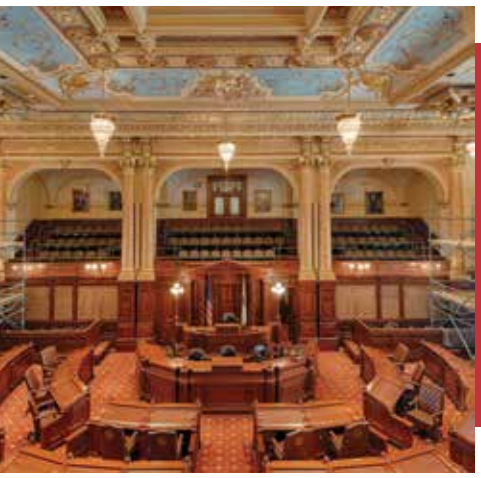
Honest & Open Government Update



FOIA & OMA Updates

By David Livingstone
Assistant Madison County State's Attorney serving as Chief of the Civil Division

***About the Author**: **David Livingstone** received his undergraduate degree in Criminal Justice, Political Science, and Public Administration from Lindenwood University. He is a 2016 graduate of St. Louis University School of Law, concentrating in Civil Litigation. Formerly a principal in the law firm Stobbs, Sinclair & Livingstone, Ltd., in Alton, Illinois, where he represented a number of individuals, entities, and various local units of government, including fire protection districts. He is now Chief of the Civil Division of the Madison County State's Attorney's Office.*

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

NO FINAL ACTION IN CLOSED SESSION

In **23-014**, a Village Trustee submitted a request for review to the PAC challenging the Village's approval of closed session minutes during closed session and not in open session. Section 2(c)(21) of the OMA authorizes public bodies to hold closed session for the purpose of "discussion of minutes of meetings lawfully closed under this Act, whether for the purposes of approval by the body of the minutes or semi-annual review of the minutes mandates by Section 2.06." The PAC said that although Section 2(c)(21) refers to "approval" of closed session minutes, it is intended only to pertain to the *discussion* of whether they should be approved. This is supported by Section 2(e) which clearly provides that "no final action may be taken at a closed meeting." The PAC also noted it is not necessarily improper for a Board to conduct a preliminary vote during closed session on a matter, so long as it is voted upon publicly in open session. The PAC ultimately directed the Village Board to "re-do it" and publicly vote on the approval of the closed session minutes at issue with proper agenda language included.

IMPROPER USE OF CLOSED SESSION TO DISCUSS BOOK BANNING

In **23-016**, a citizen submitted a request for review challenging a school board's closed session to discuss the removal of a specific book from an English class curriculum. The Board cited Sections 2(c)(1) [specific personnel exemption], 2(c)(4) [hearing evidence or testimony], 2(c)(10) [issues pertaining to individual students], and 2(c)(11) [pending, probably litigation] for the closed session. Following a confidential review of the closed session recording, PAC said although the Board briefly referenced a complaint made by a parent against a certain teacher regarding use of the book, the Board's discussion focusing on the book being part of the curriculum rather than the employee's performance or merit. The Board also did not demonstrate how the discussion was "inextricably intertwined" with the employment-related discussions. The Board's use of Section 2(c)(1) did not work. The PAC said that the Board's discussion did not consider evidence or testimony while acting as a quasi-adjudicative body, but, rather, it focused on the curriculum, so 2(c)(4) did not work. The PAC said 2(c)(10) was inapplicable because the Board's discussion did not pertain to individual students. The Board acknowledged it did not actually utilize Section 2(c)(11), as there was no pending, probable, or imminent litigation. The PAC directed the Board to release the entire closed session recording and minutes, except as to discussions pertaining to an individual student.

USE OF CLOSED SESSION FOR COLLECTIVE BARGAINING AND WITHHOLDING CLOSED SESSION RECORDS BASED UPON ATTORNEY-CLIENT PRIVILEGE

This is an OMA/FOIA two-for-one. In *Int'l Assoc. of Firefighters Local 4646 v. Village of Oak Brook*, 2024 IL App (3d) 220466, a union challenged a village's closed session and the village's denial to disclosure records pertaining to the closed session. During the village's public hearing to consider its annual budget, the village went into closed session pursuant to Section 2(c)(2) [collective bargaining] and 2(c)(11) [probable or imminent litigation]. The closed session lasted nearly three hours. The Union alleged the closed session was improper, and the union, after requesting the closed session recording and minutes which was denied, challenged the denial. The PAC rendered a decision in favor of the Union. The Village argued the budget discussion was pertinent to both closed session exemptions because its

Continued on page 23

Honest & Open Government

Continued from page 22

decision would impact its contract with a paramedic services company which would, in turn, affect its firefighter membership. In essence, the impact of the budget decision would necessarily implicate collective bargaining issues and lead to probable litigation, and it also, therefore, required confidential advice from its legal counsel. The Court found because the Village was not engaged in active or immediate negotiations with a union when it conducted the closed session, the Village did not satisfy the requirements of Section 2(c)(2). It also found that the Village did not demonstrate how the budget decision would have resulted in litigation at the time it entered into closed session. The Court did, however, find that the Village may redact any attorney-client privileged communications contained within the records to be released to the Union, even if they were made in the improper closed session.

FREEDOM OF INFORMATION ACT

COMMERCIAL NON-DISCLOSURE AGREEMENT DISCLOSABLE

In **23-015**, a citizen requested a copy of a non-disclosure agreement between a city and a commercial entity regarding a development project. The City claimed the document was exempt under Section 7(1)(g) alleged it is a trade secret or proprietary information and that disclosure of the NDA would cause a "chilling effect that would deter private businesses from entering into potential future developments and public-private partnerships." The PAC disagreed with the argument, apparently, on the grounds that the NDA did not strictly fall within the parameters of Section 7(1)(g). For this exemption to apply, the document must contain (1) a trade secret, commercial, or financial information ("protected information"), (2) that was obtained from a person or business where the protected information are furnished under a claim they are either (a) proprietary, (b) privileged, or (c) confidential, *and* (3) that disclosure of the protected information would cause competitive harm to the person or business. The PAC noted the use of the word "would" is intentional and is narrower and a more onerous standard than simply "could reasonably be expected to." The PAC concluded that the NDA at issue met the first two elements Section 7(1)(g), but it did not meet the third element because it did not demonstrate that disclosure would cause competitive harm. Further, the PAC noted that the commercial entity publicly announced its intention to open a distribution facility in the City in the near future, so the need confidentiality of an NDA at that point was likely low.

DUTY TO RESPOND TO FOIA REQUESTS

23-017 is the fifth binding opinion of the year that addresses the most frequently disregarded requirement of the Act: that public bodies must respond to FOIA requests within five (5) business days of the request with a disclosure, whole or partial denial, or a proper extension. ■