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Accessing Government:

How difficult is it?

AN ANALYSIS OF
OPEN GOVERNMENT LAWS
IN THE MIDWEST

ABOUT THE CITIZEN ADVOCACY CENTER

The Citizen Advocacy Center (Center) is an award-winning, non-profit, non-partisan community legal organization based in the suburbs of Chicago. Founded in 1994, the Center's mission is to build democracy for the 21st century by strengthening the public's capacities, resources and institutions for self-governance.

Community lawyers at the Center help citizens and community groups address self-identified issues of public concern through providing resources and training in how to use civic tools, the law, community organizing, coalition building, and the media to affect government decision-making.

The Center's work has a regional and statewide impact due to our focus on identifying systemic reforms that increase government accountability, accessibility, and transparency as well as citizen participation in government affairs. Additionally, the Center monitors government agencies for abuse of power and anti-democratic policies, and, only when necessary, engages in president setting federal and state litigation to hold government agencies accountable for abuse of power.

ABOUT THE MIDWEST DEMOCRACY NETWORK

The Citizen Advocacy Center is a member of the Midwest Democracy Network, an alliance of Midwest state-based civic and public interest organizations, academic institutions, and policy and legal experts.

Members of the Midwest Democracy Network share a commitment to fundamental democratic values and principles, especially those that speak to honesty, fairness, transparency, accountability, citizen participation, competition, respect for constitutional rights and the rule of law, and the public's need for reliable information. They believe that such principles must be continuously reinforced and zealously protected against those who see politics as a means to promote narrow interests rather than the common good.

Toward these ends, members seek to reduce the influence of money in politics; keep courts fair and impartial; promote open and transparent government; create fair processes for drawing congressional and legislative districts; guarantee the integrity of our election systems; promote ethical government and lobbying practices; and democratize the media.

ABOUT THE AUTHORS

Ms. Terry Pastika

Ms. Pastika joined the Center's staff as a community lawyer in 1999 and became executive director in 2001. As a community lawyer Ms. Pastika spearheaded the Center's three suburban Civic Fairs, networking with more than 150 community organizations and civic leaders throughout the Chicago metropolitan region. She also coordinated the Center's Citizen Training Corps, a program recognized as "civics boot camp with clout." Ms. Pastika provides legal assistance to those who contact the Center with concerns about issues of public significance, litigates to hold public bodies accountable for abuse of power, and regularly speaks at conferences, law schools, and with community groups on topics such as the First Amendment, the Open Meetings Act, the Freedom of Information Act, tax increment financing, election laws, community organizing, and community empowerment.

Ms. Pastika was part of the team of community lawyers recognized regionally for "Most Innovative Advocacy" and has been a guest speaker at the John F. Kennedy School of Politics at Harvard University. Ms. Pastika was also nationally recognized by the Washington D.C. non-profit OMB Watch, as one of only three young people inducted into the first "Public Interest Rising Star Hall of Fame" for leading a new generation in pursuit of social justice. Ms. Pastika graduated from Marquette University in 1992 and Creighton University School of Law in 1997. She is a member of the California, Nebraska and Illinois Bar.

Ms. Natalie Brouwer

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Ms. Brouwer graduated from the University of Chicago in 1992 with a B.A. in Political Science. She completed four years of Ph.D. coursework and taught several undergraduate classes in Political Science at Indiana University at Bloomington. She graduated from Cornell Law School in 2000, during which she served on the Executive Boards of the Latino Law Student Association and the National Lawyers Guild. Before joining the Center, Ms. Brouwer worked as an employment lawyer for six years at firms in Miami and Washington, D.C. She is a member of the Illinois, Florida and District of Columbia Bars.

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The Citizen Advocacy Center is a 501(c)(3) non-profit legal organization is dedicated to building democracy for the 21st century by strengthening the public's capabilities, resources, and institutions for better self-governance. For more information about the Center, becoming a volunteer, or making a tax-deductible contribution, please contact us at:

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ANALYSIS OF OPEN GOVERNMENT LAWS

Executive Summary

“A popular government without proper information or the means of acquiring it is but a prologue to a farce or a tragedy—or perhaps both. Knowledge will forever govern ignorance; and the people who mean to be their own governors, must arm themselves with the power which knowledge gives.”

—James Madison, Letter to W. T. Barry, 1822

Strong open government laws that mandate transparency in conducting the people’s business are essential components of a healthy democracy. The ideals of a government that is of the people, by the people, and for the people require that the public have, to the fullest extent possible, the capacity to access the governmental decision-making process and documents that are created and maintained with public tax dollars.

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.

Both the federal government and all individual states have open government laws. These laws uphold the ideals of transparency in government and mandate liberal access to government documents and government meetings. By providing public access to government meetings and robust access to information regarding government affairs, open government statutes are cornerstone laws that ensure and protect the free flow of information from government to the people.

However, state open government laws have statutorily weak features that must be reformed. Moreover, the implementation of state open government laws suffers from inconsistent governmental responses, despite strong public policy statements which are supposed to provide a framework to interpret statutory provisions. While public bodies have the legal burden to ensure compliance with open government laws, more often than not compliance rests on the shoulders of the public.

Our democracy is weakened when government can circumvent transparency based on ineffective oversight mechanisms, a lack of penalties or implementation of penalties, a lack of training that leads to inadvertent violations, excessive fees that make information inaccessible, 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. These are just a few of the barriers that impede public participation.

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.

To address systemic barriers that chill public participation and access to government, the Citizen Advocacy Center (Center) conducted a systemic overview of open government laws in the states of Michigan, Ohio, Illinois, Wisconsin, and Minnesota with the goals of evaluating the provisions and implementation of the statutes.

In executing this project, the Center reviewed the relevant statutes and more than 1,000 legal cases, attorney general opinions, and professional publications to produce a comprehensive study of each state's respective strengths and weaknesses. The study serves as a valuable resource for policy makers, good government organizations, the media, and citizens who regularly use open government laws.

Specifically, the Center analyzed how the public in each state is entitled to participate in the democratic process and to what extent policy goals of mandating transparency and accessibility to government operations are achieved.

With regard to the Freedom of Information Act (FOIA) statutes, the Center focused on issues such as:

- Response time to requests;
- Appeal time and procedures;
- Fees and costs associated with requests;
- Fines and penalties for lack of responsiveness by a government body;
- The frequency with which available fines and penalties have been implemented;
- The extent of exempt information from public records requests;
- The presence of government resources to act as an ombudsman; and
- Provisions that mandate access and disclosure of public records created via the Internet.

With regard to the Open Meetings Act (OMA) statutes, the Center reviewed:

- Public notice and agenda requirements;
- Provisions to address the use of the Internet and other forms of electronic communications to conduct meetings;
- Fines and penalties;
- The frequency with which available fines and penalties are implemented; and
- The extent to which a public body can close public meetings.

During the course of completing the Midwest Open Government Project, four major themes surfaced.

The first is that all of the surveyed Midwestern states suffer from a lack of enforcement implementation. In every state surveyed except Illinois, public information laws have some kind of fine or penalty provision to deter non-compliance. While fine and penalty schemes are available, a review of case law indicates that they are rarely enforced in the states where present.

With respect to open government laws, every state statute includes a variety of enforcement and penalty provisions, some of which include criminal charges and removal from office. Despite strong provisions, few states implement their statutory provisions to hold public bodies accountable. The lack of implementation of enforcement provisions has a detrimental ripple effect: public bodies are less likely to be responsive to requests for public information and more likely to inappropriately utilize exemption provisions. In addition, government bodies are less likely to hold open government meetings.

The second theme is that no state surveyed has a statutorily created entity with enforcement powers specifically dedicated to ensuring compliance with sunshine laws. It is laudable that every state examined had either state resources or non-profit organizations available to the media, public officials, and the general public to navigate respective open government statutes, provide training, and advocate for more transparency, accountability, and accessibility of government. Despite these resources and considering the systemic lack of enforcement among open government laws in general, a statutorily created office with enforcement powers would substantially increase the likelihood that governmental bodies will comply with open government laws.

The third theme is the lack of mandated training for public officials and public employees on appropriate utilization of open government statutes. Ohio was the only state surveyed that requires every elected official, or a designee, to receive three hours of training regarding use of that state's open records law 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. Required training increases the capacity of public officials and employees to comply with the law and offers a degree of accountability.

The fourth theme is that participatory opportunities for the public during open meetings are absent. The preamble of each state's open meetings statute identifies broad goals as ensuring transparency in the government decisionmaking process and guaranteeing that the public has access to full and complete information regarding the affairs of government.

Beyond having the capacity to access government information and observe how government operates, a healthy democracy requires an engaged public that has the opportunity to publicly comment on issues that public officials intend to take action on. Michigan is the only state surveyed that requires public bodies to provide an opportunity for the public to speak at public meetings, within appropriate restrictions. This is a tremendously important element that is conspicuously absent in other states.

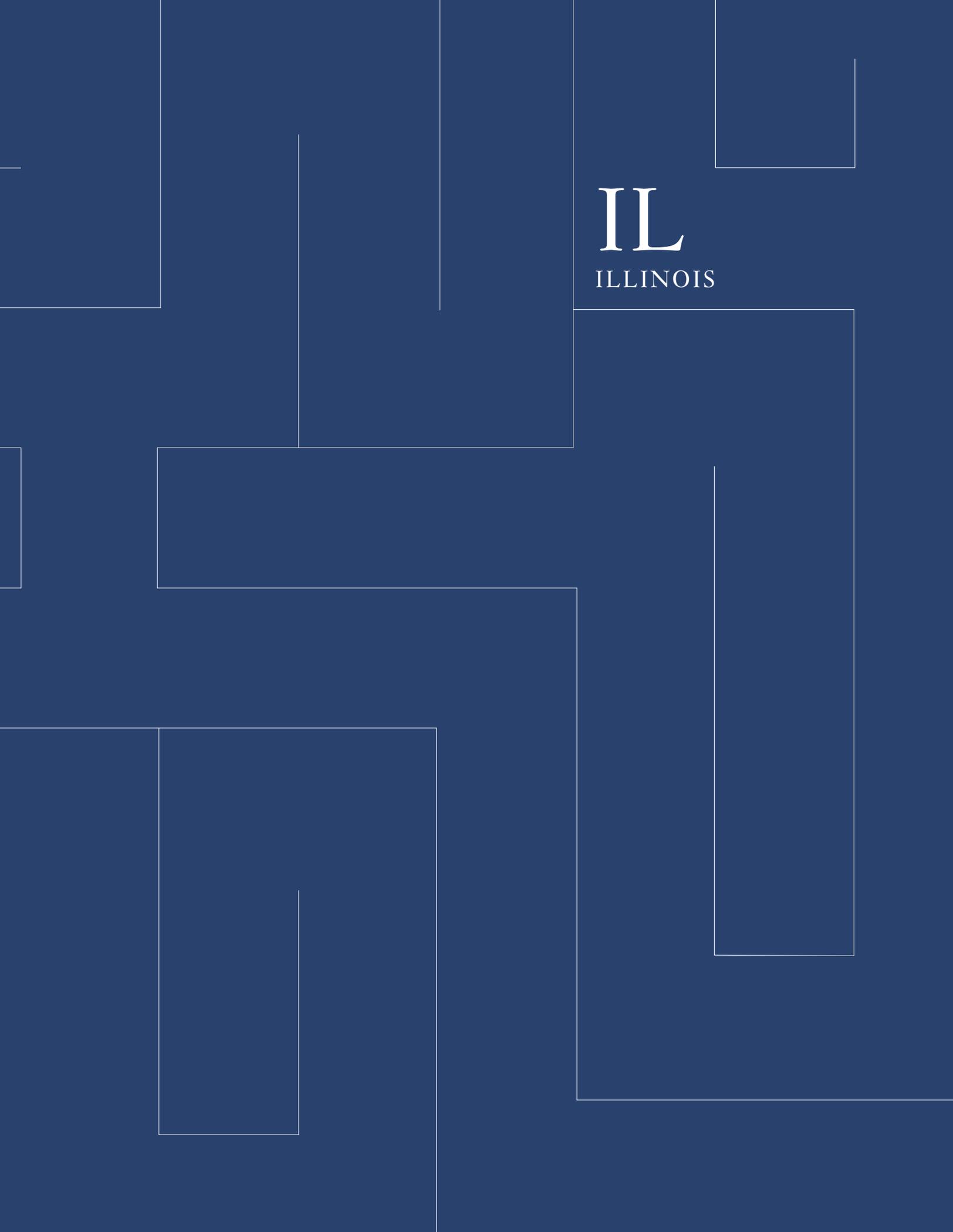
In addition to the major themes identified above, the Midwest Open Government Project brought to light interesting aspects of each state's open government laws. For example:

- Ohio's OMA has outstanding provisions within the statute and remarkable fines and penalties for non-compliance, however, the statute does not apply to home rule units of government per the Ohio Constitution;
- In Illinois, the notice and minutes provisions of the OMA are the most stringent of the five statutes, but its FOIA was the only state surveyed that fails to have any kind of penalties or fines for violations. In addition, Illinois's statute has the longest list of exemptions by far, making the statute perplexing;
- With respect to Michigan, while its OMA mandates public comment opportunity at public meetings and its FOIA covers private entities that receive more than half of its funding from a government agency, the Governor's office, Lieutenant Governor's office and legislature are exempt from the statute. In addition, Michigan has the most stringent requirements regarding the imposition of fees for searching and compiling public records and the shortest statute of limitations for a lawsuit to be filed under OMA when issues of expenditures are at stake;

- Wisconsin, while considered to have fairly strong open government laws, 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 places a high priority on protecting the privacy of a requestor of public records, as well as an individual who may be the subject of a request. The high sensitivity to protecting individual privacy coupled with many regulations, leads to tremendously complex and confusing open records laws. The multi-tiered system regarding the production of government documents renders the statutes virtually unusable to general public. Moreover, public bodies in Minnesota are not required by law to provide public notice of meetings, agendas detailing what action public bodies will take at such meetings, or that any minutes beyond the recording of votes be taken.

As the Center completed its broad overview of each state's statutory provisions, we completed comparative analyses highlighting positive and negative anomalies that influenced our eventual reform recommendations for each state. In addition to the individual state policy reports that provide an overview of each state's open government laws and the identification of specific strengths and weaknesses, the Center drafted ten model statutes that are tailored to each state that good government advocates can use to begin the conversation about how to advance specific reforms.

Additionally, the Center has produced citizen guides that translate dense legalese into an easily understandable format for the public. The combination of the policy reports, model legislation, and citizen guides results in a comprehensive open government tool box that can be effectively deployed to advance systemic democratic protocols. The Midwest Open Government Project is a substantial endeavor embarked on by the Center that has produced significant results to help strengthen democracy and build the capacity of the public to participate and affect government decision-making.

The background is a solid dark blue color. Overlaid on this are several thin, white, rectangular lines of varying lengths and orientations. These lines form a complex, abstract pattern that resembles a stylized map or a series of interconnected paths. The lines are positioned in the upper and lower portions of the page, creating a sense of depth and structure.

IL
ILLINOIS

IL

ILLINOIS

Illinois' sunshine laws have provisions and protections that mandate open government. In 1984, the Illinois General Assembly was one of the last states nationwide to enact a Freedom of Information Act statute (FOIA). Illinois' FOIA law has a strong public policy statement advocating that "all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees." 5 ILCS 140/1.

Illinois' Open Meetings Act statute (OMA), originally enacted in 1957, states that, "[i]t is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. . . [I]t is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1. The OMA is explicit in promoting public participation in the democratic process by requiring public bodies to provide adequate notice of meeting times and keep records of public meetings.

While the Illinois FOIA and OMA have several strengths, there are substantial weaknesses within each statute. Weaknesses identified in both statutes are the lack of effective enforcement and extensive exemptions. While other Midwest FOIA statutes have varied penalty provisions that include substantial fines, Illinois has none. Thus, provisions that can be interpreted as strong, such as firm deadlines for public bodies to respond to requests for information, are nullified by non-existent enforcement provisions.

The Illinois OMA statute has commendable criminal penalties for violations, but state's attorneys rarely file OMA claims against a public body and a review of case law indicates that courts rarely impose penalties. The lack of enforcement within each statute gives the appearance that public bodies can violate open government statutes with little expectation of accountability.

With regard to FOIA exemption provisions, respectively, Minnesota has four, Ohio has ten, Wisconsin has eleven, Michigan has twenty and Illinois has more than fifty. Likewise, under the Illinois OMA, the permissible reasons to convene a meeting in closed session are extensive. While Minnesota has seven and Ohio has eight reasons to close a meeting, Michigan has ten, Wisconsin has eleven and Illinois has twenty-four.

The excessive reasons for why information may be exempt or why a meeting may be closed coupled with extensive exemptions in the FOIA and OMA, inappropriately focuses a public body's attention on exceptions to open government, contradicts public policy that mandates open government and perpetuates a culture of non-transparency.

Reform is needed to improve transparency and access to government in Illinois. More importantly, the laws need to be enforced so that public bodies understand that compliance with open government laws rests on the public body and is mandatory. The following provides an analysis of the strengths and weaknesses of FOIA and OMA, as well as a summary of the main components of the laws. Copies of model versions of both statutes, as well as citizen guides, are available by contacting the Citizen Advocacy Center (Center).

Freedom of Information Act

STRENGTHS

of Illinois' Freedom of Information Act

The FOIA has strengths which encourage disclosure at the outset of a requesting party's search for public records and protect the requesting party's interests in litigation. The firm deadlines for public bodies to respond to requests and increasingly liberal provisions for attorneys' fees and court costs give the impression that the Illinois is serious about open government laws.

The FOIA provides stringent deadlines under which a public body must respond. Within seven working days of a request being made to a public body, the public body must either produce the documents, provide a reason for its refusal to produce documents, or request an extension. 5 ILCS 140/3(c).

When an individual has been denied access to records and files an appeal, the public body is required to respond within seven working days. 5 ILCS 140/10(a). Michigan is the only other state surveyed that also mandates responsiveness to a request within a specific timeframe. A firm deadline leaves little ambiguity for when compliance is necessary, and theoretically guarantees that a requesting party will receive public documents, or at least the reasons why the documents are unavailable, within a specific amount of time.

When an individual has been denied access to records, the denial must include a disclosure of the right to an administrative appeal. The denial must also include a citation to the specific exemption and the names and titles or positions of each person responsible for the denial. 5 ILCS 140/9. If an appeal is filed, the public body is required to respond within seven working days by either producing the

records or denying the records. If the records are denied, the public body must inform the requestor of the right to seek judicial review. 5 ILCS 140/10(a). Michigan is the only other state surveyed that mandates responsiveness to a request within a specific timeframe as well as for an appeals process prior to pursuing judicial intervention. Firm deadlines leave little ambiguity for when compliance is necessary, and theoretically guarantees that a requesting party will receive public documents, or at least the reasons why the documents are unavailable, within a specific amount of time.

Additionally, because litigation is a costly and burdensome process for requestors to undertake, an appeals process is an opportunity for the requestor and public body to amicably resolve a dispute and avoid unnecessary litigation costs.

Another strength of the Illinois FOIA is that it allows for greater access to attorneys' fees for a party that prevails in obtaining public records pursuant to a lawsuit. Under the original FOIA, a court could award attorneys' fees to the person requesting records if the court found that the records were of significant interest to the general public, withheld without any reasonable basis in law, and if the requesting party substantially prevailed on the merits of the case. *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778, 237 Ill. Dec. 568, 709 N.E.2d 1281 (Ill. App. Ct. 1 Dist. 1999).

While attorneys' fees are not mandated, the Illinois General Assembly recognized the significant barrier constructed by the difficulty in accessing attorneys' fees. The law was amended in 2003 so that a party is eligible to receive attorneys' fees whenever he or she has substantially prevailed on the merits of the case. 5 ILCS 140/11(i).

WEAKNESSES

of Illinois' Freedom of Information Act

While FOIA has some ostensible benefits for the requesting parties, the weaknesses in the law often results in nondisclosure and creates significant hurdles for those seeking access to public records.

The lack of penalties for FOIA violations allow public bodies to disregard requests for public information with little concern for reprisal.

Surveys by the Citizen Advocacy Center and the Illinois Press Association have documented that compliance with FOIA requests is scattershot among public bodies. Because of the lack of penalty provisions, public bodies may simply ignore FOIA requests and have little incentive to produce records until a lawsuit is filed. Moreover, even when a lawsuit is filed to compel production, the public body can avoid accountability by merely tendering the requested document, thus rendering the lawsuit moot.

The ability of a public body to ignore the law, only to produce public documents in an effort to avoid a judgment, circumvents the intent of FOIA. What should be an expedited and nearly cost-free endeavor for public records per the requirements of the statute, can turn into a cumbersome and costly process for the requestor, with no punitive impact on the public body.

Additionally, while Illinois has a Public Access Counselor (PAC) within the Attorney General's office who is available to respond to questions regarding FOIA and OMA, it is not a statutorily created office and does not retain enforcement capacity.

REFORM: (1) Implement mandatory FOIA training of public employees; (2) Implement mandatory attorneys' fees for plaintiffs who substantially prevail in litigation as well as a punitive fee structure imposed on public bodies that willfully ignore FOIA requests; (3) statutorily create the PAC to ensure its existence and enforcement capacity.

Commercial parties seeking public records must meet higher standards to award attorneys' fees.

Commercial entities seeking public records under the Illinois FOIA, who are forced to file lawsuits for access to records are required to meet heightened standards to win attorneys' fees. *Duncan*, 304 Ill.App.3d at 786, 709 N.E.2d at 1288. Even if a commercial litigant substantially prevails in a case, it may still be denied attorneys' fees unless two additional elements are met: (1) the records sought must be of significant interest to the general public; and (2) the public body must have withheld the records without any reasonable basis in law.

While FOIA specifically states that it is not intended to further commercial enterprises, 5 ILCS 140/1, the commercial motivations of a party are irrelevant to whether or not government records are disclosable public documents. The higher threshold for attorneys' fees that must be met for a commercial litigant, as compared to an individual, is unreasonable.

Furthermore, this provision allows a public body to easily circumvent requests by the media, an entity that is categorized as a commercial enterprise but readily uses FOIA in the course of reporting on government activity.

REFORM: Mandatory attorneys' fees should be awarded to any party that substantially prevails on the merit of a FOIA case.

Technology has outpaced provisions of FOIA.

Technology has outpaced provisions of Illinois' 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" to respond to requests for disclosure. Courts interpreting FOIA have held that public bodies are not required to create records to respond to a request that the body does not ordinarily maintain in record form. Additionally, a public body responding to a FOIA request is not required to prepare the records in a new format merely to accommodate a request for certain information. *American Federation of State v. Cook County*, 182 Ill. App.3d 941, 538 N.E.2d 776 (Ill.App. 1 Dist. 1989).

In practice, public bodies withhold records maintained electronically and/or on an Internet website if the records require any additional manipulation to be responsive to a particular request. 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. Even though a public body may create a new record responsive to a request by a mere “click of the mouse,” a public body is under no legal obligation to do so.

For example, cellular phone records can be accessed by going to the phone company’s Internet website for the account at issue. If cell phone records are usually maintained by a public body through a web account which only displays a summary page when the online account is opened, the public body could refuse to produce itemized phone call records subject to FOIA. Public bodies have claimed that because they do not regularly view the itemized records, they are not required to do so for a FOIA request. Regardless of the ease in merely clicking a link on the phone company’s website, public bodies can use technology to circumvent disclosure.

REFORM: If a public body can electronically sort records it maintains, or has the capacity to access records electronically, disclosure pursuant to a FOIA request is mandatory unless the public body can prove that the request is unduly burdensome.

Excessive exemptions within the FOIA statute and broadly construed exemptions contradict the mandate of open government.

A significant weakness in the Illinois FOIA that results in systemic barriers to the production of public records is the exemptions portion of the statute. Illinois’ FOIA has more than 50 exemptions, far exceeding the number of other states surveyed. In addition to duplicative exemptions that make the statute convoluted and restate non-disclosable information within other statutes, *per se* privacy exemptions listed under 5 ILCS 140/7(b)(i-vi) are particularly problematic.

The broad exemption of 7(b) is intended to protect “clearly unwarranted invasion of personal privacy” and is supported by six examples which include personnel files and student files. However, Illinois’ privacy provisions are by far

the most general of the other states surveyed. Public bodies routinely expand the interpretation of a per se exemption to include information such as public employment contracts.

Furthermore, the courts' interpretation of what constitutes a per se exemption has created tensions under the general language of 7(b). Exemptions may be applied even though it would be impossible to identify the names of any private citizens included in the records. *Chi. Tribune Co. v. Bd. of Educ.*, 332 Ill. App.3d 60, 773 N.E.2d 674 (Ill.App. 1 Dist., 2002). For example, student files and personnel files which do not contain readily identifiable information are being automatically exempt from disclosure wherein a proper analysis would necessitate a case-by-case assessment.

Additionally, broad interpretations of what constitutes a "draft" document under 5 ILCS 140/7(b)(f) is also problematic. Public bodies routinely withhold such documents from public disclosure, claiming that until a public body takes a vote on such a document, it is in draft form. However, when a public body holds a draft document in perpetuity, or chooses to abandon the draft and still withhold the document, the mandate of FOIA to narrowly construe exemption provisions is circumvented.

REFORM: The convoluted and superfluous FOIA exemptions contradict a policy of openness. The Illinois exemptions should be limited and modeled after the Federal FOIA, which has only a handful of exemptions.

Ambiguous costs provisions within FOIA results in the denial of public records.

The amount charged by public bodies in order to access public documents is a weakness within the FOIA. Public bodies who copy files in response to a FOIA request are permitted to charge fees only to reimburse the actual cost of physically reproducing the records. 5 ILCS 140/6(a). Although a public body may charge fees "reasonably calculated to reimburse its actual cost," it may not charge search costs.

The Attorney General has reiterated this concept by opining that a public body's fees "cannot include any of the cost of searching for the requested records, and cannot exceed the cost of reproduction." *Illinois Attorney General's, "A Complete Guide to the Illinois Freedom of Information Act" pg. 38.*

Despite explicit language within the statute, public bodies inconsistently apply copy charges for access to public documents without justification, and use it as a barrier for public access to government documents. For example, a 2008 Citizen Advocacy Center survey of public bodies within DuPage County, Illinois documented that public bodies charged anywhere from \$.10 per page to \$1.00 per page for access to public records.

REFORM: (1) Require public bodies to, when feasible and desirable by the requestor, access documents via electronic mail free of charge. Electronic mail technology allows public bodies to disburse information quickly, efficiently, and at virtually no cost;

(2) Moreover, for public bodies that regularly maintain a website, mandate the creation of "electronic reading rooms." Electronic reading rooms are the automatic posting of previously requested public documents;

(3) Finally, to limit excessive costs of documents and lessen public skepticism that cost is being used as a mechanism to block public access to information, public bodies must either cap costs of information to \$.15 per copy or disclose actual costs to the public body;

(4) Increase the amount of public information automatically posted on public websites. For public bodies that have regularly maintained websites, mandate automatic posting of basic finance, procurement and additional records as produced.

SUMMARY OF LAW

of Illinois' Freedom of Information Act

The following section provides a summary of the main components of the Illinois FOIA. This summary provides an overview of the nuts and bolts of FOIA, including what records are covered, how to appeal a denial of records requests and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in FOIA litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

Who is Covered Under the Law?

The FOIA sets forth specific requirements for the disclosure of public records by all "public bodies" in the state. According to subsection 2(a) of the FOIA, the term "public body" includes any legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing.

Public Records Open to Disclosure

Public records are presumed to be open and accessible, although there are numerous exceptions to the rule. Records covered include administrative manuals, procedural rules, instructions to staff, final opinions and orders made in the adjudication of cases, substantive rules, statements and interpretations of policy which have been adopted by a public body, final planning policies, inspection reports, expenditure reports, employee information, applications for contract and reports prepared by independent contractors for a public body.

Public Records Exempt from Disclosure

The Illinois FOIA has a plethora of exemptions to disclosure:

- (a) Information specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law.
- (b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted under this subsection (b) shall include but is not limited to:

- (i) files and personal information maintained with respect to clients, patients, residents, students or other individuals receiving social, medical, educational, vocational, financial, supervisory or custodial care or services directly or indirectly from federal agencies or public bodies;
 - (ii) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions;
 - (iii) files and personal information maintained with respect to any applicant, registrant or licensee by any public body cooperating with or engaged in professional or occupational registration, licensure or discipline;
 - (iv) information required of any taxpayer in connection with the assessment or collection of any tax unless disclosure is otherwise required by State statute;
 - (v) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies; provided, however, that identification of witnesses to traffic accidents, traffic accident reports, and rescue reports may be provided by agencies of local government, except in a case for which a criminal investigation is ongoing, without constituting a clearly unwarranted per se invasion of personal privacy under this subsection; and
 - (vi) the names, addresses, or other personal information of participants and registrants in park district, forest preserve district, and conservation district programs.
- (c) Records compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body, but only to the extent that disclosure would:
- (i) interfere with pending or actually and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency;
 - (ii) interfere with pending administrative enforcement proceedings conducted by any public body;
 - (iii) deprive a person of a fair trial or an impartial hearing;
 - (iv) unavoidably disclose the identity of a confidential source or confidential information furnished only by the confidential source;

- (v) disclose unique or specialized investigative techniques other than those generally used and known or disclose internal documents of correctional agencies related to detection, observation or investigation of incidents of crime or misconduct;
 - (vi) constitute an invasion of personal privacy under subsection (b) of this Section;
 - (vii) endanger the life or physical safety of law enforcement personnel or any other person; or
 - (viii) obstruct an ongoing criminal investigation.
- (d) Criminal history record information maintained by state or local criminal justice agencies, except the following which shall be open for public inspection and copying:
- (i) chronologically maintained arrest information, such as traditional arrest logs or blotters;
 - (ii) the name of a person in the custody of a law enforcement agency and the charges for which that person is being held;
 - (iii) court records that are public;
 - (iv) records that are otherwise available under state or local law; or
 - (v) records in which the requesting party is the individual identified, except as provided under part (vii) of paragraph (c) of subsection (1) of this Section. “Criminal history record information” means data identifiable to an individual and consisting of descriptions or notations of arrests, detentions, indictments, information, pre-trial proceedings, trials, or other formal events in the criminal justice system or descriptions or notations of criminal charges (including criminal violations of local municipal ordinances) and the nature of any disposition arising there from, including sentencing, court or correctional supervision, rehabilitation and release. The term does not apply to statistical records and reports in which individuals are not identified and from which their identities are not ascertainable, or to information that is for criminal investigative or intelligence purposes.
- (e) Records that relate to or affect the security of correctional institutions and detention facilities.

- (f) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body. The exemption provided in this paragraph (f) extends to all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents.
- (g) Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information may cause competitive harm, including:
 - (i) All information determined to be confidential under Section 4002 of the Technology Advancement and Development Act.
 - (ii) All trade secrets and commercial or financial information obtained by a public body, including a public pension fund, from a private equity fund or a privately held company within the investment portfolio of a private equity fund as a result of either investing or evaluating a potential investment of public funds in a private equity fund. The exemption contained in this item does not apply to the aggregate financial performance information of a private equity fund, nor to the identity of the fund's managers or general partners. The exemption contained in this item does not apply to the identity of a privately held company within the investment portfolio of a private equity fund, unless the disclosure of the identity of a privately held company may cause competitive harm. Nothing contained in this paragraph (g) shall be construed to prevent a person or business from consenting to disclosure.
- (h) Proposals and bids for any contract, grant, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body, until an award or final selection is made. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made.
- (i) Valuable formulae, computer geographic systems, designs, drawings and research data obtained or produced by any public body when disclosure could reasonably be expected to produce private gain or public loss. The exemption for "computer geographic systems" provided in this paragraph (i) does not extend to requests made by news media as defined in Section 2 of this Act when the requested information is not otherwise exempt and the only purpose of the request is to access and disseminate information regarding the health, safety, welfare, or legal rights of the general public.

- (j) Test questions, scoring keys and other examination data used to administer an academic examination or determined the qualifications of an applicant for a license or employment.
- (k) Architects' plans, engineers' technical submissions, and other construction related technical documents for projects not constructed or developed in whole or in part with public funds and the same for projects constructed or developed with public funds, but only to the extent that disclosure would compromise security, including but not limited to water treatment facilities, airport facilities, sport stadiums, convention centers, and all government owned, operated, or occupied buildings.
- (l) Library circulation and order records identifying library users with specific materials.
- (m) Minutes of meetings of public bodies closed to the public as provided in OMA until the public body makes the minutes available to the public under Section 2.06 of OMA.
- (n) Communications between a public body and an attorney or auditor representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body, and materials prepared or compiled with respect to internal audits of public bodies.
- (o) Information received by a primary or secondary school, college or university under its procedures for the evaluation of faculty members by their academic peers.
- (p) Administrative or technical information associated with automated data processing operations, including but not limited to software, operating protocols, computer program abstracts, file layouts, source listings, object modules, load modules, user guides, documentation pertaining to all logical and physical design of computerized systems, employee manuals, and any other information that, if disclosed, would jeopardize the security of the system or its data or the security of materials exempt under this Section.
- (q) Documents or materials relating to collective negotiating matters between public bodies and their employees or representatives, except that any final contract or agreement shall be subject to inspection and copying.
- (r) Drafts, notes, recommendations and memoranda pertaining to the financing and marketing transactions of the public body. The records of ownership, registration, transfer, and exchange of municipal debt obligations, and of persons to whom payment with respect to these obligations is made.

- (s) The records, documents and information relating to real estate purchase negotiations until those negotiations have been completed or otherwise terminated. With regard to a parcel involved in a pending or actually and reasonably contemplated eminent domain proceeding under the Eminent Domain Act, records, documents and information relating to that parcel shall be exempt except as may be allowed under discovery rules adopted by the Illinois Supreme Court. The records, documents and information relating to a real estate sale shall be exempt until a sale is consummated.
- (t) Any and all proprietary information and records related to the operation of an intergovernmental risk management association or self-insurance pool or jointly self-administered health and accident cooperative or pool.
- (u) Information concerning a university's adjudication of student or employee grievance or disciplinary cases, to the extent that disclosure would reveal the identity of the student or employee and information concerning any public body's adjudication of student or employee grievances or disciplinary cases, except for the final outcome of the cases.
- (v) Course materials or research materials used by faculty members.
- (w) Information related solely to the internal personnel rules and practices of a public body.
- (x) Information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of a public body responsible for the regulation or supervision of financial institutions or insurance companies, unless disclosure is otherwise required by State law.
- (y) Information the disclosure of which is restricted under Section 5-108 of the Public Utilities Act.
- (z) Manuals or instruction to staff that relate to establishment or collection of liability for any State tax or that relate to investigations by a public body to determine violation of any criminal law.
- (aa) Applications, related documents, and medical records received by the Experimental Organ Transplantation Procedures Board and any and all documents or other records prepared by the Experimental Organ Transplantation Procedures Board or its staff relating to applications it has received.
- (bb) Insurance or self insurance (including any intergovernmental risk management association or self insurance pool) claims, loss or risk management information, records, data, advice or communications.

- (cc) Information and records held by the Department of Public Health and its authorized representatives relating to known or suspected cases of sexually transmissible disease or any information the disclosure of which is restricted under the Illinois Sexually Transmissible Disease Control Act.
- (dd) Information the disclosure of which is exempted under Section 30 of the Radon Industry Licensing Act.
- (ee) Firm performance evaluations under Section 55 of the Architectural, Engineering, and Land Surveying Qualifications Based Selection Act.
- (ff) Security portions of system safety program plans, investigation reports, surveys, schedules, lists, data, or information compiled, collected, or prepared by or for the Regional Transportation Authority under Section 2.11 of the Regional Transportation Authority Act or the St. Clair County Transit District under the Bi-State Transit Safety Act.
- (gg) Information the disclosure of which is restricted and exempted under Section 50 of the Illinois Prepaid Tuition Act.
- (hh) Information the disclosure of which is exempted under the State Officials and Employees Ethics Act.
- (ii) Beginning July 1, 1999, information that would disclose or might lead to the disclosure of secret or confidential information, codes, algorithms, programs, or private keys intended to be used to create electronic or digital signatures under the Electronic Commerce Security Act.
- (jj) Information contained in a local emergency energy plan submitted to a municipality in accordance with a local emergency energy plan ordinance that is adopted under Section 11-21.5-5 of the Illinois Municipal Code.
- (kk) Information and data concerning the distribution of surcharge moneys collected and remitted by wireless carriers under the Wireless Emergency Telephone Safety Act.
- (ll) Vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks upon a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure could reasonably be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public. Information exempt under this item may include such things as details pertaining to the mobilization or deployment of personnel or equipment, to the operation of communication systems or protocols, or to tactical operations.

- (mm) Maps and other records regarding the location or security of generation, transmission, distribution, storage, gathering, treatment, or switching facilities owned by a utility or by the Illinois Power Agency.
- (nn) Law enforcement officer identification information or driver identification information compiled by a law enforcement agency or the Department of Transportation under Section 11-212 of the Illinois Vehicle Code.
- (oo) Records and information provided to a residential health care facility resident sexual assault and death review team or the Executive Council under the Abuse Prevention Review Team Act.
- (pp) Information provided to the predatory lending database created pursuant to Article 3 of the Residential Real Property Disclosure Act, except to the extent authorized under that Article.
- (qq) Defense budgets and petitions for certification of compensation and expenses for court appointed trial counsel as provided under Sections 10 and 15 of the Capital Crimes Litigation Act. This subsection (qq) shall apply until the conclusion of the trial of the case, even if the prosecution chooses not to pursue the death penalty prior to trial or sentencing.
- (rr) Information contained in or related to proposals, bids, or negotiations related to electric power procurement under Section 1-75 of the Illinois Power Agency Act and Section 16-111.5 of the Public Utilities Act that is determined to be confidential and proprietary by the Illinois Power Agency or by the Illinois Commerce Commission.
- (ss) Information that is prohibited from being disclosed under Section 4 of the Illinois Health and Hazardous Substances Registry Act.

Special Provisions Regarding Electronic Mail

According to the Illinois Attorney General, electronic mail records of a member of a public body should be considered a public record for purposes of the Act; however, certain exemptions may exist that permit a withholding of these records.

Main Areas of Litigation and Typical Outcomes Regarding Public Records Exempt From Disclosure

A number of contentious FOIA cases hinge on the “personal privacy” exemption 7(b). Section 7(b) lists a number of examples of information that may qualify as exempt, including medical records, student files and tax assessments. The list is not exhaustive, and the courts have determined the enumerated items to be *per se* exempt. Any other claims of 7(b) exemptions must be evaluated case by case.

What Information Must a Requestor Provide?

According to the Illinois Attorney General, a public body may not require that the requestor provide his or her identity or intended use.

Deadline for Production of Public Records

Absent extraordinary circumstances, the public body must respond within seven working days of receipt of the request. Under extraordinary circumstances, FOIA provides that the seven day period for response may be extended for up to seven additional working days. When such additional time is required, the public body must notify the person making the request by letter specifying the reason for the delay and the date when the records will be released or denied within the original seven day period.

Denial of a Record

When a request for public records is denied by a public body, that body must, notify the person who made the request, by letter, of the decision to deny the request. Failure to respond within the specified time period is considered a denial of the request under FOIA.

What Must be Included in Denial Letter?

The letter must contain reasons for the denial, and the names and titles of all persons responsible for the denial. If an exemption has been asserted, the letter must specify which exemption authorizes the denial. The letter must also explain that the requesting party can appeal the denial to the head of the public body.

Appeal to Public Body

Any person denied access to inspect or copy any public record for any reason may appeal the denial by sending a written notice of appeal to the head of the public body. Upon receiving that written notice, the head of the public body, or such person's designee, is required to review the requested public record promptly, and to determine whether, under the provisions of the FOIA, such records are open to inspection and copying.

The person requesting the records must be notified of that determination within seven working days. If the head of a public body denies access to public records, he or she must explain in a letter of denial that the requestor has a right to judicial review.

Appeal to State Court

When the head of a public body denies access to public records, the requesting person is “deemed to have exhausted his administrative remedies.” When the denial is from the head of a public body of the State, suit may be filed in the circuit court for the county in which the public body has its principal office or where the requesting party resides. When the denial is from the head of a municipality or other type of public body, suit must be brought in the circuit court for the county in which the public body is located.

Penalties for Violation

The requesting person may file suit in the circuit court for injunctive or declaratory relief.

Availability of Attorneys’ Fees for FOIA Litigation

Under a January 1, 2004, amendment to 5 ILCS 140/11, a private party may recover attorneys’ fees when he or she has substantially prevailed absent special circumstances. Special circumstances justifying a trial court’s denial of attorneys’ fees may include (1) the plaintiff is a non-lawyer proceeding *pro se*; (2) an attorney proceeds *pro se* under the FOIA; (3) the defendant entered into a nuisance settlement solely to end a frivolous and groundless suit and avoid the expense of litigation; (4) the plaintiff was not instrumental in achieving the remedy sought; or (5) the plaintiff, through a settlement or consent order, agreed to waive his or her right to pursue fees. *Callinan v. Prisoner Review Bd.*, 371 Ill. App. 3d 272, 862 N.E.2d 1165, 2007 Ill. App. LEXIS 91, 308 Ill. Dec. 962 (Ill. App. Ct. 3d Dist. 2007). If the requesting party sought the records in order to further commercial interests, the test is the same as that stated in *Duncan*.

Whether Attorneys’ Fees Are Usually Granted

Under the original FOIA, attorneys’ fees were rarely granted. It remains to be seen whether the 2004 amendment, which *Callinan* interprets, will increase the frequency with which attorneys’ fees are granted.

General Areas Litigated Most Commonly and Typical Outcomes

A number of contentious FOIA cases hinge on the “personal privacy” exemption 7(b), as discussed above.

Ranking in 2007 National Study of 50 States’ Freedom of Information Laws

In 2007, the nonpartisan, nonprofit organizations Better Government Association and National Freedom of Information Coalition conducted a 50-state study of FOIA responsiveness.

Three of the criteria—Response Time, Attorneys’ Fees & Costs and Sanctions—were worth four points each.

Two of the criteria—Appeals and Expedited Process—were assigned a value of two points each.

Response Time, Attorneys' Fees & Costs and Sanctions were assigned a higher value because of their greater importance.

These criteria determine how fast a requestor gets an initial answer, thus starting the process for an appeal if denied, and provide the necessary deterrent element to give public records laws meaning and vitality.

Appeals and Expedited Process, although important, were determined to be less critical in promoting open government access and thus assigned only a two-point value.

The following sets forth Illinois' rankings in this study, which may be found at www.bettergov.org/policy_foia_2008.html.

- For response time (analyzing response times, the process of appealing FOIA denials and expediency, and the means to give a case priority on a court's docket in front of other matters because of time concerns); **4 of 4**.
- For appeals (analyzing choice, cost and time); **1.5 of 2**.
- For expedited review (if a petitioner's appeal, in a court of law, would be expedited to the front of the docket so that it is heard immediately); **1 of 2**.
- For fees and costs ((1) whether the court is required to award attorneys' fees and court costs to the prevailing requestor; and (2) what sanctions, if any, the agency may be subject to for failing to comply with the law); **3 of 4**.
- For sanctions (whether there was a provision in the statute that levied penalties against an agency found by a court to be in violation of the statute); **0 of 4**.
- Percentage (compared to other 49 states); **59 of 100**.

GRADE: F

CASE IN POINT

In connection with an open government survey, the Citizen Advocacy Center (Center) sent FOIA requests to public bodies throughout the Chicago area asking for basic election-related referendum records. Addison Township was one governmental agency surveyed. Their timeliness to the request was grossly delinquent under statutory time limits.

The Center submitted a proper FOIA request, per Addison Township's policies on June 25, 2008. On July 25, 2008, more than twenty days past the statutorily mandated response time, Addison Township requested an extension. Thereafter, on August 5th and again on August 14th, two additional extensions were requested. After subsequent communications with a Center community lawyer, Addison Township produced the requested records on September 24, 2008, and agreed to waive the copy charges.

Open Meetings Act

STRENGTHS

of Illinois' Open Meetings Act

The Illinois' OMA has a broad presumption of coverage. All meetings of public bodies are presumed to be open and subject to the provisions of OMA, unless the meeting topic falls under a specific exemption. The OMA mandates that a closed session action is limited to the debating of public issues only. Illinois courts have strictly construed the exceptions. For meetings that have been improperly closed, Illinois courts have invalidated final actions.

In addition, the public benefits from a lenient approach to the disclosure of information discussed in executive session. The OMA does not grant public bodies the right to sanction its members for disclosing information discussed at a closed meeting. Therefore, members who share information from closed sessions with interested individuals or groups are protected from suffering legal reprisal.

Lastly, Illinois OMA is the only one of the states surveyed that specifically addresses electronic communications and meetings. The OMA states that email and Internet chat room communications can be considered meetings. While there is ambiguity within the statute regarding exactly when successive email communications among a public body's majority of a quorum is a meeting, Illinois is ahead of the curve in attempting to address the integration of technology into the business of governing.

Illinois' OMA has the strongest requirements of the states surveyed to ensure notice of meetings and public business to be decided. Minnesota fails to have any notice requirements for a meeting or an agenda. Michigan requires only eighteen hours notice for a meeting and does not require a detailed agenda.

Ohio requires twenty-four hours notice for a meeting and does not require a posted agenda in certain circumstances. Wisconsin requires twenty-four hours notice, but no detailed agenda is required.

Illinois' OMA requires that a meeting agenda must be posted at least 48 hours prior to a meeting with an agenda that sufficiently informs the public of action to be taken by the public body. Additionally, the public body must also post notice of the meeting and an agenda if it normally maintains a website. 5 ILCS 120/2.02. Illinois courts have upheld OMA's strict notice provision. For example, an adopted ordinance was invalidated because it was listed as "new business" on the meeting agenda rather than with sufficient detail to notify the public that the item was a local law proposed for adoption. *Rice v. The Board of Trustees of Adams County*, 326 Ill.App. 3d 1120, 762 N.E. 2d 1205 (Ill.App. 4 Dist, 2002)

Lastly, the Illinois Attorney General's Public Access Counselor (PAC) is a valuable asset. The PAC is a non-statutorily created office that takes an active role in ensuring that public bodies conduct their business openly and that members of the public have access to the governmental information to which they are entitled.

Although the PAC does not have the power to sanction government bodies that violate OMA, it will proactively mediate complaints from the public and media regarding violations. For instance, in responding to a resident's complaint regarding potential OMA violations, the PAC will investigate, intercede, and promote adherence to OMA through such measures as ordering training to help advance good government practices.

The PAC's commitment to OMA accountability and transparency positively impacts the public's open government rights in Illinois.

WEAKNESSES

of Illinois' Open Meetings Act

While there are several weaknesses in Illinois' OMA statute, the most significant stems from lack of effective enforcement.

The Illinois penalty provisions are rarely utilized to enforce compliance with OMA.

The Illinois OMA is one of two states surveyed that provide for criminal penalties for violating the law. 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. Despite criminal provisions, state's attorneys throughout Illinois rarely pursue criminal actions against government officials or governmental bodies that violate the statute. Furthermore, while the courts have the power, they never assess criminal penalties, even for egregious OMA violations.

The failure to implement penalties leads public bodies to openly violate OMA without fear of reprisal. Furthermore, the courts' failure to impose criminal penalties for intentional violators and repeat offenders discourages OMA compliance and serves as a disincentive for state's attorneys who want to pursue criminal charges. With state's attorneys failing to file OMA claims and the PAC not having enforcement capacity, the burden inappropriately rests solely on the average citizen to hold public bodies accountable through filing civil litigation.

Lastly, even if a lawsuit is filed to seek the invalidation of an improper final action, a public body may simply re-enact the illegal action properly, thereby mooting the legal claim. Allowing for subsequent remedial action permits a public body to overtly violate the law without fear of accountability.

REFORM: (1) Implement mandatory fines against public bodies that violate the OMA; (2) Revise OMA to disallow the mooting of a legal claim by subsequent remedial action by a public body; (3) Statutorily create the PAC with enforcement capacity; and (4) Mandate annual OMA training for public officials and require attendees to sign a certification form.

Short statute of limitation deadlines are a disincentive for members of the public to file lawsuits to hold public bodies accountable.

Illinois has a very short statutory deadline for which the public can file an OMA civil claim. As compared, Minnesota has no time limits to file a claim and Wisconsin and Ohio have a two year statute of limitations. Michigan has a short deadline of 30 or 60 days depending on the claim. Illinois' statute of limitations is 60 days. 5 ILCS 120/3.

Members of the public who identify an OMA violation have three alternative avenues to address their grievances prior to filing litigation: organizing and speaking out publicly against the governmental body to pressure public officials to address the violation through a re-vote; mediating the dispute through the PAC; or filing a complaint with the appropriate state's attorney. While these are laudible options to mediate a dispute, none of these options suspend the 60 day time bar, placing immense pressure is placed on an individual to quickly decide whether or not to pursue costly litigation.

REFORM: Extend the statute of limitations to two years.

Meeting minutes are often a vague documentation of a public meeting.

The Illinois OMA mandates that a public body record votes taken and summarize discussions on all matter proposed, deliberated or decided at a public meeting. 5 ILCS 120/2.06 While the OMA details what must be included in meeting minutes, the practical application often results in vague documentation of meeting activity and a failure to effectively apprise the public of what took place.

The Attorney General has opined that minutes must include sufficient data so that either the body or a court examining its minutes will be able to ascertain what was discussed, the substance of that discussion, and what, if any, action was taken. The OMA itself does not include such specific requirements. As a result, members of the public who were not present at a meeting, but seek to become informed, are often unable to ascertain the full extent of meeting activity.

REFORM: Amend the statute to require that meeting minutes include substantive information regarding public body discussions or that audio or video tape records of all public meetings be archived and made available to the public.

Legally permissible reasons to close public meeting discussions are routinely abused.

As with the Illinois FOIA, OMA has far more legally permissible reasons to close a meeting as compared to the other states surveyed. While Illinois has 24 exceptions to close a meeting, Wisconsin is the next closest state with only 10.

In contradiction to the statute, the extensive list to close meetings is often broadly construed, allowing public bodies to operate in a non-transparent manner. Furthermore, the Illinois OMA does not require that a subsequent vote of an illegal discussion in closed session be voided, providing the public body with substantial leeway to violate the statute. A public body merely has to reconvene in open session and vote on the matter that was illegally deliberated.

Further, the exemption that allows for the discussion of pending litigation in closed session is widely exploited. While the Attorney General has indicated that litigation must be probable, imminent, or pending against a public body for the exception to apply, a vast amount of deliberation is incorrectly shielded under the umbrella of pending litigation.

This is especially seen in meetings of school districts, given that they regularly discuss personnel issues or pending litigation in closed session. Since a large number of education matters involve staff issues, and any action or inaction regarding staff can result in a lawsuit, some school districts interpret the closed session exemptions in an overly broad manner. In general, as compliance with closed sessions is difficult to police, and because filing litigation is a costly and an undesirable alternative, the public is forced to rely only on those who participate within the closed session to ensure compliance.

REFORM: (1) Amend the OMA to reduce permissible reasons for a public body to convene in closed sessions; (2) prohibit a public body from taking remedial action in open sessions for impermissible closed meeting action; and (3) require public bodies to disclose verbatim recordings made during closed sessions after one year.

SUMMARY OF LAW

of Illinois' Open Meetings Act

The following section provides a summary of the main components of the Illinois OMA. This summary provides an overview of the nuts and bolts of the statute, including what types of meetings are covered by the law, the procedures for closed sessions, how to appeal a violation and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in OMA litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

Who is Covered Under the Law?

The law applies to any public body, which includes legislative, executive, administrative, or advisory bodies of the state, counties, townships, cities, villages, incorporated towns, school districts, and all other municipal corporations, boards, bureaus, committees, or commissions, and any subsidiary bodies of any of the foregoing.

Coverage applies whether the public body is paid or unpaid. Home rule units must comply with the law, and may not adopt weaker standards. The law does not apply to private, not-for-profit corporations even if they administer programs funded primarily by governmental agencies and are required to comply with government regulations.

Are Committees, Advisory Groups, Sub-Committees Covered?

Yes. Committees are covered by the law. Sub-committees and advisory committees that are supported in any part by tax revenue or which expend tax revenue also are covered by the law. The General Assembly's committees, subcommittees and advisory committees are exempt.

Types of Gatherings Covered

The law applies when the following requirements are met. There must be (1) a gathering (2) of a majority of a quorum of the public body (3) who comes together to discuss public business. Gatherings include in-person, telephonic and electronic meetings (e.g., electronic mail and Internet chat rooms) where public business is discussed.

A recently passed amendment provides an exemption from the meeting coverage requirement for public bodies with five members. Under the OMA amendment, public discussions by three, rather than two, members trigger coverage of the law for meeting purposes.

What Meetings Must Be Open?

Any meeting that includes a majority of a quorum of the members of a public body must be open if it is held for the purpose of discussing public business.

Exceptions: Closed Meetings

There are twenty-four authorized subjects permitted for closed meetings. The closed meetings exceptions authorize but do not require the holding of a closed meeting to discuss a covered subject.

- (1) The appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity.
- (2) Collective negotiating matters between the public body and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees.
- (3) The selection of a person to fill a public office, including a vacancy in a public office, when the public body is given power to appoint under law or ordinance, or the discipline, performance, or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance.
- (4) Evidence or testimony presented in open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning.
- (5) The purchase or lease of real property for the use of the public body, including meetings held for the purpose of discussing whether a particular parcel should be acquired.
- (6) The setting of a price for sale or lease of property owned by the public body.
- (7) The sale or purchase of securities, investments, or investment contracts.
- (8) Security procedures and the use of personnel and equipment to respond to an actual, threatened, or reasonably potential danger to the safety of employees, students, staff, the public, or public property.
- (9) Student disciplinary cases.
- (10) The placement of individual students in special education programs and other matters relating to individual students.

- (11) Litigation, when an action against, affecting, or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.
- (12) The establishment of reserves or settlement of claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if otherwise the disposition of a claim or potential claim might be prejudiced, or the review or discussion of claims, loss or risk-management information, records, data, advice, or communications from or with respect to any insurer of the public body or any intergovernmental risk-management association or self-insurance pool of which the public body is a member.
- (13) Conciliation of complaints of discrimination in the sale or rental of housing, when closed meetings are authorized by the law or ordinance prescribing fair housing practices and creating a commission or administrative agency for their enforcement.
- (14) Informant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, when discussed by a public body with criminal investigatory responsibilities.
- (15) Professional ethics or performance when considered by an advisory body appointed to advise a licensing or regulatory agency on matters germane to the advisory body's field of competence.
- (16) Self-evaluation, practices and procedures, or professional ethics, when meeting with a representative of a statewide association of which the public body is a member.
- (17) The recruitment, credentialing, discipline or formal peer review of physicians or other health care professionals for a hospital or other institution providing medical care that is operated by the public body.
- (18) Deliberations for decisions of the Prisoner Review Board.
- (19) Review or discussion of applications received under the Experimental Organ Transplantation Procedures Act.
- (20) The classification and discussion of matters classified as confidential or continued confidential by the State Employees Suggestion Award Board.
- (21) Discussion of minutes of meetings lawfully closed under OMA, whether for purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06.

- (22) Deliberations for decisions of the State Emergency Medical Services Disciplinary Review Board.
- (23) The operation by a municipality of a municipal utility or the operation of a municipal power agency or municipal natural gas agency when the discussion involves (1) contracts relating to the purchase, sale, or delivery of electricity or natural gas or (2) the results or conclusions of load forecast studies.
- (24) Meetings of the Residential Health Care Facility Resident Sexual Assault and Death Review Teams or the Executive Council under the Abuse Prevention Review Team Act.

Public Notice of Time and Place for Meetings: Requirements for Agendas

The OMA requires public bodies to give public notice at the beginning of each calendar or fiscal year of the dates, times and places of their regular meetings to be held that year. Public bodies must post an agenda for each regular meeting at least 48 hours in advance of the meeting at the principal office of the public body and at the location where the meeting is to be held.

Public notice of any special, rescheduled, or reconvened meeting must be given at least 48 hours in advance, except that public notice is not necessary for a meeting to be reconvened within 24 hours or if the time and place of the reconvened meeting was announced at the original meeting and there is no change in the agenda.

Notice of a meeting held in the event of a bona fide emergency need not be given 48 hours prior to such meeting, but notice must be given as soon as practicable.

In addition, the schedule of regular meetings must be available at the office of the public body listing the times and places of regular meetings. If a change is made in regular meeting dates, notice of the change must be given at least ten days in advance by posting a notice at the public body's office or at the place of meeting and sending a notice to each news medium that filed an annual request to receive such notice.

Further, notice of the change must be published in a newspaper of general circulation in the area. If the population served by the public body is less than 500 and there is no newspaper published there, the ten day notice may be given by posting a notice in three prominent places within the unit served.

Procedures for Closed Meetings

A majority of a quorum must vote during an open meeting to close a meeting or to hold a closed meeting at a specific future date. The vote of each member on the question of holding a closed meeting must be publicly disclosed at the time of the vote, recorded and entered in the minutes of the meeting. The public statement and minutes must recite the language of the exemption.

A series of meetings may be closed by a single vote as long as each meeting in the series involves the same particular matter and is scheduled to be held within three months of the vote.

Recordkeeping for Meetings: Minutes Requirements

Minutes must include the following: (1) the date, time and place of the meeting; (2) the members of the body recorded as present or absent; and (3) a summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken. With respect to the summary requirement, the Attorney General has opined that the minutes must include sufficient data so that either the body or a court examining its minutes will be able to ascertain what, in fact, was discussed, the substance of that discussion, and what, if any, action was taken.

Taping or Filming Meetings

Individuals may tape or film open session meetings so long as it does not interfere with the meeting. Rules regarding taping or filming should be written and published after appropriate public notice and deliberation rather than spontaneously created. Individuals giving testimony at public hearings may request that they not be recorded under certain conditions. If a witness before a commission, administrative agency or other tribunal refuses to testify because his or her testimony will be taped or filmed, the authority holding the meeting must prohibit the recording during the testimony of the witness.

Are Electronic Mail Communications a Meeting?

Yes. Electronic mail and Internet chat room communications are considered communications for meeting purposes under the law.

Summary of Pivotal State Supreme Court OMA Decisions

The OMA is designed to prohibit secret deliberations and action on matters which, due to their potential impact on the public, should properly be discussed in a public forum. *People ex rel. Difanis v. Barr*, 83 Ill. 2d 191, 202 (1980).

Nothing in the OMA provides a cause of action against a public body for discussing information from a closed meeting. *Swanson v. Board of Police Comm'rs*, 197 Ill. App. 3d 592 (1990).

The exemptions to the OMA are limited in number, very specific and must be strictly construed. *I.N.B.A. v. City of Springfield*, 22 Ill. App. 3d 226, 228 (1974).

Enforcement

Enforcement is weak. While the state's attorneys have the ability to prosecute OMA violations, they almost never do. The Illinois Office of the Attorney General has established a Public Access Counselor's (PAC) office to take an active role in assuring that public bodies understand the requirements of open government laws conduct their business openly and that the public has access to the governmental information to which they are entitled. While the PAC has no punitive authority, it responds to resident's complaints and occasionally refers OMA matters to the appropriate state's attorney for investigation.

Penalties for Violation

Civil and criminal penalties are available for OMA violations. A civil lawsuit may be filed by any private individual or the state's attorney of the county in which a violation occurred. The lawsuit must be filed within 60 days after the meeting alleged to have been held in violation of the law, or within 60 days of the discovery of a violation by the appropriate state's attorney. Mandamus and injunction are available. Criminal penalties are limited to Class C misdemeanor charges, which are punishable by a fine of up to \$1,500 and imprisonment for up to 30 days. Criminal charges may only be initiated by the appropriate State's Attorney.

Are Criminal Penalties Assessed Regularly?

Criminal penalties are rarely imposed in OMA cases.

Availability of Attorneys' Fees for OMA Litigation

Attorneys' fees are available for a prevailing party in OMA litigation. *Pro se* plaintiffs (individuals who serve as their own lawyers) may not be awarded attorneys' fees.

Whether Attorneys' Fees Are Usually Granted

Attorneys' fees are usually not granted to prevailing parties.

General Areas Litigated Most Commonly and Typical Outcomes

The area that appears to trigger the most litigation is when a public body improperly enters an executive session under OMA. Courts generally construe the closed session exceptions narrowly. Courts also have considered several cases interpreting the notice requirement and have mostly invalidated final actions where notice was defective.

While the Citizen Advocacy Center monitored a meeting of the DuPage County Board, the Chairman of the Board provided his “Chairman’s Report.” The agenda published prior to the meeting only had the title of “Chairman’s Report” with no subsections listed. During the Chairman’s report, he called on the Board to vote on a resolution altering DuPage County’s policy position opposing O’Hare Airport expansion, a controversial issue at the time. The Board immediately voted to pass the resolution.

A lawsuit was filed alleging a violation of OMA notice requirements, specifically that the DuPage County Board failed to appropriately notify the public of business to be conducted. After nearly three years litigation, the DuPage County Board rescinded the resolution pursuant to a settlement agreement.

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Michigan is considered to have fairly strong open government laws that explicitly make full access to government a top priority. In 1977, the Michigan General Assembly enacted the Michigan Freedom of Information Act (FOIA) which mandates that, within specified limitations, the FOIA allows anyone to inspect and obtain copies of all public records prepared, possessed, used by, or in the control of any public office. This access to government information is fundamental to the system of open government in Michigan and ensures that citizens have the right to be informed about the actions of public offices on matters of public concern.

In 1976, the Michigan General Assembly enacted the Michigan Open Meetings Act (OMA). The OMA promotes openness and accountability in government and courts have ruled that general provisions should be interpreted broadly. *Booth Newspapers Inc. v. University of Michigan Board of Regents*, 192 Mich. App. 574, 481 N.W.2d 778, 782 (1992). The OMA places a high value on public participation in government meetings and requires public bodies to provide the public with adequate notice of meetings, keep records of public meetings and publish meeting minutes within strict deadlines.

The FOIA and OMA have numerous strengths but the most impressive aspect of Michigan's open government laws is the range of penalties available for violations. Michigan law permits prevailing plaintiffs in FOIA litigation to recover actual and compensatory damages, as well as punitive damages against a public body. Moreover, violations of the OMA subject a public body official to civil and criminal penalties. Also notable is that Michigan is the only state surveyed that requires public comment opportunities at government meetings.

While Michigan OMA and FOIA have several strengths, there are also many weaknesses. Prosecuting attorneys often fail to pursue criminal actions and the courts rarely assess criminal penalties for substantial OMA violations. Additionally, Michigan has the most restrictive provisions regarding the costs for the production of documents. The OMA allows a public body to charge for searching, examining, and reviewing public records.

In regards to information exempt from the FOIA, Michigan's list is extensive. It is second to Illinois, with twenty exemptions that specifically exclude the Governor, Lieutenant Governor, employees of those executive offices and the state legislators from the FOIA. Moreover, Michigan joins Illinois as the only two states surveyed that exempt records pertaining to education and documents related to the internal operations of public bodies. Further, Michigan has the most restrictive statute of limitations provisions.

Reform is needed to improve certain aspects of access to government and government documents in Michigan. In addition, enforcement provisions already established by the FOIA and the OMA statutes need to be imposed. The following provides an analysis of the strengths and weaknesses of Michigan's sunshine laws and a summary of the main components. Copies of model versions of both statutes and citizen guides are available by contacting the Citizen Advocacy Center.

ANALYSIS OF MICHIGAN'S

Freedom of Information Act

STRENGTHS

of Michigan's Freedom of Information Act

Michigan's FOIA has numerous strengths designed to ensure access to public records. Cases interpreting the FOIA have strictly construed exemptions and courts have generally ruled in favor of disclosure. Notably, a Michigan appellate court ruled that public bodies may not create new exemptions under the Act. *Messenger v. Consumer & Industry Services* 238 Mich.App. 524, 531, 606 N.W.2d 38, 42 (Mich.App. 1999).

In addition, Michigan is the only state surveyed in which a body primarily funded by or through state or local authority is considered a "public body" under the FOIA if it receives more than half of its funding through state or local authority. *Kubick v. Child & Family Services of Michigan, Inc.* 171 Mich.App. 304, 308, 429 N.W.2d 881, 883 (Mich.App. 1988). For example, a Michigan appellate court held that a private corporation was properly joined as a defendant in a FOIA suit where it possessed public documents pursuant to a contract with a public school. *Jackson v. Eastern Michigan University Foundation* 215 Mich.App. 240, 544 N.W. 2d, 737 (Mich.App. 1996). Subjecting private organizations to the FOIA under certain conditions increases transparency immeasurably.

The Michigan FOIA has firm deadlines for public bodies to respond to requests for information while also allowing reasonable time for the public body to access and produce information. A public body must respond to a FOIA request within five business days of receiving the request, with a ten day extension available in certain cases. Mich. Comp. Laws § 15.235 Sec. 5(2). If a request for

a record is denied, a public body must provide written notice to the requestor within five days (or fifteen days under unusual circumstances). Mich. Comp. Laws § 15.235 Sec. 5(2)(b). Michigan's deadlines theoretically guarantee that a requesting party will receive a response in a timely manner.

The Michigan FOIA also has an administrative appeals provision that allows for review of a denied public document prior to filing a lawsuit. FOIA requestors who face a full or partial denial of their records requests may submit a written appeal to the head of the appropriate public body, or may directly file a claim in court within 180 days of the purported denial. Mich. Comp. Laws § 15.235 Sec. 5(4)(d)(i).

An administrative appeals process benefits the requestors by providing an intermediary step to resolving a dispute prior to filing litigation, as well as giving public bodies the opportunity to circumvent litigation funded by taxpayer dollars. Should administrative efforts fail to resolve a FOIA dispute, a requestor may commence an action in the circuit court to compel the public body's disclosure of public records. Mich. Comp. Laws § 15.240 Sec. 10(1)(b).

Enforcement penalties are a strong component of Michigan's FOIA. The FOIA provides for actual and compensatory damages for prevailing plaintiffs in FOIA litigation, as well as punitive damages against the public body. Mich. Comp. Laws § 15.240 Sec. 10(7).

If a circuit court finds that a public body has arbitrarily and capriciously violated the FOIA statute by refusing or delaying a request for a public document, it may award punitive damages of \$500 to the plaintiff. *Id.* While the fine may seem minimal, and a plaintiff must demonstrate that the public body's disclosure of information was the result of a court order, the availability of punitive damages provides an additional disincentive to violate the FOIA. In addition, prevailing plaintiffs in FOIA litigation are statutorily entitled to reasonable attorneys' fees. Mich. Comp. Laws § 15.240 Sec. 10(6).

Though the exemptions section of the FOIA is extensive, there is a key category omitted. Employment records are substantially available under the Michigan FOIA. Michigan is one of the few states surveyed that allow the disclosure of personnel records that consist solely of performance appraisals, disciplinary actions, and complaints relating to performance in public jobs. As employment matters are typically a contentious area, the intentional omission of personnel records from the FOIA's exemption list serves to significantly advance transparency and openness in government.

The Michigan FOIA also takes a reasonable approach to the requirements pertaining to the language of requests. The statute does not require requestors to submit legally precise requests in order to obtain public records, but rather establishes a mandate that a request need only describe the records “sufficiently” to enable the public body to identify it. Mich. Comp. Laws § 15.233 Sec. 3(1). Regular citizens merely have to describe the public records they seek with enough detail to allow the public body to understand and fill the request accordingly.

Another practical aspect of Michigan’s FOIA is that it permits standing FOIA requests. Under the statute, a person has the right to subscribe to future issuances of public records which are created, issued or disseminated on a regular basis. Mich. Comp. Laws § 15.233 Sec. 3(1). This has a significant practical benefit for public bodies and regular FOIA users, especially the media and civic organizations. It is a convenient and effective mechanism to streamline production of regular requests.

Lastly, the Michigan Freedom of Information Committee (Committee) plays an important role in advancing state open government laws by providing comprehensive guidance on the FOIA.¹ The Committee is a nonprofit organization committed to ensuring the public’s right to access government records and meetings, as provided under the state’s sunshine laws.

The Committee promotes its objectives by providing information and advice to Michigan residents regarding FOIA issues; holding seminars, workshops and speeches free of charge; responding to FOIA developments and trends in Michigan; linking citizens to attorneys who specialize in FOIA; and advocating stronger sunshine laws while opposing legislative initiatives that would abridge the public’s right to access.

The Committee’s website includes the open government laws, summaries of key FOIA decisions, Attorney General opinions and links to websites with additional resources. The Committee is an invaluable resource for individuals and government entities seeking a better understanding of open government laws in Michigan.

¹ www.mfoia.org

WEAKNESSES

of Michigan's Freedom of Information Act

While the Michigan FOIA strongly encourages the accessibility of public records for most people, there are significant weaknesses with the law.

Exemptions that exclude incarcerated individuals' access to information inappropriately bar one segment of the population from obtaining public records.

Notably, the FOIA excludes incarcerated prisoners from FOIA coverage. Mich. Comp. Laws § 15.232 Sec. 2(c). Access to public information is critically important to all individuals, and the refusal to extend FOIA rights to incarcerated prisoners unnecessarily discriminates against one segment of the population.

REFORM: Remove this provision from the statute.

Michigan's broad exemptions, which exclude internal communications, Constitutional officers and the legislature from the FOIA, undermine transparency goals.

Michigan's FOIA exemptions are extensive. One of the most troubling exemptions is the intra-agency immunity exemption for certain public records. Under the FOIA, internal communications and notes between and within public bodies of an advisory nature are exempt from disclosure, including electronic mail communications. Mich. Comp. Laws § 15.243 Sec. 13(1)(m). However, the intra-agency immunity exemption does not apply unless the public body can demonstrate that the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.

This provision essentially requires a requestor to file suit against a public body under the FOIA to determine whether a record fits the intra-agency immunity exemption, particularly whether the communication is advisory in nature.

Additionally, the Michigan FOIA exempts the Governor, Lieutenant Governor, employees of those executive offices and the state legislators from the FOIA. Mich. Comp. Laws § 15.243 Sec. 13(4). The exclusion of Constitutional officers and the legislature from the purview of the FOIA grossly undermines the intent of the statute to advance citizens' rights to be informed about the actions of public offices on matters of public concern.

REFORM: Remove the intra-agency exemption from the statute and subject Constitutional officers, as well as the legislature and state employees, to FOIA coverage.

Michigan's costs provision discourages use of FOIA and is the most restrictive of the states surveyed.

Michigan's FOIA lacks sensitivity toward high costs for copies of certain records. Michigan permits a government agency to charge not only for the actual cost of duplication and mailing for public records requests, but also for clerical labor. Mich. Comp. Laws § 15.234 Sec. 4(1). Though the FOIA provides for a full or partial waiver of copying and labor costs if the public body determines a request to be in the public interest because it primarily benefits the general public, such waivers are wholly discretionary and unevenly granted.

While FOIA provides that the first \$20 of work must be free for a person who is on welfare or presents facts showing inability to pay due to indigency, costs for obtaining copies of FOIA documents can be excessive. *Id.*

The potential for excessive copy costs can act as a de facto denial of records and a disincentive to those seeking public records. Moreover, the FOIA is deferential towards public bodies in allowing the recouping of labor costs while being silent on mandating that public bodies electronically post routinely requested documents.

REFORM: Eliminate costs for examination, search, and review of public records and cap costs per page to \$.15.

SUMMARY OF LAW

of Michigan's Freedom of Information Act

The following section provides a summary of the main components of the Michigan FOIA. This summary provides an overview of the nuts and bolts of the FOIA, including what records are covered, how to appeal a denial of records requests and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in FOIA litigation, and whether attorneys' fees are actually awarded to successful plaintiffs.

Who is Covered Under the Law?

The Michigan FOIA sets requirements for the disclosure of public records by all "public bodies." All state agencies, county and other local governments, school boards, other boards, departments, commissions, councils, and public colleges and universities are covered.

Michigan courts have held that a body "primarily funded by or through state or local authority" is considered a "public body" if it receives more than half of its funding through state or local authority. Thus, even a private organization that receives more than half of its funding from several public sources is a "public body" subject to FOIA, though private corporations that do not reach the same funding threshold are generally not considered a "public body" covered by the FOIA, even if they are licensed, franchised, or otherwise regulated by the government. Incarcerated prisoners are precluded from making public records request under the FOIA.

Public Records Open to Disclosure

The FOIA applies to any handwriting, typewriting, printing, photostating, photographing, photocopying and every other means of recording, and includes letters, words, pictures, sounds or symbols, or combinations thereof, as well as papers, maps, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.

Notably, personnel records consisting solely of performance appraisals, disciplinary actions, and complaints relating to accomplishments in public jobs are disclosable under the FOIA. The FOIA does not include computer software. Requests for public records must be issued to the designated "FOIA coordinator" of the public body.

Public Records Exempt from Disclosure

The exemptions to FOIA include the following:

- (1) Investigating records compiled for law enforcement purposes, but only to the extent that disclosure would do any of the following:
 - interfere with law enforcement proceedings;
 - deprive a person of the right to a fair trial or impartial administrative adjudication;
 - constitute an unwarranted invasion of personal privacy;
 - disclose the identity of a confidential source or, if the record is compiled by a criminal law enforcement agency in the course of an investigation, disclose confidential information by a confidential source;
 - disclose law enforcement investigative techniques or procedures; or
 - endanger the life or physical safety of law enforcement personnel.
- (2) Information or records subject to the attorney-client privilege.
- (3) Personal information, such as gun ownership records.
- (4) Public records which if disclosed would prejudice a public body's ability to maintain the physical security of custodial or penal institutions occupied by persons arrested or convicted of a crime or admitted because of a mental disability, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.
- (5) Records which if disclosed would violate the Federal (Buckley) Educational Rights and Privacy Act (primarily student records).
- (6) An exempt public record or exempt information which is furnished by the public body originally compiling, preparing, or receiving the record or information to a public officer or public body in connection with the performance of the duties of that public officer or public body, if the consideration originally giving rise to the exempt nature of the public record remains applicable.

- (7) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy.
- (8) Information subject to attorney-client privilege.
- (9) Information subject to other enunciated privileges such as counselor-client and those recognized by statute or court rule.
- (10) Pending public bids to enter into contracts.
- (11) Appraisals of real property to be acquired by a public body.
- (12) Test questions and answers, scoring keys and other examination instruments.
- (13) Medical counseling or psychological facts which would reveal an individual's identity.
- (14) Internal communications and notes between and within public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action.
- (15) Law enforcement communication codes and deployment plans unless the public interest in disclosure outweighs the public interest in nondisclosure.
- (16) Information that would reveal the location of archeological sites.
- (17) Product testing data developed by agencies buying products where only one bidder meets the agency's specifications.
- (18) A student's college academic transcript where the student is delinquent on university payments.
- (19) Records of any campaign committee including any committee that receives moneys from a state campaign fund.
- (20) Records and information pertaining to an investigation or a compliance conference under Article 15 of the Public Health Code, before a complaint is issued.

Form of Records

The FOIA requires that a public body furnish “a reasonable opportunity for inspection and examination of its public records.” The public body or agency has a responsibility to provide reasonable facilities so that persons making a request may examine and take notes from public records. The facilities must be available during the normal business hours of the public body. One Michigan court found that if a requestor asks to inspect original records, supplying copies does not meet the FOIA’s requirements. *Hubka v. Pennfield Township*, 197 Mich App 117 (1992).

Special Provisions Regarding Electronic Mail

Electronic mail is a public record subject to disclosure under the FOIA.

Trend of Public Records Law Cases Addressing Electronic Mail

No cases directly address electronic mail issues in FOIA context.

Fees for Public Records

A government agency can only charge actual duplication, mailing and clerical labor costs for producing public records. The first \$20 of work must be free for a person who is on welfare or presents facts showing inability to pay due to indigency. A public body may require a good faith deposit at the time of request, but the deposit may not exceed half of the total cost.

Main Areas of Litigation and Typical Outcomes Regarding Public Records

Exempt From Disclosure

Under the FOIA, a public body may exempt records if they are personal in nature and disclosure would constitute a clearly unwarranted invasion of an individual’s privacy. Courts addressing privacy issues have generally advanced transparency by ruling in favor of the disclosure of public records.

For example, in *Penokie v. Michigan Technological University*, 93 Mich. App. 650 (1979), an appellate court held that disclosure of the names and salaries of employees of the defendant university was not a clearly unwarranted invasion of personal privacy. The appellate court in *Kestenbaum v. Michigan State University*, 97 Mich. App. 5 (1980) held that lists of names may be disclosed, while the nature of information associated with those names may be redacted to protect privacy interests. An appellate court also held that public disclosure of performance evaluation of school administrators is not an invasion of privacy because people have a strong interest in public education and because taxpayers are increasingly holding administrators accountable for expenditures of tax money. *Ridenour v. Dearborn Board of Education*, 111 Mich. App. 798 (1981).

Deadline for Production of Public Records

A public body must respond to a FOIA request for a public record within five business days of receiving the request. The public agency may, under unusual circumstances (defined below), notify the requestor in writing and extend the time limit by ten days. If a request for a record is denied, written notice of the denial must be provided to the requestor within five days, or within fifteen days under unusual circumstances. Where a public body timely claims an additional ten business days for a response, the new response deadline is fifteen business days after the receipt of the request, regardless of when the notice of extension is issued.

FOIA defines “unusual circumstances” as one or both of the following circumstances: the need to search for, collect, or appropriately examine or review a voluminous amount of separate and distinct public records pursuant to a single request; or the need to collect the requested public records from numerous field offices, facilities, or other establishments which are located apart from the particular office receiving or processing the request.

Denial of a Record

Written notice of a public body’s FOIA denial must be provided to the requestor within five days, or within fifteen days under unusual circumstances. A failure to respond within the time limits or provide no response also amounts to a denial.

What Must be Included in Denial Letter?

The public body must provide the requestor with a full explanation of the reasons for the denial and the requestor’s right to seek judicial review. The denial letter must also include notification of the right to receive attorneys’ fees and collect damages.

Appeal to Public Body

If a public body makes a final determination to deny all or part of a request, the requestor may submit to the head of the public body. Within ten days after receiving a written appeal, the head of a public body shall reverse the disclosure denial, issue a written notice to the requesting person upholding the disclosure denial, or reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part. Under unusual circumstances, an additional ten days may be taken.

Appeal to State Court

A requestor has the right to commence an action in circuit court to compel disclosure of public records that have been denied. An action must be filed within 180 days after a public body’s final determination to deny a request.

Penalties for Violation

Actual and compensatory damages are available to prevailing plaintiffs in FOIA litigation. Moreover, if the circuit court finds that the public body has arbitrarily and capriciously violated the FOIA statute by refusal or delay in disclosing or providing copies of a public record, it may award punitive damages of up to \$500 to the plaintiff.

Attorneys' Fees

Prevailing plaintiffs in FOIA litigation are statutorily entitled to reasonable attorneys' fees. If the plaintiff prevails only in part, he or she may not be entitled to an award. *Pro se* litigants are not entitled to attorneys' fee awards.

Whether Attorneys' Fees Are Usually Granted

Courts award attorneys' fees fairly consistently in FOIA cases where the plaintiff prevails and is not *pro se*.

General Areas Litigated Most Commonly and Typical Outcomes

Cases addressing whether records are disclosable under FOIA generally extend broad coverage to the statute's reach. In addition, exemptions to FOIA are construed narrowly by Michigan courts in most decisions.

The issue of whether to award punitive damages for FOIA violations has been considered by several courts. Generally, courts have held that in order to obtain punitive damages, a plaintiff must demonstrate that disclosure of information was the result of a court order and that defendant acted arbitrarily and capriciously in failing to timely comply with the disclosure request in a timely manner.

Ranking in 2007 National Study of 50 States' Freedom of Information Laws

In 2007, the nonpartisan, nonprofit organizations Better Government Association and National Freedom of Information Coalition conducted a 50-state study of FOIA responsiveness.

Three of the criteria—Response Time, Attorneys' Fees & Costs and Sanctions—were worth four points each.

Two of the criteria—Appeals and Expedited Process—were assigned a value of two points each.

Response Time, Attorneys' Fees & Costs and Sanctions were assigned a higher value because of their greater importance. These criteria determine how fast a requestor gets an initial answer, thus starting the process for an appeal if denied, and provide the necessary deterrent element to give public records laws meaning and vitality.

Appeals and Expedited Process, although important, were determined to be less critical in promoting open government access and thus assigned only a two-point value.

The following sets forth Michigan's rankings in this study, which may be found at www.bettergov.org/policy_foia_2008.html.

- For response time (analyzing response times, the process of appealing FOIA denials and expediency, and the means to give a case priority on a court's docket in front of other matters because of time concerns); **4 of 4**.
- For appeals (analyzing choice, cost and time); **2 of 2**.
- For expedited review (if a petitioner's appeal, in a court of law, would be expedited to the front of the docket so that it is heard immediately); **1 of 2**.
- For fees and costs ((1) whether the court is required to award attorneys' fees and court costs to the prevailing requestor; and (2) what sanctions, if any, the agency may be subject to for failing to comply with the law); **4 of 4**.
- For sanctions (whether there was a provision in the statute that levied penalties against an agency found by a court to be in violation of the statute); **1 of 4**.
- Percentage (compared to other 49 states); **75 of 100**.

GRADE: C

CASE IN POINT

As reported by *The Argus-Press*, a local newspaper in Central Michigan, the Shiawassee County Sheriff charged *The Argus-Press* an exorbitant amount of money for a one-page FOIA request denial, in violation of state law. *The Argus-Press* made a FOIA request for information regarding the Law Enforcement Information Network rights of a former police officer.

In the Sheriff's August 18, 2008 two-paragraph denial, he stated, "...internal labor issues are not subject to FOIA. I have no knowledge concerning the details of [the officer's] employment issues." The Sheriff sent *The Argus-Press* an invoice for \$10 for FOIA denial.

"He can't charge you for the response," Dawn Hertz, general council for the Michigan Press Association, accurately assessed. Indeed, a public body may charge only actual duplication, mailing and clerical labor costs for producing public records, not for issuing a denial letter. *The Argus-Press* did not pursue the matter but did try to reach the Sheriff for comment, to no avail.

The full story can be viewed here:

www.argus-press.com/articles/2008/08/25/news/news3.txt

Open Meetings Act

STRENGTHS

of Michigan's Open Meetings Act

The greatest strength of Michigan's OMA is its extensive coverage. As a Michigan appellate court held, the purpose of the OMA "is to promote openness and accountability in government; it is therefore to be interpreted broadly to accomplish this goal." *Booth Newspapers Inc. v. University of Michigan Board of Regents*, 192 Mich. App. 574, 580, 481 N.W.2d 778, 782 (Mich.Ct.App. 1992).

All meetings of public bodies are presumed to be open and subject to the provisions of the OMA, unless the meeting topic falls within a legally identified exemption. Mich. Comp. Laws § 15.268 Sec. 8. The OMA is interpreted liberally in favor of openness and closed-session exceptions are strictly construed. The Michigan Legislature clearly intended to advance government accountability and transparency by creating a strong open government law in the OMA.

The Michigan OMA has a comprehensive penalty scheme that allows individuals to be personally accountable for violating the statute. Individuals, the Attorney General and state prosecuting attorneys have standing to file complaints in the circuit court to compel compliance or to enjoin further noncompliance of public bodies. Violations of the OMA can subject a public body official to both civil and criminal penalties. Mich. Comp. Laws § 15.270 Sec. 10(1).

A public official who intentionally violates the OMA can be found personally liable in a civil action for actual and exemplary damages of not more than \$500 total. Mich. Comp. Laws § 15.273 Sec. 13(1). Moreover, a public official who intentionally violates OMA can be found guilty of a misdemeanor punishable by a fine of not more than \$1,000. In cases of a second intentional violation of

OMA within the same term, there is the possibility of a misdemeanor punishable by a fine of not more than \$2,000 and/or imprisonment for up to 1 year. Mich. Comp. Laws § 15.272 Sec. 12. The stringent penalty structure can act as a deterrent to violations.

In addition to a comprehensive penalty structure, mandatory attorneys' fees are an essential provision that promote government accountability. As such, Michigan's OMA provision that awards fees to a prevailing plaintiff significantly advances open government. Mich. Comp. Laws § 15.271 Sec. 4. Attorneys' fees provisions encourage the filing of lawsuits against offending public bodies. So long as a plaintiff has a valid case against a public body or official and prevails, he or she is statutorily entitled to attorneys' fees. Ohio and Wisconsin also mandate the awarding of attorneys' fees to prevailing plaintiffs.

A significant OMA provision that advances transparency is that Michigan's closed session exemption list *does not* include most employment or personnel matters. This is a substantial departure from other states surveyed in that the OMA requires public bodies to meet openly to discuss nearly all in-house issues concerning employees. Mich. Comp. Laws § 15.268 Sec. 8.

According to the OMA, unless a person subject to an evaluation, dismissal or suspension, disciplinary action, or complaint specifically asks for a closed session, such matters must be handled in an open public meeting. Mich. Comp. Laws § 15.268 Sec. 8(a). In addition, interviews for public employment generally must be open, although a meeting to review the specific contents of an application for employment may be conducted in closed session. *Booth*, 192 Mich. App. 574, 481 N.W.2d 778, 783 (1992).

Paired with the strict construction of closed session exemptions, the OMA's requirements on employment matters effectively make such matters fully public. Michigan has been criticized for not exempting employment matters from closed sessions, but its approach increases transparency tremendously in an area that is often important to the public.

Michigan is the only state surveyed that allows members of the public to comment at open government meetings. The OMA states that a person shall be permitted to address a meeting of a public body under rules established and recorded by the public body. The legislature or a house of the legislature may provide by rule that the right to address may be limited to prescribed times at hearings and committee meetings only. Mich. Comp. Laws § 15.268 Sec. 3(5).

This is a significant provision as it gives a statutory right to members of the public to actively participate in the government decision-making process rather than merely passively observe it. Allowing members of the public to give comment at government meetings advances the policy goal of OMA to promote public participation.

Finally, the Michigan Freedom of Information Committee is essential in promoting compliance with the OMA. As a non-profit organization, the Committee's multitude of educational and training resources provides significant capacity-building opportunities for the general public. Moreover, their government monitoring of, and advocacy for, sunshine legislation is essential to ensuring government accountability.

WEAKNESSES

of Michigan's Open Meetings Act

While Michigan's OMA is fairly strong in several areas, there are significant provisions in need of reform.

Michigan lacks a state resource to act as an intermediary in OMA disputes.

While Illinois, Ohio, Minnesota, and Wisconsin have state resources to mediate claims regarding OMA and FOIA claims, Michigan has none. The Committee plays a crucial role in filling this void and is tremendously valuable in referring citizens who seek to file a claim with an attorney who has expertise in the OMA.

The availability of a state mechanism to address OMA violations would advance the state's policy goals of promoting a transparent government while saving taxpayer dollars from needlessly being spent on litigation. Wisconsin has the State Programs, Administrative and Review division (SAR); Illinois has the Public Access Counselor; Ohio has the Auditor State Open Government Unit; and Minnesota has the Information Policy Analysis Division. While Wisconsin's SAR program is not exclusively focused on sunshine laws, and the resources from the other Midwestern states are not statutorily created, they are a notable public resource.

REFORM: Statutorily create an Open Government division in Michigan that includes investigative powers and enforcement capacity for violations of the FOIA and OMA.

The OMA, which has aggressive punitive measures, suffers from lack of effective enforcement.

While the statute has aggressive punitive measures for public officials who willfully violate the law, a review of case law indicates those measures are rarely implemented. Prosecuting attorneys throughout Michigan routinely fail to pursue criminal actions for OMA violations. Moreover, the courts never assess criminal penalties regardless of the egregious nature of the violation. The practical adverse effect is that any deterrence provided by the aggressive punitive structure currently within OMA is entirely nullified and rendered meaningless.

REFORM: Mandate implementation of punitive measures and annual OMA training for public officials. Additionally, require public officials to sign a certification form that they have completed the training.

Michigan OMA allows a public body to circumvent accountability by taking subsequent action to cure a violation.

The OMA allows a court to invalidate an improper final action based on a lawsuit by an individual, the Attorney General or a state prosecuting attorney.

During the course of litigation the public body may, without being deemed to make any admission contrary to its interest, take affirmative action to re-adopt the previously illegal action in compliance with OMA. The “re-do” vote is effective from the date of re-enactment and may not be declared invalid by

reason of the initial fault. The capacity of a public body to easily readopt a decision to moot a lawsuit claim allows a public body to circumvent accountability under the statute.

REFORM: Statutorily prohibit a public body from taking remedial action to moot legal claims filed against it for an OMA violation.

Michigan’s short deadline for filing an OMA lawsuit is a disincentive to the public to bring legal action and hold public bodies accountable.

Michigan has the most restrictive statutory deadlines in which to file an OMA civil claims. Minnesota has no time limits to file claims and Wisconsin and Ohio have a two-year statute of limitations. Illinois has a short 60-day statute of limitations.

Michigan, however, is even more restrictive. Michigan’s OMA states that the statute tolls within 60 days after the approved minutes are made available to the public by the public body. Mich. Comp. Laws §15.270 Sec. 10(3)(a). If the decision involves the approval of contracts, the receipt or acceptance of bids, the making of assessments, the procedures pertaining to the issuance of bonds or other evidences of indebtedness, or the submission of a borrowing proposal to the electors, the statute tolls a mere 30 days after the approved minutes are made available to the public. Mich. Comp. Laws §15.268 Sec. 10 (3)(b).

Lastly, Michigan law states that a public official who intentionally violates OMA can be subject to a suit within 180 days after the date of the violation that gives rise to the cause of action. Mich. Comp. Laws §15.273 Sec. 13(2).

Members of the public who identify an OMA violation can attempt to redress it through two options: organizing and speaking out to pressure public officials to address the indiscretion through a re-vote; or filing a complaint with the appropriate State’s Attorney or the Attorney General. However, pursuing these options does not suspend the statute of limitations, and places extraordinary pressure on an individual to quickly decide whether or not to pursue costly litigation.

REFORM: Extend the statute of limitations to two years.

SUMMARY OF LAW

of Michigan's Open Meetings Act

The following section provides a summary of the main components of the Michigan OMA. This summary provides an overview of the nuts and bolts of the OMA, including what types of meetings are covered by the law, the procedures for closed sessions, how to appeal a violation and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in OMA litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

Who is Covered Under the Law?

The purpose of the Michigan OMA is to strengthen the right of all Michigan citizens to know what goes on in government by requiring public bodies to conduct nearly all business at open meetings.

Public bodies include any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement.

Notably, the OMA provides that it shall supersede all local charter provisions, ordinances, or resolutions which relate to requirements for meetings of local public bodies to be open to the public.

The OMA includes specific exemptions for certain public bodies when they are deliberating on the merits of a case: Worker's Compensation Appeal Board; Employment Security Board of Review; State Tenure Commission; Michigan Public Service Commission; and an arbitrator or arbitration panel appointed by the Employment Relations Committee or selected under Michigan law.

Are Committees, Advisory Groups, Sub-Committees Covered?

Committees and subcommittees are covered by the OMA so long as they exercise governmental authority or perform a governmental function. No clear guidance establishes whether advisory groups are covered by the OMA. The Attorney General has issued an opinion that the OMA does not apply to committees and subcommittees of public bodies which are merely advisory or only capable of making recommendations concerning the exercise of governmental authority, but which are not legally capable of rendering a final decision. 1977-78 Op. Att'y Gen. 21, 40 (1977).

However state appellate courts have taken a broader view of advisory committees and held them subject to OMA coverage in certain cases. *Schmiedicke v. Clare Sch. Bd.*, 228 Mich. App. 259, 577 N.W. 2d 706 (1998) (school board's referral to a committee for a recommendation regarding method of evaluating administrators and length of their contracts was a delegation of authority to perform a public function and meetings are subject to OMA); *Morrison v. City of East Lansing*, 255 Mich. App. 505, 520, 660 N.W.2d 395 (where city council "effectively authorized" committee to perform a governmental function and the committee held public meetings to solicit public input, despite the fact that the committee was not capable of rendering a final decision, it was still a public body subject to OMA).

In sum, a case by case evaluation is required to determine the status of advisory groups under the OMA.

Types of Gatherings Covered

The OMA covers any meeting of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under the Home Rule City Act. "Meeting" also applies to information-gathering and fact-finding sessions called by the governmental body where a quorum of members are present and the session relates to the body's public business. However, the OMA specifically excludes a gathering that is "a social or chance gathering or conference not designed to avoid this act [OMA]." M.C.L.A. § 15.263(10).

The Attorney General stated in an opinion that the legislature included this exception so that members of a public body, despite constituting a quorum, could listen to the concerns of members of the public or persons with special knowledge in the presence of other interested persons. 1979-80 Op. Att'y Gen. 29 (1979).

Governmental bodies may hold meetings through written, telephonic, electronic, wireless, or other virtual means. However, an electronic meeting is still subject to the notice requirements described below and must be held at a designated place and time.

What Meetings Must Be Open?

Under the OMA, all meetings of a public body must be open to the public and held in a place available to the general public. All decisions made by a public body must be at a meeting open to the public and all deliberations of a quorum of the public body must take place at a meeting open to the public.

Importantly, the OMA explicitly provides the right to any member of the public to speak or comment during a meeting, subject to rules established by the public body for maintaining order. The OMA also specifically provides that “A person shall not be required as a condition of attendance at a meeting of a public body to register or otherwise provide his or her name or other information or otherwise to fulfill a condition precedent to attendance.” M.C.L.A. § 15.263(4).

Exceptions: Closed Meetings

There are several types of authorized closed meetings. A public body may close a meeting under any of the following conditions:

- (1) To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of a public officer, employee, staff member, or individual agent, if the named person requests a closed hearing. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered after the rescission only in open sessions.
- (2) To consider the dismissal, suspension, or disciplining of a student if the public body is part of the school district, intermediate school district, or institution of higher education that the student is attending, and if the student or the student’s parent or guardian requests a closed hearing.
- (3) For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing.
- (4) To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained.
- (5) To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body.
- (6) To review and consider the contents of an application for employment or appointment to a public office if the candidate requests that the application remain confidential. However, except as otherwise provided in this subdivision, all interviews by a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this act.
- (7) Partisan caucuses of members of the state legislature.

- (8) To consider material exempt from discussion or disclosure by state or federal statute.
- (9) For a compliance conference conducted by the Department of Commerce under section 16231 of the Public Health Code, Act No. 368 of the Public Acts of 1978, or Section 333.16231 of the Michigan Compiled Laws, before a complaint is issued.
- (10) In the process of searching for and selecting a president of an institution of higher education.

In practice, courts have upheld the “exempt-material” exemption to the OMA. This exemption provides that when a document is exempt from disclosure under the FOIA, the meeting or correspondence producing the document is also not subject to OMA. Section 8(h). The OMA authorizes closed sessions to discuss matters which are exempt from disclosure or discussion by a statute (such as the FOIA), or which are reasonably related thereto.

To advance the Legislature’s intent of promoting openness and accountability, the scope of the discussion in closed session must legitimately relate to legal matters, and not bargaining, economics, or other tangential non-legal matters.

Procedures for Closed Meetings

According to the OMA, a two-thirds roll call vote of public body members is required to call a closed session, except for the closed sessions permitted under OMA Sections 8(a), (b), (c), (g), (i), and (j). (Such closed sessions include the following: (a) to consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, a public officer, employee, staff member, or individual agent, if the named person requests a closed hearing; (b) to consider the dismissal, suspension, or disciplining of a student if the public body is part of the school district, intermediate school district, or institution of higher education that the student is attending, and if the student or the student’s parent or guardian requests a closed hearing; (c) for strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing; (g) partisan caucuses of members of the state legislature; and (i) for a compliance conference conducted by the Department of commerce under section 16231 of the Public Health Code, Act No. 368 of the Public Acts of 1978, or Section 333.16231 of the Michigan Compiled Laws, before a complaint is issued.)

The roll call vote and the purpose for calling the closed session must be entered into the minutes of the meeting at which the vote is taken. In addition, a separate set of minutes must be taken by the clerk or the designated secretary at the closed session. These minutes must be retained by the clerk, are not available to the public, and shall only be disclosed if required by an appropriate civil action.

Closed session minutes may be destroyed one year and one day after approval of the minutes of the regular meeting at which the closed session was approved.

Recordkeeping for Meetings: Minutes Requirements

Meeting minutes must be kept for government meetings showing the date, time, place, members present or absent, any decisions made, the purpose for which a closed session is held and all roll call votes taken. It is required that the public body make any corrections in the minutes at the next meeting after the meeting to which the minutes refer. Corrected minutes must be available at or before the next subsequent meeting.

Notably, the OMA establishes a set deadline for the publication of minutes. Proposed minutes must be made available for public inspection within eight business days after the meeting to which the minutes refer. Approved minutes must be available for public inspection within five business days after the meeting at which the minutes are approved by the public body. Michigan courts have allowed for many exceptions regarding the release of minutes.

Taping or Filming Meetings

Taping, recording, and filming meetings are allowed. Michigan courts have determined that a public body may reasonably regulate press coverage that involves television and other technologies, so the coverage does not disrupt the meeting.

Are Electronic Mail Communications a Meeting?

The statute is silent and no cases directly address whether electronic mail communications constitute a meeting.

Public Notice of Time and Place for Meetings: Requirements for Agendas

The OMA requires public bodies to publish notice of their regularly scheduled meetings within ten days of the first meeting in each calendar or fiscal year. The required notice must contain the dates, times, and places of the public body's regular meetings, as well as the name of the public body, its telephone number and its address. It is required that public bodies post this notice at their principal office and any other location deemed appropriate.

Public bodies may also hold "special" meetings for meetings not on the regular schedule. Such special meetings require the public body to post notice at least 18 hours prior to the meeting. In addition, a meeting recessed for more than 36 hours can be reconvened only after a public notice is posted which meets the requirements above.

Summary of Pivotal State Supreme Court OMA Decisions

Most relevant decisions in the Michigan courts have been issued in the appellate courts, as described below.

Regents of Univ. of Mich. v. Washtenaw County Coalition Against Apartheid, 97 Mich App 532, 296 N.W.2d 94 (Mich. Ct. App. 1980)

Procedure of University Board of Regents in recessing meeting that was disrupted by an association opposing racial policies of South Africa, followed by removal of the meeting to a new location and the announcement of new location and time of reconvening to all who were present at the original place, did not violate the OMA since the meeting was reconvened within 36 hours from commencement of the recess, and change of location occurring did not convert the meeting from “recess” to “rescheduled” such as would require 18 hours’ notice under the OMA.

Ridenour v Board of Education, 111 Mich. App. 798, 314 N.W. 2d 760 (1981)

Information may be discussed at a closed meeting if it is exempt from disclosure under the section of the FOIA permitting a public body to exempt from disclosure information of personal nature, where public disclosure of information would constitute a clearly unwarranted invasion of individual’s privacy.

Ryant v Cleveland Twp., 239 Mich. App. 430, 608 N.W.2d 101 (2000)

Meetings during which board members who are present do not exchange any affirmative or opposing views, debate an amendment or engage in any discussion are not “meetings” of a public body subject to the requirements of the OMA.

Stablein v Schuster, 183 Mich. App. 477, 455 N.W.2d 315 (1990)

There is no restriction of the “public and official proceedings” privilege to judicial proceedings.

St. Aubin v Ishpeming City Council, 197 Mich. App. 100 (1992)

Gatherings where decisions and public policy are made will not be deemed “chance gatherings,” and should always be open to the public. Chance gatherings are valid, but when decisions are rendered, it crosses the line of an unplanned meeting and must be open.

Enforcement

Civil and criminal penalties are available for OMA violations. The Attorney General, the county prosecuting attorney where the offending public body is located and individuals may enforce the OMA through court action. A civil action may be filed in the circuit court to compel compliance or to enjoin further noncompliance.

Final actions made in violation of OMA may be invalidated by a court. Litigation which seeks to invalidate a decision of a public body must be initiated within 60 days of the approved minutes, or within 30 days for decisions involving property, money, contracts or bond issuance.

Where the decision of a public body is challenged on the ground that it was not made in compliance with the requirements of the OMA, the public body may, without being deemed to make any admission contrary to its interest, re-adopt the decision in compliance with OMA. Decisions re-adopted in such a manner are effective from the date of re-enactment and may not be declared invalid by reason of the initial fault.

Penalties for Violation

The state may bring criminal penalties in an OMA matter. The following penalties may be assessed against public officials for OMA violations:

- *Damages* (§ 15.273): A public official who intentionally violates OMA shall be personally liable for actual and exemplary damages of not more than \$500 total in a civil action.
- *Fines* (§ 15.272): A public official who intentionally violates OMA is guilty of a misdemeanor or punishable by a fine of not more than \$1,000; a second intentional offense within the official's same term results in a misdemeanor punishable by a fine of not more than \$2,000, or imprisoned for not more than 1 year, or both.

In addition, the OMA provides for substantial fines against universities under certain conditions. If a university violates the OMA with respect to the process of selecting the institution's president at any time after the recommendation of final candidates to the governing board, the institution is responsible for a maximum civil fine of \$500,000, in addition to any other remedy under the OMA. Funds from the financial penalty are intended to pay for the travel and expenses of the members of the governing board.

Are Criminal Penalties Assessed Regularly?

Criminal penalties are generally not assessed for OMA violations.

Availability of Attorneys' Fees for OMA Litigation

Michigan's OMA allows for attorneys' fees and costs where the violation was intentional and the plaintiff's suit is successful. Attorneys' fees will not be awarded for pro se litigants. In addition, Michigan courts will typically not grant attorneys' fees unless injunctive or declaratory relief is granted.

An interesting distinction in Michigan's open government statutes is that while attorneys' fee awards under the state FOIA are discretionary, under OMA they are mandatory. M.C.L.A. § 15.240(4), 15.271(4).

Whether Attorneys' Fees Are Usually Granted

Michigan courts generally award attorneys' fees when declaratory or injunctive relief is granted. However, no consistent standards have been established for when attorneys' fees are appropriate.

General Areas Litigated Most Commonly and Typical Outcomes

What constitutes proper notice of meetings has been heavily litigated under the OMA. Michigan courts have held the following with respect to notice issues:

- A meeting held by a public body may be recessed for subcommittees to meet. Subcommittees do not have to issue notice for the meeting provided that no quorum is present, and the subcommittees does not discuss the same issue;
- When providing notice of a meeting, a public body must also provide notice of the items of business to be conducted at the meeting. Using the word "discuss" on the agenda does not preclude the committee from acting on an issue;
- The OMA only requires that a meeting be held in a place available to the general public; it does not dictate that the meeting be held within the geographical limits of the public body's jurisdiction. If a meeting is held so far from the public which it serves that it would be difficult or inconvenient for citizens residing in the area served by the public body to attend, the meeting could be considered as being held at a place unavailable to the general public. Whenever possible, the meeting should be held within the geographical boundaries served by the public body;
- A meeting that has been properly closed to the public can change locations (due to the attendance of an unwanted official) without reissuing notice provided that the reconvened session occurs within 36 hours; and
- New notice does not need to be provided when a closed meeting has to move locations as long as the reconvened meeting happens within 36 hours.

CASE IN POINT

As reported by the Clare Sentinel, within a period of 15 months, four public bodies located within Claire County clearly violated provisions of the OMA.

First, the Farwell school board voted on February 11, 2008 to meet in closed session to discuss a personnel issue. Second, the Clare County Board of Commissioners voted on January 16, 2008 to meet in closed session to discuss the sale of property near the local airport. Third, the Harrison school board voted on December 11, 2006, to meet in closed session to discuss the sale of the district's early childhood building. Fourth, the Clare City Commission voted on November 20, 2006 to meet in closed session to discuss the sale of the city's old library building.

The full story can be viewed at: www.clarecountyonline.com/?p=129.

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Minnesota's two open government laws have significant protections built into the statutes, including extremely strong penalty provisions to deter and punish violations. However, with regard to the Open Meetings Law (OML), notable omissions undermine its overall efficacy and the convoluted statutory scheme of the public records law makes it excessively complicated.

In 1979, the Minnesota General Assembly enacted the Minnesota Government Data Practices Act (MGDPA), which is Minnesota's public records law. MGDPA refers to public information as government data and is atypical among other Midwestern states' freedom of information-type laws due to its complicated approach to public records.

Within certain limitations, MGDPA allows anyone to inspect and obtain copies of all government data, *i.e.*, public records, prepared, possessed, used by, or in the control of any government entity, *i.e.*, public office. However, MGDPA is lengthy, tremendously detailed, and provides differentiated levels of access to government data based on different circumstances. For example, individuals who are the subject of government data requests have special rights and administrative procedures to protect their personal information from public disclosure.

The Minnesota OML, originally enacted in 1957, generally requires that meetings of governmental bodies be open to the public. The Minnesota Supreme Court has articulated the following three critical purposes of OML:

- To prohibit actions taken at a secret meeting where it is impossible for the public to become fully informed about a board's decisions or to detect improper influences;

- To assure the public’s right to be informed; and
- To afford the public an opportunity to present its views to the public body. *St. Cloud Newspapers, Inc. v. District 742 Community Schools*, 332 N.W.2d 1, 4 (Minn. 1983).

The OML promotes public participation in local government and gives citizens the right to observe government meetings, except in limited circumstances which are designed to protect the public interest or personal privacy concerns.

The MGDPA and OML have numerous strengths, described more fully below, but the most impressive aspect of Minnesota’s open government laws is the range of penalties available for violations. Minnesota’s public records law provides substantial civil and criminal penalties for violations. Additionally, the MGDPA was recently amended to increase monetary penalties to allow potential exemplary damages of \$1,000 to \$15,000 for willful violations.

While the OML lacks criminal penalties, the available civil fines for OML violations are remarkably high, permitting a \$300 fine for a single occurrence and reasonable costs, disbursements, and attorneys’ fees of up to \$13,000 in OML litigation. Severe penalties for open government violations operate as a deterrent. In addition, Minnesota has established a state office dedicated exclusively to educating both the public and elected officials on the state’s open government laws, namely Minnesota’s Information Policy Analysis Division.

While the goal of the Minnesota’s public records law is to balance openness in government with privacy interests of citizens who are subject to government data requests, reform is needed to improve the MGDPA’s overly complicated scheme. Further, the significant penalties established by the MGDPA and OML statutes need to be imposed on public bodies that violate the law. Penalties have to be imposed to have a meaningful effect and force public bodies to take open government laws seriously.

The following provides an analysis of the strengths and weaknesses of the Minnesota MGDPA and OML and a summary of the main components of the laws. Copies of model versions of both statutes as well as citizen guides are available by contacting the Citizen Advocacy Center.



ANALYSIS OF MINNESOTA'S

Government Data Practices Act

STRENGTHS

of Minnesota's Government Data Practices Act and Public Records Laws and Regulations

The MGDPA and the additional state laws that impact the disclosure of public records are lengthy and complicated. However, these laws also establish a flexible standard for differentiated levels of access to data for different circumstances. The different levels of access to government data allows for Minnesota's laws to balance the public's right to information, individuals' right to privacy, and the government's need to function responsibly. Furthermore, the MGDPA is strengthened by the legal guidance provided by the state Legislature in its regulations that interpret the MGDPA, set forth in the Minnesota Administrative Rules, Chapter 1205.

The MGDPA establishes a presumption that government data is public and accessible for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that declares certain data to not be public. Minn. Stat. § 13.01(3). In general, Minnesota courts have held that when specifically authorized by statute, disclosure of otherwise nonpublic data becomes permissible under MGDPA.

Individuals who are the subject of government data requests under MGDPA may take advantage of an administrative appeals process to protest disclosure of personal information and have the right to be informed of requests that include personal information.

Minnesota Administrative Rules, Section 1205.1600 sets forth the procedures by which an individual can appeal the release of government information that includes individual information based on a challenge to the accuracy and/or completeness of data about him or her. In order for an individual to attempt to circumvent disclosure of information, he or she must file a data challenge with the Responsible Authority.¹ Furthermore, the Responsible Authority must have failed to protect all of the data identified in the data challenge.

The administrative appeal option within MGDPA offers an opportunity to resolve disputes without costly litigation between a government entity responding to a public information disclosure request and an individual whose personal information is part of the request. In addition, public bodies must disclose to an individual when personal information is released. They must also disclose when there has been a security breach that results in a person obtaining government data without statutory authority or informed consent of an individual subject to a request. The disclosures by the public body must be made in the most expedient time possible.

Another significant strength of the MGDPA is its access to the courts for government data violations and robust enforcement of criminal and civil and penalty provisions. Any aggrieved person may enforce the MGDPA by filing a lawsuit seeking to compel compliance with the statute or obtain an injunction.

A plaintiff may be awarded compensation for the costs of the lawsuit and reasonable attorneys' fees. If a court issues an order to compel compliance by a public body, it may impose civil penalties up to \$1,000 payable to the state general fund and assess \$1,000 to \$15,000 for willful violations as exemplary damages.²

In addition, any person who willfully violates the MGDPA is guilty of a misdemeanor. A willful violation by any public employee constitutes just cause for suspension without pay or dismissal.

As with the concern for protecting the privacy of one who may be the subject of a public records request, the MGDPA explicitly protects individuals' anonymity in making public records requests. The law specifically states that a requestor need not identify himself or herself. In addition, no explanation for why public data is being requested is necessary, except for the sole purpose of facilitating data access.

¹ Under the regulations that interpret MGDPA, a "Responsible Authority" is the individual in a state agency, or statewide system, who is responsible for the entity's data by law or by the Commissioner of Administration. In a political subdivision, the Responsible Authority is the individual designated to be responsible for data by the local governing body.

² The 2008 Omnibus Data Practices Bill (Minnesota Session Laws 2008, Chapter 315) revised MGDPA to substantially increase penalties for MGDPA violations. Effective August 1, 2008, the maximum fine a court can assess if it finds a government entity did not comply with MGDPA more than tripled from \$300 to \$1,000 and the increase in the minimum award for exemplary damages for a willful violation rose from the range of \$100 to \$10,000 to \$1,000 to \$15,000.

Provisions that protect requestors' privacy rights eradicate the possibility of a government entity refusing to disclose information for fear of how the information is going to be used. It is also an incentive for those who are concerned about government retaliation to continue to use the MGDPA.

Minnesota has demonstrated an impressive commitment to the state's open government laws by establishing a state office dedicated exclusively to educating both the public and elected officials on the state's open government laws. Minnesota's Information Policy Analysis Division (IPAD) in the Minnesota Department of Administration is responsible for the following:

- Providing technical assistance and consultation
- Working with individuals, organizations, government entities, and the Legislature in drafting, proposing, and tracking legislation; assisting the Commissioner of Administration in performing duties under the open government laws
- Preparing explanatory publications to assist government entities in performing their duties and to assist individuals in actualizing their rights
- Preparing model forms, policies, and procedures to assist in compliance
- Consulting on complex legal, technical, and policy issues
- Consulting with the information technology community to ensure that information systems are developed that comply with data practices laws.

Although IPAD is not a statutorily created office and does not have the power to sanction government bodies that violate MGDPA, it is actively involved in advancing MGDPA compliance. IPAD provides free training seminars to instruct citizens and governments on their rights and obligations under open government laws. In addition, IPAD's comprehensive website contains significant open government resources.

Finally, the Minnesota Coalition of Government Information (Coalition) fills a crucial role in advancing state open government laws by providing comprehensive guidance on MGDPA and other public records laws.

The Coalition is a nonprofit organization committed to the promotion of public access to government information and transparency of government operations. It advances its goals by maintaining a website with numerous resources per-

taining to public records, posting a blog for discussion of issues about access to government information and operating a speaker's bureau to provide public presentations on access to government information.

In addition, the Coalition sponsors presentations by subject matter experts, promotes and supports open government research and collaborates with other organizations to enhance participation in the affairs of government, particularly with regard to public access to government information. The Coalition's website contains guides to open government laws, the public records statutes, legislative summaries, and links to various websites with additional resources. The Coalition is an invaluable resource for individuals and government entities seeking a better understanding of the often-bewildering public records laws in Minnesota.

WEAKNESSES

of Minnesota's Government Data Practices Act and Public Records Laws and Regulations

MGDPA and related public records laws are extraordinarily complicated and inherently confusing.

Unlike most states, which have one public records statute, Minnesota has dozens of data practices laws. In addition, there are numerous state regulations that serve the purpose of interpreting the various laws. The purpose of the various open records laws is to establish differentiated levels of access to government data for different people.

The overall composition of laws that govern disclosure of public information is tremendously complex in nature and is virtually impossible for the average citizen to decipher. While IPAD is a public resource to help navigate the complexity of the statutes, more resources, or a simplification of the law is needed.

Notably, the Attorney General's website is void of resources to assist individuals or government entities to understand the MGDPA. The site includes only a link to the MGDPA statute. While the state Legislature created the Minnesota Government Information Access Council for the purpose of improving public access to government information through the use of information technology, enacting legislation was repealed and the entity disbanded.

REFORM: Simplification of the statutes dealing with public access to government data is necessary in order to make public information accessible and usable to the public.

Uncertainty regarding which government agency, if any, is the appropriate entity to respond to requests undermines transparency and accountability.

Minnesota's convoluted public records law makes it difficult to determine which government agency may be the appropriate "Responsible Authority" to respond to a request under the MGDPA, or against whom to file a legal claim to enforce disclosure. Worse yet, individuals seeking to enforce the law may find that there is no proper authority to sue.

The ill-defined MGDPA inadvertently strips legal remedies from requestors. For example, in an unpublished decision, a district court denied a party's access to government data because it found that the respondent was not a Responsible Authority under MGDPA. *Feehan v. St. Mary's Point*, No. CX-02-1780, 2003 WL 21321691 (Minn. App. Jun. 10, 2003). As the record demonstrated in *Feehan*, there technically was no Responsible Authority appointed at the time the request was denied for a particular government entity. The court ruled that an outside party had been fulfilling the role of dispensing data. Since the plaintiff could not sue a non-responsible authority, there was no avenue available to redress MGDPA claim.

This glaring oversight could have been remedied if the plaintiff had been allowed to sue the government entity itself for failing to appoint a Responsible Authority, however MGDPA provides for no such recourse.

A similar problem emerges when a government employee gains access to government data while outside of his or her scope of employment. In such a case, neither the government nor the employee may be held responsible under the law for a violation of MGDPA. The government entity cannot be sued because the employee was acting outside of the scope of employment, and the employee cannot be sued because he or she is not a Responsible Authority under MGDPA.

REFORM: Require government entities to appoint a clear Responsible Authority for public information requests.

Requests for electronic records often lead to delays and confusion.

An additional weakness in MGDPA is that Responsible Authorities are often unable to comply with requests for electronic data. Government data is public regardless of format, so how information is stored should not affect its accessibility. However, reports indicate that agencies in Minnesota are starting to encounter problems responding to requests for large databases. Since many data programs were not designed with attention to MGDPA's disclosure requirements, or with broad accessibility as a goal, responses by government agencies are inconsistent.

For example, an agency may have to separate information from databases containing both public and non-public data pursuant to a request. However, separating data may involve complicated programming which might slow access. Time delays and confusion abound with respect to mass electronic data requests.

REFORM: Gradually increase technological capacity of government agencies subject to MGDPA to sort electronic records.

Allowing a Responsible Authority to recover attorneys' fees lessens MGDPA's effectiveness.

Another substantial weakness of MGDPA is its aggressive approach of permitting a Responsible Authority to recover attorneys' fees from a plaintiff in MGDPA litigation. The statute explicitly states that an individual seeking to enforce the MGDPA may be ordered to pay an award to the Responsible Authority. Attorneys' fees may be awarded by the court if it determines that an action brought is frivolous and without merit.

The Minnesota state Legislature’s decision to allow Responsible Authorities to assess attorneys’ fees and costs against plaintiffs creates a disincentive for individuals to bring legal action for MGDPA violations. Although courts have rarely awarded Responsible Authorities fees and costs under the law, there is a substantial chilling effect since members of the public do not have the requisite legal training to assess what constitutes a frivolous lawsuit.

REFORM: Remove provisions that allow a Responsible Authority to recover attorneys’ fees.

Vague provisions within MGDPA circumvent transparency and accountability.

The efficacy of the MGDPA is further undermined by the ambiguous nature of definitions and related requirements. For example, what constitutes “eligible parties” subject to the MGDPA is not well-established. Municipal corporations are typically outside of the MGDPA’s reach while third-party contractors are subject to coverage. Unlike government entities, third-party contractors may not have fully-established public records.

The law should clarify to what extent a contractor is expected to be directly responsible for providing public information and how it will protect nonpublic data. Minnesota courts usually require contractors to directly respond to requests for information rather than mandating sponsoring government entity to respond. As such, contractors need clarification as to which company documents are not considered government data. The MGDPA fails to provide clarity and guidance regarding this matter.

REFORM: Clarify within the MGDPA what constitutes an “eligible party”, its responsibilities, and what information is subject to disclosure.

SUMMARY OF THE LAW

of Minnesota's Government Data Practices Act and Public Records Laws and Regulations

The following section provides a summary of the main components of MGDPA and the state's various public records laws. This summary provides an overview of the nuts and bolts of MGDPA, including what records are covered, how to appeal a denial of records requests and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in MGDPA litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

This section first addresses the regulations that detail how to administer the procedures covered under MGDPA that pertain to data on individuals. The next section addresses MGDPA's standard procedures for government data.

INDIVIDUAL DATA

Who is Covered Under the Law?

The Minnesota Department of Administration Data Practices regulations detail how to administer the procedures covered under MGDPA, but only as they pertain to data on individuals. The regulations do *not* cover data on businesses or other entities that are not individuals (*i.e.*, nonpublic and protected nonpublic data). The regulations define to what extent information is made available to the public, while keeping other information confidential for the sake of efficient government operations.

This set of regulations only applies to data on individuals or to summary data. Coverage only extends to government entities or nonprofits in a contract with a state agency. Contractors' data generated independently of a state contract (such as personnel data) is exempt.

Who Can Access Data?

Public data may be seen by anyone, regardless of the nature of the person's interest in the data. Private data may be seen by the subject of the data, individuals with express written consent from the subject of the data, individuals within a recordkeeping entity whose work assignments reasonably require access and/or agencies authorized by statute or federal law.

Private data on minors may be seen by parents of the subject, unless there is a state law or court order to the contrary. Notably, parents can be denied access at the minor's request or by the Responsible Authority's statutory authority.

Fees for Public Records

Cost of labor and materials and mailing costs may be charged for standard public records requests. Special costs may be charged if copying involves a machine-based system (*e.g.*, microfilm). A government entity may establish a schedule of costs.

For summary data, reasonable costs of preparation, copying and mailing can be charged. The government entity can reduce the costs charged to the requestor if the summary data being prepared is also of value to the entity.

Appeals Process

As described more fully below in “Administrative Appeal,” under the MGDPA, an individual can appeal a Responsible Authority’s adverse decision to the Commissioner of Administration. The appeal must be made within 60 days of the Responsible Authority’s decision if the Responsible Authority informed the individual of his or her right to appeal in writing, otherwise the deadline is 180 days.

The notice must contain contact information for the appellant, the name of the Responsible Authority and entity, a description of the nature of the dispute and the data, and a description of the desired outcome. The Responsible Authority’s entity must reimburse the Department of Administration for any costs of appeal.

GOVERNMENT DATA

Who is Covered Under the Law?

The MGDPA governs the data practices of all government entities and government contractors in Minnesota, except for the judicial branch. It creates a presumption that all data is open to the public unless otherwise specified.

There are four types of classified data specified, and rules for defining how each data type changes classification or becomes public. This statute also explains the duties of the Commissioner and other Responsible Authorities for managing access to records and explains the rights of the public to access data, appeal denials, and be informed of breaches of security to their private data.

MGDPA does not address public records as “records;” it addresses such records as “data,” specifically, “government data,” which it defines as data collected, created, received, maintained or disseminated by any state agency, political subdivision, or statewide system regardless of its physical form, storage media or conditions of use.

Government entities include state agencies, record-keeping systems, political subdivisions, corporations or non-profits under contract, state university system and school districts, and any officer, board, or authority appointed for an agency or ordinance or any level of local government (counties, districts, charter cities, towns, etc.).

Types of Data

Data On Individuals: Data on individuals are defined as government data in which any individual is or can be identified as the subject of that data, unless the appearance of the name or other identifying data can be clearly demonstrated to be only incidental to the data and the data is not accessed by the name or other identifying data of any individual.

There are several classifications of data on individuals:

- *Public.* Public data is government data that may or may not identify an individual but is available to any member of the public for any reason, *e.g.*, names and salaries of agency employees.
- *Summary Data:* Summary data are statistical records and reports derived from data on individuals in which individuals are not identified and from which neither their identities nor any other characteristics that could uniquely identify individuals are ascertainable. Summary data are usually statistics compiled by the government agency about its programs or recipients. This data is public data unless classified as not-public by another statute, federal law or temporary classification.
- *Private.* This is data about individuals which can be disclosed only to the subject of the data or to government entities and employees whose work assignments reasonably require access to the data. For example, welfare system data about individuals is generally private, *e.g.*, names of persons who are receiving welfare benefits.
- *Confidential:* This is data about individuals that even the individuals themselves cannot be told, *e.g.*, information from an investigation regarding adoption records. Note that even if the confidential data itself cannot be disclosed to individuals, individuals do retain the right to know whether an agency is maintaining confidential data about them.

Data Not On Individuals: Data not on individuals are government data about non-individuals, such as organizations including partnerships, corporations, associations, etc.

- *Public.* This is data about non-individuals, such as businesses, which can be disclosed to anyone for any purpose, *e.g.*, names of vendors who have contracts with a government entity.

- *Private*: This is data about non-individuals which can be disclosed only to the subject of the data or to government entities and employees whose work assignments reasonably require access to the data, *e.g.*, certain financial information about businesses.
- *Protected Non-Public*: This is data about non-individuals, which is available only to government entities with a legal right to know it. For instance, a corporation being investigated for fraud would not have a right to the information being collected during the investigation.

Relevant Government Entities

“Commissioner” means the commissioner of the Department of Administration. A “Responsible Authority” is the individual in a state agency or statewide system who is made responsible for the entity’s data by law or by the Commissioner of Administration; in a political subdivision, he or she is the individual designated to be responsible for data by the local governing body. For the purposes of MGDPA, it is typically the Responsible Authority who is the relevant entity.

Form of Records

The data must be in a format and condition that is “easily accessible for convenient use.” Photographic, photostatic, and microfilm formats are automatically considered “accessible” and “convenient” regardless of size. An individual may request data that requires a customized search. If the requestor seeks a copy of the data, he or she may be charged for the costs of “searching for and retrieving” that data.

Special Provisions Regarding Electronic Mail

Electronic mail records are considered a public record, subject to the coverage of MGDPA.

Fees for Public Records

- *Inspection*: The government cannot charge a fee for inspecting data, except when providing for remote access that enhances the data or access at the person’s request.
- *Copying*: If 100 or fewer black-and-white pages are requested, then the fee will be no more than 25 cents per page and no actual costs may be charged. Otherwise, the fee may cover the actual costs of searching for, compiling, or electronically transmitting the data (including employee time under certain conditions, as discussed more fully below).
- *Staff Costs*: Actual costs may be charged in the discretion of the Responsible Authority if the request entails more than 100 pages of copies and the staff is required to retrieve documents, use certain materials (paper, copier ink, staples, diskettes, video or audio cassettes,

etc.), write or modify a computer program to format data, incur mailing costs, or incur vehicle costs directly involved in transporting data to the appropriate facility when necessary to provide copies.

- *Development Costs:* If the requested data has commercial value and is a “substantial and discrete portion” of work developed with significant public funds, then the copy fee can reflect actual development costs for the information. (The government must give a justification of such costs upon request).
- *Private Data:* In the case of copies of private data, a Responsible Authority’s ability to recover costs is very limited, including only actual reproduction costs associated only with making, certifying, compiling, and electronically transmitting or mailing the data.

MGDPA does not provide for fee waivers.

Public Records Open to Disclosure

Regardless of physical form, all information collected, created, received, maintained, or disseminated by the government. All government data are presumed public for inspection and copying unless there is federal law, state law, or temporary classification (see Minnesota Statutes, Section 13.06) making it not public.

Public Records Exempt From Disclosure

The following types of data are exempt from disclosure under MGDPA:

- *Private Data:* Data on individuals only accessible by individual (data becomes public only with subject’s consent or whichever is later—30 years after creation of data or 10 years after subject’s death); educational data; and welfare data. Example: court data for psychological evaluations.
- *Confidential Data:* Data on individuals only accessible by the government (data becomes public on whichever is later—30 years after creation of data or 10 years after subject’s death). Example: criminal investigation data.
- *Nonpublic Data:* Data on a business or other entity that is only accessible by the subject of the data (data becomes public only with subject’s consent or 10 years after creation/receipt of data, unless the government determines it against public interest). Example: inactive criminal investigation data.
- *Protected Nonpublic Data:* Data on a business or other entity that is only accessible by the government data becomes public ten years after creation/receipt of data (unless the government determines it against public interest). Example: criminal investigative data.

Changes in Classification of Non-Public Data

Changes in classification must take place by statute, by judicial or administrative rules of procedure, by physical transfer to the state archives or when the classified data is released to the public (because it is 10 years after subject's death, or 10 years after creation of data for business entities). The classification *at the time of the request* applies to the request. If non-public data is transferred between government entities, the classification stays the same for both entities. Note that a Responsible Authority can apply to the Commissioner of an agency for temporary classification of public data into non-public data until the legislature enacts a statute under a complicated set of procedures.

Breach of Security of Individuals' Data

When there is a reasonable belief that a person has obtained government data without statutory authority or informed consent of the data subject, the person must have the intent to use the data for governmental purposes. The state agency must give notice when a breach occurs and disclosure must be made in the most expedient time possible, without unreasonable delay. If more than 1,000 individuals are affected, the agency must notify all consumer reporting agencies without unreasonable delay.

Types of Notice: Written notice by first-class mail; electronic notice to each individual; substitute notice if breach affects 500,000 plus people or notice would cost over \$250,000 (substitute notice requires e-mail notice to all individuals affected, conspicuous posting on website, and notification to major media outlets).

Administrative Appeal for Individuals Who Are the Subject of Government Data

MGDPA contains an administrative appeals process for individuals who are the subject of government data, have made a data challenge with a government entity and that entity has not corrected all of the data identified in the data challenge. The state's administrative rules interpreting MGDPA establish the right to administratively appeal the Responsible Authority's determination on a person's challenge to the accuracy and/or completeness of data about that person. See Minnesota Administrative Rules, Section 1205.1600.

An individual may appeal an adverse determination of a Responsible Authority to the Commissioner of Administration. A notice of an appeal must be submitted to the Commissioner within a reasonable time of the determination made by the Responsible Authority, generally 180 days, unless the Responsible Authority has provided the individual with a written statement which informs the individual of the right to appeal the determination to the Commissioner within 60 days.

The appeal must be in writing and addressed to the Commissioner and include: the name, address, and phone number, if any, of the appealing party; the name of the Responsible Authority and the entity which he or she represents; a description of the nature of the dispute, including a description of the data; and a description of the desired result of the appeal. Upon written request of the data subject stating justifiable reasons, the appeal may be processed under the name of a pseudonym.

If the Commissioner determines that the appeal meets all of the requirements in the law, the appeal will be accepted. Informal resolution or mediation may be proposed by the Responsible Authority. If the dispute cannot be resolved informally, the Commissioner will in most instances order a hearing by an administrative law judge in the state Office of Administrative Hearings. The administrative law judge will hear the case and issue a recommendation to the Commissioner. The Commissioner will review the recommendation and issue an order about whether the data is accurate and/or complete. Both the appealing party and the Responsible Authority have the right to appeal the Commissioner of Administration’s order to the Minnesota Court of Appeals.

The Department of Administration shall be reimbursed for all costs associated with the contested case proceeding by the entity whose Responsible Authority has been the impetus for the individual’s appeal to the commissioner.

Deadline for Production of Public Records

MGDPA requests data must be complied with in an “appropriate and prompt manner” as “soon after that time [of the request] as possible.”

What Must be Included in Denial Letter?

The requestor has a right to be informed in writing by the Responsible Authority of the specific law or classification that justifies the denial.

Appeal to Commissioner of Administration

Note: the following two appeal categories apply to individuals denied access to government data *not* pertaining to themselves. Described earlier is the administrative remedy for challenging the Responsible Authority’s determination on a person’s challenge to the accuracy and/or completeness of data about that person.

An individual denied access to data by the Responsible Authority’s decision or the Responsible Authority itself may ask the Commissioner of Administration to issue an opinion with respect to the nature of the data sought. Such opinions are not binding on a public agency, but must be given deference by a court in a proceeding regarding the data. There is no time limit for requesting an opinion from the Commissioner of Administration.

If the Commissioner decides not to issue an opinion, he or she will provide a notice of that decision within 5 days of the receipt of the request. If the Commissioner issues an opinion, it must occur within 20 days of receipt of the request, however, the commissioner may “for good cause” extend this deadline for one additional 30-day period.

Appeal to State Court

A person denied access to government records pursuant to an MGDPA request may bring a lawsuit in the district court of the county where the records are kept or in any county for state agencies. The Responsible Authority may be sued, in addition to the particular agency. In an action seeking compliance with MGDPA, the statute states that “the matter shall be heard as soon as possible.” No statute of limitations is set forth in MGDPA for initiating a state court lawsuit.

Penalties for Violation

Criminal Penalties: Any person who willfully violates MGDPA is guilty of a misdemeanor. Willful violation of MGDPA by any public employee constitutes just cause for suspension without pay or dismissal of the public employee.

Civil Remedies: Any aggrieved person may enforce MGDPA by bringing a lawsuit seeking to compel compliance or obtain an injunction. An action to compel compliance must be heard “as soon as possible.” A person who wins a lawsuit alleging losses as a result of violation of MGDPA may be awarded compensation for the loss and for costs of the lawsuit and reasonable attorneys’ fees.

Penalties: If a court has to issue an order to compel compliance, then it may impose civil penalties up to \$1,000 payable to the state general fund (the court decides on the penalty based on to what extent the defendant complied with Minnesota Statutes, Chapter 13). Exemplary damages between \$1,000 to \$15,000 may be awarded for willful violations.

Burden of Proof: A subject must show that he or she suffered damages (which may include emotional distress). Damages must be a result of the violation.

Exemption from Civil or Criminal Liability: A person or government agency is immune from civil and criminal liability for releasing data that are not public, if the data are released pursuant to a court order.

Responsible Authority: If the court determines that an action brought under MGDPA is frivolous and without merit and a basis in fact, it may award reasonable costs and attorneys’ fees to the Responsible Authority.

Availability of Attorneys’ Fees for MGDPA Litigation

For an action for damages under MGDPA, a successful party may recover costs and reasonable attorneys’ fees from the Responsible Authority. A prevailing plaintiff must be awarded attorneys’ fees if there was a prior written opinion from the Commissioner directly relating to the cause of action, to which the Responsible Authority did not conform.

Whether Attorneys' Fees Are Usually Granted

Attorneys' fees are usually not granted under MGDPA. Some of the obstacles include the following: proving that a party is "aggrieved"; showing but-for causation between the violation and the harm; and, proving that there was any damage other than the wrong of the access itself. *Pro se* litigants may not recover attorneys' fees.

Main Areas of Litigation and Typical Outcomes Regarding Public Records Exempt From Disclosure

Courts have addressed what constitutes active investigative data under MGDPA, typically holding that ongoing investigative data collected in anticipation of a lawsuit is confidential. However, the courts have found that once the investigation is inactive, it becomes public. Further, even if derived from data available to the public, investigative reports generated can still be confidential, and if investigative data is turned over to the court, it must rely on court rules for protection, not MGDPA.

In most cases, the issue turns on whether an investigation is still pending, whether the data was actively collected or passively received, and whether the data was collected in the course of regular business or if it was collected specifically to prepare for litigation.

Whether educational data is disclosable under MGDPA has also been litigated regularly, with courts typically holding that drug use data is classified as "educational data," which is private, and cannot be disclosed to anyone without the student's permission.

Courts have further held that law enforcement data maintained separately and only used for law enforcement purposes is not educational data, even if it is kept at a school. In this line of cases, courts have determined that the main difference between educational data and law enforcement data is that educational data remains private while law enforcement data is confidential and will become public once an investigation is over.

General Areas Litigated Most Commonly and Typical Outcomes

Courts addressing scope of liability issues have found that there is no obligation to produce documents that are not proven to exist, no liability for public employees who violate the law outside of the scope of their employment, no liability for data that was not "collected" but passively received from a non-government entity, and no improper disclosure when data is already available in public court files (*e.g.*, from previous litigation).

Ranking in 2007 National Study of 50 States' Freedom of Information Laws

In 2007, the nonpartisan, nonprofit organizations Better Government Association and National Freedom of Information Coalition conducted a 50-state study of FOIA responsiveness.

Three of the criteria—Response Time, Attorneys' Fees & Costs and Sanctions—were worth four points each.

Two of the criteria—Appeals and Expedited Process—were assigned a value of two points each.

Response Time, Attorneys' Fees & Costs and Sanctions were assigned a higher value because of their greater importance. These criteria determine how fast a requestor gets an initial answer, thus starting the process for an appeal if denied, and provide the necessary deterrent element to give public records laws meaning and vitality.

Appeals and Expedited Process, although important, were determined to be less critical in promoting open government access and thus assigned only a two-point value.

The following sets forth Minnesota's rankings in this study, which may be found at www.bettergov.org/policy_foia_2008.html.

For response time (analyzing response times, the process of appealing records denials and expediency, and the means to give a case priority on a court's docket in front of other matters because of time concerns); **1 of 4**.

For appeals (analyzing choice, cost and time); **0.5 of 2**.

For expedited review (if a petitioner's appeal, in a court of law, would be expedited to the front of the docket so that it is heard immediately); **1 of 2**.

For fees and costs ((1) whether the court is required to award attorneys' fees and court costs to the prevailing requestor; and (2) what sanctions, if any, the agency may be subject to for failing to comply with the law); **2 of 4**.

For sanctions (whether there was a provision in the statute that levied penalties against an agency found by a court to be in violation of the statute); **4 of 4**.

Percentage (compared to other 49 states); **53 of 100**.

GRADE: F

CASE IN POINT

Governor Tim Pawlenty has developed a questionable record in filing and preserving records. Pawlenty's administration has cited a 40-year-old Minnesota Supreme Court decision to justify retaining only records of final decisions. E-mails and paperwork that cast light on how decisions are made are not included. Under that policy, for example, many of the e-mail exchanges regarding the Interstate 35W bridge collapse could have been destroyed if they had not been ordered preserved by the attorney general in anticipation of lawsuits.

While the public can always file a Data Practices Act request to the Governor's office for documents that it's still holding, that would not help someone trying to recover e-mails and other documents that the staff decided were never official records and destroyed.

"Our staff retains e-mails while they are useful and then they are deleted," wrote Pawlenty director of operations Paula Brown in an e-mail to the Star Tribune. When the Star Tribune sought e-mails and other correspondence from Pawlenty Chief of Staff Matt Kramer and Deputy Chief of Staff Bob Schroeder since August 1, 2007, the documents made available were largely limited to correspondence of the last two months. No correspondence about key legislative issues or budget negotiations was included, even though both Kramer and Schroeder played key roles in the talks.

Pawlenty's administration has taken a more limited view on what records to keep than former Minnesota Governors. Pawlenty has also called for the state public records law to be rewritten to provide that most of the personal information in government files, like driver license data, be confidential.

The entire story can be found at: www.startribune.com/politics/state/23659144.html?page=1&c=y

ANALYSIS OF MINNESOTA'S

Open Meetings Law

STRENGTHS

of Minnesota's Open Meetings Law

The Minnesota OML benefits from a strong presumption of coverage, which generally requires that meetings of governmental bodies be open to the public. The Minnesota Supreme Court has articulated three critical purposes of OML:

- (1) To prohibit actions taken at a secret meeting where it is impossible for the interested public to become fully informed about a public board's decisions or to detect improper influences;
- (2) To assure the public's right to be informed; and
- (3) to afford the public an opportunity to present its views to the public body. *Prior Lake American v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002) (citing *St. Cloud Newspapers, Inc. v. District 742 Community Schools*, 332 N.W.2d 1, 4 (Minn. 1983)).

In addition, while the term “public body” is not defined in the OML, the Minnesota Supreme Court has stated that “[i]n common understanding, ‘public body’ is possibly the broadest expression for the category of governmental entities that perform functions for the public benefit.” *Star Tribune Co. v. University of Minnesota Board of Regents*, 683 N.W.2d 274, 280 (Minn. 2004).

The OML also benefits from a tiered system for determining when to close public meetings. The statute mandates closed sessions for a limited range of subjects while permitting a public body to exercise discretion as to whether to close a meeting for other matters. The existence of different standards is an indication by the legislature that most public business can be discussed in the open.

This is especially significant in several instances. For example, employment matters are usually subject to mandatory closed sessions. However, there is no specific provision of the OML that would allow the public body itself, or a quorum, to close a meeting to interview a perspective employee.

In addition, the OML does not contain a mandatory exception for matters involving pending and imminent litigation. A government entity has the choice to close a session addressing a matter permitted by the attorney-client privilege, but it is not required to do so. Moreover, meetings where labor negotiations and certain property transactions are discussed may also, potentially, be open based on the government's discretion.

A significant strength of the OML is its stringent enforcement and penalty provisions. While only individuals can bring litigation to enforce the OML, the potential fines for OML violations are remarkably high. A person who intentionally violates the OML is subject to a civil penalty up to \$300 for a single occurrence, which cannot be paid by the public body. Minn. Stat. § 13D.06(1). In addition, an individual who intentionally violates the law in three or more legal actions involving the same governmental body forfeits the right to serve on that body for a time equal to the term the person was serving. Minn. Stat. § 13D.06(3)(a). Most significantly, the court may award reasonable costs, disbursements, and attorneys' fees of up to \$13,000 to any party in an OML action. Minn. Stat. § 13D.06(4)(a).

While courts rarely impose high costs and fees against a government entity defendant, the possibility of such an award provides a serious incentive to government bodies and their members to comply fully with the law. Moreover, there are no time limits to file a lawsuit in state court. This allows members of the public to bring an OML action when they learn of such a violation regardless of the length of time.

Coverage of the OML regarding public bodies is especially strong. Although "public body" is not explicitly defined, the Minnesota Supreme Court has stated that "[i]n common understanding, 'public body' is possibly the broadest expression for the category of governmental entities that perform functions for the public benefit." *Star Tribune Co. v. University of Minnesota Board of Regents*, 683 N.W.2d 274, 280 (Minn. 2004).

The list of groups and entities covered by the OML does not include nonprofit corporations created by a governmental entity, but the OML has explicitly extended coverage to nonprofit corporations under certain conditions. A 1986 Minnesota Attorney General opinion stated that the OML did not apply to nonprofit corporations created by political subdivisions. Minn. Op. Att’y Gen. 92a-30, (Jan. 29, 1986). In 1999 the Legislature established a taskforce to recommend legislation governing corporations created by political subdivisions. The resulting 2000 legislation addressed the issue of application, stating that the law applied and a nonprofit corporation created by a political subdivision cannot be exempted from it. See Minn. Stat. § 465.719(9). Statutorily mandated OML coverage of nonprofit corporations increases transparency and accountability in Minnesota.

As with enforcement of MGDPA, Minnesota’s Information Policy Analysis Division (IPAD)³ provides technical assistance and resources to the public and governmental entities to ensure maximum compliance. The IPAD tracks OML issues and legislation and is proactively involved in advancing government accountability and transparency. Additionally, the Minnesota Coalition for Government Information plays an essential role in ensuring government compliance with OML. Their educational resources and trainings are geared to build the capacity of the public to effectively utilize OML to maximize public participation in the democratic process.

³ www.ipad.state.mn.us

WEAKNESSES

of Minnesota's Open Meetings Law

Weak notice and vague meeting requirements circumvent transparency.

The minimal agenda requirements for public meetings provide little notice to the public as to what public business is going to be discussed and what votes regarding public items shall take place. Agendas are not required to include proposed final actions, property transactions, or specific business items to be discussed. The OML however does require that if printed materials relating to an agenda item(s) are prepared by or at the direction of the governing body, and are distributed or available to public officials, one copy of these same materials must be available in the meeting room for inspection by the public. Minn. Stat. § 13D.01(6)(a).

The failure of the OML to require specific agendas severely undercuts government transparency and impedes the ability of concerned individuals and citizen groups to address issues of public concern.

Further, the OML does not specifically require that minutes of public meetings be taken. All that is required is a record of mere vote tallies for actions taken during a public meeting. The record must be kept in a journal that is open to the public during normal business hours. If a vote involves the appropriation of money, the roll call vote of each member must be recorded.

The OML's bare bones minutes requirement similarly impedes government transparency as documentation of policy discussions is not required. Paired with the scant agenda requirement, the OML fails to inform individuals of what to expect from meetings, or what has occurred at them in a meaningful manner.

REFORM: Require agenda notice provisions that reasonably inform the public of proposed meeting activity and mandate detailed minutes that provide the public with enough information to be reasonably apprised of substantive issues discussed.

The tiered closed session provision, while a strength, also acts as a weakness.

While Minnesota’s two-tiered system for closed meetings provides public bodies with some flexibility regarding entering closed sessions, but also mandates closed meetings for various subjects without exception. Government entities have no discretion to make meetings public in cases involving certain disciplinary hearings and educational data, health data, medical data, welfare data, or mental health data that are not public data, among other areas. In addition, public bodies have no incentive to avoid making final decisions in improperly closed meetings.

Except for labor regulation, the OML is silent on invalidating final actions taken at a closed session that was illegally closed. The Minnesota Supreme Court has addressed the issue and ruled that courts cannot void the decisions made at meetings that were improperly closed. *Sullivan v. Credit River Township*, 299 Minn. 170, 176-177, 217 N.W.2d 502, 507 (Minn. 1974). The lack of recourse to invalidate a decision made under illegal circumstances violates good open government principles and strips power from the public in Minnesota.

REFORM: Revise the OML to mandate the invalidation of a vote made during an improperly closed meeting.

The recovery of attorneys’ fees from individuals who file OML lawsuits against public bodies has a chilling effect.

As with MGDPA, if a court determines that a citizen’s OML suit is frivolous and without merit, the court may award to the public body court costs and reasonable attorneys’ fees to the public body. This provision has a severe chilling effect on the public and is inconsistent with the statute’s emphasis on accessibility. Even if courts rarely award public bodies fees and costs, the possibility of high legal costs is a disincentive to individuals holding public bodies accountable.

REFORM: Remove the defendant attorneys' fee provision from the statute.

The OML is devoid of references to technology.

Notably, the OML is silent regarding electronic communications and whether a series of electronic mail communications among several public officials at one time constitutes a meeting. To date, no court has directly addressed this issue. Considering the significant degree to which technology is impacting the business of governing, it is crucial for electronic communications to be explicitly covered in the statute. Further, the OML does not address whether meetings may be taped or filmed.

While the Attorney General has opined that an individual may tape a meeting as long as the taping does not have a significantly adverse effect on the order of the proceedings or impinge on constitutionally protected rights (Minn. Op. Atty.Gen., 63a-5, Dec. 4, 1972), the OML provides no statutory protection of the public's right to record meetings.

REFORM: Specifically prohibit electronic quorums and mandate the public's right to document public meetings.

SUMMARY OF THE LAW

of Minnesota's Open Meetings Law

The following section provides a summary of the main components of the Minnesota OML. This summary provides an overview of the nuts and bolts of the OML, including what types of meetings are covered by the law, the procedures for closed sessions, how to appeal a violation and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in OML litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

Who is Covered Under the Law?

The OML applies to any public body, which includes a state agency, board, commission, or department when it is required or permitted by law to transact public business in a meeting, the governing body of any school district, unorganized territory, county, city, town, or other public body, and a committee, subcommittee, board, department, or commission of a public body subject to the law.

Although "public body" is not explicitly defined in the statute, the Minnesota Supreme Court has stated that "[i]n common understanding, 'public body' is possibly the broadest expression for the category of governmental entities that perform functions for the public benefit." *Star Tribune Co. v. University of Minnesota Board of Regents*, 683 N.W.2d 274, 280 (Minn. 2004).

An amendment to the OML in 2000 established that corporations created by political subdivisions are subject to OML's coverage.

Are Committees, Advisory Groups, Sub-Committees Covered?

Yes. Committees and sub-committees are covered by the law. There is no reference in the OML to advisory groups, but courts have held that they might consider an advisory committee to be a committee of the governing body depending on the number of members of the governing body involved and on the form of the delegation of authority from the governing body to the members. Whether advisory bodies are subject to the OML depends on a fact-specific, case-by-case basis.

Types of Gatherings Covered

The OML covers gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee board, department or commission at which members discuss, decide or receive information as a group on issues relating to the official business of that governing body.

The Minnesota Supreme Court held that “chance or social gatherings” are not subject to the OML even if a quorum is present. *St. Cloud Newspapers Inc. v. District 742 Community Schools*, 332 N.W.2d 1, 6 (Minn. 1983).

What Meetings Must Be Open?

Any meeting that includes a majority of a quorum of the members of a public body must be open if it is held for the purpose of discussing public business.

Meetings may be held by interactive television if the following specified conditions are met to ensure openness and accessibility for attendees:

- (1) all members of the body participating in the meeting, wherever their physical location, can hear and see one another and can hear and see all discussion and testimony presented at any location at which at least one member is present;
- (2) members of the public present at the regular meeting location of the body can hear and see all discussion and testimony and all votes of members of the body;
- (3) at least one member of the body is physically present at the regular meeting location; and
- (4) each location at which a member of the body is present is open and accessible to the public.

The OML provides that each member of the public body who participates in an interactive meeting is considered present for determining a quorum and participation. Minn. Stat. § 13D.02(2).

The OML specifies that various government entities specified in the statute have broader authority to hold meetings by telephone conference call or other electronic means.

Exceptions: Closed Meetings

The OML does not explicitly define a closed meeting. It defines the subject matter of the meetings that are exempt from the provisions of the OML. A two-tiered system exists for mandatory versus discretionary closure of meetings. Any portion of a meeting must be closed if expressly required by other law or if the following types of data (*i.e.*, records) are discussed:

- (1) data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minors or vulnerable adults;

- (2) active investigative data as defined in Minnesota Statutes, Section 13.82(7) or internal affairs data relating to allegations of law enforcement personnel misconduct collected or created by a state agency, statewide system, or political subdivision;
- (3) educational data, health data, medical data, welfare data, or mental health data that are not public data under Minnesota Statutes, Sections 13.32, 13.3805(1), 13.384, 13.46(2) or 13.46(7); and
- (4) an individual's medical records governed by Minnesota Statutes, Sections 144.291 to 144.298.

In addition, a public body must close one or more meetings for preliminary consideration of allegations or charges against an individual subject to its authority. If the members conclude that discipline of any nature may be warranted as a result of those specific charges or allegations, further meetings or hearings relating to those specific charges or allegations held after that conclusion is reached must be open. Further, the OML does not apply to any state agency, board, or commission when exercising quasi-judicial functions involving disciplinary hearings.

A meeting *may* be closed under the following conditions:

- If disclosure of the information discussed would pose a danger to public safety or compromise security procedures or responses;
- To discuss strategy and proposals for labor negotiations conducted under the Public Employment Labor Relations Act;
- To evaluate the performance of an individual who is subject to its authority, so long as the public body identifies the individual to be evaluated prior to closing a meeting and at its next open meeting, the public body summarizes its conclusions regarding the evaluation;
- If the closure is expressly authorized by statute or permitted by the attorney-client privilege; to determine the asking price for real or personal property to be sold by the government entity;
- To review confidential or nonpublic appraisal data under Minnesota Statutes, Section 13.44(3); and
- To develop or consider offers or counteroffers for the purchase or sale of real or personal property.

The 2008 Omnibus Data Practices Bill (Minnesota Session Laws 2008, Chapter 315) revised the OMA to require that all closed meetings of a public body be electronically recorded at the expense of the public body (except those meetings closed as permitted by the attorney-client privilege). The revised law mandates that these recordings must be preserved for at least three years, unless otherwise provided by law.

Procedures for Closed Meetings

Generally, before closing a meeting, a public body must state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed. Special provisions apply to certain closing meetings, as follows:

- To discuss labor negotiations, the time and place of the closed meeting must be announced at a public meeting;
- If the meeting to be closed is regular, special or emergency, the public body must follow the notice provisions that apply to the particular type of meeting to be closed; and
- And if a public body proposes to close a meeting to evaluate the performance of an individual subject to its authority, it must identify the individual at an open meeting, prior to closing the meeting.

Public Notice of Time and Place for Meetings: Requirements for Agendas

The OML establishes the following notice and agenda requirements:

Regular Meetings:

Public bodies must keep schedules of regular meetings on file at their offices.

If a person receives actual notice of meeting of a public body at least 24 hours before the meeting, all notice requirements of the OML are satisfied with respect to that person regardless of the method of receiving notice.

A schedule of the regular meetings is on file in the City Clerk's office and available to City staff and the public. If there is a deviation in the meeting time or place, notice must be provided as required for a special meeting.

Special Meetings:

The public body must give three days' written notice of the date, time, place and purpose of a special meeting. The notice of a special meeting shall include the "purpose of the meeting" and be posted on the principal bulletin board of the public body, or if the public body has no principal bulletin board, on the door of its usual meeting room.

In addition to posting the notice, the public body must mail or deliver a copy of the notice to each person who has filed a written request for notice of special meetings with the public body.

Emergency Meetings:

There is no time limit for giving notice of an emergency meeting, though the statute provides that notice must be given "as soon as reasonably practicable after notice has been given to the members."

Closed Meetings:

Notably, the OML requires public bodies to comply with the notice provisions listed above for all meetings for closed meetings.

The Minnesota Supreme Court has held that the OML must be construed to require "adequate" notice to the public. *Sullivan v. Credit River Township*, 299 Minn. 170, 174, 217 N.W.2d 502, 506 (1974). The Court has further stated that conducting business before the time publicly announced for the meeting constitutes an OML violation. *Merz v. Leitch*, 342 N.W.2d 141 (Minn. 1984).

The OML fails to specify agenda requirements for meetings covered by the statute. If printed materials relating to agenda items are prepared by or at the direction of the governing body, and are distributed or available to those members, one copy of these same materials must be available in the meeting room for inspection by the public.

Recordkeeping for Meetings: Minutes Requirements

The OML does not specifically require that minutes be taken of events occurring at a regular meeting. The only statutory requirement is that votes taken at a meeting required to be public will be recorded in a journal kept for that purpose, which must be open to the public during normal business hours. The vote of each member must be recorded on appropriations of money, except for payments of judgments and claims and amounts fixed by statute.

Taping or Filming Meetings

The OML is silent regarding whether meetings may be taped or filmed. However, the Attorney General has opined that an individual may tape a meeting as long as the taping does not have a significantly adverse effect on the order of the proceedings or impinge on constitutionally protected rights. Minn. Op.Atty.Gen., 63a-5, Dec. 4, 1972.

Are Electronic Mail Communications a Meeting?

OML is silent regarding whether electronic mail communications constitute meetings, and no court decision directly addresses this issue.

Summary of Pivotal State Supreme Court OML Decisions

Previously, the Minnesota Supreme Court held that parties could seek an order rendering the decision taken at a wrongfully closed meeting invalidated. *Quast v. Knutson*, 276 Minn. 340, 150 N.W.2d 199 (1968). After the state legislature amended the OML to include civil penalties, the Supreme Court concluded that invalidation was not available. *Sullivan v. Credit River Township*, 217 N.W.2d 502 (Minn. 1974).

Opinion by the Commissioner of Administration

Both public bodies subject to the OML and individuals may seek advice on the application of the law and compliance guidance from the Commissioner of Administration. A governing body or person requesting an opinion of the Commissioner of Administration must pay a \$200 fee if the commissioner decides, within his or her discretion, to issue an opinion. There is no time limit for requesting an opinion from the Commissioner of Administration.

If the Commissioner decides not to issue an opinion, he or she will provide a notice of that decision within 5 days of the receipt of the request. If the Commissioner issues an opinion, it must occur within 20 days of receipt of the request, however, the commissioner may “for good cause” extend this deadline for one additional 30-day period.

Opinions of the Commissioner of Administration are not binding, but a 2008 amendment to OMA has established that a court is now required to give the opinions deference. A governing body that conforms to an opinion is not liable for fines, attorneys’ fees or any other penalty, or forfeiture of office.

Enforcement

The appropriate mechanism to enforce the OML is to bring an action in district court seeking injunctive relief or damages. There are no time limits on bringing a lawsuit in state court. Notably, the Minnesota Supreme Court has held that courts cannot void the decisions made at meetings that were improperly closed. *Sullivan v. Credit River Township*, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (Minn. 1974).

Penalties for Violation

A person who intentionally violates the OML is subject to a civil penalty up to \$300 for a single occurrence, which cannot be paid by the public body. An individual who intentionally violates the law in three or more legal actions involving the same governmental body forfeits the right to serve on that body for a time equal to the term the person was serving.

Are Criminal Penalties Assessed Regularly?

Criminal penalties are not available in OML cases.

Availability of Attorneys' Fees for OML Litigation

The court may award reasonable costs, disbursements, and attorneys' fees of up to \$13,000 to any party in an OML action. Attorneys' fees may not be awarded against a member of the public body unless the court finds there was an intent to violate the law. The court may also award costs and attorneys' fees to a defendant, but it must find the action was frivolous and without merit.

Pursuant to 2008 amendments to the OML, a court now may award monetary penalties or attorneys' fees when it finds "an intent to violate" the statute as opposed to "a specific intent" to violate the statute. Additionally, the court must award reasonable attorneys' fees to a prevailing plaintiff if defendant public body was the subject of a Commissioner of Administration advisory opinion (*i.e.*, the court must give deference to the advisory opinion).

Whether Attorneys' Fees Are Usually Granted

Attorneys' fees are usually granted to prevailing plaintiffs.

General Areas Litigated Most Commonly and Typical Outcomes

Minnesota courts have frequently ruled on whether closed sessions were properly convened under the OML. In particular, closing meetings to discuss threatened or pending litigation has engendered substantial litigation. The Minnesota Supreme Court rejected the argument that there should be a *per se* exception to the OML when there is threatened or pending litigation and established a balancing test that must be employed to analyze whether the exception applies. *Prior Lake American v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002) (threat of a lawsuit if a city council decision did not support a request did not warrant closing a meeting).

The Supreme Court in *Prior Lake* found that the attorney-client privilege exception only applies when the purposes for the exception outweigh the purposes of the OML. An appellate court following the *Prior Lake* ruling however held that the need for absolute confidentiality, when balanced against purposes of state open-meeting law, justified the closing of the city council's meeting with counsel retained by its insurer, under the OML's attorney-client privilege exception. *Brainerd Daily Dispatch v. Deben*, 693 N.W.2d 435 (Minn.App. 2005).

CASE IN POINT

County officials in Blue Earth County and city officials in Eagle Lake and Mankato have been reported to be walking a thin line regarding conducting public issues over private e-mail. In Eagle Lake, a former city administrator resigned because the City Council discussed public items over e-mail and did not take the matter seriously after they were told that doing so was probably a violation of the OML. The former city administrator brought forth paper copies of e-mails that show council members discussing an upcoming housing project.

Mayor Tim Auringer sent an e-mail to at least three council members describing the project and giving his opinion about it. Another councilman replied with a few questions. Smith reported the matter to the city attorney who found there appeared to be a violation of the OML. The former city administrator claims the city officials disregarded and ignored his protests.

Although the law is unclear about how electronic communications relate to the requirement of transparency under the OML, the state's information Policy Analysis Division has stated that it would be likely that a court would analyze use of e-mail in the same way as it has telephone conversations and letters. One on one meetings between public officials, known as serial meetings, are illegal in under the OML. E-mails and letters can be used to conduct business concerning public issues and build a consensus outside of the public's eye, the sort of activity that the OML is seeking to eliminate.

The entire story can be found at:

www.mankatofreepress.com/local/local_story_357191117.html?start:int=15

OH

OHIO

OH

OHIO

In recent years, Ohio has made significant efforts to improve its open government laws, which have been considered weak in many regards. In 1963, the Ohio General Assembly enacted the Ohio Public Records Law (OPRL), which codified a rich common law history. The Ohio Supreme Court explicitly stated of the OPRL, “public records are the people’s records, and officials in whose custody they happen to be are merely trustees for the people.” *State ex rel. Warren Newspapers Inc. v. Hutson*, 70 Ohio St. 3d 619, 640 N.E.2d 174 (1994). Within specified limitations, the OPRL allows anyone to inspect and obtain copies of all public records prepared, possessed, used by, or in the control of any public office.

In 1975, the Ohio General Assembly enacted the Ohio Open Meetings Act (OMA). Ohio Revised Code § 121.22 establishes that, “This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically exempted by law.” Ohio courts have generally read this provision as a presumption in favor of finding bodies to be “public,” and therefore covered by OMA.

While there are several strengths of Ohio’s open government laws additional reforms are necessary to promote transparent, accountable, and accessible government. Regarding the OPRL, Ohio is one of three Midwestern states that lacks firm deadlines in mandating responses to request for information and does not have an administrative appeals process to dispute denied requests for public records. Additionally, while Ohio has significant penalties for non-compliance with the OPRL, they are rarely imposed.

With respect to the OPRL, the strong statutory language mandating openness is circumvented by court rulings that home rule charters of municipalities can prevail over the OMA due to provisions within the Ohio Constitution. Moreover, Ohio is one of two states among those surveyed that limits the ability to sue to individuals and allows a public body to recover attorney fees for frivolous OMA suits filed by a plaintiff.

The above-mentioned weaknesses are significant statutory restrictions within the OPRL. Furthermore, the home rule provision within the OPRL is particularly egregious and the lack of fine and penalty implementation allows non-compliant public bodies to ignore laws that provide for public access to government and government decision-making.

The following provides an analysis of the strengths and weaknesses of Ohio's open government laws and a summary of each law's main components. Copies of model versions of both statutes as well as citizen guides are available by contacting the Citizen Advocacy Center.



ANALYSIS OF OHIO'S

Public Records Law

STRENGTHS

of Ohio's Public Records Law

The OPRL benefits from a strong presumption of coverage. Ohio courts have interpreted statutory exemptions strictly and have refused to expand them beyond what is specifically enumerated. Most importantly, penalties for violating the OPRL are substantial and can serve as a serious deterrent to violating the law if applied.

Statutory damages are fixed at \$100 per business day during which the public office fails to comply with a proper request, beginning the day the requestor files a mandamus action. The statutory damages are capped at \$1,000 and are assessed against the public office. However, damages may be reduced or eliminated by a court if it determines the denial by the public body was made in good faith. *State ex rel. Fox v. Cuyaboga County Hospital System*, 39 Ohio St. 3d 108, 111-12, 529 N.E.2d 443, 446-47 (Ohio 1988).

Ohio courts have provided requestors further protection by establishing that a public office cannot avoid statutory penalties by producing requested records only after a lawsuit has been filed to force compliance. *Specht v. Finnega*, 149 Ohio App. 3d 201, 206-07, 776 N.E.2d 564, 569 (Ohio App. 6 Dist. 2002). This is a significant aspect of the statute.

Of the five Midwestern states, Ohio is the only one that specifically prohibits the mooted of a legal claim filed in court by a mere production of records prior to a judgment. While in other states, a lawsuit may immediately end without any penalty to the public office for forcing a requestor to file suit, the OPRL mandates accountability.

Recent amendments have significantly strengthened the OPRL. Under 2007 legislative amendments, every elected official (or his or her appropriate designee) must receive three hours of training regarding the OPRL during every term of office. Ohio Rev. Code § 149.43(E)(1) (2008). Ohio is the only Midwestern state surveyed that mandates open government training. The goal of mandatory training is to ensure that at least one employee of each public office is appropriately educated about the official's obligations under the law.

Notably, the new law requires that the Attorney General develop, provide and certify free training programs and seminars that focus on the duty of public offices to provide access to public records. *Id.* Mandating OPRL training ensures accountability and advances open government in Ohio.

The OPRL also provides leniency in the request process to encourage public access to government documents. While a public office may deny a request that is ambiguous or excessively broad, it must inform the requestor of his or her opportunity to revise the request by indicating the following:

- (1) the manner in which the records are maintained by the public office; and
- (2) how the records are accessed in the ordinary course of the public offices' or persons' duties. Ohio Rev. Code § 149.43(B)(2) (2008).

This recent legislative amendment is a user-friendly provision that ensures public offices do not deny the release of legitimate public records simply because the requesting person does not have a sophisticated knowledge of how the records are kept.

While the OPRL does not mandate specific deadlines in which to comply with the production of records, the statute requires swift compliance by public offices, stating that records must be "promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." Ohio Rev. Code § 149.43(B)(1) (2008).

Notably, the Ohio Coalition for Open Government conducted a statewide audit in 2004 for basic records. The Ohio Coalition for Open Government results indicated that records were produced the same day in 50.1% instances and produced the next day in 2.6% instances, while only 10.2% of public offices were too busy to produce same-day results and nearly the rest of the requests were partially granted or denied.¹

Ohio specifically protects the privacy of a requestor and the purpose of the request. The OPRL is one of the few states that explicitly indicate that a requestor need not identify him or herself, nor identify the purpose for requesting information. Ohio Rev. Code § 149.43(B)(4) (2008). These provisions protect requestors' privacy rights and reduce the possibility of a public office refusing to disclose information based on how the information will be used. They also shield a requestor from potential retaliation by a public body.

Lastly, Ohio has demonstrated an impressive commitment to open government law by establishing an office dedicated exclusively to educating the public and elected officials on Ohio's sunshine laws. Created in 2003, the Ohio Auditor of State's Open Government Unit (OGU) seeks to educate public and private entities about the intricacies of the Ohio PRL and Ohio Open Meetings Act.² Although the OGU is not a statutorily created office and does not have the power to sanction government bodies that violate the OPRL, it is actively involved in advancing governmental compliance. The OGU provides free training seminars to instruct citizens and governments on their rights and obligations under open government laws.

In addition, OGU's comprehensive website contains significant open government resources, including the Open Government Resource Manual, case updates, statutory text, and even pending legislation impacting open government laws. Notably, the OGU permits members of the public to file OPRL inquiries through an online submission form that can be filed electronically or printed out and mailed.

¹ www.ohionews.org/pdf/ocogspring2004se.pdf

² *Id.*

WEAKNESSES

of Ohio's Public Records Law

The lack of an administrative appeal process and the imposition of enforcement provisions weakens the OPRL.

While the OPRL has strong enforcement provisions, the lack of administrative remedies and the failure to implement sound enforcement provisions weaken the statute's effectiveness.

Once an individual makes a request for public information and it is denied, the OPRL provides no mechanism for resolving the dispute outside of litigation. Ohio is one of three Midwestern states surveyed that does not have an administrative appeal process for reconsideration of a request by the head of a public body.

Once a request is denied, the only enforceable remedy available is to file a lawsuit for disclosure of the public documents, Ohio Rev. Code § 149.43(C)(1) (2008). Litigation is a costly endeavor and has a chilling effect. Moreover, once an individual files litigation for public records and prevails, a review of relevant case law reveals that penalties for violations and attorneys' fees are rarely recoverable under OPRL, providing a further disincentive to pursue litigation.

REFORM: An administrative appeal process and statutory authority of the OGU is necessary to provide an alternative mechanism to accessing public records. Additionally, mandatory attorney fees for a plaintiff who prevails in a lawsuit are necessary, as well as the mandatory imposition of current fines.

Statutory language mandating a firm deadline to respond to requests is necessary.

While studies from the Ohio Coalition for Open Government documented that half of public bodies surveyed produced basic information requests the same day, firm statutory deadlines are necessary to remove ambiguity as to the meaning of “promptly prepared” within the OPRL. A review of case law indicates that Ohio courts have failed to establish a legal definition of “promptly prepared” or determine how much response time is too long. Additionally, the courts have not ruled on what length of delay would constitute a constructive denial under the OPRL.

REFORM: A firm statutory deadline, such as five days, is necessary to mandate when public documents must be produced.

Exemptions within the OPRL that limit incarcerated individuals’ access to information create a tiered system of access public records.

The OPRL has relatively few exemptions as compared to other Midwestern states despite the legislature expanding the exemptions three separate times since 2004 (mainly involving privacy and security issues). While the exemption list is relatively small, an exemption exists stating that a person who is incarcerated may not access a copy of any public record concerning a criminal investigation or prosecution.

The only circumstances under which public records may be accessible is if the judge who imposed the sentence finds that the public information sought by the incarcerated individual is necessary to support what appears to be a justiciable claim of the person. Ohio Rev. Code § 149.43(B)(8). This provision unfairly denies access to public records to a certain class of individuals.

REFORM: Strike this provision from the OPRL as it creates unequal access to public records.

SUMMARY OF LAW

of Ohio's Public Records Law

The following section provides a summary of the main components of the OPRL. This summary provides an overview of the nuts and bolts of the law, including what records are covered, and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in public records litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

Who is Covered Under the Law?

The OPRL sets requirements for the disclosure of public records by any public office. The OPRL defines "public office" as "... any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." Ohio Rev. Code § 149.011(A).

"Public records" are defined as "...any document, device, or item, regardless of physical form or characteristic... which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." Ohio Rev. Code § 149.011(G).

Public Records Open to Disclosure

Under the statute, public records are "records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code." Ohio Rev. Code § 149.43(A)(1). Public records are presumed to be open and accessible. A public office refusing to release records has the burden of proving that the records are exempt from disclosure. Public records covered include, but are not limited to, meeting minutes, administrative manuals, expenditure reports, personnel records, state licensing requirements and lists, police incident reports, Department of Motor Vehicle records and property titles.

Form of Records

Applicable records must be supplied at the requestor's choice on paper, or via the medium upon which it is kept by the public office or via any other medium the person in charge of keeping the records determines such records can be reasonably duplicated on such media.

The Ohio Supreme Court has established that records may consist of a single document within a larger file of documents or a compilation of documents, regardless of physical form or characteristics, that is created, received or used by a public office or official in the organization, functions, policies, decisions, procedures, operations or other activities of the office. *Kish v. Akron*, 109 Ohio St.3d 162 (2006).

Special Provisions Regarding Electronic Mail

Electronic mail is generally considered to be a public records. The OPRL defines “records” as including an electronic record as defined in Ohio Rev. Code § 1306.01: “... a record created, generated, sent, communicated, received, or stored by electronic means.”

However, not all electronic mail sent or received on a public office’s electronic mail system are subject to disclosure. Electronic mail that does not “document the organization, functions, policies, decisions, procedures, operations or other activities of the office” are not subject to disclosure. Electronic mail between employees that are not related to the organization are not “records” under the statute, just as a personal note written by a public office employee on public office stationary would not be subject to disclosure. There is very little case law defining the interpretation of the statute with respect to electronic mail.

Fees for Public Records

Public records shall be available “at cost.” Public offices can only charge for actual duplicating and mailing costs, but not for the cost of the labor of the employees compiling the records.

Prior to an amendment on December 16, 1999, public offices were only required to have records available for pick up during regular business hours at reasonable times. The amendment provided that public offices must mail copies if so requested.

Public Records Exempt from Disclosure

The OPRL includes a “catch-all exception” which mandates non-disclosure of certain types of information or records, including the following:

- Attorney-client privileged materials;
- Certain medical records (birth and death);
- Trade secrets or fair use copyrighted materials;

- Trial preparation records specifically compiled in reasonable anticipation of a civil action;
- Records the release of which is prohibited by state or federal law; and
- Certain confidential law enforcement investigatory records

The OPRL also lists specific types of records that a public office *may* be permitted to withhold in its discretion, including the following:

- Records of probation and parole hearings;
- DNA records stored in the DNA database;
- Records pertaining to adoption hearings; and
- Public service child agency records

Notably, the law includes an exemption stating a person who is incarcerated is not required to be allowed to access a copy of any public record concerning a criminal investigation or prosecution unless the judge who imposed the sentence finds that the information sought is necessary to support what appears to be a justiciable claim of the person.

Primary Areas of Litigation and Typical Outcomes

Litigation frequently addresses what constitutes a public office, particularly pertaining to the proper coverage of the law regarding private entities. The Ohio Supreme Court has developed a test for determining when a private entity is a public institution and thus a public office under the OPRL:

- (1) Does the private entity perform a governmental function?;
- (2) What is the extent of the government involvement or regulation?;
- (3) What is the level of government funding?; and
- (4) Was the private entity formed by the government for the purpose of avoiding the requirements of the Public Records Act? *State ex rel. Fox v. Cuyaboga Co. Hospital Sys.*, 529 N.E.2d 443 (Ohio 1988).

A private entity's records are not open to public scrutiny merely because it performs services on behalf of the government, but the Ohio courts have often found that such records are public. For example, a private non-profit organization that acted a solicitor of gifts for a public university was found to be subject to the OPRL.

The question of what constitutes a public record is often litigated. Outside of the exemptions, the Ohio courts adopt the viewpoint that records are presumed public and the public entity who denies a request for records must show that the record in question fits under one of the enumerated exemptions. The Ohio courts have not generally expanded the exemptions beyond their plain meaning.

Deadline for Production of Public Records

The OPRL does not specify a time period by which records must be produced, only that they must be "promptly" prepared. There is no case law clarifying how long is too long, but Ohio courts have held that public offices cannot avoid statutory penalties by complying only after a requestor has filed suit.

Denial of a Records Request

If a request is denied in part or in whole, the public office shall provide the requestor with an explanation, including the underlying legal authority, setting forth why the request was denied. The explanation is not required to be written, unless the requestor so requests.

What Information Must a Requestor Provide

Unless it is specifically required or authorized by federal law, a provider of records may not require that the requestor provide his or her identity or intended use. Any such requirement constitutes a denial.

Previously, public offices could *request* that a public records request be placed in writing; however, public offices could not *require* that a request be placed in writing. Under a recent amendment to OPRL, a public office may ask that a request be placed in writing only if the following two conditions are satisfied:

- (1) it may do so only after disclosing that a written request is not mandatory, and that the requesting person may decline to reveal his or her identity or the intended use of the information; and

- (2) the public office may ask that the request be placed in writing when a written request or disclosure of the requestor's identity or intended use would benefit the requestor by enhancing the ability of the public office to identify, locate or deliver public records.

Appeal

The only appeal provided for by OPRL is for the aggrieved requestor to file a mandamus action asking a court to compel disclosure. The person who files the mandamus action is called the "relator" and is not required to prove a lack of adequate remedy at law to prevail.

A relator may file a mandamus action in any one of three courts: the local court of common pleas, the appellate court for that district or the Ohio Supreme Court. If a relator files in the Ohio Supreme Court, the case may be assigned to mediation.

Penalties for Violation

Under a 2007 amendment to OPRL, a person who transmits a valid written request for public records by hand-delivery or certified mail is entitled to receive statutory damages if a court finds that the public office failed to comply with its obligations.

The OPRL provides for statutory damages fixed at \$100 per business day during which the public office fails to comply with a proper request, beginning on the day the requestor files a mandamus action. The statutory damages cap at \$1,000 and may be reduced or eliminated by the court for the following reasons: (1) if the court determines the denial was made either because a well-informed public official or records custodian would believe that the withholding of the records was not a failure to comply with an obligation under the law; or (2) that his or her actions served the public policy that underlies the authority asserted for withholding the information.

If the court determines the public office failed to grant a proper request, the court must award court costs. A court must also award reasonable attorneys' fees when it determines a proper request was denied.

A court must award reasonable attorneys' fees when the public office either failed to respond affirmatively or negatively to the request in the allotted time, or promised to permit the requestor to inspect or receive copies within a specified period of time but failed to fulfill that promise. Relators representing themselves (*i.e., pro se*) are generally not awarded attorneys' fees.

Typical Outcome or Request for Attorney Fees

Attorneys' fees are difficult to collect. They are generally not awarded if the public office can show some good faith justification for the denial. The Ohio Supreme Court has established that a court may award attorney fees where:



- (1) a person makes a proper request for public records pursuant to R.C. 149.43;
- (2) the custodian of the public records fails to comply with the person's request;
- (3) the requesting person files a mandamus action pursuant to R.C. 149.43 to obtain copies of the records; and
- (4) the person receives the requested public records only after the mandamus action is filed, thereby rendering the claim for a writ of mandamus moot. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171 (1996).

Some courts have held that the requestor must also show that there will be a public benefit in the awarding of fees, however that requirement is generally met by the fact that the requestor seeks public disclosure of records. *See, e.g., State ex rel. Toledo Blade Co. v. Board of Hancock County Co.*, 82 Ohio St.3d 34, 36 (1998) (Relators established a sufficient public benefit by making respondents provide access to the requested records, having them charge a public record copy fee closer to actual cost, and respondents refusing to comply for reasons that were unreasonable and unjustifiable).

Courts have ruled that they will not award attorneys' fees on a case of first impression, because the lack of precedent justifies the public office's claim of good faith on the denial.

Ranking in 2007 National Study of 50 States' Freedom of Information Laws

In 2007, the nonpartisan, nonprofit organizations Better Government Association and National Freedom of Information Coalition conducted a 50-state study of FOIA responsiveness.

Three of the criteria—Response Time, Attorneys' Fees & Costs and Sanctions—were worth four points each.

Two of the criteria—Appeals and Expedited Process—were assigned a value of two points each.

Response Time, Attorneys' Fees & Costs and Sanctions were assigned a higher value because of their greater importance. These criteria determine how fast a requestor receives an initial answer, thus starting the process for an appeal if denied, and provide the necessary deterrent element to give public records laws meaning and vitality.

Appeals and Expedited Process, although important, were determined to be less critical in promoting open government access and thus assigned only a two-point value.

The following sets forth Ohio's rankings in this study, which may be found at www.bettergov.org/policy_foia_2008.html.

- For response time (analyzing response times, the process of appealing FOIA denials and expediency, and the means to give a case priority on a court's docket in front of other matters because of time concerns), **1 of 4**;
- For appeals (analyzing choice, cost and time), **0.5 of 2**;
- For expedited review (if a petitioner's appeal, in a court of law, would be expedited to the front of the docket so that it is heard immediately), **0 of 2**;
- For fees and costs ((1) whether the court is required to award attorneys' fees and court costs to the prevailing requestor; and (2) what sanctions, if any, the agency may be subject to for failing to comply with the law), **4 of 4**;
- For sanctions (whether there was a provision in the statute that levied penalties against an agency found by a court to be in violation of the statute), **0 of 4**; and
- Percentage (compared to other 49 states), **34 of 100**.

GRADE: F

CASE IN POINT

The Ohio Coalition for Open Government (OCOG)

published a report in 2004 on a statewide audit regarding records access. Newspapers across Ohio conducted public records audit in all of Ohio's 88 counties. The records sought included: county minutes, executive expense reports, police chief pay, police incident reports, superintendent compensation and school treasurer phone bill. The audit found that 52.7% of the total records sought were granted either the same day or the next day. 17.1% of the inspected records were granted after complying with one or more preconditions not provided by law. Records were denied 30.2% of the time. Most auditors also reported that public officials pressed them for more information even though the law sets no prerequisite for obtaining records (although the report did note that many of these questions were asked in an effort to help).

The reasons given by public officials for their denial of a public record included: that they were procedurally forbidden to give the record; that personnel was unavailable or too busy; that the record in question was not a public record. Ohio's open records law states all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during business hours.

The full report can be viewed at www.ohionews.org/pdf/ocogspring2004se.pdf.

Open Meetings Act

STRENGTHS

of Ohio's Open Meetings Act

Ohio's Open Meetings Act (OMA) benefits from a strong presumption of coverage. Ohio Rev. Code § 121.22 establishes that, "This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically exempted by law." Ohio courts have generally read this provision as a presumption in favor of finding bodies to be "public," and therefore covered by OMA.

In nearly every appellate decision on the issue of whether a questionable entity is a public body, Ohio courts have ruled in favor of the plaintiff. For instance, in cases involving political party committees and public hospital advisory boards, courts have found the public body definition is met and coverage applies. *State ex rel. Hayes v. Jennings*, 173 Ohio St. 370, 182 N.E.2d 546 (Ohio 1962) (political party committees); *Stegall v. Joint Township District Memorial Hospital*, 20 Ohio App.3d 100, 484 N.E.2d 1381 (3rd Dist. 1985) (hospital advisory boards).

The OMA also benefits from a strong burden of proof presumption with respect to litigation. Under the OMA, any individual may bring suit for a violation of the statute, and "[i]rreparable harm and prejudice to the party that sought the injunction shall be conclusively and irrebuttably presumed upon proof of a violation or threatened violation of this section." Ohio Rev. Code § 121.22(I)(3).



This provision essentially grants members of the public the right to sue under the OMA without any need to show a personal stake or harm different from that of any other member of the public. It also removes barriers traditionally faced by litigants in seeking an equitable remedy when an injunction is sought. Additionally, the Attorney General or prosecuting attorney is responsible for bringing an action against public officials who violate the injunction. Ohio Rev. Code § 121.22(3)(4).

A significant strength of the OMA is its strong enforcement and penalty provisions. Remedies available under the OMA are extensive, and for the most part mandatory. If a court determines that a public body has violated the OMA, it will automatically issue an injunction. Once a court issues an injunction, full court costs, a \$500 civil forfeiture fine, and invalidation of the public body's action (if applicable) follow by law. Reasonable attorneys' fees are also automatically awarded, but are subject to the trial court's discretion.

Additionally, a public official who knowingly violates an OMA injunction may be removed from office. A public official who is appointed in a closed proceeding in violation of the OMA may be removed from office as well. These forceful provisions are a strong deterrent to public bodies violating the OMA.

Additionally, Ohio courts narrowly construe the eight limited reasons to convene a public meeting in executive session. Of the five Midwestern states surveyed, Ohio and Minnesota have the most limited basis for which to close meetings. Michigan allows for closed meetings in ten circumstances, Wisconsin allows for eleven circumstances, and Illinois allows for twenty-four circumstances.

Furthermore, Ohio courts have been strict in upholding the OMA's limitations for convening closed sessions. Typically, if a public body discusses anything that does not fall into one of the executive session categories, the closed session exception does not apply and the court will find a violation. This is generally the case even if the forbidden topic is discussed in conjunction with a related topic that falls under an exemption. Likewise, even if there is no formal action on the forbidden topic until a later public meeting, courts have found a violation if it is discussed in an executive session. A consideration is whether the discussion contributed to the ultimate decision.

In addition, since the OMA requires courts to invalidate *any* formal action adopted at a closed meeting, the courts have been aggressive in invalidating formal actions that result from improper closed session deliberations.

Lastly, as with the OPRL, the resources of the OGU are significant in providing a public resource to ensure open government. The OGU is proactive in providing education and training to the general public, the media, and government officials. It also serves as a clearing house for information on legal opinions, statutes updates and pending litigation. A valuable resource, the OGU advances open government to its fullest capacity.

WEAKNESSES

of Ohio's Open Meetings Act

Ohio's OMA fails to apply universally to all public bodies.

The most significant weakness of Ohio's OMA arises not due to a deficiency in the statute, but because of the Ohio judiciary's interpretation of provisions of the Ohio State Constitution. The judiciary has ruled that the OMA may be trumped in certain conditions because the statute does not purport to be an exercise of police power by the state legislature.

Ohio Appellate courts have essentially voided the OMA's operation against charter cities as violative of the Ohio Constitution's "home rule provision" in Article XVIII in Section III and have held that a charter municipality has the right to determine by charter the manner in which meetings will be held.³

Since Ohio is a home rule state, courts have concluded that when the local law and the state open government laws conflict, the local law prevails.⁴ This judicial interpretation serves to strengthen city charters that provide for open meetings without any exceptions, thereby offering protection more comprehensively than that envisioned by the statute. It also leaves citizens without any right of access to municipal public meetings if their charter neglects to provide for public access to government meetings.

REFORM: The Ohio Constitution needs to be amended to allow the OMA provision to apply to all public bodies.

³ *State ex rel. Bond v. City of Montgomery*, 63 Ohio App.3d 728, 580 N.E.2d 38 (1st Dist. 1989); *Hill & Dales, Inc. v. Wooster*, 4 Ohio App.3d 240, 448 N.E.2d 163 (9th Dist. 1982).

⁴ Ohio Constitution, Article XVIII, Sections 3 and 7. See also, *State ex rel. Inskeep v. Staten*, 74 Ohio St.3d 676, 660 N.E.2d 1207 (1996); *State ex rel. Fenley v. Kyger*, 72 Ohio St.3d 164, 648 N.E.2d 493 (1995); *State ex rel. Lightfield v. Village of Indian Hill*, 69 Ohio St.3d 441, 633 N.E.2d 524 (1994); *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 564 N.E.2d 486 (1990); *State ex rel. Craft v. Schisler*, 40 Ohio St.3d 149, 532 N.E.2d 7 19 (1988); *Fox v. City of Lakewood*, 39 Ohio St.3d 19, 528 N.E.2d 1254 (1988); *Butler Twp. Bd. of Trustees v. Winemiller*, 2003 Ohio 1258, 2003 Ohio App. LEXIS 1177, (2nd Dist. Mar. 14, 2003); *State ex rel Gannett Satellite Info. Network v. Cincinnati City Council*, 137 Ohio App.3d 589, 739 N.E.2d 387 (1st Dist. 2000); *Klaban Ford, Inc. v. City of Kent*, No. 91-P-2342, 1992 Ohio App. LEXIS 1622 (11th Dist. Mar. 3 1, 1992); *Hill & Dales, Inc. v. City of Wooster*, 4 Ohio App.3d 240, 448 N.E.2d 163 (9th Dist. 1982).



The Ohio OMA allows a public body to circumvent the law by remedial action.

When a public body has violated the OMA, and an individual files a lawsuit to hold the entity accountable, the public body may avoid judgment by merely taking subsequent remedial action.

According to the Ohio Attorney General, the failure of the OMA to specifically address the appropriateness of remedial action has resulted in a split of authority among Ohio Appellate Courts (www.ag.state.oh.us/legal/pubs/ohio_sunshine_laws_2008.pdf). Some courts have held that a public body can cure an illegal action through remedial action while other courts have held that it cannot. The lack of a consistent interpretation among appellate courts favor public bodies who seek to evade accountability by simply remediation.

REFORM: Amend the statute to prohibit subsequent remedial action by a public body to moot a legal claim filed against it.

Recovery of attorneys' fees from plaintiffs who file OMA suits has a chilling effect on the public seeking to use the courts to address grievances.

A significant weakness of the OMA statute is its provisions that allow public body defendants to recover from plaintiffs. While the OMA has outstanding enforcement provisions available for the public, those same provisions have a substantial chilling effect. The Ohio OMA explicitly provides that an individual seeking to enforce OMA may, in fact, be ordered to pay an award to the public body under certain conditions. Ohio Rev. Code § 121.22(I)(2)(b).

If the court does not issue an injunction pursuant to an OMA action, and determines that a citizen's suit was frivolous, the court *must* award to the public body court costs and reasonable attorneys' fees. Although a review of case law indicates that courts have rarely awarded public bodies fees and costs under the law, this is a troublesome provision that its presence alone contradicts open government policies.

REFORM: Remove statutory provisions that allow mandatory or permissible awarding of court costs and reasonable attorneys' fees to public bodies who are the subject of an OMA suit.

The OGU, while a valuable resource, needs enforcement capacity to be truly effective.

As already recognized, the OGU is a creation of the Ohio Auditor of States Open Government Unit that is a valuable resource. However, it is limited in its effectiveness because it is not a statutorily created office and does not have the requisite enforcement capacity to deter OPRL and OMA violations by governmental bodies. Additionally, because the office was created by an individual, there is no guarantee the office will remain in perpetual existence.

REFORM: Statutorily create the office of the OGU with enforcement capacity that includes the ability to issue binding opinions, file lawsuits and intervene in individual lawsuits.

SUMMARY OF LAW

of Ohio's Open Meetings Act

The following section provides a summary of the main components of the Ohio OMA. This summary provides an overview of the nuts and bolts of the law, including what types of meetings are covered by the law, the procedures for closed sessions, how to appeal a violation and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in OMA litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

Who is Covered Under the Law?

OMA applies to any public body, which includes “[a]ny board, commission, committee, council, or similar decision-making body of a state agency . . . and any . . . board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision.” Ohio Rev. Code § 121.22(B)(1).

Although the law provides wide coverage, it can be trumped by individual city charters due to the home rule provision in Article XVIII, Section III of the Ohio State Constitution. Where a local government has a home rule charter that does not provide for as much public access as the sunshine law (*i.e.*, OMA), some state appellate courts hold that the charter prevails. *See, e.g., Hills & Dales Inc. v. City of Wooster*, 4 Ohio App. 3d 240, 448 N.E.2d 163 (Wayne 1982); *City Comm'n of Piqua v. Piqua Daily Call*, 64 Ohio App. 2d 222, 412 N.E.2d 1331 (1979).

The Ohio Supreme Court has not provided comprehensive guidance regarding this issue, but has applied OMA to local governments with home rule charters where there was no direct conflict between the charter and the sunshine law, such as where the charter provides for greater public access than the sunshine law. *State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St. 3d 540, 668 N.E.2d 903 (1996); *State ex rel. Inskip v. Staten*, 74 Ohio St. 3d 676, 660 N.E.2d 1207 (1996); *State ex rel. Fenley v. Kyger*, 72 Ohio St. 3d 164, 648 N.E.2d 493 (1995); *State ex rel. Plain Dealer Publishing Co. v. Barnes*, 38 Ohio St. 3d 165, 527 N.E.2d 807 (1988).

Are Committees, Advisory Groups, Subcommittees Covered?

Committees and subcommittees are expressly included in the statute's coverage as public bodies under Ohio Rev. Code § 121.22(B)(1)(b). Advisory groups are not expressly covered under the law. The OMA applies to “any” committee or subcommittee of a decision-making body of a political subdivision, and “any” committee or subcommittee of a decision-making body of a state agency, and therefore, can cover advisory bodies.

While Ohio courts are split on whether advisory groups constitute public bodies, they have held that the making of a recommendation is a form of decision-making and thus constitutes the delegation of investigatory duties to a committee. Therefore, giving the committee sufficient decision-making authority allows it to be considered a public body. *Maser v. City of Canton*, 62 Ohio App. 2d 174, 405 N.E.2d 731 (1978); *Thomas v. White*, 85 Ohio App. 3d 410, 620 N.E.2d 85 (1992); see also *Cincinnati Enquirer v. Cincinnati*, 145 Ohio App. 3d 335, 762 N.E.2d 1057 (2001) (an architectural review board that advised and made recommendations was to be considered a public body).

Types of Gatherings Covered

A “meeting” within the scope of the OMA is a prearranged discussion of public business of a public body by a majority of its members. The absence of a quorum ordinarily means that OPRL’s coverage does not apply and members of the public have no right to attend a meeting.

One Ohio court, however, has held that where a public body prearranges back-to-back, repetitive sessions of less than a majority of members at each session, but has a majority present when all sessions are considered together, a meeting under OMA has occurred and must be open to the public. *State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St. 3d 540, 668 N.E.2d 903 (1996).

The Ohio Supreme Court has repeatedly determined that quasi-judicial hearings and the deliberations of the quasi-judicial bodies are not “meetings” under OMA and are therefore not subject to the statute’s requirements. See, e.g., *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, 81 Ohio St.3d 58, 689 N.E.2d 32 (1998).

What Meetings Must Be Open?

The OMA establishes that all prearranged discussions of public business by a public body with a majority of its members present are subject to statute. Exceptions are provided for grand juries and audit conferences, as well as other public bodies (the adult parole authority, the organized crime investigations commission, the child fatality review board, etc.) under certain conditions.

If a public body meets merely to observe and gather information for ministerial purposes, the fact-finding session is outside the scope of OMA. See *Springfield Local School Dist. Bd. of Ed’n v. Ohio Ass’n of Public School Employees*, 106 Ohio App. 3d 855, 667 N.E.2d 458 (1995); *Holeski v. Lawrence*, 85 Ohio App. 3d 824, 621 N.E.2d 802 (1993); *Piekutowski v. S. Cent. Ohio Educ. Serv. Ctr. Governing Bd.*, 161 Ohio App. 3d 372, 830 N.E.2d 423 (2005).



Exceptions: Closed Meetings

There are a limited amount of authorized subjects permitted for closed meetings. A public body *may* close a meeting for the following eight categories:

- (1) The appointment, employment, dismissal, discipline, promotion, demotion or compensation of an employee or official, or the investigation of charges or complaints against an employee, official, licensee or student, unless the employee, official, licensee or student requests a public hearing;
- (2) The purchase of property for public purposes or the sale of property at competitive bidding;
- (3) Conferences with the public body's attorney to discuss matters which are the subject of pending or imminent court action;
- (4) Preparing for, conducting, or reviewing negotiations or collective bargaining sessions with employees;
- (5) Matters required to be kept confidential by federal law or rules or state statutes;
- (6) Details of security arrangements and emergency response protocols where disclosure could be expected to jeopardize the security of the public body or public office;
- (7) To discuss trade secrets of a county hospital organized under Ohio Rev. Code Chapter 339; and
- (8) Veterans Service Commission meetings to consider an applicant's request for financial assistance, unless the applicant requests a public hearing.

Procedures for Closed Meetings

To call a closed (executive) session, the public body must first hold a roll call vote, and a majority of the quorum must vote affirmatively to enter into executive session. The public body must then immediately convene the closed session. The OMA requires that if a public body holds a closed session for personnel matters, the motion and vote to hold that executive session must state the specific type of personnel matter to be discussed.

Recordkeeping for Meetings: Minutes Requirements

The OMA requires that minutes need only discuss the general subject matter of a public body's discussion. The OMA further provides that the minutes of a regular or special meeting must be promptly prepared, filed, and maintained by a public body and must be open to public inspection.

The Ohio Supreme Court has established that a public body must keep full and accurate minutes, *i.e.*, the minutes must state sufficient facts and information to permit the public to understand and appreciate the rationale behind the public body's decisions. *White v. Clinton County Bd. of Commissioners*, 76 Ohio St.3d 4 16, 667 N.E.2d 1223 (1996); *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 748 N.E.2d 58 (2001).

Taping or Filming Meetings

The OMA does not specifically include provisions authorizing the audio or video recording of meetings. While not specifically stated within the statute, an Ohio Attorney General's Opinion states that audio or video recording of meetings is permissible if it does not unduly interfere with a meeting. 1988 Op. Att'y Gen. No. 88-087.

Are Electronic Mail Communications a Meeting?

The statute does not address whether electronic mail communications constitute a meeting. In an unpublished decision, an appellate court held that because the OMA, which was revised in 2002, makes no specific mention of electronic communications, electronic communications are not covered by OMA. *Haverkos v. Northwest Local Sch. Dist. Bd. of Educ.*, 2005 Ohio App. LEXIS 3237 (Ct. App. Ohio, July 8, 2005).

Public Notice of Time and Place for Meetings: Requirements for Agendas

Public bodies are required to establish at least one reasonable method, by rule, "whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings." Ohio Rev. Code § 121.22(F). Placing a sign on the front door of town hall or publishing the information in a newspaper of general circulation constitutes reasonable methods of notice under OMA. *See, e.g., Doran v. Northmont Bd. of Educ.*, 147 Ohio App. 3d 268, 770 N.E.2d 92 (2002).

Notably, a public body is not required to include the agenda items to be discussed at a regular meeting in its notice. A public body must comply, however, with requests to give "reasonable advance notification" of all meetings "at which any specific type of public business is to be discussed," provided the requester paid a reasonable fee. Ohio Rev. Code § 121.22(F).

There are special notice requirements with regard to the news media. Public bodies are required to give notice to the news media who have requested such notice at least twenty-four hours before special meetings. For emergency meetings, OMA requires that notice must be given to such news media immediately.

Summary of Pivotal State Supreme Court Open Meetings Act Decisions

In *State ex rel. Randles v. Hill*, 66 Ohio St. 3d 32; 607 N.E.2d 458; 1993 Ohio 204 (Ohio, 1993), the Ohio Supreme Court determined that a mistake is not a defense to a violation. The court held that Ohio Rev. Code § 121.22 provides only two defenses to a violation: “(1) that the action to be taken is exempt from the open-meetings requirement, or (2) that public access was provided.”

White v. Clinton County Board of Commissioners, 76 Ohio St. 3d 416; 667 N.E.2d 1223 (Ohio, 1996) establishes the duty of county commissions to keep full and accurate minutes during public meetings. The Ohio Supreme Court defines “full” minutes as including details about the rationale and decision-making process of the public body, with “sufficient facts and information to permit the public to understand and appreciate the rationale behind the public body’s decision.” For public bodies other than county commissions, the OMA requires minutes that do more than merely recount the general subject matter of discussions.

State ex rel. Long v. Cardington Village Council, 92 Ohio St. 3d 54; 748 N.E.2d 58; 2001 Ohio 130 (Ohio, 2001) expands on the central holding in *White v. Clinton County Board of Commissioners*, stating that city councils are also required to keep “full and accurate minutes.”

Enforcement

No state or local governmental official is authorized to bring legal action to enforce the OMA. The OMA provides that any member of the public may bring an action to enforce the statute. Any such action must be filed within two years of the date of the violation or threatened violation. If a citizen suit results in an injunction against a public body, the Attorney General or prosecuting attorney is responsible for bringing an action against officials who violate the injunction.

Penalties for Violation

Injunction. Any individual may bring an injunction action in a common pleas court to enforce the OMA. The OMA mandates that a court *must* issue an injunction whenever a public body violates the OMA. Ohio courts generally agree that a plaintiff need not show harm, the likelihood of future harm or prejudice to receive an injunction. This is because harm and prejudice are conclusively and irrebutably presumed whenever there has been a violation. The OMA also provides for injunctions in the face of a threat of *future* violation.

Mandamus. Any individual may also bring a mandamus action to enforce OMA. Courts have established that mandamus may be appropriate in an OMA action. *State ex rel. Inskeep v. Staten*, 74 Ohio St.3d 676, 660 N.E.2d 1207 (1996), *State ex rel. The Fairfield Leader v. Ricketts*, 56 Ohio St. 3d 97, 564 N.E.2d 486 (1990). For mandamus relief, a lawsuit may be brought in a common pleas court, court of appeals, or the Ohio Supreme Court. *See* Art. IV, § 2, Ohio Constitution.

Civil Forfeiture. If the court finds a violation by the public body in an OMA action, the statute establishes that the court *must* order it to pay the plaintiff a \$500 civil forfeiture fine. The public body defendant must pay a civil forfeiture for each violation.

Invalidation. Any public rule, resolution, or other formal action that is decided in violation of OMA is invalid. Ohio Rev. Code § 121.22(H) requires courts to invalidate any formal action adopted at a closed meeting (the executive session exception allows only deliberation, not adoption). Additionally, Ohio Rev. Code § 121.22(H) invalidates formal actions adopted at open public meetings if those actions result even partly from deliberations conducted in private in violation of OMA.

Removal from office. A public official who knowingly violates an OMA injunction may be removed from office if the Attorney General or prosecuting attorney brings an action against him or her. *See State ex. rel. Delph v. Barr* (44 Ohio St.3d 77; 541 N.E.2d 59 (Ohio, 1989) (Ohio Supreme Court removed from office a sheriff who was appointed in a non-Act-compliant meeting). In such cases, the court will issue a writ of *quo warranto* ordering the public official's removal.

Plaintiff's penalties. OMA provides that if the court does not issue an injunction, and the court deems the plaintiff's action to have been frivolous, the court may award all court costs and reasonable attorneys' fees to the public body. The court has the discretion to determine the amount of the fee award to the public body.

Are Criminal Penalties Assessed Regularly?

Criminal penalties are not available for violations under OMA.

Availability of Attorneys' Fees for Open Meetings Act Litigation

If the court finds a violation by the public body defendant, it must award the plaintiff reasonable attorneys' fees under the statute. However, the OMA provides that a court has the discretion to reduce an award of attorneys' fees, or to award no attorneys' fees, where both of the following conditions are met:

- (1) based on the ordinary application of statutory law and case law as it existed at the time of violation or threatened violation, a well-informed public body reasonably would believe that the public body was not violating the open meetings statute; and
- (2) a well-informed public body reasonably would believe that its conduct would serve the public policy that underlies the authority asserted by the public body for not acceding to the demands of the person who successfully sought the injunction. Ohio Rev. Code § 121.22(I)(2)(i)-(ii).

Ohio courts have held that attorneys' fees are not available for *pro se* litigants who prevail.

As stated above, the court may award attorneys' fees to a prevailing public body when the court finds that the suit was frivolous.

Whether Attorneys' Fees Are Usually Granted

Attorneys' fees are generally granted to plaintiffs who prevail in winning injunctive relief. However, they are rarely awarded to defendant public bodies for frivolous lawsuits brought by a plaintiff.

General Areas Litigated Most Commonly and Typical Outcomes

Courts have frequently ruled on when a public body may call for an executive session, and what procedures it must follow for such a session. Ohio courts have been strict in upholding OMA's limitations on calling executive sessions. Typically, if a public body discusses anything that does not fall into one of the Ohio Rev. Code § 121.22(G) executive session categories, the exception does not apply and the court will find a violation.

This is generally the case even if the forbidden topic is discussed with other related topics that do fall under closed session exemptions. Likewise, even if there is no formal action on the forbidden topic until a later, public meeting, courts have found a violation if it is discussed in an executive session, so long as the discussion contributes to the ultimate decision.

Courts have also addressed when it is appropriate to remove from office a board member who knowingly violates an injunction which has been granted by a court. In two separate cases, board members have been removed from office in part due to repeated violations of the OMA. In both of these appellate cases, the boards repeatedly held lengthy executive sessions, then returned to open session to vote on matters after little or no public discussion. See *Evans v. Rock Hill Local School District Board of Education*, Lawrence App. No. 04CA39, 2005-Ohio-5318, and *In Re: Removal of Kuehnle*, 161 Ohio App. 3d 399, 2005-Ohio-2373.

CASE IN POINT

The Ohio Coalition for Open Government (OCOG)

exposed a recent OMA violation concerning a vast sum of taxpayer money. As reported in the OCOG's Summer 2008 newsletter, three trustees of the Northeast Ohio Regional Sewer District violated OMA by secretly discussing the district's plans for spending hundreds of millions of taxpayers' dollars. According to the OCOG, a three-member committee of the sewer district's seven-member board met privately in early 2008 to review and give recommendations for the district's proposed \$321 million budget, as set forth in the meeting minutes.

Fred Gittes, a Columbus civil rights lawyer and public records expert, stated that budget deliberations by a public body behind closed doors is a blatant violation because the committee, just like the full board, is a public body subject to the law. "This is really a total disregard of the obligations of the open meetings law," he said. "They were obligated to provide notice to the public of the location, time and purpose of the meeting. And most importantly, the public should have been invited to attend."

The three committee members under scrutiny called the secret meeting an oversight and the District Executive Director acknowledged the violation of the law and promised to send letters to board members explaining the law and cautioning them not to do it again.

The full OCOG article may be viewed at
www.ohionews.org/pdf/ocogsummer2008.pdf.

WI
WISCONSIN



The very first laws adopted after Wisconsin officially became a state in 1849 provided for public access to the meetings and records of county government. From its origins, Wisconsin has had a long history of promoting open government. In 1981, the Wisconsin State Legislature enacted the Public Records Law (PRL), that in Section 19.31 provides: “In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” Within specified limitations, PRL allows anyone to inspect and obtain copies of all public records prepared, possessed, used by, or in the control of any public office.

In 1959, the Wisconsin State Legislature enacted the Open Meetings Law (OML) and made substantive revisions in 1973 and 1975. Section 1981(1) of OML declares that: “In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.”

OMA promotes public participation in local government and requires public bodies to hold open meetings, provide the public with adequate notice of meeting times so that citizens may freely attend, and keep records of public meetings.

The PRL and OML have numerous strengths but the most impressive aspect of Wisconsin's open government laws is the range of penalties available for violations. The PRL includes substantial penalties, such as punitive damages and criminal penalties for destruction, damage, removal or concealment of public records with intent to injure, defraud, or falsify public records. The OML provides forfeiture, mandamus, injunction and declaratory judgments as remedies and subjects public officials who violate the law to fines between \$25 and \$300 for each violation.

Wisconsin's steep penalties demonstrate the state's strong commitment to open government and its willingness to hold those accountable who fail to properly comply with the law. However, both laws lack administrative channels for contesting a violation, leaving expensive and cumbersome litigation as the primary option for relief.

Additionally, the PRL allows a public body to charge for search costs for public records in some cases, and enforcement of the OML is reportedly weak. Reports suggest that the agencies responsible for the enforcement are unwilling to pursue open meetings complaints and individuals must often initiate litigation to avail themselves of their rights. Additionally, while public notice is required for meetings subject to the OML, it is a mere 24 hours. Furthermore, detailed meeting minutes are not required under law.

While the PRL and OML are strong, additional reform is needed to improve access to government in Wisconsin. The following provides an analysis of the strengths and weaknesses of the PRL and OML in Wisconsin and a summary of the laws' main components. Copies of model versions and citizen guides of both statutes are available by contacting the Citizen Advocacy Center.

ANALYSIS OF WISCONSIN'S

Public Records Law

STRENGTHS

of Wisconsin's Public Records Law

The broad coverage of Wisconsin's PRL is its greatest strength. Notably, the PRL provides one of the strongest policy declarations in the Wisconsin statutes. Wis. Stat. § 19.31. The stated policy of the law is to give the public "the greatest possible information regarding the affairs of government." *Id.* Accordingly, the PRL must "be construed in every instance with a presumption of complete public access, consistent with the conduct of government business." *Id.* The PRL further provides that "denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." *Id.* Cases interpreting the PRL adhere to the aforementioned public policy objectives by strictly construing exemptions and generally ruling in favor of disclosure.

Penalties for violations of the PRL are substantial and therefore encourage compliance. Mandatory attorneys' fees, damages of at least \$100 and other actual costs are available to a requestor who prevails in whole or in substantial part in a mandamus. Moreover, punitive damages of up to \$1,000 can be assessed against a records custodian responsible for an arbitrary and capricious delay or denial of a public records request. In addition, criminal penalties may be imposed for destruction, damage, removal or concealment of public records with intent to injure, defraud, alter or falsification of public records.

Wisconsin's steep civil and criminal penalties demonstrate the state's strong commitment to open government and its willingness to hold accountable those who fail to properly comply with the law.

A 2003 amendment to the PRL simplified the law as it pertains to individuals identified in public records and advanced transparency. The amendment addressed the cumbersome requirements created by *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), in which the Wisconsin Supreme Court established procedural steps that custodians must take before releasing public records implicating the privacy or reputational interests of any individual identified in the records. In *Woznicki*, the Supreme Court held that before releasing a record implicating such interests, a district attorney must notify the subject of the record and give him or her a reasonable opportunity to seek court review of the decision to release the record. *Id.* at 185.

The 2003 amendment explicitly limited the categories of records subject to *Woznicki* notice to three discrete categories. It also established reasonable time limits for the *Woznicki* process. Wis. Stat. § 19.356. Thus, the amendment curtailed efforts by some government authorities to delay or deny the disclosure of public records requests based on *Woznicki* and improved the public's right to access public records.

In addition, the PRL protects a requestor's privacy rights by explicitly stating that a requestor does not need to provide his or her identity or the reasons for which records are requested. Extending the privacy concerns to a requestor, as well as the subject of a request, demonstrates consistency within the statute. Moreover, specific provisions in the statute that prohibit a public body from asking why records are sought promote accessibility and lessen the likelihood that records will be withheld because of how an individual intends to use them.

Wisconsin has remarkable open government resources for the public. The Wisconsin Attorney General is committed to providing open government training seminars conducted by attorneys from the Wisconsin Department of Justice. As such, these seminars are free and open to government officials, the media and the public. The purpose of the seminars is to help government officials and the public better understand their responsibilities and rights under the law. In addition, the State Programs, Administration and Revenue Unit (SARS) within the Department of Justice will answer specific questions from local officials and the general members of the public regarding the PRL and OML. The Attorney General has the capacity to file lawsuits for compliance with sunshine laws, and while the state does not have an office dedicated solely to PRL and OML compliance, Wisconsin's resources are significant.

Wisconsin also has the Freedom of Information Council (FOIC) that provides important resources to the public to promote open government. The FOIC is a non-profit organization dedicated to safeguarding access to state and local government and defending freedom of the press. Since 1978, journalists and members of the public who comprise the FOIC have worked to protect and promote access to public records and public meetings as well as educate the public about press censorship issues.

The FOIC provides invaluable free open government resources through its website, including legal analysis of problem areas, frequently asked questions, tracked legislation and summaries of pivotal cases and Attorney General opinions. The FOIC's site, www.wisfoic.org, also provides links to the statutes, Attorney General written guides and video seminars for open government laws. Additionally, the FOIC takes up open government issues with the Attorney General and requests investigation of key matters. The FOIC is a powerful advocate for transparent and accountable government in Wisconsin.

WEAKNESSES

of Wisconsin's Public Records Law

While Wisconsin's PRL is strong in many aspects, there are several areas of weakness that could benefit from reform.

The lack of firm deadlines to mandate responsiveness to request allows public bodies to delay the production of public records.

Wisconsin's PRL states that requested records must be provided "as soon as practicable and without delay," but establishes no set timeframe. Wis. Stat. § 19.35(4)(a). Without an established response deadline, government authorities are able to delay responding to a request. Government authorities can, and according to reports, often do delay the production of records for weeks or even months.¹ The lack of specificity for which records must be produced results in needless litigation for documents that are clearly publicly accessible.

REFORM: Establish a firm statutory deadline of five days to respond to requests for public information.

Excessive and broad interpretations of PRL exemptions circumvent transparency.

An additional weakness under the PRL is the exemptions of public records classified as "drafts." The "draft" exemption has raised thorny legal questions and resulted in routine abuses of the PRL. Under the law, drafts are defined as records "prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working." Wis. Stat. § 19.32(2).

Though pivotal court rulings and Attorney General decisions have narrowly construed the draft exemption, custodians regularly claim that draft status extends to any form of a document short of the final version they determine fit for release. As a result, public bodies routinely refuse the production of records disclosable under the PRL which is in contradiction to case law.

¹ 2007 National Study of 50 States' Freedom of Information Laws by the Better Government Association and National Freedom of Information Coalition.

Abuses have been identified that include the refusal to produce reports prepared under contract by outside agencies as well as reports prepared by one agency and submitted to others for review, even though the draft definition does not authorize non-disclosure in such cases.

Charging for costs associated with searching for a requested public record is a significant disincentive to public utilization of PRL.

Wisconsin's PRL allows for the imposition of high costs imposed on individuals who make a request for public records. Wisconsin's PRL permits a government authority to charge only the "actual, necessary and direct cost" of reproducing records, but the law contains a provision allowing the authority to charge for the location of records if the cost of such efforts would be more than \$50. Wis. Stat. § 19.35(3)(a)-(c).

This provision provides a disincentive to making large-volume records requests by individuals, members of the media or civic organizations that would request a substantial number of records from government authorities. Moreover, the definition of "location costs" is not clearly defined in the statute, leading government authorities to manipulate ambiguity within the law and force significant charges on requestors.

REFORM: Limit allowable costs by a public body to actual costs of reproduction that does not include searching, compiling, or redacting public information and cap allowable costs by a public body to \$.15 per page.

The lack of an administrative appeals process provides for litigation as the primary avenue to address non-disclosure.

Once an individual makes a request for public information through the PRL and is denied access, the PRL provides for no mechanism to resolve the dispute outside of litigation. Wisconsin, along with Ohio and Minnesota, does not have an administrative appeals process for reconsideration of a request. A person who has been denied a request may file his or her own action in court seeking relief. Wis. Stat. § 19.37(1).

An individual may also request that the district attorney of the county where the record is located pursue the matter in court, as well as the Attorney General. Wis. Stat. § 19.37(1)(b). Litigation is a costly endeavor that could be circumvented by an administrative appeals process.

REFORM: Amend the PRL to allow for an administrative appeals process to the head of the public body that must be responded to within a specific amount of time, such as seven working days, prior to filing litigation.

Ambiguity regarding who is covered under the PRL leaves large loop-holes.

Entities that are subject to the PRL include state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or a *quasi-governmental corporation*. . . . Wis. Stat. § 19.32.

However, the PRL fails to further define what a quasi-governmental entity is, leaving significant questions as to which contractors are covered by the statute and creating situations where private government contractors can attempt to circumvent disclosure under the PRL. In an effort to clarify the statute, in 2008, the Wisconsin Supreme Court ruled that a “quasi-governmental corporation” falls under the open meetings and public records laws if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status. *State of Wisconsin v. Beaver Dam Area Development Corporation*, 2008 WI 90.

REFORM: Amend the PRL to state that in addition to governmental bodies, private entities that are supported by public monies are subject to the PRL. Additionally, private entities that contract with public bodies are subject to PRL regarding all public services contracts and supporting documentation.

Wisconsin's statute of limitations only applies to a certain segment of the population and creates a tiered system for access to public records.

The PRL provides for no time limits for which an individual must file a claim seeking a mandamus to force the production of public records. However, the PRL has a provision which mandates that a committed or incarcerated person may only file for mandamus action within 90 days after the date that the request is denied by the authority having custody of the records. Wis. Stat. §19.37(1m). Creating a two-tiered system for enforcing access to public records contradicts openness provisions of the statute.

REFORM: Delete this provision as it creates unequal access to public records.

SUMMARY OF LAW

of Wisconsin's Public Records Law

The following section provides a summary of the main components of the Wisconsin PRL. This summary provides an overview of the nuts and bolts of the law, including what records are covered, how to appeal a denial of records requests and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in public records litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

Who is Covered Under the Law?

The Wisconsin PRL permits requestors to inspect or obtain copies of public records maintained by government "authorities." Authorities include a state or local office, elected official, agency, board, commission, committee, council, department, or public body corporate and politic created by constitution, law, ordinance, rule, or order, and any governmental or quasi-governmental corporation (except for the Bradley Center sports and entertainment corporation).

Requested records are evaluated in one of three categories:

- (1) absolute right of access;
- (2) absolute denial of access; and
- (3) right of access determined by a balancing test.

The Wisconsin courts have created a balancing test which asks: (1) is there such a record; (2) is the requestor entitled to access the record pursuant to the statute or a court decision; (3) is the requestor prohibited from accessing the record pursuant to the statute or a court decision; and (4) does the balancing test compel access to the record. The custodian evaluating the request must weigh the competing interests involved and determine whether permitting inspection of the record would result in harm to the public interest, which outweighs the legislative policy recognizing the public's interest in allowing inspection.

Public Records Open to Disclosure

The PRL applies to any material on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. Contractors' records are disclosable to the same extent as if the record were maintained by a government authority. Access to records however, does not extend to subcontractors to which the authority is not a party unless the information is required by, or provided to, the authority under the general contract to which the authority is a party.

Public Records Exempt From Disclosure

The exemptions to PRL may be grouped into the following areas:

- (1) Records requested by prisoners and committed persons, unless the person requests inspection or copies of a record that contains specific references to that person or to his or her minor children if the physical placement of the children has not been denied to the person and the record is otherwise accessible to the person by law.
- (2) Certain law enforcement investigative records.
- (3) Computer programs and trade secrets.
- (4) Identities of applicants for public positions (until finalists are chosen).
- (5) Identities of law enforcement informants.
- (6) Employees' personnel records and records of public officers (*i.e.*, containing personal information or pending investigations, though employees may review their own files subject to certain exemptions).
- (7) Ambulance records.
- (8) Patient health care records.
- (9) Law enforcement officers' records of children (*i.e.*, juvenile criminal records).
- (10) Public library user records.
- (11) Certain assessment records. *I.e.*, personal property records and property tax income and expense information are generally confidential.

As discussed more fully below in the "Main Areas of Litigation" category the PRL also contains an exemption for drafts, defined by the law as records "prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working."

Special Provisions Regarding Electronic Mail

The PRL specifically includes "electromagnetic information" among its definition of a record, therefore electronic mail is treated as a public record so long as it is created or kept in connection with official business. In addition, Wisconsin Stat. § 16.61, which governs retention, preservation, and disposition of state public records, includes "electronically formatted documents" in its definition of public records.

Trend of Public Records Law Cases Addressing Electronic Mail

Wisconsin courts have consistently affirmed that electronic mail and other electronic records are covered by the PRL and must be disclosed if requested. However, certain electronic mails may fit within the “draft” or “notes” exceptions to PRL and are thus exempt from disclosure.

Fees for Public Records

Only the “actual, necessary, and direct cost” of reproducing records may be charged under the PRL. Costs associated with locating records may be assessed when more than \$50 is required to locate records.

Main Areas of Litigation and Typical Outcomes Regarding Public Records Exempt From Disclosure

The PRL’s exemption for drafts has created significant legal questions. The exemption defines drafts as records “prepared for the originator’s personal use or prepared by the originator in the name of a person for whom the originator is working.” Though pivotal court rulings and Attorney General decisions have narrowly construed the draft exemption, custodians regularly claim that draft status extends to any form of a document short of the final version they determine fit for release.

Custodians’ attempt to withhold public records under the draft exemption typically fail. Whether prosecutors’ records are disclosable under the PRL has been a contentious issue. The Wisconsin Supreme Court resolved this question by ruling that state prosecutors’ files are exempt from the PRL and that prosecutors are not required to respond to records requests under the statute.

What Information Must a Requestor Provide?

A requestor does not need to provide his or her identity or the reason why the requestor wants particular records.

Deadline for Production of Public Records

The custodian of records must respond to a PRL request “as soon as practicable and without delay.” Though no exact timeframe is provided, the PRL provides that a reasonable response time depends on the nature of the request, the staff and other resources available to the authority to process the request, the extent of the request and related considerations.

Denial of a Records Request

If a public records request is made orally, the government authority may deny the request orally unless the requestor asks for a written statement of the reasons for denial within five business days of the oral denial. Denial of a public records request must be specific and sufficiently stated. If the public records request was made in writing, a denial or partial denial also must be in writing.

What Must be Included in Denial Letter?

If the confidentiality of the requested record is guaranteed by the PRL, citation to the appropriate statutory provision is sufficient. If no statutory provision is applicable, the denial must be accompanied by a statement detailing the specific public policy reasons for refusal. Denial of a written request must inform the requestor that the denial is subject to review in a mandamus action under Wisconsin Stat. § 19.37(1) or by application to the local district attorney or Attorney General.

Appeal to Public Body

Appeals for standard denials of public records requests are discussed in the following category (“Appeal to State Court”). Personally affected individuals have the right to appeal to the government authority. An individual authorized to inspect a record under PRL or a person authorized by that individual may challenge the accuracy of a record containing personally identifiable information pertaining to that individual by notifying the government authority in writing of the challenge.

The authority must correct the public record or deny the challenge, notify the challenger of the denial, and allow the challenger to file a concise statement of reasons for the individual’s disagreement with the disputed portions of the record.

Appeal to State Court

If a government authority denies a public records request in whole or in part or delays granting access to a record or part of a record after a written request for disclosure is made, the requestor may (1) bring a mandamus action asking a court to order release of the record or (2) submit a written request to the district attorney of the county where the record is located or to the Attorney General requesting that a mandamus action be brought.

Penalties for Violation

Attorneys’ fees, damages of at least \$100 and other actual costs are available to a requestor who prevails in whole or in substantial part in a mandamus action. A government authority’s custodian who is responsible for an arbitrary and capricious delay or denial may be subject to punitive damages of no more than \$1,000.

A committed or incarcerated person is not entitled to the minimum \$100 damages, although the court may award damages. In a request for personally identifiable information, there is no minimum recovery of \$100 in damages. In such a case, actual damages may be recovered if the court finds that the authority acted in a willful or intentional manner.

Criminal penalties may be imposed for (1) destruction, damage, removal, or concealment of public records with intent to injure or defraud or (2) alteration or falsification of public records.

Availability of Attorneys' Fees for Public Records Litigation

Attorneys' fees are available to a requestor who prevails in whole or in substantial part in a mandamus action. Courts have established that the test for "prevailing" for purposes of winning attorneys' fees requires the requestor to show that the prosecution of the mandamus action could "reasonably be regarded as necessary to obtain the information" and that a "causal nexus" exists between the legal action and the custodian's disclosure of the requested information. Pro se plaintiffs (individuals who serve as their own lawyers) are not entitled to attorneys' fees under PRL.

Whether Attorneys' Fees Are Usually Granted

Courts award attorneys' fees fairly consistently in PRL cases in which the plaintiff prevails and is not representing himself or herself as a *pro se* plaintiff.

General Areas Litigated Most Commonly and Typical Outcomes

Disclosure of public documents is a key area of litigation. Courts generally analyze disputes in this area by balancing the public's interest in nondisclosure against the public's right to information. *See, e.g., Osbkosb NW Co. v. Osbkosb Library Bd.*, 373 N.W.2d 459 (Wis. Ct. App. 1985), which found that while protecting an official's reputation was an insufficient reason for nondisclosure of public records, protecting the public interest in criminal investigation was a valid reason.

Wisconsin courts are generally more favorable to the party desiring nondisclosure if the party can point to a specific public policy found in a statute that supports withholding the documents.

Litigation is on the rise regarding whether certain entities are covered by PRL as "quasi-governmental entities." It is not uncommon that Groups developed from publicly funded agencies are being sued for PRL violations. In turn, private agencies argue that the PRL does not apply to them because they are not quasigovernmental entities.

In a case of first impression in 2008, the Wisconsin Supreme Court held that an entity is a “quasi-governmental corporation” within the meaning of the open meetings and public records laws if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status. *State v. Beaver Dam Area Development Corp.*, 312 Wis.2d 84, 752 N.W.2d 295 (Wis. 2008). The Wisconsin Attorney General sued an entity to hold it accountable as a quasi-governmental entity and publicly stated that a government agency “cannot ‘spin off’ a private entity ... then consider itself above the state laws that ensure the public has open access to the public’s business.”

Ranking in 2007 National Study of 50 States’ Freedom of Information Laws

In 2007, the nonpartisan, nonprofit organizations Better Government Association and National Freedom of Information Coalition conducted a 50-state study of FOIA responsiveness.

Three of the criteria—Response Time, Attorneys’ Fees & Costs and Sanctions—were worth four points each.

Two of the criteria—Appeals and Expedited Process—were assigned a value of two points each.

Response Time, Attorneys’ Fees & Costs and Sanctions were assigned a higher value because of their greater importance. These criteria determine how fast a requestor gets an initial answer, thus starting the process for an appeal if denied, and provide the necessary deterrent element to give public records laws meaning and vitality.

Appeals and Expedited Process, although important, were determined to be less critical in promoting open government access and thus assigned only a two-point value.

The following sets forth Wisconsin’s rankings in this study, which may be found at www.bettergov.org/policy_foia_2008.html.

- For response time (analyzing response times, the process of appealing FOIA denials and expediency, and the means to give a case priority on a court’s docket in front of other matters because of time concerns); **1 of 4**.
- For appeals (analyzing choice, cost and time); **0.5 of 2**.
- For expedited review (if a petitioner’s appeal, in a court of law, would be expedited to the front of the docket so that it is heard immediately); **0 of 2**.

- For fees and costs ((1) whether the court is required to award attorney’s fees and court costs to the prevailing requestor; and (2) what sanctions, if any, the agency may be subject to for failing to comply with the law); **4 of 4**.
- For sanctions (whether there was a provision in the statute that levied penalties against an agency found by a court to be in violation of the statute); **1 of 4**.
- Percentage (compared to other 49 states); **41 of 100**.

GRADE: F

CASE IN POINT

A recent statewide public records audit conducted by the Wisconsin Freedom of Information Council and the University of Wisconsin-Madison School of Journalism and Mass Communication found that one in ten public requests for basic documents were denied or ignored by local governments. Another two in ten requests were fulfilled only after records custodians required the requesters to identify themselves or explain why they wanted the documents, in violation of state law.

The comprehensive audit involved 318 public records requests filed in 65 counties. Notable among the audit's findings were that some municipalities charged as much as \$5 a page for photocopies, while one school district charged \$25 for meeting minutes and agendas.

Full audit results can be viewed here: www.wisfoic.org/audit/index.html.

Open Meetings Law

STRENGTHS

of Wisconsin's Open Meetings Law

The greatest strength of Wisconsin's OML is its broad coverage. The law states that "it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1). Moreover, it is well established that meetings are presumed to be open unless specific action conducted in strict compliance with the law is taken to close a meeting.

In addition, Wisconsin courts have found that the OML prevails over other laws. For example, while one Wisconsin statute provides that no action may be brought against a public official unless the official receives notice 120 days in advance, OML claims are exempt from this notice provision. *State ex rel. Auchinleck v. Town of La Grange*, 573 N.W.2d 900 (Wis. Ct. App. 1997).

The OML also provides for multiple avenues in which a lawsuit can be filed against an offending public body for violations. Individuals may file a claim in court or with the district attorney in the county where the OML violation occurred.

If the district attorney refuses to begin an enforcement action within 20 days of receiving a complaint, an individual then has two years to file a claim. The 20 day deadline provision is laudable in that it holds the district attorney accountable and ensures that individuals have timely access to courts when enforcement officers are unwilling to pursue a complaint. Alternatively, an individual may file a certified complaint with the Attorney General requesting that OML be enforced. Wis. Stat. § 19.97 et seq.

Wisconsin's OML also establishes powerful penalties for violations. Officials who violate the law are subject to forfeiture of between \$25 and \$300 for each violation. Further, courts can void actions taken at a meeting that violate the law. Significant penalties, in addition to the availability of attorneys' fees, undoubtedly serve to hold violators of the OML accountable and deter noncompliance.

Wisconsin only requires 24 hour notice for public meetings and for issuing an agenda. However, the OML requires that public notice must contain the time, date, place, and subject matter of the meeting, as well as a delineation of issues that will be considered in a closed session. Wis. Stat. § 19.84 Votes taken on items not properly listed on the public notice agenda have been found to be invalid.

In cases where a public body has voted on non-agenda items, the Attorney General has intervened and the public body has rescinded its votes. Ensuring that public bodies only take action on items that the public has properly received notice of advances transparency in government decision making.

Lastly, Wisconsin has significant resources available to the public to address OML issues. As noted under the Wisconsin PRL section, the Attorney General provides free training seminars to government officials, the media and the public. Additionally, the Attorney General will field calls from the public regarding the PRL and OML as well as file litigation against public bodies who violate the OML. Moreover, the non-profit FOIC is an essential advocate and educator about sunshine matters and press censorship. They also monitor open government issues and take action to encourage the Attorney General to investigate matters that thwart transparency in government.

WEAKNESSES

of Wisconsin's Open Meetings Law

Enforcement of the OML rests largely on the public despite alternative avenues.

Reports suggest that the agencies charged with enforcement of OML are often unwilling to pursue open meetings complaints. While the Attorney General and/or the district attorneys have the statutory capacity to intervene on OMA issues and bring litigation to ensure that an offending public body is brought to account, they rarely do so.

The result is that individuals bare the burden of enforcing the statute. The reluctance of the Attorney General and district attorneys to pursue violations weakens statutory provisions that would otherwise substantially further transparency goals espoused in the OML.

REFORM: While the Attorney General will consider responding to the PRL and OML inquiries, the SARS program should have a sunshine division dedicated to enforcing the PRL and OML. Additionally, mandatory annual training of public officials should be required, along with signing a certification of completion.

Short public notice provisions contradict public policy of encouraging public participation in the affairs of government.

The OML has a tremendously short statutory notice period of 24 hours which is given to a designated official newspaper that has been designated. Wis. Stat. § 19.84 Publication on a public body website is not required. The practical implication of a mere one day notice in an official newspaper significantly impedes the public from adequately preparing and organizing to attend meetings.

The short notice provision is particularly acute for State Legislature meetings, which may be located far from where advocacy groups or individuals reside. Moreover, reports indicate that certain groups are favored in notification, while others only get the brief statutory notice.

REFORM: Require a minimum of 72 hours notice for public meetings. Require that the notice be posted on the public body's website, and at the location of the meeting in a clearly identifiable location, as well as to any newspaper that submits a notice request.

The OML fails to address email communications.

While Wisconsin's PRL law specifically identifies electromagnetic information as being subject to disclosure, the OML is silent on when electronic communications become an impermissible meeting. Increased Internet usage by public officials creates a problem of "walking quorums" not yet regulated by the OML. A walking quorum exists when a matter discussed outside of the public view by electronic communication comes into question and is a contradiction to transparency provisions.

REFORM: Mandate that electronic communications, including successive email communications, among a simple majority of a public body are prohibited under the OML.

Detailed public meeting minutes are not required under the statute.

In addition to poor notice requirements, Wisconsin's OML does not require public bodies to keep detailed minutes of their meetings for open or closed sessions. The OML requires only that motions and roll call votes from closed sessions be recorded and available. Wis. Stat. § 19.88(3). For individuals who do not attend public meetings, the mere documentation of motions, votes, and roll calls for closed meetings does little to inform the public about meeting activity.

Moreover, because public meetings and closed meetings are not required to be taped, there is little historical documentation of public discussions. The result is a limited and linear documentation of public meetings. Moreover, closed sessions provide for even less transparency regarding minutes, and as such, the minutes of closed sessions are not useful because no substantive detail is required under the law.

REFORM: Require meetings minutes to include substantive discussion detail. Mandate verbatim recordings of closed sessions, which become publicly available after one year.

As with the PRL, Michigan’s OML lacks definition as to who is covered under the law.

As with the PRL, the OML identifies “quasi-governmental corporations” as being subject to the statute. However there is no precise definition as to what a quasi-governmental corporation is. The ambiguous nature of the term has been the subject of much debate.

In 2008, the Wisconsin Supreme Court ruled that a “quasi-governmental corporation” falls under open government statutes if the entity, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status. *State v. Beaver Dam Area Development Corp.*, 312 Wis.2d 84, 752 N.W.2d 295 (Wis. 2008).

REFORM: Amend OML to state that private entities supported by public monies are subject to the PRL.

SUMMARY OF LAW

of Wisconsin's Open Meetings Law

The following section provides a summary of the main components of the Wisconsin OML. This summary provides an overview of the nuts and bolts of OML, including what types of meetings are covered by the law, the procedures for closed sessions, how to appeal a violation and what relief is available through the courts. Also included are assessments based on a review of the relevant case law of the main issues in OML litigation and whether attorneys' fees are actually awarded to successful plaintiffs.

Who is Covered Under the Law?

Wisconsin's OML applies to every meeting of a governmental body. Governmental bodies include state or local agencies, commissions, departments, and councils. The law also applies to the State Legislature, but not to a partisan caucus of the Senate or Assembly. In addition, governmental or quasi-governmental corporations are covered by the law.

Are Committees, Advisory Groups, Subcommittees Covered?

Yes. The OML covers separate, smaller bodies created by the parent body and including people from the parent body. Bodies created by a directive and advisory bodies created by a constitution, statute, ordinance, rule, or order and bodies created by a directive also are covered.

Types of Gatherings Covered

The law applies when two requirements are met: (1) the body meets with the purpose of engaging in governmental business; and (2) the number of members present is sufficient to determine the body's course of action.

Under the first requirement, the body must meet to engage in business, including discussion, decision, or information-gathering on issues within the body's responsibilities.

To satisfy the second requirement, a gathering is covered under the law depending on the number of members needed to determine a course of action. This can be fulfilled by a simple majority. It also can be fulfilled by the existence of a negative quorum, which is a group of a sufficient size to block a proposal.

The numbers requirement also can be satisfied with a walking quorum. A walking quorum is a series of gatherings of members of a governmental body, each less than quorum size, who agree to act in concert to reach a quorum. Also, when a quorum of the members of one governmental body attend another body's meeting to gather information or engage in governmental business on a matter under their responsibility, that meeting also is covered. Gatherings that happen by chance or as social occasions are not covered.

If at least one-half of the body is present at the meeting, then the meeting is presumed to be for engaging in government business.

What Meetings Must Be Open?

Each meeting of a body whose purpose is to conduct official business has to be in open session. "Official business" includes discussion, decision-making, or information-gathering regarding issues subject to the body's authority.

Exceptions: Closed Meetings

There are several types of authorized closed meetings:

- (1) Judicial or quasi-judicial hearings.
- (2) Consideration of employment or licensing matters, including consideration of financial, medical, social, or personal information of public employees or prospective public employees, and disciplinary actions.
- (3) Consideration of financial, medical, social or personal information.
- (4) Conducting public business about issues with competitive or bargaining implications.
- (5) Conferring with legal counsel for litigation that is pending or likely to occur.
- (6) Considering applications for probation, parole, or strategy for crime detection and prevention.
- (7) Deliberations by the state council on unemployment insurance and worker's compensation.
- (8) Deliberations about the location of a burial site.
- (9) Consideration of requests for confidential written advice from an ethics board.

- (10) Considerations about a business ending its operations or laying off employees.
- (11) Considering financial information about a non-profit corporation operating an ice rink owned by the state.

Procedures for Closed Meetings

Every meeting must first be convened in open session. To move to a closed session, the chief presiding officer must announce and record the nature of the business to be discussed and the exception in the OML that allows for the closed session. Then, the body must pass a motion, by recorded majority vote, to meet in closed session. In the closed session, members of the body may only discuss the business specified during the vote. The members must return to open session to vote on said business.

If the body wants to reconvene in open session within twelve hours of the closed session, the body must provide public notice of the open session “at the same time and in the same manner” as the public notice of the original open session.

Recordkeeping for Meetings: Minutes Requirements

Governmental bodies do not need to keep detailed minutes of their meetings. The body must keep a record of the motions and roll call votes at each meeting. The motions and roll call votes can be tape recorded. A consent agenda is most likely not a sufficient means for recording votes.

Statutes outside the OML require the county, village, and city clerks to keep a record of proceedings of their governing bodies.

Counties: The county clerk is required to keep and record in a book the minutes of all proceedings of the board. The clerk must make entries of the board’s resolutions and decisions on all questions and record the vote of each supervisor on any question submitted to the board. The county clerk also must record in a book every resolution adopted, order passed, and ordinance enacted.

Villages: The village clerk must record and sign the proceedings of all meetings of the village board. In addition, the village clerk must record and sign all ordinances, bylaws, resolutions, and regulations that the village board adopts. The village clerk must use a minute book, which contains the full minutes of all the proceedings of the board of trustees.

Cities: The city clerk must attend the meetings of the city council and keep a full record of the city council’s proceedings.

Taping or Filming Meetings

As long as the meeting is not disrupted, individuals may tape or film open session meetings. The governmental body must make a reasonable effort to accommodate members of the public who wish to tape, film, or photograph a meeting in open session.

Are Electronic Mail Communications a Meeting?

The OML does not address electronic communications, but lists “electromagnetic information” in its definition of a record. Courts interpreting PRL have held that electronic mail and other electronic records must be released on request.

The Wisconsin Attorney General suggests that the following factors are relevant to determine whether means of electronic communications constitute a meeting under the OML: number of participants; number of communications regarding the subject; time frame within which the communications occurred; and extent of conversation-like interactions.

Public Notice of Time and Place for Meetings: Requirements for Agendas

Public notice must contain the time, date, place, and subject matter of the meeting, including issues that will be considered in a closed session. The form of the notice must be reasonably likely to inform members of the public and news media. The notice does not need to contain a detailed agenda.

The Wisconsin Attorney General has suggested that an appropriate benchmark is to ask whether, after reading the notice, a person interested in a particular issue would be aware that this issue would be discussed during the meeting. Bodies cannot use general designations, such as “miscellaneous business” or “agenda revisions” as a means to raise a broad range of subjects.

As for timing, the OML requires the government body to provide 24-hour notice of a meeting, unless good cause makes the 24-hour requirement impractical or impossible. Wisconsin courts have not defined “good cause.” In the case of an emergency, the government body must provide notice at least two hours prior to the meeting.

The notice must alert the public, news media that request notice, and any officially designated newspapers. Public notice may be accomplished by posting in places likely to be seen by the public. The Wisconsin Attorney General has suggested a minimum of three locations. Notice must be provided for each separate meeting; that is, a government body cannot produce a single notice for a series of meetings.

Summary of Pivotal State Supreme Court OMA Decisions

State ex rel. Auchinleck v. Town of LaGrange, 547 N.W.2d 587 (Wis. 1996)

The court held that actions brought under the OML are exempt from the usual notice provisions required when someone sues an official. The court reasoned that requiring a resident to follow the statutory notice period of 120 days would frustrate the purpose of the OML.

State ex rel. Newspapers v. Showers, 398 N.W.2d 154 (Wis. 1987)

Showers articulated the requirements for when a gathering is subject to the OML: (1) The purpose of the meeting is to engage in governmental business, including information-gathering, decision-making, or discussion; and (2) the number of members present is sufficient to determine the parent body's course of action regarding the proposal at issue.

State ex rel. Lynch v. Conta, 239 N.W.2d 313 (Wis. 1976)

The court held that, when a subgroup of a parent body meets, the gathering is subject to the OML if a quorum is present. A political party meeting is not subject to the OML.

State ex rel. Journal/Sentinel, Inc. v. Pleva, 456 N.W.2d 359 (Wis. 1990)

A lease between the City of Milwaukee and a non-profit organization incorporated the OML. The court held that when a contract incorporates the OML, plaintiffs may use the law to seek relief.

Enforcement

The Wisconsin Attorney General and district attorney have the authority to enforce OML. A district attorney can enforce the law after an individual files a complaint. Once an individual files a complaint, the district attorney has 20 days to enforce the law. After 20 days, if the district attorney refuses to begin an enforcement action or fails to act, the individual can bring an action in the name of the state.

Penalties for Violation

Members of governmental bodies are subject to a forfeiture of between \$25 and \$300 for each violation. If the district attorney brings the action, then the forfeiture is awarded to the county. If the Attorney General or a private resident brings the action, the forfeiture is awarded to the state. A court also can issue a declaratory judgment, an injunction, or a mandamus. The court also can void an action taken at a meeting that violated the OML.

Are Criminal Penalties Assessed Regularly?

No. Only civil penalties are available.

Availability of Attorneys' Fees for OMA Litigation

Attorneys' fees are available, but not for a pro se plaintiff. If a resident brings an action on behalf of the state because the district attorney refused or failed to commence the action, and the resident prevails, the court may award reasonable attorneys' fees.

In an advisory opinion, the Wisconsin Attorney General has stated that in limited circumstances, a city council may reimburse a council member for attorneys' fees. To be reimbursed, the council member must not have violated OML while conducting his or her official duties. 66 Op. Att'y Gen. 226 (1977).

Wisconsin courts also have addressed the issue of what constitutes "reasonable" attorneys' fees. *State ex rel. Hodge v. Town of Turtle Lake*, 526 N.W.2d 784 (Wis. Ct. App. 1994). In *Hodge*, the court stated that to determine the amount of fees to pay, the court should start by taking the number of hours billed and multiply that figure by the reasonable private rate of service. The court also stated that when determining attorneys' fees, courts may take into account factors specific to the case, such as the particular facts surrounding the violation and the ability of the responsible party to pay.

Whether Attorneys' Fees Are Usually Granted

Successful plaintiffs are generally awarded attorneys' fees.

General Areas Litigated Most Commonly and Typical Outcomes

The most commonly litigated area involves the notice requirement. In most cases, the court determined that the government body's notice was sufficient. Courts generally found in favor of the government body as long as the notice was specific enough to apprise members of the public of the subject matter of the meeting. For closed meetings, one court stated that because those discussions are unpredictable, it would be unreasonable for a governmental body to specify the exact issues to be discussed. *State ex rel. Auchinleck v. Town of La Grange*, 573 N.W.2d 900 (Wis. Ct. App. 1997).

There are two cases in which the notice was found to be insufficient. In one instance, the notice was insufficient because the members of one body failed to give separate notice that they were attending the meeting of another body. *State ex rel. Badke v. Village Bd. of Greendale*, 494 N.W.2d 408 (Wis. 1994). In the second instance, the town failed to provide proper notice before going into closed session. *County of Oneida v. Crist*, 460 N.W.2d 447 (Wis. Ct. App. 1990).

CASE IN POINT

A Circuit Court judge in Polk County found that 20 Polk County Board supervisors violated Wisconsin's OML while negotiating and finalizing a sale agreement for a county owned nursing home for the elderly by repeatedly making key decisions in closed session. The County argued that the identity of the buyer needed to remain confidential until a sale agreement was finalized because the Finance Committee of the County Board was concerned that if the name of any potential buyers were released, they could walk away from the deal if they were harassed by a group who was opposing the sale.

The judge rejected the argument, stating that the mere fact that a government decision is contentious does not warrant a closed meeting. The original complaint listed 83 OML violations. Jim Drabek acted as a citizen prosecutor, and he appears to be the first layperson to win such an OML case. Drabek was outraged by the County Board's behavior, saying, "What if your mother lived at Golden Age Manor, if she was a resident there? Wouldn't you want to know who's going to take care of her? I think this is just horrendous." In September 2008, a Wisconsin appellate court voided the Golden Age Manor sale agreement and the state Supreme Court declined to review the decision.

The entire story can be found at:
www.burnettcountysentinel.com/read/detail/36931.html.

COMPARE AND CONTRAST

Freedom of Information Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
Coverage	All public bodies, including legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of the state.	All public bodies, including state agencies, county and other local governments, school boards, other boards, departments, commissions, councils, and public colleges and universities. If an entity receives more than half of its funding through a state or local authority, it is considered a public body.
Public Records Open to Disclosure	Any handwriting, typewriting, printing, photostating, photographing, photocopying and every other means of recording, including letters, words, pictures, sounds or symbols, or combinations thereof, as well as papers, maps, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.	A writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function.
Form of Records	Requestor's choice; can be paper or other medium if public body normally maintains records in that form.	Requestor's choice; can be paper or other medium.
Electronic Mail	E-mails are covered.	E-mails are covered.
Fees for Public Records	Only for actual cost of reproduction and certification; not for cost of labor.	Fees may be charged for the necessary copying of a public record for inspection or providing a copy of a public record to a requestor. Fees also may be imposed for search, examination and review and the separation of exempt information in those instances where failure to charge a fee would result in unreasonably high costs to the public body. The fee must be limited to actual duplication, mailing and labor costs.

MINNESOTA	OHIO	WISCONSIN
<p>All government entities, including state agencies, record-keeping systems, political subdivisions, corporations or non-profits under contract, state university system and school districts, and any officer, board, or authority appointed for an agency or ordinance or any level of local government (counties, districts, charter cities, towns, etc.).</p>	<p>All public bodies, including state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by any alternative school in the state of Ohio kept by a non-profit or for profit entity.</p>	<p>All government “authorities,” including a state or local office, elected official, agency, board, commission, committee, council, department, or public body corporate and politic created by constitution, law, ordinance, rule, or order, and any governmental or quasi-governmental corporation (except for the Bradley Center sports and entertainment corporation).</p>
<p>Regardless of physical form, all information collected, created, received, maintained, or disseminated by the government.</p>	<p>Regardless of physical form, any document, device, or item which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.</p>	<p>Regardless of physical form, all material on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved and has been created or is being kept by an authority.</p>
<p>Must be “easily accessible for convenient use.”</p>	<p>Requestor’s choice; can be paper or other medium if public body normally maintains records in that form.</p>	<p>Requestor’s choice; can be paper or other medium.</p>
<p>E-mails are covered.</p>	<p>E-mails relating to office functioning are covered.</p>	<p>E-mails are covered.</p>
<p>If copied amount is less than 100 pages, the fee is limited to 25 cents per page. If over 100 pages, charge can cover actual costs of searching for, compiling, or electronically transmitting the data (including employee time under certain conditions).</p>	<p>Only for actual cost of reproduction and mailing; not for cost of labor.</p>	<p>Only for the “actual, necessary, and direct cost” of reproducing records; not for the cost of labor. Costs associated with locating records may be assessed when more than \$50 is required to locate records.</p>

Freedom of Information Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<p>Public Records Exempt from Disclosure</p>	<p>Key specific exemptions include:</p> <ul style="list-style-type: none"> - records related to litigation - medical records - personnel records - tax assessments 	<p>Key specific exemptions include:</p> <ul style="list-style-type: none"> - information or records subject to the attorney-client privilege - law enforcement information - trade secrets
<p>Deadline for Production of Public Records</p>	<p>Seven business days, additional seven business days with extension.</p>	<p>Five business days, additional ten business days with extension for unusual circumstances.</p>
<p>Denial of a Records Request</p>	<p>Public body must, in writing, provide explanation, identify responsible parties, and explain appellate process.</p>	<p>Public body must provide written explanation and inform requestor of right to seek judicial review within five days, or within fifteen days under unusual circumstances.</p>
<p>What Information Must a Requestor Provide</p>	<p>None. Requestor may provide identification and purpose for a waiver of fees in the “public interest.”</p>	<p>None. Reason for request may be disclosed but cannot constitute effective denial.</p>
<p>Appeal Process (Administrative or State)</p>	<p>Requestor must appeal denial to the head of the public body in writing. If such administrative appeal is denied or ignored, requestor may file action in circuit court for injunctive or declaratory relief.</p>	<p>Requestor must appeal denial to the head of the public body in writing. If such administrative appeal is denied or ignored, requestor may try to compel disclosure in circuit court.</p>

MINNESOTA	OHIO	WISCONSIN
<p>Key specific exemptions include:</p> <ul style="list-style-type: none"> - law enforcement information - proprietary information and trade secrets - personnel data - private, confidential, nonpublic and protected nonpublic data 	<p>Key specific exemptions include:</p> <ul style="list-style-type: none"> - medical records - trial preparation records - records pertaining to adoption hearings - trade secrets 	<p>Key specific exemptions include:</p> <ul style="list-style-type: none"> - law enforcement information - proprietary information and trade secrets - patient health care records - personnel records
<p>“As soon as reasonably possible,” but no exact time period. Ten days for private and summary data.</p>	<p>“Promptly prepared,” but no exact time period.</p>	<p>“As soon as practicable and without delay,” but no exact time period.</p>
<p>Requestor has right to be informed of the specific law or classification that justifies the denial.</p>	<p>Public body must provide explanation, including legal authority. The explanation is not required to be written, unless the requestor so requests.</p>	<p>If oral request, the government authority may deny the request orally unless the requestor asks for a written statement of the reasons for denial within five business days of the oral denial. If written request, a denial or partial denial must be in writing. Reasons for the denial must be specific and sufficient.</p>
<p>None for public and summary data. Specifications vary regarding access to private data and confidential data.</p>	<p>None. Public body may ask for written request, requestor’s identification and reason, but must disclose non-mandatory nature.</p>	<p>None. A requestor does not need to provide his or her identity or the reason why the requestor wants particular records.</p>
<p>No administrative appeal process exists. Requestor may try to compel disclosure in district court. Personally affected individuals have the right to appeal to the government authority administratively regarding their personally identifiable information.</p>	<p>No administrative appeal process exists. Requestor may file a mandamus action to compel disclosure in the court of common pleas.</p>	<p>No administrative appeal process exists. Requestor may bring a mandamus action asking a court to order release of the record or submit a written request to the district attorney of the county where the record is located or to the Attorney General requesting that a mandamus action be brought. Personally affected individuals have the right to appeal to the government authority administratively regarding their personally identifiable information.</p>

COMPARE AND CONTRAST

Freedom of Information Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<p>Penalties for Violation</p>	<p>None.</p>	<p><i>Punitive damages:</i> Up to \$500. <i>Actual or compensatory damages:</i> awarded by courts.</p>
<p>Availability of Attorneys’ Fees for Prevailing Plaintiffs in Litigation</p>	<p>Yes, but not for <i>pro se</i> plaintiffs.</p>	<p>Yes, but not for <i>pro se</i> plaintiffs.</p>
<p>Typical Outcome of Request for Attorneys’ Fees by Prevailing Plaintiffs in Litigation</p>	<p>Not often awarded.</p>	<p>Not often awarded.</p>
<p>Statute of Limitations to File Administrative Appeal or to File Action in Circuit Court</p>	<p>None.</p>	<p>FOIA requestors who face a full or partial denial of their records requests may submit a written appeal to the head of the appropriate public body, or may directly file a claim in court within 180 days of the purported denial.</p>

MINNESOTA	OHIO	WISCONSIN
<p><i>Exemplary damages:</i> Between \$1,000 and \$10,000. Civil penalties: Up to \$1,000 awarded by courts, payable to the state general fund.</p>	<p><i>Statutory damages:</i> \$100 per business day, up to \$1,000.</p>	<p><i>Statutory damages:</i> minimum \$100 and other actual costs (except no such recovery by committed or incarcerated persons). <i>Punitive damages:</i> up to \$1,000 for a government authority's custodian who is responsible for an arbitrary and capricious delay or denial.</p>
<p>Yes, but not for <i>pro se</i> plaintiffs.</p>	<p>Yes, but not for <i>pro se</i> plaintiffs.</p>	<p>Yes, but not for <i>pro se</i> plaintiffs.</p>
<p>Not often awarded.</p>	<p>Not often awarded.</p>	<p>Usually awarded.</p>
<p>None.</p>	<p>None.</p>	<p>When the request comes from a committed or incarcerated person, the claim must be filed within 90 days after the request is denied.</p>

COMPARE AND CONTRAST

Open Meetings Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<p>Coverage</p>	<p>Any public body, including any legislative, executive, administrative, or advisory bodies of the state, counties, townships, cities, villages, incorporated towns, school districts, and all other municipal corporations, boards, bureaus, committees, or commissions, and any subsidiary bodies of any of the foregoing. Does not apply to private, non-profit corporations under any conditions.</p>	<p>Any public body, including any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, which is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform such a function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement. A board of a nonprofit corporation formed by a city under the Home Rule City Act is a public body, however, courts have found no coverage for a nonstock, nonprofit corporation created independent of state or local authority without the assistance of public funds or generally for private non-profit corporations.</p>
<p>Are Committees, Advisory Groups, Sub-Committees Covered?</p>	<p>Committees and sub-committees are covered by the law. Advisory committees that are supported in any part by tax revenue or which expend tax revenue are covered by the law pursuant to a balancing test.</p>	<p>Committees and sub-committees are covered by the law so long as they exercise governmental authority or perform a governmental function. Advisory groups are not expressly covered under the law. The Attorney General has suggested there is no coverage, however state appellate courts have found advisory committees subject to coverage in certain cases.</p>
<p>Types of Gatherings Covered</p>	<p>Coverage extends to a gathering of a majority of a quorum to discuss public business.</p>	<p>Coverage extends to any meeting of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, or any meeting of the board of a nonprofit corporation formed by a city under the Home Rule City Act. Also covered are information-gathering and fact-finding sessions called by the governmental body where a quorum of members are present and the session relates to the body's public business.</p>

MINNESOTA	OHIO	WISCONSIN
<p>Any public body, including any state agency, board, commission, or department when it is required or permitted by law to transact public business in a meeting, the governing body of any school district, unorganized territory, county, city, town, or other public body, and a committee, subcommittee, board, department, or commission of a public body subject to the law. A 2000 amendment established that corporations created by political subdivisions are subject to coverage.</p>	<p>Any public body, including any board, commission, committee, council, or similar decision-making body of a state agency, any county, township, municipal corporation, school district, or other political subdivision. Coverage can be trumped by individual city charters due to the home rule provision in the State Constitution.</p>	<p>Any public body, including state or local agencies, commissions, departments, and councils. The law also applies to the state Legislature, but not to a partisan caucus of the Senate or Assembly. Governmental or quasi-governmental corporations are also covered by the law. The statute does not address coverage for non-profit corporations, though Attorney General opinions lean toward coverage for non-profits as quasi-governmental entities.</p>
<p>Committees and sub-committees are covered by the law. Advisory groups are not expressly covered under the law, but courts have held that an advisory committee may be covered depending on the number of members of the governing body involved and on the form of the delegation of authority from the governing body to the members.</p>	<p>Committees and sub-committees are covered by the law. Advisory groups are not expressly covered under the law and Ohio courts are split on whether advisory groups constitute public bodies.</p>	<p>Committees and sub-committees are covered by the law. Bodies created by a directive and advisory bodies created by a constitution, statute, ordinance, rule, or order and bodies created by a directive are also covered.</p>
<p>Coverage extends to gatherings of a governing body reaching a quorum, or a quorum of a committee, subcommittee board, department or commission at which members discuss, decide or receive information as a group on issues relating to the official business of that governing body.</p>	<p>Coverage extends to a prearranged meeting of a public body in which a majority of its members attend and discuss public business.</p>	<p>Coverage extends to gatherings of a majority of the public body where the body meets to engage in business, including discussion, decision, or information-gathering on issues within the body's responsibilities. A negative quorum (sufficient number of members to determine a public body's course of action if the group votes as a block) or walking quorum (series of meetings, telephone conferences, or some other means of communication such that groups of less than a quorum are effectively meeting) can satisfy the majority requirement.</p>

Open Meetings Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<p>Exemptions: Closed Meetings</p>	<p>A meeting may be closed under 24 exemptions. Examples include personnel matters, purchase of property, probable or imminent litigation and collective bargaining.</p>	<p>A meeting may be closed under 10 exemptions. Examples include personnel matters, purchase of property, pending litigation and collective bargaining.</p>
<p>Public Notice of Time and Place for Meetings: Requirements for Agendas</p>	<p>Public bodies must post an agenda for each regular meeting at least 48 hours in advance at both the principal office of the public body and at the meeting location. A schedule listing the times and places of regular meetings must be available at the office of the public body. A public body that has a website maintained by the full time staff of the public body must post all agendas and notices on its website regarding all public body meetings.</p>	<p>Public bodies must post a notice containing the dates, times, and places of the public body’s regular meetings, as well as the name of the public body, its telephone number and its address at least 18 hours before a meeting. It is required that public bodies post this notice at their principal office and any other location deemed appropriate.</p>
<p>Procedures for Closed Meetings</p>	<p>A majority of a quorum of the public body must vote to hold a closed meeting. The vote of each member and the citation to the specific closed session exemption must be publicly disclosed and entered into the minutes of the meeting.</p>	<p>A 2/3 roll call of members of the public body is required, except for the closed sessions permitted. The roll call vote and the purpose for calling the closed session must be entered into the minutes of the meeting where the vote takes place.</p>

MINNESOTA	OHIO	WISCONSIN
<p>A meeting <i>must</i> be closed for a limited range of subjects, for instance if data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse, or maltreatment of minors or vulnerable adults, to discuss data regarding educational data, health data, medical data, welfare data, or mental health data that are not public data or for preliminary consideration of allegations against an individual subject to the government's authority. A meeting may be closed under limited conditions, for instance if disclosure of the information discussed would pose a danger to public safety or compromise security, for labor negotiations purposes, purchase of property or attorney-client privileged matters.</p>	<p>A meeting <i>may</i> be closed under 8 exemptions. Examples include personnel matters, purchase of property and collective bargaining.</p>	<p>A meeting <i>may</i> be closed under 11 exemptions. Exemptions include personnel matters, purchase of property, pending litigation and collective bargaining.</p>
<p>Public bodies must keep schedules of regular meetings on file at their offices. The law fails to specify agenda requirements for meetings covered by the statute. However, if printed materials relating to agenda items are prepared by or at the direction of the governing body, and are distributed or available to those members, one copy of these same materials must be available in the meeting room for inspection by the public. No time limit is provided in the statute for posting notices for regular meetings, though special meetings require at least three days' notice.</p>	<p>Public bodies must establish at least one reasonable method of informing the public of meetings (sign on the front door of town hall, published information in a general circulation). News media must be informed at least 24 hours before meetings (exempting emergency meetings).</p>	<p>Public notice must contain the time, date, place, and subject matter of the meeting, including issues that will be considered in a closed session. No detailed agenda is required. The public body must provide 24-hour notice of a meeting, which may be accomplished by posting in places likely to be seen by the public. The Wisconsin Attorney General has suggested a minimum of three locations.</p>
<p>A public body must state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed. Special provisions apply to close a meeting to discuss labor negotiations or to evaluate the performance of an individual subject to the government's authority.</p>	<p>The public body must hold a roll call vote and have a majority of the quorum vote to enter executive session. The motion and vote must state which one or more of the closed session exemptions will be considered at the executive session.</p>	<p>The chief presiding officer must announce and record the nature of the business to be discussed and the closed session exemption that allows for the closed session. Then, the public body must pass a motion, by recorded majority vote, to meet in closed session.</p>

COMPARE AND CONTRAST

Open Meetings Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
<p>Recordkeeping for Meetings: Minutes Requirements</p>	<p>Minutes must include the date, time and place of the meeting, the members of the body recorded as present or absent and a summary of discussion on all matters proposed, deliberated or decided, and a record of any votes taken.</p>	<p>Meeting minutes must be kept for each meeting showing the date, time, place, members present or absent, any decisions made, the purpose for which a closed session is held and all roll call votes taken at the meeting. Proposed minutes must be made available for public inspection within 8 business days after the meeting to which the minutes refer, and approved minutes must be available for public inspection within 5 business days after the meeting at which the minutes are approved by the public body.</p>
<p>Taping of Filming Meetings</p>	<p>Taping or filming meetings is permissible so long as it does not interfere with the meeting.</p>	<p>Taping or filming meetings is permissible so long as it does not interfere with the meeting.</p>
<p>Are Electronic Mail Communications a Meeting?</p>	<p>Email and Internet chat room communications are considered communications for meeting purposes under the law.</p>	<p>The law does not address whether electronic mail communications are meetings.</p>
<p>Enforcement</p>	<p>State's Attorneys and individuals may sue to enforce the law in the circuit court. The Public Access Counselor's Office has no punitive authority but may respond to citizen's complaints and occasionally refers potential violations to the State's Attorney for investigation.</p>	<p>Individuals, the Attorney General, and the prosecuting attorney of the appropriate county all have the authority to enforce the law by filing a civil action in the circuit court to compel compliance or to enjoin further noncompliance.</p>

MINNESOTA	OHIO	WISCONSIN
<p>The law does not specifically require that minutes be taken at a regular meeting. The only statutory requirement is that votes taken at a meeting required to be public will be recorded in a journal kept for that purpose, which must be open to the public during normal business hours.</p>	<p>Minutes of regular or special meetings of any public body need to be prepared promptly, filed, and maintained so that they are available to public inspection.</p>	<p>Governmental bodies do not need to keep detailed minutes of their meetings. The body must keep a record of the motions and roll call votes at each meeting. Statutes outside the Open Meetings Law require the county, village, and city clerks to keep a record of proceedings of their governing bodies.</p>
<p>The law does not specifically address, however, a Minnesota Attorney General's Opinion states that taping is permissible if it does not have a significantly adverse effect on the order of the proceedings or impinge on constitutionally protected rights.</p>	<p>The law does not specifically address, however, an Ohio Attorney General's Opinion states that taping or filming meetings is permissible if it does not unduly interfere with a meeting.</p>	<p>Taping or filming meetings is permissible so long as it does not interfere with the meeting.</p>
<p>The law does not address whether electronic mail communications are meetings.</p>	<p>The law does not address whether electronic mail communications are meetings.</p>	<p>The law does not address whether electronic mail communications are meetings, but the state Public Records Law lists "electromagnetic information" in its definition of a record and courts interpreting that law have held that e-mail and other electronic records must be released on request.</p>
<p>Only individuals may sue to enforce the law in a district court.</p>	<p>Only individuals may sue to enforce the law in a court of common pleas. However, if a citizen suit results in an injunction against a public body, the attorney general or prosecuting attorney is responsible for bringing an action against officials who violate the injunction.</p>	<p>Individuals, the Attorney General and the district attorney have the authority to enforce the law in circuit court (though an individual must first file a verified complaint with the district attorney for his or her office to prosecute the case).</p>

Open Meetings Act

CATEGORIES OF CONCERN	ILLINOIS	MICHIGAN
Relief/Penalties for Violation	Available relief and penalties include mandamus, invalidation, injunction, costs and attorneys' fees. Criminal penalties include a fine of up to \$1,500 and imprisonment of up to 30 days.	Available relief and penalties include injunction, invalidation, damages up to \$500, criminal fines, costs and attorneys' fees. Criminal penalties for an intentional violation by a public official include a misdemeanor punishable by a fine of up to \$1,000, and a second intentional offense subject to a misdemeanor punishable by a fine of up to \$2,000 and/or imprisonment for up to 1 year.
Are Criminal Penalties Assessed Regularly?	Criminal penalties are rarely imposed for violations.	Criminal penalties are rarely imposed for violations.
Availability of Attorneys' Fees for OMA Litigation	Attorneys' fees are available for a prevailing party, but not for <i>pro se</i> plaintiffs.	Attorneys' fees are available where a violation was intentional and the plaintiff is successful, but not for <i>pro se</i> plaintiffs. Attorneys' fees will not be granted unless injunctive or declaratory relief is granted.
Whether Attorneys' Fees are Usually Granted	Attorneys' fees are usually not granted to prevailing parties.	Attorneys' fees are generally awarded when declaratory or injunctive relief is granted to a plaintiff.
Public Comment Mandated at Public Meetings?	No public comment required	Public comment <i>required</i>
Statute of Limitation to File Lawsuit	60 days	An action for injunctive relief must be filed within 180 days of the alleged violation. Litigation which seeks to invalidate a decision of a public body must be initiated within 60 days of the approved minutes, or within 30 days for decisions involving property, money, contracts or bond issuance.

MINNESOTA	OHIO	WISCONSIN
<p>Available relief and penalties include injunction, damages up to \$300, costs, attorneys' fees and removal from office. In addition, if a person is found to have intentionally violated the statute in three or more actions involving the same governing body, that person must forfeit any further right to serve on the governing body for a period of time equal to the term of office such person had served.</p>	<p>Available relief and penalties include injunction, \$500 civil forfeiture fine, costs, attorneys' fees, invalidation and removal from office. If the court deems the plaintiff's action was frivolous, the court may award all court costs and reasonable attorneys' fees to the public body.</p>	<p>Available relief and penalties include declaratory relief, injunction, mandamus, invalidation, damages from \$25 to \$300, costs and attorneys' fees.</p>
<p>Criminal penalties are not available for violations.</p>	<p>Criminal penalties are not available for violations.</p>	<p>Criminal penalties are not available for violations.</p>
<p>The court may award reasonable costs, disbursements, and attorneys' fees of up to \$13,000 to any prevailing party, but attorneys' fees may not be awarded against a member of the public body unless the court finds there was an intent to violate the law. Public bodies may recover attorneys' fees for frivolous lawsuits brought by plaintiffs without merit.</p>	<p>Attorneys' fees are available for a prevailing party if the court issues an injunction, but not for <i>pro se</i> plaintiffs. Public bodies may recover attorneys' fees for frivolous lawsuits brought by plaintiffs.</p>	<p>Attorneys' fees are available for a prevailing party, but not for <i>pro se</i> plaintiffs.</p>
<p>Attorneys' fees are usually granted to prevailing plaintiffs.</p>	<p>Attorneys' fees are generally granted to plaintiffs who prevail in winning injunctive relief. However, they are rarely awarded to defendant public bodies for frivolous lawsuits.</p>	<p>Attorneys' fees are usually granted to prevailing plaintiffs.</p>
<p>No public comment required</p>	<p>No public comment required</p>	<p>No public comment required</p>
<p>No time line</p>	<p>Two years</p>	<p>Once an individual files a verified complaint, the District Attorney has 20 days to enforce the law. After 20 days, if the District Attorney does not begin an enforcement action, the individual can bring the action in the name of the state for up to two years.</p>