



## Newsletters

### Informing Illinois Newsletter - November 2017

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#### When Records Are Not Reasonably Accessible

The Illinois Freedom of Information Act (FOIA) was amended in December, 2014 to provide that a public body is not required to copy a public record that is published on the public body's website. 5 ILCS 140/8.5. The exception requires that the requester be able to "reasonably access" the record online after being directed to the website by the public body. A recent Illinois Appellate Court decision, *Garlick v. Naperville Township*, found that copyrighted materials are not properly challenged under FOIA.

Mr. Garlick requested an electronic copy of Naperville Township's real-property database in its native file format. The request was declined stating that it did not have possession of or access to the records in native file format (5 ILCS 140/6 (a)), nor was it required to create such a file. (5 ILCS 140/1). Mr. Garlick was directed to its website, where he could search for the records on a parcel-by-parcel basis. 5 ILCS 140/8.5 (Records maintained online). JRM Consulting, Inc. (JRM) asserted confidentiality, trade-secret and copyright claims over the intellectual property.

Mr. Garlick apparently didn't like this and filed suit for declaratory judgment arguing that access to the data base in this manner did not constitute reasonable access. Mr. Garlick argued that there was substantially more information stored within the database than what was published online. He argued the Township was compelling him to launch 32,000 independent web database searches and such an endeavor would involve over 2,600 hours of time.

Mr. Garlick further argued that the township cannot claim JRM's trade-secret and copyright protections as an exemption on the ground that public data is so inextricably intertwined with the copyrightable elements of its design that the public data cannot be extracted without revealing these copyrightable elements.

The court found this argument failed as the Township offered to provide all of the contents of the database excluding the software and such satisfied the request. The Township's motion to dismiss was granted. The second district

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court of appeals reversed and remanded holding Mr. Garlick had properly pleaded a reasonable access claim. Any question as to whether the database was sufficiently available on the website was thus a question of fact that should be decided at a later stage in the trial.

On remand, cross motions for summary judgment were filed. The Township's motion was granted and the Court found that two statutory exemptions applied to preclude disclosure of the database in its native file format because of JRM's assertions of confidentiality, trade-secret and copyright protection. The exemption applicable in this case was (5 ILCS 104/7(1)(a)).

- Information specifically prohibited from disclosure by federal or state law or rules and regulations implementing federal or state law.

Hence, the Trade Secrets Act precluded disclosure of the database in its native format because JRM had not consented to the disclosure. The court found that challenges to the validity of trade-secret or copyright claims were not proper proceedings under FOIA.

**What's the key takeaway of this ruling?:** In Illinois, persons are entitled to full and complete information regarding the affairs of the government and the official acts and policies of those who represent them. Courts liberally construe FOIA to achieve this goal. The Act also provides restraints on access to information, but these exemptions are narrowly construed. It is important for public entities to be aware of these situations where copyright or contractual obligations may prevent disclosure of records under FOIA.

### **To Disclose or Not to Disclose? That is the Question When Weighing Competing Interests of Public Disclosure and Confidentiality of Records Following a Grand Jury Investigation**

The appeal consolidated two cases as to competing interests of public disclosure and confidentiality in records generated because of a grand jury investigation. The cases arose from an incident in 2004 when Vanecko assaulted Koschman in a Rush Street neighborhood in Chicago. Koschman ultimately died from injuries, and no charges were filed against Vanecko or anyone else. Dissatisfied with this outcome, the Koschman family filed a petition for the appointment of a special prosecutor. The petition, which was granted, alleged that a special prosecutor should be appointed because Vanecko was related to Chicago Mayor Richard Daley and that officials in the police department may have been induced by favoritism or other improper motives to obstruct the investigation. A grand jury was empaneled to investigate the incident. Information was presented from over 140 witnesses, and 22,000 documents totalling more than 300,000 pages were reviewed.

While the grand jury was empaneled, the Office of the State Prosecutor (OSP) requested a protective order to "prevent entities like the City [of Chicago] from complying with FOIA requests for the secret grand jury materials that would inevitably end up in its hands." The interests of justice required secrecy in grand jury proceedings. The order was entered and the documents were placed under seal.

Eventually, Vanecko was indicted for involuntary manslaughter to which he pled guilty. The grand jury was discharged and a 162 page report detailing the grand jury's investigation was made available to the public. Following this, various parties made requests to unseal documents generated during the proceedings. The City requested the documents be unsealed due to a FOIA request from the *Chicago Sun-Times*. The judge denied the request. Another FOIA request was received from the Better Government Association (BGA) which the City denied based on the protective order and cited section 7(1)(a) which exempts documents if they are prohibited by "State Law." 5 ILCS 140/7(1)(a). BGA filed suit and after some lengthy litigation, the matter ended up before the Appellate Court who affirmed in part and reversed in part.

The Appellate Court affirmed the decision not to disclose the grand jury documents based on respect for judicial process which requires that a lawful court order must take precedence over the disclosure requirements of FOIA and a public body refusing to disclose documents because a court order commands it to do so does not always withhold those documents "improperly." The Court noted that the Illinois Supreme Court has relied on FOIA's strong policy statement in support of rulings requiring the release of government records to public view. The Supreme Court has also emphasized the need for secrecy in grand jury proceedings.



It was argued that there was a concern that "all information regarding the affairs of the government would be legally exempt from disclosure as long as the government could find a judge to sign an order prohibiting disclosure."

However, in this particular case the order was issued upon the court's due consideration of the need for confidentiality in a certain circumstance and issued by the judge supervising the grand jury proceedings, not at the request of the City. This case is set apart by the fact that the OSP requested the protective order without involvement from the public agency—the City. The City was not a party to the grand jury proceedings, but the protective order prohibited it from releasing the records in its possession. Hence, the court did not share the concern that public entities would abuse the rule.

The issue that was reversed was the request for the attorney fee invoices paid from public funds which are generally disclosable under FOIA, subject to redaction for work-product and privilege. The court reversed this denial, and remanded for in camera review of those records pursuant to Section 11(f) of FOIA.

**What's the key takeaway of this ruling?:** A court order does not automatically exempt records from disclosure, because the court order may not be considered "State law." If a FOIA request is received concerning documents that are subject to a court order, seek advice from your local municipal attorney before simply denying the request. Remember, FOIA has a strong policy preference for disclosure.

### **Summary of Binding 2017 PAC Opinions**

To date in 2017, the Public Access Counselor of the Attorney General's Office has issued 11 binding opinions, each of which has concluded that the public body violated either the Open Meetings Act, 5 ILCS 120/1 *et seq.*, or the Freedom of Information Act, 5 ILCS 140/1 *et seq.* Four of those opinions (Nos. 17-002, 17-007, 17-008, and 17-009) addressed the duty of public bodies to respond to FOIA requests by providing the requested documents, extending the time for a response, or denying the request with reasons for the denial and the factual basis for the application of the claimed exemptions.

An insufficiently detailed factual explanation was the basis for the PAC to disallow a claim of pending criminal investigation given as the reason for the denial (Nos. 17-001 and 17-011). In addition, the PAC has issued important opinions regarding the discussion of legal matters by a public body, the redaction of financial terms from public contracts, statistical data in preliminary reports, the release of 9-1-1 calls, and other matters.

#### **No. 17-001**

The mere existence of an opinion criminal investigation does not render records relating to it exempt. The public body, using facts rather than conclusions, must demonstrate how the release of the records would interfere with a pending or reasonably contemplated law enforcement proceeding.

#### **No. 17-002**

Within 5 business days after receipt of a FOIA request, the public body must provide the requested records, extend the time for a response as specified in FOIA, or deny the request in accordance with FOIA.

#### **No. 17-003**

A confidentiality clause in a public contract cannot shield financial terms, such as base fees and other payment terms from disclosure. Records of the obligation, receipt, and use of public funds are required to be publically available notwithstanding any proprietary claim.

#### **No. 17-004**

Not all matters of a legal nature can be discussed by a public body in a closed session. The litigation exception to the Open Meetings Act cannot be used to deliberate on the merits of a controversial or sensitive matter. Only the strategies, posture, theories, and consequences of the litigation may be addressed in a closed session under the litigation exception.



**No. 17-005**

Statistical data, even if contained in a preliminary or draft report, is not exempt from FOIA under the deliberative process exemption. That data is fact material and does not constitute part of the give and take of deliberations.

**No. 17-006**

Records relating to the designation of essential public employees in the event of a government shutdown were not exempt as attorney-client or attorney work product communications in a lawsuit or preliminary drafts. The public body failed to provide any factual basis supporting the attorney-client or work product exemptions or the deliberative process exemption.

**Nos. 17-007, 17-008, and 17-009**

A public body has a duty to respond to FOIA requests with provisions of the requested records or a denial in accordance with FOIA.

**No. 17-010**

While a city may redact the addresses, telephone numbers, and social security numbers of the employees of a contractor on a public works project while providing a copy of a certified payroll under FOIA, the employees' names may not be redacted.

**No. 17-011**

A recording of a 9-1-1 call regarding to the death of a child may not be withheld under FOIA as a biometric identifier. Furthermore, the claim that the release of the recording would interfere with a criminal investigation was insufficiently supported with detailed facts.

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*City of Chicago v. Office of the Special Prosecutor (In re Special Prosecutor)*, 2017 IL App (1<sup>st</sup>) 161376.

*For more information, please contact Charles Schmadeke.*