Honest & Open Government Update

Open Meetings and Freedom of Information Acts

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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 *a lot* of activity from the Public Access Counselor (PAC) and the courts. There has been 1 binding opinion on the OMA and 1 new legislative item, there have been 3 PAC opinions interpreting the FOIA, 1 important legislative item, and there have been several cases on the FOIA, but this article focuses on some most applicable to fire protection districts.

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OPEN MEETINGS ACT

In **19-009**, a citizen submitted a request for review alleging a city council refused to let her speak during public comment because she was not a resident of the city. The allegations were not disputed. As expected, the PAC said that there is no requirement that public comment be limited only to residents of the public body, and no such requirement can be imposed by a public body. The PAC determined the city council violated the Act.

On August 26, 2019, the HB2124 became Public Act 101-0459 amending Section 2(c)(1) of the Act to allow public bodies to discuss the appointment, employment, compensation, discipline, performance, or dismissal of "specific volunteers" in closed session.

FREEDOM OF INFORMATION ACT

PAC Op. 19-006 is yet another opinion to add to the ever-growing list of opinions describing a public body's failure to respond to a FOIA request or cooperate with the PAC. A Village received a FOIA request from its police union, and failed to respond within five business days. A request for review was filed. The PAC attempted to contact the Village, and the Village did not respond. Public bodies must take FOIA requests (and correspondence from the PAC) seriously, and must respond to a request within 5 business days of receiving the request with a disclosure, a valid extension of time to respond, or a proper complete or partial denial.

In **PAC Op. 19-007**, a municipality claimed the disclosure of reports submitted by manganese bearing materials operators showing the quantity of manganese handled in their facilities was proprietary information that would result in competitive harm if disclosed. The PAC determined that exemption improper because the information in the reports revealed no information about the companies' revenue, expenditures or customers such that potential competitors would be able to "reverse-engineer" the information to the companies' competitive detriment. In order to claim the proprietary information exemption in Section 7(1)(g), a public body must show that competitive harm would result from the disclosure of records.

In PAC Op. 19-008, a police department was requested to produce records related to two difference cases. The police department redacted the "narrative" portions of the police reports produced and cited a number of exemptions. The police department claimed Section 7(1)(a), which prohibits disclosure of records that are prohibited from disclosure by some other federal or state law, applied. The department said Illinois Supreme Court Rule 415(c), which says any materials furnished to an attorney shall remain in the attorney's exclusive custody for the purposes of conducting his side of the case, was the basis for claiming that exemption section, as the County State's Attorney was using the information to prosecute the cases, and the State's Attorney objected to the records' release. The PAC said, in part, that there was no judicial precedent for the application of Rule 415 to FOIA requests and further said that there is no exemption in the Act on the basis that another public body objects to disclosure. The department claimed Section 7(1)(b) exempted disclosure as some unique identifiers were present in the narratives. The PAC agreed that some information, like home addresses,

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telephone numbers, and license plate numbers were appropriately redacted, but the other information redacted was not a "unique identifier" under the Act. The department further claimed the release of the records would be an "unwarranted invasion of personal privacy" under 7(1)(c). The PAC said that the department did not provide a detailed factual basis to support the exemption and did not show that privacy outweighed the public's legitimate interest in the information, however birth dates and identities of criminal suspects not yet arrested or charged would constitute a clearly unwarranted invasion of personal privacy. The department claimed 7(1)(d)(iii) applied because the release of the records would taint a jury and would deprive the defendants of a fair trial. The PAC said that the FOIA request was submitted just days after the arrest, and there was no indication that a trial was pending or truly imminent. Furthermore, the PAC said the department did not set forth facts proving that the disclosure would deprive the defendant of a fair trial. Finally, the department claimed the release of records would disclose the identity of a confidential witness. The PAC did allow the redaction of witness names and information that would identify undercover officers, but said the remainder of the information in the narrative did not fall within this exemption.

In ***Barner v. Fairburn***, 2019 IL App (3d) 180742, a requester sought an incident report and actual dispatch radio communication related to an incident occurring roughly three years prior from a police department. Within the five business days to respond, the Department's FOIA officer granted the request in part, by providing the incident report, but denied the request in part, not supplying the actual dispatch radio communication, because the Department no longer retained the radio communication – they were properly deleted after "a few months." The requester sued, claiming the Department failed to provide specific reasons for the denial. The Department contended the lack of records was a valid defense, and no additional explanation was necessary. The trial court agreed and dismissed the requester's complaint. The requester appealed, and the appellate court agreed with the trial court. The appellate court reasoned that (a) the FOIA officer did search for all records and found no responsive recorded radio communication, and (b) since the absence of records is not an "exemption", a detailed factual basis for the denial was not required. The takeaway is, understandably: if the public body does not possess the records, then no records can possibly be produced and no further explanation is required. Of course, this is subject to other PAC and court opinions that cover the retention of records by a third party, and this would assume that, the records, if destroyed, were destroyed properly.

On August 20, 2019, SB1712 became Public Act 101-0434 adding Section 7(1)(kk) which now exempts from disclosure a public body's credit and debit card numbers, bank account numbers, Federal Employer Identification Numbers, security code numbers, passwords, and other account information that could result in identity theft or defrauding of the public body or a person. ■