

OPPOSE SB 189 (RAOUL/MADIGAN)

SB 189 amends the Freedom of Information Act (FOIA) by imposing new requirements and procedures for public entities responding to FOIA requests. There are several significant changes, including a new Public Access Counselor position in the Attorney General's office and requiring public bodies to designate employees or officials to act as FOIA officers. Despite our best efforts, school districts were not included in negotiations during the spring session. While we understand the political necessity of addressing common abuses of FOIA, we believe the legislation places significant burdens on a school district's ability to responsibly manage FOIA requests.

In considering the proposed changes to FOIA, there are a few key points to keep in mind:

- Transparency in government is the goal of FOIA. We believe school districts work in support of transparency and accountability for public funds and information.
- While there may be public bodies that disregard FOIA, the majority of school districts properly comply with FOIA requests.
- Such school districts should not be penalized with onerous new requirements.

Major concerns with the legislation:

Mandatory award of attorney fees and costs - The bill imposes a mandatory award of attorneys' fees and costs if a court determines the person was entitled to all or a portion of the record. This provision does not take into consideration that some FOIA exemption matters are grey in nature. A well-intentioned school district may end up in litigation on a matter where the law is not clear as to whether the record is exempt from disclosure. A court should have the ability to determine if the public body has acted irresponsibly and award fees at its discretion.

Additionally, fee provisions should be mutual. The original version of the bill (HB 1370) included a provision allowing "the court to award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a public body if the court finds that a suit filed under this Section was frivolous." This section was removed in the final version of SB 189. Public bodies must have the same ability to recoup costs associated with unnecessary actions on the part of FOIA requestors. This is an important mechanism for school districts and should be considered in future legislative sessions.

Exemptions of personal information - The bill includes an ambiguous definition of "personal information" as it relates to personal property. We believe this will become a litigious issue in considering personnel records and place districts at risk to inadvertently disclose information that should be exempt, or, fail to disclose information available under FOIA.

Burden of proof - The bill establishes a clear and convincing burden of proof on the school district and imposes an extremely high legal standard for the district to prove that a document

is exempt from disclosure. This high standard is especially troublesome if the appeal process is abolished pursuant to this legislation and attorney fees are mandatory.

“Detailed Factual Basis” and “Supporting Legal Authority” - The bill requires districts to include a “detailed factual basis” and “supporting legal authority” for the application of an exemption in the denial letter. This proposed amendment is problematic because the school district may not be able to fully discuss facts without revealing the exempt matter. Further, the proposed amendment does not clarify what constitutes “supporting legal authority.” The exemption (i.e. the specific statutory provision) must already be provided. It is unclear whether citations to case law would also be required under this change. The inclusion of cited cases in FOIA responses would be onerous for non-lawyer FOIA officers.

Removal of Internal Appeal Process - The bill removes the internal appeal process for denials of FOIA requests. A school district should have an opportunity to conduct its own internal review. A board of education, for example, may resolve an issue differently than the FOIA officer without the need for judicial procedures. One staff member, working with complex legal issues, could subject the public body to serious legal consequences without an appeal process.

Records of Independent Contractors - The bill expands the definition of public records to include “documents that are in the possession of a party with whom the district has contracted.” This definition change is problematic as a school district does not control independent contractors or records that are in the possession of an independent contractor.

Form of requests - The bill prohibits a school district from requiring a particular form or FOIA submission. Thus, any written request, including email messages and faxes to any employee in the district, would count as an official FOIA request. A formal process helps a public body administer FOIA requests. Requiring the submittal of a FOIA request on a specific form to a specific person is not a significant burden on the public and, in fact, streamlines the process.

Shortened response/extension time - The bill shortens the response period from 7 to 5 days and shortens the extension period from 7 to 5 days. Shortened response/extension times will hinder the school district’s ability to provide a thorough response. Diligent efforts by school districts require adequate time for reviewing multiple requests, identifying documents, and applying exemptions.

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**EDUCATION ORGANIZATIONS OPPOSING SB 189:**  
**Chicago Public Schools**  
**ED-RED**  
**Legislative Education Network of DuPage**  
**Large Unit District Association**  
**South Cooperative Organization for Public Education**  
**Statewide School Management Alliance**

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