THE FREEDOM OF INFORMATION ACT: A USEFUL RESOURCE FOR ATTORNEYS

The Illinois Freedom of Information Act (the "Act"), 5 ILCS 140/1 et seq., provides attorneys with an effective means of gathering information on people and property, a public body's course of conduct in adjudicative matters, the uses of public funds and a host of other records collected and maintained by public bodies. This article discusses the lessons I have learned in administering the Act as an appointed Freedom of Information Officer and my experiences in using the Act as an attorney who represents private parties in zoning and other matters involving public bodies. It further provides advice on the do's and don'ts of using the Act for the benefit of your clients.

THE NEW FREEDOM OF INFORMATION ACT

Last August the General Assembly enacted substantial amendments to the Act in response to public pressure to make Illinois government more transparent and accountable. These amendments became effective on January 1, 2010. See P.A. 96-542. The amended Act provides that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying." If a governmental entity denies a request based upon one of the Act's forty-four exemptions, it has the burden of proving by clear and convincing evidence that the record in question falls within an exemption. 5 ILCS 140/1.2. The exemptions protect various types of information, including the privacy rights of governmental employees, aid recipients and parties involved in ongoing investigations and information protected by other laws. 5 ILCS 140/7. All Illinois public bodies are subject to the Act, including state, county and municipal governments, state agencies and other taxing districts. 5 ILCS 140/2. Every public body must appoint a Freedom of Information Officer, who is charged with administering

its responses to requests submitted pursuant to the Act.[1] Since January 1, 2010, I have served as an appointed Freedom of Information Officer for a suburban municipality. Through my experiences in representing both a public body and private parties in matters involving the Act, I have become well versed in its terms and how it can be used effectively.

THE ACT AS A RESOURCE FOR ATTORNEYS

The Act enables attorneys and the public to obtain useful information from governmental entities. Think of all the documents and important information submitted to local municipalities, governmental agencies, counties and the state. Records impart knowledge. Knowledge is power. And, government collects a veritable mountain of records. Attorneys generally utilize the Act to obtain three types of information: 1) records concerning people and property; 2) government's course of conduct in adjudicative matters; and 3) the use of public funds and resources.

As part of the due diligence process in commercial real estate transactions in which I represent purchasers, I always submit a request to the municipality in which the property is situated. The contents of such requests vary depending on the transaction. However, I always ask for all records in the municipality's possession concerning environmental conditions on the property, violations or alleged violations of the building code or other portions of the municipal code, and village health and building inspection reports concerning any businesses and facilities on the property. As a Freedom of Information Officer, I often receive requests from environmental consultants seeking records of underground storage tanks and other environmental hazards often maintained by municipal fire departments. Employers and landlords often submit requests for records pertaining to potential or existing employees and tenants, although certain

[1] For a more thorough overview and critique of the newly amended Freedom of Information Act, see Alison K.

criminal records and records containing personal and private information are subject to exemptions. See 5 ILCS 140/7(1)(b), (c) and (d). The presence or absence of any such records is often highly relevant to a client's investigation. When investigating property or individuals, the Act provides attorneys with a useful method of obtaining pertinent information.

The Act affords attorneys the ability to ascertain a government's course of conduct in adjudicative proceedings. When petitioning a governmental agency for a license, permit or other relief in representing a client, it is often useful to gain an understanding of how the particular board or committee before which you must appear has decided cases similar to that of your client. The minutes and records associated with public hearings of zoning boards of appeal, plan commissions, city councils and boards of trustees are all subject to disclosure under the Act. For instance, if your client seeks to obtain a special use permit from a county or municipality allowing the construction and operation of a gas station, you could submit a request for copies of all petitions for gas station special use permits filed in the past five years, all supporting documents and the minutes of the public hearing(s) and meeting(s) concerning such petitions. The results of such a request would give you a good idea of how the public body evaluates special use permit petitions for gas stations.

Attorneys can also use the Act to support their clients' positions in adjudicative matters. For instance, on several occasions my office has refuted the arguments of municipalities and members of the public in zoning matters with the municipality's own records through our use of the Act.

Of course, attorneys can use the Act to determine how governments use their funds and resources. The Act is an effective tool to obtain more detailed information on the ultimate uses

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Hayden's article in the February, 2010 Illinois Bar Journal (available at http://www.isba.org/ibj/archives).

of funds listed on budget line items. Attorneys often utilize the Act to ensure that impact fees, special taxes and assessments fund the programs and projects for which they were intended. The Act affords attorneys a multitude of ways to investigate the accountability of public bodies.

STRATEGIES IN DRAFTING REQUESTS

Well drafted requests ask for records, not information. Section 3.3 of the Act provides that "[t]his Act is not intended to compel public bodies to interpret or advise requesters as to the meaning or significance of public records." Public bodies have the right to deny requests for reports containing information that could be ascertained from a combination of records in the possession of a public body, but which the body would have to create. Rather than ask that you revise your request, the public body in that scenario could respond with a simple statement that no such record exists. Make sure you phrase your request in terms of the records that could contain the information you seek, rather than requesting the information itself.

In asking for records, you should worry more about making your request too narrow, rather than too broad. A public body has no duty to inform you of records in which you appear to have an interest, but which fall outside of the bounds of your request. However, Section 3(g) of the Act prohibits governments from denying a request for being overbroad without first conferring with a requester in an attempt to reduce the request to manageable proportions. Therefore, if your request is too narrow, you may unintentionally exclude records you wish to obtain. However, if your request is overbroad, the public body cannot deny the request without first working with you to refine it.

The Act requires governments to make available upon request a list of documents or categories of records it maintains and a narrative describing the public body's purpose, subdivisions, budget, the locations of its offices, the number of its employees and the names and

positions of all elected and appointed officials. 5 ILCS 140/3.5, 4. Use these resources in drafting your requests. Having an understanding of the types of records a public body maintains and the manner in which they are kept will assist you in drafting more pointed requests. If your request is couched in terms that do not comport with a public body's record-keeping system, the public body may attempt to deny the request, extend the time in which it has to respond pursuant to Section 3(f) or accidentally omit relevant records from the results of the request.

The Act segregates requests into commercial and non-commercial classifications. While governmental agencies must respond to non-commercial requests within five business days, they have twenty-one business days to respond to a commercial request. See 5 ILCS 140/3-3.1. Governmental entities cannot charge any fees for the first fifty copies of letter-sized black and white paper. After the first fifty pages, such copying fees cannot exceed fifteen cents per page and, in all cases, fees cannot exceed the entity's cost of reproducing the documents. See 5 ILCS 140/6. Note that Section 7(1) prohibits a public body from withholding records containing both exempt and non-exempt information. It gives the public body the option to redact the exempt portions of such documents, but requires that they are ultimately turned over.

The Freedom of Information Act is complex and many governmental entities administering it commit errors. Should a governmental entity deny a request pursuant to one of the Act's exemptions, you may appeal the denial to a new office of the Attorney General, the Public Access Counselor. Section 11 of the Act further provides requesters with the right to immediately file suit for injunctive or declaratory relief against a public body for the denial of a request.

I hope my experiences in working on both sides of the freedom of information fence and the advice contained herein are useful to you in your practice.