

Client Alert

Date: June 1, 2009
To: Local Government Clients
From: Local Government Practice Group
Re: Freedom of Information Act Amendments

Late Thursday, May 28, the Illinois Senate passed, on a vote of 58 to 1, a bill substantially amending the Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq.* (the “Act”). The Illinois House of Representatives had passed the same bill, known as Senate Bill 189—as amended by House Amendment No. 2, on Wednesday, May 27, on a 116 to 0 vote. The bill now moves to Governor Quinn. Although the Governor has not publicly stated his position on the bill, observers believe that, under the circumstances, he is likely to sign it. If the Governor signs the bill as is, then it will go into effect on January 1, 2010.

Senate Bill 189 is substantially similar to the earlier bill amending the Act promoted by Attorney General Lisa Madigan, but some important provisions are different. Among those important differences is the creation of a Public Access Counselor, which had been proposed by Attorney General Madigan in separate legislation.

This Client Alert summarizes many of the key provisions of Senate Bill 189. If you have any questions about any aspect of the bill, you may contact Peter Friedman at 312.578.6566, Mark Burkland at 312.578.6557, or any Holland & Knight lawyer with whom you work.

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: The bill creates a new position of Public Access Counselor (the “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." The PAC's decision is reviewable under Illinois' Administrative Review Law.

3. No Local Appeals: As a result of the new review process by the PAC, 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: Under the bill, each public body must make a list of employees or officers who will handle FOIA requests. That list must be submitted to the PAC. 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 PAC and, thereafter, must have additional training annually. Every newly designated employee or officer must receive training within 30 days after designation.
5. Form and Purpose of FOIA Request: The bill 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: The bill shortens the time for an initial response to most requests to 5 business days from 7 working days, and shortens the time allowed for the final response after an extension to 5 additional business days from 7 additional working days. Certain information from arrest reports must be disclosed even sooner, within 72 hours after the arrest. And 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: Under the bill, if a public body fails to respond within the prescribed time limits, it waives its right to assert most of the otherwise-permitted exemptions. Also, the public body may not charge copying fees in connection with a late response.
8. Form of Disclosure in Electronic Formats: The bill requires public bodies to produce responsive records in the requested electronic format whenever practical. A municipality thus may be required to reformat electronic data.
9. Broader Definition of "Public Body": The bill 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”: The bill 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, 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: The bill 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: The bill 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: 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 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 five 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. Removal of Exemption for Criminal History Information. The bill removes the existing exemption available for documents relating to completed criminal proceedings, including arrest and detention records.
15. Removal of Exemption for Financial Transactions. The bill removes the existing exemption available for draft documents and memoranda relating to a public body's financing and marketing transactions.
16. Costs of Reproduction: The bill prohibits public bodies from charging fees for the first 50 pages of black-and-white documents. 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.
17. Fines and Costs. The bill 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 that [*sic*] \$2,500 nor more than \$5,000 for each occurrence." Also, 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." Notably, the criminal penalties included in the earlier bill are not included in Senate Bill 189.

This Client Alert does not include all of the changes to the Act under Senate Bill 189. Please contact us if you have a question about whether a provision of the Act in addition to those described in this Client Alert is amended by Senate Bill 189.

Please note that each public body's standard FOIA forms and policies must be changed if Senate Bill 189 becomes law. We will be pleased to assist you with that transition.