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Testimony from Marie Dillon, Director of Policy, and Matt Topic, Outside General Counsel

Better Government Association

Re: SB2135, House Amendment 4 (FOIA)

May 22, 2020

The Better Government Association strongly opposes the following provision in SB2135, House Amendment 4:

Section 15-10. The Freedom of Information Act is amended by adding Section 3.4 as follows:

16 (5 ILCS 140/3.4 new)
17 Sec. 3.4. 2020 exception. Notwithstanding any provision of
18 law or rule to the contrary, no public body shall be considered
19 in violation of this Act for failing to respond within the time
20 prescribed by this Act to any request due on or after March 9,
21 2020 and prior to June 1, 2020, provided the public body
22 provides a response by the later of 30 days after the effective
23 date of this amendatory Act of the 101st General Assembly or
24 the time prescribed by this Act for the relevant request.

Throughout the COVID-19 emergency, local governments represented by the Illinois Municipal League have repeatedly petitioned Attorney General Kwame Raoul for relief from their responsibility to respond to public records requests under FOIA.

The Attorney General has held firm in advising those governments that Gov. Pritzker’s executive order “**does not authorize public bodies to disregard FOIA or to issue blanket denials of all FOIA requests.**” ([Guidance to Public Bodies on the Open Meetings Act and the Freedom of Information Act During the COVID-19 Pandemic](#), updated April 9, 2020.)

The guidance notes that the General Assembly has determined that “it is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible in compliance with [FOIA].”

With public buildings closed and many government employees working from home, it is understandable that some requests for public information cannot be fulfilled within statutory deadlines. Such cases are covered by FOIA’s “undue burden” provision as long as the public body meets its obligation to assert an exception. Suspending the deadlines would make those

case-by-case determinations impossible. The law also allows requesters and governments to work out a longer timetable if needed, and in our experience they are able to do so.

There has been no ambiguity in the Attorney General's guidance, nor has there been any move by the governor to relax the requirements of FOIA during this emergency. **The language in SB2135, House Amendment 4 undermines FOIA and gives a free pass to governments that have ignored that guidance at the expense of the public.**

Earlier this month, bipartisan members of the U.S. Senate Judiciary Committee pressed the U.S. Department of Justice to explain its failure to ensure compliance with federal FOIA rules during the pandemic.

"While many agencies have sought to be clear about their temporarily reduced capabilities, we are concerned that some, particularly the FBI, may have created unnecessary burdens on requesters in response to the COVID-19 national emergency declaration," wrote Sens. Patrick Leahy (D-Vt.), Chuck Grassley (R-Iowa), Dianne Feinstein (D-Calif.), and John Cornyn (R-Texas).

"We understand all agencies and departments are continuing to adapt to the current circumstances, but it is the [Justice] Department's duty to ensure that FOIA administration is not simply cast aside as a temporary inconvenience."

We hope and expect that Illinois lawmakers share that commitment to public transparency.

The Illinois Municipal League argues that enforcing FOIA during the pandemic exposes its members to lawsuits for failure to provide records under extremely trying circumstances. But local governments have nothing to worry about if they have a legitimate hardship and a timely claim.

In its letters to the Attorney General, IML has sought (but not received) an advisory opinion waiving the statutory deadlines. "Such an opinion would protect municipalities from monetary sanctions if their staffing restrictions prevent them from responding to FOIA requests in a timely fashion," according to the IML's May 4 letter.

The concerns expressed in that letter would be addressed by inserting "willful" into the bill before "violation" since only willful violations are subject to civil penalties.

State and local governments have exercised extraordinary authority to deal with the public health emergency. That calls for more transparency, not less. **Please do not allow SB2135 to create an end run around the Freedom of Information Act.**
