

MANUAL ON ILLINOIS “SUNSHINE LAWS”

The Open Meetings and Freedom of Information Acts



By

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PREFACE

The Illinois General Assembly has enacted two major pieces of legislation designed to provide full access to units of local government in Illinois. These "sunshine laws" are the Illinois Open Meetings Act and the Illinois Freedom of Information Act.

This Manual is intended as a practical guide for local officials in dealing with the Acts, and is a combination and expansion of the authors' previously published pamphlets on each of the Acts. Thus, it is hoped that this Manual will be a ready reference tool for municipal officials to guide them through the myriad provisions of each Act.

The general purpose of the Open Meetings Act, of course, is to provide public access to meetings of public officials, and input into and review of decisions made at such meetings. The Freedom of Information Act, on the other hand, is designed to insure public access to records assembled, gathered, produced and disseminated by public bodies, except for certain statutory exemptions.

Chapter I of the Manual contains a description of the Open Meetings Act together with opinions of the Attorney General and court cases interpreting the Act. Chapter 2 contains a description of the Freedom of Information Act together with court cases interpreting the Act. In addition, because the Act is patterned after the Federal Freedom of Information Act and other state acts, interspersed in Chapter 2 are decisions from other jurisdictions which undoubtedly will have an impact on how the Illinois Act will be construed. Finally, an appendix of forms has been added with forms that can be readily adapted for use by all units of local governments in Illinois.

ABOUT THE AUTHORS

Patrick A. Lucansky and Terrence M. Barnicle are both members of the law firm of Klein, Thorpe and Jenkins, Ltd. The firm represents a large number of units of local government, including cities, villages, school districts, public libraries, library districts, park districts, fire protection districts and townships. Furthermore, the law firm has extensive experience at the Trial, Appellate and Illinois Supreme Court levels in representing units of local government in all types of litigation. Moreover, the firm is often retained on a case-by-case basis by units of local government with unique, situational needs and has done so for many units of local governments.

In 1987, Chicago Consumer selected Klein, Thorpe and Jenkins, Ltd., as one of the city's top-rated law firms ("Chicago Top-Rated Law Firms", Vol. 1, No.3, 1987). As this selection indicates, Klein, Thorpe and Jenkins, Ltd., is a leader in providing effective, cost efficient and professional legal services to local governments throughout Illinois.

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A special thanks to Arlene Nemes who worked so hard to make this publication possible.

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CHAPTER 1
THE OPEN MEETINGS ACT
CHAPTER 5 ACT 120 §§ 1-6, ILLINOIS COMPILED STATUTES

INTRODUCTION

The Open Meetings Act (hereinafter referred to as the "Act") is found in Chapter 5, Act 120, sections 1 through 6, of the Illinois Compiled Statutes. The authors realize that a chapter of this nature cannot possibly answer all questions relative to the Act, and suggest, because of the Act's application to practically all meetings of public officials, that public officials consult regularly with their municipal attorneys to be certain that they are fully complying with the Act.

Also, in considering the scope and effect of the Act, it must be remembered that its provisions apply equally to home rule and non-home rule units. However, the Act (ch. 5, Act 120, sec. 6) expressly allows home rule units to adopt more stringent requirements than those provided in the Act.

Furthermore, it is important for all public officials to know and familiarize themselves with the Act. A violation of the Act (ch. 5, Act 120, sec. 4) is a criminal matter, a Class C misdemeanor, which is punishable by a fine not to exceed \$1,500.00 and/or up to 30 days in jail. Also, the relatively recent actions of the Will County State's Attorney seeking felony convictions (the charges were subsequently dropped) against certain municipal officials for alleged violations of the Act, make it imperative for all public officials to be thoroughly conversant with the Act.

I. INTENT OF THE ACT

The first inquiry in reviewing the Act is, "Why?" Why a law that requires public bodies to deliberate and act in public? Illinois has not always had an Open Meetings Act, and the present Act did not become effective until July, 1957, and several times since then it has been substantially revised.

The Act was initially adopted because it was felt that too many governmental bodies were transacting public business like private corporations. In the very first paragraph of the Act (ch. 5, Act 120, sec. 1), the legislature clearly states that the public policy of the State of Illinois is that public commissions, committees, boards and councils exist "...to aid in the conduct of the people's business..." The expressed intent of the Act is that the actions of public bodies "be taken openly and that their **deliberations** be conducted **openly**." (Emphasis added.) The Act goes on to indicate that it is a public policy of the State that the people be given advance notice of meetings of public bodies and of their right to attend.

Certainly the expressed intent of the Act is reasonable, acceptable and one with which all public officials should readily be able to comply, provided the Act also contains clearly stated provisions for allowing public officials the necessary flexibility to meet in closed session in order to carry out their duties competently, efficiently and effectively. However, many public officials do not feel that the Act as it existed, or as it has been amended from time to time, provides for such flexibility, and it is this

inadequacy which in the past has led to the flood of discussions, legal opinions and litigation regarding the meaning and intent of the Act and which will, in all likelihood, continue to generate such activities in the future.

In furtherance of the intent of the Act, and in an attempt to correct perceived abuses of the requirement that actions and deliberations of public bodies be taken openly, Section 2(e) of the Act, which requires that meetings of public bodies shall be open, contains the following provisions:

"No final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that would inform the public of the business being conducted." (See, Section IV C below.)

II. WHAT CONSTITUTES A MEETING UNDER THE ACT

Although the Act was originally entitled "Meetings of Public Agencies" (now known as the "Open Meetings Act," ch. 5, Act 120, sec. 1.01), the Act did not originally define the word "meeting." However, as amended, a meeting is defined as "...**any** gathering of a majority of a quorum of the commissioners of a public body held for the purpose of discussing public business." (Emphasis added.) This definition should eliminate the confusion which often existed under the prior Act as to whether a gathering of two or more public officials at which public business was discussed had to be open to the public. (See, ch. 5, Act 120, sec. 1.02.)

What constitutes a majority of a quorum for a particular public body can be easily determined. For example, in a commission form government with a mayor and four commissioners, a majority of a quorum is two - the mayor and one commissioner, or two commissioners. In a city or village with a seven-member council or board, a majority of a quorum is three - the mayor and two aldermen or the president and two trustees, or three aldermen or three trustees. Naturally, as the number of members of a public body increases, the number of members needed to constitute a majority of a quorum also increases. For additional examples of a majority of a quorum of a public body, consult the following chart.

<u>CHART</u>		
<u>Number of Members of Public Body</u>	<u>Quorum of Public Body</u>	<u>Majority of a Quorum of Public Body under Act (Open Meeting Requirements Apply)</u>
3	2	2
5	3	2
7	4	3
9	5	3
11	6	4
13	7	4
15	8	5
17	9	5

When considering committee or commission meetings, subsidiary board meetings (e.g. zoning boards, boards of fire and police commissioners, fire and police pension boards, etc.) or meetings of other covered public bodies, it must be remembered that a majority of a quorum is determined based upon the number of members of that committee, commission or subsidiary body and not upon the number of trustees or aldermen. For example, a majority of a quorum of a streets and alley committee composed of five aldermen or trustees is two. Therefore, if two members of such a streets and alley committee meet for the purpose of discussing public business, it is a meeting covered by the Act. A majority of a quorum of a streets and alley committee composed of three aldermen or trustees is also two. *See*, Ill. Att'y. Gen. Op. No. 82-030 (1982).

The last part of the definition requires that the gathering of a majority of a quorum be held for the purpose of discussing public business. In other words, there must be an intent to discuss public business before the gathering will be held to be a meeting covered by the Act. The legislature added this intent language so that public officials would not have to fear violating the Act if they unintentionally discussed public business by some or all of the members of a public body at a social event. However, whether a discussion of public business by some or all of the members of a public body at a social event (dance, dinner, party, etc.) is now covered by the Act, still depends upon the particular facts involved.

If a majority of a quorum of a public body was present at a social event, and if they intended to gather there to discuss public business, or if the purpose of attending this social event was to discuss public business, and they actually gather together and discuss public business, it would be a meeting covered by the Act, and if it was not open to the public and all of the requirements of the Act, including notice, were not complied with, the public officials involved would be guilty of a violation of the Act. It is not necessary that public officials meet at their official meeting place in order to have a meeting under the Act. Also, if public officials gather together at a social event with the intent of evading the Act, they will be in violation of the Act.

On the other hand, if at least a majority of a quorum of a public body comes together at a social event with no intent to evade the Act and not for the purpose or with the intent of discussing public business, a casual, chance or informal discussion of public business by such members of a public body should not be considered a meeting within the purview of the Act. After all, it is only natural for people with a common interest to discuss it when they are together. However, the authors would caution public officials that the Attorney General in his written explanations of the Act has stated that:

"...although a gathering may not be held for the purpose of discussing public business at the outset, the gathering is subject to conversion to a meeting at any point. Thus, for example, at the point that a dinner party turns to a discussion of public business upon which the attention of the requisite number of public body members present is focused, the gathering becomes a 'meeting' for purposes of the Act."

This statement by the Attorney General ignores the clear intent language of the Act, however, at least until such time as this definition is interpreted by the courts, public officials would be well advised to limit discussions of public business at social events.

III. COVERAGE OF THE ACT - WHAT CONSTITUTES A PUBLIC BODY?

The Act applies to all meetings of public bodies (except those meetings discussed in Section IV). Public bodies as defined in the Act include: city councils, boards of trustees, and all commissions or committees of said councils or boards, including but not limited to those created by statute such as zoning boards of appeals, plan commissions, police and fire pension boards, boards of fire and police commissioners, boards of local improvements, civil service commissions, electrical commissions, and all other such boards, bureaus, committees or commissions. However, public body does not include an ethics commission, ethics officer, or ultimate jurisdictional authority acting under the State Gift Ban Act. (See, ch. 5, Act 120, sec. 1.02) As to whether certain committee meetings are covered by the Act see, Ill. Att'y. Gen. Op. S-495 (1972), S-997 (1975), and S-1116 (1976). Public hearings by a public body on a proposed special service area are subject to the Act. Ill. Att'y. Gen. Op. No. S-1145 (1976). In addition, the Attorney General has opined that local ethics commissions are not per se exempt from the provisions of the Open Meetings Act. Ill. Att'y. Gen. Op. No. 99-007 (1999).

However, the Act does not apply to meetings or conferences of department heads, staff or employees. A court (People ex rel. Cooper v. Carson, 28 Ill. App. 3d 569, 328 N.E.2d 675 (2d Dist. 1975)) has held that such meetings or conferences are not covered by the Act because the participants do not adopt any resolutions and meet only for the purpose of promoting "good staff work". A mayor or other member of a city council or board of trustees may attend such a staff meeting without bringing it within the coverage of the Act. However, if a majority of a quorum of a public body attend such a staff meeting at which public business is discussed, the meeting would then come within the Act and would have to be open to the public. An "internal" committee which is not formally appointed by, or accountable to, any public body, by its very nature, does not have deliberations which fall within the scope of the Act. Pope v. Parkinson, 48 Ill. App. 3d 797, 363 N.E.2d 438 (4th Dist. 1977). However, in Board of Regents v. Reynard, 292 Ill. App. 3d 968, 686 N.E. 2d 1222 (4th Dist. 1997), the Athletic Council (the Council) of Illinois State University (ISU) was held to be a public body that was required to comply with the Open Meetings Act and the Freedom of Information Act. The Council was an external, standing committee of the Senate. The Council was composed of people who were not on the Senate. The Senate, which is the primary body determining educational policy at ISU, reports to the president who, in turn, reports to the Board of Regents. Finally, a Federal District Judge has ruled that a "political rally" is not a meeting under the Act even though all the board members were there and discussed public business. Nabhani v. Coghane, 552 F. Supp. 657 (N.D. Ill. 1982).

In the determination of whether an entity is a "subsidiary body" of a public body and thereby subject to the Open Meetings Act, the First District Appellate Court found the following criteria to be relevant: (1) legal nature of the entity; (2) whether the entity is subject to direct governmental control and the degree of such control or supervision; (3) amount of public funding of the entity; and (4) nature of the responsibilities of the entity. Hopf v. Topcorp., Inc., 170 Ill. App. 3d 85, 527 N.E.2d 1 (1st Dist. 1988), *app'l den.* 122 Ill.2d 575 (1988). (J. Pincham dissenting). The court in Hopf determined that a for-profit economic development corporation that had contracted with the City of Evanston to purchase and develop a research park with some

public funding and direction was not a subsidiary body of the City within the meaning of the Open Meetings Act.

Following remand and additional discovery, alleged new evidence of City control and involvement in the day-to-day operations of the two corporations in question did not persuade either the trial court or the appellate court to change its earlier opinion. See, Hopf v. Topcorp, Inc. 256 Ill. App. 3d 887, 628 N.E.2d 311 (1st Dist. 1993). See also, Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism and Drug Dependence, 64 Ill. App. 3d 94, 380 N.E.2d 1192 (2d Dist. 1978).

A. Teleconferencing

Can meetings of a public body be conducted by teleconferencing? Both the Attorney General and the Appellate Court have answered in the affirmative. It is the opinion of the Attorney General, No. 82-041 dated November 10, 1982, that telephone conference calls held by a majority of a quorum of a public body for the purpose of discussing public business are meetings under the Act and, therefore, all notice and public accessibility requirements of the Act must be complied with before holding such conferences. Further, it is proper to conduct a closed meeting, pursuant to one of the exceptions, by way of a teleconference call, provided that there is compliance with the Act. Scott v. Illinois State Police Merit Board, 222 Ill. App. 3d 496, 584 N.E.2d 199 (1st Dist.1991).

In Freedom Oil Co. v. Pollution Control Bd., 275 Ill. App. 3d 508, 655 N.E.2d 1184 (4th Dist.1995), the Court found that although there was no specific statutory authority for the Board to conduct its meetings by telephone conference, such a telephone conference meeting fell within the Board's specific authority to conduct meetings. In addition, the Court determined that a telephone conference qualifies as an open meeting despite the fact that a quorum was not physically present in the same room so long as all the requirements of the Open Meetings Act were followed. However, the Court opined that if the Board intended to conduct some of its meetings by telephone conference in the future, better practice would dictate it should have rules in place for the procedures to be followed.

B. Taping or Filming of Meetings

Finally, under the Act, any person may record the proceedings at any public meeting by tape, film, or other means. The Act (ch. 5, Act 120, sec. 2.05) allows public bodies to prescribe reasonable rules governing the right to record, and it is suggested that public bodies adopt such rules if they wish to control these activities during their meetings.

IV. EXCEPTIONS

A. List of Exceptions

Although the public policy as stated in the Act is to have meetings conducted openly, there are several statutory exceptions. (Ch. 5, Act 120, Sec. 2) The Act indicates that the exceptions allowing closed meetings are to be strictly construed against closed meetings and extend only to subjects "clearly within their scope." The excep-

tions authorize or allow, but do not require closed meetings to discuss a subject covered by an exception. Those exceptions which apply to municipalities are the following:

1. meetings on collective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees;

2. meetings where the purchase or lease of real property for the use of the public body is being considered, including meetings held for the purpose of discussing whether a particular parcel should be acquired, or where the setting of the price for sale or lease of real estate owned by the public body is being considered;

3. meetings held to discuss litigation "when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting";

4. meetings held to discuss the appointment, employment, compensation, discipline, performance or dismissal of specific employees of the public body, including hearing testimony on a complaint lodged against an employee to determine its validity;

5. meetings to consider the discipline, performance or removal of the occupant of a public office, when the public body has the power to remove the occupant under the law or ordinance;

6. meetings to consider the selection of a person to fill a public office, including a vacancy in a public office, when the public body is given power to appoint under law or ordinance;

7. meetings to consider professional ethics or performance when considered by an advisory body appointed to advise a licensing or regulatory agency on matters germane to the advisory body's field of competence;

8. meetings for the conciliation of complaints of discrimination in the sale or rental of housing, when closed meetings are authorized by law or ordinance prescribing fair housing practices and creating a commission or administrative agency for their enforcement;

9. meetings to establish reserves or settle claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if otherwise the disposition of a claim or potential claim might be prejudiced, or to review or discuss claims, loss or risk management information, records, data, advice, or communications from or with respect to any insurer of the local public entity or any intergovernmental risk management association or self insurance pool of which the local government is a member;

10. meetings to consider the sale or purchase of securities, investments or investment contracts;

11. meetings to consider emergency security procedures and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff or public property. (Note: House Bill 3881, P.A. 91-730, effective January 1, 2001, made revisions to this exemption which deleted the requirement that the security measures be designed for emergencies only and that the actual danger be described as a part of the motion);

12. meetings to consider informant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, when discussed by a public body with criminal investigatory responsibilities;

13. meetings to hear evidence or testimony presented in open hearing or in closed hearing where specifically authorized by law to a quasi-adjudicative body (which means an administrative body charged by law or ordinance with the responsibility to conduct hearings, receive evidence or testimony and make determinations based thereon, but does not include local electoral boards when such bodies are considering petition challenges), provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning;

14. meetings to consider self evaluation, practices and procedures or professional ethics, when meeting with a representative of a statewide association of which the public body is a member;

15. meetings for the discussion of minutes of meetings lawfully closed under the Act either for purposes of approval by the body of the minutes or semi-annual review of the minutes as required by the Act;

16. meetings to discuss the operation by a municipality of a municipal utility or the operation of a municipal power agency or a municipal natural gas agency when the discussion involves (i) contracts relating to the purchase, sale or delivery of electricity or natural gas or (ii) the results or conclusions of load forecast studies.

B. Action Required to Hold a Closed Meeting

If a particular topic falls within one of the above listed exceptions, under the provisions of the Act (ch. 5, Act 120, sec. 2a) specific steps must be taken so that convening a closed meeting is legally accomplished.

1. To conduct a closed meeting, a motion must be passed at an open meeting to hold a closed meeting, which may be held either on the same day or sometime in the future. A quorum is required at that open meeting, and a majority of those members present at the meeting must vote in favor of the motion. The motion must specify the specific exception which authorizes the closed meeting (for example, a motion "to hold a closed meeting to discuss collective negotiating matters" or to discuss "pending" or "probable or imminent" litigation—note that you do not have to identify the specific items to be discussed such as the name of the lawsuit that is to be discussed - you only have to identify the exception that allows the particular closed

meeting), and the vote of each member and identification of the specific exception must be disclosed at the time of the vote, recorded and entered into the minutes of the meeting.

2. To schedule a series of closed meetings, a single vote may be taken providing for the entire series, provided that (a) each meeting in such series involves the same particular matters and (b) the meetings are scheduled to be held within no more than three months of the day the vote is taken.

You should note, of course, that at a closed meeting the only topics allowed to be discussed are those which are covered by one of the exceptions and specified in the vote to hold the closed meeting. In other words, topics not covered by an exception and topics not specifically included in the exception(s) identified in the vote at the open meeting may not be discussed, even though the closed meeting is otherwise proper.

Further, in conducting a closed meeting, there must be compliance with the Act's additional requirements regarding notice and minutes which must be taken. For a more detailed discussion of the notice and minutes requirements, see Sections V and VI below.

C. Interpretation of Certain Exceptions

Since the Act was originally adopted, questions have been raised regarding certain specific exceptions. Therefore, several court decisions have been rendered under the Act, and the Attorney General of Illinois (the state officer with the duty to interpret the Act) has rendered numerous opinions interpreting the Act (such opinions, while not having the force of law, are nevertheless helpful and should be followed unless the municipality's attorney advises to the contrary). A partial listing of these decisions or opinions follows:

Final Action - The Illinois Appellate Court has upheld a vote taken in a closed meeting where another vote was thereafter taken on the same matter in an open meeting. Jewel v. Board of Education, 19 Ill. App. 3d 1091, 312 N.E.2d 659 (5th Dist. 1974). In addition, an Illinois Appellate Court has determined that a school board's request for mediation to resolve an impasse during bargaining was not a final action under the Act such that it would have to be discussed in open session. Gosnell v. Hogan, 179 Ill. App. 3d 161, 534 N.E.2d 434 (5th Dist. 1989), *app'l den.* 126 Ill. 2d 558 (1989).

Although the Regional Board may have violated the Open Meetings Act when it adjourned to deliberate in private after the close of evidence at two hearings, the Board then reconvened and voted in open forum. The Court in not condoning violations of the Act, was unwilling to remand on the basis of this error. Board of Education of Community Unit School District No. 337 v. Board of Education of Community Unit School District No. 338, 269 Ill. App. 3d 1020, 647 N.E.2d 1019 (3d Dist. 1995).

The Illinois Appellate Court has held that it is proper for a Village Board to go into closed session to consider the dismissal of a member of its Board of Fire and

Police Commissioners so long as their final action is taken at an open meeting. Ealey v. Board of Fire and Police Commissioners of the City of Salem, 188 Ill. App. 3d 111, 544 N.E.2d 12 (5th Dist. 1989), *app'l den.* 128 Ill. 2d 662 (1989); Simonis v. Countryside Fire Protection District, 173 Ill. App. 3d 418, 527 N.E.2d 673 (2d Dist. 1988), *app'l den.* 123 Ill. 2d 567 (1988); Kosoglad v. Porcelli, 132 Ill. App. 3d 1081, 478 N.E.2d 489 (1st Dist. 1985). (See, Exception number 5). See also, Davis v. Board of Education of Farmer City - Mansfield Community School District No. 17, 63 Ill. App. 3d 495, 380 N.E.2d 58 (4th Dist. 1978); Grissom v. Board of Education of Buckley - Loda Community School District No. 8, Ford and Iroquois County, 75 Ill.2d 314, 388 N.E.2d 398 (1979); Haight v. Board of Education of Community Unit School District No. 205, Knox and Warren Counties, 29 Ill. App. 3d 48, 329 N.E.2d 442 (3d Dist. 1975).

Employment or Dismissal of Employees - As noted above, the Act authorizes discussion of the employment of an employee in a closed meeting. The Attorney General issued an opinion indicating that this exception allows a discussion of information relating only to the initial employment of an individual. Ill. Att'y. Gen. Op. S-726 (1974). However, the Illinois Appellate Court disagreed in People v. Board of Education, 40 Ill. App. 3d 819, 353 N.E.2d 147 (2d Dist. 1976), and held that the Act exempts closed meetings regarding renewal or continuation of employment and compensation as well. The Act, as amended, (See, Exception number 4 above) adopts this interpretation.

The Act also permits "deliberations concerning salary schedules for one or more classes of employees." Previously, salaries in general could not be discussed unless a collective bargaining agreement was involved. Also, you can consider the salary of an individual employee as part of the employment process (either to initially hire or in reviewing a contract) in a closed meeting. The scope of this exception had been expanded by one court to include independent contractors within the definition of "employee." Gosnell v. Hogan, 179 Ill. App. 3d 161, 534 N.E.2d 434 (5th Dist. 1989), *app'l den.* 126 Ill.2d 558 (1989). However, the Act now defines "employee" to specifically exclude an independent contractor. (Ch. 5, Act 120, Section 2d)

For Due Process Clause purposes, it is irrelevant whether a board meeting complied with the Open Meetings Act. The Act does not cover substantive rights for due process clause purposes. (no property right in probationary teacher Kyle v. Morton High School, 144 F. 3d 448 (7th Cir. 1998))

Personnel Matters - Many municipalities frequently adopt a motion to go into a closed (executive) meeting to "discuss personnel matters" - such a motion is insufficient under the Act. But see Gosnell v. Hogan, 179 Ill. App. 3d 161, 534 N.E.2d 434 (5th Dist. 1989). For example, a proper motion would be a motion to go into a closed meeting to discuss, for example, the "employment" or "dismissal" of an individual employee, etc. (See, exception 4 which specifies what now may be discussed in closed session). The Attorney General has further stated that this exception covers only discussions relating to **specific individuals** and does not include a class of employees or officers. Ill. Att'y. Gen. Op. S-726 (1974) (but see exception 1 which does allow a closed meeting to consider "salary schedules" for different classes of employees, as well as the collective bargaining exception).

It is proper under this exception to meet in closed session to discuss the evidence relating to an employee's suspension from duty. Scott v. Illinois State Police Merit Board, 222 Ill. App. 3d 496, 584 N.E.2d 199 (1st Dist. 1991). Also, a public body may discuss the reasons for the dismissal of an employee in a closed session and such discussions or knowledge is not therefore suspect or irrelevant. Verticchio v. Divernon Community Unit School District, 198 Ill. App. 3d 202, 555 N.E.2d 738 (4th Dist. 1990).

Meetings of Members of a Political Party - According to the Attorney General, a meeting of a political party's county central committee is not subject to the Act even when the meeting is to select a person to fill a vacancy on the County Board (Ill. Att'y. Gen. Op. S-1007 (1975)), but this opinion may be questionable since the Illinois Supreme Court held that a closed session of a political party caucus which included a majority of the members of the city council was subject to the Act where the matters discussed were not confined to business of the political party but extended to a discussion of city business as well. People ex. rel. Difanis v. Barr, 83 Ill. 2d 191, 414 N.E.2d 731 (1980).

The Attorney General has opined that a meeting attended by the re-elected mayor, a re-elected commissioner and three newly elected, but unsworn, commissioners of a commission form government, held for the purpose of discussing the appointment of village officials for the next term, was not a meeting of members of a political party, but was a meeting covered by the Open Meetings Act even though the meeting was held after the election, but before the new council members began their terms. Ill. Att'y. Gen. Op. 96-005 (1996).

Collective Negotiating Matters - This exception allows municipalities and their employees to meet and discuss a broad range of subjects relative to collective bargaining, such as salaries, terms of employment and working conditions. In addition, the Attorney General has indicated that the exception allows the public body to hold a closed meeting to consider its offer or counteroffer to bargaining matters raised by its employees or their representatives, and that the exception is not limited to face-to-face negotiations with employees or their representatives. Ill. Att'y. Gen. Op. 80-024 (1980). However, the Illinois Attorney General has issued an opinion that this exception does not include deliberations on the question of whether to recognize a union or association as the collective bargaining agent for the school's employees (Ill. Att'y. Gen. Op. S-1490 (1980)), but an Illinois circuit court judge has held to the contrary in Evergreen Communications, Inc., v. Richard Godfrey, et al., Case No. 79-MR-12 in the Circuit Court of the Eleventh Judicial Circuit (McLean County). See also, Ill. Att'y. Gen. Op. No. 80-024 (1980).

Acquisition of Real Property - The Attorney General has indicated that a lease of real property is included within the meaning of the term "acquisition" if the municipality is the lessee, and also that if the lease involves the municipality as the lessor it may not be discussed in private even though the lease provides that any improvements constructed by the lessee during the term of the lease are to become the property of the municipality at the end of the lease. Ill. Att'y. Gen. Op. 80-024 (1980). (See, Exception number 2) According to the holding in People ex rel Ryan v. Village of Villa Park, 212 Ill. App. 3d 187, 570 N.E.2d 882 (2d Dist. 1991), *app'l den.* 141 Ill. 2d 558 (1991), the "acquisition of real property" exception to the Open Meetings Act only applies if the public agency is:

- a. discussing formulating the terms of an offer to purchase specific real estate;
- b. discussing the seller's terms; or
- c. considering strategy for obtaining **specific** real estate.

Selling Price of Real Estate - This exception does not justify holding a closed session to discuss rescheduling the date on which to hold a public auction for the purpose of selling a public building. Board of Education of School District 67 v. Sikorski, 214 Ill. App. 3d 945, 574 N.E.2d 736 (1st Dist. 1991), *app'l withdrawn* 143 Ill. 2d 635 (1992), (the court, however, held that subsequent action in holding the auction and approving the contract had the effect of ratifying the Board's action and avoiding a nullification of the contract because of the Open Meetings Act violation).

Pending or Possible Litigation - The Act as originally adopted exempted meetings held to consider "pending" litigation. The Attorney General originally indicated that this exception applied only when an actual lawsuit had been filed in court, but the Illinois Appellate Court in People ex rel. Hopf v. Barger, 30 Ill. App. 3d 525, 332 N.E.2d 649 (2d Dist. 1975), held that a municipality could consult **with its attorney** in a closed session regarding foreseeable litigation. The court's decision recognized the attorney-client privilege, at least in relation to litigation that was likely to be commenced (by the municipality or by another party against the municipality) in the foreseeable future.

Furthermore, the 1982 amendments expanded the exception to include litigation which the municipality finds to be "probable" or "imminent." This amendment apparently is legislative recognition of the Barger decision. The Act specifically requires, however, that the municipality record in the minutes of the closed meeting the basis for the conclusion that litigation is probable or imminent.

Also, the Attorney General has issued a controversial opinion, File No. 83-026 dated December 23, 1983, regarding the basis of the "probable or imminent" litigation exception contained in Section 2 of the Act. This Attorney General's opinion emphasizes the importance of the closed meeting minutes containing a clear and definite statement of the basis for the finding that litigation is probable or imminent. But see Gosnell v. Hogan, 179 Ill. App. 3d 161, 534 N.E.2d 434 (5th Dist. 1989), (interpreting this exception to cover a discussion between a school board and the superintendent as to whether to talk to the media).

It must be emphasized that, as indicated in the Barger decision, there appears to be a non-statutory exception available to municipalities pursuant to the attorney-client privilege and that is, the corporate authorities may meet privately with their attorney if the circumstances are such that the attorney-client privilege is applicable. However, see Ill. Att'y. Gen. Op. No. S-1501 (1980) which found that a public body could **not** meet in closed session with its attorney on the grounds of attorney-client privilege to discuss a petition for a referendum to reduce the public body's tax rate. The Illinois Supreme Court in 1932 (In Re Sanitary District Attorneys, 351 Ill. 206, 184 N.E. 332 (1932)) has recognized that municipalities may invoke such privilege. A description of the extent of this privilege is beyond the scope of this chapter, but such privilege is presumably limited somewhat (to what extent is unclear) by the

adoption of the Act. The municipal attorney should be consulted in each particular situation when the municipality chooses to meet with him or her in private. The attorney will have to weigh the municipality's need for confidentiality against the expressed public policy established legislatively by adoption of the Act. Although the attorney-client privilege is very important it should not be used to evade the spirit and intent of the Act. For example, the House debates on House Bill 411 made it clear that the General Assembly did not intend to allow public bodies to consult in private with their attorneys on "routine things" such as "interpretation of statutes, legal policies or options generally available and so forth," and the Attorney General has indicated in his explanation of the amendments that this includes "general legal advice." Finally, one point must be emphasized. The root of the privilege is confidentiality, and any private meeting must be solely between the attorney and the municipal authorities.

D. Sanction of Member For Disclosure of Information From Closed Meeting

One of the continuing problems caused by holding closed meetings is how to control disclosure of confidential information by one or more board or council members. In the opinion of the Attorney General, No. 91-001 dated January 31, 1991, municipalities do not have power to sanction members for revealing what went on during a closed meeting. However, on the other side of the coin, a board cannot be sued by someone who claims he or she was injured merely by such a disclosure. In Swanson v. Board of Police Commissioners, 197 Ill. App. 3d 592, 555 N.E.2d 35 (2d Dist. 1990), *app'l den.* 133 Ill.2d 574 (1990), the Court found that there is nothing in the Open Meetings Act that provides a cause of action against a public body for disclosing information from a closed meeting.

V. MEETING DATES, PLACES AND NOTICE REQUIREMENTS

The Act (ch. 5, Act 120, sec. 2.01) requires all public meetings to be held at specified **times** and **places** which are convenient and open to the public. Therefore, a public body cannot schedule a meeting to be held at midnight or in the "wee" hours of the morning. However, if a meeting called at a convenient time extends into the early morning hours, it would be a proper and legal meeting. Also, a public body cannot properly schedule a meeting to be held outside of its corporate boundaries. Except for special circumstances, a meeting outside of its corporate boundaries, depending at least upon how far outside it was and the reasons why the site was chosen, would probably be "inconvenient" to the public.

In addition, no meeting is to be held on a "legal holiday" unless a public body's **regular** meeting day falls on such a holiday. Simply stated, a public body cannot schedule a special meeting to take place on Christmas Day, New Year's Day, Thanksgiving or any other legal holiday. The Act does not define "legal holidays" or the source of such days. However, the Bank Holiday Act (205 ILCS 630/17(a)) does set out a list of "legal holidays." A special meeting on such a legal holiday would not be convenient to the public. However, if a public body regularly meets, for example on the first Monday of the month, and one of the legal holidays falls on such a Monday, the public body may, nevertheless, meet on such holiday, provided, of course, that a quorum of its members are present. *See, Argo High School Council of*

Local 571 v. Argo Community High School District No. 217, 163 Ill. App. 3d 578, 516 N.E.2d 834 (1st Dist. 1987). *See also*, Bromberek School District No. 65 v. Sanders, 174 Ill. App. 3d 301, 528 N.E.2d 1336 (1st Dist. 1988), *app'l den.* 124 Ill.2d 553 (1988) (although first day of hearing was on a legal holiday, the issue was waived since the objector failed to bring an action within the 45 day statutory limit).

The Act expressly requires public notice of all meetings, whether open or closed, to be given as follows:

1. At the beginning of each calendar or fiscal year, each public body covered by the Act must give public notice of the **schedule** of its regular meetings and must state the regular dates, times and places of these meetings. In addition, an **agenda** of each **regular** meeting must be prepared and posted at least 48 hours in advance of the meeting. It must be posted at the principal office of the public body. However, the posted agenda does **not** preclude the consideration of items **not** specifically set forth in the posted agenda.

2. Public notice of special meetings, except a meeting held in the event of a **bona fide** emergency, must be given at least 48 hours before such special meeting, **and** the notice must also include the **agenda** for the special meeting. The actions of the public body, while not required to be specifically detailed in the notice, should be "closely related" to those matters set forth in the agenda for the special meeting. *See*, Argo High School Council of Local 571 v. Argo Community High School District No. 217, 163 Ill. App. 3d 578, 516 N.E.2d 834 (1st Dist. 1987). Special care must be taken in relation to preparation of the notice and agenda since no action can be taken unless the subject matter was specifically identified in the notice and agenda. Also, broad or vague items such as "Old Business," "New Business," "Reports and Communications" and similar such items are inappropriate for a special meeting because they do not inform the public adequately as to the purpose(s) for the special meeting. A special meeting agenda, at which a vacancy on the board was to be filled, which stated any other matters or problems related to the abandonment of responsibilities by a township supervisor "A" and trustee "B" regarding personnel, finance, etc., and all other matters pertaining to the function of the township was "too generic to give notice of any action by the board" to fill the vacancy of trustee "C" and, "in essence, amounted to no agenda at all." "Because this clause was too all-inclusive to give any notice", and the appointment to fill the vacancy of trustee "C" was not germane to the remainder of the agenda items," the court concluded that the action of the board to fill the vacancy of trustee "C" was invalid. People ex rel Redell v. Giglio, 238 Ill. App. 3d 141, 606 N.E.2d 128 (1st Dist. 1992).

3. Notice of an emergency meeting must be given as soon as practicable, but in any event prior to holding of the meeting, to any news medium which has filed an annual request for notice under the provisions of the Act. For example, if a community were to be hit by a tornado or flash flood, the corporate authorities would not have to wait 48 hours before meeting in order to post notice of a special meeting, but could notify the news medium and meet immediately in order to decide upon a course of action and then give notice as soon as practicable to the public. Of course, the same restrictions and exception apply to such emergency meetings being open or closed.

4. Public Notice of a rescheduled regular meeting or of a reconvened meeting must be given at least 48 hours beforehand, **and** the notice must also include the **agenda** for the rescheduled or reconvened meeting. However, such 48-hour notice of a reconvened meeting is not necessary where the original meeting was open to the public and it is to be reconvened within 48 hours, or an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda.

In other words, if a public body changes or reschedules its regular meeting from, say, September 28th, because its members are attending an out-of-town convention, to October 1st, the public body must give at least 48 hours notice and the notice of the rescheduled meeting must contain a copy of the agenda.

Now, in the event a public body does not complete its agenda items at a public meeting and adjourns it to another date but wants to consider additional items of business that were not on the original agenda, notice of the reconvened meeting must be given at least 48 hours in advance with, as before, a copy of the agenda of the reconvened meeting.

However, if the meeting is to be reconvened within 24 hours, or if at the close of the original meeting the public body announces the time and place of the reconvened meeting and there is to be no change in the agenda, no notice is required. It is suggested that the minutes of the original meeting show the action taken by the public body adjourning to a definite date, time and place.

Public notice is accomplished by posting a copy of the notice at the city or village hall or, if there is no city or village hall, then at the building in which the meeting is to be held. Also, the public body must supply copies of the notices of all of its meetings to any news medium that has filed an annual request for such service. In addition, any news medium must be given the same notice of all special, emergency, rescheduled and reconvened meetings in the same manner as is given to members of the public body, provided the news medium has given the public body an address or telephone number within the city or village limits at which such notice may be given. Substantial compliance with certain provisions of the Act (e.g. notice) is sufficient. See e.g., Gosnell v. Hogan, 179 Ill. App. 3d 161, 534 N.E.2d 434 (5th Dist. 1989); Argo High School Council of Local 571 v. Argo Community High School District No. 217, 163 Ill. App. 3d 578, 516 N.E.2d 834 (1st Dist. 1987); Williamson v. Doyle, 112 Ill. App. 3d 293, 445 N.E.2d 385 (1st Dist. 1983); Menssen v. Eureka Unit District No. 140, Woodford County, 70 Ill. App. 3d 9, 388 N.E.2d 273 (4th Dist. 1979).

If a public body makes a change in its regular meeting dates (for example, a change from the first and third Mondays to the first and third Wednesdays), it must give at least 10 days notice of such change by publishing a notice in a newspaper of general circulation in the city or village. Notice of a change in meeting dates must also be posted at the place of the meetings and supplied to those news media which have filed annual requests.

On the other hand, if a public body merely changes (reschedules) one of its regular meetings (e.g., from September 7 to September 9) it need only give 48 hours

notice of the changed (rescheduled) meeting date and include the agenda for the rescheduled meeting in said notice. This notice need only be posted and sent to the news media and it need not be published.

In regard to the agenda for a regular meeting, one court has held that the Act does not require notice in the agenda of those topics to be considered by the public body in closed session and that the reference in the agenda to "Executive Session-personnel, negotiations and legal matters" was not improper. *See, Gosnell v. Hogan*, 179 Ill. App. 3d 161, 534 N.E. 2d 434 (5th Dist. 1989).

VI. MINUTES

All public bodies, including committees and commissions, must keep written minutes of all their meetings, whether open or closed. The statute prescribes the following **minimum** requirements for such minutes:

1. the date, time and place of the meeting;
2. the members recorded as either present or absent; and
3. a summary of discussion on all matters proposed, deliberated or decided, and a record of any votes taken.

ALSO

4. On a motion to go into a closed meeting, the minutes must contain the vote of each member and the identification of the specific exception allowing such closed meeting.

5. If there is a closed meeting on "probable or imminent litigation," the basis for the finding that the matter discussed was a matter of probable or imminent litigation must be specified in the minutes - this should be placed in the minutes of the closed meeting. *See supra*, Ill. Att'y. Gen. Op. No. 83-026 (1983).

The 1994 Amendments changed the information required in the minutes from a "general description" of all matters proposed, discussed, or decided to, as indicated, a "summary of discussion" on all matters proposed, "deliberated" or decided. Since the 1994 Amendments were the result of a compromise bill, there is little, if any, direction as to what was intended by the adoption of these changes. It appears, however, that the intent was to include some description of the nature of the discussions that ensued on any particular matter as contrasted with a mere description of the matter. In other words, it appears that the General Assembly has mandated that the minutes reflect what discussion occurred and not merely the topics that were discussed. However, since the Amendments require only a "summary" of the discussion, as opposed to verbatim reports, it appears that only general comments need be included, not quotations. For example, if a zoning matter was discussed, the minutes might reflect something like the following: "The Board next considered the rezoning of the property located at _____ from R-1 to R-6 Residential District for a townhouse development. There were questions raised from the audience concerning flooding and there were individuals in the audience that expressed they

were against the proposed rezoning and also individuals who were in favor of the proposed rezoning. Board members also expressed their viewpoint and the Village Engineer addressed the engineering concerns and indicated it was his opinion that there would be no adverse flooding consequences." Prior to the Amendments, it would have been sufficient to just describe the actual proposed rezoning.

Also, note that a summary is required only when a matter is either "proposed," "deliberated" (rather than "discussed") or "decided." Accordingly, if only the audience discusses an issue (without any deliberation or decision by the Board), it would appear that no summary is required.

The keeping of minutes of closed meetings is potentially dangerous (but required) to the best interests of a community. For example, if a public body holds a closed meeting to discuss settlement proposals relative to a matter of pending litigation and records in the minutes the amount it would like to settle for along with the highest amount it is willing to pay, it would be very damaging to the municipality if a copy of such minutes were somehow to get into the hands of the opposing attorney. Therefore, a public body should take the following steps to protect itself against such a situation:

1. The chairman should stress the importance of the confidentiality of such minutes to the members and persuade them that under no circumstances are the contents of the minutes or what was discussed at the closed meeting to be divulged to anyone.
2. Minutes of closed meetings should contain a summary and not contain any details of the discussion or of the proposed settlement terms. The Act does not require a verbatim or detailed record of the closed meeting.
3. It is recommended that the minutes of all closed meetings be kept in a separate volume or filing place from the minutes of the open meetings.

Other provisions in the Act relating to minutes include:

1. The minutes of open meetings must be made available for public inspection within seven days after the approval of the minutes of the public body.
2. Minutes of closed meetings need not be made available for public inspection until after the public body determines that it is no longer necessary to keep them confidential in order to protect the public interests or the privacy of an individual.
3. Minutes of closed meetings can be approved at a subsequent closed meeting and need not be approved at an open meeting. (*See*, Exception number 15)
4. The Act requires public bodies to periodically, but no less than semi-annually, meet to review minutes of all closed sessions. At such meetings a determination must be made, and reported in an open session that:
 - a. the need for confidentiality still exists as to all or part of those minutes; or,

b. that the minutes or portions thereof no longer require confidential treatment and are available for public inspection. These semi-annual review meetings should be first conducted in closed session and it is then recommended that a written resolution be adopted at the public portion of the meeting stating that the review has been conducted and listing by meeting date which, if any, of the closed meeting minutes are now available for public inspection. Meeting minutes for all municipal boards, committees and commissions must be kept and comply with all the requirements of the minutes of the municipality's meetings. Their minutes should be kept separately and need only be approved by the appropriate board committee or commission, and not by the full city council, village board or commissioners.

VII. ENFORCEMENT OF ACT - EFFECT OF FAILURE TO COMPLY

If a public body fails to comply with the Act, or if there is probable cause to believe that it failed to comply, any person, including the State's Attorney, may, within 60 days of the alleged illegal meeting, institute a civil suit in the proper circuit court. An individual's opportunity to request any remedy under the Open Meetings Act expires 60 days after the board meeting. Kyle v. Morton High School, 144 F. 3d 448 (7th Cir. 1998). Also the Act extends this time limitation for the State's Attorney by providing for an action to be brought within 60 days of the illegal meeting or, if facts concerning the meeting are not discovered within the 60 day period, "within 60 days of the discovery of a violation by the State's Attorney." Safanda v. Zoning Board of Appeals of City of Geneva, 203 Ill. App. 3d 687, 561 N.E.2d 412 (2d Dist. 1990), *app'l den.* 136 Ill. 2d 554 (1991); Verticchio v. Divernon Community Unit School District No. 13, 198 Ill. App. 3d 202, 555 N.E.2d 738 (4th Dist. 1990); Bromberek School District No. 65 v. Sanders, 174 Ill. App. 3d 301, 528 N.E.2d 1336 (3d Dist. 1988), *app'l den.* 124 Ill. 2d 553 (1988).

A city and its mayor have standing under the Open Meetings Act to challenge the propriety of a school board meeting. The State's Attorney is not the only public body or public official authorized to file suit under the Act. However, persons other than the State's Attorney are required to file suit either prior to or within 60 days of the meeting. (Contrary to the Safanda case, *supra*. A conflict exists between the second and first appellate districts.) Paxson v. Board of Education, 276 Ill. App. 3d 912, 658 N.E.2d 1309 (1st Dist. 1995).

In deciding such a case the court may examine **in camera** any portion of the minutes of a meeting at which a violation of the Act is alleged to have occurred, and may take such additional evidence as it deems necessary.

The court may then grant such relief as it deems appropriate, including:

a. the issuance of a writ of mandamus requiring that a meeting be open to the public; People ex rel. Hopf, 30 Ill. App. 3d 525, 332 N.E.2d 649 (2d Dist. 1975)

b. the issuance of an injunction against future violations of the Act; Lindsey v. Board of Education of City of Chicago, 127 Ill. App. 3d 413, 468 N.E.2d 1019 (1st Dist. 1984)

- c. ordering the public body to make available to the public any portion of the minutes of a meeting as is not authorized to be kept confidential under the Act; or
- d. declaring null and void any final action taken at a closed meeting in violation of the Act.

The power of a court to declare null and void final action improperly taken at a closed meeting is potentially very serious and alters the case law interpreting the Act prior to the 1982 amendments. *See, Betts v. Department of Registration and Education*, 103 Ill. App. 3d 654, 431 N.E.2d 1112 (1st Dist. 1981); *Matter of Byron Park District*, 67 Ill. App. 3d 61, 385 N.E.2d 67 (2d Dist. 1978); *Board of Education Community Unit School District No. 300, Kane, Cook, McHenry and Lake Counties v. County Board of School Trustees of Kane County*, 60 Ill. App. 3d 415, 376 N.E.2d 1054 (2d Dist. 1978); *Bigham v. City of Rock Island*, 120 Ill. App. 2d 381, 256 N.E.2d 897 (3d Dist. 1970); *WSDR, Inc. v. Ogle County*, 100 Ill. App. 3d 1008, 427 N.E.2d 603 (2d Dist. 1981). As to the effect of ratifying action taken at an earlier meeting in violation of the Act, see *Board of Education School District No. 67 v. Sikorski*, 214 Ill. App. 3d 945, 574 N.E.2d 736 (1st Dist. 1991); *Collinsville Community Unit School District No. 10 v. Witte*, 5 Ill. App. 3d 600, 283 N.E.2d 718 (5th Dist. 1972). For example, if a city council or board of trustees were to adopt a general obligation bond ordinance at a meeting that was later declared an illegal meeting by the court and the court declared the adoption of the ordinance null and void, the municipality could not issue any bonds under that ordinance. Therefore, great care has to be taken that all provisions of the Act are complied with, particularly as they relate to notice and the possible holding of a closed meeting. An even more serious situation would develop if a municipality were to adopt its tax levy shortly before the filing deadline and a court, after the deadline, were to hold that the meeting was improperly closed or otherwise violated the Act (e.g., improper notice, etc.) and nullify the passage of the tax levy ordinance. In such a situation, the municipality would lose a full year's tax revenues. All public bodies, therefore, should be careful to adopt all ordinances and take final action on all important matters at meetings which are clearly open to the public and in full compliance with the Act.

However, the transcript of the legislative debates on the 1982 amendments clearly indicates that the intent of the legislature was merely to make it possible (not mandatory) for courts to invalidate final action improperly taken at closed meetings or otherwise in violation of the Act. Also, the Attorney General has indicated in his explanation of the Act that an action may not be voided because of a "technical notice violation" nor merely because it was previously "discussed or matters related to it were deliberated in closed session." Support for such conclusion can be found in the legislative debates on the 1982 amendments. *See Williamson v. Doyle*, 112 Ill. App. 3d 293, 445 N.E.2d 385 (1st Dist. 1983).

In addition, the court may assess reasonable attorney's fees and other costs against the municipality where the party who files the suit "substantially" prevails.

On the other hand, the court may award the municipality attorney's fees and costs against a private party filing such a suit only if the court determines that the action was brought with malice or was frivolous. Therefore, the likelihood of any such recovery by the city or village is, at best, remote, while recoveries against the city or village are very possible (perhaps even probable).

VIII. CONCLUSION

As indicated previously, the intent of the Act is to have public business conducted openly in order that the members of the public can be informed citizens and watchdogs for the public good. Certainly, such is a praise-worthy goal for which all public officials should strive. The exceptions listed in the Act were included in recognition of the fact that in certain circumstances it is not in the best interests of the public to have particular matters discussed openly. The exceptions further recognize that certain discussions regarding individuals should first be conducted in private in order to protect the individual's right to privacy. Gosnell v. Hogan, 179 Ill. App. 3d 161, 534 N.E.2d 434 (5th Dist. 1989).

It is hoped that in the process of drafting what otherwise is an acceptable Act, the General Assembly has not substantially impeded the ability of local governmental officials to carry out their duties effectively. During the ceremony at which Governor Thompson signed the 1982 amendments to the Act, he indicated that he "took into account all the worries and concerns of those who argued that the Act was unworkable," but felt that the interests of the people of Illinois would be best served by approving the legislation, stating: "It is better, if there is doubt, to err on the side of openness and honesty in government." Certainly no one can disagree with that statement. However, the Governor went on to say that if the 1982 amendments prove too cumbersome for local officials, he would work to change it. Therefore, it is recommended that all public officials and staff members continue to record those instances when the Act impedes the operations of local government—the incumbent Governor and the General Assembly undoubtedly will want specific examples and not abstract complaints if a campaign is initiated by local officials to change the Act.

CHAPTER 2
THE FREEDOM OF INFORMATION ACT
CHAPTER 5, ACT 140, §§ 1-11, ILLINOIS COMPILED STATUTES

INTRODUCTION

It is the purpose of this chapter to explain the current status of the original Local Records Act (Chapter 50, Act 205, Section 1 et seq., of the Illinois Compiled Statutes), to review and explain the important provisions of the Freedom of Information Act (hereinafter referred to as the "Act"), and to review cases interpreting the Act, the Federal Freedom of Information Act and similar state acts to illustrate how the courts have viewed similar provisions dealing with the public's right to inspect and copy public records.

Again, the authors realize that this chapter cannot possibly answer all questions relative to the Act and suggest—because the Act is rather complex—that public officials consult regularly with their municipal attorneys regarding questions arising under the Act.

Although the Act does not expressly pre-empt home rule powers in this area, that certainly seems to be the intent of the legislature as evidenced by the legislative debates. However, the effect of the Act on home rule municipalities is uncertain. Section 1 of the Act contains the following statement:

"This Act shall be the exclusive State statute on freedom of information..."

Section 6(h) of Article VII of the Illinois Constitution provides:

"(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in the subsection (1) of this Section." Ill. Const. Art. VII, § 6(h).

Although it is stated that it is the exclusive state statute, it does not specifically provide by law for the exclusive exercise of the power as would seem to be required by the Constitution and by the decision in Rozner v. Korshak, 55 Ill. 2d 430, 303 N.E.2d 389 (1973) where the Supreme Court indicated that preemption of home rule should be specifically set forth in the legislation, nor does it seem to comply with Section 7 of Act 70 of Chapter 5 of the Illinois Compiled Statutes (5 ILCS 70/7).

I. INTENT OF THE ACT

Section 1 of the Act indicates that:

"Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing

public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest."

However, Section 1 also indicates what purposes the Act is not intended to cover or impose:

"This Act is not intended to be used to violate individual privacy, nor for the purpose of furthering a commercial enterprise, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to access to information.

This Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, State or federal law."

(In other words, the Act does not require you to prepare and keep any new records.) The furnishing of records located in two different places does not constitute the creation of a new record. Hamer v. Lentz, 132 Ill. 2d 49, 547 N.E.2d 191 (1989). However, the public body is not required to prepare its records in a new format merely to accommodate a request for certain information. AFSCME v. County of Cook, 136 Ill. 2d 334, 555 N.E.2d 361 (1990). Furthermore, Section 1 of the Act goes on to emphasize that these are "limited exceptions" to the general right of the public to know, and that the Act should be construed in such a manner.

Note that the Act says it is not intended to further the interests of a commercial enterprise. Although the legislative intent is not entirely clear on what this means (and also note that it is not included in the list of exemptions in Section 7 of the Act), it would have originally appeared, for example, that you could refuse to give out a list of the municipality's water customers to a business when the only interest the business would have is to use the list for marketing purposes (e.g., a mass mailing to potential customers), or to expand its business. See, Healey v. Teachers Retirement System 200 Ill. App. 3d 240, 558 N.E.2d 766 (4th Dist. 1990), *app'l den.* 135 Ill. 2d 556 (1990). Also, in the later appellate court case of Local 1274, Ill. Federation of Teachers v. Niles Township High Schools, 287 Ill. App. 3d 187, 678 N.E.2d 9 (1st Dist. 1997) the court said, "...FOIA was not intended to be used to...further a commercial enterprise..." However, in Lieber v. Board of Trustees of Southern Illinois University, 176 Ill. 2d 401, 680 N.E.2d 374 (1997), the Illinois Supreme Court completely emasculated this apparent expression of legislative intent by holding that it was merely a preamble and "it is not part of the Act itself...and has no substantive legal force..." In addition, "as long as the particular request is not barred under the Act's exemptions, the purpose of the requester in making his request is irrelevant." People ex rel. Ulrich v. Stukel, 294 Ill. App. 3d 193, 689 N.E.2d 319 (1st Dist. 1997), *app'l den.* 178 Ill. 2d 595 (1998).

Finally, the Act is to be construed as the exclusive statute on freedom of information unless another state statute creates any additional restrictions on disclosure of information (e.g., provisions relating to juvenile court proceedings) or creates additional obligations for disclosure (one thus might parenthetically ask how it is to be construed as "exclusive").

II. THE EFFECT ON THE LOCAL RECORDS ACT

Section 15 of the Local Records Act (50 ILCS 205/1 et. seq.) provides that Section 3a of the Local Records Act as it relates to the inspection of records "shall apply only as to records and reports prepared or received prior to" July 1, 1984. Section 3a requires all records and reports "of the obligation, receipt and use of public funds" to be kept at the municipality's official place of business and made available for "public inspection during regular office hours except when in immediate use by persons exercising official duties which require the use of those records." Section 3a also allows the municipality to require a 24 hour advance written notice of the request to inspect, including a list of the records to be inspected. Section 3a also limits such disclosure where it would constitute an invasion of any person's right to privacy.

The remaining provisions of the Local Records Act regarding such matters as disposal and preservation of records, etc., still retain their status as law and are not affected by the Act.

Therefore, in dealing with records prepared or received prior to July 1, 1984, you will want to consider prior Attorney General Opinions and court decisions interpreting the Local Records Act— *see e.g.*, Oberman v. Byrne, 112 Ill. App. 3d 155, 445 N.E.2d 374 (1st Dist. 1983) (financial records); People ex rel. Gibson v. Peller, 34 Ill. App. 2d 372, 181 N.E.2d 376 (1st Dist. 1962) (financial records); People ex rel. Hamer v. Board of Education, 130 Ill. App. 2d 592, 264 N.E.2d 420 (2d Dist. 1970) (real estate records); People ex rel. Better Broadcasting Association v. Keane, 17 Ill. App. 3d 1090, 309 N.E.2d 362 (1st Dist. 1973) (private financial reports submitted as part of a cable TV franchise application); People ex rel. Recktenwald v. Janura, 59 Ill. App. 3d 143, 376 N.E.2d 22 (1st Dist. 1978); Mid-American Television Company v. Peoria Housing Authority, 93 Ill. App. 3d 314, 417 N.E.2d 210 (3d Dist. 1981) (list of landlords receiving Title 8 federal funds, amount of rental payments and list of addresses of the properties); Lopez v. Fitzgerald, 76 Ill. 2d 107, 390 N.E.2d 835 (1979) (preliminary investigatory records); Preservation of local public records does not pertain to the government and affairs of a home rule unit, therefore, a home rule unit cannot adopt an ordinance conflicting with the provisions of the Local Records Act. Ill. Att'y. Gen. Op. No. 82-054 (1982); Ill. Att'y. Gen. Op. No. S-1461 (1979) (traffic accident reports); Ill. Att'y. Gen. Op. No. S-1484 (1980) (background investigation, psychological and polygraph reports of candidates for deputy sheriffs). *See also*, Chicago Title and Trust Co. v. Danforth, 236 Ill. 554, 86 N.E. 364 (1908); Pope v. Parkinson, 48 Ill. App. 3d 797, 363 N.E. 2d 438 (4th Dist. 1977); People ex rel. Sherman v. Slater, 42 Ill. App. 3d 396, 355 N.E.2d 735 (1st Dist. 1976); Ill. Att'y. Gen. Op. No. 54-118 (1954).

While the Local Records Act clearly applies to requests for financial records prepared or received prior to July 1, 1984, there is a serious question as to whether the Local Records Act or the Freedom of Information Act applies to all other records prepared or received prior to July 1, 1984. The Attorney General and the Lieutenant Governor have concluded that the Freedom of Information Act applies to such non-financial records regardless of whether they were received or prepared prior to July 1, 1984.

III. COVERAGE OF ACT

Cities and villages and all of their boards, bureaus, committees and commissions come within the coverage of the Act. The definition (see Section 2(c) of the Act) of the words "public records" is very broad and includes, but is not limited to, administrative manuals, procedural rules, final opinions and orders made in the adjudication of cases, statements and interpretations of policy which a public body adopts, final planning policies, factual and inspection reports, financial data and minutes of public meetings. However, an alderman/trustee is not included in the definition of a "public body" under the Act and, therefore, the personal records of an alderman/trustee are not subject to inspection and copying under the Act. Quinn v. Store, 211 Ill. App. 3d 809, 570 N.E.2d 676 (1st Dist. 1991), *app'l den.* 141 Ill. 2d 559 (1991). The Attorney General has opined that local ethics commissions or local ultimate jurisdictional authorities are not per se exempt from the provisions of the Freedom of Information Act. Ill. Att'y. Gen. Op. No. 99-007 (1999). In addition, the Athletic Council of Illinois State University is a public body that is covered by FOIA. Board of Regents v. Reynard, 292 Ill. App. 3d 968, 686 N.E.2d 1222 (4th Dist. 1997). Each individual department of the city is a subsidiary body of the city and is a "public body" as defined by FOIA. Duncan Publishing, Inc. v. City of Chicago, 304 Ill. App. 3d 778, 709 N.E.2d 1281 (1st Dist. 1999), *app'l den.* 185 Ill. 2d 622 (1999).

IV. INSPECTION AND COPYING OF PUBLIC RECORDS - RULES AND REGULATIONS

Section 3 of the Act requires public bodies to make available to any person for inspection or copying all public records except for those records expressly made exempt by Section 7 of the Act. The Act pertains only to the availability of information and does not in any way protect the use of the information once received. Zientana v. Long Creek Township, 211 Ill. App. 3d 226, 569 N.E. 2d 1299 (4th Dist. 1991). However, the Act does not require a public body to prepare answers to questions. Kenyon v. Garnels, 184 Ill. App. 3d 28, 540 N.E.2d 11 (4th Dist. 1989).

In addition, if the person requesting a public record submits a written request, the public body must promptly provide such person with a copy of the public record requested (a certified copy must be provided if requested).

The public body must either comply with or deny such written request within 7 working days after its receipt. If the written request is denied, the denial must be by letter. (See Section IX of this chapter for a discussion of the contents of a denial letter.) Even though a public body is late in responding to a request for records, once it produces all the records, the merits of a plaintiff's claim for relief in the form of production of information, become moot. Duncan Publishing, Inc. v. City of Chicago, 304 Ill. App. 3d 778, 709 N.E.2d 1281 (1st Dist. 1999), *app'l den.* 185 Ill. 2d 622 (1999).

Failure to respond within 7 working days is considered a denial of the request.

In the event the public body cannot fill the request within this 7 working-day period, it may obtain an additional 7 working days if it can meet one of the following 7 reasons:

1. the requested records are stored in whole or in part at other locations than the office having charge of the requested records;
2. the request requires the collection of a substantial number of specified records;
3. the request is couched in categorical terms and requires an extensive search for the records response to it;
4. the requested records have not been located in the course of routine search and additional efforts are being made to locate them;
5. the requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are exempt from disclosure under Section 7 of the Act or should be revealed only with appropriate deletions;
6. the request for records cannot be complied with by the public body within the time limits prescribed by paragraph (c) of Section 3 without unduly burdening or interfering with the operations of the public body; *See, AFSCME v. County of Cook*, 136 Ill. 2d 334, 555 N.E.2d 361 (1990).
7. there is a need for consultation which shall be conducted with all practicable speed with another public body or among two or more components of a public body having a substantial interest in the determination or in the subject matter of the request. *See, Twin-Cities Broadcasting Corp. v. Reynard*, 277 Ill. App. 3d 777, 661 N.E.2d 401 (4th Dist. 1996), *app'l den.* 167 Ill. 2d 570 (1996).

It must be remembered, however, that the maximum time available to fill a written request is 14 working days.

Whenever a public body extends the time by the additional 7 working days for one of the 7 stated reasons, it must send a letter within the initial 7 working-day period to the person making the request, stating the reason(s) for the delay and the date by which the records will be made available or the request denied.

In those cases where a person makes a request for all records falling within a category, the public body must fill the request unless to do so would unduly burden the public body and there is no way to narrow the request. In order to deny such a request, the burden on the public body must outweigh the public interest in the information sought. In addition, before a public body can rely upon this "burden" exemption, it must allow the person making the request an opportunity to confer with it in an effort to narrow the request to one that can be filled. Once again, if the public body relies upon this "burden" exemption, it must notify the requesting party and specify the reason(s) why it would be unduly burdensome for the public body to comply with the request. The repeated requests for the same public records by the same person shall be deemed unduly burdensome. *See AFSCME, supra*, wherein the court found that if one generally requests recorded information, that person may not request the same recorded information "soon thereafter," even if the person making the request asks for the recorded information in a different format.

The Act provides in part that if a lawsuit is filed, the court must on motion of the plaintiff, order the public body to provide an index of the public records to which access has been denied. The index must include certain specified information. Also, the Act makes it easy for the plaintiff to obtain an award of attorney's fees against the public body. However, an attorney proceeding pro se (on his own behalf and not on behalf of a client) in an action under the Act is **not** entitled to an award of fees under the Act. Hamer v. Lentz, 132 Ill. 2d 49, 547 N.E.2d 191 (1989).

Finally, a public body may adopt rules and regulations, in conformity with the Act, setting forth the times and places where records will be made available and the persons from whom such records may be obtained. The authors strongly recommend that public bodies adopt rules and regulations and that such rules and regulations also provide that as to records prepared or received prior to July 1, 1984, the actual cost of retrieval and review of such records shall be charged in addition to the cost of reproducing and certifying them. Furthermore, since Section 10 of the Act does not provide a time limit within which a notice of appeal from a denial must be mailed to the mayor or president, such rules and regulations might provide that notice of appeal from a denial must be mailed to the mayor or president within 14 days (or another reasonable time-frame) after notification of the denial.

The term "head of the public body" means the president, mayor, manager or individual otherwise holding "primary executive and administrative authority" for the city or village, **or** such person's "duly authorized designee." (*See*, Section 2e.) Of course, in appeals the designee cannot be the same person as the one who made the original decision. If there is to be a designee, the "head of the public body" should make the designation in writing and file it with the official records of the public body.

V. MUNICIPAL DIRECTORIES

Section 4 of the Act requires all public bodies to prepare, prominently display at each of its offices, make available for public inspection and copying, and mail out if requested, each of the following two directories:

1. A brief description of the public body, including: (a) a short summary of its purpose, (b) a block diagram of its functional subdivisions, (c) the total amount of its operating budget, (d) the number and location of all of its separate offices, (e) the approximate number of full and part-time employees, and (f) the identification and membership of all boards, commissions, committees or councils which operate in an advisory capacity relative to the operation of the public body, or which exercise control over its policies or procedures, or to which the public body is required to report and be answerable for its operations.

2. A brief description of the methods whereby the public may request information and public records, a directory designating by titles and addresses those employees to whom requests for public records should be directed, and any fees allowable under Section 6 of the Act.

Most of the information required in Paragraph A above can probably be obtained from a financial statement contained in a recent bond prospectus.

VI. CATALOGING OF PUBLIC RECORDS

Public bodies, must list (catalog) all types or categories of records under their control which were prepared or received after July 1, 1984. Records prepared or received prior to July 1, 1984 need not be so listed. However, once such a list has been prepared, it will, in all likelihood, also cover all records under a public body's control prior to July 1, 1984. This list of records must be made available to the public for inspection and copying, must be "reasonably" current, and must be "reasonably" detailed in order to assist the public in obtaining access to public records. (*See*, Section 5.)

In the event the public body has stored its records (electronic data) in computers, it must provide the public with a description of how such records may be obtained in a form comprehensible to persons lacking knowledge of computer language or printout formats. The definition of "public records" includes computer tapes within its scope and computer tapes must be made available to the public. *AFSCME v. County of Cook*, 136 Ill. 2d 334, 555 N.E.2d 361 (1990).

Computer technology also raises other issues such as whether e-mail constitutes a public record within the meaning of the Act (as well as the issue of preservation of such e-mail under the Local Records Act). The Ohio Supreme Court has ruled that sometimes e-mail is not a public record (e-mail generated by individual co-workers containing racial slurs and not serving to document the business functions of the Sheriff's Department), but that e-mail that does "document the organization, functions, policies, decisions, procedures, operations or other activities of the office" would be considered a public record. *State ex. rel. Wilson-Simmons v. Lake County Sheriff's Department*, 82 Ohio St. 3d 37, 693 N.E.2d 789 (Ohio 1998).

VII. FEES AND COSTS

A public body is allowed to charge fees only to reimburse its actual cost for reproducing and certifying public records, and for the use by the public of equipment of the public body to copy records. The public body is not allowed to charge for any staff time necessary to retrieve or review the records. Therefore, all salary costs associated with filling requests for public records must be absorbed by the public body. The allowable fees must be charged according to a standard scale of fees and such fee scale must be made public. (*See*, Section 6a.)

Records are to be furnished without charge or at a reduced charge, as determined by the public body, if the person making the request states the specific purpose for the request and indicates that a waiver or reduction of the fee is in the public interest. A waiver or reduction of the fee is in the public interest if the principal purpose of the request is to obtain information regarding the health, safety and welfare or the legal rights of the general public and is not for the principal purpose of personal or commercial benefit. The words "commercial benefit" do not apply to requests made by news media when 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. In setting the amount of waiver or reduction, the public body may take into consideration the number of records requested and the cost of copying them. (*See*, Section 6b.)

If a public body knowingly charges a fee which exceeds its actual cost of reproduction and certification, such excessive fee is considered to be a denial of access to public records for the purpose of judicial review. (*See*, Section 6c.)

In those instances where an insurance company or an attorney requests a police department accident report and also requests "special service" beyond the requirements of the Act, such as that it be mailed to it or him within 24 or 48 hours, it should be legally permissible to charge a flat fee of \$5.00 or \$10.00 for such "special service." If such a flat fee is to be charged, the preferred procedure would be to require the requestor to submit a written request for "special service" and a statement that the requestor consents to the charge of \$5.00 or \$10.00 for such "special service."

VIII. EXEMPTIONS

Under Section 8 of the Act, if any public record that is exempt from disclosure under Section 7 contains any material which is not exempt, the public body must "delete" the exempt information and then make the remaining information available for inspection and copying. For example, if the public body has a pre-printed form which includes both exempt and non-exempt material, the public body would have to give the entire pre-printed form, including all pre-printed material even if it was located where the exempt material was originally inserted, and delete from it the exempt information. In the past it would have been permissible to give only the portion of the form where the non-exempt information was contained. *See*, Staske v. Champaign, 183 Ill. App. 3d 1, 539 N.E.2d 747 (4th Dist. 1989), *app'l den.* 127 Ill.2d 642 (1989).

While reading and interpreting the exemptions contained in Section 7, note that Section 1 specifically indicates that the Act is not intended to violate individual privacy nor further any commercial enterprise. However, in Lieber v. Board of Southern Illinois, 176 Ill. 2d 401, 680 N.E.2d 374 (1997), the Illinois Supreme Court held that Section 1's prohibition against furthering any commercial enterprise is "simply a declaration of policy or preamble" and, as such, "it is not part of the Act itself...and has no substantive legal force." Furthermore, any municipality claiming an exemption under Section 7 has the burden of proving the information sought to be protected falls within one of the exemptions. Wayne County Press, Inc. v. Isle, 263 Ill. App. 3d 511, 636 N.E.2d 65 (5th Dist. 1994); Local 1274, Ill. Federation of Teachers v. Niles Township High Schools, 287 Ill. App. 3d 187, 678 N.E.2d 9 (1st Dist. 1997).

Section 7 contains a rather long list of exemptions (as well as exceptions to the exemptions) and it is not the intent of this chapter to cover or merely repeat each and every exemption and exception thereto. However, we would like to highlight some of the more important exemptions and exceptions, including:

1. Information specifically prohibited from disclosure by federal or State law, or rules and regulations adopted under federal or State law (e.g., certain records relating to juvenile court proceedings).
2. Information that, if disclosed, would constitute a "clearly unwarranted invasion of personal privacy," unless disclosure is consented to in writing by the individual whose privacy is being invaded. Section 7 further states that disclosure of infor-

mation that "bears on the public duties" of public employees and officials shall not be considered an invasion of personal privacy. This Section clearly is in need of judicial interpretation. For example, when is such an invasion "clearly unwarranted"? Also, in light of the intent of the Act expressed in Section 1, if the disclosure would not "clearly" be an invasion of privacy, would the Act require disclosure? In addition, when would an invasion of personal privacy be "warranted"? Moreover, if information is released and (in hindsight) it is determined that there was an invasion of privacy, will there be monetary liability for disclosure? The Sixth Circuit has answered this question in the affirmative. Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998). Most, if not all, lawyers, both municipal and others, would find it extremely difficult, if not impossible, to accurately determine (or even judge after the fact) when an act constitutes an invasion of privacy, let alone a clearly unwarranted one. For example, in U.S. v. Martin, 38 F.Supp. 2d 698 (C.D. Ill. 1999), the court held that the unindicted co-conspirators' privacy interests outweighed the public's right of access to their identities. Since the Act requires the local municipality's employees and officials to initially make such decisions, we can only hope for enlightened judicial interpretation.

Judicial interpretation also is sorely needed as to what information may "bear on" the public duties of municipal officials and employees. If the Act is to be construed liberally as it indicates, might not almost all information regarding such officials and employees have some "bearing on" their public duties and thus be required to be disclosed, despite the Act's avowed goal to avoid invasions of privacy? Disclosure of a probationary police officer's polygraph and psychological testing evaluations did not violate FOIA. In Roehrborn v. Lambert, 277 Ill. App. 3d 181, 660 N.E.2d 180 (1st Dist. 1995), *app'l den.* 166 Ill. 2d 554 (1996), the court said,

It is clear that the Act is intended to ensure access to information as well as to provide for remedies in cases where an individual is unreasonably denied access to information. There are no explicit remedies for disclosing personal information. The purpose of the Act is to ensure disclosure of information, not to protect information from disclosure. Plaintiff was a probationary officer who wanted to become a police officer. A law enforcement officer is undoubtedly a public employee and, thus, disclosure of his test results would not be considered an invasion of personal privacy

* * *

Plaintiff cannot now claim that defendant violated the Act because this "personal" information was exempted from the Act. The exemptions cannot be read to prohibit dissemination of such information, but rather are simply cases where disclosure is not required. Accordingly, we find that the disclosure of plaintiff's test results did not fall in the exempted category or violate the Act.

A separate exemption does, however, cover personnel files and "personal information" (what does that entail?) maintained with respect to such individual officers and employees, and applicants for such positions. To avoid unwarranted disclosure, the best practice, therefore, would be to keep any borderline information in the official personnel files. Race, religious affiliation and marital status of a public employee would be protected from disclosure. However, some matters in personnel files and

records may be discoverable. CBS, Inc. v. Partee, 198 Ill. App. 3d 936, 556 N.E.2d 648 (1st Dist. 1990), *app'l den.* 133 Ill.2d 553 (1990).

3. Files and personal information regarding individuals receiving certain care or services from the municipality. Local 1274, Ill. Federation of Teachers v. Niles Township High School District 219, 287 Ill. App. 3d 187, 678 N.E.2d 9 (1st Dist. 1997); Gibson v. Ill. State Board of Education, 289 Ill. App. 3d 12, 683 N.E.2d 894 (1st Dist. 1997).

4. Personnel files and personal information as to employees, appointees or elected officials or applicants for those positions. A Union's request to the Teachers Retirement System for the names, addresses, home telephone numbers and number of years in the system of all of system's enrollees was exempt from disclosure. Healey v. Teachers Retirement System, 200 Ill. App. 3d 240, 558 N.E.2d 766 (4th Dist. 1990), *app'l den.*, 135 Ill.2d 556 (1990). *See also*, Local 1274, Gibson and Lieber, *supra*, which are also discussed in XI below.

5. Files and personal information regarding applicants, registrants or licensees receiving or requesting professional or occupational registration or licenses.

6. Information revealing the identities of persons filing complaints with or providing information to administrative, investigative, law enforcement and penal agencies; provided, however, traffic accident reports, rescue reports, and identification of witnesses to traffic accidents **may** be released, except in a case where there is an ongoing criminal investigation, without it constituting a clearly unwarranted invasion of privacy. *See* Staske, *supra*, wherein the appellate court held that disclosure of witness information and statements contained in a traffic accident report were exempt from disclosure. This case led to the amendment of Section 7(b)(2) which now allows, but does not mandate, the disclosure of such information without constituting a clearly unwarranted per se invasion of personal privacy. For support of the fact that the amendment to Section 7(b)(2) is permissive and not mandatory, see the Senate debates on Senate Bill 142 (PA 88-444) and the statements by the Bill's sponsor, Senator Maitland.

7. Investigatory records compiled for local administrative law enforcement purposes or for internal matters, but only under certain specified circumstances. However, such records must be disclosed unless certain specifically listed criteria are met. *See*, Copley Press v. Springfield, 266 Ill. App. 3d 421, 639 N.E.2d 913 (4th Dist. 1994), *rev. den.* 158 Ill. 2d 550 (1995). As to the purpose of the law enforcement privilege under FOIA (Sec. 7(l)(c)(i) and its application to city housing authority's records relating to investigation of authority police officer, see Doe v. Hudgins, 175 F.R.D. 511 (N.D. Ill 1997) State Fire Marshall's logs that pertain to removal of underground storage tanks are not generally exempt from disclosure, but may be in specific circumstances. Ill. Att'y. Gen. Op. No. 96-032 (1996).

8. Criminal history records (as defined in Section 7) except arrest logs, police blotters, the name and charges against an individual, court records which are public records, records which are otherwise available under state or local law, and except where the requesting party is the individual identified in the records (with certain exceptions under Section 7(c)(vi) of the Act.)

9. Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion thereof shall not be exempt when the record is publicly cited and identified by the head of the public body. In People ex rel. Birkett v. Chicago, 184 Ill. 2d 521, 705 N.E.2d 48 (1998), the Illinois Supreme Court said:

The existence of a FOIA exemption for predecisional materials [Section 7(l)(c)(i)] is evidence of a public policy favoring the confidentiality of such communications. However, it is not dispositive of whether the legislature sought to create an analogous evidentiary privilege.

* * *

... courts considering this question under the federal FOIA have held it unsound to equate FOIA exemptions to similar discovery privileges.

See also, Doe v. Hudgins, 175 F.R.D. 511 (N.D. Ill. 1997) where the court said, "The FOIA does not create an evidentiary privilege because the statute concerns disclosure to the public generally, not disclosure to a specific litigant in response to discovery in litigation." *See*, Ill. Att'y. Gen. Op. No. 96-032 (1996).

10. Trade secrets or commercial or financial information obtained from a person or business which are "privileged, proprietary or confidential" (how will municipal employees and officials make such a determination?), or where disclosure of trade secrets or information obtained from a person or business under circumstances where it would "cause competitive harm" (again another potentially difficult decision for public employees and officials to make).

11. Proposals and bids for any contract, grant or agreement, until an award or final selection is made. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made.

12. Test questions, scoring keys and other examination data (e.g., for applicants for the police or fire departments).

13. Certain architects' plans and engineers' technical submissions for projects not built in whole or in part with public funds, to the extent that disclosure would compromise security.

14. Minutes of meetings allowed to be kept confidential under the Illinois Open Meetings Act.

15. Certain limited communications with the attorney for the municipality (seek his or her advice as to what may or may not be included), as well as materials prepared for a criminal, civil or administrative proceeding upon the request of the attorney and also materials prepared for an internal audit.

16. Certain administrative or technical information associated with automated data processing. (*See*, Subsection (p) of Section 7.)

17. Documents or materials relating to collective bargaining matters but not including the final contract or agreement which is entered into.

18. Certain documents pertaining to financing and marketing transactions. What constitutes "financing and marketing" transactions will have to be judicially or legislatively clarified. Also exempt are the records of ownership, registration, transfer and exchange of municipal debt obligations, and of persons to whom payment with respect to such obligations is made.

19. Records regarding real estate (purchases and sales) negotiations up until the time the negotiations are concluded. (*See*, Section 7(s) regarding eminent domain matters.) *See*, Osran v. Bus, 226 Ill. App. 3d 704, 589 N.E. 2d 1027 (2d Dist. 1992).

20. Certain information relating to an intergovernmental risk management association, self-insurance pool or jointly self-administered health and accident cooperative or pool.

21. Information related solely to the internal personnel rules and practices of a public body.

22. Manuals or instructions to staff which relate to establishment or collection of liability for any state tax or which relate to investigations by a public body to determine violation of any criminal law.

23. Insurance or self insurance (including any intergovernmental risk management association or self insurance pool) claims, loss or risk management information, records, data, advice or communications.

IX. DENIALS OF REQUESTS FOR RECORDS

In the event that requested disclosure of public records is denied, each public body or head of a public body must notify by letter the person making the request of:

1. the decision to deny;
2. the reasons for the denial;
3. the names and titles or positions of "each person responsible for the denial" (is this more inclusive than merely the person or persons actually who makes the decision to deny?); and
4. of the person's right to appeal to the "head of the public body" (either the president, mayor or manager) or if the decision was made by such head of the public body, then of the person's right to judicial review under Section 11 of the Act.

If the request is denied on the basis of one of the exemptions contained in Section 7 of the Act, the notice of denial must specify the exemption.

Copies of all notices of denials must be retained, indexed and made available for public inspection. The indexing must be as to the type of exemption asserted (i.e.,

as listed in Section 7) and to the extent feasible according to the types of records requested, (e.g., criminal records, preliminary investigative reports, etc.). By maintaining office files in each city department containing copies of denials, city complies with statute. Duncan Publishing, Inc. v. City of Chicago, 304 Ill. App. 3d 778, 709 N.E.2d 1281 (1st Dist. 1999), *app'l den.* 185 Ill. 2d 622 (1999).

If the decision to deny is made by someone other than the head of the public body, it may be appealed to such head by written notice to the head. No time frame is given for such an appeal. The head of the public body must, upon receipt of such an appeal, "promptly" review the records, determine whether the decision to deny was correct, and notify the person making the appeal of his decision "within 7 working days after the notice of appeal."

A person will be deemed to have been denied access to the records and also to have exhausted all administrative remedies if the head of the public body upholds the denial or fails to act within the 7-day time limit. In such circumstances, the individual will be entitled to judicial review by a complaint for injunction or declaratory judgment.

X. ENFORCEMENT OF THE ACT

The Act provides for civil remedies for enforcement of the Act. As noted in Section IX., any person denied access may file a suit for injunctive or declaratory relief. No time limit is provided within which such a suit may be brought, and all municipal officials should seek the support of their local legislative representatives to obtain a statutory amendment to provide a reasonable period of time within which the suit must be brought.

If the court determines the Act was violated, it may enjoin withholding of the records and order disclosure, and the burden is on the public body to establish that its refusal was legitimate.

In the event of non-compliance with its order, the court may enforce the order through its contempt-of-court powers.

The court also has the power to award reasonable attorneys fees to the person requesting disclosure if such person "substantially prevails" in any such lawsuit, but only if the court finds that the records were "of clearly significant interest to the general public" and that the public body lacked any rational legal basis for withholding the record. No corresponding right for a municipality to recover attorneys fees is included under the Act. The refusal by a public body to furnish a lost record is not a violation of the Act and such refusal does not entitle the plaintiff to an award of attorneys fees. Workmann v. Illinois State Board of Education, 229 Ill. App. 3d 459, 593 N.E.2d 141 (2d Dist. 1992). Neither a pro se attorney nor a pro se individual who "substantially prevails" is entitled to collect attorney fees for the simple reason that neither incurred any such fees. Hamer v. Lentz, 132 Ill. 2d 49, 547 N.E.2d 191 (1989); Brazas v. Ramsey, 291 Ill. App. 3d 104, 682 N.E.2d 476 (2d Dist. 1997), *app'l den.* 174 Ill. 2d 555 (1997). In addition, if action was not brought under FOIA, there is no basis for FOIA fees. Ebert v. Thompson, 282 Ill. App. 3d 385, 668 N.E.2d 184 (1st Dist. 1996), *app'l den.* 168 Ill. 2d 587 (1996). However, although a plaintiff's

claim for production of records is moot due to production of the records, plaintiff's motion for fees, which is "ancillary to the underlying action," is not moot. Duncan Publishing, Inc. v. City of Chicago, 304 Ill. App. 3d 778, 709 N.E.2d 1281 (1st Dist. 1999), *app'l den.* 185 Ill. 2d 622 (1999). However, a plaintiff will not be eligible for an award of fees if the production of records was independent of the lawsuit or if it was due to routine administrative processing. Id.

XI. COURT INTERPRETATIONS OF FOIA ACTS

The Illinois Act is modeled after the Federal Freedom of Information Act (FFOIA), 5 U.S.C., Section 552 (1976), and shares several key provisions with the Federal Act, including exemptions from disclosure relating to personal privacy, investigatory records and trade secrets. The legislative history of the Illinois Act clearly indicates that the Act's sponsors intended that interpretations of the FFOIA by federal courts will serve as a guide to understanding the provisions of the Illinois Act. Also, other states have adopted acts similar to the Illinois Act. Thus, by examining judicial treatment and interpretation of similar provisions in the Federal Act and other state acts, it is possible to gain some insight into the impact the Illinois Act may have on public officials and governmental units within the state.

In one recent Appellate Court case the court held that a settlement agreement reached in a contract suit was not exempt from disclosure despite the fact that one of the parties requested and was granted a "gag order" by the Court. Carbondale Convention Center, Inc. v. City of Carbondale, 245 Ill. App. 3d 474, 614 N.E.2d 539 (5th Dist. 1993). This decision is in accord with decisions under similar laws in Alaska, California, Colorado, Maine, Ohio, Pennsylvania and Washington. Also, the Illinois Appellate Court has held that a liquor license is an "occupational license" within the meaning of Section 7(b)(iii) of the Act and, therefore, information relating to a city's liquor license application is exempt from disclosure under the Act. Copley Press Inc. v. City of Springfield, 143 Ill. App. 3d 370, 493 N.E.2d 127 (4th Dist. 1986), *app'l den.* 112 Ill. 2d 571 (1986). In addition, an Illinois Appellate Court has held that the Act is constitutional and does not violate the constitutional guarantees of freedom of the press. City of Monmouth v. Galesburg Printing, 144 Ill. App. 3d 224, 494 N.E.2d 896 (3d Dist. 1986).

In interpreting such acts, generally courts have broadly construed in favor of disclosure provisions in the FFOIA and similar state acts which require disclosure of information to the public. *See*, U.S. Dept. of Justice v. Tax Analysts, 845 F.2d 1060 (D.C. Cir. 1988), *aff'd* 492 U.S. 136 (1989); N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 21 (1978); Alirez v. N.L.R.B., 676 F. 2d 423 (10th Cir. 1982); Cox v. U.S. Dept. of Justice, 576 F. 2d 1302 (8th Cir. 1978); San Gabriel Tribune v. Superior Court of State of Calif., 143 Cal. App. 3d 762 (1983); while giving a narrow reading to the exemptions from disclosure contained in the Act and resolving all doubts in favor of disclosure. *See*, Founding Church of Scientology of Washington, D.C., Inc. v. Bell, 603 F. 2d 945 (D.C. Cir. 1979); Charlotte Mecklenburg Hospital Authority v. Perry, 571 F. 2d 195 (4th Cir. 1978); Griffith Laboratories U.S.A. v. Metropolitan Sanitary District, 168 Ill. App. 3d 341, 522 N.E.2d 744 (1st Dist. 1988), *app'l den.* 122 Ill.2d 574 (1988); Fink v. Lefkowitz, 47 N.Y. 2d 567 (1979). When hearing cases arising under the FFOIA, courts have also imposed strict procedural requirements on agencies seeking to avoid disclosure. These measures include placing the burden of

proof on the agency opposing disclosure, Cunoco, Inc. v. U.S. Dept. of Justice, 687 F. 2d 724 (3d Cir. 1982); and requiring the agency opposing disclosure to provide "particularized and specific justification for exempting information from disclosure" with all objections indexed to the material sought to be exempted from disclosure. Cuneo v. Schlesinger, 484 F. 2d 1086, 1090 (D.C. Cir. 1973); *See also*, Vaughn v. Rosen, 484 F. 2d 820 (D.C. Cir. 1973), *cert. den.* 415 U.S. 977 (1974). In imposing strict procedural requirements on agencies opposing disclosure, the Court in Cuneo recognized the difficulty faced by plaintiffs seeking the release of public records arising from the fact that they are without access to the material sought and unable to oppose the factual characterization of the material by the agency opposing disclosure. Vaughn, 484 F. 2d at 1091.

The U.S. Supreme Court recently attempted to clarify the scope of the Federal Act by defining the term "agency records." U.S. Dept. of Justice v. Tax Analysts, 492 U.S. 136 (1989). The Court stated that two requirements must be satisfied for requested materials to qualify as "agency records." First, an agency must "either create or obtain" the requested materials as a prerequisite to its becoming an "agency record" within the meaning of the FFOIA. The Court pointed out that in performing their official duties, agencies routinely avail themselves of studies, trade journal reports, and other materials produced outside the agencies both by private and governmental organizations. It was determined by the Court therefore that to restrict the term "agency records" to materials generated internally would frustrate Congress' desire to put within public reach the information available to an agency in its decision-making processes. The Court cited its earlier decision in Forsham stating, "[t]he legislative history of the FOIA abounds with...references to records acquired by an agency." 445 U.S. 169, 184 (1980) (emphasis added). Furthermore, an agency's "pre-submission review" regulation that provided that information submitted to it in support of an application was not considered part of the agency's files pending a determination by it as to whether any such information would be exempt from disclosure under the FFOIA and that, if the agency determined that any such information was discoverable, the applicant was given the option of withdrawing the information, violated the FFOIA. Teich v. Food and Drug Administration, 751 F.Supp 243 (D.D.C.1990).

The second requirement the Court delineated was that the agency must be in control of the requested materials at the time the FFOIA request is made. By control we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties. To this effect, the court in Illinois Institute for Continuing Legal Education v. United States Dept. of Labor, 545 F. Supp. 1229 (N.D. Ill. 1982) held that a transition staff was not an agency within the provisions of the FFOIA and records created by a transition staff are not subject to disclosure. The Court explained that an entity qualifies as an agency only if it has authority to perform specific government functions. *Id.* at 1231. Similarly, in Forsham v. Califano, 587 F. 2d 1128 (D.C. Cir. 1978), *aff'd* 445 U.S. 169 (1980), the Court held that persons or institutions receiving grants from a branch of the federal government do not automatically become agencies for the purposes of the FFOIA. In making this determination, the Court looked to whether the contractors or grantees were subject to "day to day control" by a federal agency and whether they "became the functional equivalent of the agency, making its decisions for it." Forsham, 587 F. 2d at 1136.

The courts in Illinois Institute for Continuing Legal Education and Forsham also pointed out further limitations on the application of the FFOIA. In Illinois Institute, the Court held that mere possession of a record by an agency official does not cause the record to become an agency record subject to disclosure. Rather, there must be some nexus between the record and the agency's work in order for the record to become an "agency record." Illinois Institute, 545 F. Supp. at 1234.¹ *See also*, Att'y. Gen. v. Lynn, 377 Mass. 151, 385 N.E. 2d 505 (1979). Note, however, that the Illinois definition of public records is very liberal and is not limited to records required to be kept by law, thus the requirement of disclosure may be broader in Illinois. *See*, Curran v. Bd. of Park Comrs., 22 Ohio Misc. 197, 259 N.E. 2d 757 (1970). The Court in Forsham further limited the scope of the FFOIA by holding that agencies are not required to exercise contractually granted rights of access to records of entities receiving public funds so as to make the information available to the public. Forsham, 587 F. 2d at 1136. Thus, agency officials are not under an affirmative duty to obtain material to which they possess a right of access merely to make such information available to the public, although they cannot violate a duty to obtain the record merely to frustrate disclosure of the record to the Public. *Id.*

Both the FFOIA and the Illinois act contain an exemption from disclosure for information which would constitute a "clearly unwarranted invasion of personal privacy." Section 7(b) of the Act; 5 U.S.C., Section 552 (b)(6). This provision has been interpreted by Federal courts as requiring a balancing of the public interest served by disclosure against the potential invasion of personal privacy. In Federal Labor Relations Authority v. Department of Treasury, 884 F. 2d 1446 (D.C. Cir. 1989), *cert. den.* 493 U.S. 1055 (1990), the court held that the disclosure of public employees' names and home addresses violates the Privacy Act, stating that federal employees have privacy interests in their names and home addresses that must be protected and that the relevant public interest in disclosure, though not nothing, is outweighed. However, in Washington Post v. U.S. Department of Agriculture, 943 F.Supp. 31 (D.D.C. 1996), the Court ordered release of the names and addresses of all recipients of farm subsidies received by cotton farmers but indicated that the "defining characteristic" of the list was that it contained business addresses but went on to indicate that it was their opinion that there was no per se prohibition of release of home addresses. However, because Illinois does not have a similar "Privacy Act," the names of public employees would be discoverable, but we believe that their addresses are exempt from disclosure. Biblis v. Oregon Natural Desert Association, 519 U.S. 355 (1997); U.S. Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994); Department of Air Force v. Rose, 425 U.S. 352, 372 (1926); Wine Hobby U.S.A., Inc. v. United States Internal Revenue Service, 502 F. 2d 133 (3d Cir. 1974). State courts have used the same balancing tests in interpreting similar state acts. Illinois originally adopted the same balancing test for the Illinois Act but there was a split in the appellate courts. Margolis v. Director, Illinois Department of Revenue, 180 Ill. App. 3d 1084, 536 N.E.2d 827 (1st Dist. 1989), *app'l den.* 126 Ill. 2d 560 (1989), holding that a request for the names and addresses of all applicants for retail licenses is exempt where the disclosure of such information would constitute a clearly unwarranted invasion of privacy, but remanding the case based upon the trial

¹ It is unclear as to whether this limitation would be applicable under the Illinois Act, due to wording in the Act which states that all material "possessed" by an agency is a public record. Section 2(c) of the Act.

court's failure to apply the balancing test. *See also*, Blumenfeld Ltd. v. Department of Professional Regulation, 263 Ill. App. 3d 981, 636 N.E.2d 594 (1st Dist. 1993); City of Monmouth v. Galesburg Printing & Publishing Co., 144 Ill. App. 3d 224, 494 N.E.2d 896 (3d Dist. 1986); but contrast Healy v. Teachers Retirement System 200 Ill. App. 3d 240, 558 N.E.2d 766 (4th Dist. 1990); Copley Press, Inc. v. City of Springfield, 143 Ill. App. 3d 370, 493 N.E.2d 127 (4th Dist. 1986). This dichotomy was resolved by the Illinois Supreme Court in Lieber v. Board of Trustees of Southern Illinois University, 176 Ill. 2d 401, 680 N.E.2d 374 (1997) when the Court adopted the *per se* rule. The Court stated as follows:

"Most of the exemptions set forth in section 7 of the Act (5 ILCS 140/7 (West 1994)) are specific, identifying the particular public records that are not subject to disclosure. Where the public body claims that a requested document falls within one of these specifically enumerated categories and is able to prove that claim, no further inquiry by the court is necessary. The documents "shall be exempt from inspection and copying". 5 ILCS 140/7(1) (West 1994). This *per se* rule applies to the specific exemptions set forth in the subsections of section 7(1)(b) of the Act (5 ILCS 140/7(1)(b) (West 1994)), which pertains to "[i]nformation that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." just as it does to the other exemptions in section 7. *See*, Healey v. Teachers Retirement System, 200 Ill. App. 3d 240, 243 (4th Dist. 1990).

The appellate court here took a different view, holding that even if information falls within a specific exemption, the court must still make an independent determination as to whether disclosure would amount to "a clearly unwarranted invasion of personal privacy," taking into account (1) the plaintiff's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information. 279 Ill. App. 3d at 561. Although this approach is not unprecedented (*see, e.g.*, Margolis v. Director of the Department of Revenue, 180 Ill. App. 3d 1084, 1089 (1st Dist. 1989); City of Monmouth v. Galesburg Printing & Publishing Co., 144 Ill. App. 3d 224, 226 (3d Dist. 1986)), we agree with the court in Healey v. Teachers Retirement System, 200 Ill. App. 3d at 244-45, that it cannot be squared with the clear and unambiguous language of the statute.

This is not to say that consideration of the various factors identified by the appellate court is never appropriate in determining whether information is exempt under section 7(1)(b) of the Act. That section does not purport to be an exclusive list of information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. To the contrary, the section expressly provides that it is not limited to the items enumerated. Where a public body asserts an exemption for information that is not specifically included on the list and therefore not exempt *per se*, the court must evaluate the particular information on a case-by-case basis.

In the matter before us, the University claimed that the information requested by Lieber in this case did fall within one of section 7(1)(b)'s specific exemptions. The appellate court was therefore wrong to make an individualized

assessment of whether disclosure of the information would invade anyone's personal privacy. If the information consisted of personal information maintained with respect to students or other individuals receiving educational services and was therefore covered by the express terms of section 7(1)(b)(i), it would, by definition, constitute "[i]nformation that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy" (5 ILCS 140/7(1)(b) (West 1994)) and be automatically exempt from disclosure."

The Illinois Supreme Court held that the owner of an apartment building approved by the University for freshmen students was entitled to a list with names and home addresses of all individuals who had contacted the University about freshmen housing. It was clear that he intended to solicit these individuals to rent from him (in competition with the University which had its own dormitories). In previous years, the University had supplied Lieber and other owners of approved off-campus housing with information about incoming freshmen and likewise routinely gave mailing labels containing names and addresses of incoming students to the local newspaper and various other groups and individuals. The Court relied on the fact that the incoming freshmen were not yet students (and also had not yet availed themselves of an educational service by signing up for a dorm room) and, therefore, did not fall under the exception relating to students receiving educational services from the public body, and also indicated that voluntary disclosure in the past "can preclude later claims that records are exempt from release to someone else."

In contrast to Lieber, in Local 1274, Ill. Federation of Teachers v. Niles Township High School District 219, 287 Ill. App. 3d 187, 678 N.E.2d 9 (1st Dist. 1997), the teacher's union requested the disclosure of the names, addresses and telephone numbers of all of the District's enrolled students and their parents in order to, in the words of the union, conduct mail surveys and communicate with the school community in the preparation of collective bargaining proposals (the union indicated, in its complaint, that the information could be "masked or scrambled as found necessary by the court," in order to protect any confidentiality against disclosure). The Court held that the names, addresses and telephone numbers clearly are "personal information" and are maintained with respect to students receiving educational services from the public body and are exempt either under the per se rule or under any balancing test (the Supreme Court's decision in Lieber adopting the per se rule had not yet been rendered).

Also, in Gibson v. Illinois State Board of Education, 289 Ill. App. 3d 12, 683 N.E.2d 894 (1st Dist. 1997), the 1st District Appellate Court likewise found that the names and addresses of individuals who had been awarded "General Assembly scholarships" by their State legislators were exempt from disclosure.

In Blumenfeld, Ltd. v. Department of Professional Regulation, 263 Ill. App. 3d 981, 636 N.E.2d 594 (1st Dist. 1993), a law firm, pursuant to FOIA, sought disclosure of Department of Professional Regulation notices of informal and disciplinary conferences. The Illinois Appellate Court found such information to be exempt, holding that disclosure would constitute a clearly unwarranted invasion of personal privacy. Meanwhile, in Schessler v. Department of Conservation, 256 Ill. App. 3d 198, 627 N.E.2d 1250 (4th Dist. 1994), the court found for the plaintiff. The plaintiff had requested copies of live pigeon shoot permit applications that were issued by the

Illinois Department of Conservation after 1990. The court held that the Department failed to demonstrate that disclosure of information concerning such applications would result in a "clearly unwarranted invasion of personal privacy" under FOIA. Courts have found that records containing a detailed synopsis of an individual's career, family relationship and financial status represent the type of information that the exemption was intended to protect, Columbia Packing Co., Inc. v. U.S. Dept. of Agriculture, 417 F. Supp. 651 (D. Mass. 1976), *aff'd* 563 F. 2d 495 (1st Cir. 1977). See also, Bahlman v. Brier, 462 N.Y.S. 2d 381 (1983); Blumenfeld, Ltd. v. Department of Professional Regulation, 263 Ill. App. 3d 981, 636 N.E.2d 594 (1st Dist. 1993), that union authorization cards are exempt from disclosure (Maderia Nursing Center, Inc. v. N.L.R.B., 615 F. 2d 728 (6th Cir. 1980)), and that disclosure of information contained on customs forms listing the names and addresses, as well as other information, passengers flying in a specific air market would constitute an unwarranted invasion of personal privacy. Ditlow v. Schultz, 379 F. Supp. 326 (D.D.C. 1974). In perhaps the most interesting case on the subject, the court in New York Times v. National Aeronautics and Space Administration, 920 F. 2d 1002 (D.C. Cir.1990), held that the tape recording of voice communications among the ill-fated crew of the space shuttle Challenger and between the crew and ground control was exempt from disclosure and that a transcript of the tape was sufficient under the FFOIA. The court stated that while the tape words do not contain information about the personal lives of the astronauts, disclosure of the tape would reveal the sound and inflection of the crew's voices during the last seconds of their lives and, therefore, the tape contained personal information. The court went on to say that a textual report accompanied by a picture provides more information than the text of the report alone and that in a particular case, the picture might be exempt from disclosure while the text is not. This case may have application to the release of certain 911 tapes.

The Illinois Supreme Court considered a FOIA request from the Family Life League seeking a list of the physicians, hospitals and other service providers who had furnished abortion services under the Illinois Medicaid program. The Court rejected the Department's claim that release of such information would constitute an unwarranted invasion of the providers' and recipients' rights to privacy based upon the Department's speculation that such release would result in improper harassment and reluctance of women to continue using such services. However, the Court did find that because a special computer program had to be developed by the Department in order to segregate confidential information out of these records, the Department would be allowed reasonable time to perform this task and that plaintiffs would have to pay the reasonable expenses of the preparation of these records. Family Life League v. Illinois Department of Public Aid, 112 Ill. 2d 449, 493 N.E.2d 1054 (1986). See also, Hamer v. Lentz, 132 Ill.2d 49, 547 N.E.2d 191 (1989) (information relating to state pension payments by former legislators subject to disclosure even though records contained exempt material where information could be separated and agency could charge fees reasonably calculated to reimburse agency for actual costs of producing records.); Staske v. City of Champaign, 183 Ill. App. 3d 1, 539 N.E. 2d 747 (4th Dist. 1989), *app'l den.* 127 Ill. 2d 642 (1989) (names and addresses of traffic accident witnesses exempted under Section 207(b)(v) of Illinois Act); Painting Industry of Hawaii Market Recovery Fund v. United States Department of the Air Force, 26 F.3d 1479 (9th Cir. 1994). Several courts have also held that the "personal privacy" exemption is not applicable to corporations. Robertson v. Dept. of Defense, 402 F. Supp. 1342 (D.D.C. 1975); Ferguson v. Kelly, 455 F. Supp. 324 (N.D. Ill.

1978). *See also*, Goodstein v. Shaw, 463 N.Y.S. 2d 162 (1983); News-Press Publishing Co., Inc. v. Good, 388 So. 2d 276 (1980); Warden v. Bennett, 340 So. 2d 977 (1976); Williams v. I.R.S., 345 F. Supp. 591 (D. Del. 1972), *aff'd* 479 F. 2d 317 (3d Cir. 1973), *cert. den.* 414 U.S. 1024 (1973); and also the indication in the Illinois Act that it was not intended to be used "for the purpose of furthering a commercial enterprise." *See also*, Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), wherein the U.S. Supreme Court stated that "the identity of the requesting party has no bearing on the merits of his or her FOIA request." In Illinois, this case would not be of precedential value if the request was made by a commercial enterprise for business reasons.

A third exemption from disclosure found in both the Federal and Illinois Acts relates to trade secrets. For information to fall within this exemption, it must be shown that it is: (a) commercial or financial; (b) obtained from a person; and (c) privileged or confidential. National Park and Conservation Association v. Melton, 498 F. 2d 765 (D.C. Cir. 1974); Consumers Union of U.S. v. Veterans Administration, 301 F. Supp. 796 (S.D. N.Y. 1969), *app'l dismissed* 436 F.2d 1363 (2d Cir. 1971). In Doctors Hospital of Sarasota, Inc. v. Califano, 455 F. Supp. 476 (M.D. Fla. 1978), the Court held that the factors to be considered by an agency in exercising its discretion in applying this exemption are whether disclosure would aid the agency in performing its functions, whether harm to producers and the public would result from release of the information, and whether alternatives to full disclosure could serve the public equally well. The state courts also have interpreted similar provisions. *See*, Belth v. Insurance Dept. of New York, 406 N.Y.S. 2d 649 (1977); Uribe v. Howie, 19 Cal. App. 3d 194, 96 Cal. Rptr. 493 (1971).

Another exemption appearing in the Illinois Act as well as the Federal Act and similar state acts is the exemption for "preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated..." This exception is intended to encourage frank and open dialogue on matters of governmental concern in order to make an informed policy decision, which decision, of course, would be available for public review; N.L.R.B. v. Sears, 421 U.S. 132 (1975); Mink v. EPA, 410 U.S. 73 (1973); Hoffman v. Illinois Department of Corrections, 158 Ill. App. 3d 473, 511 N.E.2d 759 (1st Dist. 1987) (burden of proof on Department to establish material exempt from disclosure as preliminary draft regarding drugs to be used for lethal injections under Illinois death penalty statute); Carrigan v. Harkrader, 146 Ill. App. 3d 535, 496 N.E.2d 1213 (3d Dist. 1986), *app'l den.* 113 Ill.2d 558 (1986) (county sheriff's opinionated letter to City regarding plaintiff's liquor license application exempt); Kheel v. Ravitch, 462 N.Y.S. 2d 182 (1983), *aff'd* 62 N.Y. 2d 1 (1984), (staff analysis of an arbitrator exempt); Johnson Newspaper Corp. v. Stainkamp, 463 N.Y.S. 2d 122 (1983), *aff'd as modified* 61 N.Y. 2d 958 (1984) (arrest records and traffic tickets not exempt); Ganhett Co. Inc. v. James, 447 N.Y.S. 2d 781 (1982) (police "use of force" forms exempt); Hafermehl v. Univ. of Washington, 29 Wash. App. 366, 69 P. 1099 (1981) (promotion recommendations exempt); Sea Crest Const. Corp. v. Stubing, 442 N.Y.S. 2d 130 (1981) (correspondence with consultants exempt).

Finally, conflicts have arisen that have required judicial interpretation concerning the exemption from disclosure where positively prohibited by another State or Federal law. *See*, e.g., Bowie v. Evanston Community Consolidated School District

No. 65, 128 Ill. 2d 373, 538 N.E.2d 557 (1989) (prohibition of disclosure of certain student records under Illinois School Code did not prohibit disclosure of masked and scrambled student records where individual identifying information was deleted); Pecora Oil Co. v. Johnson, 156 Ill. App. 3d 521, 509 N.E.2d 495 (2d Dist. 1987), *app'l den.* 116 Ill.2d 562 (1987) (certain tax records requested by plaintiff of Illinois Department of Revenue not exempt under provisions of Retailers' Occupation Tax Act).

The State and Federal Acts exempt from disclosure investigatory records compiled for administrative law enforcement purposes where disclosure would interfere with pending or reasonable contemplated enforcement proceedings. *See e.g.*, Moorfield v. U.S. Secret Service, 611 F. 2d 1021 (5th Cir. 1980), *app'l den.* 449 U.S. 909 (1980); Griffith Laboratories U.S.A. v. Metropolitan Sanitary District, 168 Ill. App. 3d 341, 522 N.E.2d 744 (1st Dist. 1988), *app'l den.* 122 Ill. 2d 574 (1988). However, a request seeking work attendance and sick leave records for a public agency's assistant bureau chief in order to substantiate a "tip" that the official had been taking unaccrued sick leave and improperly using sick leave time to take paid vacations was proper and the records were not exempt under the FFOIA. Dobronski v. Federal Communications Comm'n, 17 F.3d 275 (9th Cir. 1994).

XII. CONCLUSION

As was the case with the Open Meetings Act, public officials must once again acknowledge the existence of the Freedom of Information Act, carry out their obligations under it, and champion its laudable public policy statement while, at the same time, seeking amendments to its many overly burdensome, unfair and unclear provisions.

All local government officials must join together with the Illinois Municipal League and fight for the rights of public officials without diluting the public's right to know. Specifically, you should continually block any attempt to re-insert unfair criminal penalties in a "vague" Act.

One final comment also is in order. As is unfortunately the trend, and notwithstanding a contrary indication by the Department of Commerce and Community Affairs, the General Assembly declared that the Act was exempt from the requirements of the State Mandates Act. The legality of the decision to do so is unclear and may be challenged. In addition to possible legal proceedings, local government officials should do everything possible to stop this trend in the General Assembly to emasculate the provisions of the State Mandates Act.

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I. OPEN MEETINGS ACT

**NOTICE OF SPECIAL MEETING AND AGENDA
- LEGAL NOTICE -**

Notice is hereby given that the President and Board of Trustees of the Village of _____ will hold a special meeting at the hour of 8:00 p.m. at the Village offices, _____, Illinois for the purpose of considering the acquisition of land (to be discussed in a closed portion of the meeting) and the purchase of a new fire truck. Attached hereto is an agenda for such meeting.

VILLAGE OF _____

By: _____
Village Clerk

**AGENDA
SPECIAL MEETING**

PRESIDENT AND BOARD OF TRUSTEES
OF THE VILLAGE OF _____
(DATE)

- (1) Call to order.
- (2) Roll call.
- (3) Discussion of acquisition of real estate (to be considered in a closed meeting).
- (4) Action on acquisition of real estate.
- (5) Purchase of equipment.
- (6) Adjournment.

II. FREEDOM OF INFORMATION ACT

II-A.

**EMPLOYEE MEMORANDUM REGARDING ORAL
REQUEST FOR RECORDS**

On the _____ day of _____, 20__ , at the hour of _____
____.M., the following individual(s) appeared in person at the office of the Village
Clerk and asked to inspect the following records:

Individual(s) making the request:
Records sought to be inspected:

The above records were presented to such individual(s) for inspection at ____M. on
the _____ day of 20__ , except for:

(here insert any records not presented)

The reason(s) for not providing the above records (or portion of records) was

(here insert reason - such as the fact that the records were exempt records, or that they
could not be immediately located and a search would continue, or that no such
records existed)

Of the records requested, copies of the below records were provided to or made by
the individual(s) making the request:

Date and Time of Memorandum: _____
Signature of Employee: _____
Title of Employee: _____
Witness: _____

II-B.

WRITTEN REQUEST FOR INSPECTION OR COPYING OF PUBLIC RECORDS

VILLAGE OF _____

1. Name of person making request: _____
2. Address of person making request: _____
3. Telephone number of person making request: _____
4. Date of request: _____

Describe in detail below the public records you are requesting and state whether you wish to inspect and/or copy such records. Also, please state whether such public records are to be certified.

The Village of _____ will respond to the above request within seven (7) working days from the above date unless one or more of the seven (7) reasons for an extension of time provided for in Section 3(d) of the Act are invoked by the Village.

Signature of person making request

[ROUTING OF REQUEST - FOR OFFICE USE ONLY]

DEPARTMENT OR OFFICE

- Clerk
- Police
- Fire
- Engineering
- Public Works
- Administration
- Other _____

II-C.

DENIAL LETTER

Dear (individual involved):

You are hereby notified that your request for the disclosure of (records requested) is hereby denied and the reason for such denial is as follows:

(reason for denial - exemption under the Act)

The person or persons making this decision to deny and their title or titles are set forth below:

Name	Official Title
_____	_____
_____	_____
_____	_____

You are hereby further notified that you have the right to appeal this decision to the head of the public body (e.g., mayor, president or manager as the case may be) who, under the Illinois Freedom of Information Act, will make a decision either to affirm the denial of disclosure to or to allow disclosure within seven working days after you file a notice of appeal. Such notice of appeal should be filed within 14 days of your receipt of this letter (the Act provides for no time limit, but we believe you can require a reasonable time limit by adoption of a policy to that effect - this form assumes adoption of a policy setting a 14-day time limit). If the decision to deny your request for disclosure was made by the head of the public body, you have the right to appeal the decision of the head of the public body to the Circuit Court of this county under Section 11 of the Freedom of Information Act.

(Name of Village)

By: _____
Title: _____

II-D.

EXTENDING TIME FOR DISCLOSURE

Dear (individual involved):

We have been unable to fill your request dated _____
requesting: (the records requested)

for the following reason or reasons [check one or more of the following reasons as appropriate]:

- The requested records are stored in another location.
- The request requires the collection of a large number of records.
- The request is categorical in nature and requires an extensive search.
- We have failed to locate the requested records in our initial attempt and the search is continuing.
- The requested records require examination by a competent person in order to determine which, if any, are exempt under Section 7 of the Act.
- It would unduly burden or interfere with the operations of this city (village) to fill the request within the initial 7 working days.
- There is a need for consultation with another public body which has a substantial interest in the determination or in the subject matter of the request.

With respect to the records you have requested, such records will be available to you by _____ or we will make a decision denying your request by such date. Such date will be within 7 additional working days from _____.
(here insert the date of the 7th working day after the original request was filed).

(Name of Municipality)

By: _____
Title: _____

II-E.

MUNICIPAL INFORMATION DIRECTORY

Village of Freedom - a hypothetical community

The Village of Freedom is a municipality incorporated and organized under the laws of the State of Illinois for the purpose of providing its residents with the following services:

- A. Police protection.
- B. Fire protection.
- C. Sewer and water service.
- D. Garbage collection service.
- E. Municipal airport.
- F. Municipal golf course.
- G. (Etc.)

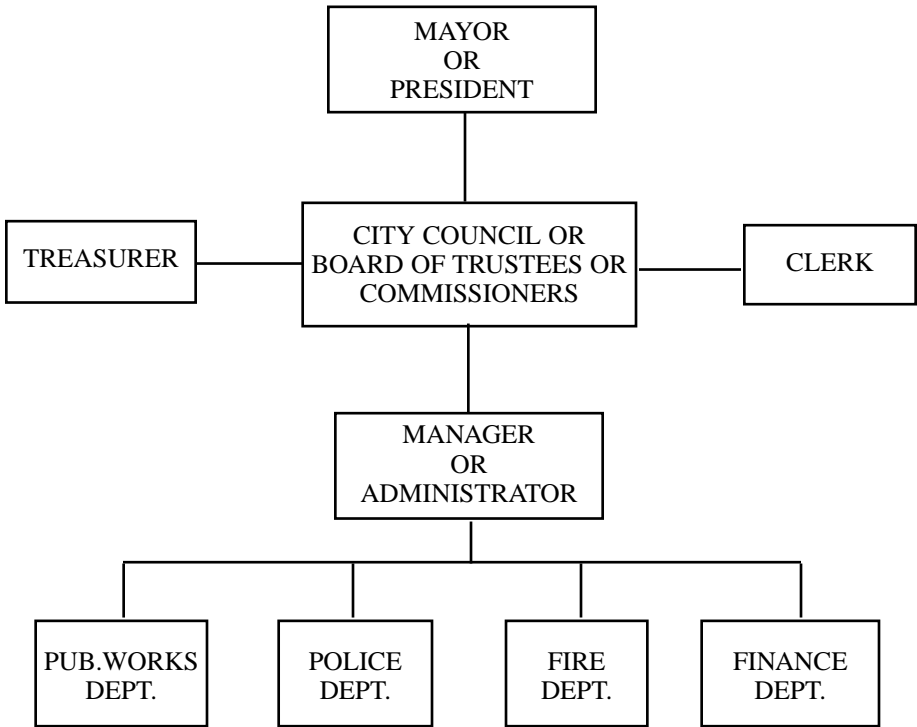
The Village of Freedom has certain functional subdivisions which are shown on Table 1 attached hereto. The approximate amount of the operating budget of the Village of Freedom is \$3,291,600.00. The Village's sole office is located at 111 Information Drive in Freedom, and the Village also has a pumping station for its water distribution system located at 311 Information Drive. The Village currently employs approximately 33 full and part-time employees. The members of the boards, commissions and committees of the Village of Freedom are as follows:

Board - Commission - Committee -	Member	Title
_____	_____	_____

(You should then list such members of each of the various boards, etc., including such boards as the city council or village board, plan commission, zoning board of appeals, police pension board, board of fire and police commissioners, etc.)

II-F.

BLOCK DIAGRAM OF FUNCTIONAL SUBDIVISIONS



II-G.

MUNICIPAL RECORDS DIRECTORY

Village of Freedom - a hypothetical community

Any person requesting records of the Village of Freedom may make such a request either in person, orally or in writing at the Village Clerk's office located at 111 Information Drive. Such request should be made to Mrs. Betsy Ross, Village Clerk at such address and if she is not present in person, you should see Mrs. Jane Thompson, Deputy Clerk. Another method would be by mailing a written request to either Mrs. Ross or Mrs. Thompson specifying in particular the records requested to be disclosed and copied. All written requests should be addressed to the address of the Clerk's office. If you desire that any records be certified, you must indicate that in your request and specify which records must be certified.

The fees for any such records, if the person requesting the records wishes them to be copied, are as follows:

- \$.18 per page (actual cost) if village employee copies records.
- \$.16 per page (actual cost) if individual requesting records makes copies using municipality's equipment.
- \$.08 per page (actual cost) if individual requesting records makes copies using his or her own equipment.
- \$.10 per certificate (actual cost) if the copies are to be certified.

II-H.

CATALOGING AND INDEXING OF PUBLIC RECORDS

The Act requires that public bodies must list (catalog) all types or categories of records under their control which are prepared or received after July 1, 1984. There is some question, and perhaps it can only be resolved by litigation, whether the municipality must catalogue exempt records. The Act indicates that the purpose of the catalogued list is to aid individuals to "gain access" to public records under the Act, and since certain records are exempt from public access, the most reasonable interpretation of the Act would be that you do not have to catalogue or list exempt records. However, you may wish to maintain a separate catalogue or listing of exempt records until such time as the Attorney General or the courts clarify the extent of cataloging required.

Please note that the Act requires the list to be by "type" or "category" of records and not listing every individual record. Suggested below are different types of categories that a public body might wish to establish to cover the records that it has under its control and which are subject to inspection under the Act. This list is by no means meant to be exhaustive and is merely for reference or descriptive purposes. Obviously, the number of types or categories will vary from municipality to municipality (e.g., some municipalities have fire departments, some do not, etc).

The "type" of records is meant to be a broad general category and the category is a sub-part of the type. For example, one type of record is a financial record. Under "financial records" may be the following categories: (a) budget; (b) appropriation ordinance; (c) audit; (d) bills; (e) receipts for revenue; (f) vouchers; (g) cancelled checks; (h) water bills; (i) sewer bills; (j) receipts for fines; (k) sales tax receipts; (l) real estate tax receipts; (m) liquor license fees; (n) other license fees; (o) building permit fees; (p) salary schedules; (q) utility bills (e.g., telephone, gas and electric); (r) etc. This gives you examples of categories that could be listed under the general type "financial record". Other general types could include, for example, the following: (1) building inspection reports; (2) administrative memoranda; (3) building permits; (4) board minutes; (5) board resolutions; (6) board ordinances; (7) correspondence received by municipality; (8) correspondence from municipality; (9) bidding specifications; (10) board policies; (11) administrative rules and regulations; (12) personnel code; (13) village maps; (14) comprehensive plan; (15) zoning ordinance; (16) building ordinance; (17) personnel files; (18) office equipment; (19) insurance; (20) capital equipment; (21) real estate; (22) legal notices; (23) newspaper articles; (24) consulting contracts; (25) contracts for capital equipment; (26) contracts for office supplies; (27) contracts for maintenance and repair; (28) professional consultant contracts; (29) pension fund records; (30) hospitalization records; (31) worker's compensation records; (32) training records; (33) official bonds; (34) municipal stickers; (35) village vehicles; (36) animal control records; (37) village liens; (38) police department records; (39) fire department records; (40) etc. Again, the above list is not meant to be exhaustive. While you certainly need not catalogue your records to the same degree as you list expenses in your annual appropriation ordinance or your annual budget, such may be used as a convenient starting point for determining what categories and types of records you may wish to list. Of course, you also should rely on your past experience by reviewing the records you currently have on hand and

dividing them into what will appear to you to be meaningful categories. Remember, there is a great deal of latitude in determining what the categories or types of records will be and consequently what the list would contain, but keep in mind the statutory mandate being that the list must be "reasonably current" and must be "reasonably detailed" in order to assist the individual in obtaining access to public records.

II-I.

**DISCLOSURE WITH DELETION OF EXEMPT MATERIAL
PURSUANT TO SECTION 8 OF ACT**

Dear (individual involved):

Pursuant to written request of _____ (date), enclosed you will find copies of the records you have requested. Please note that pursuant to Section 8 of the Freedom of Information Act, certain material originally contained in such records has been deleted because such material is exempt material under Section 7 of the Act.

By: _____
Title: _____

II-J.

**NOTICE TO MEET AND CONFER TO REDUCE CATEGORICAL
REQUEST TO MANAGEABLE PROPORTIONS**

Dear (individual involved):

You are hereby notified that your written request dated _____ calling for all records falling within _____
(category of records requested) has been determined to be unduly burdensome pursuant to Section 3(f) of the Freedom of Information Act, that there is no way to narrow your request and the burden on the Village outweighs the public interest in the information requested.

We hereby extend to you an opportunity to meet and confer with the undersigned in an attempt to reduce your request to manageable proportions. Please call me at _____ between the hours of _____ and _____ in order to schedule a conference.

Dated: _____

II-K.

DENIAL LETTER - UNDULY BURDENSOME

Dear (individual involved):

You are hereby notified that your request for all the Village's financial records is hereby denied because to comply with your request would be unduly burdensome for the following reason(s):

(set forth why it would be unduly burdensome, such as this is a repeated request for the same records by the same person).

After meeting and conferring with you on the _____ day of _____, 20____, we were unable to reduce your request to manageable proportions and it appears from your explanation as to why you are requesting these records, that the burden on the Village outweighs the public interest in the information being sought.

(NAME OF MUNICIPALITY)

By: _____
Title: _____

II-L.

**ORDINANCE SETTING FORTH PROVISIONS FOR COMPLIANCE WITH
THE ILLINOIS FREEDOM OF INFORMATION ACT**

WHEREAS, the General Assembly has enacted Public Act 83-1013, the short title of which is the "Freedom of Information Act", and such Act took effect on July 1, 1984; and

WHEREAS, such Act is intended to provide the public with greater access to the records of public bodies; and

WHEREAS, it is necessary for the Village of _____ to establish practices and procedures ensuring its full compliance with said Act, so that the public policy stated therein can be carried out effectively and efficiently with respect to the records of the Village.

BE IT ORDAINED by the President and the Board of Trustees of the Village of _____, _____ County, as follows:

SECTION 1: The Village Clerk is hereby designated as the person to whom all initial requests for access to the records of the Village are to be referred. Such requests are to be made at the offices of the Village at _____, Illinois, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. In the event that the Village Clerk is not available during the times described above, the Deputy Village Clerk is designated as the person to whom such initial requests are to be made.

SECTION 2: Any records which are the subject of a request under the Freedom of Information Act shall be retrieved from such place as they are stored, by the Village Clerk or the Deputy Village Clerk, or by an employee of the Village acting under the direction of the Clerk or Deputy Clerk. In no event shall records be retrieved by the party requesting them or by any person who is not employed by the Village.

SECTION 3: If copies of records are requested, the fees for such copies, whether certified or not, shall be as determined from time to time by the Village Clerk. The Village Clerk shall maintain a written schedule of current fees in the Clerk's office. The fees so charged shall reflect the actual cost of copying the records, and the cost of certifying copies, if certification is requested.

SECTION 4: In the event that a request to inspect Village Records is denied by the Village Clerk or the Deputy Village Clerk, the denial may be appealed to the Village President. Such an appeal must be made within fourteen (14) days after the requesting party receives the written notice denying said request; or, in the event that the denial is not by letter, the appeal must be made fourteen (14) days after the request is effectively denied. In the absence of the Village President, appeals from denials of requests for access shall be made to the Village Administrator in the times set forth above.

SECTION 5: The Village Clerk shall prepare: (a) a Village Information Directory; (b) a block diagram of the functional Subdivisions of the Village; (c) a Village Records Directory; and (d) a Records Catalogue, all of which shall be substantially in the same form as the documents attached hereto and made a part hereof as Exhibits "A", "B", "C", and "D".

SECTION 6: THIS ORDINANCE shall be in full force and effect immediately upon its passage and approval as required by law.

PASSED this _____ day of _____, 20____, by the Corporate Authorities of the Village of _____, County of _____, Illinois, by a roll call vote as follows:

AYES: _____ NAYS: _____ ABSENT: _____

APPROVED this _____ day of _____, 20____, by the President of the Village of _____, County of _____, Illinois.

Village President

ATTEST:

Village Clerk

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