Attorney General Pre-Authorization No Longer Required Under Illinois FOIA Law for Personal Information and Predecisional Materials

September 1, 2011

By **Jackie Wernz**

Governor Quinn recently signed into law amendments to the Illinois Freedom of Information Act (FOIA) addressing "recurrent requesters," commercial requests, and the requirement that public bodies seek Attorney General pre-authorization before relying on certain exemptions. Although the recurrent requester requirement has received the most attention in the news media, changes regarding pre-authorization and appeal rights for commercial requesters are likely to have the greater impact on public bodies, including public schools.

Public Act 097-0579, effective August 26, 2011, made the following changes to the Illinois FOIA:

Provides additional time for responses to requests from "recurrent requesters," which are defined as requesters who have submitted to the same public body (i) a minimum of 50 requests for records, (ii) a minimum of 15 requests for records within a 30-day period, or (iii) a minimum of 7 requests for records within a 7-day period. Although a public body must provide an initial response to the requester within the normal 5-day period for general FOIA requests (or within a 10-day period if an extension is taken), the public body has 21 days to respond to the request. Moreover, in its response after 21 days, the public body has four options, none of which require producing records on the day of the response:

- If there is a basis for denial, the public body should deny the request;
- If the request is unduly burdensome, the public body should notify the requester and offer the requester a chance to narrow the request;
- If the request can be fully responded to within the 21-day timeframe, the public body should provide the requested records; or
- If the public body does not provide records with the response, the public body should provide an estimate of a "reasonable period [of time] considering the size and complexity of the request" by which the public body will respond to the request and an estimate of the fees to be charged.

News media and non-profit, scientific, or academic organizations are generally exempt from the recurrent requester rules, and thus responses to requests from those sources must still comply with the general timelines under the FOIA. Because the news media are often the source of recurrent requests to public bodies, it is unclear how significant of an impact this change will have on the workload for FOIA officers.

Allows a public body to charge up to $10 each hour for time spent by personnel in searching and retrieving requested records in response to commercial requests, although the first eight hours must be free.

Provides that commercial requesters cannot appeal a denial of their request to the Public Access Counselor, except for the limited purpose of reviewing whether the public body properly determined that the request was made for a commercial purpose. Because commercial requesters can no longer request review based on the substance of denials of their requests, and can only seek review in the limited case where the requester denies that he or she is making a commercial request at all, this amendment can be expected to provide some relief to public bodies and FOIA officers at least relating to commercial requests.

Removes the requirement that public bodies seek pre-authorization from the Public Access Counselor of the Attorney General's office (the PAC) before denying a request based on the exemptions for "personal information" or "predecisional materials", which includes "preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated." Public bodies, including school districts, have expended significant time and resources in preparing "Notices of Intent to Deny" for the personal information and predecisional materials exemptions since the new FOIA became law on January 1, 2009. And the Attorney General has publicly admitted that the PAC has been unable to keep up with the heavy pace of responding to such notices. The removal of the pre-authorization requirement means public bodies no longer must submit such notices before denying requests based on these exemptions. This amendment thus has the potential to lessen the work load for FOIA officers of public bodies, as well as the PAC. Requesters may, however, still seek review from the PAC of any denial under Sections 7(1)(c) and 7(1)(f), and so public bodies may still be required to defend their decisions to rely on the exemptions to the PAC. But public bodies will only be required to do so if a requester files a request for review with the PAC and the PAC notifies the public body of the request.

All public bodies should revise their FOIA policies and procedures to address these important new changes.

More Information

Jacqueline F. Wernz
jfw@franczek.com
312.786.6137

Related Practices

Education Law