

THE ILLINOIS FREEDOM OF INFORMATION ACT

Presented By H. Allen Yow

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The *Illinois Freedom of Information Act*, 5 ILCS 140/1 *et. seq.* (hereinafter the “*Act*”) impacts the day-to-day operations of municipalities, school districts, and other public bodies. Accordingly, it is important for public officials and employees to understand the *Act*’s requirements and how to fulfill them. Recently, the General Assembly passed Senate Bill 189, which significantly amends and revises the language of the *Act*. The Governor is expected to sign the bill in to law, which would become effective January 1, 2010. This handout summarizes the current provisions of the *Act* as well as the changes to the same provided for in Senate Bill 189.

I. The Purpose of FOIA (5 ILCS 140/1).

A. Current Law.

As currently written, the stated purpose of the *Act* is to allow persons full and complete access to “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". The preamble goes on to provide that the *Act's* restrictions on the disclosure of some information "should be seen as limited exceptions to the general rule that the people have a right to know 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". However, Section 1 of the *Act* has been held to be simply a declaration of policy without substantive legal force. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill.2d 401, 680 N.E.2d 374 (1997).

B. Senate Bill 189.

In Senate bill 189, the General Assembly expands upon the stated policy behind the *Act*. In fact, the General Assembly declares that, "it is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this *Act*." Moreover, the providing of records in compliance with the *Act* "is a primary duty of public bodies to the people of this State, and this *Act* should be construed to this end, ***fiscal obligations notwithstanding.***" (emphasis added)

New Section 1.2 provides that (1) all records in the custody or possession of a public body are presumed to be open to inspection and copying, and (2) a public body has the burden of proving by ***clear and convincing evidence*** that a record is exempt from disclosure. This new section codifies prior appellate court decisions holding that public records are presumed to be open to public

inspection and that public bodies have the burden of establishing an exemption. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill.2d 390, 844 N.E. 2d 1 (2006); *Bluestar Energy Services v. Commerce Commission*, 374 Ill.App.3d 990, 871 N.E.2d 880 (1st Dist. 2007).

II. Definitions (5 ILCS 140/2).

A. Current Law.

As used under the *Act*, the term “**public body**” includes, among other entities, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this state. The term “**person**” includes any individual, corporation, partnership, firm, organization, or association acting individually or as a group. Inclusion within the definition of “public body” depends primarily upon the structure of the organization. *Board of Regents of the Regency University System*, 292 Ill.App.3d 968, 686 N.E.2d 1222 (4th Dist. 1997).

The term “**public records**” includes “all records, reports, forms, writings, letters, memorandums, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information, and all other documentary materials, regardless of fiscal form or characteristics, having been prepared or having been or being used, received, possessed, or under the control of any public body.” The *Act* provides examples of “public records”, which include (i) administrative manuals, procedural rules, instructions to staff; (ii) final opinions and orders made in the adjudication of cases, except an educational institution adjudication of student or employee grievance or

disciplinary cases; (iii) final planning policies, recommendations, and decisions; (iv) information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds of public bodies; (v) the names, salaries, titles, and dates of employment of all employees and officers of public bodies; and (vi) the name of every official and the final records of voting and all proceedings of public bodies.

Note: The term “**public record**” refers to the original document, rather than a copy thereof. *Despain v. City of Collinsville*, 382 Ill.App.3d 572, 888 N.E.2d 163 (5th Dist. 2008). In *Despain*, the court held that the requester was entitled to listen to the original audio-tapes of city council meetings, rather than accepting copies of the same.

The term “**copying**” includes the reproduction of any public record by means of any photographic, electronic, mechanical or other process device or means.

B. Senate Bill 189.

Senate Bill 189 dramatically revises Section 2 of the *Act*. First, under the new legislation, “**public records**” now includes *electronic communications*. Second, “**public records**” are those materials “pertaining to the transaction of public business . . . in the possession of or in the control of any public body.”

Third, Senate Bill 189 provides definitions for two additional terms:

“**Private Information**” means 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

e-mail 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.

'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."

New Section 2.5 provides that, "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." Similarly, new Section 2.10 provides that certified payroll records submitted to a public body under the *Prevailing Wage Act* are public records subject to inspection and copying. However, contractors' employees' addresses, telephone numbers, and social security numbers must be redacted by the public body prior to disclosure.

New Senate Bill 189 also addresses arrest reports and criminal history records. Specifically, new Section 2.15 requires local criminal justice agencies, not later than seventy-two (72) hours after an arrest, to furnish the following information: (i) information that identifies the individual, including the name, age, address and photograph, when and if available; (ii) information detailing any charges relating to the arrest; (iii) the time and location of the arrest; (iv) the

name of the investigating or arresting law enforcement agency; (v) if the individual is incarcerated, the amount of any bail or bond; and (vi) 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.

Section 2.15 also provides that the following criminal history records are subject to inspection and copying: (i) court records that are public; (ii) records that are otherwise available under State or local law; and (iii) records in which the requesting party is the individual identified, except as provided under Section 7(1)(d)(vi). However, the disclosure of certain arrest information may be withheld if it is determined that disclosure would either (i) interfere with pending or actually 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; and (iii) compromise the security of any correctional facility.

New Section 2.20 declares that all settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, except that information exempt from disclosure under Section 7 of the *Act* may be redacted.

Under the revised *Act*, a record that is not in the possession of the public body but is in the possession of a third-party with whom the public entity has contracted to perform a public function on behalf of the public body, is a "*public record*" for purposes of the *Act*. (See new Section 7)

III. Inspection and Copying of Records (5 ILCS 140/3).

A. Current Law.

As currently written, Section 3 requires a public body, within seven (7) working days of receiving a written request, to provide a copy of any public record required to be disclosed. If the public body believes a document should not be disclosed, it is to provide a written denial of the person's request within seven (7) working days. A public body's failure to respond to a written request within seven (7) working days after its receipt constitutes a denial of the request. A public body can extend the deadline to provide a document for not more than seven (7) additional working days for one or more of the following reasons: (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 a 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 under Section 7 of the *Act*; (vi) the request for records cannot be complied with within the time limits prescribed without unduly burdening or interfering with the operation of the public body; and (vii) the public body needs to consult 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 additional time is requested, the public body is required to notify the requester by letter specifying the reasons for the delay and the date by which the records will be made available or a denial will be forthcoming. Current law provides that in no instance may the delay in processing last longer than seven (7) working days. Prior to a public body declaring that it is unable to comply with a request because it would be “unduly burdensome” on the public body, it must extend to the requester an opportunity to confer with it in an attempt to reduce the request to manageable proportions.

B. Senate Bill 189.

The new legislation dramatically revises the procedure for producing documents. For instance, although a request for inspection or copies is to be in writing and directed to the public body, the public body may **not** require that a request be submitted on a standard 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 whether to grant a request for a fee waiver. A written request may be submitted to a public body *via* personal delivery, mail, telefax, or other means available to the public body. A public body *may* honor an oral request for inspection or copying.

The new legislation requires that all requests for inspection and copying received by a public body to be immediately forwarded to its *Freedom of Information Officer or designee*. [As set forth below, Senate Bill 189 requires public bodies to designate a *Freedom of Information Officer*.]

Senate Bill 189 requires a public body to either comply or deny a request for public records within **five (5) business days** after receipt of the request, unless the time for response is properly extended under Subsection (e) of Section 3. Under the new legislation, a public body that fails to respond to a request within the requisite time period but thereafter provides the requester with copies of the requested public records may not impose a fee for such copies. A public body that fails to respond to a request may not treat the request as “unduly burdensome”. Also, the time for responding under Section 3 can be extended for no more than five (5) business days from the original due date; however, the requester and the public body may agree in writing to extend the time for compliance for a period to be determined by the parties. Further, repeated requests from the same person for the same records that are unchanged or identical to records previously provided are properly denied under the *Act* and shall be deemed “unduly burdensome”.

Senate Bill 189 treats requests for records made for a “commercial purpose” differently. Specifically, new Section 3.1 allows a public body twenty-one (21) working days within which to comply for a request for records to be used for a commercial purpose. A public body’s response shall (i) provide the requester an estimate of the time required by the public body to provide the records requested and an estimate of the fees to be charged which the public body may require the person to pay in full before copying the requested documents; (ii) deny the request pursuant to one or more of the exemptions set out in the *Act*; (iii) notify the requester that the request is unduly burdensome and

extend an opportunity to the requester to attempt to reduce the request to manageable proportions; or (iv) provide the records requested. Unless the records are exempt from disclosure, a public body is to comply with the request within a reasonable period of time considering the size and complexity of the request. Section 3.1 requires a public body to give priority to records requested for non-commercial purposes. In addition, 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 a public body.

New Section 3.5 requires public bodies to designate one or more officials or employees to act as its Freedom of Information Officer or Officers (FIO). Except in instances when records are furnished immediately, the FIO, or his/her designee is to receive each request submitted to the public body under the *Act*, ensure that the public body responds to each request in a timely fashion, and issues a response under the *Act*. FIOs are required to develop a list of documents or categories of records that the public body shall immediately disclose upon request. The new law requires the FIO to do the following:

- “(i) note the date the public body receives the written request;
- (ii) compute the day on which the period for a response will expire and make a notation of that date on the written request;
- (iii) maintain an electronic or paper copy of a written request, including all documents submitted within the request until the request has been complied with or denied; and
- (iv) create a file for the retention of the original request, a copy of the response, a record of written communications with requester, and a copy of other communications.”

By June 1, 2010, all FIOs are to successfully complete an electronic training curriculum to be developed by the public access counselor within the Attorney General's office. On an annual basis, the FIO must complete additional training. Whenever a public body designates a new FIO, that person shall complete the electronic training curriculum within thirty (30) days after assuming the position. Successful completion of the training curriculum is a pre-requisite to continuing to serve as a FIO.

IV. Publication of Information (5 ILCS 140/4).

A. Current Law.

Section 4 of the *Act* requires each public body to prominently display at its administrative or regional offices, and to make available for inspection and copying the following information: (i) a brief description of itself, which is to include a short summary of its purpose; (ii) a block diagram given its functional subdivisions; (iii) the total amount of its operating budget; (iv) the number and location of all its separate offices; (v) the approximate number of full and part-time employees; (vi) the identification and membership of any board, commission, committee, or council which operates in an advisory capacity relative to the operation of the public body; (vii) a description of the methods whereby the public may request information of public records, a directory designating the title and address of those employees to whom requests for public records should be directed, and any fees allowable under Section 6 of the *Act*.

B. Senate Bill 189.

The new legislation amends Section 4 to require the public body to identify the name of its FIO. In addition, a public body that maintains a website shall also post on the website all of the information required to be disclosed by Section 4.

V. Categories of Information (5 ILCS 140/5).

The *Act* requires each public body to maintain and make available for inspection and copying a reasonably current list of all types or categories of records under its control. The list is to be reasonably detailed in order to aid persons in obtaining access to public records. In addition, a public body is to furnish upon request a description of the manner in which public records stored by means of electronic data processing may be obtained in a form comprehensible to persons lacking knowledge of computer language or print out format.

VI. Authority to Charge Fees (5 ILCS 140/6).

A. Current Law.

Section 6 of the *Act* allows a public body to charge fees reasonably calculated to reimburse it for its actual cost of reproducing and certifying public records. The fees must exclude the cost of any search for and review of the record, and is not to exceed the actual cost of reproduction and certification, unless otherwise provided for by State statute. Fees are to be imposed according to a standard scale of fees, established and made public by the public body. Documents are to be furnished without charge or at a reduced rate, as determined by the public entity, if the person requesting the documents states

the specific purpose of the request and indicates that a waiver or reduction of the fee is in the public interest. A 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 setting the amount of the waiver or reduction, the public body may take into consideration the amount of materials requested and the costs for copying them. The “purposeful imposition” of a fee inconsistent with the *Act* is considered to be a denial of access to the public records for purposes of judicial review.

B. Senate Bill 189.

Senate Bill 189 impacts a public body’s ability to charge fees. First, if a person requests a copy of a record maintained in an electronic format, the public body is to 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, the public body is to furnish the records in the format in which it is maintained by the public body, or in a paper format at the option of the requester. A public body may charge the requester for the actual cost of purchasing the recording medium, whether disc, diskette, tape, or other medium. The public body may not charge the requester for the cost of any search for and review of the records or other personnel cost associated with reproducing the records.

Although new Section 6 still allows a public body to charge fees reasonably calculated to reimburse its actual cost for reproducing and certifying

public records, it **prohibits the charging of fees for “the first 50 pages of black and white, letter, or legal size copies requested by a requester.”** In addition, the fee for black and white copies shall not exceed .15 per page, nor may it charge more than its actual cost for reproducing color copies. In calculating the actual cost for reproducing records or for the use of the equipment of the public body to reproduce records, a public entity may not include the costs of any search for and review of the records or other personnel costs associated with reproducing the records. The cost for certifying a record may not exceed \$1.00.

Under revised Section 6, the imposition of a fee inconsistent with Section 6 “constitutes” a denial of access to public records for purposes of judicial review.

VII. Exemptions (5 ILCS 140/7).

A. Current Law.

As currently enacted, Section 7 of the *Act* identifies the categories of records exempt from inspection and copying. For example, the *Act* exempts from inspection and copying information specifically prohibited from disclosure by federal or State law, or rules and regulations adopted under federal or State law. Section 7 exempts from inspection and copying public records containing personal information. Specifically, Subparagraph (1)(b) provides as follows:

“(b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted

under this subsection (b) shall include but is not limited to:

(i) files and personal information maintained with respect to clients, patients, residents, students or other individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from federal agencies or public bodies;

(ii) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions;

(iii) files and personal information maintained with respect to any applicant, registrant or licensee by any public body cooperating with or engaged in professional or occupational registration, licensure or discipline;

(iv) information required of any taxpayer in connection with the assessment or collection of any tax unless disclosure is otherwise required by State statute;

(v) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies; provided, however, that identification of witnesses to traffic accidents, traffic accident reports, and rescue reports may be provided by agencies of local government, except in a case for which a criminal investigation is ongoing, without constituting a clearly unwarranted per se invasion of personal privacy under this subsection; and

(vi) the names, addresses, or other personal information of participants and registrants in park district, forest preserve district, and conservation district programs.”

Section 7 exempts from disclosure a variety of records, including the following:

(a) records compiled by a public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for the internal matters of a public body but only to the extent that the disclosure would (i) interfere with pending or actually and reasonably contemplating law enforcement proceedings; (ii) interfere with pending administrative enforcement proceedings conducted by a public body; (iii) deprive a person of a fair trial or impartial hearing; (iv) unavoidably disclose the identity of a confidential source or confidential information furnished only by a confidential source; (v) disclose unique or specialized investigative techniques; (vi) constitute an invasion of personal privacy; (vii) endanger the life or physical safety of law enforcement personnel or any other person or aide obstruct ongoing criminal investigation;

(b) criminal history records, except that certain basic information relating to the arrest and detainment of an individual, public court records, and records otherwise available under state or local law;

(c) proposals and bids for any contract, grant or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contract or agreement with the body, until an award or final selection is made. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made.

(d) architects' plans, engineers' technical submissions, and other construction related technical documents for projects not constructed or developed in whole or in part of public funds and the same for projects constructed or developed with public funds, but only to the extent that disclosure would compromise security, including but not limited to water treatment facilities, airport facilities, sport stadiums, convention centers, and all government owned, operated, or occupied buildings.

(e) minutes of meetings of public bodies closed to the public as provided in the *Open Meetings Act*.

(f) communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil, or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies;

(g) documents or materials 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.

(h) the records, documents and information relating to real estate purchasing negotiations until those negotiations have been completed or otherwise terminated.

(i) information related solely to the internal personnel rules and practices of a public body

(j) information contained in a local emergency energy plan submitted to a municipality in accordance with a local emergency energy plan ordinance.

(k) test questions, scoring keys and other examination data used to administer an academic examination or determined the qualifications of an applicant for a license or employment.

Note: Public Employment Contracts Are Not Exempt From Disclosure. On May 21, 2009, the Supreme Court of Illinois issued its decision in *Stern v. Wheaton-Warrenville Community Unit School District 200*, 2009 WL 1416105. In *Stern*, the Court held that a superintendent's contract was not exempt from disclosure. The school district argued that the contract was not subject to inspection and copying because it was contained in the superintendent's personnel file. The Court disagreed, holding that the disclosure

of the superintendent's contract, as with employment contracts in general, does not constitute an invasion of personal privacy for purposes of Section 7(1)(b) of the *Act*. The Court noted the *Act* defines public records to include contracts involving the use and expenditure of public funds.

B. Senate Bill 189.

Senate Bill 189 significantly revises current Section 7 of the *Act*. First, new Section 7 authorizes a public body to redact a document that contains both exempt and non-exempt information. Upon redaction, the public body is to make the document available for inspection and copying. (Actually, new Section 7 incorporates the requirements of current Section 8, which is repealed by Senate Bill 189.)

Second, "***private information***" is exempt from disclosure, unless the Act, a State or federal law or court order requires disclosure.

Third, exempt from disclosure is personal information contained within public records, "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." New Section 7 defines "***unwarranted invasion of personal privacy***" to mean "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." Information bearing on the public duties of public employees and officials is not to be considered an invasion of personal privacy.

New Section 7 also exempts from disclosure records relating to a public bodies' adjudication of employee grievances or disciplinary cases; however, the exemption would not extend to the final outcome of cases in which discipline is imposed.

Senate Bill 189 deletes from Section 7 several categories of exempt materials; however, Senate Bill 189 creates Section 7.5, which exempts a variety of documents from inspection and copying, including the following:

(a) library circulation and order records identifying library users with specific materials under the library records *Confidentiality Act*,

(b) firm performance evaluations under Section 55 of the *Architectural, Engineering and Land Surveying Qualifications Base Selection Act*,

(c) information contained in a local emergency energy plans subject to a municipality in accordance with a local emergency energy plan ordinance that is adopted under Section 11-21.5-5 of the *Illinois Municipal Code*; and

(d) information prohibited from being disclosed by the *Illinois School Student Records Act*.

VIII. Denial of a FOIA Request (5 ILCS 140/9).

A. Current Law.

Currently, Section 9 requires a public body denying a request for public records to notify the requester by letter of the decision to deny his/her request and the reasons for the denial. If the public body has denied the request based on an exemption set forth in Section 7, the notice must specify the exemption claimed to authorize the denial. The notice of denial must inform the requester of his/her right to appeal to the head of the public body. Further, each notice of

denial of an appeal by the head of a public body must inform such person of his right to judicial review.

B. Senate Bill 189.

Revised Section 9 requires the public body to include in the notice of denial a “detailed factual basis for the application of any exemption claimed . . . “. In addition, a notice of denial must inform the requester of his/her right to a review by the public access counselor and provide the address and phone number for the Public Access Counselor (PAC). [As discussed below, Senate Bill 189 creates the office of Public Access Counselor within the Attorney General’s office.] When a request for public records is denied on the grounds that the records are exempt under Section 7, the notice of denial must specify the exemption claimed and the “specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority”.

Under new Section 9.5, a person whose request to inspect or copy a public record is denied by a public body, may file a request for review with the PAC established in the office of the Attorney General, not later than sixty (60) days after the date of the final denial. To seek such a review, the request for review must be in writing, signed by the requester, and include a copy of the request for access to records and any responses from the public body.

If a public body asserts that records are exempt under Subsection (1)(c) or (1)(f) of Section 7 of the *Act* (personal information or preliminary drafts and notes in which opinions are expressed), shall, within the time periods provided for responding to a request, provide written notice to the requester and the PAC

of its intent to deny the request in whole or in part. Such a notice must 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.

Upon receipt of a notice of intent to deny from a public body, the PAC is to determine whether further inquiry is warranted. Within five (5) working days of receiving a notice of intent to deny, the PAC must notify the public body and the requester of his/her decision. If further investigation is deemed warranted, the PAC will conduct an inquiry pursuant to the procedures set forth in the *Act*. However, during the pendency of the inquiry, the times for responding for compliance under the *Act* are tolled.

If, upon receipt of a request for a review, the PAC determines that the alleged violation is unfounded, he/she is to advise both the requester and the public body and no further action will be undertaken. However, in the event the PAC determines that a violation is founded, the PAC will forward a copy of the request for review to the public body within seven (7) working days after receipt and shall specify the records or other documents that the public body shall furnish to facilitate his/her review. Within seven (7) working days after receipt of the request for review, the public body shall provide copies of the records requested and shall otherwise fully cooperate with the PAC.

Within seven (7) working days after it receives a copy of the request for review and request for production of records from the PAC, the public body may,

but is not required to, answer the allegations of the request for review. The answer may take a form of a letter, brief or memorandum.

Unless the PAC resolves the matter without the issuance of a binding opinion, the Attorney General is to examine the issues and the records and make findings of fact and conclusions of law, and issue to the requester and public body an opinion in response to the request for review within sixty (60) days after its receipt. The opinion shall be binding upon both the requester and the public body subject to administrative review under Section 11.5. The Attorney General may choose to resolve a request for review by mediation or by means other than the issuance of a binding opinion.

Upon receipt of a binding opinion concluding that a violation of the act has occurred, the public body shall either take immediate action to comply with the directive or initiate an administrative review under Section 11.5. If the opinion concludes that no violation of the *Act* has occurred, the requester may initiate an administrative review under Section 11.5. A public body that discloses records in accordance with an opinion of the Attorney General is immune from all liabilities by reason thereof and shall not be liable for penalties under the *Act*.

If a requester files suit under Section 11 with respect to the same denial that is the subject of a pending request for review, the requester is to notify the PAC, and the PAC shall take no further action with respect to the request for review and shall so notify the public body.

The Attorney General may also issue advisory opinions to public bodies regarding compliance with the *Act*. A request may be initiated by a head of the

public body or its attorney, and must contain sufficient facts from which a determination can be made. A public body that relies in good faith on an advisory opinion of the Attorney General and responding to a request is not liable for penalties under the *Act*, as long as the facts upon which the opinion is based have been full and fairly disclosed.

New Section 11.5 provides for administrative review of the Attorney General's binding opinions. In particular, a binding opinion issued by the Attorney General shall be considered a final decision of an administrative agency for purposes of administrative review under the Administrative Review Law. An action for administrative review of a binding opinion is to be commenced in either Cook or Sangamon County. An advisory opinion issued to a public body shall not be considered a final decision of the Attorney General for purposes of administrative review.

IX. Appeals (5 ILCS 140/10).

A. Current Law.

Current Section 10 allows a person denied access to inspect or copy a public record to appeal the denial by sending a written notice of appeal to the head of the public body. Upon receipt of the notice, the head of the public body shall properly review the public record and determine whether under the provisions of the *Act* such record is open to inspection and copying, and notify the person making the appeal of such determination within seven (7) working days.

B. Senate Bill 189.

Senate Bill 189 deletes Section 10 and requires all appeals to go directly to the PAC or the circuit court.

X. Access to the Courts (5 ILCS 140/11).

A. Current Law.

Currently, Section 11 permits a person denied access to inspect or copy a public record to file suit for injunctive or declaratory relief. Suit is to be filed in the circuit court for the county where the public body is located. The circuit court is to consider the matter *de novo*, and shall conduct such examination of the requested records as it finds appropriate. The burden of proof is on the public body to establish that its refusal to permit public inspection or copying is in accordance with provisions of the *Act*. If the person requesting the right to inspect or copy a public record substantially prevails, the court may award such person reasonable attorney's fees and cost. However, if the court determines that the fundamental purpose of the request was to further the commercial interest of the requester, the court may award reasonable attorney's fees and costs if the court finds that the records in question were of clearly significant interest to the general public and that the public body lacked any reasonable basis in law for withholding the record.

B. Senate Bill 189.

Senate Bill 189 amends Section 11 to some degree. Of particular note is that the burden of proof on the public body has been increased. Specifically,

under Senate Bill 189, “**any public body that asserts that a record is exempt from disclosure has the burden of proving that it is exempt by clear and convincing evidence.**” In addition, if the person seeking the right to inspect or receive a copy of a public record prevails, in determining what amount of attorney’s fees is reasonable, the court must consider the degree to which the relief obtained relates to the relief sought.

Moreover, if the court determines that a public body willfully and intentionally failed to comply with the *Act*, or otherwise acted in bad faith, the court must impose upon the public body a civil penalty of not less than \$2,500.00, but no more than \$5,000.00 for each occurrence. In determining the amount of the civil penalty, the court must consider in aggravation or mitigation the budget of the public body and whether the public body has previously been assessed penalties for violations of the *Act*.