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LAW ALERT

New FOIA Amendments Ease Burden on Public Bodies

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On August 27, 2011, Public Act 97-579 was signed into law, which amends FOIA by: (1) eliminating the "pre-authorization" process when asserting a denial under Section 7(1)(c) or 7(1)(f) of FOIA; (2) defining "recurrent responder"; (3) creating a new timeframe for response to a request from a "recurrent requester"; (4) allowing a public body to charge an hourly rate for responding to a request made for a "commercial purpose"; and (5) limiting who may file a request for review with the Illinois Attorney General's Public Access Counselor ("PAC"). These amendments are effective immediately and will ease the burden placed on a public body in responding to certain FOIA requests.

Pre-Authorization Process Eliminated

One of the more burdensome aspects of the 2010 amendments to FOIA was the "pre-authorization" process created by Section 9.5(b) of FOIA. This process required a public body to seek pre-approval from the PAC before denying a request under Section 7(1)(c) ("unwarranted invasion of personal privacy") or Section 7(1)(f) ("preliminary drafts, notes, recommendations...in which opinions are expressed..."). It further required that a public body include a factual and legal basis for asserting either exemption. Often, the PAC would request further information from the public body and/or copies of the records at issue before the PAC would make a determination. This process proved to overwhelm both public bodies and the PAC. Consequently, the "pre-authorization" process has been eliminated. A public body can now assert Section 7(1)(c) and/or 7(1)(f) as a basis to deny a FOIA records request, or a part thereof, without seeking pre-approval from the PAC.[1]

"Recurrent Requester" and the Time for Response

A "recurrent requester" is defined as "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 within a 7-day period." [2] 5 ILCS 140(2)(g). Unfortunately, however, this new law also provides that a single written request (or oral, if allowed) may identify *multiple* records to be inspected or copied. Thus, for example, if a requester submits one letter to a public body which contains five requests for different records, it would constitute one request for purposes of the definition of "recurrent requester".

Public Act 97-579 accords a public body at least 21 business days after receipt to respond to a request from a "recurrent requester" [3], provided the public body notifies the requester within 5 business days after receipt: (1) that it is treating this as a request from a "recurrent requester"; (2) the reasons for such designation; (3) that it will send a response within 21 business days after receipt; and (4) of the proposed responses. [4]

- A public body has 21 business days after receipt to: (1) provide the requester with an estimate of the time required for response (if **more** than 21 business days is needed) and an estimate of the fees to be charged; (2) deny the request based upon one of the exemptions enumerated under FOIA; (3) notify the requester that the request is unduly burdensome and extend an opportunity for the request to be reduced; **or** (4) provide the records requested.
- *Please note that the public body's response time must be reasonable based upon the size and complexity*

of the request.

"Commercial Purpose" Requests

When responding to a request made for a "commercial purpose"[5], a public body may now charge the requester up to \$10 per hour for the cost of any search and review of records or other personnel costs associated with providing the responsive records, and for the actual cost of retrieving and transporting public records from an off-site storage facility. An accounting of all fees and costs must be issued to the requester. Please note, however, that the first 8 hours of any search and review efforts must be provided for free.

This new law exempts requests made for a "commercial purpose" from the PAC's request for review process, unless it is for the limited purpose of reviewing whether the public body properly determined that a request was for a "commercial purpose".

In addition to the above amendments, this new law also allows the PAC to extend the timeframe for its response to a request for review to 30 business days (previously, the extension was limited to 21 business days).

If you require additional information regarding the amendments to FOIA, please do not hesitate to contact any RSNLT attorney.

Catherine R. Locallo, an associate in the firm's Chicago office prepared this *Law Alert*.

[1] Please note, however, that the PAC's request for review process still exists. A request for review may be made by a requester if a public body denies a FOIA records request based upon any of the exemptions under Sections 7 or 7.5 of FOIA.

[2] This definition does not generally apply to news media or non-profit, scientific, or academic organizations.

[3] All other requests made under FOIA must be responded to within the original 5 business day timeframe after receipt, unless (1) an additional 5 business day extension is warranted and timely notice is given to the requester; (2) the request is for a "commercial purpose"; or (3) the requester agrees to a longer timeframe for response.

[4] The proposed responses include: an estimate of the time and fees (which may be collected prior to disclosure of the responsive records) in order for the public body to provide the records; a denial of the request under one of the exemptions set forth under Sections 7 or 7.5 of FOIA; that the request is unduly burdensome and extend an opportunity to the requester to reduce the request to a manageable proportion; or provide the requested records.

[5] A "commercial purpose" is defined as "the use of any part of a public record...for sale, resale, or solicitation or advertisement for sales or services." This does not include requests made by news media and non-profit, scientific or academic organizations. See 5 ILCS 140/2(c-10). If asked by the public body, a requester must disclose whether the request is for a commercial purpose. See 5 ILCS 140/3.1(c).

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