

# *In Brief*

March 2011

## **FOIA UPDATE:**

### ***Binding Opinions and Pre-Approval Letters Issued by the Public Access Counselor***

It has been over one (1) year since the amended Freedom of Information Act (“FOIA”) took effect. While some of the initial questions and concerns about the amended FOIA have been answered, many more have and continue to be raised. These questions and concerns are beginning to be addressed by the Public Access Counselor (“PAC”) and the Illinois legislature.<sup>1</sup> This *In Brief* will provide you with a summary of the binding opinions and pre-approval letters issued by the PAC to date.

#### **Binding Opinions**

FOIA grants the PAC power to issue binding opinions which a public body must either comply with or initiate administrative review in a court located in Cook or Sangamon counties. During calendar year 2010, the PAC issued four (4) binding opinions. For calendar year 2011, the PAC has issued two (2) binding opinions so far. A summary of each binding opinion is set forth below.

1. When a public body is asked to provide copies of a non-exempt record, the public body must comply with the request upon payment of any applicable fees by actually providing a copy of the record to the requester. This is true even if the record is available via the internet on the public body’s website. 2010-001.

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<sup>1</sup> As you may recall, the 96<sup>th</sup> General Assembly enacted three (3) laws which impacted FOIA (one of which prohibits the disclosure of all performance evaluations in response to a FOIA request. The recently convened 97<sup>th</sup> General Assembly has already introduced two (2) bills which would amend existing FOIA (House Bill 1715 and Senate Bill 2203). We are tracking these bills and will update you immediately if they are signed into law.

2. A public body may only charge a requester applicable fees for the copy of the responsive record actually provided to the requester. A public body may not charge a requester for a duplicate copy of the public record provided in response to a FOIA request that the public body elects to retain in its own file – that cost must be borne by the public body. 2010-002.
3. With the exception of post-mortem photographs, autopsy records are generally subject to disclosure in response to a FOIA request. 2010-003.
4. A settlement agreement entered into or on behalf of a public body is a public record subject to disclosure in response to a FOIA request, even if the public body lacked input and approval in reaching the settlement, and even if the public body does not currently possess the settlement agreement (*e.g.*, the settlement agreement is in the possession of the entity that entered into the settlement agreement on behalf of the public body). 2010-004.
5. Section 2.15 of FOIA requires a public body to disclose certain information regarding arrests in response to a FOIA request. 2011-001.
6. The sum and number of sworn officers assigned to a particular district is subject to disclosure in response to a FOIA request, unless the public body is able to demonstrate by clear and convincing evidence that such information constitutes

“vulnerability assessments, security measures or response policies or plans” and/or that disclosure of this information could “reasonably be expected to jeopardize the effectiveness of any security measures or the safety of the personnel who implement them or the public”, as set forth under Section 7(1)(v) of FOIA. 2011-002.<sup>2</sup>

Copies of the PAC’s binding opinions can be accessed via the internet at <http://foia.ilattorneygeneral.net/bindingopinions>.

### Pre-Approval Letters

In order for a public body to utilize the exemptions provided under Sections 7(1)(c) for unwarranted invasion of personal privacy and/or 7(1)(f) for preliminary drafts or documents in which opinions or recommendations are expressed, a public body must request permission from the PAC within the statutory timeframe for response. Since January 1, 2010, over **1,900** pre-approval letters have been answered by the PAC – some granted the public body’s request to assert Section 7(1)(c) or 7(1)(f) as a basis to deny a request for a public record, in whole or in part, while others denied the public body’s request.<sup>3</sup> Some of the pre-approval decisions are highlighted below.

1. With regard to Section 7(1)(c), the PAC has held that the following records or information within records is highly personal and would be objectionable to a reasonable person if disclosed in response to a FOIA request:

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<sup>2</sup> In this case, the PAC determined that the Chicago Police Department (“CPD”) had failed to meet its burden despite the fact that the CPD had expressly relied upon the language under Section 7(1)(v) regarding “mobilization and deployment” of CPD officers and the “clear and present danger to the health and safety of the community”. We anticipate that the CPD may seek administrative review of this binding opinion.

<sup>3</sup> Please remember that the public access counselor’s response to a pre-approval letter is specific to the public body making the request. Thus, while pre-approval responses may be used as guidance, a public body **must** request permission from the PAC before denying any request for a public record under Section 7(1)(c) or 7(1)(f) of FOIA, even if approval has been granted to another public body on the same subject.

- Dates of birth;
- Signatures;
- Names, application and application-related information of **unsuccessful** applicants for employment;
- Educational transcripts;
- Employer-issued cell phone numbers;
- Name and relationship of an employee’s emergency contact;
- An employee’s race;
- An employee’s personal expenses for meal and entertainment which were not submitted for reimbursement to the public body;
- An employee’s personal appointments;
- Names of citizens who express opinions about a specific matter;
- Names of pension fund beneficiaries;
- Names of employees who have registered as domestic partners;
- DNA analysis results and conclusions;
- Names of victims;
- Photographs of a suicide;
- Names of subjects **not arrested**;
- Personal, handwritten statements from a subject;
- Names and contact information of persons associated with a subject; and
- Medical information in accident reports.

2. In contrast, the PAC has held that the following records or information within records should **not** be exempt from disclosure under Section 7(1)(c):

- Names, titles, salary and hire date of current or former employees;
- Employment application and resume of current or former employees;
- Personnel files (but can withhold/redact signatures, names or references, and names of direct supervisors at prior places of employment);
- Timesheets;
- Records which reflect a current or former employee’s vacation time, sick time, comp. time, personal time, etc.;
- Records which reflect a current or former employee’s paid or unpaid leaves of absence;
- Illinois Tollway’s I-PASS transponder history reports, the location and

- direction of travel and plaza locations for a particular license plate;
  - Federal Employer Identification Numbers (FEIN);
  - Severance agreements;
  - An employee's discipline file;
  - Real property assessment data including valuations; and
  - Names of deceased victims.
3. With regard to Section 7(1)(f), the PAC has approved a denial of a request for records under this basis for:
- Documents in "draft" form;
  - Memoranda containing recommendations of officials and/or employees of a public body about an individual's continued employment;
  - Proposed itemized budget;
  - Handwritten notes;
  - E-mails expressing opinions about a job candidate;
- Internal e-mails in which strategy was discussed and deliberated and courses of action were formulated;
  - Pre-decisional notes and other communications used as part of the public body's deliberative process in determining how to proceed with a specific matter;
  - Candidate interview questions;
  - Candidate rating sheets;
  - Chart listing candidate strengths and weaknesses; and
  - Scoring sheets used in bidding process.

Copies of the PAC's pre-approval responses can be accessed via the internet at: <http://foia.ilattorneygeneral.net/preauthapprovalanddenialletters>.

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