Honest & Open Government Update

FOIA & OMA Updates

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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 two binding opinions from the Public Access Counselor (PAC), and considerable case law concerning FOIA, but very little with respect to OMA. Should you endeavor to read any of the binding PAC opinions, the new Public Access Counselor 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.

***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 have been no PAC opinions and little pertinent case law on OMA since our last update. So this portion of the article is not lacking content, I want to briefly discuss special meetings and their agendas, because this issue comes up from time to time. The basic rule is that a Board can discuss anything at a regular meeting even if it is not specifically set forth on the agenda, but the Board cannot take final action on anything unless the general subject matter of the item is set forth on the agenda. For special meetings, I have regularly represented to Districts and others that a Board cannot discuss something, let alone take final action, unless its general subject matter is specifically set forth on the agenda. This rule is laid out in 2014 PAC 32604, a non-binding determination letter. Although it is only a determination letter, we look to these letters for guidance on how the PAC will rule on a specific question or issue.

5 ILCS 120/2.02(a) provides, "[t]he requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda." This provision does not reference special meetings, and the PAC found it evident that the legislature was intentionally silent as to special meetings. For your latin phrase of the day: *expressio unius est exclusio alterius*, which means "to express or include one this implies the exclusion of the other, or of the alternative". In other words, since the statute does not specify that items not set forth on a special meeting agenda can be considered, then items not specified on a special meeting agenda cannot be considered.

The intention of the exclusion makes sense. Every public body must post its regular meeting schedule, and, because of that, it can be presumed that members of the public know when the Board will regularly meet, they know to check the fire house window or bulletin board at least 48 hours before the meeting for the agenda, and they know the Board will meet to discuss District business. However, special meetings can come up on as little as 48-hours' notice, and members of the public do not always know to check the fire house every day or every other day for agendas. Allowing Boards to discuss matters not specifically listed on a special meeting agenda could lead to abuse and tarnish the tenet of transparency. I'll note, quickly, that this rule would not apply to members of the public during public comment – the public can talk about whatever they want during the public comment period and the content may not be limited expressly to items on the agenda.

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FREEDOM OF INFORMATION ACT

In **22-013**, a requestor requested emails from a city police department. The City supplied certain records, but withheld a letter from a private attorney that was sent on behalf of a client initially pursuant to Section 7(1)(a) of the FOIA (that is, information prohibited from disclosure by federal or state law), and later pursuant to Section 7(1)(f) (that is, the "deliberative process" exemption). The City asserted that both federal and state rules of evidence prohibit the disclosure of settlement negotiations. The PAC first issued a non-binding determination directing the department to disclose the letter. The City replied and refused to comply on the grounds that "producing the materials requested would eviscerate the City's ability to litigate and negotiate cases and would not serve any public interest." The requestor submitted a second request seeking basically the same information, and the City denied disclosure again. As a preliminary matter, the PAC said the City could not establish the letter was related to settlement negotiations because the letter did not propose or demand a settlement to resolve a dispute. With respect to relationship between Section 7(1)(a) and evidentiary rules, the PAC acknowledged that federal and state evidentiary rules do provide that documents related to settlement negotiations are generally inadmissible as evidence at trial. However, the inadmissibility of these document as evidence at trial, the PAC intimated, is unrelated to their disclosure pursuant to FOIA. Finally, the PAC said that the City failed to demonstrate that the letter revealed or was a part of the City's deliberative process regarding a settlement.

In **22-014**, a requester requested from a County State's Attorney's Office invoices for legal services from an outside law firm involved in a specific case. The County took a five date extension to reply. The County thereafter did not respond to the request, and continued to not respond despite several communications from the PAC. This is another opinion where the PAC said a public body must respond within 5 business days following the receipt of the request with a disclosure, denial or partial denial, or proper extension.

Interestingly, in **2022 PAC 73336**, a non-binding determination letter, the PAC opined that a group of individuals submitting FOIA requests and apparently colluding to determine who would submit requests for certain records can be considered a "person" under 5 ILCS 140/2(b), and, as such, successive requests from such a group of individuals might categorize the requests as "repeated requests".

Chi. Sun-Times v. Cook Cnty. Health & Hosps. Sys., 2022 IL 127519, is an important and recent Illinois Supreme Court case addressing FOIA requests for potentially HIPAA protected information. A requestor sought records from a hospital pertaining to the dates and times of 'walk-in' gunshot victims and the subsequent reports of those cases to law enforcement. The hospital denied the request (1) pursuant to Section 7(1)(a) as the disclosure of private health information is prohibited by HIPAA, and (2) pursuant to 7(1)(b) as the records, even with redactions, still constitute "medical records" of individuals which are included in the definition of 'unique identifiers.' Without getting deep into the procedural history, the ultimate takeaways are: so long as private health information is redacted, the remaining non-exempt portion of the records can be produced, and the year of the patient records and law enforcement reports is not necessarily protected by HIPAA.

Although not necessarily specific to fire protection districts, ***Ballew v. Chicago Police Dept.***, 2022 IL App (1st) 210715, is an example of the proper use of Section 7(1)(d)(i) and 7(1)(d)(vii) regarding records exempt due to an ongoing investigation. In this case, a requestor wanted all department records related to a certain homicide. The department provided a redacted copy of the original incident report, but denied the remainder of the records citing the disclosure would compromise or obstruct the integrity and outcome of the investigation. As part of its denial, the department provided an affidavit of the investigator in charge of overseeing the investigation. The affidavit explained sufficient detail, going beyond mere conclusory statements, supporting the exemption including that the disclosure of records would jeopardize the investigation if techniques or evidence were released, and that premature release of records to the public would make the investigators' determination of the veracity of subsequent witnesses more difficult. The court said the affidavit was sufficient clear and convincing evidence that the withheld records were exempt. ■