

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 at least four binding opinions from the Public Access Counselor (PAC): two concerning OMA and two concerning FOIA. Should you endeavor to read any of the binding PAC opinions, the new Public Access Counselor website address is: <https://foiapac.ilag.gov/>.

OPEN MEETINGS ACT

IMPROPER PRIVATE MEETING:

In **23-003**, a library district with a seven-member board was found by the PAC to have held an improper meeting under OMA when its board president and two trustees held an informal “Meet and Greet” with members of the public. The board did not post an agenda for the meeting at least 48-hours in advance, and the attendance of three out of seven members was a majority of a quorum (a quorum in this case would be four members). Instead of having a “social gathering” type of “Meet and Greet”, the board members discussed staffing, salary, and other public body issues of business. The fact that the board members did not take action is not controlling – any gathering of a majority of a quorum of public body members at which they discuss public body business is sufficient to constitute a meeting under the Act, which would require a posted agenda and minutes in accordance with the Act. The PAC ordered the public body make public the video recording of the meeting

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and that it prepare and approve minutes from the same.

AGENDA – GENERAL SUBJECT MATTER OF PERSONNEL TRANSACTIONS:

In **23-004**, a school board went into closed session to discuss a specific personnel matter – a severance agreement with an employee. The Board returned to open session and approved the severance agreement. Four months later, someone discovered the meeting’s agenda language was insufficient for the Board to take action on the severance agreement. The open session agenda language under which the Board took action to approve the agreement read:

The appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body 5 ILCS 120/2(c)(1), amended by P.A. 101459.

Immediately following closed session, action may take place as a result of closed session discussion.

First, the PAC rejected the Board’s argument that the request for review was untimely because it was not filed within

60 days of the alleged violation. The PAC said that it was not discovered until later, and, once discovered, the complaint may be brought within 60 days thereafter.

Second, the Board’s attorney made many arguments defending the action taken. Among them was the contention that the severance agreement agenda item needed to be stated in more general terms than other agenda items that do not concern closed session topics because of public policy that favors allowing public bodies to discuss certain sensitive matters in closed session. In other words, to provide more specific detail about closed session discussions would disrupt the intent of OMA, render the use of closed session discussion moot, and infringe on the candor of the closed session. The PAC said that the term “general subject matter” and the requirement that it be included on an agenda when final action is contemplated by its definition would not reveal the content of detailed, length, closed session deliberations. In essence, a member of the public, knowing nothing of the public body’s activities, should be able to review an agenda and have a general idea of what the public body intends to

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act upon. The PAC closed its opinion with the following:

Although section 2.02(c) does not require the agenda to identify the subject of possible final employment action by name, an agenda that merely notified the public that the Board would consider some kind of action related to appointment, employment, compensation, discipline, performance, or dismissal of unspecified employees does not set forth the general subject matter of the severance agreement with the assistant superintendent that the Board approved at its September 15, 2022 meeting.

Oftentimes, when considering a disciplinary matter, a Board may not know exactly which direction it will take, especially when it affords the employee/volunteer an opportunity to present his

or her side of the story – that defense may change the course of action. For example, if a Board wanted to accept a severance agreement with an employee at a meeting and, because of this PAC opinion it included the acceptance of a severance agreement on the agenda, but that employee notified the Board in closed session it refused to sign the agreement at the last minute, could the Board lawfully terminate or take some other employment action against the employee back in closed session? Likely not. Perhaps the PAC would accept something more general such as “Discussion/Action regarding approval of severance agreement or other disciplinary action against a firefighter.” This may still be too general, and adding “or other disciplinary action” might place the firefighter in a more defensive posture prior to a meeting.

FREEDOM OF INFORMATION ACT

DUTY TO RESPOND TO FOIA REQUESTS:

In **23-001**, a public body failed to respond to a FOIA request within five

business days with a disclosure, whole or partial denial, or a proper extension. This is the most simple and most unfollowed rule of FOIA.

EMPLOYEE SURVEY RESULTS EXEMPT UNDER 7(1)(f):

In **23-002**, a public body declined to produce employee survey results used in preparing performance evaluations for staff members on the grounds that it was exempt under Section 7(1)(f) of the Act – the “deliberative process exemption”. The public body said it reflected the anonymous opinions and recommendations of employees and those were used as part of a pre-decisional and deliberative process of the management and board to evaluate staff. The PAC said they were properly withheld, and a public body does not need to provide advance notice of all possible uses of information it may gather or prepare before it makes a decision. The deliberative process must only be identified and the public body must describe the role of the records in that process. ■

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