

HEYL ROYSTER

Bryan Vayr

Complying with the Illinois Freedom of Information Act (FOIA)

Heyl Royster

Governmental Practice

IACBM – January 13, 2023

Complying with the Illinois Freedom of Information Act (FOIA)

Copyright © 2023 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.

Helpful Tips for FOIA

- FOIA (general tips)
 - Most requesters are willing to work out alternative response dates
 - Get your records in order
 - Track EVERYTHING!
 - Utilize an excel spreadsheet to track all FOIA related actions;
 - Date received;
 - All calls or written communications with the requester;
 - Response due date
 - Actual response date
 - Keep a copy of the response with records produced (and records not produced/ redacted)





FOIA in a Nutshell

- What is the FOIA?
 - The FOIA provides public access to government documents and records.
 - Recordings, reports, forms, writings, letters, memoranda, books, papers, maps, photos, etc.
- What is a FOIA request?
 - Written requests for records kept by a public body
- Generally, a public body has 5 days to respond to a FOIA request
 - Some extensions are allowed
- Must provide records and reasons for any redactions / exemptions
 - What are common reasons for exemptions?

Common Reasons for Exemptions

Information prohibited from disclosure by federal or State law

Private information, unless disclosure is otherwise required by the Act

Personal information contained within public records, which would constitute an unwarranted invasion of personal privacy

Trade secrets and commercial or financial information

Proposals and bids for any contract, grant, or agreement

Minutes of meetings of public bodies closed to the public as provided in the Open Meetings Act

The request is unduly burdensome

Who can Initiate of FOIA Request?

- Any individual, corporation, partnership, firm, organization or association, acting individually or as a group, may initiate a FOIA request.
 - Need not be a citizen or resident of Illinois, and in some cases, need not provide a name or reason for the request.

Complying with a FOIA Request

- Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 and 8.5 of this Act.
 - Copying means the reproduction of any public record by means of any photographic, electronic, mechanical (or other process) device or means not known or hereafter developed and available to the public body.
- What if a request is made to inspect a public record that contains information that is exempt, but also contains information that is not exempt?
 - Redactions

Common Redactions

- Information prohibited from disclosure by federal or State law
- Private information, unless disclosure is required by another provision of the Act, a State or federal law, or a court order
 - Examples: Unique identifiers, such as SSNs, home addresses, phone numbers, personal financial information, medical records, etc.
- Personal information contained within public records, the disclosure of which would be an unwarranted invasion of personal privacy
- Preliminary drafts, notes, memos, or other records in which opinions are expressed or policies or actions are formulated
- Proposals and bids for any contract, grant, or agreement, including any information which would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body
- Minutes of meetings of public bodies closed to the public



Denying a Request

- Each public body denying a request for public records shall notify the requester in writing of the decision to deny the request
 - Must include the reason(s) for the denial, names and titles/positions of each person responsible for the denial.
- Each denial must also inform the requester of the right to review by the PAC and provide the address and phone number of the PAC.
- Each notice must also inform requester of the right to judicial review under Section 11 of the Act.

2021 FOIA PAC Opinions

- Binding Opinion 21-002 (FOIA)
 - PAC found that a public body properly withheld records concerning an alleged sexual offense against a minor. The opinion provides strong support for withholding or redacting records relating to complaints involving minors.
 - When addressing FOIA 7(1)(c), which prohibits disclosure of records that would constitute a clearly unwarranted invasion of personal privacy, the factors in determining whether disclosure is required are:
 - (1) the requester's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of an alternative means to obtain the requested information.

2021 FOIA PAC Opinions

- Binding Opinion 21-004 (FOIA)
 - PAC found a municipality in violation of FOIA after it denied a FOIA request for communications between the city and an applicant for a zoning change.
 - The city had denied the request, arguing that the communications were a part of the city’s “deliberative process” on the zoning application, and were therefore exempt under 7(1)(f) of FOIA.
 - Because the requested records were exchanged between the city and a third party (zoning applicant), they did not fall within the type of “inter- and intra-agency pre-decisional or deliberative material” that would be covered by section 7(1)(f) exemption and, as a result, PAC said that they should be released to the FOIA requester.

2021 FOIA PAC Opinions

- Binding Opinion 21-010 (FOIA)
 - PAC determined that a public body violated the FOIA by redacting names of employees found to have engaged in misconduct.

2022 FOIA PAC Opinions

- Binding Opinion 22-001 (FOIA)
 - PAC found that a State's Attorney's Office did not violate the requirements of FOIA by denying a request that was seeking copies of reports between an attorney and a public body regarding the county funding a college degree for a county's employee education.
 - The Office properly denied the request pursuant to Section 7(1)(m) of FOIA, stating the documents are protected by attorney-client privilege and the Illinois work product doctrine.

2022 FOIA PAC Opinions

- Binding Opinion 22-002 (FOIA)
 - PAC found that a police department violated the requirements of FOIA by improperly denying in its entirety a FOIA request submitted by a not-for-profit corporation.
 - The department relied on Section 7(1)(d)(vii) of FOIA, which exempts from disclosure law enforcement records to the extent that disclosure would obstruct an ongoing criminal investigation by the agency that is the recipient of the request.
 - The department improperly withheld the police report; it may properly withhold a Law Enforcement Agencies Database System (LEADS) printout.

2022 FOIA PAC Opinions

- Binding Opinion 22-004 (FOIA)
 - PAC found that a village police department violated the requirements of FOIA by improperly denying a FOIA request submitted by an individual requesting a copy of an email that addresses police department policies and procedures.
 - The village disclosed a copy of the e-mail but redacted most portions.
 - PAC found disclosure would not constitute an unwarranted invasion of personal privacy under FOIA because the email bears on staff members' public duties.

2022 FOIA PAC Opinions

- Binding Opinion 22-005 (FOIA)
 - PAC determined that a city's office violated the requirements of FOIA by improperly denying a FOIA request that sought disciplinary records for a department employee.
 - Complaints describing alleged workplace misconduct bear directly on the duties of public employees and are not exempt from FOIA.

FOIA PAC Opinions

- Binding Opinion 22-011 (FOIA)
 - PAC determined that a village violated the requirements of FOIA by denying a request submitted by an individual who was seeking the names and applications of the candidates for a vacancy on the Village Board of Trustees.
 - PAC determined that all records in the custody or possession of a public body are presumed to be open to inspection or copying, and the village must provide the application materials, except for the permissible redaction of private individuals' personal phone numbers, home addresses, personal e-mail addresses, and signatures.

2021 FOIA Case Law

- *Love v. City of Chicago*
 - An inmate filed several FOIA requests with Chicago Police Department, requesting records related to his conviction.
 - After receiving responses, the plaintiff filed various complaints alleging failure to respond, failure to include correct number of documents, failure to provide an index of records, etc.
 - Trial court found for the Police Department, concluding that it was reasonably diligent in its search efforts for responsive documents and it provided all responsive and non-exempt public records in response to the requests.

2021 FOIA Case Law

- *Watson v. Foyx*
 - Inmate filed complaint against State's Attorney's Office, alleging it failed to comply with a FOIA request submitted in 2015 for records related to criminal cases against him.
 - State produced nearly 3000 pages of records in response to the request, and despite this, the inmate filed a Motion for Fees, Costs, and Equitable Damages for Civil Penalties, alleging that the State failed to disclose various records.
 - State moved to dismiss, arguing that it had already provided the inmate with all responsive documents
 - Court held that the State was correct, and that the requested records were appropriately provided to the inmate. Court denied inmate's request for fees because the inmate was *pro se*, and *pro se* litigants do not incur attorney's fees.
 - Additionally, there is no FOIA provision allowing a requester to recover time spent prosecuting a FOIA action *pro se*.

2021 FOIA Case Law

- *Watford v. Rowe*
 - Appellate court determined that a person may not use FOIA to obtain discovery materials after their motion for discovery was denied in a separate collateral proceeding that is still pending.
 - Court also determined that the inmate in this case was not entitled to an award of attorneys fees under FOIA section 11(i), because the inmate did not prevail on his claim and because a pro se litigant is not entitled to an award of attorneys fees.
 - Further, the court denied the inmate's petition for civil penalties against the State's Attorney's Office pursuant to FOIA section 11(j) because there was no evidence that the SAO intentionally or willfully failed to comply with the FOIA request or otherwise acted in bad faith.

2021 FOIA Case Law

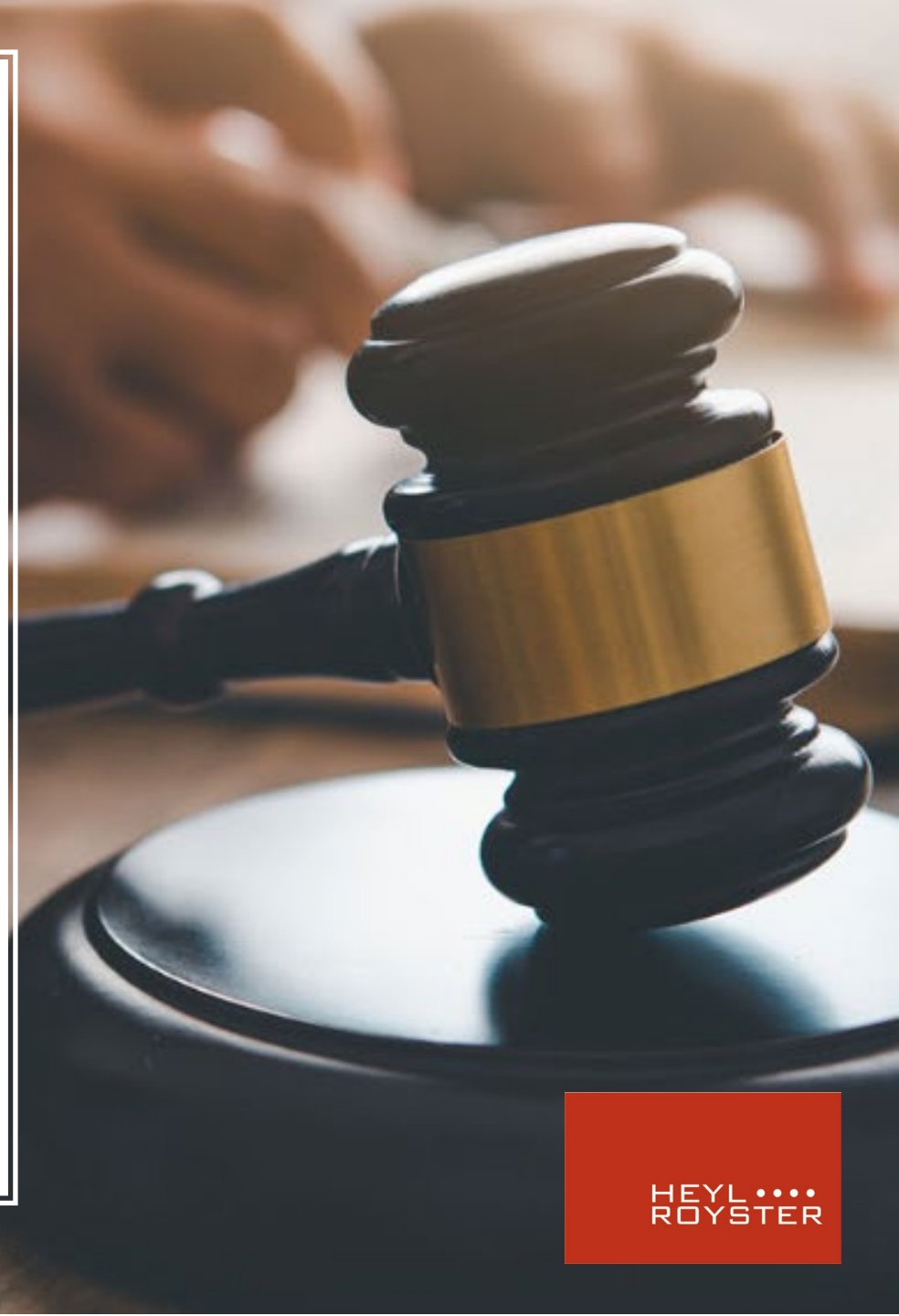
- *Fisher v. Office of the Illinois Attorney General*
 - Court held that the AG’s Office appropriately withheld records under the pre-decisional exemption because the records were internal, pre-decisional, and deliberative.
 - Section 7(1)(f) exempts from disclosure “preliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed or policies or actions are formulated.”
 - (1) Court concluded that communications were internal even though they included conversations with an outside consultant hired to provide the AG with recommendations regarding settlement.
 - Court reasoned that the communications could still be considered internal because the outside consultant performed the same deliberative functions that the AG would have, had the AG performed the review of the settlement claims.

2021 FOIA Case Law

- *Fisher v. Office of the Illinois Attorney General*
(continued)
 - (2) Court found that the documents were pre-decisional because they were related to AG's process of policy formulation, the documents assisted in creating final settlement plans, and the documents were a procedural part of the AG developing final plans of adoption regarding settlement.

2021 FOIA Case Law

- *United States Fish and Wildlife Service v. Sierra Club*
 - The U.S. Supreme Court addressed the “deliberative process privilege”.
 - SCOTUS provided useful guidance on when a document will be considered a draft, pre-decisional document that is protected from FOIA. The following factors may apply under Illinois FOIA:
 - (1) The fact that a record is not followed by additional documentation does not make the record final.
 - (2) The following is relevant in determining whether a document is a draft or final:
 - Whether the opinions in the document are subject to change or are express, settled policy;
 - Whether the document had any real, operative effect; and
 - Whether the agency treats the document as a draft
 - (Did agency name the document as a draft? Did agency approve the document? Document sent or not?)



2022 FOIA Case Law

- *Donley v. City of Springfield*
 - An individual submitted three FOIA requests: 1) to a city that sought police reports regarding incidents that occurred at a halfway house the individual stayed at and 2) copies of all police reports and 3) arrests made concerning all inmates in the past five years that lived at the halfway house.
 - The city provided records related to the first request but denied the later requests because the request was vague and failed to reasonably describe a specific record or process at the police department.
 - The court found that the city properly denied the FOIA request because those documents were considered law enforcement records.



2022 FOIA Case Law

- *Ballew v. Chicago Police Department*
 - An individual submitted a FOIA request to a police department seeking documents and videos relating to a homicide.
 - The police department denied the request, stating that the investigation is ongoing and the release of records would obstruct the investigation.
 - Section 7(1)(d)(vii) exempts records that, if disclosed, would obstruct an ongoing criminal investigation by the agency that is the recipient of the request
 - Thus, the court held that the homicide records were exempt from disclosure.



2022 FOIA Case Law



Helpful Tips

(cont.)

- Get everything memorialized in writing
- Have the public body keep track all of its responses
- If the requested material is hyper-sensitive, consult your lawyer





Questions and Answers?

HEYL ● ● ● ●
ROYSTER

www.heyloyster.com

Champaign, IL • Chicago, IL • Edwardsville, IL • Jackson, MS • Peoria, IL

Rockford, IL • Springfield, IL • St. Louis, MO