

Illinois General Assembly Joint Committee on Government Reform

Statement of

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February 18, 2009

On behalf of the Citizen Advocacy Center, thank you Speaker Madigan, President Cullerton, and honorable members of the Committee for allowing me the opportunity to speak today.

The Citizen Advocacy Center was founded in 1994 and is a non-profit, non-partisan, community based legal organization. Our mission is to build democracy for the 21st Century. A significant portion of our work involves community lawyers working with individuals and community groups on addressing local issues of public concern.

We focus on identifying systemic solutions, strengthening public resources that increase access to government, building the public's capacity to participate in the democratic process, and advocating for policies that increase accountable, accessible, and transparent government. As a last resort, we engage in impact litigation to reform anti-democratic policies and institutions.

While the impetus for many of the issues we address starts at the community level, because we look to policy solutions, our work often has ripple effect throughout the region. Additionally, because we help people understand the processes by which government decision-making happens, and how to impact that decision-making, we witness first-hand deficiencies in open government laws. Lastly, in addition to our impact litigation, our policy work has a statewide impact. We have been, and are part of broad based coalitions that work to reform campaign finance laws, ethics laws, and the Illinois State Toll Highway Authority. We have also worked with legislators to reform legislative deficiencies regarding tax increment financing districts and the election code.

Over the last two years the Citizen Advocacy Center embarked on a study that included a detailed analysis of five Midwestern States sunshine laws. The states reviewed were Illinois, Ohio, Wisconsin, Minnesota, and Michigan. We looked at specific the statutory provisions and reviewed more than 1,000 legal cases, publications, and Attorney General opinions to analyze statutory provisions and implementation of the statutes. My testimony is based on our experience assisting citizen groups and our study findings. I will briefly highlight five issues related to the Freedom of Information Act, or FOIA, and four issues related to the Open Meetings Act.

To begin, the lack of penalties for FOIA violations allow public bodies to disregard the statute with little concern for reprisal.

Of the five Midwestern states surveyed, Illinois was the only state devoid of penalty provisions. The only method of accountability under the FOIA is for an individual to file a lawsuit to compel

the production of records. For the average person, this is an unrealistic avenue, especially because the statute does not mandate attorneys' fees.

The lack of enforcement provisions act as a protective barrier to the public body that refuses to produce records or makes FOIA responsiveness a low priority. For example, as part of our student internship program, we conduct regular government surveys. Inevitably, timely responses to FOIA requests become an issue.

Last summer, we made FOIA requests to various public bodies for election records. One agency waited until the end of the statutory deadline to tell us that they would not respond to our request until we used their FOIA request form. After we did so, they asked for an extension of time, which they interpreted as three months. It was not until we took aggressive action to compel production that we ultimately received the records.

From our experience, this example is not an isolated incident. It is indicative of an institutional attitude towards non-disclosure. In an attempt to help improve government accountability and responsiveness, the Attorney General created the Public Access Counselor. This is a crucial public resource. Our organization has referred many individuals, public officials, and members of the media to the Public Access Counselor. However, its lack of enforcement capacity is an enormous barrier to its overall effectiveness. There is absolutely no mandate on government agencies to be responsive to requests from Public Access Counselor who intervene on FOIA and OMA issues.

The lack of enforcement within the FOIA statute, combined with the lack of enforcement capacity of the Public Access Counselor, leaves the individual who is confronting a non-responsive agency in the untenable situation. They have to choose between walking away from obtaining records that they are legally entitled to or bearing the brunt of litigation. Either way, the citizen loses and the public body walks away with no punitive impact.

Penalty provisions, mandatory attorneys' fees, and enforcement authority of the Public Access Counselor are needed to put teeth into the FOIA statute and to increase compliance with FOIA requests.

Second, training should be required for those who are required to comply with the FOIA to increase compliance.

From our experience in identifying the appropriate individuals within public bodies to respond to FOIA requests, and in talking with them once they are identified, more training is necessary to build a better understanding of FOIA. While the Public Access Counselor, professional organizations, and the Citizen Advocacy Center provide trainings, participation is not mandatory. Mandating FOIA trainings for those who have to comply with the statute strengthens compliance capacity and accountability.

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Third, technology has outpaced provisions of the FOIA and can be used to deny access to records.

While technology has made it easier for a public body to track and document government activity, it can be used as a barrier to public access because of wording within the statute.

An example is when our organization made a FOIA request for contractor records from a public body. Responsiveness to our request would have required the public body to generate a simple report that sorted existing electronic records. The public body refused to do so based on the ‘new search’ and ‘creating a new record’ provision of the FOIA. While eventually the public body turned records over, they did so only after litigation ensued. However, the records turned over were essentially a data dump of records that we had to spend a substantial amount of time and money to sort through to pull the ultimate information we were seeking.

The public body could have provided the information in a few key strokes but instead forced us to sort through thousands of records. In another example, we assisted an individual who made a FOIA request for the individual cell phone records of a school district superintendent. The district denied the request stating that they received their cell phone bill electronically. They stated that while there was the capacity to view individual cell phone records, because they did not click the link to open those records during the course of business, they were not required to do so in order to be responsive to the FOIA request.¹

The “new search” or “creation of a new records” provision within the statute needs to be amended to compensate for advances in technology.

Fourth, excessive exemptions within the FOIA statute, and broadly construed exemptions, contradict the mandate of open government.

Illinois’ FOIA 45 exemptions, and that does not include the subsection exemptions. The average among the other Midwestern states studied by the Center was 15. Illinois’ FOIA exemptions section is convoluted and makes the statute tremendously difficult for professionals, much less average citizens to navigate. Additionally, many of the exemptions, such as those under personal privacy and what constitutes a ‘draft’ document are inappropriately broadly construed by public bodies.

For example, school districts across the state are increasingly refusing to disclose superintendent contracts pursuant to the *per se* privacy exemption.² The privacy provisions within the statute are supposed to protect “clearly unwarranted invasion of personal privacy” however, public bodies are using them to circumvent disclosure of public contracts. Additionally, we have seen public bodies refuse to disclose to attendees of public meeting documents that public officials are using in their deliberations until a vote is taken. The responses of public bodies is often that until a document is voted on, what they are debating is a draft and therefore not disclosable.

¹ New Lenox

² Stern Case. *per se* privacy exemptions under 5 ILCS 140/7(b)(i-vi).

The convoluted exemptions section needs to be revised to be simplified and emphasize mandatory disclosure of documents except in limited circumstances.

Fifth, ambiguous costs provisions within the FOIA results in the denial of public records.

The FOIA statute currently allows public bodies to charge fees only to reimburse the actual cost of physically reproducing the records. Search costs are not permitted. 5 ILCS 140/6(a). While the law is explicit, there is no rhyme or reason to determining how public bodies decide what to charge for records. In a 2008 Center survey of public bodies in Cook and DuPage County, we saw copy costs ranging anywhere from \$.10 per page to \$1.00 per page.

Capping costs under FOIA, improving on-line access to information through the regular posting of documents produced by public bodies, encouraging email dissemination of public records, and creating electronic reading rooms would substantially address cost of information issues. (Electronic reading rooms are the automatic posting of previously requested public documents)

A counter part to the FOIA is the Open Meetings Act. The Illinois Open Meetings Act is relatively strong as compared with other Midwestern states that we surveyed in regards to notice requirements, meeting minutes, the inclusion of electronic communications, and the presence of penalty provisions. However, as with the FOIA, the lack of enforcement creates a significant barrier to those who want to hold public bodies accountable.

First, the Illinois penalty provisions within the Open Meetings Act are rarely utilized to enforce compliance.

The OMA allows for punitive measures that include a Class C misdemeanor punishable by a fine of up to \$1,500 and imprisonment for up to 30 days. 5 ILCS 120/4. However, State's Attorneys almost never pursue criminal actions against government officials or governmental bodies for violating the OMA, and the court rarely assess criminal penalties.

Rarely enforced provisions do little to deter governmental bodies from violating the statute. As with FOIA, the burden once again lies primarily on the individual to hold the public body accountable through a law suit. Even then, a public body can circumvent accountability by simply 'doing over' the illegal action properly, thereby mooting the legal claim.

The following are just a few examples of issues the Center has seen regarding violations of the statute: voting on agenda items not listed, requiring members of the public to physically leave the public building where meetings are taking place and the doors then being locked prior to executive sessions, posting public notices in places that the public can not read, and continuing public meeting deliberations after meetings have been adjourned.

Mandatory fines against public bodies that violate the OMA, prohibiting the mooting of a claim by subsequent remedial action by a public body, proving the Public Access Counselor with enforcement authority, and mandated training for public officials would improve compliance and accountability.

Second, narrow windows in which to file Open Meetings Act suits further inhibit the public's ability to hold government bodies accountable.

Illinois has a very short, 60 day deadline, for which the public can file an OMA civil claim. Among the Midwestern states surveyed, only Michigan had a comparable limitation.

Members of the public who identify an Open Meetings Act violation have three avenues to address grievances prior to filing litigation: speak out against the public body to pressure public officials to address the indiscretion or conduct a legal "re-vote"; attempt to mediate the dispute through the Public Access Counselor; or file a complaint with the appropriate State's Attorney. None of these options suspend the 60 day time bar. If it is going to be that the public that is charged with the primary task of holding public bodies accountable for violating the Open Meetings Act, a longer statute of limitation is necessary.

Third, executive session exceptions are excessive and broadly construed by public bodies.

As with the FOIA, the OMA has far more legally permissible reasons to close a meeting as compared to the other states surveyed. Illinois has 24 where as the other states average 10. Additionally, in our experience, exceptions such as litigation and personnel are inappropriately broadly construed. Moreover, while closed sessions are required to be taped, compliance is difficult to police unless someone who participated in the meeting discloses inappropriate activity. Tightening Open Meetings Act exceptions and amending the statute to at some point require disclosure of closed session recordings would increase accountability.

Lastly, while the Open Meetings Act guarantees the public the right to observe government decision-making, it does not permit participation in government meetings.

Only school board meetings by virtue of the school code, mandate an opportunity for the public to comment at board meetings. The public deserves the right to participate in the democratic process.

As such, the Open Meetings Act should be amended to mandate public comment opportunities. Moreover, the public should be protected against policies that attempt to regulate content.

We appreciate your commitment to exploring ways to improve government accountability, transparency, and accessibility. Thank you for the opportunity to address you today, and copies of our Illinois Midwest Open Government report are available for your review.