

Chicago Bar Association – Civil Practice Committee

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Effective Use of the Illinois Freedom of Information Act

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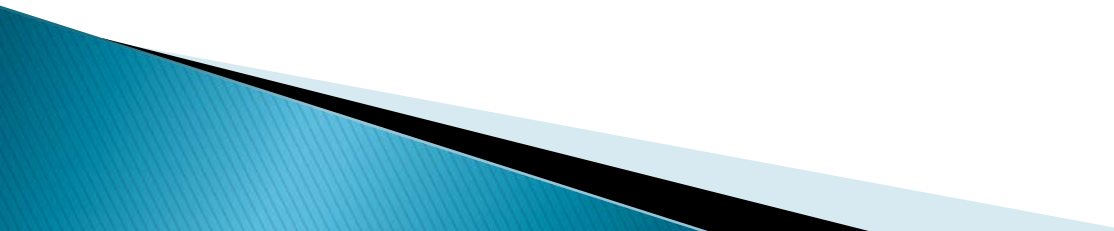
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Overview of Presentation

- ▶ Provide overview of the recently amended FOIA
 - most sweeping changes to FOIA in the nearly three decades since its enactment
 - ▶ At core, *FOIA's aim is transparency*, allowing the governed to know what their governors are doing.
 - ▶ This program will help those receiving or making FOIA requests, whether on their own behalf or on behalf of clients.
 - The uses of FOIA requests are limited only by a practitioner's understanding of the law
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Overview of Presentation

- ▶ Introduction to FOIA
- ▶ Mechanics of Compliance
- ▶ Exemptions
 - Disclosure is the rule, exemptions are construed narrowly
- ▶ Enforcement of FOIA
 - Judicial enforcement
 - Public Access Counselor in the Office of Illinois Attorney General
- ▶ FOIA Curveballs

▶ Introduction

Introduction – Presumption of Openness

- ▶ Presumption built in by Public Act 96–542
 - All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt. (5 ILCS 140/1.2).
- ▶ The Illinois Supreme Court aptly stated:
 - “the purpose of FOIA is to open governmental records to the light of public scrutiny.” *Stern v. Wheaton–Warrenville Community Unit School Dist. 200*, 233 Ill.2d 396, 405 (2009) (internal citations and quotations omitted).

Introduction - Definition of Public Bodies

- ▶ Public Act 96-542 also revised the definition of “public bodies” (5 ILCS 140/2(c)) to include:
- ▶ “all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof...”

Introduction - Definition of Public Bodies

- ▶ This new definition, as amended by Public Act 96-542, significantly expands the public bodies subject to the FOIA by removing the prior requirement that a “public body” for purposes of the Act be supported in whole or in part by tax revenue or be one that expended tax revenue
- ▶ Essentially, the FOIA now applies to all government bodies, including subsidiary bodies such as committees and subcommittees

Introduction – Definition of Public Records

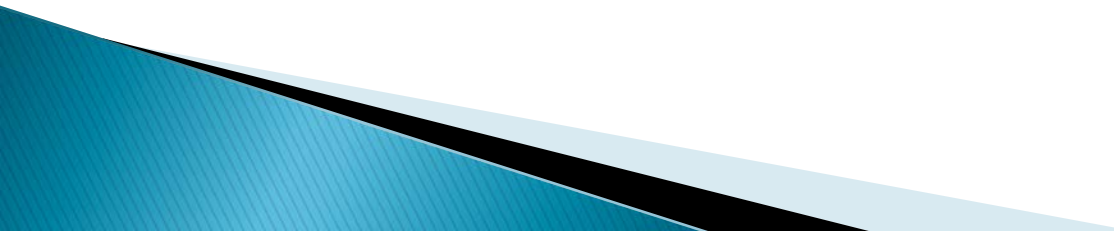
- ▶ Public Act 96–542 also revised the definition of “public records” (5 ILCS 140/2(c)) to include:
- ▶ “[A]ll * * * documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, possessed or under the control of any public body.”
 - *Compare* – emails setting lunch dates, even if inappropriate use of work computers

Introduction - Definition of Public Records

- ▶ “Electronic communications” are expressly included within the definition of “public records.”
 - “Electronic communications” includes e-mails and other media that create a record (in contrast, for example, to telephone calls.)
- ▶ Metadata? – to be determined
 - These are the “footprints” in the digital sand – many legal cases are *made* with metadata
 - Definition states “regardless of physical form or characteristics”

Introduction – Why Public Act 96–542 Was Needed

The Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.*) originally became effective on July 1, 1984. Although various provisions of FOIA had been added or amended since its enactment, there had been no comprehensive revision of the Act since its effective date. PA 96–542 addressed numerous problems that had become apparent over the previous 25 years.



Introduction – Why Public Act 96-542 Was Needed

▶ How much changed since 1984?...

- Phones

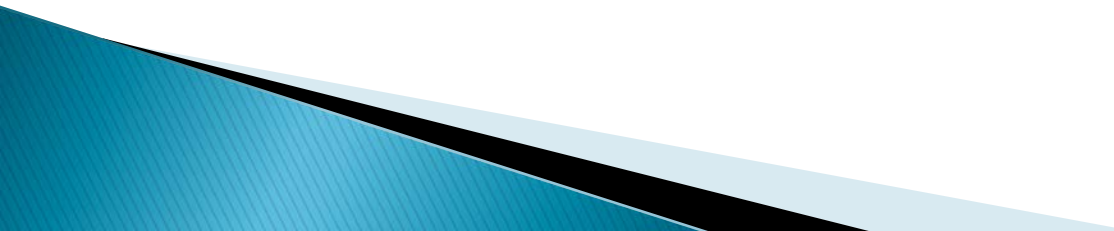


- Computers

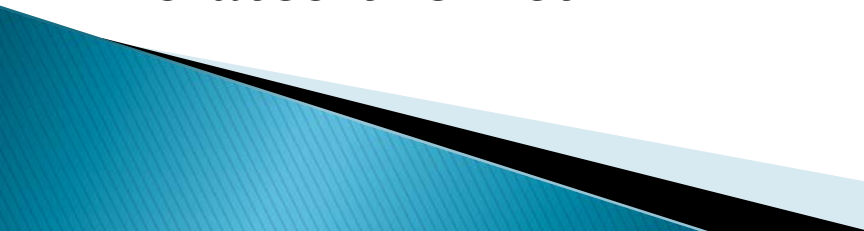


Introduction – Why Public Act 96-542 Was Needed

Public Act 96–542 also codified a *non-judicial procedure* for addressing issues concerning compliance with the Freedom of Information and Open Meetings Acts by creating the ***Public Access Counselor***, an office within the Attorney General’s office dedicated to *resolving complaints without litigation*.



Introduction – Select Changes in Public Act 96-542

- ▶ requires public bodies to designate one or more “FOIA officers”;
 - ▶ shortens the length of time that a public body has to comply with a FOIA request from “7 working days” to “5 business days”;
 - ▶ requires annual training by public officials;
 - ▶ imposes attorney’s fees and court costs for violations; and
 - ▶ imposes damages between \$2,500 and \$5,000 if a public body wilfully, intentionally, or in bad faith violates the Act.
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▶ Mechanics of Compliance

Mechanics of Compliance – Appoint FOIA Officer

- ▶ Each public body must designate 1 or more officials to act as its FOIA Officer
 - May designate outside personnel
 - ▶ Upon receiving a request for a public record, FOIA officers must:
 - note the date the request is received;
 - compute the day on which the response is due;
 - maintain an electronic or paper copy of the written request; and
 - create a file for the retention of the original request, response, and a copy of other communications.
- 5 ILCS 140/3.5(a).
- ▶ FOIA officers must successfully complete annual online training program, available at http://foia.ilattorneygeneral.net/electronic_foia_training.aspx

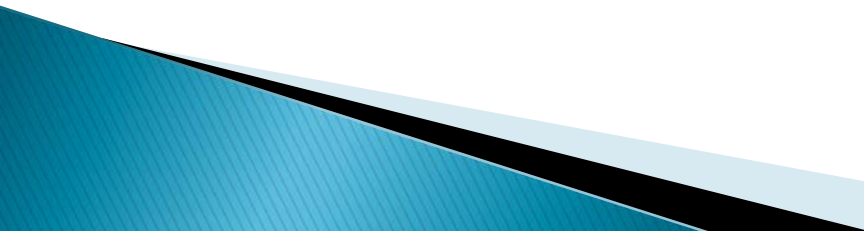
Mechanics of Compliance – Obligation to Create Records

- ▶ FOIA requires public bodies to create materials in order to assist FOIA requesters:
 - create list of FOIA officers and how to submit requests;
 - create public postings describing the function of the public body;
 - create “reasonably current list of all types or categories of records under [the public body’s] control”;
 - create list records that are immediately available;
 - Description of FOIA process for requesters
- 5 ILCS 140/4 and 5.
- ▶ **Post to website, if maintained** (AND WHO DOESN'T HAVE A WEBSITE)
 - Opinion: This requirement is routinely violated

Mechanics of Compliance – Timing

- ▶ The time for responding to a request is 5 business days after receipt of a written request.
 - The time for response may be extended for an additional 5 business days for one of the reasons specified in the Act.
 - Negotiable, if in writing
 - Life Lesson: Document extensions, since most oral statements are only as good as the paper they are written on!

Mechanics of Compliance – Timing

- ▶ Failure by a public body to respond within the time permitted is considered a denial of the request.
 - ▶ A public body that fails to respond to a request within the time permitted or any extension, but thereafter provides the requester with copies of the requested public records may not impose a fee for those copies.
 - ▶ Further, a public body that fails to respond to the request within the time permitted may not treat the request as unduly burdensome.
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Mechanics of Compliance – Commercial Requests

- ▶ Public Act 96–542 added a new definition of “commercial purpose” (5 ILCS 140/2(c–10)) as:
- ▶ “‘Commercial purpose’ means the use of any part of a public record or records, or information derived from public records, in any form for sale, resale, or solicitation or advertisement for sales or services.”

Mechanics of Compliance – Commercial Requests

- ▶ Excepted from the definition of “commercial purpose” are:
 - “requests made by news media and non-profit, scientific, or academic organizations * * * when the principal purpose of the request is (i) to access and disseminate information concerning news and current or passing events, (ii) for articles of opinion or features of interest to the public, or (iii) for the purpose of academic, scientific, or public research or education.”

Mechanics of Compliance – Commercial Requests

- ▶ The general time periods for compliance with or denial of a request to inspect or copy records do not apply to requests for records made for a commercial purpose.
- ▶ A public body must respond to a request for records to be used for a commercial purpose within 21 working days after receipt

5 ILCS 140/3.1



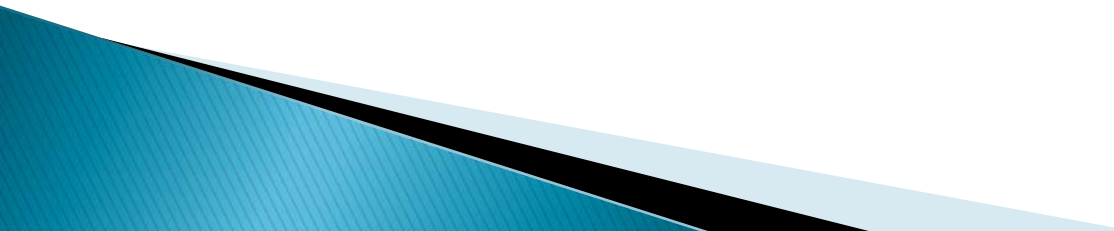
Mechanics of Compliance – Recurrent “Vexatious” Requests

- ▶ Public Act 97–579 added a new definition of “recurrent requester” (5 ILCS 140/2(g)) as:
- ▶ “‘recurrent requester’...means a person that, in the 12 months immediately preceding the request, has 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.”
 - Not applicable to “requests made by news media and non–profit, scientific, or academic organizations”

Mechanics of Compliance – Voluminous Requests

- ▶ Another recent amendment to FOIA created a definition of "voluminous request" intended to provide a public body with some relief in responding to a "voluminous request."
- ▶ Voluminous Request Process:
 - 1. Public body has 5 business days to request is being treated as a "voluminous request"
 - 2. Requester then has 10 business days to modify request
 - 3. Public body can charge based on volume of electronic data.
 - 4. Public body can also charge up to \$10/hour for examining records for necessary redactions, in addition to search and retrieval fees for responding to these type of requests.
 - 5. Also allows a public body additional time to respond to voluminous requests.
- ▶ Not applicable to "requests made by news media and non-profit, scientific, or academic organizations"

Mechanics of Compliance – Records Available Online

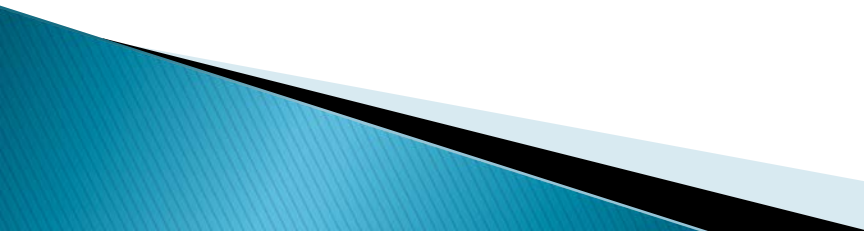
- ▶ Section 8.5 of FOIA now allows a public body to direct FOIA requesters to the website where the record can be “reasonably accessed.”
 - ▶ If a requester cannot reasonably access the record online, then the public body must make the record available for inspection or copying as otherwise required by FOIA.
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Mechanics of Compliance – Fees

- ▶ Subject to the collection of the requisite fee (if applicable), a public body is required to furnish copies of public records to a requestor
 - Translation: Public body is entitled to ask you to “pay up first”



Mechanics of Compliance – Fees for Paper Copies

- ▶ First 50 free – No fees may be charged for the first 50 pages of black and white, letter or legal sized copies requested by a requester
 - ▶ The fee for black and white, letter or legal sized copies may not exceed 15 cents per page.
 - ▶ If a public body provides copies in color or in a size other than letter or legal, the public body may charge its actual cost for reproducing the records.
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Mechanics of Compliance – Fees for Electronic Copies

- ▶ If a person requests a copy of a record that is maintained in an electronic format, the public body must furnish it in the electronic format specified by the requester, *if feasible*.
 - Consider in light of PREAMBLE to FOIA:
“The General Assembly further recognizes that technology may advance at a rate that outpaces its ability to address those advances legislatively. To the extent that this Act may not expressly apply to those technological advances, this Act should nonetheless be interpreted to further the declared policy of this Act that public records shall be made available upon request except when denial of access furthers the public policy underlying a specific exemption.”
- ▶ If it is not feasible to furnish the public records in the specified electronic format, then the public body may furnish it in the format in which it is maintained by the public body, or in paper format, at the option of the requester

Mechanics of Compliance – Fees

- ▶ A public body may only charge the requester for the actual cost of purchasing the recording medium, whether disc, diskette, tape, or other medium.
- ▶ Statutory fees applicable to copies of public records when furnished in a paper format shall not be applicable to those records when furnished in an electronic format, unless the General Assembly otherwise provides.
 - TRANSLATION: Always ask for records in electronic format!

Mechanics of Compliance – Fee Waivers

- ▶ Additionally, requesters may specifically ask for a waiver of fees
- ▶ A waiver should be granted if the public body determines 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 access and disseminate 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.” 5 ILCS 140/6(c)

Mechanics of Compliance – Denials

- ▶ Each public body denying a request for public records must notify the requester *in writing* of the decision to deny the request, including:
 - the reasons for the denial, including a detailed factual basis for the application of any exemption claimed;
 - the exemption claimed to authorize the denial and the specific reasons for the denial, including a detailed factual basis and a citation to supporting legal authority; and
 - the names and titles or positions of each person responsible for the denial

Mechanics of Compliance – Denials

- ▶ Each notice of denial by a public body must also inform the requester of the right to review by the Public Access Counselor and shall provide the address and phone number for the Public Access Counselor.
 - Sample forms available at http://foia.ilattorneygeneral.net/foia_formssampleletters.aspx
- ▶ Each notice of denial must also inform the requester of the right to judicial review.

▶ Exemptions

Exemptions

- ▶ To enable public bodies to maintain certain types of sensitive public records confidentially, FOIA provides a number of exceptions to the requirement that public records be made available for public inspection.
- ▶ *Important Point.* The exemptions do not, however, prohibit the dissemination of information; rather, they merely authorize the withholding of information. *Roehrborn v. Lambert*, 277 Ill. App. 3d 181, 186 (1st Dist. 1995)

Exemptions

- ▶ The exemptions can be categorized into the following six categories:

- 1. Personal Privacy**
- 2. Law Enforcement and Security**
- 3. Educational Matters**
- 4. Legal Proceedings**
- 5. Internal Operations**
- 6. Business and Finance**

Exemptions – Personal Privacy

- ▶ “Private information” is exempt from disclosure unless disclosure is required by another provision of the Freedom of Information Act, a State or federal law or a court order (5 ILCS 140/7(1)(b))
- ▶ For purposes of FOIA, “private information,” ((5 ILCS 140/2(c-5)) includes:
 - “...unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.”

Exemptions – Personal Privacy

- ▶ Prior law contained enumerated categories of information *per se* exempt from disclosure as unwarranted invasion of personal privacy
- ▶ Public Act 96–542 deleted and replaced with Section 7(1)(c) balancing test.
 - “(c) Personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. “Unwarranted invasion of personal privacy” means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.”

Exemptions – Personal Privacy

Personal information has been defined by the courts as information "that is private and confidential." *Chicago Tribune v. Board of Education of the City of Chicago*, 332 Ill. App. 3d 60 (1st Dist. 2002)



Exemptions – Internal Operations

- ▶ Also exempted from disclosure under FOIA are:
“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 of a record shall not be exempt when the record is publicly cited and identified by the head of the public body.”

5 ILCS 140/7(1)(f)

- *Rationale*: sometimes government can't “do business in a fishbowl”
- Opinion: This exemption is prone to abuse



Exemptions – Business and Finance

- ▶ Public bodies often collect information from businesses and individuals in the course of regulation and licensing. Section 7(1)(g) permits the exemption of commercial or financial information obtained from a person or business
 - FOIA purpose “is to guarantee ‘that the *Government’s* activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.’ ”
Trent v. Office of Coroner of Peoria County, Illinois, 349 Ill.App.3d 276 (3d Dist. 2004)
 - think about core purpose of FOIA – to let governed know what governors are doing

Exemptions – Statutory Exemption

In addition to the exemptions previously noted, several existing exemptions have been revised, consolidated or deleted. Statutory exemptions referring to other statutes have been consolidated in new section 7.5 (5 ILCS 140/7.5) and “catch-all” section 7(1)(a)

- ▶ Family Educational Rights and Privacy Act
- ▶ Health Insurance Portability and Accountability Act
- ▶ Illinois Personnel Record Review Act
- ▶ Illinois Income Tax Act
- ▶ Illinois Identity Protection Act

▶ Enforcement of FOIA

Enforcement – Judicial Enforcement

- ▶ When a request is denied in whole or in part by a public body, the requester may file an action in circuit court seeking relief
- ▶ Prior to PA 96–542, a requester could appeal to the head of the public body
 - Such appeals have been eliminated

Enforcement – Judicial Enforcement

- ▶ If a person seeking the right to inspect or receive a copy of a public record substantially prevails in a judicial enforcement proceeding, the court shall award such person reasonable attorneys' fees and costs
 - SHALL = court has NO discretion in granting fees and costs
- ▶ In determining what amount of attorneys' fees is reasonable, the court shall consider the degree to which the relief obtained relates to the relief sought
 - Discretion remains as to amount

Enforcement – Judicial Enforcement

- ▶ Additionally, if the court determines that a public body wilfully and intentionally failed to comply with FOIA, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than \$2,500 nor more than \$5,000 for each occurrence.

Enforcement – Public Access Counselor

- ▶ Public Act 96–542 created in the Office of the Attorney General the Office of Public Access Counselor (PAC). The primary function of the PAC is to resolve disputes involving potential violations of the Open Meetings Act or the Freedom of Information Act in response to requests for review by an aggrieved party, by mediating or otherwise informally resolving the dispute or by issuing a binding opinion.

Enforcement – Public Access Counselor

- ▶ A person whose request to inspect or copy a public record is denied by a public body may file a request for review with the Public Access Counselor not later than 60 days after the date of the final denial.
- ▶ The request for review must be in writing, signed by the requester, and include:
 - (i) a copy of the request for access to records, and
 - (ii) any responses from the public body

Enforcement – Public Access Counselor

- ▶ Unless the Public Access Counselor extends the time by no more than 21 business days, or decides to address the matter without the issuance of a binding opinion, the Attorney General shall examine the issues and the records, shall make findings of fact and conclusions of law, and shall issue to the requester and the public body an opinion in response to the request for review within 60 days after its receipt.
 - Summary: PAC must act within 60 days of receipt (able to extend by 21 days)
 - Jurisdictional limitation

Enforcement – Public Access Counselor

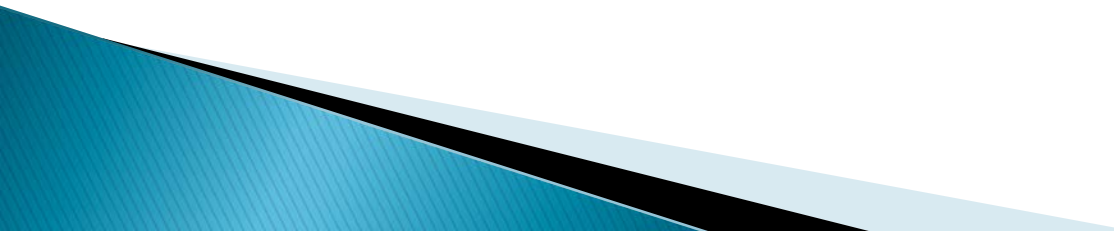
- ▶ Upon receipt of a binding opinion concluding that a violation of FOIA has occurred, the public body is required either to take necessary action immediately to comply with the directive of the opinion, or to initiate judicial review. If the opinion concludes that no violation of the FOIA has occurred, the requester may initiate judicial review.
 - A binding opinion issued by the Attorney General is be considered a final decision of an administrative agency, for purposes of judicial review under the Administrative Review Law

Enforcement – Public Access Counselor

- ▶ The *PAC may also issue advisory opinions* with respect to the Open Meetings Act and the Freedom of Information Act either in response to a request for review or otherwise, and may respond to informal inquiries made by the public and public bodies.

▶ FOIA Curveballs

FOIA Curveballs

- ▶ What if I text from my personal cellphone?
 - ▶ Applicability to Public–Private Partnerships?
 - ▶ Can a requester be anonymous?
 - ▶ Any practical uses of FOIA?
- 

FOIA Curveballs

- ▶ Practical Uses of FOIA
 - Ensure honest government
 - “*Quis custodiet ipsos custodes*” – Who guards the guardians
 - Strategic Uses of FOIA
 - Due diligence in transactional matters
 - Level playing field in dispute with public body
 - client is being investigated or enforced against by a regulatory agency
 - ascertain course of dealing in other situations
 - Political tool in elections
 - Business development tool (2/3 of all requests are commercial)
 - prospective client lists
 - Cottage industry involving business intelligence (ex. Kroll)

Questions?

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