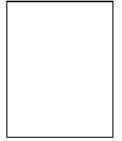


## ZUKOWSKI, ROGERS, FLOOD & McARDLE

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# *Municipal Matters*

Timely news in the area of municipal law

promotional material

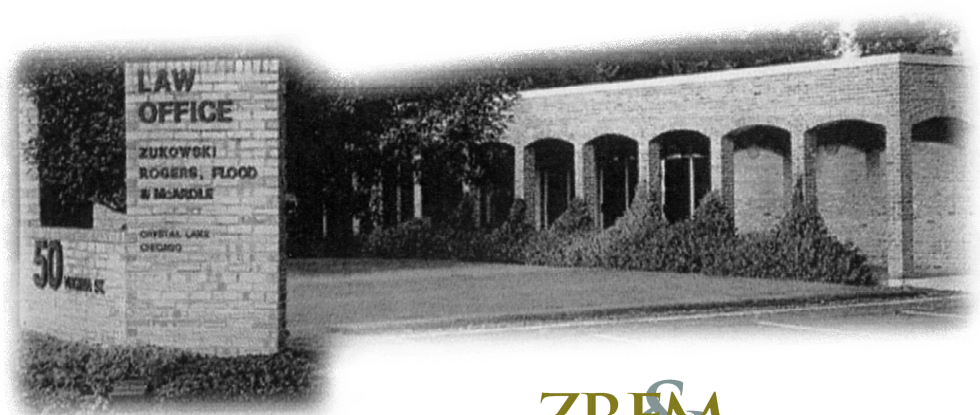
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## INSIDE THIS ISSUE

Zukowski, Rogers, Flood & McArdle's quarterly newsletter that allows units of government and their employees to stay up-to-date on legal matters in an ever-changing legal climate.

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- Dates to Remember
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### A New Era of Openness: The 2009 FOIA Amendments

By Ruth A. Schlossberg

On August 17, 2009, Governor Pat Quinn signed legislation that makes major changes to the Freedom of Information Act ("FOIA"). These changes will have real implications for municipal operations, record-keeping and disclosure. While the Governor signed the legislation without changes despite concerns expressed by the Illinois Municipal League and the Illinois State's Attorneys Association, he acknowledged the existence of lingering concerns and called for trailer legislation to address the new Act's shortcomings. The new Act is scheduled to go into effect on January 1, 2010. Under the terms of the law, the State Attorney General's office will develop a training program that all officials responsible for FOIA requests will be required to complete. We also anticipate that in the coming months, a great deal of information about the new Act and its expectations will be published by the Attorney General and a number of commentators and professional associations. We will keep you posted as the Act is implemented, and we will try to work closely with you to develop new policies to the extent changes are advisable or appropriate under the new Act.

This article is a summary of some of the most significant, new main points of the Act of which you should be aware:

**1. Designation of Freedom of Information Act Officer:** The new Act will require each body to designate at least one person who will be responsible for FOIA requests. These officers will be required to undergo State training and to prepare new documentation in order to comply with the FOIA requirements.

**2. Changes and Responses:** Under the new Act, municipalities are given only five (5) business days to reply to or reject a request for records rather than the seven (7) business days permitted in the past.

**3. Fees:** The statute clarifies the rules governing what fees, if any, may be imposed for replying to requests. The first 50 letter-sized black and white copies are free, and copies thereafter are restricted to \$.15 per page.

Municipalities are permitted to pass on costs for color copies or larger sizes. The Act formalizes the requirement that costs for search or review may not be passed on to requesters. It is important to note that any fees in violation of the new statutory rules are now defined as a denial and will be subject to immediate appeal to the state's Public Access Counselor or to the court system.

**4. Changes to Address Electronic Records:** The Act now makes it very clear that records include not just paper copies, but all records including material stored electronically. Moreover, if a request is made for a copy of the electronic documentation, if possible, the government body must furnish it in the electronic format. We think this is going to have significant implications for your internal e-mail policies, and we are reviewing and reconsidering e-mail policies right now. Most significantly, it is important to ensure that you are complying with any State laws regarding retention of e-mail and avoiding any e-mail correspondence that might violate the Open Meetings Act. You will need to be able to generate e-mail records when requests are made for them. This means that if your staff or elected officials are using work accounts as well as personal accounts or are keeping records on personal computers or perhaps hand-held devices, it is important to set up some sort of system that will allow your FOIA officer to access those records. Otherwise, every time you get a request, you will need to ask all of your officials to review their personal computers. Again, our office will review and prepare updated recommendations for e-mail record retention in the coming weeks after we have had some time to consider the full implications of these changes from both a legal and an operational perspective.

**5. FOIA Now Applies to Records Outside Your Municipal Files:** Under the new Act, a record does not need to be in the public body's possession to be subject to FOIA. If it is in the possession of another party under contract to perform a governmental function or if it is

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# Welcome

In this issue, Ruth Schlossberg highlights amendments to the Freedom of Information Act.

Also included in this issue are important dates from September through December 2009, along with some timely ZRFM attorney news.

If you have any questions, comments, or suggestions for articles in upcoming issues, please contact us.

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A New Era of Openness - continued from page 1

directly related to the governmental function and is not otherwise exempt, it still will need to be produced. This may have implications for your agreements with your engineers, consultants and even lawyers (though much of the documentation provided to your lawyers will continue to be exempt under attorney/client privilege standards). Nonetheless, this means that when you get FOIA requests, it may be necessary to consult with your outside contractors. Remember that you cannot pass any associated costs for FOIA searches onto the requesting party. Thus, going forward, when entering into agreements with outside consultants, it will be important to address this issue and obligation with your contractors and to determine whether or how you will be charged for such services.

**6. Requests for Extension of Time:** Government bodies may ask for an extension of time to reply for the same reasons as in the past; however, these extensions will now be for only five (5) additional business days instead of seven (7) business days. The parties may agree in writing, however, to extend this time. If a request for an extension is made and you do not then reply on a timely basis, this will constitute a denial under the Act. You will not be allowed to pass on any charges for documents and, under the Act, you will have waived the right to claim that the request is unduly burdensome.

**7. Commercial Purposes:** The Act does allow a greater period of time to reply to commercial requests. More specifically, within twenty-one (21) business days of the request, a government body must respond. If it is not including the documents requested at that time, it must provide an estimate of the time required to provide the records. The statute requires only that you produce the records within a "reasonable" period "considering the size and complexity of the request", and you are permitted to prioritize non-commercial requests.

**8. Denying a Request:** When you deny a request, the petitioner has two alternative options for appealing. First, they can seek review from the Public Access Counselor in the Attorney General's office, or they have the right to seek judicial review. The Public Access Counselor review is new and judicial review rights are considerably expanded and changed under this Act. Further, unlike previous practice, you do not get a second "bite of the apple" or an opportunity to reconsider a denial by providing for an appeal to a senior officer of the municipality. Instead, petitioners have the right to appeal your denial to the Public Access Counselor or to the court system immediately.

**9. Records That Are Subject to FOIA Have Been Expanded:** Everything that was previously subject to disclosure remains so subject, and new records are now included as well. The Act explicitly includes many of the areas that were

once ambiguous or not previously covered including electronic communication or material in the hands of a contractor. The Act also explicitly addresses records for use of public funds, prevailing wage payroll reports, arrest reports (with some limitations), criminal history records (with some limitations) and settlement agreements. To the extent the Act permits material to be redacted, it specifically requires that you may redact, but you must make the balance of the document available. Therefore, you may no longer withhold a document because some part of it would be exempt under the Act. Among the most notable changes and clarifications regarding exemptions are the following:

- **Private Information:** Private information is explicitly exempt. Private information includes such unique identifiers as social security numbers, passwords, medical records, phone numbers, e-mails, home addresses and the like.

- **Personal Privacy:** The Act eliminates the list of items that used to be per se exempt for personal privacy. Instead, the Act provides that personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, is exempt unless the disclosure is consented to in writing. "Unwarranted invasion of personal privacy" includes material which, if disclosed, would be highly personal or objectionable to a reasonable person, and one for which the subject's right to privacy outweighs legitimate public interest in obtaining the information. The Act also makes clear that information that bears on the public duty of an individual does not constitute personal privacy. What, exactly, this balancing test will mean in practice is something that it may take several years of experience under the Act to know with any certainty, but it seems meant to be an expansion of documents that will have to be produced. Perhaps, most notably, whenever you invoke the personal privacy exemption, you will be required to notify the State's Public Access Counselor who will have the right to review all such decisions.

- **Law Enforcement Proceedings:** The Act provides exemptions for certain law enforcement proceedings. We anticipate that police associations will provide additional information about the implication of some of these for operations and, if that information is not shortly forthcoming, we will provide additional information to help your departments continue to operate within the confines of the law without compromising investigations or public safety.

- **Preliminary Drafts:** The exemptions for preliminary drafts and notes, recommendations, memoranda and other records in which opinions are expressed remains in place. However, like the personal privacy exemption, whenever this preliminary draft exemption is

invoked, you will be required to notify the Public Access Counselor who will have the opportunity to review this.

- **Trade Secrets or Commercial or Financial Information:** Trade secrets or commercial or financial information remain exempt if they are furnished under a claim that they are confidential, and if their disclosure would cause competitive harm.

- **Records Relating to Adjudication of Employee Grievances or Disciplinary Cases:** This information remains exempt, but the final outcome of the case is not exempt.

- **Statutory Exemptions:** The Act also provides a long list of statutory exemptions that will be per se exempt because they are already excluded under other Acts. That list is included in our attachment. However, this list is not exhaustive, and you can anticipate that future exemptions will be made under other Acts. Nonetheless, it may be good record-keeping practice to flag any files you maintain that have any of these statutorily exempt information within them so that, in the future, when you are reviewing files, the FOIA officer has a heads-up that potentially exempt material is included in the files.

**10. Public Access Counselor:** The State has made official and expanded the powers of the Public Access Counselor who already is located within the office of the Attorney General. The Public Access Counselor will be permitted to issue binding opinions regarding petitions made under FOIA, although those opinions ultimately will be subject to administrative review. The Public Access Counselor also is given the authority to review public body decisions by mediation and other means and may issue advisory opinions. Moreover, the office will have the authority to review certain public body decisions such as claims of exemption for personal privacy or preliminary drafts, and the Counselor may require you to submit potentially exempt information so that they can review your decisions (although this information remains exempt from FOIA and may not be publicly disclosed by the Public Access Counselor). The good news is that a public body that complies with an opinion from this office will be immune from liability for penalties under the Act and may rely on good faith on the advisory opinions. In the event a petitioner appeals to the Public Access Counselor for review, the Act outlines a procedure to follow. The Counselor will need to notify both you and the other party, and each of you will have a chance to either defend your position or to challenge that defense. Ultimately, however, the Public Access Counselor is required to rule within sixty (60) days although they are given one 21-day extension. Public bodies are permitted to appeal decisions of the Public Access Counselor, but that administrative review must take place only in Cook or Sangamon County Courts. Also, the public body now has the burden of proving that your actions were appropriate by clear and convincing evidence. This is a new and high standard.

**11. Lawsuits for Injunctive or Declaratory Relief:** As under the old Act, a party who is not happy with your decision under FOIA may elect to bring a claim in circuit court seeking injunctive or declaratory relief. The statute increases the burden on the public bodies to defend the exemption by requiring the high "clear and convincing evidence" standard. Moreover, the Act now changes awards of attorney's fees to the winners from a discretionary award made at the option of the judge to a mandatory award. Finally, the Act also adds that if a court finds willful or intentional failure to comply or bad faith, a civil penalty may be levied on the public body of between \$2,500 and \$5,000 per occurrence.

## Dates to Remember:

**Sept. 24 – 26:** Illinois Municipal League 96th Annual Conference.

**Oct. 1:** Last day to file a certified copy of any ordinance or resolution imposing or discontinuing a retailer's occupation tax (or home rule sales tax), or changing the rate, with the Dept. of Revenue to take effect Jan. 1.

**Oct. 31:** If your fiscal year started May 1, the municipal treasurer should have filed an annual account of moneys received and expenditures incurred during the preceding fiscal year with the municipal clerk. The clerk is required to publish the annual account if your population exceeds 500. (If your fiscal year started Jan. 1, the deadline is June 30.)

**Nov. 26 & 27:** The law offices of Zukowski, Rogers, Flood & McArdle are closed in observance of the Thanksgiving holiday.

In anticipation of the December 29 deadline for filing a certified copy of your tax levy ordinance with the county clerk, the Truth in Taxation Law requires that not less than 20 days prior to the adoption of the tax levy ordinance the corporate authorities are required to determine the amounts of money estimated to be necessary to be raised by property taxes. We recommend a resolution be passed that contains the total estimated taxes that are anticipated, the total sum that was extended for the previous tax year and the percent of increase between the figures.

**December (or sooner):** If the total levy is more than 105% of the amount of property taxes extended for the previous tax year, plus any amount abated prior to the extension, a "Truth in Taxation" hearing is required before the levy is approved. A public notice, in substantially the form found in 35 ILCS 200/18-80, must be published not more than 14 days nor less than 7 days prior to the public hearing.

## Important Deadlines to Remember:

30 days before the passage of a new or amended building code or zoning ordinances that establishes constructed related activities that are applicable to structures within a municipality, notice must be listed at the Illinois Building Commission website.

Within 30 days after a bill is received or within 30 days after the date when goods or services are received, whichever is later, the Local Government Prompt Payment Act requires that such bill be approved or disapproved by the appropriate local governmental official. In addition, if an approved bill is not paid within the 30 day period, an interest penalty of 1% of any amount approved and unpaid "shall be added for each month of fraction thereof" until final payment is made.

## ZRFM Attorney News

Kelly Cahill recently conducted harassment and diversity training for the City of Marengo.

Melissa Cooney and Ryan Farrell are conducting an estate planning presentation at Hearthstone on September 10, 2009.

Rich Flood and Ruth Schlossberg will be speaking at the Illinois Municipal Conference in September. The topic: "Congratulations, You've Been Elected: Now What Do You Do?"