

Informing Illinois Newsletter - January 2015 Edition

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HB 3796 FOIA and Voluminous Requests

On December 3, 2014, the Illinois Senate joined the Illinois House of Representatives in voting to override then-Governor Pat Quinn's veto of HB 3796. These votes clear the way for public bodies to recover fees incurred in responding to "voluminous requests," a new designation that has been added to the Illinois Freedom of Information Act (FOIA) by HB 3796.

Governor Quinn had vetoed the bill on grounds that it "reduces government transparency [and] . . . make[s] it more difficult for citizens to obtain a large volume of records." Many public bodies, however, are inundated with single requests for information that encompass various records.

The new amendments to FOIA will also ease the burden of complying with these requests. HB 3796 increases the response time from 5 days to 10 days for "voluminous" FOIA requests after the entity from which the documents are sought has notified the requestor that it is treating the request as such. It also allows public bodies to charge for electronic data provided to requestors and to require payment before the copies are made.

A voluminous request is defined as a request that:

Includes more than 5 individual request for more than 5 different categories or records or combination of individual requests that total more than five different categories of record in a period of 20 business days;

or

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.

A voluminous request does not pertain to requests made by the news media or nonprofit, scientific or academic organizations.

Pursuant to 5 ILCS 140/8.5, a public body may direct the FOIA requestor to information that is available on the entity's website in response to a request instead of providing the requested documents. In doing this, the requestor must be informed that such information is available online and pointed to the website where the record can reasonably be accessed. If the requestor cannot access the document, he or she must submit another FOIA request setting forth why the document could not be accessed online. The public body must respond and make the record available for inspection or copying.

To invoke the statute's provision on voluminous requests, the public body must notify the requestor, offer an opportunity to amend the request within five business days, and advise that it is being treated as a voluminous request.

Fees may be imposed for voluminous requests, but the public entity must provide the requestor with an accounting of all fees, costs and personnel hours in connection with the request. The statute outlines the fees that can be charged for documents that are not in PDF format. 5 ILCS 140/6(a-5).

Want to Refer a FOIA Requester to Your Website? Here Are Three Best Practices.

It's a common scenario: An Illinois public body receives a Freedom of Information Act (FOIA) request (Note: This article deals only with the Illinois FOIA, 5 ILCS 140/ *et seq.*) for all of the minutes for board meetings at which a certain topic was discussed. In an effort to promote transparency and accessibility, the public body has already posted all of its board meeting minutes on its website. How, then, should it respond to the FOIA request? Does it have an obligation to search through all of the minutes to find the ones that are responsive to the request?

Thanks to a new section of FOIA and a recent public access counselor (PAC) opinion of the Illinois attorney general, the answer is no longer clear. Prior to December 2, 2014, a public body had to conduct a "reasonable search" of the minutes itself and provide copies of the responsive minutes to the requester even if all of the minutes were already available on its website. As of December 2, 2014, [Section 8.5 of FOIA](#) provides that a public body may direct a requester to records on its website instead of providing copies. To invoke Section 8.5, the public body must notify the requester that the records are available on its website and direct the requester to the website. The public body is obligated to provide a copy of the records only when the requester is unable to reasonably access them online and re-submits his or her request accordingly.

However, it is probably still necessary for the public body to perform a reasonable search of the records on the website to locate the responsive ones before directing the requester there. Section 8.5 seems to bear only on a public body's responsibility to *provide* copies of responsive records. It does not bear on a public body's responsibility to locate those responsive records in the first place.

A recent PAC opinion, PAC 15-001 (Jan. 15, 2015), addressed a public body's duty to perform a "reasonable search" for responsive records. The Illinois Department of Professional and Financial Regulation (IDPFR) received a FOIA request in September 2014 for the minutes of all State Board of Professional Engineers meetings at which a particular complaint was discussed. Rather than provide the requester with the minutes, the IDPFR instructed the requester that the board's meeting minutes were available on its website. The attorney general found that the IDPFR violated FOIA because it failed to conduct a "reasonable search" for the minutes itself.

The FOIA request in PAC 15-001 pre-dates Section 8.5, so the PAC did not factor Section 8.5 into its opinion. But the outcome would likely be the same today. Every FOIA request contains two implied requests: the requester asks the public body to locate a given record and, once the record is located, to copy or otherwise make it available to him or her. Section 8.5, strictly construed, addresses only the second implied request. It relieves a public body of the burden of copying the requested record, but it does not appear to relieve the public body of its duty to conduct a reasonable search for the record in the first place.

A search for a few particular records can be burdensome, not to mention frustrating, when the general category of records is already available online. However, it is important to conduct a search, if only to determine whether responsive records exist at all. The requester in PAC 15-001 asked for all of the board meeting minutes reflecting the board's discussions of a certain complaint. In that case, the board *had* discussed that complaint at some meetings. But a requester could just as easily ask for minutes reflecting discussions of a topic that a board never discussed. The public body would have no records responsive to that request for the very good reason that no minutes reflecting discussions of that topic would exist. A generic reply from the public body stating that responsive records were available on its website would be untrue. If the requester looked at the website but could not locate the minutes, he or she could involve the public body in PAC proceedings or litigation over records that never actually existed in the first place.

It remains to be seen how the PAC and the courts will interpret Section 8.5. As when dealing with any FOIA provision, a cautious and narrow construction of Section 8.5 is likely the best approach. Upon receiving a request for a specific type of records that also fall into a general category of records posted on a website, the best practice may be to:

1. Conduct a reasonable search of all records in the general category to determine whether records responsive to the specific request exist; and
2. If responsive records exist, notify the requester precisely where on the website he or she can access the specific records (e.g., a link to a particular PDF instead of a link to a list of PDFs or the general site); or
3. If no responsive records exist, notify the requester [pursuant to Section 9](#), but direct him or her to the location of the general category of records on the website anyway.

Recent Illinois Attorney General Opinions to Help You Navigate FOIA

Navigating Illinois' Freedom of Information Act (FOIA) can be difficult. Much of the law's language is open to interpretation, and precedent-establishing court cases are rare. Luckily, binding public access counselor (PAC)

opinions of the Illinois attorney general (AG) can provide public bodies with guidance and answers to common questions.

Q: Are public employees' résumés and job applications subject to FOIA?

A: Probably, although private information such as home addresses, personal telephone numbers and personal e-mail addresses may be redacted before disclosure.

Ex. The Village of Winnetka received a FOIA request for the *résumé* and employment application of its assistant director of public works and engineering. The village denied the request, stating that the *résumé* and application were exempt from disclosure under Section 7(1)(c) of FOIA as “personal information” and under Section 7(1)(q) of FOIA as prohibited from disclosure by the Personnel Record Review Act. The AG found that the *résumé* and application were not exempt under either section. Section 7(1)(c) states that “[t]he disclosure of information that bears on the public duties of public employees shall not be considered an invasion of personal privacy.” Because the *résumé* and application detailed the education, training and experience that qualified the employee for his position, and because all of those factors bear on the employee’s ability to perform his public duties and his “merit and fitness” for hire under state law, neither record was exempt. Moreover, the Personnel Record Review Act does not prohibit a public body from disclosing *résumés* or employment applications, so Section 7(1)(q) did not apply. PAC 14-015 (Nov. 25, 2014).

Q: Are lease agreements between public bodies and private companies subject to FOIA? What if they contain sensitive or confidential pricing information?

A: Lease agreements between public bodies and private companies are subject to FOIA. And if such a lease agreement contains sensitive or confidential pricing information, it is still subject to FOIA if that information is related only to the public body’s own business transactions and was not “obtained” from the private company.

Ex. A reporter requested copies of lease agreements for rental space for trade shows and conventions held at Chicago’s McCormick Place from the Metropolitan Pier and Exposition Authority (MPEA). The MPEA denied the request on the ground that the lease agreements contained confidential and proprietary business information and that release of the information would make McCormick Place — and, by extension, Chicago — less competitive when attracting trade shows. The AG found that the leases were subject to disclosure under FOIA. FOIA’s confidential business information exemption, Section 7(1)(g), is limited to “commercial or financial information obtained from a person or business,” not “information relating to the public body’s own business transactions.” In addition, the AG found, because each lease was negotiated under different circumstances, the MPEA did not meet its burden of showing by clear and convincing evidence that release of *all* of the leases would harm McCormick Place. PAC 14-016 (Dec. 2, 2014).

Related People



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