

COUNCIL WARS AND POWER PLAYS
2012 Illinois Municipal League Conference

by:

Stewart H. Diamond, Robert K. Bush, Keri-Lyn J. Krafthefer,
Derke J. Price and Julie A. Tappendorf

A. MUNICIPALITY vs. TECHNOLOGY

Q1: Are the text messages sent and received on private cell phones of members of a public body subject to release under the Freedom of Information Act?

A: If the message relates to public business, then yes, according to a recent opinion issued by the Public Access Counselor.

Q2: Are comments posted on a government Facebook page subject to the Open Meetings Act?

A. They might be. Just as with any other electronic communication, if a majority of a quorum of a public body is engaging in a contemporaneous discussion of public business, whether in-person, on a telephone, through e-mail, or by posting comments on a Facebook page, their actions may be considered a meeting subject to the requirements of the Open Meetings Act.

Q3: Can a public body require advance notice before permitting a member of the public to record a public meeting?

A. No, the Attorney General recently issued an opinion finding a public body in violation of the Open Meetings Act when it refused to allow an individual to record a public meeting because the individual failed to advise the public body in advance of his intention to record the meeting in accordance with the public body's rules.

B. PUBLIC ACCESS COUNSELOR vs. MUNICIPALITY

Q1: Can a municipality conduct a meeting in the private home of one of its members where the meeting was noticed and open to the public and the municipal building was closed?

A. According to a recent PAC opinion, probably not. In PAC Opinion 12-008, the PAC found a school district in violation of the Open Meetings Act where it conducted a meeting to adopt the annual tax levy in the private home of the school superintendent. The PAC determined that a home is "ill-suited" for a public meeting and could deter members of the public from attending.

Q2: Can a municipality discuss budgetary matters in closed session as part of the discussion of layoffs of individual employees?

A: According to the PAC, probably not. In PAC Opinion 12-011, the PAC found a municipality in violation of the Open Meetings Act when a discussion about layoffs included a discussion of village finances and budgetary constraints.

Q3: **BONUS QUESTION:** Have any of the PAC opinions issued since 2010 (the year the PAC was established) been in favor of the public body?

A: No. There have been 23 binding opinions issued by the PAC since it was created. All of them went against the public body.

C. MUNICIPALITY vs. PUBLIC

Q1: Must a public body allow an opportunity for public comment at every meeting?

A: Although the current version of the Open Meetings Act does not specifically make this requirement, the Public Access Counselor appears to be interpreting the Act to require that such an opportunity be granted to the public.

Q2: Does the opportunity to address a public body extend to all open meetings of its committees and commissions?

A: Yes. The provisions of the Open Meetings Act apply to all governmental bodies and all of their sub-units.

Q3: Does the Open Meetings Act require that audience members be allowed to address the Board on each Agenda item?

A: No. Each governmental body can establish rules, which, for example, can limit public comment to either the beginning or the end of a meeting. If individuals are allowed to address the public body during the meeting, there must be a fair opportunity for all views to be expressed.

Q4. Can the Mayor only allow the first ten speakers who sign up to speak at a public hearing?

A: No. Although some limit in number or time period may be established for the number of individuals who will be allowed to speak, ten (10) is too small of a number.

Q5: Can a public body limit the time for any one person to comment to a maximum of 3 or 5 minutes?

A: We believe that such a rule would be upheld if established in advance and if uniformly administered.

Q6: Can a representative, who speaks for a large group of people, be given additional time?

A: We believe that the Public Access Counselor and the courts would uphold such a rule.

Q7: Can individuals who address the members of a public body require an immediate answer or any answer to their questions?

A: Under the First Amendment of the Federal Constitution, people who address public bodies are given great flexibility in what they can say or ask. There is, however, no legal requirement that elected officials respond to the questions either when asked or ever. Members of the public who are not given answers may, however, extensively seek the answer to their questions through Freedom of Information Act requests.

Q8: Must all meetings of a governmental body be held within its corporate boundaries?

A: No. The law requires, however, that meetings must be held at a convenient time and a convenient place. In some communities, the convenient place may be in a building just outside of the current corporate boundaries.

Q9: Is it a violation of the Open Meetings Act for elected officials to discuss public business about their community at a conference of the IML.

A: It actually is. If a majority of a quorum of a public body is in attendance at a conference, the members can discuss the information being disseminated at the conference, but any discussion of local business, which can be considered deliberative is in violation the law. Local politics, as opposed to local public policy matters can be discussed. Who should be the next candidate for Mayor?

Q10: Can a Freedom of Information Act request demand an answer to a particular question?

A: No. Freedom of Information Act requests are only valid if they seek to see, review and get copies of particular named and described documents. Governmental bodies only need to turn over the documents. They do not need to explain or interpret them for the requesting party.

Q11: Can the Mayor use a municipal newsletter to urge the passage of a referendum or to outline his successes around election time?

A: A newsletter can give facts about a coming referendum, but public funds cannot be used in support of or in opposition of a public issue or a candidate. Factual

data about the successes of a municipality may, obviously, encourage the re-election of an incumbent.

D. COUNCIL/BOARD vs. MAYOR

Q1: Who controls what appears on the agenda?

A: The development and posting of the agenda is controlled by the full legislative body, and can be assigned to various parties. It is often assigned to the Clerk.

Q2: Is the Mayor the only one who can call a special meeting or establish an agenda?

A: No. For municipalities, the statutes provide that either the Mayor or any three Aldermen or Trustees can call a special meeting. If the number of participants who appear at the meeting do not constitute a quorum, the meeting cannot go forward. In most communities, the Mayor or the Clerk prepare the Agenda. An Agenda should be allowed to contain items requested by any Member of the Board of Council. That job can, by ordinance, be given to any named person or position, but the obligations would be the same.

Q3: Who can call an emergency meeting?

A: The Mayor or any three Trustees or Board members can call an emergency meeting. While a special meeting requires 48 hours advanced notice, an emergency meeting can be called on the shortest practical notice, although notification must be made to all Board members, posted and given to the members of the press that have properly asked for the notification of meetings. The court will likely overrule actions taken in an emergency meeting if there is no true emergency.

Q4: Can the Mayor refuse to allow the Council to discuss or act on an issue?

A: The Mayor cannot refuse to allow the Council or Board to discuss or act on an issue. His action to do so can be overridden.

Q5: Can the Mayor give an oral veto and, if so, when must he or she do it?

A: No. The ordinances, resolutions and motions which the Mayor vetoes must be returned to the corporate authorities with the Mayor's written objection at the next regular meeting of the Council or Board occurring not less than five (5) days after their passage. (65 ILCS 5/3.1-40-45)

Q6: If a Mayor vetoes an ordinance, when does it go into effect?

A: If the veto is not overridden, then the ordinance never comes into effect. If the veto is overridden, then the effective date of the ordinance is the date established

in the ordinance. If, for example, a Mayor vetoes an appropriation ordinance, effective before the end of the first quarter of the fiscal year, the ordinance relates back to that date when the veto process is finished.

Q7: Does the Mayor have the power to veto all motions?

A: No. The power of the Mayor to veto relates to motions or resolutions that create any liability against a municipality and that provide for the expenditure or appropriation of its money and all ordinances. (65 ILCS 5/3.1-40-40)

Q8: Can a Board of a home rule community change the President's veto power by ordinance?

A: No. Even in a home rule municipality, the Mayor's veto power can only be modified by a binding referendum changing the form of government.

E. TRUSTEE OR ALDERMAN DYSFUNCTION

Q1: Can a Council pass procedural rules to prevent an Alderman from speaking for a long time or repeatedly?

A: Yes. All governmental bodies have the ability to adopt procedural rules. So long as legislative members are given a reasonable opportunity to speak, limitations may be placed upon duration or frequency.

Q2: What do you do if a Board or Council member discloses information to the press which were discussed in a closed session?

A: An effective answer remains one of the great mysteries in Illinois law. A vote of censure can help and making that act a violation of municipal ordinances and prosecuting may be effective. WE think that in the right case, a court might enter an injunction against such an individual on a continuing basis. The State's Attorney may also be willing to get involved.

Q3: Can a community refuse an Alderman's requests for documents, whether the Alderman requests them either directly or under FOIA?

A: Although only the Mayor is specifically authorized by statute to review all documents, courts have held that members of legislative bodies are entitled to data which can reasonably assist them in their legislative duties. FOIA requests from legislators are to be treated the same way as FOIA requests from anyone else.

Q4: Can a Board prevent a Trustee from repeatedly raising the same issue?

A: Yes. Once an issue has been definitively decided by a legislative body, efforts to raise the same question without a significant change of circumstances can be ruled out of order by the Mayor or Chair of the meeting.

Q5: Can a member of a Board be charged with disturbing the peace at a meeting?

A: Yes. Anyone who disrupts a public meeting can be arrested and charged with disturbing the peace or disorderly conduct.

Q6: Can our Council videotape an Alderman's shenanigans and seek an injunction to prevent the repeat of such practices?

A: Yes. All open session public meetings can be recorded by the government or by a citizen. Someday, a government will have the gumption to seek a court-ordered injunction to prevent the repeat of disruptive tactics by an elected official.

F. ALDERMAN/TRUSTEE vs. ALDERMAN/TRUSTEE

Q1: What can we do if two Board members hate each other and any statement by one results in an angry statement by the other?

A: Debate can be limited at a public meeting and officials can be publicly chastised about their incivility.

Q2: Can a Board majority prevent a minority member from explaining his or her vote?

A: No. Although a legislative body has the ability to establish rules of order and procedure, no rule would be valid that prematurely cut off debate regarding an action item and prevented a member from explaining, for example, why she thought that the Board majority was very much "off base" in approving or denying a particular item. That discussion can be limited to the period of debate and the voting process itself can prohibit explanation at that time.

Q3: Can one Board member demand that another Board member "answer the question?"

A: Neither a Board or Council member, or members of the public can demand that a Board or Council member "answer the question."

Q4: Can an alderman demand that her supporters in the audience be allowed to comment repeatedly on issues being considered by the Council?

A: A Board or Council member can point out the occurrence of the improper act of failing to allow all views to be stated regarding a particular issue. The Council or Board can, however, forbid repetitive comments or multiple comments so long as the individual has been given an opportunity to initially speak for a reasonable period of time.

Q5: What can we do if a Board member threatens to hold his breath until he gets his way?

A: We suggest the use of “time out.”

G. THE CLERK vs. EVERYBODY

Q1: We don't like the way the Clerk takes the minutes. What can we do about this?

A: The corporate authorities and subsidiary bodies of all governmental bodies have the ability to choose the person taking the minutes and the draft minutes are to be reviewed and considered by the body that held the meeting.

Q2: I am the Municipal Clerk. Council members want me to change my minutes to include things that they never said. Can they do that?

A: The Council has the right to approve its own minutes, but since the Clerk's Office is generally the repository for all minutes, the Clerk can add his or her note at the end of the minutes if it is believed that they are incorrect.

Q3: I am an elected Clerk, paid on a part-time basis, and the Council wants me to be at the municipal building every day. Can they make me?

A: If the elected Clerk fails to fill responsibilities given to that office by the Council, it is probably up to the electorate to decide, during the next election cycle, if the Clerk has or has not done a good job.

Q4: Can a Municipal Clerk, on his or her own, determine that nominating petitions are invalid?

A: Yes. If the Clerk can tell by the face of the petitions that they are invalid, the Clerk can unilaterally decide not to send them forward to an election authority. The Clerk should notify the candidate that she is taking this action. Where there is any question about the sufficiency of the petitions, a disqualification process should be initiated by a private citizen and a decision made by an Electoral Board.

Q5: Must the Municipal Clerk record minutes of all meetings?

A: In most municipalities, the Clerk, by tradition or ordinance, takes and keeps the minutes of all regular or special meetings, along with the tapes of closed sessions. The Clerk, by statute, is entitled to attend all meetings of the Council or Board, and may not be excluded unless a conflict of interest exists such as a lawsuit by the Clerk against the municipality. Clerks generally are not required to record minutes of other sub-units of the government such as Plan Commissions and Zoning Boards of Appeals. By law, the Clerk is the keeper of all records except those for which the possession has been specifically assigned to others.

H. THE MAYOR vs. THE MANAGER

Q1: I am a Manager in a community that adopted a Manager form of government by referendum. Who appoints the municipal attorney – me or the Mayor?

A: In a municipality, which by referendum has adopted the Manager form of government, the Manager has the power to appoint and remove all directors of departments. (65 ILCS 5/5-3-7)

Q2: I am the Mayor in a municipality where we call the Administrator “the Manager.” I want to see books and records of the municipality and the Manager refuses to give them to me. Can she do this?

A: No. In all municipalities in this State, the Mayor or President may, at all times, examine and inspect the books, records and papers of any agent, employee or officer of the municipality. (65 ILCS 5/3.1-35-20)

Q3: We have a Manager, but we are not the “Manager form” of government. Who gets to appoint department heads who are listed as officers in the ordinances?

A: Although some municipalities have given the power to appoint officers to an administrator, the statutes reserve that power to the Mayor or President. (65 ILCS 5/3.1-35-10)

Q4: We have a Manager, but we are not the “Manager form” of government. Can we give the power to hire employees to the heads of committees?

A: State law does not generally provide the office or entity who has the power to appoint employees.

Q5: We have a Manager form of government. We want to fire our Manager in the middle of his contract. Can we do so? If so, do we have to pay severance pay?

A: In the statutory Manager form of government, the Manager is to be appointed for an indefinite term and the conditions of the Manager’s employment may be set forth in an agreement. (65 ILCS 5/5-3-7) There is no requirement to pay severance pay unless a community has agreed to do so, for example, in an employment contract. Severance clauses in such agreements generally will be honored.

I. MAYOR vs. POLICE OR FIRE CHIEF

Q1: I am the Mayor in a town of under 5,000 that does not have a Board of Fire and Police Commissioners. I appointed the Chief of Police for four years, but I have lost confidence in the Chief. What can I do?

A: You can remove the Police Chief when it is your opinion that the “interests of the municipality demand removal.” The corporate authorities can override your decision by a two-thirds vote. (65 ILCS 5/3.10)

Q2: I am a Police Chief in a non-home rule municipality with a population of 12,000. My contract and the Mayor’s term are up next year. Can I negotiate a new four-year contract?

A: Probably not. In non-home rule communities, multi-year contracts with officers generally cannot extend beyond the term of the Mayor. This allows a new Mayor to make substantial changes if the Council or Board will confirm new appointments.

Q3: I am the Police Chief in a community of 30,000 and the Mayor has told me not to investigate a charge that one of the Aldermen took a bribe. What should I do?

A: You should report what may be this obstruction of justice to the State’s Attorney, and you should ask the Sheriff or Attorney General to conduct an investigation.

Q4: There is a vacancy in the office of Fire Chief in our municipality of 15,000. The Mayor wants to appoint me as the permanent Chief, but a majority of the Council will not support his action. Can he appoint me anyway?

A: The Mayor can appoint you but you cannot serve in that position unless and until the Council confirms your appointment. (65 ILCS 5/10-2.1-4)

Q5: I am an Alderman. Can I be the Chief of Police, too?

A: A member of the Police Department can serve as an Alderman if elected, but only if the municipality grants that individual a leave of absence as Chief of Police. (65 ILCS 5/3.1-15-15)

J. THE MUNICIPALITY vs. THE NEWSPAPERS

Q1: The newspaper keeps writing unfair stories about the Council. As Mayor, what can I do?

A: You can address this issue at a meeting of the Council or Board, where your remarks will be likely subject to absolute immunity. You can address issues at a press conference, or in a letter to the editor, in which case your immunity will be inapplicable.

Q2: I am the Finance Director. One of the Aldermen called me a crook during a public meeting and the newspaper printed his comments. What can I do?

A: You can sue the Alderman and the newspaper. Because you will likely be classified as a public official, you will only collect damages if the remarks were false and malicious. The Alderman probably has absolute or qualified immunity.

Q3: As an Alderman, I am constantly misquoted by the newspapers. Is there any way that I can control printed statements?

A: You can submit your views to the newspapers in press releases and not talk to them otherwise. They will likely quote the words in your press releases or state that you were unavailable for comment.

Q4: The newspaper keeps printing terrible pictures of me. How can I fight back or make them use my photos from Glamour Shots?

A: You can provide the newspaper with better pictures or have plastic surgery. You can show terrible pictures of the editor and owner during your televised meetings. The plastic surgery is not reimbursable by the Village.

Q5: As a Clerk, do I have to notify a small newspaper in the next town of our meetings? That silly paper strongly supports the Mayor's opponent in the next election.

A: You shouldn't base the submission of notices on the political views of the newspaper. Interestingly enough, however, a governmental body is only required to supply notices to "any news media that has filed an annual request for such notice." (5 ILCS 120/2.02) Of course, public hearing notices must be published in specific newspapers per statute.

K. HOME RULE CONFLICTS

Q1: I am the Mayor of a home rule municipality. The Council just passed an ordinance giving the Chairman of the Finance Committee the power to appoint the Treasurer, subject to confirmation by the corporate authorities. Is that legal?

A: Probably not. Even in a home rule municipality, all officers are to chosen by the Mayor. That power can perhaps be taken away from the Mayor, but only by referendum.

Q2: In a home rule municipality, the Mayor, as the presiding officer, always calls on his supporters first. Can he do that?

A: Yes, the Mayor probably can choose who he wishes to call upon first to address a particular issue. No statutory or constitutional problem will occur if members of the Board or Council taking different positions are also allowed to speak in an equal manner. Ordinarily, the proponents of a motion are allowed to speak first.

Q3: In our home rule municipality, the Council members voted to reduce the Mayor's salary because she doesn't come to meetings. Can they do that?

A: No. Even in a home rule municipality, the constitutional prohibition against an increase or decrease in an elected official's salary remains in effect.

Q4: We are firefighters in our Fire Department. Can a home rule municipality require that we also be police officers?

A: Home rule municipalities have been given the power to make changes in the structure of various municipal departments. Such changes are subject to collective bargaining rights, but the organization of police and fire departments have been found to be within the power of a home rule municipality.

Q5: Can my home rule Council take away the Mayor's power to fill vacancies in appointed officer positions?

A: Probably not. A home rule municipality does not have the power by ordinance to make significant changes in the respective powers between the Executive and Legislative branches of municipal government.

L. THE CITY vs. THE COURT SYSTEM

Q1: I am the Mayor of a City of 40,000, involved in a controversial lawsuit in which the City is the plaintiff. The Judge said he will dismiss the lawsuit if I don't appear for a negotiating session. People on the other side are horrible liars and I hate them. Do I really, really have to appear?

A: Yes. Under our Constitution, the Judicial Branch is equal in power to the Legislative Branch and decisions by courts must be followed. Your lawyers can explain the reasons why you do not wish to appear, and can seek interlocutory appeal to test the validity of the trial court judge's threatened action.

Q2: I believe that the Judge in a court case is prejudiced against our Village. What can I do about it?

A: You can make a motion for a substitution of judges at the very beginning of the case. If the prejudice occurs later, a motion can be made asking the judge to transfer the case. Simply arguing that the Judge is ruling against you is not adequate grounds to prove improper prejudice.

Q3: We made some terrible business decisions in trying to encourage economic development and we owe a lot of people a lot of money. Can we declare bankruptcy?

A: Not at the moment. Although Federal law allows municipalities to seek bankruptcy protection, they can only do so in accordance with State law. There is

some question about whether Illinois has an appropriate law in place to allow for municipal bankruptcies.

Q4: We won a case at the trial court level and lost it at the Appellate level. Can't we automatically appeal to the Illinois Supreme Court? P.S. The Appellate Court is wrong and the people who sued us are very bad people.

A: Illinois is one of those States where there is an automatic appeal to the Appellate Court, but the Illinois Supreme Court has discretion over the cases it will hear and only takes a small percentage of the cases which it is asked to consider.

Q5: I am a Mayor. My former spouse is suing me personally in federal court alleging that I took away his liquor license because he was not paying alimony payments. Can he do that? Should the City defend me in this case?

A: A lawsuit claiming that a public official is depriving someone of constitutional rights because of a personal vendetta is rare, but not unique. In some cases, the governmental body, or its insurance carrier or governmental self-insurance pool, may conclude that the plaintiff is right and that your actions are personal and not governmental and so outrageous that it will not defend you or pay damages. Make sure that your decisions are fact and not fantasy based.

TECHNIQUES THAT MIGHT DIMINISH COUNCIL WARS

1. Don't confront people at board meetings with information or allegations that they could have been furnished prior to the meeting.
2. If you really have a question to ask, wait for a real answer.
3. Don't reject ideas you didn't think of first.
4. Use an egg-timer to delay immediately sending nasty e-mails.
5. Write out and read your response to controversial issues and give copies of your carefully-crafted words to the press.
6. Really, really listen to compromise suggestions. At rare and golden moments, be willing to admit that your previously held position might have been incorrect. Remember Mark Twain's quote, "Loyalty to a petrified opinion never yet broke a chain or freed a human soul in this world – and never will."
7. Praise your natural opponent when that individual surprises with a cogent idea of well thought-out position.
8. Try to creatively expand your power base.
9. Don't let anger or sarcasm use you.
10. Really listen to suggestions from people you respect.
11. Crush your opponent only when to do so really helps your cause, and when you can actually accomplish the crushing effectively.

TREATMENTS OR CURES FOR COUNCIL WARS

1. Newspaper editorials or letters to the editor demanding that officials work together.
2. Open workshops with consultants to discuss municipal problems and goals.
3. Workshops in closed session with representatives of the Illinois Municipal League or other statewide organizations.
4. Litigation to focus the issue and mediation to broker solutions.
5. Referenda to change the form of government.
6. An ordinance of a home rule unit permitting recall.
7. The normal election process.
8. Citizens' petitions.
9. Resignation because of frustration.
10. Implementing suggestions from Rob Bush's article on civility.

If you have any further questions or comments about the phenomenon of Council Wars, or the questions and answers we have provided, please feel free to call any of the speakers at: 312-782-7606. Also, if you visit the Ancel Glink website, you will also find a great deal of additional material about governmental bodies, and municipalities in particular. From that website, you will be able to download 10 pamphlets, which we call the Ancel Glink Library, as follows:

Ancel Glink's 2013 Guide for Newly-Elected Officials
Municipal Questions and Answers
Labor Law Handbook for Smaller Governments
Illinois Tort Immunity Handbook
Ancel Glink's Zoning Administration
Zoning Administration and Tools of the Trade
Municipal Annexation Handbook
Economic Development Toolbox for Municipal Officials
Lien on Me: Municipal Debt and Expenditure Recovery Procedures
Ten Things You Need to Know About 14 Local Governmental Issues