

Fall 2009

## Table of Contents

Page 2	Quo Warranto
Page 3	Video Gaming
Page 5	How Libraries Lead Great Referenda Campaigns
Page 6	Court Decisions
Page 7	Sexual Harassment Case
Page 8	Equitable Sharing through the Recession
Page 9	Copyright Protection
Page 11	Political Campaign Committee
Page 12	Cutting off 'Water Service'
Page 14	Springfield & You: Legislative Update
Page 15	Election Dates Filing Info Ancel Glink Notes & News

## New FOIA Law Imposes Sweeping Changes

On August 17, 2009, Governor Quinn signed Public Act 96-0542 into law, which makes broad changes to the state's public access laws, including the Freedom of Information Act and the Open Meetings Act. It also creates the office of Public Access Counselor and provides this officer with the ability to issue binding opinions on disputes over alleged violations of both the Freedom of Information Act and the Open Meetings Act. This article is designed to provide a brief overview of this comprehensive new legislation. Without doubt, this new law, effective January 1, 2010, will have a substantial impact on units of local government in complying with Freedom of Information Act (the "Act") requests. The following are the top 16 things public officials should know about this new law.

**1. Change in the Public Policy:** Previously, the Act stated it "was not to be used to violate individual privacy." Under the new statement of the Act's purpose, this has now been eliminated. The Act also previously stated that it was "not to be used for the purpose of furthering a commercial enterprise," so the requests of a commercial enterprise would not be used to unduly burden public resources. This language has also been eliminated. Based upon the elimination of these phrases, there is a presumption that all records are open to inspection or copying, and emphasizes the 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. Another change in the public policy section is that, under the new law, the public body will have the burden of proving by clear and convincing evidence that it is exempt.

**2. "Personnel Files/Private Information."** The new law eliminates the exemption for "personnel files," but keeps and further defines the exemption for "private information" that is contained within public records. "Private information" is now defined as "unique identifiers," which includes such things as social security numbers, driver's license numbers, biometric identifiers, personal financial information, medical records, personal telephone numbers, etc. "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." In addition, the bill 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 give the requester and the Public Access Counselor a written notice of the public body's intent to deny the request or any part of it. The notice must include a detailed summary of the public body's basis for asserting the exemption. The Public Access Counselor must notify the public body and the requester, within five days after receiving the notice of intent to deny, whether further inquiry is warranted. If the Public Access Counselor determines to undertake a further inquiry, a substantial process is triggered leading to a binding decision by the Public Access Counselor.

**3. The Law Eliminates the Exemption for Records regarding Financial Transactions.** The bill removes the existing exemption available for draft documents and memoranda relating to a public body's financing and marketing transactions.

**4. Settlement Agreements are now public records...even if they contain confidentiality clauses.**

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## FOIA Law

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**5. Time for Response.** The new law changes the timeline from seven business days to five business days. In the event that an extension is required to comply with a request, the new law permits an extension of five business days instead of seven. If a public body misses a deadline, it cannot claim an exemption for the request being overly burdensome. Further, if a public body misses a deadline, it cannot charge any fee for copies, if fees were permitted in the first place (see below).

**6. "Commercial Purpose" changes.** Under the new law, public entities must comply with requests submitted for a commercial purpose, but instead of producing those documents within five working days, public bodies must produce them "within a reasonable period considering the size and complexity of the request," up to 21 business days. In addition, a municipality may now inquire whether the record is sought to advance a commercial purpose. In the event that someone attempts to procure a public record for a commercial purpose without disclosing that the use is for a commercial purpose, it constitutes a violation of the Act.

**7. FOIA Officers.** The Act requires the designation and training of a FOIA officer, as well as requiring ongoing education for those officers. The identity of the FOIA officer must be designated on the public entity's website. The list of FOIA employees or officers must be submitted to the Public Access Counselor. Within six months after the new Act goes into effect, the designated employees and officers must successfully complete an electronic training class administered by the Public Access Counselor and, thereafter, must have additional training annually. Every newly designated employee or officer must receive training within 30 days after designation.

**8. The Act requires a formal system for processing FOIA requests.** The new law requires the FOIA officer to note and date the time the request is received; calculate the five day response deadline and note it in writing on the response; keep all documents related to a request until it is complied with or denied; and keep files maintaining all FOIA requests.

**9. Use of FOIA Forms.** Under the new law, a public body cannot require the use of certain forms. However, public bodies may still require that requests made under the Act be submitted in writing. The public body may require the requester to disclose whether the request is for a commercial purpose or to decide whether to grant a fee waiver.

**10. Electronic Records.** Public bodies must provide records in an electronic format, if they maintain them in such a format and they are requested in such a format.

**11. Fees and Costs.** Under the new law, public entities may not charge fees for the first fifty pages of standard black and white

copies. An illegal fee constitutes a denial of records under the Act. After the first 50 pages, the fee for black-and-white copies thereafter may not exceed 15¢ per page unless the public body can demonstrate that its actual cost of reproduction (excluding personnel costs) is higher. (A fee equal to actual cost may be charged for color copies.) The actual cost of purchasing the recording medium, such as a disc or tape, may be charged for electronic records. The cost of a certified copy is limited to \$1.00.

**12. "Public Records" now include records that contractors have in their possession.** Public entities are now required to produce public records that are in the possession of a party with whom the agency has contracted to perform a governmental function. Specifically, municipalities 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.

**13. Expansion to Cover E-Mails.** The bill broadens the definition of "public records" by including "electronic communications," so e-mail and other similar communications are now 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.

**14. Fines.** If a public body willfully and intentionally fails to comply with the Act, it can be fined \$2,500 to \$5,000 per occurrence. Also, now a court must "award such person reasonable attorneys' fees and costs." However...there is no reciprocal penalty for a requestor who abuses the FOIA process.

**15. The Act Creates a Public Access Counselor.** The Public Access Counselor will be an attorney within the Attorney General's office. The public access counselor must conduct training of representatives of public bodies, consider complaints filed by people who believe the Act has been violated, may issue binding opinions, and may issue advisory opinions to public bodies. The Public Access Counselor's decision is reviewable under Illinois' Administrative Review Law.

**16. The Act Eliminates Appeals to the Head of the Public Body.** Under the new law, all appeals will go directly to the Public Access Counselor instead of to the head of the public body, as previously specified.

Because of the sweeping changes provided in this new law and its impact on our public sector clients and friends, Ancel, Glink is committed to providing ongoing instruction regarding this new law's provisions. If you have questions regarding this new law, please contact Keri-Lyn Krafthefer at 312-782-7606.

*-Keri-Lyn Krafthefer*