Honest & Open Government Update

OMA and FOIA Developments

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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, to wrap up year 2018, one Public Access Counselor (PAC) opinion on the OMA, and there have been five PAC opinions interpreting the FOIA and one important appellate court case.

OPEN MEETINGS ACT

In **PAC Op. 18-015**, an individual filed three requests for review with the PAC. One was determined to be untimely, and thus not in the PAC's jurisdiction, because it was filed more than 60 days after the public body's alleged wrongful act, one was determined to be untimely and premature because the public meeting had not yet occurred, and the third was timely because it was filed within that 60-day window. In this opinion, a public body (a County) entered into closed session, pursuant to Section 2(c)(1) of the Act, to discuss the duties and salaries of two elected officials (the county auditor and county coroner). Although the determination of whether someone is an "employee" of a public body would be on a case-by-case basis, the PAC opined that the OMA does not allow public bodies to discuss "occupants of public office," like elected officials, because they are not "employees" of the public body – there is no "employer-employee relationship." Furthermore, the PAC opined that Section 2(c)(3) would not apply because the public body has no authority to remove the officials under law or ordinance.

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FREEDOM OF INFORMATION ACT

In **PAC Op. 18-013**, a requester sought a broad array of emails from the Governor's office related to appointments since 2015. The Governor's office subsequently denied the request. The requester sent a second request, slightly narrowing the original request. The Governor's office denied the request as being "overbroad and vague," and offered the requester the opportunity to further narrow his request. The requester obliged and did narrow the request, and offered to work "out a reasonable timeline for production of all of the requested public records." The Governor's office extended its time to respond by five days, and, thereafter, replied by letter informing the requester that a preliminary search yielded more than 44,000 emails that would require manual review and redaction, which would unduly burden their office. The requester filed a request for review. The PAC required the Governor's office to provide all of the search terms it used to locate responsive records. It did. The PAC determined that, even though the Governor's office utilized 40 keywords to locate records, it did *not* use the word "appoint," or its variations. Had it done so, it would have revealed only 1,783 potentially responsive emails. The PAC determined this was a much more manageable number, that the Governor's office's original search was not reasonably adequate to reveal potentially responsive records, and that the Governor's office failed to demonstrate how reviewing the records would unduly burden it and how compliance would outweigh the public's interest in the disclosure of the records. It had to review, redact (as necessary), and produce the records. Bottom line: use appropriate search terms when searching for records, make a record of the terms used, and, more than likely, produce them.

In **PAC Op. 18-014**, another public body failed to respond to a FOIA request within the 5-business-day time period with a disclosure of the records requested, a valid extension, or a proper denial or redaction. The PAC concluded the public body violated the Act for not following this simple rule.

The records request in **PAC Op. 18-016**, dealt with an issue not likely to be encountered by fire protection districts, but the opinion is mentioned here for information. In short, the PAC opined that, under the Juvenile Court Act, law enforcement records where a minor is being investigated, arrested or taken into custody may not be disclosed, however records where the minor is a victim or witness may be.

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In **PAC Op. 18-017**, yet again, the public body failed to respond to a FOIA request within 5-business-days by disclosing the requested records, or by properly extending the response time, or by properly denying or redacting the response. Additionally, the public body did not fully cooperate with the PAC when it contacted the public body about a response. As a result, the PAC concluded the public body violated the Act.

In **PAC Op. 18-018**, a requester sought records concerning complaints of misconduct against a former, named police officer. The public body, although raising other exemption sections at the outset, ultimately determined the records were exempt under Section 7(1)(c) for unwarranted invasion of personal privacy. There were two misconduct complaints at issue: one was determined to be unfounded and meritless, and, in the other, the officer's actions were determined to be appropriate and reasonable. The public body contended that unfounded complaints against an individual would be objectionable and would constitute an absolute invasion of privacy to a reasonable person because releasing the reports would be embarrassing to the officer and would besmirch an otherwise unblemished career. Ultimately, the PAC concluded that the misconduct reports, including the unsubstantiated complaint, were disclosable because the complaints concern the officer's actions while he was performing his duties as a police officer. The PAC did, however, say that the names of the complainants, victims, or other third parties would be redactable pursuant to Section 7(1)(c), because the release of their identities would be highly personal, and their privacy rights would outweigh any legitimate public interest in the disclosure of their identities.

In ***Sargent Shriver Nat'l Ctr. on Poverty Law, Inc. v. Bd. of Educ.***, 2018 IL App (1st) 171846, the court offered some guidance on properly denying a request believed to be unduly burdensome. Here, the requester requested records related to complaints made to Chicago Public Schools, between a 5-year period, involving school police officers or security guards. First, the public body properly extended its response time by five business days. Then, the public body notified the requester that the requests were unduly burdensome and it asked the requester to narrow the categorical requests (that is, it sought all records falling within a category). The requester refused, but sent a second request seeking "alleged employee misconduct reports involving school police officers" in 2014. The public body denied the request as unduly burdensome and properly explained, in detail, why the request was unduly burdensome. The public body explained that 635 files would have to be reviewed and redacted, and it cited the hundreds of manpower hours that would be necessary to supply the records, such that the burden on the public body would outweigh the public's interest in the information. The court held that the public body did not violate the FOIA because it followed all necessary procedural steps to respond and because the facts supported the conclusion that the request was unduly burdensome. ■