

# Illinois's Freedom of Information Act: More Access or More Hurdles?

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## I. INTRODUCTION

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”<sup>1</sup> As was articulated by James Madison in 1822, freedom of information continues to remain essential to the successful functioning of a democracy.<sup>2</sup> Specifically:

Access to public records gives citizens the opportunity to participate in public life, help set priorities, and hold their governments accountable. A free flow of information can be an important tool for building trust between a government and its citizens. It also improves communication within government to make the public administration more efficient and more effective in delivering services to its

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1. Letter from James Madison to W.T. Berry (Aug. 4, 1822), in 1 THE FOUNDER'S CONSTITUTION 690 (Philip B. Kurland & Ralph Lerner, eds., 1987), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html>.

2. Jeremy Lewis, *Freedom of Information Laws and Policies: Quotes on Official Information, Privacy, Open Government, and Secrecy*, HUNTINGDON C. DEP'T OF POL. SCI. (June 21, 2012), <http://fs.huntingdon.edu/jlewis/FOIA/FOIAquotes.htm>.

constituency. But, perhaps most importantly, access to information is a fundamental human right and can be used to help people exercise other critical human rights, such as clean water, healthcare, and education.<sup>3</sup>

Freedom of information, or “Sunshine,”<sup>4</sup> laws are at the forefront of many current social issues across the country, including gun control.<sup>5</sup> For instance, a New York newspaper recently published the names and addresses of holders of gun permits in two New York counties, in response to the recent school shooting in Connecticut, and intends to use the New York Freedom of Information Act to access the same information in other counties in the state.<sup>6</sup> With such recent and profound emphasis on freedom of information laws and their aims at the federal and state levels, it is important to examine the laws—specifically the enforcement provisions—and ensure that they will be followed in accordance with prescribed presumptions and goals of openness.

The State of Illinois has emphasized the importance of freedom of information and public access, through both the Illinois Constitution and through the enactment and subsequent amendment of the Illinois Freedom of Information Act. “[A]rticle VIII, section 1(c) of the Illinois Constitution of 1970 [ ] provides that ‘reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law.’”<sup>7</sup> The Illinois legislature passed its first version of the Freedom of Information Act (hereinafter “FOIA” or “the Act”) in 1983, and although it was one of the last states to do so, the Illinois Act became one of the most liberal throughout the United States when it was amended in 2009.<sup>8</sup> The 2009 amendments were intended to open government records to the public and un-complicate the process of obtaining records; the amendments were likely in response to the abundance of corruption and government secrecy

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3. *Id.*

4. Freedom of information laws are commonly referred to as “Sunshine” laws because the purpose of such laws is to achieve government transparency, or a government open and accountable to the public. *See* 5 ILL. COMP. STAT. 140/1 (State Bar Edition 2010).

5. *See* J. David Goodman, *Newspaper that Put Gun Permit Map Online Hires Armed Guards*, N.Y. TIMES (Jan. 2, 2013), [http://www.nytimes.com/2013/01/03/nyregion/putnam-officials-keep-gun-permit-records-from-journal-news.html?emc=eta1&\\_r=0](http://www.nytimes.com/2013/01/03/nyregion/putnam-officials-keep-gun-permit-records-from-journal-news.html?emc=eta1&_r=0).

6. *See id.*

7. *Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist.* 200, 233 Ill. 2d 396, 399 (2009).

8. *See* Steven Helle, *Survey of Illinois Law: New Freedom of Information Act—Peeking Behind the Paper Curtain*, 34 S. ILL. U. L.J. 1089, 1089 (2010).

in the State of Illinois,<sup>9</sup> which is one of the most corrupt states in the country.<sup>10</sup>

The Illinois legislature based their “Sunshine” law on the Federal Freedom of Information Act, the principles of which were highlighted and reaffirmed at the beginning of President Barack Obama’s first term.<sup>11</sup> Specifically, in 2009, President Obama issued a “memo . . . on transparency and open government” aimed at achieving “the most transparent administration in history,” which was soon followed by the issuance of new guidelines for the Federal Freedom of Information Act by Attorney General Eric Holder.<sup>12</sup> Holder’s guidelines were aimed at implementing “a presumption of openness” regarding the release of government information.<sup>13</sup> In addition, Peter Orszag, the Director of the Office of Management and Budget . . . issued an ‘Open Government Directive,’ in which he directed [federal] agencies to take ‘specific actions to implement the principles of transparency, participation, and collaboration.’”<sup>14</sup> In Illinois, Attorney General Lisa Madigan has also recently emphasized the importance of reforming the FOIA in order to ensure government transparency.<sup>15</sup> Specifically, the Attorney General stated that, “[t]o move the state forward, we must

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9. See Sarah Klaper, *The Sun Peeking Around the Corner: Illinois’ New Freedom of Information Act as a National Model*, 10 CONN. PUB. INT. L.J. 63, 65 (2010).

10. See Dick Simpson et al., *Chicago and Illinois, Leading the Pack in Corruption*, U. ILL. CHI. INST. FOR GOV’T & PUB. AFF. (Feb. 15, 2012), <http://www.chicagomag.com/images/2012/0612/C201206-UIC-SIMPSON-REPORT.pdf>. In November of 2012, the former comptroller of Dixon, Illinois pled guilty to embezzling fifty-three million dollars in public money, which began in 1990. See Melissa Jenco, *Ex-Dixon Comptroller Pleads Guilty to Sealing \$53 Million From City*, CHI. TRIB. (Nov. 15, 2012), [http://articles.chicagotribune.com/2012-11-15/news/ct-met-dixon-comptroller-guilty-1115-20121115\\_1\\_rita-crundwell-public-money-dixon](http://articles.chicagotribune.com/2012-11-15/news/ct-met-dixon-comptroller-guilty-1115-20121115_1_rita-crundwell-public-money-dixon). According to her attorney, her decision to plead came from her desire “to spare the Illinois taxpayers the expense of a trial.” *Id.*

11. See 31A ILL. L&P § 13; see also Trevor Timm, *Under Obama, the Freedom of Information Act Is Still in Shackles*, ELECTRONIC FRONTIER FOUNDATION (Jan. 26, 2012), <https://www.eff.org/deeplinks/2012/01/under-obama-administration-freedom-information-act-still-shackles>.

12. Timm, *supra* note 11.

13. *Id.*

14. Mary M. Cheh, *Making Freedom of Information Laws Actually Work: The Case of the District of Columbia*, 13 D.C. L. REV. 335, 336 (2010) (quoting Memorandum from Peter Orszag, Dir., Off. of Mgmt. and Budget, to Heads of Executive Departments and Agencies regarding the Open Government Directive (Dec. 8, 2009), available at <http://www.whitehouse.gov/open/documents/open-government-directive>).

15. *Attorney General Madigan Supports Effort to Improve Public Access Counselor’s Role, Increase Transparency in Illinois*, ILLINOISATTORNEYGENERAL.GOV (May 30, 2011), [http://illinoisattorneygeneral.gov/pressroom/2009\\_03/20090312.html](http://illinoisattorneygeneral.gov/pressroom/2009_03/20090312.html) [hereinafter *Increase in Transparency in Illinois*].

reestablish the public's confidence in its government. Ensuring transparency in government is a critical first step in restoring the public's trust."<sup>16</sup>

Although the amendments to the Illinois FOIA have catapulted its status to being known as one of the most "open" laws in the country, the purpose behind enacting such laws (i.e. to simplify the road to public access and rebuild public trust in government) has not yet been realized.<sup>17</sup> Because of the weak sanctions and lack of neutral oversight imposed for violations of the law, the general attitude of public bodies toward compliance with requests for information is unenthusiastic, to say the least.

After generally examining the purpose of the Illinois Freedom of Information Act and discussing the 2009 amendments to the Act in Part II and Part III, respectively, Part IV of this Comment will delve into the reality of compliance with the current Act, particularly regarding the incentives of public employees to comply with the FOIA requirements. Part IV and Part V of this Comment will argue that the recently imposed "sanctions" in the 2009 amendments are relatively powerless and that in order to reach the state and national goal of maintaining a "presumption of openness" in regard to records requests, these "sanctions" will need to be increased in number and stringency. In addition, through an examination of what other states and the federal government have done in terms of enforcing their FOIA laws, the options for sanctions against the public body, as well as against the individual assessing the requests, will be examined. Further, the various alternatives for the creation of an effective office of oversight when denials of requests have been made will also be discussed. Finally, Part V of this Comment will address the current state of affairs in Illinois, and Part VI will propose a course of action for legislators in Illinois to consider in order to obtain a level of compliance with the Act sufficient to meet the public's constitutional right to such information.

## II. PURPOSE OF THE ILLINOIS FREEDOM OF INFORMATION ACT

The Illinois Freedom of Information Act aims to ensure government transparency and provide taxpayers with full access to information regarding government affairs.<sup>18</sup> Under the Act, public bodies in Illinois are re-

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16. *Id.*

17. *See Our Opinion: Efforts to Weaken FOIA Are a Mistake*, ST. J.-REG. (Feb. 21, 2010), [http://www.sj-r.com/opinions/x1487803833/Our-Opinion-Efforts-to-weaken-FOIA-are-a-mistake?zc\\_p=0](http://www.sj-r.com/opinions/x1487803833/Our-Opinion-Efforts-to-weaken-FOIA-are-a-mistake?zc_p=0) [hereinafter *Efforts*].

18. *See* 5 ILL. COMP. STAT. 140/1 (State Bar Edition 2010); 31A ILL. LAW & PRAC. RECORDS § 13.

quired to promptly respond to requests for public records by making them available for copying.<sup>19</sup> Specifically:

All records in the custody or possession of a public body are presumed to be open to inspection or copying. Each public body must make available to any person for inspection or copying all public records except as otherwise exempted. Subject to the fee provisions, each public body must promptly provide, to any person who submits a request, a copy of any public record required to be disclosed and must certify such copy if so requested.<sup>20</sup>

The purpose of opening government records to the public is to ensure that taxpayers are equipped to fulfill their duty of publicly scrutinizing government action,<sup>21</sup> which developed in response to common trends of secrecy in government affairs, particularly during wartime.<sup>22</sup> In the Illinois FOIA, there is a stated presumption of openness towards public requests for inspection of government records, subject to the exemptions listed in the Act.<sup>23</sup> Specifically, the Illinois legislature has articulated that transparency in regards to government records is a “fundamental obligation of [the] government” and “that it 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.”<sup>24</sup> Further, in enacting the Freedom of Information Act, the Illinois legislature acknowledged that government secrecy is contradictory to the public interest and that transparency in the government “is the best antidote to [the] public corruption”<sup>25</sup> facing the State of Illinois.<sup>26</sup>

Prior to enactment of the 2009 amendments, the Illinois Supreme Court emphasized the importance of “giv[ing] effect to the intent of the General Assembly” when interpreting the Illinois FOIA.<sup>27</sup> In doing so, the

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19. See 5 ILL. COMP. STAT. 140/3 (State Bar Edition 2010).

20. 31A ILL. LAW & PRAC. RECORDS § 13.

21. See 5 ILL. COMP. STAT. 140/1 (State Bar Edition 2010).

22. See Daxton R. “Chip” Stewart, *Let the Sunshine in, or Else: An Examination of the “Teeth” of State and Federal Open Meetings and Open Records Laws*, 15 COMM’N L. & POL’Y 265, 265-66 (2010).

23. See 5 ILL. COMP. STAT. 140/1.2 (State Bar Edition 2010); 31A ILL. LAW & PRAC. RECORDS § 13.

24. Stewart, *supra* note 22, at 266 (quoting 5 ILL. COMP. STAT. 140/1-1 (State Bar Edition 2010)).

25. Alison K. Hayden, *Two Cheers for the new Illinois Freedom of Information Act*, 98 ILL. B.J. 82, 83 (2010) (quoting *Better Gov’t Assn. v. Blagojevich*, 386 Ill. App. 3d 808, 818 (4th Dist. 2008)).

26. See Simpson et al., *supra* note 10.

27. *S. Illinoisan v. Ill. Dep’t of Pub. Health*, 218 Ill. 2d 390, 415 (2006).

court stressed the importance of viewing the statute as a whole and giving special weight to the statute's plain language.<sup>28</sup> In regard to the Illinois FOIA, the Illinois Supreme Court determined that based on the stated purpose in section 1 of the Act, which "is to open governmental records to the light of public scrutiny," the Illinois Legislature, although concerned with personal privacy of government employees,<sup>29</sup> intended the Act to receive a liberal construction.<sup>30</sup> Specifically, the court determined that the legislature "did not intend absurdity, inconvenience or injustice."<sup>31</sup> Because of this, a public body must comply with a public information request unless one of the statutory exemptions apply.<sup>32</sup> In addition, the Illinois Supreme Court has made clear that the public body, and not the individual requester, has the burden of proving that a specific statutory exemption applies.<sup>33</sup>

### III. 2009 AMENDMENTS TO ILLINOIS FREEDOM OF INFORMATION ACT

The 2009 amendments to the Illinois Freedom of Information Act consist of changes regarding access to private government contractors' records, fees and response times to requesters, the meaning of "public body," the burden of proof, attorneys' fees, and electronic communications.<sup>34</sup> Most importantly, section 1.2 of the Act has been amended to coincide with President Obama's views on the presumption of openness; specifically, the Act now states that "[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt."<sup>35</sup>

With the amendments, greater authority was given to the Public Access Counselor, a pre-existing entity of the Attorney General.<sup>36</sup> The goal of the legislature was to create a body that would "provide advice and educa-

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28. *See id.*; *see also* Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200, 233 Ill. 2d 396, 410 (2009) (quoting Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65, 128 Ill. 2d 373, 378 (1989)).

29. *Stern*, 233 Ill. 2d at 405.

30. *See S. Illinoisan*, 218 Ill. 2d at 416.

31. *Id.* at 415.

32. *See id.* at 417; *see also* Day v. City of Chicago, 388 Ill. App. 3d 70, 73 (1st Dist. 2009) (holding that the City of Chicago failed to "establish that [the] on-going investigation" and "deliberative process" exemptions to FOIA disclosure applied "to investigation file on murder conducted 17 years earlier.").

33. *See S. Illinoisan*, 218 Ill. 2d at 414.

34. *See Helle*, *supra* note 8, at 1094.

35. 5 ILL. COMP. STAT. 140/1.2 (State Bar Edition 2010); Hayden, *supra* note 25, at 83.

36. *See* Hayden, *supra* note 25, at 82.

tion with respect to the interpretation and implementation' of the Illinois FOIA."<sup>37</sup> In particular, the Public Access Counselor now has the power to issue binding opinions, enforceable through court action taken by the Public Access Counselor rather than the individual requester, obtain injunctive relief, and issue subpoenas.<sup>38</sup> Prior to these amendments, if a public body denied a request for information, the requester's only option was to seek redress through judicial appeal; however, first the requester was required to appeal to the head administrator of the public entity.<sup>39</sup> Judicial appeal as the only option of redress posed a problem because most ordinary citizens do not have the means to pay for expensive court costs and do not find their information request to be worth the money or "emotional strain."<sup>40</sup>

Before the amendments, the definition of "public body" included a requirement that the body be "supported in whole or in part by tax revenue, or [] expend tax revenue";<sup>41</sup> however, the amendment removed this language.<sup>42</sup> Not only did the amendments theoretically broaden the type and number of public bodies that may be subject to the FOIA, they also broadened the scope of what is deemed to be a "public record," which, in effect, also broadened what constitutes a "public body," as we will see.<sup>43</sup> The new definition for "public record" now encompasses records that not only were prepared by the public body during any "transaction of public business" but also records that were "*used by . . . any public body*" during public business transactions.<sup>44</sup> Because of this expansion, as many critics of the amendments note, enforcers of the FOIA can now reach records of private companies that have contracted to perform functions for the government.<sup>45</sup> These records can include purchases, emails, and employee salaries and evaluations.<sup>46</sup>

The Illinois Freedom of Information Act is not without loopholes. The Act contains forty-four exemptions, which have been reorganized into two sections: section 7 and section 7.5.<sup>47</sup> Section 7 contains twenty-five exemptions including, but not limited to, exemptions for

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37. Helle, *supra* note 8, at 1091-92 (quoting Pub. Act 543, 96th Gen. Assembly, § 20 (2009), *amending* The Attorney General Act, 15 ILL. COMP. STAT. 205/7(a) (State Bar Edition 2010)).

38. *See id.*

39. *See* Klaper, *supra* note 9, at 68; *see also* Helle, *supra* note 8, at 1091.

40. *See* Klaper, *supra* note 9, at 68-69; *see also* Hayden, *supra* note 25, at 84.

41. 5 ILL. COMP. STAT. 140/2 (State Bar Edition 2009), *amended by* Pub. Act 542, 96 Gen. Assembly, § 10 (2009).

42. Helle, *supra* note 8, at 1098-1100.

43. *See id.* at 1095-96.

44. *Id.* (emphasis added, ellipsis in original).

45. *See id.*

46. *See id.*

47. *See* Hayden, *supra* note 25, at 83-84.

private information, . . . [p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, . . . [r]ecords in the possession of any public body created in the course of administrative enforcement proceedings, and any law enforcement purposes, . . . [and] [r]ecords that relate to or affect the security of correctional institutions and detention facilities.<sup>48</sup>

In addition, exemptions are included for “[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated,” “trade secrets,” and for “records relating to a public body’s adjudication of employee grievances or disciplinary cases.”<sup>49</sup> Other exemptions relate to educational matters, data processing, collective bargaining, and emergency safety plans.<sup>50</sup>

Section 7.5 includes nineteen statutory exemptions for statutes protecting certain information from disclosure, such as the Illinois Sexually Transmissible Disease Control Act and the State Officials and Employees Ethics Act.<sup>51</sup> It should also be noted that “private information” has been defined in the amendments to cover “information that might commonly be considered private, such as personal financial information, passwords[,], . . . medical records[,], . . . home address[es], personal license plates, home telephone numbers, and personal email addresses.”<sup>52</sup> Further, the amendments dispose of the previous list of examples of private information and, instead, establish a balancing test to determine “whether a ‘subject’s right to privacy outweighs any legitimate public interest in obtaining the information.’”<sup>53</sup>

Since the adoption of the 2009 amendments, a denial by a public body of a request for information based on two exemptions listed in section 7 of the Act, the exemptions for “‘unwarranted invasions of personal privacy’ [and] ‘[p]reliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed or policies or actions are formulated,’” warrants a mandatory notification to the Public Access Counselor by the public body.<sup>54</sup> For other denials, including intentional denials, a requester maintains the right to file a request for review with the Public Ac-

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48. 5 ILL. COMP. STAT. 140/7(1)(b), (c), (d), (e) (State Bar Edition 2010).

49. 5 ILL. COMP. STAT. 140/7(1)(f), (g), (n) (State Bar Edition 2010).

50. 5 ILL. COMP. STAT. 140/7 (State Bar Edition 2010).

51. 5 ILL. COMP. STAT. 140/7.5 (d), (h) (State Bar Edition 2010); *see* Hayden, *supra* note 25, at 83-84.

52. Helle, *supra* note 8, at 1097.

53. *Id.* at 1098.

54. *Id.* at 1092.



cess Counselor within sixty days of the denial.<sup>55</sup> If, however, the public entity does not respond with a denial based on one of the many formerly listed exemptions, but rather fails to comply with the Act at all, the requester may either contact the Public Access Counselor or file suit and may receive attorneys' fees upon prevailing in court.<sup>56</sup> If the court finds the public entity to have "willfully or intentionally failed to comply with the act," the court may also award a civil penalty, which in Illinois can range from \$2,500.00 to \$5,000.00.<sup>57</sup>

If the requester chooses to initiate review with the Public Access Counselor or review is mandated based on the exemption applied by the public body, the Public Access Counselor can issue subpoenas to obtain further information and records needed for adequate review. The Public Access Counselor can also issue advisory and binding opinions based on their conclusions.<sup>58</sup> If the Public Access Counselor determines that a wrongful denial has occurred, they may issue an opinion warranting the release of the desired records.<sup>59</sup> If the public body complies with the opinion and releases the records, they are held harmless and the investigation ends.<sup>60</sup> After the opinion is issued, either the requester or the public entity may request an administrative review of the Public Access Counselor's decision, unless the Public Access Counselor decided not to issue a binding opinion.<sup>61</sup> The Act is silent as to the prospect of a public body that fails to comply with a binding decision of the Public Access Counselor. Presumably, this silence implies that a requestor's only option would be to file a court action.<sup>62</sup>

The 2009 amendments to the Illinois Freedom of Information Act now impose sanctions for public bodies that fail to comply with the Act and provide requested information within the required time limits.<sup>63</sup> As previously stated, if the requester takes the action to court and the public body is found to have "willfully or intentionally failed to comply with the act," the public

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55. See Hayden, *supra* note 25, at 85; see also Helle, *supra* note 8, at 1091.

56. See Helle, *supra* note 8, at 1093.

57. *Id.* (quoting 5 ILL. COMP. STAT. ANN. 140/11(j) (West 2010)). See also Stewart, *supra* note 22, at 287 (describing remedies available in other states for similar violations).

58. See Hayden, *supra* note 25, at 85.

59. See Helle, *supra* note 8, at 1092.

60. See *id.*; see also 5 ILL. COMP. STAT. 140/9.5(f) (State Bar Edition 2010).

61. See *id.*

62. See Helle, *supra* note 8, at 1093 ("Noncompliance with the act only offers the prospect of liability for the public body if the requester, instead of contacting the Public Access Counselor[,] . . . files an action with the circuit court, and that court awards attorneys' fees to a requester who prevails or a civil penalty of between \$2,500 and \$5,000 if the public body 'willfully and intentionally failed to comply' with the act.") (discussed in 5 ILL. COMP. STAT. 140/11(j) (State Bar Edition 2010)).

63. See Hayden, *supra* note 25, at 85.

body can be condemned through civil penalties ranging from \$2,500 to \$5,000.<sup>64</sup> In addition, under section 3 of the Act, public bodies now have only five business days to respond to requests, as opposed to the previously allotted seven working days.<sup>65</sup> If the public body bypasses the new time limits, they may be restricted from later defending the request on the ground that it would be too burdensome to comply,<sup>66</sup> which is otherwise a proper reason for the non-production of records within the time limits.<sup>67</sup> In addition, if the public body ultimately discloses records but fails to do so within the five-day limit, they can no longer charge a fee for the documents, which is fifteen cents per page after the first fifty pages.<sup>68</sup>

Critics of the amendments may argue that the 2009 amendments expanded the FOIA too extremely and that the FOIA fails to adequately protect private parties from government disclosure.<sup>69</sup> As previously stated, due to the new amendments, requesters can now seek information from private contractors working with the government.<sup>70</sup> Specifically, the Act now states in section 7:

A public record that is not in the possession of a public body but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body, and that directly relates to the governmental function and is not otherwise exempt under this Act, shall be considered a public record of the public body, for purposes of this Act.<sup>71</sup>

However, the work that is done for the government through private contractors has traditionally been done by the government itself,<sup>72</sup> and therefore, the information obtained from private contractors in the future because of the amendment will likely be information that would have come from the

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64. See Helle, *supra* note 8, at 1093; see also Stewart, *supra* note 22, at 287.

65. See Helle, *supra* note 8, at 1102; see also Hayden, *supra* note 25, at 107.

66. See Hayden, *supra* note 25, at 85.

67. See Helle, *supra* note 8, at 1102. A request may be deemed “unduly burdensome” where the public interest in obtaining the information is outweighed by the burden on the public body of producing the information. See *Illinois Freedom of Information Act Frequently Asked Questions by the Public*, ILLINOIS ATTORNEY GENERAL HOME PAGE (Jan. 4, 2010), [http://www.illinoisattorneygeneral.gov/government/FAQ\\_FOIA\\_Public.pdf](http://www.illinoisattorneygeneral.gov/government/FAQ_FOIA_Public.pdf) [hereinafter *Frequently Asked Questions*].

68. See Helle, *supra* note 8, at 1102; see also Hayden, *supra* note 25, at 107.

69. See Hayden, *supra* note 25, at 84.

70. See Helle, *supra* note 8, at 1094.

71. *Id.* at 1095 (quoting 5 ILL. COMP. STAT. 140/7(2) (State Bar Edition 2010)).

72. See *id.*

government prior to the increased latitude of private government contractors.<sup>73</sup>

Other critics of the amendments charge that compliance with the new rules will be too costly, in that it will require public bodies to hire staff to explicitly work with FOIA requests, which will in turn force them to lay off other public workers.<sup>74</sup> This argument is likely due to the addition of section 3.5, which requires that each public entity, if they have not already done so, appoint a FOIA officer to help make the process run smoother.<sup>75</sup> The FOIA officer is responsible for responding to FOIA requests, and is trained annually by the Attorney General's Office.<sup>76</sup> However, the cost of adding an additional staff member, or even up to four for larger public bodies, may actually reduce later litigation costs since an informed decision will be made as to whether to grant an information request at the outset.<sup>77</sup>

In May of 2009, prior to the enactment of the 2009 amendments, Illinois Attorney General Lisa Madigan released her own version of suggested amendments to the Illinois FOIA.<sup>78</sup> Although the Attorney General's proposal included time limits similar to the enacted amendments, as well as similar "sanctions" for failing to respond within the requisite time limits, General Madigan's proposal is notable because it also included criminal sanctions for those employees who knowingly violate FOIA.<sup>79</sup> Specifically, it proposed that those employees would potentially be convicted of misdemeanors for violating FOIA if the presence of the requisite mental culpability could be proven.<sup>80</sup> The proposal that eventually became law, however, did not include the criminal penalties prevalent in General Madigan's proposal.<sup>81</sup> The final amendments to the Illinois FOIA did include the Attorney General's suggested revisions in terms of individual public body FOIA officers and the Public Access Counselor.<sup>82</sup>

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73. *See id.*

74. *See Helle, supra* note 8, at 1090.

75. *See Hayden, supra* note 25, at 85.

76. *Frequently Asked Questions, supra* note 67, at 1.

77. *See Cheh, supra* note 14, at 357.

78. *See Jessica O'Neill, Illinois Freedom of Information Act Changes on the Horizon*, QUERRY & HARROW, <http://www.querrey.com/news-newsletterarticles-248.html> (last visited Jan. 6, 2013).

79. *See id.*

80. *See O'Neill, supra* note 78.

81. *See id.*

82. *See Madigan's Reform Legislation Package Moves to House Floor to Attorney General's Office*, ILLINOISATTORNEYGENERAL.GOV (Mar. 12, 2009), [http://illinoisattorneygeneral.gov/pressroom/2009\\_03/20090312.html](http://illinoisattorneygeneral.gov/pressroom/2009_03/20090312.html) [hereinafter *Madigan's Reform*]; *see also* Eric Naing, *Lisa Madigan Proposes FOIA Rewrite*, ST. J.-REG. (May 12, 2009), <http://www.sj-r.com/news/x529237559/Madigan-proposes-FOIA-rewrite>.

#### IV. THE 2009 AMENDMENTS LACK ENFORCEABILITY

The 2009 Illinois Freedom of Information Act amendments do not go far enough to ensure public access. Although the amendments to the Illinois FOIA are headed in the right direction in terms of opening the government to the public, “the actual administration of the FOIA can be anything but simple, and long processing delays and inadequate responses can easily frustrate requesters.”<sup>83</sup> Specifically, because requesters are often forced to file court actions in order to obtain adequate responses, the process of acquiring information has become too expensive and time-consuming, which ultimately wastes judicial resources.<sup>84</sup> Efforts to open government records to scrutiny by the public should not, in effect, make the process harder for requesters, but rather, these efforts should be aimed at changing the general presumption of hiding information at every level of government in Illinois. Because it is more likely that a government agency will withhold information from the public than release it,<sup>85</sup> the problem lies within the misaligned incentives of government agencies, which is due to the lack of sanctions available to deter the conduct.<sup>86</sup> The success of obtaining a true presumption of openness is dependent upon harsher sanctions and penalties for those public bodies that fail to comply with the Act.<sup>87</sup>

##### A. ATTITUDE TOWARDS COMPLIANCE

As previously stated, the commonplace practice of government agencies in regard to releasing information upon public request has become directly contradictory to the goal of creating a presumption of openness.<sup>88</sup> Consequently, the public perception in regards to government information is that these records are “off limits.”<sup>89</sup> These practices and perceptions can be attributed to “a need to control information that is deeply rooted in the culture of government.”<sup>90</sup> Specifically, “[p]eople who control information, even at the level of a clerk, are reluctant to share it because it diminishes their power.”<sup>91</sup> In addition, “requests are perceived with suspicion or outright hostility.”<sup>92</sup> Requesters are often simply told that their requests were

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83. Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387, 389 (2010).

84. See Cheh, *supra* note 14, at 349.

85. See *id.* at 346.

86. See *id.* at 349.

87. See Stewart, *supra* note 22, at 302.

88. See Cheh, *supra* note 14, at 346.

89. See *id.*

90. Stewart, *supra* note 22, at 303.

91. *Id.*

92. Cox, *supra* note 83, at 416.

lost, that they violated privacy, or that the search for the request did not turn up any documents.<sup>93</sup> According to the Illinois Supreme Court, however, these responses are unacceptable.<sup>94</sup> Because the court has held that the public body has the burden of proving that certain records fall within a specified exemption, in order to meet this burden, the public body “must provide a detailed justification for its claimed exemption” and “may not[] ‘simply treat the words ‘attorney-client privilege’ or ‘legal advice’ as some talisman, the mere utterance of which magically casts a spell of secrecy over the documents at issue.’”<sup>95</sup> Instead, as the court has held, the public body must prove that a specific exemption is objectively applicable to the requested documents.<sup>96</sup>

This problem is two-fold: government agencies not only have no incentive to release the records, they may actually have incentives *not* to release records.<sup>97</sup> First, because government officers are more worried about the possibility of receiving internal reprimands for wrongfully releasing confidential information than for wrongfully withholding it, due to the absence of legal sanctions, they have an incentive to stray on the cautious side and refuse information requests.<sup>98</sup> Further, instead of basing the decision to release information upon the law itself or even the inconsequential repercussions of failing to correctly apply the FOIA provisions, public bodies may base their decision on political concerns, the identity of the requester, or the chance that the request will lead to litigation.<sup>99</sup> In particular, the public body may be more inclined to deny requests from individuals and groups with opposing goals and viewpoints.<sup>100</sup> For example, studies have shown that requests from journalists and political activists are routinely denied.<sup>101</sup>

If the agency has a reason to believe the requester will not pursue litigation, either because they cannot afford to (which is usually the case since only three percent of requests are litigated in court or appealed administratively) or because they are unlikely to be aware that a response is incomplete, they will use this fact to deny a request or produce insufficient results.<sup>102</sup> In denying requests, public bodies tend to rely on this general “re-

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93. See Cheh, *supra* note 14, at 345.

94. See Day v. City of Chicago, 902 N.E.2d 1144, 1148-49 (Ill. App. Ct. 2d Dist. 2009).

95. *Id.* (emphasis omitted) (quoting Illinois Education Ass’n. v. Bd. of Educ., 791 N.E.2d 522, 531 (Ill. 2003)).

96. See *id.*

97. See Cheh, *supra* note 14, at 349, 355-56.

98. See Stewart, *supra* note 22, at 302-03.

99. See Cox, *supra* note 83, at 416; see also Cheh, *supra* note 14, at 349.

100. See Cox, *supra* note 83, at 416.

101. See David Cuillier, *Honey v. Vinegar: Testing Compliance-Gaining Theories in the Context of Freedom of Information Laws*, 15 COMM. L. & POL’Y 203, 206 (2010).

102. See Cox, *supra* note 83, at 396-97, 399.

luctance to appeal.”<sup>103</sup> In addition, agencies often produce many more records in court after being sued by a requester than they had released to the requester in the initial request, and it is also common for agencies’ pre-litigation exemption claims to falter once in court.<sup>104</sup> For example, in *Day v. City of Chicago*, the Illinois Supreme Court rejected the Chicago Police Department’s generalized argument that the plaintiff’s information request was exempt under the “[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated” exemption, which is now under section 7 of the Illinois FOIA, as previously stated.<sup>105</sup> The Chicago Police Department argued that “‘office unit or working files, general progress notes, contact analysis reports, investigative files and major crime worksheets necessarily contain analysis and opinions.’”<sup>106</sup> The Illinois Supreme Court held that the denial was too generalized and that any opinions or analysis could be redacted from the accessible documents.<sup>107</sup>

In addition, the type of request itself may be a precursor for denial, as was the case in a study done by David Cuillier, where “threatening letter[s] resulted in slightly higher response rates, lower copy fees and faster response times.”<sup>108</sup> In his study into compliance with requests for police use of force records and school superintendent contracts, not only did Cuillier discover that the agencies that responded were more likely to respond to letters implicating future litigation, he found that less than sixty percent of agencies responded at all.<sup>109</sup> Although the presumption against disclosing public information is evident, other factors affecting non-compliance include the copious amounts of requests that cannot be timely dealt with due to understaffing and the lack of oversight.<sup>110</sup> As previously stated, because only three percent of requests are handled by someone other than the initial agency officer, over ninety percent of requests are never reviewed, which “undoubtedly has consequences for the incentives and expectations of the FOIA officers making the disclosure decisions.”<sup>111</sup>

The incentive to deny requests and the lack of sanctions for doing so are intertwined. In order to increase compliance with FOIA, and in effect decrease incentives to withhold information, external sanctions against the

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103. Hayden, *supra* note 25, at 84.

104. See Cox, *supra* note 83, at 398-99.

105. Day v. City of Chicago, 902 N.E.2d 1144, 1152 (Ill. App. Ct. 2d Dist. 2009) (quoting 5 ILL. COMP. STAT. 140/7(f) (State Bar Edition 2010)).

106. Day, 902 N.E.2d at 1152.

107. See *id.*

108. Cuillier, *supra* note 101, at 203 (emphasis omitted).

109. See *id.* at 217-20.

110. See Cox, *supra* note 83, at 398.

111. *Id.* at 396-97.

public body must be hardened and internal sanctions against the employees answering FOIA requests must also be strengthened. Instead of fearing internal reprimands for release of confidential information, public employees should fear internal consequences for withholding legitimate public information. The ignorance of public employees as to what FOIA requires<sup>112</sup> must also be reversed. In addition, the public's perception in regards to the openness of government records has increased public anxiety about government secrecy, and "has a chilling effect on efforts to obtain records."<sup>113</sup> In order to transform this presumption of secrecy and concealment of information into a presumption of openness, the public must have some type of reliable and affordable recourse, and some incentive to pursue that recourse.<sup>114</sup>

#### B. THE 2009 AMENDMENTS IMPOSE WEAK SANCTIONS

"[N]o amount of verbiage will create 'government in the sunshine' unless the government has the will and resources to comply."<sup>115</sup> Although the amendments have created potential sanctions for the public bodies that fail to comply with the Act, these "sanctions" will unlikely deter similar future conduct.<sup>116</sup> Just because a public body is restricted from claiming an unduly burdensome request when they fail to timely respond does not mean that the prospect of this outcome will compel them to make adequate and truthful decisions in granting or denying those requests. In addition, the possibility of being prevented from charging fees if a response is not made within the predetermined time limits will likely have no effect on the incentives of the public employees, or even the administrators of the public bodies, since the fees are forwarded to the general treasury and are not kept by the public body anyway.<sup>117</sup> Also, although the number of days given to a public body to respond has been reduced, the public body can extend this time period for a number of reasons, including that the request "is stored at a different location," "requires the collection of a substantial number of documents," "requires an extensive search," or that additional effort is required to find the documents, as long as notice is given to the requester of the reason for

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112. See *id.* at 414.

113. Cheh, *supra* note 14, at 346.

114. See Stewart, *supra* note 22, at 302.

115. Helle, *supra* note 8, at 1104.

116. *You Call this Reform?*, CHI. TRIB. (May 22, 2009), [http://articles.chicagotribune.com/2009-05-22/news/chi-090522edit\\_youcall\\_1\\_illinois-house-illinois-reform-commission-far-reaching-reform-package](http://articles.chicagotribune.com/2009-05-22/news/chi-090522edit_youcall_1_illinois-house-illinois-reform-commission-far-reaching-reform-package) ("Out came the language meant to put some teeth in the deadlines that public officials routinely ignore when dealing with records requests.").

117. See Cheh, *supra* note 14, at 355.

extension.<sup>118</sup> These possible “sanctions” are unlikely to deter public bodies from making their determinations based on other factors besides what is actually in the requested documents and whether this information accurately falls into an exemption to disclosure.

In a study of open records laws across the country during the late nineties and early two thousands, compliance by public employees with information requests averaged around fifty-nine percent; however, compliance tended to be lower in regards to requests for criminal records, such as incident reports and jail logs, and higher, around ninety-three percent, for requests regarding matters such as city council meeting minutes.<sup>119</sup> Even though the law was recently amended, “[m]any state agencies and other public bodies have not complied with restrictions set out in the FOIA in the past.”<sup>120</sup> Because the amendments are so recent, it remains to be seen whether they will be enough to reverse compliance and reach the sought-after presumption towards openness.

“Public access laws . . . need to be able to be applied and enforced in order to have any realistic impact.”<sup>121</sup> As previously discussed, although the Public Access Counselor’s new authority has created an alternative route to the courts for the individual requester, imposing liability on a public body that refuses to comply with the Act will still result in a court action in which either the requester or the Public Access Counselor acts as the petitioner.<sup>122</sup> Therefore, although the individual requester will not have to incur the costs of litigation at this point, and may even be awarded attorneys’ fees upon prevailing, the public body faces only the consequence of civil penalties, and the employee who wrongfully withheld the information is faced with no mandatory disciplinary action.<sup>123</sup> In order to deter future conduct, some type of personal sanction against the employee personally is needed.<sup>124</sup> At the very least, a harsher sanction against the public body would make it more probable that the public body itself would discipline its employees or possibly implement more stringent review policies.

“[A]uthority is a powerful force.”<sup>125</sup> As David Cuillier uncovered in his compliance experiment, the threat of court action tends to result in higher levels of compliance.<sup>126</sup> People are generally more likely to comply with policies and procedures when “symbols of authority, such as titles, height,

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118. *Frequently Asked Questions*, *supra* note 67.

119. *See Stewart*, *supra* note 22, at 269.

120. *Hayden*, *supra* note 25, at 107.

121. *Stewart*, *supra* note 22, at 271.

122. *See Helle*, *supra* note 8, at 1091.

123. *See Stewart*, *supra* note 22, at 307, 309.

124. *See id.* at 301-02.

125. *Cuillier*, *supra* note 101, at 211.

126. *See id.* at 224.



uniforms, experts, and legal authority” are present.<sup>127</sup> Authority figures within public bodies may have the power to influence the attitude and methodology that employees take in regard to responding to information requests. Therefore, administrators need to emphasize the importance of complying with FOIA, balanced with the need to maintain confidential information, and stronger sanctions for violating FOIA will encourage them to do this.<sup>128</sup>

Not only are the “sanctions” in the 2009 amendments unlikely to elicit change in the general attitude towards compliance with the FOIA, due to the fact that they have relatively little impact on the incentives of public bodies, even if they did, public bodies would still have little resources to ensure compliance.<sup>129</sup> For a large number of public bodies throughout the nation, the quantity of requests is too low for employees to become well versed with the details of the FOIA, leading to inconsistent responses to requests.<sup>130</sup> At the other end of the spectrum, some public bodies have accumulated a backlog of requests due to understaffing, and public employees are under pressure to move requests along as quickly as possible, which prevents them from taking a meaningful look at each individual request.<sup>131</sup> The attitude towards FOIA requests is misaligned: instead of focusing on the speed of responses and reducing backlog, public employees should be focused on accurately following FOIA procedures in an efficient and timely manner.

#### C. A NEUTRAL DECISIONMAKER IS NEEDED

At the outset of a request for public information in regard to private information of a public employee, the public entity itself balances the personal privacy of the employee with the necessity of the public’s right to know the information.<sup>132</sup> If the scale tips in favor of the privacy of the employee, the public body can claim an exemption based on personal information listed in section 7 of the Act.<sup>133</sup> Because a requester will never truly know whether their request was denied based on a legitimate exemption or whether the denial was an attempt to conceal information by the public body,<sup>134</sup> denials based on exemptions are sure to elicit an immediate appeal if the requester has the means of doing so.

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127. *Id.* at 211.

128. *See id.* at 225.

129. *See Cox, supra* note 83, at 397.

130. *See Cheh, supra* note 14, at 348.

131. *See Cox, supra* note 83, at 396-98.

132. *See Klaper, supra* note 9, at 65.

133. *See id.*

134. *See Hayden, supra* note 25, at 84; *see also Klaper, supra* note 9, at 65.

Because it is unlikely, and financially unrealistic, that a neutral party could balance these interests when requests are made to a public body, it is important that an adequate basis of review of these decisions is put into place. In the 2009 amendments to the FOIA, the Illinois legislature aimed to create this level of review through their issuance of binding authority to the pre-existing Public Access Counselor. The Public Access Counselor is housed in the Attorney General's office, specifically in the Public Access Bureau where assistant attorneys general work on FOIA issues.<sup>135</sup>

Although the issuance of binding authority to the Public Access Counselor (PAC) has been praised as offering an alternative to judicial appeal and as evening up the scale between the requester and the public body<sup>136</sup> by making an ultimate judicial action more likely and cost-effective for the requester, placing another step in the already-arduous process contradicts the fundamental notion of open access to the public.<sup>137</sup> As previously stated, the public right to attain information from the government is implied in the Illinois Constitution and is essential in order for a member of the public "to perform his function as ultimate sovereign."<sup>138</sup> In theory, any amendments to the preexisting Act should aim to make the process easier for the citizen, not place another hurdle in his or her path.

Some advocates of the amendments will point out that the mandatory appeal to the head of the public body before judicial appeal has been eliminated under the new Act, in effect eliminating a step in the process.<sup>139</sup> Therefore, the additional, and albeit optional, step of appeal to the Public Access Counselor at the very least evens out the playing field and places the requester with just as many obstacles as were present before the amendments.<sup>140</sup> This does not, however, align with the statutory and constitutional right of the public to be fully aware of its government's affairs, which "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 being conducted in the public interest."<sup>141</sup> Again, to fulfill this objective, the legislature should aspire to

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135. *Frequently Asked Questions*, *supra* note 67, at 1.

136. *See* Klaper, *supra* note 9, at 75.

137. *See* Hayden, *supra* note 25, at 85; *see also* Cheh, *supra* note 14, at 356.

138. Stewart, *supra* note 22, at 269. *See* Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200, 233 Ill.2d 396, 399 (2009). The public's right to know is also inferred in the United States Constitution. *See* Stewart, *supra* note 22, at 269 ("[T]he First Amendment [has been viewed] not only as a guarantee of the right of free speech, but also as providing protection for the activities that assure self-governance, including 'Public discussions of public issues, together with the spreading of information bearing on those issues.'").

139. *See* Helle, *supra* note 8, at 1091.

140. *See id.*

141. *Stern*, 233 Ill.2d at 404.

make government documents available to the public with the least amount of steps in the process as possible.

In any event, more power for the Public Access Counselor means more power for the executive branch of government in a role that has been traditionally left to the judiciary.<sup>142</sup> Specifically, the authority to issue subpoenas, advisory opinions, and binding opinions based on “findings of fact and conclusions of law” is the type of authority encompassed in the judicial branch of government, and not the executive.<sup>143</sup> Further, because the Public Access Counselor is an entity of the office of the Attorney General, which is part of the executive branch, there is a conflict of interest in entrusting the Public Access Counselor with the power to review, and when necessary bring action against, other government agencies’ denials of information requests.<sup>144</sup> This conflict of interest arises because the office of the Attorney General “is tasked with instituting all actions on behalf of the state and defending all actions and proceedings against any state officer acting in his official capacity.”<sup>145</sup> Therefore, the office of the Attorney General, through the Public Access Counselor, is in effect bringing action against and defending action against the same public bodies<sup>146</sup> and is also placed “in the ‘intolerable’ position of having to advise client agencies whether to disclose information in the first instance, and then being legally obligated to sue *and* defend an agency that refuses to release information.”<sup>147</sup>

Due to the clear conflict of interest within the executive branch, as well as the separation of powers concerns, review of public bodies’ denials of information requests should be performed “at the very least by a separate and independent arbiter or separate branch of government.”<sup>148</sup> An independent authority review could result in less unnecessary litigation, which could consequently result in taxpayer savings and more efficient government spending.<sup>149</sup> Further, if the independent review body were made up of citizens as well as government employees, as is the case in New York and Virginia to be discussed *infra*,<sup>150</sup> it would be possible to diminish the conflict of interest so evident in the current process, thereby obtaining a more objective review of public body denials of legitimate information requests.<sup>151</sup>

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142. See Hayden, *supra* note 25, at 85.

143. See *id.*

144. See *id.*

145. *Id.*

146. See *id.*

147. Cheh, *supra* note 14, at 342-43 (emphasis in original).

148. Hayden, *supra* note 25, at 85.

149. See Cheh, *supra* note 14, at 343; see also Cuillier, *supra* note 101, at 204-05.

150. See Cheh, *supra* note 14, at 351-52.

151. See *id.* at 343.

Although New York's Committee on Open Government has limited enforcement power, the makeup of the Committee includes seven public representatives, three of which are from the news media and the local government, and four executive branch officials, with all eleven members serving four-year terms.<sup>152</sup> Virginia's Freedom of Information Advisory Council also holds little enforcement power, but its membership includes members of the public, the media, local government, as well as members of the executive and legislative branches.<sup>153</sup> In contrast, Connecticut's Freedom of Information Commission does not include public representatives, but rather allows the governor to appoint its members, which must be diverse politically.<sup>154</sup> The commission does, however, constitute a formal appeal board and has the power to investigate violations and issue advisory opinions pertaining to violations of the Connecticut FOIA.<sup>155</sup> In addition, Connecticut's commission provides government employees with training on the policies and procedures of the FOIA.<sup>156</sup>

Creating a new independent review board in Illinois to deal with FOIA disputes will likely come with costs; however, these costs may be offset by a reduction in litigation due to a more neutral initial review.<sup>157</sup> Further, even if this review board is developed under the executive branch of government, its independence can be guaranteed through inclusion of citizen members, as well as through budgetary independence.<sup>158</sup>

## V. STRONGER SANCTIONS ARE NEEDED

As the *Chicago Tribune* proclaimed, "[p]utting some teeth into FOIA's enforcement provisions will send a message statewide that the presumption stands with the taxpayer who owns the records instead of the agencies that store them."<sup>159</sup> Not only do the sanctions proposed by the amendments to the Illinois FOIA need to be increased and strengthened, they need to be reinforced perpetually by the head of each public body to ensure that President Obama's and Attorney General Holder's objective of maintaining a "presumption of openness" is realized. Specifically, "without

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152. See *id.* at 351-52.

153. See *id.*

154. See *id.* at 350-51.

155. See Cheh, *supra* note 14, at 350-51.

156. See *id.*

157. See *id.* at 357.

158. See *id.* at 357-58.

159. *Statement of the Chicago Tribune with Regard to Illinois' Freedom of Information Act*, CHI. TRIB. (Mar. 6, 2009), <http://www.chicagotribune.com/news/local/chi-090306-tribune-statement,0,4200338.story>.

enforcement of these teeth, even the strongest laws will continue to struggle to be effective.”<sup>160</sup>

Because the Illinois FOIA was based off of the Federal FOIA, “case law construing the Federal Act should be used in Illinois to [guide interpretation] of the Illinois FOIA.”<sup>161</sup> The Federal FOIA implements disciplinary action against employees who are found by a court of law to have improperly withheld records “arbitrarily or capriciously,” subjecting the United States to court costs and attorney’s fees, and, at the very least, the Illinois law should do the same.<sup>162</sup> Specifically, the Federal FOIA requires a special counsel to investigate and recommend to the head of the public body a proposed disciplinary action in the event that the former findings are made against the employee in a judicial action.<sup>163</sup> The current Illinois FOIA allows for the possibility of civil fines ranging from \$2,500.00 to \$5,000.00 against willful or intentional violations of the Act but does not provide for criminal fines or jail time for violators.<sup>164</sup> Further, it makes awards of attorneys’ fees mandatory but contains no provision for disciplinary action against the public body or employee.<sup>165</sup>

Although it has previously been stated that, at the very least, the Illinois FOIA should mirror the Federal Freedom of Information Act in terms of recommendations of disciplinary action to the public body for findings of arbitrary unwillingness of employees to provide information requests, the provisions of the Illinois FOIA should go even further to deter future misconduct and ensure that public bodies are implementing the “presumption of openness.” Specifically, the Illinois FOIA should be beefed up with stronger civil penalties or the possibility of criminal penalties for individual employees who illegally deny public information requests or, at the very least, for those who repeatedly do so. The United States Department of Justice has determined that Illinois is one of the most corrupt states in the nation and that in particular, Chicago “has been the most corrupt area in the country since 1976.”<sup>166</sup> Illinois averages about fifty-one convictions for public corruption a year, which includes elected officials and government employees.<sup>167</sup> Although Illinois ranks third in terms of actual convictions, falling behind California and New York, the ratio of conviction per capita is much higher in Illinois due to the smaller population.<sup>168</sup> Because Illinois

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160. Stewart, *supra* note 22, at 286.

161. 31A ILL. L. & PRAC. RECORDS § 13 (2011).

162. See Stewart, *supra* note 22, at 288-89.

163. See *id.*

164. See *id.* at 307.

165. See *id.* at 309.

166. Simpson et al., *supra* note 10.

167. See *id.*

168. See *id.*

has such a reputation for dishonesty, greed, and secrecy and because reform in Illinois has become a primary objective for current government officials,<sup>169</sup> it is imperative that the people of Illinois have an uninhibited view of government records.

A. A LOOK AT OTHER STATES' SANCTIONS

Some states aim to deter intentional acts of withholding public information through the imposition of damages:

Punitive damages serve multiple goals, including rectifying the negative effects of bad conduct "in a moral sense," providing an incentive for plaintiffs to sue for extreme conduct on the part of a defendant when actual damages may not make it worthwhile, and most importantly, "to punish and to set an example that will deter similar conduct in the future."<sup>170</sup>

As noted, the possibility of punitive damages would help to curtail the problem of excessive court costs, which deters everyday citizens from obtaining relief through the courts.<sup>171</sup> However, in order "[f]or a punitive damages provision[] to [be successful], the law must 'regularly catch and punish' people who 'flagrantly violate the rights of other persons,' and potential offenders must understand that their potential violations will be punished."<sup>172</sup> In addition, only three states use punitive damages as a sanction in their FOIA's, and "[t]here is little evidence that [they] have been enforced."<sup>173</sup> A punitive damages provision, however, would be beneficial to the Illinois FOIA because it would give Illinois citizens "incentives to enforce the unlawful actions that match the risks inherent in litigation," while at the same time deterring government employees who are inclined to violate FOIA through denial of legitimate information requests.<sup>174</sup>

Around half of the jurisdictions across the United States incorporate some type of criminal fine or jail time into their FOIA provisions, which "offers a moralizing effect by 'strengthen[ing] moral inhibitions,' and . . . 'stimulat[ing] habitual law-abiding conduct.'"<sup>175</sup> Most states' criminal fines range from \$100.00 to as much as \$1,000.00 and their provisions for possible jail time tend to range anywhere from thirty days to a year; however, a

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169. *See id.*

170. *See* Stewart, *supra* note 22, at 280.

171. *See id.*

172. *Id.* at 301.

173. *Id.* at 280-81.

174. *Id.* at 291.

175. Stewart, *supra* note 22, at 307.

few states place much stricter consequences on willful acts of withholding public information.<sup>176</sup> In particular, the state of Nevada's freedom of information law proposes the possibility of criminal fines up to \$10,000.00 and jail time of one to five years.<sup>177</sup>

If the legislature were to impose criminal penalties for willful violations of the Act, prosecution of these violations could be performed by the state's attorney, which the Illinois State's Attorneys Association sought to do in the first place in order to avoid another costly layer of government.<sup>178</sup> However, just as a conflict of interest is apparent in allotting review power to the Public Access Counselor, because state's attorneys generally have discretion in filing charges and because violators of FOIA are likely to be public officials, prosecutors may be inclined to base their decisions as to whether to enforce the law on personal and political concerns as well.<sup>179</sup>

As previously stated, the Illinois FOIA does not implement any type of disciplinary action or jail time for public employees that willfully withhold public information.<sup>180</sup> In order to deter future wrongful conduct in terms of FOIA requests from citizens, public employees must be held personally accountable for their wrongful conduct. The problem with criminal fines and jail time is that they are rarely enforced.<sup>181</sup>

If the Illinois legislature continues to find increased civil penalties, jail time, or criminal fines unnecessary to combat this type of illegal behavior, employee misconduct can be discouraged through less-harsh sanctions such as education on FOIA, public service projects, or even continued reports of compliance to the court, as the state of Tennessee does.<sup>182</sup> In addition, alternative dispute resolution systems such as mediation have become more popular in terms of public records disputes, but the success of these systems tends to depend on the approach taken by those in charge,<sup>183</sup> which is true of most tactics in the quest for opening government to the public. Those at the top, including President Obama at the national level and Attorney General Lisa Madigan in Illinois, have made their stance on freedom of information clear.<sup>184</sup> It is the heads of each of the public bodies and agencies that need to emphasize the same agenda every day to their employees that receive records requests.

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176. See *id.* at 291, 307.

177. See *id.* at 307.

178. See Helle, *supra* note 8, at 1093-94.

179. See Stewart, *supra* note 22, at 291.

180. See *id.* at 307.

181. See *id.* at 293-94.

182. See *id.* at 273 ("Tennessee goes a step further, requiring courts to order permanent injunctions against people who violate the state's open meetings act, while violators must report to the court semiannually in writing of their continued compliance.").

183. See Cuillier, *supra* note 101, at 207.

184. See Cheh, *supra* note 14, at 335-36; Madigan's Reform, *supra* note 82.

The legislature could also aim to punish and deter public bodies that fail to comply with the Act through the imposition of attorneys' fees to requesters who prevail in litigating denials, even if the denials were made in good faith.<sup>185</sup> Currently, in Illinois, attorneys' fees are awarded to requesters upon a showing of bad faith in the denial by the public body, which can be extremely hard to show.<sup>186</sup> A requirement of bad faith can be difficult for a requester to prove, especially since there is no uniform way for a public body to search for a requested document.<sup>187</sup> If requesters were able to obtain attorneys' fees without having to show that a denial was made in bad faith, and just that a denial was illegal or wrongful, requesters would be much more likely to pursue litigation after an initial denial, and the costly barrier to litigation would be diminished since attorneys' fees would be easier to obtain.<sup>188</sup> Further, because attorneys' fees can have a substantial financial impact on a public body, if the threshold for awarding attorneys' fees were lowered from a requirement of mental culpability to a requirement of illegality, public bodies would have an increased monetary incentive to grant access to proper information requests.<sup>189</sup> Critics may argue that the additional prospect and ease of attaining attorneys' fees would lead to an increase in litigation; however, attorneys' fees could also be awarded to public bodies where an action brought by a requester is found to be frivolous, which would seemingly counteract this forecast of an increase in litigation.<sup>190</sup>

On the other hand, the Illinois FOIA's civil penalty provision of granting civil fines between \$2,500.00 and \$5,000.00 is one of the harshest civil penalties in the country.<sup>191</sup> Because it has been argued that at the very least the Illinois legislature should implement disciplinary actions similar to the Federal FOIA since it was based off of the Federal FOIA, an expected criticism would be that the civil penalty in the existing Illinois FOIA should be eliminated since the Federal FOIA lacks a civil penalty provision. It is important here to reiterate the state of affairs of the Illinois government in recent years to explain why the Illinois FOIA sanctions must be stronger than the Federal FOIA sanctions.

"[C]orruption is a serious problem that hurts all citizens who put their trust—and tax dollars—in the hands of politicians who abuse the power they are given."<sup>192</sup> Most recently and most famously was the conviction of

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185. See Stewart, *supra* note 22, at 285-86.

186. See *id.* at 283.

187. See *id.* at 300; see also Cox, *supra* note 83, at 408.

188. See Stewart, *supra* note 22, at 283.

189. See *id.* at 283, 285.

190. See *id.* at 285.

191. See *id.* at 307.

192. Simpson et al., *supra* note 10.



former Illinois Governor Rod Blagojevich in 2011.<sup>193</sup> Blagojevich served as governor from 2003 until 2009, at which time he was impeached and eventually convicted of trying to sell President Obama's former U.S. Senate seat, among other things.<sup>194</sup> Not only did the Blagojevich scandal intensify the State of Illinois's reputation as an immensely crooked government, it cost Illinois taxpayers millions of dollars.<sup>195</sup> Specifically, political corruption among public officials and employees costs the Illinois taxpayers near \$500 million per year.<sup>196</sup>

Blagojevich does not stand alone in terms of corrupt public officials in Illinois. Four of the seven governors that have held office in Illinois since 1970 have been convicted of corruption.<sup>197</sup> This set of men also includes "Otto Kerner, who . . . was convicted [ ] of mail fraud, bribery, perjury, and income tax evasion[,] . . . . Dan Walker, who . . . was convicted [ ] of obtaining fraudulent loans[,] . . . . [and] George Ryan, who . . . was convicted of racketeering, conspiracy and numerous other charges."<sup>198</sup> In addition, since 1976, 1,828 people, including "elected officials, appointees, government employees, and a few private individuals," have committed crimes of public corruption in Illinois, of which nearly eighty-five percent are committed in Chicago alone.<sup>199</sup> Further, about one out of every three Chicago aldermen since 1973 has been convicted of crimes of corruption including bribery, racketeering, income tax evasion, money laundering, and mail fraud.<sup>200</sup> Although it may be argued Illinois could simply be more privy to and capable of prosecuting government officials for crimes of corruption, the reality seems to be that the state of government in Illinois has fallen into a cycle of corruption that current officials and lawmakers are aware of and have recently made a priority to combat.<sup>201</sup> Specifically, current Illinois Governor Quinn has created an Ethics Reform Commission, and Chicago Mayor Rahm Emanuel has created a Mayor's Ethics Taskforce, both of which are aimed at reshaping the government culture in Illinois.<sup>202</sup>

In addition, as previously stated, although the Illinois FOIA's civil penalty provision is one of the strongest in the country, it does not include any type of disciplinary action or possible sanction against the violating employee him or herself.<sup>203</sup> Sanctions in the Illinois FOIA should also go

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193. Blagojevich was also convicted of crimes such as extortion and bribery. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See Simpson et al., supra* note 10.

198. *Id.*

199. *Id.*

200. *See id.*

201. *See id.*

202. *See Simpson et al., supra* note 10.

203. *See Stewart, supra* note 22, at 307, 309.

further than the Federal FOIA because state FOIA officers and employees are more likely to be “[i]nvolved with the subject matter of the request . . . [to] identify with the agency’s underlying mission[,] and . . . to know the personnel in the agency’s other offices that are encompassed by the FOIA request.”<sup>204</sup> Because of this, the incentives of employees that receive legitimate information requests are unlikely to change based on such small “sanctions” that do not affect them personally.

## VI. CURRENT STATE OF AFFAIRS IN ILLINOIS

Although evidence shows that President Obama has been successful in increasing government transparency,<sup>205</sup> this may not be the case in Illinois.<sup>206</sup> In the fall of 2012, the Illinois Policy Institute (Institute) issued findings based on their “government transparency audit.”<sup>207</sup> Based on information the counties posted on their websites, the Institute reviewed compliance of counties in Illinois with the Illinois FOIA.<sup>208</sup> Under FOIA, public bodies are required to post information on their websites about the public body, as well as how to submit a request for information.<sup>209</sup> According to their audit, twenty-one out of twenty-two counties in Eastern Illinois received “Fs” for their levels of government transparency, and only eight of the twenty-two counties complied with the Illinois FOIA, specifically in regard to requirements that they post “purpose of agency, size, number of part-time and full employees, FOIA filing process, calendar of meetings, agendas and minutes” online.<sup>210</sup>

Furthermore, within a year after the enactment of the 2009 amendments, the Illinois “legislat[ure] ha[s] introduced at least [one] half-dozen bills aimed at making access more difficult.”<sup>211</sup> For example, two weeks after the 2009 amendments went into effect, Illinois Governor Pat Quinn signed an amendment exempting evaluations of teachers, principals, and superintendents from disclosure.<sup>212</sup> The exemption, however, is not placed

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204. Cox, *supra* note 83, at 415.

205. *See id.* at 423.

206. *See Efforts, supra* note 17.

207. *See Eastern Illinois Counties Earn Low Marks in Government Transparency Audit*, ILLINOIS POLICY INSTITUTE (Aug. 28, 2012), <http://www.illinoispolicy.org/news/article.asp?ArticleSource=5004>.

208. *See id.*

209. *Frequently Asked Questions, supra* note 67, at 3-4, 6.

210. *Eastern Illinois Counties Earn Low Marks in Government Transparency Audit, supra* note 207.

211. Bruce Rushton, *FOIA Overhaul Already Under Siege by Legislators*, ST. J.-REG. (Feb. 15, 2010), <http://www.sj-r.com/top-stories/x2077694644/Legislators-move-to-roll-back-Freedom-of-Information-Act-changes>.

212. *See Helle, supra* note 8, at 1104.

within the FOIA, which contradicts the fundamental purpose of reevaluating the FOIA, which was “to simplify the task for requesters.”<sup>213</sup> Other recent proposals to the current FOIA include proposals to exempt performance evaluations for other groups such as public employees and law enforcement personnel, a proposal to make awards of attorneys’ fees to prevailing plaintiffs noncompulsory, a proposal to reduce the number of pages that a requester may receive for free, and a proposal that would require criminal convictions in order to disclose employee disciplinary records.<sup>214</sup>

## VII. CONCLUSION

These recent proposals to undo the 2009 FOIA amendments, coupled with historical evidence of non-compliance with prior FOIA provisions, contradict the intent of the Freedom of Information Act.<sup>215</sup> A cost-effective and timely way to enforce the law as well as some type of actual penalty against violators is needed to improve compliance and increase incentives for citizens to enforce their right to know.<sup>216</sup> Illinois Attorney General Lisa Madigan has been working towards greater government transparency through FOIA revisions since her election in 2002,<sup>217</sup> and she continues to do so today. In 2011, the Attorney General supported a revision to the existing FOIA that would eliminate the mandatory referral to the Public Access Counselor in situations where the public body claims exemptions for invasions of personal privacy or for the presence of preliminary notes and opinions, in order to decrease the number of delays for requesters.<sup>218</sup>

Instead of tearing apart the current FOIA provisions one-by-one, the Illinois legislature should revisit the Attorney General’s initial proposal, which included the possibility for criminal sanctions against those employees who intentionally and knowingly violate the FOIA.<sup>219</sup> The “us versus them” mentality in Illinois created by government officials has “fostered [their] sense of entitlement and impunity with sunshine laws that ke[ep] more public information in the dark than in the sunlight.”<sup>220</sup>

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213. *Id.*

214. *See Efforts*, *supra* note 17.

215. *See Our Opinion: Make Fines Key Part of FOIA Fix*, ST. J.-REG. (Feb. 23, 2009), <http://www.sj-r.com/opinions/x1434779997/Our-Opinion-Make-fines-key-part-of-FOIA-fix> [hereinafter *Make Fines Key Part of FOIA Fix*].

216. *See id.*; *see also* Stewart, *supra* note 22, at 302.

217. *See* Chris Rizo, *Newspaper Group Endorses Madigan’s FOIA Rewrite*, LEGAL NEWSLINE LEGAL J. (May 22, 2009), <http://legalnewsline.com/news/221103-newspaper-group-endorses-madigans-foia-rewrite>.

218. *Transparency in Illinois*, *supra* note 15.

219. *See* O’Neill, *supra* note 78.

220. Klaper, *supra* note 9, at 64-65.

The culture in Illinois government in regard to records requests must be reversed in order to fulfill the legislative intent of the Illinois Freedom of Information Act,<sup>221</sup> and criminal sanctions will meet this end.<sup>222</sup> As the Attorney General herself put it, “‘it is far too easy’ for local governments to dodge the current law.”<sup>223</sup> Because litigation takes time and money, requesters need an incentive to pursue this type of litigation. In addition, because “public access actions can confer such common benefits and are in furtherance of the stated public policy of transparent government,” the knowledge requirement in obtaining attorneys’ fees should be eliminated, and requesters should be awarded attorneys’ fees when an illegal denial of information is found to have happened.<sup>224</sup> However, the knowledge requirement should remain mandatory for the imposition of criminal sanctions.

Finally, the Illinois legislature should work towards the introduction of an independent review board made partly of citizen members, similar to that of New York and Virginia, in order to reduce the amount of litigation through a more neutral initial review. Because it is important to make the process as simple and efficient as possible for requesters who wish to appeal a public body’s denial, this should be a formal appeals board, similar to that in Connecticut, and should have some type of binding authority and the ability to regularly consult public bodies in applying the FOIA. The Public Access Counselor’s role could be expanded to include citizen members and possibly members of other branches of government to avoid separation of powers concerns and the usurping of judicial power.

There are many ways to improve compliance with the Illinois Freedom of Information Act, and an effective proposal would “help the state to restore the people’s confidence in [the Illinois] government.”<sup>225</sup> Further:

If the government deigns to lift the paper curtain separating it from its citizens and share its records, then it can be seen as honoring its responsibility to communicate with its citizens, to further the flow of information vital to the functioning of our form of government. Government has more than the ability or power to speak . . . it has an obligation to speak and freedom of information acts . . . are illustrative of a willingness to assume that obligation.<sup>226</sup>

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221. *See id.*

222. *See Stewart, supra* note 22, at 302.

223. *Make Fines Key Part of FOIA Fix, supra* note 215.

224. *Id.*; *Stewart, supra* note 22, at 302.

225. *Madigan’s Reform, supra* note 82.

226. *Helle, supra* note 8, at 1104.

As President Obama emphasized in his memorandum on open government, “[i]n the face of doubt, openness prevails.”<sup>227</sup> The Illinois legislature has a choice between opening the affairs of the Illinois government to its citizens and fulfilling the intent of its predecessors, as well as the Illinois Constitution, or continuing to foster the secretive, greedy reputation that Illinois has come to be known for. Here is to choosing the former.

ALYSSA HARMON\*

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227. Cheh, *supra* note 14, at 335-36.

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