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Newsletters

Informing Illinois Newsletter- November 2014

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Government

Welcome to *Informing Illinois*

Local government officials are regularly confronted with new challenges and burdens regarding the demands of open government. Nobody can disagree with Illinois' public policy that the people of Illinois have a right to be informed about the conduct of their government. But a failure to properly address the intricacies of Illinois' Open Meetings Act, Freedom of Information Act and Local Records Act can result in inadvertent — and ultimately costly — violations of open government laws. Hinshaw & Culbertson LLP has created this quarterly newsletter to aid government officials and their lawyers in navigating those intricacies or, at least, to raise awareness of them with the hope that the public policy is advanced without impairing the efficient and effective operation of government.

Hinshaw is a national law firm with six offices located throughout Illinois. Our Government Practice regularly handles matters involving the administration and operation of government. If you have any questions or would like to discuss any of the issues addressed in this newsletter, please contact any of the authors or the editors, Charles R. Schmadeke and Raylene DeWitte Grischow.

Your Cell Phone May Be Subject to Public Review

An Illinois court recently concluded that certain text messages between members of a city council during a meeting may be public records available for public scrutiny under Illinois' Freedom of Information Act (FOIA).

In July 2011 a newspaper filed a FOIA request asking the city for all "electronic communications, including cellphone text messages, sent and received by members of the city council and the mayor" during meetings held since May 3, 2011. The city rejected the request, contending that the communications between council members on privately owned equipment are not public records. In a binding opinion, the Illinois Attorney General Public Access Counselor disagreed and concluded that texts and emails sent during public meetings can be public records and subject to FOIA. Public Access Opinion No. 11-006; 2011

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PAC 15916 (2011) (PAC 11-006). The circuit court shared the attorney general's view, and on subsequent review, the Illinois Fourth District Appellate Court held that electronic communications sent and received during city council meetings by council members and the mayor pertaining to public business while the council members are functioning as a "public body" are subject to FOIA.

Practical Implications

Although the appellate court's opinion left unresolved some questions regarding whether elected officials' private communications are subject to FOIA, it clarified that text messages and emails sent and received by city council members are generally *not* subject to FOIA so long as the communications: (1) remain in private control, and (2) are not sent or received while the council members are at a public meeting.

Nevertheless, emails and texts may be subject to FOIA if:

- They are on the private device of a council member and are sent to or from the municipality's server or related systems;
- They are on the private device of a council member and are sent, received or used by council members and trustees while at a public meeting;
- They are on the private device of a council member and are shared with a majority of a quorum of the council or village; or
- They are on the private device of a mayor or village president (regardless of whether sent or received during a meeting of the corporate authorities). In these situations, the communication(s) may be subject to FOIA because, unlike individual council or board members, a mayor or village president is an officer of the municipality.

To avoid confusion over public or private matters, council members should put their phones down — if not, turn them off — during a public meeting. Otherwise, local governments should be prepared to appropriately process FOIA requests that ask for these types of private communications. At a minimum, the process requires a review of the communications if they are not produced. The appellate court urged local governmental bodies to adopt policies governing the use of private email and private electronic devices during public meetings to avoid controversy about whether records may be subject to FOIA.

Points to Ponder

1. *Who has the obligation to store/maintain public records originating from private devices?*

PAC 11-006 defined private electronic devices to include "cell phones, iPhones, iPads, blackberries, computers, or any other device used to send/receive communications by means of e-mail, voice and/or text messages." Millions of Illinoisans have at least one of these devices. So must a public official forward everything (text message strings, voicemails, Facebook posts, Twitter tweets, Snapchat messages, Instragram posts, etc.) to the FOIA officer for storage? In order to avoid this conundrum, public officials should refrain from using their phones during meetings.

2. *Who determines what is a public record?*

Is a local government FOIA officer or public official obligated to determine whether the substance of information on an official's electronic device is related to the transaction of public business and subject to disclosure? Do we need some sort of "fail safe" provision where the FOIA officer must review everything on its officials' electronic device(s) before deletion? Is someone now responsible for checking every piece of data forwarded to the official to ensure that it relates to the transaction of public business, or do we allow each official to make that determination — especially if his or her private business is included on certain messages?

3. *What happens if a public official deletes data or loses or otherwise has to replace a device?*

Is a public official now required to go to his or her wireless provider and pay for recovery of this data? How does a municipality compel a public official to recover this data? Implications arise about the potential destruction of public records (intentional or not) without following the appropriate standards of the Local Records Act if lost data is not

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retrievable.

It is not clear if any of these problems are solved in situations involving public officials who were issued city-owned devices. These individuals may still have their own devices, or a device from their employers, to handle political or personal matters. PAC 11-006 makes clear that it does not matter on what device a record is created if it involves the transaction of public business. Such transmissions are public records subject to FOIA.

4. *What if the public official will not turn over the cell phone?*

After all, the device is private property. What obligation does this official have to turn over the device in response to a FOIA request? Neither the attorney general nor the appellate court addressed the issue of whether the failure of a public official to cooperate may require the local government to sue the official in order to secure the local government's public records stored on the official's private device.

Eight Illinois Attorney General Opinions That Will Help You Navigate the OMA and FOIA

Navigating Illinois' Open Meetings Act (OMA) and Freedom of Information Act (FOIA) can be difficult. Much of the language in these laws is open to interpretation, and precedent-establishing court cases are rare. Luckily, binding public access counselor (PAC) opinions of the Illinois attorney general (AG) can provide public bodies with guidance and answers to common questions.

PAC Opinions on the OMA

Question: *May we change the agenda less than 48 hours before the meeting?*

Answer: Yes, as long as you don't take final action on any items you added or changed.

Example: A township board amended its posted agenda to move certain items to executive session. The board posted a clearly marked amended agenda about 29 hours before the meeting. The AG found no OMA violation because a board is never required to take final action on any agenda items, the board could not take final action on the items it moved to executive session, and the posting of a clearly marked amended agenda demonstrated appropriate transparency. PAC 14-003 (May 5, 2014)

Question: *How much must we discuss an item at a meeting before taking final action on it? May we just read the agenda item and then vote on it?*

Answer: No; you must provide the public with meaningful information about the action you are taking.

Example: A school district board of education had a separation agreement with its superintendent as an agenda item but did not discuss the agreement at the meeting. Instead, the board president simply read the agenda item aloud before the board voted to approve the agreement. The AG found that this violated the OMA because public bodies must provide a "verbal explanation of the significance of [their] action" before taking that action. Reciting what is already on the agenda is not enough. PAC 14-001 (April 10, 2014)

Question: *We have some unwritten but long-standing customs when it comes to public comments at our meetings. May we enforce those the same way we could enforce written rules? And may we require someone who wants to make a public comment to state his or her full home address before addressing the board?*

Answer: No and no — not even if you have adopted a written rule.

Example: A village had an informal "long-standing custom and practice" of requiring members of the public to state their full home addresses before making public comments at board meetings. The AG found that informal "customs and practices" are not equivalent to written rules. Regardless, the AG found, a written rule requiring members of the public to disclose their home addresses on the record as a condition of making a public comment would still violate the OMA because it could have a chilling effect on free speech. PAC 14-009 (Sept. 4, 2014)

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Question: *May we require people who want to make public comments at our meetings request permission and submit their topics five days in advance of the meeting?*

Answer: No. You may make "reasonable" rules for public comments, but such a rule would not be "reasonable."

Example: A county board had a rule that any member of the public wanting to speak at a meeting had to ask for permission and submit the topic of his or her comments at least five working days in advance. The AG found that the rule violated the OMA because it was not "a reasonable limitation necessary to further a significant government interest." The board did not have to post its meeting agenda until 48 hours before the meeting, so it made no sense to make the public submit topics five days in advance. PAC 14-012 (Sept. 30, 2014)

PAC Opinions on FOIA

Question: *If someone requests photographs of our personnel, must we release them under FOIA? Aren't they exempt as "private information" — as "biometric identifiers," maybe?*

Answer: Yes, you probably have to release them, and no, photographs are not "biometric identifiers."

Example: A sheriff's office refused to provide "personnel" photographs of a former auxiliary deputy in response to a FOIA request, contending that they were exempt as "private information" because they were "biometric identifiers." The AG found that this violated FOIA because "biometric identifiers" refers "to the measurement and analysis of a unique physical or behavioral characteristic that identifies a person," and photographs do not measure or analyze anything. The AG concluded that the photographs therefore did not qualify for that exemption. (Note, however, that more sensitive types of photographs may still be exempt as "an unwarranted invasion of personal privacy" or under a different exemption.) PAC 14-008 (Aug. 19, 2014)

Question: *What is a "reasonable search" of our records to respond to a FOIA request? If there is nothing in our central archive or database, but one of the individual facilities we oversee might have the records, must we search there, too?*

Answer: Yes. You must search any system likely to turn up the requested information and explain to the requester in detail where, when and how hard you looked, regardless of whether you found anything.

Example: A school district searched two of its central offices for records to respond to a FOIA request. It replied to the requester that it had no responsive records but did not describe the extent of its search efforts. In addition, the school district acknowledged that individual schools might have the records but noted that it had not looked there itself. The PAC found that the district violated FOIA because it "fail[ed] to demonstrate that it conducted an adequate search of its internal accounts system" or to provide any of the records from individual schools. PAC 14-007 (Aug. 14, 2014)

Question: *We recently finalized a hard-won settlement agreement, which has a confidentiality provision. Now we're getting FOIA requests for copies of the agreement. Must we release the settlement agreement even though it is supposed to be confidential?*

Answer: Yes, unless some of the information in the settlement agreement is exempt under FOIA, in which case you may redact it. Confidentiality provisions in settlements with public bodies are essentially unenforceable.

Example: To resolve a sexual harassment matter, a county entered into a settlement agreement that included a confidentiality provision. The county withheld the agreement in responding to a reporter's FOIA request, contending that it was confidential and that disclosure would humiliate the victims. The AG found that although a public body may redact private and other information already exempt under FOIA, any settlement agreement with a public body is not confidential because a confidential public record goes against the letter and spirit of FOIA. PAC 14-004 (May 9, 2014)

Question: *Does FOIA require that we release copies of our attorneys' bills? How about release of copies of our payments to the attorneys? Aren't these items protected by the attorney-client privilege?*

Answer: Yes; probably; and no, not necessarily.

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Example: A city received a FOIA request for the records of payments to a law firm and the invoices the firm had sent to the city. The city denied the request, citing FOIA's attorney-client privilege exemption. The AG found that the invoices could be redacted, but only to the extent that they "include[d] detailed descriptions of legal services that reveal[ed] privileged information," such as meetings with specific individuals, the topics of those meetings, and the subject matter of research. Invoices with general descriptions of services, the dates of services, the time spent on the services, and the amounts billed had to be disclosed. PAC 14-002 (April 15, 2014)

For more information, please contact your Hinshaw attorney.

What's on Your Website?

Illinois' Open Meetings Act (OMA) and Freedom of Information Act (FOIA) both have special requirements for what must be posted on a public body's website. In the OMA, these requirements mostly come into play when the public body has a website "that the full-time staff of the public body maintains." However, other sections of the OMA and of FOIA are more general and apply to a public employer or public body "that maintains a website." Therefore, even if you have a website that is not maintained by a full-time staff member — say, if your part-time clerk is solely responsible for maintaining it, or you outsource it to a company — you may still have posting obligations under the OMA and FOIA. It may therefore be a good idea to post the information that the OMA requires for "full-time staff member" websites, too.

FOIA

FOIA has only one website-related provision. Every public body is already under an obligation to display, at each of its offices, "a brief description of itself . . . and a brief description of the methods whereby the public may request information and public records." If the public body has a website, it must also post the same information there. Further details about what must be in the "brief description" of a public body and the methods by which the public can obtain records can be found here.

OMA

The OMA requires public bodies to provide public notice of the location and agenda for each regular meeting at least 48 hours in advance, as well as public notice of all of their meeting dates at the beginning of each calendar year. This information must also be posted on any public body's website "that the full-time staff of the public body maintains." Each regular meeting's agenda must remain posted on the website until that meeting is concluded. In addition, once the annual meeting schedule is posted, it must remain posted until a new public notice of the annual schedule is approved.

The OMA also requires public bodies to keep written minutes of meetings. If you have a website "that the full-time staff of the public body maintains," the OMA also requires that you post minutes of your regular, open meetings within 10 days after those minutes are approved. Once those minutes are posted, they must remain posted for at least 60 days. So, for example, if your board approved the minutes for its September 24 meeting at its next meeting on October 21, the approved September 24 meeting minutes must be posted on the website by October 31, and they must stay posted until December 31.

Finally, there are special rules for public bodies that participate in the Illinois Municipal Retirement Fund and have websites—even if a full-time staff member does not maintain the website. Employee compensation packages that exceed $75,000 per year (including salary, health insurance, housing and vehicle allowances, vacation and sick days granted, etc.) must be posted on the website within six days after they are approved. Employee compensation packages exceeding $150,000 must be posted at least six days before they are approved. Note that in both instances, if the public body posts a physical copy of the package information at its principal office, it does not have to post the information on its website. However, the public body must post on its website directions for how to access the information.

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