

# 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 six binding opinions from the Public Access Counselor (PAC): one concerning OMA and five 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

#### FINAL ACTION IN CLOSED SESSION:

In **24-003**, a citizen submitted a Request for Review alleging that a City Council improperly took final action to authorize an exclusive representation agreement with a real estate broker during the closed session portion of its city council meeting. The City Council contended the city's local code, authorizes the City Manager to execute agreements on behalf of the city for amounts under \$25,000. In the PAC's review of the closed session recording, the PAC discovered that the City Manager sought the City Council's approval of the proposed exclusive representation with the real estate broker before he signed. The mayor polled the Council in closed session on the question of whether to authorize the agreement. They polled in the affirmative, and the City Manager was directed to sign the agreement, without any subsequent public vote. The PAC confirmed there is no prohibition against polling board members in closed session, however the poll must be followed up and confirmed

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by properly noticed, public vote. That did not occur here. The takeaway here is to never take a vote or poll in closed session that results in actual, concrete action taken without first voting publicly.

### FREEDOM OF INFORMATION ACT DISCLOSURE OF SETTLEMENT AGREEMENTS:

In **24-001**, a citizen submitted by e-mail a FOIA request to Homer Township seeking "the invoices and all relevant documents that support" nine specific checks, identified by check number and amount, payable to the Township's law firm or its law firm's trust account. The Township provided responsive records for eight of the checks, but did not provide any records for the ninth. The Township also declined to produce a certain settlement agreement based upon a "mutual non-disparagement clause" contained in the agreement. The PAC cited Section 2.20 of FOIA which expressly provides that "[a]ll settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 of FOIA may be redacted," and confirmed there is no permissible exemption for agreements containing such a clause. Therefore, the settlement agreement was

a public record which must be produced.

### DUTY TO RESPOND TO FOIA REQUESTS:

**24-002** and **24-004** relate to the most common misstep of public bodies concerning FOIA requests: they must respond to FOIA requests within five (5) business days of the request with a disclosure, whole or partial denial, or a proper extension.

### DISCLOSURE OF VIDEO FOOTAGE:

In **24-005**, a citizen submitted a request for records to a County Sheriff's Office seeking specific video footage from the County Animal Control facility. The Sheriff's Office initially denied the request in its entirety pursuant to Section 7(1)(n) of FOIA (exemption for records related to a public body's adjudication of employee grievances or disciplinary cases), and asserted that the video footage was not subject to FOIA. As a threshold matter, the PAC concluded that the video footage was a public record, because it pertained to Sheriff's Office duties, and it was in the possession of the Sheriff's Office. The PAC also concluded that the Sheriff's Office failed to demonstrate that the records were exempt pursuant to Section 7(1)(n).

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While the individual that was the subject of the footage was ultimately disciplined, the Sheriff's Office did not explain whether any "adjudication", i.e., a formalized legal process that results in a final, enforceable decision, occurred as a result of the investigation. Further, the PAC concluded that the 7(1)(n) applies only to records generated *during* an adjudication, but not necessarily records that existed prior to an adjudication or the records of an underlying investigation.

### WITHHOLDING POLICE REPORTS REGARDING MISSING PERSON DEATH:

In **24-006**, an investigative journalist submitted a request for records to a Sheriff's Office seeking police reports about a missing person who was subsequently confirmed as deceased. The Sheriff's Office denied the request in its entirety, citing Section 7(1)(b) and (c) claiming the responsive reports were highly personal and private, and the privacy interests of the parties involved in the reports outweighed the requestor and public interest in this information. After balancing the journalist's and the public's interest in disclosure against the degree of invasion of personal privacy to the decedent's family, the PAC found the journalist and the public to have interests that outweigh the privacy interests involved, warranting disclosure. The immediate surviving family members of a decedent possess distinct privacy interests in highly sensitive, gruesome, intrusive, or anguish-inducing records concerning decedents (for example, post-mortem photographs), however, the records at issue did not arise to that level. The records concerned the Sheriff's Office's investigation into the disappearance, and for this reason, the reports requested were not exempt from disclosure in their entirety under 7(1)(b) or 7(1)(c) of FOIA. Further, the PAC found that the public interest was not diminished just because the incidents did not involve threats or harm to the public at large. Therefore, the records were subject to disclosure.

### A CITY MAYOR IS NOT A PUBLIC BODY:

In *Shehadeh v. City of Taylorville*, 2024 IL App (5th) 220824-U (this is a Rule 23, unpublished opinion that is not precedential, but it is used as guidance), an inmate sent a letter to a mayor, and then send a FOIA request for the same letter in an effort to confirm the mayor's receipt of the letter. The Court concluded (1) the content of the letter did not pertain to public business and (2) the letter was not "received by, in the possession of, or under the control of a public body," because a mayor is not a "public body" under FOIA despite the mayor having legal authority to bind the public body under certain circumstances. This is a rather unusual opinion, but one worth remembering.

### CATEGORICAL FOIA REQUEST UNDULY BURDENSOME:

A City denied a request for all communications between two municipal police chiefs since January 1, 2022, and the requestor sued. After the circuit court

found in favor of the City, the requestor appealed. In *Shehadeh v. City of Taylorville*, 2024 IL App (5th) 220829-U, the court held that the FOIA request was unduly burdensome because it was seeking all communications between the two police chiefs (a categorical request), the requestor refused to narrow or clarify its large request, and the City's burden of complying with this request outweighed the public interest in disclosing the requested records. The court called the request a "fishing expedition." The court's opinion offered "best practices" for public bodies using the "unduly burdensome" provision of FOIA in that "[i]t would have been preferable for the City to provide at least an estimate of the number of records, or the amount of time involved in obtaining and sifting through them and redacting exempt information." *Id.* Regardless, the Court found the request to be unduly burdensome and upheld the decision of the circuit court. ■

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