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Freedom of Information Axed

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Counsel's Column

In general, government operates with an eye toward transparency, which allows for public involvement and accessibility to government operations and information maintained. Boards of social work are statutorily created and empowered through government acts and are subject to the applicable laws related to open records and open meetings. Open meetings laws require public notice of when and where board meetings are to be held, allowing for public attendance. While the public may be allowed to attend board meetings, participation by the attending public can be limited and customarily is restricted to a designated public comment period during the meeting. Boards of social work generally have the authority to meet in closed session (which prohibits public attendance) for certain reasons identified in the law, including protection of confidential information, protection of attorney-client privilege, and discussion of personnel matters.

Open records laws require disclosure of records maintained by the board when requested, as set forth in the law. Disclosure of records is subject to various exceptions that can be quite complex and varied from jurisdiction to jurisdiction. Under the majority of open records laws, all records and materials in possession of the social work boards are subject to disclosure unless delineated as exceptions to accessibility. However, records not maintained by the board need not be created merely for the purpose of disclosure and compliance with the sunshine laws. Distinguishing between records already maintained and records that must be created to comply with an open records request can be subject to debate. Persons or entities dissatisfied with the form of materials or the materials disclosed (or refused to be disclosed) by the board have a right to challenge the decision by seeking a judicial order. Consider the following.

In February 2010, the Chicago Tribune Company (Tribune) requested under the applicable Freedom of Information Act (FOIA) provisions that the Illinois Department of Financial and Professional Regulation (Department) and the director of the Division of Professional Regulation disclose certain general information as well as specific data related to multiple identified licensed physicians. In particular, the Tribune sought records related to:

1. The number of licensees overseen by the Department's medical prosecutions unit who have

been identified as sex offenders

2. The names of such identified sex offenders
3. The total number of initial claims, complaints, and formal complaints against each such identified sex offender
4. The dates of all such claims and the dates of and resolution of such claims, complaints, and formal complaints
5. What types of disciplinary action were taken and when
6. The number of claims since 2000 of sexual misconduct of any kind that have been made against medical license holders that fall under the medical prosecutions unit

Thereafter, the Tribune made a second FOIA request seeking the following information on nine identified physician licensees:

1. A timeline of each case dating back to the initial claim
2. A copy of the formal complaint
3. A copy of the final order and any transcripts
4. Identification of any other initial claims, complaints, and formal complaints against the nine identified licensees
5. Whether the Department was aware of any criminal charges against the identified licensees
6. The dates the Department was notified of any such criminal charges

In March 2010, the Department responded to the second Tribune FOIA request, providing the information sought with the exception of the "additional claims and complaints made against these licensees." The Department claimed that such data were exempt from disclosure under the applicable law. The Department also claimed that information related to the disclosure of criminal complaints was maintained in the investigative files and, thus, also exempt from disclosure.

In April 2010, the Department responded to the first FOIA request and provided the Tribune with a list of 17 individuals, their license numbers, associated case numbers, the date each case was opened, and the current status of the individuals' licenses. Regarding the more general information requested, the Department stated that it did not maintain such data in an "accessible format" and, thus, such was not produced.

The Tribune requested from the Attorney General Public Access Counselor an administrative review of the denial of disclosure as is allowed under the law. In its request for administrative review, the Tribune attempted to clarify its request, noting that it sought: the number of claims and complaints against the identified individuals, when such claims were made, and how they were resolved. Additionally, the Tribune requested the number of claims and complaints made against licensed medical professionals identified by the Department as sex offenders. The Tribune abandoned its other outstanding requests for information. In response to the internal appeal, the Department noted its refusal to provide information regarding the initial claims and complaints because such data could not be separated from the investigative files, which were exempt from disclosure. The parties eventually agreed that the only question at issue was whether the number of initial claims and complaints against individual license holders is protected from disclosure under the FOIA. In October 2010, the Public Access Counselor, in a nonbinding opinion, found that the Department "failed to sustain its burden of establishing that disclosure of the number of initial complaints filed against a specific physician is exempt" under the FOIA.

Thereafter, the Tribune filed action in the circuit court alleging that the Department improperly withheld the number of claims or informal complaints filed against each of the identified physicians. Both parties filed motions for summary judgment, a procedure whereby the litigants agree to the important facts and ask the court to rule on the legal issues without the need for a trial on the merits. The circuit court ruled in favor of the Tribune and ordered the disclosure of the requested information. The Department appealed the case to the appellate court.

On appeal, the Department argued that initial claims received by the Department against named physicians are exempt under the FOIA and that the lower court erred by requiring disclosure. Specifically, the Department argued that the Medical Practice Act of 1987 prohibits the disclosure of the number of claims or informal complaints received by the Department against named physicians. Further, the Department argued that FOIA does not require a state agency to prepare for disclosure records not maintained in the ordinary course of its operations. Finally, the Department argued that previous

judicial precedence recognizes a protectable interest in a "blemish-free license to practice medicine."

After reviewing the standard of review for summary judgment cases, the court turned its attention to the merits of the legal arguments. First, the purpose of the FOIA is to "open government records to the light of public scrutiny." Thus, there is a presumption of open and accessible public records. The court quoted the legislative intent of the statute and noted the public policy of the State of Illinois to include access by all persons. It noted the fundamental obligations of government to operate openly and provide public records as expediently and efficiently as possible. However, it noted that the FOIA is "not intended to cause an unwarranted invasion of personal privacy, nor to allow the requests of a commercial enterprise to unduly burden public resources, or to disrupt the duly undertaken work of any public body... ."

The court next focused on the Department's argument that it does not maintain the number of initial claims received against individual physicians and, accordingly, has no duty to compile and produce information necessary to satisfy that FOIA request. In response, the Tribune argued that the Department waived this argument because it did not raise this defense in its denial letters, in the administrative proceedings, or before the Public Access Counselor.

The appellate court reviewed the options available to a person requesting circuit court review of a denial under the FOIA. In the current case, the Tribune sought and received a nonbinding review by the Public Access Counselor. Thereafter, the Tribune sought judicial relief from the circuit court, which ruled in its favor. The appellate court noted the fact that circuit court review is *de novo*; that is, reviewed without consideration of any previous rulings. Based on the *de novo* review, coupled with the unambiguous language of the statute, the appellate court held that the Department did not waive its defenses related to the fact that the Department does not maintain the requested information in the ordinary course of business.

The court was also troubled by the ambiguous nature of the Tribune request for information and the exact nature of what data were sought. After an analysis of the request, the court concluded that the information requested included the number of initial claims received. Under the FOIA, public records are defined to include:

> all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data, processing records, electronic communications, recorded information, and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.

According to the appellate court, "it is apparent that the [Tribune] does not seek production of 'public records' as that term is defined in the FOIA but requests the Department to perform a review of its investigative files and prepare a tally as to the number of initial claims made against certain license holders." The court further noted that the FOIA does not compel the agency "to provide answers to questions posed by the inquirer." Accordingly, the court held that the Tribune FOIA inquiry requested that the Department "compile" the number of initial claims received by the Department against a set of 22 physicians. Because the Department does not maintain nor was it required to maintain under law the requested information, the circuit court erred in granting the Tribune's motion for summary judgment. The appellate court reversed the opinion of the circuit court and remanded the matter for an entry of an order granting the Department's motion for summary judgment and upholding its right to not produce the requested information.

As regulation in general is under scrutiny and in need of justification for continued existence, the likelihood of requests by the media and others for information from social work boards may increase. Understanding the parameters of FOIA laws is essential to complying with any such requests.

Chicago Tribune Company v. The Department of Licensure and Professional Regulation, 2014 Ill. App. LEXIS 120 (App. Ct. Il 2014)