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AN OVERVIEW OF THE NEW FOIA LAW

On June 26, 2009, the General Assembly passed Senate Bill 189. The Governor signed the bill into law on August 17, 2009, as Public Act 96-542. The Act makes sweeping changes to the state's public access laws, including the Freedom of Information Act and the Open Meetings Act. It also creates the office of Public Access Counselor and provides this officer with the ability to issue binding opinions on disputes over alleged violations of both the Freedom of Information Act and the Open Meetings Act. The changes became effective on January 1, 2010. This handout is designed to provide a brief overview of the new legislation. Without doubt, this new law will have a substantial impact on units of local government in complying with Freedom of Information Act requests.

1. Change in the Public Policy:

   - Previously, the Act stated it "was not to be used to violate individual privacy." Under the new statement of the Act's purpose, this has now been eliminated.

   - Previously, the Act stated that it was "not to be used for the purpose of furthering a commercial enterprise," so the requests of a commercial enterprise would not be used to unduly burden public resources. This language has also been eliminated.

   - Now, there is a presumption that all records are open to inspection or copying, access to public records is a fundamental obligation of government, and compliance with the Act is a primary duty of public bodies, regardless of fiscal impact.

   - Under the new law, the public body will have the burden of proving by clear and convincing evidence that it is exempt.

2. Eliminates exemption for "personnel files," but keeps and further defines the exemption for "Private Information" that is contained within public records. "Private information"

is now defined as "unique identifiers," which includes such things as social security numbers, driver's license numbers, biometric identifiers, personal financial information, medical records, personal telephone numbers, etc. "Personal information" still is exempt if disclosure would constitute a "clearly unwarranted invasion of personal privacy," but now the phrase "unwarranted invasion of personal privacy" is narrowly defined as "highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." In addition, the bill provides a new, substantial process if a public body intends to withhold a record from disclosure based on either the "personal information" exemption or the "preliminary drafts" exemption. In that case, the public body must give the requester and the Public Access Counselor a written notice of the public body's intent to deny the request or any part of it. The notice must include a detailed summary of the public body's basis for asserting the exemption. The Public Access Counselor must notify the public body and the requester, within five days after receiving the notice of intent to deny, whether further inquiry is warranted. If the Public Access Counselor determines to undertake a further inquiry, a substantial process is triggered leading to a binding decision by the Public Access Counselor.

3. The Law Eliminates the Exemption for Records regarding Financial Transactions. The bill removes the existing exemption available for draft documents and memoranda relating to a public body's financing and marketing transactions.

4. Settlement Agreements are now public records even if they contain confidentiality clauses.

5. Time for Response. The new law changes the timeline from seven business days to five business days.

   - It also only permits an extension of five business days instead of seven.
   - If you miss the deadline, you cannot claim an exemption for the request being overly burdensome.
   - If you miss the deadline, you cannot charge any fee for copies, if fees were permitted in the first place (see below).

6. "Commercial Purpose" changes.

   - Public entities must comply with requests submitted for a commercial purpose, but instead of producing those documents within five working days, public bodies must produce them "within a reasonable period considering the size and complexity of the request," up to 21 business days.
   - A public entity can inquire whether a record is sought to advance a commercial purpose.
   - If someone tries to procure a public record for a commercial purpose without disclosing that the use is for a commercial purpose, it is a violation of the Act.

7. FOIA Officers. The Act requires the designation and training of a FOIA officer, as well as requiring ongoing education. The identity of the FOIA officer must be designated on the public entity's website. The list of FOIA employees or officers must be submitted to the Public Access Counselor. Within six months after the new Act goes into effect, the designated employees and officers must successfully complete an electronic training class administered by the Public Access Counselor and, thereafter, must have additional training annually. Every newly designated employee or officer must receive training within 30 days after designation.

8. The Act requires a formal system for processing FOIA requests. The FOIA officer must:

- Note and date the time the request is received.
- Calculate the five day response deadline and note it in writing on the request
- Keep all documents related to a request until is it complied with or denied
- Keep files maintaining all FOIA requests

9. Use of FOIA Forms. Under the new law, a public body cannot require the use of certain forms. However, public bodies may still require that requests made under the Act be submitted in writing. The public body may require the requester to disclose whether the request is for a commercial purpose or to decide whether to grant a fee waiver.

10. Electronic Records. Public entities must provide records in an electronic format, if you have it that way and it is requested that way.

11. Fees and Costs. Public entities may not charge fees for the first fifty pages of standard black and white copies. An illegal fee constitutes a denial of records under the Act. After the first 50 pages, the fee for black-and-white copies thereafter may not exceed 15¢ per page unless the public body can demonstrate that its actual cost of reproduction (excluding personnel costs) is higher. (A fee equal to actual cost may be charged for color copies.) The actual cost of purchasing the recording medium, such as a disc or tape, may be charged for electronic records. The cost of a certified copy is limited to $1.00.

12. "Public Records" now include records that contractors have in their possession. Public entities are now required to produce public records that are in the possession of a party with whom the agency has contracted to perform a governmental function. Specifically, Municipalities must disclose documents held by "a party with whom the agency has contracted to perform a governmental function on behalf of the public body" and that directly relate to the governmental function.

13. Expansion to Cover E-Mails. The bill broadens the definition of "public records" by including "electronic communications," so e-mail and other similar communications are now expressly covered by the Act. This revision does not include the language from an earlier bill which included in the definition of "public records" e-mail messages sent to or from personal e-mail addresses.

14. Fines. If a public body willfully and intentionally fails to comply with the Act, it can be fined $2,500 to $5,000 per occurrence. Also, now a court must "award such person reasonable attorneys' fees and costs." Notably, the criminal penalties included in the earlier bill are not included in Senate Bill 189. There is no penalty for a requestor who abuses the FOIA process.

15. The Act Creates a Public Access Counselor. The Public Access Counselor is an attorney within the Attorney General's office. The public access counselor must conduct training of representatives of public bodies, consider complaints filed by people who believe the Act has been violated, may issue binding opinions, and may issue advisory opinions to public bodies. The Public Access Counselor's decision is reviewable under the Illinois Administrative Review Law.

16. The Act Eliminates Appeals to the Head of the Public Body. Under the new law, all appeals will go directly to the Public Access Counselor instead of to the head of the public body, as previously specified.

PRELIMINARY QUESTIONS AND ANSWERS

PUBLIC ACCESS COUNSELOR

1. Who is the Public Access Counselor and why do I care?

The powers of the Attorney General were amended to provide the power to give "written binding and advisory public access opinions." 15 ILCS 205/4. These opinions are provided through the newly created office of the Public Access Counselor to be housed within the Attorney General's office. Accordingly, the Public Access Counselor will have the authority to issue binding opinions on whether violations of the Open Meetings Act occurred in your community and to order the release of documents otherwise believed by your community to be exempt from disclosure. The Attorney General is also given subpoena power to enforce the Public Access Counselor's powers. Accordingly, the Public Access Counselor will be a watchdog, with teeth, ensuring that your public body is complying with all public access laws.

2. Are there limitations on who can serve as the Public Access Counselor?

There is only one limitation, namely that the Public Access Counselor must be an attorney licensed to practice law in Illinois. 15 ILCS 205/7(b).

3. What are the duties of the Public Access Counselor?

The Public Access Counselor is charged with many responsibilities, including to name a few: (1) establishing and administering training programs on public access laws; (2) providing educational material and programs on public access laws; (3) resolving disputes over potential violations of the public access laws, by mediating, informally resolving the dispute or by issuing a binding decision; (4) issuing advisory opinions with respect to public access laws; and (5) to

promulgate rules to implement the powers of the office; and (6) to prepare and distribute model policies for compliance with the Freedom of Information Act. 15 ILCS 205/7(c).

OPEN MEETINGS ACT

1. Will there be training requirements for complying with the Open Meetings Act?

Yes. The new provisions of the Open Meetings Act ("OMA") provide that every public body shall designate "employees, officers, or members to receive training on compliance with the Act." 5 ILCS 120/1.05. The language indicates at least two persons from the public body should be trained. Training essentially means an electronic training curriculum, developed and administered by the Public Access Counselor, which must be passed by July 2010 and that the designees must thereafter complete an annual training program. Future designees must complete the electronic training curriculum within 30 days after the designation. The course is currently available and should be taken directly online from the Attorney General's website.

2. John Smith, a citizen that always speaks at our meetings and thinks we go into closed session just to talk about him, maintains we are constantly violating the OMA. Under the new laws, what could he do?

If a person believes a violation of the OMA has occurred, the new provisions allow such individuals to file a request for review with the Public Access Counselor. This request must be made within 60 days after the alleged violation and must be: (1) in writing; (2) signed by the requester; and (3) include a summary of the facts supporting the allegation. See 5 ILCS 120/3.5. The Public Access Counselor will either tell the requester the allegation is unfounded or otherwise forward a copy of the request to the public body within 7 working days. The public body thereafter has 7 working days after receipt of the Public Access Counselor's request to provide the documents for review. Within that same timeframe, the public body may also "answer the allegations" of the request for review. The "answer" is also sent to the requester who may also file a response within 7 working days after receipt.

3. Is the Public Access Counselor able to listen to the tape of our closed session?

Yes. Section 3.5 provides that the Public Access Counselor has the same right to examine the verbatim recording as the court in a civil action brought to enforce this Act. Although courts are rarely called upon to examine tapes, with the ease that individuals can file complaints, it is likely that these tapes will be more frequently reviewed. Accordingly, public bodies need to stay focused and on topic while in closed session.

4. How soon will the Attorney General issue an opinion on the OMA dispute?

The Attorney General must examine the issues and the records and make findings of fact and conclusions of law and issue an opinion on same within 60 days after initiating the review. Presumably, this means 60 days after receipt of the initial request for review. Note that the Public Access Counselor may extend the time by no more than 21 days by sending written notice to the requester and public body that details the reasons for the extension. The Attorney General could also decide to address the matter without issuance of a binding opinion. See 5 ICLS 120/3.5.

5. What happens if the Public Access Counselor determines that a violation of the OMA occurred?

If the Public Access Counselor finds that a public body violated the OMA and issues a binding opinion on same, Section 3.5(e) requires the public body to "take necessary action as soon as practical to comply with the directive of the opinion..." Accordingly, if the public body took action on an item at an "illegal" meeting, the opinion may require the public body to reconsider the matter at a properly-noticed meeting in the future. If the complaint involved a public body going into closed session to decide what color an office should be painted, the opinion might direct that such a topic is not a proper subject of closed session and that future discussion on the topic must be in open session.

6. What if the public body disagrees with the Attorney General's opinion?

An opinion issued by the Attorney General may be appealed pursuant to the administrative review laws. This essentially requires appealing the decision to the Circuit Court, however the appeal must be filed either in Cook County or Sangamon County. 120 ILCS 5/7.5.

7. Will we be able to seek informal advice from the Attorney General's Office on OMA issues?

Yes. Section 3.5(h) provides the Attorney General may issue advisory opinion to public bodies regarding compliance with the Act. This requires submission of a written request either from the public body or its attorney.

FREEDOM OF INFORMATION ACT

1. Are there significant changes to the purpose of the Freedom of Information Act?

No. Although the General Assembly modified some of the language in the preamble of the Freedom of Information Act, the changes are unlikely to impact any public body. In essence, the preamble provides it is a "fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible...." It also states it is not the purpose to "cause an unwarranted invasion of personal privacy, nor to allow the requests of a commercial enterprise to unduly burden public resources." See 5 ILCS 140/1.

2. If it is unclear whether a document is subject to inspection or not, should we presume it is subject under the new provisions?

Yes. Section 1.2 establishes a presumption that "all records in the custody or possession of a public body are presumed to be open to inspection or copying." The burden is on the public body to provide "clear and convincing evidence" that it is exempt. See 5 ILCS 140/1.2.

3. Are there changes to what public bodies are covered?

Yes. A small, but significant change was made to Section 140/2(a) regarding the Act's applicability to committees. Formerly, only committees and subcommittees that were supported in whole or in part by tax revenue or that expend tax revenue were covered. This exception was

eliminated and the Act now applies to all committees of public bodies. Accordingly, if an ad hoc committee is formed to investigate and make a recommendation on what color to paint an office, it is now subject to the provisions of the Act.

4. Are e-mails considered "public records" under the new provisions?

Yes. Although the Attorney General's office has taken the position for some time that the e-mails of a municipality are covered by the Act, "electronic communications" has now been added to the definition of public records. 5 ILCS 140/2(c). However, it is unclear how far this definition goes and whether it extends to emails from a personal or private account. Although the Act now clearly includes e-mails from and between public officials made from, or received by, a public body computer server, it likely does not include e-mails that are not contained within the public server or otherwise in the possession and control of the public body.

5. Is "private information" exempt under the new provisions?

Generally yes. The Act adds "private information" as an exemption, unless the information is required to be disclosed under a different provision of the Act. Private information is defined as "unique identifiers, including a person's social security number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses." It also includes "home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person." See 5 ILCS 140/2(c-5) and 5 ILCS 140/7(1)(b).

6. What is the difference between "private information" and "personal information"?

While "private information" is exempted under Section 7(1)(b), Section 7(1)(c) also exempts any "personal information" contained within public records. However, for the exemption to apply, the disclosure of the "personal information" must constitute a clearly "unwarranted invasion of personal privacy." This means information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The subject of the information may consent in writing to the disclosure. Otherwise, the personal information should not be disclosed. Please also note that notice of this claimed exemption must be given to the Public Access Counselor. 5 ILCS 140/9.5(b).

7. What are the special requirements for claiming an exemption under Section 7(1)(c) or (1)(f)?

If an exemption is claimed based on personal privacy under Section 7(1)(c) or on the preliminary draft provisions under Section 7(1)(f), the public body must, within the statutory time period, provide written notice to the requester and the Public Access Counselor of its intent to deny the request. The notice must include: (1) a copy of the request for records; (2) the proposed response from the public body; and (3) a detailed summary of the public body's basis for asserting the exemption. After receiving the notice, the Public Access Counselor shall, within 5 working days, determine whether further inquiry is warranted and advise the public body and the requester of same.

8. What happens if the request is for a commercial purpose?

If the request is for a commercial purpose, the timeframe for responding to the request is extended to 21 days. However, within this 21 days, the public body must either: (1) provide to the requester an estimate of the time required to provide the records requested and the estimated cost for same; (2) deny the request pursuant to an applicable exemption; (3) notify the requester that the request is unduly burdensome and notify the requester that the request should be narrowed; or (4) provide the records. 5 ILCS 140/3.1. The Act defines "commercial purpose" as the use of "any part of a public record or records or information derived from public records, in any form for sale, resale, or solicitation or advertisement for sales or services." 5 ILCS 140/2(c-10).

9. Are requests by the news media considered to be made for commercial purposes?

Not likely. Requests made by news media and non-profit, scientific or academic organizations are not considered to be for a commercial purpose when the purpose of the request is to: (1) access and disseminate information concerning news and current or passing events; (2) for articles of opinion or features of interest to the public; or (3) for the purpose of academic, scientific or public research or education.

10. Will we be able to require a requester to state the reason for the request?

Sometimes. The only time the public body can require a requester to state the reason for the request is to determine whether the records are requested for a commercial purpose or whether to grant a fee waiver.

11. If we receive a request from Big Map Company for a variety of data related to our District, what should we do under the new provisions?

First, remember that requests for commercial purposes are treated differently under the Act. Accordingly, if the FOIA request sounds like it may be commercial in nature, you should ask the requester if the records are for a commercial purpose. Pursuant to Section 3.2(c), it is a violation of the Act for a person to knowingly obtain a public record for a commercial purpose without disclosing that it is for a commercial purpose when requested to do so by the public body. If the request is for a commercial purpose, then you have 21 days to respond. See the answer to question 8 for further details.

12. Does the Act outline any specific financial documents that *must* be disclosed?

Yes. Section 2.5 provides that all records relating to the obligation, receipt, and use of public funds of a public body are public records subject to inspection and copying. Section 2.10 also provides the certified payroll records submitted pursuant to the Prevailing Wage Act are public records. However, the contractors' employees' addresses, telephone numbers and social security numbers must be redacted prior to disclosure.

13. Are arrest reports subject to disclosure under the Act?

Yes. Section 2.15 requires the following chronologically maintained arrest information maintained by a local criminal justice agency to be furnished as soon as practical, but no later than 72 hours after the arrest: (1) information that identifies the individual, including the name, age, address, and photograph, when and if available; (2) information detailing any charges relating to the arrest; (3) the time and location of the arrest; (4) the name of the investigating or arresting law enforcement agency; (5) if the individual is incarcerated, the amount of any bail or bond; and (6) if the individual is incarcerated, the time and date that the individual was received into, discharged from or transferred from the arresting agency's custody. 5 ILCS 140/2.15(a). However, items 3 through 6 may be withheld if it is determined disclosure would (1) interfere with a pending or actual reasonably contemplated law enforcement proceeding conducted by any law enforcement agency; (2) endanger the life or physical safety of law enforcement, correctional personnel or any other person; or (3) compromise security of any correctional facility. 5 ILCS 140/2.15(c).

14. Do public bodies have to disclose criminal history records?

Yes. Section 2.15(b) provides that the following documents maintained by a public body pertaining to criminal history record information are public records subject to inspection and copying: (1) court records that are public; (2) records that are otherwise available under State or local law; and (3) records in which the requesting party is the individual identified, except as provided under Section 7(1)(d)(vi).

15. Do the disclosure requirements for arrest and criminal history information apply to juveniles?

No. Section 2.15(d) states the disclosure requirements do not supersede the confidentiality provisions for arrest records of the Juvenile Court Act of 1987.

16. Do the new provisions still contain the exemption for preliminary drafts in which opinions are expressed or policies or actions are formulated?

Yes. Section 7(f) still exempts preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated (absent the head of the public body citing the record in public). However, when a public body claims one of these exemptions, it must give special notice to both the requester and the Public Access Counselor under Section 9.5(b).

17. One of our firefighters accidentally cut down a 50 year-old tree belonging to Timmy Terror, a very litigious and outspoken member of our community. We ended up entering into a settlement agreement with Mr. Terror and paying him $5,000 to replace the tree. Even though the settlement agreement contains a confidentiality clause, will it be subject to disclosure under the new laws?

Yes. Section 2.20 provides that all settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, provided that information exempt from disclosure under Section 7 may be redacted.

18. We contract with a public relations firm to promote certain programs in our District. Are the records they keep subject to disclosure under the Act?

Yes. Section 7(2) states that a public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of the Act. Contracts with vendors should include provisions obligating the contractors to assist the government in fulfilling its obligations under the Act, including the requisite timelines.

19. Historically, our District has required individuals seeking information under FOIA to use a standard request form we created. Can we continue this process under the new provisions?

No. Although Section 3(c) requires that requests must be made in writing, it prohibits public bodies from requiring that a request be submitted on a standard form. Basically, the request can be submitted by any means available to the public body (i.e., mail, facsimile, e-mail, etc.). If a public body desires, it can also decide to honor oral requests.

20. If our public body has the capability to scan and e-mail records, do we have to honor a request to provide them in that format?

Maybe. Section 140(d) defines "copying" as the reproduction of any public record by means of any photographic, electronic, mechanical or other process, device or means now known or hereafter developed and available to the public body. According, if the public body has the technological ability to produce records via e-mail, the Attorney General may require such.

21. How long will we have to respond to FOIA requests?

Five days. The time to respond was shortened from seven days to five business days. 5 ILCS 140/3(d). This time can be extended for another five-day period (this also was seven days) from the original due date for the same reasons under the old statute (i.e., requester seeks collection of a substantial number of records, the records need to be reviewed, etc.).

22. If we cannot provide the records even by the extension, what should we do?

If a public body needs additional time beyond the first five days and then the five-day extension, the Act allows the public body and the requester to set a new date for compliance if both parties can agree in writing. 5 ICLS 140/3(e). Accordingly, you should contact the requester, explain the reasons for the expected delay and try to work out an agreed upon extension date. A simple letter signed by both parties stating the new extension date should be sufficient to comply with the Act.

23. What if we fail to respond within five days?

The first consequence is that it is treated as a denial of the request. This allows a requester to either file for injunctive or declaratory relief or to get the Public Access Counselor involved. The

second consequence is that the public body loses the right to claim the request is unduly burdensome and to charge fees.

24. Are there new requirements we must follow in denying a request?

Yes. Like before, the denial must be in writing and inform the requester of the denial. However, it must also now include a "detailed factual basis for the application of any exemption claimed." Since appeals are no longer made to the head of the public body, the letter must provide notice of the requester's right to seek review of the denial by the Public Access Counselor along with the Counselor's address and phone number. Each letter must also inform the requester of his or her right to judicial review under Section 11 of the Act. See 5 ICS 140/9(a). If the denial is made utilizing an exemption under Section 7, the notice of denial must specify the exemption claimed and the "specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority." 5 ILS 140/9(b).

25. Currently, when we deny a FOIA request, the individual can appeal the decision to the District President as the head of the public body. Will this process continue?

No. Appeals of any denial will now be handled directly by the Public Access Counselor. These appeals must be made within 60 days of the denial and must: (1) include a copy of the request for access to records; and (2) any responses from the public body. 5 ILCS 140/9.5(a).

26. If we are claiming an exemption under Section 7, what does the requirement to cite supporting legal authority mean?

Since the Section 9(b) already contains a specific requirement to cite to the statutory exemption, it is unclear what other legal authority the Act refers to. Until this is clarified by the Attorney General, it is our recommendation to simply cite to the specific provisions of the Act.

27. Can a person go straight to the Circuit Court if we fail to respond timely to a request?

Yes. Section 9(c) provides that any person making a request for public records shall be deemed to have exhausted his or her administrative remedies with respect to that request if the public body fails to act within the statutory time periods. Accordingly, the claim would be ripe for review by the circuit court of the county in which the public body is located.

28. How does the Public Access Counselor handle denial reviews?

Upon receipt of a request for review, the Public Access Counselor must determine whether further action is warranted. The Public Access Counselor will either tell the requester the allegation is unfounded or otherwise forward a copy of the request, along with the specific documents necessary for review, to the public body within seven working days. The public body thereafter has seven working days after receipt of the Public Access Counselor's request to provide the documents for review. Within that same timeframe, the public body may also "answer the allegations" of the request for review. The "answer" is also sent to the requester who may also file a response within seven working days after receipt.

29. How soon will the Attorney General issue an opinion on the FOIA dispute?

The Attorney General must examine the issues and the records and make findings of fact and conclusions of law and issue an opinion on same within 60 days after initiating the review. Presumably, this means 60 days after receipt of the initial request for review. Note that the Public Access Counselor may extend the time by no more than 21 days by sending written notice to the requester and public body that details the reasons for the extension. The Attorney General could also decide to address the matter without issuance of a binding opinion. See 5 ICLS 140/9.5

30. Do we have to give all documents, even those that contain personal or private information, to the Public Access Counselor if a claim is made under the new provisions?

Yes. If the public body fails to provide the documents to the Public Access Counselor, the Attorney General can issue subpoenas. 5 ILCS 140/9.5(c).

31. What if we disagree with the Public Access Counselor's opinion?

Any binding opinion of the Attorney General's office under the Act is subject to administrative review. If the public body wants to appeal a decision, it must "immediately" initiate administrative review procedures (i.e., file an appeal with the circuit court). It is also important to note that the action for administrative review can only be commenced in Cook County or Sangamon County. Advisory opinions are not subject to administrative review.

32. What if the requester seeks review from the Public Access Counselor and then disagrees with the Public Access Counselor's opinion?

Similar to the right of public bodies, the requester may seek administrative review of the decision under Section 11.5 of the Act. However, the action for administrative review can only be commenced in Cook County or Sangamon County.

33. Can a person skip the Public Access Counselor and go directly to the Circuit Court?

Yes. Section 11 permits a person, whose request has been denied by a public body, to file suit for injunctive or declaratory relief in the Circuit Court in the county where the public body is located.

34. What if we lose in court under Section 11?

Besides any negative political consequences, if the person seeking the request prevails, the court must award the person their reasonable attorneys' fees and costs. 5 ILCS 140/11(i). Additionally, if the court finds that the public body willfully and intentionally failed to comply with the Act, or otherwise acted in bad faith, the court must impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence. While there are no criminal penalties, there is no discretion for the award of attorneys' fees and cost against a losing public body.

35. What is the difference between appealing a denial with the Public Access Counselor and appealing a decision to the circuit court?

If a public body denies a request based on an exemption, the denial may be appealed to the Public Access Counselor who will review the situation and determine the validity of the exemption. The Public Access Counselor may eventually order the release of the documents in question. There is no charge for this and can easily be done by any person wishing to appeal a decision. In addition to the right to appeal a denial to the Public Access Counselor, the Act also provides that any person denied access to inspect or copy any public record of a public body may file suite for injunctive or declaratory relief in the circuit court for the county where the public body is located. Accordingly, an individual could either go straight to the Public Access Counselor (for free) or take the public body to court in an attempt to seek injunctive or declaratory relief. If a suit is filed with the court, the Attorney General's office will cease involvement in the matter. The courts also get involved if a party appeals the binding decision of the Public Access Counselor. However, in such cases, the case must be heard in the circuit court of either Cook County or Sangamon County.

36. The District Secretary usually handles our FOIA requests. Should this process continue?

Maybe. Section 3.5 requires each public body to designate one or more officials or employees to act as its Freedom of Information ("FOI") officer. In many Districts the secretary can certainly be designated by the public body as the FOI officer.

37. What is the role of the Freedom of Information officer?

The FOI officer receives requests submitted to the public body, ensures that requests are responded to in a timely fashion and issues responses under the Act. The FOI officer must also develop a list of documents or categories of records that the public body shall immediately disclose upon request. 5 ILCS 140/3.5.

38. How are requests processed?

The FOI officer must: (1) note the date the public body receives the written request; (2) compute the day on which the period for response will expire and make a notation of that date on the written request (3) maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been complied with or denied; and (4) create a file for the retention of the original request, a copy of the response, a record of written communications with the requester, and a copy of all other communications. 5 ILCS 140/3.5(a).

39. Are there any training requirements for FOI officers?

Yes. Within six-months after the new provisions of the Act are effective, the FOI officer must successfully complete an electronic training curriculum to be developed by the Public Access Counselor. The FOI officer must thereafter successfully complete an annual training program. If new officers are designated, they must complete the electronic training curriculum within 30 days of assuming the position. It is presumed the course will be made available and taken

directly online from the Attorney General's website. Last date for completion of required training is June 30, 2010.

40. We maintain our own website, do we have any additional posting requirements under the Act?

Yes. For public bodies that "maintain" a website, they must post the general information otherwise required to be on hand as provided in Section 4 of the Act. Under these circumstances, it is likely that "maintain" means the public body itself actually controls and handles the content of the website as opposed to contracting with a third-party.

41. What happens if we get requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied?

Section 3(g) allows such requests to be deemed "unduly burdensome" and to be denied by the public body.

42. Even though Ancel Glink advised us that charging $1.00 a page was too high for copies, we still want to do it. Is that ok?

No. The new provisions require that no fee may be charged for he first 50 pages of black and white, letter or legal sized copies requested by a requester. 5 ILCS 140/6(b). After 50 pages, the fee cannot exceed 15 cents per page. Color and oversize copies beyond legal may not be charged more than its actual cost for reproduction. The cost for certifying a document cannot exceed $1.

43. Do we have to provide the record in the format specified by the requester?

Yes. Section 6(a) provides that when a person requests a copy of a record maintained in an electronic format, the public body shall furnish it in the electronic format specified by the requester, if feasible. If such is not feasible, then the public body must furnish it in the format in which it is maintained by the public body or in paper format, whichever the requester prefers. The actual cost of the disk, tape or other medium can be charged to the requester. However, no other search or staff time can be charged.

44. What is the difference between "statutory exemptions" and the other exemptions outlined in the new provisions?

In the old version of the Act, all of the exemptions were located under Section 7. The new provisions contain some exemptions under Section 7, but there are also "statutory exemptions" under a new Section 7.5. The "statutory exemptions" references exemptions that derive from other statutes, such as the Notarial Record in the Illinois Notary Public Act, 5 ILCS 312/2-102(h)(i).

45. Will the Public Access Counselor's binding opinions be made public?

Yes. The Attorney General is required to post his or her binding opinions on the official website of the Office of the Attorney General. 15 ILCS 205/7(g).

FOIA

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* FOR OPINIONS ON WHAT TYPE OF INFO, CAN BE RELEASSED

* QUESTIONS ON THE LAW