

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 have been at least five binding opinions from the Public Access Counselor (PAC), and one notable court decision. The Public Access Counselor page of the Illinois Attorney General's website is finally operational. The new website address is: <https://foiapac.ilag.gov/>. According to the website, FOIA and OMA training is now available after registering on the website. Any questions about registering, the training, or the training certificate of completion should be directed to the Illinois Attorney General Public Access Counselor's office. Now that the training is available, those trustees who have not yet completed it should add the task to their list of things to promptly do. Be sure to print a copy of the certificate of completion and file it with your District's secretary.

OPEN MEETINGS ACT

In **22-003**, a citizen alleged a City did not comply with Section 7(e) of the OMA regarding remote meetings. She alleged the City did not provide a Zoom link or telephone number on an agenda notifying the public how to attend the remote meeting – however she received it late by text message after contacting the City. She missed part of the meeting because it was sent late. In response to the PAC, the City said it provided the link to her and she was able to participate in the meeting, and, also, that members of the public were welcome to attend in person. However,

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the City acknowledged there was no link or telephone number on its agenda, but the public could request it. The City also admitted it did not have an audio or video recording of the meeting. The PAC said the meeting was not in compliance with the Act because (1) the agenda was not posted on the public body's website, (2) the agenda lacked access information for the public, and (3) the City did not record the remote meeting. The takeaways here are to (1) be sure to post a remote meeting agenda on your website – for the purposes of Section 7(e), it does not matter if your website is not maintained by full-time staff; (2) always include access information on your agenda, and (3) ensure the meeting is recorded. Follow Section 7(e) to the letter.

In **Pal v. City of Elmhurst**, 2022 IL App (2d) 210048-U, the plaintiff alleged the city council held an improper closed session because the city engaged in "generalized discussions" about the retirement of an official and the filling of that soon-to-be-vacant position. The plaintiff also alleged FOIA violations, because the city did not turn over recordings from the closed session. On the trial court's review of the closed session recording, it determined the entire discussion was subject to closed session, and it dismissed the plaintiff's complaint entirely. The appellate court found no error in the trial court's ruling and affirmed the decision. There was

another interesting set of facts in this case which ended up being moot according to the appellate court. Apparently the City inadvertently posted its closed session minutes from that meeting on its website and the plaintiff obtained them. The City argued the plaintiff knew the City had not voted to make them public, so the plaintiff "invaded" the City's privilege and could not use them against the City in the litigation. Again, since the trial court dismissed the complaint, the argument was moot.

FREEDOM OF INFORMATION ACT

In **22-001**, a requestor sought reports prepared and supplied by the County State's Attorney to the County Board about the use of county funds. The FOIA request was denied based upon Section 7(1)(m)'s exemption for confidential attorney-client privileged communications. The requestor alleged the State's Attorney was not acting as a legal advisor, but, rather, was providing public relations advice to help address alleged misuse of funds. Section 7(1)(m), and attorney-client privilege, applies (1) where legal advice of any kind is sought, (2) from a professional legal advisor in such capacity, (3) the communications relate to that purpose, (4) made in confidence, (5) by the client, (6) are permanently protected,

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(7) from disclosure by the client or the legal advisor, (8) except if the privilege is waived. Based on the PAC's review of the records provided to it for review, the records were confidential attorney-client privilege under Section 7(1)(m) because the documents reflected the substance of the attorney's opinions and legal advice concerning the underlying matter, they did not devise a public relations strategy or contain advice about how to frame its findings to the public, and there was no indication the privilege was waived.

In **22-002**, a requestor requested a document concerning a report, including all supplements and handwritten notes, from a village police department. The Department denied the request pursuant to Section 7(1)(d)(vii) on the grounds that disclosure would interfere with or obstruct an ongoing investigation. The PAC said that the Department did not show that there was an active administrative enforcement proceeding or investigation ongoing (the Department said in its response "...to the extent any investigation is ongoing..." the records would be exempt), and that it also failed to explain how or why the disclosure of the records would obstruct an ongoing investigation. The takeaway here is to ensure you are explaining the *why* of your denial.

In **22-004**, a requestor requested a copy of an email sent by an outgoing village police chief to staff on his department email account. The Village denied the request pursuant to Section 7(1)(c) [unwarranted invasion of personal privacy exemption] stating the email was "very personal; the Chief's last heartfelt message to his team upon his retirement," but the Village later amended its response providing parts of the email with other parts redacted. After the requestor appealed to the PAC, the Village additionally contended that the record was exempt under Section 7(1)(f) [deliberative process exemption] and, too, that the record was not a public record because it was personal and did not have a "substantial nexus" to public business. The PAC said that although the email contained personal opinions, it was a public record because the comment directly related to police department policies and procedure

and conduct of Village employees. The PAC said Section 7(1)(c) did not apply because that exemption clearly states that "disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy." The PAC said that 7(1)(f) did not apply because the exemption encompasses only predecisional opinions that are exchanged as part of the public body's process of formulating action, and a 'goodbye' email is not part of that process. The takeaway here is that emails sent by public officials concerning public business are, subject to a very limited set of exclusions, disclosable under the Act even if they contain opinions.

PAC Opinion **22-005** contains great analysis on Section 7(1)(c) and complaints against employees. Here, a requestor sought disciplinary records of and complaints against a City employee regarding racial discrimination and harassment. City denied the request pursuant to Section 7(1)(c) [unwarranted invasion of personal privacy] and Section 7(1)(f) [deliberative process exemption]. The PAC because involved and issued a non-binding determination letter directing the City to disclose the records subject to redactions of certain personal and private information. The City did not comply with the non-binding letter. The requestor sent a second FOIA request. The City produced a redacted work history and suspension

notice, and redacted information pursuant to 7(1)(a) and 7(1)(b), and the City advised the requestor it was working on other parts of his request. Weeks later, with no response, the requestor filed a request for review concerning the lack of response. The City responded that it was withholding complaints against the employee pursuant to 7(1)(c) and 7(1)(f). The PAC said the records were not exempt under 7(1)(c). First, there is a significant public interest in claims of racial discrimination, harassment, and other forms of public employee misconduct. Second, the information that bears on the performance of employees' public duties is generally not exempt. Third, disclosure would not be an unwarranted invasion of the accused employee's privacy even if the complaints are determined to be unfounded. Notwithstanding this, however, the PAC said the names and other identifying information of the complainants could be redacted. Fourth, the records are disclosable because there is no alternative means for the requestor to obtain them. With respect to Section 7(1)(f) the PAC said the records were disclosable because the City did not demonstrate that the complaints reveal information that would provide insight into the give-and-take of any decision-making process. ■

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