The New Freedom of Information Act (P.A. 96-542)
Phillip Lenzini, Peoria

Effective January 1, 2010, Illinois has installed a major revision to the Freedom of Information Act, found at 5 ILCS 140/1 et seq. Under this law, public records are presumed to be open and accessible to the public and Section 1 of the revised Act now expressly declares that it is the public policy of Illinois that access by all persons (note, no limitation to Illinoisans, Americans or even legal aliens) to public records promotes “transparency and accountability of public bodies” and that it is “a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible.”

Although Section 1 recognizes the Act “imposes fiscal obligations on public bodies to provide adequate staff and equipment to comply with its requirements,” it declares that providing records is a “primary duty of public bodies…fiscal obligations notwithstanding.” In other words, P.A. 96-542 has taken what was the largest unfunded mandate in Illinois history and dramatically increased both the mandate and the compliance costs to public bodies and their taxpayers, without hesitation and in spite of such costs. This article will discuss the new requirements along with those that continue from existing law.

Requirements for all public bodies.

It is frequently misunderstood that the FOIA law only applies when someone makes a request for a public record. The truth is that FOIA has several requirements for public bodies whether they ever receive a request for records or not. We begin with those universal compliance requirements, which have also been expanded greatly by P.A. 96-542.

Every public body in Illinois is (and was) required to “prominently display” at each of its offices, and make available to the public, a “brief description of the public body, which will include, but not be limited to, a short summary of its purpose, a block diagram giving its
functional subdivisions, the total amount of its operating budget, the number and location of its separate offices, the approximate number of full and part-time employees, and the identification and membership of any board, commission, committee, or council which operates in an advisory capacity…or which exercises control…or to which the public body is required to report….” [140/4(a)]

In addition, every public body must include a brief description of methods whereby the public may request information and records, and, as a new addition, it must include a directory designating the FOIA officer or officers, the address where requests are to be directed, and any fees allowable under the Act. [140/4(b)] Also, as a new requirement, P.A. 96-542 adds that if the public body maintains a website, all of this information must be posted there. [140/4(c)]

Although FOIA does not directly require a public body to promulgate or adopt a specific written policy to comply with it, almost all public bodies in fact prepare and adopt a policy, ordinance or resolution as the best practice in order to comply with these requirements.

**The new mandate for Freedom of Information Officer(s).**

Perhaps the most expensive and imposing mandate on all public bodies, particularly the smaller ones, whether they ever receive a FOIA request or not, is the new requirement that each body must designate one or more “officials or employees to act as its Freedom of Information officer or officers.” [140/3.5] In general, the purpose of the FOIA officer is to receive the FOIA requests, ensure that the requests are responded to in a timely fashion, issue responses, and the officer(s) must develop a list of documents or categories of documents that will be “immediately disclose upon request.” [140/3.5]

Before turning to their duties IF a FOIA request is ever filed, and addressing the requirements for all public bodies whether a request is ever made or not, the FOIA designated
officer(s) are required, prior to July 1, 2010, to undergo an “electronic training curriculum” to be developed by the Public Access Counselor. They must “successfully complete” the training as a prerequisite to serving as a FOIA officer. Further, they must successfully complete the electronic training curriculum annually thereafter or if newly designated, they must do so within 30 days of assuming the position. [140/3.5(b)]

The further specific duties of FOIA officer(s) upon receipt of a FOIA request are:

1. to note the date the public body receives the request;
2. to compute the day on which the time to respond expires, and note that on the request;
3. to maintain an electronic or paper copy of the request and all documents submitted with it, until complied with or denied; and
4. to create a file for retention of the original request, a copy of the response, and a record of all written communications with the requester and copies thereof.

Changes in the definition of “public records.”

For some time, the definition of what constitutes “public records” in Illinois for purposes of FOIA has been quite expansive. This is particularly troublesome in Illinois given the interface of FOIA with the provisions of both the Local Records Act [50 ILCS 205/1 et seq.] and the State Records Act [5 ILCS 160/1 et seq.] which contain somewhat different definitions of the term [50 ILCS 205/3 and 5 ILCS 160/2], and perhaps more importantly, contain various provisions regarding the storage, preservation, and destruction of “public records.”

P.A. 96-542 alters the FOIA definition of “public records” in two important ways: First, in the definition itself, the term “electronic communications” is specifically added, but more expansively, the definition also includes “all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics” and that are
prepared by or for the body, have been used or are being used by, received by, or in the
possession or control of any public body. [140/2(c)]. Secondly, a public record that is not in the
possession of the public body, but is in the possession of a party with which the agency has
contracted to perform a “governmental function” that relates directly to the governmental
function and is not otherwise exempt, is now a “public record” of that public body, subject to
disclosure. [140/7(2)]

Changes in exemptions from disclosure.

Although the scope of this article does not allow for an extended discussion of the 43
enumerated exemptions, or the thousands of permutations and applications of those exemption
classifications to myriad circumstances, we will highlight the changes in exemptions that are
occurring and a few of the more universal issues or provisions.

Perhaps the most noticeable change in FOIA exemptions made by P.A. 96-542, is the
reorganization of those exemptions into two separate sections: Section 7 which somewhat
parallels the old list; and Section 7.5 which is essentially a new category of exemptions called
“Statutory Exemptions” though it includes many of the stated exemptions that had been
originally included in old section 7. Section 7.5 is an attempt to list exemptions to disclosure
found in other statutory provisions such as the Library Records Confidentiality Act [75 ILCS
70/1]. In other words, most of the 19 listed statutory exemptions in section 7.5 are similar
provisions, or at least reference the same statutes as under the FOIA existing prior to January 1,
2010. For instance the second one listed in section 7.5 is: “Library circulation and order records
identifying library users with specific materials under the Library Records Confidentiality Act.”
[140/7.5(b)] This is very close to the pre-existing provision of FOIA which stated: “Library
circulation and order records identifying library users with specific materials.” [140/7(l)]
However, not all statutory exemptions listed in Section 7.5 were previously singled out. An important example of such is section 7.5(r), where “information prohibited from being disclosed by the Illinois School Student Records Act” is now expressly exempted. [140/7.5(r)] The School Student Records Act was not previously listed as an exemption, though it was usually understood as exempt under the general language of the preceding section, Section 7(1)(a) which exempts “information specifically prohibited from disclosure by federal or State law….” [140/7(1)(a)]

Although each of the 19 exemptions under second 7.5 are important in their respective spheres, because of the general application of some of the provisions, mention is made here of section 7.5(q) which exempts: “Information prohibited from being disclosed by the Personnel Records Review Act” (referring to 820 ILCS 40) [140/7.5(q)]; and section 7.5(h) which exempts information exempted from disclosure under the State Officials and Employees Ethics Act (referring to 5 ILCS 430/1-1 et seq.) [140/7.5(h)]; and section 7.5(f) which exempts: “Firm performance evaluations under Section 55 of the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act.” (referring to 30 ILCS 535/55) [140/7.5(f)]

**Non-statutory exemptions under FOIA.**

Turning to section 7 of the new FOIA, which lists the 24 sections of exemptions effective January 1, 2010, it must be said at the outset of any discussion of these exemptions, that section 7(1) (formerly found at 5 ILCS 140/8, which was entirely deleted by P.A. 96-542) expressly states that any requested public record that contains information exempt from disclosure under section 7, but also contains information that is not exempt, must be redacted by the public body of the exempt information, but otherwise made available for inspection and copying. This rule, preserved from the “old” FOIA but with new exemption language to consider, accounts for a
huge share of the increased costs of FOIA compliance, both in staff time and attorney consultation if not more. What the General Assembly and the Attorney General continue to fail to realize is that each exemption narrowed, or rewritten or altered, dramatically increases compliance costs to local governments and their taxpayers, even when their true goal is actual compliance. Compared to the federal government FOIA, which has only a handful of exemptions, but which are broadly written and easy to apply, the “narrow approach” continued by Illinois is misguided to say the least, and terribly costly to taxpayers at best.

Perhaps the first listed exemption in section 7 is the most important, because it exempts from disclosure: “Information specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law.” [140/7(1)(a)] Although many of the 24 listed categories under P.A. 96-542 are similar to existing exemption provisions of FOIA, there are some with significant changes. For instance, all of the exemption provisions that the Supreme Court and Illinois Appellate Court had determined were “per se” exemptions (meaning documents or records within those “per se” categories did not require a court examination or inspection because the legislature had already determined they were exempt categories) have been deleted. In place of the “per se” categories, three concepts are essentially substituted.

The first such “concept” is referred to as an “unwarranted invasion of personal privacy.” Notwithstanding the claim that this phrase is ambiguous, very subjective, impossible to apply in a “real world” setting and destined to lead to a lot of litigation, P.A. 96-542 attempts a “definition” as “disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject’s right to privacy outweighs any legitimate public interest in obtaining the information.” [140/7(1)(c)] Complicating this concept is the sentence immediately succeeding the quoted language that reads: “The disclosure of information that bears on the
public duties of public employees and officials shall not be considered an invasion of personal privacy.” [140/7(1)(c)] This sentence is to limit the application of the exemption.

The second “concept” is “personal information” but this term must be read and understood in relationship with the “unwarranted invasion of personal privacy” clause. This is because “personal information,” to the extent it may be included within public records, if it constitutes a “clearly unwarranted invasion of personal privacy” is exempt from disclosure, unless disclosure is consented to in writing by the subject of the information. [140/7(1)(c)]

“Personal information” is not defined in P.A. 96-542 or FOIA and therefore we are left to somewhat guess at its meaning or the scope of the term. Presumably it may include some information beyond the defined term “private information” (see below) but it may be something less than the information contained in the former, “per se” exempt category of personnel file. The absence of a definition, at least until courts have ruled on the issue and given some guidance as to meaning, will simply perplex public bodies and their FOIA Officer(s) who will be called upon to interpret, respond and apply the term in the interim.

The third “concept” introduced in the new FOIA is the term “Private information” which is defined as: “unique identifiers, including a person’s social security number, driver’s license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.” [140/2(c-5)] Such “private information” is exempt from disclosure “unless

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1 Although neither FOIA nor P.A. 96-542 define the term, the Illinois Supreme Court, in Lieber v. Bd. Of Trustees of S. Ill. Univ., 176 Ill.2d 401, 680 N.E.2d 374 (1997) did address the term as it was then used in the Act and concluded that it did not include “basic identification” like names and addresses. [680 N.E.2d at 379]. However, P.A. 96-542 has now created the term “private information” and included within that definition, at least to some extent, home addresses. Continued viability of Lieber’s view given the later legislative acts is an open question.
disclosure is required by another provision” of FOIA, a State or Federal law or a court order.

[140/7(1)(b)]

**Listed exemptions from disclosure.**

In addition to these new concepts, there are listed the balance of the 24 exemptions, many of which are similar to existing exemptions under FOIA. Most of them have had some minimal language modifications, presumably to clarify the scope of the intended exemptions. But most of the changes, rather than adding clarity, appear to complicate and/or add cost to the implementation, and surely tend to narrow the scope of the exemptions in favor of fuller disclosure.

Many of the prior specified exemptions continue to exist and will not be summarized here, though exemption “j” dealing with educational matters and in particular testing has been substantially rewritten in respects beyond testing, including evaluation materials for faculty members, course materials or research materials used by faculty materials, as well as materials used for adjudication of student disciplinary matters, which previously were individually listed sections. [140/7(1)(j)]

Finally, of note is the newly worded section “n” that exempt “records relating to a public body’s adjudication of employee grievances or disciplinary cases” but, the exemption does not extend to “the final outcome of cases in which discipline is imposed.” [140/7(1)(n)] Also the exemption for communications between the public body and attorney or auditor is unchanged except for renumbering to 140/7(1)(m).

**Critical considerations relating to exemptions from disclosure.**

No discussion of FOIA exemptions would be complete without mention of three significant changes relating to exemptions and their applications. First, P.A. 96-542 expressly
states that there is a presumption in respect to all public records that they are to be open for inspection and copying. [140/1.2] Second, any assertion by a public body that a record is exempt from disclosure must be shown by what lawyers call a burden of proof known as “clear and convincing evidence.” Basically that means the public body must show that the records sought clearly fall within the narrow reading of the exemption and that a reasonable person would be convinced that interpretation or application.

Third, P.A. 96-542 requires that if either the exemption relating to “personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” [140/7(1)(c)] or the exemption for “preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated…” [140/7(1)(f)] is asserted or applies, then the public body must report in writing, within the same time period for a respond to the FOIA request, a notice to the requester and Public Access Counselor of the intent to deny the request, in whole or in part, on those bases. [140/9.5(b)] The notice must include a copy of the request, the proposed response, and a “detailed summary of the public body’s basis for asserting the exemption.” The Public Access Counselor is to determine whether further inquiry is “warranted.” Within five (5) working days of receipt the Public Access Counselor is to notify the requester and public body if such an inquiry is warranted, which then will be processed as other reviews by the Public Access Counselor which will be discussed further below.

**Specific non-exempt public records.**

In addition to the general principles and rules that presume all public records to be open, P.A. 96-542 has added several specific provisions setting out particular types of public records that must be disclosed and are not exempt. Under new section 2.5, all records relating to
“obligation, receipt, and use of public funds of the State, units of local government, and school districts” are expressly held to be public records open to public inspection and copying. [140/2.5]

Similarly, under new section 2.10, the certified payroll records submitted to public bodies under the Prevailing Wage Act are public records open to inspection and/or copying except “contractors’ employees’ addresses, telephone numbers, and social security numbers must be redacted by the public body prior to disclosure.” [140/2.10]

Under new section 2.15, certain information in arrest reports and criminal history records must be furnished as soon as practical, but in no event later than 72 hours after the arrest (notwithstanding the general time periods for responses to FOIA requests). [140/2.15] This is: (1) information that identifies the individual (name, age, address, and photograph when and if available); (2) any charges relating to the arrest; (3) time and location of arrest; (4) name of investigating or arresting law enforcement agency; (5) if incarcerated, the amount of any bail or bond; and (6) if incarcerated, the time and date the individual was received into, discharged from or transferred from the arresting agency’s custody. [140/2.15(a)] However, the information in items 3 to 6 may be withheld if disclosure would “interfere with pending or actually and reasonably contemplated law enforcement proceedings” or endanger the life or physical safety of law enforcement or correctional personnel or any other person, or compromise the security of any correctional facility. [140/2.15(c)]

The provisions of section 2.15 do not supersede the confidentiality provisions for arrest records of the Juvenile Court Act. [140/2.15(d)]

Finally under new section 2.20, all settlement agreements entered into, by or on behalf of public bodies, are subject to inspection and copying by the public excepting that information exempt from disclosure may be redacted. [140/2.20]
The new fee structure for responses.

The preexisting language that the fees or costs which may be charged by a public body are those “reasonably calculated to reimburse its actual cost for reproducing and certifying” the records, which can not include search costs, any costs for reviews, and must be imposed according to a standard scale of fees established by the public body [originally 140/6(a), and now 140/6(b)] was left in FOIA by P.A. 96-542. But the context has been materially changed. The proviso that “purposeful imposition” of a fee inconsistent with this section must be considered a denial of access subject to judicial review also remains [formerly 140/6(c), and now 140/6(d)]. Any requestor, who states the purpose of the request and indicates that a waiver or reduction of the fee is in the public interest, may be, as determined by the public body, entitled to the copies without charge or at a reduced charge [140/6(c)].

But the major changes brought about by P.A. 96-542 are that unless another statute provides for a fixed fee, under a FOIA request for the first fifty (50) pages of “letter size” or “legal size” black and white copies, no fee at all may be charged. The maximum fee for any pages more than 50 is $.15 per page and the maximum cost for certifying a record is $1.00.[140/6(b)] Additionally, if the copies are in another size and/or in color, the “public body may not charge more than its actual cost for reproducing the records.” In calculating those costs, the body may not include any search fees, review fees, or any personnel costs. [140/6(b)]

For electronic records, if a requestor requests a copy of a record maintained in electronic format, the public body shall furnish the copy in the requested format if feasible. If not feasible, then it must be provided in the electronic format in which it is maintained, or in paper format, at the option of the requester. If provided in electronic format, there can be no charge for the search, review or personnel costs of reproducing the copies, and the public body may only
charge the actual cost of purchasing the recording medium, i.e. the disc, diskette, tape or other medium. [140/6(a)]

The process of responding to FOIA requests.

The Act does not require any specific format for the “written request” nor expressly authorize the public body to require a specific format for a request. In fact, P.A. 96-542 expressly states that the public body may not require that a request be submitted on a standard form [140/3(c)], though it can make the request. All FOIA requests must be “immediately” forwarded to its FOIA officer(s). We recommend that the public body make every attempt to have requestors fill out a Request Form of the type it uses, as it helps insure that all of the information needed is provided and necessary procedures and timelines are followed. Incomplete addresses or unclear dates can definitely lead to compliance problems. If a public body has more detailed policies or administrative procedures in place, including specific letter examples to use for extension notifications, denials, approvals, etc. those are perfectly suitable substitutes so long as each deadline and step in the process is complied with. They simply can’t be required of the requesters.

Although public bodies may require that FOIA requests be “written” (delivered by personal delivery, mail, telefax or other means available), the public body may honor oral requests. The public body may not require the requester to specify the reason or purpose of the request “except to determine whether the records are requested for a commercial purpose or whether to grant a request for a fee waiver.” [140/3(c)]

Except for “commercial requests,” which is discussed herein, within five (5) business days of a FOIA request, unless the time is properly extended (as discussed next), the public body must comply or deny, in writing. Failure to deny, comply or extend within those 5 days is
considered a denial of the request. Failure to respond within the proper time, but thereafter providing the copies must be done without any fee charge. And failure to respond eliminates the public body from treating a request as “unduly burdensome.”

One extension of an additional five (5) business days may be used, if a request is: (1) for records stored in whole or in part at other locations; (2) the request requires collection of a substantial numbers of records; (3) the request is a categorical one and to be responsive requires an extensive search; (4) the requested records are not located in a routine search and additional effort is being made to locate them; (5) the records requested require examination and evaluation as to exemptions or require appropriate deletions from them; (6) the requested records can not be provided within the time limit without unduly burdening the operations of the public body; or (7) there is a need for consultation with another public body which has a substantial interest in the determination or subject matter of the request. [140/3(e)] In the event of such additional time, the public body must, within the initial 5 day period, notify the requester of the reasons and the date by which the documents will be available. Failure to do so is considered a denial of the request. If the time limit is passed but the public body does produce the records, they may not charge any fee for those copies. Failure to produce the records during the extension denies the public body the right to treat the request as “unduly burdensome.”

If the public body and its FOIA officer(s) intend to deny a request, it must notify the requester in writing of the denial and the specific reasons, including “a detailed factual basis for the application of any exemption claimed.” [140/9(a)] The notice must include the names and titles or positions of each person responsible for the denial, inform the requester of their right to review by the Public Access Counselor and provide the address and phone number thereof, and inform the requester of their right to judicial review under the Act. [140/9(a)]
“Unduly burdensome” requests.

The Act does not really define what the term “unduly burdensome” means, though it does expressly state in section 3(g) that “repeated requests from the same person for the same records that are unchanged or identical records previously provided or properly denied under this Act shall be deemed unduly burdensome under this provision.” We would call this the “rain man” requester for the possible, though highly unlikely, requester who repeats the identical records request (i.e. not even having their spouse or sibling do so) repeatedly from the public body. Of far more cost and difficulty is the requester who seeks huge amounts of material in a request or multiple requests and/or the requester who seeks documents or records that may be few in number but are contained, or likely so, within huge data bases or data banks, especially the poorly indexed ones, as in a “needle in the haystack” challenge. Neither are necessarily “unduly burdensome” under FOIA, and both will require the public body to prove by clear and convincing evidence (at the risk of fines and mandatory attorneys’ fees as discussed below) that such a requests are indeed “unduly burdensome.”

FOIA specifies that before a public body may invoke the “exemption” for “burdensome requests” it must extend to the requestor the opportunity to confer with it in an attempt to reduce the request to manageable proportions. This is not only a mandate, it can be a useful tool in respect to *bona fide* requests in trying to narrow, identify, and locate specific records desired by the requester (though not the purpose of the request). If the public body responds to a categorical request by stating it would be unduly burdensome, it must do so in writing specifying the reasons why it would be unduly burdensome and the extent to which compliance would burden the operations of the public body. That is treated as a denial of the request [140/3(f)].
The new concept of “commercial purpose” requests.

P.A. 96-542 creates a new term of “commercial purpose” and defines it as: “the use of any part of a public record or records, or information derived from public records, in any form of sale, resale, or solicitation or advertisement for sales or services.” [140/2(c-10)] However, requests from news media and non-profit, scientific, or academic organizations are excluded, when the principal purpose of the request is “to access and disseminate information concerning news and current or passing events” or for articles of opinion or features of interest to the public, or for academic, scientific or public research or education. [140/2(c-10)]

A public body has twenty-one (21) days to respond to a request made for a “commercial purpose.” The response must either: (1) provide the requester an estimate of the time required to provide the records requested and an estimate of the fees to be charged (which the public body may require to be paid in full prior to copying); (2) deny the request under a listed exemption; (3) provide notice to the requester that the request is unduly burdensome and offer the opportunity to attempt to reduce the request to manageable proportions; or (4) provide the requested records. [140/3.1(a)] The public body, giving priority to requests for non-commercial purposes, and considering the size and complexity of the request, is to comply with a commercial request within a reasonable period, unless the records are exempt from disclosure. [140/3.1(b)]

It is a violation of FOIA for someone to knowingly obtain a public record for a commercial purpose without disclosing that it is for a commercial purpose, if asked to do so by the public body. [140/3.1(c)] Therefore in any request form or checklist used by a public body, or in the event of receipt of a written FOIA request, we recommend the public body expressly inquire whether the request is for a “commercial purpose.”
New provisions relating to fines, penalties and attorneys’ fees.

Of course FOIA provides that anyone who is denied access to public records or copies thereof, may sue the public body. [140/11(a)] In all such suits, the public body bears the burden of proof on any claim of exemption from disclosure. Under the “old” FOIA law, if a requester sued the public body for any allegation of improper action, and the public body had a reasonable claim that its action was authorized by law, the requester could not recover their attorneys’ fees even if they “won” the lawsuit and the records were disclosed. A few years ago, this aspect of the law was changed to provide that if the requester substantially prevailed in the litigation, (unless the fundamental reason for the request was to further their commercial interests, and then only if the public body lacked any reasonable basis in the law for withholding the records) the courts could order the public body to pay the requester’s reasonable attorneys’ fees and costs. This was not good enough for requesters, so P.A. 96-542 again changed section 11, so that if a requester prevails in litigation the court must award the requester “reasonable attorneys’ fees and costs” though in determining what is “reasonable” the court is to consider the “degree to which the relief obtained relates to the relief sought” in the lawsuit. [140/11(i)]

Perhaps most importantly, under P.A. 96-542, if a court determines “that a public body willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith, the court shall also impose upon the public body a civil penalty of not less than $2,500 nor more than $5,000 for each occurrence.” [140/11(j)] The court is to consider in assessing the fine, for “aggravation or mitigation” the budget of the public body and whether the body has previously been assessed penalties for violations of FOIA.
The Public Access Counselor.

Although we have had a Public Access Counselor in the Illinois Attorney General’s office since 2004, that position was essentially just a title that Attorney General Lisa Madigan had created and assigned to one of her assistant attorneys. It was not statutorily created or authorized. Under P.A. 96-542 now the office of Public Access Counselor, as a part of the Attorney General’s Office, has been created by statute.

Any requester who believes a violation of FOIA has occurred (by a public body other than the General Assembly, its committees, commissions and agencies [140/9.5(a)]) may file, not later than within 60 days after the alleged violation, a request with the Public Access Counselor for a review of the public body’s actions. The request for review must be written and include a copy of the request and any responses from the public body.

Upon receipt of a request for review, the Public Access Counselor is to determine whether further action is “warranted.” If the Public Access Counselor determines that the alleged violation is unfounded, he must so advise the requester and public body and no further action shall be taken. [140/9.5(c)] In all other cases, he must, within seven (7) working days of receipt, forward a copy of the request for review to the public body and specify the list of records or other documents the public body must furnish for review. Within seven (7) working days of receipt of the request, the public body must furnish those records or documents and “shall otherwise fully cooperate with the Public Access Counselor.” [140/9.5(C)]

If the public body fails to furnish the records or documents, or “if otherwise necessary,” the Attorney General may issue a subpoena to the public body or any person having knowledge of or records pertaining to a request. To the extent that records or documents produced by a public body contains information claimed to be exempt under section 7, the Public Access
Counselor shall not further disclose such information. [140/9.5(c)] Within seven (7) working days after it receives the request for production of records, the public body may, but is not required, to answer the allegations of the request for review. The “answer” may take the form of a letter, brief, or memorandum and the Public Access Counselor shall forward a copy to the requester, with any alleged confidential information redacted from the copy. [140/9.5(d)] The requester may, but is not required to respond in writing within seven (7) working days and must provide a copy to the public body.

Unless the Public Access Counselor extends the time by not more than 21 business days, by sending a written notice to the requester and public body, that includes a statement of the reason for the extension, or decides to address the matter without the issuance of a binding opinion, the Attorney General shall examine the issues and records, shall make findings of fact and conclusions of law, and shall issue to the requester and the public body an opinion in response to the request for review within sixty (60) days after the receipt, which shall be binding on both the requester and the public body, subject to administrative review. [140/9.5(f)]

Upon receipt of a binding opinion concluding that a violation has occurred, the public body must either take necessary action immediately to comply with the directive of the opinion or shall initiate administrative review. If the opinion concludes that no violation occurred, the requester may initiate administrative review. [140/9.5(f)] If the public body discloses records in accordance with the Attorney General’s opinion, the Act says it is immune from all liabilities by reason thereof and shall not be liable for penalties under the Act.

In any event, and at any time, if a requester initiates a lawsuit under section 11 of FOIA, the requester must notify the Public Access Counselor who shall take no further action with respect to the request and must notify the public body. [140/9.5(g)]
The Attorney General may exercise her discretion and choose to resolve a request for review by mediation or by some means other than issuance of a binding decision (e.g. a duel?). [140/9.5(f)] And the decision not to issue a binding decision is not reviewable. The PAC is expressly authorized to issue advisory opinions to public bodies regarding compliance and may initiate a review by a written request (from either the head of the public body or its attorney) which must contain “sufficient accurate facts from which a determination can be made” though the PAC may request additional information from the public body to assist in the review. Most importantly, a public body that relies in good faith on an advisory opinion of the Attorney General in responding to a request “is not liable for penalties” so long as “the facts upon which the opinion is based have been fully and fairly disclosed” to the PAC. [140/9.5(h)] A binding opinion issued by the Attorney General is reviewable only by an administrative review filed in either Cook or Sangamon County.

P.A. 96-542 also makes several additions to the Attorney General Act [15 ILCS 205/1 et seq.] but those are mostly duplicative of the changes noted above to FOIA and below to the Open Meetings Act, such as the authority to issue binding and advisory opinions, to establish the Public Access Counselor, who will have, among other statutory powers, the power:

(1) to establish and administer a program to provide free training for public officials and to educate the public on their rights and the responsibilities of public bodies under the Freedom of Information Act and the Open Meetings Act; and to prepare and distribute educational materials and programs;

(2) to conduct research on compliance issues; and to make recommendations to the General Assembly concerning ways to improve public access to public records and to the processes of government;

(3) to develop and make available on the AG's website, or by other means, an electronic training curriculum for Freedom of Information officers, and an electronic Open Meetings Act training curriculum for employees, officers, and members designated by public bodies;
(4) to prepare and distribute to public bodies model policies for compliance with the Freedom of Information Act; and

(5) to promulgate rules to implement these. [15 ILCS 205/7(c)]

To accomplish these objectives, the PAC may request that subpoenas be issued in accordance with FOIA and the OMA. If a person or public body fails to obey an issued subpoena the AG may file a complaint in the circuit court to: obtain compliance, obtain injunctive relief and other relief as may be required. [15 ILCS 205/7(d) and (e)]

The AG is authorized to file an action in the circuit court of Cook or Sangamon County for injunctive or other relief to compel compliance with a binding opinion, to prevent a violation of the OMA or the FOIA, and for other relief. [15 ILCS 205/7(f)] The AG shall post his or her binding opinions on the official website of the Office of the Attorney General, with links to those opinions from the official home page, and shall make them available for immediate inspection in the Office. [15 ILCS 205/7(g)]

The revisions to this Act pertain mainly to the establishment of the PAC, who must be a licensed Illinois lawyer, and the PAC’s powers. It is important to note however, that the PAC position is an appointed position by the AG. The Act does not provide the term length or anything regarding removal of office.

**Changes made by P.A. 96-542 to the Open Meetings Act.**

The Act establishes that “[e]very public body shall designate employees, officers, or members to receive training” on the Open Meetings Act. The names of those designated must be submitted to the Public Access Counselor (“PAC”), and within 6 months after the effective date of the Act, and they must “successfully complete” an electronic curriculum designed and administered by the PAC. Once certified, those individuals must then complete annual training programs. Any new members added to the designated list, must successfully complete the certification within 30 days.
The other major change P.A. 96-542 makes to the Open Meetings Act is that if any person believes there has been a violation of the Act, that person has 60 days to file a Request for Review to the PAC. The request must be in writing, signed by the requester, and include a summary of the facts. If the PAC determines further action is warranted the PAC shall forward a copy of the request to the public body within 7 working days and specify the records to be furnished. Within 7 working days after receipt of the request, the public body shall provide copies of the records. If the public body fails to comply, or if otherwise necessary, the Attorney General may issue subpoenas to anyone having knowledge of the violation. **When conducting a review, the PAC has the same right to examine the required “verbatim recording” of a meeting closed to the public or minutes of a closed meeting as does a court.**

After receiving a copy of a request for review and production of records, a public body may answer the allegations in the form of a letter, brief, or memorandum. The PAC shall then forward a copy of the answer or redacted answer to the requester. A requester or public body may furnish affidavits and records concerning any matter germane to the review.

Within 60 days of the request, the PAC will issue a binding opinion. If the parties disagree with the opinion, that binding opinion is subject to administrative review. Importantly, all the public records that have been provided to the PAC during its review process are exempt from disclosure under FOIA while in the possession of the PAC. In situations where the public body is unclear as to the proper procedure, the PAC may issue advisory opinions, and any good faith reliance on such opinion relieves any liability by the public body under the Open Meetings Act.

When responding to any written request, the AG may resolve the matter through mediation or by a means other than issuing a binding order. The decision to not issue a binding
order is not reviewable. If a binding order concludes a violation has occurred, the public body shall either comply as soon as practical or initiate administrative review. If no violation is found, the requester may seek administrative review. If the requester files a civil suit with respect to the same alleged violation of Open Meetings Act, then the PAC shall be notified by requester and PAC shall take no further review action and must notify the public body.

The AG may issue advisory opinions to public bodies regarding compliance with the Open Meetings Act. A written request for review may be initiated by the public body or its attorney and must contain specific facts. The PAC can request additional information. If a public body relies in good faith on the advisory opinion, then it is not liable for penalties under the Open Meetings Act, so long as the facts have been fully and fairly disclosed to the PAC.

Any binding opinions issued by the AG shall be considered a final decision of the administrative agency, and advisory opinions issued to a public body shall not be considered a final decision of the AG. All actions for administrative review of binding opinions shall be commenced in Cook or Sangamon Counties.