

Robbins Schwartz

# OMA-FOIA Refresher and Recent Developments

Illinois Council of School Attorneys'  
30<sup>th</sup> Annual Seminar on School Law  
Friday, November 18, 2016

Presented By: Dennis L. Weedman & Catherine R. Locallo

## Introduction

- » 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.

Robbins Schwartz

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

- » On September 8, 2016, the 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 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 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.

Robbins Schwartz

## **PAC Opines that RIF Joint Committee Meetings are Subject to 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, based on the following factors.
  - › The RIF Joint Committee's 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.
  - › 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 school district.

Robbins Schwartz

## Public Act 99-478: Severance Agreements

- » 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.”



Settlement Agreement

Robbins Schwartz

## Public Act 99-515: Review of Closed Session Minutes and Verbatim Recordings

- » 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.



Robbins Schwartz

## Public Act 99-586: Additional FOIA Penalties

- » Effective January 1, 2017, public bodies that fail to comply with binding decisions issued by the PAC may face additional civil penalties if a requester sues to enforce the binding decision. (New FOIA Section 11.6).
- » **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.

Robbins Schwartz

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

- » 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.

Robbins Schwartz

## 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.



Robbins Schwartz

## The BOE of Springfield District 186 Case: Facts

- » Late 2012: Superintendent approaches the Board about terminating his contract.
- » Jan. 1, 2013: Superintendent signs and dates a 19-page separation agreement.
- » Feb. 4, 2013: 6 Board members sign, but do not date, the separation agreement in closed session.
- » March 1, 2013: Agenda posted for the March 5 meeting – includes an action item to approve the separation agreement and a link to view the separation agreement.
- » March 5, 2013: Motion to approve the separation agreement carried by vote of 6:1. This date is added to the separation agreement.
- » Reporter sought review by the Illinois Attorney General's Public Access Counselor of the Board's actions on February 4 and March 5.

Robbins Schwartz

## ***The BOE of Springfield 186 Case: 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....”
  
- » “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.”

Robbins Schwartz

## ***The BOE of Springfield 186 Case: Relevant Sections of the OMA***

- » 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.
  
- » “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....”

Robbins Schwartz

## ***The BOE of Springfield 186 Case: The AG/PAC Decision***

- » The signing of the separation agreement by six (6) of the Board'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 Board 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.

Robbins Schwartz

## ***The BOE of Springfield 186 Case: The Appellate Court's Ruling and Case Status***

- » Administrative review action filed by the Board. The circuit court reversed the AG's binding decisions, and the AG appealed the ruling.
- » The Appellate Court determined that the Board appropriately considered the Superintendent's dismissal from his contract during the February 4 closed session.
- » The Appellate Court agreed with the circuit 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.
- » The AG was granted leave to appeal to the Illinois Supreme Court and the case is presently under review.

Robbins Schwartz

## ***Garlick v. Naperville Township***

- » A Rule 23 Opinion, interpreting 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.
- » FOIA request 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 directed the requestor to its website which allowed a user to individually query each parcel by PIN number or address.
- » Plaintiff 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 moved to dismiss based on FOIA Section 8.5.
- » 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" – which is a question of fact. The case was remanded to the trial court for further proceedings.

Robbins Schwartz

## ***Hites v. Waubensee Community College***

- » Plaintiff, Daniel Hites, submitted a 16-part FOIA request to Waubensee Community College.
- » WCC denied 13 of the requests because it did not aggregate or maintain the requested information.
- » Plaintiff then requested that WCC provide a complete copy of its databases which housed the requested information. This was denied by WCC.
- » 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.

Robbins Schwartz

## Hites v. Waubonsee Community College

- » Plaintiff filed a lawsuit based upon WCC's denials of his request.
- » The trial court dismissed Plaintiff's complaint because it deemed his requests were not for public records under FOIA.
  - › A proper FOIA request has to identify a public record, not just general data, information, or statistics. *Chicago Tribune Co. v. Department of Financial & Professional Regulation*, 2014 IL App (4th) 130427 (March 6, 2014).
  - › Plaintiff was requesting that WCC provide tallies of data instead of existing public records, which would require WCC to create a new record.
  - › 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.
  - › 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.

Robbins Schwartz

## Knox County Board (15-007)

- » 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.

Robbins Schwartz

## ***Illinois Department of Transportation (15-011)***

- » Request 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.



Robbins Schwartz

## ***Governor's Office of Management and Budget (15-015)***

- » Request 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) (deliberative process) in support of its denial.
- » The PAC determined that the power point was 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.

Robbins Schwartz

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

- » FOIA request to CPD for “all emails related to Laquan McDonald from Police Department email accounts and personal email accounts where business was discussed” for 12 CPD officers on specified dates.
- » The PAC determined that the CPD violated FOIA by failing to conduct an adequate search for all emails responsive to the request.
  - › Emails were pulled only from CPD servers/accounts after conducting a search utilizing the search term “Laquan McDonald”. PAC and said CPD needed to expand search terms.
  - › 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.
- » On September 13, 2016, CPD filed for administrative review of the PAC’s binding decision.



Robbins Schwartz

## Village of Lisle (16-007)

The PAC concluded that the Village Board violated the OMA at its June 6, 2016, meeting by:

- (1) closing a portion of the meeting to discuss “Pending/Imminent Litigation” without recording or entering into the closed session minutes its basis for finding that litigation was probable or imminent; and
- (2) discussing the mere possibility that opponents of a bond sale might seek an injunction or initiate other legal action against the Board without reasonable grounds to believe that a lawsuit was more likely than not to be instituted or that such an occurrence was close at hand.



Robbins Schwartz

## City of Collinsville (16-008)

- » FOIA request for “digital copies of emails between [City Manager] and [urban planning/architecture firm] from June 1 through July 1, 2016.” The City’s FOIA Officer responded by stating that she was “of the opinion that the request is broad and consequently could be unduly burdensome in that there are over 50 emails consisting of over 100 pages plus numerous pages of attachments.”
  - › In response to the PAC’s Request for Review, the City asserted that “it located 50 individual emails consisting of 77 pages and several attachments within the emails consisting of approximately 97 pages for an overall total of 174 pages that are responsive to the request.”
- » The PAC concluded that the City violated FOIA because the City, “did not demonstrate a clear and convincing basis for its assertion that requiring the IT employee and FOIA officer to devote several hours to reviewing the pertinent records would so burden its operations as to outweigh the public interest in the disclosure of those records.” Although the retrieval and review of approximately 174 pages of documents will impose a burden upon the City’s operations, “the City has not demonstrated that compliance with [the request] would be *unduly* burdensome for purposes of asserting section 3(g) of FOIA...the City did not demonstrate with specificity how the process of retrieving and reviewing these records would constitute a significant burden on its operations...”

Robbins Schwartz

## QUESTIONS?

Dennis L. Weedman  
dweedman@robbins-schwartz.com

Catherine R. Locallo  
clocallo@robbins-schwartz.com

Robbins Schwartz