2013 ICSA School Law Seminar
BALANCING TRANSPARENCY AND DISCRETION: FOIA UPDATE

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BREAKING FOIA

Hypothetical #1

Hank Schrader and his wife, Marie Schrader, live within the boundaries of the Albuquerque (IL) School District. They are suspicious that their brother-in-law, Walter White, a chemistry teacher at a local high school, is engaging in criminal activities. The School District receives the following FOIA requests in a 7 day period:

1. Marie submits 4 separate and distinct requests in 4 emails
2. Hank submits 5 separate and distinct requests in 1 email
3. Marie and Hank submit 2 separate and distinct requests in 1 joint letter
4. Marie submits 1 request and Hank submits 1 request
5. Marie and Hank submit 1 request
6. Hank submits 30 requests in one email, none of which is unduly burdensome on its own

Assuming no exemptions apply, how should the School District respond?

Hypothetical #2

One of the requests by Hank and Marie seeks results of a survey of students at Mr. White's high school about their use of controlled substances. Hank and Marie think this survey will include incriminating information about Mr. White and ask for a copy. The President of the Board of Education for Albuquerque School District, Saul Goodman, had referred to the survey in a public Board meeting, identifying the nature of the survey and its purpose, identifying and personally thanking key players behind and authors of the survey, and citing the survey as support for a new "scared straight" program announced for the first time at the Board meeting. The Board meeting was later posted on the School Board's YouTube channel and a press release issued with many details of the survey. Can Hank and Marie receive a copy of the survey? What if the Superintendent had cited to an Executive Summary of the survey?

Hypothetical #3

Hank and Marie also sought copies of results of investigations into misconduct by Mr. White that the School District may have conducted, including communications between Mr. White and a former student, Jesse Pinkman. Some of the responsive emails included factual statements from witnesses and from Mr. White regarding incidents for which the Board made a decision to issue a notice to remedy, but there was no formal adjudication. Can Hank and Marie receive a copy of the communications, including the statements?

Hypothetical #4

Hank and Marie also sought information about sick and vacation time that Mr. White may have taken for cancer treatments, contributions he made to his pension?

Hypothetical #5

There is a video of Mr. White speaking in a very threatening manner to one of his students, Skyler, that is found on the surveillance tape. Can Hank and Marie obtain the video?

MAD ABOUT FOIA

Hypothetical #1:

Don and Betty Draper are divorced parents of two students, Sally and Bobby, who attend Westchester (IL) School District. Betty learns that Don had a relationship with one of Sally's former teachers, and decides she wants all communications about Sally and Bobby by all of their female teachers. She submits a FOIA request for the information and specifically asks for all copies to be produced to her in electronic form.

1. Is Betty entitled to the emails under a FOIA request?
2. Sally's former teacher used her personal email account to email other teachers about students. Must the school district search and produce emails from her personal account? What if Sally's former teacher used Facebook for those purposes?

Hypothetical #2:

Betty also requests copies of a report regarding certain incidents in Bobby's class. The responsive report contains only exempt information about students other than Sally and Bobby. Once the student information has been redacted, nothing useful would be left. Further, although the School District has software that allows users to view the report, in order to print the report the School District would need to purchase a computer program that would cost $500.

1. Can the request be denied because nothing useful would remain after the redactions?
2. If not, is purchasing the software an undue burden?

GAME OF FOIA

A former School Board president for Kings Landing (IL) School District, Aerys Targaryen, resigned from the Board in shame years ago under pressure from a prominent family in the area, the Lannisters. His adult daughter, "Khaleesi," now lives in an exotic neighboring land (WI). She has her sights on taking back the School Board presidency to restore her father's honor, and wants to create waves for the new Board president, a son in the Lannister family, Joffrey. She submits a number of FOIA requests for the following. Which requests can be denied and for what reasons?

1. An Excel™ spreadsheet with de-identified data about students accepted into training for the Night's Watch, a highly competitive selective enrollment program in the School District. Khaleesi requests the spreadsheet to be in "unlocked" form so that the data can be manipulated.

2. De-identified raw data on current students' jousting test scores. The only option for accessing the test score data is to run a report from a test score reporting service, which automatically lists the students names in alphabetical order. Because there are only 80 students studying jousting, redacting the names of the students would not protect their identity. The only way to scramble the names is to print a paper copy, redact the names, cut the scores into strips of paper, arrange them in random order, and furnish the strips to Khaleesi.

3. Copies of electronic communications that Joffrey sent to or received from Board members during Board meetings, whether on personal or School District technology devices or accounts and whether relating to purely personal issues or bearing on public business.

4. Copies of electronic communications that Joffrey sent at other times, whether on personal or School District technology devices or accounts.

The School District denies some of Khaleesi's requests and she appeals to the Public Access Counselor. The PAC issues a binding decision in the School District's favor, and Khaleesi appeals and prevails. Is she entitled to attorney's fees? What if the PAC decision had been nonbinding? What if before the PAC issued a decision, Khaleesi filed a lawsuit in court?

2013 FR ALERTS: FOIA MATTERS

Illinois Court Opinion Clarifies Key FOIA Provisions

Recently, the Illinois Appellate Court clarified three key provisions of the Illinois Freedom of Information Act: the "predecisional" or "deliberative process" exemption; the exemption for unwarranted invasion of personal privacy; and the exemption applying to school student records. The case provides good examples for when these exemptions apply to records created and obtained in an internal investigation, including statements from witnesses such as students.

The case, *State Journal-Register v. University of Illinois Springfield*, arose out of a 2010 FOIA request by a central Illinois newspaper, the *State Journal-Register*, which sought evidence of allegedly improper conduct by three college coaches. The newspaper also sought inappropriate communications between any students and one of the coaches. The university produced a number of documents but withheld others based on the predecisional/deliberative process, personal information, and student records exemptions to FOIA. The *Journal-Register* published a number of articles detailing the alleged incidents and impropriety, presumably based on information it received from the university in response to the FOIA request.

The *Journal-Register* then filed a lawsuit in state court seeking access to the records that had been withheld. A trial court and appellate court opinion followed, with the following takeaways for these key FOIA provisions:

Predecisional or Deliberative Process Records

The most important point the court clarified regarding the predecisional/deliberative process exemption is that, although an entire document relied on by a public body in making a decision is exempt before the decision is made, once the decision is made the "purely factual" material is not protected by the exemption unless it is "inextricably intertwined" with predecisional and deliberative discussions.

Applying this rule, the court found that email strings containing staff opinions and general communications about the investigation and the scheduling of meetings were "clearly" protected, because they were collected to help the university reach a decision about whether misconduct occurred and, if it did, how to address it. Similarly, portions of a letter from an alleged victim regarding how they wished to proceed with resolving their legal claims against the university was exempt, as the university "undoubtedly" relied on that information in formulating a plan or policy for settling potential litigation. Once the decision was made, however, documents containing witness statements were not exempt under the predecisional exemption, even though the university relied on the documents prior to making a decision. The factual accounts of events by witnesses could "stand alone" and so were not "inextricably intertwined" with the predecisional process.

Personal Privacy

The court made clear that the personal privacy exemption is quite broad. For instance, the court noted that information in a personnel file is only subject to disclosure under FOIA if it relates to the public duties of the employee; otherwise, it is personal information protected by the personal privacy exemption. Notably, the court found that documents reflecting a public employee's compensation for accrued sick and vacation time, employee status, and other related documents were exempt personal information. Such

information does not bear on the alleged misdeeds or public duties of the coaches and is of a highly personal nature, the court said.

The court also clarified that where personal information is at issue, it will only be released if the rights of the public to the information outweigh the victim's right to privacy. The court found that witness statements could not be produced without improperly invading the students' rights to privacy. Importantly, the public interest in the information in the statements was limited because a significant amount of information had already been released, and it appeared that the *Journal-Register* was only seeking to find out the "nasty dirty stuff" that allegedly took place. In contrast, at least one victim had filed a letter with the court pleading to have his or her privacy protected.

The court also made clear that in some cases redacting an individual's name would not be enough to protect the privacy of the individual. For example, there was a small number of students on the relevant sports teams involved in the incident, so redacting student names from witness statements would not protect those students' identities.

Records indicating actions and observations made by the softball coaches preceding the alleged incident, however, could be produced and were not exempt personal information. As the court explained, the public has strong interest in the decisions of the university or its coaches that led to the behaviors preceding the sexual misconduct. That information does not affect the personal privacy rights of the students, but instead reflects on the decisions of the university and its coaches.

Finally, with respect to settlement agreements, the court determined that a student's name could be redacted from such documents.

Student Records

The court made clear that the mere fact that a document is created with information about a student or even names a student is not enough to make it an educational record exempt from FOIA. For example:

- The court found that a student complaint was not subject to FERPA. It did not relate to the student; rather, it expressed the opinion of a student about actions of public employees and included no identifying characteristics once the student's name was redacted.
- The court also found that the coaches' witness statement were not subject to FERPA because they reflected on the actions and behaviors of the coaches, not the students.

Because the court found that none of the relevant documents were educational records covered by FERPA, it did not address the issue of whether FERPA specifically *prohibits* schools from releasing student records, thus making student records exempt under FOIA. As we reported in an earlier FR Alert, a federal judge in Chicago in 2011 found that FERPA did not protect student information from disclosure under FOIA. A later decision of the Seventh Circuit Court of Appeals vacated that earlier decision and included helpful dicta supporting educational institutions continued reliance on FERPA to withhold private student-related documents under FOIA. But the question is still an open question under Illinois law. Notably, the case did not deal with the Illinois School Student Records Act (ISSRA), an Illinois law that is similar to FERPA and that applies to primary and secondary Illinois school districts. There is no question that student records as defined by ISSRA are exempt under FOIA.

Illinois Appellate Court Clarifies When Electronic Communications by Council and Board Members on Personal Electronic Devices and Accounts are Subject to FOIA

The Illinois Appellate Court recently ruled that electronic communications about public business sent or received by members of a city council during a public meeting or study session are "public records" subject to the Illinois Freedom of Information Act. Although making clear that at least some electronic communications by public officials and employees on personal electronic devices and accounts will be subject to FOIA, the decision actually narrows the circumstances when such communications will be subject to FOIA. Nonetheless, it is still best practice for public bodies to discourage officials and employees from conducting public business through their personal technology and accounts. This includes communications on personal e-mail accounts, through personal cell phones (e.g., text messages and voicemails), and on personal social media accounts.

The court also decided an important attorney's fee issue in the case. The court determined that a FOIA requester may not receive attorney's fees for an administrative review of an Illinois Attorney General Public Access Counselor opinion in court. The practical effect of this decision is that a FOIA requester is only eligible to receive attorney's fees if the requester sues in court before the Attorney General rules on a request for review of a denial.

A thorough summary and analysis of the case follows.

As we reported in an earlier FR Alert, in 2011 the PAC held that the City of Champaign must release all records responsive to a FOIA request seeking electronic communications sent or received by city council members and the mayor during city council meetings and study sessions, including communications on personal cell phones, e-mail addresses, and Twitter accounts. Last year, a trial court in Sangamon County upheld the PAC's decision, and also awarded the FOIA requester, the *News Gazette*, attorney's fees. Last week, the Illinois Appellate Court, Fourth District, agreed in *City of Champaign v. Madigan* that at least some electronic communications regarding public business and sent or received on the personal electronic devices of the city council members are subject to FOIA.

The court explained that an electronic communication created or received by a city council member would only be a "public record" subject to FOIA if it: (1) pertains to the transaction of public business; and (2) was either prepared by or for a public body, used by a public body, received by a public body, possessed by a public body, or controlled by a public body.

Relying on dictionary definitions of "public," the court explained that the first prong of the test would be met if the communication pertains to "business or community interests as opposed to private affairs." Accordingly, purely personal communications with no bearing on public business are not subject to FOIA.

For purposes of the second prong of the test, moreover, the court held that it was not enough for the communication to be prepared, used, received, possessed, or controlled by or prepared for a member of the public body, such as a city council member. The court held that because an individual city council member cannot conduct the business of the public body alone, a council member is not a "public body."

Nonetheless, the court found that in the circumstances of the case before it, the city council members were acting as the public body for purposes of FOIA. The court noted that once the individual city council

members convened a city council meeting (or "study session"), they were acting in their collective capacity as the "public body" during the time the meeting was in session. The court specifically noted that the city council cannot act unless it acts through its individual members during a meeting.

The court's decision sets reasonable limits on a troubling PAC opinion by providing clarification for public bodies on when FOIA will apply to communications and other records on board member personal electronic devices and accounts. The court's decision leads to the following general conclusions:

- Communications about non-public matters will not be subject to FOIA even if they are created, maintained, or accessed by employees or board members on public technology or accounts.
- Communications authored or received by public employees or board members about public business on publicly issued electronic devices will be subject to FOIA unless an exemption applies regardless of how many members of a public body receive the communication.
- Communications authored or received by board members on private devices that discuss public business are subject to FOIA if any of the following apply: (1) the communication is received by a majority of a quorum of the public body (this includes committees); (2) the communication is sent or received during a public meeting; or (3) the communication is subsequently forwarded to on a publicly issued device or electronic address.
- Communications authored or received by board members on private devices that discuss public business but are sent to the private devices of less than a majority of a quorum of public body members may not be subject to FOIA. The court's decision seems to imply that such records are not public records of the public body because less than a majority of a quorum of the public body is not the public body.
- The underlying rationale for the court finding that the communications were public bodies in this case would not apply to employees of the District, who can never act in the capacity of a public body. There may, however, be other rationales that the PAC or a court could apply to find that the communications by employees about public business on personal electronic devices or accounts are nonetheless public records subject to FOIA.

Because the court's decision leaves some questions unanswered and makes clear that at least some messages by public body officials on private devices will be subject to FOIA, we still advise that public bodies implement policies and procedures discouraging employees and officials from using personal electronic devices and accounts for public business. This will allow the public body to avoid the logistical hurdles, costs associated with searches of such technology, and potential privacy issues that we identified in our first FR Alert on this case. Indeed, the court in *City of Champaign v. Madison* encouraged public bodies to implement such policies, stating: "We would encourage local municipalities to consider promulgating their own rules prohibiting city council members from using their personal electronic devices during city council meetings."

Illinois Appellate Court Decision Clarifies Waiver of the FOIA Predecisional Materials Exemption

The Appellate Court of Illinois (First District) recently issued an opinion clarifying how a public body can waive the Freedom of Information Act protection for predecisional records. In *Dumke v. Chicago*, the court held that then-Mayor Richard Daley's repeated references to a consultant's report were sufficient to waive the exemption in response to a FOIA request issued to the Chicago Police Department, even though the Mayor is not technically the "head of" the Police Department.

In *Dumke*, a citizen made a FOIA request to the Chicago Police Department for a copy of a final report of a study conducted by consultants for the City of Chicago regarding Police Department operations. The Police Department denied the FOIA request, asserting first that the record was exempt under Section 7(1)(f) of the FOIA, which exempts from disclosure "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except [when a] record is publicly cited and identified by the head of the public body." 5 ILCS 140/7(1)(f). The FOIA defines "head of the public body" to mean "the president, mayor, chairman, presiding officer, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body, or such person's duly authorized agent." 5 ILCS 140/2(e).

Although the Mayor had cited the report publicly, the Police Department maintained that the Mayor was not the "head of the public body" and so his citation to the report could not waive the exemption for predecisional records. In the alternative, the City argued that the citations by the Mayor were not sufficient to waive the privilege. The Illinois Attorney General's Public Access Counselor and a state trial court agreed with the Police Department.

On appeal, however, the Illinois Appellate Court reversed and found in favor of the requester. First, the court found that the Mayor was a "head of the public body," even though the definition of that term suggests that the Superintendent of the Police Department would be the Police Department's head. Although the Court's reasoning is not completely clear, it appears to be based on the fact that the Mayor is also the head of the City, and that the Police Department is a subsidiary of the City. It is unclear whether the court's reasoning would apply in other situations. For instance, it is unclear whether it would apply where the head of one public body cites a report, but a FOIA request is issued to a second, unrelated public body. For example, if two school districts work together on a project and obtain a report from a consultant, and the superintendent of District 1 cites the report publicly, is the exemption waived with respect to a FOIA request to District 2?

Second, the court found that the Mayor's citations to the report were sufficient to waive the protections for predecisional materials under Section 7(1)(f). The court pointed to the fact that the Mayor repeatedly referred to the report in a press conference, identifying the nature of the report and its purpose, identifying and indeed personally thanking the key players behind and authors of the report, and citing the report as support for the police reorganization plan he was announcing at the press conference. In arriving at its decision, the court also found persuasive that the press conference was later posted on the Mayor's YouTube channel and that a press release was issued with many of the same details as provided in the press conference. The court distinguished an earlier Appellate Court case, *Harwood v. McDonough*, in which a public body was allowed to withhold a consultant's report even though the Governor had

previously cited to an executive summary of the report and to charts recapitulating the information contained in the executive summary. The court noted that in *Harwood*, unlike in the *Dumke* case, the head of the public body never cited or identified publicly the report, rather citing only to the executive summary of the report.

The court's decision in *Dumke* is an important reminder to public bodies to think carefully about what records high-level officials in the public body publicly identify or cite. If a high-level official from a public body, or its subsidiary or parent entity, wishes to cite publicly to information from the record, the public body should create an executive summary and explicitly label it "Executive Summary," and only allow citations to that summary, not the underlying record. The executive summary should include information that the public body is willing to release to the public. If the executive summary includes data or other information from the report, the public body should paraphrase language and summarize data from the underlying record.

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.