



SB 189 FOIA ANALYSIS (as of May 27, 2009)

Sponsor: Currie-Watson-Franks-Froehlich-Dugan

The bill re-writes the Illinois Freedom of Information Act. Major provisions are that:

Definitions

- The General Assembly declares that providing records in compliance with the Act is the *primary duty* of public bodies. (p. 10)
- It establishes a presumption that all records held by a public body are open for inspection and copying. The burden of clear and convincing evidence proving exemption otherwise is that of the public body. (p. 11)
- Disallow requests of a commercial enterprise to unduly burden public resources, as well as disrupt the duly-undertaken work of any public body. (p. 9)
- It expands the definition of “Public Records” to include records to include electronic communications and materials pertaining to the transaction of public business. (p. 11)
- It creates a new definition of “Private information” for persons including unique identifiers. (p. 12)
- It deletes the current enumerated definition of “Public Records”. (p. 12)
- It creates a new definition for “Commercial purpose” to include any information from the public record to be used for sale or advertisement. It further states that requests made by news media, non-profit, scientific, or academic organizations shall not be “commercial purpose” under certain definitions. (p. 12)
- It states that all records related to the use of public funds are public records available for inspection by the public. (p. 15)
- It states that certified payroll records with personal information redacted are public records available for inspection by the public. (p. 15)
- It establishes a section for proper disclosure of arrest reports and criminal history records. (p. 16)
- It requires all settlement agreements entered into by the public body to be available for public inspection and copying. (p. 17)

Public Body Compliance and Reprimand

- It requires that record requests be made in writing and directed to the public body. It adds that the written request may be made by mail, telefax or other means available to the public body. Allows the public body to honor oral requests as well. (p. 18)
- The bill disallows the public body the ability to require the written request be in a specific format. The public body may only require a purpose for the request to determine if it is commercial in nature or to grant a request for fee waiver. (p. 18)
- Requires that the request be immediately forwarded to the Freedom of Information Officer or designee. (p. 18)
- It requires that the request must be complied within 5 business days of receipt of the request (instead of the current 7). Failure to comply, extend the time, or deny within 5 business days will be considered a denial. (p. 18)
- It requires that denial must be provided in writing (p. 18) and include detailed factual basis for the application of any exemption claimed and the persons responsible. It also provides that the denial include a citation to supporting legal authority. (p. 48)
- It requires the notice of denial to include the right to review by the Public Access Counselor (see description below) and his or her address and phone number and right to judicial review. (p. 48)
- While it eliminates the local appeal process for denial, it provides that any person making a request for records also has exhausted administrative remedies when the public body fails to act within time periods provided in the Act. (p. 49)
- It prohibits the public body for imposing a fee if it fails to respond in the required time periods. (p. 19)
- It extends up to 5 additional business days from the original due date, for compliance for the reasons already existing in law: records stored in another location; the request requires collection of a substantial number of records; request is couched in categorical terms and requires extensive search; records not found in routine search and additional efforts are needed to locate them; records require evaluation by personnel to determine whether they are exempt from disclosure; the request would unduly burden or interfere with the operations of the public body; need for consultation with another public body. (p. 19)
- The person making the request and the public body may agree in writing to extend the time for compliance. If this is the case, failure of the public body to comply within that time period shall not be treated as a denial. (p. 20)
- It requires that when additional time is needed, the public body shall notify the requestor within 5 business days of receipt of the request, the reasons for the extension and the date they'll respond. (p. 20)
- It also provides that when a public body fails to respond to the request in the extended time period but provides the materials, it may NOT charge a fee. (p. 21)

- Disallows a public body that requests an extension and fails to provide records to treat the request as unduly burdensome under that section. (p. 21)
- It modifies the section addressing the burdensome nature of repeated requests to define this as “requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied under the Act”. (p. 21)
- It creates a new section for requests for commercial purposes and allows the public body 21 days to comply with requests. Creates a violation for a requestor to knowingly obtain a record for commercial purposes without disclosing such. (p. 22)
- It provides that public records obtained by a State’s Attorney for review may not be disclosed to the public and are exempt from disclosure under FOIA. (p. 2)
- It requires the court to award attorney’s fees and costs to the prevailing requesters if it finds that they were entitled to the record requested under the Act. In determining reasonable fees the court shall consider the degree to which the relief obtained relates to the relief sought. This version of the bill removed the section allowing the court to award reasonable attorney’s fees and costs to the public body if the court finds that the suit filed was frivolous. (p. 55)
- It allows the court to impose a civil penalty of not less than \$2,500 or more than \$5,000 for each occurrence if the court finds that a public body willfully and intentionally failed to comply or acted in bad faith to comply with a request for information. (p. 56)
- In assessing the civil penalty, the court shall consider the budget of the public body and whether they have previously been assessed penalties for violations. (p. 56)
- This draft REMOVED the criminal penalty of a Class C misdemeanor for any person who knowingly and willfully violates any of the provisions of the Act.
- It requires that each public body designate one or more employees or officials as a “Freedom of Information Officer(s)” and specifies the duties of the officer(s):
 - requires every public body to designate employees, officers or members to receive FOIA training, annually
 - receives requests for public documents
 - directs requests to the appropriate persons for compilation
 - responsible for timely response and issuance of final responses
 - responsible for maintaining records of requests and responses (p. 23)
- In the section that requires notification to the public of FOIA, it requires that if the public body has a website the same information must be posted there as well. Also requires the body to provide a directory of FOIA officers and addresses where requests are to be submitted. (p. 26)
- Requires the public body to submit the list of designated employees, officers or members to the Public Access Counselor.

- It states that requested information shall be furnished in the format in which it is maintained by the public body or in paper format, the option chosen by the requester. (p. 26)
- When records are maintained in an electronic format the public body shall furnish it in electronic format specified by the requester, if feasible. Also allows the public body to charge for the actual cost of purchasing the recording medium. (p. 26)
- It allows for the charging of fees (p. 26), but:
 - the public body may not charge for the search and review of the record requested or for personnel costs associated with reproducing the records
 - prohibits the public body from charging copying fees when the request is provided in electronic format
 - no fees shall be charged for the first 50 pages (black and white, letter or legal sized copies) of a request
 - copies shall not exceed \$.15 per page
 - the cost for certifying a record shall not exceed \$1
 - for copies other than letter or legal-sized, the public body may not charge more than its actual cost for reproduction
 - the imposition of a fee not consistent with this section constitutes a denial of access to public records for the purposes of judicial review

General Exemptions

- The Act would exempt:
 - Requests for records containing personal information; information the release of which could constitute an unwarranted invasion of privacy. Defines unwanted invasion of personal privacy. (p. 29)
 - Current provisions (previously deleted) providing that invasion of personal privacy does not include public duties of public employees and officials. (p. 29)
 - information specifically prohibited from disclosure by federal or State law, rules and regulations (p. 29)
 - Private information, unless disclosure is required by law, or court order (p. 29)
 - Records in the possession of any public body created in the course of law enforcement with exceptions in current law with modifications (p. 31)
 - preliminary documents generated by members, employees, or officials of a public body where policies or actions are formulated (p. 34)
 - trade secrets and commercial or financial information (p. 34)
 - trade secret or confidential information shared in the evaluation or investing of public funds in a private equity fund (p. 35)
 - proposals and bids for any contract with the public body (p. 35)
 - valuable formulae, computer geographic systems, designs, drawings and research data when disclosure of this information could be reasonably expected to produce private gain or public loss
- For educational matters (p. 36) the bill exempts:
 - test questions, scoring keys and other examination data
 - information received by schools for evaluation of faculty
 - information concerning a school's adjudication of student discipline to the

- o extent that the information would reveal the identity of a student
 - o course material or research material
- Other exemptions include:
 - o construction related technical documents (p. 37)
 - o minutes of closed meetings under the OMA until the minutes become available under Section 2.06 of the Open Meetings Act (p. 37)
 - o communications between a public body and an attorney or auditor (p. 37)
 - o records relating to a public body's adjudication of employee grievances or disciplinary cases (Final outcomes in which discipline is imposed are not exempt) (p. 38)
 - o technical information associated with automated data processing operations (p. 38)
 - o records relating to collective negotiating matters between public bodies and their employees or representatives (p. 38)
 - o test questions, scoring keys, and other exam data used to determine qualifications of applicants for license or employment (p. 39)
 - o records related to real estate purchase (p. 39)
 - o proprietary information related to intergovernmental risk management or self-insurance pool or self-administered health insurance pools (p. 39)
 - o records pertaining to the regulation or supervision of financial institutions or insurance companies (p. 40)
 - o information that may disclose private keys intended to be used to create electronic or digital signatures under the Electronic Commerce Security Act (p. 42)
 - o records pertaining to community safety procedures (p. 42)
 - o records regarding the location or security of facilities owned by a utility (p. 43)
 - o information pertaining to negotiations related to electric power procurement (p. 44)
 - o library records under the Library Records Confidentiality Act (p. 45)
 - o records restricted under the IL Sexually Transmissible Disease Control Act (p. 45)
 - o firm performance evaluations for architects, engineers and land surveyors (p. 46)
 - o information restricted under the IL Prepaid Tuition Act (p. 46)
 - o exempted information under the State Officials and Employees Ethics Act and records exempt under a local or executive inspector general's office (p. 46)
 - o information contained in a local emergency energy plan submitted to a municipality (p. 46)
 - o information prohibited from disclosure under the Illinois Health and Hazardous Substances Registry Act (p. 47)
 - o Information prohibited for disclosure under the Personnel Records Review Act (p. 47)
 - o Information prohibited for disclosure under the Illinois School Student Records Act (p. 47)
 - o Restricted information under the Public Utilities Act (p. 48)
- Requires that when a request is made for information that contains exempted material, the exempted material may be redacted and the remaining information shall be provided. (p. 29)

- Further, the exemptions section provides that a public record not in the possession of the public body because it has contracted another entity to perform a governmental function will not be exempt from the act. (p. 44)

Public Access Counselor

In two sections (pages 3-7 and 49-53) the bill creates Public Access Counselor (PAC) position within the Office of the Attorney General, who will:

- review, when requested, denied FOIA requests by public bodies except the General Assembly and committees, commissions, and agencies
 - Request for review of denial must be filed not later than 60 days after questioned denial and include (i) a copy of the request and (ii) any responses from the public body
 - Request must be in writing, include a summary and be signed
 - PAC must inform the public body of intent to review a FOIA denial within 7 days and specify which records they want to review.
 - Public body has 7 days to provide records requested by PAC
 - PAC may subpoena any person or public body “having knowledge of” records in question if public body does not provide them within the 7 days allowed
 - Public body may respond to review notice
 - PAC may issue a non-binding opinion, or the Attorney General must issue “findings of fact and conclusions of law within 60 days after initiating review
 - The Attorney General may issue a binding opinion or resolve a request for review by mediation
 - The decision not to issue a binding opinion is not reviewable
 - If a requestor files suit, the PAC shall halt the review
- advise, when requested, public bodies on FOIA requests before the body determines whether or not to grant access.
- Disallow release of records collected by the PAC for a review of a denied request to the public until the PAC has reviewed the case and only if the denial request was unfounded
- Provide that a public body that denies a request under Section 7, 1c (personal information) or 1f (preliminary drafts, etc.) shall provide written notice of such to the PAC and the requestor
 - PAC must determine within 5 days whether to review denial
- A public body that discloses records in accordance with an opinion of the Attorney General is immune from all liabilities
- advise public bodies on FOIA requests before the body determines whether or not to grant access.

Attorney General Provisions (p. 56-64)

- A binding opinion by the Attorney General shall be considered a final decision
- Added to the duties of the Attorney General to give written binding and advisory public access opinions under FOIA.
- Creates PAC position in Attorney General’s office
 - PAC must be an attorney licensed to practice in IL
- By establishing the PAC the Attorney General will have the power to:
 - Develop FOIA training
 - Prepare and distribute educational materials
 - Resolve disputes in response to requests by mediating, informally resolving or issuing binding opinions

- Issue advisory opinions to public bodies
- Respond to informal public inquiries
- Conduct research on compliance issues
- Recommend ways to improve public access to General Assembly
- Prepare and distribute model policies for public bodies
- Promulgate rules to implement these powers
- Describes subpoena powers provided to the PAC
- Attorney General binding opinions may be appealed through the Administrative Review Law and action commenced in Cook or Sangamon County.
- Advisory opinions issued to a public body shall not be considered final opinions.
- Attorney General shall post binding opinions on website

This analysis was created by the Governmental Relations Department of the Illinois Association of School Boards.