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First Quarter 2021 Illinois FOIA & OMA Update

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FREEDOM OF INFORMATION ACT

FIRST QUARTER 2021

Below are the key decisions of which all Illinois public bodies should be aware regarding the Illinois Freedom of Information Act. For more information on any FOIA issues, contact Brian Crowley, Jackie Gharapour Wernz, Emily Tulloch, or any other Franczek attorney.

PRE-DECISIONAL & DELIBERATIVE PROCESS UPDATES

U.S. SUPREME COURT DECISION

On March 4, 2021, the U.S. Supreme Court issued a decision in *United States Fish and Wildlife Service v. Sierra Club* addressing the "deliberative process privilege" under the Federal FOIA law. The Court rarely weighs in on the Federal FOIA, and it only applies to requests to federal agencies. But Illinois courts and the Illinois Attorney General's Office have long recognized the value of Federal court decisions when analyzing the Illinois FOIA law. In the first published opinion by Justice Amy Coney Barrett, the Court provided useful guidance on when a document will be considered a draft, pre-decisional document that is protected from FOIA.

The case involved the Sierra Club's FOIA request to two Federal agencies for records relating to consultation between the agencies and the Environmental Protection Agency (EPA) prior to the EPA's issuance of a proposed final rule about "cooling water intake structures." The agencies produced thousands of documents in response but withheld draft biological opinions analyzing the proposed rule. The agencies relied on the Federal "deliberative process privilege," which is similar to Illinois' "pre-decisional" exemption. The parties disputed whether the records in question were drafts, which would be protected under either the Federal or Illinois law, or a final opinion that must be released.

In finding that the records contained protected preliminary opinions and not a final decision, the Court pointed to a few important factors that may apply equally under the Illinois FOIA.

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First, the mere fact that a record is not followed by any additional documentation does not make the record final. Second, the court found the following relevant to the analysis of whether a document is a draft or final document:

- Whether the opinions in the document are subject to change, on the one hand, or express settled policy, on the other,
- Whether the document had any real operative effect, and
- Whether the agency itself treats the document as a draft. Here, the agencies named the documents drafts and treated them as such by, in part, not approving the documents and not sending the draft opinions to the EPA.

Public bodies in Illinois should consider these factors when preparing internal documents to maximize the protection of the FOIA for documents that are intended to be deliberative in nature under Illinois' similar exemption.

IL APPELLATE COURT DECISION

The Illinois Appellate Court also recently provided additional guidance about the pre-decisional exemption under the Illinois FOIA. In *Fisher v. Office of the Illinois Attorney General*, issued on March 12, 2021, the Court held that the Attorney General's Office appropriately withheld records under the pre-decisional exemption because the records were internal, pre-decisional, and deliberative.

In *Fisher*, the Illinois Attorney General denied a FOIA request for communications related to various settlement agreements, claiming that the requested communications were exempt under Section 7(1)(f) of the Illinois FOIA. Section 7(1)(f) exempts from disclosure "preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed or policies or actions are formulated." The requester subsequently sued, claiming that the Attorney General improperly withheld the documents. The circuit court found for the Attorney General and the requester appealed.

The Illinois Appellate Court upheld the circuit court's decision, reasoning that the records were appropriately withheld under the pre-decisional exemption because they were internal documents that were deliberative in nature. First, the Court concluded that the communications were internal even though they included conversations with an outside consultant hired to provide the Attorney General with recommendations regarding settlement. The Court reasoned that the communications could still be considered

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internal because the outside consultant performed the same deliberative functions as the Attorney General would have, had the Attorney General performed the review of various claims for settlement on its own. Second, the Court found that the documents were pre-decisional because they were related to the Attorney General's process of formulating policies, they assisted in creating final settlement plans, and they were preliminary steps before the Attorney General adopted final plans regarding settlement. Therefore, the records contained opinions and recommendations prior to final plans and decisions, causing them to be pre-decisional and exempt under Section 7(1)(f) of the Illinois FOIA.

REASONABLENESS OF FOIA SEARCH

IL APPELLATE COURT DECISION

In *Love v. City of Chicago*, an inmate filed several FOIA requests with the Chicago Police Department, requesting records relating to his conviction. After receiving responses to the requests, the plaintiff filed various complaints alleging that the Police Department failed to respond to his requests, failed to include the correct number of documents, and failed to provide an index of records, among other complaints. The trial court found for the Police Department, concluding that it was reasonably diligent in its search efforts for responsive documents and it provided all responsive and non-exempt public records in response to the requests.

In its March 9, 2021 decision, the Illinois Appellate Court upheld the trial court's decision, finding that the plaintiff failed to identify where the Police Department fell short in complying with his FOIA requests. Notably, the Court found that public bodies are not required to produce an index of records that were withheld in response to a FOIA request, outside of a court order requiring it.

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SEXUAL OFFENSES INVOLVING MINORS

IL PUBLIC ACCESS COUNSELOR OPINION

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In a recent binding opinion, the Public Access Counselor (PAC)—the division of the Attorney General that reviews appeals regarding the FOIA and OMA—found that a public body properly withheld records concerning an alleged sexual offense against a minor. The PAC opinion provides strong support for withholding or redacting records relating to complaints against minors.

In Public Access Opinion 21-002, a requester sought records held by the Bartlett Police Department regarding a complaint or allegation of a sexual offense against a minor. The police department denied the request in its entirety, citing sections 7(1)(a), 7(1)(b), and 7(1)(c) of the FOIA. Section 7(1)(a) prohibits disclosure of information protected by State or Federal law, Section 7(1)(b) exempts "private information," and Section 7(1)(c) prohibits disclosure of records if the disclosure would constitute a clearly unwarranted invasion of personal privacy.

When addressing Section 7(1)(c), the PAC reviewed the typical factors in determining whether disclosure was required. The factors are:

1. The requester's interest in disclosure,
2. The public interest in disclosure,
3. The degree of invasion of personal privacy, and
4. The availability of an alternative means to obtain the requested information.

The PAC reviewed the first and second factors together because the requester was a reporter, reasoning that to the extent the requester sought to report on the responsive records, her personal interest was likely aligned with the public interest in disclosure. On the first and second factors, the PAC found that the public interest in disclosure was not strong, particularly because the records related to a sexual assault case involving a minor.

Continuing its analysis, the PAC found that the degree of invasion of personal privacy would be particularly high, as the exempted records involved sexual assault allegations against a minor. In addressing the fourth factor, the PAC acknowledged that there were likely few alternative means of obtaining the requested record. The PAC nonetheless gave the fourth factor less weight as the other factors and found that the police department did not violate the FOIA by exempting the records under Section 7(1)(c). Further, the PAC commented

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that while other sections of the FOIA, such as 7(1)(b), only exempt from disclosure discrete information that could be redacted, these particular records were exempt in their entirety under Section 7(1)(c), likely because redactions could not guarantee the minor's privacy.

Public bodies, including public schools, colleges, and universities, can rely on this decision to support denial of FOIA requests for records of sexual offenses against a minor under Section 7(1)(c). The decision also accords with the Illinois Appellate Court's 2013 decision in *State Journal-Register v. University of Illinois Springfield*, which recognized the strong protection Section 7(1)(c) provides regarding sexual misconduct claims involving students. As the *State Journal-Register* recognized, however, Section 7(1)(c) is less likely to shield information about school, college, or university employees with respect to sexual misconduct claims because there is strong public interest in information about public employee behavior related to sexual misconduct. In that case, release of employee information did not affect the personal privacy rights of the students and, thus, certain employee information could be released. The PAC's recent opinion does not change the analysis that would likely apply to such information.

ATTORNEYS' FEES AND CIVIL PENALTIES

IL APPELLATE COURT DECISION

In a February 21, 2021 decision, the Illinois Appellate Court denied awarding a requester legal fees, costs, and civil penalties related to a FOIA request, and held that the remainder of the requester's appeal was moot because he received the records he requested.

In Watson v. Foxx, an inmate filed a complaint against the State's Attorney's Office, alleging it failed to comply with a FOIA request he submitted in 2015 for records relating to criminal cases against him. Shortly thereafter, the State's Attorney's Office produced 2,867 pages of records in response to the request. Despite the response, the requester filed a Motion for Fees, Costs, and Equitable Damages for Civil Penalties, in which he asked the court to award him fees, costs, and civil penalties for the costs of litigation, *pro se* representation, and fees relating to his original FOIA request. The requester also alleged that the State's Attorney's Office violated the FOIA by failing to disclose various records.

In response, the State's Attorney's Office moved to dismiss the requester's complaint and motion, arguing that the case was moot because it had already provided the requester with all responsive documents, subject to redactions permitted under the FOIA. Ultimately, the Court held that the State's Attorney was correct and the issue was moot because the requested records were appropriately provided to the requester. Further, the Court denied the requester's demand for fees because *pro se* litigants do not incur any attorneys' fees and there is no provision under the FOIA allowing a requester to recover time spent prosecuting a FOIA action *pro se*.

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OPEN MEETINGS ACT

FIRST QUARTER 2021

Below are the key decisions of which all Illinois public bodies should be aware regarding the Illinois Open Meetings Act. For more information on any OMA issues, contact Brian Crowley, Jackie Gharapour Wernz, Emily Tulloch, or any other Franczek attorney.

PROBABLE LITIGATION

IL PUBLIC ACCESS COUNSELOR OPINION

On March 4, 2021, the Illinois Public Access Counselor issued a binding opinion finding that the probable litigation provision under Section 2(c)(11) of the Open Meetings Act (OMA) did not authorize closed session discussions on topics that could potentially give rise to litigation on some unknown future date. In PAC Opinion 21-003, a City Council entered closed session to discuss issues involving a sanitary and storm sewer main, citing Section 2(c)(11) of the OMA, which allows public bodies to discuss "probable or imminent litigation" in closed session. A resident involved with the storm sewer main issue complained to the PAC on the grounds that the City Council went into closed session improperly. Specifically, he contended that there was no "probable or imminent" litigation to justify discussions on the topic in closed session.

The PAC reviewed various previous decisions from its own office and case law discussing the meaning of "probable and imminent," ultimately finding that there must be reasonable grounds to believe that litigation is more likely to occur than not or that litigation is actually impending. The belief that litigation *may* occur at some point in the future is not an adequate justification for deliberating in closed session.

The City Council attempted to justify its decision, stating it believed litigation was possible or threatened because the individual had previously stated that he "was going to retain an attorney" if the sewage main issue was not resolved to his satisfaction. The PAC, however, found that the materials the City Council submitted did not indicate that the individual threatened litigation or that the City Council had any reason to believe that litigation was "probable or imminent." Further, the City Council cited "possible or threatened litigation" as its reason for entering into

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closed session, which the PAC clarified is not the applicable legal standard—the standard is "probable or imminent" litigation. Ultimately, the PAC determined that the City Council violated the OMA because it failed to find that litigation was probable or imminent. The PAC directed the City to make that portion of the closed session recording and corresponding portion of closed session meeting minutes open to the public.

AGENDA REQUEST BY MEMBER OF THE PUBLIC

IL PUBLIC ACCESS COUNSELOR OPINION

While not binding, the PAC also frequently releases non-binding advisory opinions. This year, the PAC addressed a request for review from a community member who alleged a park district board of commissioners violated the OMA by holding an improper meeting.

The community member asked the board to place an item on its agenda for an upcoming meeting, which the board denied. As a result, the community member alleged that the Board engaged in improper contemporaneous communication, during which it agreed to decline his request. In its response to the PAC, the board explained that an employee of the park district, who was not a board member, separately conferred with individual board members regarding the request to add an agenda item. As a result of those communications, the park district employee gathered a consensus that the board would decline the request.

The PAC ultimately determined that there was no evidence of contemporaneous communication among a majority of a quorum of board members and therefore, that no violation of the OMA occurred. Importantly, the PAC noted that determining which items to include on an agenda does not constitute a final action on behalf of the public body. The PAC also stated that the OMA does not require a public body to include agenda items at the request of community members.

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