

ICCCFO Spring Conference
***Current Issues Relating to the
Open Meetings Act and the
Current Landscape Relating to Tax
Compliance***

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Sharone Levy
Senior Counsel
Chapman and Cutler LLP
(312) 845-3703
sharone_levy@chapman.com

Open Meetings Act

1. Overview and Policy
2. “Open” requirements
3. Agenda requirements
4. Notice requirements
5. Effects of Open Meetings Act violations
6. Public Access Counselor

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

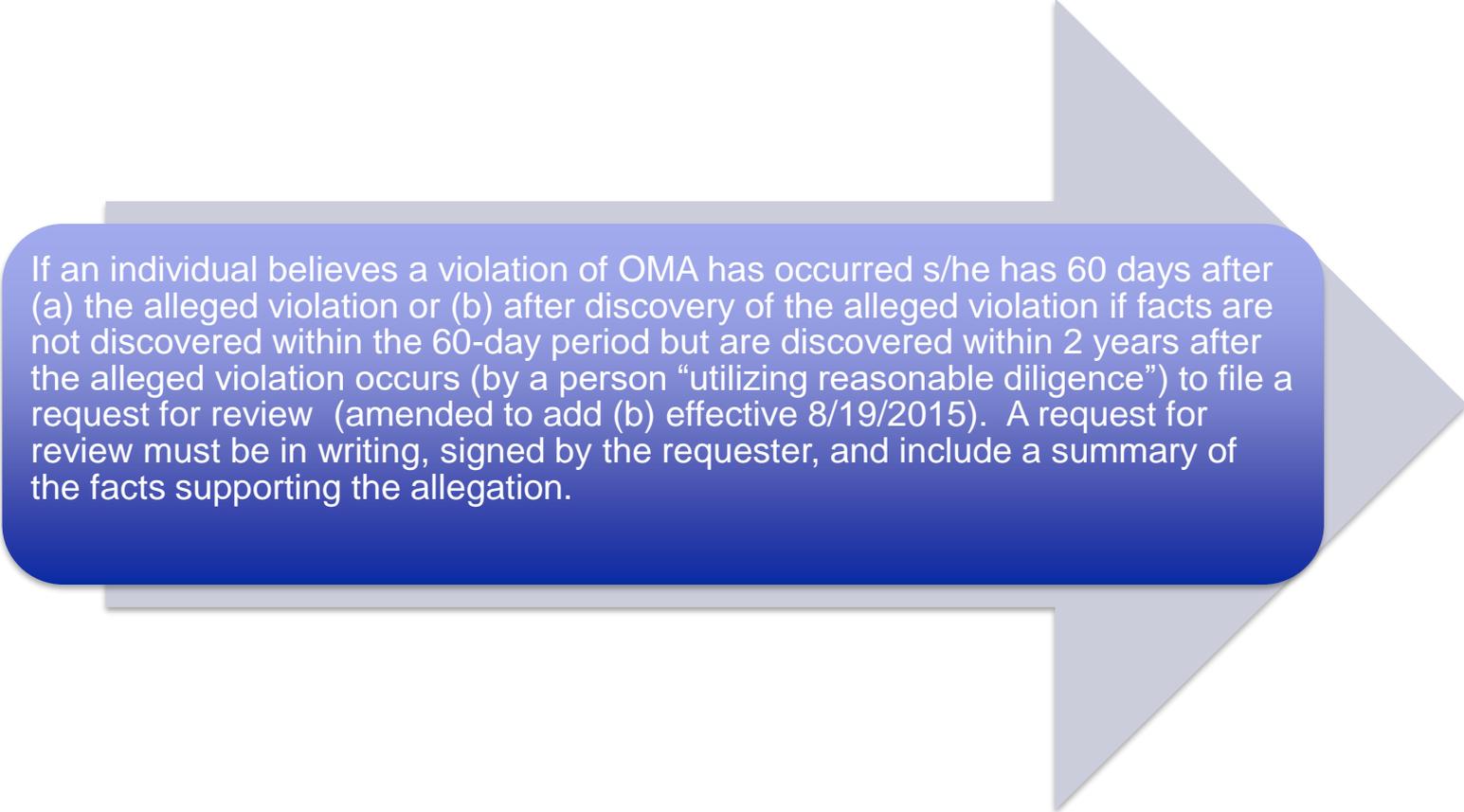
- The Public Access Counselor (“PAC”)
 - In 2010, State laws were amended “to ensure” that the public had access to public records and meetings
 - These updated provisions made it easier to enforce OMA because the PAC became a permanent part of the Office of the Attorney General
 - The PAC is an attorney 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- PAC Opinions

Binding



If an individual believes a violation of OMA has occurred s/he has 60 days after (a) the alleged violation or (b) after discovery of the alleged violation 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”) to file a request for review (amended to add (b) effective 8/19/2015). A request for review must be in writing, signed by the requester, and include a summary of the facts supporting the allegation.

Open Meetings Act- PAC Opinions

Binding

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- PAC Opinions

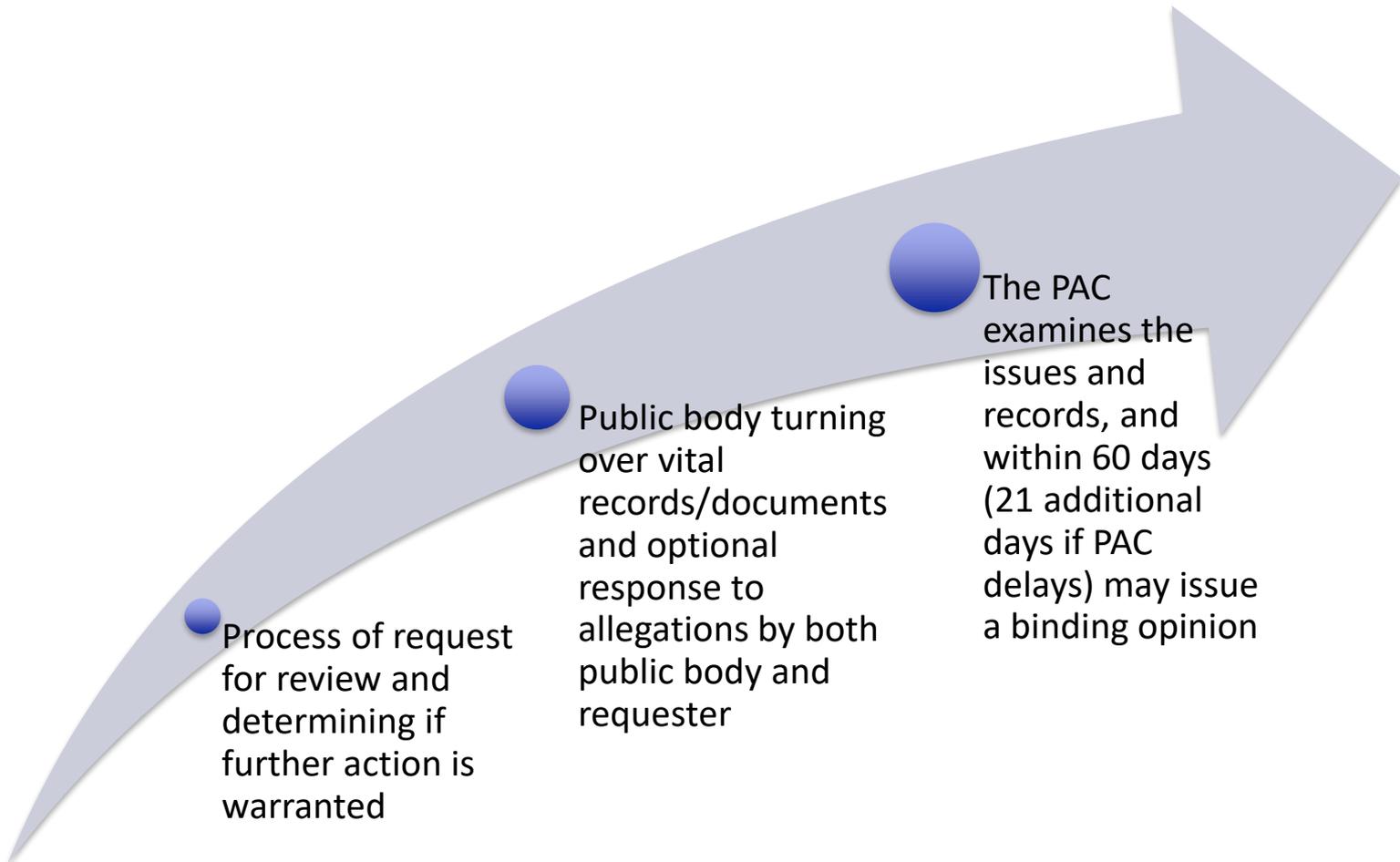
Binding

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- PAC Opinions

Binding



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

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

The following 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)

- 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.

Binding PAC Opinion-Section 2.02(c) (Agendas)

- The following recent binding PAC opinion deals with Section 2.02(c) of OMA which states in relevant part:
 - “Any agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting.”

Binding PAC Opinion 16-015 (Taking Final Action on Matter Not on Meeting Agenda)

- On November 19, 2016, the PAC received a request from a Village Trustee to review alleging that the President and Board of Trustee of the Village of Caseyville violated Section 2.02(c).
- On November 16, 2016, the Board voted on a motion to amend the terms of a settlement agreement, which agreement was not included in the posted agenda.
- Section 2.02(c) was added to OMA effective January 1, 2013.
- The PAC opinion notes that the legislative history regarding the amendment “indicates that the General Assembly intended this provision to ensure that agendas provide sufficiently descriptive advance notice of the matters upon which a public body anticipates taking final action.”
- The Board discussed the settlement agreement under the agenda item “Old Business,” which the PAC determined did not provide any information regarding the general subject matter of the settlement and noted that even prior to the addition of Section 2.02(c) the Illinois Appellate Court held that the agenda item “New Business” was insufficient advance notice of a final action.
- The PAC directed the Board to remedy the OMA violation by reconsidering the settlement amendment at a future meeting for which said amendment is contained on the agenda.

What's next?

- Takeaways
- Practice tips
- To stay updated with OMA and PAC opinions visit the Attorney General's website at: illinoisattorneygeneral.gov, or the Illinois Municipal League's website at: www.iml.org.

Tax Compliance

- IRS Overview
- Arbitrage Rebate
- Private Business Use of Bond Financed property
- Record-keeping Policy

IRS Enforcement

- Various consequences of non-compliance with tax rules:
 - Interest treated as taxable
 - Additional arbitrage rebate may be owed (non-paid or underpaid rebate amounts, plus interest)
 - Penalties

IRS Activity

- Compliance Check Questionnaires
 - Information about compliance practices and post-issuance monitoring procedures related to all of an issuer's bond transactions within a market segment
 - Not an audit
 - Voluntary (?)
- Audits
 - Information Document Requests
 - Compliance deadlines

Investment of Bond Proceeds – Arbitrage Rebate Rules

- Arbitrage: Difference between (i) what would have been earned if tax-exempt bond proceeds were invested at bond yield and (ii) the earnings on the investment of such tax-exempt bond proceeds in higher yielding securities.
- Rebate: Issuer must pay (or rebate) arbitrage profits to federal government.
- Anything above bond yield gets paid to the US Treasury, unless you meet one or more exceptions:
 - Small issuer exception
 - Spend-down exceptions

Arbitrage Rebate

- Arbitrage post-issuance compliance tips:
 - Obtain computation of bond yield and establish procedure to track investment returns
 - Monitor compliance with temporary period expectations for expenditure of bond proceeds
 - Monitor compliance with 6-month, 18-month or 2-year spending exceptions to rebate, if relevant
 - Arrange for timely computation of rebate liability and, if rebate is payable, for timely filing of Form 8038-T and rebate payment
 - May engage outside arbitrage rebate consultants to do computations

Unspent Bond Proceeds?

- Issuers of tax-exempt bonds must (generally) qualify for a 3-Year Temporary Period — Capital Projects Only
 - Based on reasonable expectations at the time of issuance
 - Must expect to spend sale and investment proceeds as follows:
 - *Expenditure Test—85% within 3 years*
 - *Time Test—5% within 6 months*
 - *Due Diligence Test*

- After 3 years from the closing date (upon expiration of the Temporary Period), tax-exempt bond proceeds:
 - must be yield restricted
 - may not be invested in investments guaranteed by the federal government (such as FDIC-insured CDs).
 - Exception: may invest in U.S. Treasury Securities

Use of Bond Proceeds—Prohibition Against Private Business Use and Payments

- Tax exemption does not apply to any “private activity bond”, with limited exceptions
- A private activity bond is a bond that:
 - Has excessive private business use
 - AND
 - Has excessive private payments/security

Private Business Use and Payments

- “Private business use”
 - More than 5% of bond proceeds finance a public facility used by a non-governmental trade or business
 - Examples of private use:
 - Sale, transfer or lease of property to private user
 - Management of property by private user under a management contract
- “Private payment or security”
 - More than 5% of debt service on the bonds is secured by an interest or derived from payments related to private use
 - Example of private payment:
 - Payments of lease rentals to the issuer by a private operator

Private Business Use and Payments

- Private Activity post-issuance compliance tips:
 - Allocate bond proceeds and funds from other sources to ensure that bond proceeds are used for qualifying costs
 - Map out what outstanding bond issue financed which facilities and in what amounts; monitor private use of bond-financed facilities to ensure compliance with applicable percentage limitations
 - Identify in advance any new sale, lease or license, management contract, or other arrangement involving private use
 - Promptly consult with bond counsel as to whether any possible remedial actions may need to be taken

Post Issuance Tax Compliance Policy

- Establish *written* procedures that can be understood and implemented over time even as officials responsible for compliance change with the following features:
 - 1) Designation of Compliance Officer
 - Assign responsibility for monitoring and filings
 - Include training of the responsible official or employee with regard to tax and disclosure requirements
 - Internal reporting of compliance efforts
 - Preserves institutional knowledge

Record Retention

2) Record Retention:

- Basic records relating to the bond transaction (transcript)
 - Bond Ordinance/Resolution
 - Bond counsel opinion
 - Tax Compliance Certificate and Agreement
 - Final Official Statement
 - Bond purchase agreement
 - Investment contracts, GICs, interest rate swaps, related bids
 - Continuing Disclosure Undertaking or Agreement

Record Retention (continued)

- Records to demonstrate tax compliance
 - Investment of bond proceeds
 - Purchase and sale of securities, SLGS subscriptions, yield calculations for each class of investments, rebate calculations
 - Account statements from bank, escrow agent or trustee
 - Expenditure of proceeds
 - Description of expenditure (capital, operating expense)
 - Amount and payment date
 - Identity of payee
 - Invoice or billing statement
 - Use of bond-financed property by public and private sources
 - Leases and management contracts
 - Sources of payment or security for the bonds

Record Retention (continued)

- Generally, regarding potential IRS audits, material records should be kept as long as the bonds remain outstanding, plus 3 years after the final redemption date
 - For a refunding issue, material records relating to the original new money bonds and material records related to the refunding issue should be maintained until 3 years after the final redemption of both bond issues
 - General record keeping policy may need to be revised to reflect the bond record retention policy

Post Issuance Tax Compliance Policy

- 3) Due diligence at regular intervals
 - Principal and interest payment dates are good benchmarks
 - Report to elected officials
- 4) Procedures reasonably expected to timely identify and timely correct noncompliance
 - Integrate monitoring of tax law compliance with existing accounting systems (for example, use special coding on a ledger to review sales, leases or contracts involving bond financed property)
 - Use of compliance checklist throughout the lifetime of the financing

Correcting Compliance Issues

- Self-help remedial actions
 - Specified time frames to take actions
- Voluntary Closing Agreement Program
 - May approach IRS voluntarily before an audit is initiated
 - Having written post issuance compliance procedures may allow for more favorable settlement treatment from the IRS

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