



# Public Access Counselor Annual Report

*An overview of 2007*



*March 2008*

A Message from  
ILLINOIS ATTORNEY GENERAL  
**LISA MADIGAN**



Illinois' residents have a fundamental right to access information about their government. We know that access to information fosters public trust, promotes equal access to government, and helps prevent abuse of power. For the last several years, I have been working

hard to ensure that information is open and accessible at all levels of government by creating a Public Access Team to educate, train, and mediate cases involving open government.

My Public Access Team, within the Public Access and Opinions Division, serves as a valuable resource for government officials, residents, and members of the media when questions or disputes arise involving the state's sunshine laws. Since I created this Division more than three years ago and appointed Illinois' first Public Access Counselor, Terry Mutchler, my office has handled more than 3,000 complaints and has conducted more than 180 trainings around the state to ensure that public officials, the public, and members of the media understand the requirements of the Freedom of Information Act, 5 ILCS 140, and the Open Meetings Act, 5 ILCS 120.

As you will see in this Third Annual Report, during 2007, inquiries to my office increased approximately 38 percent, from 988 complaints in 2006 to 1,366 complaints in 2007. Additionally, we conducted 51 trainings statewide to ensure that public officials, residents, and members of the media understand these important open government laws.

The Office of the Attorney General is also subject to the requirements of the Freedom of Information Act. To ensure that we are serving the public efficiently, I have directed the Public Access Counselor to conduct an internal review of how the Office of the Attorney General responds to Freedom of Information Act requests. As part of this process, we have undertaken internal staff training to improve our response time and we are streamlining and improving our procedures. Throughout 2008, we will continue to search for ways to enhance our process for responding to requests from the public.

As Attorney General, I will continue to provide these valuable resources to assist members of the public, government officials, and the media in making sure that government at every level in Illinois is open and accessible to all.

Lisa Madigan  
Attorney General

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# Complaint Statistics

In 2007, the Public Access Counselor, as part of the Public Access and Opinions Division, handled 1,366 cases specifically dealing with the Freedom of Information Act, 5 ILCS 140, and the Illinois Open Meetings Act, 5 ILCS 120. The Public Access and Opinions Division conducted more than 51 statewide trainings for the public, government officials, members of the media, and students.

The following is a statistical breakdown of the requests received by our office in 2007. Most of the 1,366 complaints and concerns addressed to the Public Access Team came from individual members of the public. The complaints came from every area of the state, and no one area had a cluster of complaints related to either of these Acts.

## TOTAL FREEDOM OF INFORMATION ACT CASES: 810

- 619 from Members of the Public
- 80 from the Media
- 111 from Government Officials

## Further Freedom of Information Act (FOIA) Breakdown

- o **320 written FOIA requests for internal documents of the Office of Attorney General**
  - 303 from Members of the Public
  - 9 from the Media
  - 8 from Government Officials
- o **299 written FOIA-assist requests asking the Office of Attorney General to help obtain documents from public bodies**
  - 213 from Members of the Public
  - 46 from the Media
  - 40 from Government Officials
- o **191 FOIA telephone inquiries**
  - 103 from Members of the Public
  - 25 from the Media
  - 63 from Government Officials



## **TOTAL OPEN MEETINGS ACT CASES: 556**

- 320 from Members of the Public
- 62 from the Media
- 174 from Government Officials

### **Further Open Meetings Act (OMA) Breakdown**

- o **277 written inquiries**
  - 214 from Members of the Public
  - 39 from the Media
  - 24 from Government Officials
- o **279 OMA telephone inquiries**
  - 106 from Members of the Public
  - 23 from the Media
  - 150 from Government Officials



# Training Seminars

The Office of the Attorney General conducted 51 statewide trainings to provide the public, government officials, and members of the media with a practical understanding of the Freedom of Information and Open Meetings Acts. Each training provided an overview of the history of the Acts, what a government official must do to be in compliance with the Acts, and how citizens can use these Acts to participate in open government throughout Illinois. At the end of each training, staff from the Attorney General's office answered questions or addressed concerns related to specific open government situations.

## The 2007 training seminars included the following:

01-10-07	MTU8	McLean
01-16-07	State Internal Auditors Advisory Board	Sangamon
01-25-07	Prairie Area Library Systems	Sangamon
02-06-07	Annual Midwest Prevailing Wage Conference	Cook
02-07-07	Belleville - News Democrat	St. Clair
03-08-07	John A. Logan College	Williamson
03-09-07	Attorney General Staff	Sangamon
03-15-07	Illinois Press Association	Sangamon
03-23-07	Regional Superintendents	Marshall
03-28-07	Office of the Comptroller	Sangamon
03-30-07	Illinois Association of School Boards	LaSalle
04-03-07	Alliance Library System	Tazewell
04-20-07	Illinois Association of School Boards	Sangamon
04-27-07	Community Information and Education Service of the University of Illinois	Adams
04-27-07	McHenry County State's Attorney	McHenry
04-23-07	Illinois Association of County Officials	Sangamon
05-11-07	CISCO	McHenry
05-15-07	Lewis & Clark Library System (Morning Session)	Madison
05-15-07	Lewis & Clark Library System (Evening Session)	Madison
05-18-07	IBEW Local 117	McHenry
05-22-07	Champaign County Officials	Champaign
05-31-07	Deaf & Hard of Hearing Commission	Sangamon
05-31-07	Chicago Public Radio	Cook
06-04-07	Illinois Department of Labor	LaSalle
06-07-07	UIS Public Affairs Center	Sangamon
06-14-07	CISCO	DuPage
06-15-07	Supervisor of Assessment & Board of Review Meeting	Sangamon
06-20-07	School District #168	Cook
07-13-07	Lake County Forest Preserve	Lake



*Training Seminars Continued*

07-31-07	Illinois Soil & Water Conservation Districts	Sangamon
08-20-07	Community Unit School District #300	Kane
08-22-07	Peoria Park District	Peoria
09-06-07	Association of Election Commission Officials of Illinois	Kane
09-12-07	AFSCME (Subchapter 79)	McLean
09-12-07	City of Freeport	Stephenson
09-24-07	School District #181	DuPage
09-25-07	Municipal Clerks of Illinois	Sangamon
09-27-07	Municipal Clerks of Illinois	Sangamon
10-10-07	Parents United for Responsible Education—Unit District 299 (Morning Session)	Cook
10-10-07	Parents United for Responsible Education—Unit District 299 (Evening Session)	Cook
10-11-07	Illinois Library Association	Sangamon
10-16-07	State Audit Advisory Board	Sangamon
10-16-07	Kane County State’s Attorney’s Office - Local Public Officials	Kane
10-18-07	Metropolitan Library System	Cook
10-18-07	Village of Hinsdale Board Members	DuPage
10-23-07	Be Our Best Group (Parents’ Group)	Cook
10-24-07	Business & Professional Women’s Group	DeWitt
10-29-07	Summit Hill School District #161	Cook
10-31-07	Columbia College	Cook
11-07-07	Ogle County Extension Service	Ogle
12-17-07	Jackson County Mass Transit District	Jackson



# How to File a FOIA Request

The following are instructions on how to file a FOIA request:

1. To ensure that you preserve all of your rights under the Freedom of Information Act, you should file a written request for documents, known as a Freedom of Information Act Request.
2. Be as specific as possible when identifying the documents you are seeking to obtain. Remember, a public body doesn't have to answer questions under FOIA. The law is designed to allow the public to inspect or receive copies of documents, not to require public bodies to answer questions.
3. Tell the public body whether you want copies or whether you want to examine the records in person. You have the right to do either.
4. You are permitted to ask for a waiver of fees. To do so, you may include the following statement in your written FOIA request: "I request a waiver of all fees for this request." You must include a specific explanation as to why the waiver of fees for the information is in the public interest—and not just your personal interest—and merits a waiver.
5. Include your name, telephone number, address, and e-mail address for contact information.
6. Keep a copy of your FOIA letter.



# FOIA Facts

Here are some critical facts to know when filing a FOIA request:

1. A public body must respond within seven working days (excluding weekends and holidays) to a written FOIA request.
2. A public body may invoke an additional seven working days to respond to a request in limited circumstances.
3. A public body must respond to your request in writing.
4. If a public body denies your entire request or a portion of your request, it must cite the specific section of the law that allows it to withhold the information you are seeking.
5. A public body must inform you of your right to appeal a denial of information by giving you the name of the head of the public body and his or her address to use in filing an appeal.
6. A public body has seven working days to respond in writing to an appeal of a denial. The public body must inform you that you have a right to seek injunctive or declaratory relief in the Circuit Court if the denial of your information is upheld.





# FOIA Assistance from the Office of Attorney General

The Office of the Attorney General can try to help you if a public body has denied or ignored your request for documents under the Freedom of Information Act, 5 ILCS 140. Unlike the Open Meetings Act, the Freedom of Information Act does not contain fines or penalties for violations.

1. To receive assistance, you can send to our office a copy of the FOIA request that you submitted to a public body, with a short explanation of the problems you are experiencing.
2. Your request to us must be made in writing, but it does not need to be lengthy.
3. Tell us:
  - a. The name of the public body involved.
  - b. The date you filed the FOIA request (and provide a copy of your FOIA request).
  - c. Any response that you have received (and provide a copy).
  - d. Whether you have contacted the local State's Attorney for assistance and the status of that request, if any.
  - e. What assistance you seek from our office.
  - f. Your name, address, telephone number, and e-mail, if applicable.
4. Send this information to Public Access Counselor Terry Mutchler at our office in Springfield. Our address is 500 S. Second Street, Springfield, IL 62704.



# FOIA Case Examples

## Examples of Freedom of Information Act (FOIA) Cases

The following are some examples of how the Attorney General's Office has intervened in disputes arising under the Freedom of Information Act (FOIA).

1. A City resident made four FOIA requests to the City over a period of several months. Each request sought the identification of the City's legal counsel. The resident contacted the Office of the Attorney General for assistance. The Office of the Attorney General intervened on behalf of the resident, worked with the City, and the resident received the information.
2. A member of the public contacted the Office of the Attorney General for assistance after filing a FOIA request with the County Sheriff's Department. The Office of the Attorney General wrote to the Department and the information was provided. The resident indicated that, "If I had not learned of your services, I'm sure I would have spent thousands of dollars in attorney fees to obtain this public information."
3. A resident requested copies of recent open meeting minutes from the village clerk. The clerk presented an invoice charging two hours of labor, which the resident paid to receive the documents. After contact from the Office of the Attorney General, counsel for the Village refunded the money.
4. Residents and members of the Board of Education contacted the Office of the Attorney General asking if electronic mail to/from board members was subject to the Freedom of Information Act. The Office of the Attorney General advised the residents and the board that the board members' electronic mail is a public record subject to FOIA, although legitimately exempt information may be redacted with proper explanation to the requestor.
5. A resident contacted the Office of the Attorney General after the City made a partial response to a FOIA request, providing the resident with heavily redacted documents, without offering an explanation for the redactions. The Office of the Attorney General discussed the FOIA requirements with the counsel for the City and counsel for the City responded, "We have rectified the form of our denial in whole/in part communication. We very much appreciate your calling those items to our attention."



# OMA Assistance from the Office of Attorney General

The Office of the Attorney General can help you if you have concerns about a public body's compliance with the Illinois Open Meetings Act, 5 ILCS 120.

The Open Meetings Act provides for both civil and criminal enforcement. Subsection 3 of the Act (5 ILCS 120/3) is the civil enforcement provision. Subsection 3(a) authorizes any person, including the state's attorney of the county in which noncompliance may have occurred, to bring a civil action for the enforcement of the Act within 60 days after a meeting alleged to have been held in violation of the Act, or, if facts concerning the meeting are not discovered within that period, within 60 days of the discovery of a violation by the appropriate state's attorney. The provision also authorizes members of the general public to institute enforcement proceedings under the Act.

1. To receive assistance, you can send to our office a copy of your OMA concerns with a short explanation of the problems you are experiencing.
2. Your request to the Attorney General must be made in writing, but it does not need to be lengthy.
3. Tell us:
  - a. The name of the public body involved.
  - b. The date of the alleged violation of the Open Meetings Act.
  - c. Whether you have contacted the public body.
  - d. Indicate if you have contacted the local state's attorney for assistance and the status of that request, if any.
  - e. What assistance you seek from our office.
  - f. Include your name, address, telephone number, and e-mail address, if available.
4. Send this information to Public Access Counselor Terry Mutchler at our office in Springfield. Our address is 500 S. Second Street, Springfield, IL 62704.



# OMA Case Examples

## Examples of Open Meetings Act (OMA) Cases

The following are some examples of how the Attorney General's Office has intervened in disputes arising under the Open Meetings Act (OMA).

1. A resident complained that the Village regularly failed to keep verbatim records of its executive sessions and to review its closed session minutes. The Office of the Attorney General wrote to the Village, explaining that the law requires verbatim records and the review of minutes. The Village agreed to corrective measures, including implementing a recording back-up policy, immediately reviewing its past closed meeting minutes, and reviewing executive session minutes on a monthly basis.
2. A complaint came into the Office of the Attorney General alleging that the Township Library Board failed to post a notice and/or an agenda of its meetings. The board asked for assistance and the Office of the Attorney General provided a formal Open Meetings Act training to the board.
3. A member of the Board of Education inquired as to whether the board had discussed improper topics behind closed doors. The Office of the Attorney General determined that the board had violated the Act by discussing in closed session matters that were not authorized for closed session under the Act. As a corrective measure, the board agreed to release the minutes of the closed session, as well as undergo training to avoid future violations.
4. A member of the City Council complained that the council held its meetings in a space that was not large enough to accommodate or provide adequate visibility or audibility to the public. After reviewing the issue, the Office of the Attorney General determined that the meeting facility in question generally provided reasonable access to the public. The Office of the Attorney General also provided examples to the board of possible instances where moving its meetings to a larger venue might be required under the Act.
5. A resident complained that in an open session of the Village Board, the mayor ordered that the resident's video recorder be turned off. The Office of the Attorney General informed the board that the Act prohibits this kind of action. The Office also advised the board that while a public body may make reasonable rules of order governing recording, it cannot make such rules on the spot. The Office of the Attorney General then worked with Village counsel in preparing formal board rules and regulations for recordings.



# Frequently Asked Questions

**Q. Can a public body charge me photocopying fees under FOIA?**

**A. Yes.** A public body may charge fees reasonably calculated to reimburse its actual cost for reproduction and certification of public records and for the use by any person of the equipment of the public body to copy records. The fees cannot include the costs of any search for and review of the records, and cannot exceed the actual cost of reproduction and certification, unless otherwise provided by State statute. In general, the fees must be imposed according to a standard scale of fees, established and made public by the body imposing them. The Office of the Attorney General charges 15 cents per page for documents in excess of 30 pages.

**Q. Can a public body charge me to research my request for information?**

**A. No.** The Act specifically states that the cost shall exclude the cost of searching for and reviewing the records.

**Q. Does a public body have to honor a "standing request" for information asking that the public body forward certain reports, such as accident reports, each month, under the Act?**

**A. No.** A person cannot request that at regular intervals, such as each month, the public body provide copies of particular reports, such as accident reports. The public body is required to respond, however, to each individual request.

**Q. Are office telephone records of members of a public body considered public records?**

**A. Yes.** The office telephone records of a member of a public body are considered public records under the Act. However, certain exemptions may permit a withholding of these records under section 7 of the Act.



**Q.** Are e-mails of members of a public body considered public records?

**A.** Yes. E-mail records of a member of a public body are public records under the Act. However, certain exemptions may permit a withholding of these records under section 7 of the Act.

**Q.** Are condominium associations subject to the Freedom of Information Act?

**A.** No. The Act only covers public bodies, not private organizations such as a condominium or homeowners association.



# FOIA Quiz

1. **Is it okay for a public body to respond to a request for information by telephone rather than sending a letter to the requestor?**

**No.** A public body may provide additional assistance by responding to a requestor via telephone, but Illinois law requires that a public body respond to a FOIA request in writing. 5 ILCS140/3(c).

2. **Is a police report a public record available for inspection and copying?**

**Yes.** Police reports are public records subject to any applicable exceptions that might permit a public body to withhold the records or portions of the records. 5 ILCS 140/2(c).

3. **The Freedom of Information Act contains which of the following penalties for violation?**

- o \$1500 fine for each violation
- o \$50 for the second offense
- o No penalties or fines

There are no penalties or fines for violating the Freedom of Information Act.

4. **Is electronic mail subject to the Freedom of Information Act?**

**Yes.** Subsection 2(c) of the Act defines the term "public records" to include all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information, and all other documentary information having been prepared, or having been or being used, received, possessed, or under the control of any public body. The physical characteristics of records are not relevant in classifying them as "public records," because the Act expressly covers all records regardless of their physical form or characteristics. Rather, the most important factor in determining whether a record is a "public record" is whether it has been prepared, or was or is being used, received, possessed, or under the control of any public body. Thus, e-mail goes through the same analysis as any other document and, if no exception applies, the public body should release it.

5. **Is a public body allowed to give the requestor photocopies of documents if the person requests the documents on a CD-ROM?**

**No.** A public body may not elect to furnish records in a different format than requested. *See American Federation of State, County & Municipal Employees, AFL-CIO v. County of Cook*, 136 Ill. 2d 334, 345-47 (1990). When a requesting party asks for a copy of computerized records in electronic format, the public body may not satisfy the request by furnishing a printout of the records.

# OMA Quiz



1. **There are seven members on your board. You and two other members meet at a local restaurant to discuss an issue that is on the agenda for the next board meeting. Have you violated the Open Meetings Act?**

**Yes.** In the absence of a statutorily fixed greater quorum, a gathering of three members of a seven member body constitutes a majority of a quorum of the body, with a quorum being four members. Therefore, three members cannot meet and discuss business of the board unless all of the requirements of the Act have been met.

2. **Four or more members of your seven-member board regularly stop for coffee after board meetings. Members present restrict their discussion to personal matters and do not discuss public business. Does the presence of a majority of your board constitute a meeting regardless of what is discussed?**

**No.** Although a full quorum of the board is present, as long as the members do not discuss business of the board, there is no "meeting" for purposes of the Act.

3. **There are seven members on your board. A member suggests that you restrict your committees to two members to avoid application of the Open Meetings Act. Will the Open Meetings Act apply to your two-member committee meetings?**

**Yes.** For purposes of the Act, subsidiary bodies—such as board committees—are considered to be separate public bodies, and the application of the Act is based upon the number of members of the subsidiary body. Thus, creating two-member committees will not avoid the application of the Act.

4. **Four members of your board are having coffee as in question two. A board member brings up a problem concerning an employee, and the rest of the board members present begin to discuss the employee's actions and whether he should be dismissed. You ask whether the board should be discussing dismissal of the employee out of the public view. The board member who brought up the issue tells you that personnel matters may be discussed in a closed meeting under an exception to the Act and, in addition, the board is not voting on the issue, only discussing it. The board continues its discussion but does not reach agreement on dismissing the employee. Did the board violate the Open Meetings Act?**

**Yes.** To properly convene and hold a closed meeting, a public body must take a record vote in an open meeting. Further, the Act applies not only to discussions concerning taking action but also to deliberative discussions generally.





5. Your board is considering a number of candidates for a new administration position. A properly closed meeting is conducted and the board reaches a consensus on the best candidate. During the closed meeting, a member suggests that the board go ahead and vote on the candidate so that he can get started with several pressing projects. The board, by unanimous vote, takes action in the closed meeting to hire the administrator. At the next regular meeting of the board, the chairman announces that an administrator has been hired by the board and is at work. During the portion of the meeting set aside for public comment, a reporter for the local paper questions the hiring of the administrator in a closed meeting. Is she correct?

**Yes.** Under the Act, public bodies cannot take final action in a closed meeting. If a lawsuit was filed to challenge this action, a court could declare the decision to hire null and void.

6. Your board meets to elect a new chairman. Three members are in contention for the chairmanship. It is suggested that, to avoid embarrassment or hard feelings, the board should select the new chairman by secret ballot. Is this permissible?

**No.** Public bodies cannot take action by secret ballot.

7. You are selected as chairman of the finance committee. Meetings are held on the first Monday of every month at 7:00 p.m. Special meetings are held occasionally. Your secretary calls to remind all members and puts up a notice on the door of the boardroom by noon on meeting days. Are you in compliance with the Act?

**No.** In general, the Act requires public bodies (including committees) to post a notice and an agenda at least 48 hours in advance of both regular and special meetings.

8. The press of business forces the division of the finance committee into two subcommittees. You tell your subcommittee chairmen not to worry about keeping minutes. Have you given the correct advice?

**No.** The law requires all public bodies (including committees and subcommittees) to keep minutes of their meetings and to make an audio or video recording of the proceedings of a body during a closed meeting.



9. **Your board conducted a series of properly closed meetings concerning dismissal of an employee. The employee was terminated. Two years later, a reporter for the local newspaper asks to examine the minutes of those meetings, arguing that since the entire matter has been settled, the minutes should be made public. Is he correct?**

Minutes of a closed meeting may be made available to the public (including the media) only if the public body determines that confidentiality is no longer necessary to protect the public interest or the privacy of an individual. Therefore, it is within the discretion of the public body to determine whether to release the records.

10. **Your board properly closes a portion of a meeting to discuss a complaint lodged against an employee. In accordance with the requirements of the Open Meetings Act, you are making a verbatim audiotape recording of the meeting. The clerk asks whether it is also necessary to prepare minutes of the meeting. You advise her that minutes are necessary, even when a meeting is recorded. Are you correct?**

**Yes.** The Act requires public bodies to keep minutes of all meetings, whether open or closed to the public. The verbatim record does not take the place of minutes.

11. **An important vote will be held at this evening's meeting of your county board. Two of the board members are unavailable to attend. One is on vacation in Arizona and the other is out of town on business. Your board has not adopted procedures authorizing electronic attendance. Both members offer to attend telephonically. Is this permissible?**

**No.** Electronic attendance may be permitted only if the public body has adopted rules authorizing it. Further, a member may participate electronically only if his or her absence falls within one of three categories: (a) personal illness or disability; (b) employment purposes or the business of the public body; or (c) family or other emergency. Absence due to a vacation is not a permitted category, although absence due to business is a permitted category.

12. **Over the course of two days, three members of your seven-member county board engage in an exchange of e-mails concerning whether to offer benefits to help bring a proposed industrial development to your county. No consensus is reached. Have the three members violated the Act?**

**Maybe.** The definition of "meeting" now expressly includes gatherings by electronic means (including e-mail) and "other forms of contemporaneous interactive communication." What constitutes a "contemporaneous" communication, with respect to e-mails, has yet to be determined.



# The Public Access and Opinions Division

## Attorneys

**Michael Luke** is a Senior Assistant Attorney General. He is a graduate of the University of Illinois (A.B. History, 1974; J.D., 1978). He served for two years as an Assistant State's Attorney in Piatt County, Illinois, before joining the Attorney General's staff in 1980. He currently serves as the Chief of the Public Access and Opinions Division, as well as Chief of the Land Acquisition Bureau, in the Office of the Attorney General. Mr. Luke is a frequent speaker on issues relating to State and local government law, governmental ethics, and eminent domain.

**Terry Mutchler** serves as Public Access Counselor for the Office of the Attorney General. Prior to joining the Attorney General's office, she was a member of the media law group and appellate practice group in the law firm of Foley & Lardner in Chicago. Ms. Mutchler is a former law clerk for Illinois Supreme Court Justice Benjamin Miller, and she also clerked for the Executive Office of the President during the Clinton Administration with a focus on privacy issues. Before becoming a lawyer, Ms. Mutchler was an investigative journalist for the Associated Press covering politics in Pennsylvania, New Jersey, Illinois, and Alaska. She later served as a spokeswoman and senior advisor for the late Illinois Minority Whip, Senator Penny Severns.

**Heather V. Kimmons** is an Assistant Attorney General serving as Assistant Public Access Counselor. Prior to joining the Office of the Attorney General in August 2007, she was an associate at the Decatur law firm of Johnson, Waller & Chiligris, where she also served as a guardian ad litem in the Sixth Judicial Circuit. Ms. Kimmons is also licensed to practice law in the state of Indiana, where she was in private practice with the Indianapolis law firm of Cohen & Malad, P.C., for seven years prior to returning to Illinois. She earned her law degree from Indiana University-Indianapolis, cum laude, and her undergraduate degree in journalism, cum laude, from the University of Illinois in Urbana-Champaign.

## Support Staff

**Jacqueline Pryor** is a paralegal with 17 years of experience in the Office of the Attorney General. She conducts research and handles issues related to the Freedom of Information Act and the Open Meetings Act within the Division.

**Delores Herren** is a legal secretary with 13 years of experience in state government, including three years with the Office of the Attorney General.