The Sun Peeking Around the Corner: Illinois' New Freedom of Information Act as a National Model

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"A fundamental premise of American democratic theory is that government exists to serve the people. . . . Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance."

– Justice Maureen O'Connor, Ohio Supreme Court[1]

I. INTRODUCTION

The State of Illinois has set the bar for the rest of the country in the areas of scandal and public corruption. In commenting on the federal investigation of then-governor Rod Blagojevich, the special agent in charge of the FBI's Chicago field office was widely reported stating that if Illinois "isn't the most corrupt state in the United States, it's certainly one hell of a competitor."[2] Former-governor Blagojevich is actually the seventh Illinois governor in history to be arrested or face indictment,[3] a level of corruption unheard of in other parts of the country. Although one of these governors escaped indictment and another was acquitted, four former governors have been convicted of crimes ranging from tax evasion and racketeering to conspiracy and bribery.[4] The record of corruption does not end with the governor's office, but rather seeps through almost every

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1 Kish v. City of Akron, 846 N.E.2d 811, 816 (Ohio 2006) (emphasis added).

2 Claire Suddath, *Illinois Corruption*, TIME, Dec. 11, 2008, *available at* http://www.time.com/time/nation/article/0,8599,1865681,00.html.

3 *Id*. Joel Aldrich Matteson, Lennington Small, William Stratton, Otto Kerner, Dan Walker, and George Ryan were all subjects of criminal investigations at minimum for activities conducted before, during, or shortly after their time in the governor's mansion. *Id*.

4 *Id*.

level of government in the state.[5]

The common thread through each of these cases has been public officials who appear to act with hubris and resulting impunity, and a public that seems nonplussed about corruption scandals. In the words of former U.S. Attorney for Northern Illinois, Patrick Collins, "it isn't a scandal in Illinois until somebody gets indicted."[6]

While it might appear that the people of Illinois just do not care, it is more that they have lived generation after generation in a culture in which it is acceptable for government to run behind closed doors without the input and monitoring of the public to insure the public interest. The people have periodically demanded a more active role in government that has resulted in small strides.[7] With an "us versus them" and "we need to protect these records from outsiders" mentality, Illinois leaders and lawmakers have been complicit in keeping an institutional shade over public information that has left the public unable to hold its representatives accountable for their actions.[8] The Illinois General Assembly fostered public officials' sense of entitlement and impunity with sunshine laws that

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[5] *See, e.g.*, Joseph Ryan, *Park District Pension Ploy Pays Off Handsomely*, CHI. TRIB., July 30, 2010, *available at* http://articles.chicagotribune.com/2010-07-31/news/ct-met-highland-park-money-20100731_1_park-district-highland-park-parks-officials (describing extreme compensation of park officials); Richard Wronski & Matthew Walberg, *Metra Chief Faces Criminal Probe*, CHI. BREAKING NEWS CTR., May 7, 2010, *available at* http://www.chicagobreakingnews.com/2010/05/criminal-probe-of-metra-finances-launched.html (describing launch of a criminal investigation into financial irregularities by the long time executive director); Joseph Ryan, *Pagano Death Part of a Disturbing Trend?*, DAILY HERALD, May 9, 2010, *available at* http://www.dailyherald.com/story/?id=379387 (describing trend of suicide amongst public figures facing corruption investigations).

[6] Patrick Collins, Former Assistant US Attorney, Keynote Address at the Citizen Advocacy Center 15th Anniversary Celebration (Sept. 26, 2009) (speech notes on file with author).

[7] *See* KATRINA KLEINWACHTER & TERRY PASTIKA, CITIZEN ADVOCACY CENTER STUDY ON MUNICIPAL INTERNET COMMUNICATIONS, THE FREEDOM OF INFORMATION ACT, AND THE OPEN MEETINGS ACT, http://www.citizenadvocacycenter.org/Reports/MunicipalInternetCommunications.pdf (2006) (discussing the Citizen Advocacy Center's mission to strengthen citizens' capacity for self-governance, focusing on laws that protect public access to government decision-making); TERRY PASTIKA & SARAH KLAPER, CITIZEN ADVOCACY CENTER OPEN MEETINGS ACT STUDY, http://www.citizenadvocacycenter.org/Reports/OpenMeetingsAct.pdf (Citizen Advocacy Center's discussion of the Open Meetings Act). *See also* ILLINOIS CAMPAIGN FOR POLITICAL REFORM, STATEMENTS OF ECONOMIC INTEREST, http://www.ilcampaign.org/issues/sei (describing SEI disclosures to provide voters with general information); ILLINOIS CAMPAIGN FOR POLITICAL REFORM, DISCLOSURE AND TRANSPARENCY, http://www.ilcampaign.org/issues/disclosure-transparency; Bob Sector, *Illinois' History of Insatiable Greed*, CHICAGOTRIBUNE.COM, Feb. 15, 2009, *available at* http://www.chicagotribune.com/news/local/chi-ready-for-reform-15-feb15,0,6270951.story.

[8] *See Police Refuse to Release Report on Official's DUIs*, THE BLOOMINGTON PANTAGRAPH, March 3, 2007, at A3 (describing Illinois agencies' blocking of access to documents requested under FOIA); Brandon Weisenberger, *Critics Say Illinois' Open Records Law is Flawed*, DAILY EGYPTIAN, June 19, 2007, *available at* http://www.highbeam.com/doc/1P1-140711073.html (describing difficulty of residents in obtaining compliance with FOIA); Justin Kmitch, *Resident, Township Differ on Public Information Act*, CHI. DAILY HERALD, Aug. 11, 2004, at 4.

kept more public information in the dark than in the sunlight.[9]

Illinois' illustrious history and apparent indifference to corruption makes what happened in the summer of 2009 all the more exciting and fascinating. In August 2009, the Illinois General Assembly made significant progress in changing Illinois' reputation from having among the worst open government laws in the country to having one of the tightest, most comprehensive set of public records and open meetings laws in the nation. Section II of this Article will focus on the history of the Freedom of Information Act in Illinois and the inadequacies of the statute prior to January 1, 2010. Section III will explore the new Illinois Freedom of Information Act and the Attorney General statute and highlight the most impressive changes, including the evolution of the Illinois Attorney General's Public Access Counselor in advocating for open government. Section III compares the Illinois Freedom of Information Act to other states' open records laws, and it includes a chart comparing enforcement provisions of the open records laws from each of the fifty states and the District of Columbia. Finally, in Section IV, the Article will conclude with a discussion of Illinois' Freedom of Information Act as a model for the rest of the country in the way that it facilitates accessibility and accountability in state and local government.

II. THE ILLINOIS FREEDOM OF INFORMATION ACT PRE-2010

A. History

On July 1, 1984, when the Illinois General Assembly became one of the last states in the country to enact Freedom of Information legislation,[10] the State perpetuated its reputation of having a corrupt and closed government. The original statute began with lofty aspirations regarding open government. The first section stated:

> Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government. . . . Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is

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[9] *See* discussion *infra* Part II.

[10] 1983 Ill. Laws 6860; CITIZEN ADVOCACY CENTER, ACCESSING GOVERNMENT: HOW DIFFICULT IS IT? 10 (2008), *available at* http://www.citizenadvocacycenter.org/OGP.html (click on "Illinois" under "State Reports").

being conducted in the public interest.[11]

Without attempting to overburden public bodies,[12] Illinois' Freedom of Information Act (hereinafter FOIA or "Act") mandated that the citizenry have a right to know how public bodies govern in the public interest by providing unfettered access to public records.[13] Specifically, the statute instructed that "[e]ach public body shall make available to any person for inspection or copying all public records,"[14] subject to limited exceptions listed in the statute.[15]

Under the original statute, public bodies included legislative, executive, administrative, and advisory bodies of any state or local government, including: state universities and colleges; state and local boards, commissions, and committees; and subsidiary bodies of any state or local government.[16] The definition of public record was equally broad on its face. Pursuant to Illinois' FOIA, public records included all records, reports, or writings, "regardless of physical form or characteristics" prepared, used, or possessed by the public body.[17]

On first examination, these sections of the Act appeared to allow unlimited access to almost all records maintained by public bodies. However, section 7 of the original Act clearly permitted public bodies to deny the public access to records that fell under any of forty-five exemptions.[18] Exemptions ranged from broadly defined information that, if disclosed, "would constitute a clearly unwarranted invasion of personal privacy,"[19] to preliminary drafts, notes, and recommendations that express opinions or formulate policies.[20] The Act also exempted materials that were considered trade secrets,[21] proposals and bids prior to the award of those bids,[22] architectural plans,[23] and minutes of closed public meetings.[24]

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11 5 ILL. COMP. STAT. ANN. 140/1 (West 2005).

12 *Id*.

13 *Id*.

14 *Id*. 140/3(a).

15 *See generally id*. 140/7.

16 *Id*. 140/2(a).

17 5 ILL. COMP. STAT. ANN. 140/2(c) (West 2005).

18 *Id*. 140/7. Many of these exemptions have subsections that provide public bodies even more latitude to deny the public access to public records. *See id*. 140/7(1)(b). In addition, although most of the exemptions are permissive, many public bodies refuse to use discretion in determining their applicability to a particular record; they instead consider the exemptions to be mandatory. *Id*.

19 *Id*. 140/7(1)(c).

20 *Id*. 140/7(f).

21 *Id*. 140/7(g).

22 *Id*. 140/7(h).

These numerous exemptions led to a great deal of confusion and a feeling amongst the public that the public business of the Illinois government was not in fact public or transparent.[25] These exemptions practically invited public officials to broaden unclear definitions or reclassify public documents to fit into the exemptions.[26]

Even with the numerous exceptions listed, the Illinois courts have repeatedly held that the statute's language is clear: the availability of public records is to be interpreted broadly, and exceptions to disclosure are to be construed strictly.[27] The exceptions cannot be read to defeat the purpose of openness in government.[28] The presumption always lies with openness and accessibility.[29]

Under the previous version of Illinois' FOIA, there was a strict timeline[30] for the public body to respond to a request for a public record by either making the record available for inspection or copying, requesting additional time to respond to the request,[31] or denying the request in writing pursuant to one or more of the statutory exemptions.[32] If denied, the requestor could file an appeal with the head of the public body.[33] If the

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[23] 5 ILL. COMP. STAT. ANN. 140/7(k) (West 2005).

[24] *Id*. 140/7(m).

[25] *See generally* Bluestar Energy Servs., Inc. v. Ill. Commerce Comm'n, 871 N.E.2d 880 (Ill. App. Ct. 2007); Harwood v. McDonough, 799 N.E.2d 859 (Ill. App. Ct. 2003); Lieber v. S. Ill. Univ., 664 N.E.2d 1155 (Ill. App. Ct. 1996); Public Access to Search Warrant Information Prior to the Final Disposition of a Case, Op. Ill. Att'y Gen. No. 07-002 (Dec. 24, 2007), *available at* http://www.illinoisattorneygeneral.gov/opinions/2007/07-002.pdf (regarding public dissemination of search warrants and accompanying evidence); Fees for Accessing Information Contained in a Geographic Information System, Op. Ill. Att'y Gen. No. 05-002 (Apr. 15, 2005), (regarding excess fees for documents that can be legally denied access) *available at* http://www.illinoisattorneygeneral.gov/opinions/2005/05-002.pdf; State Board of Elections' Voter Registration Database as a Public Record Exempt from Disclosure under the Freedom of Information Act, Op. Ill. Att'y Gen. No. 02-009 (Aug. 28, 2002), *available at* http://www.illinoisattorneygeneral.gov/opinions/2002/02-009.pdf (regarding public dissemination of the voter registration database); Log of Underground Storage Tank Removal, Op. Ill. Att'y Gen. No. 096-032 (Nov. 27, 1996), *available at* http://www.illinoisattorneygeneral.gov/opinions/1996/96-032.pdf (regarding public dissemination of State Fire Marshal logs).

[26] *See generally* Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200, 910 N.E.2d 85 (Ill. 2009).

[27] *See, e.g*., City of Monmouth v. Galesburg Printing & Pub. Co., 494 N.E.2d 896, 898 (Ill. App. 1986).

[28] S. Illinoisan v. Dep't of Pub. Health, 747 N.E. 2d 401, 407 (Ill. App. Ct. 2001) (citing *Lieber*, 664 N.E.2d at 1161).

[29] Day v. City of Chi., 902 N.E.2d 1144, 1147 (Ill. App. 2009) (citing *Stern*, 910 N.E.2d at 91 and Lieber v. Bd. of Trs. of S. Ill. Univ., 680 N.E.2d 374, 377 (Ill.1997)).

[30] 5 ILL. COMP. STAT. ANN. 140/3(c) (West 2005).

[31] *Id*. 140/3(d).

[32] *Id*. 140/9.

[33] *Id*. 140/9(a).

head of the public body also denied the request, the requestor could file suit for injunctive or declaratory relief.[34]

B. The Biggest Flaw—Enforcement

The biggest flaws in the Illinois FOIA were the completely ineffective enforcement provisions. While a requestor could file suit to seek compliance with the law, the language of the statute was incredibly weak.[35] Even if a requestor could wend her way through the FOIA request process and the convoluted exemption provisions, the public body could still deny the request, or simply ignore the request, thereby signifying a denial, most likely doing so without repercussion.[36]

The requestor could also seek assistance from the Illinois Attorney General's Public Access Counselor (hereinafter "PAC"), whose position was designed to assist both public officials and the requestor with open government issues.[37] However, the PAC had no enforcement capacity.[38] Although she could attempt to mediate the situation or write letters encouraging the public bodies to comply with the law, her capacity was merely advisory, and it was non-binding.[39] Therefore, the requestor was effectively on her own, unless the public body decided to work with the PAC. Although the statutory burden in FOIA was on the public body to demonstrate why its denial was proper, without binding assistance from the PAC, the practical burden shifted to the requestor. The requestor faced the up-hill battle of either finding the financial resources to hire an attorney and file suit, or trying to navigate the court system in a *pro se* action. These options were particularly bleak considering that at the end of potentially years-long, expensive litigation, the only "hammers" to enforce the law were injunctions and possible attorney's fees and costs, if the requestor "substantially prevailed" in the lawsuit.[40] These "hammers" acted more like feathers in that it was a rare requestor who could afford the financial and emotional strain of a lawsuit that was likely to require lengthy, expensive, and complex appellate litigation, often lasting two

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[34] *Id*. 140/11(a).

[35] *See* 5 ILL. COMP. STAT. ANN. 140/11 (West 2005).

[36] *See* Weisenberger, *supra* note 8.

[37] *See* ILL. ATT'Y GEN., PUBLIC ACCESS COUNSELOR ANNUAL REPORT 1 (2005), *available at* http://foia.ilattorneygeneral.net/pdf/Public_Access_Counselor_Report_05.pdf.

[38] *Compare* 5 ILL. COMP. STAT. ANN. 140 (West 2005), *with* 5 ILL. COMP. STAT. ANN. 140/9.5(5) (West Supp. 2010).

[39] *Id*.

[40] 5 ILL. COMP. STAT. ANN. 140/11(i) (West 2005) "[T]he court may award such person reasonable attorneys' fees and costs." *Id*.

years or more.[41] Public bodies knew that they had a natural deterrent built into the statute—a requestor was not likely to appeal to the appellate courts—so responding to FOIA requests became almost an optional component of the statute.

III. THE NEW ILLINOIS FOIA 2010

A. Amendments of General Interest

1. Purpose

In August 2009, the Illinois General Assembly, in cooperation with the Illinois Attorney General and several advocacy groups,[42] passed amendments to the Illinois Freedom of Information Act.[43] The January 1, 2010 amendments started with a bang by clarifying the aspirational purpose section and giving a clear directive to public bodies that

> [i]t is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government. It is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with this Act.[44]

The amendments also clarified that statutory exemptions "are limited exceptions to the principle that people of this State have a right to full disclosure of information relating to the . . . conduct of government and the lives of any or all of the people."[45]

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[41] For example, Mr. Scott Kibort filed a FOIA case against the DuPage County Election Commission on June 1, 2005. Complaint at 1, Kibort v. Westrom, no. 2005 CH000784, 2005 WL 6231597 (Ill. Cir. June 1, 2005). His case did not receive final adjudication for nearly two full years until Illinois Supreme Court denied his petition to appeal on May 27, 2007. Kibort v. Westrom, 871 N.E.2d 56 (Ill. 2007). Similarly, Mr. Mark Stern faced an extensive legal battle when he filed a FOIA request for a public school superintendent's employment contract. His litigation began on November 21, 2006, and ended with an Illinois Supreme Court decision on November 28, 2009. *See* Complaint at 1, Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200, No. 2006CH002194, 2008 WL 6742181 (Ill. Cir. Nov. 21, 2006); Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200, 900 N.E.2d 1126 (Ill. 2008).

[42] Such as the Illinois Campaign for Political Reform in Chicago and the Citizen Advocacy Center in Elmhurst, Illinois.

[43] *See* 5 ILL. COMP. STAT. ANN. 140/1 (West Supp. 2010).

[44] 2009 Ill. Legis. Serv. P.A. 96-542 (S.B. 189) (West).

[45] 5 ILL. COMP. STAT. ANN. 140/1 (West Supp. 2010).

2. Advancements in Technology & Private Information

The new FOIA is somewhat shocking in its progressiveness. For example, the General Assembly recognized and accounted for advancements in technology and acknowledged that technology will likely progress faster than FOIA itself.[46] Regardless, the General Assembly specifically stated that it intends for the law to be interpreted to expressly apply to records created or maintained due to those unanticipated technological advances.[47]

Further, the newest incarnation of FOIA clarified and narrowed the meaning of "private information" in the exemption section. While the privacy exemption was previously used as an excuse to deny information such as employment contracts, benefit packages, and the names and titles of public employees,[48] the private information exemption is now limited to unique identifiers such as social security numbers, drivers license numbers, personal financial information, passwords, etc.[49] The privacy exemption now requires public bodies to perform a balancing test between "the subject's right to privacy . . . [and] any legitimate public interest in obtaining the information."[50] The explicit nature of these amendments limits the "wiggle room" in the privacy exemption and will undoubtedly lead to better, more consistent enforcement of requestors' rights than what had happened in the past. It will also assist public officials in understanding what they are permitted to release by law.

3. Settlement Agreements, Motives for Requests, & Time Limits

Another area of change is that settlement agreements are now specifically defined as public records.[51] Settlement agreements were not addressed in the 1984 FOIA,[52] which made it easy for public bodies to turn away requests through the privacy exemption. Now, "[a]ll settlement agreements entered into by or on behalf of a public body are public records subject to inspection and copying by the public . . . ."[53] The public body is permitted to redact portions of the settlement agreement that are subject to exemption elsewhere in the law; however, the document as whole must be

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[46] *Id*.

[47] *Id*.

[48] *See, e.g.*, Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200, 894 N.E.2d 818 (Ill. App. 2008).

[49] 5 ILL. COMP. STAT. ANN. 140/2(c-5) (West Supp. 2010).

[50] *Id*. 140/7(c).

[51] *Id*. 140/2.20.

[52] *Compare* 1983 Ill. Laws 6860 (lacking a provision for settlement agreements) *with* 5 ILL. COMP. STAT. ANN. 140/2.2 (West Supp. 2010) (documenting the inclusion of settlement agreements).

[53] 5 ILL. COMP. STAT. ANN. 140/2.20 (West Supp. 2010).

released to the requestor.[54]

In addition, although the Attorney General clearly opined many years ago that a public body may not demand to know the purpose of a request, many public officials take FOIA requests very personally, especially when those requests are regarding sensitive information.[55] In advocating on behalf of requestors and working with public officials to resolve FOIA issues, it never ceases to amaze advocates when clerks feel protective of public information and refuse to disclose it to the public because they do not trust the requestor's motives.[56] The new FOIA amendments make clear that a requestor's format and motives are irrelevant to the FOIA process; a public body cannot require that a requestor use a specific request form or be subject to denial, and the public body does not have the right to require the purpose of the request before releasing public records.[57]

The General Assembly also narrowed and clarified time limits placed on public bodies to respond to FOIA requests. Public bodies must now respond to a request within five business days of receipt of the request, as opposed to seven "working days."[58] A denial must be in writing, and a failure to respond in writing within the appropriate timeline comes with a penalty in that the public body may not impose copying fees for any documents provided after five business days.[59] In addition, a public body that does not respond to a request within the proscribed timeline is prohibited from thereafter claiming that the request is unduly burdensome,[60] another common denial technique for understaffed public offices. Instead, the amendments almost encourage requestors and public officials to avoid unnecessarily adversarial relationships and work together if the timeline is genuinely too short for compliance. A requestor and a public body can agree in writing to extend a time limit for compliance.[61]

4. *FOIA Officers & Fees*

In an effort to clarify the process of FOIA requests, each public body is now required to designate a Freedom of Information Officer.[62] This

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[54] *Id*.

[55] *See supra* note 8.

[56] *See supra* note 8.

[57] These prohibitions do not apply when the public body is making a determination as to whether a commercial purpose exists or whether to grant a fee waiver. 5 ILL. COMP. STAT. ANN. 140/3(c) (West Supp. 2010).

[58] *Id*. at 140/3(d).

[59] *Id*.

[60] *Id*.

[61] *Id*. 140/3(e).

[62] *Id*. 140/3.5(a).

Officer will be responsible for receiving and responding to FOIA requests and also must develop a list of categories of records that the body will disclose immediately upon request.[63] The amendments also provide for a specific process of receiving requests, calculating the time for response and filing requests.[64] In addition, with the law changing so dramatically, and the likelihood of forthcoming amendments in upcoming sessions of the General Assembly,[65] Freedom of Information Officers are now required to successfully complete an online annual training program provided by the Attorney General's office.[66]

One of the most dramatic and requestor-friendly amendments to Illinois' FOIA are the clarifications in the costs and fees section of the Act. Previously, excessive costs were another common way to deter requestors in their quest for public records.[67] Despite statutory language and Attorney General Opinions to the contrary,[68] public bodies would often charge requestors multiple dollars per page for copying costs, as well as additional administrative costs to find, compile, and manage the public records.[69] The Act now specifically states that the public body may not charge for the first fifty black and white copies of records made pursuant to a FOIA request.[70] Charges for any copies made thereafter may not exceed $0.15 per page.[71] The statute specifically requires public bodies to calculate the actual costs of reproduction, without including administrative, review, or equipment rental costs.[72]

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[63] 5 ILL. COMP. STAT. ANN. 140/3.5(a) (West Supp. 2010).

[64] *Id*.

[65] *See, e.g.*, H.B. 5154, 2010 96th Gen. Assemb. (Ill. 2010) (removing personnel evaluations from purview of FOIA); 2010 S.B. 3130 96th Gen. Assemb. (Ill. 2010) (clarifying the timeline for a response to an unduly burdensome request); 2010 S.B. 3588, 96th Gen. Assemb. (Ill. 2010) (providing notice of FOIA requests to employees).

[66] 5 ILL. COMP. STAT. ANN. 140/3.5(b) (West Supp. 2010).

[67] TERRY PASTIKA, SARAH KLAPER, & REENA DESAI, CITIZEN ADVOCACY CENTER FREEDOM OF INFORMATION ACT STUDY, *available at* www.citizenadvocacycenter.org/Reports/FreedomOfInformationAct.pdf.

[68] *See, e.g.*, Fees for Accessing Information Contained in a Geographic Information System, Op. Ill. Att'y Gen. 05-002 (2005), http://www.illinoisattorneygeneral.gov/opinions/2005/05-002.pdf; Access to County Recorder's Records Via the Internet, Op. Ill. Att'y Gen. 00-012 (2000), http://www.illinoisattorneygeneral.gov/opinions/2000/00-012.pdf (explaining that there is no express or implicit statutory authority to charge extra fees for viewing electronic records).

[69] *See, e.g.*, *id*.

[70] 5 ILL. COMP. STAT. ANN. 140/6(b) (West Supp. 2010).

[71] *Id*.

[72] *Id*.

B. Public Access Counselor & Enforcement

1. Appeal to the PAC

The single most controversial component of the 2010 version of Illinois' FOIA is the changes to the Public Access Counselor position within the Illinois Attorney General's office. Pursuant to section 9.5 of the Act, public requestors now have a new avenue of redress when a public body denies a request pursuant to FOIA, other than going straight into a lengthy and expensive court battle.[73] Upon denial, a requestor may file a "request for review" with the PAC within sixty days of the denial.[74] The PAC will determine whether further action is warranted on the case.[75] The PAC will then either advise the requestor that the alleged violation is unfounded and take no further action, or will forward a copy of the request for review to the public body within seven days of receipt and request specific documents or records that the public body is required to furnish for the review.[76] Both the public body and the requestor are also permitted to answer each other's claims in writing or supplement the review with additional affidavits or records.[77]

Within sixty days of the receipt of request for review, the PAC must take one of three actions: mediate the situation between the parties; issue a non-binding opinion; or make findings of fact and conclusions of law and issue a binding opinion to resolve the matter.[78] This binding opinion is considered to be a final decision of an administrative agency pursuant to Illinois' Administrative Review Law.[79] If the PAC determines that a public body has violated FOIA, the public body is required to either immediately comply with the opinion or to initiate administrative review.[80]

The new PAC provisions in no way limit a requestor's ability to pursue a claim against a public body on her own. A requestor is not required to file a request for review with the PAC prior to litigating a denial.[81] A public body's denial of a FOIA request is itself considered to be a final

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[73] *See id*. 140/9.5.

[74] *Id*. 140/9.5(a).

[75] *Id*. 140/9.5(c).

[76] 5 ILL. COMP. STAT. ANN. 140/9.5(c) (West Supp. 2010). If the public body fails to provide the requested documents to the PAC, the Attorney General may issue a subpoena to the public body. *Id*.

[77] *Id*. 140/9.5(e).

[78] *Id*. 140/9.5(f).

[79] *Id*. 140/11.5; 735 ILL. COMP. STAT. ANN. 5/3-101 (2003) (defining an administrative agency and an administrative decision).

[80] 5 ILL. COMP. STAT. ANN. 140/9.5(f) (West Supp. 2010).

[81] *See id*. 140/11.

administrative decision subject to appeal within the court system.[82] The new authority of the PAC takes the burden off of the requestor to consider litigation as the only resource available to remedy a FOIA violation.[83] It evens the playing field to two public bodies with (relatively) equally deep pockets, as opposed to a David versus Goliath situation between a citizen and a public body with a staff attorney.

2. *Pre-approval to Deny Access & Liability for Relying on a PAC Opinion*

Two other sections of the new PAC provisions are equally groundbreaking. First, a public body that plans to assert a privacy or preliminary draft exemption pursuant to title 5, section 140/7(1)(c) or 7(1)(f) of the Illinois Compiled Statute must provide written notice to the requestor and the PAC regarding its intent to deny the request in whole or in part.[84] The PAC is then obligated to determine within five days whether further inquiry is needed in the case.[85] The PAC can go on to request further information, determine that no violation has occurred, issue a binding or non-binding opinion, or attempt to mediate the situation with the parties.[86]

The second PAC provision of note relates to the PAC's position within the Office of the Attorney General as advisor to state office holders and public bodies. The PAC continues to be able to issue advisory opinions to public bodies regarding FOIA compliance issues, upon the written request of a public body.[87] A public body that relies on that opinion in good faith cannot be held liable for FOIA violations related to that opinion.[88]

C. *Interplay with the Illinois Attorney General Statute—Enforcement*

At the same time that the General Assembly amended Illinois' FOIA, it also amended the Attorney General Act[89] to include legislative findings and amendments regarding the Public Access Counselor.[90]

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[82] *Id*. 140/9(a), 9(c); 140/11(a).

[83] *See id*. 140/9.5 (permitting a person whose request has been denied to file a request for review). *See also* 140/11.5.

[84] *Id*. 140/9.5(b).

[85] *Id*.

[86] 5 ILL. COMP. STAT. ANN. 140/9.5(c), (f) (West Supp. 2010).

[87] *Id*. 140/9.5(b).

[88] *Id*.

[89] 15 ILL. COMP. STAT. ANN. 205/1 (West Supp. 2010).

[90] *See id*. 205/7.

> The General Assembly finds that members of the public have encountered obstacles in obtaining copies of public records from units of government, and that many of those obstacles result from difficulties that both members of the public and public bodies have had in interpreting and applying the Freedom of Information Act. . . . The public's significant interest in access to public records . . . would be better served if there were a central office available to provide advice and education with respect to the interpretation and implementation of the Freedom of Information Act.[91]

The General Assembly went on to create the position of the Public Access Counselor, but with greatly expanded powers.[92] Because the focus of reform was on FOIA itself, it is doubtful that many realized the implications of the changes to the Attorney General Act. However, one of the changes with the largest impact on the citizenry in FOIA cases is contained therein.

Because public bodies are used to the PAC having absolutely no enforcement capacity in FOIA cases, public bodies might be tempted to disregard a subpoena from the PAC or a binding opinion from the PAC. However, section 7(f) of the Attorney General Act gives the PAC the authority to file an action in the circuit courts of either Cook or Sangamon County, the two counties in which the Office of the Attorney General is located,[93] to compel compliance with a binding decision of the PAC, to prevent a violation of FOIA, and to seek other relief as needed.[94] This provision again takes the burden of litigation off of the requestor by giving the PAC the ability to enforce its own order or subpoena through court action. It evens the playing field between two public bodies, instead of having a private citizen with limited means against a public body with relatively unlimited means to litigate.

The location of the litigation also helps the citizenry in that it is definitely an advantage to the PAC in both the factor of convenience and the factor of preventing the public body from getting a "hometown judge," who could be perceived as favoring the public body. Although the location can be a drawback for the requestor, who might want to attend hearings but

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[91] *Id*. 205/7(a).

[92] *See*, *e.g*., *id*. 205/7.

[93] 15 ILL. COMP. STAT. ANN. 205/7(f) (West Supp. 2010). While location of the public body and violation is considered in compliance actions in which the requestor commences litigation, convenience to the PAC is of primary importance in cases filed pursuant to this statute.

[94] *Id*.

could determine that it is prohibitive due to the distance from the requestor's home, that inconvenience is outweighed by the positives. With this provision, the Attorney General's PAC has her own home-court advantage of litigating in one of two courthouses that is used to seeing Assistant Attorneys General in its hallways. In addition, the cost of traveling or hiring a Chicago or Springfield attorney to litigate the issue will hopefully deter public bodies from around the state from disregarding the PAC's binding decisions. Again, the General Assembly is weighing in on the side of the citizen requestor and enforced openness in government.

D. Public Access Counselors Across the Country

Illinois, a state that used to have one of the weakest sets of open government laws in the country, is now emerging as an accessibility and transparency leader. Only ten states in the country, and the District of Columbia, have established public access counselors or their equivalent, to review potential FOIA violations and issue binding opinions on these issues.[95] However, Illinois is one of only three states in the country in which the PAC, or its equivalent, can issue binding decisions regarding FOIA violations and also seek enforcement of those binding decisions with the trial court.[96]

For example, Connecticut has a Freedom of Information Commission that serves a similar function as the PAC in Illinois.[97] Individuals who suspect a violation of the state's Freedom of Information Act have thirty days from the date it became known that the public agency had violated the law to file an appeal with the Freedom of Information Commission.[98] The Commission must hold a hearing within thirty days of receiving the appeal and must decide within sixty.[99] The Commission may impose fines

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[95] These states are: Connecticut, Delaware, District of Columbia, Illinois, Kentucky, Massachusetts, Nebraska, New Jersey, Pennsylvania, South Dakota, Texas, and Utah. *See* CONN. GEN. STAT. § 1-206 (2007); DEL. CODE ANN. tit. 29, § 10005 (Supp. 2008); D.C. CODE § 2-537 (LexisNexis 2001); 5 ILL. COMP. STAT. ANN. 140/9.5, 140/11–11.5 (West Supp. 2010); 15 ILL. COMP. STAT. ANN. 205/7 (West Supp. 2010); KY. REV. STAT. ANN. §§ 1.880, 1.882 (West 2006); MASS. GEN. LAWS ANN. ch 66, §§ 1, 10(b) (West 1986 & Supp. 2010); NEB. REV. STAT. §§ 84-712.03, -712.07 (2008); N.J. STAT. ANN. §§ 47:1A-6, -7, -11 (West 2003 & Supp. 2010); 65 PA. CONS. STAT. ANN. § 67.1101 (West 2002); S.D. CODIFIED LAWS §§ 1-27-1.5, -38, -40, -41 (West Supp. 2010); TEX. GOV'T CODE ANN. §§ 552.301, .321, .323 (West 2004 & Supp. 2010); UTAH CODE ANN. §§ 63G-2-402, -403, -801(3), -802(2) (LexisNexis 2008).

[96] *See* 5 ILL. COMP. STAT. ANN. 140/9.5(f), 11.5 (West Supp. 2010); 15 ILL. COMP. STAT. ANN. 205/7(c)(3), (c)(7), (f) (West Supp. 2010). The other states are Nebraska, and Texas. NEB. REV. STAT. §§ 84-712.03, -712.07 (2008); TEX. GOV'T CODE ANN. §§ 552.301, .321, .323 (West 2004 & Supp. 2010).

[97] *See* CONN. GEN. STAT. § 1-205 (2009).

[98] *Id*. § 1-206(b)(1).

[99] *Id*.

between $20 to $1000 on either the agency or the individual filing the suit, depending on who was wronged and if the suit was clearly designed to harass the public agency.[100] The decisions of the Commission can be appealed to district and later appellate courts.[101]

Similarly, in Pennsylvania, a requestor who suspects a FOIA violation can file a denial appeal with the state's Office of Open Records (hereinafter "OOR").[102] The OOR can request further information or decide to have a full hearing regarding the alleged violation.[103] The OOR then makes a determination that is binding on the public body.[104] Either the public body or the requestor can file a timely appeal of the OOR decision with the appropriate court.[105] The court can then issue an order for attorney's fees against the agency if it violated FOIA, or against the requestor if the court determines the suit to be frivolous.[106]

While Indiana maintains a Public Access Counselor position that is appointed by the governor, and the Indiana PAC provides a service of public education regarding openness in government laws, the position itself is without teeth.[107] Unlike the Illinois, Connecticut, and Pennsylvania PAC-equivalents, Indiana's PAC can issue only advisory opinions.[108] While the work of the Indiana PAC is certainly admirable, the practical effect of the lack of enforcement capacity is that the burden for enforcement remains on the individual requestor.[109]

Open records laws in the majority of states are more similar to those in Ohio and Wisconsin than to Illinois' law. The burden in most states is solely on the individual requestor.[110] The respective public access/sunshine statutes are considered "self-help." These states do not maintain any sort of an administrative process; requestors must accept responsibility to go straight to the court system for assistance on their own

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[100] *Id*. § 1-206(b)(2).

[101] *Id*. § 1-206(d). *See also id*. § 4-183(a) ("A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court . . . .").

[102] 65 PA. CONS. STAT. ANN. § 67.1101(a)(1) (West 2010).

[103] *Id*. § 67.1102(a)(2).

[104] *See id*. § 67.1102(a)(4).

[105] *Id*. § 67.1301. *See also id*. § 67.1302.

[106] *Id*. § 67.1304.

[107] IND. CODE ANN. §§ 5-14-4-6, -10 (LexisNexis 2006) (The PAC can only provide advisory opinions and make recommendations.).

[108] *Id*. § 5-14-4-10.

[109] *See generally id*.

[110] See *infra* Appendix A below for a full comparison of states and their public records statutes.

when they suspect a violation of their state's FOIA.[111] While Attorney General or other advisory opinions may be available in these states, true enforcement of requestor rights to public records lies squarely with the requestor without assistance. Similarly, the burden of the extensive time and expense required to privately litigate FOIA violations falls on the citizen requestor alone.

IV. CONCLUSION

Representative democracy requires transparency, accessibility, and accountability so that the citizenry can be educated on how public officials are conducting public business and so that it can be involved in that business. Without that transparency and the ability to access government records, citizens cannot monitor the government, hold the government accountable for its actions, or perpetuate the democracy with civic action. Citizens of a democracy must be able to acquire knowledge of the activities of the government, including taxing and spending public money, in order to make educated decisions on how to participate in that government in the future and ensure that public officials are truly acting in the public's interest.

Illinois used to have one of the weakest open government laws in the country.[112] It is no coincidence that Illinois also has an extensive history of corruption and illegality in its government under those weak laws.[113] Although the purpose statement of Illinois' former FOIA was admirable, the content of the Act contained one roadblock to transparency after another. The system was almost unworkable for the average citizen due to the numerous and vague exceptions to disclosure, as well as the complete lack of enforcement provisions.[114] The law was not a tool for accountability; instead, it was a sham that offered transparency in one hand and took away the offer with the other hand. Public officials did not feel compelled to comply and cooperate because they simply did not have to do so.

The amendments to Illinois' Freedom of Information and Attorney General Acts make Illinois one of the most progressive states in the country regarding transparency in government. Not only can the PAC mediate disputes and offer advisory opinions, she can also issue binding opinions and file court action on her own in order to enforce those opinions, removing the burden from the shoulders of individual citizen

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[111] *See infra* Appendix A.

[112] *See* discussion *supra* Part II.A.

[113] *See supra* notes 2–6.

[114] *See* 5 ILL. COMP. STAT. ANN. 140/7, 140/11 (West 2005).

requestors.[115] The coming years will require a cultural shift for the state to move from darkness to sunshine, and for public officials to move from "protecting their records" to accepting that most public records are presumed to be accessible and open to anyone.

The Illinois Municipal League and other local government organizations are openly critical of the new FOIA.[116] They fear extra work with no extra money for already over-worked staff, with budgets that are shrinking by the minute.[117] They fear the release of documents such as performance reviews will lead to the release of truly private information.[118] They fear that the Illinois Attorney General is usurping power within the state by infringing on a judicial role of issuing binding opinions.[119] Maybe some current and former public officials are fearful of exposure to the sun and what that will mean for institutional power and personal profit.

Even with those fears in mind, the "costs" of an improved FOIA are far outweighed by the overwhelming benefits to the people of the State of Illinois. The former Act did not work. Neither the public nor the PAC had enforcement capacity. It had no hammer; it was a feather. It had old, broken dentures instead of teeth. The teeth of the new Illinois FOIA now match the aspirations of its purpose statement. The public can hold its government accountable, and the government, through the PAC, can in turn assist the public in ensuring that accountability. Further, the framework is in place for government and the people to work together to achieve transparency with less of an adversarial relationship than in the past. Illinois' statute, with its myriad of exceptions, is not perfect. However, it is a huge step forward for the people of Illinois, and it is a statute that other states can now model and make better.

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[115] 5 ILL. COMP. STAT. ANN. 140/9.5 (West Supp. 2010); 15 ILL. COMP. STAT. ANN. 205/7 (West Supp. 2010).

[116] *See e.g*. Brian Day, *Governor Uses Veto Pen to Limit FOIA Exemption for Performance Reviews*, ILLINOIS MUNICIPAL LEAGUE, http://legislative.iml.org/page.cfm?key=5488 (last visited Oct. 19, 2010); *FOIA Changes Needed*, ILLINOIS MUNICIPAL LEAGUE, http://foia.iml.org/page.cfm?key=4167 (last visited Oct. 19, 2010); *Discussion Points for FOIA Changes*, ILLINOIS MUNICIPAL LEAGUE, http://foia.iml.org/page.cfm?category=1531 (click on "Discussion Points for Changes" hyperlink) (last visited Oct. 19, 2010); John Patterson, *Why Your Access to Government Should Improve in 2010*, DAILY HERALD, December 30, 2009, *available at* http://www.dailyherald.com/story/?id= 347330&src=109.

[117] Patterson, *supra* note 116.

[118] Day, *supra* note 116.

[119] *Id*.

APPENDIX A

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Alabama	No	No	No	Ala. Code § 13A-10-12; § 36-12-40; § 36-12-41	AG responsible for enforcement, may file a suit	Improper denial can be considered tampering with a government record under criminal code. Tampering is a misdemeanor.
Alaska	No	No	No	Alaska Stat. § 40.25.124	Requestor may file a court action for injunctive relief.	Injunctive relief is the only remedy available under Alaska law.
Arizona	No	No	No	Ariz. Rev. Stat. § 39-121.02	Requestor may file court action for injunctive relief.	If requestor substantially prevails, the court may award reasonable attorney fees, costs, and damages.
Arkansas	No, although Attorney General can issue advisory opinions.	No	No	Ark. Code. § 25-19-107; § 25-19-108; § 25-19-104; § 25-19-105	Requestor may seek advisory opinion from Attorney General, or file a court action for injunctive relief.	If requestor prevails, the court may award reasonable attorney fees and costs. Court may also award reasonable fees and costs to defendant if suit was for frivolous and dilatory purposes. If requestor substantially prevails against a State agency, requestor may apply for reasonable attorneys fees and costs. Negligent violation of the Act is a misdemeanor, punishable by fine of up to $100, imprisonment, or both.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
California	No	No	No	Cal. Gov't Code § 6258-6259	Requestor may file court action for declaratory or injunctive relief.	If requestor prevails, court shall award reasonable attorneys fees and costs. If the court finds the action to be frivolous or vexatious, the court may award reasonable attorneys fees and costs to the agency.
Colorado	No	No	No	Colo. Rev. Stat. §24-72-204; 24-72-206	Requestor may file a court action for injunctive relief.	Any person who willfully and knowingly violates the Act is guilty of a misdemeanor, punishable by a fine of no more than $100, by imprisonment for no more than 90 days, or by both.
Connecticut	No, but Freedom of Information Commission, which will issue a binding, appealable opinion.	Yes	No	Conn. Gen. Stat. § 1-206	Requestor may appeal denial to the Freedom of Information Commission, that will hold hearings and issue a binding opinion, which the aggrieved party can appeal to court.	The commission may impose penalties of fines between $20-$1000, on either the agency or the individual filing the suit, depending on who was wronged and if the suit was clearly designed to harass the public agency.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Delaware	No, but requestor can appeal denial to Attorney General, who can provide an administrative decision.	Yes	No	Del. Code tit. 29 § 10005	Requestor may file a complaint with the Attorney General, who will issue a binding decision that is appealable to the Superior Court. Requestor can also file regardless of AG decision.	If requestor prevails, the court may award reasonable attorney fees and costs. Court may also award reasonable fees and costs to defendant if suit was frivolous and for the purpose of harassment.
District of Columbia	No, but requestor may appeal to Mayor for administrative decision	Yes	No	D.C. Code § 2-537	Requestor may file administrative appeal with Mayor. If Mayor finds that record should be released, but public body fails to comply, requestor may appeal to court.	If requestor prevails, the court may award reasonable attorney fees and costs.
Florida	No	No	No	Fla. Stat. §§ 119.07, 199.10, 119.11	Requestor may file a court action for injunctive relief.	A public official who willingly and knowingly violates this Act can be subject to misdemeanor charges, felony charges, disciplinary action, and fines of up to $500.
Georgia	No, but Attorney General's office can provide informal mediation services.	No	No	Ga. Code §50-18-73	Requestor and Attorney General have ability to bring court action for injunctive relief.	If requestor's suit was substantially justified, the court may award reasonable attorney fees and costs. A knowing violation is a misdemeanor punishable by fine of up to $100.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Hawaii	No, but Office of Information Practices, which can provide advisory opinions and can file and intervene in public records cases.	No	No	Hawaii Rev. Stat. § 92F-15; § 92F-15.5; § 92F-41; § 92F-42	Requestor may file a court action for injunctive relief.	If requestor prevails, the court may award reasonable attorney fees and costs.
Idaho	No	No	No	Idaho Code § 9-343	Requestor may file court action for injunctive relief.	Reasonable costs and attorneys fees to prevailing party, if denial of access or pursuit of records was frivolous. If public official acted in bad faith in denying access, court can assess fines not to exceed $1000.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Illinois	Yes	Yes	Yes	5 Ill. Comp. Stat. 140/9.5; 5 Ill. Comp. Stat. 140/11; 5 Ill. Comp. Stat. 140/11.5; 15 Ill. Comp. Stat. 205/7	Requestor can go directly to court action for injunctive relief, or requestor can appeal to PAC for a binding administrative decision. If public body fails to comply with the administrative decision, the PAC can seek enforcement from the court. If public body plans to deny access based on privacy or preliminary draft exceptions, the public body must provide notice to the PAC. The PAC can then decide to take further action.	If requestor prevails, court shall award reasonable attorneys fees and costs. If the court finds that the public body willfully and intentionally violated the Act, or otherwise acted in bad faith, the court shall also impose a fine between $2500 and $5000 for each occurrence.
Indiana	Yes, but can issue only advisory opinions.	No	No	Ind. Code § 5-14-3-9; § 5-14-1 et seq.	Requestor may file complaint with PAC or with court directly. However, if requestor bypasses PAC, requestor is precluded from receiving attorneys fees and costs.	If requestor substantially prevails, court shall award reasonable attorneys fees and costs. If the court finds the action to be frivolous or vexatious, the court may award reasonable attorneys fees and costs to the agency.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Iowa	No, but requestor can make complaint to the Office of Citizens' Aide/Ombudsman for investigation and an advisory opinion.	No	No	Iowa Code §§ 22.10, 22.5, 141-1.1 et seq.	Requestor, district attorney, or Attorney General may bring court action for injunctive relief.	Knowing violation is a misdemeanor. Court may award damages in an amount between $100-$500, and costs and reasonable attorneys fees for a knowing violation. Court may also issue an order removing a person from office if that person has engaged in two prior violations for which damages were assessed during the person's term.
Kansas	No	No	No	Kan. Stat. § 45-222; § 45-223	Requestor, district attorney, or Attorney General may bring court action for injunctive relief.	If the agency's denial was not in good faith and without a reasonable basis in fact or law, the court may award costs, reasonable attorneys fees, and fines not to exceed $500 per violation. In addition, the court may award costs and reasonable attorneys fees if requestor filed the action not in good faith and without a reasonable basis in fact or law.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Kentucky	No, but requestor may ask for a binding opinion from the Attorney General.	Yes	No	Ky. Rev. Stat. Ann. § 61.880; § 61.882	Requestor may file court action for injunctive relief, or she may ask the Attorney General for an opinion as to a violation. If neither party appeals the AG opinion, that decision becomes binding with enforcement capability in the circuit court.	If requestor is successful and violation was willful, court can award reasonable attorneys fees and costs. Court can also issue fine of up to $25 per day.
Louisiana	No	No	No	La. Rev. Stat. § 44:35; § 44:37	Requestor may file a court action for mandamus, injunctive, or declaratory relief.	If requestor prevails, the court may award reasonable attorney fees and costs. If custodian withheld documents arbitrarily and capriciously, the court may hold that custodian personally liable for actual damages and fines of up to $100 per day.
Maine	No	No	No	Me. Rev. Stat. tit. 1 § 409	Requestor may file a court action for injunctive relief.	If requestor substantially prevails, court may award reasonable attorneys fees and costs. Court may assess fines of no more than $500 for willful violations of the Act.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Maryland	No	No	No	Md. Code § 10-619; § 10-623	If public body temporarily denies access to a record, the public body must then petition the court for an order to continue the denial. Requestor may file a court action for injunctive relief.	If requestor substantially prevails, court can award reasonable attorneys fees, costs, and actual damage (if a knowing and willful violation or public body failed to seek court order to continue temporary denial). If court finds that the public body acted arbitrarily or capriciously in denying access to the record, the court shall send a certified copy of its finding to the appointing authority of the custodian for possible disciplinary action.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Massachusetts	No, but Supervisor of Public Records who can issue opinions.	Yes	No	Mass. Gen. Laws ch. 66 § 1 et seq.; ch. 66 § 10(b)	Requestor may ask Supervisor of Public Records for opinion. If public body refuses to comply with opinion to release records, Supervisor may notify the Attorney General or district attorney for action as they see fit. Requestor may also go directly to independent court action for injunctive relief.	No penalties, attorneys fees, or costs are specified as available under the act.
Michigan	No	No	No	Mich. Comp. Laws § 15.240	Requestor may file court action for injunctive relief.	If requestor prevails, the court shall award reasonable attorneys' fees, costs, and disbursements in part or in total. If the public body has arbitrarily and capriciously violated this act, the court shall award additional, punitive damages in the amount of $500.00.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Minnesota	No, but requestor may appeal to Commissioner of Administration for a non-binding opinion. Although opinion is non-binding, the court must give that opinion deference on appeal.	Yes, although non-binding.	No	Minn. Stat. §§ 13.07-13.08	Requestor may file court action for injunctive relief or ask the Commissioner of Administration for a non-binding opinion.	Court may award costs, reasonable attorneys fees, and damages ranging from $1000 to $15000, if the violation was willful.
Mississippi	No, but requestor can appeal to Ethics Commission for advisory opinion.	No	No	Miss. Code Ann. § 25-61-13; § 25-61-15	Requestor may file court action for injunctive relief or ask the Ethics Commission for an opinion.	If court finds a knowing and willful violation of the act, the court may award a fine of up to $100, as well as all reasonable expenses in bringing the lawsuit and possible jail time.
Missouri	No	No	No	Mo. Rev. Stat. § 610.027.	Requestor, district attorney, and Attorney General can bring court action for injunctive relief.	If court finds a knowing, purposeful violation, the court can award reasonable attorneys fees and costs, as well as fines ranging up to $5000 (depending on violation).
Montana	No	No	No	Mont. Code. § 2-6-107; § 2-3-221	Requestor may file a court action for injunctive relief.	If requestor prevails, the court may award reasonable attorney fees and costs.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Nebraska	No, but requestor can appeal denial to Attorney General, who can then issue a binding opinion requiring disclosure.	Yes	Yes, if requestor demands in writing that AG bring suit in name of the state.	Neb. Rev. Stat. § 84-712.03; § 84-712.07	Requestor may file court action for injunctive relief or request that Attorney General review case and issue decision. If AG issues decision for disclosure and the agency does not comply, requestor may file court action for injunctive relief or demand in writing that the AG file court appeal in the name of the state. The AG shall then file case within fifteen calendar days, and the requester shall have an absolute right to intervene as a party at any time.	If requestor substantially prevails, the court may award reasonable attorney fees and costs.
Nevada	No	No	No	Nev. Rev. Stat. § 239.011 - § 239.012	Requestor may file court action for injunctive relief.	If requestor prevails, court shall award reasonable attorneys fees and costs.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
New Hampshire	No	No	No	N.H. Rev. Stat. § 91-A:7; § 91-A:8	Requestor may file a court action for injunctive relief.	If court finds that the agency or individual knew or should have known that the denial was a violation of the act and the lawsuit was necessary to make the information available to the public, the court shall award reasonable attorneys fees. If court finds that officer denied request in bad faith, fees and damages can be assessed against the individual. In addition, court can award attorneys fees to the agency if requestor's lawsuit is in bad faith, frivolous, unjust, vexatious, wanton, or oppressive.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
New Jersey	No, but Government Records Council to act as informal mediator, to hear complaints, and to issue opinions.	Yes	No	N.J. Stat. § 47:1A-6; § 47:1A-7; § 47-1A-11	Requestor may file a court action or file a complaint with the Government Records Council.	If requestor prevails, court shall award reasonable attorneys fees. If a public official, officer, or employee knowingly and willfully violates the act by unreasonably denying access the employee shall be subject to a civil penalty of $1,000 for an initial violation, $2,500 for a second violation that occurs within 10 years of an initial violation, and $5,000 for a third violation that occurs within 10 years of an initial violation.
New Mexico	No	No	No	N.M. Stat. § 14-2-11; § 14-2-12	Attorney General, district attorney, or requestor may file court action for injunctive relief.	Fine of up to $100 per day for public body's failure to issue and deliver a written denial. If requestor is successful in court action, court shall award damages, costs, and reasonable attorneys fees.
New York	No, but New York State Committee on Open Government provides advisory opinions and ombudsman role.	No	No	N.Y. Public Officers Law §§ 89,	Requestor may file a court action for injunctive relief.	If requestor substantially prevails, court may award reasonable attorneys fees and costs if the agency had no reasonable basis for denying access or agency failed to respond to request in the statutorily-allotted time.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
North Carolina	No, but requestor can seek mediation of fee disputes through the Information Resource Management Commission.	No	No	N.C. Gen. Stat. § 132-9; § 132.6.2(c).	Requestor may file suit for injunctive relief.	Prevailing party can recover reasonable attorneys fees, and court can award fees to agency if requestor's suit was frivolous.
North Dakota	No, but requestor can appeal denial to Attorney General.	No	No	N.D. Cent. Code §§ 44-04-21.1 through 21.2.	Any individual can ask for AG opinion regarding a possible violation. If AG determines that a violation occurred, then public body has 7 days to correct or requestor can file suit. Requestor can also file suit independently.	If requestor prevails, court can award damages in amount of $1000 or actual damages, whichever is greater for an intentional and knowing violation. Court can also award attorneys fees and costs.
Ohio	No	No	No	Ohio Rev. Code 149.43(C)(1)-(2).	Requestor may file a mandamus action against the body or official to compel.	Court can award compensation for injury in the amount of $100 per each business day public body is out of compliance from day that requestor files the mandamus action, up to a maximum of $1000. Court may also award attorneys fees and costs.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Oklahoma	No	No	No	Okla. Stat. tit. 51 § 24.A.17.	Requestor may file action for injunctive relief in district court or district attorney may prosecute a willful violation.	If requestor is successful, court can award attorneys fees. However, if court finds requestor's suit to be frivolous, it can award fees to the public body. A public official who willfully violates the act is guilty of a misdemeanor, and court can fine up to $500 and/or imprison for no more than one year.
Oregon	No	No	No	Or. Rev. Stat. §§ 192.450 through 192.480; § 192.90	Appeal directed to Attorney General, district attorney, or court depending on what layer of government denied access. Requestor may then appeal a denial to court for injunctive relief.	If requestor prevails, court shall award reasonable attorneys fees and costs.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Pennsylvania	No, but requestor can appeal to Office of Open Records.	Yes	No	7 Pa. Cons. Stat. §§ 1101, 1304, 1305.	Requestor can appeal denials to the Office of Open Records, which will investigate the case and make a determination within 30 days. Either party can then appeal the OOR decision to court.	If court reverses agency decision or makes previously unavailable records available, court can award reasonable attorneys fees and costs to requestor. Court can also award fees and costs to agency if appeal was frivolous. If denial was in bad faith, the court may impose a fine of no more than $1500. If the agency does not promptly comply with the court's order, it can also be subject to fine of no more than $500 per day until records are released.
Rhode Island	No, but Attorney General's office will assess and file complaints on behalf of private requestors.	No	No	R.I. Gen. Laws § 38-2-8; § 38-2-9	Any aggrieved citizen of the state may file a complaint with the attorney general who may prosecute any alleged violations. The requestor can also file a private action instead of working through the AG's office.	Declaratory or injunctive relief available. Also, the court may impose fine of up to $1000 and award attorneys fees and costs for willful violation of the law. Court also has right to award attorneys fees and costs to public body if requestor's case was not grounded in good fact or law or filed in good faith.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
South Carolina	No	No	No	S.C. Code § 30-4-100; § 30-4-110.	Individual may file suit, for either declaratory or injunctive relief.	Injunctive relief available; reasonable attorney fees and costs are available if requestor prevails; criminal penalties if willful violation (no more than $100 and 30 days in jail for first violation).
South Dakota	No, but have Office of Hearing Examiner to which requestor can appeal a denial.	Yes	Aggrieved party may appeal Office of Hearing Examiner's decision to court.	S.D. Codified Laws § 1-27-1.5; § 1-27-38; § 1-27-40; § 1-27-41; § 1-22-24	Requestor may file action for injunctive relief in district court. Class 5 Felony to conceal or impair access to a public record.	Criminal penalties for impairing access to a public record. Immunity for good faith denial of records.
Tennessee	No	No	No	Tenn. Code § 10-7-505.	Individual may file suit for injunctive relief. Court may award reasonable costs to requestor if denial was willfully in violation of the law.	If court finds a knowing and willful violation of the act, the court may award reasonable attorneys fees and costs.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Texas	No, but public body must get pre-approval from AG to deny certain records.	Yes	Yes	Tex. Gov't Code § 502.301; § 552.321; § 552.323	If public body wants to deny access to certain public records, it must request permission from Attorney General first. AG will then issue a binding opinion. Either the AG or the requestor may file suit in district court in the county where the public body is located, or in Travis County, depending on size of the public body.	Injunctive relief available. If requestor substantially prevails, court can award attorneys fees and costs.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
Utah	No, but appeal available to Utah State Records Committee	Records Committee – yes	No	Utah Code § 63G-2-402; § 63G-2-403; § 63G-2-801(3); § 63G-2-802(2)	Individual requestor can file suit in district court or appeal to Utah State Records Committee, which can issue a binding, but appealable opinion.	Failure of agency to comply with Records Committee decision can result in executive or administrative action and/or a civil penalty of up to $500 for each day of continuing noncompliance. A public employee who intentionally and unlawfully refuses to release a record is guilty of a class B misdemeanor. If requestor substantially prevails in a judicial appeal (not Committee appeal) of a denial, the district court may award reasonable attorney fees and costs reasonably incurred.
Vermont	No	No	No	Vt. Stat. Ann. Tit. 1 §§ 316-320.	Individual can bring suit in county courts for injunctive relief.	If the requestor substantially prevails, the court may award reasonable attorney fees and other litigation costs. If court does so, and the court issues a written finding that personnel withheld records arbitrarily or capriciously, the department of human resources shall determine whether disciplinary action is warranted

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Virginia	No	No	No	Va. Code Ann. § 2.2-3700 et seq.; § 2.2-3714; § 30-179	Individual can file suit in county/local court for enforcement. Individual can seek advisory opinions and other informal assistance through the Virginia Freedom of Information Advisory Council, as state agency.	If the court finds a member of a public body knowingly and willfully made a violation of the statute, it shall impose upon such member in his individual capacity a penalty of no less than $250 and no more than $1000, to be paid into the State Literary Fund. Upon subsequent violations, the penalty increases to no less than $1000 and no more than $2500.
Washington	No	No	No	RCW 42.56 et seq.; RCW 42.56.030; RCW 42.56.550	Individual can file suit in county/local court for enforcement. State Attorney General will review denials from state agencies, but AG opinion is not binding.	Any person who prevails in court shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. It is within the discretion of the court to award not less than $5 and no more than $100 for each day that she was denied the right to inspect or copy the public record in question.

State	Public Access Counselor	Authority to Issue Admin Hearing Decision (or equivalent)	Authority of PAC to Appeal	Applicable Statutes	Comments	Penalties
West Virginia	No	No	No	W. Va. Code § 29B-1-1 et seq.; §29B-1-5 through 1-7.	Courts enforce public access records/laws; individuals may file suit	Any custodian guilty of a willful violation is guilty of a misdemeanor and shall be fined not less than $200 nor more than $1000, or be imprisoned for no more than 20 days; in the discretion of the court; punished by both fine and imprisonment. Successful suit shall result in attorneys fees and costs.
Wisconsin	No	No	No	Wis. Stat. §§ 19.31 - 19.39.	Complaints allege violations filed with State Attorney General or District Attorney, broad discretion to determine whether to prosecute. If DA does not prosecute, individual can bring suit in name of the state to enforce the Open Records Laws. AG can give express advice on the applicability of ORLs	Possible legal fees if prevail in substantial part; Fines up to $1000
Wyoming	No	No	No	Wyo. Stat. §§ 16-4-401 to 16-4-407	Requestor may file case in district court where record is found.	A person who willfully and knowingly violates the act is guilty of a misdemeanor and shall be punished by a fine that is no more than $750.