

# 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 has been at least one binding opinion from the Public Access Counselor (PAC) and a few court opinions. There has been much more FOIA activity than OMA activity, and because the Public Access Counselor page of the Illinois Attorney General's website is still unavailable, at the time this article is written, we may not have completely up-to-date PAC binding opinions. Regardless, we will report on them as we receive them.

### OPEN MEETINGS ACT

In *City of Bloomington v. Raoul*, 2021 IL App (4th) 190539, at a meeting in 2017, the City went into closed session under the litigation exception to discuss the termination of an agreement with the Town of Normal. The Court held that the City's entering into closed session to discuss the potential for litigation should it terminate an agreement was improper because there was no pending litigation involved with this agreement, because the council members did not reasonably believe litigation was probable or imminent, because the City legal counsel said litigation "could be plausible", and other factors including the Mayor's report to the press after the meeting that he doubted the Town would file suit. Additionally, the Court determined that the City did not strictly

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discuss the strategies, legal theories, defenses, claims or possible approaches to litigation, and, instead, strayed off into ancillary issues and topics, and further found that because the Council did not stick to the primary topic of the discussion, it violated the Act. The takeaways are (a) public bodies cannot enter closed session to discuss litigation that might result if it terminates an agreement, and (b) avoid straying off into off-topic matters during closed session.

### FREEDOM OF INFORMATION ACT

In **21-004**, a requester sought communications between a City and a zoning change applicant that occurred after a public hearing on the zoning change. The City denied the request, relying on Section 7(1)(f) which excludes from disclosure preliminary drafts, notes, memoranda, and other records in which opinions are expressed or policies or actions are formulated. This is typically referred to as the "deliberative process" exemption to disclosure. The City said that the records consisted of pre-decisional "review com-

ments" from City officials regarding zoning application deficiencies, City requirements, and recommendations to improve applications. The requester replied that withholding records related to communications intended to help the applicant improve its application created an unlevel playing field for adjacent property owners who oppose a zoning change. The PAC said that Section 7(1)(f) did not in all cases apply to those shared with third parties who do not represent the public body or who otherwise do not have an independent interest in the subject of the communication – in other words, the communications must be "inter- or intra-agency". Here, since the zoning change applicant was part of the conversation, and because it had an interest in the outcome of the zoning change, the records could not be withheld in accordance with Section 7(1)(f).

In *Chi. Sun Times v. Chi. Transit Auth.*, 2021 IL App (1st) 192028, a requester sought security footage from an attack that occurred at a subway station. The

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Transit Authority denied the request in reliance on Section 7(1)(v) which, in summary, exempts from disclosure records the disclosure of which would jeopardize the effectiveness of security measures. The trial court ordered that the footage be disclosed. The appellate court, however, relying on an affidavit from a homeland security expert which said the disclosure of the videos, would reveal video resolution, camera field of view, and blind spots, which could be used by people to evade security measures. The appellate court reversed the trial court and found that the release of the videos, then, could reasonably be expected to jeopardize

the effectiveness of the Transit Authority's surveillance system.

In *Chi. Pub. Media v. Cook Cty. Office of the President*, 2021 IL (1st) 200888, a requested wanted records related to a political action committee what was chaired by a commissioner of the Cook County Board of Commissioners. Without belaboring the extensive facts, we'll just focus on the takeaways. In order to deny production of records pursuant to Section 7(1)(f) of the FOIA (this is the "deliberative process" exemption again), the records must be inter- or intra- agency material that is pre-decisional and deliberative. It must actually occur *before* a policy is adopted and it must actually relate to the process by which policies are formulated. Material that is purely factual

must be supplied unless it is "inextricably intertwined" with pre-decisional and deliberative discussions. Particularly in this case, emails showing tracked edits to the Commissioner's Wikipedia page did not reflect pre-decisional communications about a policy or action, and contrarily, simply relate to factual information. Additionally, draft answers to a reporter's questions did not reveal any deliberative process regarding a policy or action. ■



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