



IML Analysis of SB 189

FOIA Rewrite / Public Access Counselor (PAC)

On May 28, 2009, the General Assembly passed Senate Bill 189. The bill amends the Open Meetings Act, the Freedom of Information Act, and the Attorney General Act to make changes concerning the codification of the Public Access Counselor and changes to the Freedom of Information Act. This guide summarizes those changes. The first document is an index, followed by a summary of the major statutory changes, and then the actual language of the bill.

When reviewing the bill, note that the changes to the existing statutes are accomplished by underlining new language and striking through deleted language. Some of the stricken language has been moved elsewhere in the statute, and some has been both moved and changed.

The bill has not yet been sent to the Governor. He can approve, veto, or amendatorily veto the legislation.

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IML Summary of SB 189

Open Meetings Act (5 ILCS 120/)		
pp. 1-2	Training	Every public body must designate employees, officers, or members to receive training on Open Meetings Act compliance by sending a list of those individuals to the Public Access Counselor (PAC). The training must occur through an electronic training curriculum developed by the PAC within 6 months of January 1, 2010 and annually thereafter.
Public Access Counselor Activities under OMA		
p. 3	PAC – OMA – Request for Review	A person who believes a violation of OMA has occurred has 60 days from the alleged violation to file a written request for review to the PAC.
pp. 3-4	PAC – OMA – Review Procedures	Upon receiving a request for review, the PAC determines whether further action is warranted. If the allegation is unfounded, then the PAC notifies requester and public body, and takes no further action. If review is warranted, then PAC forwards, within 7 working days after receipt, the request to the public body for specific records. The public body shall furnish copies of the requested records within 7 working days and fully cooperate. The Attorney General has the power to subpoena any person or public body having knowledge of or records pertaining to the denial review. The PAC has the same right to examine a verbatim recording of a meeting closed to the public or the minutes of a closed meeting as does a court in a civil action.

pp. 4-5	Public Body Answer	Within the same 7 working days, the public body may answer the allegations in a letter, brief, or memorandum. The answer redacted if necessary is given to the requester, and they may respond within 7 working days.
pp. 5-6	PAC Binding Opinion	The PAC shall issue a binding opinion within 60 days after the request for review unless a request for extension of 21 business days is noticed. The binding opinion shall make findings of fact and conclusions of law and shall be issued to the requester and public body. The binding opinion is subject to administrative review by either party.
p. 5	Mediation	The Attorney General has discretion to choose to resolve a request for review by mediation or other means. The decision is not reviewable.
p. 6	Requester Files Suit	If the requester files a civil suit with respect to the same alleged violation of OMA, then the PAC takes no further review action and notifies the public body.
p. 6	Records with PAC	Those public records that were provided to the PAC during the review process are exempt from disclosure under FOIA while they are in the possession of the PAC.
pp. 6-7	PAC Advisory Opinion	The Attorney General / PAC may issue advisory opinions to a public body when requested in writing by the head of the public body or its attorney. The public body's good-faith reliance on the advisory opinion relieves it from any liability under OMA.
p. 7	Administrative Review	A binding opinion issued by the Attorney General shall be considered final for purpose of administrative review. An action for administrative review of a binding opinion shall be commenced in Cook or Sangamon County.
Freedom of Information Act Provisions (5 ILCS 140/)		
pp. 8-10	Findings and Preliminary Statements	The bill makes a number of changes to the statements concerning the findings and purpose of the Freedom of Information Act (FOIA). Most notable is the inclusion that providing records is a "primary duty" of public bodies and the Act should be construed to that end, fiscal obligations notwithstanding. In addition, public

		records shall be available to access unless a specific exemption furthers public policy.
p. 10	Presumption; Clear and Convincing Evidence Standard	All records are presumed to be open to inspection and copying and any exemption used to deny a request must be proven by clear and convincing evidence.
pp. 10-14	Definitions	The bill makes numerous changes to the definitions in FOIA. Among these changes are: <ul style="list-style-type: none"> • Change to the definition of “public record” to include electronic communications, the requirement that the record be related to the transaction of public business, and the deletion of “per se” records; • New definition of “private information”; and • New definition of “commercial purpose”.
pp. 15-17	Treatment of Specific Records	The bill adds four new Sections concerning the disclosure of certain types of documents: <ul style="list-style-type: none"> • Section 2.5 states that records relating to public funds are public records subject to copying and inspection; • Section 2.10 concerns certified payroll records submitted under the Prevailing Wage Act; • Section 2.15 requires the disclosure of arrest reports within 72 hours and governs the treatment of criminal history records; and • Section 2.20 states that settlement agreements are public records that are subject to disclosure.
p. 18	Requests in Writing	Requests for inspection or copies must be made in writing and be directed to the public body. A public body may not require that a request be submitted on a standard form or require the requester to specify the purpose for a request, except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver. A public body may respond to an oral request. The request must be immediately forwarded to the FOIA officer or designee.



pp. 18-20	Time Limits for Response	The time for responding to a request has been decreased from seven to five business days. The public body may, for specific reasons, extend the five-day period by five additional business days. If a public body fails to respond to a FOIA request within the time permitted, then the public body may not charge copying fees or treat the request as unduly burdensome. The requester and public body may mutually agree to extend the time period for response.
p. 21	Unduly Burdensome Requests	Repeated requests from the same person for the same records that are unchanged or identical to records previously provided or properly denied are deemed to be unduly burdensome.
pp. 22-23	Commercial Requests	<p>Within 21 working days after receiving a commercial request, the public body must do one of four things: (i) provide the documents; (ii) deny the request due to exemptions; (iii) treat the request as unduly burdensome under subsection (g) of Section 3 [formerly subsection (f)]; or (iv) provide an estimate of the time required to provide the records requested and an estimate of the fees to be charged which can be required to be paid before copying. A public body must comply with a request within a reasonable period considering the size and complexity of the request, and giving priority to records requested for non-commercial purposes. The public body may require that the fees be paid up front before copying.</p> <p>It is a violation of the Freedom of Information Act for a person to knowingly obtain a public record for a commercial purpose without disclosing that it is for a commercial purpose if asked to do so by the public body.</p>
p. 23	Not Required to Interpret Records	The Act is not intended to compel public bodies to interpret or advise requesters as to the meaning or significance of the public records.
p. 23	Designation of FOIA Officers	Each public body must designate one or more officials or employees to act as a Freedom of Information Officer. The FOIA officer or his or her designee must receive requests submitted to the public body (unless the records are furnished immediately). The FOIA officer,

		<p>or his or her designee, is responsible for:</p> <ul style="list-style-type: none"> • Receiving FOIA requests; • Ensuring timely responses to FOIA requests; • Issuing responses; and • Developing a list of documents or categories of records that the public body shall “immediately disclose upon request”.
pp. 23-24	FOIA Officers Duties Upon Receiving Requests	<p>Upon receiving a request, the FOIA officer must:</p> <ul style="list-style-type: none"> • note the date the public body receives the written request; • compute the day on which the period for response will expire and make a notation of that date on the written request; • maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been complied with or denied; and • create a file for the retention of the original request, a copy of the response, a record of written communications with the requester, and a copy of other communications.
p. 24	FOIA Training	<p>Within six months after January 1, 2010, all FOIA officers must successfully complete an electronic training curriculum provided by the PAC, and they must annually complete the curriculum thereafter. New FOIA officers must complete the curriculum within 30 days after assuming the position.</p>
p. 25	Posting Information	<p>The public body must make available a directory of its FOIA officers and, if it maintains a website, must publish certain information concerning its records on that site.</p>
p. 26	Electronic Records	<p>If a person requests a copy of a record that is maintained in an electronic format, the public body must furnish it in the electronic format specified by the requester, if feasible. If it is not feasible to furnish the public records in the specified electronic format, then the public body shall furnish it in the format in which it is maintained by the public body, or in paper format at the option of the requester. Unless otherwise provided, statutory fees that apply to copies of public records when furnished in a paper format do not apply to those records when they are furnished in an electronic format.</p>



pp. 26-27	Fees	The public body may not charge fees for the first 50 pages of black and white, letter or legal sized copies, and the fee for black and white, letter or legal sized copies may not exceed 15 cents per page. The fee for color or irregular sized copies may not exceed the actual cost for reproducing the records. The fee for certification may not exceed \$1.
pp. 28-47	Exemptions Generally	The Section concerning exemptions was dramatically restructured. Those exemptions that are specifically enumerated in other statutory provisions were moved to a new Section 7.5. Many of the remaining exemptions were moved around, combined, or deleted. The provision concerning the redaction of non-exempt information was moved from Section 8 to Section 7.
p. 29	Exemption for Private Information	Private information, as defined on page 11, is exempt unless its disclosure is required by another provision of FOIA, a different State or federal law, or a court order.
pp. 29-31	Exemption for Unwarranted Invasion of Personal Privacy	The itemized list of private records has been deleted. Now, the exemption applies to the disclosure of information that is 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.
pp. 31-33	Law Enforcement Exemptions	The exemption now applies only if it would interfere with investigations or law enforcement proceedings conducted <i>by the agency that receives the request</i> . The criminal history information is no longer regulated under the exemptions but is instead regulated under the new Section 2.15 on page 15.
pp. 34-35	Exemption for Trade Secrets	Trade secrets and other proprietary information is exempt only if it is furnished under a claim that it is proprietary, privileged or confidential, and that disclosure would cause competitive harm to the person or business, and only insofar as the claim directly applies to the records requested.
pp. 37-38	Employee Grievances	Records relating to a public body's adjudication of employee grievances or disciplinary cases are exempt—but this exemption does not extend to the final outcome in which discipline is imposed.



p. 44	Records Not in the Possession of the Public Body	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, is considered a public record of the public body.
pp. 45-47	Statutory Exemptions	The new Section 7.5 contains exemptions that are granted by statutory reference by other statutes outside of FOIA.
pp. 47-48	Request Denials	<p>If a FOIA request is denied, then the public body must notify the requester in writing of: (i) the decision to deny the request; (ii) the reasons for the denial, including a detailed factual basis for the application of any exemption claimed; (iii) the names and titles or positions of each person responsible for the denial; (iv) the right to review by the Public Access Counselor and the address and phone number for the Public Access Counselor; and (v) the right to judicial review.</p> <p>If an exemption is claimed, then the denial must include the specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority.</p>
p. 48	Exhaustion of Administrative Remedies	Any person making a request for public records is deemed to have exhausted his or her administrative remedies with respect to that request if the public body fails to act within the time periods provided in Section 3 of the Act.
Public Access Counselor Activities under FOIA		
p. 49	PAC – FOIA – Request for Review	A person whose request to inspect or copy a public record is denied may, within 60 days, file a written request for review with the PAC.
p. 49	Denials Under l(c) & l(f) Automatic PAC Review	A public body that asserts an exemption under § 7(l)(c) [clearly unwarranted invasion of personal privacy] or §7 (l)(f) [preliminary drafts, notes, recommendations] must notify the requester and PAC, within the time periods, of its intent to deny the request based, in whole or in part, on these exemptions . The PAC reviews every such intent to deny and determines, within 5 working days, whether further inquiry is warranted. If not warranted,



		the bill is silent, but it can be expected the PAC will notify the parties and the public body proceeds with the denial. If further inquiry is warranted, then proceed under review procedures.
p. 50	PAC – FOIA – Review Procedures	Once a request for a FOIA denial review is filed in writing to the PAC they determine if further action is warranted. If the allegation is unfounded, they notify requester and public body no further action is taken. If warranted to review, then PAC forwards within 7 working days after receipt the request to the public body for specific records. The public body shall furnish copies of the requested records within 7 working days and fully cooperate. The Attorney General has subpoena power to any person or public body having knowledge of or records pertaining to the denial review. The PAC may not disclose records of the public body as part of the review process to the extent that the public body claims that those records are exempt to the extent claimed.
p. 51	Public Body Answer	Within the same 7 working days, the public body may answer the allegations in a letter, brief, or memorandum. The answer redacted if necessary is given to the requester and they may respond within 7 working days.
pp. 51-52	PAC Binding Opinion	The PAC shall issue a binding opinion within 60 days after the request for review unless a request for extension of 21 business days is noticed. The binding opinion shall make findings of fact and conclusions of law and shall be issued to the requester and public body. The binding opinion is subject to administrative review by either party.
p. 52	Mediation	The Attorney General has discretion to choose to resolve a request for review by mediation or other means. The decision is not reviewable.
p. 52	Binding Opinion Public Body	If a violation occurred, the public body shall comply with the directive or initiate administrative review.
p. 52	Liability	A public body that discloses records in accordance with an opinion of the Attorney General is immune from all liability and is not liable for penalties under FOIA.



p. 52	Requester Files Suit	If the requester files a civil suit with respect to the same denial, then the PAC takes no further review action and notifies the public body.
pp. 52-53	Public Body Advisory Opinions	The Attorney General may issue advisory opinions with regard to FOIA compliance when requested in writing from the head of the public body or its attorney. Reliance on the advisory opinion in good faith is not liable for penalties under FOIA.
p. 54	Clear and Convincing Standard	Any public body that denies a record has the burden of proving that it is exempt by clear and convincing evidence.
p. 55	Attorney Fees	Changes standard for awarding attorney fees from “may” to “shall” for the person seeking records that prevails in court. Eliminates the requirement that the person seeking records “substantially” prevail in their suit. The court is to consider the degree to which the relief obtained relates to the relief sought.
p. 56	Civil Penalties	If the court determines a public body willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith, the court shall impose upon the public body a civil penalty of not less than \$2,500 nor more than \$5,000 for each occurrence.
p. 56	Administrative Review	A binding opinion issued by the Attorney General shall be considered final for purpose of administrative review. An action for administrative review of a binding opinion shall be commenced in Cook or Sangamon County.
p. 57	Head of Public Body	Section 10 which provided for an appeal of a denial to the head of the public body has been REPEALED. No longer is this local additional step in the process available. The only review of a FOIA decision is now conducted by the PAC or in a civil judicial action.
p. 59	Attorney General Duties	Authorizes the office to give written and advisory public access opinions under new Section 7 – 15 ILCS 205/7 Public Access Counselor.



**Attorney General Act Provisions
(15 ILCS 205 /)**

pp. 59-60	Public Access Counselor	The first two long paragraphs are (i) introductory findings by the General Assembly and (ii) a creation of the office of the PAC, who must be a licensed attorney appointed by the Attorney General.
pp. 60-63	PAC Powers	<p>A list of PAC powers include: training, interpretative materials, resolve disputes under OMA and FOIA either by binding opinions or mediation, issue advisory opinions, responses to informal inquiries, conduct research, recommendations to the General Assembly, electronic training curriculum for OMA and FOIA, prepare and distribute to public bodies model policies for FOIA compliance, and promulgating rules.</p> <p>The PAC has subpoena powers and enforcement powers through seeking injunctive relief to prevent a violation of OMA or FOIA.</p>
p. 63	PAC Enforcement of Binding Opinion	The Attorney General can file an action in the circuit court of Cook or Sangamon for injunctive or other relief to compel compliance with a binding opinion or prevent a violation of OMA or FOIA.
p. 63	PAC Website	All binding opinions issued concerning OMA and FOIA shall be posted on the Attorney General's official website with any rules concerning the implementation of the powers authorized.
p. 63	Effective Date	The new law takes effect on January 1, 2010.