

The Freedom of Information Act

Presented by:

Bryan J. Vayr & Keith E. Fruehling
Heyl, Royster, Voelker & Allen, P.C.

kfruehling@heyloyster.com

bvayr@heyloyster.com

Illinois Association of County Board Members

March 29, 2021



Freedom of Information Act

Copyright © 2021 by Heyl, Royster, Voelker & Allen, P.C.

**Heyl, Royster, Voelker & Allen, P.C.
300 Hamilton Boulevard
Peoria, Illinois 61601**

No part of this presentation may be copied or reproduced in any form without written permission from the publisher.

Limits of Liability and Disclaimer of Warranty

While every precaution has been taken in preparing this presentation, the publisher and the presenters do not assume responsibility for errors or omissions. No liability is assumed by the publisher or presenters for damages resulting in the use of this information nor is it intended to create an attorney-client relationship.

Overview:

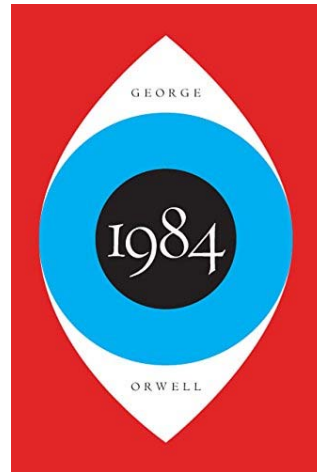
1. What FOIA is
2. What is/is not "FOIA-able"
3. How to respond to a FOIA Request
4. Consequences of getting FOIA "wrong" (i.e., lawsuits)

Also, maybe have an amusing fact or two . . .



Amusing Fact No. 1

Illinois was the *last* state to pass a
Freedom of Information Act



. . . with the Act taking effect in 1984

Public Policy – 5 ILCS 140/1

- 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.

Presumption – 5 ILCS 140/1.2

- *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 records is exempt from disclosure has the burden of proving by *clear and convincing evidence* that it is exempt.

Unamusing Fact No. 1: “Clear and Convincing Evidence”

There are three main “standards of proof” in the law:

Preponderance of the
Evidence (*most* civil law)



Clear & Convincing Evidence
(???)



“Beyond a Reasonable Doubt”
(Criminal law only)



Amusing Fact no. 2:

. . . by forcing public bodies to prove a record is NOT disclosable by a “clear and convincing evidence” standard, it is “harder” to prove a FOIA exception than proving:

- Constitutional violations;
- Civil Rights violations;
- Medical malpractice;
- That a company breached a contract.

Example of How “Far” FOIA Coverage Goes (Hint: *Far*)



Records of Funds – 5 ILCS 140/2.5

- 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.

Payrolls – 5 ILCS 140/2.10

- 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.

Settlement and Severance Agreements – 5 ILCS 140/2.20

- All settlement and severance 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.

A cartoon illustration of a dog sitting at a desk. The dog is looking at a piece of paper on the desk that has the word 'CONFIDENTIAL' written on it in red, slanted letters. The background shows a window and some office equipment.

Unamusing Fact no. 2:

A “confidentiality” provision will *not* make a settlement “exempt” from FOIA

FOIA Requests: The Hoops We Jump Through



Requests for Inspection or Copies – 5 ILCS 140/3

- Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act.
- Requests for inspection or copies shall be made in writing and directed to the public body.
- 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.

Extensions of Time – 5 ILCS 140/3

- The time for response 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:
 - The requested records are stored in whole or in part at other locations than the office having charge of the requested records
 - The request requires the collection of a substantial number of specified records
 - The request is couched in categorical terms and requires an extensive search for the records responsive to it
 - The requested records have not been located in the course of routine search and additional efforts are being made to locate them

Extensions of Time – 5 ILCS 140/3 (cont)

- The requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are exempt from disclosure
 - The request for records cannot be complied with by the public body within the time limits prescribed without unduly burdening or interfering with the operations of the public body
 - 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
- 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.

Requests for Commercial Purposes – 5 ILCS 140/3.1

- 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:
 - 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;
 - Deny the request pursuant to one or more of the exemptions set out in this Act;
 - 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
 - Provide the records requested.

Freedom of Information Officers – 5 ILCS 140/3.5

- Each public body shall designate one or more officials or employees to act as its Freedom of Information officer(s).
- Upon receiving a request for a public record, the Freedom of Information officer shall:
 - Note the date the public body receives the written request;
 - Compute the day on which the period for response will expire and make a notation of that date on the written request;
 - 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
 - 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.



Unamusing Question no.1

What if a FOIA request is, well, ENORMOUS?!?

Do we really only have 5
(10, or 21, or 26) days?

Voluminous Requests – 5 ILCS 140/3.6

- A public body shall respond to a voluminous request within 5 business days after receipt.
- The response shall notify the requester:
 - That the public body is treating the request as a voluminous request;
 - The reasons why the public body is treating the request as a voluminous request;
 - That the requester must respond to the public body within 10 business days after the public body's response was sent and specify whether the requester would like to amend the request in such a way that the public body will no longer treat the request as a voluminous request;
 - That if the requester does not respond within 10 days or the request continues to be a voluminous request following the requester's response, the public body will respond to the request and assess any fees the public body charges

Voluminous Requests – 5 ILCS 140/3.6 (cont)

- That the public body has 5 business days after receipt of the requester's response or 5 business days from the last day for the requester to amend his or her request, whichever is sooner, to respond to the request;
- That the public body may request an additional 10 business days to comply with the request;
- Of the requester's right to review of the public body's determination by the Public Access Counselor and provide the address and phone number for the Public Access Counselor; and
- That if the requester fails to accept or collect the responsive records, the public body may still charge the requester for its response and the requester's failure to pay will be considered a debt due and owing to the public body and may be collected in accordance with applicable law.

Voluminous Requests – 5 ILCS 140/3.6 (cont)

- A public body shall provide a person making a voluminous request 10 business days from the date the public body's response is sent to amend the request in such a way that the public body will no longer treat the request as a voluminous request.

What is “exempt” from FOIA?
(Hint: *A lot* . . . But less than you’d think)



Exemptions – 5 ILCS 140/7

- 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, the public body may elect to redact the information that is exempt.
- The following shall be exempt from inspection and copying (for a complete list, please see the statute):
 - (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
 - (c) Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy

Exemptions – 5 ILCS 140/7 (cont)



- (f) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated
- (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.
- (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
- (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 for 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

Denying a Request – 5 ILCS 140/9

- 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, and the names and titles or positions of each person responsible for the denial.
- Each notice of denial shall also inform such person of the right to review by the Public Access Counselor (PAC) and provide the address and phone number for the PAC.
- Each notice shall also inform such person of his right to judicial review under Section 11 of this Act.



Helpful Fact No. 1: The FOIA Mulligan

If the public agency is sued, its legal defense is not limited only to the exception(s) cited in the agency's FOIA denial.

... Stated differently, if a lawsuit *does* occur, the fact your FOIA officer made a mistake and cited the wrong exception does not doom your defense.

Authority: *Chicago Tribune Co.*, 2014 IL App (4th) 130427, ¶126 (citing *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 769-70 (1st Dist. 2009) (noting a trial court's examination under §11 litigation is *de novo*, and to see if the information can be withheld "under any provision of this Act," citing 5 ILCS 140/11(f)).

Example of How Messy this Can Get: Names

- The Request:
 - “Disclose the names of all persons who have sent FOIA requests to the public agency in the last five years”
- The Response:
 - Provide all FOIA requests themselves and documentation of exchanged fees, but redact the name of the requesting party.
- Was this correct?
 - Potential Exemptions?
 - Section 7.1(b): “Private Information”
 - Section 7.1(c): “Personal Information” that would constitute a “clearly unwarranted intrusion of personal privacy”

What about records anyone can download from your website?



County Board Meeting Minutes

2012

[September 11, 2012](#)

[October 10, 2012](#)

[November 26, 2012](#)

[December 11, 2012](#)

2013

[January 8, 2013](#)

[February 13, 2013](#)

[March 12, 2013](#)

[April 10, 2013](#)

[May 14, 2013](#)

[June 11, 2013](#)

[July 9, 2013](#)

[August 13, 2013](#)

[September 10, 2013](#)

[October 8, 2013](#)

[November 12, 2013](#)

[December 10, 2013](#)

2014

[January 14, 2014](#)

[February 11, 2014](#)

[March 11, 2014](#)

[April 8, 2014](#)

[May 8, 2014](#)

[June 10, 2014](#)

[July 8, 2014](#)

[August 12, 2014](#)

[September 9, 2014](#)

[October 14, 2014](#)

[November 10, 2014](#)

[December 1, 2014](#)

[December 1, 2014](#)
[\(Re-Organizational Meeting\)](#)

[December 9, 2014](#)

2015

[January 13, 2015](#)

[February 10, 2015](#)

2016

[January 12, 2016](#)

[February 9, 2016](#)

2017

[January 10, 2017](#)

[February 14, 2017](#)

Records Maintained Online – 5 ILCS 140/8.5

- A public body is not required to copy a public record that is published on the public body's website. The public body shall notify the requester that the public record is available online and in direct the requester to the website where the records can be reasonably accessed.
- If the person requesting the record is unable to reasonably access the record online after being directed to the website, the requester may re-submit his or her request for the record stating his or her inability to reasonably access the record, and the public body shall make the requested record available for inspection or copying.

You denied the Request.
Now what?



Public Access Counselor – 5 ILCS 140/9.5

- A person whose request to inspect or copy a public record is denied by a public body may file a request for review with the PAC 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 requestor, and include (i) a copy of the request for access to records and (ii) any responses from the public body.
- If the PAC determines that further action is warranted, a copy of the request for review shall be forwarded to the public body and shall specify the records that the public body shall furnish to facilitate the review.

Injunctive or Declaratory Relief – 5 ILCS 140/11

- Any person denied access to inspect or copy any public record may file suit for injunctive or declaratory relief.
- 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.
- In the event of noncompliance with an order, the court may enforce its order against any public official or employee so ordered or primarily responsible for such noncompliance.

Sad Fact No. 1:
This Presentation is Now Over

Questions?

Freedom of Information Act

Presented by:

Bryan J. Vayr & Keith E. Fruehling
Heyl, Royster, Voelker & Allen, P.C.

kfruehling@heyloyster.com

bvayr@heyloyster.com

Illinois Association of County Board Members

March 29, 2021