

# HONEST & OPEN GOVERNMENT UPDATE



## FOIA & OMA Updates

By David Livingstone  
Assistant Madison County State's Attorney serving as Chief of the Civil Division

Since our last update on the Illinois Open Meetings Act (OMA) (5 ILCS 120/) and the Illinois Freedom of Information Act (FOIA) (5 ILCS 140/), there have been at least two binding opinions from the Public Access Counselor (PAC): one concerning OMA and one concerning FOIA. New legislation amending the OMA and FOIA will also be covered. Should you endeavor to read any of the binding PAC opinions, the new Public Access Counselor website address is: <https://foiapac.ilag.gov/>.

### OPEN MEETINGS ACT

#### PUBLIC COMMENT LIMITATION RESTRICTIONS

In **23-013**, a citizen spoke to a school district board during public comment. When her comments turned to the district's hiring policy, the Board President interrupted before she could finish speaking and advised her that she could not comment on personnel matters. The citizen left the podium and submitted a request for review with the PAC. The PAC asked the school district for its public comment policy. The policy provided by the District did place a restriction on "personnel matters" as a limitation on the scope of public comment. As such, such a restriction was improper, and the PAC found the District in violation of the OMA. The PAC flirted with the possibility that such a restriction, even if it was present in the policy, would have been an inappropriate content-based speech restriction implicated First Amendment

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concerns, but it did not go very far in that analysis. The takeaway here is to ensure your public comment rules are clear and to strongly consider avoiding most "content-based restrictions" on speech (that is, limiting what people may speak about).

#### OPEN MEETINGS ACT LEGISLATIVE AMENDMENT REGARDING REMOTE ATTENDANCE

Public Act 103-311 was made effective on July 28, 2023. This law amended Section 7(a) of OMA allowing a new reason for board members to be physically absent but remotely present. Now, board members may be physically absent due "unexpected childcare obligations," in addition to personal illness or disability, employment purposes or business of the District, or a family or other emergency. Remember: in order to take advantage of Section 7(a), a quorum must be physically present, and it must vote to allow the physically absent member to join the meeting and participate. Districts must also have a remote attendance policy adopted as a prerequisite to taking advantage of Section 7(a), and, with this new amendment, Districts are encouraged to amend their Remote Attendance policy to include it.

#### MEETING NOTICE VIEWABLE FROM OUTSIDE THE BUILDING

In a non-binding opinion (2023 PAC 75604) the PAC said that a committee did not violate OMA when it did not post its agenda on the public body's website because that requirement of the Act applies only to the *governing body* of the public body, and not necessarily its committees (see also 2023 PAC 76681). However, the PAC also determined that the committee's physically posted agenda was not in line with OMA's requirements. The agenda must be "continuously available" to the public for the entire 48 hours before the meeting. According to the PAC, this means it must be posted outside of the building so it can be accessed when the building is closed. Note, though, that posting on the public body's website will satisfy the requirement for continuous posting (Section 2.02(c) of OMA). *Interestingly*, too, the PAC questioned, but did not come to a determination, whether a scrolling screen containing the agenda posted outside of the building satisfied the requirement since it would not be "continuously available" due to the screen's scrolling to different documents from time to time.

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## Honest & Open Government

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### FREEDOM OF INFORMATION ACT

#### DUTY TO RESPOND TO FOIA REQUESTS

23-012 is the fourth binding opinion of the year that addresses the most frequently disregarded requirement of the Act: that public bodies must respond to FOIA requests within five (5) business days of the request with a disclosure, whole or partial denial, or a proper extension.

#### FOIA DENIAL NOT IN BAD FAITH

I'll focus only on one particular aspect of *Thomas v. County of Cook*, 2023 IL App (1st) 211656-U, rather than belabor all of the facts. A requestor wanted postmortem photographs and autopsy photographs. The County denied most of

the requests claiming disclosure would constitute an "unwarranted invasion of personal privacy" under Section 7(1)(c) of FOIA and in reliance of PAC Opinion 10-003 in support of its denial. The trial court ultimately ordered the public body disclose some of the withheld records, but it specifically found that the public body's denial was not in bad faith because it relied on a PAC opinion that determined family members of a decedent have a privacy interest in keeping postmortem photographs from being released to the public. The takeaway here is that Courts may, like the one in this case, recognize and respect a public body's reliance on PAC Opinion authority when analyzing FOIA requests, so our review, study, and use of them as guidance is good.

#### LEGISLATIVE AMENDMENT EXEMPTING PROTECTED HEALTH INFORMATION

Public Act 103-554's amendments to FOIA will be effective January 1, 2024. They will expand the definition of "private information" in Section 2(c-5) for HIPAA-covered entities to include electronic medical records and protected health information as defined by the Health Insurance Portability and Accountability Act. It also adds subsection 7.5(pp) to exempt protected health information. Covered entity public bodies, before this amendment, are/were still authorized to exempt this information from disclosure – the proper exemption citation is Section 7(1)(a) which excludes information prohibited from disclosure by federal laws, including HIPAA. ■



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