



The Illinois Freedom of Information Act

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THE ILLINOIS FREEDOM OF INFORMATION ACT (FOIA)

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I. INTRODUCTION

Collectively, the Open Meetings Act (“OMA”) and the Freedom of Information Act (“FOIA”) are known as the “sunshine laws” because they require public business to be open and accessible. Codified in the state statutes at 5 ILCS 140/1 *et seq.*, the FOIA establishes the minimum rights of the public to inspect or receive a copy of a wide range of public records. The presumption is that all public documents are open to inspection, as noted in the statute:

All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt.

If a public body seeks to exempt a document from inspection, the burden is on the public body to “prove” the exemption by clear and convincing evidence.

II. PUBLIC BODIES

The definition of a “public body” in the Freedom of Information Act is almost identical to the definition of public body found in the Open Meetings Act. Public bodies include cities, villages, school, park, and library districts, townships, counties, among many other governmental bodies. In addition to the governing boards, commissions, and committees, subsidiary bodies of the above-mentioned entities are subject to the FOIA. The factors used in determining whether an entity is a “subsidiary body” are set out in court decisions which require a court to consider the legal nature of the entity, the degree of direct governmental control over the entity’s officers and employees, the nature of the functions performed by the entity and the amount of public funds that it uses.

The Illinois Appellate Court has ruled that an elected official (and presumably other individual public officials) is not considered a “public body” and thus is not required to individually comply with a FOIA request. However, if the public official is acting as part of a public body (i.e., communicating during a public meeting or to a quorum of a public body), then the individual alderman may be considered a “public body” and his or her communications subject to release under FOIA. In a recent case involving the City of Champaign, the appellate court held that text messages that were transmitted during a public meeting were releasable under FOIA even though they were transmitted on private devices because the communications were transmitted while the officials were acting as a public body. The court also noted that if communications are transmitted to a majority of the public body, even outside of a meeting they may also be releasable under FOIA for the same reason.

III. PUBLIC RECORDS

“Public records,” a term of art used throughout the Act, is broadly defined in Section 2(c), which sets forth a definition containing a multitude of synonyms:

. . . all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records,

electronic communications, recorded information and all other documentary materials.

In addition, Section 2.5 provides that all records relating to the obligation, receipt and use of public funds of a public body are subject to inspection and copying by the public.

The preamble in Section 1 relieves a public body of the burden of *preparing* a public record in response to a request. Additionally, Illinois courts have addressed the issue of whether a public body must create a record not previously existing in order to satisfy a request. One court ruled that plaintiff's request for a letter answering questions rather than for specified records was not a proper FOIA request because no existing record contained the answers and a new record would have to be created to answer the request. Similarly, a public body is not required to furnish records which have been lost.

In addition to not being required to prepare a public record, Section 3.3 provides the Act is not intended to "compel public bodies to interpret or advise requesters as to the meaning or significance of the public records." Accordingly, while the FOIA may require the disclosure of certain documents, it does not require public officials to answer questions about those documents or explain the same.

As noted above, the term "public records" now includes as part of its definition "electronic communications." The question is whether this extends to emails from a personal or private account, or whether it includes only emails on public computers or through public accounts. While some may argue this question is debatable, the PAC's position on the issue seems clear. In early decisions on requests to review, the PAC explained that emails are subject to FOIA even if they are on an official's home or personal account or computer. According to the PAC opinion, the key determinant is whether the emails relate to public business. The appellate court limited the PAC opinion somewhat in its decision in *City of Champaign v. Madigan*, holding that communications sent on private devices are releasable under FOIA only if they are transmitted to a majority of the public body's members, forwarded to an official account, or sent during the public body's meeting.

IV. COMPLIANCE WITH FOIA

A. Appoint a FOIA Officer

Section 3.5 requires each public body to designate one or more officials or employees to act as its Freedom of Information ("FOIA") officer or officers.

The FOIA officer has the following functions: (1) receive requests for documents submitted to the public body; (2) ensure a timely response by the public body; and (3) issue the response to the request. Upon receiving a request, Section 3.5 requires the FOIA officer to: (1) note the date the public body received 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 other

communications. It should be noted that one of the PAC binding decisions provides an actual copy of the documents provided subject to the request *does not* have to be maintained as part of this file.

Who should serve as the public body's FOIA officer and how many FOIA officers are needed is within the discretion of the public body. Some public bodies name one FOIA officer with several deputies while other public bodies appoint various FOIA officers to cover the public body's different departments. Still others have named multiple FOIA officers that are simply given direction to coordinate amongst themselves to handle any and all FOIA requests that come in. At the very least, it is recommended that a public body name more than one person to serve as the FOIA officer for situations where a FOIA officer is suddenly not available due to illness, vacation, or departure from the office. Though not strictly required, the use and number of the FOIA officers should be set forth in an overall FOIA policy described below.

All FOIA officers must register with the Illinois Attorney General's Office and receive training from the Attorney General. The original FOIA officers appointed had to be trained by July 1, 2010, and thereafter again annually. Any new FOIA officers must be trained within six months of appointment.

B. Provide Data about the Public Body

Under Section 4 of the Act, each public body must prepare and maintain a brief description of its functional subdivisions of government, the total amount of its operating budget, the number and location of its separate offices, the approximate total number of full-time and part-time employees, and information regarding the identification and membership of its boards, commissions, committees or advisory councils. The governmental body must also prepare and maintain a brief description of the methods whereby the public may request information and public records and a directory designating, by title and address, those employees to whom requests for public records should be directed, as well as the fee structure established by the public body. A reasonably current list of all types or categories of records under its control which were prepared or received after July 1, 1984, must also be available. The fee structure for copying documents is set forth below.

If your public body maintains a website, the above-referenced information must be posted on it.

C. Prepare Rules of Procedure

Even before a request is made, a public body should have in place written rules of procedures regarding FOIA compliance. While a public body is not required to have a formal FOIA policy, Section 3(h) provides each public body may promulgate rules and regulations in conformity with the provisions of the FOIA pertaining to the availability of records and the procedures to be followed.

Each public body should consider adopting a policy that outlines how FOIA requests are to be handled. For example, the policy may outline, within the limits of the law, the responsibilities of the FOIA officers, the number and structure of the FOIA officers, how requests are to be made and responded to, the form of the various responses, the fee structure and the public body's general compliance obligations. The policy should also set forth the time periods for producing records (see below for more information on the timeframes for responding).

The FOIA policy should also set forth whether oral requests will be accepted by the public body. This is optional under Section 3(c) and for practical reasons, simple requests should be considered to reduce the paperwork in recording requests. The FOIA policy may provide that all requests may be required to be submitted in writing. However, note that the PAC has ruled that a public body must accept FOIA requests by hand delivery at reasonable times and locations, and may not implement a rule requiring FOIA requests to be submitted only by mail. While public bodies may require under Section 3(c) that requests be made in writing, public bodies are prohibited from requiring that requests be submitted on a standard form. That said, many public bodies still offer forms that a person making a request may choose to utilize.

D. Respond to FOIA Requests within the Statutory Time Frame.

A public body has five business days to respond to a FOIA request. Failure to respond or otherwise extend the response time as discussed next, is considered a denial of the request.

If the initial five-day timeframe is not enough time, an additional five days may be taken under Section 3(e). Section 3(e) allows the public body to extend the time for responding for another five-day period from the original due date for any of seven specified reasons (*i.e.*, requester seeks collection of a substantial number of records; the records need to be reviewed, etc.). Note, however, if an extension is utilized and the public body fails to respond within that extended timeframe there are substantial consequences. First, the failure to respond is treated as a denial of the request. This allows a requester to either file for injunctive or declaratory relief or to get the PAC involved (see below). The public body also loses the right to claim the request is unduly burdensome and to charge fees for reproducing records if it does not timely respond to a FOIA request. Accordingly, it pays to ensure all requests are timely responded to.

There may be times when a request is so large, that it is impracticable to respond within the total ten-day time period set forth above. In this situation, where a public body needs additional time beyond the first five days and the five-day extension set forth in Section 3(e), the Act allows the public body and the requester to set a new date for compliance if both parties can agree in writing. Accordingly, the public body 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 is likely sufficient to comply with the Act.

E. Fees for Copies

A public body cannot charge for the first 50 pages and the cost per page for pages after the first 50 may not exceed 15 cents. A public body also cannot charge for the costs of any search for, compiling or review of the documents (*i.e.*, staff time, information technology services, etc.) unless the request is for commercial purposes. At least one court has held that the FOIA “does not permit the charging of fees for inspection of an original record.” Consequently, a requester is entitled to inspect the original audio tapes of public meetings, free of charge. A public body may not charge for copies of documents made for its internal FOIA file.

Despite the restrictions set forth above, the actual cost of reproduction may be charged for oversize copies (*i.e.*, beyond standard letter or legal-sized copies). Accordingly, if a copy of a map is

requested and the public body has to have the map copied at a local copy store at an expense of \$10.00, it may pass that cost along. Again, however, the public body may not charge for the time incurred in finding the map or taking it to the copy store unless the request was for commercial purposes.

With respect to commercial requests, a public body may now charge up to \$10 per hour for time spent by personnel “searching for or retrieving a requested record,” although no such fee can be charged for the first eight hours of searching and retrieval. Additionally, a public body may charge a commercial requester for “the actual cost of retrieving and transporting public records from an off-site storage facility” if the public body has contracted with a third-party storage company. If a public body imposes fees under section 6(f), it must provide the requester with a written accounting of all fees, costs and personnel hours involved in responding to the commercial request. However, no fees can be charged for electronic copies of documents under the FOIA – even for commercial requests – other than for the actual cost of the medium used to provide the documents, such as a CD-ROM or flash drive.

Furthermore, documents must be furnished without charge, or at a reduced charge, as determined by the public body, if the person requesting the records states the specific purpose for the request and indicates that a waiver or reduction of fees would be in the public interest. A waiver or reduction is in the “public interest” if the primary purpose of the request is to access and disseminate information regarding the health, welfare, safety or legal rights of the general public and is not for the principal purpose of commercial or personal benefit. A presumption exists that any news media request for information regarding health and safety is not for a commercial benefit. In setting the amount of any reduction, the public body may take into consideration the amount of materials requested and the cost of conveying them.

As to the form in which public bodies must provide records, if a record maintained in an electronic format is requested, the public body must furnish it in the format specified by the requester, if feasible. Note also that “copying” is defined under Section 2(d) 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. Accordingly, if the public body has the technological ability to produce records via e-mail, the PAC may require such.

Finally, it should finally be noted that if a copy of a record is requested, the public body must comply and have a copy made. While the public body may offer inspection as an alternative, it may not refuse to make the copy.

F. Denials

A denial must be in writing and it must include a “detailed factual basis for the application of any exemption claimed.” The denial also must provide notice of the requester’s right to seek review of the denial by the PAC along with the PAC’s address and phone number. Each denial letter must also inform the requester of his or her right to seek judicial review under Section 11 of the Act. If the denial utilizes an exemption under Section 7 (discussed in Section V below), 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.”

V. FOIA EXEMPTIONS

There are now two primary sections within the FOIA that cover exemptions. First, Section 7 of the FOIA contains a long list of classes and subclasses exempt from inspection and copying. Section 7.5 thereafter sets forth a list of exemptions derived from other Illinois statutes.

As set forth in the preamble, the exemptions are strictly construed and access favored. Along with Section 2.5, the courts have historically been consistent in ruling that the burden of showing that a particular exemption applies lies with the public body. Among the exemptions and interpretive case law of most interest to public officials are the following:

A. Disclosure Prohibited by Other Laws

Section 7(1)(a) of the Act exempts information specifically prohibited from disclosure by federal or state law or resolution. For example, certain student records are confidential under the Illinois School Student Records Act. A FOIA request for these confidential student records can be denied under Section 7(1)(a), with a reference to the School Student Records Act.

B. Invasion of Privacy

Some documents in the possession of a public body may contain personal information that is not appropriate for public purview. Under the new provisions of the FOIA, this information may be treated either as private information or personal information.

(1) Private Information

Section 7(1)(b) exempts “private information” unless disclosure is required by another provision of the FOIA, a state or federal law or a court order. Private information is defined as:

. . . unique identifiers, including a person’s social security number, driver’s license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses.

Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.

If information within a document subject to a FOIA request meets the definition of “private information” within Section 2(c-5), the public body may redact the information utilizing this exemption. However, the public body should still provide a denial to the person making the request that specifies why the exemption applies. For example, if you have a document, responsive to a request, that contains a home phone number, that phone number should be redacted pursuant to Section 7(1)(b). However, when providing the responsive document, the public body must still provide a denial citing Section 7(1)(b) and explaining the basis for the redaction.

Note that when utilizing this exemption the public body should still cite the exemption (and provide the necessary denial language for the redacted information) to the person making the request, redaction of “private information” *does not* require pre-approval from the PAC.

(2) Personal Information

Section 7(1)(c) exempts “personal information” contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. An “unwarranted invasion of personal privacy” means the “disclosure of 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.”

Birth dates are a common example of “personal information.” A birth date is not within the definition of “private information” in Section 7(1)(c) and thus public bodies are left to argue it is “personal information” under Section 7(1)(c). Accordingly, if a public body receives a request for a document that contains a birth date, it should redact the birth date as personal information and follow the steps to provide a proper denial. A public body is no longer required to obtain pre-approval from the PAC to use the “privacy” exemption, but it still may seek an advisory opinion if it is unsure about whether requested information is exempt from disclosure.

When considering what “personal information” is, it should be noted the disclosure of information that bears on the public duties of public employees and officials *is not* considered an invasion of personal privacy. Accordingly, even if the information within a public record may be highly personal and embarrassing, so long as it relates to the public duties of an employee or official, use of this exemption will not be allowed. Accordingly, since the FOIA no longer contains an exemption for information within a personnel file, it is difficult to exempt such records as “personal information.” Similarly, the PAC has ruled that police arrest reports are not generally exempt under section 7(1)(c), even though the information was arguably highly personal and embarrassing to the public official who was the suspect named in the arrest report.

C. Investigatory Materials

The exemption in Section 7(1)(d) provides protection against the disclosure of investigatory records compiled for ordinance or administrative enforcement and law enforcement purposes where the disclosure would interfere with ongoing investigations, unavoidably disclose the identity of an informant, disclose specialized investigative techniques, or cause other itemized harms.

D. Quasi-Commercial, Trade, Technical and Financial Items

The exemptions in Sections 7(1)(g), 7(1)(h), 7(1)(i), 7(1)(k), 7(1)(p), 7(1)(r), and 7(1)(t) all relate to quasi-commercial, trade, technical or financial items, including documents pertaining to real estate purchase negotiations. A public body is able to keep from the public certain matters that would prevent them from effectively operating as a buyer or seller or user of services in the marketplace where a trade partner or adversary is not required to make such disclosure.

E. Communications with Attorney

Section 7(1)(m) exempts from disclosure communications between a “public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation...” This exemption permits attorneys to advise their clients candidly regarding both litigation and non-litigation matters.

Public bodies often receive requests for their attorney bills. Information within these bills may be subject to attorney-client privilege, including the narrative of services performed if the narrative contains privileged information. Accordingly, while the public body will likely be required to provide copies of attorney bills with the number of hours worked and the final amount due, some of the descriptive information may be exempted under Section 7(1)(m), and permitted to be redacted.

F. Preliminary Materials and Drafts

Section 7(1)(f) exempts “preliminary drafts, notes, recommendations, memoranda and other records” in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion thereof shall not be exempt when the record is publicly cited and identified by the head of the public body. The head of a public body is defined in Section 2(e) as meaning, among various individuals with primary executive and administrative authority for the public body. Thus, unless the head of the governmental body, as previously defined, publicly identifies and cites the preliminary material, it will not need to be made available for inspection. The exemption is intended to protect and permit the free expression of ideas in all sorts of reports prepared at all levels of local government.

The pre-approval requirement in the 2010 statute was repealed in 2011 and is no longer required. It should still be noted, however, that simply referring to a record as a “draft,” or a “recommendation,” is an insufficient basis to use this exception. If a record held out as a preliminary draft is, in fact, part of a final document, it is subject to disclosure.

G. Personnel Records

The previous exemption of “personnel files” no longer exists for public officers or employees. Accordingly, public bodies are left to find another exemption, such as that said records, or portions thereof, may constitute “personal information.” With Section 7(1)(c) specifying that the disclosure of information that bears on the public duties of public employees and officials is not considered an invasion of privacy, there is little protection in the current version of the FOIA. The PAC has seized on this and routinely denies use of the “personal information” exemption when it relates to public employees.

For example, the PAC has held an invasion of privacy is not a legitimate reason to withhold a village manager’s performance evaluation and that performance evaluations in general are not an unwarranted invasion of personal privacy. Note, however, some information within the performance evaluation may still be considered private and thus subject to exemption under Section 7(1)(b).

After the PAC’s decision concerning performance evaluations, the Illinois General Assembly passed legislation to prohibit the disclosure of performance evaluations. Section 11 of the Personnel

Records Review Act now states that “disclosure of performance evaluations under the Freedom of Information Act shall be prohibited.” Note that public officials should be aware that this language is more than an exemption from FOIA. Under this statute, it is a violation of the law to disclose performance evaluations under FOIA.

Other documents within the records of a public body may also contain information about personnel to utilize the “personal privacy exemption.” For example, in another decision, the PAC sided with the school where the request related to whether a teacher was going to take maternity leave.

In addition, the PAC has not required public bodies to release the names or resumes of people who seek employment with the public body; however, the appointment of an official is treated differently. In Pre-Authorization Request No. 10-5611, the PAC noted that the resumes and applications of those seeking a vacant alderman position had to be released, but noted a distinction between other employment positions. In Pre-Authorization Request No. 10-6805, the PAC determined it was proper to decline to disclose the names of applicants for the position of university president and the applications submitted for same. However, the PAC noted the decision was limited to those not selected for the position.

A recent PAC opinion dealt with the issue of confidentiality provisions in severance agreements, finding that FOIA will “trump” contractual provisions that require a public body to keep the agreement and its terms confidential. Public bodies should be careful in drafting severance and other agreements to make sure that they include an express exemption from any confidentiality clause to allow the public body to comply with its obligations under FOIA.

In sum, when public bodies receive requests for records relating to employees or officials, they should be carefully reviewed to determine if an exemption applies and how the request will be handled.

H. An Overview of Additional Exemptions

Many other exemptions exist, however, and whenever confronted with a question as to whether disclosure is required, it is important for a public body to contact its attorney or to carefully read the statute for additional options. Further, the FOIA is sometimes amended to include additional exemptions to keep up with changing times. For example, the legislature enacted exemptions found in Sections 7(1)(v) and (x), which exempt policies, plans and maps designed to identify, prevent or respond to attacks on the municipal population, facilities or systems, but only to the extent that such disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of those implementing them.

Section 7(1)(k) exempts technical documents related to public construction, including architectural and engineering plans, but also only to the extent that disclosure would compromise security. This provision was recently amended to specifically include plans for water treatment facilities, airport facilities, sports stadiums, convention centers and any governmentally owned, operated or occupied buildings.

In addition to the exemptions set forth in Section 7, Section 7.5 sets forth various statutory exemptions. For example, Section 7.5(b) exempts the library circulation and other records identifying library users under the Library Records Confidentiality Act.

VI. UNDULY BURDENSOME REQUESTS

For categorical requests, the legislature, recognizing the potential cost and difficulty in answering such requests, has given the public body a means for denial which is separate and distinct from the fact that the request is not for a public record, as defined under Section 2, or exempt under Section 7 or Section 7.5. Accordingly, requests calling for all records falling within a category must be complied with unless compliance with the request would be unduly burdensome for the public body and there is no way to narrow the request *and* the burden on the public body outweighs the public interest in the information. Before invoking such a denial, the public body must extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions.

Absent a “categorical request,” there is no process to simply deny a FOIA request because it is burdensome to the public body or otherwise constitutes harassment. In such situations, the public body should consider reaching out to the PAC for guidance or assistance. In some cases, the PAC may attempt to mediate the situation.

There is only one reported case dealing with the application of the “unduly burdensome” provision in FOIA and it happened to involve a FOIA request submitted to the Attorney General herself. In *Shehadeh v Madigan*, 2013 IL App (4th) 120742 (October 4, 2013), the Attorney General office received and denied a FOIA request, and then issued an opinion finding that the denial was appropriate. Both the circuit court and appellate court ruled in favor of the Attorney General, finding that its denial of the request based on the unduly burdensome exception was proper. The court’s analysis is helpful to public bodies because it provides some guidance on how this exemption can be utilized.

First, a public body is not required to prove the adequacy of its search for requested records. Here, the Attorney General asserted that its search turned up over 9,000 records, and that was sufficient for the court.

Second, nothing in FOIA precluded the Attorney General from asserting the unduly burdensome exception even after plaintiff refused to narrow his request.

Third, the Attorney General was not required to provide affidavits of staff members or otherwise prove its claim that producing the records would be unduly burdensome. Section 3(g) only requires a public body to specify in writing the reasons compliance would be unduly burdensome and the extent to which compliance would burden the operations of the public body. Here, the Attorney General explained that staff would have to go through 9,000 records to determine if they were responsive and then review and redact exempt information. That was sufficient justification for the court.

The court also rejected plaintiff's argument that the Attorney General has substantial resources at its disposal to deal with FOIA requests, finding that reviewing these documents would impede staff's ability to "perform its other duties in a timely fashion."

This case is an important one for public bodies, as there has been little or no guidance from the courts on what is meant by the "unduly burdensome" exception to FOIA. Although FOIA is clear that a public body is entitled to use this exception after it has requested that a requester narrow a FOIA request, many public bodies have been hesitant to use this exception because of the very liberal review of FOIA challenges, particularly by the PAC office of the Attorney General, where all but one PAC binding opinion has gone against the public body.

Public bodies now appear to have permission to use this exception, and a road map as to how to cite this exception by first requesting that the requester narrow the request, and if he or she refuses, citing written support for the exception by explaining why compliance would be unduly burdensome and the extent of those burdens. One would hope that the PAC and the courts will now be receptive to public body use of this exception so long as the use is reasonable and justified.

VII. COMMERCIAL REQUESTS

If the request is for a commercial purpose, the timeframe for responding to the request is extended to 21 days. 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. Clearly, the request may be answered in some reasonable time period beyond the 21-day reporting period. 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."

It should be noted that 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. Certain fees may also be assessed for commercial requests as discussed earlier in this chapter.

VIII. ENFORCEMENT

After the applicant has been denied access to the records by the FOIA officer, the applicant has two options: (1) file a request for review with the PAC; or (2) file for review with the circuit court in the county where the public body's primary offices are located.

A. Appeal to the PAC

The Public Access Counselor, or PAC, 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; (5) promulgating rules to implement the powers of the office; and (6) preparing and distributing model policies for compliance with the Freedom of Information Act.

If a public body denies a request for a document or otherwise fails to timely respond to a FOIA request, the person making the request may ask the PAC to review the denial. The request for review must be filed within 60 days after the date of the final denial and must be: (1) in writing; (2) signed by the requester; and (3) include a copy of the original request for records and any and all responses.

Upon receipt of a request for review, the PAC first determines whether further review is warranted. This determination must be made within seven working days. If the PAC determines the alleged violation is unfounded, it shall so advise the requester and the public body and no further action shall be undertaken. If the PAC determines a review is appropriate, the PAC will forward a copy of the request for review to the public body within seven working days after receipt and shall specify the records or other documents necessary to be provided to the PAC for the review. Within seven working days of receiving the request for review from the PAC, the public body may, but is not required to, answer the review. This is essentially a legal brief that sets forth the basis and reasoning of the public body's denial and must be filed within seven working days of receiving a copy of the request for review. If the public body does answer, the person making the request may also file a response within seven working days of the answer being filed. If the public body does not answer, does not supply the PAC with the records it requested, or otherwise fails to participate in the review process, the PAC likely will enter a binding opinion against the public body.

Unless the PAC decides to address the matter in another way (mediation of informal opinion), Section 9.5(f) provides the PAC must examine the issues and the records and make findings of fact and conclusions of law and issue a binding decision on same within 60 days after a review is initiated. Presumably, this means 60 days after receipt of the initial request for review. Note that the PAC may extend the time by no more than 21 days by sending written notice to the requester and public body detailing the reasons for the extension. As noted, the PAC could also decide to address the matter without issuance of a binding opinion.

If the PAC issues a binding decision, either party may appeal the decision under the Administrative Review Law. Such an appeal must be initiated within 35 days (per the Administrative Review Law, 735 ILCS 5-3-103) of the final decision and is appealed to the circuit courts in either Cook County or Sangamon County.

B. Appeal to the Circuit Court

In the alternative to seeking relief from the PAC, a person whose FOIA request was denied may appeal directly to the circuit court of the county where the public body is located. If the public body is located in more than one county, suit should be brought in the county where the public body has its office.

The circuit court has jurisdiction to enjoin public bodies from withholding public records and to order the production of any public records improperly withheld. If the public body can show that exceptional circumstances exist and that the public body is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the public body additional time to complete its review of the records.

If a person seeking the right to inspect or receive a copy of the public record prevails in a proceeding under court review, the court *must* award the person reasonable attorneys' fees and costs to the successful litigant. Notably, parties that seek and receive a PAC opinion before filing an appeal with the circuit court are not entitled to attorneys' fees and costs. In determining what amount of attorneys' fees is reasonable, the court may consider the degree to which the relief obtained relates to the relief sought. Also, if the court determines the public body willfully and intentionally failed to comply with the Act, or otherwise acted in bad faith, the court is required to impose a civil penalty against the public body in an amount not less than \$2,500 nor more than \$5,000 for each occurrence. Note that if a public official or employee refuses to produce a record ordered by the court, he or she may be held in contempt.

APPENDIX

Summary of PAC Binding Opinions – FOIA (2010-2014)

2014

PAC Opinion 14-002 (legal invoices)

The PAC found a public body in violation of FOIA for denying a request for legal invoices. The PAC first stated that the dates on which legal services were performed, the initials of the attorney performing the work, the number of hours billed, and the corresponding amount billed for each entry did not reveal any privileged attorney-client communication and was not, therefore, exempt under FOIA. The PAC did acknowledge that information contained in the billing descriptions or explanation of the work being performed could be exempt as an attorney-client communication, except for general descriptions that do not reveal any privileged information (i.e., holding a telephone conference, exchanging emails, or drafting and revising a memo).

PAC Opinion 14-004 (separation agreements)

The PAC interpreted FOIA to require the release of separation agreements even where the agreements included confidentiality provisions prohibiting release by either contracting party. First, settlement agreements are public records under section 2.20 of FOIA. The PAC relied on a general principle that a contract provision that violates a state law contravenes public policy and is not enforceable to find that the county should have released the settlement agreements because the confidentiality provisions were unenforceable. Second, the PAC rejected the county's argument that the personal privacy exemption should protect the settlement agreements because the agreements resolved allegations of sexual harassment, finding that the public's right to know about the county's expenditure of public funds outweighs any personal privacy rights of a complainant or victim of sexual harassment.

PAC Opinion 14-005 (financial contract terms)

The PAC determined that the Illinois Department of Lottery violated FOIA by redacting financial information from contracts with the company that operates the lottery in Illinois. Specifically, the information that was redacted related to annual and monthly fees, pricing, and compensation paid to the contractor to operate the lottery. The PAC rejected the state's argument that this information was considered "confidential data" under the Illinois Lottery Act nor did it qualify as proprietary or financial information under Section 7(1)(g) of FOIA. Finally, the PAC rejected the contractor's argument that confidentiality provisions in the state's contract with the contractor prohibited release of the confidential data.

PAC Opinion 14-006 (duty to disclose records of student association)

The PAC determined that Chicago State University violated FOIA by failing to provide public records in its possession to a requester. Specifically, the requester asked the University to release information relating to the specific amount of money that was collected at a Homecoming dance and how that money was housed and appropriated. The university had denied the request, stating that the records are not records of a "public body" under FOIA because the records were records of the Student Government Association. The university further argued that the records are not related to the "transaction of public business" to constitute public records under FOIA. The PAC rejected the university's arguments. First, the PAC determined that because the SGA had distributed the

records to the university, they were in the university's possession and, therefore, subject to release. Second, the PAC found that the university controls the funding of student associations, including the SGA, because of language in a student association publication that states that funds remaining in a student association account that are not expended by the end of the fiscal year revert to the university.

2013

PAC Opinions 13-001, 004, 005 and 009 (duty to respond)

In these virtually identical opinions, the Chicago Public Schools, the villages of Caseyville and Cleveland, and Chicago State University all violated sections 3(d) and 9(a) of the FOIA by failing to respond to a request for records within five business days. Each governmental body also failed to participate in the PAC's review process. PAC 13-004, PAC 13-005.

PAC Opinion 13-011 (internal investigations)

The City of Bloomington violated FOIA section 7(1)(n) by improperly withholding investigatory records and citations related to a traffic accident involving the city's assistant chief of police. The PAC found the city never "adjudicated" the underlying allegations against the police chief, and therefore the records related to the imposition of final discipline were *not* exempt from disclosure.

PAC Opinion 13-012 (possession of records)

The UNO Charter School Network ("UCSN") violated FOIA section 3 by failing to provide records that were in the possession and control of its subsidiary organization, UNO Advantage Charter School, Inc. ("UNO"). The PAC found that UCSN was the "governing body" of UNO, and both were subject to the FOIA pursuant to the Illinois Charter Schools Law. The two organizations were so closely related that the PAC ruled UCSN had control of documents that were in the possession of UNO, and therefore UCSN should have provided all requested documents from both entities.

PAC Opinion 13-013 (duty to respond)

In PAC 13-013, the City of Harvey violated FOIA sections 3(d) and 9(a) by failing *in part* to respond to a request for records within five business days. The city timely provided some of the requested documents, but additional records could not be located and therefore were not disclosed. The PAC ruled that failing to provide records that cannot be located is a denial of the FOIA request, and the city's failure to inform the requester of this denial violated the Act.

PAC Opinion 13-015 (preliminary or draft records)

The Illinois State Police violated FOIA by failing to turn over preliminary monthly crime report statistics submitted to the ISP by the Harvey Police Department. The ISP had denied the request based on the "draft document" exception, arguing that the statistics were still preliminary in nature, and had not yet been reviewed or published by the ISP. In PAC 13-015, the PAC disagreed, concluding that the mere fact that records are subject to review and further revision does not render them preliminary for purposes of the preliminary records exception.

PAC Opinion 13-017 (police report and discovery)

In PAC 13-017, the city denied a FOIA request for a police report, citing 7(1)(d) of FOIA that exempts law enforcement records because release would interfere with ongoing law enforcement proceedings and deprive a person of a fair trial. The PAC concluded that the City did not meet its

burden of showing by clear and convincing evidence that FOIA prohibited disclosure because the City failed to provide enough detail about the ongoing investigation and how the disclosure of the records would deprive a person of a fair trial. The PAC also rejected the City's argument that the requester should obtain the records through discovery, stating that just because records might not be available through discovery does not mean that they should not be accessible through FOIA.

PAC Opinion 13-018 (outside consultant records and fees)

In PAC 13-018, a union group submitted a FOIA request seeking city records relating to a sidewalk/curb improvement project. Although the city provided copies of some of the records, it informed the requester that it would have to pay \$1,136.00 for copies of records held by the city engineering consultant to cover the city's actual costs. The PAC ruled against the City, finding that under the city's agreement with the private engineering firm and the FOIA statute, the requested records were public records and the city could not charge the requester for the costs of search and personnel time.

2012

PAC Opinion 12-001 (recurrent requester)

On January 9, 2012, the PAC issued an opinion interpreting the new provision in the Freedom of Information Act that authorizes a municipality to classify an individual as a "recurrent requester" for purposes of responding to FOIA requests. In this case, a husband and wife had submitted numerous FOIA requests to a particular village over the course of a year. The village combined the couple's requests together, classifying them as "recurrent requesters" under Section 3.2 of FOIA. As a result, the village took the position that it had 21, rather than 5, business days to respond to the request. The PAC found that the village violated FOIA because the statute defines a requester as one "person." Therefore, the couple's requests could not be consolidated to fall within the statutory provision of 50 requests within the statutory time period.

PAC Opinion 12-002 (time for response)

A reporter submitted a request for disciplinary records for the years 2003-2006 from the Chicago Public Schools (CPS) but did not receive a response within 5 business days of the request. The reporter filed a request for review with the PAC. CPS responded to the PAC's inquiry that it was in the process of retrieving and compiling the records. The PAC determined that because CPS did not provide the records within 5 business days, it violated FOIA, ordered CPS to provide the documents at no charge to the reporter.

PAC Opinion 12-003 (privacy exemption)

A reporter filed a FOIA request to Chicago State University seeking the names of all freshman in 2005, names of all who graduated in 2011, and names of those who began school in 2005 who graduated in 2011. CSU submitted a notice of intent to deny to the PAC, asserting that release of the names would be an unwarranted invasion of personal privacy. CSU also claimed that the Family Educational Rights and Privacy Act prohibited release of the requested information. The reporter filed a request for review with the PAC, who concluded that CSU violated FOIA because (1) FERPA does not protect the requested information from disclosure; (2) the requested information is not "private information" under section 7(1)(b); and (3) release of the information would not be an unwarranted invasion of privacy.

PAC Opinion 12-004 (personal delivery of FOIA)

An individual hand-delivered a FOIA request to the village president at a board meeting. The village president denied the request, citing the new village policy that required all requests be submitted by mail, and the requester filed a complaint with the AG. The AG looked to Section 3(c) of the Act that provides that FOIA requests “may be submitted to a public body via personal delivery, mail, telefax, or other means available to the public body.” Based on this language, the village could not adopt a policy refusing to accept hand-delivered FOIA requests. The AG did acknowledge that the opinion did not mean that personal delivery at any time or place is acceptable. Specifically, the opinion did not mean a “village officer” would be obligated to accept delivery of a FOIA request during a chance encounter on the sidewalk, or at his or her private residence or place of business.

PAC Opinion 12-005 (legal invoices)

A reporter filed a FOIA request requesting records of a school district’s legal expenses regarding a proposed TIF district in the City. The district denied the request, citing section 7(1)(m) which exempts communications between a public body and an attorney representing the public body that would not be subject to discovery in litigation. The district offered to provide records showing the amounts paid for legal work. The reporter filed a request for review with the PAC. The PAC determined that although certain types of billing records that indicate the type of work performed or matters discussed between the attorney and client are subject to the attorney-client privilege; however, other information on the invoices should be released such as the date on which work was performed, the attorneys who performed the work, the number of hours billed, and the amount billed. The PAC also opined that certain work descriptions that do not disclose privileged information could also be disclosed. The PAC concluded that the district violated FOIA by withholding the legal invoices in their entirety and should have provided redacted invoices.

PAC Opinion 12-006 (arrest records)

A reporter filed a FOIA request for all police incident reports related to a school board president and candidate for election to the General Assembly, including any batteries of a woman or paramedic assistance to a battered woman. The village denied the request pursuant to section 7(1)(c), as an unwarranted invasion of privacy. The reporter filed a request for review with the PAC. The PAC reviewed the records and determined that because they were “arrest records” they were subject to release under section 2.15(a) of FOIA. The analysis in the opinion centers on the individual being deemed an “arrestee,” even though the PAC itself acknowledges that this individual was not charged and he was released from custody the same day he was detained.

PAC Opinion 12-007 (investigative records)

An individual filed a request with the Illinois Department of Financial and Professional Regulation requesting records relating to an investigation of a real estate agent and realty company. There was no response and the individual filed a request for review with the PAC. The PAC found there was no valid exemption and ordered that the Department provide the records.

PAC Opinion 12-009 (redactions)

In this opinion, the PAC determined that the DuPage County Forest Preserve District violated FOIA by denying a request for all FOIA denial letters issued by the FPD. The FPD redacted the denial

letters to protect private information and to redact information that was not “germane” to the FOIA request. The requester appealed the denial to the PAC. The PAC determined that the redactions of information that was not “germane to the request” was improper, and the FPD should have released the records with only the home addresses and personal e-mail addresses redacted.

PAC Opinion 12-012 (investigative records)

The PAC found that the Illinois State Police (ISP) improperly withheld investigatory records involving the shooting death of a minor pursuant to FOIA. The ISP cited to section 7(1)(a) of FOIA which permits a public body to withhold records when federal or state law specifically prohibits disclosure. In support of its denial of the FOIA request, the ISP had cited multiple sections of the Juvenile Court Act (JCA) which prohibit disclosure of records regarding minors in certain situations. The PAC, however, determined that the JCA only applied to minors who had been arrested, taken into custody, or in cases in which a juvenile court proceeding was initiated. The minor was neither arrested nor taken into custody, and the PAC refused to extend the statutes despite the ISP’s assertion that had the minor survived, he would have been the subject of criminal charges. The PAC did, however, allow the ISP to redact certain unique identifiers in the requested records, including the names and dates of birth of the victim's family members pursuant to various provisions of FOIA, including the protection of personal privacy and confidential sources.

PAC Opinion 12-014 (student test scores)

The PAC determined that a school district violated FOIA by failing to disclose math scores for the ITSB tests for fourth grade students. The district had cited the Illinois School Student Records Act which protects student records. The PAC rejected the district’s argument that the data was exempt because the data could have been released in a format that would not include students’ names or other identifying information. The PAC also rejected the district’s argument that it would have to create a new record to respond to the request, finding that it could have redacted and scrambled the data before releasing it, and scrambling and re-ordering data is not the “creation” of a new record.

PAC Opinion 12-015 (definition of public body)

The PAC determined that the State Judicial Inquiry Board is not a public body required to comply with FOIA because that board is an entity within the judicial branch of government.

2011

PAC Opinion 11-001 (arrest records)

An individual filed a FOIA request seeking arrest records and a gunshot residue test report. The request was denied based on the criminal history record exemption under Section 2.15 and because the public body did not possess the report. On appeal, the PAC first determined that since the gunshot residue report was not in the public body's possession, the denial was permissible. However, the PAC also determined that the arrest records were not exempt under FOIA and, therefore, the public body violated FOIA by improperly denying the records.

PAC Opinion 11-002 (police officer assignments)

A reporter filed a FOIA request seeking records containing the number of sworn officers assigned to each district. The public body denied the request under Section 7(1)(v), claiming that the information related to the mobilization and deployment of police personnel. The PAC determined that the records were not exempt because the public body failed to demonstrate how the number of

officers assigned to a district could reasonably be expected to jeopardize the effectiveness of security measures or safety of the officers or public. In short, the PAC found that the public body violated FOIA.

PAC Opinion 11-003 (unduly burdensome)

A reporter filed a FOIA request seeking various records relating to a university's presidential search. The university sought pre-authorizations to withhold certain information under Section 7(1)(c) as personal privacy information, which was partially denied by the PAC. The university then partially denied the FOIA request. A subsequent request was filed, seeking the documents previously denied and the university denied the subsequent request, asserting that providing the requested documents would be unduly burdensome and that the request was a "repeated request" from the same person for the same records. The PAC found that the university violated FOIA because the public body did not either (1) previously disclose the requested records or (2) properly deny the previous request.

PAC Opinion 11-004 (settlement agreements)

A reporter filed a FOIA request seeking a copy of a settlement agreement between a public body and a former employee. The public body denied the request under Section 7(1)(s) which permits a public body to withhold records relating to insurance or self-insurance claims and loss or risk management information because the settlement amount was paid by the public body's insurance carrier. The PAC determined that the settlement agreement was not exempt under FOIA because (1) FOIA was recently amended to expressly provide that settlement agreements are public records subject to release and (2) Section 7(1)(s) only protects proprietary information regarding policies, procedures, and practices of the self insurance or risk management pool or association, and not information relating to individual claims or losses, including the amount to settle a claim. In short, the PAC found that the public body violated FOIA.

PAC Opinion 11-005 (workers compensation records)

A reporter filed a FOIA request seeking 50 individual reports containing "nerve conduction velocity" results conducted as part of workers compensation claims involving employees at a particular correctional center. The requestor subsequently clarified his request to the public body that personal identifying information could be redacted. The public body denied the request, claiming that the tests were risk management records protected by Section 7(1)(s). Based on similar analysis as contained in PAC Opinion 11-004, the PAC found that the records were not "proprietary" insurance or risk management documents and that the public body violated FOIA.

PAC Opinion 11-006 (electronic records on private devices)

The PAC issued a binding opinion regarding the denial of reporter's FOIA request for text messages, emails, and other electronic records on public officials' personal cell phones and other devices. The public body had argued that the records were not "public records" subject to release, but the PAC disagreed and determined that the public body violated FOIA.

UPDATE: this was appealed to the circuit court, and then the appellate court in *Champaign v. Madigan*, which upheld the PAC opinion that the text messages were releasable, but on more limited grounds. Text messages sent on private devices are releasable under certain limited circumstances: (1) if forwarded to an official account; (2) if sent during a meeting; or (3) if sent to a majority of the public body members.

PAC Opinion 11-007 (copies)

An individual filed a FOIA request for electronic and paper copies of mining plans with the Department of Natural Resources. The Department responded that the records were available on microfiche and invited the requester to schedule an appointment for inspection. The requester filed a request for review with the PAC, arguing that the Department's response was a denial of his request for a printed copy of the reclamation plan. The PAC agreed, finding that the Department violated FOIA by refusing to provide copies of the records.

2010**PAC Opinion 10-001 (copies)**

An individual filed a FOIA request seeking a copy of a public body's water meter card showing reading for a six month period. The public body responded that the requestor could inspect a copy of the records, but the public body was not obligated to provide a copy of the records. On appeal, the PAC determined that the public body violated FOIA by not furnishing copies of the records as required by Section 3(b) of FOIA.

PAC Opinion 10-002 (fees for copies)

An individual filed a FOIA request for certified payroll records and contracts with various contractors. The public body charged a fee for the copies that were provided to the requestor as well as a fee for duplicate copies that were retained by the public body. The individual appealed the duplicate fee charges to the PAC. The PAC determined that although FOIA requires a public body to retain a copy of the original request and response, the public body is not entitled to pass on duplicate copy costs to the requestor. In short, the PAC determined that the public body violated FOIA.

PAC Opinion 10-003 (autopsy reports)

Reporters filed a FOIA request for autopsy records of Christopher Kelly (fundraiser for former Governor Blagojevich) and Michael Scott (President of the Chicago Board of Education), both suicide victims. The requested documents included photographs, toxicology reports, police reports, and various other records. The public body requested pre-authorization from the PAC to deny the request based on the "personal privacy" exemption, arguing that the privacy interests of the victims' families outweighed the public's interest in the release of these records. The PAC denied the pre-authorization request except as it related to post-mortem photographs, ordered the public body to release the records, and determined that the public body violated FOIA by not releasing the records.

PAC Opinion 10-004 (settlement agreement)

A reporter filed a FOIA request for a copy of a settlement agreement in an employment discrimination case. The public body denied the request, stating that it did not have a copy of the settlement agreement because the lawsuit was defended by the public body's insurance carrier. The PAC determined that Section 2.02 of FOIA expressly states that settlement agreements are public records subject to release to the public and that the public body violated FOIA by not providing a copy of the settlement agreement.