

# HONEST & OPEN GOVERNMENT



## 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 three binding opinions from the Public Access Counselor (PAC): all 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/>.

### FREEDOM OF INFORMATION ACT

#### PUBLIC BODY MUST JUSTIFY ITS CLAIMED EXEMPTIONS

In **24-016**, former employees of a Civilian Office of Police Accountability (COPA) sent a letter to a City Community Commission for Public Safety requesting an investigation of a COPA Administrator. A citizen sent a FOIA request for that letter. The Commission withheld the record claiming it was exempt because (1) disclosure would result in an unwarranted invasion of personal privacy, (2) disclosure would interfere with an ongoing law enforcement investigation, (3) disclosure would endanger someone's life or safety, (4) the record was a component of its "deliberative process", (5) the record was a component of an internal audit, and (6) the record fell under the employee grievance adjudication exemption. The PAC said the Commission failed to uphold its burden to show (1) that the public's interest outweighed personal privacy

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considerations especially when the letter contained no private details, (2) that the Commission was a law enforcement agency availed to law enforcement exemptions, (3) how disclosure would endanger someone, (4) that the record, which was submitted to the Commission without solicitation, included contents or parts of their deliberations, (5) that record was created as part of any internal audit, or that (6) any adjudication was pending (and, further, the PAC said that records created prior to an adjudication of a grievance are not necessarily exempt under Section 7(1)(n). The takeaway here is to be certain that you can sufficiently justify the claimed exemptions.

#### PUBLIC BODY MUST PROVIDE RECORDS IN ELECTRONIC FORMAT REQUESTED, EVEN WITHOUT PASSWORD PROTECTION

In **25-001**, a requestor asked for copies of certain Microsoft Excel workbooks which included budgets. The public body provided the workbooks, but they were locked and password protected with hidden columns. After PAC intervention, the public body ultimately provided the workbooks without hidden columns, but

maintained password protection. The requestor maintained that the password protection "effectively redacts information" because the protection hides certain information (e.g., formulas and notes) and restricts functionality of the record. The public body claimed that it complied with the Act because it is only required to provide copies of records in the version in which they are maintained, and the public body maintains the workbooks with password protection in the ordinary course of business. The public body further alleged that it did not maintain an unlocked version of the same workbooks. In short, the PAC cited Section 6(a) of FOIA which requires that a "public body shall furnish [a record] in the electronic format specified by the requestor, if feasible." 5 ILCS 140/6(a). The PAC said the public body did not dispute or demonstrate that it was not feasible to unlock the workbooks and provide unlocked copies to the requestor. (Note: in *Fagel v. IDOT*, 2013 IL App (1<sup>st</sup>) 121841, the court concluded "a fear of manipulation of the information is not an exemption under section 6 of FOIA upon which IDOT could justify withholding the unlocked version of the Excel spreadsheet.") The takeaway here is

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that a public body must provide a copy of a record in the requested format (which apparently includes elimination of certain security features) unless doing so is not feasible.

### PUBLIC BODIES MUST EXPLAIN AND JUSTIFY THEIR EXEMPTIONS

In **25-002**, a requestor sought termination and resignation records as well as payroll records for a city police department. The department disclosed the payroll records, but it withheld the termination and resignation records claiming they were wholly exempt in that disclosure would (a) interfere with actual or reasonably contemplated law enforcement proceedings, (b) interference with active administrative enforcement proceedings, (c) create a substantial

likelihood that a person would be deprived of a fair trial or impartial hearing, or (d) contravene the Illinois Police Training Act's confidentiality provisions. The PAC disagreed with the police department's exemptions. In short, the PAC said a public body must articulate *why* or *how* disclosure would interfere with law enforcement or administrative proceedings, and it must identify an administrative proceeding if one exists. Here, the police department did not prove by clear and convincing evidence that those two exemptions applied. Further, the PAC reiterated its prior opinions that a public body must demonstrate that a trial or adjudication must be imminent or would otherwise deprive the subject of a fair and impartial adjudication. Finally, the PAC identified a section in the Illinois Police Training Act which specifically provides that nothing in that Act exempts a law enforcement agency from disclosing certain materials in accordance with the FOIA.

## PENDING LEGISLATION

There are several bills pending in the legislature that propose to amend the Open Meetings Act and Freedom of Information Act in several ways. Should any amendments be adopted and signed into law, we will report back! ■



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