

HONEST & OPEN GOVERNMENT UPDATE



New Developments with OMA and FOIA

By David Livingstone
Attorney at Law

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 some activity from the Public Access Counselor (PAC) and the courts. There has been one binding opinion on the OMA, 3 PAC opinions interpreting the FOIA, and several appellate court cases interpreting the FOIA.

OPEN MEETINGS ACT

There has been one PAC binding opinion on the OMA since the last article. PAC Opinion **20-007** dealt with Zoom meetings during the COVID-19 pandemic. First, the Village Board's agenda for its remote meeting said that only Zoom attendance was allowed, and in-person attendance was prohibited. The agenda contained the Zoom information for members of the public to attend by video or telephone conference. The PAC said that since the Village President determined that in-person meetings were not practical due to the pandemic, in accordance with the new Section 7(e) of the OMA, and since instructions for access were provided, the prohibition of physical attendance by members of the public was appropriate. Second, at one point during the entire audio of the Zoom meeting was muted for all participants for approximately 60 seconds. The Village stated that the Village President and Clerk had a "sidebar" during that time to discuss whether a certain personnel issue should be considered in closed session. The Village contended that these short

About the Author: David Livingstone received his undergraduate degree in Criminal Justice, Political Science, and Public Administration from Lindenwood University in St. Charles, Missouri. He is a 2016 graduate of St. Louis University School of Law, concentrating in Civil Litigation. He is now principal in the law firm Stobbs, Sinclair & Livingstone, in Alton, Illinois, where he serves and represents individuals in assorted legal matters, local small businesses and various local units of government, including fire protection districts.

sidebars were a routine practice during in-person meetings and were an effort to save time. The PAC said that Section 7(e) (4) of the OMA is clear and unambiguous: members of the public must be able to hear "all discussion," and any muted part of an open session, absent technical difficulties, and regardless of whether it is a simple procedural issue, must be open and available to all members of the public.

FREEDOM OF INFORMATION ACT

In **20-008**, a Sheriff's Office denied a FOIA request for records regarding the sexual assault of a minor, stating that it was prohibited from disclosing "juvenile reports." The PAC said the Sheriff's Office only offered "bare assertions without a detailed rationale" for its denial, and it did not satisfy the public body's burden of demonstrating that records are exempt from disclosure. Further, the PAC said that the Juvenile Court Act prohibited disclosure of records pertaining to a juvenile subject of an investigation, arrest, or detention, but it did not prohibit disclosure of records pertaining to a juvenile victim. The lesson here: if records are denied, be sure to explain *why* they were denied in the response to the requester.

In **20-009**, a requester sought arrest records of a particular person ("Mr. White") during a particular time. The Sheriff's Office denied the request in part on the grounds that some of the records related to a pending prosecution. The requester replied that Mr. White was deceased, so there could be no pending prosecution against him. The Sheriff's Office said that there were pending prosecutions against other individuals who were involved in the crime, and that the release of the records would prejudice their trials. The PAC said that the Sheriff's Office did not sufficiently demonstrate clear and convincing evidence to support the claim that the disclosure of records would interfere with the prosecutions. The mere fact that an investigation remains open is not sufficient to satisfy that burden. The same lesson for 20-008 applies: be sure to explain *why* your cited denial is appropriate.

PAC Opinion **20-010** is another addition to the long list of instances where public bodies fail to respond to a request within five business days. A requester sought records relating to a recent parcel division from a County Assessor's Office. The Assessor's Office

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failed to respond with a disclosure, denial, or proper extension within five business days. Of course, the PAC said this violated the FOIA. Always be sure to respond to FOIA requests within the time allotted by law.

In **Better Gov't Ass'n v. Metro. Pier & Exposition Auth. & Navy Pier**, 2020 IL App (1st) 190697, the questions before the appellate court were (a) whether Navy Pier, Inc. (NPI) was a subsidiary body of Metropolitan Pier and Exposition Authority (MPEA), and (b) whether NPI performs governmental functions on behalf of MPEA such that certain records are disclosable under the FOIA. For background, NPI was incorporated in 2011 by some employees and directors of MPEA, a government entity, to facilitate the ongoing recreational, cultural and other development of Navy Pier for the benefit of the general public. MPEA leased Navy Pier to NPI for \$1 per year in exchange for NPI offering free admission to the general public, and large grants and loans were given to NPI from MPEA. In 2014, the Better Gov't Ass'n (BGA) requested certain records related to the operation of Navy Pier in Chicago from NPI and MPEA. MPEA supplied some of the documents, but claimed others were not in its possession. NPI denied the request claiming it was not a public body subject to the FOIA. First, the appellate court determined that NPI *does* perform a governmental function because NPI performs duties the state legislature assigned by statute to MPEA. Those duties are set forth in 70 ILCS 210/4(b) and require MPEA to "carry out or otherwise provide for the recreational, cultural, commercial, or residential development of Navy Pier." By reason of that governmental function, it is subject to the FOIA insofar as requests are directly related to that function. Finally, the appellate court determined that NPI was *not* a subsidiary body because (a) it was a formally independent corporation from MPEA despite the fact that MPEA put the "training wheels" on NPI's "bike" to help it get started, (b) the MPEA did not have significant control over NPI, despite the limitations place upon it in the lease from MPEA to NPI, (c) although MPEA made contributions to NPI, most of its funds

for daily operations were raised without MPEA's help, and (d) although NPI did perform a governmental function, that, alone, was not sufficient to find that it was a subsidiary body rendering it subject to the FOIA.

In **Peery v. Madison Cty. State's Attorney's Office**, 2020 IL App (5th) 190016-U, the appellate court revised the circuit court's decision to assess a \$2,500 penalty against a public body for willfully and intentionally withholding records from a requester. The appellate court, in a lengthy opinion, determined that the State's Attorney's Office, although records were misplaced for some time, did turn over the records immediately once they were found. This immediate turn over, in the eyes of the appellate court, suggested good faith on part of the State's Attorney's Office, and there was no other evidence before the circuit court of willful and intentional failure to comply with the FOIA.

Briefly, in **Mancini Law Grp., P.C. v. Schaumburg Police Dep't**, 2020 IL App (1st) 191131-U, accident reports were

requested from the police department, and the police department returned redacted copies (redacting home addresses, personal telephone numbers, driver's license numbers, license plate numbers, dates of birth, and insurance policy numbers). The requester sued contended that because the police department provided *unredacted* copies of records to LexisNexis, it waived any claim to exemptions at a later date. The requester cited an Illinois Supreme Court case, *Lieber*, 176 Ill.2d 401 (1997), which held that a university could not claim certain information was exempt from disclosure when the university previously provided the same information to other parties. Here, however, the court determined that because the police department provided unredacted copies to LexisNexis, an approved third-party vendor for the State of Illinois, as part of its mandatory reporting requirements under the Illinois Vehicle Code, it did not waive any claim to FOIA exemptions for certain parts of records. ■



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