

# **OMA-FOIA REFRESHER AND RECENT DEVELOPMENTS**

**PRESENTED FOR**

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**BY**

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## OMA-FOIA REFRESHER AND RECENT DEVELOPMENTS

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The Illinois Open Meetings Act (OMA) is designed to ensure that the public has access to information about government and its decision-making process.

The Freedom of Information Act (FOIA) is a state law under which public records of a public body may be accessed by a member of the public upon written request. In summary, “public records” includes all records, reports, forms, writings, letters, memoranda, and all other documentary materials pertaining to the transaction of public business. Public records are presumed to be open for public inspection unless an exemption (FOIA Sections 7.1 and 7.5) applies to all or part of a record.

### **A. PAC Opines that RIF Joint Committee Meetings are Subject to the OMA**

On September 8, 2016, the Illinois Attorney General’s Public Access Counselor (“PAC”) issued a non-binding decision to School District 46, in which it opined that meetings of its RIF Joint Committee are subject to the requirements of the Open Meetings Act (“OMA”). This would include posting notice and agendas, keeping minutes, allowing time for public comments, properly entering closed session, and keeping a verbatim recording of all closed sessions.

The PAC non-binding decision here was the result of a request made to the PAC by a member of the public who claimed that the December 18, 2013 meeting of School District 46’s RIF Joint Committee was held without public notice in violation of the OMA. More than 2 ½ years after the PAC received the request, the PAC concluded that the RIF Joint Committee is an advisory or subsidiary body the school district and, therefore, a “public body” subject to the OMA. In short, the PAC reached its decision based on the following factors:

- Although the RIF Joint Committee’s creation and duties originate in the School Code and it does not have by-laws, its operations and functions are inextricably connected to those of the school district.
- The RIF Joint Committee makes binding decisions concerning groupings, reports to the Board of Education, and has a statutorily-defined role that makes it part of the formal organizational structure of the school district, which is a primary consideration in determining whether a public body is subject to the OMA.
- The RIF Joint Committee is an established part of the school district’s formal process for determining the order of honorable dismissal and exists to advise the District.

The PAC also concluded that the RIF Joint Committee does not engage in collective bargaining negotiations and, thus, the meetings were not excused from the requirements of the OMA.

## B. Legislative Update

### 1. Public Act 99-478: Severance Agreements (FOIA)

Effective June 1, 2016, amends FOIA to clarify that severance agreements, in addition to settlement agreements, are public records subject to FOIA. Defines severance agreements as “a mutual agreement between any public body and its employee for the employee’s resignation in exchange for payment by the public body.”

### 2. Public Act 99-515: Review of Closed Session Minutes and Verbatim Recordings (OMA)

Effective June 30, 2016, elected and appointed officials have the right to access closed session minutes and verbatim recordings of the public body on which they serve. The amendment grants access to elected and appointed officials as follows:

- In the public body’s main office or official storage location;
- In the presence of a records secretary, an administrative official or elected official of the public body; and
- No removal from the public body’s main office or official storage location, except by vote of the public body or court order.

### 3. Public Act 99-586: Additional FOIA Penalties and Review (FOIA)

Effective January 1, 2017, public bodies that fail to comply with binding decisions issued by the Illinois Attorney General’s Public Access Counselor (“PAC”) may face additional civil penalties if a requester sues to enforce the binding decision. (New FOIA Section 11.6). These new penalties apply to binding PAC opinions that are requested or issued after January 1, 2017.

The Original Penalty: If a court determines that a public body has “willfully and intentionally” failed to comply with FOIA, or otherwise acted in bad faith, the court shall impose a civil penalty of not less than \$2,500 nor more than \$5,000 for each occurrence.

New Presumption of Willful and Intentional Failure to Comply: There is a presumption that a public body “willfully and intentionally” fails to comply with FOIA for purposes of these new penalties if:

- The Attorney General issued a binding PAC opinion;
- The public body does not file for administrative review of the binding opinion within 35 days after the binding opinion is served; and

- The public body does not comply with the binding opinion within 35 days after the binding opinion is served.

A public body may rebut the presumption that it has “willfully and intentionally failed to comply” with FOIA by showing that it is “making a good faith effort to comply with the binding [PAC] opinion, but compliance was not possible within the 35-day time frame.”

The New, Additional Penalty: A court may impose an additional penalty of up to \$1,000 for each day the violation continues if:

- The public body fails to comply with the court’s order after 30 days;
- The court’s order is not on appeal or stayed; and
- The court does not grant the public body additional time to comply with the court’s order to disclose public records.

4. Public Act 99-714: Open Meetings Civil Action

As of August 5, 2016, a person may bring a civil action in the circuit court within 60 days of the decision by the Attorney General to resolve a request for review by means other than the issuance of a binding opinion.

5. SB 3112: Incarcerated Individuals and FOIA Information (FOIA)

Amends FOIA Sections 7(1)(e-5) and (e-6) to extend the exemptions to persons committed to a county jail, in addition to the Department of Corrections. Adds the following new sections:

- FOIA Section 7(1)(e-8), “[r]ecords requested by persons committed to the Department of Corrections or a county jail, the disclosure of which would result in the risk of harm to any person or the risk of an escape from a jail or correctional institution or facility.”
- FOIA Section 7(1)(e-9), “[r]ecords requested by a person in a county jail or committed to the Department of Corrections containing personal information pertaining to the person’s victim or the victim’s family, including, but not limited to, a victim’s home address, home telephone number, work or school address, work telephone number, social security number, or any other identifying information, except as may be relevant to a requester’s current or potential case or claim.
- FOIA Section 7(1)(e-10). Law enforcement records of other persons requested by a person committed to the Department of Corrections or a county jail, including, but not limited to, arrest and booking records, mug shots, and crime scene photographs,

except as these records may be relevant to the requester's current or potential case or claim.

- Creates new FOIA Section 7(1)(kk). Information or materials received, generated, or maintained by a State's Attorney, or other special prosecutor, county sheriff, or other law enforcement agency that relate to a criminal case pending at the trial level.

**Last Action:** Senate Concurred with House Amendment No. 2 (5/31/16). On June 29, 2016, a motion was filed to reconsider the vote.

## C. Case Decisions

### 1. The Board of Education of Springfield District 186 Case (OMA)

The recent Appellate Court decision in *Board of Educ. of Springfield School Dist. No. 186 v. The Illinois Attorney General, et al.*, 2015 IL App (4th) 140941 (Dec. 15, 2015), removes some of the uncertainty with respect to what public notice is needed prior to a board action. Specifically, the Appellate Court rejected the Illinois Attorney General's interpretation that Section 2(e) of the OMA requires a public body to provide a detailed explanation about the significance or impact of a proposed final action and held that a public body is only required to advise the public about the general nature of the final action to be taken.

#### a. Relevant Facts

- In late 2012, the superintendent approached the Board of Education ("BOE") about terminating his employment contract.
- The parties reached an agreement on terms to release the superintendent from his contract.
- On January 1, 2013, the superintendent signed and dated a 19-page separation agreement.
- During the closed session of the February 4, 2013 BOE meeting, six (6) members signed, but did not date, the separation agreement.
- On March 1, 2013, the BOE posted the agenda for its March 5 meeting which included an action item to approve the separation agreement.
- The agenda included a specific action for approval of a resolution regarding the separation agreement between the superintendent and the BOE.

- The agenda also included a link to the District's website where a complete copy of the separation agreement could be viewed by the public.
- At the March 5 meeting, the BOE president made a recommendation and motion for the BOE to approve the separation agreement with the superintendent. The motion carried by roll call vote of 6:1.
- The March 5 date was added to the previously signed separation agreement.
- A reporter sought review by the Illinois Attorney General's Public Access Counselor ("AG") of the BOE's actions on February 4 and March 5.

b. Relevant Sections of the OMA

- "A public body may hold closed meetings to consider the following subjects: (1) the appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body...." 5 ILCS 2(c)(1).
- "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).
- An agenda for each regular and special meeting shall be posted at the principal office of the public body, at the location where the meeting is to be held, and on the website of the public body (if full-time employees of the public body maintain the website) at least 48 hours in advance of the holding of the meeting. See 5 ILCS 120/2.02(a).
- "Any agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject matter of any resolution or ordinance that will be the subject of final action at the meeting...." 5 ILCS 120/2.02(c).

c. The AG/PAC Decision

The PAC issued binding decisions concluding:

- The signing of the separation agreement by six (6) of the BOE's seven (7) members during the February 4, 2013, closed session constituted the taking of final action in violation of Section 2(e) of OMA.
- The BOE violated Section 2(e) of the OMA by voting to approve the separation agreement during its March 5, 2013, meeting without adequately informing the public of the business being conducted. The AG opined that the BOE's posting of the separation agreement on its website did not constitute a public recital during an open meeting within the scope of Section 2(e) of the OMA.
  - Further, the few comments made during the motion leading to the vote were insufficient to provide the public with information from which it might comprehend the purpose and effect of the BOE's actions.

d. The Appellate Court's Ruling and Case Status

The BOE sought administrative review of the AG's decisions, and the circuit court reversed the AG on both issues involving Section 2(e) of the OMA. The AG then appealed the ruling by the circuit court.

The Appellate Court agreed with the lower court's ruling. The Appellate Court first determined that the BOE appropriately considered the superintendent's dismissal from his contract during the February 4 closed session as permitted by Section 2(c)(1) of the OMA. Therefore, signing the separation agreement did not constitute an impermissible final action given the BOE's action on March 5. The Court noted that its conclusion was "hardly new or novel".

Second, the Appellate Court agreed with the lower court's assessment that the AG's interpretation of Section 2(e) of the OMA would impose a greater burden than the plain language of the statute requires. Significantly, the Court held that "[a]s 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."

On March 29, 2016, the AG's discretionary petition for leave to appeal to the Illinois Supreme Court was granted. Once briefing has concluded, the Illinois Supreme Court will review the decision and either affirm or reverse the Appellate Court.

2. *Garlick v. Naperville Township*, 2016 IL App (2d) 150381-U (Feb. 22, 2016)

In a recent Rule 23 Opinion, the Second District Appellate Court interpreted the application of FOIA Section 8.5: a public body is not required to copy a public record that is published on the public body's website. The public body shall notify the requestor that the public record is available online and direct the requestor to the website where the record can be reasonably accessed. 5 ILCS 140/8.5.

Plaintiff Garlick submitted a FOIA request to Defendant Naperville Township for property details and assessment data for the entire township including a database in the format maintained by the township and all other subdirectory material on each parcel. Naperville Township denied his request under Section 8.5, and directed the requestor to its website which allowed a user to individually query each parcel by PIN number or address.

Garlick filed a lawsuit alleging that Naperville Township violated FOIA because compiling the amount of data he was requesting one property at a time is not feasible. Naperville Township responded that because the information was available online, it was not required to produce any material in response to the request. Rather, Section 8.5 permits a public body to point the requestor to the website where they can find the requested information.

The trial court agreed with Naperville Township and granted its motion to dismiss. The Appellate Court reversed. While the Appellate Court did not directly disapprove of Naperville Township's response, it found the case revolves around the requirement that the record "be reasonably accessed". The Court determined that whether the requested data can be reasonably accessed is a question of fact more properly the subject of a summary judgment motion or trial. The case was remanded to the trial court for further proceedings.

3. *Hites v. Waubensee Community College*, 2016 IL App (2d) 150836 (June 6, 2016)

Plaintiff, Daniel Hites, submitted a FOIA request to Waubensee Community College ("WCC") for the following data:

- a. The zip codes of all people taking the National Safety Council's Defensive Driving Course (DDS-4) in 2011.
- b. The zip codes of all people taking GED classes in the fall of 2011 at the Aurora Campus.
- c. The zip codes of all people taking ESL classes in the fall of 2011 at the Aurora Campus.

- d. The total number of registered students without social security numbers in the fall of 2011 at the Aurora Campus.
- e. The raw input for the “city” field on the student registration forms for all students registered in the fall of 2011 at the Aurora Campus.
- f. The raw input for the “county code” field on the student registration forms for all students registered in the fall of 2011 at the Aurora Campus.
- g. The raw input for the “U.S. Citizen” field on the student registration form for all students registered at the Aurora Campus in the fall of 2011.
- h. The raw input for the “Are you in the United States on a visa-nonresidential Alien” field on the student registration forms for all students registered in the fall of 2011 at the Aurora Campus.
- i. The total number of registered students by year from 1995 to 2008 at the Aurora Campus.
- j. The total number of registered students by year from 1995 to 2008 taking ESL classes at the Aurora Campus.
- k. The total number of registered students by year from 1995 to 2008 taking ABE/GED classes at the Aurora Campus.
- l. The total number of registered students from 1995 to the present taking classes at Beaupre Elementary School, Family Focus, Hermes Elementary School, Rollins Elementary School, St. Mark’s Lutheran Church, and Westminster Presbyterian Church (as shown on page AS of the fall 2009 workforce development noncredit course schedule).
- m. The total number of out-of-district students in the fall of 2011 at the Aurora Campus.
- n. A copy of the charter for WCC.
- o. The mailing addresses of WCC trustees.

WCC denied request nos. 1-13, because it does not aggregate or maintain this information and there was not purpose for the College to do so. Thereafter, Plaintiff alternatively requested that WCC provide a complete copy of its databases which housed the requested information. This request was likewise denied. In a final attempt to compromise, Plaintiff sent WCC an Adobe-based script, accompanied with a description of the script’s functional use, which could automate the redaction process of the information that they were seeking. WCC maintained that the script would not diminish the burden of retrieving the

requested information, and stood by its decision to refuse to provide the information requested.

Plaintiff filed a lawsuit based upon WCC's denials of his request. The trial court held an evidentiary hearing ("the hearing") to address WCC's burden in complying with Plaintiff's request and to determine the availability of alternative methods of providing Plaintiff the requested information. During the hearing, WCC's Chief Information Officer ("CIO") testified about the WCC databases' purposes and functions. CIO explained that the databases utilized were relational databases and were used to "handle every major function" at WCC, including finance, financial aid, student records, and inventory. It tracked all sorts of student information, including the student's name, address, zip code, what courses a student took and when they took them, the county in which the student lived, whether a student was a United States citizen, and whether a student lived within the school district. Additionally, relational databases allowed the user to quickly extract the data and put it in an Excel format. It was also determined that WCC employed two IT employees who could extract the information from WCC's database by writing a program to do so.

After the evidentiary hearing, the trial court dismissed Plaintiff's complaint because it deemed his requests were not for public records under FOIA. Having previously determined in *Chicago Tribune Co. v. Department of Financial & Professional Regulation*, 2014 IL App (4th) 130427 (March 6, 2014), that a proper FOIA request had to identify a public record, not just general data, information, or statistics. It reasoned that Plaintiff, much like the plaintiff in *Chicago Tribune*, was requesting that WCC provide tallies of data instead of existing public records, which would require WCC to create a new record. Furthermore, the trial court held that FOIA did not require WCC to conduct database searches to create a new report for plaintiff, as WCC did not maintain documents with the aggregate data that Plaintiff sought. Finally, the trial court deemed that the undue burden on WCC to provide a complete copy of its databases, with privileged information redacted, would be outweighed by the public's interest in obtaining the requested information.

Plaintiff appealed and argued that given that the information that is stored in these databases is not exempt and, therefore, allowed under FOIA, the nature in which it is filed should not extinguish its accessibility under FOIA. To hold otherwise would create an exception that would allow public bodies to evade FOIA obligations. Specifically, Plaintiff argued that Illinois courts have held that FOIA applies to digital records and that they should be made available to the plaintiff for inspection and copying. *Hamer v. Lentz*, 132 Ill.2d 49, 56-57 (1989). In *Hamer*, the court suggested that, if necessary, the defendant would have to prepare a computer program to generate a hard copy of the information stored electronically. Given the testimony by the OIC during the evidentiary hearing, where it was explained that the databases were created to allow for easy storage and retrieval of information, there is no undue burden placed on WCC. Additionally, Plaintiff maintained that case law

interpreting the federal statute should guide Illinois courts interpreting the state statute, given that the state statute was modeled after the federal one. The federal FOIA has been interpreted by case law as stating that individual pieces of data residing in a database are subject to disclosure. *National Security Counselors v. Central Intelligence Agency*, 898 F.Supp.2d 233, 270 (D.D.C. 2012). Plaintiff also argued that the information in WCC's databases is subject to disclosure because each file of information is a single public record, and FOIA would therefore compel disclosure if requested individually.

The Appellate Court determined that the trial court erred in dismissing Plaintiff's complaint as it related to request nos. 1 through 3, 5 through 8, and 14 and 15. It opined that because data on WCC's databases constitute public records under FOIA and the requests required searches for information already stored and would therefore not require creating new records, that those requests should not have been dismissed. Also, given that Illinois case law did not provide direct guidance regarding the disclosure of data stored in a database, the Appellate Court agreed with Plaintiff in turning to federal case law for guidance. Federal case law has found that databases, which store aggregations of data and do not just store documents, are subject to FOIA disclosure. The Appellate Court agreed that the trial court properly dismissed Plaintiff's request nos. 4, and 9 through 13, because these requests would have required the WCC to create new records, as they sought a total number of students, which WCC did not keep.

4. *Better Government Association v. Illinois High School District 230*, 2016 IL App (1st) 151356 (June 24, 2016)

The Better Government Association ("BGA") appealed the circuit court's order which dismissed its complaint against Illinois High School Association ("IHSA") and Consolidated High School District 230 ("District 230") (jointly referred to as "Defendants") which alleged that Defendants violated FOIA.

BGA's claim stemmed from a denial of its written request for all of IHSA's contracts for accounting, legal, sponsorship, and public relations and crisis communication services and all licensed vendor applications for the 2012-2013 and 2013-2014 fiscal years. In response to BGA's request, IHSA stated that it was a nonprofit 501(c)(3) charitable organization that is not subject to FOIA. Thereafter, BGA submitted a request to District 230 seeking the same records pursuant to Section 7(2), and District 230 responded that it did not possess any of the requested documents.

BGA filed a one-count complaint against Defendants alleging a violation of FOIA. In the complaint, BGA requested that the court declare IHSA a subsidiary "public body" under FOIA, declare that IHSA performs a governmental function on behalf of its member schools, including District 230, and also order IHSA and District 230 to produce the requested documents.

The trial court dismissed BGA's complaint finding that IHSA was not a subsidiary public body as the term is used in FOIA, and that IHSA does not perform a governmental function for member public schools, including District 230, such that the requested records were available to the public through District 230 pursuant to section 7(2) of FOIA. BGA appealed, and the Appellate Court affirmed the dismissal of the case.

The Appellate Court analyzed whether the IHSA constituted a subsidiary public body, which would make it susceptible to FOIA request. In determining whether an entity is a subsidiary body as used in FOIA, the court utilized the "*Rockford Newspapers*" test, which instructs courts to consider: (1) whether the entity has a legal existence independent of government resolution; (2) the nature of the functions performed by the entity; and (3) the degree of governmental control exerted. *Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism & Drug Dependence*, 64 Ill. App. 3d 94, 96-7 (1978).

In applying this test, the Appellate Court determined that IHSA has separate legal existence because it is:

- an established 501(c)(3) charitable organization;
- recognized by the IRS as a separate legal entity that files its own tax returns and has its own federal employer identification number;
- a voluntary, unincorporated association of member Illinois high schools, both public and private;
- an employer who maintains its own employees for whom it withholds payroll taxes and issues W-2 tax forms;
- the owner of the building in which its offices are housed;
- independent from its member schools or any other public body; and
- able to sue and be sued.

When analyzing the nature of the functions performed by IHSA, the Appellate Court agreed that there is no question that IHSA is an organization that serves the public body by coordinating sporting events for its member schools. However, it focused on whether those functions are necessarily governmental and found that they were not. Specifically, even though a public body could perform the same function of the IHSA (developing, supervising, and promoting interscholastic competitions among member schools), it does not diminish the IHSA's private, independent, not-for-profit status.

When applying the third element of the “*Rockford Newspapers*” Test, the Appellate Court analyzed documents and testimony that established IHSA’s government free control. Specifically, the court looked at the IHSA’s by-laws and general make up, and highlighted the fact that IHSA is not owned or controlled by its member schools. IHSA is controlled by its board members, which are principals that were elected for the position. Additionally, the Appellate Court determined that the executive director and administrative staff are employees of IHSA and not employees of the member schools or any public entity and, therefore, not subject to regulations of public employees because they are not eligible for state retirement or insurance benefits. To further support the conclusion that IHSA does not receive governmental funding, the appellate court noted that IHSA does not charge any of its member schools dues and does not charge schools entry fees for its events. IHSA contracts the use of the schools’ facilities, both public and private, and compensates the schools by providing minimum guaranteed fees and splitting any profits in excess of those guarantees.

Finally, the Appellate Court reiterated that IHSA is an independent, private, not-for-profit entity, and therefore did not meet the requirements of section 7(2) of FOIA. It deemed IHSA as being an entity that does not perform public or governmental functions. Therefore, the documents sought by the BGA did not pertain to IHSA’s transactions of public business, and District 230 was under no obligation to comply with BGA’s request.

On September 28, 2016, the Illinois Supreme Court granted the BGA’s petition for leave to appeal the Appellate Court’s unanimous decision. Once briefing has concluded, the Illinois Supreme Court will review the decision and either affirm or reverse the Appellate Court.

#### **D. Recent PAC Binding Decisions**

1. *Waubonsee Community College* (PAC Binding Decision 15-003) (OMA)

College trustees went into closed session under OMA exceptions 2(c)(1) and 2(c)(5). A reporter saw through a window certain slides projected during the closed meeting related to financial forecasts, tuition rate projections, and other financial topics, and alleged improper discussion of budgetary matters in closed session. The College argued exception 2(c)(1) for appointment and employment of personnel because financial discussion could lead to a decision affecting employees.

The PAC determined that Knox County violated the OMA. Specifically, the PAC held that:

- 2(c)(1) is not applicable because it does not authorize budgetary discussions even if the financial matters might ultimately impact employment or compensation of personnel.

- 2(c)(5) is not applicable because exception is to discuss the purchase or lease of property by a public body, and Board discussed disposal of public property related to the financial matters.
- College was ordered to disclose the closed session minutes and verbatim recording, together with copies of the slide projections that were referred to during the discussion.

2. *Village of Blue Mound* (PAC Binding Decision 15-005) (OMA)

The Village Board went into closed session to discuss proposal to contract with Macon County Sheriff to provide full-time police officer to the Village. No specific exception was cited. The Village Board returned to open meeting and voted to approve the contract with the County. No related action item was listed on the meeting agenda. The complainant filed Request for Review alleging improper closed session. The Village Board responded that it went into closed session to discuss “personnel.”

The PAC determined that the Village Board violated the OMA. Specifically:

- Violation of OMA because no specific exception for closed session cited by the Village Board.
- Violation because no agenda item listed that “set forth the general subject matter of any resolution that will be the subject of final action at the meeting.”
- Even if the contract may have affected employment status of some employees, Board did not discuss the performance or conduct of any specific employee.
- Village Board ordered to make public the closed session minutes and verbatim recording, and reconsider and re-vote on final contract action at open meeting with proper agenda item.

3. *Franklin Hospital* (PAC Binding Decision 15-006) (FOIA)

Franklin Hospital, an Illinois Hospital District, received a FOIA for physician employment contracts, including records showing incentive and bonus payment. Hospital provided records, but redacted all compensation amounts from the records pursuant to the following exemptions:

- 7(1)(b) personal financial information; and

- 7(1)(c) unwarranted invasion of personal privacy (UIPP) because physicians strongly objected to release of this information, and information is not a public record of the hospital because physicians do not perform public duties, even though they are employees of a public body

The PAC rejected all arguments and ordered the information to be released to the requester.

- First, information is a public record because the physicians are employees of a public body and providing health care services to local residents is a public duty. Even if such is not a public duty, amounts are subject to disclosure because they are paid from public funds.
- Second, amounts are paid from public funds, so not within realm of “personal financial information” exemption under FOIA Section 7(1)(b).
- Third, no UIPPP because physicians are performing duties pursuant to a contract with a public body and compensation directly bears on performance of public duties.

4. *Knox County Board* (PAC Binding Opinion 15-007) (OMA)

The Knox County Board went into closed session to discuss implementing a hiring freeze and eliminating a job position for budgetary reasons. The Board relied on OMA exceptions 2(c)(1) and 2(c)(2) for the closed session. 2(c)(1) authorizes closed session to consider the “appointment, employment, compensation, discipline, performance, or dismissal of specific employees. A newspaper reporter claimed this was an improper closed meeting.

The PAC determined that Knox County violated the OMA. Specifically, the PAC held that:

- Elimination of a job position, even if currently held by a single employee, related to a budget decision and not performance or employment of a specific employee, sono exception under 2(c)(1).
- Discussing the possibility of a hiring freeze is not a discussion of collective negotiation matters. No collective negotiations in process or being planned at the time. No exception under 2(c)(2).
- The Board did not cite the specific statutory exceptions to go into closed session.
- Board committee ordered to disclose closed session minutes to reporter.

5. *Office of the Governor* (PAC Binding Decision 15-008) (FOIA)

Newspaper reporter requests documents showing Governor Rauner's appointments from April 1 – May 14, 2015 including times and dates of all meetings and functions attended, and names and titles of all meeting attendees. The Governor's office provided his calendar with redactions of identities of persons who attended the meetings with the Governor. Newspaper sought review of the redactions by the PAC.

Exemptions Asserted

- 7(1)(f) for deliberative privilege claiming identity of persons Governor met with could reveal his thought process and direction of his judgment.
- 7(1)(m) because many meetings included legal counsel.
- Also claimed Governor's calendar was not a public record under FOIA.

The PAC opined that the Governor's calendar is public record under FOIA because it pertains to public business. Specifically, the calendar is prepared and maintained by Governor's assistant, a State employee. It is used for scheduling official meetings and other governmental events and it is circulated to senior staff members.

The PAC further opined that the claimed 7(1)(f) redactions were not applicable because there was no evidence that the redacted identities would reveal pre-decisional deliberative material. No redactions were permissible under 7(1)(m) because there was no evidence that redacted identities would reveal substance of confidential attorney-client discussions. The PAC ordered full disclosure of the calendar subject only to redaction of home or personal telephone numbers under 7(1)(b) for private information.

6. *Office of the Governor* (PAC Binding Decision 15-010) (FOIA)

Governor's Office was asked for "a list of databases, in electronic format, of outside counsel used by the State in FY14 and FY15 to date (or calendar years) including the department or agency for which the work was done and the nature or description of the work." A list existed, which generally identified the agency represented, the compensating agency, the hourly rate or flat rate, the names and addresses of the law firms and/or the names of the attorneys involved, and either the general subject matter of the representation or the court, case name, and case number of the matters for which outside counsel were to be appointed." Governor's office denied the request in its entirety pursuant to FOIA Section 7(1)(m) and work product.

The PAC disagreed and found a violation of FOIA because the records do not reveal legal advice, discussions, theories, mental impressions or litigation plans.

7. *Illinois Department of Transportation* (PAC Binding Decision 15-011) (FOIA)

Request was for certified payroll records for all projects awarded to Christian County from June 2014 to present. Request was mailed on 6/22/15, and IDOT said it was received on 7/11/15. IDOT did not issue unduly burdensome designation letter until 7/22/15, which was more than 5 business days after receipt.

The PAC held that IDOT cannot assert that request is unduly burdensome because the initial response from IDOT was not timely made. PAC further determined that there is a public interest in knowing whether IDOT complied in paying workers on projects outweighed any burden on IDOT in responding to the request in full.

*Note:* There are many binding decisions issued by the PAC for failure to comply with the timeframes for response set forth in FOIA. Timing of response is critical. Failure to timely respond not only could result in the issuance of a binding decision finding that the public body violated FOIA, but also means that the public body waives the right to assert that a request would be unduly burdensome to comply with and the right to charge fees for copies.

8. *City of Danville* (PAC Binding Decision 15-014) (FOIA)

Request was made for records related to the Danville Housing Task Force, including dates, times, locations, minutes of meetings, and communications between members of the Task Force and officials and/or employees of the City. The Task Force was organized by the City to assist a department in planning 5 year strategy, using City resources and during regular business hours of the City. The Task Force prepared and issued a report to the City, which was shared with the public. The City denied the request, asserting that the Task Force was not a public body and not subject to FOIA.

The PAC determined that records relating to actions of City officials and employees who convened the Task Force and continue to work on objectives of Task Force pertain to the transaction of public business of the City and are subject to disclosure under FOIA.

9. *Governor's Office of Management and Budget* (PAC Binding Decision 15-015) (FOIA)

Request was made for "power point deck in which budget policy is described". The power point was presented to GOMB analysts as training material on preparing for their role in the FY17 budget

development process. The power point was prepared by a budget consultant (not an employee) to the Governor's Office.

The Governor's Office denied the request and asserted FOIA Section 7(1)(f) in support of its denial. Section 7(1)(f) exemption encompasses "communications between government agencies and outside consultants whose analyses and recommendations 'played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done.'" *Harwood*, 344 Ill. App. 3d at 248, quoting *Dept. of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10 (2001). A report prepared by an outside consultant for a State agency fell within the scope of Section 7(1)(f) partly because the consultant did "not represent an interest of its own, or the interest of any other client, when it advised the agency". *Id.*

The PAC determined that the outside budget consultant to the Governor's Office did not represent an interest other than those of the Governor's Office in connection with the power point, so the PAC's determination was based on whether the power point constitutes exempt pre-decisional deliberative material.

Further, the power point is not exempt from disclosure under Section 7(1)(f) because:

- The power point contained the description of budget policy and was presented to analysts as training material on preparing for their role in the FY17 budget development process.
- It is not a draft or pre-decisional material because any decisions that may have been made with respect to what policies and information would be provided to budget analysts to help them prepare for their role in the budget process were finalized and memorialized in the slides that were presented as guidance to them.
- It also is not deliberative – it explains the considerations and policies that should guide the budget analysts in their role rather than reflecting the process of working out which policies and considerations should guide the analysts. As the Court in *American Immigration Council and Leadership Conference on Civil Rights* explained, when records are used for training purposes they constitute final decisions rather than pre-decisional materials. 905 F. Supp.2d 206, 218.

10. *Chicago Police Department – Laquan McDonald Emails* (PAC Binding Decision 16-006) (FOIA)

On January 28, 2016, CNN submitted a FOIA request to the Chicago Police Department ("CPD") seeking "all emails related to Laquan McDonald from Police Department email accounts and personal email accounts where business was discussed" for 12 named CPD officers for

specified date ranges. CNN sought review of the scope of the CPD's search for responsive records.

The PAC determined that the CPD violated FOIA by failing to conduct an adequate search for all emails responsive to the request. The emails that CPD produced in response to the request were pulled only from CPD servers/email accounts after conducting a search utilizing the search term "Laquan McDonald". The PAC concluded that CPD had a duty to search for responsive records contained in the personal email accounts of the named officers since "communications pertaining to the transaction of public business that were sent or received on the CPD employees' personal e-mail accounts are 'public records' under the definition of that term in section 2(c) of FOIA." The PAC directed CPD to search the personal email accounts of the 12 named officers for responsive documents but noted that CPD may initially conduct this search by asking the named officers whether they maintain any records responsive to the request, and, if so, by requiring the officers to provide copies of the records to CPD's FOIA officer. Additionally, the PAC directed CPD to expand the search of its CPD servers/email accounts to include other search terms, such as alternate name spellings, the name of the involved officers, the incident number, the location of the incident, and a physical description of Mr. McDonald.

On September 13, 2016, CPD filed for administrative review of the PAC's binding decision.

# Robbins Schwartz

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Dennis Weedman represents school districts, community colleges, county boards and other units of local government in labor negotiations and employment related matters, including complaints and charges of discrimination, wrongful termination litigation, claims of sexual harassment, civil rights violations and unfair labor practice charges. Dennis also advises clients on the handling of grievances, as well as represents public entities in labor arbitration hearings. He has represented employers in more than 200 arbitration hearings and has handled more than a hundred union organizational cases before the various public sector labor relations boards. Following certification of the bargaining unit, Dennis also serves as a negotiator and advisor for collective bargaining agreements, having negotiated several hundred labor contracts for public employers.

Dennis' area of practice extends well beyond just labor and employment matters. He counsels clients in all areas of personnel management, including employee leave rights, overtime obligations, and employee disciplinary matters, as well as in the areas of board governance, general education law and student rights and responsibilities. Dennis has served on the Illinois State Bar Association's Labor and Employment Section and is a frequent presenter for the Illinois Association of School Boards and at statewide conferences, including the Chicago-Kent School of Law Public Sector Labor Relations Conference.

Dennis has over twenty years of experience representing public entities in labor and employment disputes. Prior to joining Robbins Schwartz, Dennis served as an Administrative Law Judge with the Illinois Labor Relations Board and was Labor Relations Counsel for the Illinois Department of Central Management Services.

Additionally, Dennis is certified by the Illinois State Board of Education to provide school board member leadership training required under Section 5/10-16a of the Illinois School Code.

### **AWARDS**

Illinois Leading Lawyer, Employment Law: Management, Labor Law: Management, School Law and Governmental, Municipal, Lobbying & Administrative Law, 2015

### **RECENT PRESENTATIONS**

*2015 Legal Update*, Wabash and Ohio Valley Special Education District – Superintendent's Special Education Academy, Rend Lake, IL (July 2015)



### **PRACTICE AREAS**

Education Law  
Labor & Employment  
Municipal Law  
Student Discipline

### **EDUCATION**

J.D., Southern Illinois  
University School of Law,  
1993

B.A., University of Illinois  
at Urbana-Champaign,  
1988

### **ADMITTED TO PRACTICE**

U.S. District Court for the  
Central District of Illinois

Supreme Court of Illinois

### **ORGANIZATIONS**

Illinois Council of School  
Attorneys

Illinois Local Government  
Lawyers Association

Illinois State Bar  
Association

*Remedies in Labor Board and Grievance Arbitration Hearings*, Chicago Kent College of Law Public Sector Labor Law Conference (Dec. 2014)

*Use of Social Media in the Workplace*, Illinois Community College Trustee Association Fall Conference (Sept. 2014)

*Ethical Considerations in Dealing with Unrepresented Parties*, Chicago Kent College of Law Public Sector Labor Law Conference (Dec. 2013)

*Practical Guidance and Overview of the Fair Labor Standards Act*, Human Resource Association of East Central Illinois, Effingham, IL (May 2013)

*PERA Evaluation of Teachers and Principals*, Wabash and Ohio Valley Special Education District (July 2012)

*Fair Labor Standards Act Update*, Continuing Legal Education Presentation, Decatur Bar Association (June 2012)

*Education Reform Under Senate Bill 7*, Wabash and Ohio Valley Special Education District (July 2011)

*Legislative and Judicial Updates*, Regional Office of Education #40, Jerseyville, IL (February 2011)

*Legal Updates – Family and Medical Leave Act*, Regional Office of Education #40 Winter Meeting, Jerseyville, IL (January 2009)

*Identifying Pedophile and Grooming Habits of School Employees; Collective Bargaining Implications of New Class Size and Rtl Requirements*, Wabash and Ohio Valley Special Education District (July 2008)

*Implementation of IRS 403(B) Requirements*, Mississippi Valley IASBO Luncheon (June 2008)

*Current Legal Issues*, IASB Wabash Valley Division Business Meeting (March 2008)

# Robbins Schwartz

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Catherine Locallo practices in the area of labor and employment law. She counsels employers in all aspects of employment law including hiring, terminations, reductions in force, unemployment compensation, employee discipline issues, labor relations, policies and practices, employment agreements, settlement agreements and severance matters, nonimmigrant worker visas, and federal and state employment discrimination matters. She also counsels public bodies on compliance with Illinois' Freedom of Information Act. Catherine has represented clients in federal court and administrative agency proceedings involving discrimination, retaliation and harassment claims.

Before becoming an attorney, Catherine was a paralegal with Robbins Schwartz for 5 years. She worked primarily with the labor and employment practice group.

### **AWARDS**

Named Illinois "Rising Star", by Super Lawyers Magazine, in the area of Employment & Labor Law (2015-2017)

### **RECENT PUBLICATIONS**

First Amendment Protections Get Broader for Government Employees," *Chicago Daily Law Bulletin*, May 25, 2016

"Regulatory Changes to the Illinois Wage Payment and Collection Act," *Justinian Society Newsletter* (Fall 2015)

"New FOIA Amendments to Ease Burden on Public Bodies," *Justinian Society Newsletter* (Spring 2015)

Illinois Supreme Court Determines Arbitration Award Ordering Reinstatement of a Paraprofessional was Binding Because the Award "Drew Its Essence" from the CBA," *Justinian Society Newsletter* (Fall 2014)

"When the Music Stops, Why Not Require Certain Title VII Plaintiffs to Find a Chair on Which to Rest Their Complaint," *The John Marshall Law Review*, Issue 42:2 (2009)

### **RECENT PRESENTATIONS**

*FOIA, OMA, and College Communications: Background and Impact of Recent Legal Decisions*, ICCTA 2015 Legal, Legislative, & Ethics Update, Schaumburg, IL (November 2015)



### **PRACTICE AREAS**

Labor & Employment

### **EDUCATION**

J.D., *cum laude*, The John Marshall Law School, 2009; Order of John Marshall

B.S., Southern Illinois University, 1999

### **ADMITTED TO PRACTICE**

U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

### **ORGANIZATIONS**

Chicago Bar Association

Illinois State Bar Association

Justinian Society of Lawyers

Oakton Community College Paralegal Advisory Committee, Member

UNICO National

*Board Governance Issues Facing the Community College Student Trustee*, ICCTA 2014 Student Leadership Institute, Springfield, IL (June 2014)

Illinois Council of School Attorneys

*Walking A Tightrope: Social Media, Employees and the Hiring Process*, 2012 American Association of School Personnel Administrators Annual Conference, Chicago, IL (November 2012)

National Council of School Attorneys

*Legal Issues for Student Leaders of Community Colleges*, ICCTA 2012 Student Leadership Institute, Normal, IL (May 2012)

*Sage Rules for a Spicy Subject: Schools and Social Media*, 2011 Joint Annual IASB/IASA/IASBO Conference, Chicago, IL (November 2011)

*Freedom of Information and Educational Institutions: Balancing the Right to Records and Privacy Rights*, 2011 FA Education/Classroom Privacy, The John Marshall Law School (November 2011)

*Family Medical Leave Act and Leaves of Absence*, IASPA Conference (January 2011)

*District Website Postings: What's Required? What's Recommended?*, 2010 Joint Annual IASB/IASA/IASBO Conference, Chicago, IL (November 2010)

*Effective Discipline of College Employees and Reasonable Suspicion Checklist*, In-Service (October 2010)

*A Guide to Illinois' Freedom of Information Act*, In-Service (June 2010)

*A Supervisor's Guide to Understanding the Family and Medical Leave Act*, In-Service (February 2010)

*Letting The Sunshine In: Implementing Sweeping Changes to Illinois' Freedom of Information Act*, IASB/IASBO/IASA Annual Conference, Chicago, IL (November 2009)