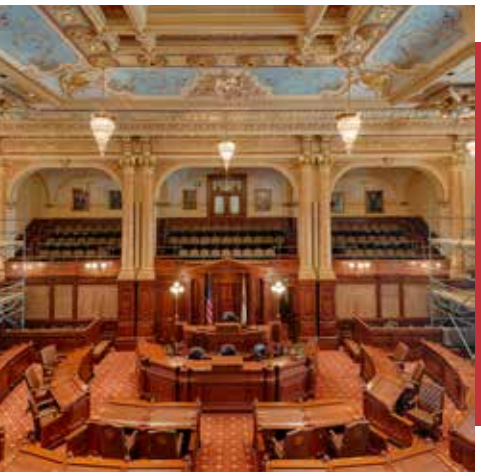
Honest & Open Government Update



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, to start off 2019, one Public Access Counselor (PAC) opinion on the OMA, there have been two PAC opinions interpreting the FOIA, and there have been several cases on the FOIA, but this article will focus on some most applicable to fire protection districts.

OPEN MEETINGS ACT

In **PAC Op. 19-002**, a school district board held a public meeting attended by approximately 100 citizens. The board announced the public comment period would only be 15 minutes in length, and that each citizen-speaker would have 3 minutes to speak. The board contended that these time limitations were used at prior meetings. A citizen filed a request for review challenging the 15-minute overall limitation. The PAC cited Section 2.06(g) of the OMA which allows public bodies to establish rules for public comment. The key word is "establish." Here, while the school board *did* have an established, adopted policy regarding the 3-minute-per-speaker limitation, it *did not* have an established, adopted policy to limit the overall public comment period to 15 minutes. The PAC said the school board could not rely solely on past practice and could not rely on the fact that the limitation was printed in the meeting's "Welcome Handout" – it must have a formally adopted policy to limit the public comment period. Furthermore, the PAC did not say that the 15-minute overall or the 3-minute individual caps were unreasonable, which indicates that they may be appropriate for regular meetings. However, it is important to recognize when discretion should be used to extend the public comment period to afford the attending public sufficient opportunity to address the board. This may be necessary when there is a particularly controversial topic on the agenda.

This is an important opinion on public comment periods. Public comment periods are required for every public meeting held by a public body and should be specifically listed on the meeting's agenda. Rarely is this topic addressed in detail by the PAC. Adopted public comment policies are now required in order for the board to enforce limitations in any manner, and those policies should be clearly posted at the regular meeting location, so all members of the public are on notice of the rules.

FREEDOM OF INFORMATION ACT

PAC Op. 19-001 dealt primarily with law enforcement worn body cameras and the PAC's interpretation of a certain section of the Law Enforcement Officer-Worn Body Camera Act (50 ILCS 706/10-1, *et seq.*). Since this is not entirely applicable to fire protection districts, not a lot of detail will be provided in this article, but, naturally, the PAC ordered disclosure of the body camera footage. To divert from this opinion, however, and briefly discuss firefighter-worn body cameras, there is no present statute like the Body Camera Act that is directly applicable to firefighters. Instead, if a district does choose to utilize body cameras for its firefighters (or even unmanned aerial systems, or "drones"), the FOIA issues involved would be novel. Anything created by the district – an electronic or physical writing, an audio recording, a video recording, etc. – is a record under the FOIA and the Local Records Act. The Local Records Act is concerned with *retention* of the records (when the district would be legally allowed to destroy the record pursuant to a retention schedule). The FOIA implications, however, would be much more complicated. Many things firefighters do, especially if medical services are provided, may involve criminal investigations and/or protected health information. Those circumstances would either render the footage wholly exempt or subject to redaction, and redacting

Continued on page 27

***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.*

Honest & Open Government

Continued from page 26

video footage is much more expensive and time consuming than redacting paper records. No PAC opinion on firefighter-worn body camera footage has yet been rendered, but given the accelerated pace of technological advancement in fire service equipment, it may not be long before one emerges.

In **PAC Op. 19-003**, the PAC issued the same opinion it has offered many, many times before: a public body must respond to a FOIA request within five business days of its receiving the request with a disclosure of records, a proper denial, or a validly taken extension.

In ***Rushton v. Department of Corrections***, 2019 IL App (4th) 180206, a prisoner died from inadequate medical care. Wexford, the company providing medical services to inmates for the Department of Corrections entered into a "confidential" settlement agreement with the deceased prisoner's estate. A FOIA request for a copy of the agreement was submitted. The DOC requested an unredacted copy from Wexford, but it refused and only provided a redacted copy. The requester sued the DOC. Wexford intervened and argued the DOC did not have a copy of the unredacted agreement in its possession, so it could not produce the record. The court held that Wexford's services "directly relate" to a governmental function – the provision of adequate medical care to inmates – and §7(2) of the Act provides that records not in possession of a public body that are in the possession of a party with whom the agency contracts to perform a governmental function on behalf of a public body and that directly relates to the governmental function are public records.

To provide the brief takeaway in ***Blackman v. City of Chicago***, 2018 IL App (1st) 172909-U (this is an unpublished case, meaning it cannot be cited as precedent except in limited circumstances, but for the purposes of this article it is used for informational purposes), the court held that a public body does not have to recreate or reacquire a record it no longer possesses, and does not have to search *every* record system it may have for a certain document. So long as a "reasonably thorough search" is conducted (and the steps taken in the search are documented) the public body will likely have complied with the Act. ■