

Illinois Freedom of Information Act

[From the Office of the Attorney General for the State of Illinois website foia.ilattorneygeneral.net and current through August 22, 2011.]

Welcome to the 2011 Freedom of Information Officers' Annual Training Program.

The Freedom of Information Act ([PA 96-542] referred to in this training module as "FOIA") requires every public body to designate one or more officials or employees to act as its Freedom of Information Officer(s) ("FOIA Officer" or "FOIA Officers"). FOIA requires every person who is designated as a FOIA Officer to successfully complete this electronic training curriculum within 30 days after assuming the position, and also to complete an annual training program each year that he or she continues to serve as a FOIA officer. The Public Access Counselor in the Attorney General's Office is responsible for developing these training programs.

This program satisfies the requirements for both initial training for newly-designated FOIA Officers and annual refresher training for those who completed the initial training program in 2010. It is essential that even experienced FOIA Officers review the requirements of FOIA periodically. Accordingly, this program includes a review of the basic requirements of FOIA, and incorporates relevant developments since the original training program was instituted.

Throughout this program you will be prompted to answer questions concerning a short hypothetical situation. At any time during the program, you may click on the link to FOIA to help you answer the questions or better understand the problem. For purposes of these hypothetical questions, assume that you are the FOIA Officer for your unit of government and that you have been asked for assistance by another officer or employee.

You must complete each section of the FOIA Officers training program. The program will not allow you to jump forward through sections you have not viewed. However, you may go back through the program to review information you have already seen and then return to your previous point. Once you have completed the FOIA Officers training program by studying and answering the questions concerning each hypothetical, you will be able to print out a certificate of completion for your records. You do not need to submit a copy of your certificate of completion to the PAC.

No training program, no matter how complete, can cover every circumstance that a FOIA Officer may encounter. The goal of this program is to familiarize you with the general principles of FOIA, and to acquaint you with the statutory provisions that you will need to consult in carrying out your duties. For additional information, including "Frequently Asked Questions," the "Public Access Counselor Guide" and other helpful informational materials, please visit the Attorney General's website at www.illinoisattorneygeneral.gov/.

Introduction

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W. T. Barry, August 4, 1822.

Open and honest government is the cornerstone of American democracy. The Freedom of Information Act is intended to ensure that members of the public have access to information about their government and its decision-making process. As a public official and a FOIA Officer, you have a duty to assist the public in obtaining that information.

The Illinois General Assembly has declared, in the first paragraph of FOIA, that it is:

the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.

FOIA balances the public's right to know with individual privacy rights and legitimate governmental interests, and establishes procedures to facilitate the inspection and copying of records. It provides a definition of those documents and communications that are "public records" that generally must be disclosed, but also permits certain records to be withheld from inspection and copying. FOIA sets out the procedures that public bodies must follow in making records available and the procedures any person may use to gain access to public records for inspection and copying. Finally, it provides for both administrative and judicial review of any decision to withhold records from inspection and copying.

In 2009, the General Assembly enacted sweeping changes to the Freedom of Information Act (5 ILCS 140/1 et seq.). These changes, enacted as Public Act 96-542, effective January 1, 2010, are intended to ensure that the public enjoys the greatest access possible to information maintained by governmental entities, while still protecting personal privacy interests and confidential government information.

The amendments enacted by Public Act 96-542 addressed certain problems and developments in technology. The amendments also codified the Public Access Counselor ("PAC"), an office within the Attorney General's office dedicated to resolving complaints without litigation, and created non-judicial procedures for addressing issues concerning compliance with FOIA and the Open Meetings Act.

Public Bodies

FOIA requires all public bodies to make their public records available for inspection. As defined in Section 2 of FOIA, the term "public body" includes all legislative, executive, administrative, or advisory bodies of the State, State universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, and any subsidiary bodies of those public bodies, and also School Finance Authorities created under Article 1E of the School Code.

The term "public body" also includes individual governmental officers in the executive branch of State government and in units of local government and school districts.

Public Records

Section 2 of FOIA defines the term "public records" as follows:

"Public records" means 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 pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

The physical characteristics of records are not relevant in classifying them as "public records," because the definition expressly extends to all records regardless of their physical form or characteristics. Rather, the most important factors in determining whether a record is a "public record" are: (1) whether the record pertains to the transaction of public business of the public body; and (2) whether the record was prepared by or for, or was or is being used by, was received by, or is in the possession of or under the control of the public body.

Despite the reference to "information" in its title, FOIA is actually an open records act. FOIA does not require public officials or employees to answer questions or to create records to respond to a question.

Under section 1.2 of FOIA (5 ILCS 140/1.2), all public records are presumed to be open and accessible to the public:

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.

The principal mandate of the Act is set out in section 3 (5 ILCS 140/3):

(a) Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act....

(b) Subject to the fee provisions of Section 6 of this Act, each public body shall promptly provide, to any person who submits a request, a copy of any public record required to be disclosed by subsection (a) of this Section and shall certify such copy if so requested.

It is important to recognize that the right of inspection is a fundamental right guaranteed by FOIA. Although a person may obtain copies of records requested, he or she is not required to purchase copies of records in order to gain access to them.

In addition to the general definition of "public records," FOIA previously included a non-exhaustive listing of various classifications of records that were specifically considered to be "public records." That listing was deleted by Public Act 96-542. However, FOIA still includes the following references to classes of records:

- Records of funds. All records relating to the obligation, receipt, and use of public funds of the State, units of local government, and school districts are public records subject to inspection and copying by the public. (5 ILCS 140/2.5).
- Payrolls. Certified payroll records submitted to a public body under Section 5(a)(2) of the Prevailing Wage Act are public records subject to inspection and copying in accordance with the provisions of this Act; except that contractors' employees' addresses, telephone numbers, and social security numbers must be redacted by the public body prior to disclosure. (5 ILCS 140/2.10).
- Settlement agreements. 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 of this Act may be redacted. (5 ILCS 140/2.20).

FOIA Officers

Section 3.5 of FOIA requires each public body to designate one or more officials or employees to act as its Freedom of Information Officer(s). Whether to designate more than one FOIA Officer is a decision left to the discretion of the public body. In a large public body with numerous FOIA requests it may be advantageous to designate a FOIA Officer for each major department. On the other hand, in a small public body a single FOIA Officer may be sufficient.

It is the responsibility of the FOIA Officer to receive FOIA requests submitted to the public body, ensure that the public body responds to the requests in a timely fashion, and issue responses to FOIA requests. With respect to such requests, a FOIA Officer is required to:

- note the date the public body receives the written request;
- compute the day on which the period for response will expire and make a notation of that date on the written request;

- 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
- 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.

In addition, FOIA Officers are required to develop a list or categories of records that the public body will furnish immediately upon request. Examples of such records might include:

- minutes of the open meetings of the governing body;
- ordinances or resolutions that are maintained in printed form; and
- directories of public officers and employees.

Procedures for Requesting Records and Responding to Requests

FOIA provides that requests for public records must generally be made in writing, although a public body may, at its discretion, honor an oral request. If it is not possible to fill an oral request while the requesting party waits, however, the requester may be asked to put that request into writing.

A public body may make a form available for oral or written requests. However, it cannot require that a request be submitted on its form or require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or in conjunction with a request for a fee waiver.

Written requests may be submitted to a public body via personal delivery, mail, fax, or other means available to the public body (such as e-mail). A person can request one or more specified records or can request all records falling within a category. The request must, however, reasonably identify the records that have been requested. *Kenyon v. Garrels*, 184 Ill. App. 3d 28 (4th Dist. 1989). All requests for inspection or copying that are received by a public body shall immediately be forwarded to its FOIA Officer or his or her designee.

Time for Response

Upon receipt of a request, every public body is required to permit inspection or to provide copies of any requested records that are subject to disclosure under FOIA. FOIA sets out a timetable to which all public bodies must adhere when processing requests for public records. A public body is required either to comply with or deny the request "promptly." The term "promptly" is not defined in FOIA, but the term implies that a public body should respond to requests as quickly as practicable. Except as otherwise provided in FOIA, the public body must respond within 5 business days after receipt of the request. Failure to respond within this time period is considered a denial of the request.

A "business day" or "working day" means a day during the week, Monday through Friday. Saturdays, Sundays and state holidays are not business days and are not counted in computing the 5 business day time period.

Extension of Time for Response

In limited circumstances, FOIA provides that the period for response may be extended by the public body for up to 5 additional business days from the original due date for response. The time for response may be extended if:

- (i) the requested records are stored in whole or in part at other locations than the office having charge of the requested records;
- (ii) the request requires the collection of a substantial number of specified records;

- (iii) the request is couched in categorical terms and requires an extensive search for the records responsive to it;
- (iv) the requested records have not been located in the course of routine search and additional efforts are being made to locate them;
- (v) the requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are exempt from disclosure or should be disclosed only with appropriate deletions;
- (vi) the request for records cannot be complied with by the public body within 5 business days without unduly burdening or interfering with the operations of the public body; or
- (vii) there is a need for consultation, which shall be conducted with all practicable speed, with another public body or among two or more components of a public body having a substantial interest in the determination or in the subject matter of the request.

When an extension of time for response is taken for any of these reasons, the public body must, within 5 business days after receipt of the original request, notify the person making the request and specify the reason for the extension and the date when a response will be forthcoming. If the public body does not respond within the extended period, the request will be considered denied.

Agreement to Extend

A person making a request for records and the public body may agree in writing to extend the time for compliance for a period to be determined by the parties. If the requester and the public body agree to extend the period for production, a failure by the public body to comply with the statutory deadlines is not treated as a denial of the request for the records.

Agreements to extend may be particularly helpful when a public body receives a request for a large number of categorical records. In many cases, the requester may be willing to waive the 5 or 10 business day response periods in order to obtain the documents, especially if the alternative would be a denial based upon the public body deeming the request to be unduly burdensome.

The time periods for complying with or denying a FOIA request do not apply to requests for records made for a commercial purpose. Requests made for commercial purposes are subject to specific procedures that will be discussed at a later point in this training.

Failure to Respond

If a public body fails to respond to a request within 5 business days, or within an extension of the period for response if one is properly taken, but then subsequently provides the requester with copies of the requested records, that public body may not impose a fee for copying those documents. Further, the public body may not treat the request as being unduly burdensome under FOIA.

Inspection or Copying

The right to inspect public records is a fundamental right guaranteed by FOIA. Although a person may obtain copies of records, a public body may not require a requester to purchase copies of records in order to gain access to them. Further, if a public body determines to redact portions of records which the requester seeks to inspect under one of the statutory exemptions, the public body cannot charge the requester for the redacted copies it creates in order to satisfy the request to inspect.

When a person requests copies of records, it is the obligation of a public body to provide the records in the format in which they are ordinarily maintained, if so requested; a public body may not elect to furnish

records in a different format. *American Federation of State County & Municipal Employees, AFL-CIO v. County of Cook*, 136 Ill. 2d 334, 345-47 (1990). For example, if a person requests paper copies of records that are maintained in a paper format, the public body cannot comply with the request by unilaterally deciding to furnish the records in an electronic format.

Electronically maintained records present additional issues because of the many formats and programs that public bodies may use. When a person requests a copy of a record maintained in an electronic format, the public body must furnish it in the electronic format specified by the requester, if feasible to do so. If it is not feasible to furnish the public records in the specified electronic format, then the public body may furnish it in the format in which it is maintained by the public body, or in paper format at the option of the requester.

For these purposes, it is feasible for a public body to furnish records in a specified format if it has the capability to do so with the equipment and programs at its disposal. Thus, if a public body maintains records in a format other than that which a requester has specified, but can convert those records electronically to the specified format with equipment that the public body currently has, it must do so. A public body is not, however, required to obtain new programs or equipment solely to comply with a request.

Redacting Exempt Information

If a public body receives a request for access to a record that contains information that is exempt from disclosure but also contains information that is not exempt, the public body must separate the exempt from the nonexempt information and disclose the nonexempt information. *Bowie v. Evanston Community Consolidated School District*, 128 Ill. 2d 373, 380 (1989). If copies of the records are requested in paper format, redaction of exempt information may be accomplished by blacking out the information or by similar means. If such information is maintained only on computer tapes or disks, however, the public body may be required to prepare a computer program that will segregate the information; this is not considered the creation of a new record, for purposes of FOIA. *Hamer v. Lentz*, 132 Ill. 2d 49, 56 (1989).

When a person has requested to inspect records containing both exempt and nonexempt information, rather than to obtain copies, the only practical method of complying may be to prepare redacted copies of the documents for inspection. In such circumstances, the public body may not require the requester to pay a copying fee in order to inspect the redacted records.

Unduly Burdensome Categorical Requests

A public body must comply with requests for all records falling within a specific category unless compliance with the request would be "unduly burdensome" for the public body. Before declining to comply with a request as unduly burdensome, the public body must extend to the person making the request an opportunity to reduce the request to manageable proportions. If the public body determines that the burden on the public body outweighs the public interest in obtaining the information, and that there is no way to narrow the request, it must notify the requester in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance would so burden the operations of the public body. Such a response shall be treated as a denial of the request for information.

Repeated requests from the same person for public records that are unchanged or identical to records that have previously been disclosed or properly denied under FOIA shall be deemed unduly burdensome. Repeated requests for the same records but in different formats may also be considered unduly burdensome, if the public body has properly responded to the previous requests. See *AFSCME v. County of Cook*, 136 Ill. 2d 334 (1990).

Exemptions to the Duty to Disclose

To enable public bodies to maintain certain types of sensitive public records confidentially, FOIA provides a number of exceptions to the requirement that public records be made available for public inspection.

Public bodies should always refer to the specific text of the pertinent exception(s) in determining whether a record, or certain information contained in a record, is exempted from disclosure. A record that contains both exempt information and nonexempt information is not exempt from disclosure. Although the public body may elect to redact the exempt information, it must disclose the nonexempt information.

It is important to bear in mind that the exceptions to disclosure are to be read narrowly. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 416 (2006). As section 1 of FOIA states: "Restrictions on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people." Illinois courts have repeatedly acknowledged this principle: "Thus, when a public body receives a proper request for information, it must comply with that request for information unless one of the narrow statutory exemptions ... applies." *Illinois Education Association v. Illinois State Board of Education*, 204 Ill. 2d 456 (2003).

Information Exempted by Federal or State Laws

The first exemption, contained in subsection 7(1)(a) of FOIA, provides that a public body may withhold from disclosure information that a federal or State law, or rules and regulations implementing a federal or State law, specifically prohibits disclosing. This exemption does not apply when a statute is ambiguous or silent concerning records disclosure. However, where the plain language of a statute demonstrates that public access to the records was not intended, the statute does not need to specifically reference the provisions of FOIA or otherwise contain an explicit prohibition against public disclosure for the exemption to apply. *Kibort v. Westrom*, 371 Ill. App. 3d 247 (2d Dist. 2007).

Conversely, where another statute or administrative regulation specifically requires that information be disclosed to a person, FOIA does not permit that information to be withheld. *Etten v. Lane*, 138 Ill. App. 3d 439 (5th Dist. 1985).

Statutory Exemptions

Section 7.5 of FOIA consolidates references to many State statutes that exempt records or information from disclosure. For example, Section 7.5(b) cites to the Library Records Confidentiality Act, which prohibits the disclosure of library circulation and order records identifying library users with specific materials. To the extent that these statutes specifically limit or prohibit the disclosure of records, they are treated as exemptions under FOIA. The extent to which records or information are exempted from disclosure depends upon the specific language of the statute.

You may review section 7.5 by clicking [Here](#).

The list of State statutes in Section 7.5 is not exhaustive. Consequently, there may be other exemption statutes applicable to your public body that are not referenced in Section 7.5. The public body must review the text of such a statute carefully before citing it as the basis for denying a request under FOIA.

In addition, federal statutes sometimes impose restrictions on the disclosure of information that are applicable to State or local public bodies. An example of a federal statute that prohibits disclosure is the Health Insurance Portability Accountability Act of 1996 (HIPAA) and its associated Privacy Rule. The Privacy Rule generally prohibits the release to third parties of all "individually identifiable health information" ("protected health information") held by an entity that is subject to HIPAA.

The remaining exemptions can be categorized into the following six categories:

- Personal Privacy

- Law Enforcement and Security

Educational Matters

Legal Proceedings

Internal Operations

Business and Finance

The exemptions in each of these categories will be discussed in the following sections.

Exemptions - Personal Privacy

Section 7(1)(b) of FOIA exempts from disclosure "private information, unless disclosure is required by another provision of this Act, a State or federal law or a court order". Under section 2(c-5), "private information" includes:

"* * * 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."

In general, this exemption protects from disclosure information that is readily identifiable to a single individual, whether a government employee or a person who otherwise has contact with a governmental agency. Underlying this exemption is the recognition that disclosure of these unique identifiers is generally not necessary to enable the public to monitor or assess the workings of government. On the other hand, disclosure of this information could lead to untoward results, such as harassment or identity theft.

Note that home addresses and personal license plate numbers are exempt from disclosure unless the address or plate number cannot be matched to an individual, or another law specifically permits disclosure. Thus, disclosure of all street addresses within a certain area (without the names of residents) would generally not be prohibited. Disclosure of a specific address together with the name of the resident, however, would be prohibited unless another statute permits disclosure.

Personal Privacy - Some Specific Examples

Since January 1, 2010, the effective date of Public Act 96-542, the Public Access Counselor has reviewed a number of issues regarding what information constitutes "private information," for purposes of Section 7(1)(b). Some specific examples and conclusions follow:

Publicly-issued cellular telephone numbers: In general, telephone numbers for cellular telephones that are issued to public employees by a public body are not exempt "private information," even if the employee is required to carry and answer the telephone after working hours.

Zip codes: Zip codes may or may not be exempt "private information," depending upon the circumstances. For example, when a requester sought the zip code of residences together with the names of public employees, the Public Access Counselor determined that the zip code could be withheld because cross-referencing the zip code with the name of an employee through other commonly available resources such as a telephone directory, property assessments or the Internet could ultimately lead to the disclosure of the home address of the employee.

Certain election documents: Although home addresses are ordinarily exempt from disclosure if the address can be matched with a residence, certain documents containing that information are subject to disclosure pursuant to specific provisions of the Election Code.

Exemptions - Unwarranted Invasion of Personal Privacy

FOIA's underlying policy is to afford free and open examination of public records. FOIA also recognizes a public interest in privacy, however, acknowledging that personal privacy is of legitimate concern and entitled to protection from invasion by unwarranted public scrutiny.

Section 7(1)(c) of FOIA exempts from disclosure personal information contained in public records if disclosing that information would constitute a clearly unwarranted invasion of personal privacy for the person or persons the information pertains to. Personal information has been defined by the courts as information "that is private and confidential." *Chicago Tribune v. Board of Education of the City of Chicago*, 332 Ill. App. 3d 60 (1st Dist. 2002). For purposes of subsection 7(1)(c), 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."

In determining whether or not the disclosure of personal information would constitute a clearly unwarranted invasion of personal privacy, the public's interest in disclosure must be balanced against the degree of invasion of privacy. FOIA contemplates a case-by-case analysis that is necessarily based upon the specific facts underlying a request for disclosure. A few examples of the types of information that have been approved for redaction under 7(1)(c) include: dates of birth; names and identifying information of victims in police reports; and graphic photos of the deceased's body in an autopsy report.

Information such as medical records and personal financial information that might otherwise cause an unwarranted invasion of personal privacy is already exempted under the definition of "private information." Section 7(1)(c) applies to other information of a personal nature that is not "private information."

Before a public body can deny a request for disclosure based on subsection 7(1)(c), however, the public body must submit the proposed denial to Public Access Counselor for review and approval. The procedures for notifying the PAC will be discussed in a later section of this training.

Exemptions - Law Enforcement and Security

Another group of exemptions covers records related to investigations, law enforcement, corrections and security issues.

Under subsection 7(1)(d) of FOIA, records in the possession of any public body created in the course of administrative enforcement proceedings, or created by any law enforcement or correctional agency for law enforcement purposes, are exempt from disclosure, but only to the extent that disclosure would:

1. interfere with pending or actually and reasonably contemplated law enforcement or correctional agency that is the recipient of the request;
2. interfere with active administrative enforcement proceedings conducted by the public body that is the recipient of the request;
3. create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing;
4. unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies; except that the identities of witnesses to traffic accidents, traffic accident reports, and rescue reports shall be provided by agencies of local government, except when disclosure would interfere with an active criminal investigation conducted by the agency that is the recipient of the request;
5. disclose unique or specialized investigative techniques other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation or investigation

of incidents of crime or misconduct, and disclosure would result in demonstrable harm to the agency or public body that is the recipient of the request;

6. endanger the life or physical safety of law enforcement personnel or any other person; or
7. obstruct an ongoing criminal investigation by the agency that is the recipient of the request.

Guidelines Regarding Law Enforcement Records

The following are general guidelines for use of the most common law enforcement exemptions under FOIA. These guidelines reflect determinations made by the Public Access Counselor in the course of addressing specific issues raised in pre-authorization requests and requests for review. Because the Public Access Counselor's Office assesses each pre-authorization request and request for review on a case-by-case basis, however, the guidelines may not apply in each and every circumstance.

Further, these guidelines do not relieve a public body of its obligation to seek advance authorization from the Public Access Counselor before asserting Section 7(1)(c) to withhold or redact information.

Section 7(1)(c) (Unwarranted invasion personal privacy):

- Dates of birth may ordinarily be redacted under Section 7(1)(c). (We encourage public bodies to seek to obtain the requester's permission to withhold dates of birth. With the requester's permission to do so, pre-authorization by the PAC is no longer required and the FOIA response may be expedited.)
- Victim's names may be ordinarily redacted.
- In appropriate circumstances, graphic descriptions of alleged offenses and graphic photographs may be withheld. However, requests to withhold general descriptions of injuries and hospital and medical services names are not typically approved.
- Third-party names may ordinarily be withheld under Section 7(1)(c). These redactions include names of both non-arrested suspects and persons incidentally related to reports, such as relatives, property owners, etc.
- Reports in which there are no arrests and where disclosure would constitute an unwarranted invasion of personal privacy, such as in domestic incidents, may be approved to be withheld in full.

Exemption 7(1)(a) (Records exempted from disclosure by other laws):

- Juvenile Court Act of 1987
- Reports in which a minor was arrested, charged or investigated must be withheld in full under the Juvenile Court Act.
- Reports in which minors are the victims of sex crimes or are incidentally mentioned are not exempt, but are subject to redaction. A public body is required to withhold identifying information regarding an alleged minor victim of a sex crime.
- Illinois Supreme Court Rule 415(a)

The discovery process and FOIA are not mutually exclusive. The fact that a requester may be able to obtain certain documents through judicial discovery procedures does not preclude the requester from seeking to obtain the same documents under FOIA. For example, if a State's Attorney obtains arrest reports from a police department as part of the ordinary preparation for prosecution of an offense, the documents are also FOIAable, subject to redactions under Section 7(1)(c) and Section 7(1)(d)(iv). To the extent that a public body first obtains documents from a litigant or party through discovery, however, Supreme Court Rule 415(a) may prohibit the public body from releasing the documents under FOIA.

Section 7(1)(b) ("Private Information"):

Private information as defined in Section 2(c-5) may be withheld under Section 7(1)(b) of FOIA. Private information includes "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."

Chronologically Maintained Arrest and Criminal History Information:

Certain law enforcement records are required to be disclosed.

Section 2.15 of FOIA requires State and local criminal justice agencies to furnish chronologically maintained arrest and criminal history information as soon as practical, but in no event later than 72 hours after the arrest. Under section 2.15, the information that must be disclosed includes:

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.

However, information described in items (iii) through (vi) above may be withheld if the public body determines that disclosure would:

- (i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement agency;
- (ii) endanger the life or physical safety of law enforcement or correctional personnel or any other person; or
- (iii) compromise the security of any correctional facility.

Court Records:

Section 2.15 of FOIA also provides that the following criminal history records are 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... [unless the public body determines that disclosure would endanger the life or physical safety of law enforcement personnel or any other person].

Exemptions - Security Issues Relating to Facilities

Several exemptions address security issues relating to facilities.

For example, Section 7(1)(k) exempts from disclosure architects' plans, engineers' technical submissions, and other technical construction documents for both publicly and privately funded projects, including water treatment facilities, airport facilities, sports stadiums, convention centers, and all government owned, operated or occupied buildings, but only to the extent that disclosure would compromise security.

Subsection 7(1)(v) exempts from disclosure vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community. However, such records are only exempt to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public. Examples of information that could be exempt under this provision are things such as details pertaining to the mobilization or deployment of personnel or equipment, the operation of communication systems or protocols, or tactical operations.

Subsection 7(1)(x) exempts maps and other records regarding the location or security of generation, transmission, distribution, storage, gathering, treatment, or switching facilities owned by a utility or a power generator, or the Illinois Power Agency.

Exemptions - Security of Data Processing Operations

There are also exemptions that specifically protect from disclosure information that could compromise the security of data processing operations.

Section 7(1)(o) exempts administrative or technical information associated with automated data processing operations, including but not limited to software, operating protocols, computer program abstracts, file layouts, source listings, object modules, load modules, user guides, documentation pertaining to all logical and physical design of computerized systems, employee manuals, and any other information the disclosure of which would jeopardize the security of the system or its data or the security of exempted materials.

Section 7(1)(u) exempts information that would disclose or might lead to the disclosure of secret or confidential information, codes, algorithms, programs, or private keys intended to be used to create electronic or digital signatures under the Electronic Commerce Security Act.

Exemptions - Educational Matters

Section 7(1)(j) of FOIA exempts from disclosure four categories of records relating to educational matters. They are:

1. test questions, scoring keys and other examination data used to administer an academic examination;
2. information received by a primary or secondary school, college, or university under its procedures for the evaluation of faculty members by their academic peers;
3. information concerning a school or university's adjudication of student disciplinary cases, but only to the extent that disclosure would unavoidably reveal the identity of the student; and
4. course materials or research materials used by faculty members.

Exemptions - Legal Proceedings

Certain records related to litigation or other legal procedures are also exempt from disclosure.

Section 7(1)(m) exempts from disclosure communications between a public body and an attorney or auditor representing that body that would not be subject to discovery in litigation, as well as material compiled for a public body in anticipation of legal proceedings and at the request of an attorney and material compiled regarding internal audits of public bodies. As used in Section 7(1)(n), "discovery" means the process by which the parties to litigation obtain documents relating to the case.

As a general principle, communications that fall within the attorney-client privilege are not required to be produced in discovery. A public body may only invoke this exemption to deny disclosure when a reasonable expectation of confidentiality exists. With regard to whether a communication between an attorney and a public body is exempt from discovery, the burden is on the public body to establish that its refusal to release the information falls within the attorney-client privilege by providing a detailed justification for its claim of exemption, addressing the requested documents specifically and in a manner that allows for adversary testing. *IEA v. Illinois State Board of Education*, 204 Ill. 2d 456, 466 (2003).

Because of the complex analysis required, a public body should always confer with its legal representative(s) to determine whether specific communications fall within the attorney-client privilege.

Records of payments made to a law firm representing a public body in pending litigation, where the records contain no legal advice, and do not directly or indirectly reveal the substance of any attorney-client confidence, are not exempt from disclosure under Section 7(1)(m). *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 203-204 (1st Dist. 1997), appeal denied, 178 Ill. 2d 595.

It has also been held that a public body may not withhold records relating to site selection for a landfill on the basis that the acquisition of property selected may require condemnation. The mere possibility that litigation will be required is not sufficient to exempt records relating to pre-acquisition analysis. *Osran v. Bus*, 226 Ill. App. 3d 704 (2nd Dist. 1992).

Exemptions - Internal Operations (Deliberative Process)

Another category of exemptions pertains to documents related to the internal operations of public bodies.

Section 7(1)(f) exempts from disclosure preliminary drafts of memoranda in which opinions or policies are formulated. This exemption protects pre-decisional deliberative communications that are part of an agency's decision-making process. *Harwood v. McDonough*, 344 Ill. App. 3d 242 (1st Dist. 2003). The exemption is evidence of a public policy favoring the confidentiality of such communications. In claiming that records are exempt under Section 7(1)(f), the burden is on the public body to establish, as a matter of fact, that the records are preliminary rather than final.

Before a public body can deny a request for disclosure based on subsection 7(1)(f), the public body must submit the proposed denial to the Public Access Counselor for review and approval. The procedures for notifying the PAC will be discussed in a later section of this training.

Exemptions - Internal Operations (Other)

Other documents concerning the internal operations of public bodies that are exempted from disclosure include:

Minutes of meetings of public bodies that were properly closed to the public as provided in the Open Meetings Act until the public body makes the minutes available to the public under Section 2.06 of the Open Meetings Act. (Section 7(1)(l))

Records relating to a public body's adjudication of employee grievances or disciplinary cases, except for the final outcome of cases in which discipline is imposed. For purposes of Section 7(1)(n), an adjudication is "[t]he legal process of resolving a dispute; the process of judicially deciding a case." *Black's Law Dictionary* at 47 (9th ed. 2009). An adjudicatory disciplinary proceedings must have been commenced in order for the exemption in Section 7(1)(n) to apply.

Records relating to collective negotiating matters between public bodies and their employees or representatives, except that any final contract or agreement shall be subject to inspection and copying. (Section 7(1)(p))

Test questions, scoring keys, and other examination data used to determine the qualifications of an applicant for a license or employment. (Section 7(1)(q))

Exemptions - Business and Finance

FOIA contains several exemptions that are designed to protect the business or financial interests of private persons and taxpayers. The following categories of records are generally exempt from disclosure:

Documents that contain information regarding contracts or agreements that, if disclosed, would frustrate procurement procedures or give an advantage to a person seeking to obtain a government contract - but these documents are only exempt until a contract award or final selection is made. (Section 7(1)(h))

Valuable formulae, computer geographic systems, designs, drawings and research data obtained or produced by any public body, when disclosure could reasonably be expected to produce private gain or public loss. However, the exemption for "computer geographic systems" does not apply to a request made by news media when the only purpose of the request is to access and disseminate information regarding the health, safety, welfare, or legal rights of the general public, and the requested information is not otherwise exempt under FOIA. (Section 7(1)(i))

Records, documents and information related to real estate purchases by a public body are exempt until negotiations for the purchase are terminated or completed; and records, documents and information relating to the sale of real estate by a public body are exempt until a sale is consummated. (Section 7(1)(s))

Exemptions - Trade Secrets and Commercial or Financial Information

Under certain circumstances, FOIA also protects some records and documents furnished to public bodies by third parties. Section 7(1)(g) is intended to protect information which is proprietary property of a private party and which is submitted to the government under an express or implied promise that it will be kept confidential. Section 7(1)(g) exempts from disclosure:

Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or commercial or financial information are furnished under a claim that they are proprietary, privileged or confidential, and that disclosure of the trade secrets or commercial or financial information would cause competitive harm to the person or business, and only insofar as the claim directly applies to the records requested.

Section 7(1)(g) also exempts, with certain exceptions, trade secrets and commercial or financial information obtained by a public body, including a public pension fund, from a private equity fund or a privately held company within the investment portfolio of a private equity fund as a result of either investing or evaluating a potential investment of public funds in a private equity fund.

Requests for a Commercial Purpose

Under section 2(c-10), "'commercial purpose' means 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. For purposes of this definition, requests made by news media and non-profit, scientific, or academic organizations shall not be considered to be made for a 'commercial purpose' when the principal purpose of the request is (i) to 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 academic, scientific, or public research or education."

The general time periods for compliance or denial of a request to inspect or copy records do not apply to requests for records made for a commercial purpose. Such requests are subject to new section 3.1 of the Act (5 ILCS 140/3.1). Instead of the 5 business day period specified for response to non-commercial requests, a

public body must respond to a request for records to be used for a commercial purpose within 21 working days after receipt. A public body may:

- provide the records;
- provide the requester with an estimate of when the requested records will be furnished and an estimate of the fees to be charged, which the public body may require be paid in full before copying;
- deny the request if the records are exempted from disclosure; or
- advise the requester that the request is unduly burdensome and must be narrowed.

Unless the records are exempt from disclosure, the public body must comply with the request within a reasonable period considering the size and complexity of the request, and giving priority to records requested for non-commercial purposes. All exemptions applicable to non-commercial requests also apply to requests made for a commercial purpose.

At the time of the request, a public body may ask a requester whether the request is for a commercial purpose. 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, if requested to do so by the public body.

Copying Fees - Paper Copies

The fee for black and white, letter or legal sized copies may not exceed 15 cents per page. However, no fees may be charged for the first 50 pages of black and white, letter or legal sized copies provided to a requester.

If a public body provides copies in color or in a size other than letter or legal size, the public body may charge its actual cost for reproducing the records.

In calculating its actual cost for reproducing records or for the use of the equipment of the public body to reproduce records, a public body may not include the costs of any search for and review of the records, or any other personnel costs associated with reproducing the records.

The imposition of a fee in excess of the amounts permitted under FOIA constitutes a denial of the request for purposes of judicial review.

Copying Fees - Electronic Records

If a person requests a copy of a record that is maintained in an electronic format, the public body must furnish it in the electronic format specified by the requester, if feasible. If it is not feasible to furnish the public records in the specified electronic format, then the public body shall furnish it in either the format in which it is maintained by the public body, or in a paper format, at the option of the requester.

When a public body responds to a request for records maintained in an electronic format, the public body may charge the requester for the actual cost of purchasing the recording medium, whether disc, diskette, tape, or other medium. A public body may not charge the requester for the costs of any search for and review of the records or other personnel costs associated with reproducing the records.

Except to the extent that another statute expressly provides, statutory fees applicable to copies of public records when furnished in a paper format are not applicable to those records when furnished in an electronic format. In other words, the public body cannot impose a per page fee for the number of pages of records included in the electronic record.

The imposition of a fee in excess of the amounts permitted under FOIA constitutes a denial of the request for purposes of judicial review.

Fee Waivers

If a person requesting documents states the specific purpose for the request and indicates that a waiver or reduction of the fee is in the public interest, the public body shall determine whether a reduction or waiver is appropriate. Waiver or reduction of the fee is in the public interest if the principal purpose of the request is to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public, and is not for the principal purpose of personal or commercial benefit. In determining the amount of the waiver or reduction, the public body may take into consideration the amount of materials requested and the cost of copying them.

Denial of Requests

Each public body denying a request for public records, whether in whole or in part, must notify the requester in writing of the decision to deny the request, the reasons for the denial, including a detailed factual basis for the application of any exemption claimed, and the names and titles or positions of each person responsible for the denial.

Each notice of denial by a public body shall also inform the requester of the right to review by the Public Access Counselor and shall provide the address and phone number for the Public Access Counselor. Each notice of denial shall also inform the requester of his or her right to seek judicial review.

When a public body denies a request for public records on the basis that the records are exempt under Section 7 of FOIA, the notice of denial must specify the exemption claimed to authorize the denial and the specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority (if any).

The Public Access Counselor

Public Act 96-542 codifies the Office of Public Access Counselor within the Office of the Attorney General. The primary function of the PAC is to resolve disputes involving possible violations of FOIA or the Open Meetings Act in response to requests for review by an aggrieved party, by mediating or otherwise informally resolving the dispute, or by issuing a binding opinion.

The PAC may also issue advisory (non-binding) opinions with respect to FOIA or the Open Meetings Act either in response to a request for review or otherwise, and may respond to informal inquiries made by the public and public bodies.

Review by the PAC is an alternative to litigation. Accordingly, the PAC may not issue a binding opinion concerning a matter that is in litigation.

Procedures for Review

A person whose request to inspect or copy a public record has been denied in whole or in part by a public body may file a request for review by the PAC not later than 60 days after the date of the final denial. The request for review must be in writing, must be signed by the requester, and must include:

- (i) a copy of the request for access to records, and
- (ii) any responses from the public body.

Unless the PAC determines from an initial review that a complaint is unfounded, the PAC shall forward a copy of the request for review to the public body within 7 working days after receipt and shall specify the records or other documents that the public body shall furnish to facilitate the review. Within 7 working days after receipt of the request for review, the public body shall provide copies of the records requested to the PAC.

If a public body fails to furnish the specified records to the PAC within 7 working days, or if otherwise necessary, the Attorney General may issue a subpoena to any person or public body having knowledge of or records pertaining to a request for review of a denial of access to records under FOIA.

Together with copies of the records requested, the public body may, but is not required to, answer the allegations of the request for review. The answer may take the form of a letter, brief, or memorandum.

If the public body elects to answer the allegations, the PAC will forward a copy of the answer to the person submitting the request for review, with any alleged confidential information to which the request pertains redacted from the copy. The requester may, but is not required to, respond in writing to the answer within 7 working days, and if he or she responds, to provide a copy of the response to the public body for its review.

PAC Review

Upon receipt of the records and answers, if any, the PAC may elect to address the matter without the issuance of a binding opinion.

Otherwise, the PAC will examine the issues and the documents, will make findings of fact and conclusions of law, and will issue to the requester and the public body an opinion in response to the request for review. The opinion will be issued within 60 days after receipt of the request for review, although the PAC may extend the time by no more than 21 business days by notifying the requester and the public body of the reasons for the extension. The opinion shall be binding upon both the requester and the public body, subject to judicial review.

A public body that discloses records in accordance with an opinion of the Attorney General is immune from all civil liabilities arising out of the disclosure, and shall not be liable for penalties for non-compliance under FOIA.

Binding Opinions

If the PAC issues a binding opinion concluding that a public body has violated FOIA, the public body must either comply immediately with the directive of the opinion or initiate judicial review under the Administrative Review Law. If the opinion concludes that no violation of FOIA has occurred, then the requester may initiate judicial review. An action to review a binding opinion must be initiated within 35 days from the date that the requester or the public body, as the case may be, receives a copy of the opinion.

For purposes of judicial review, a binding opinion issued by the Attorney General is considered a final decision of an administrative agency. Review by the courts under the Administrative Review Law is limited to questions of law and fact presented by the record before the court (in this case the documents and records which the PAC considered in reaching a determination), and no new or additional evidence is heard by the court.

Review of Intent to Deny

As was mentioned earlier in this training, a public body that receives a request for records and asserts that the records are exempt under either Section 7(1)(c) [unwarranted invasion of personal privacy] or 7(1)(f) [deliberative process] of FOIA, must, within the time periods provided for responding to a request, provide written notice to the requester and to the PAC of its intent to deny the request in whole or in part. The notice shall include:

- a copy of the request for access to records;
- the proposed response from the public body; and
- a detailed summary of the public body's basis for asserting the exemption.

Within 5 working days after receipt of the notice of intent to deny, the PAC shall determine whether further inquiry is warranted, and shall notify both the public body and the requester if further review will be undertaken. The procedures governing the review of denials, including the production of documents, shall also be applicable to the review of an intent to deny submitted by a public body. Times for response or compliance by the public body under Section 3 of FOIA are tolled until the PAC concludes his or her inquiry.

Judicial Review of Denials

When a FOIA request is denied in whole or in part by a public body, the requester is not required to seek review by the PAC. Instead, the requester may file an action in circuit court seeking a judicial determination that he or she is entitled to access the records. Unlike the administrative review of a PAC opinion, the court is not limited to reviewing an administrative record but may hear testimony and review evidence.

The court has jurisdiction to enjoin a public body from withholding public records and to compel the public body to produce public records it has improperly withheld. The public body has the burden of proving that records are exempt from disclosure by clear and convincing evidence. If a person seeking the right to inspect or receive a copy of a public record substantially prevails in a judicial enforcement proceeding, the court shall award the requester reasonable attorneys' fees and costs. In determining what amount of attorneys' fees is reasonable, the court will consider the degree to which the relief obtained relates to the relief sought.

Additionally, if the court determines that a public body willfully and intentionally failed to comply with FOIA, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than \$2,500 nor more than \$5,000 for each occurrence. In assessing the civil penalty, the court shall consider in aggravation or mitigation the budget of the public body and whether the public body has previously been assessed penalties for violations of FOIA.

 End of material from the Office of the Attorney General of the State of Illinois

Revisions to FOIA (PA 96-542)

PA 97-0579

1. Eliminates the process requiring public bodies to seek pre-approval from the Public Access Counselor before denying a request based on the unwarranted invasion of personal privacy exemption and the deliberative process exemption.
2. Authorizes a public body to charge a commercial records requester for the actual cost of retrieving and transporting public records from an off-site storage facility when those records are maintained by a third-party storage company that is under contract with that public body.
3. Establishes procedures for public bodies allow additional time to respond to requests from recurrent requesters who submit (i) a minimum of 50 requests for records in a 12-month period, (ii) a minimum of 15 requests for records within a 30-day period, or (iii) a minimum of 7 requests for records within a 7-day period.
4. Authorizes a public body to charge a \$10 fee for each hour spent by personnel in searching for and retrieving records in response to commercial requests after the first 8 hours.

Effective August 2011