

# Illinois Local Government Lawyers Association Annual Conference

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## RECENT DEVELOPMENTS IN FOIA/OMA

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# The PAC in 2015

## 13 binding Pac opinions

- » 8 FOIA
- » 5 OMA

## Major PAC Themes

1. Proper closed session topics for discussion
2. Closed session procedure
3. Financial and budget info is subject to FOIA

# Key Cases

- » *Howard v. Weitekamp*, 2015 IL App (4th) 150037 (statutory prohibition prevented release of grievance records)
- » *Devyn Corp. v. City of Bloomington*, 2015 IL App (4th) 140819, (General Ledgers are subject to FOIA because they “concerned the obligation, receipt, and use of public funds by a unit of local government”)
- » *Bd. of Educ. of **Springfield** Sch. Dist. No. 186 v. Attorney Gen. of Illinois*, 2015 IL App (4th) 140941 (PAC interpretation of actions in closed session and “public recital” requirement rejected by the appellate court.)
- » *Baldermann v. Bd. of Trustees of Police Pension Fund of Vill. of Chicago Ridge*, 2015 IL App (1st) 140482, 27 N.E.3d 170, 172 (multiple OMA procedural irregularities prevented conclusion that final action had occurred by pension board)
- » *Tolbert v. Office of Emergency Mgmt. Commc'ns*, 2015 IL App (1st) (Rule 23) (Discussion of good faith investigation requirements.)

# OMA Quiz

1. Is “Personnel” a proper closed session topic?
  - A. No. Personnel involves money and the Pac says all money discussions must occur in the open.
  - B. Yes. People shouldn’t talk about people in the open.
  - C. Yes. This is a catch all term for hiring, evaluating, compensating employees.
  - D. No. The term does not even appear in the statute.

# PAC does not like “Personnel” as term for exception 1

## 15-007—Knox County Board:

1. The board moved to close the meeting for “Personnel”
2. Recorder not working
3. Minutes show they discussed eliminating a position
4. PAC found the closing of the meeting and the topic were invalid.

# PAC Opinion 15-005

## Village of Blue Mound

1. Outsourcing of police services not a valid closed session topic.
2. Failing to cite closed session exception and then later calling it “personnel” is not proper close session procedure.

# OMA Quiz #2

1. True or False, votes and straw polls are allowable in closed session and don't count as final action.
  - A. False. The PAC says you should just sit quietly in closed session and think about what you're doing wrong.
  - B. False. There's a chance that you may mention money, so you should never adjourn to closed session.
  - C. True. The statute says as a matter of law, you can't take final action in closed session whether you vote or not.

# OMA Quiz 2A

Is the mayor's announcement of an agenda item sufficient "recital of the nature" of the item prior to a vote?

- A. No, since the OMA requires classroom-like explanations for the public prior to a vote.
- B. No, since it's not possible for the PAC to ever know what an item is about just by its title on an agenda.
- C. Yes, since that is all that is required by the OMA and has been since at least 1974.



# Springfield Board of Ed.

1. *Bd. of Educ. of Springfield Sch. Dist. No. 186 v. Attorney Gen. of Illinois*, 2015 IL App (4th) 140941.

- A. PAC said illegal final action took place in closed session.
- B. Court says, final action is impossible in closed session per the statute

# Facts of Springfield

1. Superintendent separation agreement needed board approval.
2. School board met in closed session and six of the seven school board members signed the release during the closed session.
3. Before its next open meeting, the school board posted the entire separation agreement on its website and listed the agreement as an action item on the agenda for the upcoming meeting.
4. At the open meeting, the board president read the title of the agreement and recommended its approval.
5. Six of the seven board members voted to approve the agreement.

# The PAC's position

1. A reporter filed a challenge with the PAC.
2. PAC agreed with the reporter and found that the school board did take a “final action,” in closed session.
3. The school board failed to adequately inform the public of the nature of the matter under consideration or the business being conducted.

# Springfield Bd. of Ed. hinges on these sections:

- 1. Section 2(c). Exceptions.** A public body may hold closed meetings to consider the following subjects:
  - (1) The appointment, employment, compensation, discipline or dismissal of specific employees of the public body. 5 ILCS 120/2(c)(1).
- 2. Section 2(e). Final action.** No final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted. 5 ILCS 120/2(e).

# Key Findings

1. Court noted that long standing precedent provides that final action can't take place in closed session.
2. On public recital issues, notable that AG didn't elaborate on what additional information the board should have provided before voting.

# Key Rule

“As written, section 2(e) of the Act requires that the public entity advise the public about the general nature of the final action to be taken and **does not**, as the AG claims, **require that the public body provide a detailed explanation about the significance or impact** of the proposed final action.”

# OMA Quiz #3

1. Can an administrative tribunal, such as a pension board, issue its final decision without voting on the final order?
  - A. Yes, as long as it shows that it is really, really in a hurry.
  - B. Yes, as long as it trusts its lawyer to write the final order in a manner that reflects the will of the board.
  - C. No, because that just doesn't sound right.
  - D. No, because a board can't issue a final order without convening a meeting to vote on the final order under the OMA and the pension code.

# Baldermann

## Baldermann v. Bd. of Trustees of Police Pension Fund of Vill. of Chicago Ridge, 2015 IL App (1st) 140482.

- Pension board held pension hearing same day as disability application
- Court could not tell if it was even on the agenda.
- Pension board never voted on final order which was circulated later by pension board attorney and signed by all members.



# Baldermann—More Baldermann

- Baldermann and another officer, Kapelinski, had a “buy out agreement” which gave them a 20% raise on his last day of work.
- Kapelinski also sat on pension board.
- Court could not tell if the first hearing was even on the pension board agenda.
- Pension board never voted on final order which was circulated later by pension board attorney and signed by all members.

# Baldermann

- Board convened several months later to consider the appropriate salary for the two officers in question.
- Relied on *Howe v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 2013 IL App (1st) 122446, 374 Ill.Dec. 969, 996 N.E.2d 664.

# FOIA Quiz

Is the Mayor's calendar subject to FOIA?

1. No, because the calendar contains personal and public related information and would be an invasion of the mayor's privacy.
2. No, because the public is not likely to learn anything about "final actions" from the calendar.
3. No, because the mayor is not the governor.
4. Yes, because per the PAC this is a critical document related to public business.

# PAC Opinion 15-008

## The Governor's Calendar

1. No preliminary document exception.
2. No security risk due to lack of detail in the calendar.
3. No atty client privilege.

# Practical FOIA

- » Even if you diligently train your clients, attorneys often end up with the more complicated requests.
- » Often notified under less-than-ideal circumstances.
- » The question is: what do you do?

# Practical FOIA – Understand

It is essential to gather as much information from the client as possible.

- » When was the request made? By whom?
- » Have any responsive records been identified?
- » Is the request particularly sensitive?
- » Who are the key client contacts for gathering the records?

# Practical FOIA – Evaluate

The most important part of the response process.

- » What is the form of the request?
  - › Does the requestor seek categories of records or specific documents?
  - › Does the request include interrogatories?
- » Does the client have responsive documents?
  - › Are they available online?
- » Is the request unduly burdensome?
  - › If so, ***contact the requestor.***
  - › Must send a written response (5 ILCS 140/3(g)), but a phone call is a great way to set the tone.

# Practical FOIA – Exemptions

Identifying exempt records and asserting the correct exemption is crucial.

- » IICLE and the Attorney General provide excellent overviews of exemptions – use them consistently.
- » Avoid the temptation to withhold records where an exemption *may* apply.
- » Unless you are absolutely certain, take the time to investigate further.



# Practical FOIA – The Response

- » The response must be timely.
  - › If you are working under a compressed schedule, assert a statutory extension (5 ILCS 140/3(e)) if possible.
  - › Alternatively, requestors are often open to mutually agreed extensions if asked. A phone call and friendly attitude can do wonders.
  
- » When withholding records (or portions of records) based on an exemption, be sure to identify:
  - › The specific request;
  - › The information/records being withheld; and
  - › The statutory/legal basis for applying the exemption.

# Practical FOIA – PAC Letters

- » PAC reviews are a fact of life – don't worry.
- » Review the letter thoroughly – the PAC attorney will explain exactly what he/she seeks.
  - › Can simply be a matter of confirming the exemptions were properly applied; or
  - › May also be a review of certain practical considerations (i.e., is the website where documents are stored accessible?).
- » Follow the FOIA response process – understand, evaluate, and respond.

# Practical FOIA – PAC Letters (cont.)

- » In formulating a response, be sure to include case law, PAC Opinions, legislative history.
- » Supporting affidavits are also powerful tools.
- » If you need more than the allotted 7 days, contact the PAC attorney.
  - › Employing a courteous and friendly demeanor will go far.
  - › Explain why the extra time is relevant to addressing the issues raised by the PAC.
  - › Confirm the extension in writing.

# Practical FOIA – Example

- » Client is undertaking the development of city-owned land – which is eliciting strong opposition.
- » A member of this opposition submits a lengthy FOIA (6+ pages) request for information.
- » On its face, the request is problematic:
  - › Majority of requests are interrogatories;
  - › Remaining document requests are categorical and stretch over a period of 15 years; and
  - › Some of the requests overlap with another FOIA request submitted by a colleague in the opposition group.

# Practical FOIA – Example (cont.)

- » Follow the response process – understand, evaluate, and respond.
  - › Draft a letter explaining the request is unduly burdensome and offer to meet-and-confer.
  - › Before sending the letter, ***contact the requestor***. Explain the issue, suggest that he/she reconsider the request, and offer to schedule a meet-and-confer conference.
- » The key is to make the process collaborative – you are making sure the requestor receives exactly what they seek.

# Practical FOIA – Example (cont.)

- » During the meet-and-confer, the requestor significantly narrowed the requests.
  - › Agreed to dispense with requests that overlapped with second FOIA request submitted by the organization.
  - › Understood that interrogatories are improper, but that the produced records contains answers.
  - › Revised request was less than ½ page.
- » Requestor also agreed to extensions to give the client time to gather the relevant records.

# QUESTIONS