

# PENDING CHANGES TO THE FREEDOM OF INFORMATION ACT

(pending signature by Governor Quinn, effective 1/1/2010)

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Illinois' Freedom of Information Act ("FOIA") is set to change, and in a big way. Recently, the legislature passed major amendments to FOIA which will increase the challenges local governments face in responding to, and even preparing for FOIA requests. While not yet signed into law by Governor Quinn, the Governor is likely to sign the bill and we will see a new FOIA, effective January 1, 2010.

The biggest changes are the (1) creation of an oversight position within the Illinois Attorney General's Office (the "Public Access Counselor"), (2) the institution of a "clear and convincing evidence" standard if a public body claims an exemption, (3) the requirement that the public body designate an officer or employee to act as its Freedom of Information Officer (and the educational requirements for the position), and (4) a shortened time frame for responding to requests.

There are other changes, too, but let's first discuss these major changes.

## THE MAJOR CHANGES

### The Public Access Counselor ("PAC")

#### 1. The PAC's role as an overseer for compliance

FOIA requires the Attorney General to create a position known as the Public Access Counselor. The Public Access Counselor will have two main roles: (1) resolving disputes and (2) educating the public (including public bodies).

A person making a request under FOIA who feels that a public body has violated FOIA, may make a request for review to the PAC. The typical scenario will involve a requester of records who has been denied records under a claimed exemption. The PAC has several options in handling a request for review. The PAC may (1) find that the alleged violation

is unfounded, or (2) proceed with investigating the alleged violation. If the latter path is chosen, the process works very similar to an administrative court. The public body is allowed to respond to the allegations, and the PAC has the ability issue subpoenas for information, require the public body to turn over copies of closed session recordings, and require the records that would be responsive (whether exempt or not, be delivered for inspection by the PAC). From there, the PAC may take any number of steps, whether issuing a binding decision, a non-binding opinion or even mediating the dispute. The PAC may even chose to take no action. If the PAC issues a binding opinion indicating a violation has occurred, the public body must comply with the directives of the opinion, take corrective action (if necessary) OR initiate an administrative review action under the Administrative Review Law (735 ILCS 5/3-101 *et seq.*).

The PAC may also issue advisory opinions to public bodies. If advisory opinions are issued, and the public body follows the advice of the PAC, the public body cannot be liable for fines/ penalties should it be found in violation of FOIA by a court (assuming it followed the advice of the PAC).

## **2. The PAC's role as educator**

The other major facet of the PAC's role is to educate public bodies and the public as to FOIA and its extensive requirements. Included in this is developing and administering an educational program for the designees of public bodies (i.e., the individuals the public bodies will choose as the FOIA officers of the public bodies). This may be a difficult hurdle for the PAC initially and we expect some difficulties in the early days of the effective period of this new act in the PAC training and playing the role of a reviewer of alleged violations.

### **The Clear and Convincing Evidence Standard**

Prior to the effective date of the amendments, a public body could claim an exemption and no burden was placed on the public body to prove that the withholding of the requested documents were subject to a claimed exemption. Rather, the requester had to show that the records should have been disclosed. After January 1, 2010, all records are presumed to be open and a public body claiming an exemption must show by "clear and convincing evidence" that the claimed exemption applies. While this standard is not clear cut, there is some guidance for what this means. Generally, it is beyond the "preponderance of the evidence" standard (probably exempt) but does not rise to the level of a "beyond a reasonable doubt" standard. Some say this standard is to convince the Trier of fact (the court) that the proposition is substantially likely to be true. In other words, the claimed exemption is substantially likely to be exempt from disclosure. To be sure, these standards are moving targets and fuzzy concepts even for the most experienced attorneys.

## **The Public Bodies Designation of a FOIA Officer**

FOIA requires each public body to make a list of the employees (or officers) that will handle FOIA requests and submit the list to the PAC. By July 1, 2010, the designated employees must complete an electronic training class with additional training annually. Any new designees must complete the training within 30 days of the designation of the employee as a FOIA contact. Our suggestion is to designate 2 or more people to handle the requests.

## **The Shortened Time Frame**

Currently, the standard time for a response under FOIA is 7 business days. However, come January 1, 2010, the standard response time (and standard time for an extension) will be 5 business days. In other words, the public body must respond within 5 business days of receipt of the request, and may obtain one 5-day extension (assuming one of the enumerated reasons for an extension of time exists).

In addition, specific information from arrest reports must be disclosed with 72 hours. However, information sought solely for a commercial purpose has a lengthened response time of 21 days. Examples of commercial purposes include personal injury attorneys or auto body shops that send advertisements to persons involved in auto accidents.

## **The Policy Statement**

While not truly a change to the current FOIA, the Legislature has added a policy statement to the FOIA changes that essentially emphasizes the importance they are placing on these new changes. Essentially, the policy statement reads that compliance with FOIA is a primary duty of public bodies, regardless of other obligations or fiscal constraints.

## **THE HIGHLIGHTS OF THE REST OF THE CHANGES**

The following are a number of other changes under the proposed FOIA:

**Agreed Upon Extensions of Time** – The requester and the public body may mutually agree to extend the deadlines for a response. Any agreement must be reduced to writing.

**Listing of Documents to be Immediately Disclosed** – A public body's FOIA officer must develop a list of documents or categories of records that the public body shall immediately disclose upon request. An example would be past meeting agendas.

**Basic FOIA Officer Responsibilities** – (1) Note date of receipt of request, (2) compute the deadline for a response and note that date on the request, (3) maintain a copy of the request, (4) maintain files of communications with requesters and copies of requests and (5) attend the required training.

**Website Requirements** – If the public body maintains a website (no matter how outdated) the public body must post on the website the names/addresses of the FOIA officer(s). This will be in addition to those previously existing requirements of: posting a statement of a description of the public body, the subdivisions, its operating budget, its various locations (if there are more than one), the members of the board, and any advisory boards.

**Charges** – A body can only charge for personnel costs associated with copying the records and the standard copying charges. The standard copying charges are no charge for the first 50 pages of black and white copies, and up to 15 cents per page thereafter. If color copies are provided, the public body can only charge the actual reproduction costs .

**Standard to Adjudge Private Information** – Whether information is private or not is to be adjudged by the “reasonable person” standard, unless the information is specifically delineated as exempted.

**Private Contractors that Perform a Government Function** – If a private entity contracts with a public body to provide a government function (for example, EMS services; security functions in public places) then the records relating to that government service are considered government records even if the records are in the possession of the private entity.

**Factual Basis for Exemptions** -- If a public body denies a request, the public body must provide a detailed factual basis for the application of any exemption and citation to any supporting legal authority. In the written response to the requester, the public body must also inform the requester of the name and address of the PAC.

**Denials Due to Personal Information and Preliminary Draft Exemptions** – If a public body is going to deny a request pursuant to 1(c) or 1(f) of Section 7, then the public body has to provide written notice to the PAC and the requester of the intent to deny the request. The notice must include (1) a copy of the request, (2) the proposed response, and (3) a detailed summary of the basis of the denial. The notice of intent to deny must be sent within 5 business days of receipt of the request (the same time for that provided for making a response).

**Advisory Opinions are Available** – The PAC may issue advisory opinions. We highly suggest using this method to obtain opinions because if the opinions are followed, the public body cannot be held liable for fines associated with violations.

**The Internal Appeals Process is Abolished** – Under the current version of FOIA, a requester who has been denied access to records must exhaust his or her internal remedies (appealing to the head of the public body) before filing a claim in circuit court. After January 1, 2010, once a requester has been denied access to records they may file an action in circuit court in the county in which the public body resides. The end result is a possible dual review process. An aggrieved requester can seek a request to review from the PAC and file an action in court. If this occurs, the PAC must refrain from taking action, deferring instead to the higher power of the circuit

court. Keep in mind as well that if court review of a PAC action is sought it must be filed in either Cook County or Sangamon County, Illinois.

**Forms of Requests** – While a public body can require a request be in writing it cannot require a specific form under the changes.

**Fines and Penalties** – If a court finds that a public body willfully and intentionally violated FOIA, it may impose fines of \$2,500 to \$5,000.

#### **A. TIPS FOR COMPLIANCE**

Overall, the statutory scheme will be difficult for small public entities. Large city governments have layers of attorneys whose only job is to deal with FOIA requests. For you, traditionally, FOIA requests are one of the last items on your to do list. However, the legislature has placed a very high priority on ensuring public bodies comply with FOIA. At one time, the legislature considered criminal penalties for non-compliance with the act. Fortunately, those criminal penalties were removed from the version currently pending before Governor Quinn. Nonetheless, compliance is important. No one wants to be responsible for a public body receiving a fine. More importantly, if you make every attempt to comply with FOIA, no fines should be levied against the public body you represent. Below are a few tips and strategies for ensuring compliance with the act.

1. **Don't wait until the 4<sup>th</sup> business day to look at the request.** This means checking your in-box daily. Upon receipt of a request several things should immediately happen (aside from those things noted above and required by FOIA). First, you should communicate with counsel, even if it is just to say that a FOIA request has been received and that you are working to effectuate compliance. Second, if possible, you should immediately pull records that you believe will be responsive (even if some of those records would be exempt from disclosure).
2. **Respond with a short initial letter.** Do not indicate that records will be supplied or not. This is merely a response letter indicating that the request is being considered. Try to get this letter turned around and out the door to the requester the same day the request is made.
3. **Determine if copying the records can be achieved in house or requires outsourcing.** If possible, it is very helpful to keep copies of every response (including the documents supplied and the requester's information). While you certainly will keep the originals, they often times end up returned to their original source (employee files, building maintenance files, etc.).

4. **EVERY communication with the requester (and now with the PAC) should be reduced to writing.** It is okay to orally communicate with the requester regarding the request for records. However, after each conversation, a letter should be sent summarizing the conversation and especially any decisions that have been made. This is vitally important (and required) if you agree to extend the deadline for a response.
  
5. **Create a spreadsheet of requests and responses.** Microsoft Excel spreadsheets are helpful to track requests. Beyond that, they can help track the types of requests you receive, the types of documents sent, and the timeliness of past responses. A spreadsheet can help you can track the types of responses received and the types of documents that are automatically to be disclosed. You may also consider assigning each request a tracking number.
  
6. **Communicate, Communicate, Communicate.** Every tip today boils down to communication. This means communicating with the requester, your counsel, the staff working to respond to the request, and the PAC.

The changes are coming to Illinois' Freedom of Information Act. These changes are sweeping and will require your immediate attention. Should you have questions about FOIA feel free to contact us. These materials are intended for informational purposes only and not legal advise.

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