

# EVERYDAY DEMOCRACY

CITIZEN ADVOCACY CENTER'S SEASONAL NEWSLETTER, FIRST EDITION, 2009

## Citizen Advocacy Center Releases Regional Report Exposing Flaws in Midwest Open Government Laws

With the recent impeachment of Governor Blagojevich, Illinois public officials are examining how to improve government transparency, accountability and accessibility. The Illinois Attorney General is advocating for comprehensive reform of the Freedom of Information Act (FOIA) and legislative authority to the Public Access Counselor; Governor Quinn has created a Reform Commission to examine ethics, transparent government, campaign finance, and technology; the Illinois General Assembly has created the Joint Commission on Government Reform; the DuPage County Board has created a Transparency Committee; and the Illinois Supreme Court recently heard oral arguments on a FOIA case regarding whether superintendent contracts are disclosable under FOIA.

In celebration of Sunshine week, the Center released its regional report examining the FOIA and Open Meetings Act (OMA) laws in five Midwestern states (Michigan, Ohio, Illinois, Wisconsin, and Minnesota). The Center reviewed the relevant statutes and more than 1,000 legal cases, attorney general opinions, and professional publications. We completed comparative analyses highlighting positive and negative aspects of each state's laws and made state specific reform recommendations. In addition, the Center drafted citizen guides and model statutes that good government advocates can use to advance specific reforms. Our report was covered in more than 50 news outlets across the country, including MSNBC and CNBC.

Broad access to government ensures the public's capacity to play a role in the democratic process and provides a mechanism by which the public can knowledgeably discuss issues of public concern, make informed judgments as to the actions of public officials, and monitor government to ensure that it is acting in the public interest.

Our democracy is weakened when government can circumvent transparency due to ineffective oversight mechanisms, a lack of penalties or implementation of penalties, a lack of training, excessive fees, ineffective policies that fail to address the integration of technology in the businesses of governing, or few resources available to provide assistance to people when government is resistant to permitting proper access or disclosure. A healthy democracy requires that open government barriers be identified, dismantled, and replaced with effective statutory language and institutional protocols that ensure citizen participation and government operation in the light of day.

During the course of completing our project, four major themes surfaced.

**All of the states surveyed suffer from a lack of enforcement implementation.** Except for Illinois, every state's public information law has a fine or penalty provision to deter noncompliance. However, a review of case law indicates that they are rarely enforced. Illinois has absolutely no enforcement provisions. With respect to open government laws, every state had a fine or penalty provision that ranged from criminal charges to removal from office, yet implementation of the available fines and penalties was minimal.

**No state surveyed had a statutorily created entity with enforcement powers dedicated to ensuring compliance with sunshine laws.** Every state examined had either state resources or non-profit organizations available to the media, public officials, and the general public that provided assistance in navigating open government statutes, conducting training, and advocating for more transparent, accountable, and accessible government. However, none of the resources reviewed had enforcement power. Considering the systemic lack of compliance with open government laws among governmental bodies, a statutorily created office with enforcement powers is necessary to increase compliance with open government laws.

**Mandated training for public officials and employees who are subject open government statutes is lacking.** Ohio was the only state surveyed that requires every elected official, or a designee, to receive three hours of open records law training during every term in office. Mandatory training for those who fall under the purview of open records and open meetings laws is essential to promoting open government and offers a degree of accountability.

**Participatory opportunities for the public during open meetings are absent.** Michigan was the only state that requires public bodies to provide an opportunity for the public to speak at public meetings, within appropriate restrictions. A healthy democracy requires an engaged public that has the opportunity to publicly comment on issues that public officials intend to take action on.

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In addition to the four major themes identified, the Center's project identified interesting aspects of each state's open government laws. For example:

- Ohio's OMA has outstanding provisions and remarkable fines and penalties for non-compliance, however, the statute does not apply to home rule units of government per the State Constitution;
- Michigan's FOIA covers private entities that receive more than half of its funding from a government agency. Of all the states surveyed, it also allows public bodies to charge the most for access to public records due to the statute's allowance to charge for searching and compiling public records. Regarding its OMA, the Governor's office, Lieutenant Governor's office and legislature are exempt from the statute and has the shortest statute of limitations for a lawsuit to be filed under OMA when issues of expenditures are at stake;
- Wisconsin's public records law is devoid of an administrative appeals process for when requests are denied and lacks a firm statutory deadline by which public bodies must respond to requests for records. The lack of a firm deadline results in unjustified delays in accessing government information; and
- Minnesota's government data practices statute places a high priority on protecting the privacy of a requestor as well as someone who may be the subject of a request. The sensitivity to privacy results in a multi-tiered system laws and regulations that must be navigated in order to produce government documents. The system is confusing and renders the statutes virtually unusable to general public. Regarding their open meetings law, public bodies are not required to provide notice of meetings, detailed agendas, or minutes beyond a mere record of votes.

Illinois' findings include:

**The FOIA is devoid of penalties for violations.** The lack of penalties allows public bodies to disregard requests with little concern for reprisal. Illinois was the *only* state surveyed that had no penalties for FOIA violations.

**Technology has outpaced provisions of the FOIA,** especially in regards to allowing a public body to deny a request for public records based on what constitutes "creating a new public record." Public bodies are not required to create records to respond to a request that they do not ordinarily maintain. For example, while public bodies maintain records in an electronic searchable format, they are under no obligation to conduct electronic searches of records to be responsive to a FOIA request. The electronic search could be categorized as a 'new search' for records.

**The FOIA statute has an excessive number of exemptions that are broadly construed in an inappropriate manner.** Illinois' FOIA has more than 50 exemptions, far exceeding the number of other states surveyed. In addition, the *per se* privacy exemption (5 IL CS 140/7(b)(i-vi)) as well as the draft document exemption (5 ILCS 140/7(b)(f)) are broadly construed. Illinois' privacy provisions are by far the most general of the states surveyed and public bodies routinely abuse the "draft" exemption to withhold documents from public disclosure, claiming that until a public body takes a vote on such a document, it is in draft form.

**Ambiguous costs provisions within the FOIA result in the denial of public records.** The amount charged by public bodies for access public documents is routinely abused. Public bodies are permitted to charge fees only to reimburse the actual cost of reproducing the records (5 ILCS 140/6(a)) and not search costs. Studies indicate that public bodies charge anywhere from \$.5 to \$1.00 per page for one sheet of paper without disclosure of actual costs.

### **Center Submits Testimony Before the Illinois General Assembly Joint Committee on Government Reform**

The Joint Committee on Government Reform has convened a series of hearings on FOIA, OMA, ethics, campaign finance, lobbying, and a host of other areas.

The Center submitted testimony before the Joint Commission twice. In the first testimonial, the Center appeared before the Joint Commission to discuss our Midwest Open Government Report, provide specific examples of systemic barriers that citizens face when utilizing the FOIA and OMA, and to make recommendations for reform.

The second testimony was written and focused on the need for the legislature to pass campaign contribution limits and public financing laws to remove money from the political system. The Center highlighted our DuPage County Procurement project that documented the dramatic increase in campaign contributions to public officials in DuPage County, including the County Board, from DuPage County vendors.

Copies of testimony submitted by the Center can be found at [www.ilga.gov](http://www.ilga.gov) Joint's Committee's website for February 18 and March 16.

# Illinois General Assembly Legislative Watch

The Illinois General Assembly is considering several pieces of legislation affecting government accessibility, accountability, and transparency. The following bills can be viewed at <http://www.ilga.gov>.

## **Freedom of Information Act, House Bill 1370.**

- Mandates that a public body justify non-disclosure of public information by “clear and convincing evidence;”
- Imposes fines and penalties based on willful and intentional failure to comply with the law. A court shall fine the public body between \$100 - \$1,000 per occurrence and allows for Class C criminal penalties;
- Provides Whistleblower protection for public employees who want to comply with the law but fear retaliation;
- Mandates the awarding of reasonable attorney fees to a prevailing party in a litigation;
- Mandates that each public body designate a FOIA officer with contact and agency information posted on websites;
- Requires the immediate production of documents and amends the timeline for public bodies to respond to a request; and
- Caps the costs public bodies can charge to \$.15 per page and requires public bodies to furnish electronic records in a specified format requested when practicable.

## **Public Access Counselor Bill, House Bill 4165**

In 2005, the Illinois Attorney General created the position of Public Access Counselor (PAC) to assist people with FOIA and OMA compliance issues, however, the PAC is not a statutorily created office and has no enforcement capacity. Key provisions of the bill include:

- Mandating training for FOIA officers;
- Investigating alleged FOIA and OMA violations;
- Issuing binding opinions regarding FOIA and OMA violations;
- Issuing subpoenas to any person or for any records pertaining to a FOIA and OMA investigation;
- Filing FOIA and OMA lawsuits;
- Posting Public Access Counselor opinions on-line; and
- Making legislative recommendations.

## **Illinois State Toll Highway Authority (ISTHA), House Bill 1075**

- Mandates that the ISTHA send a toll violation notice to the registered owner of a vehicle at the address on the plate registration if the owner has accrued 3 or more toll violations; and
- Mandates that if the ISTHA fails to notify the owner, they may not charge penalties on the fine and must allow the individual to participate in a payment plan.

## **Illinois State Toll Highway Authority, House Bill 642**

- Mandates toll violation notice must be sent 30 days after the date of the alleged toll violation;
- Mandates the ISTHA or a municipality may provide a website address to provide any and all evidence of a toll or automated traffic law violation;
- Mandates that when a vehicle owner requests any information relevant to an alleged toll violation, the ISTHA must stay any action or hearing against the owner until they have provided the information requested; and
- Mandates that a vehicle owner is not required to file a FOIA request to obtain evidence, material, or similar information relevant to an alleged toll or automated traffic law violation.

**Illinois is one of five states with no campaign contribution limits and allows unlimited contributions and money transfers from legislative campaign funds. Legislative proposals are modeled after the federal campaign contribution law.**

## **State Officials and Employees Ethics, House Bill 2428**

- Changes the contribution limit to the greater of \$2,400 or the amount set by federal law for individual contributors to candidates for federal elected office; and
- Applies the limit to contributions made or caused to be made by the appointee or prospective appointee in aggregate with his or her household members.

## **Campaign Limits, House Bill 24.**

- Sets campaign contribution limits for statewide, legislative, judicial, local candidates and political action committees;
- Caps individual contributions at \$2,300;
- Caps union, corporate, and interest group donations at \$5,000; and
- Caps legislative caucus committees at \$30,000; and
- Limits candidates and political parties to one political committee.

**A hotline (800-719-3020), courtesy of the AARP, has been created for any Illinois resident to contact their specific state legislators to advocate for legislation to impose campaign contribution limits.**

*Everyday Democracy* is a publication of the *Citizen Advocacy Center*, a non-profit, nonpartisan, 501(c)(3) corporation. Submissions from citizen advocates in the western suburbs of Chicago are encouraged. The *Center* is an educational and charitable organization dedicated to building democracy for the 21st century by strengthening the public's capacities, resources, and institutions for self-governance.

If you are interested in more information, becoming a volunteer, or making a tax-deductible contribution, please feel free to contact or visit us.

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## **SAVE THE DATE!**

**Saturday, September 26, 2009**

**Citizen Advocacy Center's 15<sup>th</sup> Anniversary Benefit Celebration**

**"People Have the Power"**

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**The Board of the Citizen Advocacy Center invites YOU to help us  
celebrate 15 years of building democracy,  
empowering people to be active community participants and  
removing anti-democratic barriers within our governmental institutions.**

### **Featured Speakers include:**

- **Ms. Theresa Amato: Center Founder and Current Board President**
- **Dr. Claire Nader: President, Shafeek Nader Trust for the Community Interest and the Center's Founding Funder**