

# **Freedom of Information Act Overview**

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# The Freedom of Information Act (5 ILCS 140/1 *et seq.*)

The Freedom of Information Act (FOIA) originally became effective on July 1, 1984. Significant revisions to FOIA took were enacted effective January 1, 2010. Major changes included:

- Presumption of openness
- Response time shortened from 7 to 5 days
- Copying charge limits
- FOIA Officers and training required

# Public Access Counselor

Office of the PAC created:

- To provide advice and education with respect to FOIA and OMA;
- To resolve complaints concerning compliance with FOIA and OMA without litigation.

15 ILCS 205(7)

# Public Access Bureau

- Public Access Counselor (PAC) has received over **49,000** complaints concerning FOIA and OMA since 2010
- Many are resolved informally or with just one letter to a public body
- 164 Binding Opinions Issued
- Thousands of determination letters issued

# The Purpose of FOIA

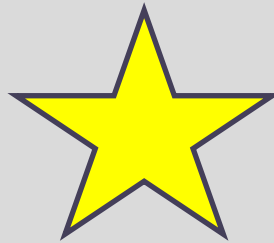
“The General Assembly hereby declares that it is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a **fundamental obligation of government** to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.” (Emphasis added.)

5 ILCS 140/1

# Presumption of Openness

“**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.”

5 ILCS 140/1.2



# What is Clear and Convincing?

Generally, under FOIA, "clear and convincing" evidence requires the public body to "provide a *detailed* justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing." (Emphasis in original.)

*Illinois Educ. Ass'n v. Illinois State Bd. of Educ.*, 204 Ill. 2d 456, 464 (2003).

# Definition of “Public Records”

The definition of “public records” includes:

“[A]ll \* \* \* 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, possessed or under the control of any public body.”

5 ILCS 140/2(c)



# What is a Public Record?

## E-mails and Texts

- Electronic correspondence is subject to FOIA if it ***pertains to the transaction of public business.***
- Even if sent on personal devices (texts on cell phones paid for by employee) or to/from personal email accounts.

# What is a Public Record?

A public record must *pertain to the transaction of public business*. Therefore, any communications relating to strictly personal matters are not “public records” subject to disclosure under FOIA, regardless of how or where they are maintained.

***Content controls, not the medium.***



# 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



# Examples of Records of Public Funds

- Paystubs, payment of severance, or overtime payments for public employees.
- Invoices for outside counsel or other legal services.
- Vendor information and payments for rent-related expenses for public housing.
- Wire Transfers made or received by a municipality.
- Money received or spent from public grants.
- Studies created for a municipality's economic development plan.
- Adjustment letters associated with public pension investment performance.

# Examples, cont.

- Public funds paid in conjunction with an employee's medical issue.
- Cell phone records for devices paid with public funds.
- Lists of residents with delinquent municipal sewer accounts.
- Expenses related to installing security cameras on CTA train platforms.
- Weapons purchased by the State from a Department of Defense surplus program.

# Payrolls

Certified payrolls submitted to a public body by contractors and subcontractors doing public work under Section (5a)(2) of the Prevailing Wage Act are public records; 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 and Severance Agreements

“All settlement and severance 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.”

➔ Presence of confidentiality clause does not supersede FOIA

5 ILCS 140/2.20

# Record Held by Agent

A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted *to perform a governmental function* on behalf of the public body, and that *directly relates to the governmental function* and is *not otherwise exempt* under this Act, shall be considered a public record of the public body, for purposes of this Act. **5 ILCS 140/7(2)**

*See Chicago Tribune v. College of DuPage and College of DuPage Foundation*, 2017 IL App (2d) 160274 (2017);  
*Rushton v. Department of Corrections*, 2019 IL 124552.



# Receiving and Responding to FOIA Requests

# FOIA Requests

- In writing, directed to the public body.
- Oral requests *may* be honored.
- Standard form *may not* be required.
- Public body *may not require* requester to specify a purpose, *except* to determine whether the request is for a commercial purpose.
- Forward immediately to FOIA officer!

5 ILCS 140/3(c)

# Time for Responding

A public body must generally respond to a FOIA request within **5** business days after receipt of a written request. The time for response may be extended ***by the public body*** for an additional 5 business days for one of seven reasons specified in the Act. The parties may also agree *in writing* to an extended time for compliance.

**5 ILCS 140/3(d),(e)**

# Failure to Respond

Failure to respond to a request within the time permitted is considered a ***denial*** of the request.

- A public body that fails to respond to a request within the time permitted, but then provides copies of the requested public records *may not impose a fee* for those copies.
- A public body that fails to respond to a request received *may not treat the request as unduly burdensome* under section 3(g).

5 ILCS 140/3(d)

# FOIA Response

A FOIA request may be granted, denied, or granted in part and denied in part. *If denying* a request for public records the public body shall *notify the requester in writing of:*

1. The decision to deny the request,
2. The *reasons* for the denial, including a detailed factual basis for the application of any exemption claimed, and
3. The names and titles or positions of each person responsible for the denial.

# FOIA Response, cont.

In addition, each notice of denial by a public body shall:

1. Inform the requester of his or her right to seek review by the Public Access Counselor,
2. Provide the address and phone number of the Public Access Counselor,
3. Inform the requester of his right to judicial review under section 11 of FOIA.

5 ILCS 140/9(a)

# Copying Fees

- No fees may be charged for the first 50 pages of black and white, letter or legal sized copies.
- The fee for black and white, letter or legal sized copies may not exceed **15 cents per page**.
- If a public body provides copies in color or in a size other than letter or legal, the public body may charge its actual cost for reproducing the records. 5 ILCS 140/6(a).
- Under the Vehicle Code, a LE agency may charge up to \$5 for crash report or up to \$20 for reconstruction report.

# Requests for Electronic Copies

- A public body must produce ***records that are maintained in an electronic format*** in the electronic format specified by the requester, if feasible.
- If not feasible, must disclose in the electronic format in which the records are maintained or in paper, at the option of the requester.



# Fees for Electronic Copies

A public body may only charge the requester for the actual cost of purchasing the recording medium, whether disc, diskette, tape, or other medium.

Statutory fees applicable to copies of public records when furnished in a paper format shall not be applicable to those records when furnished in an electronic format, unless the General Assembly otherwise provides.

5 ILCS 140/6(a)

# Records Maintained Online

A public body is not required to copy a public record that is published on the public body's website.

- Public body must **notify** the requester that the public record is available online and **direct** the requester to the website.
- Persons unable to reasonably access the record online may **re-submit the request**, public body must then respond as provided in section 3.

5 ILCS 140/8.5

# Unduly Burdensome Requests

Section 3(g) permits a public body to deny a request if the burden of compliance on public body outweighs public interest in the information.

- Before invoking this section, public bodies must extend to requester an opportunity to ***confer with it to reduce the request to manageable proportions.***
- Repeated requests by same person for same records identical to records previously provided or properly denied are unduly burdensome.

5 ILCS 140/3(g)

# Unduly Burdensome - Examples

- ... manually locating and compiling large numbers of records from 93 separate facilities or systems over a 23-year time span.
- ... compiling all records, including financial records, school policies, and correspondence for a 12-year period.
- ... only two employees to gather, review, and redact thousands of records from several sources over a six-year span.

# EXEMPTIONS

Exemptions allow public bodies to maintain certain types of sensitive public records or information confidentially. FOIA provides a number of exceptions to the requirement that public records are available for public inspection.

The exemptions do not, however, prohibit the dissemination of information; rather, they merely authorize the withholding of information.

*Roehrborn v. Lambert*, 277 Ill. App. 3d 181, 186 (1st Dist. 1995), *appeal denied*, 166 Ill. 2d 554.

# Exemptions are Narrowly Construed

The exemptions to disclosure under FOIA are to be narrowly construed.

*Lieber v. Board of Trustees of Southern Illinois University*,  
176 Ill. 2d 401, 408 (1997).

# Section 7(1)(a)

Exempts from disclosure:

“Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.”

5 ILCS 140/7(1)(a)

# Section 7(1)(a) – Information Exempt Under Other Laws

Section 7(1)(a) applies only when a law or rule implementing a law ***specifically*** prohibits the public body from releasing the information in question. *Better Government Ass'n v. Blagojevich*, 386 Ill. App. 3d 808, 814 (4th Dist. 2008).



## 7(1)(b) – Private Information

- Allows withholding of ***private information***, unless required by another provision of FOIA, a State or federal law or a court order.
- Private information is defined in section 2(c-5) of FOIA.

# Private Information

5 ILCS 140/2(c-5) **Unique identifiers**, including:

- Social Security Numbers
- Driver's License Numbers
- Employee Identification Numbers
- Biometric Identifiers (DNA, retina/iris scan, fingerprint, voiceprint, scan of hand)
- Personal Financial Information
- Passwords or Other Access Codes
- Medical Records
- Home or Personal Telephone Numbers
- Personal Email Addresses

# 7(1)(c) – Personal Information

Exempts “[p]ersonal 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[.]”

5 ILCS 140/7(1)(c)

# Personal Information, cont.

- “Clearly 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.
- 7(1)(c) involves a fact-specific, case-by-case inquiry, balancing right to privacy with public interest.

# Personal 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.”

5 ILCS 140/7(1)(c)

# Exempt Personal Information

- Dates of birth
- Race
- Family information about employees (i.e., emergency contacts)
- Specific medical information (i.e. descriptions of specific injuries, illnesses, and treatments)
- Information related to unsuccessful candidates for employment
- Names of victims and witnesses

# 7(1)(d)(i) – Pending Law Enforcement Proceedings

Exemption 7(1)(d)(i) of FOIA allows a public body to withhold records if disclosure ***would interfere*** with pending or actually and reasonably contemplated law enforcement proceedings conducted ***by the law enforcement or correctional agency that received the FOIA request.***

# If “Disclosure Would Interfere”

- Mere fact that an investigation is underway is not, by itself, enough for a public body to meet this burden.
- Factors considered: nature of the offense, the stage of the investigation or prosecution, and the sensitivity of the investigatory records.



# 7(1)(f) – Deliberative Process

- Allows withholding of “records in which opinions are expressed, or policies or actions are formulated”
- Except when record is publicly cited by head of public body
- The purpose of the deliberative process exemption is to protect the predecisional communications process and encourage frank and open discussion *among agency employees.*

## 7(1)(m) – Privileged Information

Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, or are prepared in anticipation of litigation, are exempt from disclosure under section 7(1)(m) of FOIA.

## 7(1)(m) cont.

Not all attorney/client communications are privileged.

- Invoices for legal services not exempt.

III. Att'y Gen. Pub. Acc. Op. No. 14-002. issued April 15, 2014.

- Lists containing names and pay rate of outside counsel for State agencies not exempt.

III. Att'y Gen. Pub. Acc. Op. No. 15-010, issued October 21, 2015.

# 7(1)(n) – Disciplinary Cases

- Allows a public body to withhold “records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed.”
- Investigative records (police reports, citations, etc.) that do not relate to an actual adjudication are not exempt.

*Peoria Journal Star v. City of Peoria*, 2016 IL App (3d) 140838, 52 N.E.3d 711 (2016) (police department improperly withheld report of investigation of grievance that was created before any adjudication).

# Section 7.5

Consolidates references to State statutes that exempt records from disclosure –extent of the exemption depends on the specific language of the statute. Examples:

- Subsection 7.5(b) cites to the Library Records Confidentiality Act (75 ILCS 70/1 *et seq.*), which prohibits the disclosure of library circulation and order records identifying library users with specific materials;
- Subsection 7.5(v) exempts names and information of people who have applied for or received FOID cards or concealed carry licenses.

# Review of FOIA Denials

# Request for Review

A Request for Review must be filed with the Public Access Counselor “not later than 60 days after the date of the final denial.”

The request must be in writing, signed by the requester and include:

- 1) a copy of the request for records, and
- 2) any responses from the public body

5 ILCS 140/9.5(a)

# Requests for Review

“A person whose request to inspect or copy a public record is denied by a public body, *except the General Assembly and committees, commissions, and agencies thereof*, may file a request for review with the Public Access Counselor [.]”

5 ILCS 140/9.5



# Resolution of Requests for Review

The Public Access Counselor may:

- Issue a binding opinion, which is subject to administrative review under section 11.5 of FOIA, or
- Resolve a request for review by mediation or by a means other than the issuance of a binding opinion. 5 ILCS 140/9.5(f)
- Other means – determination letter.

# Judicial Review

Any person denied access to inspect or copy any public record by a public body may file suit for injunctive or declaratory relief.

5 ILCS 140/11(a)

If the requester files suit under section 11 \* \*

\* the Public Access Counselor shall take no further action with respect to the request for review and shall so notify the public body.

5 ILCS 140/9.5(g)



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## STUDENT LOAN

# Contact Information

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