

SURVEY OF ILLINOIS LAW: NEW FREEDOM OF INFORMATION ACT—PEEKING BEHIND THE PAPER CURTAIN

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I. INTRODUCTION

Much of the discussion regarding the fast-developing government speech doctrine has focused on government's authority or power to speak.¹ Relatively little attention has been paid to the government's responsibility or obligation to speak.² Illustrative, though, of this latter responsibility are freedom of information acts, enacted at the federal level³ and by every state.⁴ Illinois was the last to enact a freedom of information act in 1983,⁵ an endeavor that one of the bill's authors described as the "most challenging, maddening experience" of her legal career.⁶ After much negotiation and despite a variety of concerns expressed by the Illinois Municipal League, the bill passed both houses, but then was subject to an extensive and controversial amendatory veto, with Governor James Thompson, among other things, adding exemptions and deleting the criminal penalty. After much debate among the

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1. *See, e.g.*, *Pleasant Grove City v. Summum*, ___ U.S. ___, 129 S. Ct. 1125 (2009); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005); *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000); *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569 (1998); *Rosenberger v. Rector*, 515 U.S. 819 (1995); *Rust v. Sullivan*, 500 U.S. 173 (1991).
2. *See* Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1 (1982).
3. 5 U.S.C.A. §552 (West 2010).
4. *See* Reporters Committee for Freedom of the Press, *Open Government Guide* (2006), available at <http://www.rcfp.org/ogg/index.php>. *See also* Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720 (1981) (pioneers in aggregating information on state access laws in this early and much-cited review); Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin & Linda M. Perry, *Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U.L. REV. 543 (1993) (all states have public records acts, but not all digitized information is readily available).
5. *Illinois Passes Law on Data*, N.Y. TIMES, Nov. 6, 1983, at 75, col. 4.
6. Susan Bandes, *Law Stories: Tales from Legal Practice, Experience, and Education: When Freedom of Information Came to Illinois*, 75 UMKC L. REV. 1145, 1146 (2007). Professor Bandes, who was then a staff attorney for the American Civil Liberties Union of Illinois, worked with Erwin Chemerinsky and Jeffrey Shaman to draft the bill and usher it through the Illinois Assembly. *Id.*

bill's proponents, as to whether to make it a test case of the governor's veto power, the legislature acquiesced and acceded to the changes.⁷

Since that troubled inception, the controversy has continued unabated with amendments proposed nearly every year, mostly in the form of additional exceptions.⁸ Then this past year, in the wake of political scandals, several proposals for reforming governmental ethics and practices, including a new freedom of information act, were put forward.⁹ In what might have been a once-in-a-generation occurrence, lawmakers had an opportunity to address a host of issues with which the courts had wrestled or that had just gone unresolved regarding public record access in Illinois.

This article will look at the changes made in the new Freedom of Information Act ("FOIA") and compare them to the old Act. As well, this article will consider several issues that the legislature did not address. It will close with some thoughts on prospects for lifting the "paper curtain" in Illinois.¹⁰

II. NEW ROLE FOR ATTORNEY GENERAL

The rebirth of freedom of information in Illinois did not go any more smoothly than it had originally in 1983. The Municipal League again mounted an offensive against the bill, claiming as one newspaper put it that the bill threatened public safety.¹¹ According to the League, "[i]t is regrettable that there may be cases where municipalities will be forced to lay off firefighters and police officers so that they can afford more FOIA lawyers and other responders to help comply with this 'primary duty.'"¹²

7. See *id.*; Joe R. Ourth, Note, *The Illinois Amendatory Veto: Defining and Enforcing the Limits*, 1987 U. ILL. L. REV. 691, 708 & nn.114–15.

8. See Nathan T. Nieman, Comment, *Reforming the Illinois Freedom of Information Act: An Opportunity to Repair the Leaky Boat*, 58 DEPAUL L. REV. 529, 534 (2009).

9. See Monique Garcia & Ray Long, *Quinn may tinker with reform bill*, CHI. TRIB., Aug. 2, 2009, available at <http://archives.chicagotribune.com/2009/aug/02/local/chi-reform-bills-edit-bd02aug02> (available on Westlaw at 2009 WLNR 14909873).

10. The phrase "paper curtain" apparently comes from Professor Bernard Schwartz in his examination of the power of Congress to demand disclosure of documents from the Executive branch. Bernard Schwartz, *Executive Privilege and Congressional Investigative Power*, 47 CAL. L. REV. 3, 46 (1959). Professor Shannon Martin adopts it as a chapter heading in her excellent treatment of public record practices, primarily at the federal level. Shannon E. Martin, FREEDOM OF INFORMATION: THE NEWS THE MEDIA USE 49 (2008).

11. *Our Opinion: Sign FOIA bill, governor*, THE STATE JOURNAL-REG., Aug. 3, 2009, available at <http://www.sj-r.com/opinions/x1911311488/Our-Opinion-Sign-FOIA-bill-governor> (editorial).

12. *Id.*

But perhaps the most surprising volleys were fired by the Illinois State's Attorneys Association, which objected primarily to the expanded role contemplated for the Attorney General ("AG") under the new law. The AG had always been able to issue advisory opinions regarding interpretation of the Act. In 2002, for example, the AG concluded that a voter registration database was not exempt from disclosure under the Freedom of Information Act.¹³

But the new Act gave the Attorney General an important and substantial new role to play with regard to implementation of the Act. In the old Act, a records requester was required to appeal any denial of access to the head of the public body¹⁴ before proceeding to challenge the denial in circuit court.¹⁵ Under the new Act, the largely perfunctory appeal to the head of the public body has been eliminated¹⁶ as a prerequisite to filing in circuit court.¹⁷ Alternatively, however, the requester now may choose to request a review of the denial within 60 days by the Public Access Counselor,¹⁸ a position in the Office of the Attorney General now given legislative recognition.¹⁹

The General Assembly devoted a long passage in its enacting legislation to a justification of the need for a Public Access Counselor, citing among other things "obstacles" to obtaining records (in part, because of questions of interpretation involving the language of the Illinois FOIA) and "difficulties in resolving alleged violations." The legislature concluded that the public interest would be better served if there were a Public Access Counselor "to

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13. 02-009 Op. Att'y Gen., (2002), *available at* <http://www.ag.state.il.us/opinions/2002/02-009.pdf>. The AG has also issued advisory opinions regarding the applicability of the Open Meetings Act. *See, e.g.*, 82-041 Op. Att'y Gen. (1982), *available at* <http://www.ag.state.il.us/opinions/1982/82-041.pdf> (concluding, among other things, that telephone conference calls were "meetings" under the OMA and must be open to the public. The inclusion of telephone conference calls—along with electronic mail and chat, instant messaging, and any "other means of contemporaneous interactive communication"—has since been incorporated into the OMA. *See* 5 ILL. COMP. STAT. ANN. 120/1.02 (West 2010) (definition of "meeting").
 14. *See* 5 ILL. COMP. STAT. 140/10 (2009) (*repealed by* Pub. Act 542, 96th Gen. Assembly, § 15 (2009)).
 15. *See* 5 ILL. COMP. STAT. 140/11 (2009) (*amended by* Pub. Act 542, 96th Gen. Assembly, § 11 (2009)).
 16. Pub. Act 542, 96th Gen. Assembly, § 15 (2009). Cara Smith was appointed in January as the first Public Access Counselor. *See* <http://foia.ilattorneygeneral.net/default.aspx>.
 17. *See* Pub. Act 542, 96th Gen. Assembly, § 11 (2009), codified at 5 ILL. COMP. STAT. ANN. 140/11 (West 2010).
 18. *See* 5 ILL. COMP. STAT. ANN. 140/11 (West 2010).
 19. Pub. Act 542, 96th Gen. Assembly, § 20 (2009), *amending* The Attorney General Act, 15 ILL. COMP. STAT. ANN. 205/7(b) (West 2010). Attorney General Lisa Madigan actually created the position of Public Access Counselor in 2004, although it did not have the authority that the new act provides. *See Madigan: Transparency legislation will transform open government laws in Illinois*, May 29, 2009, *available at* http://www.illinoisattorneygeneral.gov/pressroom/2009_05/20090529.html (press release).

provide advice and education with respect to the interpretation and implementation” of the Illinois FOIA as well as the Open Meetings Act.²⁰

However, claiming that it was creating a position to provide advice and education was perhaps more than a little disingenuous on behalf of the legislature. Certainly, the Public Access Counselor was assigned numerous tasks regarding training of public officials, preparing educational materials, researching compliance, distributing model policies to public bodies, and, yes, issuing advisory opinions.²¹ But the Public Access Counselor was also given the authority to issue subpoenas, obtain injunctive relief, provide binding opinions, and compel compliance with those opinions, if necessary, through filing an action in the circuit court of Cook or Sangamon County.²²

Indeed, without any exercise of initiative by the requester, a public body must now notify the Public Access Counselor if the body denies a request by claiming an exemption under sections 7(1)(c) or 7(1)(f),²³ involving respectively an “unwarranted invasion of personal privacy” or “[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated.” In the case of a denial by the public body under sections 7(1)(c) or 7(1)(f) or in any case in which the requester does seek review of a denial by the Public Access Counselor, the Public Access Counselor will first determine if further inquiry is warranted. If so, the Public Access Counselor can seek information and the

20. Pub. Act 542, 96th Gen. Assembly, § 20 (2009), *amending* The Attorney General Act, 15 ILL. COMP. STAT. ANN. 205/7(a) (West 2010). This legislative statement was not worded quite as strongly as the statement coming from the Attorney General’s office:

Through my office’s extensive public access work, we have seen that far too often, people are routinely denied access to public documents,” Madigan noted. “For the last six years in Illinois government, we experienced a culture of secrecy imposed by the former governor. Among the complaints against the former governor and his administration was that they routinely and blatantly disregarded the sunshine laws and failed to provide the public and the media with access to information. Our experience over these last six years served to emphasize the importance of strong public access laws and the need for a Public Access Counselor with clear authority to step in and ensure compliance with the laws.

Madigan: Transparency legislation will transform open government laws in Illinois, May 29, 2009, available at http://www.illinoisattorneygeneral.gov/pressroom/2009_05/20090529.html (press release).

21. See The Attorney General Act, 15 ILL. COMP. STAT. ANN. 205/7(c) (West 2010). Advisory opinions are not considered final decisions and are not reviewable under the Administrative Review Act. See 5 ILL. COMP. STAT. ANN. 140/11.5 (West 2010). Public bodies that rely on advisory opinions from the Attorney General’s office in responding to requests for records cannot be held liable under the act. See *id.* 140/9.5(h). Public bodies that comply with binding opinions likewise are immune from all liabilities or penalties under the act. See *id.* 140/9.5(f).

22. See 5 ILL. COMP. STAT. ANN. 140/7(d), (e), (f) (West 2010).

23. See *id.* § 9.5(b). The Public Access Counselor will then notify the public body and the requester whether it will conduct a further inquiry. *Id.*

documents in question from the public body and a response to that information from the requester, but any binding opinion must be issued within 60 days of the initial request (although that period may be extended at the AG's discretion up to 21 business days).²⁴

Instead of a binding opinion, the Public Access Counselor may attempt to resolve the matter by other means, including mediation (and any decision not to issue a binding opinion is not reviewable).²⁵ But if the Public Access Counselor does issue a binding opinion, with findings of fact and conclusions of law, then either the public body or the requester may initiate administrative review under section 11.5 of the Administrative Review Law, or if the opinion concludes release of the records is warranted, then the public body may release the records and be held harmless.²⁶ Noncompliance with the act only offers the prospect of liability for the public body if the requester, instead of contacting the Public Access Counselor (or at some point before issuance of the AG's binding opinion²⁷), files an action with the circuit court, and that court awards attorneys' fees to a requester who prevails²⁸ or a civil penalty of between \$2,500 and \$5,000 if the public body "willfully and intentionally failed to comply" with the act.²⁹

The Illinois State's Attorneys Association apparently thought the role of the state's attorney, not the Attorney General's office, ought to be enlarged under the revised freedom of information act: "Criminal prosecution by the State's Attorney of any FOIA violation more than capably addresses effective enforcement without adding another cumbersome and costly layer of

24. *See id.* § 9.5(f).

25. *See id.*

26. *See id.* § 9.5(f), 11.5.

27. During the period when the denied request is pending review by the Public Access Counselor, the requester may resort to litigation instead and notify the Public Access Counselor, at which point the Public Access Counselor "shall take no further action with respect to the request for review and shall so notify the public body." *Id.* § 9.5(g). It is not entirely clear what the consequences would be if the requester, after seeking review by the Public Access Counselor, then filed suit without notifying the Public Access Counselor. Would any subsequent "binding" opinion be null and void and of no effect? Would it assume the status of an advisory opinion? If it favored the public body, for example, could the public body introduce it as evidence in the litigation? If it favored the requester, could the requester dismiss the lawsuit and renew the request for review by the Public Access Counselor?

28. *See* 5 ILL. COMP. STAT. 140/11(I) (2009). In what could be a quite significant alteration of the attorneys' fees provision, the new act specifies that the court "shall" award attorneys' fees to a requester who prevails. The old act gave the court discretion in cases where requesters "substantially" prevailed, stating that the court "may" award fees. *See* 5 ILL. COMP. STAT. 140/11(I) (2009), *amended by* Pub. Act 542, 96th Gen. Assembly, § 10 (2009). In determining the reasonableness of attorneys' fees, the court under the new act is to determine the degree to which the relief granted relates to the relief sought. *See* 5 ILL. COMP. STAT. ANN. 140/11(i) (West 2010).

29. *See* 5 ILL. COMP. STAT. ANN. 140/11(j) (West 2010).

government.”³⁰ Neither the old nor the new freedom of information act contains any provision for criminal penalties, however, so the Illinois State’s Attorneys Association could be seen as seeking enlargement of more than just their role. The Illinois Open Meetings Act does have a criminal provision,³¹ but only one criminal case has ever been brought (in Will county) and those charges were dismissed.³²

III. NUMEROUS ADDITIONAL CHANGES

The addition of the Public Access Counselor provisions takes up the bulk of the changes to a FOIA that has roughly doubled in size.³³ It is hard to overestimate the significance of the new Public Access Counselor as an alternative to litigation, but many of the changes taking far less verbiage might prove just as important in their own way.

In particular, a provision providing access to records possessed by entities contracting with public bodies and performing “governmental functions” is brimming with possibilities. As well, amendments regarding the definition of public bodies, fees that can be charged requesters, response times, electronic communications, burden of proof, and attorney’s fees might be of considerable import to requesters depending on circumstances.

A. Private Interests and Public Bodies

The Illinois Supreme Court declared that language in the prior act specifying that the act was not to be used “for the purpose of furthering a commercial enterprise” was simply a declaration of policy or preamble and therefore unenforceable.³⁴ If there was any doubt, that language in the preamble has now been removed and the act has been reworded to specify that only requests from commercial enterprises should not be allowed “to unduly burden public resources.”³⁵ Furthermore, an entire new section 3.1 has been

30. See *Our Opinion: Sign FOIA bill, governor*, THE STATE JOURNAL-REG., Aug. 3, 2009, available at <http://www.sj-r.com/archive/x1911311488/Our-Opinion-Sign-FOIA-bill-governor> (editorial).

31. See Open Meetings Act, 5 ILL. COMP. STAT. ANN. 120/4 (West 2010).

32. See *Our Opinion: Sign FOIA bill, governor*, THE STATE JOURNAL-REG., Aug. 3, 2009, available at <http://www.sj-r.com/archive/x1911311488/Our-Opinion-Sign-FOIA-bill-governor> (editorial); *Don't Dilute the FOIA*, BELLEVILLE NEWS-DEMOCRAT, Aug. 5, 2009, at <http://www.bnd.com/editorial/story/871284.html> (editorial).

33. Using the word counting feature of a word processor, the old act has 10,553 words while the new one comes in at 20,075 words.

34. See *Lieber v. Bd. of Trustees*, 176 Ill. 2d 401, 413–14, 680 N.E.2d 374, 380 (1997).

35. See Pub. Act 542, 96th Gen. Assembly, § 10 (2009), codified at 5 ILL. COMP. STAT. ANN. 140/1 (West 2010).

added instructing public bodies on how to deal with requests for commercial purposes.³⁶ Elsewhere the act now states that public bodies may not require requesters to specify their purpose *except* to inquire if the purpose is commercial or for determining whether to grant a fee waiver.³⁷ Oddly, this language would seem to have the opposite effect of what was apparently intended³⁸ and open the door to asking requesters' purposes, as long as the inquiry was couched in terms of determining the applicability of a fee waiver.

But the most tantalizing amendment to the act does not involve requests by private enterprises with commercial purposes but requests made for records *possessed by* private commercial enterprises. The new provision, section 7(2), is buried at the end of a long list of exemptions, but merits quotation in full:

A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act.³⁹

Possibly with this provision in mind, the definition of "public record" has been amended to include all records "pertaining to the transaction of public business . . . having been prepared by or for, or having been or being used by . . . any public body."⁴⁰ Given the hugely increased scope of private contractors

36. See *id.* codified at 5 ILL. COMP. STAT. ANN. 140/3.1 (West 2010). The amendment allows for longer response times to requests for commercial purposes and provides that fees can be charged before any copying occurs. Public bodies need only comply with requests for commercial purposes "within a reasonable period considering the size and complexity of the request, and giving priority to records requested for non-commercial purposes." *Id.*

37. See 5 ILL. COMP. STAT. ANN. 140/3(c) (West 2010).

38. The amendment seemingly was intended to strengthen the bar on inquiring into purpose that existed under the old act. See *People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 204, 689 N.E.2d 319, 327 (1st Dist. 1997) (purpose of request irrelevant).

39. 5 ILL. COMP. STAT. ANN. 140/7(2) (West 2010).

40. *Id.* §140/2 (c).

handling functions previously fulfilled by government,⁴¹ an imaginative use of these new FOIA provisions could yield a wealth of material.

As long as the company has contracted to perform a governmental function, then the scope of records available from that company could be breath-taking if the act is liberally construed (and perhaps even if construed narrowly). Records of purchases made to fulfill the contract, salaries, e-mails, employee evaluations—just about any record had by a company performing a government function that in any way relates to that function might be subject to disclosure after this amendment to the FOIA.

To cite just one example of the possible breadth of this new provision, the Second District once casually observed that surely a construction company receiving 100 percent of its income from state contracts for “road building” would not be considered a public body for that reason alone. The court said it could not believe that the legislature intended for its access provisions to affect the large numbers of completely private entities that receive a large portion of their funding from the State.⁴² But under the new act, such foregone conclusions will require rethinking.⁴³ If “road building” can be considered a government function, then the company still would not be a public body, but it would seem section 7(2) could be invoked with regard to any of the company’s records relating to that function. If courts apply the provision literally, then it could well be that those “large numbers of completely private entities” affected by the amendment will be flocking to Springfield and seeking an amendment to the amendment.

41. See, e.g., Janine R. Wedel, *SHADOW ELITE: HOW THE WORLD’S NEW POWER BROKERS UNDERMINE DEMOCRACY, GOVERNMENT AND THE FREE MARKET* (2009); Reporters Committee for Freedom of the Press, *Privatization v. The Public’s Right to Know*, <http://www.rcfp.org/ogg/index.php> (last visited Feb. 23, 2010) (functions from school bus driving to evaluations of public-sector employees contracted to private firms).

P.W. Singer, an expert in contracting at the Brookings Institution, said that the types of jobs that have been outsourced in recent years make a mockery of regulations about “inherently governmental” functions. “We keep finding functions that have been outsourced that common sense, let alone U.S. government policy, would argue should not have been handed over to a private company,” he said. “And yet we do it again, and again, and again.” James Risen & Mark Mazzetti, *Blackwater Guards Tied to Secret Raids by C.I.A.*, N.Y. TIMES, Dec. 11, 2009, at A1. See Solomon Ortiz, *Proper Role of Government*, CQ Congressional Testimony, March 11, 2008 (opening statement before Committee on House Armed Services Subcommittee on Readiness) (tremendous growth in private service contracting at federal level).

42. See *Rockford Newspapers, Inc. v. N. Ill. Council*, 64 Ill. App. 3d 94, 96, 380 N.E.2d 1192, 1193 (2nd Dist. 1978) (dicta regarding corollary definition of public body in Open Meetings Act).

43. Indeed, it was almost as if the drafters of the new act had this opinion in mind, with amendments seemingly directed at the court’s further statement: “Nor does the fact that the private company’s acts may be connected with a governmental function create a public body where none existed before.” *Rockford Newspapers*, 64 Ill. App. 3d at 97, 380 N.E.2d at 1194.

Of course, the same exemptions that apply to public bodies would apply to private contractors, and the privacy exemption comes to mind. Corporations have trade secrets and proprietary information that would be exempt under the act,⁴⁴ but a corporation does not have a privacy right.⁴⁵ Employees of the company presumably would argue privacy invasion, however, as indeed any individual identified in any public record might argue, and the new act has several provisions bearing on such a claim.

A new section regarding “private information” has been added to the definitions.⁴⁶ The section includes information that might commonly be considered private, such as personal financial information, passwords, and medical records. But it also extends the definition to include information in which individuals arguably might not have a reasonable expectation of privacy, such as home address, personal license plates, home telephone numbers and personal email addresses.⁴⁷ The section of the act pertaining to exemptions then prominently lists private information as the new second exemption.⁴⁸

But the drafters of the act seemed to travel in the opposite direction in the very next exemption for “personal information . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”⁴⁹ Interpretation of this exemption precipitated perhaps the most contentious dispute involving the old act, pitting the First,⁵⁰ Third⁵¹ and Fifth District⁵² courts against the Fourth District.⁵³ The old act gave specific examples of information that could be considered private, but the majority of Illinois appellate courts held that a balancing test must be applied in each case to determine if the information could be disclosed. The Fourth District held that the examples created per se exceptions and balancing was unnecessary,⁵⁴ a position ultimately endorsed by the Illinois Supreme Court.⁵⁵

44. See 5 ILL. COMP. STAT. ANN. 140/7(g) (West 2010).

45. See *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 594–95 (Ind. 2001).

46. 5 ILL. COMP. STAT. ANN. 140/2(c-5) (West 2010).

47. See *id.*

48. See *id.* §140/7(1)(b).

49. See *id.* §140/7(1)(c).

50. See *Margolis v. Dir., Ill. Dep’t of Rev.*, 180 Ill. App. 3d 1084, 536 N.E.2d 827 (1st Dist. 1989).

51. See *Monmouth v. Galesburg Printing & Publ’g Co.*, 144 Ill. App. 3d 224, 494 N.E.2d 896 (3rd Dist. 1986).

52. See *Lieber v. Bd. of Trustees*, 279 Ill. App. 3d 553, 664 N.E.2d 1155 (5th Dist. 1996), *rev’d*, 176 Ill.2d 401, 680 N.E.2d 374 (1997).

53. See *Healey v. Teachers Ret. Sys.*, 200 Ill. App. 3d 240, 558 N.E.2d 766 (4th Dist. 1990).

54. For an overview of the controversy, see Thomas C. Britton & Bradley Colwell, *Survey of Illinois Law: Developments in Education Law 1997 & 1998*, 23 S. ILL. U. L.J. 967, 983–84 (1999).

55. See *Lieber*, 176 Ill. 2d 401, 680 N.E.2d 374 (1997).

However, the new act throws out the specific examples and specifically requires analysis of whether disclosure is “objectionable to a reasonable person” and whether a “subject’s right to privacy outweighs any legitimate public interest in obtaining the information”⁵⁶—or what would seem to entail balancing. Thus, information that might have been private because of a per se exemption under the old act conceivably might be subject to disclosure under the new act, all of which would seem unwelcome news for those identified in public records, whether those records are held by public bodies or private companies performing government functions.

B. A Public Body by Any Other Name

Of course, governmental bodies performing government functions remain covered by the act, but even in that respect the drafters implemented an intriguing change. The definition of public body always involved a laundry list of the various units of government affected (universities, counties, school districts, etc.).⁵⁷ The critical clause would seem to have been not so much the laundry list, but in the qualifying language that required that public bodies be “supported in whole or in part by tax revenue, or . . . expend tax revenue.”⁵⁸

A number of courts have done their best to minimize the effect of this language regarding spending or receiving tax monies, effectuating what they assumed to be legislative intent by ignoring what the legislature actually wrote. In construing the companion provision in the Open Meetings Act, for example, the Second District contended that a drug and alcohol dependence council that received 90 percent of its funding from taxes was not a public body. Otherwise, the court wrote, “completely private entities,” even if they receive

56. See 5 ILL. COMP. STAT. ANN. 140/7(1)(c) (West 2010).

57. The act does now refer to “all” legislative, executive, administrative or advisory bodies of those units, instead of “any” such bodies. 5 ILL. COMP. STAT. ANN. 140/2(a) (West 2010). Although “any” might have seemed sufficiently inclusive, reference to “all” certainly removes any prospect of exception.

58. 5 ILL. COMP. STAT. 140/2 (2009), amended by Pub. Act 542, 96th Gen. Assembly, § 10 (2009): “Public body” means any legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, and a School Finance Authority created under Article 1E of the School Code. “Public body” does not include a child death review team or the Illinois Child Death Review Teams Executive Council established under the Child Death Review Team Act.

100 percent of their funding from the state, would have to be treated as public bodies subject to access provisions.⁵⁹

Indeed, in a rather remarkable passage in light of the plain language of the statute, the Second District wrote that the amount or percentage of government funding “should have no bearing” on whether an entity is a public body.⁶⁰ The court continued, noting that the act provides that an entity could be a public body without any government funding, although that would not seem to lead to the conclusion that tax support should have *no* bearing. The court instead considered factors not in the statute and having nothing to do with tax support, such as the council’s “formal legal nature,” the independence of its board and employees from direct governmental control, and the nature of the function performed by the agency.⁶¹

In a later case, the three factors had assumed the status of a “test,”⁶² enabling the First District to conclude that two development corporations, jointly funded by the city of Evanston and Northwestern University, were not public bodies. As the Second District had done, the First District concentrated on whether the development corporation was a “subsidiary” body,⁶³ one of the entities in the laundry list of governmental units that were named as public bodies under the Illinois FOIA and Open Meetings Act.⁶⁴ Of course, the only criterion in the statute for determining whether a body was a “subsidiary” involved the spending or receipt of tax revenues. In an heroic attempt to isolate and then give meaning to the term “subsidiary,” the court noted that the two entities were private corporations and the public had not been attending the private meetings, and minutes of those meetings and other documents had not been made available to the public⁶⁵—when attending those meetings and obtaining those documents was the precise issue before the court! When, in the last few paragraphs of the case, the court did analyze the significance of the city’s matching funds in supporting the corporation, it adopted wholesale the Second District’s logic, quoting with approval the Second District’s observation that government funding should have no bearing on whether an entity is a public body.⁶⁶

59. See *Rockford Newspapers, Inc. v. N. Ill. Council*, 64 Ill. App. 3d 94, 96, 380 N.E.2d 1192, 1193 (2nd Dist. 1978).

60. See *id.*

61. See *id.* at 96–97, 380 N.E.2d at 1193–94.

62. See *Hopf v. Topcorp, Inc.*, 256 Ill. App. 3d 887, 893, 628 N.E.2d 311, 315 (1st Dist. 1993) (“[T]he *Rockford* test provides the focus for our inquiry.”).

63. See *id.*

64. See note *supra* 58.

65. See *Hopf*, 256 Ill. App. 3d at 892–93, 628 N.E.2d at 314.

66. See *id.* at 896–97, 628 N.E.2d at 317.

Perhaps the defining moment in pronouncing the irrelevance of the tax revenue provision of the Illinois FOIA and Open Meetings Act came in *Board of Regents v. Reynard*. In *Reynard*, the members of the Illinois State University Athletic Council were not paid and the council had no budget, but the Fourth District concluded that the council *was* a public body under both the FOIA and the Open Meetings Act.⁶⁷ The court looked to “organizational structure.”⁶⁸ The council was an external standing committee of the ISU Senate, which reports to the President of the university, and who reports to the Board of Regents, which was created by the Illinois General Assembly.⁶⁹ The Board and Senate were public bodies and because the council was subsidiary to them, then the council was a public body.⁷⁰ Furthermore, the council was charged with a broad scope of responsibilities.⁷¹

The beauty of whether an entity is “supported in whole or in part by tax revenue, or . . . expend[s] tax revenue” is its simplicity. It yields a yes or no answer. Considerations such as organizational structure and scope of responsibilities, while certainly important, do little to improve predictability while enlarging the discretion of the courts in considering whether an entity is a public body. But the drafters perhaps bowed to reality in abandoning the tax revenue clause in the new FOIA (but not in the Open Meetings Act).⁷² The problem, of course, is that the drafters scrapped what little guidance there was in the statute as to which bodies should be considered public, leaving only the laundry list that seems to help not at all in the hard cases of arguable “advisory” or “subsidiary” bodies. The excision perhaps reinforces that a body need not be spending or receiving tax revenues to be a public body, but beyond that it clarifies nothing. The dearth of authority, of which the *Reynard* court complained,⁷³ was not addressed in the new act.

C. More Unresolved Questions

The drafters of the new FOIA also left unresolved questions surrounding fee waivers, but much important language regarding fees generally was added.

67. See *Bd. of Regents v. Reynard*, 292 Ill. App. 3d 968, 686 N.E.2d 1222 (4th Dist. 1997). Compare *id.* with *Pope v. Parkinson*, 48 Ill. App. 3d 797, 363 N.E.2d 438 (4th Dist. 1977) (if member of a university’s internal *ad hoc* and solely advisory committee were dismissed, the public tax burden would be unaffected).

68. See *Reynard*, 292 Ill. App. 3d at 977, 686 N.E.2d at 1228.

69. See *id.* at 971, 686 N.E.2d at 1224.

70. See *id.* at 978, 686 N.E.2d at 1229.

71. See *id.*

72. See Pub. Act 542, 96th Gen. Assembly, §§ 5, 10 (2009).

73. See *Reynard*, 292 Ill. App.3d at 977, 686 N.E.2d at 1228.

Section 6(c), regarding fee waivers, is the new section 6(b), but otherwise is unchanged.⁷⁴ The section opens with a statement that “[d]ocuments shall be furnished without charge or at a reduced charge, as determined by the public body.”⁷⁵ Whether the cost will be zero or something more than zero, and if more than zero, how much more remain open questions. Public bodies can take into account “the amount of materials requested and the cost of copying them,”⁷⁶ but it is entirely unclear whether those are supposed to factor for or against the amount of fee reduction. Bodies have seemingly unlimited discretion in calculating how much of a fee to waive.

Additionally, a fee waiver or reduction is to be granted if the requester states a specific purpose and indicates such purpose is in the public interest. Waiver or reduction serves a public interest “if the principal purpose of the request is to access and disseminate information regarding the health, safety and welfare or the legal rights of the general public” and is not for personal or commercial purposes. But if the public body simply denies that the fee waiver is in the public interest, the route to appeal is unclear and perhaps nonexistent. Both the provisions for review by the Public Access Counselor⁷⁷ and for filing suit for injunctive or declaratory relief⁷⁸ refer specifically only to denials of access for the purpose of inspecting or copying a public record. A creative interpretation might be that a denial of a fee waiver constitutes a denial of access. Section 6(d) does state that imposition of a fee can constitute a denial of access, but it specifically refers only to fees inconsistent with sections 6(a) and (b).⁷⁹

Sections 6(a) and (b) provide important new avenues of obtaining documents in electronic format. In particular, public bodies must provide the documents in the electronic format requested, if feasible. Otherwise, they must furnish the documents in the format maintained by the public body or in hard copy, at the option of the requester.⁸⁰ If furnished in electronic format,

74. See Pub. Act 542, 96th Gen. Assembly, § 10 (2009).

75. See 5 ILL. COMP. STAT. ANN. 140/6(c) (West 2010).

76. See *id.*

77. See *id.* § 140/9.5.

78. See *id.* § 140/11.

79. See *id.* § 140/6(d).

80. The Illinois Supreme Court had held under prior law, which included “electronic data processing records” in its examples of public records, that public bodies cannot supply a requester with a computer printout when a computer tape was sought. *Am. Fed. St., Co., & Mun. Emp. v. Cook Co.*, 136 Ill. 2d 334, 343, 555 N.E.2d 361, 364 (1990). The outcome was somewhat confusing, however, in that the Court seemed to suggest, in remanding the case for further argument, that printouts might be provided if the means of verifying information on the computer tape was more difficult. See *id.* at 347, 555 N.E.2d at 366. If there was any confusion, the mandate in the new act that the information be supplied in the format requested seems to resolve it.

the public body may only charge for the cost of the disc, tape or other recording medium, and not for any other costs associated with search, review or personnel.⁸¹ If provided in hard copy, the public body may not charge for the first 50 pages and fees for copies beyond 50 shall not exceed 15 cents per page.⁸²

Combined with a specific reference now to “electronic communications” in the definition of records publicly available,⁸³ these provisions are significant tools for those seeking to download, analyze and disseminate information in the rich array of databases controlled by government. Recalcitrant public bodies, of course, can continue to argue about what might be “feasible.” Requesters likely will be seeking data in spreadsheet format, but a public body might, for example, post it to the web in .pdf format and hope that satisfies the requester. Information in .pdf format cannot be entered or analyzed in a spreadsheet without re-entering all the data, which a public body would know to be a daunting and expensive task. But public bodies often work with proprietary software and if it really is not feasible to output the data in anything other than .pdf format, it might be the best that the requester can hope for. It is clear, however, that providing the data in the “format specified by the requester” is not the same as producing a new record, which the public body is not required to do.⁸⁴

Whatever the format, the new act has decreased the public body’s response time from seven working days to five business days,⁸⁵ which is particularly notable because the Congress has increased the response time from ten to twenty days under the federal FOIA.⁸⁶ If the public body complies with a request, but not within the five-day period, the body may not charge any fee.⁸⁷ Categorical requests for records, however, can be considered “unduly burdensome,”⁸⁸ and that has not changed—although the new law does specify that failures to respond within the five-day period cannot be treated as unduly

81. See 5 ILL. COMP. STAT. ANN. 140/6(a) (West 2010).

82. See *id.* § 140/6(b).

83. See *id.* § 140/2(c).

84. See *Bowie v. Evanston Comm. Cons. Sch. Dist.*, 128 Ill. 2d 373, 382, 538 N.E.2d 557, 561 (1989) (district is not being required to produce new record by deleting or scrambling identifying data). See also *Schladetsch v. Dep’t of Hous. & Urban Dev.*, 2000 U.S. Dist. LEXIS 22895 at 8–9 (D.C. 2000) (extracting and compiling data in electronic format does not constitute creation of new record for purposes of federal FOIA).

85. See Pub. Act 542, 96th Gen. Assembly, § 10 (2009), amending 5 ILL. COMP. STAT. 140/3(c) (now 140/3(d)).

86. See Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 § 8(b) (codified at 5 U.S.C.S. § 552(a)(6)(A)(i) (West 2010).

87. See 5 ILL. COMP. STAT. ANN. 140/3(d)(West 2010).

88. See *id.* 140/3(g).

burdensome,⁸⁹ which apparently trumps the more general provision regarding undue burdens. That also would seem to put a high premium on ensuring a quick response, because otherwise a body might be stuck fulfilling an otherwise unduly burdensome request.

Finally, a possible inconsistency now exists in section 7 regarding exemptions from the act. Language stating the “following shall be exempt” from disclosure is unchanged.⁹⁰ That was always a significant difference from the language of the Open Meetings Act, which stated that a public body “may” hold closed meetings, but did not require it to do so.⁹¹ The mandatory nature of the records act exemptions also likely made public servants err on the side of nondisclosure of records, because no sanction existed for nondisclosure, but it was a violation of the act to disclose if the material actually was exempt.

Now, not only are there possible civil sanctions for willful failure to comply with the act,⁹² but the drafters might have tucked in an escape clause for disclosing information that “shall” be exempt. Additional language in the same paragraph mandating exemption now states that the public body “may” elect to redact exempt information.⁹³ It is a bit of a puzzle as to how documents shall not be released, but if they are, they may or may not be redacted to remove the exempt information. The discretionary language shows up as well in a new provision stating that settlement agreements made by a public body are public records, stating that information in such agreements “may” be redacted if exempt from disclosure.⁹⁴ Perhaps there is a way to reconcile these clauses and ingenious judges will just have to discover it.

IV. CONCLUSION

A 2008 survey by the Better Government Association and the National Freedom of Information Coalition ranked Illinois among the 38 states receiving a letter grade of F for its FOIA, although Illinois’ grade was toward the top of the F range and no state received an A. Nebraska and New Jersey tied for first, both receiving Bs, and Alabama and South Dakota tied for last, both receiving zeroes on the 1–100 scale. Illinois scored a 59.⁹⁵

89. *See id.* 140/3(d).

90. *See id.* 140/7(1).

91. *See* 5 ILL. COMP. STAT. ANN. 120/2(b), (c) (West 2010).

92. *See* 5 ILL. COMP. STAT. ANN. 140/11(j) (West 2000).

93. *See id.* § 140/7(1).

94. *See id.* § 140/2.20.

95. *See* Results and Criteria of BGA/NFOIC survey, at http://www.bettergov.org/pdfs/foia_results_2008.pdf (retrieved Jan. 29, 2010).

Access proponents have much to celebrate in this new law, including the provision for a Public Access Counselor, reduced response times, and introduction of sanctions, all of which were given much weight in the BGA/NFOIC survey. If the survey is ever conducted again, Illinois might well vie for the top score.

But ultimately no amount of verbiage will create “government in the sunshine” unless the government has the will and the resources to comply. As Sam Archibald, who was integrally involved in passage of the federal freedom of information act, has noted, “[T]he sharpness of the tool depends substantially upon the will of the government—the will of the executive branch to honor the open-records provisions of the law, the will of the judicial branch to enforce the access-to-information provisions of the law and the will of the legislative branch to stand up for the people’s right to know if the other two branches emasculate the freedom of expression necessary to make participatory democracy work in the Information Age.”⁹⁶

If the government deigns to lift the paper curtain separating it from its citizens and share its records, then it can be seen as honoring its responsibility to communicate with its citizens, to further the flow of information vital to the functioning of our form of government. Government has more than the ability or power to speak so celebrated by the United States Supreme Court—it has an obligation to speak and freedom of information acts and open meetings laws are illustrative of a willingness to assume that obligation.

The Illinois General Assembly has produced one of the finest freedom of information acts in the country. But it is not written in stone, as events shortly after its effective date demonstrated. With an effective date of January 1, 2010,⁹⁷ barely two weeks had passed when an amendment flew through the Illinois Assembly in January and was instantly signed by the Governor, exempting from disclosure evaluations of public school superintendents, principals and teachers.⁹⁸ Regrettably, despite yeoman efforts to collect and consolidate all exemptions to disclosure throughout all Illinois statutes into the new FOIA to simplify the task for requesters, the exemption for public school administrators and faculty will not appear in the FOIA, but will be contained separately in the School Code.

96. Sam Archibald, *The Early Years of the Freedom of Information Act, 1955 to 1974*, 26 PS: POLITICAL SCIENCE AND POLITICS 726, 731 (1993).

97. See Pub. Act 542, 96th Gen. Assembly, § 99 (2009).

98. See Performance Evaluation Reform Act of 2010, Pub. Act 861, 96th Gen. Assembly § 10 (2010), amending School Code, 105 ILL. COMP. STAT. ANN. 5/24A-7.1 (West 2010).

With additional constituencies queueing to push their respective amendments,⁹⁹ the future vitality of this act is not at all certain. One is reminded of Benjamin Franklin's response upon exiting the Constitutional Convention of 1787, when asked if we had gotten a Republic or Monarchy: "A Republic, if you can keep it."¹⁰⁰

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99. See Bruce Rushton, *FOIA overhaul already under siege by legislators*, THE STATE J-REG., Feb. 15, 2010, available at <http://www.sj-r.com/state/x2077694644/Legislators-move-to-roll-back-Freedom-of-Information-Act-changes>; Letter from Donald M. Craven, Interim Executive Director, Illinois Press Association, to Attorney General Lisa Madigan (Jan. 20, 2010) (copy on file with author) (Craven cited the "FOP, AFSCME, SEIU, IFT, and others" as parties with amendments to the act that they would like to have adopted).
100. Respectfully Quoted: A Dictionary of Quotations (1989), <http://bartelby.org/73/1593.html> (retrieved Jan. 29, 2010).

