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FR Alert: KEY TAKEAWAYS FROM RECENT FOIA AND OMA DECISIONS

The Illinois courts and the Attorney General's Public Access Counselor ("PAC") issued a flurry of decisions in May and June relating to the Illinois Freedom of Information Act ("FOIA") and the Illinois Open Meetings Act ("OMA"). The following are some of the more important takeaways from these decisions.

FOIA Decisions

- ***Appellate Court Decision:*** *FOIA requires a public body to produce records in the exact format maintained by the public body, even if that format allows manipulation or misuse of the records.*

In *Fagel v. Department of Transportation*, the requester sought certain documents regarding the Illinois Department of Transportation (IDOT) "Red Light Running Camera Enforcement System," and specifically requested the records in "an electronic version in Excel Format." IDOT released the Excel spreadsheet but "locked" it, preventing selecting, sorting, filtering, or other manipulation of the data and access to hidden secondary information in the file. In a request for review, the PAC agreed with IDOT that it was not required to release the unlocked Excel file.

On appeal the First District Illinois Appellate Court disagreed with the PAC, finding that IDOT was required to release the unlocked Excel spreadsheet because: (1) it maintained the spreadsheet in that format; (2) it was feasible for IDOT to produce it in that format; and (3) there were no exceptions under FOIA allowing IDOT to withhold the unlocked version. Specifically, although IDOT expressed fear that the requester would improperly change or manipulate the information, the court found that such a fear was not a statutory exemption under which IDOT could justify withholding the unlocked version of the Excel spreadsheet.

- ***PAC Decision:*** *In certain circumstances, scrambling a record or compiling information into a new format is not "creating" a new record under FOIA, and may be required.*

In binding PAC Opinion 12-014, a requester sought de-identified raw data from a school district on current students' math scores on a test. The district denied the request, asserting that the records were school student records and so were exempt from production under FOIA. The district explained that the only option for accessing the test score data was to run a report from the test score reporting service to which it subscribes, and that such report automatically lists student names in alphabetical order. Because there were only 80 students to which the request was applicable, redacting the names of the students from the report would not protect their identity and so producing the record would violate the Illinois School Student Record Act.

The District also argued that it could not scramble the names of the test scores in the report through the reporting service. The only way it could scramble the names would be to print a paper copy, redact the names, cut the scores into strips of paper, arrange them in random order, and furnish the strips or copies of the strips to the requester. The district argued that it was not required to take those steps because the FOIA does not require a public body to compile data or create a new record that it does not ordinarily maintain in response to a FOIA request.

The PAC determined that the district must print, redact, cut, and reorder the records, relying on a court case that held that scrambling data does not create a new record. The PAC also relied on case law holding that a public body does not create a new record when it compiles information in its possession in a new format to make the information available for inspection and copying, such as creating a computer program to generate a hard copy of information possessed only on a computer tape and a case in which a public entity was required to compile a list of names from information contained in various disparate locations. Finally, the PAC rejected an argument that printing and compiling the records would be unduly burdensome because the district did not timely assert that claim and did not allow the requester an opportunity to narrow the request.

Notably, although school officials who deal with FOIA should be aware of this decision when responding to requests, there are still very strong arguments against creating a new record, even one like the ones explored in this case summary. Further, this decision was a PAC decision and is not binding on the courts.

OMA Decisions

- ***PAC Decision:***
  - *Receipt of multiple letters from an attorney expressly referencing the filling of a lawsuit is sufficient for invoking the "probable or imminent litigation" exception to the OMA.*
  - *Closed session minutes must adequately reflect the reasoning for going into closed session under the OMA.*

In another binding opinion, Opinion 13-008, the PAC addressed the exception to the OMA that allows a public body to go into closed session to discuss "probable or imminent" litigation. A Library District received three letters threatening to file suit or pursue other legal action unless the District agreed to reimburse certain disputed payments. Based on the letters, the PAC found the District's determination that there was probable or imminent litigation was reasonable.

In an FR Alert issued last year, we reported on another binding opinion in which the PAC found that there was not "probable or imminent litigation" when, three months before a closed session meeting, a County Board received a letter from a company's president, not its lawyer, threatening to "proceed to file an appropriate legal action" if certain action was not taken. These two binding opinions together provide a clearer indication of when the PAC understands the litigation exception to the OMA to be implicated. The number of litigation threats, the identity of the author of the threat, and the timing of the threat are significant facts.

In the same decision, the PAC reiterated the importance of providing an adequate justification for discussing potential litigation in closed session. Under the OMA, a public body going into closed session to discuss litigation must make a finding immediately upon entering closed session that litigation is probable or imminent and the basis for that finding. The PAC found that the Library District violated the OMA because the district did not include a sufficient explanation of why it believed litigation was probable or imminent in the closed session minutes. The PAC ordered the District to amend its minutes accordingly. Although not provided in the opinion, the District could have complied with the requirements of the OMA by citing on the record the letters it received and the fact that they threatened litigation.

- ***PAC Decision:*** *The public must be given adequate notice of the matters under consideration prior to voting on matters discussed in closed session.*

In two binding opinions addressing actions by the same school board, the PAC provided insight into how it interprets requirements that public bodies give adequate notice when voting on matters discussed at closed sessions of meetings. Section 2(e) of the OMA provides that no final action may be taken in closed session and final action "shall always be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." The PAC decisions discussed this requirement in the context of employment decisions first discussed in closed session but acted on later in open session.

In PAC Opinion 13-007, the PAC found that the school board violated the OMA by failing to provide sufficient notice of matters discussed during closed session before voting in open session. In Opinion 13-007, a reporter challenged a school board's action of signing a separation agreement with the district's former superintendent in closed session, which the board had not publicly voted to approve at the time of the signatures. The board members signed the agreement but did not date it until a later meeting at which a roll call vote was taken to approve the action taken at the prior meeting. The agenda at the second meeting included an item regarding approval of "a Resolution regarding the Separation Agreement and Release" for the superintendent. Prior to the vote, no further details other than the reference in the agenda of the separation agreement were provided, and one board member made clear that she and the public were unaware of the reason for the separation agreement. Also prior to the vote, the district did not discuss publicly the terms of the agreement, which included a lump sum payment to the superintendent.

The district defended its action by pointing to case law holding that a public body can discuss and sign a decision in closed session if the public body votes to approve the decision in open session and arguing that a confidentiality provision in the separation agreement prohibited it from publicly discussing it. The PAC distinguished the case law cited by the district because, after the cases were decided, the General Assembly amended the OMA to require public bodies to inform the public of the nature of matters under consideration and the business being conducted before taking final action. Moreover, this was not a "straw vote" taken merely to gain a sense of the support or opposition, which may be allowed under the OMA. The PAC found that the existence of the confidentiality provisions in the agreement was irrelevant because the agreement was a public document.

In PAC Opinion 13-010, on the other hand, the PAC found that the same school board provided sufficient notice and did not violate the OMA with respect to another employment decision. During closed session on February 25, 2013, a board of education discussed the appointment of an interim superintendent. The next day, prior to holding a public vote, the board issued a press release stating that the board had "reached a consensus" on a particular individual and planned to take formal action on it at the next meeting. Later, on March 5, 2013, the board held a "robust" public discussion before voting to approve the individual's appointment as superintendent.

Relying on case law, the PAC found that the board did not take final action by having a "general discussion" about an issue and reaching a "tentative consensus." Because board members were still allowed to suggest additional candidates for the position even after the straw poll vote on February 25 and a formal vote was taken later, there was no final action at the closed meeting.

The PAC also found that the board adequately "substantively described and publicly discussed" the individual's appointment before voting on it. A motion publicly cited at the meeting included information about the individuals' name, proposed term of service, and salary. At the meeting, the board discussed for 15 minutes the individual's salary, eligibility under the Teacher Retirement System guidelines, and whether he perceived his role to include recommending the elimination of employment positions. Only after discussing those issues did the board vote.

Based on these two decisions, it appears that the PAC expects a board to "adequately" advise the public of the nature of proposed action before voting on employment issues and other issues discussed in closed session. What "adequately" means, however, is unclear and will be difficult to understand in each case. In Opinion 13-010, it was enough for the board to discuss the salary and duration of the individual's employment, as well as his duties and responsibilities as interim superintendent, but it is unclear if that will be sufficient in all cases. In Opinion 13-007, moreover, the PAC indicated that the board at least should have shared information about a lump sum payment the employee was to receive under an agreement before voting on it. Presumably, however, there were numerous other provisions of the agreement. Did those all need to be discussed to comply with the OMA in the opinion of the PAC? Such a requirement would create a significant burden for all public bodies in efficiently conducting and completing meetings and could be construed to prohibit the approval of agreements under the consent agenda.

Although it is advisable based on these decisions to take steps to inform the public of the nature of an agreement, we would not recommend that clients take such extreme measures. Public bodies should not feel compelled to discuss every provision of an agreement or employment situation at a public meeting or abandon the use of the consent agenda for contract and other employment approvals. While the PAC decision should not be completely ignored, it is only an isolated decision by the PAC—not a court—examining specific facts. Strong arguments support a position that public bodies do not need to discuss every provision in a contract or employment situation in public session prior to a vote. This is especially true for contracts, which are subject to public review through FOIA. Further, the public has an interest in efficient meetings.

Conclusion

This flurry of decisions from the courts and the PAC regarding the FOIA and OMA are an important reminder that the legal landscape on these issues is constantly changing. Public bodies should contact their attorneys when issues under FOIA and OMA arise to avoid violating these important laws.

