# CITY OF COUNTRY CLUB HILLS
# ADMINISTRATIVE MEETING

## MONDAY, January 4, 2010
## 7:00 P.M.
## AGENDA

1. Call to Order — Dwight W. Welch, Mayor

2. Roll Call:

3. Set Committee/Meetings:
   Finance Committee - Thursday January 21, 2010 6:30 pm
   Law, Ordinance & Government - Monday, January 11, 2010 6:00 pm
   Public Works & Utilities - Monday, January 4, 2010 6:30 pm
   Economic Development Wednesday, January 6, 2010 7:00 pm
   Planning, Zoning & Development - Tuesday, January 12, 2010 7:00 pm
   Insurance & Risk Management - Thursday, January 7, 2010 5:00 pm
   Community & Park Activities - Tuesday, January 5, 2010 7:00 pm
   Contract Compliance - Tuesday, January 12, 2010 6:30 pm
   Schools & Education - Thursday, January 14, 2010 5:00 pm

4. Presentations/Requests:

   A. Presentation - City Attorney John Murphey - Amendments to the Freedom of Information Act (Public Act 96-542)

5. Committee Reports:

   I. Finance Committee — Alderman Ford, Chairman

   II. Law, Ordinance and Government — Alderman Martin, Chairman

   III. Public Works and Utilities — Alderman Battie, Chairman

   IV. Economic Development — Alderman Hutson, Chairman

   V. Planning, Zoning and Development — Alderman Lockett, Chairman

   VI. Insurance & Risk Management — Alderman Comein, Chairman

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| **VII.** | **Community & Park Activities** | **Alderman Singleton, Chairman** |
| **VIII.** | **Contract Compliance** | **Alderman Lee, Chairman** |
| **IX.** | **Special Committee/ Schools & Education** | **Alderman Williams, Chairman** |

6. **Adjournment**

**TO:** Mayor Welch and the City Council

**FROM:** Deborah M. McIlvain, City Clerk

**RE:** Public Act 96-542 (Amendments to the Freedom of Information Act)

**The Amendments to the Illinois Freedom of Information Act (Public Act 96-542) become effective January 1, 2010.**

**The Act requires that a public body designate as Freedom of Information Officer in compliance with the act.**

**City Attorney, John Murphy will be in attendance at the Administrative Meeting of January 4, 2010 to explain the additional amendments to the act.**

# THE FREEDOM OF INFORMATION ACT AMENDMENTS MADE EASY

1. Q: Where do I find this new law?

   A: The law has been signed by the Governor and is Public Act 96-542.

2. Q: When does the new law go into effect?

   A: January 1, 2010.

3. Q: What makes this new law so different and so challenging?

   A: The legislature has made it crystal clear that the best way to promote the "transparency and accountability of public bodies at all levels of government" is to require public bodies – as a "fundamental obligation of government" – to "provide public records as expeditiously and efficiently as possible."[1] This declaration makes it clear that producing rather than withholding records "is a primary duty of public bodies to the people of this State," in spite of any fiscal obligations that compliance imposes.[2]

   Finally, the new law now creates a presumption that all records in possession of the public body are subject to disclosure, and if a public body claims an exemption, that body "has the burden of proving by clear and convincing evidence that [the record] is exempt."[3]

   The best way to understand the philosophy of the new law is that it provides multiple disincentives to non-disclosure. In the case of close calls, the

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[1] 5 ILCS 140/1.
[2] 5 ILCS 140/1.
[3] 5 ILCS 140/1.02.

new law makes it clear to local government that the cost of non-compliance outweighs any costs or risks associated with compliance and disclosure.

4. Q: What is this about there being a "new sheriff in town"?

A: The new law creates a state-wide office under the auspices of the Attorney General. The office is called the "Public Access Counselor" or "PAC". The PAC will now serve the role of both advisor and judge. Among other things, the PAC will issue opinions and advice to local governments as to whether documents are subject to disclosure. In cases of dispute, the PAC has the authority to issue subpoenas to obtain disputed local records, to issue binding opinions requiring the disclosure of documents which have been withheld by the governmental body, and to file lawsuits against local governments to obtain compliance.[4]

In essence, the PAC is a fast track alternative to expensive and time-consuming litigation over whether certain documents are subject to disclosure under the law.

5. Q: What's the first thing we need to do to get into compliance with the law?

A: Each public body must designate one or more of its officials or employees to serve as the "Freedom of Information Officer," or "FOIO". The Act shifts all of the response and compliance responsibilities to the FOIO.[5]

6. Q: Don't we still have the system where an administrative denial of access can be appealed to the head of the public body?

A: No. That two-tiered system has been eliminated. The FOIO is the sole responder on behalf of the local government.

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[4] 15 ILCS 205/7.
[5] 5 ILCS 140/3.5.

7. Q: What are some of the first things the FOIO must do?

A: As a generic matter, the FOIO must develop a list of all documents or categories of records that the local public body will immediately disclose upon request. These would include things such as financial records, records of expenditures, records of any official actions of the local body; in short, all categories where there is not even a potential exception to disclosure.

8. Q: How is the FOIO supposed to keep track of individual requests?

A: The law requires the FOIO to develop systems for receiving and responding to requests. In particular, whenever the FOIO receives a request for public records, she has to:

(i) Note the date of receipt;

(ii) Make a note of the response due date;

(iii) Maintain a record of the request and all documents submitted with the request until the request has complied with or denied; and

(iv) Create a file to retain the original request, a copy of the response of record of all communications with the requestor and a copy of all related relevant correspondence.[6]

9. Q: Is the new law going to help the FOIO learn about her duties?

A: Yes. Within six (6) months from the date of the Act, the FOIO must complete an electronic training curriculum to be developed by the PAC and must thereafter complete an annual training program. If the FOIO is replaced, the new person

[6] 5 ILCS 140/3.5(a).

must complete that training curriculum within thirty (30) days after assuming the position. This is mandatory.[7]

10. Q: The law already requires us to prominently display and maintain basic information about the public body. Is there any additional information we have to display?

A: The mandatory global disclosure information now has to include the identification of the FOIO and the address where records requests should be directed. In addition, all websites must include this information.[8]

11. Q: Has the new law affected the manner in which we can charge for records?

A: Substantially. First, the law creates a bias in favor of producing records in electronic form. There can be no charge at all when information is simply e-mailed to a requestor.[9]

12. Q: Can we still charge for paper records?

A: Not as much as before. When records are being produced in paper form there can be no charge for the first fifty (50) pages. Thereafter, the maximum fee is fifteen (.15) cents a page. If color copies or oversized copies are produced, the public body cannot charge any more than its actual reproduction costs. There can be no passing on of any "administrative fee" associated with personnel costs. Finally, the costs of providing a certified copy of a record cannot exceed one ($1.00) dollar.[10]

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[7] 5 ILCS 140/3.5(b).
[8] 5 ILCS 140/4.
[9] 5 ILCS 140/6(a).
[10] 5 ILCS 140/6(b).

13. Q: Can you please now discuss the exemptions. Are there any categories of records which are exempt? What happens if a record contains some exempt and some non-exempt material?

A: Let's answer the second question first. When a record contains some exempt and non-exempt material, a public body choosing not to disclose the exempt material may redact the information which is exempt.[11] Some of the new exemptions will be discussed in the next few questions and answers.

14. Q: There is so much concern about disclosure of private or personal information. How does the new law address these sensitive areas?

A: Let's first talk about private information. The law generally protects against disclosure of private information, defined to mean "unique identifiers including a person's social security number, driver's license number, employee identification number, personal financial information, passwords, medical records, home or personal phone numbers and personal e-mail addresses." Private information also includes home address and personal license plates.[12]

15. Q: We frequently deny FOIA requests because of concern about invasion of privacy. Does the law still allow this exemption?

A: Yes, but with a much tighter definition. The law exempts disclosure of personal information contained within a public record when the disclosure of that information would constitute a clearly unwarranted invasion of personal privacy. The term "unwarranted invasion of personal privacy" is now defined to mean information that "is highly personal or objectionable to a reasonable person and in

[11] 5 ILCS 140/7(1)(a).
[12] 5 ILCS 140/7(1)(b)

which the subject's right to privacy outweighs any legitimate public interest in obtaining the information."[13]

16. Q: Wow. Does that mean that the FOIO is going to have to make judgment calls and engage in balancing?

A: Yes. This is probably one of the most difficult areas for the FOIO to tackle.

17. Q: We are periodically involved in on-going administrative investigations for all sorts of enforcement proceedings. Do we now have to give up these documents?

A: The law still allows these documents to be exempt from disclosure, but the exemption must fit within one of several tightly constructed exceptions. Non-disclosure is allowed only to the extent that disclosure would:

(i) Interfere with pending or contemplated law enforcement proceedings that the recipient of the request is contemplating;

(ii) Interfere with an active administrative enforcement proceeding by the recipient. This means that if a proceeding is completed or is no longer considered "active" by the agency, the documents need to be disclosed;

(iii) Create a "substantial likelihood" that a person will be deprived of a fair trial or an impartial hearing;

(iv) Unavoidably disclose the identity of confidential sources, confidential information furnished by confidential sources, or persons who file complaints with, or provide information to, investigative or administrative agencies. However, the identities of witnesses to traffic accidents, traffic accident reports and fire department/paramedic records must be produced

[13] 5 ILCS 140/7(1)(c).

unless those disclosures would interfere with an active criminal investigation conducted by the recipient;

(v) Disclose specialized investigative techniques, but only where such disclosure would result in "demonstrable harm to the agency or public body that is the recipient of the request";

(vi) Endanger the life or safety of any person (primarily in the law enforcement area); or

(vii) Obstruct an on-going criminal investigation by the recipient.[14]

18. Q: We frequently assume that a lot of records dealing with private or commercial matters are "proprietary" and therefore we don't disclose them. Does the law affect this at all?

A: Yes. The "trade secrets" exception has been tightened up. First, a trade secret must consist of "commercial or financial information." Secondly, it is no longer the public body's judgment call as to what records are proprietary. It is now up to the party furnishing the information to the local government to make "a claim that [the records] are proprietary, privileged or confidential" and that the disclosure of this information would cause competitive harm to that person or business.[15]

19. Q: Much of our work force is now unionized. We are constantly dealing with grievances and disciplinary arbitrations. How does the law address these matters?

A: The law has an unusual "half a loaf" exemption in this regard. Records relating to a public body's adjudication of employee grievances or disciplinary cases are exempt from disclosure. However, this exemption "shall not extend to the final

[14] 5 ILCS 140/7(1)(d).
[15] 5 ILCS 140/7(1)(g).

outcome of cases in which discipline is imposed." This means that if a public body brings an action to terminate an employee and the matter results in a grievance or arbitration, the underlying documents are exempt from disclosure, but the bottom line result is a public record.[16]

20. Q: In the past, one way we have prevented sensitive information from being subject to disclosure is to have it held by our outside accountant or outside attorney. Is this practice still acceptable?

A: No. The law now specifically provides that a document that is not in possession of a public body but is in possession of an outside third party with that type of relationship with the governmental body and is not otherwise exempt under the Act is considered a public record.[17]

21. Q: Assuming we now have any basis at all for denying any kind of an FOIA request, how is that denial to be handled?

A: When a request is denied, denial must be in writing, and it must include a "detailed factual basis for the application of any exemption claimed." In addition, the FOIO must notify the requestor that she has a right to review this denial by the PAC. The notice of denial must also provide the address and phone number of the PAC.[18]

22. Q: Wow. It almost sounds like the FOIO has to be a lawyer in order to make an intelligent denial.

A: You may be right. The Act specifically provides that when a request is denied based on a specific part of Section 7 (the list of reasons for denial discussed

[16] 5 ILCS 140/7(1)(n).
[17] 5 ILCS 140/7(2).
[18] 5 ILCS 140/9(a).

above), the notice must not only include the specific reasons for denial, it must include a "detailed factual basis and a citation to supporting legal authority," meaning, things such as prior court cases authorizing an exemption. To be sure, the FOIO will need to consult regularly with legal counsel in the case of exemptions.[19]

23. Q: Let's assume we deny a request. How does the PAC come into play?

A: If the public body denies a request, the requestor has sixty (60) days to request review from the PAC.

24. Q: Are there ever any occasions when the local body itself has to reach out to the PAC in advance of a denial?

A: Yes. The legislature has concluded that the two disclosure exemptions most capable of abuse are 7(1)(c), which is the "unwarranted invasion of personal privacy" exemption, and 7(1)(f), which is the exemption allowing non-disclosure of preliminary drafts, notes, recommendations, memoranda or other records in which opinions are expressed or policies or actions are formulated (the "preliminary draft/recommendation" exemption). If the FOIO determines that a requested record is exempt under one of these two sections, the FOIO must – within the time periods provided for responding to a request that we discuss below – must provide notice to the requestor and the PAC of the body's intent to deny the request. The notice has to include a copy of the request, the proposed response, and a detailed summary of the basis for asserting the exemption.[20]

25. Q: What happens when the PAC gets this notice?

[19] 5 ILCS 140/9(b).
[20] 5 ILCS 140/9.5(b).

A: The PAC has five (5) days to determine whether further inquiry is warranted. If the PAC determines that further inquiry is warranted, then the appeal procedures are triggered.[21]

26. Q: What are those appeal procedures?

A: Once the PAC is involved, the PAC may determine that the requestor's appeal is without merit. If the PAC determines that further review is warranted, then the public body has seven (7) working days after receipt to furnish the requested records to the PAC for review.[22]

27. Q: Does the public body have the right to provide a more thorough explanation of the basis for the denial?

A: Yes. The law allows this type of supplementation subject to time frames.[23]

28. Q: How does the PAC resolve the matter?

A: Generally, the PAC, in consultation with the Attorney General, issues a binding opinion as to whether or not the record should be disclosed.[24]

29. Q: We know we have a right to appeal a decision ordering the release of records to court, but litigation is expensive. Can we get in trouble for releasing records in response to an Attorney General's opinion?

A: No. One of the most important aspects of the new law is the safe harbor immunity provided local governments which act in accordance with an opinion of the Attorney General. A body that discloses information in response to such

[21] 5 ILCS 140/9.5(b).
[22] 5 ILCS 140/9.5(c).
[23] 5 ILCS 140/9.5(d).
[24] 5 ILCS 140/9.5(h).

opinion is immune from all liabilities by reason of such disclosure and is not liable for any penalties under the law.[25]

30. Q: What if we decide to fight the matter and take it to court? What do we face?

A: It will be difficult. The burden of proof is now on the public body to prove that a record is exempt. The public body has the burden of proving a record is exempt "by clear and convincing evidence." As you can see, there are real disincentives built in to any potential decision by a local government to fight a determination of the PAC or attorney general.[26]

31. Q: It sounds like we will be producing a lot more than we will be withholding. Are there any categories of records which are "automatic" public records?

A: Yes. Here are the most important broad categories of records which the legislature has now determined to be more or less automatic public records:

(i) All records relating to any obligations, use or expenditure of public funds is public record. In essence, anything dealing with public monies is public record subject to inspection and copying by the public; and

(ii) The related area of payroll records submitted to a public body by contractors working on public jobs pursuant to the Prevailing Wage Act are public records.[27]

32. Q: You mentioned above that the two-tiered response format is no longer part of the law. Have the timetables for compliance themselves been changed?

A: Yes. First, the public body may not require that the request be submitted on any standard form. As long as a request is in writing, it must be honored. In addition,

[25] 5 ILCS 140/9.5(f).
[26] 5 ILCS 140/11(f).
[27] 5 ILCS 140/2.5, 2.10.

the public body may, but does not have to, honor oral requests. Under the prior law, the initial response deadline was 7 working days. Now, the public body must respond to a request within five (5) business days after receipt of the request.[28]

33. Q: Let's say the FOIO happens to be a couple of days late. Is there any penalty?

A: Yes. If the response is late, the public body forfeits its right to charge the requestor for fees.[29]

34. Q: Can the FOIO extend the deadline?

A: Yes. The FOIO may extend the compliance date by not more than five (5) business days. The law does allow the requestor and the FOIO to negotiate an extended deadline.[30]

35. Q: What if the FOIO takes an additional five (5) days and then determines that compliance would be unreasonably burdensome?

A: By invoking an extension, the FOIO forfeits the right to invoke the "unduly burdensome" protection.[31]

36. Q: Are there any special rules for police records?

A: Yes. As a general rule, arrest reports must now be furnished "as soon as practical, but in no event later than seventy-two (72) hours after the arrest." One of the new amendments makes it clear that arrest information, as well as related court records, are subject to disclosure. Some details may be withheld if it is determined that the disclosure would interfere with pending or contemplating law

[28] 5 ILCS 140/3(c) and (d).
[29] 5 ILCS 140/3(d).
[30] 5 ILCS 140/3(e) and (f).
[31] 5 ILCS 140/3(f).

enforcement proceedings, endanger the life or safety of someone, or compromise the security of a correctional facility.[32]

37. Q: With all of these new disclosure obligations, we are sure to be bombarded by companies seeking all sorts of records for commercial purposes. Are we bound to the same deadlines when we get such a request?

A: No. The law creates a new definition of "commercial purposes," to mean the use of records for purposes of sale, resale, advertising or related purposes. This exception makes it clear that matters relating to the media or not-for-profit organizations shall not be considered commercial purposes.[33] In the case of a request for records for commercial purposes, the body has twenty-one (21) days to file a response. The twenty-one (21) day response gives the public body four options:

(i) To provide the requestor with an estimate of time gathering the records will take and a fee to be charged. The body may require that the entire fee be paid in full beforehand;

(ii) To deny the request based on one of the exceptions;

(iii) To notify the requestor that the request is unduly burdensome and offer an opportunity to reduce the request; or

(iv) To provide the records.

[32] 5 ILCS 140/2.15
[33] 5 ILCS 140/2(c)(10).

The law then allows a much more flexible "reasonable period" for a response, "considering the size and complexity of the request and giving priority to records requested for non-commercial purposes."[34]

38. Q: How do we know whether a request is for commercial purposes or not?

A: During this twenty-one (21) day period, the public body may require the requestor to verify whether or not the request is for commercial purposes. The new amendments make it a violation of the law for a person to knowingly obtain a public record for a commercial purpose without disclosing that it is for a commercial purpose.[35]

39. Q: So far you have talked only about The Freedom of Information Act. Doesn't the new law affect rights and obligations under The Open Meetings Act?

A: Yes. First, the new law requires that each public body must designate employees, officers or other individuals to receive training on complying with The Open Meetings Act. Much more important is the enhanced role of the PAC in the event there is a claim that a local government is violating The Open Meetings Act. A person may file a request for review by the PAC within sixty (60) days after the claimed violation.

Once the PAC receives the request, the PAC shall determine whether there is a basis for further action. If there is such a determination made, the PAC then forwards a copy of the request to the public body along with a request for records or other documents that the public body has to furnish to facilitate the PAC review.

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[34] 5 ILCS 140/3.1(a) and (b).
[35] 5 ILCS 140/3.1(c).

The most important aspect of the PAC's enhanced authority is that the PAC has the right to examine the verbatim recordings of an executive session in order to determine whether or not there has been a violation. This enhanced enforcement authority underscores the importance for local bodies to continue to fully comply with the limitations of The Open Meetings Act.[36]

40. Q: What happens after the PAC reviews this material?

A: First, the public body has the right to file a letter response or a legal memorandum setting forth why the public body believes there has been no violation. Other information or affidavits may be provided.

The PAC then has two options. One is to attempt to resolve the matter by mediation or less formal means. The other alternative is to have the Attorney General examine the matter and issue a binding final opinion. This opinion is binding subject only to either party's right to have the matter reviewed in court.[37]

41. Q: What happens if the Attorney General determines that there has been a violation?

A: The public body must either take necessary corrective action as soon as practical to comply with the directive of the Attorney General's opinion, or else initiate a lawsuit by filing an "administrative review" action in the local court. If the Attorney General's opinion favors the local government, the requestor has the right to appeal the matter to the courts.[38]

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[36] 5 ILCS 120/1.05, 3.5.
[37] 5 ILCS 120/3.5(e).
[38] 5 ILCS 120/3.5(e) and (f).

## CONCLUSION

We hope this summary in a Q and A format will be of assistance to staff and officials as we move through compliance with the new amendments. One thing is clear – our two sunshine laws are trending towards a full disclosure model, where virtually every document generated by or received by a public body will be subject to disclosure. The tight time frames, restricted exceptions and costs and penalties associated with non-disclosure all indicate a deliberate legislative effort to make public records in Illinois a fully sunshine proposition.

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