

June 7, 2017

TECHNICAL BULLETIN

To: SCAC Board
County Council Chairs
County Attorneys
CAOs
Clerks to Council

From: SCAC Staff

Re: Changes to the Freedom of Information Act - 2017 Act No.67 (R. 102, H. 3352)

This *Technical Bulletin* outlines major changes to the process of handling requests for documents and records to counties and all other public bodies under the Freedom of Information Act (FOIA). These changes are the result of several years of efforts by the Press Association and others to make changes to the Act. Several stakeholders, including SCAC were involved in amending key provisions in this legislation. A copy of the Act is attached for your convenience.

The Act changes the response time to a FOIA request and adds a timeframe for the documents to be produced. It requires fee schedules and sets a threshold for hourly charges. A deposit can be required for large or time consuming FOIA request, and the public body can withhold the documents until they receive full payment. A person can bring an action in circuit court for violation of FOIA and a public body can bring an action for unduly burdensome or improper FOIA requests. The Act replaces the criminal penalties formerly under FOIA with a civil penalty. It also makes it a crime to obtain personal information from a county or other political subdivision for commercial solicitation. Changes are discussed more fully below. In addition, the Act makes dash cam videos and recordings public documents.

Section 30-4-30(A) of the Act states that a public body is not required to create an electronic version of a public record when one does not exist. If records are in an electronic format and are transmitted to a requestor, a public body may not charge a copy fee. However, if a public body agrees to convert documents that are not in an electronic format, the public body may charge for the staff time required to transfer the documents to an electronic format. The fee shall not exceed the prorated hourly salary rate of the lowest paid employee capable of fulfilling the request. The Act is silent on how a public body is to list the hourly rate on the fee schedule, especially in light of the fact that depending on the nature of the request, any number of persons may be involved or capable of fulfilling the request. A deposit, not to exceed twenty-five percent of the total reasonably anticipated cost for reproduction of the records, may be required prior to a public body searching for or making copies of records.

Section 30-4-30(C) states that a public body has ten business days to respond to a written FOIA request if the records are two years old or less. This response constitutes the final opinion of the body as to the availability of the records. The determination is not required to include a final decision as to whether specific portions of the documents or information may be subject to redactions based on exemptions. If the request is granted, the records must be produced no later than thirty calendar days from the date on which the final determination was provided. If the records requested are more than two years old, a public body has twenty business days to respond. If the request is granted, the records must be produced no later than thirty-five calendar days from the date on which the determination was provided. The response and production deadlines may be extended by written mutual consent of the requestor and public body, and consent to an extension cannot be unreasonably withheld. If a public body fails to respond to a written FOIA request within the allotted timeframes, the request must be considered approved as to nonexempt records, while the exemptions still apply.

Section 30-4-30(D) makes certain records available for public inspection and copying without a written FOIA request during normal business hours. For example, all documents produced by the public body or its agent that were distributed to or reviewed by a member of the public body during a public meeting for the preceding six-month period must be immediately available for inspection and copying. This would include subcommittee meetings of the public body as well as meetings of boards and commissions that are appointed by the public body. A public body may comply with this section by placing all of the documents on their website. However, the documents must still be produced if they are requested.

Section 30-4-50 makes dash-cam videos and audio recordings public records. Law enforcement may apply to circuit court for an order to prevent the release of the dash-cam data upon a showing by clear and convincing evidence that the data is exempt under §30-4-40(a)(3) and that the reason for exemption outweighs the public interest in disclosure. A circuit court hearing must be requested within fifteen days of receipt of the request for disclosure. A court order to withhold the release of the recording data must specify a definite time period for the withholding of the release of the recording data and must include the court's findings.

Section 30-4-100 allows a citizen to apply to circuit court for a declaratory judgment or injunctive relief to enforce a FOIA violation. A hearing must be held within ten days after filing upon all parties being served with notice of the action. If a person or entity prevails against the public body, they may be awarded reasonable attorney's fees and costs of litigation. Section 30-4-110 allows a public body to request a hearing in circuit court to seek relief from an unduly burdensome, overly broad, vague, repetitive, or otherwise improper FOIA request. It also allows them to bring an action for clarification when they are unable to make a determination as to whether the information is exempt from disclosure. If a court determines that the records are not subject to disclosure, the determination constitutes a finding of good faith on behalf of the public body and serves as a complete bar from attorney's fees should the determination be reversed on appeal. If the court determines that a public body has arbitrarily and capriciously violated FOIA, it may impose a civil fine of five hundred dollars in addition to actual or compensatory damages.

Finally, §30-2-50 prohibits a person or private entity from knowingly obtaining personal information from a public body for commercial solicitation. Each state agency, local government, and political subdivision of the State shall provide a notice to all requestors which states that obtaining or using public records for commercial solicitation directed towards any person in this State is prohibited. A person who violates this provision is guilty of a misdemeanor, and upon conviction, must be fined up to five hundred dollars or imprisoned for up to one year, or both.

This *Technical Bulletin* does not constitute legal advice. It is intended for general information on this topic. Please consult your county attorney for specific issues affecting your county.