



Counties *at the* Capitol

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Special Report



FOIA bill goes to the Governor

Senate Bill 189, which rewrites the state's Freedom of Information Act (FOIA), passed the Senate on May 28, 2009 and now awaits the Governor's signature. The bill, which was written by Attorney General Lisa Madigan, had strong support from her father, Michael Madigan, speaker of the House and co-chair of the Joint Committee on Government Reform.

The IACBMC staff worked countless hours with the "good government" proponents to negotiate a workable compromise on certain provisions of the bill which pertain to response time, statutory exemptions, copying fees, liability and civil penalties. Several amendments were offered but not adopted.

This is how it played out! The General Assembly pushed the bill through on the evening of May 27. House Amendment #2 was adopted by a voice vote on the House Floor without a committee hearing. The bill was immediately moved to 3rd Reading and passed unanimously by a vote of 116-0. **Senate Bill 189** arrived in the Senate the same evening and was subsequently heard by the Senate Executive Committee the next day. Local government advocacy groups were afforded little time to testify. The committee approved the bill by consent 11-0. With little debate, the Senate passed the bill later that same day on a vote of 58-1. The lone vote in opposition to the bill was Sen. Gary Dahl (R-Granville) stating, "I think this FOIA, the way it is written, is a real burden for small communities."

Senate Bill 189 contains major changes to the Freedom of Information Act, the Open Meetings Act and the Attorney General's Act. Each public body's standard FOIA forms and policies must be changed if this bill becomes law.

The IACBMC is planning to host a special Tele-Institute later this summer on the new transparency reform legislation. **Pending signature by Governor Quinn, Senate Bill 189 becomes effective January 1, 2010.**

Key provisions of Senate Bill 189

1. Statements of Purpose: The bill substantially revises the purpose provisions of the Act to emphasize that access to public records is a fundamental obligation of government and that compliance with the Act is a primary duty of public bodies, regardless of fiscal impact. All public records are presumed to be open to inspection or copying, and the public body bears the burden of proving an exemption from disclosure by clear and convincing evidence. This is a new and heightened standard for public bodies.

2. Public Access Counselor/Requests for Review. Creates a new position of Public Access Counselor (PAC) in the Office of the Attorney General. Any person who believes that a public body has violated the Act may request a review by the PAC. There is a process by which the public body may respond. The PAC's decision on review is "binding" and reviewable under Illinois' Administrative Review Law.

3. No Local Appeals. There is no longer an appeal to the "head of the public body." All appeals go directly to the PAC.

4. Designation and Training of Local Employees and Officers. Each public body must make a list of employees or officers who will handle FOIA requests and submit it to the PAC. The designated employees and officers must complete an electronic training curriculum administered by the PAC within six months after the new Act goes into effect (Jan. 10, 2010) and annually thereafter. Every newly designated employee or officer must receive training within 30 days after designation.

continued on page 2

5. Form and Purpose of FOIA Request.

Allows public bodies to require that requests made under the Act be submitted in writing, but prohibits the insistence on a standard form. The public body may not require the requester to specify the purpose for a request except to determine whether the request is for a commercial purpose or to decide whether to grant a fee waiver.

6. Time for Response. Shortens the time for an initial response to most requests from 7 to 5 business days. Shortens the time allowed for the final response after an extension from 7 to 5 additional business days. Certain information from arrest reports must be disclosed within 72 hours after the arrest. The response time for requests for records “to be used for a commercial purpose” is lengthened to “within a reasonable period considering the size and complexity of the request,” up to 21 business days.

7. Failure to Respond. If a public body fails to respond within the prescribed time limits, it waives its right to assert most of the permitted exemptions. Also, the public body may not charge copying fees in connection with a late response.

8. Form of Disclosure in Electronic Formats. Requires public bodies to produce responsive records in the requested electronic format whenever practical. A county thus may be required to reformat electronic data.

9. Broader Definition of “Public Body”. Broadens the definition of “public body” to include all subsidiary bodies (including committees and subcommittees) without the previous qualifier “which are supported in whole or in part by tax revenue, or which expend tax revenue.”

10. Broader Definition of “Public Record”. Broadens the definition of “public records” by including “electronic communications,” thus making e-mail and other similar communications explicitly covered by the Act. This revision, however, is different from the earlier bill which included in the definition of “public records” e-mail messages sent to or from personal e-mail addresses. Notably,



If feasible, public bodies must furnish documents in electronic format.

the public body also must disclose documents held by “a party with whom the agency has contracted to perform a governmental function on behalf of the public body” and that directly relate to the governmental function. This revision seemingly would apply to documents held by consultants, contractors, and similarly situated third-parties depending on the meaning of the phrase “governmental function.”

11. Narrower Exemption for Private Information. Narrows the disclosure exemption for “private information.” “Private information” now is defined as “unique identifiers,” including such things as social security numbers, driver’s license numbers, biometric identifiers, personal financial information, medical records, personal telephone numbers, and the like.

12. Narrower Exemption for Personal Information. Narrows the disclosure exemption for “personal information.” “Personal information” still is exempt if disclosure would constitute a “clearly unwarranted invasion of personal privacy,” but now the phrase “unwarranted invasion of personal privacy” is narrowly defined as “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.”

13. Special Treatment of Denials based on “Personal Information” or “Preliminary Drafts” Exemptions. Provides a new, substantial process if a public body intends to withhold a record from disclosure based on either the

“personal information” exemption or the “preliminary drafts” exemption. In that case, the public body must provide the requester and the PAC a written notice of the public body’s intent to deny the request (whether in whole or in part). The notice must include a detailed summary of the public body’s basis for asserting the exemption. The PAC must notify the public body and the requester, within 5 days after receiving the notice of intent to deny, whether further inquiry is warranted. If the PAC determines to undertake a further inquiry, a substantial process is triggered leading to a binding decision by the PAC.

14. Removes Exemption for Criminal History Information. Removes the existing exemption available for documents relating to completed criminal proceedings, arrest and detention records.

15. Removes Exemption for Financial Transactions. Removes the existing exemption available for draft documents and memoranda relating to a public body’s financing and marketing transactions.

16. Costs of Reproduction. Prohibits public bodies from charging fees for the first 50 pages of black-and-white documents and limits the charge for the remaining pages to 15 cents per page unless the public body can demonstrate that its actual cost (excluding personnel costs) is higher. A fee equal to actual cost may be charged for color copies. The actual cost of purchasing recording medium, such as a disc or tape, may be charged for electronic records. The cost of a certified copy is limited to \$1.

17. Fines and Costs. Provides that if a court determines that a public body “willfully and intentionally” failed to comply with the Act or “otherwise acted in bad faith,” then 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.” The previous discretion in the court whether to award attorneys’ fees to a person who wins the right to inspect or copy a public record has been made mandatory – a court “shall” award such person reasonable attorneys’ fees and costs.

NOTE: The criminal penalties included in the earlier bill are not included in Senate Bill 189.