

# OPEN GOVERNMENT GUIDE

Access to Public Records  
and Meetings in

ILLINOIS

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

Sixth Edition  
2011



# OPEN GOVERNMENT GUIDE

## OPEN RECORDS AND MEETINGS LAWS IN

# ILLINOIS

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## ILLINOIS

**SIXTH EDITION**  
**2011**

Previously Titled  
Tapping Officials' Secrets

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## Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

## User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

*Following the outline.* Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, [www.rcfp.org/ogg](http://www.rcfp.org/ogg). The Internet version of the outlines allows you to search the database and compare the law in different states.

*Updates:* The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at [www.rcfp.org/ogg](http://www.rcfp.org/ogg). This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.





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**FOREWORD**

It is public policy in Illinois that all persons are entitled to full and complete information about the affairs of government and the official acts and policies of public officials and public employees, and that the actions and deliberations of public bodies be conducted openly. *See* 5 ILCS 120/1; 5 ILCS 140/1. The legislature has declared that “access [to government records] 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 interests.” 5 ILCS 140/1. These policies are reflected in the legislative intent statements preceding Illinois’ Open Meetings Act, 5 ILCS 120/1 to 6, and Freedom of Information Act, 5 ILCS 140/1 to 11.

An Open Meetings Act has existed in Illinois since 1957, and a number of amendments over the years have served to widen its scope and to effectively overrule cases that restricted notice requirements and relief available for violations. As for records, Illinois acknowledges the common law right to inspect and copy records, *People ex. rel. Gibson v. Peller*, 34 Ill. App. 2d 372, 374-75, 181 N.E. 2d 376, 378 (1st Dist. 1962). The state has had a State Records Act, 5 ILCS 160/1 to 26, since the late 1800s, but the 1984 FOIA was designed to serve as the focal reference statute for open records questions. The FOIA does not nullify other case and statutory law regarding records, but the Legislature declared it to be the exclusive state statute on freedom of information, except to the extent that other state statutes create additional restrictions on disclosure of information or to the extent that other state laws create additional obligations for disclosure of information. 5 ILCS 140/1.

A lengthy statement of intent precedes the FOIA: The Act is not intended to be used to violate individual privacy, to further commercial enterprise, or to disrupt the day-to-day workings of any public body. It is not intended to create an obligation on the part of any public body to maintain or prepare any public record that was not maintained and prepared by it at the time the Act became effective, except as otherwise required by applicable local state or federal law. Restraints on infor-

mation access are to be regarded 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 the government and the lives of its people.

The legislative history of the FOIA reflects the explicit intention that case law construing the federal Freedom of Information Act is to be used in Illinois to interpret the Illinois Act. *Roulette v. Department of Central Mgmt. Servs.*, 141 Ill. App. 3d 394, 400, 490 N.E. 2d 60, 64, 95 Ill. Dec. 587, 591 (1st Dist. 1986). The Act applies to all disclosure requests initiated after the effective date of the Act even if the requested records were prepared or received prior to that date. *See Carrigan v. Harkrader*, 146 Ill. App. 3d 535, 496 N.E. 2d 1213, 100 Ill. Dec. 148 (3rd Dist. 1986).

An agency may not deny access to records on grounds that they contain confidential or non-disclosable information; the agency must delete the confidential and non-disclosable information and disclose the remainder of the record. *See* 5 ILCS 140/8. The first rule of thumb that every person seeking information should follow is this: *Read the statutes.* They are written in reasonably clear language, and most questions do not require a lawyer’s help to interpret.

With respect to open meetings, city councils, county boards and school districts have a tendency to invoke the “litigation” exception to the Open Meetings Act at any opportunity. Case law and Attorney General opinions make it clear that this exception has specific limitations, which are discussed below, and persons seeking information should be sufficiently aware of those limitations to ask questions in an effort to determine whether the exemption is being invoked legitimately.

The authors, as counsel to the Illinois Press Association, Illinois Broadcasters Association and Illinois News Broadcasters Association, provide advice to journalists on a daily basis. There is no such thing as a “minor” violation of the Open Meetings Act. Each violation, no matter how “minor” or technical, can be used as a tool to educate public officials about the Act and the proper application of the Act.

This outline is intended to be a survey of the Open Meetings Act and the Illinois FOIA. The case law included here is intended to address the most important, general principles used to interpret the statutes. Illinois has a large body of case law involving disputes over open records, and a somewhat smaller collection of case law addressing open meetings. Many of the older cases are no longer good law because of subsequent amendments. This outline does not purport to be an exhaustive treatment of all case law in Illinois addressing open meetings and records questions, but it is hoped that it will provide persons seeking information with a sound knowledge of the basics and the ability to ask informed questions when faced with a closed meeting or a denial of a record request.

# Open Records

## I. STATUTE — BASIC APPLICATION

### A. Who can request records?

#### 1. Status of requestor.

Every public body must make available to any person for inspection and copying all public records except those identified as exceptions. See 5 ILCS 140/3(a). Person is defined as any individual, corporation, partnership, firm, organization or association, acting individually or as a group. See 5 ILCS 140/2(b).

#### 2. Purpose of request.

The FOIA states that a public body may not 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. 5 ILCS 140.3(c). But it is a violation of the FOIA for a requester 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. 5 ILCS 140/3.1(c).

The legislative intent section states that the Act is not intended to be used to further a commercial enterprise, violate individual privacy or disrupt the day-to-day working of public bodies. See 5 ILCS 140/1. However, the Illinois Supreme Court has stated that this section is simply a declaration of policy or preamble. As such, it is not part of the Act itself . . . and has no substantive legal force. *Lieber v. Board of Trs.*, 176 Ill. 2d 401, 680 N.E.2d 374, 223 Ill. Dec. 641 (Ill. 1997). Further, the Illinois Supreme Court has noted that the Act does not require that persons requesting information explain their need for it or their planned use of it. *Family Life League v. Dep of Public Aid*, 112 Ill.2d 449, 456, 493 N.E.2d 1054, 1057-58, 98 Ill. Dec. 33, 36-37 (1986).

#### 3. Use of records.

The public policy declaration makes it clear that the intent of the Act is to further the fundamental philosophy of self-government and to permit fully informed public discussion of issues and monitoring of government. The Act also makes no specific restrictions on subsequent use of information acquired.

### B. Whose records are and are not subject to the act?

The Act applies to any public body. See 5 ILCS 140/2; 5 ILCS 140/1.2. “Public body” is defined broadly to include any 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, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof, and a School Finance Authority created under Article 1E of the School Code. 5 ILCS 140/2(a). No particular agency is specifically excluded in entirety from provisions of the Act, but the Act contains numerous exemptions, the nature of which depends on the agency in question and the records sought. The Act, however, does specifically exclude child death review teams or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act. See 5 ILCS 140/2(a).

The Illinois Appellate Court, Fourth District, held in *Board of Regents of the Regency University System v. Reynard*, 292 Ill. App. 3d 968, 686 N.E.2d 1222, 227 Ill. Dec. 66 (1997), that inclusion within the definition of a “public body” “depends primarily upon organizational structure.” *Board of Regents*, 292 Ill. App. 3d at 977, 686 N.E.2d at 1228, 227 Ill. Dec. at 72. *Reynard* further held that subsidiaries of public bodies can themselves be public bodies that, in turn, have subsidiaries constituting public bodies covered by the Act. The court noted that the Illinois State University Board of Regents was both an arm of the State of Illinois and the governing body of ISU. The ISU Senate

was a subsidiary of the board, and a subsidiary public body is itself a public body under the Act. *Board of Regents*, 292 Ill. App. 3d at 978, 686 N.E.2d at 1229, 227 Ill. Dec. at 73. Consequently, a subsidiary of the ISU Senate, the Athletic Council of Illinois State University, was a public body that was required to comply with the Act. *Id.*; see also *Duncan Publ’g Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 709 N.E.2d 1281, 237 Ill. Dec. 568 (1st Dist. 1999) (holding that individual departments of city were subsidiary public bodies and, thus, public bodies that were each individually subject to the Act).

#### 1. Executive branch.

##### a. Records of the executives themselves.

The Act applies to all public bodies, including executive offices. See 5 ILCS 140/2(a). As with all public bodies, the exemptions set out in 5 ILCS 140/7 apply to specific types of records kept by executive branches.

In *Quinn v. Stone*, 211 Ill. App. 3d 809, 570 N.E. 2d 676, 156 Ill. Dec 200 (1st Dist. 1991), the court held that a FOIA request directed at an individual alderman was properly denied, because a single alderman is not a “public body” subject to the Act. Rather, *Quinn* held that suit should have been brought against the mayor and the City Council, of which the alderman was a member. See *Quinn*, 211 Ill. App. 3d at 811, 570 N.E.2d at 677, 156 Ill. Dec. at 200, 201.

The Act also emphasizes that financial records are open: 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. See 5 ILCS 140/2.5. Relatedly, certified payroll records submitted to a public body under Section 5(a)(2) of the Prevailing Wage Act are open—except that contractors’ employees’ addresses, telephone numbers, and social security numbers must be redacted by the public body prior to disclosure. 140/2.10. And all settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public, although certain information specifically exempt under Section 7 may be redacted. 5 ILCS 120/20.

##### b. Records of certain but not all functions.

The Act does not set out exceptions to disclosure of records concerning specific functions of executive offices; it sets out exceptions only to specific types of records. The Act may *in effect* exempt all the records generated by one entire function. For example, one function of an executive office is to set policy. Subsection 7(1)(f) exempts “[p]reliminary drafts, notes, recommendations, memoranda and other records in which . . . policies or actions are formulated,” with one exception: If a document containing such policies is publicly cited and identified by the head of the public body (as in a decision to grant a license or zoning request, for example), then the document must be disclosed. See 5 ILCS 140/7(1)(f). Accordingly, in *Carrigan v. Harkrader*, 146 Ill. App. 3d 535, 496 N.E.2d 1213, 100 Ill. Dec. 148 (3d Dist. 1986), the court held that an applicant for a liquor license was not entitled to a copy of a letter which the local sheriff submitted in conjunction with the license application because the letter merely expressed an opinion about the applicant and was not publicly cited or identified as a basis for the decision. In *Harwood v. McDonough*, the Appellate Court, First District, denied access to a consultant’s final report, finding it was “preliminary” to the final agency decision. 799 N.E.2d 859 (1st Dist. 2003).

#### 2. Legislative bodies.

Public bodies whose records are subject to the Act include legislative bodies. See 5 ILCS 140/2(a). It should be noted that records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents are exempt from disclosure if those records are in the nature of preliminary drafts, notes, recommendations, memoranda and other records *in which opinions are expressed, or policies or actions are formulated*. 5 ILCS 140/7(1)(f) (emphasis added).

### 3. Courts.

Court records are open under the First Amendment, the common law and Illinois' Clerk's of Courts Act. *Press-Enterprises Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1 (1986); *Skolnick v. Alzheimer & Gray*, 191 Ill.2d 214, 230-233, 730 N.E.2d 4, 15-17 (2000); 705 ILCS 105/16. But a court may deny access where there are conflicting interests between the public right of access and other fundamental rights—such as a defendant's constitutional right to a fair trial. See *In re CBS Inc.*, 540 F. Supp. 769 (N.D. Ill. 1982).

The Illinois FOIA does not specifically address court records, except to state that the following documents maintained by a public body pertaining to criminal history record information are open: (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, unless disclosure would physically endanger law enforcement personnel or other persons. 5 ILCS 140/2.15(b).

However, Illinois' appellate courts have held that the entire judicial branch, including a circuit clerk and a pretrial services agency that was an arm of the court and directly accountable to the chief judge of the judicial circuit, is not subject to the disclosure requirements of the Act. See *Newman, Raiz and Shelmadine, LLC v. Brown*, 394 Ill.App.3d 602, 915 N.E.2d 782, 333 Ill.Dec. 711 (1st Dist.2009); *Copley Press Inc. v. Administrative Office of the Courts*, 271 Ill. App. 3d 548, 648 N.E.2d 324, 207 Ill. Dec. 868 (2d Dist. 1995); see also Ill. Att'y Gen. Op. 005 (1999) (Illinois Attorney General opining, in response to inquiry from Illinois Supreme Court justice, that Illinois Courts Commission not covered by FOIA, as lack of reference to courts or judiciary in Act's definition of a public body indicates an intent to exclude the judicial branch from the requirements of that Act).

### 4. Nongovernmental bodies.

#### a. Bodies receiving public funds or benefits.

The Act does not specify any covered non-governmental bodies, although it does cover subsidiary bodies, which include committees and subcommittees of a public body. 5 ILCS 140/2(a). "Subsidiary body" is not defined by the Act, but a court interpreting the meaning of that term under the FOIA would look to case law construing the Illinois Open Meetings Act definition of public bodies, which is almost identical to the definition contained in the Freedom of Information Act. For example, in *Rockford Newspapers Inc. v. Northern Illinois Council on Alcoholism and Drug Dependency*, 64 Ill. App. 3d 94, 380 N.E.2d 1192, 21 Ill. Dec. 16 (2d Dist. 1978), the court found that a private, not-for-profit organization formed to administer drug and alcohol treatment programs ("NICADD") was not subject to the provisions of the Open Meetings Act, despite the fact that 90 percent of its funding came from governmental grants and contracts, and despite the fact that its programs were monitored and regulated by federal, state and local governments.

The court stated that emphasis on the extent of governmental funding was misplaced. Instead, the court held, that the following factors were relevant in determining that NICADD was not a subsidiary body subject to the Open Meetings Act: (1) the formal legal nature of NICADD (not-for-profit corporation); (2) the independence of its board of directors; (3) the independence of employees from direct government control; and to a lesser extent (4) the degree of governmental control over NICADD; and (5) the nature of NICADD's function's. *Rockford Newspapers*, 64 Ill. App. 3d at 96-97, 380 N.E.2d at 1193-94, 21 Ill. Dec. at 17-18.

*Hopf v. Topcorp*, 170 Ill. App. 3d 85, 527 N.E. 2d 1, 122 Ill. Dec. 629 (1st Dist. 1988), applied the *Rockford Newspapers* analysis to a FOIA claim. An economic development corporation, owned by a city and a private university, was found to not be a public body within the meaning of the Act.

However, in certain contexts, records relating to non-governmental entities may be available from the governmental entities that fund

them. For example, the Illinois Appellate Court has ruled that private landlords receiving federal funds for housing through a local housing authority have no protectable right of privacy that prevents disclosing a list of those landlords who receive such funds, the amount of payments received and the addresses of properties subsidized under the program. *Mid-America Television Co. v. Peoria Hous. Auth.*, 93 Ill. App.3d 314, 417 N.E.2d 210, 48 Ill. Dec. 808 (3d Dist. 1981).

And in *Family Life League v. Dep't of Public Aid*, 112 Ill. 2d 449, 493 N.E.2d 1054, 98 Ill. Dec. 33 (1986), the Illinois Supreme Court ruled that the Illinois Department of Public Aid was required to disclose the names of doctors who provide abortion services, the number of abortions performed and the amounts paid for the services. In making its ruling, the court noted that receipt of state funds by physicians creates a public interest in the physicians' activities regarding the use of the funds that outweighs the physicians' limited privacy interest in the information. See *Family Life League*, 112 Ill. 2d at 457, 493 N.E.2d at 1058, 98 Ill. Dec. at 37. The same principles extend to other factual situations.

In Public Access Opinion 11-004 (available at <http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-004.pdf>), the PAC concluded that settlement agreements entered into by an intergovernmental risk management association or self-insurance pool on behalf of a public body are subject to disclosure; 5 ILCS 140/7(1)(s) does not exempt the amount of money expended to settle a claim.

#### b. Bodies whose members include governmental officials.

The Act probably does not cover non-governmental bodies unless the governmental officials are serving on the body in some type of official capacity and their presence on the body has an impact on public policy or expenditure of public money. Also, courts may examine to what extent, if at all, a governmental body is exercising control over the relevant entity pursuant to the test enunciated in *Rockford Newspapers Inc.*, *supra*.

*Lathrop v. Juneau & Associates, Inc.*, 220 F.R.D. 322 (S.D.Ill. 2004) held that a requester stated claim under the FOIA against members of private engineering firm, based on allegations that the firm held a municipal position of city engineer.

### 5. Multi-state or regional bodies.

Multi-state or regional bodies created by agreements between states would be covered by FOIA because 5 ILCS 140/1 states that "access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government." (emphasis added).

Persons faced with a denial on the grounds that another state law prohibits disclosure should keep in mind that Illinois FOIA specifically provides that, if a record contains information that is not exempt (in this case, for example, information that may pertain to another state and may not be disclosed under the state's laws), the exempt material may be redacted and the non-exempt material made available. See 5 ILCS 140/7. *Carter v. Meek*, 322 Ill. App. 3d 266, 750 N.E. 2d 242, 255 Ill. Dec. 661 (5th Dist. 2001).

If a multi-state or regional body is not a part of Illinois' government, but is subject to control by an Illinois agency, an argument can be made that disclosure is required pursuant to the test enunciated in *Rockford Newspapers Inc. v. Northern Illinois Council on Alcoholism and Drug Dependency*, 64 Ill. App. 3d 94, 380 N.E.2d 1192, 21 Ill. Dec. 16 (2d Dist. 1978).

### 6. Advisory boards and commissions, quasi-governmental entities.

Advisory boards and commissions are subject to the Act, because the FOIA defines "public body" broadly. See 5 ILCS 140/2. Quasi-governmental entities may be public bodies depending on the test enunciated in *Rockford Newspapers Inc.* See "bodies receiving public funds or benefits," *supra*.



## 7. Others.

The Act prohibits public bodies from granting to any person or entity, whether by contract, license or otherwise, the exclusive right to access and disseminate any public record. *See* 5 ILCS 140/3(a).

The Act's definition of a "public body" also includes state universities and colleges and school districts. *See* 5 ILCS 140/2(a).

The Illinois Attorney General has opined that local ethics commissions or ultimate jurisdictional authorities (the elected or appointed official or subsidiary body of a unit of local government or school district having the power to discipline a particular employee) are not exempt from disclosure under the Act. *See* Ill. Att'y Gen. Op. 007 (1999).

### C. What records are and are not subject to the act?

#### 1. What kind of records are covered?

Public records are broadly defined as "*all records*, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, *regardless of physical form or characteristics*, having been prepared, or having been or being used, received, possessed or under the control of any public body." 5 ILCS 140/2(c) (emphasis added). "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 ex-empt under this Act, shall be considered a public record of the public body, for purposes of this Act." *See* ILCS 140/7(2).

#### 2. What physical form of records are covered?

Any and all records regardless of physical form or characteristics are covered. 5 ILCS 140/2(c). 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. If it is not feasible to furnish the public records in the specified electronic format, then the public body must furnish it in the format in which it is maintained by the public body, or in paper format at the option of the requester. 5 ILCS 140/6(a); *see also AFSCME v. County of Cook*, 136 Ill. 2d 334, 555 N.E.2d 361, 144 Ill. Dec 242 (1990). Requesters should be aware that repeated requests from the same person for the same records that are unchanged or identical to records *previously provided or properly denied* under this Act may be exempt as "unduly burdensome." 5 ILCS 140/3(d); *see* Public Access Opinion 11-003 (available at

<http://foia.illattorneygeneral.net/pdf/opinions/2011/11-003.pdf>) (a subsequent FOIA request cannot be deemed "unduly burdensome" unless the public body has either previously disclosed the requested records or properly denied the request); *see also National Ass'n of Criminal Defense Lawyers v. Chicago Police Dept.*, 399 Ill.App.3d 1, 924 N.E.2d 564, 338 Ill.Dec. 358 (1st Dist. 2010). Requesters should resolve what format they prefer *before* making requests and explicitly state so in the initial request. Records requests should be as precise as possible. *See Kenyon v. Garrells*, 184 Ill. App. 3d 28, 540 N.E.2d 11, 132 Ill. Dec 595 (4th Dist. 1989).

#### 3. Are certain records available for inspection but not copying?

There is nothing in the FOIA which makes certain records available for inspection but not copying. The Act states that public records must be made available for inspection *or* copying. *See* 5 ILCS 140/3(a).

*DesPain v. City of Collinsville*, 382 Ill.App.3d 572, 888 N.E.2d 163, 320 Ill.Dec. 946 (5th Dist. 2008), held that the term "public record," as used in the FOIA, referred to the original document, rather than a copy thereof. Thus, a requester who asked to listen to recordings of city council meetings was entitled to listen to the original record-

ings rather than pay for copies to be made; the fact that the city had no facility for the public to listen to audiotapes was not a valid basis for denying a request to inspect a tape-recorded public record. *Id.*; *see also AFSCME v. County of Cook*, 136 Ill. 2d 334, 555 N.E.2d 361, 144 Ill. Dec 242 (1990) (Public body cannot choose the format in which it releases information).

### D. Fee provisions or practices.

#### 1. Levels or limitations on fees.

The fees, if any, a public body may charge for producing copies of public records are set forth in 5 ILCS 140/6. Separate fee limitations apply to records in electronic format (5 ILCS 140/6(a)) as opposed to paper records (5 ILCS 140/6(b)). A public body may not charge any fee for producing copies if it failed to respond to an initial request within 5 business days or failed to obtain the requisite extension of time, but later provides the requester with copies of the requested public records. 5 ILCS 140/3.

#### 2. Particular fee specifications or provisions.

With respect to electronic records, the FOIA provides as follows: "When a person requests a copy of a record maintained in an electronic format, the public body shall 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 the format in which it is maintained by the public body, or in 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. 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 the General Assembly expressly provides, 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." 5 ILCS 140/6(a).

With respect to non-electronic records the Act provides that except when a fee is otherwise fixed by statute, a public body may charge fees *reasonably calculated to reimburse its actual cost* for reproducing and certifying public records and for the use, by any person, of the equipment of the public body to copy records. 5 ILCS 140/6(b). But no fees shall be charged for the first 50 pages of black and white, letter or legal sized copies requested by a requester. *Id.* After that, the fee for black and white, letter or legal sized copies shall not exceed 15 cents per page. *Id.* If a public body provides copies in color or in a size other than letter or legal, the public body may not charge more than its *actual cost for reproducing the records*. *Id.* 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 shall not include the costs of any search for and review of the records or other personnel costs associated with reproducing the records. *Id.* Such fees shall be imposed according to a standard scale of fees, established and made public by the body imposing them. The cost for certifying a record shall not exceed \$1. *Id.*

For abstracts of a driver's record, the FOIA's fee provision allows the Illinois Vehicle Code, 625 ILCS 5/6-118, to set the fee—regardless of whether a paper or electronic copy is furnished. 5 ILCS 140/6(e).

The Act states that "the imposition of a fee not consistent with subsections (6)(a) and (b) constitutes a denial of access to public records for the purposes of judicial review." 5 ILCS 140/6(d).

The Illinois Attorney General has opined that, while county recorders may establish a Web site providing Internet access to information contained in the recorders' records and need not post public records in their entirety (though they all must be open for examination at the recorders' offices), county recorders may not charge a fee upon persons or businesses as a condition of providing Internet access to records, absent a statutory provision authorizing the fee. *See* Ill. Att'y Gen. Op. 012 (2000).

### a. Search.

The FOIA's fee provision does not authorize a public body to recover any search costs it incurred in filling a request for records. 5 ILCS 140/6.

### b. Duplication.

A public body may not charge a copying fee for electronic records—it may only charge the requester for the actual cost of purchasing the recording medium, whether disc, diskette, tape, or other medium. 5 ILCS 140/6(a).

With respect to paper copies, a public body must provide for free the first 50 pages of black and white, letter or legal sized copies requested by a requester. After that, a public body may charge fees *reasonably calculated to reimburse its actual cost* for reproducing and certifying public records and for the use, by any person, of the equipment of the public body to copy records. 5 ILCS 140/6(b). But the fee for black and white, letter or legal sized copies shall not exceed 15 cents per page. *Id.* If a public body provides copies in color or in a size other than letter or legal, the public body may not charge more than its *actual cost for reproducing the records*. *Id.* 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 shall not include the costs of any search for and review of the records or other personnel costs associated with reproducing the records. *Id.* Such fees shall be imposed according to a standard scale of fees, established and made public by the body imposing them. The cost for certifying a record shall not exceed \$1. *Id.*

### c. Other.

The FOIA's fee provision allows other statutes to fix a fee for the production of non-electronic public records in certain cases. 5 ILCS 140/6(b).

### 3. Provisions for fee waivers.

If a request for documents states the specific purpose for the request and also indicates that a waiver or reduction of fees is in the public interest, the public body *must* furnish the documents either without charge or at a reduced charge, as determined by the public body. *See* 5 ILCS 140/6(c). In determining the amount of the waiver or reduction, the public body may consider the amount of materials requested and the cost of copying them. Waiver or reduction of fees 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 not principally for personal or commercial benefit. *See id.* The phrase “commercial benefit” does not apply to requests by news media, as long as the principal purpose of news media requests is to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public. *See id.* The news media is defined as a newspaper or other periodical issued at regular intervals, a news service, a radio station, a television station, a community antenna television service, or a person or corporation engaged in making news reels or other motion picture news for public showing. *See* 5 ILCS 140/2(f).

### 4. Requirements or prohibitions regarding advance payment.

There is no specific provision with respect to whether fees must be paid in advance. Presumably this will be according to the agency's policy.

### 5. Have agencies imposed prohibitive fees to discourage requesters?

The Act states that “the imposition of a fee not consistent with subsections (6)(a) and (b) constitutes a denial of access to public records for the purposes of judicial review.” 5 ILCS 140/6(d); *Sage Information Services v. Henderson*, 397 Ill.App.3d 1060, 923 N.E.2d 339, 337 Ill. Dec. 780 (3d Dist. 2010) (challenging fees sought to be imposed by a

county assessment office).

### E. Who enforces the act?

The Act provides that “any person” may request records. 5 ILCS 140/3(a). 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).

#### 1. Attorney General's role.

The Public Access Counselor established in the Office of the Illinois Attorney General has jurisdiction to resolve and mediate FOIA disputes. *See* 5 ILCS 140/9.5. A public body that asserts that records are exempt under 5 ILCS 140/7(1)(c) and 5 ILCS 140/7(1)(f), must, within the time periods provided for responding to a request, provide written notice to the requester and the Public Access Counselor of its intent to deny the request in whole or in part. 5 ILCS 140/9.5. The Public Access Counselor will, then, decide whether those exemptions are properly invoked. *Id.* The Public Access Counselor may also issue binding opinions, which are considered final decisions of an administrative agency, for purposes of administrative review under the Administrative Review Law. 5 ILCS 140/11.5.

#### 2. Availability of an ombudsman.

*See* “Attorney General's role” above.

#### 3. Commission or agency enforcement.

*See* “Attorney General's role” above.

### F. Are there sanctions for noncompliance?

Yes, a requester who prevails in a court proceeding can recover reasonable attorneys' fees and costs.

*See* 5 ILCS 140/11(i). Moreover, if the court determines that a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty. The penalty should range between \$2,500 and \$5,000 for each occurrence. In assessing the civil penalty, courts consider in aggravation or mitigation the budget of the public body and whether the public body has previously been assessed penalties for violations of this Act. *See* 5 ILCS 140/11(j).

## II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

### A. Exemptions in the open records statute.

#### 1. Character of exemptions.

##### a. General or specific?

The Illinois FOIA sets out specific categories of exemptions. The scope of the exemptions has been subject to litigation, and the judicial districts of the Appellate Court of Illinois have addressed the scope of statutory as well as state constitutional provisions covering exemptions.

In *Pope v. Parkinson*, 48 Ill. App. 3d 797, 363 N.E.2d 438, 6 Ill. Dec. 756 (4th Dist. 1977), a pre-FOIA case, a reporter on a student newspaper sought records giving a breakdown of financial data for each individual performance of the university-operated Assembly Hall. The court denied detailed disclosure, finding first that the Local Records Act, 50 ILCS 205/1 to 15, did not apply, as the university was “not a unit of local government or a school district to which section 3a of the Local Records Act might apply.” *Pope*, 48 Ill. App. 3d at 802, 363 N.E.2d at 442, 6 Ill. Dec. at 760 (citation omitted).

The court further found that the Illinois Constitution did not require the detailed disclosure sought by the plaintiff. Relying on the legislative history of Article VIII, Section 1(c)) of the 1970 Illinois Constitution, the court concluded that the term “reports and records” was not intended to extend to every working paper that bore upon the financial transactions of state and local government. *See Pope*, 48 Ill. App. 3d at 801, 363 N.E.2d at 441, 6 Ill. Dec. at 759.

Six years later, in *Oberman v. Byrne*, 112 Ill. App. 3d 155, 445 N.E.2d 374, 67 Ill. Dec. 894 (1st Dist. 1983), the First District disagreed with the *Pope* court with respect to the scope of disclosure under the state constitution. The *Oberman* court opined that the *Pope* court failed to fully consider a committee report on the stated objectives of the constitutional provision. See *Oberman*, 112 Ill. App. 3d at 163, 445 N.E.2d at 380, 67 Ill. Dec. at 900. Relying on *Mid-Am Television Co. v. Peoria Hous. Auth.*, 93 Ill. App. 3d 314, 417 N.E.2d 210, 48 Ill. Dec. 808 (3d Dist. 1981), the court concluded that disclosure of only total expenditures did not comply with the intent of the drafters of the 1970 Constitution.

To effect the purposes of the constitutional provision, the court concluded “it is necessary that public disclosure be made of specific transactions and not mere disclosure of the source of the revenue and ‘broad direction’ to which expenditures went.” *Oberman*, 112 Ill. App. 3d at 162, 445 N.E.2d at 380, 67 Ill. Dec. at 900. Accordingly, the *Oberman* court found that a mayor’s contingency fund was not exempt from disclosure, where no claim was made that the funds were used for law enforcement or investigation purposes, disclosure of which was exempt under the Act. See *Oberman*, 112 Ill. App. 3d at 164, 445 N.E.2d at 381, 67 Ill. Dec. at 901; see also *Kenyon v. Garrels*, 184 Ill. App. 3d 28, 540 N.E.2d 11, 132 Ill. Dec. 595 (4th Dist. 1989) (holding that a document which itemizes legal fees is subject to disclosure).

This line of cases indicates that exemptions to records requests should be construed very narrowly. See also *Warden v. Byrne*, 102 Ill. App. 3d 501, 430 N.E.2d 126, 58 Ill. Dec. 184 (1st Dist. 1981) (holding that reports of a mayor-elect’s transition team, involving six volumes of reports and recommendations on the urban conditions of Chicago and the administration of city government, were subject to disclosure under a city Municipal Reference Librarian ordinance. These cases also indicate that the *Pope* decision is subject to challenge.

The definition of a “public record” under the Freedom of Information Act is: “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.” See 5 ILCS 140/7(2).

The Illinois Supreme Court has held that, under the Freedom of Information Act, “public records are presumed to be open and accessible. The Act does create exceptions to disclosure, but those exceptions are to be read narrowly.” *Lieber v. Board of Trs.*, 176 Ill. 2d 401, 407, 680 N.E.2d 374, 377, 223 Ill. Dec. 641, 644 (1997). When a public body receives a proper request, “it *must* comply with that request unless one of the narrow statutory exemptions applies.” *Lieber* (emphasis added); see also *Lieber v. Southern Ill. Univ.*, 279 Ill. App. 3d 553, 664 N.E.2d 1155, 216 Ill. Dec. 227 (5th Dist. 1996) (holding that Act’s public policy statement, 5 ILCS 140/1, does not provide an alternative exemption from disclosure, and that public body may validly shield itself from mandatory disclosure only by meeting its burden to prove that the information is exempt under 5 ILCS 140/7; “[T]he main purpose of the Act is to provide the public with easy access to government information, and the exemptions in section 7 and the public policy statements of section 1 should not be construed to defeat that purpose”).

#### b. Mandatory or discretionary?

The Act suggests that invoking any applicable exemptions is discretionary, while releasing non-exempt material is mandatory: “When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying.” 5 ILCS 140/7(1) (emphasis added).

Likewise, the Illinois Appellate Court held that “[t]he purpose of

the Act is to ensure disclosure of information, not to protect information from disclosure.” *Roehrborn v. Lambert*, 660 N.E.2d 180, 183 (1st Dist. 1995). The court noted the FOIA provides, for example, “no explicit remedies for disclosing personal information.” *Id.* Relying on *Roehrborn*, the Illinois Attorney General has stated that “[t]he exemptions do not . . . prohibit the dissemination of information; rather, they merely authorize the withholding of information.” A Guide to the Illinois Freedom of Information Act 13 (2004) (available at [http://www.ag.state.il.us/government/FOIA\\_guide.pdf](http://www.ag.state.il.us/government/FOIA_guide.pdf)).

#### c. Patterned after federal Freedom of Information Act?

Some Illinois exemptions resemble exemptions in the federal Act. It should be noted here that the legislature intended that case law construing the federal Act be used to interpret the Illinois Act. See *Roulette v. Department of Cent. Mgmt. Servs.*, 141 Ill. App. 3d 394, 400, 490 N.E.2d 60, 64, 95 Ill. Dec. 587, 591 (1st Dist. 1986).

#### 2. Discussion of each exemption.

The following information is exempt from inspection and copying:

**Federal or State Law Exemption.** Information specifically prohibited from disclosure from federal or state law or rules and regulations adopted under these laws. See 5 ILCS 140/7 (1)(a). In *Chicago Tribune v. University of Illinois Board of Trustees*, the court held that the federal Family Education Rights and Privacy Act, 20 U.S.C. 1232g (“FERPA”) did not qualify as a FOIA exemption because FERPA does not “specifically prohibit” disclosure of the information. See 5 ILCS 140/7 (1)(a) (emphasis added). The court notes that this is a narrow ruling because FERPA was the only exemption at issue. *Chicago Tribune Co. v. University of Illinois Board of Trustees*, U.S. District Court, N.D. Illinois, Case No. 10 C 0568 (March 7, 2011), 2011 WL 982531; 5 ILCS 140/7(1)(a). The Appellate Court of Illinois, Fifth District, held that this exemption did not apply to a state trial court order gagging the parties to a lawsuit from disclosing the terms or conditions of a settlement agreement where the parties themselves had requested the gag order. *Carbondale Convention Center Inc. v. City of Carbondale*, 245 Ill. App. 3d 474, 477, 185 Ill. Dec. 405, 407, 614 N.E.2d 539, 541 (5th Dist. 1993); see also *Kibort v. Westrom*, 371 Ill. App. 3d 247, 862 N.E.2d 609 (2d Dist. 2007) (disclosure of election ballots, ballot box tapes and poll signature cards was prohibited by the Election Code and, thus, exempt under 5 ILCS 140/7(1)(a)). **Private Information.** Private information is exempt from disclosure, unless disclosure is required by another provision of this Act, a State or federal law, or a court order. See 5 ILCS 140/7(1)(b).

“Private information” means unique identifiers—such as 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. 5 ILCS 140/2(c-5).

Private information also includes “files, documents, and other data or databases maintained by one or more law enforcement agencies and specifically designed to provide information to one or more law enforcement agencies regarding the physical or mental status of one or more individual subjects.” 5 ILCS 140/7(1)(b-5).

Note: The Illinois Appellate Court, First Judicial District, has ruled that a school district must release the information it compiles regarding test scores where that information can be masked and scrambled in order to preserve individual student identities. See *Bowie v. Evanston Cmty. Consol. School Dist. 65*, 168 Ill. App. 3d 101, 522 N.E.2d 669, 119 Ill. Dec. 7 (1st Dist. 1988). The Fifth District Appellate Court ordered the production of records from the Cancer Registry main-



tained by the Illinois Department of Public Health. *Southern Illinoisian v. Department of Public Health*, 349 Ill. App. 3d 431, 812 N.E. 2d 27, 285 Ill. Dec. 438 (5th District, 2004). A newspaper had requested records for the diagnosis of neuroblastoma by date of diagnosis and ZIP code. The Illinois Supreme Court affirmed, finding that because the request did not tend to lead to the identity of patients, the documents were not exempt. 218 Ill. 2d 390, 844 N.E. 2d 1 (2006).

**Personal Information.** When disclosure of information contained within a public record would “constitute a clearly unwarranted invasion of personal privacy” that is “highly personal or objectionable to a reasonable person *and* ... the subject’s right to privacy outweighs any legitimate public interest in obtaining the information.” 5 ILCS 140/7(c). The public duties of a public employee or official are not considered an invasion of personal privacy. *Id.*

Note: If disclosure is consented to in writing by the individual subject of the information, then disclosure is permissible.

Note: A superintendent’s employment contract is not exempt because, “by its very nature, the superintendent’s employment contract, as a whole, constitutes information that bears on his public duties.” See *Stern v. Wheaton-Warrenville Community Unit School Dist.*, 233 Ill.2d 396, 910 N.E.2d 85 (2009); See also *Reppert v. Southern Illinois University*, 375 Ill.App.3d 502, 874 N.E.2d 905 (4th Dist. 2007) (holding that employment contracts are not *per se* exempt). In addition, post-mortem photographs are exempt to the extent that “surviving family members have legally-recognized right in the depiction of a decedent’s remains.” The attorney general noted that family members have a right to be free from the embarrassment that may result from the public display of a loved one’s remains. See Public Access Opinion 10-003 (available at <http://foia.ilattorneygeneral.net/pdf/opinions/2010/2010-003.pdf>); *Nat’l Ass’n of Criminal Def. Lawyers v. Chicago Police Dept.*, 399 Ill. App. 3d 1, 924 N.E.2d 564 (1st Dist. 2010) (release of de-identified photos used in police lineups did not invade personal privacy so as to exempt photos).

**d. Law Enforcement and Administrative Enforcement.** “Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes,” see 5 ILCS 140/7(1)(d)), but only to the extent that disclosure would:

(i) interfere with *pending* law enforcement proceedings; See 5 ILCS 140/7(1)(d)(i); See also *Castro v. Brown’s Chicken & Pasta Inc.*, 732 N.E. 2d 37 (1st Dist. 2000).

(ii) interfere with *active* administrative enforcement proceedings; See 5 ILCS 140/7(1)(d)(ii).

(iii) likely to deprive a person of a fair trial or an impartial hearing; See 5 ILCS 140/7(1)(d)(iii).

(iv) “unavoidably disclose the identity of a confidential source or confidential information furnished only by the confidential source, persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies;” See 5 ILCS 140/7(1)(d)(iv). But, there are exceptions: “identities of witnesses to traffic accidents, traffic accident reports, and rescue reports shall be provided by agencies of local government” may be disclosed – *unless* disclosure would interfere with an active criminal investigation. *Id.*

Note: In *Chicago Alliance for Neighborhood Safety v. City of Chicago*, the court held that the names of community liaisons with the police department are exempt. 348 Ill. App. 3d 188, 808 N.E. 2d 56, 283 Ill. Dec. 506 (1st Dist. 2004); see *Nat’l Ass’n of Criminal Def. Lawyers v. Chicago Police Dept.*, 399 Ill. App. 3d 1, 924 N.E.2d 564 (1st Dist. 2010) (ordering disclosure, because redaction

of open investigation files was not unduly burdensome to agencies and invasion of personal privacy in making disclosure of faces in photographic police lineups did not outweigh public’s interest in disclosure).

(v) “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;” See 5 ILCS 140/7(1)(d)(v) (emphasis added). This applies only if disclosure would result in *demonstrable harm* to the agency or public body. *Id.*

(vi) “endanger the life or physical safety of law enforcement personnel or any other person;” See 5 ILCS 140/7(d)(vi) (emphasis added).

Note: *Criminal history record information.* Pursuant to section 2.15, the following documents are deemed public records subject to inspection and copying by the public: (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). Arrest records must be released notwithstanding the personal information exemption under Section 7(1)(c). Additionally, Section 2.15(b) provides specific circumstances when criminal history records may be released—but this is not an exclusive list. Criminal history records may be released even if they do not fit into one of the categories provided for in Section 2.15(b). The public body need not create or maintain records they would not otherwise create or maintain. See Public Access Opinion 11-001 (available at <http://foia.ilattorneygeneral.net/pdf/opinions/2011/2011-001.pdf>).

(vii) obstruct an ongoing criminal investigation by the public body receiving the FOIA request. See 5 ILCS 140/7(1)(d)(vii).

Note: The Illinois Appellate Court, First Judicial District, has ruled that sampling data and calculations compiled by a metropolitan sanitary district are investigatory records compiled for law enforcement purposes and thus not subject to disclosure where the sanitary district relied on a self-reporting system and the data sought was used to monitor compliance with the self-supporting system. The court held that disclosure would defeat the purpose of the sampling data system, which was to check on whether the targets of the program were reporting accurately. *Griffith Labs. v. Metropolitan Sanitary Dist.*, 168 Ill. App. 3d 341, 522 N.E.2d 744, 119 Ill. Dec. 82 (1st Dist. 1988).

**e. Correctional Institutions:** “Records that relate to or affect the security of correctional institutions and detention facilities.” 5 ILCS 140/7(1)(e). The names of federal prisoners held in a county jail were exempt from disclosure. *Brady-Lunny v. Massey*, 185 F. Supp. 2d 928 (C.D. Ill. 2002).

**f. Preliminary drafts.** “Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated.” See 5 ILCS 140/7(1)(f). Exception: a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body. *Id.* This “extends to all those records or officers and agencies of the General Assembly that pertain to the preparation of legislative documents.” *Id.*

Care should be taken to assure that a government agency does not attempt to assert that information sought is in preliminary report form when in fact it is not. This occurred in *Hoffman v. Illinois Dep’t of Corr.*, 158 Ill. App. 3d 473, 511 N.E.2d 759, 110 Ill. Dec. 582 (1st Dist. 1987). There, the plaintiff sought disclosure of information relating to the identity and procedure for administering drugs used to implement Illinois’ death penalty. The Department of Corrections argued

that the information sought, contained in a memorandum discussing procedures governing execution, was exempt because it was in preliminary draft form. The plaintiff invoked the provision of the Act which allows a trial court to conduct an *in camera* examination (private examination by the judge in the judge's chambers) of requested records. The judge found that, despite the department's assertion, the memorandum indicated that it was final, and therefore subject to disclosure.

One federal court, interpreting the federal FOI Act, has stated that documents that reflect the "give-and-take" of the decision-making process, such as drafts or memos generated before adoption of a policy or the making of a decision, are exempt from disclosure. *Marzen v. U.S. Dep't of Health & Human Servs.*, 632 F. Supp. 785 (N.D. Ill. 1986). Since the legislature intended that case law construing the federal Act be used to interpret the Illinois Act, *Roulette v. Dep't of Cent. Mgmt. Servs.*, 141 Ill. App. 3d 394, 400, 490 N.E.2d 60, 64, 95 Ill. Dec. 591 (1st Dist. 1986), this case would apply to documents exempted from disclosure under this provision.

In *Hardwood v. McDonough*, the court applied this exemption to a final consultant report because it was preliminary to final government action. 799 N.E.2d 859 (1st Dist. 2003).

The exemptions described here apply to all records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents. See 5 ILCS 140/7(1)(f).

g. *Trade Secrets and Commercial Information.* If disclosure would cause competitive harm, the following are exempt: trade secrets, commercial information, or financial information, obtained from a person or business, where the trade secrets or information are proprietary, privileged or confidential. The claim must directly apply to the requested records. See *BlueStar Energy Services, Inc. v. Illinois Commerce Comm'n*, 374 Ill. App. 3d 990, 871 N.E.2d 880 (1st Dist. 2007).

Note: It is permissible consent to public disclosure. See 5 ILCS 140/7(1)(g). Legislative history indicates that trade secrets includes information that would inflict substantial competitive harm or make it more difficult for the agency to induce people to submit similar information in the future. *Roulette v. Dep't of Cent. Mgmt. Servs.*, 141 Ill. App. 3d 394, 400, 490 N.E.2d 60, 64, 95 Ill. Dec. 587, 591 (1st Dist. 1986). See discussion at 2, below. See also *Cooper v. Dep't of Lottery*, 266 Ill. App. 3d 1007, 640 N.E.2d 1299, 203 Ill. Dec. 926 (1994).

h. *Proposals and Bids.* Proposals and bids for any contract, grant or agreement, including information that would frustrate procurement or give an advantage to someone if it were disclosed. Information prepared by or for a body is exempt until a final selection is made. See 5 ILCS 140/7(1)(h).

i. *Research Data.* Valuable formulas, 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." See 5 ILCS 140/7(1)(I). This exemption does not apply to requests from the news media for Geographic Information Systems documents.

j. *Educational Examination Data.* The following information is subject to exemption:

(i) Test questions, scoring keys and other exam data used to administer academic examinations;

(ii) faculty evaluations;

(iii) student disciplinary cases—but only the *identity* of the student is exempt.

(iv) and course or research materials used by faculty. 5 ILCS 140/7(1)(j). Note: Scrambled or masked test scores in which individual students' identities are unascertainable are available. See *Bowie v. Evanston Cmty. Consol. School Dist.* 65, 128 Ill. 2d 373, 538 N.E. 2d 557, 131 Ill. Dec. 182 (1989).

k. *Architects and Engineers.* Architects and engineers' technical sub-

missions for projects that are *not* developed—in whole or in part—with public funds. Projects constructed or developed with public funds are exempt when disclosure would compromise security. See 5 ILCS 140/7(1)(k).

l. *Closed Meeting Minutes.* Minutes of meetings of public bodies closed to the public in the Open Meetings Act. But, the closed meeting minutes may be disclosed when the public body makes the minutes available to the public under Section 2.06 of the Open Meetings Act. See 5 ILCS 140/7(1)(l).

m. *Communications with Attorney or Auditor.* Communications between a public body and an attorney, or an auditor representing the public body—but only if the communications would *not* be subject to discovery in litigation. The following are also exempt: materials prepared or compiled with respect to internal audits of public bodies; and, upon the request of the public body's attorney, materials prepared or compiled by or for a public body in anticipation of a criminal, civil, or administrative proceeding. See 5 ILCS 140/7(1)(m).

In *Illinois Education Association v. State Board of Education*, 204 Ill. 2d 456, 791 N.E.2d 522, 274 Ill. Dec. 430, the court rejected the application of this exemption to materials supplied by the State Board to the Attorney General. The State Board, by the way of vague or conclusory affidavits, failed to establish a privilege.

Note: Attorney billing records that contain explanations for legal fees or indicate the type of work done or matters discussed between the attorney and client could reveal the substance of confidential attorney-client discussions and, thus, would be subject to valid claims of attorney-client privilege or exemption under 5 ILCS 140/7(1)(n). See *Ulrich v. Stukel*, 294 Ill. App. 3d 193, 689 N.E.2d 319, 228 Ill. Dec. 447 (1st Dist. 1997). However, attorney billing records are not *per se* exempt. "It is well-recognized that information regarding a client's fees generally is not a 'confidential communication' between an attorney and client, and thus is not protected by the attorney client privilege. . . . The payment of fees is merely incidental to the attorney-client relationship and typically does not involve the disclosure of confidential communications arising from the relationship." *Ulrich*, 294 Ill. App. 3d at 203-04, 689 N.E.2d at 327, 228 Ill. Dec. at 455. Note also that, if attorney billing records may be exempted from disclosure, the exempted material may be redacted or deleted and any material that is not exempt, which could include hours, amount of fees, identification of attorneys and assignments, etc., must be made available for inspection and copying. See 5 ILCS 140/8.

n. *Employee Grievances or Disciplinary Cases.* "Records relating to a public body's adjudication of employee grievances or disciplinary cases." But the final outcome of the case is not exempt when discipline is imposed. See 5 ILCS 140/7(1)(n). See generally *Gekas v. Williamson*, 393 Ill. App. 3d 573, 912 N.E.2d 347 (4th Dist. 2009).

o. *Data-processing Operations.* Administrative or technical information associated with automated data-processing operations. This includes—but is 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 designs of computerized systems, employee manuals, and any other information that—if disclosed—would jeopardize the security of the system, its data, or the security of materials exempt under this section. See 5 ILCS 140/7(1)(o).

p. *Collective Bargaining Negotiations.* Documents or materials relating to collective negotiating matters between public bodies and their employees or representatives. Exception: any final contract or agreement shall be subject to inspection and copying. See 5 ILCS 140/7(1)(p).

q. *Employee Examination Data.* "Test questions, scoring keys, and other examination data used to determine the qualifications of an applicant for a license or employment." See 5 ILCS 140/7(1)(q); see *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 919 N.E.2d 76 (1st Dist. 2009).



r. *Real Estate*. The records, documents and information relating to real estate purchase negotiations until those negotiations end. With regard to parcels involved in an eminent domain proceeding under the Eminent Domain Act, records, documents and information relating to that parcel are exempt except as may be allowed under discovery rules adopted by the Illinois Supreme Court. The records, documents and information relating to a real estate sale are exempt until a sale is consummated. See 5 ILCS 140/7(1)(r).

s. *Proprietary Insurance Information*. Any proprietary information and records related to the operation of an intergovernmental risk management association, self-insurance pool, or a jointly self-administered health and accident cooperative or pool. See 5 ILCS 140/7(1)(s). In Public Access Opinion 11-004 (available at <http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-004.pdf>), the PAC concluded that settlement agreements entered into by an intergovernmental risk management association or self-insurance pool on behalf of a public body are subject to disclosure; 5 ILCS 140/7(1)(s) does not exempt the amount of money expended to settle a claim. Likewise, in Public Access Opinion 11-005 (available at <http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-005.pdf>), the PAC determined that the Illinois Department of Central Management should disclose Nerve Conduction Velocity Tests results obtained with respect to workers' compensation claims, because those test results were not protected by 5 ILCS 140/7(1)(s).

t. *Regulation Procedures for Financial Institutions*. Information contained in or related to examination, operating, or condition reports that are prepared by or for the use of a public body that is responsible for the supervision of financial institutions or insurance companies. Exception: if disclosure is otherwise required by State law. See 5 ILCS 140/7(1)(t).

u. *Electronic Security*. 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, see 5 ILCS 140/7(1)(u).

v. *Security Threats*. Vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent or respond to potential attacks upon a community's systems, population, facilities, or installations. This exemption applies when destruction or contamination would constitute a *clear and present danger* to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the public or the personnel who implement the security measures. Information exempt under this subsection may include details pertaining to the mobilization or deployment of personnel or equipment, the operation of communication systems or protocols, or tactical operations. See 5 ILCS 140/7(1)(v).

w. (left blank in statute).

x. *Power Generator Maps and Records*. "Maps and other records regarding the location or security of generation, transmission, distribution, storage, gathering, treatment or switching facilities owned by a utility, by a power generator, or by the Illinois Power Agency." 5 ILCS 140/7(x).

y. *Public Utility Documentation*. Information related to proposals, bids, or negotiations that deal with electric power procurement under Section 1-75 of the Illinois Power Agency Act and Section 16-111.5 of the Public Utilities Act. It must be deemed confidential and proprietary by the Illinois Power Agency or by the Illinois Commerce Commission. See 5 ILCS 140/7(1)(y).

z. *Information about Students*. "Information about students exempted from disclosure under Sections 10-20.38 or 34-18.29 of the School Code, and information about undergraduate students enrolled at an institution of higher education exempted from disclosure under Section 25 of the Illinois Credit Card Marketing Act of 2009." 5 ILCS 140/7(1)(z).

aa. *Viatical Settlements Act*. "Information the disclosure of which is exempted under the Viatical Settlements Act of 2009." See ILCS 140/7(1)(aa).

bb. *Human Remains*. "Information regarding interments, entombments, or inurnments of human remains that are submitted to the Cemetery Oversight Database under the Cemetery Care Act or the Cemetery Oversight Act, whichever is applicable." See 5 ILCS 140/7(1)(bb).

Note: Section 7 "does not authorize withholding of information or limit the availability of records to the public, except as stated in [Section 7] or otherwise provided in this Act." See 5 ILCS 140/7(3).

#### STATUTORY EXEMPTIONS UNDER SECTION 7.5

The following are exempt from inspection and copying:

(a) *Technology Advancement Development Act*. "All information determined to be confidential under Section 4002 of the Technology Advancement and Development Act." 5 ILCS 140/7.5(a).

(b) *Library Records Confidentiality Act*. Library records identifying library users with the books or other materials checked out by an individual under the Library Records Confidentiality Act. See 5 ILCS 140/7.5(b).

(c) *Organ Donation Records*. "Applications, related documents, and medical records received by the Experimental Organ Transplantation Procedures Board and any and all documents or other records prepared by the Experimental Organ Transplantation Procedures Board or its staff relating to applications it has received." 5 ILCS 140/7.5(c).

(d) *Sexually Transmissible Disease Control Act*. "Information and records held by the Department of Public Health and its authorized representatives relating to known or suspected cases of sexually transmissible disease or any information the disclosure of which is restricted under the Illinois Sexually Transmissible Disease Control Act." 5 ILCS 140/7.5(d).

(e) *Radon Industry Licensing Act*. "Information the disclosure of which is exempted under Section 30 of the Radon Industry Licensing Act." 5 ILCS 140/7.5(e).

(f) *Architectural, Engineering, and Land Surveying Qualifications Based Selection Act*. "Firm performance evaluations under Section 55 of the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act." 5 ILCS 140/7.5(f).

(g) *Illinois Prepaid Tuition Act*. "Information the disclosure of which is restricted and exempted under Section 50 of the Illinois Prepaid Tuition Act." 5 ILCS 140/7.5(g).

(h) *State Officials and Employees Ethics Act*. "Information the disclosure of which is exempted under the State Officials and Employees Ethics Act, and records of any lawfully created State or local inspector general's office that would be exempt if created or obtained by an Executive Inspector General's office under that Act." 5 ILCS 140/7.5(h).

(i) *Emergency Energy Plans*. "Information contained in a local emergency energy plan submitted 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." 5 ILCS 140/7.5(i).

(j) *Wireless Emergency Telephone Safety Act*. "Information and data concerning the distribution of surcharge moneys collected and remitted by wireless carriers under the Wireless Emergency Telephone Safety Act." 5 ILCS 140/7.5(j).

(k) *Vehicle Code*. "Law enforcement officer identification information or driver identification information compiled by a law enforcement agency or the Department of Transportation under Section 11-212 of the Illinois Vehicle Code." 5 ILCS 140/7.5(k).

(l) *Abuse Prevention Review Team Act*. "Records and information provided to a residential health care facility resident sexual assault and

death review team or the Executive Council under the Abuse Prevention Review Team Act.” 5 ILCS 140/7.5(l).

(m) *Residential Real Property Disclosure Act*. “Information provided to the predatory lending database created pursuant to Article 3 of the Residential Real Property Disclosure Act, except to the extent authorized under that Article.” 5 ILCS 140/7.5(m).

(n) *Capital Crimes Litigation Act*. “Defense budgets and petitions for certification of compensation and expenses for court appointed trial counsel as provided under Sections 10 and 15 of the Capital Crimes Litigation Act. This subsection (n) shall apply until the conclusion of the trial of the case, even if the prosecution chooses not to pursue the death penalty prior to trial or sentencing.” 5 ILCS 140/7.5(n).

(o) *Health and Hazardous Substances Registry Act*. “Information that is prohibited from being disclosed under Section 4 of the Illinois Health and Hazardous Substances Registry Act.” 5 ILCS 140/7.5(o).

(p) *Regional Transportation Authority Act and the Bi-State Transit Safety Act*. “Security portions of system safety program plans, investigation reports, surveys, schedules, lists, data, or information compiled, collected, or prepared by or for the Regional Transportation Authority under Section 2.11 of the Regional Transportation Authority Act or the St. Clair County Transit District under the Bi-State Transit Safety Act.” 5 ILCS 140/7.5(p).

(q) *Personnel Records Review Act*. “Information prohibited from being disclosed by the Personnel Records Review Act.” 5 ILCS 140/7.5(q).

(r) *School Student Records Act*. “Information prohibited from being disclosed by the Illinois School Student Records Act.” 5 ILCS 140/7.5(r).

(s) *Public Utilities Act*. “Information the disclosure of which is restricted under Section 5-108 of the Public Utilities Act.” 5 ILCS 140/7.5(s).

(t) *Health Information Exchange*. “All identified or deidentified health information in the form of health data or medical records contained in, stored in, submitted to, transferred by, or released from the Illinois Health Information Exchange, and identified or deidentified health information in the form of health data and medical records of the Illinois Health Information Exchange in the possession of the Illinois Health Information Exchange Authority due to its administration of the Illinois Health Information Exchange. The terms “identified” and “deidentified” shall be given the same meaning as in the Health Insurance Accountability and Portability Act of 1996, Public Law 104-191, or any subsequent amendments thereto, and any regulations promulgated thereunder.” 5 ILCS 140/7.5(t).

## B. Other statutory exclusions.

If another statute permits disclosure, or the rules of a particular agency do so, such provisions may be construed to prevail over any arguable exception in the Act. *See, e.g., Etten v. Lane*, 138 Ill. App. 3d 439, 442, 485 N.E.2d 1177, 1179, 92 Ill. Dec. 934, 936 (5th Dist. 1985) (holding that records must be disclosed under the clear language of an administrative rule; parole board rule granting an inmate access to all documents considered in making a parole decision prevailed over any arguable exception in the Act.)

## C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

None. In fact, the Illinois Appellate Court, Fourth District declined to engage in a balancing test that weighs the FOIA’s policy of openness against the burden imposed by forcing a public body to comply with the Act’s requirements. *See Board of Regents v. Reynard*, 292 Ill. App. 3d 968, 977, 686 N.E.2d 1222, 1228, 227 Ill. Dec. 66, 72 (4th Dist. 1997) (“There is nothing in either [the Illinois Freedom of Information Act or the Illinois Open Meetings Act] that suggests a body determined to be public may be exempt from the requirements of the statutes simply because it may be a burden to comply.”).

## D. Are segregable portions of records containing exempt material available?

When a request is made to inspect or copy a public record that contains information that is exempt from disclosure, but also contains information that is not exempt from disclosure, the public body may choose to redact the information that is exempt. But it must make the remaining information (which does not specifically qualify for an exemption) available for inspection and copying. *See* 5 ILCS 140/7(1); *Carter v. Meek*, 322 Ill. App. 3d 266, 750 N.E. 2d 242, 255 Ill. Dec. 661.

## E. Homeland Security Measures.

The General Assembly added or amended the in exemptions Section 7 (k), (v) and (x) in response to homeland security concerns.

## III. STATE LAW ON ELECTRONIC RECORDS

### A. Can the requester choose a format for receiving records?

Yes, the requester can choose a format for receiving records, if producing the records in that format is reasonably feasible. The Act provides state “[w]hen a person requests a copy of a record maintained in an electronic format, the public body shall 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 the format in which it is maintained by the public body, or in paper format at the option of the requester.” 5 ILCS 140/6(a).

### B. Can the requester obtain a customized search of computer databases to fit particular needs?

There is no statutory basis for obtaining a customized search of computer databases. The ability to obtain such a customized search will depend on the public official who maintains the records. But nothing in the Act requires a public body to create a record to satisfy a request. A public body also must not advise a requester about the meaning of public records. 5 ILCS 140/3.3.

### C. Does the existence of information in electronic format affect its openness?

No, the existence of the information in electronic form does not affect its openness. Electronic records, cards, tapes, recordings, electronic data processing records, recorded information and all other documentary materials, regardless of physical form or characteristic are included within the definition of public records under 5 ILCS 140/2(c)). Moreover, the legislature stated that the Act should be interpreted broadly to include emerging technologies. *See* 5 ILCS 140/1 (stating that the legislature “recognizes that technology may advance at a rate that outpaces its ability to address those advances legislatively. To the extent that this Act may not expressly apply to those technological advances, this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption.”)

### D. How is e-mail treated?

E-mail is treated as any other public record. *See* 5 ILCS 140/2(c).

#### 1. Does e-mail constitute a record?

Yes. *See* 5 ILCS 140/2(c).

#### 2. Public matter on government e-mail or government hardware

Any public matter contained in a government e-mail or in government hardware is subject to inspection and copying under the FOIA. *See* 5 ILCS 140/2; 5 ILCS 140/1; 5 ILCS 140/7(1)(c) (“The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.”)

### 3. Private matter on government e-mail or government hardware

The FOIA applies to any public record within the control of a public body; government-owned e-mail accounts or hardware constitute public records which are presumptively open. 5 ILCS 140/2; 5 ILCS 140/1.2. That is, a public body can withhold “private matter” contained within this public record only if it can show—by clear and convincing evidence—that the private matter qualifies for any specific exemption under the FOIA. See 5 ILCS 140/1.2; 5 ILCS 140/7. For example, the public body may attempt to invoke 5 ILCS 140/7(1)(c), arguing that releasing the private matter would amount to an invasion of privacy. But to do so successfully the public body must provide facts that demonstrate that disclosing the records would be “highly personal or objectionable to a reasonable person and [that] the subject’s right to privacy outweighs any legitimate public interest in obtaining the information.” 5 ILCS 140/7(1)(c); see 5 ILCS 140/1.2. The FOIA makes clear that “[t]he 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).

### 4. Public matter on private e-mail

Given broad definition of public record, possibly open. See 5 ILCS 140/2; 5 ILCS 140/1.2. No published appellate opinion on point.

### 5. Private matter on private e-mail

Closed. See *Quinn v. Stone*, 211 Ill.App.3d 809, 570 N.E.2d 676, 156 Ill.Dec. 200 (1st Dist. 1991).

#### E. How are text messages and instant messages treated?

##### 1. Do text messages and/or instant messages constitute a record?

Yes, text messages and instant messages are public records as long as they have been prepared by or for, or have been or are being used by, received by, or are in the possession of, or under the control of any public body. 5 ILCS 140/2(c). Although an alderman is not a “public body” under the Act (and, thus, is not subject to the Act’s disclosure requirements) if the alderman’s text or instant messages have been received by, used by or are in the possession of, or under the control of any public body, they would be subject to disclosure. See also *Quinn v. Stone*, 211 Ill.App.3d 809, 570 N.E.2d 676, 156 Ill.Dec. 200 (1st Dist. 1991).

##### 2. Public matter message on government hardware.

Any public matter contained in government hardware is subject to inspection and copying under the FOIA. See 5 ILCS 140/2; 5 ILCS 140/1; see also 5 ILCS 140/7(1)(c) (“The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.”)

##### 3. Private matter message on government hardware.

The FOIA applies to any public record within the control of a public body; a message on government-owned hardware constitutes a presumptively-open public record. 5 ILCS 140/2; 5 ILCS 140/1.2. That is, a public body can withhold “private matter” contained within this public record only if it can show—by clear and convincing evidence—that the private matter qualifies for any specific exemption under the FOIA. See 5 ILCS 140/1.2; 5 ILCS 140/7. For example, the public body may attempt to invoke 5 ILCS 140/7(1)(c), arguing that releasing the private matter would amount to an invasion of privacy. But to do so successfully the public body must provide facts that demonstrate that disclosing the records would be “highly personal or objectionable to a reasonable person and [that] the subject’s right to privacy outweighs any legitimate public interest in obtaining the information.” 5 ILCS 140/7(1)(c); see 5 ILCS 140/1.2. The FOIA makes clear that “[t]he 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).

##### 4. Public matter message on private hardware.

A public matter message on private hardware would be subject to disclosure only if the message (or the hardware containing the message) has been prepared by or for, or has been or is being used by, received by, in the possession of, or under the control of any public body. 5 ILCS 140/2(c).

##### 5. Private matter message on private hardware.

Closed. See *Quinn v. Stone*, 211 Ill.App.3d 809, 570 N.E.2d 676, 156 Ill.Dec. 200 (1st Dist. 1991).

#### F. How are social media postings and messages treated?

A social media site or social media postings are subject to disclosure if the site or the posting have been prepared by or for, or have been or are being used by, received by, or is in the possession of, or under the control of any public body. 5 ILCS 140/2(c).

#### G. How are online discussion board posts treated?

Online discussion board posts are presumptively open if the posts have been prepared by or for, or have been or are being used by, received by, in the possession of, or under the control of any public body.

#### H. Computer software

##### 1. Is software public?

Yes, software would be open, unless (1) it constitutes proprietary or trade secret information under 5 ILCS 140/7(1)(g); (2) it is copyright protected as, thus, exempt under 5 ILCS 140/7(1)(a); or (3) it is exempt as “[a]dministrative or technical information associated with automated data processing operations . . . that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt under 5 ILCS 140/7(1)(o).

##### 2. Is software and/or file metadata public?

See “Is software public?” above. The FOIA and the case law interpreting the Act do not address metadata. As such, it should be open. See 5 ILCS 140/1.2.

#### I. How are fees for electronic records assessed?

When producing electronic records a public body may charge no more than the cost of the medium (digital device) used to transmit the requested electronic records. That is, if the records are produced on a disc, the public body’s fee can only be as high as the cost of a disc. See 5 ILCS 140/6(a).

#### J. Money-making schemes.

Records pertaining to public funds are open. See 5 ILCS 140/2.10; Ill. Const. Art. VIII, § 1(c) (“Reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law.”)

##### 1. Revenues.

Records pertaining to a public body’s revenues are open: “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 140/2.10 (emphasis added).

##### 2. Geographic Information Systems.

Open, but closed when disclosure could reasonably be expected to produce private gain or public loss. Specifically, 5 ILCS 140/7(1)(i) exempts “[v]aluable 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.” The exemption for “computer geographic systems”



does not extend to requests made by news media as defined in 5 ILCS 140/2 when the requested information is not otherwise exempt and the only purpose of the request is to access and disseminate information regarding the health, safety, welfare, or legal rights of the general public. *See* 5 ILCS 140/7(1)(i).

#### K. On-line dissemination.

A public body that maintains a website must post the following information on its website: “(a) A brief description of itself, which will include, but not be limited to, a short summary of its purpose, a block diagram giving its functional subdivisions, the total amount of its operating budget, the number and location of all of its separate offices, the approximate number of full and part-time employees, and 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, or which exercises control over its policies or procedures, or to which the public body is required to report and be answerable for its operations; and

(b) A brief description of the methods whereby the public may request information and public records, a directory designating the Freedom of Information officer or officers, the address where requests for public records should be directed, and any fees allowable under Section 6 of this Act.” 5 ILCS 140/4.

### IV. RECORD CATEGORIES — OPEN OR CLOSED

The following is only a very general opinion of whether the record in question is exempt from disclosure. Whether disclosure can be denied may depend on how the record is being used by the public body that has possession. Private individuals’ bank records, for example, are not public records, but if they are introduced into evidence in a court proceeding, they may become public records. This transformation may occur in other contexts. The general rule is that if it is a *record* kept by a *public body* (see definitions), it is an open record unless it is exempted by the provisions of the Act. (The reference following each entry refers to the specific statutory exemption.)

#### A. Autopsy reports.

Open if in connection with a coroner proceeding, but might be closed in connection with a pending criminal investigation under 5 ILCS 140/7(1)(d)(i); *see* Public Access Opinion 10-003 (available at <http://foia.ilattorneygeneral.net/pdf/opinions/2010/2010-003.pdf>). Post-mortem photographs may be exempt if release of those photographs would raise privacy concerns. An autopsy of a private citizen done by a public hospital would probably be exempt from disclosure under the personal privacy exemption or the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). *See* 5 ILCS 140/7(1)(c); 5 ILCS 140/7(1)(a); *see also* *Trent v. Coroner of Peoria County*, 349 Ill. App. 3d 276, 812 N.E. 2d 21, 285 Ill. Dec. 432 (3d District 2004).

#### B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

##### 1. Rules for active investigations.

Open, unless the public body can show that disclosure would cause any of the problems enumerated in 5 ILCS 140/7(1)(d). Section 7(d) exempts records in the possession of a public body created in the course of administrative enforcement proceedings “*but only to the extent that disclosure would*: interfere with active administrative enforcement proceedings conducted by the public body that is the recipient of the request; . . . create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing; [ ] 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 . . . 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; [ ] 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; [ ] endanger the life or physical safety of law enforcement personnel or any other person.” 5 ILCS 140/7(1)(d).

##### 2. Rules for closed investigations.

*See* “Rules for active investigations,” above. The enumerated problems listed in 5 ILCS 140/7(1)(d) are less likely to exist in connection with closed as opposed to active investigations, so as to render administrative enforcement records for closed investigations more accessible.

#### C. Bank records.

Bank records pertaining to public bodies, are open unless a specific exemption applies. Section 7(1)(t) closes data on regulation of financial institutions. *See* 5 ILCS 140/7(1)(t). Financial information that a public body has obtained from a person or business which was furnished under a claim of privilege or confidentiality and which would cause competitive harm to the person or business is also exempt from disclosure. 5 ILCS 140/7(1)(g).

#### D. Budgets.

Open; “[a]ll 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 140/2.10.

#### E. Business records, financial data, trade secrets.

Depends; such records are exempt if release would cause competitive harm to a person or entity from which the records were obtained. *See* 5 ILCS 140/7(1)(g); *see also* *BlueStar Energy Services, Inc. v. Illinois Commerce Comm’n*, 374 Ill. App. 3d 990, 871 N.E.2d 880 (1st Dist. 2007) (holding that documents furnished to state agency that regulates public utilities by a regulated utility company were exempt from disclosure for containing confidential information). Financial information pertaining to a public body’s regulation of financial institutions is closed. *See* 5 ILCS 140/7(1)(t).

#### F. Contracts, proposals and bids.

Final contracts are not exempt. Proposals and bids for contracts, grants or agreements are closed by 5 ILCS 140/7(1)(h). In general, the statute protects competitive business information. *See also* 5 ILCS 140/7(1)(g), (t), (s), (u).

#### G. Collective bargaining records.

Closed except for final contracts. *See* 5 ILCS 140/7(1)(p).

#### H. Coroners reports.

Open, except for post-mortem photographs if release of those photographs would raise privacy concerns. *See* Public Access Opinion 10-003 (available at <http://foia.ilattorneygeneral.net/pdf/opinions/2010/2010-003.pdf>).

#### I. Economic development records.

Open, but records pertaining to real estate purchase negotiations are exempt until those negotiations have been completed or terminated. 5 ILCS 140/7(1)(r). With respect to a parcel involved in a pending or actually and reasonably contemplated eminent domain proceeding, records regarding that parcel are exempt except as allowed under discovery rules. Records relating to a real estate sale are exempt until a sale is consummated. 5 ILCS 140/7(1)(r).

Also exempt are construction related technical documents (such as architects' plans and engineers' technical submissions) for public and non-public projects (including power generating and distribution stations and other transmission and distribution facilities, water treatment facilities, airport facilities, sport stadiums, convention centers, and all government owned, operated, or occupied buildings) *if disclosure would compromise security*. 5 ILCS 140/7(1)(k).

## **J. Election records.**

### **1. Voter registration records.**

The voter registration database maintained by the State Board of Elections is open. 2002 Op.Atty.Gen. No. 02-009.

### **2. Voting results.**

Open, unless specifically prohibited by state law as in *Kibort v. Westrom*, 371 Ill.App.3d 247, 862 N.E.2d 609, 308 Ill.Dec. 676 (2d Dist.2007). *Kibort* held that under Election Code, an election authority was required to keep ballots sealed for two months after receiving them apart from examination upon statutorily authorized discovery recount proceeding, and tally lists and poll books delivered to county clerk were required to be kept sealed for one year after delivery except for use of certified copies as evidence in election contests and other judicial proceedings, and thus, within such time periods, records from were exempt from disclosure.

Illinois does not allow secret ballots. *See WSDR, Inc. v. Ogle County*, 100 Ill. App. 3d 1008, 1011, 427 N.E.2d 603, 606 (2d Dist. 1981)

## **K. Gun permits.**

Closed. *See* House Bill 3500.

## **L. Hospital reports.**

Closed under personal privacy exemption and federal statute protecting medical records, the Health Insurance Portability and Accountability Act of 1996 (HIPAA). *See* 5 ILCS 140/7(1)(c); 5 ILCS 140/7(1)(a). A private hospital would not qualify as a public body. *See* 5 ILCS 140/2; *see generally* *Coy v. Washington County Hosp. Dist.*, 372 Ill. App. 3d 1077, 1090, 866 N.E.2d 651, 663 (5th Dist. 2007) (holding that names of patients treated at public hospital were exempt from disclosure).

(As a practical matter, certain records — admission and birth information, for example — are often published by voluntary agreement between hospitals and the media.)

## **M. Personnel records.**

Open if it related to the performance of public duties, *Gekas v. Williamson*, 393 Ill. App. 3d 573, 590, 912 N.E.2d 347, 361 (4th Dist. 2009), but may be closed if specifically exempt under 5 ILCS 140/7(1)(n) or other exemptions.

### **1. Salary.**

Open. *See* 5 ILCS 140/2.10; *see also* *Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200*, 233 Ill. 2d 396, 415, 910 N.E.2d 85, 97 (2009) (superintendent's employment contract was not exempt under personnel file exemption).

### **2. Disciplinary records.**

Disciplinary records relating to a public body's investigation of employee grievances are open. But any records generated as part of a public body's adjudication of employee grievances are closed—except for the final outcome in cases where discipline was imposed. 5 ILCS 140/7(1)(n); *see generally* *Gekas v. Williamson*, 393 Ill. App. 3d 573, 590, 912 N.E.2d 347, 361 (4th Dist. 2009).

### **3. Applications.**

The name of an unsuccessful applicant to public employment is likely closed. *See* Public Access Opinion 11-003, at pp. 13-19 (avail-

able at <http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-003.pdf>) (opining that disclosure of names of unsuccessful applicants would amount to an invasion of privacy pursuant to 5 ILCS 140/7(1)(c).) Public Access Opinion 11-003 also concluded that the names of the unsuccessful applicants' current employers should be closed for privacy reasons. On the other hand, information regarding a public body's expenses incurred in process of evaluating applicants—such as fees for services assessed by a private search firm or interviewees' plane tickets paid for by the public body—should be released. *See* Public Access Opinion 11-003, at pp. 17-19.

### **4. Personally identifying information.**

Closed. 5 ILCS 140/2; 5 ILCS 140/7(1)(b). Exempt is "private information, which "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 email addresses, as well as home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person." 5 ILCS 140/ 2(c-5).

### **5. Expense reports.**

Open. *See* 5 ILCS 140/2.10.

## **N. Police records.**

*See generally* 5 ILCS 140/2.15; 5 ILCS 140/7(1)(d).

### **1. Accident reports.**

Open, unless (a) an investigation is ongoing or actually contemplated and that investigation would be compromised if the records were released; (b) release of the records would likely deprive someone of a fair trial; or (c) release of the records would likely identify an confidential source. *See* 5 ILCS 140/7(1)(d)(i), (iii), (iv). The identities of witnesses to traffic accidents, traffic accident reports, and rescue reports are open, unless disclosure would interfere with an active criminal investigation conducted by the agency that is the recipient of the request. 5 ILCS 140/7(1)(d)(iv).

### **2. Police blotter.**

Open.

### **3. 911 tapes.**

Open.

### **4. Investigatory records.**

Open, unless release of the records would compromise an ongoing or reasonably contemplated investigation. *See generally* 5 ILCS 140/7(1)(d).

#### **a. Rules for active investigations.**

Open, unless release of the records would interfere with the investigation. *See* 5 ILCS 140/7(1)(d)(i); *Day v. City of Chicago*, 388 Ill. App. 3d 70, 80, 902 N.E.2d 1144, 1153 (1st Dist. 2009) (Ongoing investigation exemption did not apply when inmate convicted 14 years earlier requested murder investigation file).

#### **b. Rules for closed investigations.**

Open. *See* 5 ILCS 140/7(1)(d)(i); *Day v. City of Chicago*, 388 Ill. App. 3d 70, 80, 902 N.E.2d 1144, 1153 (1st Dist. 2009) (city could not invoke ongoing investigation exemption where it had provided no evidence that this murder investigation remained open and where perpetrator had been convicted 14 years prior).

### **5. Arrest records.**

Open. 5 ILCS 140/2.15; Public Access Opinion 11-001 (available at <http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-001.pdf>)

(concluding that Section 2.14 of the FOIA requires disclosure of arrest reports).

## 6. Compilations of criminal histories.

Open, pursuant to 5 ILCS 140/2.15(b). That subsection provides a *non-exclusive* list of records pertaining to criminal history record information which should be open: “(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).” 5 ILCS 140/2.15(b); see Public Access Opinion 11-001 (available at <http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-001.pdf>).

## 7. Victims.

Depends; closed if the victim’s life or physical safety would be endangered, if the victim acts as a confidential source whose identity would unavoidably be disclosed, or if release of the victim’s information would disclose unique or specialized investigative techniques and would result in demonstrable harm to the public body that is the recipient of the request. 5 ILCS 140/7(1)(d). Certain private information pertaining to victims (especially child victims) may also be exempt under 5 ILCS 140.7(1)(c).

## 8. Confessions.

Open, unless exempt by 5 ILCS 140/7(1)(d).

## 9. Confidential informants.

Closed, pursuant to 5 ILCS 140/7(1)(d)(iv).

## 10. Police techniques.

Only specialized investigative techniques which would result in demonstrable harm to the public body that is the recipient of the request are exempt. 5 ILCS 140/7(1)(d)(v). Generic police techniques are open. *Id.*; Public Access Opinion 11-002 (available at <http://foia.ilattorneygeneral.net/pdf/opinions/2011/11-002.pdf>) (number of police officers assigned to districts is subject to disclosure).

## 11. Mug shots.

Generally open. See *National Ass’n of Criminal Defense Lawyers v. Chicago Police Dep’t*, 399 Ill.App.3d 1, 13-14, 924 N.E.2d 564, 575, 338 Ill.Dec. 358, 369 (1st Dist. 2010) (ordering disclosure of faces in photographic police lineups after personal identifying information was removed from photos).

## 12. Sex offender records.

Open and accessible via <http://www.isp.state.il.us/sor/>. See 730 ILCS 152/115 (a), (b). The Illinois Department of State Police maintains that statewide online sex offender database, which identifies persons who have been convicted of certain sex offenses and/or crimes against children. *Id.*

## 13. Emergency medical services records.

Probably closed as personal information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. See 5 ILCS 140/7(1)(c)

## O. Prison, parole and probation reports.

Open. See *Etten v. Lane*, 138 Ill.App.3d 439, 485 N.E.2d 1177, 92 Ill.Dec. 934 (5th Dist.1985).

## P. Public utility records.

Consumers’ public utility records are open. See 5 ILCS 140/2.5 (stating that records regarding the receipt and use of public funds are open). But exempt are (1) maps and other records regarding the location or security of generation, transmission, distribution, storage, gathering, treatment, or switching facilities owned by a utility, by a

power generator, or by the Illinois Power Agency; and (2) information contained in or related to proposals, bids, or negotiations related to electric power procurement under Section 1-75 of the Illinois Power Agency Act and Section 16-111.5 of the Public Utilities Act that is determined to be confidential and proprietary by the Illinois Power Agency or by the Illinois Commerce Commission. 5 ILCS 140/7(1)(x), (y).

## Q. Real estate appraisals, negotiations.

Open, unless the records pertain to a not yet consummated or not yet completed real estate purchase negotiation. With regard to a parcel involved in a pending or actually and reasonably contemplated eminent domain proceeding, records, documents and information relating to that parcel shall be exempt except as may be allowed under discovery rules. Records relating to a real estate sale shall be open after a sale is consummated. 5 ILCS 140/7(1)(r).

### 1. Appraisals.

See “Real estate appraisals, negotiations,” above.

### 2. Negotiations.

See “Real estate appraisals, negotiations,” above.

### 3. Transactions.

See “Real estate appraisals, negotiations,” above.

### 4. Deeds, liens, foreclosures, title history.

Open.

### 5. Zoning records.

Open.

## R. School and university records.

The FOIA specifically exempts the following information pertaining to educational matters:

(i) test questions, scoring keys and other examination data used to administer an academic examination;

(ii) information received by a primary or secondary school, college, or university under its procedures for the evaluation of faculty members by their academic peers;

(iii) 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

(iv) course materials or research materials used by faculty members.

5 ILCS 140/7(1)(j).

While the Illinois School Student Records Act, 105 ILCS 10/1 *et seq.*, (which applies to Illinois’ primary and secondary schools) protects certain student records wherein students are individually identifiable, masked or de-identified student records and test scores are open. *Bowie v. Evanston Community Consol. School Dist. No. 65*, 128 Ill.2d 373, 538 N.E.2d 557, 131 Ill.Dec. 182 (1989).

Generally, while records pertaining to individually identifiable students are exempt, records pertaining to a school’s or university’s administration are not.

The federal Family Education Rights and Privacy Act, 20 U.S.C. ‘ 1232g (“FERPA”) can not be invoked as an exemption to the FOIA, because the FERPA does not specifically prohibit release of records—rather, it simply makes federal funding contingent on universities abiding by certain privacy standard established by that statute. *Chicago Tribune Co. v. University of Illinois Board of Trustees*, U.S. District Court, N.D. Illinois, Case No. 10 C 0568 (March 7, 2011), 2011 WL 982531; 5 ILCS 140/7(1)(a).



### 1. Athletic records.

Athletic records, if in the possession of a public school, are probably treated the same as other records pertaining to students. See “School and university records,” above.

### 2. Trustee records.

Open, unless deliberative process exemption applies. See 5 ILCS 150/7(1)(f); see generally *Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist.* 200, 233 Ill. 2d 396, 910 N.E.2d 85 (2009). (Superintendent’s employment contract does fall within FOIA’s exemption for personnel files).

### 3. Student records.

Student records held by a public school, excluding colleges or universities, are exempt from disclosure under Illinois School Student Records Act, but only if and to the extent that the records identify a particular student; de-identified or masked student records are releasable. *Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65*, 128 Ill. 2d 373, 379, 538 N.E.2d 557, 560 (1989) (ordering disclosure of masked standardized test scores for students from certain years, grades and schools).

*Lieber v. Bd. of Trustees of S. Illinois Univ.*, 176 Ill. 2d 401, 403, 680 N.E.2d 374, 375 (1997) (Freedom of Information Act exemption did not apply to information regarding names and addresses of individuals who had been accepted to attend university); but see *Local 1274, Illinois Fed’n of Teachers, AFT, AFL-CIO v. Niles Twp. High Sch.*, Dist. 219, 287 Ill. App. 3d 187, 678 N.E.2d 9 (1st Dist. 1997) (names and addresses of school district’s enrolled students and their parents were exempt from disclosure under FOIA).

## S. Vital statistics.

### 1. Birth certificates.

Closed pursuant to the Illinois Vital Records Act, 410 ILCS 535/1 *et seq.* and 5 ILCS 140/7(1)(a).

### 2. Marriage & divorce.

Closed pursuant to the Illinois Vital Records Act, 410 ILCS 535/1 *et seq.* and 5 ILCS 140/7(1)(a). However, a marriage *application* (as opposed to a marriage license) is public.

### 3. Death certificates.

Closed pursuant to the Illinois Vital Records Act, 410 ILCS 535/1 *et seq.* and 5 ILCS 140/7(1)(a).

### 4. Infectious disease and health epidemics.

Open if the data does not identify any specific patient or reveal medical information belonging to a specific person. See *Southern Illinoisan v. Illinois Dept. of Pub. Health*, 218 Ill. 2d 390, 844 N.E.2d 1 (2006).

## V. PROCEDURE FOR OBTAINING RECORDS

### A. How to start.

#### 1. Who receives a request?

A request for public records should be addressed to the relevant public body’s FOIA Officer—by way of personal delivery, mail, telefax, or other written means available to the public body. 5 ILCS 140/3(c). A 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. 5 ILCS 140/3(c).

5 ILCS 140/4 requires each public body to prominently display at each of its administrative or regional offices, to make available for in-

spection and copying, and to send through the mail if requested, each of the following:

(a) A brief description of itself, which will include, but not be limited to, a short summary of its purpose, a block diagram giving its functional subdivisions, the total amount of its operating budget, the number and location of all of its separate offices, the approximate number of full and part-time employees, and 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, or which exercises control over its policies or procedures, or to which the public body is required to report and be answerable for its operations; and

(b) A brief description of the methods whereby the public may request information and public records, a directory designating the Freedom of Information officer or officers, the address where requests for public records should be directed, and any fees allowable under Section 6 of this Act.

A public body that maintains a website shall also post this information on its website. See 5 ILCS 140/4.

5 ILCS 140/3(g) states that requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information. Before invoking this exemption, the public body must extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions. If any body responds to a categorical request by stating that compliance would unduly burden its operation and the conditions described above are met, it shall do so in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance will 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 the same records that are unchanged or identical to records previously provided or properly denied under this Act shall be deemed unduly burdensome under this provision. See 5 ILCS 140/3(g).

The Illinois Appellate Court, Fourth District, has held that the mere possession of records by a public body is not determinative of an agency’s ability to release documents under the Act if another governmental entity has a substantial interest in asserting an exemption. See *Twin-Cities Broad. Corp. v. Reynard*, 277 Ill. App. 3d 777, 661 N.E.2d 401, 214 Ill. Dec. 547 (4th Dist. 1996). Where one public body holds records in which another public body has a substantial interest in asserting an exemption and the holder denies that the records are exempt from disclosure or decides not to assert an otherwise applicable exemption and knows the other public body would assert the exemption, the holder of the records must consult with the other public body, which may assert an exemption on its own behalf. See *Twin-Cities* (holding that a state’s attorney possessing the minutes and transcript of a university board of regents closed meeting who was willing to disclose them to a FOIA requester could not unilaterally do so when he knew board would have asserted an exemption, and holding that board was entitled to assert FOIA exemption on its own behalf).

The statute contains a separate provision for public records prepared or received after the effective date of the act (July 1, 1984). As to these records, each public body must maintain and make available for inspection and copying a reasonably current list of all the types or categories of records under its control. The list must be reasonably detailed in order to aid persons in obtaining access to public records. Each public body must 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 printout format. See 5 ILCS 140/5.

## 2. Does the law cover oral requests?

The Act does not expressly prohibit oral requests, but 5 ILCS 140/3(c) states that requests “*shall* be made in writing and directed to the public body.” While a “public body may honor oral requests for inspection or copying,” it is advisable to submit requests in writing. 5 ILCS 140/3(c) (emphasis added).

As a practical matter, informal telephone inquiry as to the status of a request can reduce the chance of an agency taking an adversarial position regarding the request.

### a. Arrangements to inspect & copy.

Not specified. But the court in *DesPain v. City of Collinsville*, 382 Ill.App.3d 572, 888 N.E.2d 163, 320 Ill.Dec. 946 (5th Dist. 2008), held that the term “public record,” as used in the FOIA, referred to the original document, rather than a copy thereof. Thus, a requester who asked to listen to recordings of city council meetings was entitled to listen to the original recordings rather than pay for copies to be made; the fact that the city had no facility for the public to listen to audiotapes was not a valid basis for denying a request to inspect a tape-recorded public record.

### b. If an oral request is denied:

Requesters should reduce their requests to writing. See 5 ILCS 140/3(c) (stating that requests “*shall*” be in writing, but that public bodies “*may*” honor oral requests).

#### (1). How does the requester memorialize the refusal?

The public body (and not a requester) should memorialize a denial in writing by sending a notice of denial. Requests for records should be in writing, because public bodies have no obligation to answer oral requests. See 5 ILCS 140/3(c).

#### (2). Do subsequent steps need to be in writing?

For purposes of appeal, it is best to reduce all stages of a FOIA request to writing.

## 3. Contents of a written request.

### a. Description of the records.

Although the Act makes no explicit requirements for the contents of a written request, it should be as specific as possible and cite applicable provisions of the Act. See 5 ILCS 140/3(c).

### b. Need to address fee issues.

The Act contemplates reduction or elimination of copying costs if the request is in the public interest. 5 ILCS 140/6(c).

### c. Plea for quick response.

Not addressed. But that FOIA does emphasize that public bodies should act expediently in releasing public records. 5 ILCS 140/1; see also 5 ILCS 140/3(e)(vii).

### d. Can the request be for future records?

No, records that are not yet in existence are not covered by the FOIA. The Act does not compel the creation of a new record.

### e. Other.

The FOIA does not require public bodies to interpret or advise requesters as to the meaning or significance of the public records. 4 ILCS 140/3.3.

## B. How long to wait.

### 1. Statutory, regulatory or court-set time limits for agency response.

Each public body must either comply with or deny a written request for public records within five business days after receiving it. See 5 ILCS 140/3(d).

The time for response under this Section may be extended by the public body for not more than 5 business days from the original due date for any 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 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 under 5 ILCS 140/7 or should be revealed only with appropriate deletions;

(vi) the request for records cannot be complied with by the public body within the time limits prescribed by 5 ILCS 140/3(c) without unduly burdening or interfering with the operations of the public body;

(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. See 5 ILCS 140/3(e).

The person making a request 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 compliance, a failure by the public body to comply with any previous deadlines shall not be treated as a denial of the request. 5 ILCS 140/3.

### 2. Informal telephone inquiry as to status.

An informal telephone call to resolve any problems or differences should always be considered before initiating a request for review with the Public Access Counselor or before filing suit. Follow-up letters can also encourage a response.

### 3. Is delay recognized as a denial for appeal purposes?

Yes, a request is deemed denied if a public body fails to comply with a written request, extend the time for response, or deny a request within 5 business days after its receipt. 5 ILCS 140/3(d); see also 5 ILCS 140/9(c). A public body that fails to respond to a request within the timeframes provided for in 5 ILCS 140/3 (generally 5 days, and an additional 5 day if an extension is requested) but, later, provides the requester with copies of the requested public records may not impose a fee for such copies. 5 ILCS 140/3(d). A public body that fails to respond to a request received may not treat the request as unduly burdensome under 5 ILCS 140/3(g).

*Procedure for denial.* Denial must be in writing and state the reasons for the denial, including a detailed factual basis for the application of any exemption claimed, as well as the names and titles or positions of each person responsible for the denial. See 5 ILCS 140/9(a). Each notice of denial by a public body must also inform the requester of the right to review by the Public Access Counselor, provide the address



and phone number for the Public Access Counselor, and inform the requester of his right to judicial review under 5 ILCS 140/11.

When a request for public records is denied on the grounds that the records are exempt under 5 ILCS 140/7, the notice of denial shall 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. 5 ILCS 140/9(b). Copies of all notices of denial must be retained by each public body in a single central office file that is open to the public and indexed according to the type of exemption claimed and, to the extent feasible, according to the types of records requested. 5 ILCS 140/9(b); *but cf. Duncan Publ'g Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 709 N.E.2d 1281, 237 Ill. Dec. 568 (1st Dist. 1999) (holding that individual departments of city were subsidiary public bodies and, thus, public bodies that were each individually subject to the Act; as such, they could comply with the Act by each department retaining copies of notices of denials in their own single, central office file and need not retain the notices in a single, central office file for the entire city).

### C. Administrative appeal.

#### 1. Time limit.

A person who was denied access to public records, by a public body other than the General Assembly and its committees, commissions and agencies, may file a request for review not later than 60 days after the date of the final denial. *See* 5 ILCS 140/9.5(a).

#### 2. To whom is an appeal directed?

A person who was denied access to public records, by a public body other than the General Assembly and its committees, commissions and agencies, may file a request for review with the Public Access Counselor established in the Office of the Illinois Attorney General. *See* 5 ILCS 140/9.5(a).

##### a. Individual agencies.

A public body's denial of a FOIA request can be appealed either to the Public Access Counselor established in the Office of the Illinois Attorney General or to circuit court—not to the public body itself.

##### b. A state commission or ombudsman.

The Public Access Counselor established in the Office of the Illinois Attorney General acts as the ombudsman deciding and, in some cases, mediating FOIA disputes. The procedures before the Public Access Counselor's office as well as relevant timeframes for submitting arguments are set forth in 5 ILCS 140/9.5.

The request for review procedure should proceed as follows: "Upon receipt of a request for review, the Public Access Counselor shall determine whether further action is warranted. If the Public Access Counselor determines that the alleged violation is unfounded, he or she shall so advise the requester and the public body and no further action shall be undertaken. In all other cases, the Public Access Counselor 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 records requested and shall otherwise fully cooperate with the Public Access Counselor. If a public body fails to furnish specified records pursuant to this Section, 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 the Act. To the extent that records or documents produced by a public body contain information that is claimed to be exempt from disclosure under Section 7 of this Act, the Public Access Counselor shall not further disclose that information. Within 7 working days after it receives a copy of a request for review and request for production of records from the

Public Access Counselor, 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. The Public Access Counselor shall 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 shall provide a copy of the response to the public body." *See* 5 ILCS 140/9.5(c)-(d).

The requester and the public body may submit to the Public Access Counselor affidavits or records concerning any matter germane to the review. *See* 5 ILCS 140/9.5(e). The Public Access Counselor 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 the Act. *See* 5 ILCS 140/9.5(c).

The Attorney General may choose (1) to issue a binding opinion pertaining to a request for review; (2) to issue an advisory opinion pertaining to a request for review; (3) to mediate a dispute; or (4) otherwise address the matter without the issuance of a binding opinion. *See* 5 ILCS 140/9.5 (f). The Attorney General makes its binding opinions available on its website at <http://foia.ilattorneygeneral.net/2011binding.aspx>.

##### c. State attorney general.

*See* state commission or ombudsman above.

#### 3. Fee issues.

This same procedure is used where the requester believes that an onerous fee is being imposed in order to discourage the request. This is clear under 5 ILCS 140/6(d), which states that the purposeful imposition of a fee not consistent with the [fee provisions of the Act] shall be considered a denial of access to public records for the purposes of judicial review. 5 ILCS 140/6(d).

#### 4. Contents of appeal letter.

The request for review must be in writing, signed by the requester, and include (i) a copy of the request for access to records and (ii) any responses from the public body. *See* 5 ILCS 140/9.5(a).

A public body that receives a request for records, and asserts that the records are exempt under 5 ILCS 140/7(1)(c) or (1)(f) (pertaining to personal information and certain preliminary drafts), shall, within the time periods provided for responding to a request, provide written notice to the requester and the Public Access Counselor of its intent to deny the request in whole or in part. *See* 5 ILCS 140/9.5(b). That written notice shall include: (i) a copy of the request for access to records; (ii) the proposed response from the public body; and (iii) 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 Public Access Counselor shall determine whether further inquiry is warranted. *See* 5 ILCS 140/9.5(b).

##### a. Description of records or portions of records denied.

Each public body denying a request for public records must provide the requester written reasons for the denial, including a detailed factual basis for the application of any exemption claimed. 5 ILCS 140/9(a). When claiming that a record is exempt under any of the exemptions listed in 5 ILCS 140/7, the public body 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. 5 ILCS 140/9(b).

##### b. Refuting the reasons for denial.

If a requester believes that he was improperly denied access to public records, he can initiate a request for review with the Public Access Counselor. *See* 5 ILCS 9; 5 ILCS 9.5.

## 5. Waiting for a response.

The time frames for responding to correspondences pertaining to a request for review before the Public Access Counselor are set forth in 5 ILCS 140/9.5(c), (d), (f)

## 6. Subsequent remedies.

There are no other administrative appeal procedures provided by the Act. Only a binding opinion is appealable—an advisory opinion is not. *See* 5 ILCS 140/9.5(f)–(h).

### D. Court action.

#### 1. Who may sue?

Any person denied access to inspect or copy any public record by a public body may file a suit for injunctive or declaratory relief. *See* 5 ILCS 140/11(a). A public body may file suit to initiate an administrative review of a binding opinion of the Attorney General. *See* 5 ILCS 140/11.5.

#### 2. Priority.

Except as to causes the court considers to be of greater importance, proceedings arising under this Act must take precedence over all other causes and be assigned for hearing and trial at the earliest practicable date and expedited in every way. *See* 5 ILCS 140/11(h).

#### 3. Pro se.

Nothing about the Act prohibits requesters from proceeding *pro se*, or “[f]or oneself; on one’s own behalf; without a lawyer.” Black’s Law Dictionary 1236 (7th ed. 1999). Whether the requester wishes to proceed *pro se* will be up to the requester or the policy of the news organization. If the question is crystal clear, one might consider proceeding without a lawyer, but only if one is certain of his or her abilities to draft a civil complaint and other pleadings.

Though 5 ILCS 140/11(i) permits recovery of attorneys’ fees, requesters who proceed *pro se* can not collect attorneys’ fees. *See Hamer v. Lentz*, 132 Ill. 2d 49, 547 N.E.2d 191, 138 Ill. Dec. 222 (1989) (denying attorneys’ fees to attorney proceeding *pro se*); *see also Brazas v. Ramsey*, 291 Ill. App. 3d 104, 682 N.E.2d 476, 224 Ill. Dec. 915 (2d Dist. 1997) (denying attorneys’ fees to nonattorney proceeding *pro se*).

#### 4. Issues the court will address:

The court may address the denial as well as the question of the amount of fees the agency seeks to charge.

##### a. Denial.

The court has jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access. If the public body can show that exceptional circumstances exist, and that the body is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. *See* 5 ILCS 140/11(d). In any action considered by the court, the court shall consider the matter *de novo*, and shall conduct such in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of this Act. *See* 5 ILCS 140/11(f).

##### b. Fees for records.

The imposition of a fee not consistent with the FOIA’s fee provision enunciated in 5 ILCS 140/6(a) & (b) constitutes a denial of access to public records for the purposes of judicial review. *See* 5 ILCS 140/6(d).

##### c. Delays.

A public body’s failure to comply with a written request, extend the time for response, or deny a request within 5 business days after its receipt shall be considered a denial of the request so as to trigger the

requester’s right to suit. *See* 5 ILCS 140/3(d); *see* 5 ILCS 140/11(a). A public body that fails to respond to a request within the requisite periods set forth in 5 ILCS 140/3 but thereafter provides the requester with copies of the requested public records may not impose a fee for such copies. *See* 5 ILCS 140/3(d).

## 5. Pleading format.

There is no particular format prescribed by the statute; the pleading format should simply take the form of a civil complaint filed in that court. *See* Illinois Code of Civil Procedure, 735 ILCS 5/1–101 to 22–105, and allege a request, an improper denial. The prayer for relief should include a request for attorneys’ fees and costs. If the requester believes that the public body acted in bad faith in denying access to the records, a request for civil penalties may be added. 5 ILCS 140/11.

## 6. Time limit for filing suit.

There are no time limits prescribed in the Act, but judicial review should be sought as soon as possible. (Illinois law provides that all civil actions not otherwise provided for shall be commenced within five years after the cause of action accrued. *See* 735 ILCS 5/13–205.)

## 7. What court.

If a state agency denies a request, suit may be filed either in the circuit court for the county where the public body has its principle office or where the requester resides. *See* 5 ILCS 140/11(b). If a non-state agency (such as a municipality) denies a request, suit may be filed in the circuit court for the county where the public body is located. *See* 5 ILCS 140/11(c). An action for administrative review of a binding opinion by the Attorney General must be filed in Cook or Sangamon County. *See* 5 ILCS 140/11.5.

## 8. Judicial remedies available.

The circuit court has jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld. If the agency can show that exceptional circumstances exist, and that it is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. *See* 5 ILCS 140/11(d).

A circuit court considering the propriety of a public body’s denial of access to public records may conduct an *in camera* examination of the requested records to determine if the records or any part of them may be withheld under any provision of the Act. *See* 5 ILCS 140/11(e).

The burden is on the public body to establish by clear and convincing evidence that its refusal to permit public inspection comports with the provisions of the Act. *See* 5 ILCS 140/11(f); *see also Lieber v. Board of Trs.*, 176 Ill. 2d 401, 680 N.E.2d 374, 223 Ill. Dec. 641 (Ill. 1997) (“If the requesting party subsequently challenges the denial in circuit court . . . , the public body has the burden of proving that the records in question fall within the exemption it has claimed.”).

To meet its burden and to assist the court in making its determination, the public body must provide a *detailed* justification for any claimed exemption, addressing the requested documents specifically and in a manner allowing for adequate adversary testing. *Illinois Educ. Ass’n v. Illinois State Bd. Of Educ.*, 791 N.E.2d 522 (Ill. 2003); *see* 5 ILCS 140/9(a) (“Each public body denying a request for public records shall 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.”).

Vague and conclusory affidavits will not suffice to meet the burden of proof. *Illinois Educ. Ass’n v. Illinois State Bd. Of Educ.*, 791 N.E.2d 522 (Ill. 2003).

In the event of noncompliance with a court order to disclose records, the court may enforce its order against any public official or employee subject to the order or primarily responsible for such non-

compliance through the court's contempt powers. 5 ILCS 140/11(g).

### 9. Litigation expenses.

The FOIA states that a requester who “prevails” in a FOIA case shall be awarded reasonable attorneys’ fees and costs. See 5 ILCS 140/11(i).

#### a. Attorney fees.

Pursuant to the FOIA’s 2010 amendment, attorneys’ fees *shall* be awarded to any requester who “prevails.” See 5 ILCS 140/11(i). Under the prior version of the Act, courts had discretion to award attorneys’ fees to requesters that “substantially prevailed.” The authors know of no published appellate opinion applying the new attorneys’ fees standard, but the language of the amended Act signals that courts no longer have much discretion in deciding whether or not to award attorneys’ fees—they must award fees and costs if they determine that the requester prevailed. See 5 ILCS 140/11(i). Also, it is unclear if, or to what extent, the new FOIA’s “prevail” standard differs from the old FOIA (and the federal FOIA)’s “substantially prevail” standard.

The burden of proving that an award of attorneys’ fees is warranted rests upon the party seeking the fees. See *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 202, 689 N.E.2d 319, 325-26, 228 Ill. Dec. 447, 453-54 (1st Dist. 1997).

Under the old Act’s “substantially prevail” standard, a requester had to demonstrate (1) that prosecution of the lawsuit could reasonably be regarded as necessary to obtain the records, and (2) that the lawsuit had a substantial causative effect on the delivery of the information. See *id.*; see also *Duncan Publ’g Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 709 N.E.2d 1281, 237 Ill. Dec. 568 (1st Dist. 1999). That is, if no causative nexus existed between the filing of the FOIA suit and release of the records, no attorneys’ fees award was due. See *Duncan*.

Also, requesters who bring suit without the aid of a lawyer are not entitled to attorneys’ fees. See Court Action, pro se” *supra*.

#### b. Court and litigation costs.

The 2010 FOIA for the first time entitles a requester who prevails to recover costs. See 5 ILCS 140/11(i). The Act does not define or limit the term “costs.”

### 10. Fines.

The court shall impose civil penalties against a public body, if the court determines that the public body willfully or intentionally failed to comply with the FOIA or otherwise acted in bad faith. The civil penalty must range between \$2,500.00 and \$5,000.00 per occurrence. See 5 ILCS 140/11(i).

### 11. Other penalties.

There are no other penalties prescribed by the Act, except that a court may enforce its orders through its general contempt powers. See 5 ILCS 140/11(g).

## E. Appealing initial court decisions.

### 1. Appeal routes.

Appeal of a denial by a circuit court of access to records is taken according to the Illinois Code of Civil Procedure, 735 ILCS 5/1-101 to 22-105, and the Illinois Supreme Court Rules.

### 2. Time limits for filing appeals.

Rules require filing in the circuit court a notice of appeal within 30 days of the court’s decision denying the request.

### 3. Contact of interested amici.

The requester might consider notifying the Illinois Press Association, the Illinois News Broadcasters Association or other media groups, which often intervene in FOIA cases. The Reporters Committee for Freedom of the Press frequently files *amicus* briefs in important press cases before a state’s highest court.

## F. Addressing government suits against disclosure.

A public body that has been directed to release records pursuant to a binding opinion by the Attorney General may file a complaint for administrative review in the circuit courts or Cook or Sangamon County. See 5 ILCS 140/11.5. The binding opinion is treated as a final decision of an administrative agency under Illinois Administrative Review Law, 735 ILCS 5/Art. III. See 5 ILCS 140/11.5.

A public body could also invoke the Declaratory Judgment provision of the Code of Civil Procedure 735 ILCS 5/101 et seq. to bring such a suit where no binding opinion was issued by the Attorney General.



# Open Meetings

## I. STATUTE — BASIC APPLICATION.

### A. Who may attend?

Any person may attend a public meeting; the Illinois Open Meetings Act, 5 ILCS 120/1 to 6, makes no distinction between members of the news media and members of the general public.

### B. What governments are subject to the law?

The Act applies to meetings of state, county and local public bodies, with specified exceptions. The public policy behind the Act states that public bodies “exist to aid in the conduct of the people’s business and that the people have a right to be informed as to the conduct of their business. In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.” 5 ILCS 120/1.

### C. What bodies are covered by the law?

The Act defines public bodies as “all legislative, executive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of [Illinois], and any subsidiary bodies of any of the foregoing.” 5 ILCS 120/1.02. Subsidiary bodies include (but are not limited to) committees and subcommittees that are supported in whole or in part by tax revenue, or that expend tax revenue, except the General Assembly and its committees or commissions. The Act specifies that the term “public body” includes “tourism boards and convention or civic center boards located in counties that are contiguous to the Mississippi River with populations of more than 250,000 but less than 300,000.” The term “public body,” however, does not include a child death review team or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act or an ethics commission acting under the State Officials and Employees Ethics Act.

Inclusion within the definition of “public body” depends primarily upon organizational structure. See *Board of Regents v. Reynard*, 292 Ill. App. 3d 968, 977, 686 N.E.2d 1222, 1228, 227 Ill. Dec. 66, 72 (4th Dist. 1997). Factors to be considered in determining whether an entity is a public body include: (1) who appoints the members of the entity; (2) the formality of the members’ appointments and whether they are paid for their tenure; (3) the entity’s assigned duties, including duties reflected in the entity’s bylaws or authorizing statute; (4) whether its role is solely advisory or whether it also has a deliberative or investigative function; (5) whether the entity is subject to government control or otherwise accountable to any public body; (6) whether the group has a budget; (7) its place within the larger organization or institution of which it is a part; and (8) the impact of decisions or recommendations that the group makes. *University Professionals v. Stukel*, 344 Ill. App. 3d 856, 865, 801 N.E.2d 1054, 1062, 280 Ill. Dec. 109, 117 (1st Dist. 2003).

#### 1. Executive branch agencies.

##### a. What officials are covered?

The Act does not name “covered” officials; neither does it exempt certain officials. Executive agencies are included in the definition of “public body.” See 5 ILCS 120/1.02.

##### b. Are certain executive functions covered?

The Act does not exempt specific executive functions.

##### c. Are only certain agencies subject to the act?

The Act does not specifically exclude any executive agencies. Certain functions of all covered public bodies may be closed, and to the

extent that executive agencies perform such functions, such meetings might be closed.

The Illinois Attorney General has opined that local ethics commissions are not *per se* exempt from the provisions of the Act. See Op. Att’y. Gen. 007 (1999). However, an ethics commission “acting under the State Officials and Employees Ethics Act” does not fall under the definition of a “public body,” and as a result, does not fall under the purview of the Act. See 5 ILCS 120/1.02.

#### 2. Legislative bodies.

The Act specifically covers legislative bodies. See 5 ILCS 120/1.02. However, the Illinois General Assembly and its committees are not covered by the Act, but are subject to the state constitutional requirement of open meetings. See Ill. Const. art. IV, § 5(c) (providing that sessions of each house of Legislature, as well as committees, joint committees and legislative commissions, are open to the public; sessions and committee meetings of a house may be closed if two-thirds of members elected to that house “determine that the public interest so requires,” and meetings of joint committees and legislative commissions may be closed if two-thirds of members elected to *each* house “determine that the public interest so requires,” presumably by vote); see also Ill. Const. art. IV, § 7 (a) and (b) (requiring “reasonable public notice of meetings, including a statement of subjects to be considered” by committees of each house, joint committees and legislative commissions, as well as the keeping of a journal of house proceedings and a transcript of debates, with the journal published and the transcript open to the public).

#### 3. Courts.

The definition of public body does not include judicial bodies. Since the judiciary is a separate branch of government, and the other two branches are specifically covered, it is likely that such meetings would not be subject to the Act. See *Copley Press Inc. v. Administrative Office of The Courts*, 271 Ill. App. 3d 548 (1995) (holding that Administrative Office of The Courts, Nineteenth Judicial Circuit, not covered, as “judiciary is exempt” under the Act); see also Op. Att’y Gen. 005 (1999) (Illinois Attorney General opining, in response to inquiry from Illinois Supreme Court justice, that Illinois Courts Commission not covered by Act as lack of reference to courts or judiciary in Act’s definition of “public body” indicates “an intent to exclude the judicial branch from the requirements of that Act.”).

#### 4. Nongovernmental bodies receiving public funds or benefits.

There are many private agencies that receive government grants or some other type of funding, such as arts councils, alcohol abuse programs, women’s shelters and other social service programs. It is doubtful that such bodies would be considered public bodies for the purposes of the Open Meetings Act. Whether a particular group’s meetings would be subject to the Act would depend on whether the particular agency would be considered an “advisory” body, or a “subsidiary” body of a public body, including — but not limited to — committees and subcommittees supported in whole or in part by tax revenue or which expend tax revenue. Such groups are covered by the Act’s definition of public body. See 5 ILCS 120/1.02.

#### 5. Nongovernmental groups whose members include governmental officials.

Depending on the function of the non-governmental group, membership of a government official in such a group could make it an “advisory” or “subsidiary” body subject to the provisions of the Act.

#### 6. Multi-state or regional bodies.

There is no case law in which the question of whether a multistate body is subject to the Act is addressed. A regional body operating entirely within the state is more than likely subject to the Act if it is composed of representatives of government.

## 7. Advisory boards and commissions, quasi-governmental entities.

Advisory boards and commissions are specifically covered. See 5 ILCS 120/1.02; see also *Board of Regents v. Reynard*, 292 Ill. App. 3d 968, 977, 686 N.E.2d 1222, 1228, 227 Ill. Dec. 66, 72 (4th Dist. 1997). Whether a “quasi-governmental” entity is covered depends on its function and the composition of its members.

While at least one court has said that the exceptions to the Act must be narrowly construed, *Illinois News Broadcasters Ass’n v. City of Springfield*, 22 Ill.App.3d 226, 228, 317 N.E.2d 288, 290 (5th Dist. 1974), the nature of subsidiary or advisory bodies subject to the Act has been the subject of judicial interpretation. Although the Act’s definition of “public body” specifically includes “advisory bodies” at all levels of government, see 5 ILCS 120/1.02, one Illinois court has ruled that a university advisory committee was not an advisory body under the Open Meetings Act. In *Pope v. Parkinson*, 48 Ill. App. 3d 797, 363 N.E.2d 438, 6 Ill. Dec. 756 (4th Dist. 1977) a reporter for a student newspaper sought access to meetings of the University of Illinois Assembly Hall Advisory Committee. The committee consisted of four faculty members and four student members appointed by the university chancellor. It advised the Assembly Hall director on “policy questions” concerning the administration of the Assembly Hall.

The court reasoned that the committee’s deliberations did not fall within the scope of the Open Meetings Act because the committee was not formally appointed by, or accountable to, any public body of the state. It was, rather, an informal committee, the sole function of which was to advise university administrators on matters pertaining to internal business affairs. The committee was not created by statute and, if disbanded, would not affect the public tax burden. See 48 Ill. App. 3d at 799, 363 N.E.2d at 440, 6 Ill. Dec. 758. The court added that its opinion was restricted to the facts of the case, and it was not deciding whether every university committee was exempt from the requirements of the Act. See 48 Ill. App. 3d at 801, 363 N.E.2d at 441, 6 Ill. Dec. at 759.

One court has set out criteria for determining in unclear cases whether a meeting of an advisory or subsidiary body must be open to the public. In *Rockford Newspapers Inc. v. Northern Ill. Council on Alcoholism and Drug Dependence*, 64 Ill. App. 3d 94, 380 N.E.2d 1192, 21 Ill. Dec. 16 (2d Dist. 1978), the court found that a private, not-for-profit organization (the NICADD), formed to administer drug and alcohol treatment programs, was not subject to the provisions of the Act, despite the fact that 90 percent of its funding came from governmental grants and contracts, and despite the fact that its programs were regulated and monitored by federal, state and local governments. The court relied on the following:

- a) The NICADD had a legal existence independent of the governmental body that regulated it. (That is, it was a private, not-for-profit); and
- b) Its board of directors and employees were independent of such control. The court declared that general supervision by the governmental body “does not transform the supervised into a subsidiary of the government.” 64 Ill. App. 3d at 95-97, N.E.2d at 1193-94, 21 Ill. Dec. at 17-18.

The Illinois Appellate Court, First Judicial District, cited *Rockford* with approval in *Hopf v. Topcorp Inc.*, 170 Ill. App. 3d 85, 527 N.E.2d 1, 122 Ill. Dec. 629 (1988). A divided court found that a “mixed” private-public entity was not subject to the Act.

In *Topcorp*, two for-profit corporations entered into an agreement with a city and a university to develop a research park on 22 acres of downtown property owned principally by the city and the university. The city and the university owned all shares of capital stock in Topcorp and Topcorp’s six-member board of directors included the mayor, an alderman and the city manager. The other for-profit corporation,

Research Park Inc., was a wholly owned subsidiary of Topcorp.

Citizens of Evanston sought copies of minutes of the Topcorp and RPI meetings, arguing that Topcorp was public in nature under the *Rockford* standards, noting, *inter alia*, that the city owned half of the stock, and public officials and appointees sat on the corporation boards.

The appellate court ruled that the corporations were not sufficiently governmental to fall within the confines of the Open Meetings Act. It relied on the fact that both corporations were privately incorporated, despite the presence of public officials on the boards of directors. The court also found that the respective corporations’ boards and employees were independent of direct governmental control, and that the private sector would provide the majority of funding for the actual development of the research park. The court also affirmed the trial court’s finding that the city’s supervision was general in nature, as was the university’s.

The Illinois Appellate Court, Fourth District, held in *Board of Regents of the Regency University System v. Reynard*, 292 Ill. App. 3d 968, 686 N.E.2d 1222, 227 Ill. Dec. 66 (1997), that subsidiaries of public bodies can themselves be public bodies that, in turn, have subsidiaries constituting public bodies covered by the Act. The court noted that the Illinois State University Board of Regents was both an arm of the State of Illinois and the governing body of ISU. As such, the ISU Senate was a subsidiary of the board, and “a subsidiary public body is itself a public body” under the Act. *Board of Regents*, 292 Ill. App. 3d at 978, 686 N.E.2d at 1229, 227 Ill. Dec. at 73. Consequently, a subsidiary of the ISU Senate, the Athletic Council of Illinois State University, was a public body that was required to comply with the Act. *Id.*

## 8. Other bodies to which governmental or public functions are delegated.

a. Coroner’s inquests — The Illinois Attorney General has never issued a formal opinion whether coroner’s hearings are open. However, according to Shawn Denney, First Assistant Attorney General, such hearings have traditionally been regarded as open. This is supported by a provision in 55 ILCS 5/3-3001 to -3044, which states that “[i]f a sufficient number of jurors [summoned to be on the jury] do not attend, the coroner may summon others from among the bystanders to make up the jury.” 55 ILCS 5/3-3022 (emphasis added). In Denney’s view, this supports an argument that the legislature intended that inquests be open. No cases have interpreted this provision. An informal opinion of the Illinois Attorney General, however, opined that a coroner’s jury is not a public body subject to the Act and, therefore, a coroner is not required to abide by the Act’s notice requirements. Informal Op. Att’y Gen. 007 (1998).

b. Whether other bodies’ meetings would be subject to the Act would depend on whether the particular body would be considered an “advisory” or “subsidiary” body of the state, or a “committee” or “subcommittee” supported in whole or in part by tax revenue. Such groups are covered by the Act’s definition of public body. See 5 ILCS 120/1.02. For example, a “public aid committee” — an entity that hears appeals from decisions denying or terminating public assistance — is a public body under the Act, according to the Illinois Attorney General. See Op. Att’y Gen. 009 (1996).

## 9. Appointed as well as elected bodies.

The definition of public bodies which are covered by the Act makes no distinction between appointed and elected bodies, so both are covered by the Act. However, the Act defines public office as “a position created by or under the Constitution or laws of this State, the occupant of which is charged with the exercise of some portion of the sovereign power of this State.” 5 ILCS 120/2. The term includes “members of the public body, but it shall not include organizational positions filled by members thereof, whether established by law or by a public body itself, that exist to assist the body in the conduct of its business.” *Id.*

## D. What constitutes a meeting subject to the law.

### 1. Number that must be present.

#### a. Must a minimum number be present to constitute a “meeting”?

The Act defines “meeting” as “any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business.” 5 ILCS 120/1.02. For example, in a village governed by a commissioner form of government in which the village council comprises a mayor and four commissioners, the Illinois Attorney General has opined that a quorum would be three members, and a majority of that quorum would be two. *See Op. Att’y. Gen. 005 (1996).*

#### b. What effect does absence of a quorum have?

The Illinois Attorney General has concluded that the Act applies to committees of a public body that may consist of less than a majority of a quorum of the members of the public body. The reasoning is that such committees are subsidiary bodies contemplated by the Act. *See Op. Att’y. Gen. 030 (1982).*

### 2. Nature of business subject to the law.

#### a. “Information gathering” and “fact-finding” sessions.

The Act applies to official as well as *unofficial* or *informal* meetings where public business is discussed. *See People ex rel. Difanis v. Barr*, 83 Ill. 2d 191, 414 N.E.2d 731, 46 Ill. Dec. 678 (Ill. 1980). Thus, information-gathering or fact-finding sessions are covered.

#### b. Deliberations toward decisions.

The public policy provision of the Act states that it is the intent of the Act that public bodies’ actions “be taken openly and that their deliberations be conducted openly.” 5 ILCS 120/1.

1) *Telephone conference calls.* The Act defines a “meeting” as “any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication.” 5 ILCS 120/1.02. The Illinois Appellate Court, Fourth District, has held that conducting a meeting by telephone conference does not, by itself, violate the Act. *See Freedom Oil Co. v. Illinois Pollution Control Board*, 275 Ill. App. 3d 508, 655 N.E.2d 1184, 211 Ill. Dec. 801 (1995). Public bodies must fully comply with all requirements of the Act, whether their meetings are held in person or by telephone. *Id.* This simply means that the press and the public can attend conference call meetings.

2) *Nature of discussion.* The discussion of public business cannot be disguised by declaring that the meeting is for other purposes. For example, in *People ex rel. Difanis v. Barr*, 83 Ill. 2d 191, 414 N.E.2d 731, 46 Ill. Dec. 678 (Ill. 1980), nine members of a 15-member city council met an hour and a half before a regularly scheduled meeting for the ostensible purpose of holding a party caucus prior to the council meeting. However, council business was discussed at the meeting. The court concluded that this violated the Act, which it found was intended to apply to more than *official* meetings of full bodies or duly constituted committees. *See Difanis*, 83 Ill. 2d at 200, 414 N.E.2d at 735, 46 Ill. Dec. at 682.

A meeting of a re-elected mayor, a re-elected commissioner and three newly elected, but unsworn, village commissioners to discuss appointments to city offices that could only be made after the new council members assumed office was a meeting subject to public notice requirements of the Act, in the opinion of the Illinois Attorney General. *See Op. Att’y. Gen. 005 (1996).* As the public body was governed by a mayor and four commissioners, a quorum was three members. *See id.* The re-elected mayor and the re-elected commissioner thus constituted a majority of a quorum, and since the meeting failed to satisfy the Act’s notice requirements, the meeting violated the Act. *See id.*

## 3. Electronic meetings.

### a. Conference calls and video/Internet conferencing.

The Act defines a “meeting” as “any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication.” 5 ILCS 120/1.02. Additionally, both the Appellate Court of Illinois and the Illinois Attorney General have addressed conference calls. The appellate court has held that conducting a meeting by telephone conference does not, by itself, violate the Act. *See People ex rel. Graf v. Village of Lake Bluff*, 321 Ill. App. 3d 897, 907-08, 748 N.E.2d 801, 811, 255 Ill. Dec. 97, 107 (2d Dist. 2001), *rev’d on other grounds*, 206 Ill. 2d 541, 795 N.E.2d 281, 276 Ill. Dec. 928 (Ill. 2003); *Freedom Oil Co. v. Illinois Pollution Control Board*, 275 Ill. App. 3d 508, 655 N.E.2d 1184, 211 Ill. Dec. 801 (4th Dist. 1995). The Attorney General held the same view that conference calls are a permissible means to hold a meeting, so long as notice provisions of the act are met and the public can participate. *See Op. Att’y Gen. 041 (1982).* However, public bodies must fully comply with all requirements of the Act, whether their meetings are held in person or by telephone. This means that the press and the public can attend conference call meetings.

### b. E-mail.

Electronic mail constitutes a “meeting” for purposes of the Act. *See 5 ILCS 120/1.02.*

### c. Text messages.

A text message qualifies as a “meeting” under the Act to the extent that it is a “contemporaneous interactive communication.” *See 5 ILCS 120/1.02.* However, the quorum requirements must still be met. For example, if a mass text message is sent to “a majority of a quorum of the members of a public body held for the purpose of discussing public business,” then the text message could fall within the definition of a “meeting.” *See Id.*

### d. Instant messaging.

The Act explicitly includes instant messaging within the definition of a “meeting.” A meeting is “any gathering, whether in person or ... electronic means (such as, without limitation, electronic mail, electronic chat, and *instant messaging*), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business.” 5 ILCS 120/1.02 (emphasis added). Put differently, an instant message qualifies as a meeting if (1) there is quorum; (2) of a public body; (3) held for the purposes of discussing public business. *Id.*

### e. Social media and online discussion boards.

Like text messages and instant messages, social media and online discussion boards qualify as a “meeting” if (1) there is quorum; (2) of a public body; and (3) held for the purposes of discussing public business. *Id.*

## E. Categories of meetings subject to the law.

The Act states that it is the public policy of the state of Illinois “that its citizens shall be given . . . the right to attend all meetings at which any business of a public body is discussed or acted upon in any way.” 5 ILCS 120/1. Public bodies subject to the Act must give public notice of *all* meetings, whether open or closed. *See 5 ILCS 120/2.02.* This right to attend is limited in circumstances where “the General Assembly has specifically determined that the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.” 5 ILCS 120/1. How notice is given depends on the circumstances discussed below. All meetings covered by the Act must be held at specified times and places that are convenient and open to the public. No meeting required by the Act to be public can be held on a legal holiday unless



the regular meeting day falls on the holiday. *See* 5 ILCS 120/2.01.

Note: The Illinois Act permits home rule units to enact, by ordinance, more stringent requirements than those set out in the Act “which would serve to give further notice to the public and facilitate public access to meetings.” 5 ILCS 120/6. Local ordinances, therefore, should be checked for local open meetings provisions. (A home rule unit is defined by the Illinois Constitution as a county which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000. Ill.Const. art. 7, § 6).

## 1. Regular meetings.

### a. Definition.

The Act does not define the term “regular meeting.”

### b. Notice.

The Act declares that it is the public policy of the state of Illinois “that its citizens *shall* be given advance notice of . . . all meetings at which any business of a public body is discussed or acted upon in any way.” 5 ILCS 120/1 (emphasis added).

The Act requires public notice of all meetings of a public body. *See* 5 ILCS 120/2.02. This includes regularly scheduled meetings, special meetings and emergency meetings. *See id.* To satisfy the public notice requirement, a public body must post a copy of the notice at its principal office *and* at the location where the meeting is to be held 48 hours in advance of the meeting. *See* 5 ILCS 120/2.02 (a). If the public body has a website, the agenda must also be posted until the regular meeting is concluded. *Id.* However, even if the public body fails to post the notice on its website, this will not invalidate any actions taken at the meeting. *See* 5 ILCS 120/2.02(b).

A public body generally must give public notice of reconvened or rescheduled meetings as well. *See* 5 ILCS 120/2.02 (a). However, the requirement of public notice of reconvened meetings does not apply if a meeting had been open to the public and either (1) it was to be reconvened within 24 hours or (2) an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change to the meeting agenda. *See id.*

### (1). Time limit for giving notice.

At the beginning of each calendar or fiscal year, public bodies must prepare and make available schedules of all of their regular meetings for that calendar or fiscal year, listing times and places for the meetings. *See* 5 ILCS 120/2.03. Also at the beginning of each calendar or fiscal year, public bodies must give public notice of their regular meetings, stating the regular dates, times and places of those meetings. *See* 5 ILCS 120/2.02 (a). If a change is made in regular meeting dates, at least ten days’ notice of the change must be published in a newspaper of general circulation in the area where the public body functions. *See* 5 ILCS 120/2.03. However, if it functions in a population of less than 500 and if no newspaper is published there, notice may be given by posting notice of the change in at least three prominent places within the governmental unit. *See id.* This notice must also be posted at the principal office of the public body or, if no such office exists, at the building where the meeting is to be held. This notice must also be supplied to those news media having filed an annual request for notice. *See* 5 ILCS 120/2.03.

Except for a meeting held in the event of a bona fide emergency, public notice of any special meeting, rescheduled regular meeting or reconvened meeting must be given at least 48 hours before the meeting. *See* 5 ILCS 120/2.02 (a). Notice must include the agenda for the meeting. *See id.* However, notice is not required of a reconvened meeting where the original meeting was open to the public and (1) it is to be reconvened within 24 hours, or (2) an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda. *See* 5 ILCS 120/2.02(a).

Notice of an emergency meeting must be given to any news medium having filed an annual request for notice under 5 ILCS 120/2.02 (b). Notice must be made as soon as is practical, but in any event it must be given prior to the holding of the meeting. *See* 5 ILCS 120/2.02 (a).

### (2). To whom notice is given.

If a news organization files an annual request for notice of regular meetings with each public body, the agency is required to supply copies of the notice of its regular meetings, and of the notice of any special, emergency, rescheduled or reconvened meetings, to the requesting news medium. *See* 5 ILCS 120/2.02 (b).

Where a meeting is an emergency, rescheduled or reconvened meeting, notice must be given to the news media in the same manner as it is given to members of the public body. To affect this, the news medium must give the public body an address or telephone number within the territorial jurisdiction of the public body where the notice may be given. *See* 5 ILCS 120/2.02(b).

### (3). Where posted.

Notice of the calendar year of regularly scheduled meetings is given by posting a copy of the notice at the principal office of the body holding the meeting. If no such office exists, the notice must be posted at the building where the meeting is to be held. *See* 5 ILCS 120/2.02(b). If the public body has a website that is maintained by the full-time staff of the public body, notice of meetings must be posted on its website. *See* 5 ILCS 120/2.02(b). Any notice of regular meeting must remain on the website until the regular meeting is concluded. *Id.*

### (4). Public agenda items required.

An agenda for each regular meeting must be posted at the public body’s principal office and at the location where the meeting is to be held at least 48 hours before the meeting. *See* 5 ILCS 120/2.02(a). If the public body has a website, they must also post the agenda on the website. *Id.* Notice of special, rescheduled or reconvened meetings must include the agenda as well. *See id.* However, the requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda. *See* 5 ILCS 120/2.02(a). A public body may not act upon items not specifically set forth in the agenda, though. *Rice v. Board of Trustees*, 326 Ill. App. 3d 1120, 762 N.E.2d 1205, 261 Ill. Dec. 278 (4th Dist. 2002). The Act does not specify any requirements for a proper agenda. The Appellate Court of Illinois, Fourth District, has held that an agenda stating “NEW BUSINESS” failed to provide sufficient advance notice to the public that a public body would take final action on a resolution providing for an alternative benefit program for elected county officers. *Rice*.

### (5). Other information required in notice.

The notice of the schedule for regular meetings set out at the beginning of each calendar or fiscal year must state the regular dates, times and place of such meetings. *See* 5 ILCS 120/2.20(a). The Act specifies no other information to be placed in a notice other than the agenda of a regular, special, rescheduled or reconvened meeting.

### (6). Penalties and remedies for failure to give adequate notice.

The State’s Attorney—or any person—who believes the Act has not been complied with, may bring a civil action in the circuit court for the judicial circuit in which the alleged noncompliance has occurred, or is about to occur, or in which the affected public body has its principal office. The action must be filed prior to or within 60 days of the meeting alleged to be in violation of the Act, or if facts concerning the meeting are not discovered within that period, then within 60 days of the discovery of a violation by the State’s Attorney. *See* 5 ILCS 120/3(a).

A court may examine *in camera* (by the judge privately in the judge’s chambers) any portion of the minutes of the meeting at which a violation of the Act is alleged to have occurred, and may take additional evi-

dence as it deems necessary. *See* 5 ILCS 120/3(b). The court is granted the power to provide “such relief as it deems appropriate.” 5 ILCS 120/3(c). This includes requiring that a meeting be open to the public, granting an injunction against future violations of the Act, ordering the public body to make available to the public that portion of the minutes of the meeting that are not authorized to be kept confidential, or declaring null and void any final action taken at a closed meeting in violation of the Act.

The court may also assess against any party — except a state’s attorney — reasonable attorney fees and other litigation costs if the court determines that the action is malicious or frivolous. *See* 5 ILCS 120/3(d).

### c. Minutes.

#### (1). Information required.

All public bodies must keep written minutes of all their meetings, whether open or closed. *See* 5 ILCS 120/2.06(a). The Act specifies that minutes shall include, but need not be limited to: 1) the date, time and place of the meeting; 2) the members of the public body recorded as either present or absent and whether the members were physically present or present by means of video or audio conference; and 3) a summary of discussion on all matters proposed, deliberated or decided, and a record of any votes taken. *See* 5 ILCS 120/2.06(a).

The Act also requires that public bodies keep a verbatim record of all their closed meetings in the form of an audio or video recording. 5 ILCS 120/2.06(a).

#### (2). Are minutes public record?

The Act specifies that minutes of meetings open to the public shall be available for public inspection within ten days after the approval of such minutes by the public body; in addition, if the public body has a Web site maintained by its full-time staff, then beginning July 1, 2006 the minutes of the public body’s regular meetings must be posted on the Web site within the same ten days after approval, as well. *See* 5 ILCS 120/2.06(b). Minutes posted on the Web site must remain posted for at least 60 days after their initial posting. *Id.*

Although a public body may consent to disclose the verbatim record of its closed meetings or may determine that the verbatim record no longer requires confidential treatment, the verbatim record is not otherwise open for public inspection other than one brought to enforce this Act. 5 ILCS 120/2.06(e).

### 2. Special or emergency meetings.

#### a. Definition.

The Act does not define special or emergency meeting. Presumably, such a meeting is one that is not on the schedule of regular meetings.

#### b. Notice requirements.

##### (1). Time limit for giving notice.

The Act specifies that public notice of any special meeting must be given 48 hours before the meeting. Notice of an emergency meeting shall be given “as soon as practicable, but in any event prior to the holding of such meeting, to any news medium which has filed an annual request for notice.” 5 ILCS 120/2.02.

##### (2). To whom notice is given.

Where a meeting is an emergency, rescheduled or reconvened meeting, notice must be given to the news media in the same manner as it is given to members of the public body. To affect this, the news medium must give the public body an address or telephone number within the territorial jurisdiction of the public body where the notice may be given. *See* 5 ILCS 120/2.02(a).

##### (3). Where posted.

Not addressed.

#### (4). Public agenda items required.

Notice of special, rescheduled or reconvened meetings must include the agenda. *See* 5 ILCS 120/2.02(a).

#### (5). Other information required in notice.

The Act specifies no other information to be placed in a notice other than the agenda of a special, rescheduled or reconvened meeting.

#### (6). Penalties and remedies for failure to give adequate notice.

The notice requirements supplement—but do not replace—any other notice required by law. *See* 5 ILCS 120/2.04. In addition, “failure of any news medium to receive a notice provided for by this Act shall not invalidate any meeting provided notice was in fact given in accordance with this Act.” *Id.*

At least one court has found an alleged notice violation inconsequential, where the ordinance passed at a special meeting for which notice was challenged was a “reenactment” of an ordinance adopted at an earlier regular meeting attended by “hundreds of citizens.” *Williamson v. Doyle*, 112 Ill. App. 3d 293, 298, 445 N.E.2d 385, 388, 67 Ill. Dec. 905, 908 (1st Dist. 1983).

### c. Minutes.

#### (1). Information required.

There is no exemption from the requirement for keeping minutes if the meeting is a special or emergency meeting.

#### (2). Are minutes a public record?

There is no exemption from the requirement that minutes are public record if the meeting is a special or emergency meeting.

### 3. Closed meetings or executive sessions.

#### a. Definition.

A public body may hold a meeting closed to the public, or close a portion of a meeting to the public, upon a majority vote of a quorum present, taken at a meeting open to the public for which notice has been given as required by the Act. *See* 5 ILCS 120/2a. The Act states that “[n]othing in . . . [the] Act shall be construed to require that any meeting be closed to the public.” 5 ILCS 120/2a.

#### b. Notice requirements.

##### (1). Time limit for giving notice.

If proper notice has been given for an open meeting, the public body may hold a closed meeting without additional notice. *See* 5 ILCS 120/2a. However, “the vote of each member on the question of holding a meeting closed to the public and a citation to the specific exception contained in Section 2 of this Act which authorizes the closing of the meeting to the public *shall be publicly disclosed at the time of the vote* and shall be recorded and entered into the minutes of the meeting.” 5 ILCS 120/2a (emphasis added).

##### (2). To whom notice is given.

Not applicable.

##### (3). Where posted.

Not applicable.

##### (4). Public agenda items required.

No agenda is required to be published for a closed meeting, but the provision of the Act authorizing the closed meeting must be publicly disclosed and be recorded and entered into the minutes of the meeting at the time the vote to close is taken. *See* 5 ILCS 120/2a. Although citation to the statutory subsection of the Act authorizing closure of the meeting is helpful, it is not required; a public body need only quote or call attention to the exception upon which it relies. *Henry v. Anderson*,



356 Ill. App. 3d 952, 955, 827 N.E.2d 522, 524, 292 Ill. Dec. 993, 995 (4th Dist. 2005).

**(5). Other information required in notice.**

Not applicable.

**(6). Penalties and remedies for failure to give adequate notice.**

Not applicable.

**c. Minutes.**

**(1). Information required.**

Minutes must be kept at closed meetings. 5 ILCS 120/2.06. Public bodies must also keep a verbatim record of all their closed meetings in the form of an audio or video recording. 5 ILCS 120/2.06(a).

**(2). Are minutes a public record?**

Minutes of a meeting closed to the public are available for public inspection “only after the public body determines that it is no longer necessary to protect the public interest or the privacy of an individual by keeping them confidential.” 5 ILCS 120/2.06 (f). There is no case law in which access to minutes was sought under this provision. Each body must twice annually review all minutes of closed meetings to determine if they should be released. *See* 5 ILCS 120/2.06 (c).

Although a public body may consent to disclose the verbatim record of its closed meetings or may determine that the verbatim record no longer requires confidential treatment, the verbatim record is not otherwise open for public inspection. 5 ILCS 120/2.06(e). Further, the verbatim record is not subject to discovery in an administrative or judicial proceeding except to enforce the Open Meetings Act. *Id.* In a civil suit to enforce the Act, the court, if it believes such an examination is necessary, must conduct an *in camera* examination of the verbatim record as is appropriate to determine whether there has been a violation of the Act.

**d. Requirement to meet in public before closing meeting.**

The Act specifies that a meeting may be closed by majority vote of the quorum present at an open meeting for which notice has been given. The vote of each member shall be publicly disclosed at the time of the vote and must be recorded in the minutes. *See* 5 ILCS 120/2a.

**e. Requirement to state statutory authority for closing meetings before closure.**

The specific exception authorizing the closed meeting shall be publicly disclosed at the time of the vote and must be recorded and entered into the minutes of the meeting. *See* 5 ILCS 120/2a.

**f. Tape recording requirements.**

The Act requires that public bodies keep a verbatim record of all their closed meetings in the form of an audio or video recording. 5 ILCS 120/2.06(a). However, this record generally is not open for public inspection. 5 ILCS 120/2.06(e).

**F. Recording/broadcast of meetings.**

Any person is permitted to record the proceedings of a meeting required to be open by the Act, using tape, film or other means. The authority holding the meeting may prescribe reasonable rules to govern the making of such recordings. *See* 5 ILCS 120/2.05 There is one exception to this. Under 735 ILCS 5/8-701, no witness can be compelled to testify in any proceeding conducted by a court, commission, administrative agency or other tribunal if any portion of the testimony is to be broadcast or televised or if motion pictures are to be taken of the testimony. A witness at any meeting required to be open which is conducted by a commission, administrative agency or other tribunal may refuse to testify on these grounds, and the authority holding the meeting may prohibit such recording during the testimony of the wit-

ness. *See* 5 ILCS 120/2.05.

**G. Are there sanctions for noncompliance?**

The open meetings law gives courts broad discretion for punishing violations. 5 ILC 120/3. Parities can file suit for a future or past violation of the open meetings law. 5 ILC 120/3(a). The court may order a future meeting be open, order minutes of a closed meeting to be made public, void any action taken in a closed meeting, and award attorney's fees to the party who prevails. 5 ILC 120/3 (c), (d). Violators of the open meetings law are guilty of a misdemeanor. 5 ILC 120/4.

**II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS**

**A. Exemptions in the open meetings statute.**

The Act states that it is the public policy of the state of Illinois “that its citizens shall be given . . . the right to attend all meetings at which any business of a public body is discussed or acted upon in any way. Exceptions to the public's right to attend exist only in those limited circumstances where the General Assembly has specifically determined that the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.” 5 ILCS 120/1.

**1. Character of exemptions.**

**a. General or specific.**

The Act specifies that only those portions of any meeting expressly enumerated as exceptions may be closed. *See* 5 ILCS 120/2a. The exceptions are to be strictly construed, and this “strict construction leaves no room for ambiguity in the announcement of exceptions.” *Henry v. Anderson*, 356 Ill. App. 3d 952, 957, 827 N.E.2d 522, 526, 292 Ill. Dec. 993, 997 (4th Dist. 2005).

No final action may be taken at a closed meeting. *See* 5 ILCS 120/2(e). All final action taken at an open meeting shall be preceded by a public recital of the nature of the matter being considered and such other information as would inform the public of business being conducted. *See* 5 ILCS 120/2(e).

Secret ballots, even if taken in a public meeting, are not permitted under Act. *See WSDR Inc. v. Ogle County*, 100 Ill. App. 3d 1008, 427 N.E.2d 603, 56 Ill. Dec. 408 (1981). In a representative democracy, voters are entitled to know how their elected officials vote on all matters coming before a public body.

Public officials are free to discuss publicly the issues raised in closed sessions. Public bodies may not impose such limitations on their members. *See* Op. Att'y. Gen. 001 (1991); *Swanson v. Board of Police Comm'rs*, 197 Ill. App. 3d 592, 555 N.E.2d 35, 144 Ill. Dec. 138 (2nd Dist. 1990).

The burden to comply with the Act is not to be balanced against the policy of openness. *See Board of Regents v. Reynard*, 292 Ill. App. 3d 968, 977, 686 N.E.2d 1222, 1227, 227 Ill. Dec. 66, 71 (4th Dist. 1997). As all exceptions go against the general requirement that public bodies meet in the open, “exceptions are to be strictly construed, extending only to subjects clearly within their scope.” 5 ILCS 120/2(b).

**b. Mandatory or discretionary closure.**

Where a specific statute requires a closed meeting, the statute prevails over the Open Meetings Act's general provisions. For example, a 1981 provision in the Election Code, 10 ILCS 5/9-21, provided that upon investigating and rendering judgments upon complaints filed under the administrative enforcement requirements for disclosure of political campaign contributions and expenditures, the state election board shall conduct a closed preliminary hearing. The Illinois Attorney General concluded that this specific provision prevailed over any apparently conflicting general provision of the Open Meetings Act. *See* Op. Att'y. Gen. 041 (1982), at 124-25.

Otherwise, the Act specifically states that “[n]othing in this Section

or this Act shall be construed to *require* that any meeting be closed to the public.” 5 ILCS 120/2a (emphasis added).

## 2. Description of each exemption.

The specified exemptions to open meetings are:

a. *Collective bargaining.* Collective negotiating matters between the public body and its employees or their representatives. See 5 ILCS 120/2(c)(2).

b. *Evidence or testimony.* Evidence or testimony presented in open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body, as defined in the Open Meetings Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning. See 5 ILCS 120/2(c)(4). A quasi-adjudicative body means an administrative body charged by law or ordinance with the responsibility to conduct hearings, receive evidence or testimony and make determinations based thereon, but does not include local electoral boards when such bodies are considering petition challenges. See 5 ILCS 120/2(d).

c. *Salaries.* Deliberations concerning salary schedules for one or more classes of employees. See 5 ILCS 120/2(c)(2).

d. *Prisoner Review Board.* Deliberations for decisions of the Prisoner Review Board. See 5 ILCS 120/(c)(18).

e. *Real property.* Meetings where there is the purchase or lease of real property for the use of the public body—including meetings held for the purpose of discussing whether a particular parcel should be acquired—and the setting of a price for sale or lease of property owned by the public body may be placed under closed session. See 5 ILCS 120/2(c)(5) and (6).

Note: The authority to close meetings to discuss the *sale* of real property was specifically eliminated by amendment in 1967. See Op. Att’y. Gen. 024 (1980). (Illinois Attorney General opining that meeting may not be closed when topic under consideration is sale of real property by a municipal corporation. See *id.* at 108). A public body may meet in closed session to set a sales price for real estate owned by the public body. See 5 ILCS 120/2(c)(6). Also, the annexation of property cannot be considered acquisition of real property. See, e.g., Op. Att’y. Gen. 026 (1983) (opining that discussion of merits of annexation should be open).

f. *Public Safety.* Security procedures and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff, the public, or public property may be discussed in closed session. See 5 ILCS 120/2(c)(8).

g. *Securities and investments.* The sale or purchase of securities, investments or investment contracts. See 5 ILCS 120/2(c)(7).

h. *Law enforcement agencies.* Informant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, when discussed by a public body with criminal investigatory responsibilities. See 5 ILCS 120/2(c)(14).

i. *Litigation.* Meetings held to discuss litigation: 1) when an action against, affecting or on behalf of the particular public body has been filed and is pending in a court or administrative tribunal; or 2) when the public body finds that such an action is probable or imminent. In this second case, the basis for such a finding must be recorded and entered into the minutes of the closed meeting. See 5 ILCS 120/2(c)(11); see also *Board of Regents v. Reynard*, 292 Ill. App. 3d 968, 686 N.E.2d 1222, 227 Ill. Dec. 66 (4th Dist. 1997) (holding that, where there was no finding of probable or imminent litigation, Act was violated and trial court erred in failing to find so and to enter an injunction against public body for future violations). “[The legislature intended to prevent public bodies from using the distant possibility of litigation as a pretext for closing their meetings to the public.” *Henry v. Anderson*, 356 Ill. App. 3d 952, 957, 827 N.E.2d 522, 525, 292 Ill. Dec. 993, 996

(4th Dist. 2005). Where such litigation is pending, a public body may authorize the filing of a motion to enforce an order in the case during a meeting closed to the public. *Allied Asphalt Paving Co. v. Village of Hillside*, 314 Ill. App. 3d 138, 146-47, 731 N.E.2d 425, 431-32, 246 Ill. Dec. 897, 903-04 (1st Dist. 2000).

Note: This provision is subject to potential abuse by a public body, which may invoke the litigation exception on the slimmest possible grounds. The court in *People ex rel. Hopf v. Barger*, 30 Ill.App.3d 525, 332 N.E.2d 649 (2d Dist. 1975), concluded that the legislature did not intend that consultations between the governing body and its attorney must always be conducted openly where this could result in the public being placed at a litigious disadvantage: “This interpretation gives to legal consultation or prospective litigation the same limited confidentiality that is given under the Act to pending litigation.” *Id.* at 659-60.

The Illinois Attorney General, in a 1983 opinion, expressed his views of the circumstances under which this exemption may properly be invoked:

1) The fact that the public body *may* become a party to a judicial proceeding because of the action it takes does not permit it to use the litigation exception to conduct its deliberations in closed sessions.

2) The presence of an attorney representing a client who opposes the contemplated action of the public body does not, in and of itself, constitute a reasonable ground for believing that litigation is forthcoming.

3) If there is a possibility of a lawsuit over the matter, this should be discussed in an open meeting, since it goes to the merits of the issue rather than to the litigation itself.

4) Consultations between the public body and its attorney concerning the potential legal impact and the legal ramifications of an item under consideration must be done publicly unless pending, probable or imminent litigation is the subject matter of the consultations. Once the litigation exception is properly invoked the only matters which may lawfully be disclosed at the closed meetings are the strategies, posture, theories and consequences of the litigation itself. See Op. Att’y. Gen. 026 (1983).

j. *Employment matters.* A meeting may be closed to consider information regarding appointment, employment, compensation, discipline, performance or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity. See 5 ILCS 120/2(c)(1). Independent contractors are specifically excluded from this exemption. See 5 ILCS 120/2(d).

k. *Student disciplinary cases.* A meeting may be closed to hear student disciplinary cases or to discuss matters relating to the placement of individual students in special education programs and on other matters relating to individual students. See 5 ILCS 120/2(c)(9) and (10).

l. *Professional ethics or performance.* A meeting by an advisory body appointed to advise a licensing or regulatory agency on matters germane to the advisory body’s field of competence. Meetings may also be closed when meeting with a representative of a statewide association of which the public body is a member with regards to self-evaluations, practices and procedures of professional ethics. See 5 ILCS 120/2(c)(15) and (16).

m. *Discrimination complaints.* Meetings to discuss such complaints may be closed for conciliating complaints in the sale or rental of housing when closed meetings are authorized by the law or ordinance prescribing fair housing practices and creating a commission or administrative agency for their enforcement. See 5 ILCS 120/2(c)(13).

n. *Appointments to fill vacancies on public bodies.* The selection of a person to fill a public office, as defined in the Open Meetings Act,

including a vacancy in a public office, when the public body is given power to appoint under law or ordinance, or the discipline, performance or removal of the occupant of a public office, when the public is given power to remove the occupant under law or ordinance may be in closed session. *See* 5 ILCS 120/2(c)(3).

*o. Establish reserves or settle claims.* A local public entity subject to this Act may meet in closed session to establish reserves or settle claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act if otherwise the disposition of a claim or potential claim might be prejudiced. 5 ILCS 120/2(c)(12).

*p. Review or discuss claims.* A public body subject to this Act may meet in closed session to review or discuss claims, loss or risk management information, records, data, advice or communications from or with respect to any insurer of the local public body or any intergovernmental risk management association or self insurance pool of which public body is a member. *See* 5 ILCS 120/2(c)(12).

*q. Illinois Experimental Organ Transplantation Procedures Board.* The review or discussion of applications received under the Experimental Organ Transplantation Procedures Act. *See* 5 ILCS 120/2(c)(19).

*r. Health care professionals.* The recruitment, credentialing, discipline or formal peer review of physicians or other health care professionals for a hospital, or other institution providing medical care, that is operated by the public body. *See* 5 ILCS 120/2(c)(17).

*s. State Employees Suggestion Award Board.* The classification and discussion of matters classified as confidential or continued confidentiality by the State Government Suggestion Award Board. *See* 5 ILCS 120/2(c)(20).

*t. Closed meeting minutes.* Discussion of minutes of meetings lawfully closed under this Act, whether for purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06 of the Open Meetings Act. *See* 5 ILCS 120/2(c)(21).

*u. State Emergency Medical Services Disciplinary Review Board.* Deliberations for decisions of the State Emergency Medical Services Disciplinary Review Board. *See* 5 ILCS 120/2(c)(22).

*v. Municipal utility.* The operation by a municipality of a municipal utility or the operation of a municipal power agency or municipal natural gas agency when the discussion involves (i) contracts relating to the purchase, sale or delivery of electricity or natural gas or (ii) the results or conclusions of load forecast studies. *See* 5 ILCS 120/2(c)(23).

*w. Death review team, executive council, residential or sexual assault health care facility.* Meetings of a residential health care facility resident sexual assault and death review team or the Executive Council under the Abuse Prevention Review Team Act. *See* 5 ILCS 120/2(c)(24).

*x. Team of experts under Brian's law.* "Meetings of an independent team of experts under Brian's Law. *See* 5 ILCS 120/2(c)(25).

## **B. Any other statutory requirements for closed or open meetings.**

Every public body is required to designate employees, officers, or members to receive training on compliance with this Act. Each public body must submit a list of designated employees, officers, or members to the Public Access Counselor. Within 6 months after the effective date of this amendatory Act of the 96th General Assembly, the designated employees, officers, and members must successfully complete an electronic training curriculum, developed and administered by the Public Access Counselor, and thereafter must successfully complete an annual training program. Thereafter, whenever a public body designates an additional employee, officer, or member to receive this training, that person must successfully complete the electronic training curriculum within 30 days after that designation. 5 ILCS 120/1.05.

The General Assembly and committees or commissions of the General Assembly are specifically exempt from the definition of "public body," but other state and local legislative bodies are covered by the

definition. *See* 5 ILCS 120/1.02. The policy of openness is the same regarding the General Assembly, but the Illinois Constitution provides that sections of each house of the General Assembly and meetings of committees, joint committees and legislative commissions are open to the public unless two-thirds of the members elected to the particular house determine that the public interest requires a closed meeting. Joint committee and legislative commission meetings may also be closed if two-thirds of the members elected to each house so determine. *See* Ill. Const. art. IV, § 5(c).

One court has noted that this provision actually places greater restrictions on the General Assembly than on bodies covered by the Act, since the General Assembly must have the concurrence of two-thirds of the members involved, while the Act allows closed meetings on certain topics without member concurrence. *See People ex. rel. Hopf v. Barger*, 30 Ill.App.3d 525, 534-35, 332 N.E.2d 649, 657 (2d Dist. 1975).

Additionally, the Open Meetings Act does *not* apply to a child death review team, the Illinois Child Death Review Teams Executive Council, and the meetings of the Executive Ethics Commission. *See* 5 ILCS 120/1.02.

## **C. Court mandated opening, closing.**

There are no provisions in the Act for court mandated opening or closing of meetings, aside from court-ordered relief upon challenge to a public body's decision to close a meeting.

## **III. MEETING CATEGORIES — OPEN OR CLOSED.**

### **A. Adjudications by administrative bodies.**

Administrative bodies are explicitly covered by the Act and their meetings are generally open. However, their adjudications are subject to the exemptions.

### **B. Budget sessions.**

Would be generally covered by the Act and would be open unless an exempt topic is discussed.

### **C. Business and industry relations.**

Would be generally covered and open unless exempt topic is discussed, such as real estate purchased or leased.

### **D. Federal programs.**

Generally, no exemption under the Act. If the nature of a discussion of a federal program fell within one of the exemptions, the meeting could be closed. *See* 5 ILCS 120/2.

### **E. Financial data of public bodies.**

This could encompass a variety of topics, so whether a meeting discussing financial data is open depends on whether one of the exemptions applies.

### **F. Financial data, trade secrets or proprietary data of private corporations and individuals.**

Not addressed.

### **G. Gifts, trusts and honorary degrees.**

No exemption addresses these topics specifically, so they are presumably open.

### **H. Grand jury testimony by public employees.**

This is a matter of constitutional law. Grand jury testimony is secret.

### **I. Licensing examinations.**

An examination is not a meeting within the definition of the Act. It is very doubtful that such an examination would be open to the public. A meeting to discuss the contents of an examination most surely



is justifiably closed under personnel exemptions, since test questions, scoring keys and other examination data used to administer an academic examination or determine the qualifications of an applicant for a license or employment are exempt from public disclosure under 5 ILCS 140/7(j) of the FOI Act.

**J. Litigation; pending litigation or other attorney-client privileges.**

Closed under certain conditions. *See* 5 ILCS 120/2.

**K. Negotiations and collective bargaining of public employees.**

Closed under 5 ILCS 120/2(c)(2).

**L. Parole board meetings, or meetings involving parole board decisions.**

The Act exempts only deliberations for decisions of the Illinois Prisoner Review Board. *See* 5 ILCS 120/2(c)(18).

**M. Patients; discussions on individual patients.**

Not addressed.

**N. Personnel matters.**

Closed under 5 ILCS 120/2(c)(1).

**O. Real estate negotiations.**

Closed under 5 ILCS 120/2.

**P. Security, national and/or state, of buildings, personnel or other.**

A meeting may be closed to discuss security procedures and the use of personnel and equipment to respond to an actual, a threatened or a reasonably potential danger to the safety of employees, students, staff, general public, or public property. *See* 5 ILCS 120/2(c) (8).

**Q. Students; discussions on individual students.**

A meeting may be closed to hear student disciplinary cases or to discuss matters relating to the placement of individual students in special education programs and on other matters relating to individual students. *See* 5 ILCS 120/2(c) (9) and (10).

## IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

### A. When to challenge.

#### 1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

Unlike the Freedom of Information Act, the Open Meetings Act contains no provision directing a court to expedite proceedings brought under the Act. It may be advisable to call a court's attention to the expediting provision in the Freedom of Information Act, 5 ILCS 140/11(h) (1987), and suggest that the same policy should apply to proceedings brought under the Open Meetings Act.

#### 2. When barred from attending.

Any person, including the State's Attorney, may bring a civil action in circuit court for the judicial circuit in which the alleged noncompliance *has occurred or is about to occur*. *See* 5 ILCS 120/3(a). The action must be brought *prior to or within* 60 days of the meeting alleged to be in violation. *See Id.*

#### 3. To set aside decision.

If facts concerning the meeting are not discovered within the 60-day period, an action may be brought within 60 days of the *discovery* of an alleged violation. *See* 5 ILCS 120/3(a). There is a split in authority among the districts of the Illinois Appellate Court as to who may bring an action when the facts concerning the meeting are not discovered

within the statutory time period after the meeting. The Act permits actions to be brought, if the facts are not discovered within 60 days after the meeting, then "within 60 days of the discovery of a violation by the State's Attorney." *Id.* The First District, for example, only allows the State's Attorney to bring such an action, *see Paxon v. Board of Educ.*, 276 Ill. App. 3d 912, 658 N.E.2d 1309, 213 Ill. Dec. 288 (1995), whereas the Second District allows anyone to bring such an action, as long as they do so within 60 days of the discovery of a violation by the State's Attorney. If the State's Attorney has not discovered the violation yet, the time period has not begun to toll. *See Safanda v. Zoning Bd. of Appeals*, 203 Ill. App. 3d 687, 561 N.E.2d 412, 149 Ill. Dec. 134 (1990). The Second District, however, is in the minority, and the majority's restrictive reading of the Act means that, unless you can get your State's Attorney on board, you are limited to bringing an Open Meetings Act suit within 60 days of the violative meeting. It also means that, if you learn of a violation 60 days or more after the meeting by, say, the periodic disclosure of the minutes of closed meetings, it will be too late to do anything about it.

### 4. For ruling on future meetings.

An action may be brought within 60 days prior to a challenged meeting. *See* 5 ILCS 120/3(a).

#### B. How to start.

##### 1. Where to ask for ruling.

A civil action should be brought in circuit court within sixty days from the time of the alleged violation. Alternatively, a request may be filed with the Public Access Counselor established in the Office of the Attorney General. This, too, should be filed within sixty days of the alleged violation. *See* 5 ILCS 120/3.5.

The Attorney General may issue binding opinions or advisory opinions to public bodies regarding compliance with this Act. A review may be initiated upon receipt of a written request from the head of the public body or its attorney. *See* 5 ILCS 120/3.5(e) and (h). A public body that relies in good faith on an advisory opinion of the Attorney General in complying with the requirements of this Act is not liable for penalties under this Act, so long as the facts upon which the opinion is based have been fully and fairly disclosed to the Public Access Counselor. *See* 5 ILCS 120/3.5(h).

##### a. Administrative forum.

Redress is sought by filing a request with the Public Access Counselor, or directly in circuit court. Thus, this section is inapplicable in Illinois.

##### b. State attorney general.

Illinois Attorney General Lisa Madigan has established the position of Public Access Counselor within the Public Access and Opinions Division of the Attorney General's office. The office seeks to enforce compliance with the Open Meetings Act. A person who believes that a violation of the Open Meetings Act has occurred may file a request for review with the Public Access Counselor established in the Office of the Attorney General. *See* 5 ILCS 120/3.5(a). Once the Public Access Counselor has issued a binding opinion, the process is over. Either party may, however, seek administrative review of the Public Access Counselor's opinion.

The office also provides answers to questions about the Act to the public, media, and to public officials, offers training on the Act to public officials, and takes action to resolve disputes arising under the Act. The telephone number of the Public Access Counselor is (877) 299-3642, and the correspondence may be sent to the Public Access Counselor at the Attorney General's Springfield office at 500 South Second Street, Springfield, Illinois 62706. The present acting Public Access Counselor is Sarah Pratt, an attorney who is a former investigative reporter for The Associated Press. More information may be found at: <http://foia.ilattorneygeneral.net/>.

### 1. Applicable time limits.

Request for review with the Public Access Counselor should be filed within sixty days after the alleged violation. *See* 5 ILCS 120/3.5(a).

### 2. Contents of request.

The request for review must be in writing, must be signed by the requester, and must include a summary of the facts supporting the allegation. *See* 5 ILCS 120/3.5(a).

*Note.* If the requester files an action in court with respect to the same alleged violation that is the subject of a pending request for review with the Public Access Counselor, the requester must notify the Public Access Counselor, and the Public Access Counselor shall take no further action with respect to the request for review. *See* 5 ILCS 120/3.5(f).

### 3. How long should you wait for a response?

If the Public Access Counselor determines from the request for review that the alleged violation is unfounded, he or she shall so advise the requester *and* the public body and no further action shall be undertaken. In all other cases, the Public Access Counselor has seven working days to forward a copy of the request for review to the public body. Within seven working days after the public body receives the request for review, the public body must provide copies of the records requested. *See* 5 ILCS 120/3.5(b).

Within seven working days after the public body receives a copy of the request for review and request for production of records from the Public Access Counselor, the public body may—but is not required to—answer the allegations. If furnished, the Public Access Counselor shall forward a copy of the answer or redacted answer to the person submitting the request for review. The requester may—but is not required to—respond in writing to the answer within seven working days and shall provide a copy of the response to the public body. *See* 5 ILCS 120/3.5(c).

In addition, a requester or a public body may—but is not required—to furnish affidavits and records to the review. *See* 5 ILCS 120/3.5(d).

Unless the Public Access Counselor extends the time by no more than 21 business days by sending written notice to the requester and public body, or if the Public Access Counselor decides to address the matter without the issuance of a binding opinion, the Attorney General shall make findings of fact and conclusions of law, and shall issue to the requester and the public body an opinion within 60 days after initiating review. *See* 5 ILCS 120/3.5(e).

#### c. Court.

Redress is sought directly in circuit court.

### 2. Applicable time limits.

Civil action must be brought within sixty days from the time of the alleged violation, or within sixty days of the *discovery* of the alleged violation. *See* 5 ILCS 120/3(a).

## C. Court review of administrative decision.

### 1. Who may sue?

A civil action may be brought either by a private party (such as a news organization) or the State's Attorney. *See* 5 ILCS 120/3(a).

### 2. Will the court give priority to the pleading?

The Open Meetings Act contains no provision directing a court to expedite proceedings brought under the Act. It may be advisable to call a court's attention to the expediting provision in the Freedom of Information Act, 5 ILCS 140/11(hg), and suggest that the same policy should apply to proceedings brought under the Open Meetings Act.

### 3. Pro se possibility, advisability.

Since the Illinois process involves drafting a complaint in circuit court, service of process, the potential necessity of drafting affidavits and preparing witnesses, it is probably inadvisable to proceed *pro se*.

### 4. What issues will the court address?

These are governed by Section 3(c) of the Act. The court may grant appropriate relief, including but not limited to a mandamus order to open a meeting, an injunction against future violations, or declaring null and void any final action taken at a closed meeting.

Although courts are authorized to declare null and void any final actions taken at a closed meeting in violation of the Act, 5 ILCS 120/3(c), such actions are not necessarily void. *People ex rel. Graf v. Village of Lake Bluff*, 321 Ill. App. 3d 897, 907, 748 N.E.2d 801, 811, 255 Ill. Dec. 97, 107 (2d Dist. 2001), *rev'd on other grounds*, 206 Ill. 2d 541, 795 N.E.2d 281, 276 Ill. Dec. 928 (Ill. 2003). Relief under the Act is discretionary, *see id.*, and minimal violations have been held not to support nullification of actions taken at such meetings. *See Graf*.

### 5. Pleading format.

The civil action should take the form of a regular civil complaint. Facts giving rise to the alleged violation should be alleged, as well as any applicable statutory provisions.

### 6. Time limit for filing suit.

An action must be brought 60 days before or after the meeting alleged to be in violation. *See* 5 ILCS 120/3(a). If facts concerning the meeting are not discovered within the 60-day period, then the State's Attorney must bring an action within 60 days of the discovery of a violation. *Id.*

### 7. What court.

The action may be brought in the circuit court for the judicial circuit in which the alleged violation occurred (or is about to occur), or in which the affected public body has its principal office. *See* 5 ILCS 120/3(a).

### 8. Judicial remedies available.

The court may grant relief in the form of ordering a meeting to be opened to the public, and/or granting an injunction against future violations of the Act. It may order the public body to make available to the public that portion of the minutes of the meeting that are not authorized to be kept confidential. The court also has the option of declaring null and void any final action taken at a meeting held in violation of the Act. *See* 5 ILCS 120/3(c). However, relief under the Act is completely discretionary. *See* 5 ILCS 120/3(c); *People ex rel. Graf v. Village of Lake Bluff*, 321 Ill. App. 3d 897, 908, 748 N.E.2d 801, 811, 255 Ill. Dec. 97, 107 (2d Dist. 2001), *rev'd on other grounds*, 206 Ill. 2d 541, 795 N.E.2d 281, 276 Ill. Dec. 928 (Ill. 2003).

### 9. Availability of court costs and attorneys' fees.

The court may assess against any party, except a state's attorney, reasonable attorney fees and other litigation costs incurred by any party who prevails in an action brought in accordance with the Act. Costs may be assessed *against* a private party or parties bringing an action pursuant to this section only if the court determines that the action was malicious or frivolous. *See* 5 ILCS 120/3(d).

### 10. Fines.

The Illinois Open Meetings Act provides for civil remedies as well as criminal penalties for violations or impending violations of the Act.

If a complaint has been filed by the State's Attorney, the court may impose penalties. Violation of the Illinois Open Meetings Act is a Class C misdemeanor, which is punishable by a fine of not more than

\$1,500 or by imprisonment for not more than 30 days, or both. *See* 730 ILCS 5/5-8-3, 5/5-9-1.

#### **D. Appealing initial court decisions.**

##### **1. Appeal routes.**

A circuit court's order can be appealed to the Illinois Appellate Court. After the issuance of a binding opinion of the Public Access Counselor, either party may seek administrative review subject to § 7.5 of the Open Meetings Act. *See* 5 ILCS 120/3.5(e). An Action for administrative review of a binding opinion of the Attorney General shall be commenced in Cook or Sangamon County. An *advisory opinion* issued to a public body is not considered a final decision of the Attorney General for purposes of Section 7.5 of the Act. *See* 5 ILCS 120/7.5. A *binding opinion*, however, issued by the Attorney General, is considered a final decision of an administrative agency, for purposes of administrative review under the Administrative Review Law (735 ILCS 5/Art. III). *Id.*

*Note.* The decision not to issue a binding opinion shall not be reviewable. *See* 5 ILCS 120/3.5(e). The Public Access Counselor may resolve a dispute through mediation. *Id.*

##### **2. Time limits for filing appeals.**

The losing party has 30 days from the day the circuit court's order is entered to appeal the decision. *See* Ill. S. Ct. Rule 303(a).

##### **3. Contact of interested amici.**

The appellant might consider notifying the Illinois Press Association, 900 Community Drive, Springfield, Illinois, 62703, which might be interested in appearing as *amicus curiae*. The Reporters Committee enters *amicus* briefs in important press cases before a state's highest court.

#### **V. ASSERTING A RIGHT TO COMMENT.**

##### **A. Is there a right to participate in public meetings?**

The Illinois Act does not specifically provide a right to participate in a public meeting. *See People ex rel. Graf v. Village of Lake Bluff*, 321 Ill.

App. 3d 897, 907, 748 N.E.2d 801, 811, 255 Ill. Dec. 97, 107 (2d Dist. 2001), *rev'd on other grounds*, 206 Ill. 2d 541, 795 N.E.2d 281, 276 Ill. Dec. 928 (Ill. 2003). The Act does, however, require "any person ... an opportunity to address public officials *under the rules established and recorded by the public body.*" 5 ILCS 120/2(g) (emphasis added).

In addition, the Act requires that public meetings be held at specified times and places which are convenient and open to the public. 5 ILCS 120/2.01. The Act may be violated by holding public meetings at inconvenient times and places. *Id.* *See also Gerwin v. Livingston County Board*, 345 Ill. App. 3d 352, 802 N.E.2d 410, 280 Ill. Dec. 485 (4th Dist. 2003). Convenience is determined by what is reasonable: It would be unreasonable to hold meetings in a small room because those wishing to attend would have difficulty gaining admittance, while it would also be unreasonable to require a public body to hold its meetings in a football stadium to accommodate all those who wish to attend. *Gerwin*. Further, a meeting place may be inconvenient under the Act even though it is the public body's typical meeting location. *Id.*

Many public bodies provide regulations governing public comment periods, or limiting the number of speakers on a particular issue.

##### **B. Must a commenter give notice of intentions to comment?**

Many public bodies require a statement of intent to comment be filed with the clerk or secretary of the body.

##### **C. Can a public body limit comment?**

Many public bodies limit the number of speakers on an issue, or limit each speaker to 5 or 10 minutes.

##### **D. How can a participant assert rights to comment?**

The Act does not provide a right to comment.

##### **E. Are there sanctions for unapproved comment?**

Disruptive behavior may result in expulsion from a meeting, or even arrest, depending on the precise nature of the behavior.



# Statute

## Open Records

### Chapter 5. General Provisions

#### Act 140. Freedom of Information Act

##### 140/1. Public policy; legislative intent

§ 1. Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be 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.

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 expeditiously and efficiently as possible in compliance with this Act.

This Act is not intended to cause an unwarranted invasion of personal privacy, nor to allow the requests of a commercial enterprise to unduly burden public resources, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to access to information.

This Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, State or federal law.

Restraints 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. The provisions of this Act shall be construed in accordance with this principle. This Act shall be construed to require disclosure of requested information as expeditiously and efficiently as possible and adherence to the deadlines established in this Act.

The General Assembly recognizes that this Act imposes fiscal obligations on public bodies to provide adequate staff and equipment to comply with its requirements. The General Assembly declares that providing records in compliance with the requirements of this 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.

The General Assembly further recognizes that technology may advance at a rate that outpaces its ability to address those advances legislatively. To the extent that this Act may not expressly apply to those technological advances, this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption.

This Act shall be the exclusive State statute on freedom of information, except to the extent that other State statutes might create additional restrictions on disclosure of information or other laws in Illinois might create additional obligations for disclosure of information to the public.

##### 140/1.1. Short title

§ 1.1. This Act may be cited as the Freedom of Information Act.

##### 140/1.2. Presumption

§ 1.2. 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.

##### 140/2. Definitions

§ 2. Definitions. As used in this Act:

(a) “Public body” means 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, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof, and a School Finance Authority created under Article 1E of the School Code. [FN1] “Public body” does not include a child death review team or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act. [FN2]

(b) “Person” means any individual, corporation, partnership, firm, organization or association, acting individually or as a group.

(c) “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.

(c-5) “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 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.

(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.

(d) “Copying” means the reproduction of any public record by means of any photographic, electronic, mechanical or other process, device or means now known or hereafter developed and available to the public body.

(e) “Head of the public body” means the president, mayor, chairman, presiding officer, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body, or such person’s duly authorized designee.

(f) “News media” means a newspaper or other periodical issued at regular intervals whether in print or electronic format, a news service whether in print or electronic format, a radio station, a television station, a television network, a community antenna television service, or a person or corporation engaged in making news reels or other motion picture news for public showing.

[FN1] 105 ILCS 5/1E-1 et seq.

[FN2] 20 ILCS 515/1 et seq.

##### 140/2.5. Records of funds

§ 2.5. 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.

##### 140/2.10. Payrolls

§ 2.10. 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.

##### 140/2.15. Arrest reports and criminal history records

§ 2.15. Arrest reports and criminal history records.

(a) Arrest reports. The following chronologically maintained arrest and criminal history information maintained by State or local criminal justice agencies shall be furnished as soon as practical, but in no event later than 72 hours after the arrest, notwithstanding the time limits otherwise provided for in Section 3 of this Act: (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.

(b) Criminal history records. The following documents maintained by a public body pertaining to criminal history record information are public records subject to inspection and copying by the public pursuant to this Act: (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).

(c) Information described in items (iii) through (vi) of subsection (a) may be withheld if it is determined 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.

(d) The provisions of this Section do not supersede the confidentiality provisions for arrest records of the Juvenile Court Act of 1987.

#### 140/2.20. Settlement agreements

§ 2.20. 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.

#### 140/3. Inspection or copying of public records; prohibition against granting exclusive right to access and disseminate public records; request procedure

§ 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. Notwithstanding any other law, a public body may not grant to any person or entity, whether by contract, license, or otherwise, the exclusive right to access and disseminate any public record as defined in 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.

(c) Requests for inspection or copies shall be made in writing and directed to the public body. Written requests 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 oral requests for inspection or copying. A 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. All requests for inspection and copying received by a public body shall immediately be forwarded to its Freedom of Information officer or designee.

(d) Each public body shall, promptly, either comply with or deny a request for public records within 5 business days after its receipt of the request, unless the time for response is properly extended under subsection (e) of this Section. Denial shall be in writing as provided in Section 9 of this Act. Failure to comply with a written request, extend the time for response, or deny a request within 5 business days after its receipt shall be considered a denial of the request. A public body that fails to respond to a request within the requisite periods in this Section 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 received may not treat the request as unduly burdensome under subsection (g).

(e) The time for response under this Section may be extended by the public body for not more than 5 business days from the original due date for any 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 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 under Section 7 of this Act or should be revealed only with appropriate deletions;

(vi) the request for records cannot be complied with by the public body within the time limits prescribed by paragraph (c) of this Section without unduly burdening or interfering with the operations of the public body;

(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.

The person making a request 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 compliance, a failure by the public body to comply with any previous deadlines shall not be treated as a denial of the request for the records.

(f) When additional time is required for any of the above reasons, the public body shall, within 5 business days after receipt of the request, notify the person making the request of the reasons for the extension and the date by which the response will be forthcoming. Failure to respond within the time permitted for extension shall be considered a denial of the request. A public body that fails to respond to a request within the time permitted for extension but thereafter provides the requester with copies of the requested public records may not impose a fee for those copies. A public body that requests an extension and subsequently fails to respond to the request may not treat the request as unduly burdensome under subsection (g).

(g) Requests calling for all records falling within a category shall be complied with unless compliance with the request would be unduly burdensome for the complying public body and there is no way to narrow the request and the burden on the public body outweighs the public interest in the information. Before invoking this exemption, the public body shall extend to the person making the request an opportunity to confer with it in an attempt to reduce the request to manageable proportions. If any body responds to a categorical request by stating that compliance would unduly burden its operation and the conditions described above are met, it shall do so in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance will 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 the same records that are unchanged or identical to records previously provided or properly denied under this Act shall be deemed unduly burdensome under this provision.

(h) Each public body may promulgate rules and regulations in conformity with the provisions of this Section pertaining to the availability of records and procedures to be followed, including:

(i) the times and places where such records will be made available, and

(ii) the persons from whom such records may be obtained.

(i) The time periods for compliance or denial of a request to inspect or copy records set out in this Section shall not apply to requests for records made for a commercial purpose. Such requests shall be subject to the provisions of Section 3.1 of this Act.

#### 140/3.1. Requests for commercial purposes

##### § 3.1. Requests for commercial purposes.

(a) A public body shall respond to a request for records to be used for a commercial purpose within 21 working days after receipt. The response shall (i) provide to 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 this 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.

(b) Unless the records are exempt from disclosure, a public body shall comply with a request within a reasonable period considering the size and complexity of the request, and giving priority to records requested for non-commercial purposes.

(c) It is a violation of this 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.

#### 140/3.3. Significance of public records; advise or interpretation requirements

§ 3.3. This Act is not intended to compel public bodies to interpret or advise requesters as to the meaning or significance of the public records.

#### 140/3.5. Freedom of Information officers

##### § 3.5. Freedom of Information officers.

(a) Each public body shall designate one or more officials or employees to act as its Freedom of Information officer or officers. Except in instances when records are furnished immediately, Freedom of Information officers, or their designees, shall receive requests submitted to the public body under this Act, ensure that the public body responds to requests in a timely fashion, and issue responses under this Act. Freedom of Information officers shall develop a list of documents or categories of records that the public body shall immediately disclose upon request.

Upon receiving a request for a public record, the Freedom of Information officer shall:

- (1) note the date the public body receives the written request;
- (2) compute the day on which the period for response will expire and make a notation of that date on the written request;
- (3) 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
- (4) 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.

(b) All Freedom of Information officers shall, within 6 months after the effective date of this amendatory Act of the 96th General Assembly, successfully complete an electronic training curriculum to be developed by the Public Access Counselor and thereafter successfully complete an annual training program. Thereafter, whenever a new Freedom of Information officer is designated by a public body, that person shall successfully complete the electronic training curriculum within 30 days after assuming the position. Successful completion of the required training curriculum within the periods provided shall be a prerequisite to continue serving as a Freedom of Information officer.

#### 140/4. Dissemination of information about public body

§ 4. Each public body shall prominently display at each of its administrative or regional offices, make available for inspection and copying, and send through the mail if requested, each of the following:

(a) A brief description of itself, which will include, but not be limited to, a short summary of its purpose, a block diagram giving its functional subdivisions, the total amount of its operating budget, the number and location of all of its separate offices, the approximate number of full and part-time employees, and 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, or which exercises control over its policies or procedures, or to which the public body is required to report and be answerable for its operations; and

(b) A brief description of the methods whereby the public may request information and public records, a directory designating the Freedom of Information officer or officers, the address where requests for public records should be directed, and any fees allowable under Section 6 of this Act.

A public body that maintains a website shall also post this information on its website.

#### 140/5. List of records available from public body

§ 5. As to public records prepared or received after the effective date of this Act, each public body shall maintain and make available for inspection and copying a reasonably current list of all types or categories of records under its control. The list shall be reasonably detailed in order to aid persons in obtaining access to public records pursuant to this Act. Each public body shall 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 printout format.

#### 140/6. Authority to charge fees

##### § 6. Authority to charge fees.

(a) When a person requests a copy of a record maintained in an electronic format, the public body shall 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 the format in which it is maintained by the public body, or in 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. 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 the General Assembly expressly provides, 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.

(b) Except when a fee is otherwise fixed by statute, each public body may charge fees reasonably calculated to reimburse its actual cost for reproducing and certifying public records and for the use, by any person, of the equipment of the public body to copy records. No fees shall be charged for the first 50 pages of black and white, letter or legal sized copies requested by a requester. The fee for black and white, letter or legal sized copies shall 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 not charge more than 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 shall not include the costs of any search for and review of the records or other personnel costs associated with reproducing the records. Such fees shall be imposed according to a standard scale of fees, established and made public by the body imposing them. The cost for certifying a record shall not exceed \$1.

(c) Documents shall be furnished without charge or at a reduced charge, as determined by the public body, if the person requesting the documents states the specific purpose for the request and indicates that a waiver or reduction of the fee is in the public interest. 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. For purposes of this subsection, "commercial benefit" shall not apply to requests made by news media when 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. In setting 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.

(d) The imposition of a fee not consistent with subsections (6)(a) and (b) of this Act constitutes a denial of access to public records for the purposes of judicial review. [FN1]

(e) [FN2]The fee for each abstract of a driver's record shall be as provided in Section 6-118 of "The Illinois Vehicle Code", approved September 29, 1969, as amended, whether furnished as a paper copy or as an electronic copy.

[FN1] 625 ILCS 5/6-118.

[FN2] So in enrolled bill.140/1.1. Short title

#### 140/7. Exemptions

##### § 7. Exemptions.

(1) When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt. The public body shall make the remaining information available for inspection and copying. Subject to this requirement, the following shall be exempt from inspection and copying:

(a) Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.

(b) Private information, unless disclosure is required by another provision of this Act, a State or federal law or a court order.

(b-5) Files, documents, and other data or databases maintained by one or more law enforcement agencies and specifically designed to provide information to one or more law enforcement agencies regarding the physical or mental status of one or more individual subjects.

(c) 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. “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. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.

(d) Records in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement or correctional agency for law enforcement purposes, but only to the extent that disclosure would:

(i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency that is the recipient of the request;

(ii) interfere with active administrative enforcement proceedings conducted by the public body that is the recipient of the request;

(iii) create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing;

(iv) 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;

(v) 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;

(vi) endanger the life or physical safety of law enforcement personnel or any other person; or

(vii) obstruct an ongoing criminal investigation by the agency that is the recipient of the request.

(e) Records that relate to or affect the security of correctional institutions and detention facilities.

(f) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body. The exemption provided in this paragraph (f) extends to all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents.

(g) 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.

All 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. The exemption contained in this item does not apply to the aggregate financial performance information of a private equity fund, nor to the identity of the fund’s managers or general partners. The exemption contained in this item does not apply to the identity of a privately held company within the investment portfolio of a private equity fund, unless the disclosure of the identity of a privately held company may cause competitive harm.

Nothing contained in this paragraph (g) shall be construed to prevent a person or business from consenting to disclosure.

(h) 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 contractor 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.

(i) 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. The exemption for “computer geographic systems” provided in this paragraph (i) does not extend to requests made by news media as defined in Section 2 of this Act when the requested information is not otherwise exempt and the only purpose of the request is to access and disseminate information regarding the health, safety, welfare, or legal rights of the general public.

(j) The following information pertaining to educational matters:

(i) test questions, scoring keys and other examination data used to administer an academic examination;

(ii) information received by a primary or secondary school, college, or university under its procedures for the evaluation of faculty members by their academic peers;

(iii) 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

(iv) course materials or research materials used by faculty members.

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

(l) Minutes of meetings of public bodies 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.

(m) 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.

(n) 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.

(o) 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 that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt under this Section.

(p) 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.

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

(r) The records, documents, and information relating to real estate purchase negotiations until those negotiations have been completed or otherwise terminated. With regard to a parcel involved in a pending or actually and reasonably contemplated eminent domain proceeding under the Eminent Domain Act, records, documents and information relating to that parcel shall be exempt except as may be allowed under discovery rules adopted by the Illinois Supreme Court. The records, documents and information relating to a real estate sale shall be exempt until a sale is consummated.

(s) Any and all proprietary information and records related to the operation of an intergovernmental risk management association or self-insurance pool or jointly self-administered health and accident cooperative or pool. Insurance or self insurance (including any intergovernmental risk management association or self insurance pool) claims, loss or risk management information, records, data, advice or communications.

(t) Information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of a public body responsible for the regulation or supervision of financial institutions or insurance companies, unless disclosure is otherwise required by State law.

(u) 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.

(v) 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, but only 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. Information exempt under this item may include such things as details pertaining to the mobilization or deployment of personnel or equipment, to the operation of communication systems or protocols, or to tactical operations.

(w) (Blank).

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

(y) Information contained in or related to proposals, bids, or negotiations related to electric power procurement under Section 1-75 of the Illinois Power Agency Act and Section 16-111.5 of the Public Utilities Act that is determined to be confidential and proprietary by the Illinois Power Agency or by the Illinois Commerce Commission.

(z) Information about students exempted from disclosure under Sections 10-20.38 or 34-18.29 of the School Code, and information about undergraduate students enrolled at an institution of higher education exempted from disclosure under Section 25 of the Illinois Credit Card Marketing Act of 2009.

(aa) Information the disclosure of which is exempted under the Viatical Settlements Act of 2009.

(bb) Information regarding interments, entombments, or inurnments of human remains that are submitted to the Cemetery Oversight Database under the Cemetery Care Act or the Cemetery Oversight Act, whichever is applicable.

(2) 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.

(3) This Section does not authorize withholding of information or limit the availability of records to the public, except as stated in this Section or otherwise provided in this Act.

#### 140/7.5. Statutory Exemptions

§ 7.5. Statutory Exemptions. To the extent provided for by the statutes referenced below, the following shall be exempt from inspection and copying:

(a) All information determined to be confidential under Section 4002 of the Technology Advancement and Development Act.

(b) Library circulation and order records identifying library users with specific materials under the Library Records Confidentiality Act.

(c) Applications, related documents, and medical records received by the Experimental Organ Transplantation Procedures Board and any and all documents or other records prepared by the Experimental Organ Transplantation Procedures Board or its staff relating to applications it has received.

(d) Information and records held by the Department of Public Health and its authorized representatives relating to known or suspected cases of sexually transmissible disease or any information the disclosure of which is restricted under the Illinois Sexually Transmissible Disease Control Act.

(e) Information the disclosure of which is exempted under Section 30 of the Radon Industry Licensing Act.

(f) Firm performance evaluations under Section 55 of the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act.

(g) Information the disclosure of which is restricted and exempted under Section 50 of the Illinois Prepaid Tuition Act.

(h) Information the disclosure of which is exempted under the State Officials and Employees Ethics Act, and records of any lawfully created State or local inspector general's office that would be exempt if created or obtained by an Executive Inspector General's office under that Act.

(i) Information contained in a local emergency energy plan submitted 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.

(j) Information and data concerning the distribution of surcharge moneys collected and remitted by wireless carriers under the Wireless Emergency Telephone Safety Act.

(k) Law enforcement officer identification information or driver identification information compiled by a law enforcement agency or the Department of Transportation under Section 11-212 of the Illinois Vehicle Code.

(l) Records and information provided to a residential health care facility resident sexual assault and death review team or the Executive Council under the Abuse Prevention Review Team Act.

(m) Information provided to the predatory lending database created pursuant to Article 3 of the Residential Real Property Disclosure Act, except to the extent authorized under that Article.

(n) Defense budgets and petitions for certification of compensation and expenses for court appointed trial counsel as provided under Sections 10 and 15 of the Capital Crimes Litigation Act. This subsection (n) shall apply until the conclusion of the trial of the case, even if the prosecution chooses not to pursue the death penalty prior to trial or sentencing.

(o) Information that is prohibited from being disclosed under Section 4 of the Illinois Health and Hazardous Substances Registry Act.

(p) Security portions of system safety program plans, investigation reports, surveys, schedules, lists, data, or information compiled, collected, or prepared by or for the Regional Transportation Authority under Section 2.11 of the Regional Transportation Authority Act or the St. Clair County Transit District under the Bi-State Transit Safety Act.

(q) Information prohibited from being disclosed by the Personnel Records Review Act.

(r) Information prohibited from being disclosed by the Illinois School Student Records Act.

(s) Information the disclosure of which is restricted under Section 5-108 of the Public Utilities Act.

(t) Records and information provided to an independent team of experts under Brian's Law.

140/8. § 8. Repealed by P.A. 96-542, § 15, eff. Jan. 1, 2010

140/9. Denial of request for public records; notice

§ 9. (a) Each public body denying a request for public records shall 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 such person of the right to review by the Public Access Counselor and provide the address and phone number for the Public Access Counselor. Each notice of denial shall inform such person of his right to judicial review under Section 11 of this Act.

(b) When a request for public records is denied on the grounds that the records are exempt under Section 7 of this Act, the notice of denial shall 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. Copies of all notices of denial shall be retained by each public body in a single central office file that is open to the public and indexed according to the type of exemption asserted and, to the extent feasible, according to the types of records requested.

(c) Any person making a request for public records shall be deemed to have exhausted his or her administrative remedies with respect to that request if the public body fails to act within the time periods provided in Section 3 of this Act.



140/9.5. *Public Access Counselor; opinions*

## § 9.5. Public Access Counselor; opinions.

(a) 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 established in the Office of the Attorney General not later than 60 days after the date of the final denial. The request for review must be in writing, signed by the requester, and include (i) a copy of the request for access to records and (ii) any responses from the public body.

(b) A public body that receives a request for records, and asserts that the records are exempt under subsection (1)(c) or (1)(f) of Section 7 of this Act, shall, within the time periods provided for responding to a request, provide written notice to the requester and the Public Access Counselor of its intent to deny the request in whole or in part. The notice shall include: (i) a copy of the request for access to records; (ii) the proposed response from the public body; and (iii) 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 Public Access Counselor shall determine whether further inquiry is warranted. Within 5 working days after receipt of the notice of intent to deny, the Public Access Counselor shall notify the public body and the requester whether further inquiry is warranted. If the Public Access Counselor determines that further inquiry is warranted, the procedures set out in this Section regarding the review of denials, including the production of documents, shall also be applicable to the inquiry and resolution of a notice of intent to deny from a public body. Times for response or compliance by the public body under Section 3 of this Act shall be tolled until the Public Access Counselor concludes his or her inquiry.

(c) Upon receipt of a request for review, the Public Access Counselor shall determine whether further action is warranted. If the Public Access Counselor determines that the alleged violation is unfounded, he or she shall so advise the requester and the public body and no further action shall be undertaken. In all other cases, the Public Access Counselor 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 records requested and shall otherwise fully cooperate with the Public Access Counselor. If a public body fails to furnish specified records pursuant to this Section, 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 the Act. To the extent that records or documents produced by a public body contain information that is claimed to be exempt from disclosure under Section 7 of this Act, the Public Access Counselor shall not further disclose that information.

(d) Within 7 working days after it receives a copy of a request for review and request for production of records from the Public Access Counselor, 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. The Public Access Counselor shall 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 shall provide a copy of the response to the public body.

(e) In addition to the request for review, and the answer and the response thereto, if any, a requester or a public body may furnish affidavits or records concerning any matter germane to the review.

(f) Unless the Public Access Counselor extends the time by no more than 21 business days by sending written notice to the requester and the public body that includes a statement of the reasons for the extension in the notice, or decides to address the matter without the issuance of a binding opinion, the Attorney General shall examine the issues and the records, shall make findings of fact and conclusions of law, and shall issue to the requester and the public body an opinion in response to the request for review within 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.

In responding to any request under this Section 9.5, the Attorney General may exercise his or her discretion and choose to resolve a request for review by mediation or by a means other than the issuance of a binding opinion. The decision not to issue a binding opinion shall not be reviewable.

Upon receipt of a binding opinion concluding that a violation of this Act has occurred, the public body shall either take necessary action immediately to

comply with the directive of the opinion or shall initiate administrative review under Section 11.5. If the opinion concludes that no violation of the Act has occurred, the requester may initiate 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 this Act.

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

(h) The Attorney General may also issue advisory opinions to public bodies regarding compliance with this Act. A review may be initiated upon receipt of a written request from the head of the public body or its attorney, which shall contain sufficient accurate facts from which a determination can be made. The Public Access Counselor may request additional information from the public body in order to assist in the review. A public body that relies in good faith on an advisory opinion of the Attorney General in responding to a request is not liable for penalties under this Act, so long as the facts upon which the opinion is based have been fully and fairly disclosed to the Public Access Counselor.

140/10. § 10. *Repealed by P.A. 96-542, § 15, eff. Jan. 1, 2010*

140/11. *Denial of request for public records; injunctive or declaratory relief*

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

(b) Where the denial is from a public body of the State, suit may be filed in the circuit court for the county where the public body has its principal office or where the person denied access resides.

(c) Where the denial is from a municipality or other public body, except as provided in subsection (b) of this Section, suit may be filed in the circuit court for the county where the public body is located.

(d) The circuit court shall have the jurisdiction to enjoin the public body from withholding public records and to order the production of any public records improperly withheld from the person seeking access. If the public body can show that exceptional circumstances exist, and that the body is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records.

(e) On motion of the plaintiff, prior to or after in camera inspection, the court shall order the public body to provide an index of the records to which access has been denied. The index shall include the following:

(i) A description of the nature or contents of each document withheld, or each deletion from a released document, provided, however, that the public body shall not be required to disclose the information which it asserts is exempt; and

(ii) A statement of the exemption or exemptions claimed for each such deletion or withheld document.

(f) In any action considered by the court, the court shall consider the matter de novo, and shall conduct such in camera examination of the requested records as it finds appropriate to determine if such records or any part thereof may be withheld under any provision of this Act. The burden shall be on the public body to establish that its refusal to permit public inspection or copying is in accordance with the provisions of this Act. 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.

(g) In the event of noncompliance with an order of the court to disclose, the court may enforce its order against any public official or employee so ordered or primarily responsible for such noncompliance through the court's contempt powers.

(h) Except as to causes the court considers to be of greater importance, proceedings arising under this Section shall take precedence on the docket over all other causes and be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(i) If a person seeking the right to inspect or receive a copy of a public record prevails in a proceeding under this Section, the court shall award such person reasonable attorneys' fees and costs. In determining what amount of attorney's fees is reasonable, the court shall consider the degree to which the relief obtained relates to the relief sought. The changes contained in this subsection apply to an action filed on or after the effective date of this amendatory

Act of the 96th General Assembly.

(j) If the court determines that a public body willfully and intentionally failed to comply with this Act, 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 this Act. The changes contained in this subsection apply to an action filed on or after the effective date of this amendatory Act of the 96th General Assembly.

#### *140/11.5. Administrative review*

§ 11.5. Administrative review. 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 (735 ILCS 5/Art. III). An action for administrative review of a binding opinion of the Attorney General shall be commenced in 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 this Section.

## **Open Meetings**

### Chapter 5. General Provisions

#### Act 120. Open Meetings Act (Refs & Annos)

##### *120/1. Policy*

§ 1. Policy. It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.

The General Assembly further declares it to be the public policy of this State that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way. Exceptions to the public's right to attend exist only in those limited circumstances where the General Assembly has specifically determined that the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

To implement this policy, the General Assembly declares:

- (1) It is the intent of this Act to protect the citizen's right to know; and
- (2) The provisions for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

##### *120/1.01. Short title*

§ 1.01. This Act shall be known and may be cited as the Open Meetings Act.

##### *120/1.02. Definitions*

§ 1.02. For the purposes of this Act:

"Meeting" means any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business.

Accordingly, for a 5-member public body, 3 members of the body constitute a quorum and the affirmative vote of 3 members is necessary to adopt any motion, resolution, or ordinance, unless a greater number is otherwise required.

"Public body" includes all legislative, executive, administrative or advisory bodies of the State, 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 any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, except the General Assembly and committees or commissions thereof. "Public

body" includes tourism boards and convention or civic center boards located in counties that are contiguous to the Mississippi River with populations of more than 250,000 but less than 300,000. "Public body" includes the Health Facilities and Services Review Board. "Public body" does not include a child death review team or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act [FN1] or an ethics commission acting under the State Officials and Employees Ethics Act. [FN2]

[FN1] 20 ILCS 515/1 et seq.

[FN2] 5 ILCS 430/1-1 et seq.

##### *120/1.05. Training*

§ 1.05. Training. Every public body shall designate employees, officers, or members to receive training on compliance with this Act. Each public body shall submit a list of designated employees, officers, or members to the Public Access Counselor. Within 6 months after the effective date of this amendatory Act of the 96th General Assembly, the designated employees, officers, and members must successfully complete an electronic training curriculum, developed and administered by the Public Access Counselor, and thereafter must successfully complete an annual training program. Thereafter, whenever a public body designates an additional employee, officer, or member to receive this training, that person must successfully complete the electronic training curriculum within 30 days after that designation.

##### *120/2. Open meetings*

#### § 2. Open meetings.

(a) Openness required. All meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a.

(b) Construction of exceptions. The exceptions contained in subsection (c) are in derogation of the requirement that public bodies meet in the open, and therefore, the exceptions are to be strictly construed, extending only to subjects clearly within their scope. The exceptions authorize but do not require the holding of a closed meeting to discuss a subject included within an enumerated exception.

(c) Exceptions. A public body may hold closed meetings to consider the following subjects:

(1) The appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity.

(2) Collective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees.

(3) The selection of a person to fill a public office, as defined in this Act, including a vacancy in a public office, when the public body is given power to appoint under law or ordinance, or the discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance.

(4) Evidence or testimony presented in open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body, as defined in this Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning.

(5) The purchase or lease of real property for the use of the public body, including meetings held for the purpose of discussing whether a particular parcel should be acquired.

(6) The setting of a price for sale or lease of property owned by the public body.

(7) The sale or purchase of securities, investments, or investment contracts.

(8) Security procedures and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff, the public, or public property.

(9) Student disciplinary cases.

(10) The placement of individual students in special education programs and other matters relating to individual students.

(11) Litigation, when an action against, affecting or on behalf of the partic-

ular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.

(12) The establishment of reserves or settlement of claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, [FN1] if otherwise the disposition of a claim or potential claim might be prejudiced, or the review or discussion of claims, loss or risk management information, records, data, advice or communications from or with respect to any insurer of the public body or any intergovernmental risk management association or self insurance pool of which the public body is a member.

(13) Conciliation of complaints of discrimination in the sale or rental of housing, when closed meetings are authorized by the law or ordinance prescribing fair housing practices and creating a commission or administrative agency for their enforcement.

(14) Informant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, when discussed by a public body with criminal investigatory responsibilities.

(15) Professional ethics or performance when considered by an advisory body appointed to advise a licensing or regulatory agency on matters germane to the advisory body's field of competence.

(16) Self evaluation, practices and procedures or professional ethics, when meeting with a representative of a statewide association of which the public body is a member.

(17) The recruitment, credentialing, discipline or formal peer review of physicians or other health care professionals for a hospital, or other institution providing medical care, that is operated by the public body.

(18) Deliberations for decisions of the Prisoner Review Board.

(19) Review or discussion of applications received under the Experimental Organ Transplantation Procedures Act. [FN2]

(20) The classification and discussion of matters classified as confidential or continued confidential by the State Government Suggestion Award Board.

(21) Discussion of minutes of meetings lawfully closed under this Act, whether for purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06.

(22) Deliberations for decisions of the State Emergency Medical Services Disciplinary Review Board.

(23) The operation by a municipality of a municipal utility or the operation of a municipal power agency or municipal natural gas agency when the discussion involves (i) contracts relating to the purchase, sale, or delivery of electricity or natural gas or (ii) the results or conclusions of load forecast studies.

(24) Meetings of a residential health care facility resident sexual assault and death review team or the Executive Council under the Abuse Prevention Review Team Act.

(25) Meetings of an independent team of experts under Brian's Law.

(d) Definitions. For purposes of this Section:

"Employee" means a person employed by a public body whose relationship with the public body constitutes an employer-employee relationship under the usual common law rules, and who is not an independent contractor.

"Public office" means a position created by or under the Constitution or laws of this State, the occupant of which is charged with the exercise of some portion of the sovereign power of this State. The term "public office" shall include members of the public body, but it shall not include organizational positions filled by members thereof, whether established by law or by a public body itself, that exist to assist the body in the conduct of its business.

"Quasi-judicative body" means an administrative body charged by law or ordinance with the responsibility to conduct hearings, receive evidence or testimony and make determinations based thereon, but does not include local electoral boards when such bodies are considering petition challenges.

(e) Final action. No final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted.

[FN1] 745 ILCS 10/1-101 et seq.

[FN2] 20 ILCS 3935/1 et seq.

120/2.01. Time and place; holidays

§ 2.01. All meetings required by this Act to be public shall be held at speci-

fied times and places which are convenient and open to the public. No meeting required by this Act to be public shall be held on a legal holiday unless the regular meeting day falls on that holiday.

A quorum of members of a public body must be physically present at the location of an open meeting. If, however, an open meeting of a public body (i) with statewide jurisdiction, (ii) that is an Illinois library system with jurisdiction over a specific geographic area of more than 4,500 square miles, or (iii) that is a municipal transit district with jurisdiction over a specific geographic area of more than 4,500 square miles is held simultaneously at one of its offices and one or more other locations in a public building, which may include other of its offices, through an interactive video conference and the public body provides public notice and public access as required under this Act for all locations, then members physically present in those locations all count towards determining a quorum. "Public building", as used in this Section, means any building or portion thereof owned or leased by any public body. The requirement that a quorum be physically present at the location of an open meeting shall not apply, however, to State advisory boards or bodies that do not have authority to make binding recommendations or determinations or to take any other substantive action.

A quorum of members of a public body that is not (i) a public body with statewide jurisdiction, (ii) an Illinois library system with jurisdiction over a specific geographic area of more than 4,500 square miles, or (iii) a municipal transit district with jurisdiction over a specific geographic area of more than 4,500 square miles must be physically present at the location of a closed meeting. Other members who are not physically present at a closed meeting of such a public body may participate in the meeting by means of a video or audio conference.

120/2.02. Public notice; agenda

§ 2.02. Public notice of all meetings, whether open or closed to the public, shall be given as follows:

(a) Every public body shall give public notice of the schedule of regular meetings at the beginning of each calendar or fiscal year and shall state the regular dates, times, and places of such meetings. An agenda for each regular meeting shall be posted at the principal office of the public body and at the location where the meeting is to be held at least 48 hours in advance of the holding of the meeting. A public body that has a website that the full-time staff of the public body maintains shall also post on its website the agenda of any regular meetings of the governing body of that public body. Any agenda of a regular meeting that is posted on a public body's website shall remain posted on the website until the regular meeting is concluded. The requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda. Public notice of any special meeting except a meeting held in the event of a bona fide emergency, or of any rescheduled regular meeting, or of any reconvened meeting, shall be given at least 48 hours before such meeting, which notice shall also include the agenda for the special, rescheduled, or reconvened meeting, but the validity of any action taken by the public body which is germane to a subject on the agenda shall not be affected by other errors or omissions in the agenda. The requirement of public notice of reconvened meetings does not apply to any case where the meeting was open to the public and (1) it is to be reconvened within 24 hours, or (2) an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda. Notice of an emergency meeting shall be given as soon as practicable, but in any event prior to the holding of such meeting, to any news medium which has filed an annual request for notice under subsection (b) of this Section.

(b) Public notice shall be given by posting a copy of the notice at the principal office of the body holding the meeting or, if no such office exists, at the building in which the meeting is to be held. In addition, a public body that has a website that the full-time staff of the public body maintains shall post notice on its website of all meetings of the governing body of the public body. Any notice of an annual schedule of meetings shall remain on the website until a new public notice of the schedule of regular meetings is approved. Any notice of a regular meeting that is posted on a public body's website shall remain posted on the website until the regular meeting is concluded. The body shall supply copies of the notice of its regular meetings, and of the notice of any special, emergency, rescheduled or reconvened meeting, to any news medium that has filed an annual request for such notice. Any such news medium shall also be given the same notice of all special, emergency, rescheduled or reconvened meetings in the same manner as is given to members of the body provided such news medium has given the public body an address or telephone number within the territorial jurisdiction of the public body at which such notice may be given. The failure of a public body to post on its website notice of any meeting or the agenda of any meeting shall not invalidate any meeting or any actions taken at a meeting.



*120/2.03. Schedule of meetings*

§ 2.03. In addition to the notice required by Section 2.02, each body subject to this Act must, at the beginning of each calendar or fiscal year, prepare and make available a schedule of all its regular meetings for such calendar or fiscal year, listing the times and places of such meetings.

If a change is made in regular meeting dates, at least 10 days' notice of such change shall be given by publication in a newspaper of general circulation in the area in which such body functions. However, in the case of bodies of local governmental units with a population of less than 500 in which no newspaper is published, such 10 days' notice may be given by posting a notice of such change in at least 3 prominent places within the governmental unit. Notice of such change shall also be posted at the principal office of the public body or, if no such office exists, at the building in which the meeting is to be held. Notice of such change shall also be supplied to those news media which have filed an annual request for notice as provided in paragraph (b) of Section 2.02.

*120/2.04. Other notices; failure to receive notice*

§ 2.04. The notice requirements of this Act are in addition to, and not in substitution of, any other notice required by law. Failure of any news medium to receive a notice provided for by this Act shall not invalidate any meeting provided notice was in fact given in accordance with this Act.

*120/2.05. Recording meetings*

§ 2.05. Recording meetings. Subject to the provisions of Section 8-701 of the Code of Civil Procedure, any person may record the proceedings at meetings required to be open by this Act by tape, film or other means. The authority holding the meeting shall prescribe reasonable rules to govern the right to make such recordings.

If a witness at any meeting required to be open by this Act which is conducted by a commission, administrative agency or other tribunal, refuses to testify on the grounds that he may not be compelled to testify if any portion of his testimony is to be broadcast or televised or if motion pictures are to be taken of him while he is testifying, the authority holding the meeting shall prohibit such recording during the testimony of the witness. Nothing in this Section shall be construed to extend the right to refuse to testify at any meeting not subject to the provisions of Section 8-701 of the Code of Civil Procedure.

*120/2.06. Minutes; right to speak*

§ 2.06. Minutes; right to speak.

(a) All public bodies shall keep written minutes of all their meetings, whether open or closed, and a verbatim record of all their closed meetings in the form of an audio or video recording. Minutes shall include, but need not be limited to:

- (1) the date, time and place of the meeting;
- (2) the members of the public body recorded as either present or absent and whether the members were physically present or present by means of video or audio conference; and
- (3) a summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken.

(b) A public body shall approve the minutes of its open meeting within 30 days after that meeting or at the public body's second subsequent regular meeting, whichever is later. The minutes of meetings open to the public shall be available for public inspection within 10 days after the approval of such minutes by the public body. Beginning July 1, 2006, at the time it complies with the other requirements of this subsection, a public body that has a website that the full-time staff of the public body maintains shall post the minutes of a regular meeting of its governing body open to the public on the public body's website within 10 days after the approval of the minutes by the public body. Beginning July 1, 2006, any minutes of meetings open to the public posted on the public body's website shall remain posted on the website for at least 60 days after their initial posting.

(c) The verbatim record may be destroyed without notification to or the approval of a records commission or the State Archivist under the Local Records Act or the State Records Act no less than 18 months after the completion of the meeting recorded but only after:

- (1) the public body approves the destruction of a particular recording; and
- (2) the public body approves minutes of the closed meeting that meet the written minutes requirements of subsection (a) of this Section.

(d) Each public body shall periodically, but no less than semi-annually, meet to review minutes of all closed meetings. At such meetings a determination shall be made, and reported in an open session that (1) the need for confidentiality still exists as to all or part of those minutes or (2) that the minutes or portions thereof no longer require confidential treatment and are available

for public inspection. The failure of a public body to strictly comply with the semi-annual review of closed session written minutes, whether before or after the effective date of this amendatory Act of the 94th General Assembly, shall not cause the written minutes or related verbatim record to become public or available for inspection in any judicial proceeding, other than a proceeding involving an alleged violation of this Act, if the public body, within 60 days of discovering its failure to strictly comply with the technical requirements of this subsection, reviews the closed session minutes and determines and thereafter reports in open session that either (1) the need for confidentiality still exists as to all or part of the minutes or verbatim record, or that the minutes or recordings or portions thereof no longer require confidential treatment and are available for public inspection.

(e) Unless the public body has made a determination that the verbatim recording no longer requires confidential treatment or otherwise consents to disclosure, the verbatim record of a meeting closed to the public shall not be open for public inspection or subject to discovery in any administrative or judicial proceeding other than one brought to enforce this Act. In the case of a civil action brought to enforce this Act, the court, if the judge believes such an examination is necessary, must conduct such in camera examination of the verbatim record as it finds appropriate in order to determine whether there has been a violation of this Act. In the case of a criminal proceeding, the court may conduct an examination in order to determine what portions, if any, must be made available to the parties for use as evidence in the prosecution. Any such initial inspection must be held in camera. If the court determines that a complaint or suit brought for noncompliance under this Act is valid it may, for the purposes of discovery, redact from the minutes of the meeting closed to the public any information deemed to qualify under the attorney-client privilege. The provisions of this subsection do not supersede the privacy or confidentiality provisions of State or federal law.

(f) Minutes of meetings closed to the public shall be available only after the public body determines that it is no longer necessary to protect the public interest or the privacy of an individual by keeping them confidential.

(g) Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.

*120/2a. Closed sessions; procedure*

§ 2a. A public body may hold a meeting closed to the public, or close a portion of a meeting to the public, upon a majority vote of a quorum present, taken at a meeting open to the public for which notice has been given as required by this Act. A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, provided each meeting in such series involves the same particular matters and is scheduled to be held within no more than 3 months of the vote. The vote of each member on the question of holding a meeting closed to the public and a citation to the specific exception contained in Section 2 of this Act which authorizes the closing of the meeting to the public shall be publicly disclosed at the time of the vote and shall be recorded and entered into the minutes of the meeting. Nothing in this Section or this Act shall be construed to require that any meeting be closed to the public.

At any open meeting of a public body for which proper notice under this Act has been given, the body may, without additional notice under Section 2.02, hold a closed meeting in accordance with this Act. Only topics specified in the vote to close under this Section may be considered during the closed meeting.

*120/2b. § 2b. Repealed by P.A. 88-621, § 10, eff. Jan. 1, 1995**120/3. Noncompliance; civil actions; public disclosure; relief; fees and costs*

§ 3. (a) Where the provisions of this Act are not complied with, or where there is probable cause to believe that the provisions of this Act will not be complied with, any person, including the State's Attorney of the county in which such noncompliance may occur, may bring a civil action in the circuit court for the judicial circuit in which the alleged noncompliance has occurred or is about to occur, or in which the affected public body has its principal office, prior to or within 60 days of the meeting alleged to be in violation of this Act or, if facts concerning the meeting are not discovered within the 60-day period, within 60 days of the discovery of a violation by the State's Attorney.

Records that are obtained by a State's Attorney from a public body for purposes of reviewing whether the public body has complied with this Act may not be disclosed to the public. Those records, while in the possession of the State's Attorney, are exempt from disclosure under the Freedom of Information Act.

(b) In deciding such a case the court may examine in camera any portion of the minutes of a meeting at which a violation of the Act is alleged to have occurred, and may take such additional evidence as it deems necessary.

(c) The court, having due regard for orderly administration and the public interest, as well as for the interests of the parties, may grant such relief as it

deems appropriate, including granting a relief by mandamus requiring that a meeting be open to the public, granting an injunction against future violations of this Act, ordering the public body to make available to the public such portion of the minutes of a meeting as is not authorized to be kept confidential under this Act, or declaring null and void any final action taken at a closed meeting in violation of this Act.

(d) The court may assess against any party, except a State's Attorney, reasonable attorney's fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with this Section, provided that costs may be assessed against any private party or parties bringing an action pursuant to this Section only upon the court's determination that the action is malicious or frivolous in nature.

#### *120/3.5. Public Access Counselor; opinions*

##### *§ 3.5. Public Access Counselor; opinions.*

(a) A person who believes that a violation of this Act by a public body has occurred may file a request for review with the Public Access Counselor established in the Office of the Attorney General not later than 60 days after the alleged violation. The request for review must be in writing, must be signed by the requester, and must include a summary of the facts supporting the allegation.

(b) Upon receipt of a request for review, the Public Access Counselor shall determine whether further action is warranted. If the Public Access Counselor determines from the request for review that the alleged violation is unfounded, he or she shall so advise the requester and the public body and no further action shall be undertaken. In all other cases, the Public Access Counselor shall forward a copy of the request for review to the public body within 7 working days. The Public Access Counselor 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 and shall otherwise fully cooperate with the Public Access Counselor. If a public body fails to furnish specified records pursuant to this Section, or if otherwise necessary, the Attorney General may issue a subpoena to any person or public body having knowledge of or records pertaining to an alleged violation of this Act. For purposes of conducting a thorough review, the Public Access Counselor has the same right to examine a verbatim recording of a meeting closed to the public or the minutes of a closed meeting as does a court in a civil action brought to enforce this Act.

(c) Within 7 working days after it receives a copy of a request for review and request for production of records from the Public Access Counselor, 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. Upon request, the public body may also furnish the Public Access Counselor with a redacted copy of the answer excluding specific references to any matters at issue. The Public Access Counselor shall forward a copy of the answer or redacted answer, if furnished, to the person submitting the request for review. The requester may, but is not required to, respond in writing to the answer within 7 working days and shall provide a copy of the response to the public body.

(d) In addition to the request for review, and the answer and the response thereto, if any, a requester or a public body may furnish affidavits and records concerning any matter germane to the review.

(e) Unless the Public Access Counselor extends the time by no more than 21 business days by sending written notice to the requester and public body that includes a statement of the reasons for the extension in the notice, or decides to address the matter without the issuance of a binding opinion, the Attorney General shall examine the issues and the records, shall make findings of fact and conclusions of law, and shall issue to the requester and the public body an opinion within 60 days after initiating review. The opinion shall be binding upon both the requester and the public body, subject to administrative review under Section 7.5 of this Act.

In responding to any written request under this Section 3.5, the Attorney General may exercise his or her discretion and choose to resolve a request for review by mediation or by a means other than the issuance of a binding opinion. The decision not to issue a binding opinion shall not be reviewable.

Upon receipt of a binding opinion concluding that a violation of this Act has occurred, the public body shall either take necessary action as soon as practical to comply with the directive of the opinion or shall initiate administrative review under Section 7.5. If the opinion concludes that no violation of the Act has occurred, the requester may initiate administrative review under Section 7.5.

(f) If the requester files suit under Section 3 with respect to the same alleged violation that is the subject of a pending request for review, the requester shall notify the Public Access Counselor, and the Public Access Counselor shall take

no further action with respect to the request for review and shall so notify the public body.

(g) Records that are obtained by the Public Access Counselor from a public body for purposes of addressing a request for review under this Section 3.5 may not be disclosed to the public, including the requester, by the Public Access Counselor. Those records, while in the possession of the Public Access Counselor, shall be exempt from disclosure by the Public Access Counselor under the Freedom of Information Act.

(h) The Attorney General may also issue advisory opinions to public bodies regarding compliance with this Act. A review may be initiated upon receipt of a written request from the head of the public body or its attorney. The request must contain sufficient accurate facts from which a determination can be made. The Public Access Counselor may request additional information from the public body in order to facilitate the review. A public body that relies in good faith on an advisory opinion of the Attorney General in complying with the requirements of this Act is not liable for penalties under this Act, so long as the facts upon which the opinion is based have been fully and fairly disclosed to the Public Access Counselor.

#### *120/4. Violations of provisions of Act*

§ 4. Any person violating any of the provisions of this Act shall be guilty of a Class C misdemeanor.

#### *120/5. Effect of invalid provisions or applications of Act*

§ 5. If any provision of this Act, or the application of this Act to any particular meeting or type of meeting is held invalid or unconstitutional, such decision shall not affect the validity of the remaining provisions or the other applications of this Act.

#### *120/6. Minimum requirements for home rule units*

§ 6. The provisions of this Act constitute minimum requirements for home rule units; any home rule unit may enact an ordinance prescribing more stringent requirements binding upon itself which would serve to give further notice to the public and facilitate public access to meetings.

#### *120/7. Attendance by a means other than physical presence*

##### *§ 7. Attendance by a means other than physical presence.*

(a) If a quorum of the members of the public body is physically present as required by Section 2.01, a majority of the public body may allow a member of that body to attend the meeting by other means if the member is prevented from physically attending because of: (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency. "Other means" is by video or audio conference.

(b) If a member wishes to attend a meeting by other means, the member must notify the recording secretary or clerk of the public body before the meeting unless advance notice is impractical.

(c) A majority of the public body may allow a member to attend a meeting by other means only in accordance with and to the extent allowed by rules adopted by the public body. The rules must conform to the requirements and restrictions of this Section, may further limit the extent to which attendance by other means is allowed, and may provide for the giving of additional notice to the public or further facilitate public access to meetings.

(d) The limitations of this Section shall not apply to (i) closed meetings of (A) public bodies with statewide jurisdiction, (B) Illinois library systems with jurisdiction over a specific geographic area of more than 4,500 square miles, or (C) municipal transit districts with jurisdiction over a specific geographic area of more than 4,500 square miles or (ii) open or closed meetings of State advisory boards or bodies that do not have authority to make binding recommendations or determinations or to take any other substantive action. State advisory boards or bodies, public bodies with statewide jurisdiction, Illinois library systems with jurisdiction over a specific geographic area of more than 4,500 square miles, and municipal transit districts with jurisdiction over a specific geographic area of more than 4,500 square miles, however, may permit members to attend meetings by other means only in accordance with and to the extent allowed by specific procedural rules adopted by the body.

#### *120/7.5. Administrative review*

§ 7.5. Administrative review. 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 (735 ILCS 5/Art. III). An action for administrative review of a binding opinion of the Attorney General shall be commenced in 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 this Section.