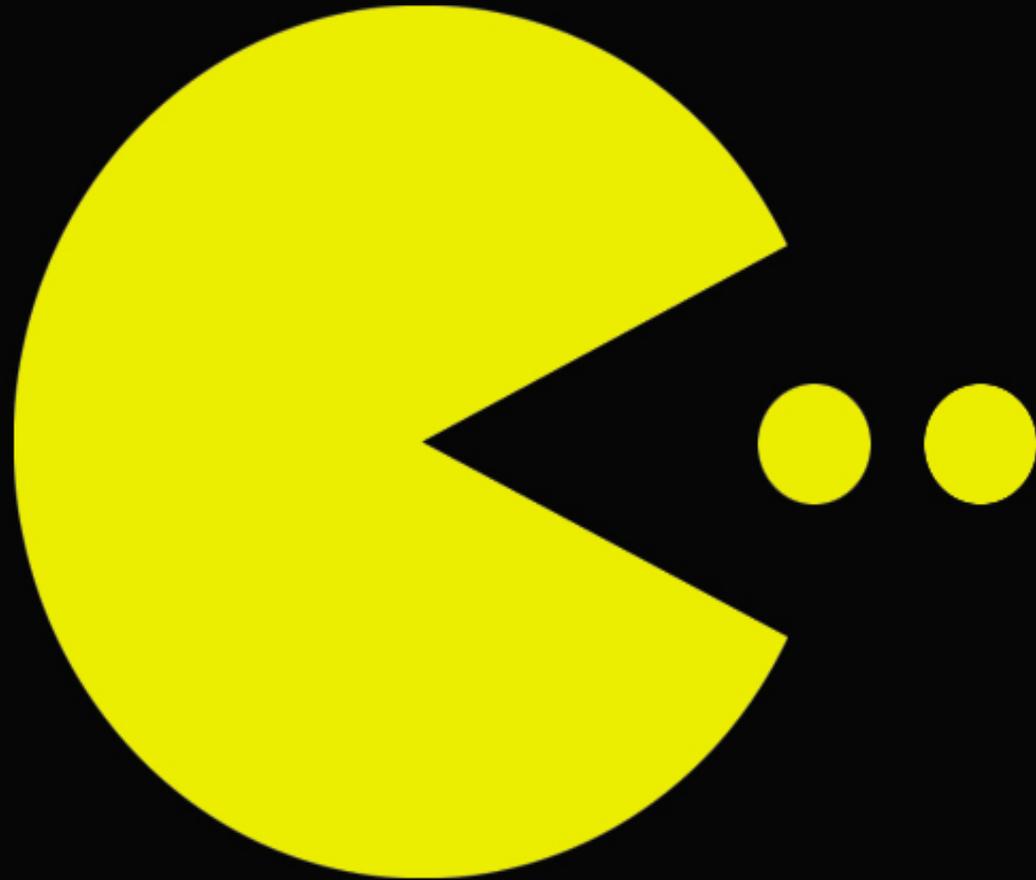
# Notice Requirements

- Posting/publication requirement for changing schedule of regular meetings (not for just rescheduling one meeting).
- Special Meeting: called by Chair or 3 members of Board of Trustees
- Rescheduled Regular Meeting: meeting changed by action of the Board of Trustees at a public meeting
- Change in time or location = special or rescheduled meeting
- Notice of special or rescheduled regular meetings must be given to the Board members and any news media that have requested such notice

# OMA: Why it Matters/Increased Scrutiny

- Violations of the Open Meetings Act (“OMA”) can result in penalties such as:
  - An injunction against future violations of OMA, or
  - Declaring null and void any final action taken
- Issuers risk having bonds invalidated if the bonds were authorized in an open meeting that was later declared to be in violation of OMA
- Historically, a long and expensive process to challenge Board actions either with State’s Attorney/Attorney General or through the courts

# Introduction of the Public Access Counselor (“PAC”)



# The Public Access Counselor

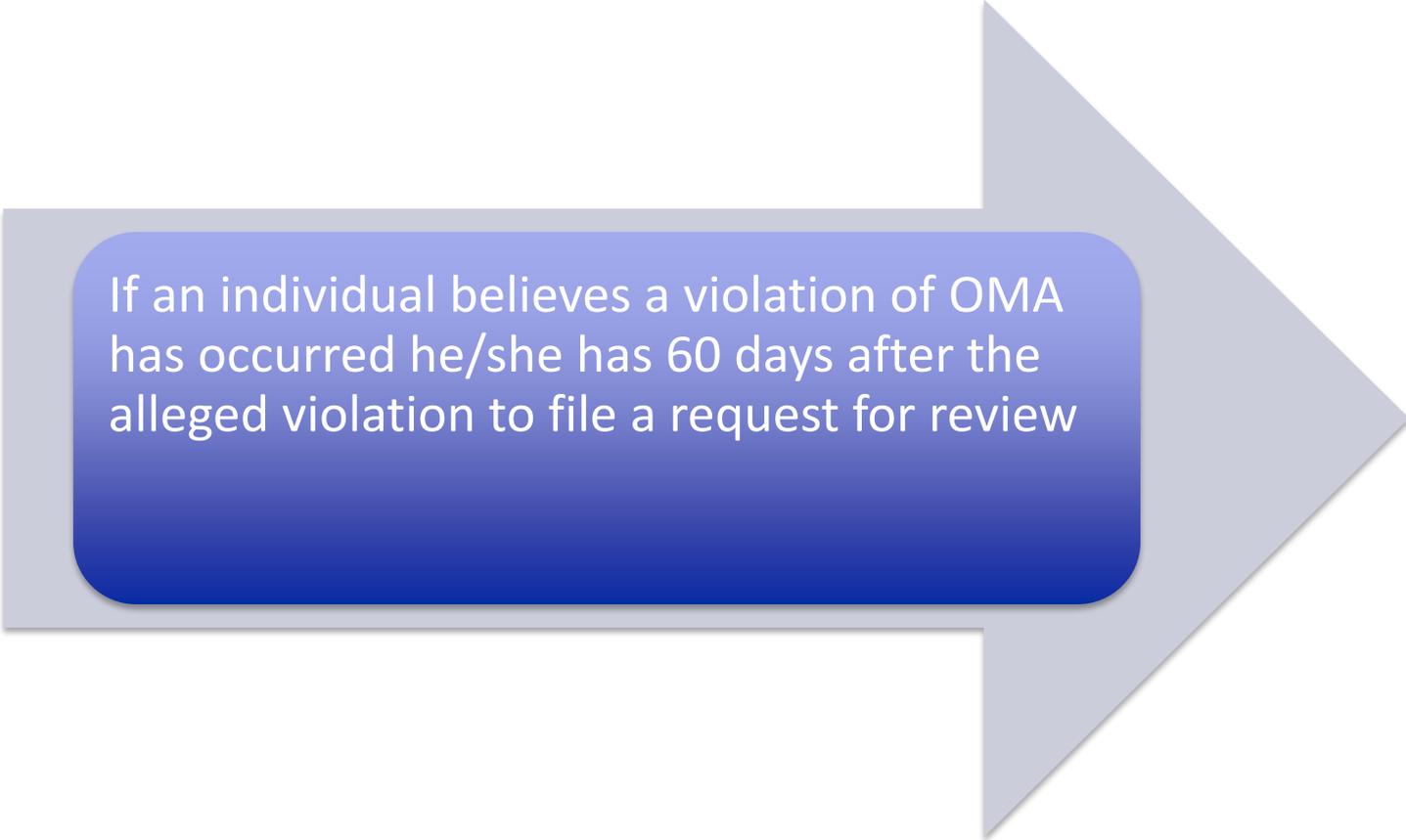
- The Public Access Counselor (“PAC”)
  - In 2010, State laws were amended “to ensure” that the public had access to public records and meetings
  - These updated provisions made it easier to enforce OMA because the PAC became a permanent part of the Office of the Attorney General
  - The PAC is an attorney in the Attorney General’s Office who works to ensure compliance with OMA by overseeing the Public Access Bureau
- Before the PAC, an aggrieved party had to file a complaint in court or try to enlist the State’s Attorney/Attorney General to take action

# Open Meetings Act- PAC Responsibilities

- PAC Responsibilities:
  - Issuing binding opinions in response to requests for review submitted by members of the public
  - Issuing advisory opinions to guide public bodies
  - Mediating disputes between members of the public and public bodies concerning compliance with OMA
  - Providing educational materials to the public
  - Responding to informal inquires regarding compliance with OMA

# Open Meetings Act- Binding PAC Opinions

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If an individual believes a violation of OMA has occurred he/she has 60 days after the alleged violation to file a request for review

# Open Meetings Act- Binding PAC Opinions

If the PAC determines the request to review *is not* warranted, the PAC will advise both the public body and the requester that no action will be taken

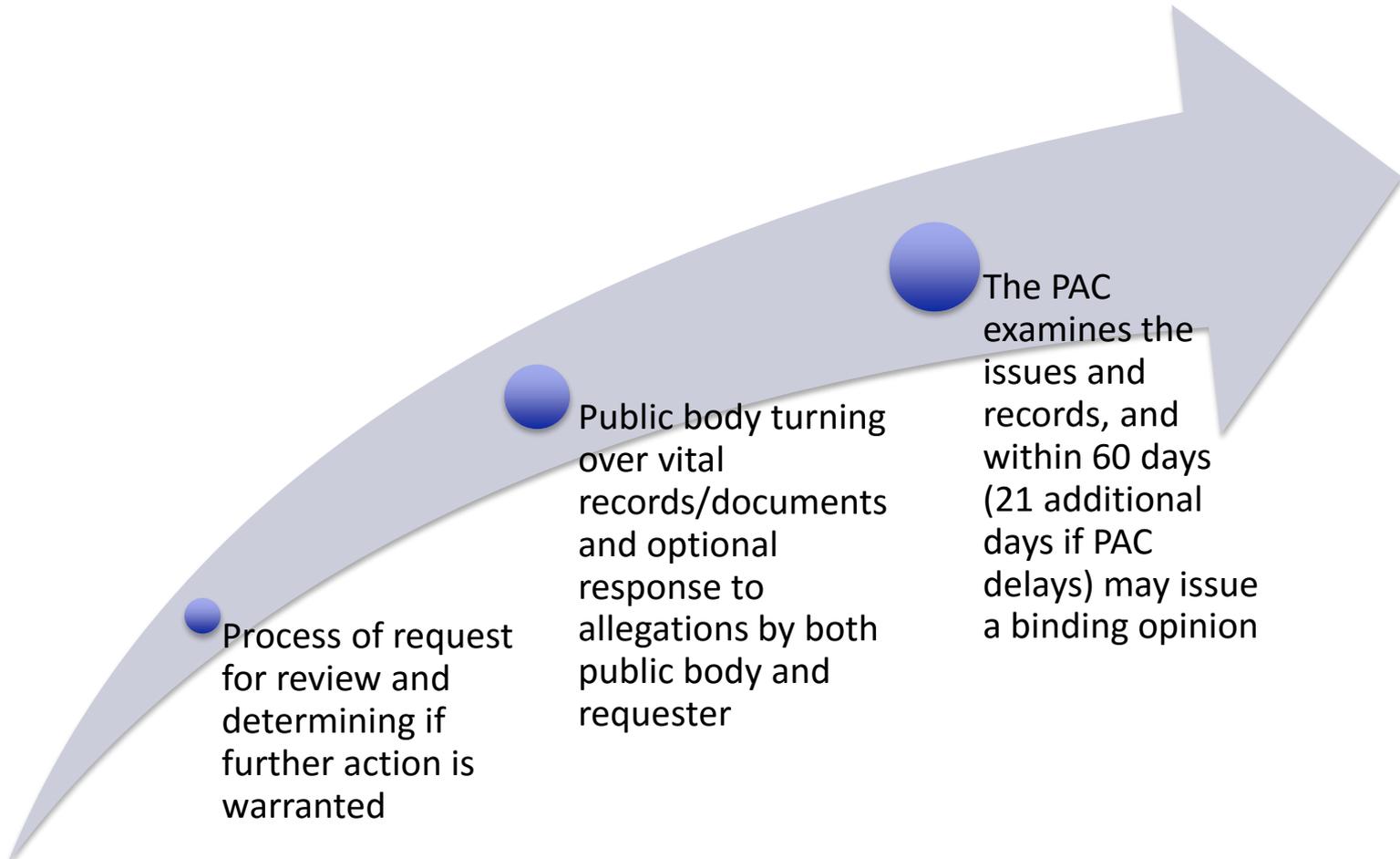
If the PAC determines the request to review *is* warranted, the PAC must send the request to the public body within 7 working days

# Open Meetings Act- Binding PAC Opinions

After receiving the request to review, the public body has 7 working days to turn over any records/documents that the PAC requested. The public body may also, but does not have to, respond to the allegations in the request to review within 7 working days

If the public body does respond to the allegations, the requester may, but does not have to, respond in writing to the answer within 7 working days

# Open Meetings Act- Binding PAC Opinions



# Open Meetings Act- Binding PAC Opinions

## The Effect of a Binding PAC Opinion

- A binding PAC opinion is considered a final decision of an administrative agency subject only to appeal.
- Once a public body receives a binding opinion that determines the public body has violated OMA, the public body must either comply with the binding opinion or initiate an administrative review.
- A binding opinion may only bind the specific parties to that opinion, but such opinions may indicate how the Attorney General may opine in the future.

# Open Meetings Act-Non Binding PAC Opinions and Advisory Opinions

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- The Attorney General may decide to resolve a request for review by mediation or by issuing a non-binding opinion
- The Attorney General may also issue advisory opinions to public bodies regarding compliance with OMA

# Binding PAC Opinions-Section 2(e) (No Final Action in Closed Session and Requirement for Public Recital)

- The next four binding PAC Opinions address how public bodies deal with the sensitive nature of hiring and firing. The applicable law governing these opinions is Section 2(e) of OMA:
  - “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.”
    - “Other information” has been interpreted by the PAC to mean that the public body is required to provide a verbal explanation of the significance of its action to members of the public.

# Binding PAC Opinion 13-007 (Closed Session + No Public Recital)

- A reporter filed a request for review alleging Springfield School District violated Section 2(e) when its Board of Education signed a separation agreement with the District's former superintendent during closed session on February 4, 2013.
- During an open meeting on March 5, 2013, the separation agreement was approved. However, the motion to approve the separation agreement provided no details of the agreement, which included a \$177,796.97 lump sum payment.
- The PAC issued a binding opinion that determined the District violated OMA when it improperly took a "final action" by signing the separation agreement on February 4, 2013. The PAC further stated that even if the Board had not taken a final action during its closed meeting, the Board could not have cured its violation by voting to approve the agreement at an open meeting because the Board failed to make a public recital that adequately informed the public of the nature of the matter under consideration.
- The Board was ordered to (1) compile and release to the reporter a summary of the closed meeting in which the Board improperly took a final vote and (2) conduct its meetings in full compliance with OMA

# Binding PAC Opinion 14-001 (No Adequate Public Recital)

- On June 25, 2013, the Board of Education of Springfield School District sought administrative review of the PAC's binding opinion 13-007. On November 19, 2013, the circuit court ruled that the roll call taken by the Board during its open session on March 5, 2013 constituted the Board's final action, and not the signing of the separation agreement at the closed meeting.
- The circuit court then remanded to the PAC the issue of whether the Board's final action was preceded by a public recital that complied with Section 2(e).
- The PAC determined that the final action was not preceded by an adequate public recital because the Board did not publicly discuss or summarize the terms of the separation agreement or discuss the reasons that led to the termination in the first place.
- In other words, it is not enough to just say that the next item to be considered is a separation agreement.

# Binding PAC Opinion 13-016 (Violation of Public Recital Requirement)

- On June 24, 2013, the Board of Geneva School District held a closed meeting to conduct a dismissal hearing. After 90 minutes the meeting was reconvened in open session and the Board voted to recommend the dismissal of an employee identified only as “Employee A.”
- On June 26, 2013, a reporter filed a request to review alleging the School District violated Section 2(e) by taking final action in firing an employee without identifying the individual by name.
- The PAC issued a binding opinion stating that the Board violated the public recital requirement of OMA because it failed to identify the employee before it made its decision.
- The PAC ordered the Board to reconsider its June 24, 2013, final action and to precede the final action with a public recital of the nature of the matter being considered, *i.e.*, naming the employee.

# Binding PAC Opinion-Section 2.01 (Open and Convenient to the Public)

The next two binding PAC opinions and one Attorney General letter deal with Section 2.01 of OMA which states:

- “All meetings required by [OMA] to be public shall be held at specified times and places which are convenient and open to the public.”
  - “Open” has been interpreted by PAC to mean not restricted to a particular group or category of participants.
  - “Convenient” has been interpreted by PAC to mean suitable or proper.

# Binding PAC Opinion 12-008 (Meeting at Superintendent's House)

- On December 21, 2011, the Board of Education of Whiteside School District held a special meeting at the private residence of the District's superintendent to adopt the District's 2011 tax levy.
- On January 6, 2012, the PAC received a request to review alleging that the Board violated Section 2.01.
- The PAC determined that the District violated Section 2.01 because the location of the meeting was not convenient.
- The PAC directed the District to take appropriate action to comply with this opinion by scheduling and conducting future meetings in full compliance with Section 2.01.

# Binding PAC Opinion 13-014 (Meeting Outside of District)

- On June 7, 2013, the PAC received a request to review alleging that the Board of the Broadlands-Longview Fire Protection District violated Section 2.01.
- On April 16, 2013 at 9:00 a.m., the Board held a meeting in Champaign, Illinois, more than 26 miles away from the Board's regular meeting location and 20 miles away from any part of the District.
- The PAC determined that the Board violated Section 2.01 because the meeting location was not convenient to the public as a whole.
- The PAC stated that no remedial action could cure the violation but ordered the District to ensure that all future Board meetings were held at places that were convenient and open.

# Attorney General Letter (Room “too” Small)

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- On October 22, 2014, the PAC wrote a letter in response to an individual’s complaint. The PAC’s letter stated there was insufficient evidence to find that the Cary Village Board violated Section 2.01 when the meeting room was too small to accommodate the large crowds of people that turned out to complain about the Board’s decision to allow a developer to build a large apartment complex that would be marketed as affordable housing.
- The PAC reasoned that the Board took reasonable steps to attempt to accommodate all of the people.

# Open Meetings Act- New development

- Public Act 099-0402:
  - Effective 8/19/2015
  - Amends the OMA to extend the allowed time for an individual to file a request for review
  - A request for review may be filed not later than 60 days after the alleged violation occurs, but amendment allows that if facts are not discovered within the 60-day period but are discovered within 2 years after the alleged violation occurs (by a person “utilizing reasonable diligence”), the request for review may be made within 60 days of the discovery.

# Public Officer Conflicts of Interest

# Conflicts Statutes in Illinois

- Public Officer Prohibited Activities Act – 50 ILCS 105/3(a)
  - Applies to officers elected or appointed under the laws or Constitution of the State of Illinois
- Variety of specific statutes
  - Municipal Code – 5/3.1-55-10(a) & 5/4-8-6(a)
  - School Code – 5/10-9 (board members only)
  - Park District Code – 1205/4-1a (incorporates POPPA by reference)
  - Public Community College District Act – 110 ILCS 805/3-48 (board members only)

# POPAA § 3(a)

- No person holding any office, either by election or appointment under the laws or Constitution of this State may be in any manner financially interested directly in his own name or indirectly in the name of any other person, association, trust, or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote.  
... Any contract made and procured in violation hereof is void.
- Violation also results in a class 4 felony and forfeiture of office

# POPAA § 3(b)(1)

- What it Does
  - Allows for elected or appointed member of a governing body to provide materials, merchandise, property, services or labor upon the conditions listed on the next slide
- Identical Provisions in:
  - Municipal Code – 65 ILCS 5/3.1-55-10(b)(1) & 5/4-8-6(b)
  - School Code – 105 ILCS 5/10-9
  - Community College District Act – 110 ILCS 805/3-48

# POPAA § 3(b)(1)

- General Conditions
  - A. Interested official publicly discloses interest prior to or during contract deliberations
  - B. Interested official abstains from voting (but is counted for quorum purposes) so it doesn't help if non-member official has the conflict
  - C. Contract is approved by majority vote
- Specific Conditions
  - A. The interested official has less than a 7-1/2% share in the ownership of the contracting entity
  - B. Contract is awarded after sealed bids (only if contract amount exceeds \$1,500)
  - C. Award of the contract would not cause the aggregate amount of all contracts awarded to the contracting entity in the same fiscal year to exceed \$25,000

# POPAA § 3(b)(2)

- What it Does
  - Allows for elected or appointed member of a governing body to provide materials, merchandise, property, services or labor upon the conditions listed on the next slide

# POPAA § 3(b)(2)

- General Conditions
  - A. Interested official publicly discloses interest prior to or during contract deliberations
  - B. Interested official abstains from voting (but is counted for quorum purposes)
  - C. Contract is approved by majority vote
- Specific Conditions
  - A. Amount of the contract does not exceed \$2,000
  - B. Award of the contract would not cause the aggregate amount of all contracts awarded to such person, firm, association, partnership, corporation, etc. in the same fiscal year to exceed \$4,000

# POPAA § 3(b)(2)

- Community College District Act contains the same provision, slightly altered
  - Amount of the contract cannot exceed \$250 (as opposed to \$2,000)
  - Aggregate annual contracts cannot exceed \$500 (as opposed to \$4,000)

# POPAA – § 3.2 – Local Bank Exception

- What it Does
  - Allows a Board member to have a pecuniary interest, as a director, officer, employee or holder of less than a 7.5% interest, in a contract of deposit or financial services with a local bank or savings and loan association
- Identical Provisions in:
  - Municipal Code – 65 ILCS 5/3.1-55-10(e) & 5/4-8-6(f)
  - School Code – 105 ILCS 5/10-9(f)
  - Community College District Act – 110 ILCS 805/3-48

# POPAA – § 3.2 – Local Bank Exception

- General Conditions
  - A. Interested official publicly discloses interest prior to or during contract deliberations
  - B. Interested official abstains from voting (but is counted for quorum purposes)
  - C. Contract is approved by majority vote
- Specific Conditions
  - A. Interested official is an employee, director, officer or has less than a 7-1/2% share in the ownership of the contracting entity
  - B. Consideration and award of the contract may only be made at a regular meeting

# Pecuniary Interests

- *Panozzo v. City of Rockford*, 28 N.E.2d 748, 754 (Ill. App. Ct. 1940)
  - Contractual interest (which would exclude a public officer from executing a contract in his official capacity) must be *certain, definable, pecuniary, or proprietary* and must be financial.
- Violation may be direct or indirect
  - Test for conflicting indirect interests – Whether the indirect interest of the official in the business and welfare of the other contracting party would naturally tend to affect officer’s judgment in determining whether to allow the contract – *Brown v. Kirk*

# Indirect Pecuniary Interests

- Examples of indirect pecuniary interest
  - Employee of Contracting Entity
    - May be interested even if duties are not affected by the contract
      - Interest in employment is the pecuniary interest
    - However, if compensation is slight or employment is temporary, no impermissible conflict arises – *People v. Sperry*, 145 N.E. 344 (Ill. 1924).
  - Third Party Beneficiary – *Kruse v. Streamwood Util. Corp.*
    - Officer has an interest in an entity which contracts with contracting entity

# Familial Relationship

- General Rule
  - Prohibited contractual interest not present merely because officer has a familial relationship with a contracting party.
  - Concerned with official's interest, not interest of related parties
  - Ex. – *Panozzo* – Insufficient interest when contractor providing service to the City employed nephew of a City alderman.
- Spousal Interests
  - Spouse's interest in contract not necessarily other spouse's
  - However, if the contract is merely a subterfuge to disguise an officer's own pecuniary interest, then conflict exists

# “May” be called upon to “Act or Vote”

- Cannot have an interest in any contract . . . with respect to which the officer may be called upon to act or vote.
- “May be called upon”
  - Mere presence of duty to act is sufficient, even if officer does not act – *Peabody v. Sanitary District of Chicago*, 161 N.E. 519 (Ill. 1928).
  - Abstention ineffectual
- “Act or Vote”
  - Includes negotiations (“contract” includes acts within the entire bargaining process leading to completion of binding contract)
  - Violation even without contract – *People v. Savaiano*

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