April 2024 Transparency Reporter
Recent IAG/PAC Opinions, Judicial Decisions, and Legislation Regarding FOIA and OMA

This report covers recent developments under the Freedom of Information Act ("FOIA") and the Open Meetings Act ("OMA"). This includes binding Public Access Counselor ("PAC") Opinions, appellate cases, and legislative developments between January 1 and April 15, 2024.

As you read, watch for the pivotal turning point where the analysis found a violation did or did not occur. This will go far in understanding how FOIA and OMA are interpreted and will aid you in your public role.

If you are more of a skimmer, we've summarized the "top hits" of FOIA and OMA in 2023. The following are the "need to know" changes and affirmations seen in the realm of FOIA and OMA in 2023:

FOIA

- Mutual non-disparagement clause in settlement agreement does not make the settlement agreement exempt from disclosure.
- Security videos of a private business or property that are obtained by law enforcement as part of an investigation are public records under FOIA.
- Court finds that a city mayor was not a "public body" under FOIA, as the definition of public body does not encompass individuals, creating some split authority in the Appellate Court.
- Court found that a FOIA request for "all communications" between two police chiefs was too vague and was unduly burdensome.
- Even if a public body improperly went into closed session, attorney-client communications can still apply to those closed meeting discussions in response to a FOIA request.

OMA

- PAC found that a city council giving direction to staff to proceed with an agreement was improper "final action" because the agreement was not subsequently approved in open session (even though it was within the City Manager's threshold).
- Collective-Negotiation-Matters Exception Does Not Apply to Anticipated or Hypothetical Negotiations

Freedom Of Information Act

Proposed Legislation:

House Bill 2620

Current Status: Assigned to Rules Committee on 4/5/2024

If adopted, this bill would amend the definition of "recurrent requestor" to mean a person who, in the immediately preceding (12) months, has submitted a minimum of (40) (rather than the current 50) requests, or (10) (rather than 15) requests in a 30-day period, or (5) (rather than 7) requests in a 7-day period.

The bill also proposes lengthening the current 5-day minimum time for a public body to comply with, deny, or extend the time to respond to (15) days. It proposes extending the time to respond to a commercial request from (21) days to (30) days.

House Bill 3364

Current Status: Assigned to Executive Committee on 1/31/2024

If adopted, this bill would allow a public body to require that FOIA requests be submitted on a standard form or to identify the purpose of the request. Currently, public bodies may not require a standard FOIA request form or require the requestor to specify the purpose of the request.

It would also limit the ability to make a request on behalf of another individual, although an individual can make a request for an organization if the organization is disclosed.

House Bill 4292

Current Status: Referred to Rules Committee on 4/5/2024

If adopted, this bill would amend the definition of "public body" to include the judicial branch and components of the judicial branch. However, it would exempt records pertaining to the preparation of judicial opinions and orders from disclosure. Denials of records from the judicial branch or its components would be excluded from the jurisdiction of the PAC.

A similar bill, Senate Bill 3613, was filed in the Senate. It was referred to Assignments on 2/9/2024.

House Bill 4401

Current Status: Referred to Rules Committee on 4/5/2024

If adopted, this bill amends the definition of "public record" to specifically exclude "junk mail." It also defines "junk mail" as unsolicited commercial mail or unsolicited commercial e-mails sent to a public body and not responded to by an official, employee, or agent of the public body.

Senate Bill 3076

Current Status: Assigned to Subcommittee on Government Operations on 2/21/2024 Rule 2-10 Committee Deadline Established As April 5, 2024 and May 3, 2024; Third Reading Deadline Established as May 3, 2024

If adopted, the bill would require public bodies to include identification and a plain-text description of the types or categories of information of each field of each database of the public body. Currently, FOIA requires public bodies to maintain a reasonably current list of the types or categories of records under its control that is reasonably detailed in order to aid requestors seeking records.

It would also require the public body to provide, upon request, a sufficient description of the database structures under its control to allow a requester to request specific database queries.

Senate Bill 3129

Current Status: Referred to Assignments on 2/2/2024

If adopted, the bill would require public bodies to designate "one or more public body officials or employees" as its FOIA officer(s), rather than "officials or employees." It proposes a definition of "public body officials" that does not include private attorneys or law firms appointed to represent the public body. Instead, "public body officials" would mean "elected or appointed officer holders of the public body."

Public Access Counselor Opinions:

Public Access Opinion 24-001 (January 24, 2024)

FOIA Requirements Render Non-Disclosure Clauses in Public Body Settlement Agreements Unenforceable

In the first binding PAC Opinion of 2024, a mutual "non-disparagement" clause did not permit Homer Township ("Township") to withhold disclosure of a settlement agreement.

Here, the requestor sought, "the invoices and relevant documents that support" nine checks and provided the check number and amount. Each check was payable to the Township's law firm or the law firm's trust account. The Township responded with copies of eight checks, as well as redacted copies of corresponding legal invoices. One check – check number 45079 (the "Check") for $22,950.00, was not disclosed.

However, the Township's response did not provide a basis for either the redactions or non-disclosure of the Check. This conflicted with the FOIA requirement that any basis for redaction or non-disclosure be stated in the public body's response. The requestor initiated a Request for Review, only challenging the Township's failure to disclose the Check.

The Township Clerk explained to the Attorney General's office that the Check was mistakenly omitted, but also expressed concern that disclosure of the remaining record related to the Check – a settlement agreement - could open the Township to legal liability.

Pursuant to Section 2.20 of FOIA (5 ILCS 130/2.20), "[a]ll settlement and severance agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public," subject to redactions under Section 7 of FOIA. The Township did not identify a Section 7 exemption, but indicated disclosure may violate the "Mutual Non-Disparagement" clause. This clause provided that neither party could disparage the other without liability for damages. The Township argued that disclosure may lead to social media backlash or other forms of disparagement, thus exposing them to legal repercussions.

Senate Bill 189, which added Section 2.20 to FOIA, illustrates that the General Assembly did not intend to permit public bodies to include these types of clauses because it would have the effect of circumventing FOIA disclosure. The PAC Opinion reinforced the legislative intent with excerpts of comments and discussions from the General Assembly. *PAC Opinion 24-001*, at 5 – 7.

The Township's withheld record met the basic definition of a settlement agreement and was a public record subject to disclosure. The "Mutual Non-Disparagement" clause did not include language prohibiting disclosure, and, even if it did, "such confidentiality clauses pertaining to settlement agreements are not enforceable." *PAC Opinion* 24-001, at 8. To allow the Township's interpretation to stand would enable public bodies to circumvent FOIA disclosure in the settlement agreement negotiation process.

Public Access Opinion 24-002 (February 9, 2024)
Village Fails to Respond to FOIA Request

On November 29, 2023, the Village of Dolton ("Village") received a FOIA request on behalf of WGN-TV. The request sought the following:

- Copies of documents to show total payments to Tiffany Heynard in 2023
- A copy of the current lease of Mayor Heynard's village vehicle
- Copies of monthly statements for any and all village credit cards, from June 1, 2023 to present

On December 14, 2024, WGN-TV forwarded its unanswered request to the Village Administrator, the Village Clerk, the Village Attorney, and a WGN-TV colleague. The following day, WGN-TV submitted a Request for Review with the PAC, alleging the Village failed to respond to the FOIA request.

Subsequent correspondence from the Public Access Bureau to the Village went unanswered.

Finally, on January 30, 2024, the Village sent an e-mail to WGN-TV, stating it was providing five pages of responsive records with redactions. However, no records were attached to the email. Despite notification of the missing attachment and a request for an explanation of how the records sought produced only five pages, no further communication was received from the Village.

The PAC Opinion easily found that the Village failed to respond to WGN-TV's request, both by failing to answer within five business days of receipt and failure to comply with the response procedures in Section 3(d) of FOIA (5 ILCS 140/3(d)).

Public Access Opinion 24-004 (issued March 15, 2024)
Chicago Transit Authority Fails to Respond to FOIA Request

In a straightforward opinion, the PAC ruled that the Chicago Transit Authority ("CTA") failed to respond, deny in whole or in part, or otherwise reply to a FOIA request submitted by a representative of Block Club Chicago.

The FOIA request was received by the CTA on December 12, 2023. Initially, the CTA utilized section 3(e)(vii) of FOIA to extend its time to respond by five business days. 5 ILCS 140/3(e)(vii). However, no follow up communication from CTA occurred after that.

The CTA responded to the Public Access Bureau on February 7, 2024, and indicated it intended to comply, but as of March 8, 2024, no records were shared.

Based on this failure to timely comply, the CTA was in violation of section 3(d) of FOIA. 5 ILCS 140/3(d).

Public Access Opinion 24-005 (issued March 15, 2024)
Security Footage Deemed Non-Exempt Public Record

In a two-part analysis, the PAC addressed the Macon County Sheriff's Office ("Sheriff's Office") argument that (1) video footage is not a public record under FOIA; and (2) the footage sought is exempt under Section 7(1)(n) of FOIA. 5 ILCS 140/7(1)(n)

Here, the requestor sought specific video footage captured near the Macon County Animal Control facility. The Sheriff's Office denied the request entirely, citing section 7(1)(n) as the basis for exemption. 5 ILCS 140/7(1)(n) (exempting records relating to adjudication of employee grievances or disciplinary cases from disclosure).

The criteria for qualifying "public records" is two-fold. A public record, "must pertain to public business rather than private affairs" and it must have been used, received,

possessed, controlled, or prepared by/for a public body. *Better Government Ass'n v. City of Chicago Office of the Mayor*, 2020 IL App (1st) 190038, ¶ 14.

Here, the video footage was obtained by the Sheriff's Office as part of its investigation into an incident in the area. The investigation ties the footage to the transaction of public business and the Sheriff's Office used, received, and possessed it. As such, the footage is a public record subject to FOIA.

Next, Section 7(1)(n) of FOIA exempts from disclosure "[r]ecords relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcomes of cases in which discipline is imposed." 5 ILCS 140/7(1)(n).

Relying on precedent, the scope of this exemption "is limited to records generated during an adjudication and does not encompass records of an underlying investigation." *PAC 24-005*, at 5 (citing *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, ¶ 22). The PAC Opinion also cites Black's Law Dictionary to define "adjudication" as "[t]he legal process of resolving a dispute; the process of judicially deciding a case." Black's Law Dictionary 52 (11th ed. 2019).

Here, the Sheriff's Office indicated that the investigation resulted in disciplinary action against an individual. However, no explanation was given as to how the action constituted an "adjudication." Review of the footage also showed the contents predate and exist independent of any adjudication. The Opinion concludes that the Sheriff's Office did not provide clear and convincing evidence that section 7(1)(n) applied to the video footage.

The denial was deemed improper under FOIA, and the Sheriff's Office was instructed to provide copies of the footage to the requestor.

Public Access Opinion 24-006 (issued April 1, 2024)
Entirety of Records Related to Disappearance and Death of a Missing Person Not Exempt from Disclosure

This binding opinion addressed releasing public records related to the death of a missing person.

On December 14, 2023, the Peoria County Sheriff's Office ("Sheriff's Office") denied a FOIA request made on behalf of the Better Government Association ("BGA") pursuant to Sections 7(1)(b) and 7(1)(c) of FOIA. Specifically, the Sheriff's Office stated the privacy interests of the individuals involved outweighed any public interest in obtaining the information. The request sought "all Peoria County police reports for Logan Dunne." In its denial, the Sheriff's Office stated there were four (4) responsive police reports.

In its request for review, the BGA stated that Logan Dunne went missing from a Peoria hospital in June 2023 and his remains were discovered in November 2023. BGA provided

links to news stories discussing the disappearance and stated the circumstances surrounding his disappearance were of public interest. Additionally, the BGA asserted that, since Dune was a deceased person, privacy concerns did not apply.

In its analysis, the PAC discussed the disclosure exemption that applies to personal information, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 ILCS 140/7(1)(c). An "unwarranted invasion" encompasses information that "is highly personal or objectionable to a reasonable person" and where the right to privacy outweighs any legitimate public interest in releasing the information.

Analyzing public interest versus privacy concerns depends on four factors: (1) the requestor's interest in the disclosure; (2) the public interest in disclosure; (3) the degree of personal privacy invasion; and (4) any alternative means to obtaining the information. *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill.App.3d 1, 13 (2010).

For the first two factors, the requestor has a journalistic interest evidenced by her involvement with the BGA. The public has an interest because of the myriad of news articles and television reports from various media outlets discussing the disappearance, search, and eventual discovery of Logan Dunne's remains. The PAC noted that, "the disappearance and death of a member of the community is a legitimate public concern [. . .] especially so when, as is the case here, the missing person investigation was highly publicized." *PAC 24-006*, at 6.

On the third element, the surviving family members have protected privacy interests in the information because it is "FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death scene images." *National Archives & Records Administration v. Favish*, 541 U.S. 157, 170 (2004).

However, the requestor did not seek graphic images, recordings, or similar details, nor do the records contain that type of information. One report contains mental health records that may be deemed private but falls outside the types of "anguish-inducing records" that are typically deemed exempt based on the interests of surviving family members. *PAC 24-006*, at 7.

Additionally, there was no indication that an alternative means of obtaining the reports was possible.

As an alternative basis, the Sheriff's Office asserted the records were exempt because disclosure would interfere with or obstruct an ongoing criminal investigation. 5 ILCS 7(1)(d)(i); 5 ILCS 7(1)(d)(vii). However, the PAC determined the Sheriff's Office did not provide sufficient explanation to demonstrate why disclosure would have negative consequences on any law enforcement proceedings. With only a conclusory explanation, the PAC declined to apply the exemption here.

Overall, the denial was found improper, and the Sheriff's Office was directed to disclose the reports with permissible redactions.

Appellate Court Cases:

***Shehadeh v. City of Taylorville*, 2024 IL App (5th) 220824-U (issued 2/14/2024)**
Request for a Copy of Requestor's Letter to City Mayor Not a "Public Record" Nor Held by a "Public Body"

This is one of two Fifth District Appellate Court ("Court") decisions involving FOIA requests submitted to the City of Taylorville ("City") by Jamal Shehadeh ("Plaintiff").

In March 2022, Plaintiff wrote a letter to the City Mayor, expressing discontent "about the city attorney and other matters." *Shehadeh*, 2024 IL App (5th) 220824-U, at ¶ 4. According to the City, it complained of conduct related to another pending lawsuit between Plaintiff and the City. Plaintiff's letter also had "a request for a copy of the letter, which was couched as a request under FOIA."

The City denied the FOIA request, noting it was an improper communication with City officials who were represented by counsel in pending litigation with Plaintiff and an invalid FOIA request.

Plaintiff's *pro se* complaint argued the letter became "public record" when the Mayor received it and that there was no legal basis to deny his request. The trial court dismissed the complaint, noting that Plaintiff needed to address "how his request for a copy of his own letter fit within the stated legislative purpose of FOIA." *Id.* at ¶ 17.

On appeal, Plaintiff argued the letter was a "public record" under FOIA and the trial court erred in deciding if Plaintiff's proposed interpretation was consistent with FOIA's purpose.

FOIA broadly defines a "public record," but it does include "writings [and] letters *** received by *** any public body." 5 ILCS 140/2(c). However, the definition is limited to records related "to the transaction of public business" and those prepared or received by or under the possession or control of a public body. 5 ILCS 140/2(c).

Here, neither requirement was met. Plaintiff admitted the letter "contained complaints regarding the conduct of the attorney representing the City in other actions filed against it by the plaintiff." *Shehadeh*, 2024 IL App (5th) 220824-U, at ¶ 28. The Court determined that this was not related to public business because Plaintiff's complaints of attorney conduct in his litigation with the City does not implicate community interests.

Additionally, the City's Mayor does not qualify as a "public body" because the definition does not encompass individuals. *Id.* at ¶ 29. Illinois courts have previously ruled that individual aldermen or city council members are not public bodies under FOIA because the individual alone cannot conduct public business without a quorum. *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, ¶ 40. That is not to say communications prepared,

used, received, or controlled by the individual could not become public record under FOIA, but only if, for example, the communication was brought forward before the whole.

Here, the recipient is the Mayor – an official who does have some unilateral authority. However, this distinction did not widen the definition of "public body" because the Court declined to create additional terms not clearly indicated in FOIA. Importantly, the mayoral role is encompassed in the definition of "head of the public body," which creates a line between the Mayor and the "public body." 5 ILCS 140/2(e).

Notably, the purpose of FOIA is to provide the public with access to information. 5 ILCS 140/1. Providing Plaintiff with a copy of his own correspondence with the City's Mayor did not meet this purpose.

Because the letter was not a "public record," nor was it held by a "public body," the Court affirmed dismissal of Plaintiff's complaint.

***Shehadeh v. City of Taylorville*, 2024 IL App (5th) 220829-U (issued March 22, 2024)**
Unduly Burdensome Exemption Applied Where FOIA Request, On Its Face, Was Too Vague to Answer

This is two of two Fifth District Appellate Court ("Court") decisions involving FOIA requests submitted to the City of Taylorville ("City") by Jamal Shehadeh ("Plaintiff").

In this case, Plaintiff requested "all the communications" between the City's Police Chief and the Police Chief for the Village of Kinkaid from January 1, 2022 to March 1, 2022. The FOIA request included a copy of PAC Opinion 16-006, involving unrelated parties, which determined the City was required to search the Police Chief's "work and personal phones, email accounts, and social media accounts" for responsive records." *Shehadeh*, 2024 IL App (5th) 220829-U, at ¶ 4. Plaintiff requested a similar search for his request.

The City denied the request, stating (1) the communications are not "public records" subject to FOIA; (2) multiple FOIA exemptions applied; (3) the request was unduly burdensome and failed to specify the type of communications and that the time to review all communications outweighed public interests; and (4) the request would require the creation of new records. The City further stated that the attached PAC Opinion was not binding on the City in the present FOIA request.

Plaintiff's complaint alleged that (1) none of the City's exemptions applied; (2) the City failed to redact exempt material; and (3) the City did not provide a detailed legal and factual basis for its denial.

The trial court granted the City's motion to dismiss and agreed that the records were either not public records or were exempt.

On appeal, Plaintiff asserted: (1) communications between two police chiefs are public records; (2) the unduly burdensome request exemption was inapplicable; (3) the City did

not redact exempt information and produce the remainder; and (4) the trial court failed to conduct an *in-camera* review.

The Court affirmed on one basis – that the unduly burdensome request exemption applied to Plaintiff's request – and did not need to address the remaining allegations.

Because of this, the Court did not decide whether, "communications between individual public officials on their personal cell phones [. . .] can become public records [. . .], at least under some circumstances." *Shehadeh*, 2024 IL App (5th) 220829-U, at ¶ 22 (citing *Better Government Ass'n v. City of Chicago*, 2020 IL App (1st) 190038, ¶¶ 19 – 24; *City of Champaign*, 2013 IL App (4th) 120662, ¶¶ 41 – 43).

An unduly burdensome request is overly broad and requires locating and reviewing large quantities of non-responsive documents to fulfill the request.

There are three requirements to assert the "unduly burdensome" exemption: (1) the request is categorical and calls for all records within that category; (2) the request cannot be narrowed; and (3) the burden of compliance on the public body outweighs public interest in the requested information. 5 ILCS 140/3(g). The requestor must have an opportunity to narrow the request.

Here, all three elements were met. The request was overly broad and encompassed an entire category: communications between two police chiefs.

While the City did fail to offer an opportunity to narrow or clarify the request, Plaintiff's testimony affirmed that it could not narrowed. He stated, "it was not his burden" to narrow the request and "he had no way to know what information was in the communications unless the City provided [. . .] an index listing the communications it was withholding." *Shehadeh*, 2024 IL App (5th) 220829-U, at ¶ 26.

On the third element, the Court determined the request, "amounts to a fishing expedition in hopes of finding any records [. . .] that are not exempt form disclosure." *Id.* at 33. The Court agreed with Plaintiff that the City should have detailed the burden compliance would impose but ultimately the FOIA request was too vague. Even if responsive records were located, much of the communications would fall under exemptions applicable to law enforcement records.

The Court affirmed dismissal on the grounds that the request was unduly burdensome. Public bodies should note that while the Court found that the request was unduly burdensome, it did emphasize that the City should have asked the requestor to narrow or clarify the FOIA request in its original response and should have provided an explanation of the City's burden of complying with the FOIA request, such as an estimate of the number of records or the amount of time involved in obtaining, reviewing and redacting the records.

***Woolsey v. Illinois State Police*, 2024 IL App (4th) 210467-UB (filed March 19, 2024)**
Supreme court* Hart *Decision Sees Immediate Impact and Application in the Fourth District

The Fourth District Appellate Court ("Court") reversed and vacated its previous judgment in light of a recent Illinois Supreme Court case, *Hart v. Illinois State Police*, 2023 IL 128275.

Originally, the Court affirmed the trial court's order that the Illinois State Police ("ISP") was required to produce all documents related to Jason Woolsey's ("Plaintiff") application for a firearm owner's identification ("FOID") card. The ISP initially denied Plaintiff's FOIA request based on Section 7.5(v) of FOIA.

Section 7.5(v) of FOIA exempts the "names and information of people" who have applied or received FOID cards. 5 ILCS 140/7.5(v). In its original decision, the Court emphasized the use of plural terms, rather than the singular, and supported the finding that "Section 7.5(v) of FOIA did not apply to those seeking information about their own FOID card applications." *Woolsey*, 2024 IL App (4th) 210467-UB, at ¶ 8.

However, because of *Hart*, 2023 IL 128275, the outcome changed.

Relying on Section 1.03 of the Statute of Statutes, the Supreme Court reasoned that the use of "[w]ords importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular." *Hart*, 2023 IL 128275, at ¶ (quoting 5 ILCS 70/1.03). As such, the plural terms in Section 7.5(v) does not necessarily mean that a request for one's own records are excluded.

The *Hart* Court also determined that FOID card applications and subsequent denial letters are private information, not public records. 2023 IL 128275, at ¶ 24 (citing 5 ILCS 140/2(c-5); 5 ILCS 140/2(c-5)). Additionally, the correct place to request copies of an individual's own FOID applications is through the Firearms Services Bureau, not FOIA. *Id.* at ¶ 25.

Applying the Supreme Court's rationale here, the Court stated Section 7.5(v) of FOIA did apply to Woolsey's FOIA request. *Woolsey*, 2024 IL App (4th) 210467-UB, at ¶ 20. The requested information was not a public record, nor did FOIA allow for an individual to authorize the release of their own FOID information.

Because the Court reversed the trial court's grant of summary judgment for Woolsey, it also vacated the subsequent order awarding attorney fees and costs.

Open Meetings Act:

Proposed Legislation:

House Bill 4402
Status: Referred to Rules Committee on April 5, 2024

If adopted, this bill would define "bona fide emergency" as "a disaster, an act of terror, or any other occurrence that the public body determines is a threat to the continuity of governmental operations or endangers the health or safety of the public."

It proposes to define "exigent circumstances" as "a situation requiring immediate attention, including, but not limited to, injury, sickness, loss of life, or damage to property."

If adopted, this bill would permit a majority of the public body to allow a member to attend by other means if they are physically unable to because of exigent circumstances concerning a family member, rather than the current exception that states "a family or other emergency."

House Bill 4162
Current Status: Referred to Rules Committee on April 5, 2024

If adopted, this bill would allow a quorum to be established by both physical and virtual presence. It would allow members to be present via audio or video conference, which means the member can hear and be heard by all other participating in the meeting. To attend virtually, the member must notify the recording secretary or clerk before the meeting, unless such notice is impractical.

Senate Bill 3774
Current Status: Assigned to Subcommittee on Government Operations on 3/7/2024

If adopted, public bodies would be allowed to hold a closed session to consider the minutes of lawfully closed meetings, whether for purposes of approval or semi-annual review, and, notwithstanding the requirement of OMA that no final action be taken in closed session, the final approval of minutes in closed session.

Currently, minutes of closed session may only be discussed, but not acted upon.

Public Access Counselor Opinions:

Public Access Opinion 24-003 (issued March 1, 2024)
Seeking Authorization to Execute Agreement Constitutes Final Action Because City Ordinance Did Not Limit the Scope of City Council's Authority

In this binding opinion, the PAC determined that the City of Evanston ("City") violated Section 2(e) of OMA when the City Manager polled the City Council to authorize an

exclusive representation agreement. In the same closed session, the City Mayor directed staff to execute the agreement.

OMA requires that no "final action" by a public body take place during a closed meeting and that "[f]inal action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." 5 ILCS 120/2(e).

OMA does allow polling in closed sessions, so long as it is followed by a final vote in open session. *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, ¶ 73. Here, the City did not approve the execution of the agreement in open session.

The City argued that the agreement fell under the $25,000.00 threshold that requires City Council approval and that the City Manager could execute the agreement without its input. However, the cited Code of Ordinances provisions were found irrelevant because it did not limit the City Council's ability to take final action on a matter, only that it did not need to do so. Instead, the PAC focused on what happened at the meeting, which was authorization for the City Manager to enter the agreement.

The City also argued that the agreement did not immediately commit public funds and any future transactions stemming from the representation would be discussed and approved in open meetings. However, there was no support for the "general proposition that a public body does not take final action when there is no immediate expenditure or public funds" and OMA, "by its plain language, places no monetary parameters on final actions." *PAC 24-003*, at 8.

The City was directed to reconsider the exclusive representation agreement in open session, following public recital and compliance with 5 ILCS 120/2(e).

Appellate Court Cases:

***International Association of Fire Fighters Local 4646 v. Village of Oak Brook*, 2023 IL App (3d) 220466 (filed January 3, 2024)**

Collective-Negotiation-Matters Exception Does Not Apply to Anticipated or Hypothetical Negotiations But Disclosure of Minutes/Recording of Improperly Closed Meeting Still Entitled to Applicable FOIA Exemptions

The Village of Oak Brook ("Village") appealed the trial court's ruling that a closed meeting violated OMA (5 ILCS 120/1) and that records were improperly withheld under FOIA (5 ILCS 140/1). The Village also appealed the trial court's order that the Village pay reasonable attorney fees to the International Association of Fire Fighters Local 4646 ("Union").

On December 8, 2020, the Village held a public hearing regarding the Village's proposed 2021 budget. The Village Trustees then entered closed session pursuant to Section (c)(2)

(collective-negotiation matters) and Section (c)(11) (probable or imminent litigation) of OMA. The Village did so because its finances and tax revenues were severely impacted by the COVID-19 pandemic. As a result, it sought mid-year bargaining, which the Union refused.

The Village prepared two alternative budgets to make significant budget cuts in 2021. One, "Budget A," would require terminating a contract that would result in laying off Union members. The Village stated the closed session was necessary to discuss the consequences of "Budget A" and the related collective bargaining issues. "Budget A" had a high likelihood of leading to litigation as well.

In January 2021, the Union submitted a FOIA request for the audio and video recording of the closed session and documents reviewed in the closed session, which the Village denied pursuant to Sections 7(1)(f), (i), (l), (m), and (p) of FOIA.

The Union's complaint alleged the Village improperly entered a closed session and subsequently failed to disclose the complete video and audio recording and the documents discussed and reviewed in closed session pursuant to the Union's FOIA request. The Union also provided a non-binding opinion from the Public Access Bureau ("PAB") that stated the meeting was not properly closed under OMA.

On summary judgment, the trial court found that the OMA exemptions did not apply. The Village argued that, even if the closed meeting was improper, the minutes and recording should be redacted to exclude legal advice received from the Village's counsel. The request to redact was denied because, "there was no viable exception" under OMA for the closed meetings and the counsel's statements "should have been discussed in open session." *International Association of Fire Fighters Local 4646*, 2023 IL App (3d) 220466, at ¶ 21(quoting the trial court).

The Village appealed and the Court reviewed the cited OMA exceptions and attorney-client privilege exemptions.

Starting with OMA, the Court agreed that the Village's closed session discussions fell outside the cited OMA exemptions.

The first exemption cited, Section 2(c)(2), is the collective-negotiation-matters exception. 5 ILCS 120/2(c)(2). This exemption permits closed meetings to discuss "collective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees." 5 ILCS 120/2(c)(2).

However, the Village was not in active negotiations at the time of the closed meeting. Instead, the Village entered closed session to discuss alternate budget proposals and the potential impact on collective bargaining issues or litigation exposure. The Village asserted "Budget A" would "necessarily affect wages, hours, and other terms of employment," and

justified the closed meeting. *International Association of Fire Fighters Local 4646*, 2023 IL App (3d) 220466, at ¶ 40.

OMA Section 2(c)(2) does not encompass *anticipated* or *hypothetical* collective bargaining negotiations. *International Association of Fire Fighters Local 4646,* 2023 IL App (3d) 220466, at ¶ 41. It does not encompass "discussion of unilateral budgetary actions that would affect members of collective bargaining units outside o *active* or *imminent* collective bargaining." *Id.* (quoting 2015 Ill. Att'y Gen. Pub. Access Op. 15-007, at 7 (emphasis added)). Because there was no imminent or active collective bargaining at the time, Section 2(c)(2) did not apply.

OMA Section 2(c)(11) permits closed meetings to discuss pending, probable, or imminent litigation. 5 ILCS 120/2(c)(11). Relevant discussion topics under Section 2(c)(11) include legal theories, claims, defenses, or potential litigation approaches. Applying this exemption requires examining the "surrounding circumstances in light of logic, experience, and reason." 1983 Ill. Att'y Gen. Op. No. 83-206, at 11.

The Village contended that this exception was proper because one of the two budgets "would most definitely lead to litigation" because the Village would breach its contract with the Union. *International Association of Fire Fighters Local 4646*, 2023 IL App (3d) 220466, at ¶ 45.

Here, the closed session occurred before choosing the budget and no facts supported that "Budget A" was the more probable result at the time, or that the second budget would also lead to litigation. The crucial point was the insufficient grounds to believe litigation "was more likely than not *at the time it entered the closed session*." *Id.* at ¶ 47 (original emphasis).

Because the Village did not demonstrate either exemption applied, the Court upheld the trial court's ruling that the Village violated OMA. As a result, the Village also did not comply with FOIA in denying the Union's request.

However, the Court did rule that the trial court erred in ordering complete disclosure of the minutes and recording without redacting attorney-client communications. *Id.* at ¶ 51.

Section 3(c) of OMA states that the trial court "may grant such relief as it deems appropriate" when it deems a public body is noncompliant. 5 ILCS 120/3(c). Section 11(d) of FOIA grants the trial court jurisdiction to order production of "improperly withheld" records. 5 ILCS 140/11(d). Pursuant to Section 7(1)(m) of FOIA, attorney-client communications that would not be disclosed in discovery are exempt from disclosure. 5 ILCS 140/7(1)(m).

OMA's statutory scheme supports application of the attorney-client privilege to the case here. First, even when noncompliance is found, the result is not automatic unfiltered disclosure of the closed meeting minutes. Section 2.06(e) provides further support

because it permits the trial court "to redact from the minutes of the meeting closed to the public any information deemed to qualify under the attorney-client privilege." 5 ILCS 120/2.06(e).

The Court determined the trial court erred by failing to conduct an attorney-client-privilege analysis and failing to recognize it had discretion to limit disclosure of privileged information. Notably, Section 3(c) of OMA states disclosure only extends to "improperly withheld" records, not the entire proceedings. 5 ILCS 120/3(c). Instead, the issue was partially remanded with instructions to consider the matter *de novo* to determine if the Village met its burden of proving the disclosure applied. 5 ILCS 140/11(f).

The last argument from the Village argued the trial court abused its discretion in awarding attorney fees. However, the initial fee-petition hearing was not part of the record, and the Court could only presume the judgment was in conformity with the law. *International Association of Fire Fighters Local 4646*, 2023 IL App (3d) 220466, at ¶ 65.

All in all, the judgment was affirmed in part, vacated in part, and remanded.

***Stop NorthPoint, LLC v. City of Joliet*, 2024 IL App (3d) 220517 (filed January 19, 2024)**
OMA's "Convenience" Requirement Extends to Time and Place of Meeting and Failure to Follow State Mask-Mandate Did Not Render Meeting Improper Under OMA

The original complaint arose in October 2020 when Stop NorthPoint, LLC and seventeen (17) individuals ("Plaintiffs") filed suit to stop the City of Joliet ("City") from annexing unincorporated land in Will County. The complaint has multiple counts, but the focus here are the alleged OMA violations made in Plaintiffs' fourth amended complaint.

Here, Plaintiffs argued that the City failed to require masks at hearings held in November and December 2021, despite a state-wide mask mandate.

The trial court initially dismissed Plaintiffs' OMA allegations because there was no legal basis to invalidate an ordinance or annexation agreement when face masks were not worn at a public hearing. Additionally, the trial court noted the face-mask mandate was directed to individuals, not municipalities.

On appeal, the Court considered Plaintiffs' argument that the City failed to require masks despite the mask-mandate and outbreak of the Omicron variant of COVID-19. Plaintiffs asserted this required the public to risk their health and safety to participate, in violation of Section 2.01 of OMA.

This section requires meetings to be held at "specified times and places which are convenient and open to the public." 5 ILCS 120/2.01. Plaintiffs viewed the risk to health and safety as violative of the "convenience" requirement.

The Court stated that the City's failure to mandate masks may have deterred public participation, but it did not violate OMA. Specifically, the Governor's executive order did not charge municipalities with enforcing the mask-mandate and the convenience requirement only applied to places and times.

Ultimately, the Court upheld dismissal of Plaintiffs' OMA claim for failure to state a cause of action.