

2017 Illinois Government Auditing Conference

Maintaining the Public Trust

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Illinois Attorney General's Office

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About the Office of the Attorney General

The Attorney General is the state's chief legal officer and is responsible for protecting the public interest of the state and the people of Illinois.

As part of this work, the Attorney General:

- Represents the State, as well as State agencies, officers and employees in all litigation;
- Advises State officers on legal questions; and
- Enforces numerous State laws designed to protect the public and ensure trust in government.

Enforcing State Laws

The Attorney General enforces numerous State laws, including:

- Illinois State Officials and Employees Ethics Act, 5 ILCS 430/1-1 *et seq.*
- Illinois False Claims Act, 740 ILCS 175/1 *et seq.*
- Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq.*
- Illinois Open Meetings Act, 5 ILCS 120/1 *et seq.*

The Role of Internal Audit

State entities and their employees have a responsibility to be open, honest and transparent. Internal auditors play a key role in maintaining the public trust:

- Identifying weaknesses and/or non conformance with laws, rules and policies;
- Recommending corrective action; and
- Reporting violations of the public trust.

Throughout this presentation, the focus will be on what auditors can look for to ensure a State entity is working to maintain the public trust.

Illinois State Officials and Employees Ethics Act

The Ethics Act put in place requirements intended to ensure ethical conduct, including:

- Adoption of personnel policies that include work time requirements mandating documentation of time spent on official business through paper or electronic time sheets;
- Annual ethics training;
- Designation of an Ethics Officer to provide guidance regarding compliance with the Ethics Act; and
- Revolving Door Prohibitions.

What Auditors Can Look For Relating to the Ethics Act

Auditors can verify:

- An Ethics Officer has been designated and his or her contact information is widely disseminated;
- Employees are completing annual Ethics Training;
- Personnel Policies that comply with the Ethics Act have been adopted and are being implemented effectively;
- Employees are being informed of how to report misconduct;
- The agency head is cooperating with the Inspector General and taking action based on the IG's recommendations; and
- When the IG has determined that misconduct occurred, the agency has considered whether policy or management changes are necessary to prevent future similar misconduct.

Revolving Door Prohibitions

The Ethics Act sets forth Revolving Door Prohibitions that apply to all State officers and employees (and their spouses and immediate family members living with them).

The Revolving Door Prohibitions apply for 1 year after public employment and restrict an employee from working for a prospective employer if:

- During the year preceding the termination of State employment, the employee participated “personally and substantially” in:
 - The award of a State contract or contracts with a cumulative value of \$25,000 or more to the prospective employer, its parent or subsidiary; or
 - Making a regulatory or licensing decision that directly applied to the prospective employer, its parent or subsidiary.

Employees Subject to Revolving Door Procedures

To ensure that employees who are likely to be involved in contracting or in regulatory/licensing decisions comply with the Revolving Door Prohibitions, section 5-45(c) of the Ethics Act specifically requires that all constitutional officers:

*“adopt a **policy** delineating which State positions under his or her jurisdiction and control, by the nature of their duties, may have the authority to participate personally and substantially in the award of state contracts or in regulatory or licensing decisions.”*

These employees are often referred to as “C-List Employees”

C-List Employees

C-List Employees Must Follow Specific Procedures Before Accepting a Non-State Position:

- Notify the Inspector General (IG) when they receive an offer of non-state employment, and
- Notify their agency's Ethics Officer.

The IG and Ethics Officer then review the matter.

Restrictions on High Ranking State Employees

High ranking State employees are strictly prohibited from accepting employment from an entity that:

- Was a party to a contract or contracts worth \$25,000 or more with their agency, or
- Was the subject of a regulatory or licensing decision involving their agency.

This restriction applies even if the high ranking employee was not “personally and substantially” involved in the decisions.

High Ranking State Employees

The list of employees who are subject to these requirements is found in section 5-45(h) of the Ethics Act. These employees are referred to as “H-List Employees.” They include:

- The head of the agency;
- Chief Procurement Officers;
- Chiefs of Staff; and
- Deputy, Associate or Assistant Chiefs of Staff

In Context of Revolving Door Prohibitions, Auditors Can Verify:

- The agency has an up-to-date and appropriate C-List of employees.
- The agency routinely notifies C-List employees of the requirements that apply to them.
- H-List Employees are aware of the strict prohibitions that apply to them.
- The agency has an effective process in place to ensure compliance by C-List and H-List Employees.

Illinois False Claims Act

The False Claims Act is the State's primary litigation tool for combating fraud.

The False Claims Act empowers both the Attorney General and private persons to institute civil lawsuits against anyone that commits fraud by submitting false or fraudulent claims to the State.

False Claim Act Cases

Civil lawsuits under the False Claims Act typically involve –

- A private individual whistleblower bringing the suit. Whistleblowers are usually insiders employed or formerly employed by private vendors doing business with the State.
- Defendants in these suits are usually private vendors doing business with the State.

Attorney General's Role in False Claim Act Cases

The Attorney General's Office investigates possible false claims and often brings these lawsuits without whistleblowers.

When whistleblowers sue, the Attorney General has broad authority to intervene in these cases to join with the whistleblower, take over from the whistleblower or allow the whistleblower to proceed alone.

What Are False Claims

All fraudulent attempts to cause the State to pay money.

False claims can be attempts to cause the State to pay for goods/services not provided. For example:

- Contractor overcharges government agencies for waste disposal services.
- Doctor bills Medicaid for medical services not provided.
- Road contractor bills IDOT for road marking materials that are more expensive than materials actually used.
- Contractor bills the State for products/services that are delivered but are so substandard that they are essentially worthless.

What Are False Claims, cont.

False Claims also can be knowingly concealing or avoiding an obligation to pay the government:

- Contractor is paid twice for the same services or mistakenly overbills the State. When she realizes the error, the contractor decides to keep the money.
- Gas station owner avoids the payment of sales tax by understating sales tax receipts on tax forms submitted to IDOR.

What Are False Claims, cont.

False Claims can be failures to disclose breaches of statutory, regulatory, or contractual provisions.

- In these types of false claims, the actual claims submitted for payment may not in and of themselves be “false.”
- These claims occur when the government payment is conditioned on compliance with certain statutory, regulatory, or contractual provisions.
- *Example:* Construction company used women-owned businesses to fraudulently secure public projects for work on roads, highways and public transit systems.
- *Example:* Counseling clinic is not in compliance with Medicaid regulations when it submits Medicaid claims for payment.

Auditors and the False Claims Act

Auditors can identify possible areas of risk based on false claims cases.

Auditors can verify that agencies are flagging possible false claims for referral to the Attorney General.

Ensuring Transparency and Accountability in Government

The two most important tools for making sure that Illinois government is transparent and accountable are:

- The Freedom of Information Act (FOIA), 5 ILCS 140/1 *et seq.*
- The Open Meetings Act (OMA), 5 ILS 120/1 *et seq.*

Public Access Counselor

The Public Access Counselor (PAC) within the Attorney General's Office:

- Provides advice and education with respect to FOIA and OMA,
- Creates training programs on FOIA and OMA, and
- Works to resolve complaints involving potential violations of FOIA or OMA.

Seeking Guidance from the Public Access Counselor

The Public Access Counselor is available to answer questions about FOIA and OMA.

Sarah Pratt, Public Access Counselor

877-299-3642

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FOIA Refresher

The Purpose of FOIA:

“The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.”

5 ILCS 140/1 (emphasis added).

Public Bodies

FOIA applies to all “public bodies.”

FOIA defines public bodies to include all legislative, executive, administrative or advisory bodies of the State.

5 ILCS 140/2(a).

Responding to FOIA requests

Each public body must designate a Freedom of Information Officer who is charged with receiving and responding to FOIA requests.

Freedom of Information Officers must complete annual training provided by the Attorney General's Public Access Counselor.

Definition of “Public Records”

The definition of “public records” includes:

*All “documentary materials **pertaining to the transaction of public business**, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.”*

5 ILCS 140/2(c).

Personal Emails and Texts

In determining whether a document is a public record, focus is on the content not the method by which it is transmitted.

If a communication:

- pertains to the transaction of public business and
- was prepared by, prepared for, used by, received by, possessed by or controlled by a public body,

It is a public record under FOIA.

Public Bodies should take action to ensure employees don't evade FOIA

Agencies should have policies:

- Prohibiting the use of personal email accounts or text messages on personal devices for work, and
- Requiring that if an employee does use a personal email account or text messages on a personal device for work, that employee must ensure that a copy of any work-related e-mail or text is maintained in office files.

Responsive Records

FOIA does not require a public body to create records to respond to a FOIA request.

On the other hand, compiling data or information that a public body maintains is NOT creating a new record.

Common Improper Responses by Public Bodies

- Don't respond at all
- Respond late
- Fail to conduct a reasonable search for responsive records
- Improperly asserts exemptions
- Fail to cooperate with Public Access Bureau review
- Fail to follow determination letters from the PAC

What to Look for Under FOIA

Auditors can verify that:

- Each entity has designed one or more FOIA Officers;
- The entity is responding to FOIA requests within the appropriate time under the statute;
- Denials of requests are proper and made in writing; and
- The entity performs a “reasonable search tailored to the nature of a particular request.”

Public FOIA Training is available at:

<http://foia.ilattorneygeneral.net/Training.aspx>

OMA Public Policy

“[T]he people have a right to be informed as to the conduct of their business.”

“The General Assembly * * * declares it to be the public policy of this State that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way.”

5 ILCS 120/1 (emphasis added).

OMA Refresher: What is a Public Body?

The requirements of OMA apply to “public bodies.”

Generally, individual elected officers and internal meetings of employees within state agencies are not subject to OMA.

Boards, commissions, committees, and advisory groups of state agencies may, however, be subject to OMA.

What is a Public Body, cont.

Whether an entity is a “public body” under OMA requires a review of various factors, including:

- How the entity is formed (by statute? Part of the formal organized structure?);
- Who appoints the members;
- Whether members are paid;
- Whether the entity’s role is solely advisory, or also has a deliberative or investigative function;
- Whether the entity is accountable to any public body;
- Whether the group has a budget; and
- The impact of the entity’s decisions or recommendations.

What is a Public Body, cont.

Bottom Line:

Groups established by statute as part of a state agency's structure, with specific requirements for the appointment of members and assigned duties, and that report back to the agency are subject to OMA.

OMA Refresher: The Meeting

OMA's requirements apply to a meeting of a public body that is “[a]ny *gathering* ... of a *majority of a quorum* of the members of a public body held for the purpose of *discussing public business.*”

5 ILCS 120/1.02 (emphasis added).

OMA Requirements for Meetings

- Notice
- Agenda identifying “general subject matter” of any resolution or ordinance that will be subject of final action
- Opportunity for members of public to speak (pursuant to appropriate rules)
- Minutes of Meetings
- Only closed when allowed by law

What to Look for Under OMA

Auditors can verify that:

- The entity has properly interpreted what constitutes a meeting (a gathering, both planned and unplanned, of a majority of a quorum, held to discuss public business);
- Meetings are held at times and places “convenient and open to the public”;
- Advance notice is properly given;
- Agendas are posted at the required time prior to meetings;
- Closed meetings are appropriately closed and handled properly;
- The entity has rules allowing members of the public to speak at meetings; and
- Appropriate minutes are kept of ALL meetings.

Public OMA Training is available at:

<http://foia.ilattorneygeneral.net/Training.aspx>

Contact Information

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