HONEST & OPEN GOVERNMENT UPDATE

Open Meetings and Freedom of Information Acts

By David Livingstone
Attorney at Law

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 has been *a lot* of activity from the Public Access Counselor (PAC) and the courts. There has been 1 binding opinion on the OMA, there have been 2 relevant PAC opinions interpreting the FOIA, and 1 important Supreme Court case interpreting the FOIA.

***About the Author*: David Livingstone** *received his undergraduate degree in Criminal Justice, Political Science, and Public Administration from Lindenwood University in St. Charles, Missouri. He is a 2016 graduate of St. Louis University School of Law, concentrating in Civil Litigation. And he is now an associate attorney at Stobbs, Sinclair & Associates, in Alton, Illinois, where he serves and represents individuals in assorted legal matters, local small businesses and various local units of government, including fire protection districts.*

OPEN MEETINGS ACT

In **19-012**, a request for review was filed by a citizen alleging a City Council failed to identify on the meeting's agenda an ordinance the City Council acted upon at the meeting. The agenda included "Consider and act on an Ordinance 19-11 to Amend Section 33-4-4(F)." The citizen contended that this was an insufficient identification of the ordinance because every other agenda item was very descriptive, and this particular amendment, he assumed, intended to increase permit fees and the City was to conceal it. The City contended that the agenda item was sufficient notice because a member of the public could have determined the general subject matter of the ordinance by reviewing the version of the City Code posted on the City's website. The OMA section at issue is 2.02(c) which provides that the general subject matter of an item subject to final action must be specifically set forth on the meeting's agenda. The PAC acknowledges that the term "general subject matter" is ambiguous and not defined by the Act. The PAC said the City's argument is misplaced in that the *agenda* must contain a sufficient description of the ordinance to be acted upon and requiring citizens to access the internet to decipher the general subject matter of agenda items frustrates the legislature's intention of Section 2.02(c). Specifically, the PAC said the City must include "application fees for permits" on the agenda to identify the general subject matter of the ordinance acted upon.

FREEDOM OF INFORMATION ACT

In **19-011**, a public body failed to respond to a records request within five business days with a disclosure, denial, or extension pursuant to a proper exception. Additionally, the public body failed to communicate with the Public Access Counselor after a request for review was filed. Another example of a request for review and PAC opinion that could have easily been avoided – always respond to a request within five business days.

19-013 is a particularly interesting opinion. A FOIA request was sent to a City seeking the audio recording from a Committee of the Whole meeting. The City responded by providing a handwritten note by the City's attorney stating that there was no meeting because there was no quorum that everything was "VOID" and there was no need to fulfill the FOIA request. The requested file a request for review. The PAC spoke with the City Clerk who said that an audio recording was taken, but it was deleted after the City received the FOIA request. The PAC said that the recording is a "public record" based upon the Act's definition of the same. More importantly, the PAC said that although the FOIA contains no express record preservation requirement, public bodies have a duty to preserve and furnish responsive records it possesses in response to FOIA requests because, without such a requirement, the destruction of records would lead to an "unjust and absurd result defeating FOIA's purpose of opening governmental records to the light of public scrutiny." The City violated the FOIA by destroying the recording after receiving the FOIA request and not disclosing the same. While the requirements of the Local Records Act were not discussed by the PAC in this opinion, bear in mind that all public bodies are required to keep and maintain

Continued on page 23

Honest & Open Government

Continued from page 22

all records (paper documents, electronic material, almost literally anything) that are created or come into their possession unless otherwise authorized by law or pursuant to a records destruction schedule created by the Local Records Archivist.

Earlier this year, this article reported on ***Rushton v. Department of Corrections*** which, at the time, was a Fourth District Appellate Court case. It made its way up to the Illinois Supreme Court (now cited as 2019 IL 124552) and on December 19, 2019, the state's high court rendered a decision. For a very brief factual background, a prison inmate died as a result of inadequate medical care and a "confidential" settlement agreement with the decedent's estate was reached. A FOIA request for the agreement was submitted. Wexford, the entity providing the medical care for the Dept. of Corrections, only provided a redacted copy of the agreement. In short, the Supreme Court affirmed the appellate court's decision that the unredacted settlement agreement must be disclosed because it was in the possession of a third party with whom the public body contracted to provide a government function (providing medical care to prison inmates) and the agreement directly related to that government function. The dissenting Justice, however, among other things, found it important that the settlement agreement was entered into by Wexford, a private correctional health care company, which is not a public body, and it was not signed *on behalf of* the Dept. of Corrections – only Wexford was a party. Since the agreement was not entered into by or on behalf of a public body, the dissenting justice opined that it was not subject to disclosure. Additionally, no public funds were used to settle the claim with the decedent's estate, and, as we know, one of the FOIA's primary goals is to shed light on the expenditure of public money. While the Justices' respective reasoning is compelling, the overarching takeaway is that public bodies cannot default FOIA disclosure by assigning a government function to third parties. ■

VICTIM ASSISTANCE

SECURING BUILDINGS
MINIMIZING DAMAGE
PROTECTING PEOPLE

Quick action and commitment to the well-being of fire victims has made 1-800-BOARDUP a leader in providing emergency board up services — trusted by firefighters and insurance companies nationwide since 1998.

SERVICES PROVIDED INCLUDE:

- Board up broken and damaged windows and doors
- Patch/tarp openings in roofs
- Stabilize structures to prevent collapse and further damage
- Provide winterization or emergency power/lights
- Protect contents from the elements
- Save belongings for restoration
- Prevent neighborhood children or thieves from entering the property
- Provide on scene relief for victims, families and pets
- Short term and long term resources to vicitims coping with the tragedy

TRUST 1-800-BOARDUP TO PROVIDE EMERGENCY ASSISTANCE IN YOUR NEIGHBORHOOD, 24 HOURS A DAY, 7 DAYS A WEEK.

Servicing Suburban Chicagoland & Quad Cities.

1-800-BOARDUP®
2 6 2 - 7 3 8 7

Securing Buildings • Protecting People • Minimizing Damage • Victim Assistance