TRAINING MATERIALS FOR MEMBERS OF THE GOVERNING BOARDS OF UNITS OF LOCAL GOVERNMENT

The attached is a summary of obligations associated with representing a unit of local government as a member of its governing board.

Open Meetings Act

The following chapter provides an outline of the Open Meetings Act. As a preliminary matter, for purposes of this Act, a "public body" is defined to include all committees of the Board. As such, any committee must conduct all meetings in conformance with the Act in the same manner as the Board. Therefore, as used herein, the term "Board" would encompass not only the Board of Education, but any committee of the Board.

I. COVERAGE

The Open Meetings Act provides that it is public policy in Illinois that citizens shall have the right to know the actions of public bodies, and therefore the meetings of all public bodies shall be open, with open deliberation, and advance notice of all meetings to citizens, who shall have a right to attend.

A. **Bodies covered.**

1. School Boards. When a majority of a quorum attends.

2. Committees and Sub-Committees. When a majority of a quorum of the whole committee attends, whether or not any board members are also members of the committee.

B. **Exceptions.** Meetings of administrators, teachers, or other employees of the District are not covered by the act. The attendance of a Board officer or member will not, by itself, bring the meeting under the Act. However, if a majority of a quorum of the public body (or a majority of a quorum of a committee) attends, and public business is discussed, then the meeting would come under the Act.

C. **Gatherings.** The Act defines a meeting as any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business. (Thus, two school board members, of a seven member board, could see each other and discuss public business and not be in violation of the Act. On the other hand, if those two board members were members of a five member committee, then even such a chance meeting could be in violation of the Act.)

D. **Public Business.** The Act does not define public business. It would be safe to assume that any matter relating to business of the District and which is or reasonably could come before the board for action would be considered public business.

E. **Intent.** The Act requires the gathering to be held for the purpose of discussing public business. This intent requirement was added to avoid violating the Act by an inadvertent conversation at a social event. Clearly, using a social event to avoid the Act would be a

violation, and the Attorney General has stated that even unintended conversations could convert a social event into a meeting which must then comply with all the requirements of the Act.

F. **Electronic Communications.** The Act was amended to make clear that electronic communication could be considered a meeting. With rapidly advancing technology, there has been much discussion on what type of communication is permitted among Board members. Undoubtedly, technology is a wonderful advancement that speeds communication and allows for rapid exchanges of information. However, when that same convenience and speed allows dialogue and interaction to take place for public bodies, that convenience may create a violation of the spirit and the letter of the Act.

Unfortunately there are no clear answers to this subject but there is much debate going on about it. Generally the debate centers upon the "asynchronous" nature of email, and most recently, text messages. As noted above, the statute makes a reference to "contemporaneous interactive communication." Most consider instant messaging or chat rooms to be clear violations of the Open Meetings Act, but a few do not consider email to be a violation because there is a time lag. Given current internet speeds, however, email can sometimes be nearly as fast as an instant message.

We would suggest that the acid test is whether a Board is able, via use of email and the "reply to all" button, to engage in a dialogue about a given subject, in very near to "real time" speed. If so, we suggest that a violation might be present. Engaging in that activity effectively would enable the Board to debate an issue without ever being gathered and without the public ever being present.

An analogy would be telephone conferences and letters. Clearly a telephone conference with a majority of a quorum of the Board would violate the act. Also, a letter writing exchange via regular mail, would not since it is not contemporaneous. The test then appears to be the speed at which the exchange takes place (telephone instantly, mail, many days). Email, of course is somewhere in between. If every Board member has high speed and is present in front of their computer at the time of the exchange, the exchange could be virtually "real time." If they are not so present, there could be small to large delays. With the rise in the use of smart phones, it is becoming increasingly more common for such messages to be received almost instantly. Thus a potential violation via email would appear to be very fact intensive and, in many instances, difficult to defend.

For this reason it is necessary to exercise due care to make sure that accidental violations do not occur. This will not only ensure that the requirements of the Act complied with, but also avoid the "appearance of impropriety," which is a critical element for most elected officials.

This is not to say that the administration should refrain from disseminating information to board members via email (i.e. they can send it to all board members). A Board can receive

information, just as if they were all hearing the same television show, or other medium. However, board members should stay away from copying all other members on replies. The goal here is to avoid creating a quasi-dialogue or conversation. Email may not be a fast as an "in person" conversation, but sometimes it can get pretty close.

If a board member replies to one person on the board (not replying to all) there would not appear to be a violation as only one other person is seeing the response. If you send to all (Blind CC) there would not appear to be a violation as long as no responses to your email are received (and you aren't responding to someone else's broadcast email). However, since board members often have each other's emails it would be very easy for a "conversation" to develop nonetheless.

Also, even if the "reply to all" function is not used, a conversation could still develop if Board members instead, "forward" the same email comments to each other member separately or in smaller "group emails." In other words, if a method is used that allows a majority of a quorum to see each other's thoughts and responses (regardless of how they do it-reply to all, separate or grouped messages) and it allows each member to air their thoughts to the others, without the public being able to be present, such a method would appear to violate the spirit of the open meetings act, if not the letter of the law. Such use of email should therefore be avoided.

A rule of thumb might be called the "**one shot rule**." *On any given subject, the first person to send an email gets to "send to all." However, no one who gets that email may "reply to all." So, if an administrator sends an email to all board members, then the administration got the "first shot" and no "reply to all" should be made. If, however, any board member has an issue to alert the rest of the board to, they get the first shot, and then no other board member can "reply to all" to that first email. The rule may be overcautious, but it is better to avoid even the appearance of impropriety on these matters.*

II. TRAINING

Each elected or appointed member of a public body must also complete the electronic training curriculum developed and administered by the PAC. The training is to be completed within one year, and for new members thereafter, within 90 days after taking the oath of office or otherwise assuming the responsibilities as a member of a public body.

III. MEETING TIMES AND PLACES

The Act requires all public meetings to be held at times and places convenient and open to the public. In addition, no meeting is to be held on a legal holiday unless the regular meeting date falls on such holiday.

IV. NOTICE

A. Type of meeting.

1. **Regular meeting**. The public body must give notice of its schedule of dates, times, and places for regular meetings at the beginning of each calendar or fiscal year and make the schedule generally available. (This would generally be done at the board's organizational meeting). The agenda for each regular meeting must be made available (and posted) at least 48 hours prior to the meeting. The posting must be at the principal office of the district and at the building where the meeting is to be held.

2. **Rescheduled meeting.** Notice of a rescheduled regular meeting must be given at least 48 hours in advance, and the notice must include the agenda for the meeting. No newspaper publication is required.

3. **Special meeting.** A special meeting may be called by the board president or by any three members of the board. Notice must be written and delivered to each board member at least 48 hours in advance if mailed, or at least 48 hours in advance if delivered in person. The notice must contain the agenda and the meeting is restricted to agenda items or items reasonably related thereto. Public notice is required at least 48 hours in advance (unless the meeting is for a bona fide emergency).

4. **Emergency meeting.** Notice of an emergency meeting must be given as soon as practical, but in any event prior to the meeting.

5. Reconvened meeting. A majority of members present at a regular or special meeting may adjourn and reconvene the meeting at another time. Any action which could have been taken at the original meeting can be taken at the reconvened meeting. Public notice of the reconvened meeting must be given 48 hours in advance and the notice must include the agenda unless the meeting is to be reconvened within 24 hours or an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda.

V. METHOD OF NOTICE

A. **Change of Regular Meetings**. If the regular meeting schedule is changed at least 10 days' notice of the change must be published in a newspaper of general circulation. The notice must also be posted at the principal office of the District, and supplied to the media which have filed a request. If one regular meeting is changed (rescheduled) then the board needs only to give 48 hour notice and include the agenda for the rescheduled meeting. This notice need only be posted and sent to the media, and does not need to be published.

B. **Other meetings.** For special, emergency, rescheduled or reconvened meetings notice is accomplished by posting a copy of the notice at the district office and supplying a copy to the media. If the any media has given the District an address or phone number within the school district, then they must receive the same notice as given to board members.

VI. CLOSED MEETINGS

A. <u>Statutory Exceptions to Open Meetings</u>. The exceptions to the requirement for open meetings are specific in the statute and the act indicates that the exceptions allowing closed meetings are to be "strictly construed, extending only to subjects clearly within their scope." It should be kept in mind that the exceptions, for the most part, allow, but do not require, closed meetings to discuss the subject of the exception, and no final action is allowed in a closed meeting. Some of the exceptions are:

1. Meetings on collective negotiating matters between the school and its employees, or deliberations concerning salary schedules for one or more classes of employees.

2. Meetings where the purchase or lease of real property is being considered or where the setting of the price for sale or lease of real estate owned by the District is being considered.

3. Meetings to discuss 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."

4. Meetings to discuss the appointment, employment and dismissal of employees. You may also discuss the compensation, discipline and performance of specific employees in closed session as well as hear testimony on a complaint lodged against an employee.

5. Meetings to discuss the discipline, performance or removal of a member of a public body when that body has the power to remove the member.

6. Meetings to consider the appointment of a member to fill a vacancy when the public body has the power to fill such vacancy.

7. Student disciplinary cases.

8. Meetings to consider the placement of individual students in special education programs and "other matters" relating to individual students.

9. Meetings to establish reserves or settle claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if otherwise the disposition of the claim might be prejudiced. You can also discuss claims, loss or risk management information, records, data, advice, or communications from or with any insurer or risk management association if you are a member.

10. Meetings to consider sale or purchase of securities, investments or investment contracts.

11. Meetings to consider emergency security procedures to respond to actual danger to safety of employees, students, or property, but a description of the actual danger must be a part of the motion to close the meeting.

12. Meetings to consider informant sources, or the hiring or assignment of undercover personnel related to criminal investigations.

13. Meetings to hear evidence or testimony presented to a quasi-adjudicative body provided the body prepares and makes available for public inspection a written decision and provided the subject matter was otherwise appropriate for the closed meeting (e.g. employee dismissal). You act as a quasi-adjudicative body when you are an administrative body charged by law with the responsibility to conduct hearings, receive evidence or testimony and make determinations based thereon.

14. Meetings to consider self-evaluation, practices and procedures or professional ethics when meeting with a representative of a statewide association of which the public body is a member.

15. Meetings for the discussion of minutes of closed meetings. This can be for the approval of such minutes or to review them on a semi-annual basis as required by the act.

B. <u>Procedure</u>.

1. There must be a motion made at an open meeting. The closed meeting may be held the same day or in the future. The open meeting must have a quorum and a majority of those present must vote in favor of the motion.

2. The motion must specify the specific statutory exception authorizing the closed meeting.

3. The minutes must contain the vote of each member (i.e. roll call vote) and identify the specific exception.

4. More than one closed meeting may be scheduled in a single vote provided:

a. each meeting involves the same particular matters, and

b. the meetings will be held no more than three months from the day the vote is taken.

5. Once a closed meeting occurs, the board may discuss only topics which are both (a) covered by a statutory exception, and (b) specified in the vote to hold the closed meeting.

VII. MINUTES

The board, as well as all committees, must keep written minutes of all meetings, whether open or closed.

A. **Open meetings**. All minutes must contain:

1. the date, time and place of the meeting;

2. the members recorded as present or absent;

3. a summary of the discussion on all matters proposed, deliberated or decided, and a record of the votes taken. The requirement of a "summary" would indicate that not just the topics discussed need to be included but that the minutes should reflect the discussion which took place. This does not mean a verbatim account, but at least general comments should be covered. Any person may record the proceeding of a public meeting.

B. **Closed meetings.** The minutes of closed meetings must contain all of the items noted in VI. A. above, but also:

1. the minutes (in open session) must show the vote of each member and identify the specific exception allowing the closed meeting;

2. if the closed meeting is on probable or imminent litigation, the basis for the finding that it is probable or imminent must be contained in the closed meeting minutes.

3. there must also be kept a verbatim record of all closed meetings in the form of an audio or video recording. Recorded minutes (but not the written minutes) may be destroyed not less than 18 months after completion of the meeting provided the Board approves the destruction and has approved the written minutes of said meeting.

C. **Public inspection.**

1. **Open meetings.** Minutes of an open meeting must be approved within 30 days after the meeting or at the second subsequent regular meeting of the body. The minutes of open meetings must be made available for public inspection within ten days after they have been approved by the board, and must be posted on the District's website within 10 days after their

approval. Committee meetings minutes should be approved by the committee only, kept separately, and are also to be made available within ten days after approval.

2. **Closed meetings.** Minutes of closed meetings need not be produced for public inspection until after the board has determined that it is no longer necessary to keep them confidential. They should be kept separately. The verbatim recording is not available except in an action to enforce the Open Meetings Act, in which case the recording is reviewed by the court. The Act requires the board to review these minutes not less than semi-annually to determine whether there still exists a need of confidentiality or whether the minutes, or a portion thereof, may be made available to the public. The findings from this meeting must be reported in an open meeting.

VIII. VIOLATIONS OF THE ACT

If anyone believes there has been a violation of the Open Meetings Act, they may file a request for review by the PAC. Upon review, the PAC determines if further action is required. If so, the PAC, within seven days, forwards a copy of the review request to the public body and specifies what records or documents the public body must furnish to the PAC, within seven days, which documents can include the tape recorded verbatim transcript of a closed session. The public body may, but is not required to, file with the PAC an answer to the request for review. This answer is also provided by the PAC to the requesting party who may, but is not required to, file a response. In addition to certain other provisions, the Attorney General examines the matter and issues an opinion within 60 days after the review is initiated. That opinion is binding unless either party files a court action for administrative review. The Attorney General is also given the authority, in his or her discretion, to resolve a request for review by mediation or some other means other than the issuance of a binding opinion. It should be noted that filing a request for review is available to the public in addition to the option of filing a suit for a violation of the Act as previously provided in the Open Meetings Act.

The Act also allows the Attorney General to issue advisory opinions to public bodies regarding compliance with the Open Meetings Act. If the public body relies in good faith on the advisory opinion in complying with the requirements of the Act, then it is not liable for the penalties for violations which are otherwise provided in the Act.

If an individual violates the act such person is guilty of a Class C misdemeanor which carries a $500 fine and/or 30 days in jail. If the board violates the act, such violations may be enjoined and any final action taken may be voided in a civil proceeding.

Freedom of Information Act

What is the Freedom of Information Act?

The Freedom of Information Act ("FOIA") is a law that establishes that it is a fundamental right for the public to have access to complete information regarding the affairs of the government. As such, it further creates the obligation for a public body to provide public records, when requested, as expediently and efficiently as possible. [5 ILCS 140/Freedom of Information Act].

What is a public body?

A public body is "all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, **school districts,** and 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** and a School Finance Authority created under Article 1E of the School Code." (Emphasis added). [5 ILCS 140/2(a)].

What is a public record?

The general rule is that **all records** in the custody or possession of a public body are presumed to be public records, and therefore should be open to inspection or copying.

Under the Illinois FOIA statute, a public record is defined as "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 used by, received by, in the possession of, or under the control of any public body." [5 ILCS 140/2(c)].

The Local Records Act further provides that "records" are: "reports and records of the obligation, receipt, and use of public funds of the units of local government and school districts, including certified audits, management letters and other audit reports made by the Auditor General, County Auditors, other officers or by licensed Certified Public Accountants permitted to perform audits under the Illinois Public Accounting Act and presented to the corporate authorities or boards of the units of local government, are public records available for inspection by the public." [50 ILCS 205].

As you can see, this list is extremely comprehensive. **While there are limited exceptions, public actors should operate under the assumption that all records (including electronic correspondence) are open to the public.**

With the rapid growth of technology, this is becoming increasingly more important to understand. Most recently, questions have arisen regarding e-mail communications and text messages. This issue of whether text messages are subject to FOIA was recently examined in

City of Champaign v. Madigan, 2013 IL App. (4th) 120662. The question presented in that case was whether text messages sent during a public meeting from a private device were required to be produced.

In its discussion, the court acknowledged a few main points that are worth noting. Specifically, it identified that FOIA's preamble acknowledges that "technology may advance at a rate that outpaces its ability to address those advances legislatively." Addressing the substantive issues as to what type of messages may be subject to FOIA, the court established that electronic communications would be considered public records where they: (1) relate to public business; and (2) were prepared by a public body, for a public body, used by a public body, received by a public body, possessed by a public body, or controlled by a public body.

The first prong sets a standard that is fairly easy to meet, in that if the matter is one of public concern, it would likely be considered public business. The second prong, however, is more nuanced. Although it is clear that no single individual constitutes the "public body," individuals can take certain actions (such as forwarding the message along to a quorum of the board or texting during a public meeting) so as to bring it into that standard. Following this analysis, the court explicitly noted **"a communication to an individual city council member's publicly issued electronic device would be subject to FOIA because such a device would be "under the control of the public body." Accordingly, so long as the inquiry pertains to a public matter, we believe the texts located on the publicly issued device would be subject to FOIA.**

The question also becomes a little more complex when evaluating whether a message sent from a privately owned device would be subject to the same requirements. Again, if the device is being used in such a manner that the messages constitute "discussing public business" by "the public body" it most likely would be subject to FOIA. While again, an individual Board member would not be considered a "public body" it may arise to that level if: the communication is received by a quorum of members (of either the Board or a subcommittee thereof), the communication was sent during a meeting of the public body, or the communication is forwarded to a publicly issued device or e-mail account (thereby bringing it under the control of the public body).

Who can request a public record?

Anyone (individuals, corporations, media outlets, etc.) may submit a request for information under FOIA. The request may also be made anonymously and the requester need not submit a reason for their request.

How must this request be made?

Even though a school district may have its own standard form for purposes of convenience, it must also accept any request that is in writing (including those submitted electronically or via fax). These requests should be immediately delivered to the FOIA compliance officer, as there are strict timeframes for review.

What public records are exempt from disclosure?

The general rule is that all persons are entitled to "full and complete information regarding the affairs of government and the official acts and policies of those who represent them."

However, there are limited exceptions to this rule. Records containing **"private information"** (unique identifiers, such as social security numbers, driver's license numbers, employee identification numbers, biometric identifiers, personal finance information, passwords, or other access codes, medical records, home/private telephone numbers, home addresses) may be withheld. [5 ILCS 140/2(c-5)]. Records containing **"personal information"** (a record that would constitute a clearly unwarranted invasion of personal privacy that is highly personal or objectionable to a reasonable person and the right to privacy outweighs any legitimate public interest) may also be withheld if it meets this standard. [5 ILCS 140/7(c)].

Other valid reasons for denial include, but are not limited to, the following categories: **law enforcement/administrative enforcement** (created for law enforcement purposes, to the extent disclosure would interfere with a pending/active proceeding...); **correctional institutions**; **preliminary drafts** (preliminary drafts, notes recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated/ unless cited by the head of the public body**); trade secrets and commercial information**; **proposals and bids** (for contract, grant, agreement if disclosure would frustrate procurement or provide an unfair advantage); **research data; educational examination data; architects and engineers** (for projects not developed with public funds or if disclosure would compromise security); **closed meeting minutes** (minutes from executive session, however, these minutes may eventually be open to the public); **communications with attorney/auditor** (that would not be subject to discovery); **employee grievances or disciplinary cases** (final outcome is not exempt with discipline is imposed); **data processing operations; collective bargaining negotiations; employee examination data; real estate** (records relating to real estate negotiations, until negotiations end); **proprietary insurance information; regulation procedures for financial institutions; electronic security; security threats; power generator maps and records; public utility documentation** (relating to proposals, bids, negotiations); information about students; **student records** (information about students and covered by the Illinois School Student Records Act).

There are additional statutory exemptions under Section 7.5, many of which would not be applicable here. However, it is worth noting that information prohibited from being disclosed by the **Personnel Records Review Act** may not be provided under FOIA. [5 ILCS 140/7.5(q)].

Please keep in mind that these exemptions are to be construed very narrowly, as the presumption is that all information in the possession of a public body is open to the public. Denials to a FOIA request made pursuant to one of these exemptions must be specific and cite both the exemption and a summary of the factual and legal basis for denial.

Are there any other reasons for denying a FOIA request?

Yes. A public body may deny a request if an individual duplicates their request (same person asking for same exact records and request is unchanged and identical) may be denied as unduly burdensome.

A public body may also deny a request as "unduly burdensome" if there is no way that the public body can narrow the request and the burden on the public body outweighs the public interest in the information. However, prior to invoking this as a basis for denial, the requester must be alerted and provided an opportunity to amend the request.

What happens if there is a challenge to a FOIA response?

Effective in 2010, the State's FOIA law was strengthened. Specifically, the Public Access Counselor ("PAC") position with the Office of the Illinois Attorney General was made permanent. It was thereby granted the authority to review FOIA challenges and render binding decisions on alleged FOIA violations. [S.B. 189; Public Act 096-0542].

Generally, a FOIA response must be rendered within 5 business days of receipt. However, the public body may request an additional 5 days under certain circumstances.

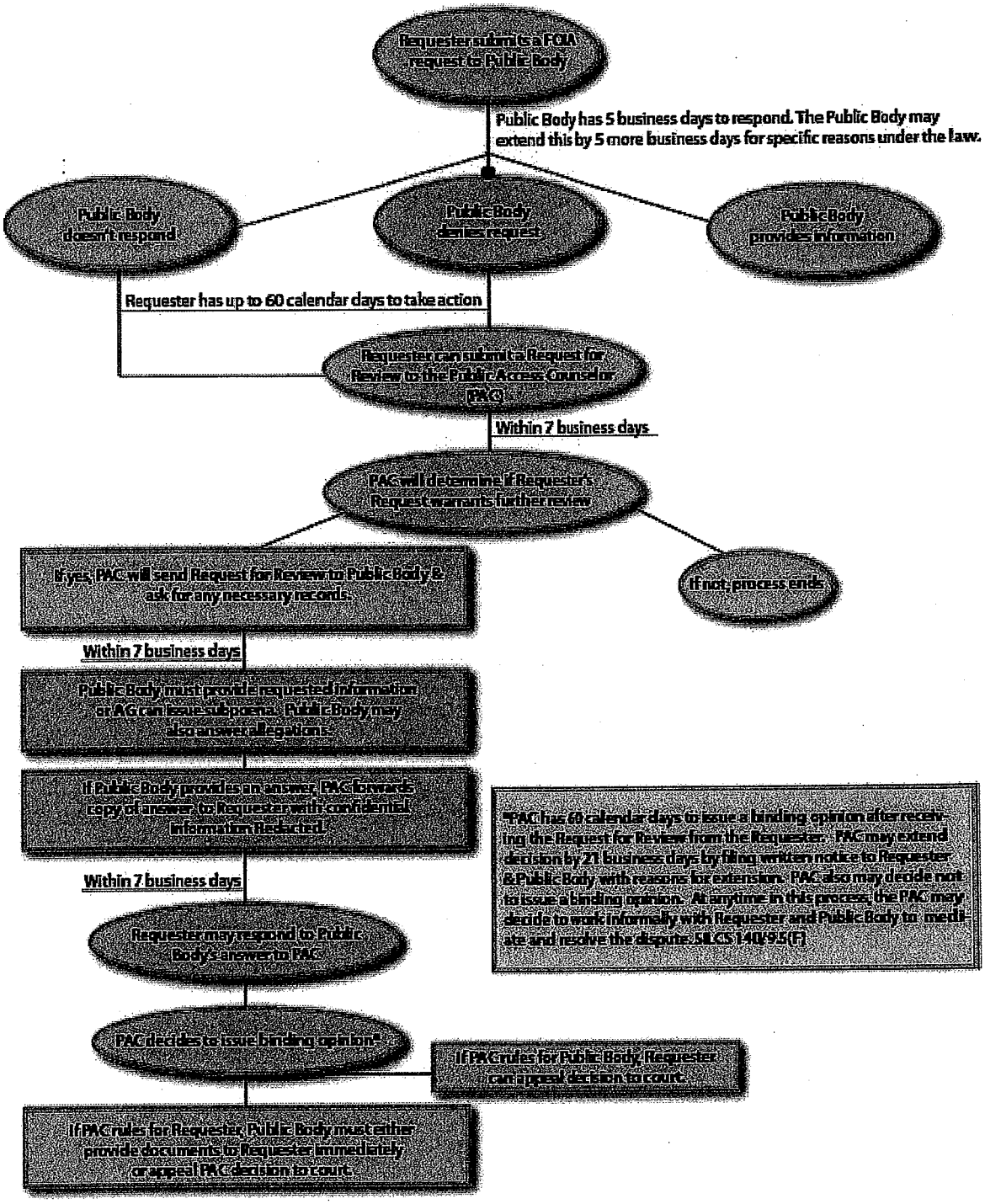
The requester has 60 calendar days from the date of an alleged violation to file a petition for review with the PAC. Upon receipt, the PAC may: (1) decide no further action is necessary; (2) request more information from the public body; or (3) may try to resolve the dispute. If the PAC seeks to issue a binding opinion, it has 60 calendar days from receipt of the request to do so.

What are the penalties for violating FOIA?

If the violation is deemed "willful," "intentional," or in "bad faith," there is a mandatory civil penalty of $2,500 - $5,000, as well as any reasonable attorney fees and costs.

In conclusion, FOIA is a highly nuanced statutory provision. Accordingly, it is a very important area of law for public entities to be aware of, as its implications transcend into all areas of municipal operations. **As a rule of thumb, public actors should be aware that the statute favors transparency and public access to information.**

PAC Request For Review Process Under FOIA



Contract Bidding Under the Illinois School Code

I. PURPOSE OF COMPETITIVE BIDDING

Section 10-20.21 of the Illinois School Code sets forth the contracting and bidding requirements applicable to school districts. In general, the purpose of the competitive bidding requirement is to prevent favoritism in the award of larger contracts by a public body, as well to guard against fraud and corruption in a public body's award of a contract. Competitive bidding helps to promote transparency while securing the best work at the lowest price.

A. When Bidding is Required.

Bidding is not required in all circumstances. The School Code provides that all contracts for purchase of supplies and material or work involving in an expenditure in excess of $25,000, or a lower amount as required by board policy, must be awarded to the lowest responsible bidder. In determining who qualifies as the "lowest responsible bidder," the District must consider conformity with specifications provided, terms of delivery, quality, and serviceability. Because the bid process can be time consuming, and an added expense, it is not required for smaller contracts.

B. Exceptions to Bidding

However, even in cases involving a contract in excess of $25,000, there are some exceptions where the bidding process does not have to be followed. The following are examples of some of the more common exceptions included in the School Code[1]:

1. Services of individuals possessing a high degree of professional skill
2. Contracts for the printing of financial reports
3. Contracts for the purchase of perishable foods and perishable beverages
4. Contracts awarded to the low bidder, but due to unforeseen revisions not the fault of the contractor, not to exceed 10% of the contract price
5. Contracts for the purchase or installation of data processing equipment, software, or telecommunications
6. Purchases from other governmental bodies

[1] For the full list of specifically enumerated exceptions, see Section 10-20.21 of the School Code

7. Repairs or remodeling of existing structures not exceeding $50,000, which do not increase the size, type, or extent of the existing structure

8. Single source purchases (such as books or utilities)

9. Certain emergency contracts (with conditions and a ¾ vote of the Board)

II. THE BIDDING PROCESS

Once it is determined that the contract requires bidding, there is a specific process that must be followed by the District that includes various notice and procedural requirements for requesting, accepting, reviewing, and awarding bids.

First, the District must create a request for bids that includes the specifications for the bid. The specifications should include the precise needs of the District, stated in clear language, and should not include requirements that would restrict competition (such as requiring a certain brand-name product which would limit the bid to one supplier). If there are any changes to the bid specifications prior to bid opening, all prospective bidders must be informed. The bid specifications should allow all bidders to respond on a level playing field to allow for a fair and adequate comparison of the bids submitted.

Prospective bidders must be notified at least three days in advance of the bid opening date, and the bid must be duly advertised in the newspaper by at least one public notice at least ten days before the bid date. All bids submitted must be sealed by the bidder, and the bids must be opened by a member or employee of the District at a public bid opening at which the contents of the bid are to be announced. In reviewing the bids, the District must determine the lowest responsible bidder that is also responsive to the bid specifications.

The School Code allows for an electronic process for communicating, accepting, and opening competitive bids, with the exception of bids for construction purposes which may not be handled electronically. The School Code provides for various safeguards to be instituted to maintain the integrity of the electronic bid process, which include the use of a specified database with specific user access and bid project number, and the use of a secure network protected by a firewall with data backup and recovery plans in place.

A. Review of the "Lowest Responsible Bidder" and the Responsiveness Requirement

It is important to note that the "lowest responsible bidder" may not necessarily be the lowest priced or economic bidder. In order to be responsible, the bidder must be able to perform the contract as promised. This means that the contractor possesses the quality, fitness, capacity, and financial responsibility to satisfactorily perform the contract.

In addition to being responsible, the bidder must also be responsive to the requirements contained in the bid documents. Accordingly, if the bidder does not conform to the requirements

of the bid documents (*i.e.*, the bid did not contain all of the items included in the specifications, failed to include a price, or was not submitted timely), the District may reject the bid as being non-responsive. Most bid protests concern the responsiveness of the bids so it is important for the District review each bid summited to determine whether it actually responds to the specifications of the bid documents. To contrast, the District is permitted to waive a minor variance to the bid specifications, but is not required to do so. However, if the variance is "a material variance" then it may be considered non-responsive, and it cannot be corrected after opening and must be rejected.

For example, in *Smith v. Intergovernmental Solid Waste Disposal Ass'n*, 239 Ill.App.3d 123, 605 N.E.2d 654 (4th Dist. 1992), the Court explained that the test for whether a variance is material is whether it gives the bidder a substantial advantage or benefit not enjoyed by the other bidders. *Id.* at 142. Further, the Court noted that it is improper to allow a bid to be modified in a material fashion after opening because that would qualify as an unfair advantage to that particular bidder. *Id.* Ultimately, the District should use this test when considering whether a variance is material, and may also consider such factors as whether the variance affects the price of the bid, and whether the variance impairs the District's ability to fairly make bid comparisons.

III. THE AWARDED CONTRACT

The submission of a bid is considered an offer by the bidder to enter into a contract to provide the services stated in the bid specifications. Once the District accepts and awards a bid, a binding contract is created between the parties. By definition, the bid specifications form the substance and terms of the contract. Once a bid is accepted, a legally enforceable contract between the parties is formed.

Gift Ban Act and Prohibited Political Activities Act

I. Overview

The purpose of this chapter is to familiarize the School Board with two important regulations impacting public officials (as well as public employees). While the statute uses the term "state officials," relevant provisions also apply to public school districts. [5 ILCS 430/70-5, *et. seq.*].

II. Prohibited Gifts (Gift Ban Act)

a. **What is the Gift Ban Act?**

This statute bans accepting (or soliciting) gifts from a "prohibited source." Be advised that this provision also extends the prohibition to a spouse and/or other immediate family member who resides with the public employee or officer. [5 ILCS 430/1-5].

Specifically, public officials may not solicit or accept gifts from "any person or entity who: (1) is seeking official action by the member or officer, (2) does business or seeks to do business with the member or officer, (3) conducts activities regulated by the member or officer, (4) has interests that may be affected by the performance or non-performance of the official duties of the member, officer, or employee, (5) is a lobbyist, (6) or is an agent of an individual who qualifies as such. [5 ILCS 430/1-5].

In sum, public employees and public officials should not accept gifts in cases where there is impropriety, there is the potential for impropriety, or there is the potential for the appearance of impropriety.

b. **What is considered a "gift" under the Act?**

The statute recognizes "gift" as including any "gratuity, discount, entertainment, hospitality, loan, forbearance, or other tangible or intangible item having monetary value...." Gift is broadly defined and accordingly, public employees and officials should critically evaluate any such offer under this provision. [5 ILCS 430/1-5].

Almost anything of value falls within the parameters of this provision. However, there are limited exceptions. Gifts do not include:

- Opportunities, benefits, services, generally available to the public;
- Anything for which fair market value is paid;
- Lawful contributions under the Election Code or associated with fund-raising;
- Educational materials;
- Travel for a business-related meeting;
- Gift from a relative (father, mother, son, daughter, brother, sister, etc.);

- Anything provided on the basis of personal friendship (unless there is a reasonable belief, under the circumstances, that the gift was provided because of the official position or employment and not because of the friendship);
- Food/drink not in excess of $75 on a single day, if consumed on premises or catered (if a spouse or family member living with the official attends the event, they are also limited to $75, to be calculated separately);
- Food/refreshment/lodging/transportation resulting from outside business, unrelated to position, and customarily provided to others in similar circumstances;
- Intra- or inter- governmental gifts;
- Bequests and other transfers at death; a
- Any item from any one prohibited source having cumulative value of less than $100/calendar year. [5 ILCS 430/10-15].

As a general rule, things that are available to the public at large, or things for which fair market value is paid, would likely not constitute a gift. However, public officials should be wary of soliciting or accepting anything that could be perceived as being tendered to them due to their position. **Again, in an effort to ensure a transparent and ethical government, it is critical to avoid even the mere appearance of impropriety.** It is therefore always advisable to err on the side of caution in such circumstances. Additionally, the municipality may adopt regulations more restrictive than those set forth by statute.

c. **How can I avoid violating the Act?**

If the situation arises in which the Board member or public employee perceives a conflict, the issue can be rectified by:

- Taking reasonable action to return the prohibited gift to the prohibited source
- Give the gift (or an amount equal in value) to a recognized 501(c)(3) organization.

In either case, this action should be documented and reported.

d. **What are the consequences of violating the Act?**

In the case that the Gift Ban Act is violated, the following adverse actions may be imposed:

- Intentional violations may result in a fine of $1,001 - $5,000 for a "business offense"
- Intentional false reports alleging a violation is a Class A misdemeanor
- Any person who violates the Act or intentionally obstructs or interferes with an investigation may be fined up to $5,000 by an ethics commission

[5 ILCS 430/50-5 (c)-(e)].

II. Prohibited Political Activities Under the Public Officer Prohibited Activities Act [5 ILCS 430/1-1 *et seq.*] and the Election Code [10 ILCS 5/9-25.1]

a. Who is prohibited from engaging in political activities?

The Public Officers Prohibited Activities Act prohibits governmental actors (both public employees and officers) from engaging in political activities during compensated or working time. This includes, but is not limited to, using governmental property (example: computer, printer, fax, copier) in furtherance of campaigning or other political endeavors. For purposes of this provision, municipal "officer" applies to both elected and appointed officials, regardless of compensation. [5 ILCS 430/5-15]. This prohibition does not prohibit any such individual from engaging in such activities using their own resources on their own time.

b. What is considered "prohibited political activity" under these Acts?

"Prohibited political activity" includes:

- Participating in or conducting any prohibited political activity during any compensated time (other than vacation, personal, or compensatory time off);
- Misappropriating any property of the public entity or resources by engaging in any prohibited political activity;
- Being pressured to participate in any such political activities as a condition of employment;
- Receiving additional employment rewards or compensation for participating in or conducting prohibited political activities; or
- Using other public employees or resources for a political use.

The Act further defines "prohibited political activity" by listing at least 15 specific activities that it regulates in accordance with the general prohibitions above. Those most probably applicable to a school district can be summarized as follows:

- Preparing for, organizing, or participating in a political meeting, rally, or other political event;
- Soliciting contributions, including the buying or selling of tickets for any political fundraiser or event;
- Soliciting, planning the solicitation of, or preparing any document or report regarding anything of value intended as a campaign contribution;
- Planning, conducting, or participating in a public opinion poll in connection with a campaign for elective office, on behalf of a political organization, or for or against any referendum question;
- Surveying or gathering information from potential or actual voters in an election to determine probable outcome for or against any referendum question;
- Assisting at the polls on election day on behalf of any candidate or for or against any referendum question;
- Soliciting votes on behalf of a candidate or for or against any referendum question or helping in an effort to get voters to the polls;

- Initiating, preparing, circulating, reviewing, or filing any petition on behalf of a candidate or for or against any referendum question;
- Making contributions on behalf of a candidate;
- Distributing, preparing, or mailing campaign literature, campaign signs, or other campaign material on behalf of a candidate or for or against any referendum question;
- Campaigning for any elective office or for or against any referendum question; or
- Managing or working on a campaign for elective office or for or against any referendum question.

The Election Code also establishes certain restrictions on the political activities of elected officials. The pertinent provision of the Election Code states:

> No public funds shall be used to urge any elector to vote for or against any candidate or proposition, or be appropriated for political or campaign purposes to any candidate or political organization. This section shall not prohibit the use of public funds for dissemination of factual information relative to any proposition appearing on an election ballot....

In its literal application it means the school district cannot appropriate money to support or oppose the passage of a referendum or the election of a board member (or candidate for any other elective office). The board can participate in the dissemination of factual information, but it should be carefully reviewed to make sure the presentation is not in fact advocating a particular proposition or candidate. In its broader context, the Election Code has been argued to prohibit the board from granting anything of economic benefit to one side or the other. Thus, allowing a referendum committee to use school equipment (e.g. copier or printing, phone systems, or mailings) may be subject to an attack. Access to a school building for a meeting, however, is probably permissible so long as the access is comparable to that allowed for other public groups, and on the same basis. That would include, however, access by any group opposed to a referendum.

c. <u>When is this issue likely to come up?</u>

In the context of school boards, this issue often comes up with regard to board elections or referenda.

It is important to keep in mind that a public official or employee does not lose their freedom of speech or right to support or oppose a proposition or candidate. They are merely regulated as to when and under what circumstances they may exercise those rights. Looking back to the prohibitions we see that they cannot engage in the prohibited political activities during compensated or working time (which excludes vacation, personal or compensatory time off). Thus, activities taken before or after work, and away from the workplace, are permitted. Board members are not compensated, and while the Ethics Act does not directly address that question, it is clear that they are subject to the Act. The general recommendation we give therefore is that board members should also not engage in any prohibited political activity at any time while on school grounds or while they are performing any board function, activity, or carrying out any duty on behalf of the school district.

Because of the very nature of election campaigns it would be impossible for us to review every possible factual situation. Some of the more basic activities previously engaged in, however, now cannot be done by teachers or other employees during the work day. Thus, teachers should not be requested to place flyers in student book bags to be sent home. Secretaries should not make or receive telephone calls with respect to organizing any referenda meetings. When a board member is engaging in political activities covered by the Act, such as sending out campaign literature, it is important that he or she refrain from using any school district title, such as board member or board president. Again, because of the nature of political campaigns, you should assume someone will be examining your conduct.

In summary, for school board members, it is important that any such political activities be away from school grounds. That is, board members should not engage in any of the prohibited political activities while on school grounds or while performing any functions or duties of a school board member. Again, please make sure you contact us if in doubt about any contemplated actions.

Conflicts of Interest

I. Types of Conflicts

a. Personal Interest in Contracts

The Illinois School Code establishes that a **school board member should not have any personal financial interest in a contract [105 ILCS 5/10-9].** This means that a public official must disclose his or her interest, shall not participate in any discussion or advocate on behalf of such a contract, and shall not vote on any such matter. Not having a personal financial interest also means that a Board member "shall not be interested, either directly or indirectly, in his or her own name, or in the name of another person, in any contract, work, or business of the school district." A "direct interest" is one in which the Board member has a pecuniary interest, and that interest is of a personal nature. Additionally, an individual does not have to act in bad faith to be found in violation of this statute – it is sufficient that they "take advantage" in some aspect of their position.

There are limited exceptions to this provision. For example, if the contract is $1,000 or less (or in certain situations, if proper disclosures are filed and the member owns less than 7.5% of a business) such contracting may be allowed. If the board member's business is the sole source of materials, labor, or merchandise, such contracting may be allowed in an amount not to exceed $5,000 annually. Moreover, Board members are not prohibited from being employed by a company that does business with the district, so long as they have no financial interest beyond their position as an employee. [105 ILCS 5/10-9].

There are also common law prohibitions, as the common law indicates that a member of a public body who has a personal interest in a matter coming before that body is disqualified from voting or otherwise acting upon the matter. Plainly stated, an individual cannot use their official capacity to advocate for their own personal interests. This applies regardless of whether there is a technical violation of the ethics statute.

This prohibition also does not apply in the case that a Board member owning a business seeks to provide free goods or services, so long as the Board member receives nothing in exchange for the transaction.

If an individual is found to have violated this provision, they may be convicted of a Class 4 Felony and/or be subject to removal from their position. They may also be found guilty of perjury in the case that they make false statements on a subject relative to this area (such as misrepresenting the extent of an interest in a company). Additionally, a court may void any contract that violates this Act. Therefore, both actual conflicts and the appearance of conflicts should be avoided.

b. Nepotism

Nepotism is generally defined as "the practice among those with power or influence of favoring relatives or friends."

In the context of school districts, this issue often arises when a Board member's spouse is employed by the same district for which the Board member serves. Most frequently, the pertinent question is whether it is a potential conflict of interest for a board member to vote on a collective bargaining agreement in the situation where a relative of the board member is employed as a certified teacher within the same school district.

This issue is addressed both through various statutes and through case law. As noted above, Section 10-9 of the School Code provides that a school board member shall not be interested, either directly or indirectly, in his or her own name or in the name of any other person, in any contract, work, or business of the school district or in any sales or purchase of the school district. A parallel provision exists in the Public Officer Prohibited Activities Act. [50 ILCS 105/0.01]. That provision further enumerates penalties for engaging in prohibited activities, including the conviction of a Class 4 felony and removal from office.

The Attorney General has also opined on this issue. In a 1974 opinion, it set forth the following elements for analysis:

- The person must be holding office, either elective or appointive, under the laws of the state;
- The public official must "have either a direct or indirect interest of a prohibited nature;"
- The official in question must be empowered to act or vote;
- A prohibited interest must exist at the time that a contract is made or let; and
- A contract must be made or let

Of these five factors, the question of "whether there is a prohibited interest" will most often be given the greatest consideration. In *Panozzo v. City of Rockford*, 306 Ill. App. 433 (1940), the court held that the interest must be "certain, definable, pecuniary or proprietary." It must also be personal in nature, in that it is not a general benefit to all persons or property. However, the mere fact that the contract would benefit the governmental entity is not sufficient to validate an impermissible conflict.

Because there are no bright-line rules, it is important to examine how the Attorney General and various courts have addressed this issue. The following cases provide an outline for the current jurisprudence in this subject area:

- *Panozzo v. City of Rockford*, 306 Ill. App. 443 (1940), Illinois Appellate Court held that mere family relationships (there, nephew and son-in-law) did not constitute an illegal direct interest
- Attorney General Opinion No. 264, Attorney General found no conflict existed when wife of a school board member entered into a contract with the board, stating a board member would not have a pecuniary interest in the contracts of his spouse.

- Later, and under slightly different facts, the Illinois Appellate Court held that a police officer did, by virtue of his marital relationship, have interest in the earnings of his spouse. *Bock v. Long*, 3 Ill. App.3d 691(1972).
- Another Attorney General Opinion, relying on *Bock*, found that it was a prohibited interest for the spouse of a school board member to be employed by the school district.
- The Attorney General then shifted back, and in 1997 found that there was no prohibited interest when the spouse of a member of the Illinois State Board of Education served as a consultant, paid by funds received by a contract with ISBE
- Additional cases have determined that a marital relationship alone is not sufficient to establish a conflict. *Hollister v. North*, 50 Ill. App. 3d 56 (1977).

In conclusion, there is varying and conflicting case law on the issue. However, the most recent trend appears toward establishing that marital or family status alone does not create a conflict. Even under such circumstances, it is most common for the board member to avoid the appearance of impropriety and refrain from participation in meetings involving the collective bargaining agreement.

c. Holding Dual Offices

Another matter than may arise is the potential for holding dual offices. There are a number of statutory provisions addressing this issue. The Illinois Council of School Attorneys ("ICSA") has opined that school board members may hold two elected offices at the same time so long as "the duties of either office are such that the holder of the office cannot in every instance, properly and fully, faithfully perform all duties of the other office." This issue was further defined by the court in *People v. Haas*, 145 Ill. App. 283 (1st Dist. 1908) which stated:

> Incompatibility is present when the written law of a state specifically prohibits the occupant from wither one of the offices in question from holding the other and, also, where the duties of either officer are such that the holder of the office cannot in every instance properly and fully, faithfully perform all the duties of the other office. This incompatibility may arise from multiplicity of business in one office or the other, considerations of public policy, or otherwise.

By way of example, ICSA and the Illinois Attorney General have found the following positions to be incompatible:

- Board of review member, city council member, city manager, community college district trustee, county board member, county engineer, county zoning administrator, county zoning board of appeals member, educational labor relations member, fire protection district trustee, park district board member, township assessor and township school trustee

As you will note above, incompatibility is defined as those that could not be faithfully held at the same time. Moreover, at least one court has held that the inquiry does not center upon whether there has been an actual conflict, but rather there will be eventually be a conflict. *People ex. Rel. Alvarez v. Price*, 948 N.E.2d 174 (Ill. App. 1 Dist. 2011). Similarly, in *People v. Brown*, 2005

WL 991720 (3rd Dist. 2005), the court noted that even if there is no subordination of offices, there still may be conflicts. In that case, the court noted that the potential for interaction between a municipal alderman and a park district board member was too great and "if one were to hold both offices, he or she could not fully represent the interest of both governmental units when those units contract with each other." The court went on to state that recusal would not be sufficient to cure this situation, as "public policy demands that an office holder discharge his duties with undivided loyalty."

In recent years, this potential for conflict has become increasingly more common, as Intergovernmental Agreements often create dual interests. **While incompatibility is addressed on a case-by-case basis, it is advisable to be prudent and to consult legal counsel prior to running for or accepting a second position.**