



## Newsletters

### Informing Illinois Newsletter - April 2015

April 15, 2015

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#### **New Illinois Law Expands Leeway in Responding to Voluminous FOIA Requests**

With the adoption of [Public Act 98-1129](#) (House Bill 3796), effective December 3, 2014, the Illinois General Assembly created an additional mechanism for public bodies in responding to Freedom of Information Act (FOIA) requests for a large number of documents. In short, a public body has additional time to respond to "voluminous requests" and has the authority to charge certain fees in responding to those requests. It is important to remember, however, that the category of "unduly burdensome requests" remains in the law and is incorporated into the "voluminous request" mechanism. If the conditions are met, the "unduly burdensome" category allows a public body to deny a FOIA request.

A "voluminous request" is defined in 5 ILCS 140/2(h) as one that:

1. includes five individual requests for more than five different categories of records or a combination of requests for more than five different categories of records in a period of 20 business days; or
2. requires the compilation of more than 500 pages of records, not including a single record that exceeds 500 pages.

The exceptions to this new category may be broad; requests from the news media and certain requests from scientific or academic organizations are excluded from the definition of and treatment as "voluminous requests." Although a request from an excepted organization may not be treated as "voluminous," it may still be "unduly burdensome" if the prerequisites are satisfied.

If a "voluminous request" is received, the public body shall notify the requestor: (1) within five business days that the request is being treated as "voluminous" and state the reasons for that treatment; (2) that within 10 business days after the public body's notice was sent, the requestor may amend the request so that it is no longer considered "voluminous"; (3) that failure to reply to the public body's invitation to amend within 10 business days, or refusal to reduce the

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request to nonvoluminous proportions within 10 business days, will result in the public body responding to the request and imposing fees, as authorized by Section 6 of FOIA, 5 ILCS 140/6; (4) that the treatment as a "voluminous request" is subject to review by the public access counselor; and (5) that the fees may be charged even if the requestor fails to retrieve the records.

A public body has several options if a "voluminous request" is not reduced. Within five business days, subject to an extension of 10 business days, the public body may:

1. advise the requestor of the fees to be charged and collect those fees before copying (but not compiling) the requested records;
2. deny the request under a Section 7 exemption, 5 ILCS 140/7;
3. treat the request as "unduly burdensome" (see below); or
4. provide the records.

"Voluminous requests" and "unduly burdensome requests" are not the same thing. While a particular request could fall within the parameters of both categories, it is also possible that a request could be in one category but not the other. An "unduly burdensome request" is one that requires the public body to locate, review, redact and arrange for inspection of a vast quantity of material that is largely unnecessary to the requestor's purpose. Before invoking the "unduly burdensome" exemption, the public body must provide the requestor an opportunity to confer with it in an attempt to reduce the request to manageable proportions. The public body must explain why the production would be unduly burdensome and describe the extent to which compliance would adversely affect the public body's operations. A public body may deny the request if compliance would be unduly burdensome, there is no way to narrow the request, and the burden outweighs the public interest in the information.

While the "voluminous request" category has quantifiable requests, categories and page parameters, the "unduly burdensome" category is more dependent upon the circumstances underlying compliance with the request. In responding to a request under either category, the public body must use care to identify and implement the appropriate statutory prerequisites. But remember, a "voluminous request" may not necessarily be "unduly burdensome," and an "unduly burdensome request" need not be "voluminous."

For more information, please contact [Charles R. Schmadeke](#).

## **Recent Illinois Attorney General Opinions to Help You Navigate the OMA and FOIA**

Navigating Illinois' Open Meetings Act (OMA) and Freedom of Information Act (FOIA) can be difficult. Much of the language in these laws is open to interpretation, and precedent-establishing court cases are rare. Luckily, binding public access counselor (PAC) opinions of the Illinois attorney general (AG) can provide public bodies with guidance and answers to common questions.

*Q: Can a public body go into executive session to discuss personnel matters and then discuss the public body's general financial condition because the general financial condition affects personnel in general?*

*A: No. General budgetary concerns must be discussed in an open meeting.*

*Ex. The Waubensee Community College Board of Trustees held a special meeting and went into closed session, ostensibly to discuss the "appointment, employment, and compensation of additional personnel" for the next fiscal year and "strategies for lease or purchase of College real property." However, the board in fact discussed the college's general financial condition and budgetary concerns. The AG found that the board violated the OMA.*

A public body may close a meeting to discuss the performance, discipline, dismissal or reclassification of a particular employee. But it cannot discuss budgetary matters in closed session, even if those budgetary matters may have an effect on employees in general. In addition, the board violated the OMA because the "selling or leasing" exception applies only to setting a price for property owned or leased by a public body, and the board did not actually discuss selling or leasing college property during the closed meeting. [PAC 15-003 \(Mar. 20, 2015\)](#).



*Q: Can a home rule municipality pass an ordinance to make a certain document exempt from FOIA? Do communications between the municipality and a third party fall under the "deliberative process" exemption?*

A: No, even a home rule municipality cannot pass an ordinance to get around FOIA, and no, communications with third parties are not part of a public body's "deliberative process."

Ex. A reporter requested copies of all documents relating to country music star Garth Brooks' appearance at the Allstate Arena, which is owned and operated by the Village of Rosemont, Illinois. The village provided some documents in response to the request but invoked the deliberative process exemption to withhold e-mails in which it discussed ticket pricing with the concert promoter. After the reporter complained to the PAC, the village sent the PAC a supplemental response stating that it had passed an ordinance that made certain financial records exempt from disclosure under FOIA. The AG found that both of the village's actions violated FOIA. The communications with the concert promoter were not part of the village's "deliberative process" because that exemption is meant to apply to "intra-agency" communications only. The communications at issue were not exchanged within the village itself, but with a third party — the concert promoter — which had its own interests at heart. Therefore, the exemption did not apply. As for the ordinance, the AG stated that the village could have passed an ordinance that was even more strict in calling for disclosure than FOIA, but it could not pass an ordinance that was less strict. In other words, FOIA's requirements are a floor, not a ceiling. The AG reasoned that FOIA has been an exclusive state prerogative for 30 years and that the state's interest in ensuring public access to governmental information outweighs home rule municipalities' interest in regulating access. Thus, the village could not pass an ordinance to exempt information not otherwise exempt under FOIA. [PAC 15-002 \(Jan. 23, 2015\)](#).

For more information, please contact your Hinshaw attorney.

*This newsletter has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*