

HONEST & OPEN GOVERNMENT UPDATE



OMA, FOIA and EO Developments

By David Livingstone
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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 activity from the Public Access Counselor (PAC) and the courts. There has been no binding opinions on the OMA, but there has been a relevant advisory opinions, and 2 PAC opinions interpreting the FOIA, and one relevant advisory opinion. There were some appellate court cases interpreting the FOIA and the issue of use of personal email accounts and devices.

OPEN MEETINGS ACT

There have been no PAC binding opinions on the OMA since the last article. There have, however, been some relevant advisory opinions. Remember: advisory opinions are not the law, but they are used as a helpful guide for interpreting the OMA.

In **2020 PAC 62981**, an individual filed a request for review with the PAC complaining that the Chicago City Council gathered by video/audio conference in violation of the OMA on four separate occasions. He alleged that at least a majority of a quorum of the Council met without providing any notice to the public and without the public having access to the meetings. The Council characterized the gatherings as “briefings” and argued that the OMA did not apply because the aldermen did not participate in the meetings in any “legislative” capacity – and that they simply participated in the meetings as “community representatives”,

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that no deliberation occurred, and that the matters discussed were not public business. The Council asserted that the gatherings were for the purpose of receiving current and relevant information related to the pandemic to share with their constituents. The PAC said there is no distinction between an alderman as a “community representative” and a legislator. The Council asserted that it did not hold “meetings” under the Act because there was no deliberative discussion or discussion of public business. The PAC said that “discussing public business” is read broadly, and “connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.” Finally, the Council stated that it addressed public safety, economic recovery, housing assistance, and education initiatives already in effect, and that the purpose of the calls was to give aldermen information to answer questions for constituents, but there was no opportunity to substantively discuss the topics and that these subjects were not matters of public business. The PAC said that these subjects were matters of public business and that these gatherings were meetings. Because there was no notice to

the public of these Council meetings, the PAC instructed the Council to make public all summaries of the four meetings.

FREEDOM OF INFORMATION ACT

In **20-005**, a requester sought a copy of squad car footage and emergency dispatch audio concerning a police chase and fatal crash and reports concerning the incident from a Sheriff’s Department. The Sheriff’s Department denied the request on the grounds that disclosure would deprive both the County and a Sheriff’s Deputy a right to a fair trial or impartial adjudication and that disclosure would seriously interfere with the fairness of the proceedings since a jury trial was demanding and the release of the records might taint the jurors. Although the Sheriff’s Department identified a court case that was pending regarding the incident, the PAC said that speculation as to whether a jury pool would be tainted and whether a right to a fair trial or impartial adjudication would be denied is insufficient. The Sheriff’s Department needed to show and explain specific facts how disclosure of the records would deprive the defendants a fair trial.

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In **20-006**, a requester submitted a FOIA request to the Illinois Department of Corrections (DOC) seeking a copy of aggregate data relating to head injuries incurred by inmates during a certain period of time as well as policies related to the DOC's evaluation of inmate head injuries. The DOC replied that it did not maintain or possess the requested policies, and that the company which provides medical care to inmates, Wexford, may and that any policies requester may be considered proprietary and confidential. The DOC did not address whether it might possess records concerning aggregate head injury data. The PAC said, first, that Wexford is an entity contracted to perform a governmental function (that is, provide medical treatment to inmates), and that records related to the governmental function that possessed by the third party but not the public body are still subject to FOIA disclosure. Second, the PAC said that the DOC did not demonstrate that the policies qualify as trade secrets or commercial or financial information, or that disclosure would cause competitive harm to Wexford. As a result, the policies were subject to FOIA disclosure.

In advisory opinion **2020 PAC 63566**, a requester sought a list of all persons or users who were banned or blocked from a Village's social media accounts including Twitter and Facebook. The Village responded that it did not possess the records. The requester submitted a request for review. The Village contended that any records of accounts it blocked on social media were not public records because they were "prepared, maintained, possessed, and controlled by Facebook and Twitter" and not the Village. The Village said that although it can view a list of block accounts, it was never send a list of names by Facebook or Twitter so it never "received" the record, and that the lists were "transitory" in nature and were not permanent copies subject to FOIA disclosure. The PAC disagreed with the Village and said that the lists viewable by the Village on these social media websites were subject to FOIA disclosure because the Village maintains the list, the identification of them as "transitory" is not an exclusion under the Act, and disclosing the list does not require the Village to create a new record.

In **Better Gov't. Assn. v. City of Chicago**, 2020 IL App (1st) 190038, a requester sought records communications between the City's Public Health Commissioner and anyone in the Mayor's office between a particular period of time. While the City provided some records, the requester believed that some records were not provided, including communications from personal email accounts. The City contended that it did not need to search the personal emails accounts of its officials. The Court said that communications related to public business with personal accounts or cell phone numbers and/or on personal devices, sent or received, may be subject to FOIA disclosure and a public body must conduct a reasonable diligent inquiry and search for responsive records. Bear in mind, other state courts outside of the 1st District may not recognize this opinion and binding and that may be persuasive only. ■

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