

# The Public Servant

The newsletter of the Illinois State Bar Association's Committee on Government Lawyers

## Demystifying “unduly burdensome” under FOIA

BY ROBERT L. MILLER

**The Illinois Freedom of Information Act** (the Act) declares that “...all persons are entitled to full and complete information regarding the affairs of government...”<sup>1</sup> The term “all persons” includes all types of organizations, all Illinois citizens, citizens from other states, and individuals from other countries.<sup>2</sup> The phrase “full and complete information” is not defined by the Act, but it serves as the appropriate focal point for FOIA

officers when reviewing FOIA requests and guides officers to make full and complete disclosures unless an appropriate exemption applies.

The Act provides that every person is entitled to *complete* information about Illinois governmental agencies. However, the Act includes various types of exclusions including approximately 70 enumerated exemptions,<sup>3</sup> an unknown number of

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## In-sites: Deposition tips

**For many lawyers, we do the things the way we have always done them.** Once you establish a routine, you stick to it.

To break that cycle – and acknowledge that there might be some new tricks to learn – here are some great articles and blogs on taking depositions and preparing witnesses for depositions. You can always learn something new!

The Illinois Trial Practice (<http://www.illinoistrialpractice.com/depositions/>) had two great articles by Evan Schaeffer. One, “How to Take Depositions Like a Pro,” provides practical tips for taking depositions. <<https://lawyerist.com/82652/take-deposition-like-pro/>>. There’s a bonus

article by Schaeffer entitled “How to Have a Collegial Relationship with Opposing Counsel.” <https://lawyerist.com/80589/collegial-relationship-opposing-counsel/> We could all be reminded that we are professionals – and sometimes when we model that behavior, we receive it!

What’s great about the Philly Law Blog is the brass tacks tone and the entertaining video clips. “How to Defend a Deposition – Don’t Just Show Up and Play Lawyer” provides tips and clips. <https://phillylawblog.wordpress.com/2013/04/16/how-to-defend-a-deposition/>

The use of paper at depositions can

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## Demystifying “unduly burdensome” under FOIA

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exemptions under the umbrella of 5 ILCS 140/7(1)(a),<sup>4</sup> and the “unduly burdensome” exemption.<sup>5</sup>

The vast majority of exemptions require close review before they are applied to a request, but the unduly burdensome exemption requires very careful attention because the result is likely to completely deny, as opposed to completely fulfill, a FOIA request. The issue for practitioners and requesters is to determine when this broad exclusion can be invoked. Prior to invoking the unduly burdensome exemption, the Act supplies a process to be used which includes asking the requester to narrow the request. Once this process is exhausted without resolution, the FOIA officer must answer three questions:

1. Would compliance unduly burden the public body?
2. Can the request be narrowed? and
3. Is the burden on the public body outweighed by the public interest in receiving the information?<sup>6</sup>

While the statute lacks guidance for practitioners who must decide how and when to invoke this exemption, both the courts and the Attorney General’s Public Access Counselor (PAC) provide important guideposts. In addition, recent changes to the Act that provide for increased penalties and fees provide strong incentives for FOIA officers to be right each and every time this exemption is used.

A recent binding opinion issued by the PAC provides a great starting point because it addresses a common issue – emails. In the matter of *Drumm and the City of Collinsville*, Public Access Opinion No. 16-008, issued November 1, 2016, the request sought emails sent from one city employee to one city vendor for a one month period.<sup>7</sup> A search by the city produced more than 50 e-mails and approximately 100 total pages plus attachments.<sup>8</sup> At first glance, such a request does not appear to be unduly burdensome, and in fact the PAC found

that it was not.<sup>9</sup>

However, complying with a request for dozens of emails and hundreds of pages is not as simple as it may appear. A FOIA officer must carefully read each document or risk the inadvertent disclosure of personal or private information. For example, this author once received a request for a copy of a contract with the musical group REO Speedwagon. The contract itself was standard and needed only a few redactions, but artists and performers typically include riders and additional agreements regarding lighting, sound, food preferences and so on. In this case, a rider was provided by the band’s manager that was several pages of fine print. Judging by the slightly askew appearance of the words and the level of blurriness, this rider was likely several generations old. Buried deep within the agreement was a list that included the names of each member of the band. Next to each name was a number – a nine digit number. In fact, it was a list of Social Security numbers which were then redacted prior to disclosure.

FOIA officers are not always aware of the information contained in documents, and while a request such as the one described in the *City of Collinsville* matter may seem easy to fulfill, both time and expertise are required to conduct a proper review. The PAC’s opinion in this matter provides a baseline for complying with requests for emails in particular and gives guidance to dealing with potentially (unduly) burdensome requests in general. The City’s response that two employees would be required to “devote several hours” to retrieving and reviewing the records was considered by the PAC, but as provided in the three question analysis listed above, the PAC found that the burden on the city was outweighed by the public interest in producing the documents.<sup>10</sup>

The PAC has established the baseline for compliance, and courts have provided guidance regarding the outer limits of information a public body is expected to

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### OFFICE

ILLINOIS BAR CENTER  
424 S. SECOND STREET  
SPRINGFIELD, IL 62701  
PHONES: 217-525-1760 OR 800-252-8908  
[WWW.ISBA.ORG](http://WWW.ISBA.ORG)

### EDITORS

Kathryn A. Kelly  
Lynn E. Patton  
Emily R. Vivian

### MANAGING EDITOR / PRODUCTION

Katie Underwood

✉ [kunderwood@isba.org](mailto:kunderwood@isba.org)

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provide. One such case involves a request submitted to the Attorney General for publications and reports that were used by that office as guidance for assisting entities with complying with the Act. *Shehadeh v. Madigan*, 2013 IL App (4th) 120742, 996 N.E.2d 1243 (2013). In its response to the request, the Attorney General's office stated that its review produced over nine thousand potentially responsive documents.<sup>11</sup> If a public body could review (and apply redactions) at the rate of thirty documents per hour, at least 300 hours would be needed to complete such a review. In affirming the circuit court's ruling in favor of the Attorney General, the appellate court held that the unduly burdensome exemption was appropriately applied because compliance with the request would interfere with the office's ability to perform its other work including its responsibility to respond to other FOIA requests.<sup>12</sup>

Based on these two cases, FOIA officers and requesters have a general idea that a request for 50 e-mails plus attachments is not unduly burdensome. On the other hand, requests for nine thousand documents *may be* unduly burdensome depending on the outcome of the public interest balancing test. In this age of digitization, it is becoming less common to consider denial of a request because of the burden of retrieving documents from boxes or a storage facility, but the responsibility to review these newer digitized records remains the same. We now know that a review that takes two people a few hours to complete is not unduly burdensome. ■

Robert L. Miller is general counsel and FOIA officer at Eastern Illinois University.

1. Illinois Freedom of Information, Act 5 ILCS 140/1 (West 2014).

2. See, Illinois Freedom of Information Act, 5

ILCS 140/2(b) (West 2014).

3. Illinois Freedom of Information Act 5 ILCS 140/7 (West 2015 Supp.), as amended by Public Act 99-642, effective July 28, 2016; 5 ILCS 140/7.5 (West 2015 Supp.), as amended by Public Acts 99-642, effective July 28, 2016, 99-776, effective August 12, 2016, 99-863, effective August 19, 2016.

4. This section includes any information that is prohibited from disclosure pursuant to any state or federal law or rule or regulation. For example, FERPA (the Federal Family Rights and Educational Privacy Act) prohibits disclosure of student records except in limited circumstances.

5. Illinois Freedom of Information Act, 5 ILCS 140/3(g) (West 2014).

6. Illinois Freedom of Information Act, 5 ILCS 140/3(g) (West 2014).

7. *Drumm and the City of Collinsville*, Public Access Opinion No. 16-008 at 2.

8. *Id.*

9. *Id.* at 9.

10. *Id.* at 7, 8.

11. *Shehadeh v. Madigan*, 2013 IL App (4th) 120742, 996 N.E.2d 1243, 1246 (2013).

12. *Id.* at 1249.

## In-sites: Deposition tips

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be daunting, especially as the hours roll by. The CEBblog has four tips for using exhibits at deposition. <<https://blog.ceb.com/2017/02/01/4-tips-for-handling-exhibits-at-deposition/>>. Basic? Yes. Worth the reminder? Absolutely.

Most of the tips above are from lawyers. But who better than the court reporter to give attorneys some suggestions after sitting through thousands of depositions? "Lights! Camera! Tips! Preparing your witness for deposition" is an article found in the blog of a court reporting agency about video depositions, ever more popular these days. <<http://www.benchmark-reporting.com/blog/lights-camera-tips-preparing-your-witness-for-deposition/>>. More advice on video depositions can be attained from the ABA. <[http://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/resources/articles/youraba0410.html](http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/articles/youraba0410.html)>.

A Tulsa law firm's blog has great suggestions to use when preparing deposition witnesses. Attorneys sometimes forget that this whole experience is foreign to a never-before-deposed witness. Break it down for them using these helpful hints. <<http://a-vlaw.com/blog/posts/view/34/tips-for-handling-your-upcoming-deposition>>.

As you can see, there are many blogs and articles out there – we found many on preparing for specific types of depositions or witnesses. Remember, you can always learn a new trick! ■

**Save the Date:**

**Ethics Extravaganza 2017**

**Thursday, May 11, 2017**

**12:30 - 4:45 p.m.**

**Michael A. Bilandic  
Building  
160 North LaSalle  
Chicago**

# What may the Concealed Carry License Review Board properly consider when granting or denying a permit?

BY PATRICK T. DRISCOLL, JR.

In 2013, the law in Illinois changed to permit the concealed carrying of firearms. Since that time, disputes have arisen regarding the denial of applications for conceal carry permits. A recent case involves the denial of an application for plaintiff Benjamin Perez (Perez), who applied for a license to carry a concealed firearm pursuant to the Firearm Concealed Carry Act, 430 ILCS 66/1 *et seq.* (the Act).

The Cook County Sheriff and the Chicago Police Department filed objections to Perez's application with the Illinois State Police. The objection of the Chicago Police Department was based on a domestic violence report in February 2007 which did not result in an arrest. The report noted, however, that the responding officers saw evidence of injury to Perez's girlfriend and that there were 14 past instances of abuse involving Perez. The objection of the Cook County Sheriff was based on Perez's arrest in August 2011 for aggravated assault on a police/sheriff employee for which Perez was found not guilty after a bench trial.

Perez also had a criminal history including a juvenile arrest, as well as four vehicle-related offenses, including criminal trespass and driving without a license.

The Illinois State Police advised Perez of the objections to his application, to which Perez responded that there was no competent evidence of domestic violence or aggravated assault. Perez asserted that the finding of not guilty of aggravated assault was evidence of his innocence and that the lack of an arrest for domestic violence was evidence that he did not perform those acts.

In December 2014, the Concealed Carry Licensing Review Board (the Board) denied Perez's application, finding by a preponderance of evidence that Perez was a danger to himself or others or posed a threat to public safety. Perez sought Administrative Review in circuit court claiming that: (1) the

Board's decision was against the manifest weight of the evidence; (2) the Board's findings were based on inadmissible and unreliable hearsay; and (3) the Board failed to conduct an evidentiary hearing. The circuit court affirmed the Board's order denying the application.

Perez sought appellate review of the circuit court's decision. In *Perez v. The Illinois Concealed Carry Licensing Review Bd.*, 2016 IL App. (1st) 152087, the Appellate Court (the court) affirmed the circuit court's decision. The court held that the acquittal of aggravated assault did not prove that Perez was innocent, but rather that the prosecution was not able to prove Perez's guilt beyond a reasonable doubt. *Id.* at ¶ 18, citing *People ex rel. City of Chicago v. Le Mirage, Inc.*, 2013 IL App (1st) 093547-B, ¶ 134.

The Act allows the Board to consider Perez's entire criminal history, as well as objections of law enforcement agencies. The legislature did not limit the consideration of an applicant's background to convictions. Rather, the broad language of the Act reflects the legislative intent for a full consideration of criminal history. *Id.* at ¶ 21. The Board's decision was not contrary to the manifest weight of all of the evidence submitted to the Board, which included Perez's written communications.

Moreover, the criminal history of Perez was not inadmissible hearsay. Perez failed to object to the Board giving consideration to his prior criminal history. In addition, the Act provides that the Illinois State Police and the Board may consider criminal history, as well as arrests, in reviewing an application. *Id.* at ¶ 24; see also, 430 ILCS 66/15(a), 20(e) and 35(2).

Perez also argued that the burden of proof should be clear and convincing evidence. However, the court held that the standard of proof is preponderance of evidence, as found in the Act. 40 ILCS 66/20 (g). The court also

relied on the decision of the Seventh Circuit in *Berron v. Illinois Concealed Carry Licensing Review Bd.*, 825 F.3d 843 (7th Cir. 2016).

The court agreed with the Seventh Circuit in *Berron*, finding that the language of the Act controls the standard of evidence before the Board.

Perez also claimed that his due process rights were violated when the Board did not conduct an evidentiary hearing on his application. The court held that an administrative proceeding does not require a hearing in order to comply with due process. *Perez* at ¶ 27, citing *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 40. The rules adopted by the Board did not require a hearing where the Board could resolve the application through written communications with the parties. *Id.* at ¶ 27, citing 20 Ill. Adm. Code §2900.140(c). Perez was notified of the objections to his application and was given the opportunity to respond; Perez responded in writing.

Perez did not request a hearing after he was notified of the law enforcement objections and did not challenge the administrative process that allows denial of an application without an evidentiary hearing. *Id.* at ¶ 28. The failure to raise the issue before the administrative board results in forfeiture of the issue on appeal. *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.*, 228 Ill. 2d 200, 213 (2008). Perez consented to the administrative proceedings being heard upon the written communications.

Perez also waived his other due process claims on appeal where he failed to develop those arguments before the Board, as well as on appeal. *Perez* at ¶29; Ill. S. Ct. R. 341 (h)(7).

The court's ruling provides direction as to what information may be considered when approving or denying a conceal carry permit application. ■

# Upcoming CLE programs

TO REGISTER, GO TO WWW.ISBA.ORG/CLE OR CALL THE ISBA REGISTRAR AT 800-252-8908 OR 217-525-1760.

## April

**Thursday, 04-06-17- Chicago, ISBA Regional Office**—Housing Justice v. Housing Injustice: How Unfair Housing Practices Keep Segregation Intact. Part 4: Resources for Rebuilding. Presented by REM; multiple cosponsors (see agenda). 1:00 – 5:00 p.m. (program). 5:00 – 6:00 p.m. (reception).

**Friday, 04-07-17—NIU, Hoffman Estates**—DUI and Traffic Law Updates—Spring 2017. Presented by Traffic Law and Courts. 8:55 – 4:00.

**Tuesday, 04-11-17- Webinar**—TBD. Practice Toolbox Series. 12:00 -1:00 p.m.

**Wednesday, 04-12-17 – Chicago Regional Office**—Nuts and Bolts of Illinois Administrative Hearings. Presented by the Administrative Law Section. 12:45 – 4:00 pm.

**Wednesday, 04-12-17 – Live Webcast**—Nuts and Bolts of Illinois Administrative Hearings. Presented by the Administrative Law Section. 12:45 – 4:00 pm.

**Wednesday, 04-12-17 – Chicago Regional Office**—Nuts and Bolts of Illinois Administrative Hearings. Presented by the Administrative Law Section. 12:45 – 4:00 pm.

**Wednesday, 04-12-17 – Live Webcast**—Nuts and Bolts of Illinois Administrative Hearings. Presented by the Administrative Law Section. 12:45 – 4:00 pm.

**Thursday, 04-13-17 – Chicago Regional Office**—2017 Amendments to the Illinois Limited Liability Company Act: What You Need to Know. Presented by the Business & Securities Section; co-sponsored by the Institute of Illinois Business Law. 12:45 – 5:00 pm.

**Thursday, 04-13-17 – Live Webcast**—2017 Amendments to the Illinois Limited Liability Company Act: What You Need to Know. Presented by the Business & Securities Section; co-sponsored by the Institute of Illinois Business Law. 12:45 – 5:00 pm.

**Wednesday, 04-19 to Friday, 04-21—Starved Rock State Park**—Allerton Conference—The Changing Landscape of Civil Practice: Technology, Ethics & Economics. Presented by Civil Practice and Procedure. Wednesday: 5:30 p.m. – 7:00 p.m.. Thursday: 8:00 a.m. – 8:30 p.m. Friday: 8:00 a.m. –12:00 p.m.

**Friday, 04-21 – Chicago Regional Office**—Winding Down Your Practice. Presented by Senior Lawyers. 1:00 – 4:30 p.m.

**Tuesday, 04-25-17- Webinar.** Outlook Power Hour. Practice Toolbox Series. 12:00 -1:00 p.m.

**Thursday – Friday, 04-27-28 – Chicago, ISBA Regional Office**—4th Annual Elder Law Bootcamp: Basics and Beyond. Presented by the Elder Law Section, Co-sponsored by the Employee Benefits Section, the General Practice Section, the International & Immigration Law Section, the Labor & Employment Section, the Legal Technology Committee, the Military Affairs Committee, the Real Estate Law Section and the Senior Lawyers Section. 8:45 a.m. – 4:45 p.m. each day.

## May

**Wednesday, 05-03-17 – Live Webcast.** The First Hundred Days and Beyond: Labor & Employment Law Developments Under Trump. Presented by Corporate Law. 12 – 1 p.m.

**Thursday –Friday, 05-04-17 and 05-05-17 – Chicago, ISBA Regional Office**—16th Annual Environmental

Law Conference. Presented by the Environmental Law Section. 8:00 – 4:45 Thursday with reception until 6:00. 8 :00 – 1:00 pm Friday.

**Tuesday, 05-09-17- Webinar**—TBD. Practice Toolbox Series. 12:00 -1:00 p.m.

**Wednesday, 05-10-17- Chicago, ISBA Regional Office**—Settlement in Federal Court Cases. Presented by the Federal Civil Practice Section. 1:00 pm – 5:00 pm.

**Friday, 05-12-17— Chicago, ISBA Regional Office**—Civil Practice & Procedure: Trial Practice 2017. Presented by the Civil Practice & Procedure Section. 8:50 am – 5:00 pm.

**Friday, 05-12-17— Live Webcast**—Civil Practice & Procedure: Trial Practice 2017. Presented by the Civil Practice & Procedure Section. 8:50 am – 5:00 pm.

**Thursday, 05-18-17— Lombard, Lindner Conference Center**—Litigation and the Real Estate Practitioner. Presented by the Real Estate Law Section. 8:30 am - 4:30 pm.

**Tuesday, 05-09-17- Webinar**—PDF Power Hour. Practice Toolbox Series. 12:00 -1:00 p.m.

**Wednesday, 05-10-17- Chicago, ISBA Regional Office**—Settlement in Federal Court Cases. Presented by the Federal Civil Practice Section. 1:00 pm – 5:00 pm.

**Thursday, 05-11-17 – Bilandic Building, Chicago**—Ethics Extravaganza 2017. Presented by the Government Lawyers Section. 12:30 – 4:45 p.m.

**Friday, 05-12-17— Chicago, ISBA Regional Office**—Civil Practice & Procedure: Trial Practice 2017. Presented by the Civil Practice & Procedure Section. 8:50 am – 5:00 pm. ■