MAYER·BROWN

Government Update
January 11, 2010

New Illinois Laws Enact Sweeping Changes to Campaign Finance, Ethics, Public Records, Lobbying and Procurement Requirements

Entities doing business with the Illinois state government or with local governments in Illinois should be aware of several new laws related to campaign finance, ethics, public records, lobbying and procurement that are effective in 2010. In short, the laws and changes are as follows:

Freedom of Information Act. P.A. 96-542 made significant changes to the Illinois Freedom of Information Act. The amended law modifies the available exemptions, the process for responding to requests and the review of decisions by a state public access counselor and the Attorney General. Of particular interest to entities submitting trade secrets or commercial or financial information to public bodies, the amended law requires that the entity submitting such information must clearly assert the confidentiality of such information at the time it is provided to a public body. These changes took effect on January 1, 2010.

Open Meetings Act. P.A. 96-542 also made changes to the Open Meetings Act. The amended law now requires regular training, and provides for the review of decisions by a state public access counselor. These changes took effect on January 1, 2010.

Lobbyist Registration Act. Significant changes were made to the Lobbyist Registration Act by P.A. 96-555. The law requires more frequent reporting and annual ethics training by all registered lobbyists. These changes took effect on January 1, 2010. (However, as of the date of this Client Update, the Illinois Secretary of State has temporarily suspended lobbyist registration due a pending lawsuit and the issuance of a temporary restraining order filed against the State.)

Pay-to-Play Law. A variety of changes were made to the so-called "Pay-to-Play Law" by P.A. 96-795, which was enacted over the Governor's amendatory veto, and by P.A. 96-848. Effective January 1, 2010, the amended law changes the scope of persons and entities required to register with the Illinois State Board of Elections and institutes a quarterly reporting system. As we describe in more detail below, clients that are currently registered are advised to review their list of registered affiliated persons and affiliated entities in light of the amended law and to report any changes within 10 business days of the end of January.[1]

Procurement Code. P.A. 96-795 also made changes to the Procurement Code. The amended law places restrictions and requirements on the use of lobbyists in procurement matters and prohibits the awarding of contracts to entities or persons who assisted the state agency in determining the need for the contract or in preparing or reviewing the request for proposals. Pursuant to P.A. 96-793, these changes take effect on July 1, 2010.

Campaign Finance. With the passage of P.A. 96-832, Illinois has established its first-ever, broad set of campaign finance and political contribution limitations. Most of the provisions in the new law take effect January 1, 2011, although certain limited changes to the current election law take effect July 1, 2010.

Changes to the Freedom of Information Act—Effective January 1, 2010

Presumption. The statement of policy in FOIA is revised to stress the "primary duty" imposed on public bodies to make public records available. The revised law will presume that any record is open for public inspection. The burden is placed on the public body to prove by clear and convincing evidence that the record should be exempt from inspection.

Definitional Changes. The definition of "public records" now contemplates electronic records. It also no longer includes an enumeration of specific examples of public records, recognizing that records are presumed to be "public records," no matter the changing technological form. Additionally, the revised law now defines "private information" and "commercial purpose" consistently with earlier case law and opinions of the Attorney General.

Certain Public Records. The revised law now expressly provides for the treatment of four types of public records: (i) records relating to public funds are public records, (ii) certified public payroll records submitted under the Prevailing Wage Act are public records, subject to redaction of employees' personal information, (iii) arrest records are public records and must be disclosed within 72 hours, and (iv) settlement agreements are public records. The revised law also provides for the treatment of criminal history records.

Requests. Requests must be made in writing (although the public body may choose to respond to a verbal request). The request must be immediately forwarded to the public body's FOIA officer or designee. The public body may not require the use of a specified form. Additionally, the public body may not require the requester to specify the purpose of the request, except in order to determine whether the documents are being requested for a commercial purpose or whether to grant a fee waiver.

Response Time. The public body must respond to the request within five business days (rather than seven working days, as previously provided); if the public body does not respond within such time, then it may not charge fees for copying and may not claim that the response is "unduly burdensome." However, the public body and the requester may mutually agree to extend the time for response beyond five business days.

The revised law enumerates special time periods for responding to requests for a commercial purpose. Within 21 working days after receipt of the request, the public body must either (i) provide the documents, (ii) deny the request (on account of an exemption), (iii) determine that the request is "unduly burdensome," or (iv) provide an estimate of the time required to provide the records an of the fees to be charged (the public body may require that fees be paid before the records are provided). A requester violates FOIA if the requester knowingly obtains a public record for a commercial purpose without disclosing that it is for a commercial purpose (if asked to do so by the public body).

FOIA Officers. Every public body must designate one or more FOIA officers to receive requests and ensure a timely response. Each officer is also responsible for maintaining certain logs and records pertaining to its FOIA activities. By July 1, 2010, all FOIA officers must complete an electronic training program developed and administered by the Public Access Counselor (an official within the Office of the Attorney General). FOIA officers must continue to complete a training program annually thereafter. The public body must post a directory of its FOIA officers and certain information concerning its records on its web site.

Electronic Records. If the public body maintains records in electronic format, then it must provide those records in the electronic format specified by the requester (if feasible). The public body may not charge fees for producing electronic records.

Fees. The public body may not charge fees for the first 50 black-and-white (letter-sized or legal-sized) copies. Fees for additional black-and-white copies may not exceed $0.15 per page. Fees for color and irregularly-sized may not exceed the actual cost to the public body (not including personnel costs). Fees for certification may not exceed $1.00.

Exemptions. There were several changes made to the enumeration of exemptions:

- **Private Information.** The disclosure of private information (as defined under the revised law) is exempt, unless required to be disclosed by another section of FOIA (expressly), another state or federal law, or court order.
- **Personal Information.** The disclosure of personal information is exempt if the person's right to privacy outweighs any legitimate public interest. The revised law no longer enumerates specific examples of exempt personal information.
- **Law Enforcement.** A record may be exempt if its disclosure would interfere with law enforcement action *by the agency to which the request was made.*
- **Trade Secrets/Commercial or Financial Information.** To be exempt as a "trade secret" or as commercial or financial information, the

provider of the information must assert (when the information is furnished) that the particular information being provided is proprietary, privileged, or confidential, and that disclosure would cause competitive harm to the business.

Clients that provide trade secrets or commercial or financial information to public bodies in Illinois should adopt internal policies to ensure that such an assertion is made when the information is provided.

- **Employee Grievances.** Records pertaining to the adjudication of employee grievances or disciplinary actions are exempt. However, if discipline is imposed, then the final outcome of the proceeding is not exempt.
- **Special Provisions Pertaining to Invasion of Privacy and Preliminary Drafts Exemptions.** If a public body intends to assert that a record is exempt from disclosure because it is either an unwarranted invasion of personal privacy or preliminary drafts, notes, or recommendations, then the public body must notify both the requester *and the Public Access Counselor* (within the normal time periods) that it intends to deny the request on account of that particular exemption. If the Public Access Counselor believes that further review of this decision is warranted, then the decision is subject to the review procedures enumerated below.

Public Records in the Custody of Third Parties. Records in the custody of a third-party contractor that performs government functions on behalf of a public body are public records subject to disclosure.

Disclosures Made with Denials. If the public body denies a request, then the public body must notify the requester in writing (i) that the request has been denied, (ii) of the reasons for the denial, including a factual basis of and citation to any exemption, (iii) of the names and titles of the persons responsible for the denial, (iv) that the decision may be reviewed by the Public Access Counselor, and (v) that the decision may be reviewed judicially.

Exhaustion of Administrative Remedies. If the public body fails to act within the time periods specified, then the requester is deemed to have exhausted his or her administrative remedies (and would therefore be entitled to judicial review).

Public Access Counselor Review. If a public body has denied a request for records, then the requester may file a request for review by the Public Access Counselor within 60 days of the denial. The request for review must be in writing and include a copy of the request to the public body and any response received.

If the Public Access Counselor determines that further action is warranted, then he or she will forward the request to the public body within seven working days, and the public body will cooperate and provide records to the Public Access Counselor within seven working days thereafter. If the public body does not cooperate, then the Attorney General may issue a subpoena to compel release of the records. The public body may, but need not, answer the allegations. The requester may, but need not, reply to the public body's answer.

The Public Access Counselor must furnish his or her opinion within 60 days (but may extend this time for an additional 21 days). The opinion is binding, subject to administrative review. Alternatively, the Attorney General may elect to have the dispute resolved through mediation, rather than through the issuance of a binding opinion.

Attorney General Advisory Opinions. The Attorney General may also issue advisory opinions to public bodies, upon which public bodies may rely.

Attorney Fees; Penalties. The court *shall* (rather than "may") award attorneys fees if the requester prevails in court. The court should consider the degree to which the relief obtained relates to the relief sought. If the court determines that the public body willfully and intentionally failed to comply with the law, or otherwise acted with bad faith, then the court may impose a civil penalty of $2,500 to $5,000 per occurrence.

Appeal to Head of Public Body. The revised law no longer provides that the requester may appeal a denial to the head of the public body to which the request was made.

Changes to the Open Meetings Act—Effective January 1, 2010

Compliance Training for Public Employees. Every public body subject to the Open Meetings Act must designate employees to be trained in compliance. By July 1, 2010, these employees will be required to

complete an electronic training curriculum developed and administered by the Public Access Counselor (an official within the Office of the Attorney General).

Records Released to State's Attorney or Public Access Counselor. If a public body releases records to a State's Attorney or Public Access Counselor for the purpose of determining whether or not the public body has complied with the Open Meetings Act, those records (while in the custody of the State's Attorney) are not subject to public disclosure under the Freedom of Information Act.

Public Access Counselor Review. Any person who believes that a public body has not complied with the requirements of the Open Meetings Act may request a review by the Public Access Counselor within 60 days of the alleged violation. The request must be in writing and state facts to support the allegation. A copy of the request will be transmitted to the public body.

If the Public Access Counselor determines that a review is warranted, then he or she may request that the public body furnish records, including a verbatim transcript of a closed meeting. If the public body does not cooperate, then the Attorney General may issue a subpoena to compel release of the records. The public body may, but need not, answer the allegations. The requester may, but need not, reply to the public body's answer.

The Public Access Counselor must furnish his or her opinion within 60 days (but may extend this time for an additional 21 days). The opinion is binding, subject to administrative review. Alternatively, the Attorney General may elect to have the matter resolved through mediation, rather than through the issuance of a binding opinion.

Attorney General Advisory Opinions. The Attorney General may also issue advisory opinions to public bodies, upon which public bodies may rely.

Internet Records. The General Assembly also recently enacted the "Gubernatorial Boards and Commissions Act." The act, P.A. 96-543, requires a public body to which the Governor appoints one or more members, and which has a full-time technology staff, to post audio or video recordings of its open meetings, as well as agendas and minutes, on its web site.

Changes to the Lobbyist Registration Act—Effective January 1, 2010

The following changes became effective January 1, 2010. However, as of the date of this Client Update, the Illinois Secretary of State has temporarily suspended lobbyist registration due a pending lawsuit concerning the increased registration fees and the issuance of a temporary restraining order filed against the State.

Registration. The Lobbyist Registration Act (the "Lobbyist Act") generally requires compensated lobbyists to register with the Illinois Secretary of State within two business days after being so employed or retained. Under the Lobbyist Act, a "lobbying entity" is any entity for whom lobbying is undertaken; an "exclusive lobbyist" is a person solely employed by a lobbying entity who lobbies only on behalf of that entity; and a "contractual lobbyist" is a person retained by one or more lobbying entities to lobby on their behalf. The amended Lobbyist Act requires each lobbying entity, exclusive lobbyist, and contractual lobbyist to submit a separate registration.

The amended Lobbyist Act also exempts local governments and schools districts, together with their officials, from registration, codifying a previously promulgated administrative rule.

The registration fee has been raised to $1,000 for all persons and entities. The registration fee had previously been $100 for qualifying non-profit entities and $350 for all other persons and entities.

Ethics/Revolving Door Rules. The amended Lobbyist Act prohibits registered lobbyists, as well as members of their immediate families, from serving on boards, commissions, or task forces authorized or created by state law or by executive order, where the lobbyist is engaged in the same "subject area" as the board, commission, or task force. The prior law did not qualify the prohibition on the basis of subject area. The amended Lobbyist Act also now prohibits registered lobbyists from accepting compensation from most state agencies for the purpose of lobbying legislative action.

Ethics Training. The amended Lobbyist Act requires all registered lobbyists to complete an annual ethics training program provided by the Secretary of State.

Expenditure and Activity Reports. The Lobbyist Act generally requires each registered entity and lobbyist to complete a periodic report of expenditures and activities. While exclusive lobbyists had previously not been required to file expenditure and activity reports, the amended Lobbyist Act now requires exclusive lobbyists to file reports to attest to the accuracy of the information disclosed in the report of the registered entity that employs the exclusive lobbyist.

Notably, the amended Lobbyist Act requires much more frequent reporting. The prior law required only semi-annual reports. The amended Lobbyist Act requires registered reports to be filed *weekly* while the General Assembly is in session, and *monthly* otherwise.

While the prior law did not require expenditures of less than $100 to be itemized, the amended Lobbyist Act requires *all* expenditures to be itemized. The itemized expenditure must also now indicate the name and address of the client on whose behalf the expenditure was made, as well as an appropriate description of the expenditure. Additionally, while the prior law provided that gifts returned within 30 days of receipt did not need to be reported, the amended Lobbyist Act now requires that all gifts be reported, including those returned.

The amended Lobbyist Act also requires contractual lobbyists to disclose additional information about their activities on behalf of particular clients. Under the prior law, the contractual lobbyist would identify its clients and, in the aggregate, report the agencies lobbied. The amended Lobbyist Act now requires the contractual lobbyist to itemize by client each lobbying activity.

Enforcement and Penalties. The amended Lobbyist Act now requires the Secretary of State Inspector General to receive and investigate allegations of violations. If the violation is not corrected within 30 days, the investigation is referred to the Attorney General.

The Lobbyist Act imposes civil penalties of up to $10,000 for violations. The amended Lobbyist Act increases this penalty by providing that for each day a report or registration is late a separate violation may be imposed. The amended Lobbyist Act also includes various factors for determining the appropriate fine, including the nature of the activities being conducted and whether or not the violation was intentional or unreasonable.

Changes to the Illinois "Pay-to-Play" Law—Effective January 1, 2010

Registration. Under the Illinois "Pay-to-Play" Law, a business entity must register with the Illinois State Board of Elections if the annual value of its bids or awarded state contracts exceeds $50,000. The business entity must also register certain affiliated entities and affiliated persons.

Affiliated Persons. The amended law, like the prior law, requires the registration of certain beneficial owners, executive employees, and the spouses of such owners and executive employees. However, the amended law no longer requires the registration of minor children. Additionally, the amended law more narrowly defines "executive employee" as the chairman, president, and chief executive officer of the bidding or contracting entity (or a functional equivalent) and any employee whose compensation is determined directly, in whole or in part, by the award of the state contract (and not paid irrespective of such award). Finally, the amended law no longer covers persons otherwise prohibited under federal law from making political contributions (e.g., foreign citizens).

Affiliated Entities. The amended law now also requires the registration of the bidding or contracting entity's operating subsidiaries, corporate parent entity, and corporate parent entity's other operating subsidiaries. This may require the disclosure of a substantial number of different entities not previously registered. The prior law had instead required the registration of entities within the "same unitary business group." Additionally, as with affiliated persons, the amended law no longer covers entities otherwise prohibited under federal law from making political contributions (e.g., foreign entities).

Updating the Registration. While the prior law had required immediate reporting of registration changes, the amended law generally requires that the registration be updated quarterly, within 10 business days of the end of each January, April, July, and October. However, if a bid or proposal is pending, registration changes must be reported within five business days, and in any case not later than the day before the contract is awarded.

In light of the changes to the definitions of "affiliated persons" and "affiliated entities," clients that are

currently registered with the Illinois State Board of Elections are advised to carefully review their registration and to make necessary changes within 10 business days of the end of January.

Changes to the Illinois Procurement Code—Effective July 1, 2010

Use of Subcontractors. The Illinois Procurement Code now requires a state contractor to notify the appropriate state purchasing officer of the use of any subcontracts. Contractors must also provide a copy of executed subcontracts within 20 days of execution.

Prohibited Contractors. The Illinois Procurement Code is amended to prohibit bidding by or contracts with persons or entities that have assisted the state agency in determining the need for a procurement or in preparing or reviewing the request for proposals, except in response to a public request for information or similar assistance.

Reimbursement for Travel, Lodging, and Meals. The Illinois Procurement Code is amended to prohibit the State from compensating or reimbursing a person or business entity let or awarded a contract for any expenses related to travel, lodging, or meals. This provision is included among a section entitled "Lobbying restrictions," although it does not expressly apply to lobbyists alone.

Use of Lobbyists in Procurement. The Illinois Procurement Code is amended to require all bidders for State contracts that retain lobbyists to make certain disclosures and to verify that none of the lobbyists' costs will be billed to the State. The law also bans the payment of contingency fees for persons or entities who retain individuals or entities to influence the outcome of procurement decisions. Violations are classified as business offenses, subject to civil penalties of up to $10,000. Finally, the law requires monthly reports of any oral communications made by lobbyists to State employees regarding procurement decisions.

Campaign Finance Law—Effective January 1, 2011 Except As Noted

Registration. Effective July 1, 2010, existing political committees must file revised registration statements with the State Board of Elections. Those revised registrations must be filed by December 31, 2010. Under the amended law, committees will be designated as either candidate political committees, ballot initiative committees, political action committees or political party committees (including legislative caucus committees).

Reporting and Disclosures. The new law requires campaign contributions and expenditures to be reported quarterly, rather than semi-annually as currently provided. Contributions of $1,000 or more, however, must be reported within either two or five business days, depending on the proximity of the next election. Additionally, "bundlers" who aggregate contributions from five or more contributors totaling $3,000 or more, outside of an official fundraiser or the presence of the candidate, must be disclosed in the quarterly report.

Application of Limits. The limits imposed by the new law, as described below, apply to elections to state and local offices in Illinois. The limits are to be adjusted for inflation on January 1 of each odd-numbered year.

Individual Contribution Limits. The new law limits contributions by individuals to $5,000 per candidate per election cycle and to $10,000 to any political party, legislative caucus committee or political action committee per year. The primary and general elections are considered different election cycles for candidates.

Corporation, Association, and Union Limits. The new law limits contributions by corporations, associations, and unions to $10,000 to any candidate per election cycle and $20,000 to any political party, legislative caucus committee or political action committee per year.

Candidate Limits. The new law limits contributions by candidates to $50,000 to any other candidate per election cycle and $50,000 to any political action committee per year. Candidates are not limited in contributing the political parties or legislative caucus committees, unless the recipient is participating in a primary election (in which case the contribution limit is $50,000).

Political Party and Legislative Caucus Committee Limits. The new law limits contributions by political parties and legislative caucus committees *during primary elections* to $200,000 to any statewide candidate, $125,000 to any Senate candidate, $75,000 to any House candidate, and between

$50,000 and $125,000 to candidates for local and judicial offices (depending on the size of the jurisdiction). Contributions by political parties and legislative caucus committees during the primary election are aggregated, such that party and caucus leaders share the same, single limit per recipient.

Self-Funded Candidates. The new law requires those candidates who, together with their immediate family members, contribute or loan more than $100,000 to their campaigns (or $250,000 in the case of statewide campaigns) to file a statement of disclosure with the State Board of Elections. The filing of this statement permits all other candidates in the race to disregard the contribution limits otherwise in effect.

2011 ILLINOIS POLITICAL CONTRIBUTION LIMITS		CONTRIBUTOR				
		Individual	Corporation, Labor Org., Association	Political Action Committee	Candidate Political Committee	Political Party Committee
RECIPIENT	Candidate Political Committee	$5,000 per election cycle	$10,000 per election cycle	$50,000 per election cycle	$50,000 per election cycle	Subject to caps during a primary election cycle; unlimited otherwise
	Political Action Committee	$10,000 per calendar year	$20,000 per calendar year	$50,000 per calendar year	$50,000 per calendar year	$20,000 per calendar year
	Political Party Committee	$10,000 per calendar year	$20,000 per calendar year	$50,000 per calendar year	$50,000 if the contributing candidate or party committee is participating in an ongoing primary election cycle; unlimited otherwise.	
	Ballot Initiative Committee	Unlimited				

Endnote

[1] For more information about the Illinois Pay-to-Play Law, please see previous Mayer Brown Client Updates/Alerts:

Registration Deadline Nears for Illinois State Contractors and Bidders Subject to Strict New Campaign Contribution and Registration Requirements

New Illinois Campaign Contribution and Registration Requirements May Affect Investment Funds and Managers

Illinois Governor Pat Quinn Rescinds Executive Order Banning Certain Illinois Campaign Contributions

For more information about the matters raised in this client update, please contact any of the following lawyers.

John A. Janicik
+1 312 701 7323
jjanicik@mayerbrown.com

Joseph Seliga
+1 312 701 8818
jseliga@mayerbrown.com

Mitchell D. Holzrichter
+1 312 701 8212
mholzrichter@mayerbrown.com