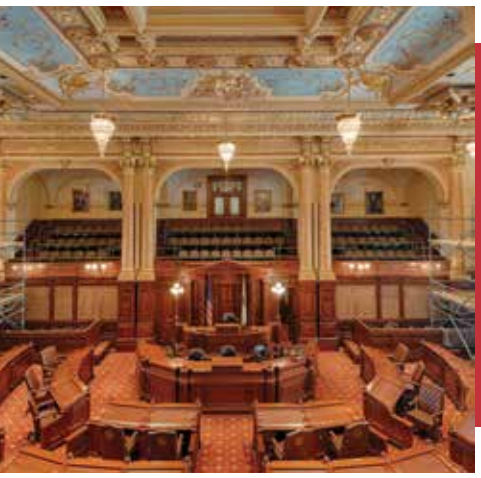
Honest & Open Government Update



New Developments with OMA and FOIA

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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 some of activity from the Public Access Counselor (PAC) and the courts. There has been one binding opinion on the OMA, 2 binding opinions interpreting the FOIA, and several court cases interpreting the FOIA. As a public service announcement: for any newly elected or appointed Trustees, be sure to take Open Meetings Act training required by Section 1.05 of the OMA and provide a copy of your certificate of completion for that training to your District Secretary. Training can be completed online at the Illinois Attorney General's website, *or* it can be obtained through the IAFPD (and I believe this training will be made available during the June conference!) by interactive presentation.

***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. He is now principal in the law firm Stobbs, Sinclair & Livingstone, 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

There has been one PAC binding opinion on the OMA since our last article. PAC Opinion **21-003**, a citizen complained to a City that the City had a sewer main under a parcel of residential property upon which the citizen wanted to build a garage. The City apparently did not have an easement for the sewer main under this property. At some point, the citizen indicated that he may need to bring an attorney to a meeting with the City about the issue. The City met and apparently discussed the matter in closed session based upon Section 2(c)(11) which allows discussion of pending, probably or imminent litigation. The PAC said the City made no finding, during its closed session, that litigation concerning the sewer issues was "probable" or "imminent", and did not record such a finding in its closed session minutes. Even if it had, the PAC said that the communications between the citizen and the City were focused more on resolution than the possibility of litigation. Further the City could not rely on a letter that it sent to the citizen as a basis to say it could have resulted in him taking legal action. Here are some takeaways: (1) make sure litigation is actually possible, in that it is much more than a remote chance of litigation, probable, imminent, or pending, (2) recite the reasons why the litigation is pending, probable or imminent in the closed session recording and minutes, and (3) Section 2(c)(11) does not authorize closed session discussion of an underlying decision or course of action merely because it *could* give rise to litigation at some point.

Freedom of Information Act

In **21-001**, a requester sought grand jury subpoena records from the Chicago Police Department (CPD). The CPD denied the request as unduly burdensome without first conferring with the requester regarding the possibility for the request to be narrowed. The PAC said a public body must first confer with the requester to narrow the request before denying it as unduly burdensome. The PAC also said the CPD failed to provide specific reasons why the request would unduly burden its operation. The takeaway here is to always confer with the requester about narrowing the requester if the "undue burden" exception may be taken, and document that conference in writing. When the "undue burden" exception is taken, document exactly what the burden on the public body may be, but remember that "unduly burdensome" exception is an extremely difficult hurdle to overcome and the law will almost always favor disclosure.

21-002 is a rare binding opinion favoring the public body, and it is not one that is entirely applicable to fire protection districts in content. In this opinion, the PAC said the disclosure of police department records concerning an alleged sexual offense against a minor that did not result in arrest or criminal charges was prohibited by the Privacy of Child Victims of Criminal Sexual Offenses Act, and the disclosure would also be a clearly unwarranted invasion of personal privacy under Section 7(1)(c). For our purposes, the takeaway can be the factors used to weigh the "clearly unwarranted invasion of personal privacy" standard. The disclosure of records may be

Continued on page 23

Honest & Open Government

Continued from page 22

a clearly unwarranted invasion of personal privacy depending on the balancing, or weighing, of the following factors: (1) the requester's interest in disclosure, (2) the public's interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information.

In ***Greer v. Board of Edu.***, 2021 IL App (1st) 200429, a requester sought records regarding racial discrimination allegations between 1999 and 2005. The public body said 28,000 pages of records required review for redaction, and it contended that such review and redaction would take 86 days to complete. The public body first asked the requester to narrow the request, and he declined. The trial court concluded that the request would unduly burden the pubic body. The appellate court, however, reversed the trial court and said that the burden on the public body was a factual issue that needed to be resolved. The appellate court additionally noted that the issues of racial discrimination, even if they were just against one person, are matters of public concern such that their disclosure may outweigh the burden on the public body. This is a rather peculiar result given other case law that suggests this number of records may be undue burden. Depending on how this case develops and progresses, we may be reporting on it again.

In ***Fisher v. Illinois Attorney General***, 2021 IL App (1st) 200225, a requester sent a request to the Attorney General for communications between the Attorney General's office and a company assisting the Attorney General on the logistics of class action proceed distributions. For background, the Attorney General sued cathode ray tube manufacturers alleging a price fixing scheme, and that case was at the point of distributing proceeds to the claimants. The Attorney General hired a consultant to help with that distribution. The Attorney General denied the request, claiming the communications were exempt under the "deliberative process exemption" under Section 7(1)(f). The trial court agreed. The requester appealed, and the appellate court affirmed the trial court. The deliberative process exemption applied because (a) the communications were inter/intra-agency in that the outside consultant was engaged to assist the Attorney General and the consultant performed the same function as the Attorney General had it done the work itself, and (b) the communications were predecisional because they were required for the Attorney General to formulate, adopt, and submit its final settlement plan. This case is important because it shows a successful argument made by the Attorney General itself, and it indicates that other public bodies, should they be in a similar position to use the deliberative process exemption, may be on solid ground to use the exemption in this manner. ■