

# **Guidelines for Complying with FOIA...Without Losing Your Mind** (with a little OMA thrown in for good measure)

**A Library State of Mind, ILA**

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Presented by:  
Rob Bush  
Julie Tappendorf

**Ancel  
Glink** | DIAMOND BUSH  
DECIANNI  
& KRAFTHEFER

## **Part 1 - FOIA**

**Ancel  
Glink** | DIAMOND BUSH  
DECIANNI  
& KRAFTHEFER

## Presumption

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.

## Rules of Procedure

A written FOIA policy, with forms, can assist the FOIA officer in compliance with FOIA

## Response to a Request

Generally, 5 days to respond

Exceptions:

1. extension is taken;
2. commercial requests;
3. recurrent request;
4. voluminous request

## Creation of Records

Public body not required to create records in response to a FOIA request, but records including information still need to be released

## Form of Response

Record must be provided in the format requested if it exists in that format

## Commercial Requests

1. Applies to request that will be used for “sale, resale, or solicitation or advertisement for sales or services”
2. 21 days to respond
3. Requests from reporters or non-profit organizations are not commercial requests
4. \$10/hour charge for personnel time can be imposed
5. Also, public body can charge the actual cost for retrieving records from off-site storage facility
6. No free copies
7. Still cannot charge for electronic records

## Unduly Burdensome

1. Applies only to “categorical requests”
2. Must provide opportunity to requester to narrow his or her request before denying a request based on this exemption
3. *Shehadeh v. Madigan* (2013), upheld use of this exemption where request would require search and review of 9,000 records

## Exemptions

- Disclosure Prohibited by Law, 7(1)(a)
- Private Information, 7(1)(b) or Personal Information, 7(1)(c)
- Investigatory Materials, 7(1)(d)
- Trade Secrets or Proprietary Information
- Real Estate Purchase Negotiations
- Architectural or Engineering Technical Drawings
- Communications with Attorney, 7(1)(m)
  - Privileged information is protected
  - Legal invoices can be redacted to protect privileged communications, but remainder of invoice should be released
- Preliminary Materials and Drafts, 7(1)(f)
- Personnel Records
  - Personnel Evaluations
  - Severance Agreements – FOIA trumps confidentiality clauses
- Library Records Confidentiality Act, 7.5(b)

## Enforcement

1. PAC Request for Review
2. Appeal to Circuit Court

## Emails

What if the e-mail is on a library computer or account?

1. If it is about library business, it is a public record
2. If it is not about library business, it is not a public record

## Use of Private Devices

What if I text from my personal cell phone?

1. If it is about library business, it could be a public record if it (1) is forwarded to/from a library account; (2) sent to a majority of the library board; (3) sent during a library meeting (Champaign v. Madigan case)
2. If it is not about library business, it is not a public record

## Website Records

Section 8.5 of FOIA now allows a public body to direct FOIA requesters to the website where the record can be “reasonably accessed.”

If a requester cannot reasonably access the record online, then the public body must make the record available for inspection or copying as otherwise required by FOIA.

## Recurrent Requester

In 2011, FOIA was amended to add a “recurrent requester” provision to provide public bodies with additional time to respond to requests filed by individuals who qualified as “recurrent requesters”

“Recurrent requester” is someone who has submitted to the same public body:

- (i) 50 or more FOIA requests in a 12 month period
- (ii) 15 or more FOIA requests within a 30 day period
- (iii) 7 or more FOIA requests within a 7 day period

## Recurrent Requester Process

1. Public body has 5 business days to notify requester that the request is being treated as a “recurrent request,” the reasons why, and that the public body will respond to the initial request within 21 days of receipt of the request.
2. Within 21 days of the receipt of the request, the public body must provide one of the following:
  1. An estimate of time required to provide the records and fee estimate;
  2. Deny the request pursuant to one or more exemptions;
  3. Provide an opportunity to narrow an unduly burdensome request; or
  4. Provide the records.



## Voluminous Request

"Voluminous request" is intended to provide a public body with some relief in responding to a "voluminous request."

"Voluminous request" is a request that:

- (i) includes more than 5 individual requests for more than 5 different categories of records or a combination of individual requests that total requests for more than 5 different categories of records in a period of 20 business days; or
- (ii) requires the compilation of more than 500 letter or legal-sized pages of public records unless a single requested record exceeds 500 pages. "Single requested record" may include, but is not limited to, one report, form, e-mail, letter, memorandum, book, map, microfilm, tape, or recording

## Voluminous Records Process

1. Public body has 5 business days to notify requester that his or her request is being treated as a "voluminous request"
2. Requester then has 10 business days to modify his or her request in a way that it would no longer be "voluminous."
3. Public body can charge up to \$20 for up to 2 MB of electronic data to \$100 for more than 4 MB of electronic data if the document is not in PDF format, or from \$20 for up to 80 MB of PDF data to \$100 for more than 160 MB of PDF data.
4. Public body can also now charge up to \$10/hour for examining records for necessary redactions, in addition to search and retrieval fees for responding to these type of requests.
5. Also allows a public body additional time to respond to voluminous requests.

## Media Treated Differently

Members of the news media and non-profit, scientific, or academic organizations are expressly excluded from the definition of "voluminous request" and "recurrent requester" if the principal purpose of their request is to:

- (i) Access and disseminate information concerning news and current or passing events;
- (ii) For articles of opinion or features of interest to the public; or
- (iii) For the purpose of scientific, academic, or public research or education.

## Severance Agreements

- [P.A. 99-0478](#) amended FOIA to treat severance agreements as "public records," just like settlement agreements.
- Severance agreements are defined as: "a mutual agreement between any public body and its employee for the employee's resignation in exchange for payment by the public body."
- The law takes effect on June 1, 2016. However, based on recent decisions by the PAC office, the PAC has already interpreted "settlement agreement" to include severance agreements.

## PAC Opinions of Interest - FOIA

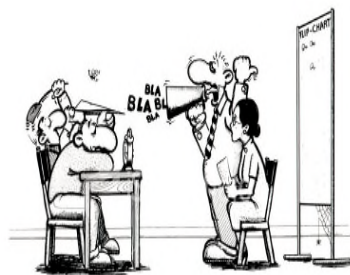
- Home addresses of public officials exempt as private information. *Ward v. Weisbaum*, 2015 IL App (3d) 130852-U.
- Government bank account numbers not exempt, 2015 PAC 33825; 33837; 33838 (consol.)
- Governor's calendar not exempt, PAC Op. 15-007
- Settlement agreements not exempt, PAC Op. 15-004
- Employee resumes not exempt, PAC Op. 14-015
- Public body must conduct exhaustive search for records, PAC Op. 14-010
- Photographs of employees not exempt, PAC Op. 14-008

## Part 2 - OMA

## New Email Posting Requirement

- Units of local government must post on their websites a single, uniform email address that members of the public can use to electronically communicate with their elected officials, unless the officials have individual email addresses for that purpose. [P.A. 98-0930](#). The email address must be "hyperlinked" and easily accessed from the public body's home page.
- The posting requirement does not apply to a government's social media sites such as Facebook, just to the public body's website.
- Effective January 1, 2015, and local governments have 90 days after the effective date to comply with the new posting requirement.

## Right to Public Comment



- “Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.” 5 ILCS 120/2.06(g).
- Public comment can be limited, but only by previously adopted written policies

## The PAC Says...

1. Public comment must be provided at all meetings
2. The public comment requirement applies to subsidiary bodies
3. Each public body (subsidiary bodies) must establish rules
4. A public body can establish time limits for public comment
5. A public body can limit comments to topics germane to the agenda
6. A public body can establish and enforce rules on decorum
7. Public comment can be provided at any point in the meeting
8. Public officials are not obligated to respond to comments
9. Section 2.06(g) does not address members of a public body
10. There is no violation if there is no request to speak

## The PAC Says...cont.

1. Public body cannot refuse to allow a person to speak during public comment for failure to disclose address.
2. Public body cannot require person to register 5 days in advance of meeting to speak during public comment

## PAC Opinions of Interest - OMA

- Just citing “personnel” in the motion to go into closed session not sufficient according to PAC, PAC Op. 15-007
- No violation of OMA where Board did not allow a person to comment on a specific topic at a meeting and removed the individual from the meeting, 2015 PAC 35101.
- Discussion of budget issues, even in connection with employment decisions, not allowed in closed session, PAC Op. 15-003,

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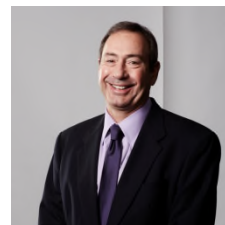
DIAMOND BUSH  
DiCIANNI  
& KRAFTHOFER

## Q&A

Julie A. Tappendorf  
Robert K. Bush  
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer  
[jtappendorf@ancelglink.com](mailto:jtappendorf@ancelglink.com)  
[rbush@ancelglink.com](mailto:rbush@ancelglink.com)  
(312) 782-7606

Visit Julie's blog, Municipal Minute  
<http://municipalminute.ancelglink.com>

Visit Ancel Glink's website: [www.ancelglink.com](http://www.ancelglink.com)



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