Welcome to the 2023 FOIA and OMA Transparency Reporter, provided by Klein, Thorpe, and Jenkins, Ltd.

The area of the Freedom of Information Act ("FOIA") and the Open Meetings Act ("OMA") saw many legislative changes, judicial interpretations, and Public Access Counselor opinions. This Reporter summarizes the 2023 Public Acts, case law, and Public Access Counselor opinions related to FOIA and OMA.

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

- New FOIA exemptions added for private health information under HIPAA, automated license plate readers, and State Board of Education reports regarding discrimination, harassment and bullying.
- In order to justify withholding security video footage, public body must demonstrate how footage could pose a potential security risk to the correctional facility.
- Section 7(1)(o) of FOIA contains per se categories of records that automatically jeopardize security systems.
- Court found public body did not have an obligation to demand records of third-party contractors and failure to do so was not an inadequate search for records.
- Employee survey results on supervisor's performance were exempt as predecisional records.
- Police records that contain juvenile and adult arrestees must be withheld in full under Juvenile Court Act.
- Public body must show that disclosure of proprietary or confidential information of third parties *would* cause competitive harm to meet Section 7(1)(g) of FOIA exemption.

OMA

- New OMA electronic attendance exception added for unexpected childcare obligations.
- New OMA closed meeting exception added for evidence or testimony regarding denial of admission to school events or school property.
- Informal meet and greet between staff and elected officials was an improper meeting under OMA because matters of public business were discussed.
- Divided opinions issued as to standard for "general subject matter" on an agenda between PAC and an unreported court opinion.
- Public body cannot discuss ancillary topics related to the sale of a property owned by the public body, and is limited to only setting the price of sale or lease.
- Closed meeting minutes cannot be approved in closed session.
- Public body improperly went into closed session to discuss the removal of a book from the curriculum.

Freedom of Information Act

The Freedom of Information Act, or FOIA, is the embodiment of that "fundamental philosophy of the American constitutional form of government." 5 ILCS 140/1. In other words, public bodies must provide the public with access to its records to ensure full and free disclosure of matters related to the public interest.

Of course, there are always exceptions to the rule, as seen in the following statutory changes, cases, and Public Access Counselor Opinions. Understanding how to respond to a FOIA request, when to respond, and what can be redacted or denied will aid your public body in providing that open discourse and transparency, while also protecting the recognized exemptions.

Statute

These are the Public Acts adopted by the Illinois General Assembly in 2023.

Public Access Counselor May Not Disclose Records Obtained in a Request for Review

Public Act 103-0069, *effective June 9, 2023*

Section 9.5(c) of FOIA (5 ILCS 140/9.5(c)) is amended to provide that records or documents obtained by the Public Access Counselor in a Request for Review may not be disclosed to the public, including the requestor, by the Public Access Counselor. The change also strikes the previous provision that limited Public Access Disclosure to the exemptions found in Section 7 of FOIA.

Data Required Under Section 2-3.196 of the School Code is Exempt from Disclosure

Public Act 103-0472, *effective August 4, 2023*

The statutory exemptions listed in Section 7.5 of FOIA is modified to create a new disclosure exemption. The new section, Section 7.5(iii), prohibits disclosure of "data exempt from disclosure under Section 2-3.196 of the School Code." 5 ILCS 120/7.5(iii).

Public Act 103-0472 also amends the School Code to add Sections 2-3.196 and 22-95, and by modifying Sections 27A-5 and 34-19.62.

Section 2-3.196 of the School Code creates reporting expectations to document reported allegations of discrimination, harassment, and retaliation. It stipulates that this information will be published in a report by the State Board of Education aggregating the information. Disclosure of information obtained under this section is exempt from disclosure under FOIA.

FOIA Exemptions Expanded to Include Protected Health Information Held by HIPAA-Covered Entities

Public Act 103-0554, *effective August 11, 2023*

Under this legislative act, the definition of "private information" in 5 ILCS 140/2(c-5) is amended to include "electronic medical records and all information, including demographic information, contained within or extracted from an electronic medical records system operated or maintained by the public body in compliance with state and federal medical privacy laws and regulations." This applied to public bodies that HIPAA-covered entities, as defined in "covered entity" in 45 C.F.R. 160.103.

Section 7(1)(pp) of FOIA is added to exempt "all information that is protected health information" held by a public body that is also a HIPAA-covered entity from disclosure under FOIA. This includes demographic

information that may be contained within or extracted from records held in compliance with State and federal medical privacy laws and regulations, such as those required by HIPAA. The definition of "HIPAA-covered entity" has the same meaning as in 45 C.F.R. 160.103 and "protected health information" has the same meaning as in 45 C.F.R. 160.103. For municipalities, schools and libraries, only EMS services fall under the definition of "covered entity."

Information Obtained by a Certified Local Health Department Under the Access to Public Health Data Act is Exempt from Disclosure.

Public Act 103-423, *effective January 1, 2024*

This Public Act added a new exemption to FOIA, also referenced under 7(1)(pp), that exempts information obtained by a certified local health department under the Access to Public Health Data Act. The Access to Public Health Data Act is a new state law that authorizes various state agencies to make certain public health data available to a certified local health department for limited purposes. Public health data includes birth and death certificate data, hospital discharge data, adverse pregnancy outcomes reporting systems data, cancer registry data, syndromic surveillance data and prescription monitoring data.

Information Related to Automatic License Place Readers is Exempt

Public Act 103-540, *effective January 1, 2024*

This Public Act amends FOIA to add a new exemption, Section 7(1)(d-7), for "information gathered or records created from the use of automatic license plate readers ("ALPR") in connection with Section 2-130 of the Illinois Vehicle Code." Section 2-130 of the Illinois Vehicle Code states that all ALPR information shall be held confidentially.

Cases

Under Section 11 of FOIA (5 ILCS 140/11), a denial or otherwise improper action relating to FOIA can be challenged through judicial review. These are the cases from 2023 where public body actions under FOIA were challenged.

Public Bodies Are Not Required to Produce Records in a New Format to Accommodate Request

Garlick v. Village of Cambridge, No. 3-21-0045, Summary Order, *filed February 2, 2023*

The Illinois Appellate Court for the Third District affirmed the decision of the lower court and held that public bodies are not required to prepare records in a new format to accommodate a FOIA request. Here, the plaintiff requested electronic copies of certain documents and the Village responded that the documents only existed in hard-copy format and would not be furnished in electronic form. The trial court granted the Villages' motion to dismiss, noting that Illinois has frequently found FOIA does not require the provider to create records in a new format to accommodate a request, even if it is in the provider's power to do so.

Plaintiff Not Entitled to Attorney Fees and Costs Where Litigation Was Not Reasonably Necessary to Ensure Public Body Compliance

Edgar County Watchdogs v. Joliet Township, 2023 IL App (3d) 210520, *issued February 28, 2023*

The Illinois Appellate Court for the Third District ("Appellate Court") affirmed the lower court's decision that denial of attorney fees and costs was consistent with FOIA's fee-shifting provision where litigation was not necessary to ensure FOIA compliance. Here, plaintiff made a FOIA request to the Township

seeking “a copy of the hard drive contents” of a specific computer and filed suit when the Township sought payment for IT services for the cost of copying the hard drive and obtaining a storage device. The trial court ordered the Township to provide the plaintiff with the documents stored on the computer and noted the lawsuit would have been avoided if plaintiffs had clarified their request before filing suit. The clarification needed concerned whether the plaintiffs sought the “metadata” on the hard drive, which would require engaging outside IT services to complete, or all the documents on the hard drive, which would not have incurred those services.

On appeal, plaintiff asserted that they “prevailed” because the Township was ordered to release the documents on the hard drive and thus, they were entitled to attorney fees and costs. This is based on Section 11(i) of FOIA that states “if a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding under this Section, the court shall award such person reasonable attorneys’ fees and costs.” 5 ILCS 140/11(i).

However, to “prevail” under FOIA, there must be more than a connection between a lawsuit and the document’s production as a result. There must also be a reasonable necessity for the lawsuit to obtain the documents. Here, the Appellate Court found that the final requirement – reasonable necessity of the lawsuit – was not met. If plaintiff had clarified what “a copy of the hard drive contents” meant prior to filing a lawsuit, the Township would have been able to comply without need for legal action. Further, the plaintiffs were denied civil penalties because they failed to show that the Township acted willfully, intentionally, and in bad faith in response to the FOIA request when they reasonably requested the costs of copying the hard drive based on the Township’s interpretation of the FOIA request.

Section 7(1)(e) of FOIA Exempts Disclosure of Security Footage at Correctional Institutions that *Could* Pose a Potential Security Threat, But Affidavit of Department’s Counsel Too Vague to Meet Clear and Convincing Standard

Glynn v. Department of Corrections, 2023 IL App (1st) 211657, *issued March 2, 2023*

In this case, the First District Appellate Court (“Court”) reversed the circuit court’s grant of summary judgment in favor of the Department of Corrections (“DOC”), determining an in-camera review was necessary to determine if the cited FOIA exemption applied.

The FOIA request, made by Ivan Glynn (“Plaintiff”) sought security video footage from the Joliet Treatment Center (“Center”). It gave a specific date and room sought. The DOC denied the request, asserting that the DOC does not maintain or possess the requested footage and, even if it did, the footage was exempt under Section 7(1)€ of FOIA (5 ILCS 140/7(1)(e)). This section of FOIA prohibits disclosure of “records that relate to or affect the security of correctional institutions and detention facilities.” (5 ILCS 140/7(1)(e)).

The circuit court reviewed an index of the denied records, provided by the DOC, and agreed the records were exempt because disclosure could jeopardize the Center’s security. An affidavit supplied by the DOC’s legal counsel also stated the security camera system provided footage only, and that the videos revealed the layout and structure of the Center, including positioning of DOC staff members, like prison guards. Significantly, disclosure would also reveal any blind spots, or areas not covered by the cameras.

On appeal, Plaintiff argued Section 7(1)(e) of FOIA was applied too broadly, that the DOC had failed to demonstrate by clear and convincing evidence that the records were exempt, and that the reveal of blind spots in the footage was insufficient to base exemption upon.

The Court first analyzed the statutory construction of Section 7(1)(e) of FOIA, which exempts "records that relate to or affect the security of correctional institutions and detention facilities." (5 ILCS 140/7(1)(e). The Court rejected Plaintiff's argument that Section 7(1)(e) of FOIA requires the DOC to show that disclosure *actually* affects security, pointing to the disjunctive conjunction ("or") between "relate to" and "affect." The meaning of "relate" was deemed ambiguous, and the Court ultimately concluded Section 7(1)(e) of FOIA "applies only when a public body demonstrates that disclosure of a requested record could pose a potential security risk to a correctional facility." *Glynn*, 2023 IL App (1st) 211657, at ¶ 34.

With that definition in mind, the Court then determined if the DOC's evidence, namely the affidavit, proved by clear and convincing evidence that the exemption was met. Finding the affidavit only vaguely described the room layout, scope of area covered by the cameras, blind spot locations, image clarity, and visibility of the cameras, the affidavit alone did not meet the clear and convincing evidence standard.

To address the issue, the matter was remanded for an *in camera* review to determine if Section 7(1)(e) of FOIA exempted the records from disclosure.

Federal and State Law Do Not "specifically prohibit" the Recipient of a Grand Jury Subpoena from Disclosing the Subpoena.

Chicago Public Media v. Illinois State Toll Highway Authority, 2023 IL App (1st) 210629-U, *issued March 31, 2023*

In this matter, the First District Appellate Court ("Court") agreed with the circuit court that subpoenas issued to a public body are not categorically exempt from FOIA disclosure but may contain exempt information. The matter was remanded for an *in camera* inspection to determine if the documents contained information subject to redaction.

The underlying FOIA request was made by Chicago Public Media ("Plaintiff"), requesting "any and all subpoenas from federal, state, or local law enforcement authorities seeking documents or testimony that have been filed with the Illinois State Tollway since January 1, 2018." The public body, the Illinois State Toll Highway Authority ("ISTHA"), initially negotiated with Plaintiff to narrow the scope of the FOIA request. 126 responsive records were identified, but ISTHA would not disclose subpoenas where the issuing agency objected to disclosure. Ultimately, 83 of 126 subpoenas were disclosed.

Plaintiff filed this case, alleging the subpoenas were non-exempt public records under FOIA. ISTHA maintained the withheld records were exempt because disclosure was prohibited under state or federal law. 5 ILCS 140/7(1)(a). Relying on Section 112-6(b) of the Illinois Code of Criminal Procedure and Federal Rule of Criminal Procedur€(e), ISTHA asserted disclosure would reveal secret aspects of grand jury investigations and proceedings. Further, disclosure would interfere with actual or expected law enforcement proceedings, which are exempt under Section 7(1)(d)(i) of FOIA. (5 ILCS 140/7(1)(d)(i)).

The trial court ruled partially in favor of both parties in Plaintiff's motion for summary judgment and ISTHA's motion to dismiss. While grand jury subpoenas are not *per se* prohibited from disclosure under Section 7(1)(a) of FOIA, they may be subject to redaction if they disclose secret aspects of the grand jury's investigation. These secret aspects include witness or juror identity, testimony substance, investigation strategy, or juror deliberation. Those aspects may be redacted.

On appeal, the Plaintiff argued that the trial court erred when it permitted ISTHA to redact information from the responsive records. ISTHA rebutted this argument with the same statutory laws, noting both federal and state law protect grand jury proceedings. *See* 725 ILCS 5/112-6(b); Fed. R. Crim€. 6(e). This

is designed to protect the integrity of the proceedings, including unwarranted exposure of innocent parties. *In re Appointment of Special Prosecutor*, 2019 IL 122949, ¶ 32.

However, as Plaintiff pointed out, neither of these statutory provisions expressly limited the recipient of a grand jury subpoena from disclosure. The expressed language of Section 7(1)(a) of FOIA exempts information *specifically prohibited from disclosure* by federal or state law. (5 ILCS 140/7(1)(a)). "Specifically prohibited" in the context of grand jury proceedings was previously considered in *Better Government Association v. Blagojevich*, 386 Ill.App.3d 808, 814-16 (2008). There, the court maintained that a public body is not specifically prohibited from disclosing the existence of a grand jury subpoena.

The trial court authorized redactions based on information protected by Section 7(1)(a) of FOIA, but, as case law noted, the state and federal criminal procedure rules cited do not apply to the recipients of grand jury subpoenas. Because those rules did not apply, ISTHA failed to provide a sufficient justification for exemption.

However, as the trial court stated, the subpoenas may still contain other information exempt under Section 7 of FOIA. The Court ordered an *in-camera* review under Section 11 of FOIA to determine if any other provisions of FOIA justified redaction of exempt information.

<u>Section 7(1)(o) Includes Ten *Per Se* Exemptions and a "Catch-All" Category Where Disclosure Would Jeopardize System Security</u>

Chapman v. Chicago Department of Finance, 2023 IL 128300, *issued May 18, 2023*

In August 2018, Matt Chapman ("Plaintiff") requested records relating to the Citation Administration and Adjudication System ("CANVAS") utilized by the Chicago Department of Finance ("Department") to issue notices and collect payment for traffic violations. The CANVAS system was developed by IBM and aids in parking, red-light, and speed-camera violation enforcement. The request indicated the records would be open to the general public.

It provided specific information sought, such as specific SQL queries to yield responsive records.

The Department denied the request, explaining the records were exempt under Section 7(1)(o) of FOIA, which exempts "administrative or technical information associated with automated data processing operations," such as software, operating protocols, source listings, where disclosure "would jeopardize the security of the system or its data or the security of materials exempt" under FOIA. (5 ILCS 140/7(1)(o)). The Department determined the request for the CANVAS table or columns, if public shared, would jeopardize the system security of the City of Chicago ("City").

The matter worked through the judicial system to reach the Illinois Supreme Court ("Supreme Court"). The trial court analyzed if disclosure would jeopardize system security, finding that the Department failed to meet the burden of proof under Section 7(1)(o) of FOIA and ordered production of the records. The Department appealed, arguing the information met the definition of a "file layout" that warranted exemption, in addition to jeopardization of the security system. The appellate court disagreed, finding that the information was not exempt.

Before the Supreme Court, both decisions were reversed.

The Department raised two issues on appeal: (1) that the records were expressly exempt from disclosure under Section 7(1)(o) of FOIA and (2) that Section 7(1)(o) of FOIA requires only a *possibility* of harm to the system's security to demonstrate disclosure would place the system in jeopardy.

The Supreme Court began by analyzing the public policy of FOIA, found in Section 140/1. (5 ILCS 140/1)). With that basis in mind, Section 7(1)(o) of FOIA was interpreted. The Supreme Court agreed with the Department that Section 7(1)(o) of FOIA created a *per se* exemption for file layouts, and most of the exemptions included in Section 7 of FOIA. Section 7(1)(o) of FOIA lists ten items but includes the phrase "including but not limited to," to show the list is illustrative and not exhaustive.

The catch-all category of information that would "jeopardize the security of the system or its data" showed the legislature could not, and did not, intend to capture all information within the scope of Section 7(1)(o) of FOIA. The Supreme Court read these exemptions in two parts, determining that the ten examples were *per se* exemptions and did not require the court to go further. Instead, demonstrating a threat to the system's security only activated if the public body sought to use Section 7(1)(o) of FOIA on records outside of the ten (10) listed examples.

Because the Department's file layouts were expressly exempt, the Supreme Court did not address if disclosure would jeopardize the system's security. It did consider if the records were "file layouts," which is not defined in statute. The dictionary definition states a "file layout" as "description of the arrangement of the data in a file." *Chapman*, 2023 IL 128300, ¶ 45. Plaintiff argued the request was for "database schema," not file layouts, but the Supreme Court determined these were one and the same.

Based on the foregoing, the requested records were deemed exempt under Section 7(1)(o) of FOIA.

<u>Audio Recordings of 911 Calls Are Exempt to the *Extent* that They Unavoidably Disclose the Identity of the Caller *and* Creation of Transcripts Not Ordinarily Kept by the Public Body Constitutes Creation of New Records</u>

Edgar County Watchdogs v. Will County Sheriff's Office, 2023 IL App (3d) 210058, *issued June 21, 2023*

The Third Circuit Appellate Court ("Appellate Court") held that 911 audio recordings are only exempt to the point where they disclose the identity of the speaker, but that application of voice alteration software would be a modification of an existing records, not creation of a new one. The Appellate Court also reversed the trial court's order to provide transcripts of the recordings because the creation of these transcripts would be a new record.

Here, the plaintiff filed a FOIA enforcement action regarding its request to receive recordings of specific 911 calls. The Will County Sheriff's Office ("Sheriff's Office") argued the 911 audio recordings were exempt under Section 7(1)(d)(iv) of FOIA (5 ILCS 140/7(1)(d)(iv)) because the recordings would "unavoidably disclose the identity" of the speaker and, at the time, could not be altered or redacted in a manner that would protect the speaker's identity. The trial court ordered the Sheriff's Office to provide either an altered audio recording or transcript of the calls. The Sheriff's Office appealed.

The Appellate Court affirmed that the 911 calls were not exempt under Section 7(1)(d)(iv) of FOIA and should be released with audio alterations to protect the speaker's identity. Section 7(1)(d)(iv) of FOIA only exempts the records to the point where they "unavoidably disclose the identity" of the involved parties. The public body must still disclose the record, or any part of it, that does not disclose the identity of the person who filed the complaint or provided law enforcement with information.

Notably, the trial court conducted an *in camera* review of the relevant recordings to find the speaker's tonal qualities were exempt but that the "substantive content" of the recordings was not exempt. Given the *in camera* review, the Appellate Court deferred to the trial court's findings and noted the recordings were not included on the appeal record.

The Appellate Court further declined to adopt the Sheriff's Office argument that *all* 911 recordings should be exempt, regardless of content. While the dissent argued that 911 recordings constitute private communications not subject to FOIA disclosure, the majority held that the plain language of FOIA clearly exempts 911 recordings to the *extent* that disclosure would reveal the caller's identity. The Appellate Court reasoned that "not every statement in a 911 recording would unavoidably disclose the caller's identity." Non-identifying information could include the date, time, and location of reports.

The Appellate Court also found that the Sheriff's Office was not creating a new record by applying the voice alteration software to the recordings. Rather, this software application modified the existing record and is akin to altering documents to remove exempt information. When the initial request was made, the Sheriff's Office did not have this technology, but, at appeal, they had the technology to mask the speaker's voice and avoid identifiable disclosure.

However, the Appellate Court reversed the trial court's order to provide written transcripts of the calls. The court noted transcript production would be a new record and that the Sheriff's Office does not ordinarily create or keep transcripts of 911 calls.

Public Body Properly Denied FOIA Request Where Cited State Law Evidenced an Intent to Avoid Public Disclosure of Inmate's Records

Kenneally v. Department of Corrections, 2023 IL App (2d) 220349, *filed June 22, 2023*

The McHenry County State's Attorney, Patrick Kenneally ("State's Attorney") sued the Department of Corrections ("Department") for a violation of FOIA when the Department refused to disclose information on certain individuals who had been released from the Department.

The State's Attorney sent a FOIA request for records relating to formerly incarcerated individuals, and the Department denied the request. The denial cited Section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a)) as grounds for exemption because state law prohibited disclosure. Specifically, the Department stated Section 3-5-1(b) of the Unified Code of Corrections (730 ILCS 5/3-5-1(b)) prohibited disclosure of information of persons "committed" to the Department.

In the complaint, the State's Attorney asserted this protection did not apply because the individuals were already released or, alternatively, the prohibition in Section 3-5-1(b) did not apply to law enforcement agencies. The trial court agreed with the State's Attorney and ordered production of the records. In a motion for reconsideration, the initial order was vacated, which led to this appeal by the State's Attorney.

Section 7(1)(a) of FOIA exempts disclosure of "information specifically prohibited by federal or State law or rules and regulations implementing federal or State law." (5 ILCS 140(7)(1)(a)). The Department's cited state law, Section 3-5-1(b), states that the "master record" file of each person committed to the Department "shall be confidential and access shall be limited to authorized personnel of the respective Department." 730 ILCS 5/3-5-1(b). Additionally, personnel of other "correctional, welfare or law enforcement agencies may have access to file under rules and regulations of the respective Department." 730 ILCS 5/3-5-1(b).

Whether the trial court got it right or not hinged on how Section 7(1)(a) of FOIA and Section 3-5-1(b) of the Code of Corrections were interpreted. Relying on prior case law, the Court stated that, even if exemption is not specifically stated in the federal or state law, the records may still be exempt if the plain language of the statute showed the legislature did not intend for the public to have access to the records. *Better Government Ass'n v. Zaruba*, 2014 IL App (2d) 140071, ¶ 21. However, Section 7(1)(a) does not apply if the statute relied upon is ambiguous or silent in regard to public disclosure. *Id.*

In the case of Section 3-5-1(b), and contrary to Plaintiff's argument, personnel of outside agencies *may* have access to the records, "under the rules and regulations of the ***Department." (730 ILCS 5/3-5-1(b)). The Department regulations specified that law enforcement agency personnel *may* access an offender's files, as approved by the Chief Administrative Officer. (730 ILCS 5/3-1-2(a)).

Here, the Chief Administrative Officer, or the highest-ranking official at a correctional facility, did not approve access to the materials. While the statute did not *expressly* prohibit disclosure, the regulations and language plainly evidenced an intent to restrict access. Thus, the Department properly applied Section 7(1)(a) of FOIA to the State's Attorney's request.

<u>FOIA Does Not Require Public Body to Demand Records from a Third-Party Contractor, Even Where Contractor Failed to File Legally Required Reports</u>

Chicago Recycling Coalition v. City of Chicago Department of Streets and Sanitation, 2023 IL App (1st) 220154, *issued August 11, 2023*

This case is an appeal from a summary judgment in favor of defendant, the City of Chicago ("City") Department of Streets and Sanitation ("Department"). The Chicago Recycling Coalition ("Plaintiff") initially alleged the Department failed to produce nonexempt public records, failed to perform an adequate search, and willfully violated FOIA.

Plaintiff's FOIA request sought records from the Department's recycling program in 2018, including those from third-party private haulers. The City is comprised of six recycling zones and contracts with private companies to collect recycling materials in four of the six zones, specifically for buildings with four or less dwelling units or single-family homes. Third-party private haulers are also authorized to collect recycling from buildings with five or more dwelling units and commercial buildings.

The Department provided some records, but stated records pertaining to miles travelled were not included because the Department did not maintain them.

Plaintiff argued the response was incomplete and that the Department did not perform an adequate search. Specifically, the Department did not provide annual reports from 72 of the 115 licensed third-party haulers, despite the reporting requirement found in Section 11-5-220(a) of the Recycling Ordinance. (Chicago Municipal Code § 11-5-220(a)). The Department argued it did not create those records, although the Department would make a request for the reports, provide a template to the third-party private hauler, and keep copies of the reports it did receive.

On appeal, Plaintiff argued that all 115 reports are in the "control" of the Department because of the Recycling Ordinance requirements, thus obligating the Department to obtain and disclose all reports, even if those reports are not in their possession. Plaintiff also argued the search was inadequate because the Department did not seek the reports from the third-party private haulers.

Because the Department did not take a position on whether the missing reports were "public records," the Court assumed they were and focused on whether the Department adequately searched for the "missing" reports.

An adequate search is "judged by a standard of reasonableness and depends upon the facts of each case." *Better Government Ass'n v. City of Chicago Office of Mayor*, 2020 IL App (1st) 190038. This does not need to be exhaustive but rather the body must search locations reasonably likely to have the responsive records.

Here, the Department submitted affidavits demonstrating the Department relies on the third-party haulers to submit the required annual reports. The Department did search and produce the records on hand. Plaintiff

asserted this search was inadequate because the Department did not contact the haulers who had not filed the required reports, despite the haulers' legal obligation to do so under the Recycling Ordinance.

The Court rejected that argument because "FOIA does not impose an obligation on the Department to make a demand on a third-party private hauler who is delinquent or otherwise noncompliant with its obligation" to submit the reports. Further, Plaintiff failed to assert the alleged records actually exist and it was pure speculation that the third-party haulers had the required records, but simply failed to submit them.

The judgment of the circuit court in favor of the Department was affirmed.

Public Body Did Not Violate FOIA When it Denied Disclosure of Photos Depicting Decedent Post-Mortem

Thomas v. County of Cook, 2023 IL App (1st) 211656-U, *issued October 10, 2023*

This decision affirms the circuit court's order denying civil penalties under FOIA because the County of Cook ("County") did not willfully and intentionally fail to comply or otherwise act in bad faith.

Plaintiff, Oily Thomas ("Plaintiff") was convicted of first-degree murder in 1992. In January 2019, Plaintiff submitted a FOIA request to the County for "all postmortem photographs, autopsy photographs, and X-rays" of the victim. *Thomas*, 2023 IL App (1st) 211656-U, at ¶ 4. A search found 38 autopsy photographs, but 35 were deemed "exempt from disclosure" because they depicted "a decedent postmortem" which was an "unwarranted invasion of personal privacy." *Id.* at ¶ 5. Section 7(1I) of FOIA states exempts disclosure of records that would create an "unwarranted invasion of personal privacy" because "the disclosure is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." (5 ILCS 140/7(1)(c)).

The Plaintiff challenged the County's response And asserted the personal privacy of the victim's family was outweighed by the reasonable possibility the photos could help an innocent man be released from jail. Plaintiff then filed a complaint alleging the denial was done willfully, intentionally, and in violation of FOIA. Section 11(j) of FOIA permits civil penalties if the court finds "a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith." (5 ILCS 140/11(j)).

The Court stated the record did not support Plaintiff's assertion that the County was motivated by bad faith. It cited a non-binding Public Access Opinion, which found that the release of post-mortem photographs would be an unwarranted invasion and highly objectionable to the reasonable person. *Public Access Opinion No. 10-003* (2010 Ill. Att'y Gen. Pub. Access Op. 10-003).

Ultimately, the denial was proper and not done in bad faith. Plaintiff's claim was dismissed.

Third District Joins Other District Courts to Find that Court-Ordered Relief is **Not** a Prerequisite to Awarding Attorney Fees Under Section 11(i) of FOIA.

Kieken v. City of Joliet, 2023 IL App (3d) 220392, *filed October 17, 2023*

In a cross-appeal, the City of Joliet ("City") argued that Plaintiff was not entitled to any statutory attorney fees under FOIA, while Plaintiff John Kieken ("Kieken") contended the fee should be increased.

Kieken submitted a FOIA request for "all traffic and environmental studies" related to a proposed development. The City denied the request based on the deliberative-process exemption (5 ILCS 140/7(1)(f)) and asserted no environmental study records existed.

On December 7, 2021, Kieken filed an emergency motion for a temporary restraining order ("TRO") or preliminary injunction to compel production or, alternatively, stay the upcoming city council hearing on the

proposed development until the FOIA request was complete and records reviewed. The motion also sought attorney fees pursuant to FOIA. On December 9, 2021, the City sent an April 2020 traffic impact study and on December 14, a second study for December 2021. Both traffic studies were prepared by a private firm for the developer and marked as "drafts."

At the hearing, the circuit court denied Kierken's request as moot because the requested records were released. The court also denied the request to stay the city council hearing, finding the remedy outside the scope of FOIA relief. On January 5 2022, Plaintiff moved for attorney fees and costs. The City contested entitlement to the fees, asserting that Kieken was not a "prevailing party" within the meaning of FOIA.

The circuit court awarded $20,742.50 in attorney fees, a lower amount than the requested $62,396. The court found the hourly rate was excessive in comparison to the rate customarily sought in Will County and/or Joliet. The appeal and cross-appeal followed. Both parties dispute the reasonableness and propriety of the award.

Section 11(i) of FOIA holds that a prevailing party shall be awarded reasonable attorneys fees and costs. (5 ILCS 140/11(i)). However, district courts are split on whether court-ordered relief is necessary to reach a Section 11(i) award.

The Second District holds that "nothing less than court-ordered relief" is required for a party to obtain attorney fees under FOIA. *Rock River Times v. Rockford Public School District 205*, 2012 IL App (2d) 110879, ¶ 40. The First, Fourth, and Fifth Districts have found the opposite. *See Uptown People's Law Center v. Department of Corrections*, 2014 IL App (1st) 130161, ¶ 27; *Martinez v. City of Springfield*, 2022 IL App (4th) 210290, ¶ 43; *Perdue v. Village of Tower Hill*, 2015 IL App (5th) 140357-U, ¶ 29.

Here, the Third District joined the First, Fourth, and Fifth Districts to find FOIA does not require court-ordered relief as prerequisite to attorney fees under Section 11(i) of FOIA. Rather, the requirements are that: (1) a lawsuit is filed; (2) the requested documents are produced; (3) as a result of the lawsuit; and (4) rendering the lawsuit reasonably necessary to obtain the documents. All requirements were met in this instance, entitling Plaintiff to fees under Section 11(i) of FOIA.

On cross-appeal, Plaintiff asserts the reduction in fees was "arbitrary" while the City argues the request should cover what would be necessary to seek Public Access Counselor review.

A FOIA award is reviewed for abuse of discretion. Factors include the skill of the attorney, nature of the case, issues at bar, subject matter amount and importance, and the usual and customary charges to clients. *Black v. Iovino*, 219 Ill.App.3d 378, 396 (1991). The circuit court determined $300 was the appropriate hourly rate based on its experience. The Appellate Court found no reason to question that finding. The circuit court was also within its discretion to reduce the number of hours attributed to the emergency TRO because it was ultimately denied. The Appellate Court disagreed that release of the records constituted a "success" of the TRO motion because, while it may have expedited the release, the TRO was not *per se* necessary to obtain the documents. The TRO motion also exceeded the scope of FOIA when it sought to stay the city council hearing until the request was complete.

The Appellate Court also denied the City's argument that all fees tied to the TRO be eliminated because the timing of the release was arguably spurred by the TRO, tying the FOIA outcome with the TRO.

The judgment of Will County was affirmed and the fee award upheld.

Crime-Fraud Exception to Attorney-Client Privilege Requires *Prima Facie* Evidence to Support Charge of Conspiracy, Fraud, or Other Illegal Conduct

Vidal-Martinez v. U.S. Department of Homeland Security, Nos. 22-2445 & 23-1900 (7th Cir.), *decided October 23, 2023*

The Seventh Circuit found U.S. Immigration and Customs Enforcement ("ICE") did not violate the federal FOIA Act when a FOIA request sought records related to the requestor's transfer from ICE custody to Indiana to face criminal charges. The Plaintiff, Jesus Vidal-Martinez, ("Plaintiff") was arrested three times in Decatur County, Indiana and, following his third arrest, detained at the McHenry County Detention Center in Illinois for ICE deportation proceedings.

Plaintiff sought the records in connection with a writ for habeas corpus where he argued his Illinois-based detention impeded his ability to address charges faced in Indiana. ICE coordinated with Decatur County to coordinate transference of Plaintiff to county custody, "until the completion of [the] criminal matter, then released to his ICE detainer." *Vidal Martinez*, Nos. 22-2445 & 23-1900, at 3. In two FOIA requests, Plaintiff sought ICE email communications , notes, and reports related to his custody transfer.

Initially, ICE produced redacted versions of the records and cited privileges based on: (1) attorney-client, work product, or deliberative process privileges (5 U.S.C. § 552(b)(5)); and (2) government employee identifying information that could expose them to harassment without any public benefit (5 U.S.C. §§ 552(b)(6) and (b)(7)(C)). The district court ruled in favor of ICE, finding the redactions were proper.

The Seventh Circuit upheld the district court's ruling, rejecting Plaintiff's assertion that the crime-fraud exception to attorney-client privilege applied. This exception "places communication made in furtherance of a crime or fraud outside the attorney-client privilege." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 818 (7th Cir. 2007). To apply this exception, the Plaintiff must show some prima facie evidence of the charge. Plaintiff argued ICE intended to deprive him of habeas right by transferring him to Decatur County and that ICE misled the habeas court by stating Plaintiff's return to ICE custody was uncertain.

The Seventh Circuit agreed with the district court that there was no factual foundation for misconduct, much less criminal conduct, by ICE. Without this prima facie evidence, the crime-fraud exception was inapplicable to the attorney-client protected records.

The Seventh Circuit also rejected the requestor's request for attorney's fees, finding ICE clearly communicated its intent to respond to the FOIA request and any administrative delay did not warrant an award under FOIA.

"Private" and "Personal" Information are Distinct Categories for FOIA Exemption Purposes

Brewer v. City of Chicago, 2023 IL App (1st) 220059-U, *filed November 2, 2023*

The First District Appellate Court (the "Court") found telephone numbers were lawfully redacted under a FOIA exemption. Darron Brewer ("Plaintiff") submitted a FOIA request to the Chicago Police Department ("CPD") to seek an arrest report, booking report, and property receipt related to his first-degree murder and aggravated kidnapping conviction.

Two years later, Plaintiff made a second FOIA request for "all the statements and records attributed to Benita Wallace without redactions." *Brewer*, 2023 IL App (1st) 220059-U, at ¶ 4. Benita Wallace ("Wallace") was a witness in Plaintiff's criminal trial, and, with the request, Plaintiff provided a notarized statement from Wallace consenting to disclosure of her personal information. CPD denied the request as a

repeat of Plaintiff's prior request, so Plaintiff narrowed the request to Wallace's unredacted phone records. CPD answered that the records were properly redacted and denied additional disclosure.

This suit followed and named the City of Chicago, CPD, former Superintendent of Police Eddie Johnson, and the FOIA Officer (collectively, the "Defendants"). It alleged willful and intentional violation of FOIA by withholding records. The Defendants moved for summary judgment, asserting that the redactions were proper based on FOIA, and the circuit court agreed.

FOIA exempts "private information" from disclosure, which includes unique identifiers like telephone numbers. 5 ILCS 140/2(c-5). The information at issue was indisputably "private information."

On appeal, Plaintiff argued the telephone numbers must be disclosed because Wallace consented to the release. Plaintiff argued that "personal information" can be disclosed if consented to in writing by the subject of the information. 5 ILCS 140/7(1)(c).

However, the Appellate Court found that Wallace's consent to disclosure of her "personal information" did not reach personal telephone numbers redacted in her phone records. There is a distinction between "personal information" and "private information." Because the redacted phone numbers were "private information" of people other than Wallace, her consent to release "personal information" did not warrant release of those numbers.

<u>Illinois Supreme Court Found That FOIA is Not the Proper Avenue to Obtain Firearm Owner's Identification Records</u>

Hart v. Illinois State Police, 2023 IL 128275, *filed November 30, 2023*

The Illinois Supreme Court ("Supreme Court") determined that a FOIA request is not the proper route for individuals to obtain their Firearm Owner's Identification ("FOID") records. This opinion upholds the exemption in Section 7.5(v) of FOIA (5 ILCS 140/7.5(v)) that prohibits disclosure of names and information of FOID applicants or recipients.

The underlying FOIA requests were made by Sandra Hart and Kenneth L. Burgess Sr. ("Plaintiffs") who contested denial of records held by the Illinois State Police ("ISP"). The records were connected with Plaintiffs' applications and subsequent rejection of FOID cards.

The appellate court sided with Plaintiffs and found the FOID documents were not exempt under Section 7.5(v) of FOIA. Section 7.5(v) of FOIA specifically exempts the names and information of applicants or recipients of FOID cards under the Firearm Owners Identification Card Act, or those who sought a concealed carry license under the Firearm Concealed Carry Act, and other statutory provisions.

Notably, Section 7.5(v) of FOIA makes no distinction between records of another versus one's own records. The Supreme Court declined to create this distinction that was outside the plain language of Section 7.5(v) of FOIA.

The Supreme Court disagreed with the appellate court's finding that an individual could consent to disclosure of their own FOID information under Section 7(1)(c) of FOIA, which limits disclosure of public records with personal information absent written consent. The Supreme Court determined that a FOID application and subsequent denial or revocation letter are not "public records" under FOIA and thus, Plaintiffs could not consent to their disclosure.

The Supreme Court reversed the lower courts decisions and noted that Plaintiffs alternative to obtaining the information was through the Firearm Services Bureau, which is the department that processes FOID applications.

Public Access Counselor Opinions

Upon a Request for Review, the Attorney General may issue a binding Public Access Opinion. (5 ILCS 140/9.5(f)). Some opinions are non-binding, but all analyze a public body's respond to a FOIA request to evaluate compliance or non-compliance. The following are the 2023 Public Access Counselor opinions discussing FOIA.

Failure to Respond Constitutes FOIA Violation

Public Access Opinion, 23-001, *issued January 12, 2023*

In its first opinion of 2023, the Public Access Bureau determined that that Proviso Township High School District 209 ("District") violated section 3(d) of FOIA by failing to comply with, deny in whole or in part, or otherwise respond to a FOIA request.

The request was submitted on August 12, 2022 where Frederick Franzwa ("Franzwa") requested records related to staffing levels for teachers in the 2023 school year. The request also included e-mails to or from eight identified individuals containing key words, and analysis or recommendations regarding the decision to approve 253 full-time teachers for that school year.

Franzwa did not hear back from the District, so he submitted the documents for a Request for Review on October 13, 2022, and 14, 2022. On October 21, 2022, the Public Access Bureau forwarded a copy of the Request for Review to the District. The District did not respond to any requests that were sent. Therefore, the Attorney General had issued a binding opinion finding that the District violated section 3(d) of FOIA and directed to take immediate and appropriate action to comply by providing Mr. Franzwa with copies of all records responsive to his August 12, 2022, request.

Survey Results Deemed Exempt Where Results Are Used to Inform Internal, Deliberative Performance Review Process

Public Access Opinion, 23-002, *issued January 26, 2023*

The Attorney General held that the Illinois Mathematics and Science Academy ("IMSA") properly denied a request for written survey answers when they demonstrated the data sought was used in an internal performance evaluation process.

Here, the requestor and other IMSA faculty members sought copies of written answers to a survey administered at the school and the IMSA Board's interpretation of the responses. IMSA released summaries of quantitative data but not the written responses. IMSA deemed this information exempt under Section 7(1)(f) of FOIA because the free-response answers were used in deliberative processes of internal evaluation.

Section 7(1)(f) of FOIA exempts deliberative information from disclosure, which includes (1) inter or intra agency records that are (2) predecisional and deliberative. Here, the IMSA survey was aimed at IMSA employees and stated the responses to the free responses would be used "to inform the performance component of the Principal and Chief Academic Officer's evaluation." The requested

written answer responses were directly used in pre-decisional, deliberative, intra-agency performance evaluation processes.

Library Fails to Comply with FOIA Request and Violates Section (3)(d) of FOIA

Public Access Opinion 23-006, *issued May 3, 2023*

In this opinion, the Attorney General found that the Chicago Public Library ("Library") violated Section 3(d) of FOIA (5 ILCS 140/3(d)) when it failed to properly reply to a FOIA request.

The request, submitted by Brian Slodysko ("Slodysko"), sought e-mail correspondence between the Library and Supreme Court Justice Sonia Sotomayor in connection with the Justice's appearance at an October 12, 2018 Library event.

Slodysko made the request on December 13, 2022 and received an acknowledgement of receipt on December 14, 2022. The Library extended its time to reply but by February 1, 2023, Slodysko had not received a response. A Request for Review was initiated and throughout the review process, the Library failed to respond to Slodysko's FOIA request.

Here, the Library failed to substantively respond to the FOIA request or to deny the request in writing. The Library was directed to comply by providing the responsive records, subject to any permissible redactions allowed by FOIA or to issue a written denial pursuant to Section 9(a) of FOIA (5 ILCS 140/9(a)).

Requestor Not Required to Identify Employee Name(s) or E-mail(s) to Search Where Request Sufficiently Describes Content Sought.

Public Access Opinion, 23-007, *issued May 26, 2023*

The Department of Planning and Development ("Department") for the City of Chicago ("Chicago") violated FOIA when it improperly denied Hugh Devlin's ("Devlin") February 16, 2023 FOIA request as unduly burdensome.

The FOIA request sought, "all e-mails, sent or received by the [Department], or circulated internally to the Department, in calendar year 2021, emails all or in part regarding the City-owned property at 6435-6445 N California Ave, commonly known as the former Northtown branch of the Chicago Public Library and emails containing any of the provided eight keywords."

Within the hour, the Department responded and asked Devlin to provide the following: (1) name and/or email address of the City employee to search, (2) timeframe, and (3) any specific search terms. Devlin replied and cited 2022 PAC 71720 where the Attorney General stated, "a requestor is generally not required to identify specific employees in order to reasonably describe e-mails concerning a particular subject matter." He referenced his initial request for the remaining two inquiries.

Pursuant to Section 3(g) of FOIA (5 ILCS 140/3(g)), the Department denied the request because it required search parameters, including email address(es) or employee name(s) to search, key words, and a time frame. Without this information, the Department found the request unduly burdensome.

In the Request for Review, the Public Access Bureau found, "the Department's rationale for denying the request as unduly burdensome raises a significant legal issue that requires clarification."

Section 3(g) of FOIA (5 ILCS 140/3(g)) allows a public body to deny a request as unduly burdensome, but requires the written denial to specify the reasoning and extent to which compliance would burden its operations. An undue burden is found when a request is overly broad and would require the public body to "locate, review, redact, and arrange for inspection a vast quantity of material" largely unrelated to the request's purpose. *Nat'l Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill.App.3d 1, 17 (1st Dist. 2010).

Here, the request provided: (1) the subject matter sought, (2) eight keywords to use in the search, and (3) a one-year time frame. Where a request "identifies the documents sought based upon a description of their content," it is proper under FOIA. *Bocock v. Will County Sheriff*, 2018 IL App (3d) 170330, ¶ 50. Where the request does not identify employees or e-mail accounts to search, the public body may conduct a reasonable search by making a judgment call on whose e-mail accounts are most likely to contain responsive records. *Better Gov't Ass'n v. City of Chicago*, 2020 IL App (1st) 190039, ¶ 31. Additionally, the public body is typically in a better position to identify where the responsive records can be found.

Because the Department inaccurately denied the request and failed to respond to further inquiries, FOIA was violated.

Public Body Improperly Treated Non-Profit Organization's Request as One With a Commercial Purpose

Public Access Opinion, 23-008, *issued May 26, 2023*

In a binding opinion, the Attorney General determined that St. Clair County ("County") improperly treated a FOIA request from the Natural Resource Defense Council ("Council") as a commercial request.

On February 15, 2023, a member of the Council submitted a FOIA request to the County for records connected with flood-related buyout programs. The stated purpose was in the public interest to aid in decision-making in a vulnerable community. The Council requests a fee waiver pursuant to Section 6(c) of FOIA (5 ILCS 140/6(c)), which allows fee exemptions for certain types of requests.

However, the County's response included a charge of $220.00 in fees, $90.00 in copying fees and $130.00 for record review. The Council sought clarification on the denial of the fee waiver, but ultimately paid the $220.00 under protest in order to receive the records. A few days later, the County followed up and informed the Council that the estimated fee was $1,000 ($400.00 for copying and $600.00 for record review).

In the Request for Review, the County stated it assessed the fees under Section 6(b) (5 ILCS 140/6(b)) and Section 6(f) of FOIA (5 ILCS 140/6(f)). Section 6(b) (5 ILCS 140/6(b)) authorizes copying fees and limits review costs to commercial requests. Section 6(f) (5 ILCS 140/6(f)) permits fees for record review only for commercial requests.

The County treated this as a request with a commercial purpose, which is defined in Section 2(c-10) of FOIA (5 ILCS 140/2(c-10)) to include the "sale, resale, or solicitation or advertisement" of any information gained from the public record. However, requests made by non-profit organizations for certain purposes, including academic, scientific, or public research or education, are not a "commercial purpose" under Section 2(c-10) (5 ILCS 140/2(c-10)).

The County did not provide any reasoning for its determination that the Council's request was for a commercial purpose. The Council successfully showed it is a registered non-profit and that the records were used for educational purposes. There was also no indication that the Council intended to use the records for commercial gain.

Overall, the $1000.00 in fees violated FOIA because the record did not show that the non-profit sought the information for commercial purposes and the County was directed to provide responsive records subject only to the permissible copying fees under Section 6(a) (5 ILCS 140/6(a)) or Section 6(b) (5 ILCS 140/6(b)) of FOIA.

Juvenile Victim's Personal Privacy Interest Can Be Protected Through Redaction, But Public Interest in Disclosure of Teacher's Criminal Offenses Did Not Justify Complete Denial of FOIA Request

Public Access Opinion 23-009 (June 16, 2023), *issued June 16, 2023*

On March 22, 2023, Katy Smyser ("Smyser"), on behalf of NBC5 Chicago and Telemundo Chicago, submitted a FOIA request to the City of South Beloit Police Department ("Department") to obtain copies of police reports about a public-school teacher's arrest and criminal offense charges involving a student in 2009.

The Department denied the request pursuant to 7(1)(c) of FOIA, which exempts personal information from being disclosed where the disclosure would constitute an unwarranted invasion of personal privacy. Smyser submitted a Request for Review with the Public Access Bureau ("Bureau") contesting the denial.

The Bureau sent a copy of the Request to the Department and requested unredacted copies of the withheld records for their confidential review and a detailed explanation of the legal and factual bases of how the documents are exempt under Section 7(1)(c) of FOIA. The City complied with that request.

Specifically, the Department asserted its denial was based on the victim's juvenile status at the time of the incident, as well as the sensitive and personal statements regarding the crime committed against the juvenile victim.

The Bureau agreed the victim holds a substantial personal privacy interest in the unredacted record. However, there is a legitimate public interest in the disclosure of information about criminal offenses by a public-school teacher against a minor student. The privacy of the minor student can be protected by redacting identifying information and graphic details of any sexual offense. The Department failed to provide clear and convincing evidence that the records were exempt under 7(1)(c) of FOIA. While some explicit details were in the record, this did not justify a complete denial.

The Attorney General found that the Department violated the requirements of FOIA by denying Smyser's FOIA request. The Department is directed to take immediate and appropriate action to comply with this opinion by providing Smyser with copies of the requested records, complying with proper redaction of the victim's identifying information.

Police Reports Concerning Both Juvenile Offender and Adult Offender are Exempt from Disclosure under the Juvenile Court Act of 1987

Public Access Opinion, 23-010, *issued July 12, 2023*

On May 3, 2023, Bob Skolnik ("Skolnik"), on behalf of the *Riverside-Brookfield Landmark* newspaper, submitted a FOIA request to the Village of La Grange ("Village") seeking copies of police reports about altercations from May 1, 2023, involving Lyons Township High School students. The Village responded on May 12, 2023 with an "Arrest information sheet," an "Arrest Card," and "CABS Mugshot Report" from an 18-year-old arrestee charged with battery, but denied the police reports under sections 7(1)(a)-(c), 7(1)(d)(iv), and 7.5(bb) of FOIA.

Skolnik submitted a Request for Review of the Village's denial of the police reports. The Public Access Bureau ("Bureau") sent a copy of the Request to the Village and requested unredacted copies of the police reports for confidential review and a written explanation of the legal and factual bases for the denial. The Bureau also asked the Village to determine the extent to which information about the adult arrestee was segregable from information about a minor.

Section 7.5(bb) of FOIA exempts "information which is or was prohibited from disclosure by the Juvenile Court Act of 1987" from disclosure. The Juvenile Court Act ("JCA") prohibits disclosure of law enforcement records that relate to a minor who has been investigated, arrested, or taken into custody before their eighteenth birthday. The JCA does not permit disclosure of parts of a police report that concern an adult arrestee when a minor suspect is also involved.

The withheld reports concern an adult arrestee, minor arrestee, and one or more juveniles. The Village properly disclosed the adult arrestee's arrest records (aka the arrest card) but kept the minor's private. JCA made no distinction regarding police reports of an adult arrestee that involves a minor suspect – all parts of the police report addressing the minors were protected by the JCA and must be withheld in their entirety. The Attorney General found that the Village did not violate FOIA by denying disclosure of the police reports pursuant to Skolnik's FOIA request.

Public Body Failed to Respond to FOIA Request in a Timely Manner

Public Access Opinion, 23-011, *issued July 12, 2023*

On March 15, 2023, Ellen P. Brewin ("Brewin") submitted a FOIA request to Proviso Township High School District 209 ("District") seeking copies of records relating to settlement agreements between June 30, 2020, and February 28, 2023. On March 27, Ms. Brewin submitted a Request for Review with the Public Access Bureau ("Bureau") alleging that the District had not responded to her FOIA request. The Bureau forwarded the Request to the District inquiring about their response to Ms. Brewin, but the District did not respond to the Bureau.

On April 27, the Bureau sent the District a second letter with no response. Brewin then showed the Bureau a letter she received from the District on April 19th indicating they would respond to the FOIA request on April 30.

By May 2, no records were received from the District. On May 4, the District's FOIA officer confirmed with the Bureau that they received the March 15 FOIA request and indicated the District was working to respond. The Bureau re-sent its letter to the District on May 16 and still received no response. On May 25, the former FOIA officer of the District informed the Bureau that she was no longer the District's FOIA officer.

The Bureau extended the time in which to issue a binding opinion by thirty (30) days. The Bureau then left three voicemails for the District's new FOIA officer, with no response. Again, the Bureau emailed the FOIA officer asking for an update on July 3. On July 10, the FOIA officer responded indicating she would work with the District Superintendent on a response to the request.

The Attorney General found that the District violated Section 3(d) of FOIA by failing to timely respond to the FOIA request. Section 3(d) states that public bodies must respond within five business days unless the time was properly extended. The Bureau extended the time for its response due to the changing of FOIA officers at the District, and the District still failed to respond within that timeline. The District is directed to take immediate and appropriate action to comply with this opinion by providing Brewin with copies of all records responsive to her March 15 FOIA request, subject to permissible redactions. If the District finds

that any of the records are exempt under section 7 of FOIA, the District must issue a written denial complying with section 9(a) of FOIA.

Lack of Response Violates FOIA

Public Access Opinion 23-012, issued September 5, 2023

In this binding opinion, the City of Chicago ("City") Department of Transportation ("Department") was found in violation of FOIA for failing to respond to a FOIA request submitted by Rony Islam ("Islam").

Islam made a FOIA request to the Department, but received no response. He then submitted a Request for Review alleging the Department failed to respond to his request.

In the analysis, the opinion notes the duty imposed on a public body to respond to FOIA requests. 5 ILCS 140/1. The opinion acknowledged the public body can extend its time to respond by no more than five (5) business days from the original due date, provided it falls under the seven (7) enumerated reasons listed in 5 ILCS 140/3(e). Because the Department did not respond within five (5) days of the original request, did not extend the time to respond, and did not deny the request in writing, the Department violated FOIA.

Section 7(1)(g) of FOIA Requires Proof of Competitive Harm to Justify Non-Disclosure

Public Access Opinion, 23-015, *issued December 12, 2023*

This binding opinion found that the City of DeKalb ("City") violated FOIA requirements when it denied a request for any non-disclosure agreements ("NDA") relating to a project known as "Supernova." The request was initially made on July 26, 2023.

In the City's denial of the request, it cited Section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g)). A Request for Review followed.

Section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g)) exempts disclosure of trade secrets and commercial or financial information from a person or business where disclosure is made under a proprietary, privileged, or confidential setting. This exemption protects disclosure of information that would cause competitive harm to the person or business, only insofar as the claim directly applies to the records requested.

The City asserted 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." *PAC 23-015*, at 3. In support, several cases were cited that interpret Section 7(1)(g) of FOIA (5 ILCS 140/7(1)(g)).

However, the opinion notes that the cited cases were interpreted under an earlier version of Section 7(1)(g) of FOIA. In 2010, this section was amended to require that disclosure *would* cause competitive harm in order for the exemption to apply. This change created a narrower exemption and more exacting standard to permit exemption under Section 7(1)(g) of FOIA. As a result, the opinion found the public body must demonstrate disclosure *would* cause competitive harm in order to apply the exemption.

Here, the City relied on federal decisions and the nature of the NDA as a private and confidential document. In review, the NDA satisfied the first two elements of Section 7(1)(g) of FOIA: it contained commercial information related to a commercial project and had a clause stating the existence of the agreement was confidential.

However, despite the customary practice of treating NDAs as confidential, is insufficient to demonstrate competitive harm. The City's response had a general assertion that disclosure may deter potential public-private development agreements, but this general harm did not specifically apply here. A persuasive factor

was that the private company had issued a press release announcing the commercial enterprise, which meant disclosure of the NDA would not necessarily reveal the existence of the development project itself. The private company did submit a letter in support of non-disclosure, but no specific facts or evidence established competitive harm from disclosure.

As a result, the standard of Section 7(1)(g) of FOIA was not met and the City was ordered to release a copy of the NDA to the requestor.

Duty to Respond Violated When City Did Not Answer, Extend the Time to Respond, or Otherwise Deny Request

Public Access Opinion, 23-017, issued December 27, 2023

In this opinion, the City of Harvey ("City") violated Section 3(d) of FOIA (5 ILCS 140/3(d)) when it failed to comply with, deny, or otherwise appropriately respond to a FOIA request.

The requestor, Shahnawaz Hasan ("Hasan"), the owner of American Kitchen Delights, submitted a request seeking documents that provided billing information from a law firm during a period from January 1, 2022 to the date of the request. Hasan also requested records identifying any real property the City intended to acquire in the Cook Count No Cash Bid Program in 2023 and related correspondence. The contact information listed American Kitchen Delights and Mr. Dennis Both ("Both"), American Kitchen Delight's counsel, for the FOIA request.

This request was made on August 31, 2023 and on October 2, 2023, Both submitted a Request for Review, stating the City failed to respond to the request. A review was initiated, but no representative from the City responded.

Because the City failed to respond to Hasan's August 31, 2023 FOIA request, whether to provide records or deny the request in whole or in part, the City violated Section 3(d) of FOIA. This section provides that public bodies must respond within five (5) business days of its receipt of a FOIA request, or extend its time to respond under subsection (e) of FOIA.

The City was ordered to disclose the records, subject to permissible redactions, or to issue a written denial pursuant to Section 9(a) of FOIA (5 ILCS 140/9(a)).

Open Meetings Act

The Open Meetings Act protects the public's right to be informed about the business of public bodies. 5 ILCS 120/1. OMA requires advance notice of public body meetings where business is discussed but grants specific exemptions where an open meeting would endanger individual privacy or guaranteed rights. 5 ILCS 120/1.

Statutes

Public Bodies May Enter a Closed Session to Hear Testimony or Evidence Regarding Denial of Admission to School Events and/or Property Pursuant to Section 24-24 of the School Code.

Physical Attendance Exception Expanded to Include Virtual Attendance When Public Body Member Has Unexpected Childcare Obligations.

Public Act 103-0311 5 ILCS 120/2

Effective July 28, 2023, the OMA was amended to add an exception for closed meetings. The new exception includes an exception aimed at school boards permitted a closed meeting to hear “evidence or testimony regarding denial of admission to school events or property pursuant to Section 24-24 of the School Code, provided that the school board prepares and makes available for public inspection a written decision setting forth its determinative reasoning.” The OMA is further amended to permit attendance by means other than physical presence when a member of a public body is prevented from attending due to unexpected childcare obligations. This expands the permissible exceptions to physical attendance listed in 5 ILCS 120/7(a). However, as public bodies establish their own rules and regulations for participation by electronic means, a public body will need to update its rules and regulations to reflect this new exception.

Cases

“Leaked” Audio Recording Not Adequate to Fulfill OMA Audio Recording Requirement

Better Gov’t Ass’n v. Chicago City Council, 2023 IL App (1st) 210765-U, *issued January 30, 2023*

The First District Appellate Court held that two of the Better Government Association’s (“BGA”) claims against the Chicago City Council (“City”) were time barred, but one claim was timely filed and should not have been dismissed. The Appellate Court held that BGA’s requested relief was not “moot” because the alleged compliance (release of an audio recording) was “leaked” and not formally released by the City, nor did the “leak” fulfill all the requested relief.

Here, BGA first asserted OMA violations in a 12-count complaint based on three teleconferences held on March 30, April 6, and May 31, 2020. BGA filed the claim on June 12, 2020, and the circuit court dismissed all of the claims because (1) the March 30 and April 6 allegations were time-barred and (2) the May 31 claims were moot because the City released a recording of the meeting to the public. The circuit court did not address whether the teleconferences were a “meeting” as defined by OMA.

On appeal, the Appellate Court affirmed that the March 30 and April 6 issues were time-barred because OMA requires complaints of OMA non-compliance to be filed within 60 days of the alleged violation or, if the meeting is not discovered in that first 60-day window, then within 60 days of the reasonable discovery of the violation. Evidence indicated the first two meetings were publicly disclosed by April 21, 2020, within the initial 60 days. So, part of BGA’s complaint fell outside the 60 day limit and the first two claims were time-barred.

However, the Appellate Court reversed the circuit court’s dismissal of the May 31 meeting and found BGA timely filed for the May 31 date and their requested relief was not moot. While the City asserted the May 31 recording was publicly released on June 6, the Appellate Court noted the recording was “leaked,” which was not an official release by the City, nor did it fulfill OMA requirements because it lacked minutes. BGA also had further relief not addressed in the initial dismissal, furthering the Appellate Court’s determination that the May 31 claim was not “moot.”

The Appellate Court reversed the counts relating to the May 31 meeting and remanded for further proceedings, including determining whether the teleconference was a “meeting” under OMA.

Dorman v. Madison County, 2023 Ill. App. (5th) 220320-U, *filed June 15, 2023*

In this Order from the Fifth District Appellate Court (“Court”) affirmed the circuit courts holding and upheld summary judgment in favor of the defendant, Madison County (“County”).

This consolidated appeal was made by Robert Dorman and Douglas Hulme ("Plaintiffs"), who are former employees of the County. The Plaintiffs alleged that the County met and discussed their employment in two meetings on April 15, 2020 and April 16, 2020. The meeting on April 15 was held pursuant to a published agenda that indicated "J. Executive Session: 1. Discuss Actions of Specific Personnel in accordance with IAW 5 ILCS 120/2(c)(1)." *Dorman*, 2023 Ill.App (5th) 220320-U, ¶ 6. The April 16, 2020 meeting indicated time for public comment and then a closed session "for board members to discuss specific personnel in accordance with 5 ILCS 120/2(c)(1)" followed by action in an open session. *Id.*

During open session at the April 16, 2020, meeting, two resolutions terminated Plaintiffs' employment for "actions undertaken *** [which were] outside of the bounds of ethical conduct and standards that are expected for someone in [their] position[s] of leadership." *Id.*

Plaintiffs initiated a request for administrative review pursuant to Administrative Review Law (735 ILCS 5/3-101). Plaintiffs also filed a complaint seeking civil enforcement of OMA, alleging the meeting agendas failed to identify the related resolutions or name the Plaintiffs.

The administrative review and OMA case were consolidated. On appeal, three issues were addressed. The third, whether the circuit court properly granted summary judgment to the County and found no OMA violation, is discussed here.

Plaintiffs advanced three grounds for OMA violations. *Id.* at ¶ 32. However, two were raised for the first time on appeal and thus forfeited. *Id.* at ¶ 33; *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403, 413 (2002) (arguments raised for the first time on appeal are forfeited).

Turning to the agendas, OMA requires these documents to be sufficient to fulfill notice requirements. Both meetings were conducted pursuant to published agendas indicated the County would discuss personnel pursuant to 5 ILCS 120/2(c)(1). This is an exception to OMA requirements that permit closed meetings to consider "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees." 5 ICLS 120/2(c)(1).

The April 15, 2020 agenda satisfied OMA's notice requirements because the agenda cited to the specific exception authorizing closed session. The County also publicly disclosed the cited exception, voted to go into closed session, and entered the vote of each member into the meeting minutes. 5 ILCS 120/2a.

The April 16, 2020 meeting was a Special Meeting, which requires at least 48 hour notice. 5 ILCS 120/2.02(a). Plaintiffs contend that "action to be taken by the board on specific personnel" was too vague to sufficiently inform the public of the action to be taken. The Court disagreed because the outcome, Plaintiffs termination, was germane to the agenda item. *Dorman*, 2023 Ill.App (5th) 220320-U, ¶ 39 (citing *In re Foxfield Subdivision*, 396 Ill.App.3d 989, 996 (2d Dist. 2009)).

The Plaintiffs also did not cite any case law to support their argument that OMA requires the specific individuals to be discussed under Section 2(c)(1) exemption to be named in the agenda.

Overall, the circuit court properly granted summary judgment and found no OMA violation.

Public Access Counselor Opinions

Pursuant to Section 3.5 of OMA, an individual can file a request for review with the Public Access Counselor to investigate suspected OMA violations. 5 ILCS 120/3.5. The following are the Public Access Counselor Opinions published in 2023.

OMA Violated by Informal "Meet and Greet" Where Collective Information Gathering for Future Deliberation Occurred

Public Access Opinion, 23-003, issued March 14, 2023

The Attorney General held the Board of Trustees ("Board) for the Stickney-Forest View Public Library District ("Library District") violated OMA based on a November 28, 2022 meeting where a "Meet and Greet" with Library District staff discussed public business without OMA compliance. The issue is whether this gathering constituted a "meeting" where business was "discussed or acted upon in any way." 5 ILCS 120/1.

Here, the meeting consisted of three out of the seven Board members and Library District staff. For the purposes of OMA, three Board members constituted "a majority of a quorum." Prior to the meeting, invitations were e-mailed to Board members and Library District staff, but no public notice was given. The Board argued the gathering was an informal "Meet and Greet" for Board and staff to "get to know each other and ask questions or state concerns any staff had," not an OMA-subject meeting.

However, upon review of discussed items and questions asked at the meeting, it was evident the "meeting" was more than a social gathering. The Library District staff presented questions and concerns and the Board led much of the resulting discussion relating to matters of public business (including topics like employment status, insurance benefits, staff salaries, and local tax changes). The Attorney General concluded that "informal sessions or conferences designed for the discussion of public business" are meetings subject to OMA, including ones where the purpose is primarily collecting information.

Because the discussion revolved around public business to serve the purpose of collective information gathering for future deliberation, this was a "meeting" subject to OMA, but did not fulfill OMA requirements for public notice. The Board violated OMA with the November 28, 2022 meeting and was directed to make the video recording publicly available, create written meeting minutes, and to ensure future meetings with three or more Board members where deliberative discussion is held comply with OMA.

Public Body Cannot Take Final Action Without Setting Forth General Subject Matter of that Vote in the Posted Meeting Agenda

Public Access Opinion 23-004, issued March 27, 2023

In this binding opinion, the Board of Education ("Board") of Township High School District 214 ("District") violated Section 2.02(c) of OMA (5 ILCS 120/2.02(c)) when it took final action to approve a severance agreement without setting forth the general subject matter of the vote on the posted meeting agenda.

The Board's September 15, 2022 meeting agenda indicated it would enter closed session to discuss "the appointment, employment, compensation, discipline, performance, or dismissal or specific employees of the public body," pursuant to Section 2(c)(1) of OMA. 5 ILCS 120/2(c)(1). The Board would then reconvene in open session to take any resulting final action.

The Board ultimately adopted a severance agreement, titled "Personnel Transaction Report II." However, the public recital during the meeting nor the minutes indicated the Board was considering a severance agreement.

Pursuant to Section 2.02(c) of OMA, agendas must provide the general subject matter of any final action at the meeting. OMA does not define "general subject matter."

Relying on dictionary definitions, "general" means "relating to, concerned with, or applicable to the whole or every members of a class or category" and "involving only the main features of something rather than details or particulars." American Heritage Dictionary 552 (2d coll. ed. 1982). "Subject matter" encompasses "the issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute." *Black's Law Dictionary* (11th ed. 2019).

The agenda items did not set forth the general subject matter of the Board's vote to approve the severance agreement. The items also did not identify the type of employee at issue or the type of personal transaction to be considered. Since members of the public who read the agenda before the meeting would not have known what the Board would be acting upon, the Board failed to provide sufficient advance notice for the severance agreement as required by Section 2.02(c).

Therefore, the Board was directed to remedy the violation by re-voting the severance agreement pursuant to a sufficiently detailed agenda item at a properly-noticed open meeting. The Board was also directed to identify the general type of employee and general type of personnel transaction to be contemplated when it wishes to approve a personnel transaction at future meetings.

Section 2(c)(6) of OMA Limits Closed Session *Only* to Discussion of Setting the Price for Sale/Lease of Publicly-Owned Property,

Public Access Opinion, 23-005, *issued April 25, 2023*

On January 23, 2023, the Lyons Township High School District 204 ("District") Board entered a closed session to discuss the sale of District owned property without publicly citing and voting on an authorized exception for the discussion.

In the Request for Review, the complainant alleged the Board cited Section 2(c)(6) of OMA (5 ILCS 120/2(c)(6)) as its basis for entering closed session discussion. The Public Access Bureau then asked the Board to provide a written basis for its reliance on Section 2(c)(6) of OMA and response to the allegations that the January 23, 2023, meeting exceeded the scope of the OMA exception.

Section 2(c)(6) of OMA allows a public body to hold closed session to discuss the "setting of a price for sale or lease of property owned by the public body." (5 ILCS 120/2(c)(6)). In its response, the Board explained the discussion addressed a 70-acre parcel of vacant land that the District had acquired through donations and purchases.

The Board received an unsolicited bid to purchase the property and held an open meeting on December 22, 2022 to discuss the sealed bid process and other terms of the potential sale. The Board noted the January 23, 2023 closed session meeting discussed next steps, including marketing and a minimum sale price. The Board also cited a 2019 Public Access Counselor Request for Review where no violation was found when a school board discussed extraneous matters under the Section 2(c)(5) exception (5 ILCS 120/2(c)(5)). *See Ill. Att'y Gen. PAC Req. Rev. Ltr. 30925*, issued May 9, 2019, at 4.

The opinion noted that Section 2(c)(6) of OMA must be strictly construed and the clear and unambiguous language limited the discussion to setting a price for the sale or lease of property owned by the public body. This is a significantly narrower exception than Section 2(c)(5) of OMA, which allows a closed session to discuss the merits of particular properties to potentially purchase or lease for the public body, including the terms of the potential sale or lease and attributes of the properties.

However, Section 2(c)(5) nor Section 2(c)(6) of OMA provides an exception to the open meetings requirements to discuss the sale or lease of property already owned by a public body. The opinion points to the legislative history to demonstrate the intent for this exception to apply to setting the price of property, but not further.

Based on the narrow application required of Section 2(c)(5) of OMA, the Board exceeded the permitted scope by discussing subjects beyond setting the price for sale of the property. Notably, the verbatim recording from the session indicated the Board had set the minimum price with no plans to change it but continued to discuss ancillary topics.

Based on the violation, the Board was directed to publicly disclose the verbatim recording and closed session minutes of the January 23, 2023 meeting.

Restrictions on Public Comments Must be Part of Established Rules/Records of the Public Body

Public Access Opinion 23-013, *issued September 13, 2023*

This binding opinion found that the Board of Education ("Board") of Wheaton Warrenville Community Unit School District No. 200 ("District") improperly imposed restriction on public comment that was unauthorized by its established and recorded rules. Improper restriction of public comment violation Section 2.06(g) of OMA. 5 ILCS 120/2.06(g).

At a June 2023 meeting the Board restricted the complainant's public comments when she referred to the District's hiring policy during an open meeting. The Board President interrupted her and stated she could not discuss personnel issues and could not continue to address the Board. The complainant stated she intended to comment on the policy, not personnel issues, but the Board terminated her comment.

Section 2.06(g) of OMA generally precludes a public body from restricting public comment, except as set forth in its established and recorded rules. 5 ILCS 120/2.06(g). OMA does not specifically address what those rules may look like, but typically they align with reasonable time, place, and manner restrictions permitted by the First Amendment. The rules must be reasonably necessary to protect a significant governmental interest.

The Board's Policy Manual addresses public comment and is quoted in the Opinion. In its response, the Board stated that, based on previous interactions with the complainant, they believed she intended to comment on a matter currently under open investigation by the Department of Children and Family Services, prompting the President's interruption. The response did not identify where the Policy Manual authorized restriction of comments addressing personnel matters. The Board did have a section of its agenda that gave guidance on public comment, which included a request to keep personnel or student matters confidential and communicated privately to the Board. The President read a portion of this section at the June meeting, but did not read the portion specific to restricting comment on personnel matters.

Relying on the language of Section 2.06(g) of OMA, the Opinion analyzed the legislative intent behind "established" and "recorded" rules to determine if the agenda constituted a recordation of rules by the Board. The Policy Manual was "established" and "recorded," based on dictionary definitions, and does not restrict public comment based on personnel matters. While the Board asserted that the limitation in the agenda was a "recording," the Opinion disagreed because there was no evidence this was communicated to the public prior to the interruption or formally established as part of the formal rules or policies.

The Opinion also notes that a restriction prohibiting public comment based on "personnel matters" is likely impermissible under OMA because it would potentially qualify as a content-based restriction and thus be

subject to strict scrutiny. The Opinion does not purport to determine if such a restriction is proper because it need not go so far.

Because the restriction was not part of the Board's established and recorded rules, it violated OMA when it prevented the complainant from completing her public comment.

<u>Public Body May Discuss Whether to Approve Closed Session Meeting Minutes in a Closed Session, But May Not Take Final Action On Approval; Closed Session Meeting Minute Approval Must Be Done in Open Session</u>

Public Access Opinion 23-014, *issued December 1, 2023*

This binding Opinion reinforces the requirement that closed session meeting minutes must be approved in open session. At issue was the Village of Skokie's ("Village") practice of approving closed session meeting minutes during a closed session meeting. A trustee on the Village Board filed an OMA Request for Review with the PAC. Ultimately, the PAC found that all action, even approval of closed session meeting minutes must be done in open session, as no final action can be taken in closed session under Section 2(e) of OMA. Therefore, the Village's practice of approving closed session meeting minutes violated OMA.

This issue has been an open question under the OMA for many years with many governmental entities, on the advice of counsel, taking the position that approval of executive session minutes in open session could subject those minutes to production under Section 7(1)(f) of the Freedom of Information Act ("FOIA"). FOIA provides at Section 7(1)(f):

> (f) Preliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body. The exemption provided in this paragraph (f) extends to all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents.

5 ILCS 140/7(1)(f).

In order to avoid the application of Section 7(1)(f) of FOIA, which could plausibly be argued to require the production of draft minutes referred to by a Village President in open session, executive session minutes have been approved by many governmental bodies in closed session. Until this binding opinion, the PAC has not spoken on this issue.

Additionally, the language of Section 2(c)(21) of OMA has created confusion, which states that public bodies can go into closed session for the "discussion of minutes of meetings lawfully closed under this Act, whether for purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06." 5 ICLS 120/2(c)(21).

The PAC, in reconciling the language of Section 2(c)(21) of OMA, stated:

> Although Section 2(c)(21) of OMA provides that closed session minutes may be discussed in closed session for purposes of approval by the body the plain language of the exception does not state that the approval itself may occur in closed session. Sections (2)(c)(21) and 2(e) of OMA may be read together and construed harmoniously to mean public bodies may enter closed session to discuss *whether* to approve closed session minutes before returning to open session to take final action on the approval of those minutes. Such a construction is consistent with the plain language of each provision and gives effect to both of them.

PAC Opinion 23-014, pg. 4.

As such, with this opinion, the PAC has held that Section 2(c)(21) of OMA's "approval" language does not authorize public bodies to approve closed meeting minutes within a closed session. Public bodies may still review and revise closed meeting minutes in closed session. In light of this opinion, if a public body was approving closed meeting minutes in closed session, the public body needs to (1) stop approving closed meeting minutes in closed session; (2) start approving closed meeting minutes in open session and (3) determine if you need to take action in open session to approve all previous closed session minutes, either as part of your semi-annual review resolution or in a separate resolution. It is recommended that a resolution listed as an action item on an agenda, be used to make the semi-annual determinations regarding the approval and release of certain closed meeting minutes and the approval and retaining as confidential of other closed meeting minutes.

Improper Closed Session Discussion of Removing Book from Curriculum

Public Access Opinion, 23-016, *issued December 27, 2023*

In a Request for Review, Mary Grzywa ("Grzywa") alleged the Board of Education ("Board") of Yorkville Community Unit School District 115 ("District") improperly discussed curriculum in a series of closed meetings between May 22, 2023 and August 7, 2023. The topic centered on the use of the book *Just Mercy* by Bryan Stevenson in an English class. Ultimately, the Board pulled the book from the curriculum following the August 7, 2023 meeting.

A news article linked to Grzywa's request explained that a parent's objection to the book initiated the District's uniform grievance procedure where the Board found the book did not violate Board policy. However, the parent appealed, and the Board reconsidered the matter in closed session meetings. Grzywa advocated for full disclosure of the debate because it was unclear why the decision was reversed.

Determining further investigation was warranted, the Public Access Bureau requested the Board respond to the allegations and provide the verbatim recording of the closed sessions. The Board complied, and also provided information about the grievances and the District's Uniform Grievance Procedure ("UGP"). The parent's complaint alleged violation of Board Policy 6:80 "Teaching About Controversial Issues." Following an investigation, the then-Superintendent determined that the claim was unsubstantiated.

The parent then appealed to the full Board, alleging the principal and English Department Leader "knowingly allowed school board policy 6.8 to be violated by assigning a novel in which the theme was America is systematically racist against black and brown people, which is a political opinion, not a fact." *PAC 23-016*, at 4.

The Board placed the item on its May 22, 2023 meeting and adjourned to closed session to discuss the issue. The Board returned to open session and moved to amend the Superintendent's decision regarding the UGP and *Just Mercy* and directed the Superintendent to inform the parties of the finding that there was inconclusive evidence to find a violation of Board policy. The amendment also directed administration to provide an alternate text to *Just Mercy* that gave a balanced viewpoint to learn the outlined objectives.

On May 31, 2023, the parent filed a new complaint against three District employees, "regarding what [she felt was] an attempt to hide assignment from [her] regarding the book 'Just Mercy'. *PAC 23-016*, at 4-5. This time, the parent alleged violation of Board Policy 6:210, "Instructional Materials." (permitting anyone to inspect any textbook or instructional materials). The parent alleged the District had not

provided access to the instructional materials related to the book and urged the Board to inspect the materials to ensure Board Policy 6:80 was not violated.

The Board revisited the issue again at its August 7, 2023 meeting under a closed session.

The analysis notes that the Board cited four OMA exceptions as the basis for its closed session discussion of the book, including:

1. Section 2(c)(1): appointment, employment, compensation, discipline, performance, or dismissal of specific employees (5 ILCS 120/2(c)(1));
2. Section 2(c)(4): evidence or testimony presented in open hearing, or in closed hearing where authorized by law, to a quasi-adjudicative body, provided a written decision is available detailing its reasoning (5 ILCS 120/2(c)(4));
3. Section 2(c)(10): Placement of individual students in special education programs and other matters relating to individual students (5 ILCS 120/2(c)(10); and
4. Section 2(c)(11): Pending or imminent litigation, provided the basis for the finding is recorded and entered into the closed meeting minutes (5 ILCS 120/2(c)(11).

The Board's response noted it did not actually use Section 2(c)(11) in the August 7, 2023 closed session.

Review of the Board's recording and minutes from the August 7, 2023 meeting showed the Board intended to discuss whether to uphold its previous decision or remove the book entirely. The discussion centered primarily on whether *Just Mercy* should remain part of the curriculum and did not name the parent's child by name. Certain employees were named, but not in connection with performance issues or relative merits.

The opinion provided an analysis for each of the cited exceptions.

Starting with Section 2(c)(1) of OMA, the Board violated OMA because the discussion did not fold remarks about the book into employee performance in connection with the May 31, 2023 complaint filed against three employees. Instead, the conversation was outside the scope of Section 2(c)(1) of OMA.

Section 2(c)(4) of OMA was violated because the Board did not discuss any topics related to a quasi-adjudicative matter. OMA defines "quasi-adjudicative body" as "an administrative body charged by law or ordinance with the responsibility to conduct hearings, receive evidence or testimony, and make determinations based thereon." 5 ILCS 120/2(d). The Board cited various provisions of the School Code to argue school boards are quasi-adjudicative bodies, including 105 ILCS 5/10-22.6 (describing adjudicatory process for expulsions and suspensions) and 105 ILCS 5/10-20.12b (creating adjudicatory process for pupil residence disputes). However, the actual discussion in the closed meeting showed the Board was not acting in a quasi-adjudicative capacity at the time. The Board pointed to the UGP complaint, but the discussion showed the Board recognized they were not discussing a pending grievance, but rather whether to include *Just Mercy* on the curriculum in the future.

Section 2(c)(10) of OMA was also violated because the plain language confines the exception to matters concerning individual students, which does not include broad matters related to curriculum. The Board argued the matter stemmed from one parent's complaint and that it would be impossible to discuss the issue without disclosing the individual student. However, the student was merely alluded to one time in hour-long discussion.

Overall, none of the cited exceptions applied to the actual discussion by the Board. The Board was directed to disclose the verbatim recording, subject to redaction of discussion referencing a particular student, and to revise its meeting minutes to include a meaningful summary of matters proposed, deliberated, or decided therein.

Non-Binding Requests for Review

At times, some opinions are non-binding, but provide guidance and understanding when it comes to interpreting the requirements of OMA. Here are two non-binding opinions from 2023.

Non-Governing Body Not Required to Post Online Notice of Meetings.

Request for Review – 2023 PAC 76681, *issued July 28, 2023*

Non-binding opinion regarding the Open Meetings Act

This non-binding opinion arises from allegations that the City of Aurora ("City") or the Tax Increment Finance ("TIF") Joint Review Board ("Board") violated OMA at its April 6, 2023 meeting. The complainant stated that no agenda or notice was posted and that the minutes were not posted after the meeting.

The Opinion found that the Board's meeting did *not* violate OMA because (1) the meeting was a special meeting and thus only forty-eight (48) hours' notice was required and (2) the Board was not a *governing body* as defined by OMA and therefore not required to post a notice on the City's website.

OMA requires a public body with a website to post online notices of any meetings of the governing body. 5 ILCS 120/2.02(a). The governing body for the City is the City Council. So, the Board did not violate OMA just because the meeting notice was not published online. The notice was posted at the meeting location and City Hall more than forty-eight (48) hours before the meeting, in compliance with OMA. The agenda was also posted three (3) days prior to the meeting.

In regard to the minutes, OMA requires approval of minutes either within thirty (30) days of the meeting *or* at its second subsequent regular meeting. 5 ILCS 120/2.06(b). The Board indicated they had not been approved because a subsequent regular meeting had not occurred yet. Additionally, the Opinion notes that the minutes need not be posted online, even after approval, because OMA requires online posting of the governing body's minutes. Because the Board is not the governing body, it may, but is not required, to post its minutes online.

Scrolling Screen Inside of Meeting Location Not a "Continuously Available" Location for Purposes of Posting Meeting Notices/Agendas

2023 PAC 75604, *issued August 23, 2023*

Here, OMA was violated by the Executive & Legislative Committee ("Committee") of the Vermilion County Board ("Board") for failure to post an agenda in a location continuously available for public review. This was a special meeting, so forty-eight (48) hours' notice was required.

OMA requires advance notice of all meetings of the governing body and that such notices/agendas be continuously available for public review during the entire 48-hour period preceding the meeting. 5 ILCS 120/2.02(b)(c). In this instance, the Committee is a subsidiary of the governing body, so the notice/agenda was not required to be on the county website, even though the Committee admitted they posted the agenda online in an untimely manner.

The issue primarily became *where* the agenda was physically posted and if it was "continuously available" to the public. The agenda was posted on a county scrolling screen inside the main hallway of the meeting location and in accordance with the 48-hour notice. In this case, the building is locked outside business hours and the screen is not readily visible from outside the building. This inaccessibility merited an OMA violation.

While not determinative, the Opinion also found that the use of a scrolling screen to post notices raises concerns about "continuous availability," especially where a number of different notices are shown, even if the screen were visible from outside the building. The Opinion encourages posting paper copy of notices/agendas in places continuously visible, even from outside the building.