# Honest & Open Government Update

## OMA, FOIA and EO Developments

*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, and 1 PAC opinion interpreting the FOIA. There was one appellate court case interpreting the FOIA and the redaction of certain information pursuant to the Health Insurance Portability and Accountability Act (HIPAA) and the Illinois Mental Health and Developmental Disabilities Act (Confidentiality Act). The end of this article will also summarize the new revision to the Illinois Open Meetings Act that addresses meetings during a public health emergency, like the COVID-19 pandemic.

***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

In **20-004**, a member of an elementary school council submitted a request for review to determine whether a violation of the OMA occurred when the council, despite her objection to the closed session, went into closed session to discuss "how…to proceed with the principal evaluation for [the] school year." In response to the PAC, the Council advised that closed session was necessary because a discussion regarding changes to the evaluation procedure would inevitably raise discussion of the current principal's performance. The PAC, after reviewing the closed session recording, determined that while approximately 2 minutes of the discussion surrounding the current principal's performance, the bulk of the roughly 30 minutes closed session was dedicated to discussion other matters not appropriate for closed session like the timing and procedure to evaluate a principal. Naturally, the PAC said this was a violation of the OMA. The PAC opined that there is a substantial public interest in determining how a high ranking official will be evaluated. The PAC further reiterated that general discussions regarding categories of employees, rather than specific employees, and discussing the elimination of a position for reasons other than non-performance are improper closed session discussions.

### FREEDOM OF INFORMATION ACT

In **20-003**, a requester sought copies of cannabis cultivation center licensed applications from the Illinois Department of Agriculture (DOA). The DOA provided the applications, but redacted social security numbers, names and dates of birth of the applicants' principal officers and board members, and facility addresses, citing the information as personal information the disclosure of which would be an unwarranted invasion of privacy under Section 7(1)(c) of the FOIA and citing Section 145(a) of the Compassionate Use of Medical Cannabis Program Act (Medical Use Act) that exempts information received from the DOA "for purposes of administering the Act." The PAC said (1) the redaction of the social security numbers was appropriate and (2) the redaction of the dates of birth were appropriate, but (3) the redaction of the names of the principal officers and board members of applicants and facility addresses was not appropriate, because the applications were submitted under the Cannabis Regulation and Tax Act (the new law that legalized cannabis in Illinois) and not the Medical Use Act. The Medical Use Act exemption, therefore, did not apply.

In ***King v. Cook County Health & Hospital Systems***, 2020 IL App (1st) 190925, a requester sought certain records of a hospital system that happened to contain zip codes of patients that received mental health treatment while detained at the Cook County Jail. The hospital produced some records, but it redacted the zip codes citing Sections 7(1)(a), exempting information prohibited from disclosure by state or federal law, and 7(1)(b), exempting private information from disclosure. The requester filed a request for review with

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the PAC. The PAC issued an advisory opinion which directed the hospital to disclose the responsive information, however the PAC acknowledged that any information identifying the individuals should be redacted. The hospital did not disclose the zip codes and the requester sued. The hospital cited HIPAA and the Confidentiality Act as a federal and state laws that prohibit the disclosure of zip codes as they related to medical and mental health records. Ultimately, the Appellate Court agreed with the hospital and concluded that HIPAA and the Confidentiality Act, when read together with the FOIA, required zip codes in mental health records to be "de-identified", or redacted.

## OPEN MEETINGS ACT REVISIONS BY LEGISLATURE

On June 12, 2020, Governor Pritzker signed Senate Bill 2135 into law which amended the OMA to add Section 7(e) to the Act. (5 ILCS 120/7(e)). The new subsection allows units of local government to meet remotely and without a physical quorum present during a public health emergency so long as the following steps are taken or requirements are met:

1. The Illinois Governor or Director of IDPH must have issued a disaster declaration related to public health concerns because of a disaster defined in Section 4 of the Illinois Emergency Management Agency Act, and all or part of the jurisdiction of the public body is covered by the disaster area. The Gubernatorial Disaster Declaration for COVID-19 should satisfy this requirement.
    a. **The Gubernatorial Disaster Declaration of June 26, 2020 extends for thirty days. Therefore, the provisions of Section 7(e) of the OMA will be available until July 27, 2020, unless the Governor extends again the Disaster Declaration or IDPH issues a disaster declaration.**
2. The President of the Board of Trustees must determine that an in-person meeting would not be prudent or practical because of the disaster. This should be reflected in the minutes of the meeting that is held pursuant to this subsection. The new law does not require the Board of Trustees to vote to approve the President's determination.
3. As has been the practice throughout the COVID-19 era, meetings must still be preceded by an agenda, physically posted at the meeting's location, and posted on the unit of local government's website. **Important Note**: the amendment does not limit this to units of local government whose website is regularly maintained by full-time staff. Therefore, the most conservative approach is to post all agendas of remotely-held meetings on a District's website (if it has one), even if not regularly maintained by full-time staff. That agenda must include the instructions for remote participation by the public. This means the telephone or video conference access information must be clearly noted on the agenda.
4. All public body Board members present must be verified, and they must be able to hear everything in the call. The verification of Trustees and confirmation that they can hear everything in the electronic meeting should be included in the minutes.
5. All citizens in attendance must be able to hear and listen to the meeting, except for closed sessions.
6. This is a new requirement, but one that has been suggested during the pandemic: At least *one* member of the Board, chief legal counsel, or a "chief administrative officer" (like a Fire Chief), must be physically present at the regular meeting location, unless that presence is physically unfeasible due to the disaster. Note there is no definition of "unfeasible" in the amendment to the Act.
7. There is another new requirement: All votes must be conducted by roll call, so each member's vote on each issue can be identified and recorded. Be sure to record each vote in the meeting's minutes.
8. There is another new requirement: **A verbatim record of all telephone or video conference meetings must be kept.** This is the same requirement for closed sessions, but it is now being applied to all remotely-held open meetings. Some video conferencing services offer the option to record a meeting through their software. Be sure to investigate and practice this – many will only offer a certain amount of storage space before charging an additional fee. Alternatively, the meeting may be recorded the "old-fashioned" way using a tape recorder or other recording device, so long as the discussion can be heard in the recording afterwards. These recordings (except closed session recordings) will be subject to the Freedom of Information Act and the Local Records Act.
9. Finally: All costs associated with the remotely held meetings will be at the expense of the public body.

Bear in mind that, as stated above, the usual agenda requirements, minutes requirements, and public comment requirements are still in place. The public will still need to be afforded the opportunity to comment during a meeting. Additionally, continue to abide by social distancing guidelines. This is intended to be a simply summary of the new requirements, so be sure to refer to your legal counsel for specific questions and more information to ensure your remote meeting is conducted properly.

## GOVERNOR'S EXECUTIVE ORDER 2020-44 (COVID-19 E.O. No. 42)

On June 26, 2020, the Governor issued a new Gubernatorial Disaster Proclamation, noted above, extending the public health emergency disaster to July 27, 2020. By the time this article is published, this will have either been extended, expired or otherwise modified. In his E.O. 2020-44, the Governor appears to have, on this author's reading of the

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Proclamation and Executive Order, muddied the waters regarding the Open Meetings Act and public body meetings, and, to some extent, the contents are unclear.

At this time, the best that can be gleaned from it are for public bodies with attendance of less than 50 people to continue their in-person meetings. Additionally, all units of government must afford attendees the ability to have video, audio, or telephone access to meetings, regardless of whether the meeting is held remotely or in-person. Finally, the Governor now appears to require all units of government to update their website and social media pages, regardless of whether they are regularly maintained by full-time staff, with meeting modifications due to COVID-19, "as well as their activities related to COVID-19." These appear to go beyond the existing statutory provisions, but it is the present interpretation of the Proclamation and Executive Order, and there may be a future, different interpretation by the Governor or Attorney General that will modify this, or it may no longer be an issue by the time this article is published. In any event, contact your legal counsel for further guidance. ■