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Amended FOIA To Take Effect on January 1, 2010: Law Promises Major Shifts for Agencies, Requesters Alike

On January 1, 2010, amendments to Illinois' Freedom of Information Act (FOIA), 5 ILCS 140/1, et seq., go into effect. Around the state, FOIA advocates and public agencies are bracing themselves for what likely will be a rocky transition as they learn and put into practice the intricacies of the new law. One thing is for certain: FOIA, allegedly long considered merely "advisory" by some public bodies (to the chagrin of the public), now has some teeth. But exactly how sharp those teeth are remains to be seen.

Inspired in part by cases such as *Stern v. Wheaton-Warrenville Community Unit School District* 200, 233 Ill.2d 396, 910 N.E.2d 85, 331 Ill.Dec. 12 (2009), in which the Supreme Court ordered a school board to release a superintendent's employment contract after years of protracted litigation over the meaning of FOIA's "personnel file" exemption, Attorney General Lisa Madigan's office championed the changes to the new law. Working with a team of stakeholders, including journalists who have long felt exasperated by the loopholes in the current statute, P.A. 96-542 was signed by Governor Pat Quinn on August 17, 2009. Since then, the Attorney General's staff has been crisscrossing the state to explain the law to public bodies before the end of the year. Below are some of the law's most important changes:

FOIA Officers Required and Time Limits Shortened.

The new FOIA requires every "public body" (a wide-ranging description encompassing virtually every state, county, township, and municipal body) to appoint a FOIA officer to receive requests from the public and to facilitate responses within 5 business days of receiving the request, two shorter than the law previously mandated. 5 ILCS 140/3(d). (A public body has 21 days to respond to a commercial request, such as those that seek to use public records to advertise sales or services. 5 ILCS 140/3.1(a).) Under certain circumstances, the time period can be extended if the public body notifies the requester within the original 5 days. 5 ILCS 140/3(e). The FOIA officer will be required to complete mandatory training by July 1, 2010, and annual training thereafter. 5 ILCS 140/3.5(b). Public bodies are required to prominently display the name of the FOIA officer and where requests can be sent. 5 ILCS 140/4. Requests must be submitted in writing, but a public body cannot require that they be submitted on a particular form. The public body cannot charge for the first 50 pages of black-and-white copying and, after that, can charge a maximum of 15 cents per page for black-and-white copying. A requester can request that documents be produced in electronic format. 5 ILCS 140/6. If a public body does not respond to a FOIA request within the time frame allotted, the public body cannot charge for copies, nor can it later allege that producing the documents was "unduly burdensome." 5 ILCS 140/3(f).

Streamlined Exemptions.

All information is presumed to be public unless it falls into an established exemption. The broad exemptions under the new FOIA include the following:

1. Private information containing unique identifiers, such as social security numbers, driver's license numbers, personal financial information, etc. These identifiers do not make the entire document exempt but, rather, must be redacted.
2. Personal information that would be an unwarranted invasion of personal privacy.
3. Law enforcement records that would interfere with a pending or reasonably contemplated proceeding or that would disclose a confidential source.
4. Information that would endanger anyone's life or physical safety or create a security risk.
5. Preliminary drafts or notes expressing opinions or in which policies are being formulated until they can be publicly identified by the head of an agency.
6. Business trade secrets or confidential, privileged, or proprietary commercial or financial information that, if disclosed, would cause competitive harm to a person or business.
7. Proposals and bids for any contract before a final selection is made.
8. Unduly burdensome requests. 5 ILCS 140/7.

Unduly burdensome requests are those in which the burden on the public body outweighs the public interest of the requested information, including repetitive requests. Before denying a request based on this exception, the public body must give the requester an opportunity to narrow the request. If the public body still believes that it is burdensome, it must deny the request in writing. Additional categories of exempt documents are also set out in §7 of the Act.

Of importance to many practitioners who are contemplating entering into settlements with a public body, the amended FOIA specifically states that settlement agreements entered into by or on behalf of a public body are subject to disclosure. However, exempt information contained within the agreement may be redacted. 5 ILCS 140/2.20.

Statutory Public Access Counselor.

Illinois has had a Public Access Counselor (PAC) in the past, but the PAC's opinions were merely advisory. Under the new FOIA, the PAC will be an administrator, a negotiator/mediator, and a decision maker. An assistant attorney general, the PAC will review which FOIA requests are properly denied by public bodies. The PAC has subpoena power, can issue advisory opinions as requested by public bodies, and, most importantly, can issue binding opinions in FOIA disputes and sue to enforce those opinions. 5 ILCS 140/9.5.

If a public body denies a FOIA request, it must inform the requester of the right to seek a review of the decision with the PAC. If a public body does not respond to a FOIA request, the nonresponse is treated as a denial, and the requester is also entitled to seek a review of the denial with the PAC. The request for review must be in writing and be made within 60 calendar days of

the denial. The PAC will either uphold the public body's denial, request more information from the public body within 7 days of receiving the request for review, or try to resolve the dispute through alternative dispute resolution methods. If the PAC decides to issue a binding opinion, it must do so within 60 days of receiving all of the information it needs and may extend the time to respond by 21 days if the requester and public body are notified in writing. Id.

A requester does not need to seek review of a denial from the PAC but can choose to sue the public body directly in circuit court. The public body must then prove to the fact finder that its denial was warranted by clear and convincing evidence. 5 ILCS 140/11. A requester can also seek administrative review in the circuit courts of either Cook County or Sangamon County if the PAC upholds a public body's denial or issues a binding opinion with which the requester does not agree. The PAC's opinions will be overturned only if clearly erroneous. The PAC can also file suit in Cook County or Sangamon County against a public body that fails to respond to a subpoena for additional information or that refuses to comply with a binding opinion. 5 ILCS 140/11.5.

Penalties.

Circuit courts are authorized to impose civil penalties in the amount of \$2,500 to \$5,000 per violation against public bodies that violate FOIA willfully, intentionally, or in bad faith. 5 ILCS 140/11. If a requester prevails on a lawsuit involving a denial of a request under FOIA, the court shall award reasonable attorneys' fees to the requester. The granting of attorneys' fees under the former FOIA was merely discretionary.

The new FOIA will have wide-ranging effects — not just on journalists or members of the public requesting records or the FOIA officers in the public agencies who must respond to the requests, but also on almost anyone who works for or does work with a public body. A case in point: At the Chicago Headline Club's First Amendment Forum in November 2009, the Attorney General's Deputy Chief of Staff Kara Smith took questions relating to whether teachers' performance evaluations would be discoverable by parents "shopping" for the best educators, whether documents relating to police investigations that a court ordered did not have to be produced in a civil suit could then be sought pursuant to FOIA, and what protections were in place for bidders on government contracts to prevent a public body from disclosing its confidential price information and other trade secrets after the bid process is complete. The response to many of these types of questions was that the Attorney General's Office was taking these issues under advisement. The Attorney General's Office has added a regularly updated "Frequently Asked Questions" section on its website to assist with interpretative questions such as these and will also post binding and advisory opinions there. See www.illinoisattorneygeneral.gov/government/index.html.

Ultimately, Illinois' new FOIA is an important step toward improving transparency in Illinois government. But it will be important for practitioners who frequently utilize FOIA, who advise clients who contract with a public body, or who are litigating against a public body to become familiar with the new law and keep abreast of the early decisions issued by the PAC and the courts.