THE ILLINOIS FREEDOM OF INFORMATION ACT
The Illinois and Federal Freedom of Information Acts (FOIA) are a powerful tool for monitoring government. This presentation provides an overview of FOIA and provides practical advice about the FOIA process. This presentation does not address every set of circumstances, and the law may have changed since the time of the last update to this presentation. Please contact Matt Topic at Loevy & Loevy any time with questions about your particular FOIA situation.
The Freedom Of Information Act

• Lay Of The Land: What Is FOIA?
• Nuts And Bolts: How to FOIA
• Remedies for FOIA Denials
Lay Of The Land: What Is FOIA?
What is FOIA?

“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.”
“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.”
What is FOIA?

“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.”
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“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.”
Who is a “public body”?

- State of Illinois
- Counties
- Cities, towns, villages, municipal corporations
- School districts, state universities and colleges
- Legislative, executive, administrative, and advisory bodies of these
- Boards, bureaus, committees, commissions, departments and subsidiaries of these
- Includes state’s attorneys
- Includes charter schools
- Need not receive or spend tax revenue
Who is a “public body”? 

- Federal agencies are subject only to federal FOIA Courts are subject to other open records laws.
- Cook County Clerk of Court takes position it is not subject to FOIA; other county clerks of court (e.g., Sangamon) have FOIA procedures and forms
- Individual legislators are not public bodies, only the legislative body itself
  - But strong argument exists that City of Chicago aldermen are public bodies when they have authority to act individually for the City in their wards
Who is a “public body”?  

- Non-profits, public-private partnerships, private companies: public funding is relevant but generally not enough – must consider:
  
  (1) whether the entity has a legal existence independent of government resolution (e.g., separately incorporated)
  
  (2) the nature and functions performed by the entity
  
  (3) the degree of government control exerted over the entity (must be “substantial, day to day supervision”; more than ability to “influence”)
  
  – Issue is currently on appeal to IL Supreme Court, Better Gov’t Assoc. v. Illinois High School Assoc.
Who is a “public body”?

• “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.”
  - Request should be directed to the public body for records in the possession of the contractor
  - Meaning of “governmental function” currently before IL Supreme Court in *BGA v. IHSA*
What Is FOIA?

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What are “public records”?

Three elements:

1. “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 . . . regardless of physical form or characteristics” (very broad)

2. “Pertaining to the transaction of public business”

3. “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”
What are “public records”? 

- Public business = not “purely private affairs”
- Broader than just in possession of public body
- Some things are specifically identified as public records for additional clarity
  - Settlement agreements
  - Notices of denials of FOIA requests
  - Certified payroll records of government contractors submitted to a public body under the Prevailing Wage Act
  - Certain arrest report information
- Public body must make available a “reasonably current and detailed list of all types or categories of documents under the public body’s control” under Section 5
What are “public records”?

- “Private” emails
  - One appellate court has ruled on “private” emails of legislators: qualify as public records if relate to public business and
    - the document was forwarded to enough members of public body to constitute a quorum for that specific body, or
    - the document was sent during a meeting of the public body, or
    - other circumstances where legislator can act on behalf of public body individually?
  - No Illinois appellate court ruling specifically addressing executive branch, but three Cook County Circuit Court judges and Illinois AG have found that records related to public business on private accounts of public officials are public records; so has the US Court of Appeals for DC Circuit
What Is FOIA?

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Who can FOIA?

- “Any individual, corporation, partnership, firm, organization or association, acting individually or as a group”
- Need not be a citizen or resident of Illinois
- Need not provide a name
- Attorney General’s opinion is that the identity of FOIA requesters is exempt under FOIA and one case found names exempt under privacy exemption under the facts of that case, but many public bodies are posting FOIA requests online, including the identity of requesters and alleged “costs” of responding
- Purpose of the request need not be provided except to request fee waiver or to specify it is not a commercial request
Who can FOIA?

• Commercial requests are subject to different rules regarding charges and timing
• “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.”
  – Excludes news media and non-profit, scientific, or academic organizations when request is for those purposes
  – “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.”
What Is FOIA?

“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.”
How are records copied or inspected?

- “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”
  - Should include scanning paper documents into PDFs
- Can charge fees reasonably calculated to approximate actual cost of copying up to $.15 per B&W page after 50 or the electronic media (CD)
- The imposition of a fee not consistent with the provisions of FOIA is treated as a denial
How are records copied or inspected?

- Fee waiver or reduction allowed if purpose of request is “to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public”
- No copying charges allowed if response to request was late
- No search costs (unless commercial request, does not include media)
- Other statutes may impose further charges for particular types of records
- New provision allows public body to direct requester to records available online – insist on specific URL for each document if not readily found
  - Can’t satisfy request for full database by pointing to website where individual database entries can be obtained one at a time
How are records copied or inspected – Electronic data

• “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.”

• Public body cannot lock an electronic record to prevent “manipulation” or produce a PDF instead of original format

• Running a database query and producing results is NOT the creation of a new record
How are records copied or inspected?

• Records can also be inspected at the public body’s offices, and you should be able to take your own pictures/scans of the documents
  – will generally need to be scheduled in advance
  – public body cannot charge for copies used for redactions on documents to be inspected
• Record retention and destruction is governed by Local Records Act, not FOIA
What is FOIA?

“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.”
What information is exempt?

• **General propositions applicable to exemptions:**
  – There is a legal presumption that all public records must be disclosed, government must prove exemptions by “clear and convincing evidence”
  – Only information specifically exempted by statute is exempt (courts cannot create new exemptions) and exemptions must be “narrowly construed”
  – Partially exempt documents are handled through redactions
  – “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.”
  – Some authority allowing redacting of non-exempt but non-responsive information – depends on how request is worded
  – Selective disclosure can result in waiver depending on nature of the disclosure
  – No requirement to assert any exemptions unless another law says so
What information is exempt?

- **Private information:** unique identifiers such as SSNs, home address/phone/email, personal financial information, medical records, driver’s license number, etc.
  - Attorney General contends signatures, and sometimes zip codes are exempt

- **Personal privacy:** information that “would constitute a clearly unwarranted invasion of personal privacy.”
  - “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.”
  - “Unless the disclosure is consented to in writing by the individual subjects of the information”
  - “The disclosure of information that bears on the public duties of public employees and officials shall **not** be considered an invasion of personal privacy.”
What information is exempt?

• Law enforcement/administrative enforcement records:
  - Must be “in the possession of any public body created in the course of
    administrative enforcement proceedings” or “in the possession of . . . any law
    enforcement or correctional agency for law enforcement purposes” and one of:
      - “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” or 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, law enforcement, or penal
        agencies” but does not include witnesses to traffic accidents (with some exceptions)
    - (cont’d)
What information is exempt?

- Law enforcement/administrative enforcement records (cont’d):
  - “disclose unique or specialized investigative techniques” and would result in demonstrable harm to the public body that is the recipient of the request
  - does not include polygraphs, use of traffic cameras to track vehicles, other techniques readily known (e.g., through internet search)
  - “disclose internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct,” and would result in demonstrable harm to the public body that is the recipient of the request
  - “endanger the life or physical safety of law enforcement personnel or any other person” or
  - “obstruct an ongoing criminal investigation by the agency that is the recipient of the request”
What information is exempt?

• Case Study: Laquan McDonald shooting video
  – Video requested from Chicago Police Department
  – CPD argued interference with pending investigations by IPRA, state’s attorney, and FBI/DOJ
  – CPD’s theory = release of video would cause witness memories to be altered
What information is exempt?

• Court’s ruling: Part One
  – Plain language of exemption only applies if recipient of the FOIA request is the agency conducting the investigation, not merely because it is “cooperating.”
  – Because CPD does not investigate shootings by its own officers, exemption cannot apply.
  – “The Department’s position ignores this command and, instead, advocates for an expansive construction that exceeds the bounds of the plain language of Section 7(1)(d)(i) of FOIA.”
What information is exempt?

• Court’s ruling: Part Two
  – CPD failed to come forward with evidence establishing that release of the video would interfere with the other investigations anyway.
  – “The Court finds that the Department’s assertions and averments of Klimas and Hunt in support thereof are entirely conclusory and inadequate to sustain the Department’s burden to establish by clear and convincing evidence that disclosure of the dashboard camera would interfere with pending or actually and reasonably contemplated law enforcement proceedings.”
What information is exempt?

- **Deliberative process:** Pre-decisional records “in which opinions are expressed, or policies or actions are formulated”
  - Does not apply to purely factual material
  - Does not apply to final decisions or alleged “drafts” that are functioning as decisions
  - Does not apply to “unverified” information
  - Does not apply “when the record is publicly cited and identified by the head of the public body”
  - Applies to “all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents”
  - Can sometimes include deliberations with outside consultants but only where they solely serve the interest of the public body
What information is exempt?

• **Attorney and auditor records:**
  – communications with attorneys or auditors that would not be discoverable in litigation
  – materials prepared at request of attorney in anticipation of civil, criminal, or administrative proceedings
  – “materials prepared or compiled with respect to internal audits of public bodies”
  – law firm invoice amounts, billing attorneys, and general description of work are non-exempt; details that would disclose attorney advice are usually exempt

• **Proposals and bids:**
  – where disclosure “would frustrate procurement or give an advantage” to a bidder
  – only “until an award or final selection”
  – also includes “information prepared by or for the body in preparation of a bid solicitation” until an award or final selection is made
What information is exempt?

- **Trade secrets/confidential proprietary information:**
  - obtained from a person or business
  - furnished to public body under a claim that they are proprietary, privileged or confidential, and
  - disclosure would cause competitive harm to the person or business
  - but certain information about private companies and private equity funds in a public pension fund must be disclosed
  - another exemption covers valuable formulae, designs, data, etc. “when disclosure could reasonably be expected to produce private gain or public loss”
What information is exempt?

- **Education-related exemptions:**
  - test questions and scoring keys (also for professional license and employment exams)
  - educator peer-review records
  - “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”
  - faculty course/research materials
  - additional exemptions through Illinois School Student Records Act, Federal Family Educational Rights & Privacy Act, other statutes and regulations

- **Records relating to a public body's adjudication of employee grievances or disciplinary cases:**
  - but not the final outcome of cases in which discipline is imposed
  - does not include investigatory records
  - police complaint registers and repeater lists are not exempt
What information is exempt?

• **Collective bargaining records:**
  – but final agreements are not exempt

• **Security plans and vulnerability assessments:**
  – “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”
What information is exempt?

• Minutes of meetings properly closed under Open Meetings Act:
  – OMA allows closed meetings (i.e., “executive session”) in certain circumstances

• Information **specifically** prohibited from disclosure by other laws, rules, and regulations:
  – Section 7.5 also contains exemptions deriving from other specific statutes

• Many others (these are short-hand descriptions):
  – construction-related technical records unrelated to publicly funded projects, computer system technical information that could jeopardize system if disclosed, real estate negotiation records while pending, certain insurance/self-insurance records, certain financial/insurance regulation records, certain utility-related information, identities of people registered in certain park district programs, and others
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Nuts And Bolts: How to FOIA
How to FOIA

1. Find the right place and procedure
2. Write the request
3. Public body responds
Find the right place and procedure

- Public body must “prominently display” at its offices, make available, and/or post on its website
  - brief description of the methods whereby the public may request information and public records
  - the address where requests for public records should be directed
  - a schedule of copying fees
  - 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
Find the right place and procedure

• “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.”
  – includes email
  – fax and email are best – quickest and verifiable
  – public body can elect to honor oral requests
• Large bodies (e.g., City of Chicago) often have different FOIA officers for different departments
• Requester is not required to use an official form
Writing FOIA requests – some options on format and approach

- General requests: “All documents related to ______”
- Specific requests: “The contract between the village of ____ and _____”
- Parameter-based: “All of the mayor’s emails sent or received the second week of August 2011”
  – could add “containing the word ___”
- Database queries: “All entries in your complaint log database in March 2013 from people in zip code 60607 regarding potholes”
- Convert questions into document requests by preceding the question with “Documents sufficient to show . . .”
- “Policies and procedures related to ____”
- “Reports, studies, analyses, etc. of ____”
Under FOIA, I request the following public records, including contractor public records under FOIA Section 7(2):

1. The RFP package sent or made available to potential bidders for the village’s IT upgrade RFP last August.
2. All materials submitted by or on behalf of any bidders in response to that RFP.
3. All documents related to the evaluation of responses to and selection process for that RFP.
4. All formal or informal policies, procedures, practices, directives, etc. applicable to that RFP, including but not limited to the disclosure and evaluation of conflicts of interest, the identity of categories of required paperwork, due diligence procedures, and the identities of all persons involved in the evaluation and selection process.
5. All communications between the village and the winning bidder of that RFP from January through September of last year, including communications through agents like attorneys or lobbyists, containing the word “donation” or “campaign.”

Please send electronic documents as PDFs and audio and video documents in commonly available formats. Please scan paper documents into PDFs. Please search any “private” email accounts used for public business. Please deliver the documents to this email address, over a cloud sharing service, or if those are impossible, mail me a CD to _____. This is not a commercial request. To the extent there are any copying charges, I request a fee waiver because I am making this request to learn more about the RFP in furtherance of my efforts to evaluate whether the village followed proper procedures in the RFP and to tell other residents of my results. If you do not grant a fee waiver, contact me for authorization before assessing copying charges over $10. Do not redact any nonresponsive information; I want the complete copy of any record with any responsive information. Produce emails and attachments together. Please communicate with me only by email to this address.
Public body’s response

- Must respond within 5 business days
- Public body may extend response by another 5 business days under certain circumstances – frequently overused
- Requester may agree to additional time, which then supersedes the statutory deadlines
- Failure to respond by deadline = denial
- No excuses for personnel issues (ie, vacations) or budget constraints
- Public body must undertake a reasonable search for records
Public body’s response

- Denials must be in writing and notify the requester of:
  - decision to deny the request
  - exemptions asserted
  - the reasons for the denial, “including a detailed factual basis for the application of any exemption claimed” and “citation to supporting legal authority”
  - the names and titles or positions of each person responsible for the denial
  - the right to seek review by the Attorney General’s Public Access Counselor
  - the right to seek judicial review (i.e., to file a lawsuit)
Public body’s response – “undue burden”

- Public body can claim that request is “unduly burdensome”
  - Only applies to a request for “ALL records falling within a category” – should be limited to the categories that public body discloses on its Section 5 records list
  - Only applies if burden outweighs public interest in disclosure
  - Must be asserted in writing and supported by specific reasons and the extent to which it would burden operations
  - Must confer with requester about narrowing before denying
  - Waived if public body fails to respond to request on time
  - Courts have given inconsistent answers on degree of proof necessary for public body to establish
Public body’s response – “recurrent requesters”

- Response deadlines are expanded for “recurrent requesters”
- Defined as “a person that, in the 12 months immediately preceding the request, has submitted to the same public body (i) a minimum of 50 requests for records, (ii) a minimum of 15 requests for records within a 30-day period, or (iii) a minimum of 7 requests for records within a 7-day period
  - does not apply to requests by news media or non-profit, scientific, or academic organizations when the requests pertain to those functions
  - “request” means “a written document (or oral request, if the public body chooses to honor oral requests) that is submitted to a public body . . . that identifies the particular public record the requester seeks. One request may identify multiple records to be inspected or copied”
  - public body cannot aggregate requests of spouses or a group
Public body’s response – “recurrent requesters”

• Entitled to same records, but subject to different deadlines:
  - within 5 business days – public body must notify the requester that it is treating the requester as recurrent requester, the reasons, and that the public body will send an initial response with 21 business days of the request
  - within 21 business days – public body must (1) provide an estimated time to provide the records and estimate of copying charges (which public body can require to be paid in advance), (2) deny the request based on any asserted exemptions, (3) assert undue burden and invite the requester to narrow the request, or (4) produce the requested records
  - within a “reasonable period” considering the size and complexity of the request – public body must provide non-exempt public records responsive to the request
"Voluminous request" means a request that: (i) includes more than 5 individual requests for more than 5 different categories of records or a combination of individual requests that total requests for more than 5 different categories of records in a period of 20 business days; or (ii) requires the compilation of more than 500 letter or legal-sized pages of public records unless a single requested record exceeds 500 pages.

Does not include news media and non-profit, scientific, or academic organization requests made for those purposes

Would not apply, for example, to request for 1-4 categories of videos, regardless of the amount of data
Public body’s response – “voluminous request”

- Modified deadlines and process
  - Public body identifies the request as voluminous within 5 day deadline, basis for claim
  - Requester has 10 days to modify or stand by request and consent to fees
  - Public body has 5 days to respond to modified request
  - If not modified, public body has 5 days to provide estimate of fees, assert undue burden or exemptions, or provide records
  - Possibility of various extensions
Public body’s response – “voluminous request”

• Charges for non-PDF records: up to $20 for not more than 2 megabytes of data, up to $40 for more than 2 but not more than 4 megabytes of data, and up to $100 for more than 4 megabytes of data
• Charges for PDF records: up to $20 for not more than 80 megabytes of data, up to $40 for more than 80 megabytes but not more than 160 megabytes of data, and up to $100 for more than 160 megabytes of data
• “If a requester does not pay a fee charged pursuant to Section 6 of this Act for a voluminous request, the debt shall be considered a debt due and owing to the public body and may be collected in accordance with applicable law. This fee may be charged by the public body even if the requester fails to accept or collect records the public body has prepared in response to a voluminous request.”
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Remedies for FOIA Denials
Remedies

- Two options
  - File request for review with Attorney General’s Public Access Counselor
  - File a lawsuit
Remedies - PAC

- Bureau within Illinois Attorney General’s Office
- Can issue binding or non-binding opinions
  - binding opinions are rare, PAC must issue within 60 days (can be extended to 90), some aspects are subject to court deference, AG participates in suit if opinion not followed
  - if non-binding opinion is not followed, requester must file own suit
- Process (see http://foia.ilattorneygeneral.net/)
  - Must be initiated within 60 days of denial (or if no response, within 60 days of the response deadline passing)
  - Submit a written request for review
  - Public body responds, you reply to the response
  - Usually takes many months, sometimes a year or more
Remedies - PAC

• Optional and free
• At least one PAC decision allowing a FOIA denial has been overturned in litigation
• Growing trend of some public bodies ignoring non-binding opinions against them
Remedies - lawsuit

- Court can enter an injunction
- Court must award attorney’s fees and costs to a prevailing requester
- Court can also award civil penalties for willful and intentional violations
- FOIA matters are supposed to receive expedited treatment on the court’s docket
- Public bodies must prove exemptions by clear and convincing evidence based on a detailed factual justification
Some parting words of wisdom:

When information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and - eventually - incapable of determining their own destinies.

Spoken by…
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