Reforming the Illinois Freedom of Information Act: An Opportunity to Repair the Leaky Boat

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REFORMING THE ILLINOIS FREEDOM OF INFORMATION ACT: AN OPPORTUNITY TO REPAIR THE LEAKY BOAT

INTRODUCTION

In 2004, Sean Bucci started www.whosarat.com, a website exposing the identities of individuals who cooperate with government prosecutors.1 The site's stated purpose is to "assist attorneys and criminal defendants with few resources."2 Through the use of court documents, the site has revealed the identities of 4300 informants and 400 undercover agents.3

While attorneys, judges, and scholars debate the dangers and merits of such a site, the effects of this kind of disclosure are not merely hypothetical: disclosure can have real consequences for individuals who fear repercussions for offering information to the government. For example, the government created a dangerous situation by disclosing certain information about David Jay Sterling.4 Sterling was in prison when the government asked him to provide information regarding his cellmate.5 In exchange for the information, prison authorities agreed to keep Sterling's identity confidential.6 Sterling's cellmate realized that someone close to him had cooperated with the government, however, and he initiated a request for the information pursuant to the federal Freedom of Information Act (FOIA).7 The government granted the cellmate's request and exposed Sterling.8 Evidently, Sterling's deal with prison authorities provided no assurance that the government would not disclose his identity.9 By the time Sterling realized the government had withdrawn its promise, his for-

2. Id.
3. Id. The website has modified its portrayal of law enforcement officers. It now states, "We [the website administrators] would like to make clear that we are not portraying Agents or Law enforcement officers as rats or informants." Who's A Rat, About Us, http://www.whosarat.com/aboutus.php (last visited Jan. 23, 2009).
5. Id. at 47.
6. Id.
8. Id.
9. See id.
mer cellmate already had the information and was sending him death threats.\textsuperscript{10} While Sterling may have suffered a real injury, a D.C. district court could not provide him with a remedy under FOIA because the damage had already been done.\textsuperscript{11} These claims, known as "reverse-FOIA actions," have arisen in a number of different contexts, but they usually must meet a high burden to succeed.\textsuperscript{12}

This example of a government agency's improper disclosure of information is particularly striking because it reveals how such disclosures can affect private parties. Federal and state agencies acquire a significant amount of private information. Information submitted by or gathered about a private party intermingles with government information and, as a result, is subject to FOIA.\textsuperscript{13} Thus, the government is a repository of private information and a useful source for those seeking to gather such information.\textsuperscript{14}

FOIA no longer ensures an open government by disclosing information regarding government activities.\textsuperscript{15} Rather, as one Supreme Court Justice explained, FOIA has become "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored."\textsuperscript{16} The Electronic Freedom of Information Act Amendments of 1996 have only compounded the problem.\textsuperscript{17} These amendments declared that FOIA should allow and improve access to all agency records, including those regarding "non-governmental private matters."\textsuperscript{18}

The federal government is not the only party doling out private information. Illinois, among other states, has implemented laws that closely mirror the federal government's FOIA.\textsuperscript{19} Private individuals

\begin{itemize}
  \item \textsuperscript{10} Sterling, 798 F. Supp. at 48.
  \item \textsuperscript{11} The court noted that Mr. Sterling had not stated a claim under FOIA because the government had already released the information, FOIA did not provide for the award of monetary damages, and FOIA did not provide a claim for such a situation. Id.
  \item \textsuperscript{12} See Paul M. Nick, Comment, \textit{De Novo Review in Reverse Freedom of Information Act Suits}, 50 Ohio St. L.J. 1307, 1319–23 (1989) (citing James T. O'Reilly, \textit{Federal Information Disclosure: Procedures, Forms, and the Law} § 2.02 (1989)). O'Reilly noted that victims of improper disclosure likely only learn of the disclosure after it occurs.
  \item \textsuperscript{14} Third parties provide "much of the information contained in government documents." \textit{Freedom of Information} xiii (Robert G. Vaughn ed., 2000).
  \item \textsuperscript{15} See Nick, supra note 12, at 1307 (stating the purpose of FOIA).
  \item \textsuperscript{16} Antonin Scalia, \textit{The Freedom of Information Act Has No Clothes}, Reg., Mar./Apr. 1982, at 15, 15 (describing the general state of FOIA and the necessity for a fundamental change in its construction and application).
  \item \textsuperscript{17} See O'Reilly, supra note 13, at 372.
  \item \textsuperscript{18} Id. at 373 (citing H.R. REP. No. 104-795, at 19 (1996)).
\end{itemize}
who may have never submitted information to the federal government often interact with and provide information to a state agency. Thus, state agencies in Illinois create other repositories for those seeking information for both benign and malicious uses.20

This Comment argues that the Illinois FOIA, in its current form, fails to protect information exempt from the statute and threatens to undermine its purpose. Part II first provides a background of the Illinois FOIA’s content, procedure, and exemptions.21 Part II then examines Illinois courts’ interpretation of the exemptions outlined in the state’s statute, and compares the Illinois FOIA to its federal counterpart.22 Part III discusses the arguments against restricting FOIA disclosure at the federal level and how those arguments do not apply to the Illinois FOIA.23 Additionally Part III argues that an amendment to the Illinois FOIA is necessary for several reasons.24 First, the Act fails to provide notice to private parties affected by government disclosure.25 Second, the Act provides no avenue of recourse for those who have suffered injury as a result of improper disclosure.26 Third, the Act creates the potential for application of FOIA that runs counter to its intended purpose.27 Part IV discusses the current statute’s impact on the safety of Illinois residents and on the state economy.28 Finally, Part V concludes that an amendment to the Illinois FOIA is necessary to prevent harm to private individuals and to support the purpose of the statute.29

II. BACKGROUND

An examination of the Illinois FOIA’s purpose and content is necessary to understand how it is incomplete.30 The content and application of the Illinois FOIA reveals problems stemming from three

20. See S. Illinoisian v. Dep’t of Pub. Health, 747 N.E.2d 401 (Ill. App. Ct. 2001). This case involved a newspaper’s request for disclosure of a state agency study of cancer patients that organized the patients by zip code, date of diagnosis, and type of cancer. Id. at 404. The state believed that this information could reveal the identity of the subjects of the study. Id. at 407–08. The appellate court held that the trial court improperly entered summary judgment for the newspaper with respect to that issue. Id. at 410.
21. See infra notes 30–103 and accompanying text.
22. See infra notes 104–135 and accompanying text.
23. See infra notes 136–171 and accompanying text.
24. See infra notes 172–235 and accompanying text.
25. See infra notes 175–205 and accompanying text.
26. See infra notes 206–211 and accompanying text.
27. See infra notes 212–235 and accompanying text.
28. See infra notes 236–257 and accompanying text.
29. See infra notes 258–263 and accompanying text.
sources: (1) the purpose of the statute,\(^3\) (2) the extent and nature of its exemptions,\(^2\) and (3) the procedure by which government agencies apply exemptions and respond to FOIA requests in both the federal and Illinois context.\(^3\) Specifically, the Illinois FOIA does not address situations in which a private party wishes to prevent a government agency's disclosure of exempt information,\(^4\) and the Illinois courts have not yet applied the state FOIA to address this problem.\(^5\)

A. The Purpose of the Illinois FOIA

Illinois enacted the state's FOIA (the Act) in July of 1984.\(^6\) The statute states its purpose:

Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.\(^7\)

The Act further provides that it "is not intended to be used to violate individual privacy, nor for the purpose of furthering a commercial enterprise, or to disrupt the duly-undertaken work of any public body independent of the fulfillment of any of the fore-mentioned rights of the people to access ... information."\(^8\) While this latter statement appears to indicate that FOIA should not serve purposes contradictory to those noted in the first paragraph, Illinois state courts have largely ignored this section of the statute.\(^9\) The Illinois Supreme Court stated that this section "is simply a declaration of policy or preamble. As such, it is not part of the Act itself and has no substantive legal force."\(^10\)

31. See infra notes 36–46 and accompanying text.
32. See infra notes 47–83 and accompanying text.
33. See infra notes 84–135 and accompanying text.
35. See id. at 404.
37. Id.
38. Id.
39. See, e.g., Lieber v. Bd. of Trs. of S. Ill. Univ., 680 N.E.2d 374, 380 (Ill. 1997) (citing Triple A Servs., Inc. v. Rice, 545 N.E.2d 706, 710 (Ill. 1989); Monarch Gas Co. v. Ill. Commerce Comm'n, 633 N.E.2d 1260, 1265 (Ill. 1994)). The Lieber court cited these cases to support the argument that this section of the statute possessed no substantive value. Id.
40. Id. (internal citations omitted).
Although the court’s statutory interpretation was correct as a legal matter, the ruling ignored this section’s value as a clear declaration of the statute’s intended use in light of its overall policy.\textsuperscript{41} Furthermore, Illinois courts have utilized the preambles of other statutes to clarify ambiguous provisions of those statutes.\textsuperscript{42} This argument, however, has yet to persuade the Illinois courts in FOIA cases.\textsuperscript{43} Instead, Illinois courts, in determining the purpose and extent of FOIA, have championed the principle that “[t]here is a presumption . . . that public records be open and accessible.”\textsuperscript{44} Thus, the courts will always read the statute through the lens of openness.\textsuperscript{45} Though limitations on this openness do exist, the statute itself sends contradictory messages: its terms are defined broadly to grant broad public access to government records, but it allows for expansive exemptions to that access.\textsuperscript{46}

\textbf{B. The Exemptions to the Illinois FOIA}

The statute begins by defining the types of records that should be open to the public.\textsuperscript{47} For purposes of the statute, a “public record” is any record, in virtually any form, “having been or being used, received, possessed or under the control of any public body.”\textsuperscript{48} These public records must be available “to any person for inspection or copying.”\textsuperscript{49} Thus, despite the overall policy in section 1, the statute appears to advocate unlimited accessibility through the definition of “public record” in section 2 and to command indiscriminate dissemination in section 3.\textsuperscript{50} However, the Illinois legislature acknowledged that such a principle would be unworkable and inserted a number of exemptions to this general mandate.\textsuperscript{51}

\textsuperscript{41} The court acknowledged that the preamble is a “declaration of policy,” but only for the purpose of declaring that it is “not part of the Act itself and has no substantive legal force.” \textit{Id.} (internal citations omitted).

\textsuperscript{42} The defendants in \textit{Lieber} articulated this point in their appellate brief, but the court did not address the ambiguity argument. See Reply Brief of Defendant-Appellant at 18, Lieber v. Bd. of Trs. of S. Ill. Univ., 680 N.E.2d 374 (Ill. 1997) (No. 5-95-0470); Lieber v. Bd. of Trs. of S. Ill. Univ., 680 N.E.2d 374 (Ill. 1997).

\textsuperscript{43} \textit{Lieber}, 680 N.E.2d at 380.


\textsuperscript{46} 5 ILL. COMP. STAT. 140/2, 7 (2006).

\textsuperscript{47} 5 ILL. COMP. STAT. 140/2(c).

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} 5 ILL. COMP. STAT. 140/3(a). This general mandate is subject to the exemptions articulated in section 7 of FOIA. 5 ILL. COMP. STAT. 140/7.

\textsuperscript{50} 5 ILL. COMP. STAT. 140/1–3.

\textsuperscript{51} 5 ILL. COMP. STAT. 140/7.
Section 7 of the statute lists forty-three categories of information that are exempt from the statute’s general command for disclosure. While the statute originally enumerated only twenty-six exemptions, the Illinois legislature has added seventeen more exemptions since 1984. Through the original exemptions and those added, the Illinois legislature has acknowledged that certain types of information are best kept confidential and out of the general public’s hands. The statute exempts a number of specific types of information: “[i]nformation that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy,” information regarding government informants or people who file a complaint with the government, trade secrets and commercial information that a public body collects from a private company, vulnerability assessments that a public health and safety agency acquires or creates, and information that “the Department of Public Health and its authorized representatives [collect] relating to known or suspected cases of sexually transmissible disease.”

The exemption that creates a particularly difficult situation for public agencies excludes from FOIA “[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law.” This exemption provides that a government agency shall refuse to disclose any information that other portions of the state or federal law define as confidential.

For example, the Illinois Medical Studies Act (MSA) defines certain information as confidential. Under the MSA, all information “used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care or increasing organ and tissue donation, shall be privileged.” The MSA’s purpose is to ensure the accuracy and
effectiveness of self-evaluation within the medical profession "in the interest of improving the quality of health care." The MSA notes that such information is not discoverable in any court action and that any disclosure of this information has no "effect upon its confidentiality, nondiscoverability, or nonadmissibility." Any person who improperly discloses information subject to this privilege commits a Class A misdemeanor.

The MSA also highlights the difficulty in exempting information from FOIA requests. While the language and purpose of the statute suggest a nearly limitless application, courts have had difficulty defining its scope. Specifically, courts have struggled to determine when a medical agency uses information in connection with a committee program or study designed to improve internal quality control, patient care, or to reduce morbidity or mortality. Hospitals and health care providers attempt to categorize every document created by their staff members under the privilege, while those suing these providers attempt to limit the scope of this privilege.

The Illinois Supreme Court addressed this issue in Roach v. Springfield Clinic, where a health care provider argued that the MSA covered all information a medical provider obtained and used for purposes set forth in the statute. Though both the trial and appellate courts supported this broad interpretation of the statute, the Illinois Supreme Court construed the privilege much more narrowly.

The court determined that the MSA does not provide a privilege for information that a typical medical staff garner. Rather, the privilege only applies to certain hospital and medical review committees.

64. Rodriguez-Erdmann v. Ravenswood Hosp. Med. Ctr., 545 N.E.2d 979, 986 (Ill. App. Ct. 1989). The court explained that the MSA "is premised on the belief that, absent the statutory peer-review privilege, physicians would be reluctant to sit on peer-review committees and engage in frank evaluations of their colleagues." Id. (citing Jenkins v. Wu, 468 N.E.2d 1162, 1168 (Ill. 1984)).

65. 735 ILL. COMP. STAT. 5/8-2102.

66. 735 ILL. COMP. STAT. 5/8-2105. While this section of the MSA appears to protect against improper disclosure, the cases that address this issue reveal that courts have struggled to determine which documents are subject to the MSA, making it unlikely that a person would actually face punishment for improper disclosure. See infra notes 68–83 and accompanying text.


69. See Roach, 623 N.E.2d 246; Giangiulio, 850 N.E.2d 249; Ardisana, 795 N.E.2d 964.

70. Roach, 623 N.E.2d at 246.

71. Id. at 249.

72. Id. at 250.

73. Id.

74. See id.
Therefore, in response to an assertion that the MSA applies to certain materials, a court must analyze both the nature of the materials and the circumstances in which a medical provider or agency gathered those materials.\textsuperscript{75} The court must also examine each document at issue and determine whether it was "initiated, created, prepared, or generated by a peer-review committee."\textsuperscript{76} This requirement demands that the examiner—whether it be a court, state agency, or a private party—have extensive knowledge of both the statute and facts surrounding the information.

Although this statute typically is at issue in lawsuits involving two private parties, its application falls squarely within the realm of Illinois state agencies. FOIA places a heavy burden upon those agencies by demanding that "[i]f any public record that is exempt from disclosure under Section 7 of this Act contains any material which is not exempt, the public body shall delete the information which is exempt and make the remaining information available for inspection and copying."\textsuperscript{77} As an example, the Illinois Department of Public Health (IDPH), a state government agency, offers a broad range of public services, which includes investigating outbreaks of infectious diseases, collecting and evaluating health statistics, and licensing hospitals and nursing homes.\textsuperscript{78} The IDPH, in acquiring information about licensing and disease prevention, gathers information regarding private individuals and corporations.\textsuperscript{79} Anyone interested in seeking information regarding private health care providers involved in the activities of the IDPH may simply submit a FOIA request to the agency. This places the state agency in a position in which it must determine which documents fall within privileges such as the MSA and which do not.\textsuperscript{80}

The state agency must therefore make a decision regarding the extent of the MSA with the same delicacy and knowledge as the Illinois Supreme Court.\textsuperscript{81} Although the IDPH may have the ability and knowledge to correctly differentiate between privileged and non-privileged information, it does not provide the same procedural safeguards

\textsuperscript{75} Id.
\textsuperscript{77} 5 ILL. COMP. STAT. 140/8 (2006).
\textsuperscript{78} Illinois Department of Health, About the Department, http://www.idph.state.il.us/about/abouthome.htm (last visited Jan. 23, 2009).
\textsuperscript{79} See id.
\textsuperscript{81} Whenever the state agency receives a request for information that may or may not fall within the MSA, it must first determine whether such materials fall within that act. This was the issue brought before the Illinois Supreme Court in Roach v. Springfield, 623 N.E.2d 246 (Ill. 1993).
as the court system.\textsuperscript{82} The Illinois FOIA outlines the procedure by which agencies confront this issue.\textsuperscript{83}

\textbf{C. State Agency Procedures for Applying the Exemptions}

The Illinois FOIA demands that government agencies provide expedient responses to those requesting information under the statute.\textsuperscript{84} As a general matter, the Act provides that "[e]ach public body shall make available to any person for inspection or copying all public records."\textsuperscript{85} The Act also demands that a public body, upon receiving a written request for information, respond to that request promptly.\textsuperscript{86} If a request necessitates an evaluation by agency staff to determine whether requested information includes documents exempt under FOIA, the agency may only extend the time for its response another seven working days.\textsuperscript{87} The emphasis here is on expediency, and the statute requires that state government agencies make decisions quickly regarding the disclosure of materials that may fall within the exemptions.\textsuperscript{88}

Furthermore, the statute does not demand that state agencies disclosing information notify private individuals or corporations that may have an interest in that disclosure.\textsuperscript{89} Specifically, this section of FOIA—regarding responses to requests—does not address notification to third parties affected by the agency's decision to disclose.\textsuperscript{90} A party who submits information to a government agency believing that such information is confidential or privileged and exempt from disclosure under FOIA does not receive notification if the state agency later determines that the information is not exempt and decides to disclose it.\textsuperscript{91} In contrast to submitters of information, those who initiate a request for information receive extensive notification regarding that re-

\begin{footnotes}
\item[82] Arguably, the IDPH does not possess the resources, skill, or motivation to make correct determinations regarding this privilege. However, the focus of this Section is on the absence of procedural safeguards within the state FOIA.
\item[83] \textit{5 ILL. COMP. STAT.} 140/3 (2006).
\item[84] See id.
\item[85] This provision is subject to the exemptions outlined in section 7 of FOIA. \textit{5 ILL. COMP. STAT.} 140/3(a).
\item[86] \textit{5 ILL. COMP. STAT.} 140/3(c). Specifically, the government agency must "either comply with or deny a written request for public records within 7 working days after its receipt." \textit{Id.} However, "[f]ailure to respond to a written request within 7 working days after its receipt shall be considered a denial of the request." \textit{Id.}
\item[87] \textit{5 ILL. COMP. STAT.} 140/3(d)(v).
\item[88] See id.
\item[89] \textit{See generally} \textit{5 ILL. COMP. STAT.} 140/1–11.
\item[90] \textit{5 ILL. COMP. STAT.} 140/3.
\item[91] \textit{Id.} Here, any demand for notification to submitters of information is absent.
\end{footnotes}
When an agency determines that the requested documents are subject to an exemption, it must notify the requesting party and specify the exact exemption that it claims as a basis for the denial.

The Illinois FOIA poses another procedural problem in addition to the lack of notification for those who submit information. It does not provide an avenue for a person who submits information to appeal an agency's decision to disclose information that may have been exempt. In contrast, the statute clearly defines a process by which a denied requestor may challenge an agency's decision: "Any person denied access to inspect or copy any public record by the head of a public body may file suit for injunctive or declaratory relief." The denied requestor may file a claim for such relief in circuit court.

If the requesting party files a complaint in circuit court, the case "shall take precedence on the docket over all other causes and be assigned for hearing and trial at the earliest practicable date and expedited in every way." Additionally, the state agency has the burden of establishing that its denial of the request was in accordance with the FOIA exemptions. Finally, the statute provides that if the requesting party prevails in a FOIA action, the court may award appropriate attorneys' fees.

In light of FOIA's notice and procedural provisions that apply to requestors who may not even have a strong interest in disclosure, the lack of notice and procedural provisions available to information submitters appears all the more unreasonable. This disparate treatment poses another series of questions concerning an agency's duty to utilize exemptions and notify interested third parties, as well as an interested third party's ability to seek judicial review of a decision to disclose. The following Subsections address the Illinois and federal approaches to these reverse-FOIA issues.

92. Id.
93. See 5 ILL. COMP. STAT. 140/9(a); see also Am. Fed'n of State, County & Mun. Employees v. County of Cook, 555 N.E.2d 361, 364 (Ill. 1990).
94. See 5 ILL. COMP. STAT. 140/11.
95. 5 ILL. COMP. STAT. 140/11(a).
96. 5 ILL. COMP. STAT. 140/11(b)-(c).
97. 5 ILL. COMP. STAT. 140/11(h).
98. 5 ILL. COMP. STAT. 140/11(f).
99. 5 ILL. COMP. STAT. 140/11(i).
102. Id.
103. See infra notes 104-135 and accompanying text.
1. Illinois Court Approach to Reverse-FOIA

Illinois's only reverse-FOIA case, *Twin-Cities Broadcasting Corp. v. Reynard*, illustrates the potential for abuse of the Illinois FOIA, but it does not provide a rule for reverse-FOIA situations involving a private party and a government agency.\(^{104}\) Instead, it addresses the issues created by an information tug-of-war between two state agencies.\(^{105}\) In *Twin-Cities Broadcasting*, Illinois State University attempted to prevent the State's Attorney's Office from disclosing information to a news agency.\(^{106}\) The University claimed that the information at issue was subject to an exemption under FOIA.\(^{107}\) Furthermore, the University argued that the State's Attorney had a duty to employ the exemption and refuse to disclose any information falling within that exemption.\(^{108}\) The issue before the court was whether one government agency may disclose information in response to a FOIA request when another government agency "having a substantial interest in the determination wishes to assert an exemption."\(^{109}\) The court held that the government agency where a document originates has a continuing interest in its protection regardless of its possession by another agency.\(^{110}\)

In its ruling, the court noted that this situation was distinguishable from a typical reverse-FOIA case because it involved two government agencies rather than a private party and a government agency.\(^{111}\) In spite of this distinction, the court's analysis provided a useful example of a party's interest in maintaining the confidentiality of certain information.\(^{112}\) The court noted that FOIA allows government agencies to consult each other in deciding whether to accept or deny a request.\(^{113}\) Thus, while a government agency may share information with another, that sharing does not give the other agency a license to disclose the

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\(^{104}\) *Twin-Cities Broad. Corp.*, 661 N.E.2d at 404.

\(^{105}\) Id.

\(^{106}\) The news agency sought records of a private meeting held by the Illinois State University Athletic Council in which the Council discussed the elimination of certain athletic programs. *Id.* The State's Attorney's office began investigating for the purpose of determining whether that meeting should have been open to the public pursuant to the Open Meetings Act. *Id.* at 402. The Council, through its governing body, the Board of Regents, sought to prevent the Attorney General from disclosing that information in response to the news agency's FOIA request. *Id.*

\(^{107}\) *Id.* at 403.

\(^{108}\) *Id.*

\(^{109}\) *Id.* at 401.

\(^{110}\) *Twin-Cities Broad. Corp.*, 661 N.E.2d at 404.

\(^{111}\) *Id.* The court stated, "we are not confronted with the issue of whether, under the Illinois FOIA, the existence of an exemption imposes an affirmative duty on an agency to withhold information sought." *Id.*

\(^{112}\) *Id.*

\(^{113}\) *Id.*
information. Furthermore, the court stated that "[b]ecause the Board had a substantial interest in the subject matter of the request, it was entitled to assert an exemption, if one exists, despite the State's Attorney's refusal to do so." The court focused on the fact that the University may still have possessed an interest in the confidentiality of the information and, consequently, still had a right to assert an exemption.

2. Federal Approach to Reverse-FOIA

In *Twin-Cities Broadcasting Corp. v. Reynard*, the parties disputed whether a government agency has a duty to utilize an exemption under the Illinois FOIA. While the Illinois Appellate Court did not rule on the issue, it acknowledged the authority of the seminal U.S. Supreme Court case, *Chrysler Corp. v. Brown*. In *Chrysler*, a government contractor relinquished information regarding its workforce to a government agency. Subsequently, the government agency received a FOIA request for that information and determined that it would disclose it. The agency chose to notify Chrysler of the FOIA request and its decision to disclose the information because Chrysler was a government contractor. In response, Chrysler sued the agency, arguing that the information was exempt from FOIA and that, as a result, the agency could not disclose it.

The Court held that the government agency did not have a duty to employ an exemption because "Congress did not design the FOIA exemptions to be mandatory bars to disclosure." However, the Court also found that the corporation potentially suffered a legal wrong because of the agency's action. Consequently, the corporation was entitled to judicial review of that agency action pursuant to the Administrative Procedure Act (APA). Following *Chrysler*, the Fifth Circuit noted that "under the APA, a court can set aside an

114. The court stated, "mere possession of the documents, standing alone, is not determinative of an agency's ability to release documents pursuant to the FOIA if another governmental entity has a substantial interest in asserting an exemption." *Id.*
115. *Id.* at 405.
117. *Id.* at 403.
118. *Id.* (citing *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)).
119. *Chrysler Corp.*, 441 U.S. at 287.
120. *Id.*
121. *Id.*
122. *Id.* at 287–88.
123. *Id.* at 293.
124. *Id.* at 318.
125. *Chrysler Corp.*, 441 U.S. at 318 (citing 5 U.S.C. § 702 (1972)).
agency’s determination if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”\textsuperscript{126}

In the aftermath of Chrysler, courts have affirmed the general rule that FOIA does not create a private right to prevent disclosure, but simultaneously courts have allowed private individuals to challenge an administrative decision under the APA.\textsuperscript{127} In McDonnell Douglas Corp. v. Air Force, a federal circuit court noted that the APA provides at least two avenues for a private party to challenge a government agency’s release of information.\textsuperscript{128} First, a party may seek review of an agency action “on the ground it is ‘contrary to law.’”\textsuperscript{129} Second, a party may seek review of an agency decision on the ground that it is arbitrary or capricious.\textsuperscript{130} The court concluded its opinion with a call for an examination of the purpose and use of FOIA, and noted that disclosing information about private parties “that reveals little or nothing about an agency’s own conduct” does not foster the purpose of FOIA.\textsuperscript{131} While the federal approach to reverse-FOIA does not provide a wide range of remedies for private parties affected by government disclosure of information, it does more to protect private interests than the Illinois FOIA.\textsuperscript{132}

In contrast to the federal approach to reverse-FOIA cases, the Illinois courts have yet to decide whether a private party may seek judicial review of a government agency’s decision to disclose information. Illinois law provides that a party may seek judicial review only of a final decision of an administrative agency.\textsuperscript{133} The Illinois statute further defines an administrative decision as “any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative

\textsuperscript{126} Doe v. Veneman, 380 F.3d 807, 813 (5th Cir. 2004) (quoting 5 U.S.C. § 706(2)(A)).
\textsuperscript{127} See, e.g., Chrysler Corp., 441 U.S. at 318; Veneman, 380 F.3d at 813–14; McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999).
\textsuperscript{128} McDonnell Douglas Corp. v. U.S. Dep’t of the Air Force, 375 F.3d 1182, 1186 (D.C. Cir. 2004). The plaintiff sought to prevent the government’s release of contract bidding information submitted to the United States Air Force. The plaintiff argued that the release would constitute a violation of the Trade Secrets Act and that the agency’s decision to do so was arbitrary and capricious. Id. at 1185.
\textsuperscript{129} The court noted that although the Trade Secrets Act does not provide for a private right of action, a private party may still seek judicial review of an agency action that is contrary to law. Id. at 1186 n.1 (citing 5 U.S.C. § 702).
\textsuperscript{130} Id. at 1186.
\textsuperscript{131} Id. at 1193 (citing Dep’t of Justice v. Reporters Comm’n For Freedom of Press, 489 U.S. 749, 773 (1989)).
\textsuperscript{132} See infra notes 206–211 and accompanying text.
\textsuperscript{133} 735 ILL. COMP. STAT. 5/3-101 (2006).
agency." It is not clear from this definition whether an agency decision to disclose information despite a potential exemption constitutes a final decision that terminates all proceedings in regard to the issue. The Illinois FOIA seems to indicate that only a denial of access constitutes a final decision for purposes of judicial review.

III. ANALYSIS OF THE ILLINOIS FOIA

In light of the Illinois FOIA's current problems, this Comment calls for an amendment to the Illinois FOIA that would provide notice to third parties who submit information to the government, provide an avenue of recourse for those parties if the government improperly discloses their information, and ensure that information flows freely between private parties and government agencies. Section A articulates the primary argument against restricting disclosure under FOIA laws at the federal level and explains how this relates to the Illinois FOIA. Section B argues that the Illinois FOIA provides sufficient safeguards to ensure that the fears expressed regarding the federal FOIA will not become reality in Illinois. Section C analyzes how the Illinois FOIA fails to ensure the free flow of information by failing to provide third parties with notice or recourse for disclosure.

A. The Federal FOIA Problem and the Primary Argument Against Restricting Disclosure

Analyzing the federal FOIA in relation to the Illinois FOIA is important for two reasons. First, the Illinois FOIA closely mirrors the federal FOIA both in purpose and content. Second, in creating the Illinois FOIA, the state legislature and courts have noted that interpretation of it should closely match its federal counterpart. Consequently, any call to amend the Illinois FOIA must address the concerns regarding the government's use of the federal FOIA. Despite the challenges posed by the state and federal FOIA laws, courts and scholars have argued that the laws must remain a forceful avenue

134. Id.
135. "Any person denied access to inspect or copy any public record by the head of a public body may file suit for injunctive or declaratory relief." 5 ILL. COMP. STAT. 140/11(a) (2006).
136. See infra notes 139-159 and accompanying text.
137. See infra notes 160-171 and accompanying text.
138. See infra notes 172-235 and accompanying text.
139. See infra note 203 and accompanying text.
140. See infra note 203 and accompanying text.
for ensuring the public's right to know the activities of its government.\textsuperscript{141}

While FOIA's role as a vehicle for the general public to acquire knowledge of a government's activities is important, the role should not encourage improper disclosure of private or privileged information.\textsuperscript{142} A call for the protection of private and privileged information held by the government does not necessarily infringe upon the general public's right to access "full and complete information regarding the affairs of government."\textsuperscript{143} Thus, this Comment only evaluates the general public's access to information submitted to the government by private parties; it does not advocate a restriction of the general public's access to government-created and government-held information.

Recent events and the actions of the Bush administration have encouraged the argument that any alteration of FOIA laws will reduce the public's access to government information. FOIA laws took on new importance after the 9/11 attacks.\textsuperscript{144} Since that date, the federal government has met public demand for openness with an increased vigor for classification of government documents.\textsuperscript{145} As one author noted, "In the year following the September 11 attacks, the government classified 11.3 million documents, which jumped to 14.2 million the following year and 15.6 million the year thereafter."\textsuperscript{146}

In October 2001, Attorney General Ashcroft issued a memorandum urging government agencies to utilize exemptions whenever agencies believed the exemptions were "on sound footing, both factually and legally."\textsuperscript{147} This policy marked a distinct change from that of the Clinton administration, which encouraged "maximum responsible disclo-

\textsuperscript{141} See, e.g., Natasha Fain, \textit{Human Rights Within the United States: The Erosion of Confidence}, 21 \textit{BERKELEY J. INT'L L.} 607, 624–25 (2003). In the past few years, courts and scholars have increasingly encountered FOIA issues regarding the government's secrecy in dealing with national security and specifically with enemy combatants. \textit{Id.} at 625. While courts recognize that secrecy infringes upon the public's right to access information about its government, much of the information remains secret and inaccessible to the general public. \textit{Id.}

\textsuperscript{142} See infra notes 172–174 and accompanying text.

\textsuperscript{143} 5 Ill. Comp. Stat. 140/1 (2006).


\textsuperscript{145} See id.

\textsuperscript{146} \textit{Id.} at iii (citing David Nather, \textit{Classified: A Rise in "State Secrets,"} 63 \textit{CQ WEEKLY} 1958, 1960 (2005)).

According to a Government Accounting Office poll, thirty-one percent of polled government officials admitted they were less likely to use their discretion to disclose information as a result of the new policies. In 2002 and 2003, federal government agencies fielded fewer FOIA requests, but generally increased the use of exemptions in denying those requests.

In addition to the expanding call for national security, the increased scrutiny of FOIA requests has been largely attributed to the Bush administration’s obsession with secrecy. The administration has routinely resisted any oversight—especially that coming from the general public. Consequently, the most recent public debate concerning FOIA has created a demand for a more rigorous enforcement of the principle of that law: to ensure the public’s access to the activities of its government.

This national debate reflects the general arguments against expanding the scope of exemptions to FOIA and limiting its applicability to information submitted by private parties. By allowing government agencies to exclude certain information from FOIA, exemptions limit the public’s access to government-held information. For this reason, the expansion or addition of exemptions to FOIA laws may thwart the purpose of those laws. Both state and federal legislatures have acknowledged this danger, yet they have continued to expand the number and scope of exemptions. Ultimately, this trend reflects an understanding that both state and federal FOIA laws should not serve to trammel all other interests simply because those interests may limit the laws’ applicability.


150. See Shane, supra note 144, at iii–iv.

151. See Uhl, supra note 147, at 270–74.


153. See id.

154. See Uhl, supra note 147, at 269.

155. Id. at 263–66.


federal and Illinois FOIAs provide an opportunity and a procedure for individuals wishing to challenge a government agency's assertion of an exemption.\textsuperscript{158} Certainly, any proposal to alter the procedure and scope of federal or state FOIAs strikes a fear that the government will abuse the law and severely reduce public access. However, this fear should not encourage public dissemination of private or privileged information.\textsuperscript{159}

\section*{B. Illinois's Use of Exemption Does Not Create Government Secrecy}

While a legitimate fear exists that the exemptions may swallow the overall rule of FOIA, such a fear has not become a reality in Illinois.\textsuperscript{160} In this sense, the call for procedures protecting private party submissions to government agencies is not a call for a limitation of FOIA. Rather, it is a call for consistent application of procedural safeguards to both requestors and submitters of information harbored by the government.\textsuperscript{161} Illinois state agencies have cited exemptions in refusing FOIA requests; however, these exemptions have not undermined the overall goals of FOIA.\textsuperscript{162} Illinois courts have instead narrowly construed the application of exemptions.\textsuperscript{163} The government agency citing the exemption bears the burden of pleading and proving that an exemption applies to the information at issue.\textsuperscript{164} Furthermore, Illinois courts have effectively applied FOIA's provision that requires the government to release a document containing both exempt and

\textsuperscript{158} See 5 ILL. COMP. STAT. 140/3 (2006).


\textsuperscript{160} Ill. Educ. Ass'n v. Ill. State Bd. of Educ., 791 N.E.2d 522, 531 (Ill. 2003) (stating that in light of FOIA's policy to provide open and accessible public records, exemptions to disclosure under the statute are to be narrowly construed by the courts); see also Baudin v. City of Crystal Lake, 548 N.E.2d 1110, 1114 (Ill. App. Ct. 1989) (holding that a government agency must provide a detailed justification for an exemption claim, addressing the information requested specifically).

\textsuperscript{161} See \textit{supra} notes 4–11 and accompanying text.

\textsuperscript{162} See \textit{supra} notes 52–61 and accompanying text.

\textsuperscript{163} See Cooper v. Dep't of Lottery, 640 N.E.2d 1299, 1310 (Ill. App. Ct. 1994) (stating that courts should not construe exemptions broadly).

non-exempt information, if the government can conceal the exempt information.¹⁶⁵

In addition to the Illinois courts’ limited application of exemptions, the Illinois FOIA also provides procedural safeguards for persons denied access to government documents as a result of an exemption.¹⁶⁶ If a government agency cites an exemption and refuses to release certain documents, the requesting party, after challenging that decision within the agency, may seek judicial review of the agency’s decision.¹⁶⁷ This procedure ensures that a judicial body has the power to enforce the general purpose of FOIA: to ensure that all persons have complete access to information regarding government affairs, while narrowly construing the exemptions to that principle.¹⁶⁸ Thus, a government agency is severely restricted and subject to judicial scrutiny in applying exemptions in response to information requests.¹⁶⁹ Private parties that disclose information to the government do not enjoy similar safeguards, however.¹⁷⁰ Ultimately, the Illinois FOIA’s failure to protect information concerning private parties threatens its effectiveness in the same way that government secrecy does.¹⁷¹

C. The Illinois FOIA’s Failure to Provide Procedural Safeguards to Third Parties

Although preventing abusive government secrecy is a noble reason to promote fewer restrictions on the free flow of information under FOIA, it is important to recognize the ramifications of ignoring the procedural interests of parties affected by government disclosure. First, the Illinois FOIA fails to provide notice to individuals who may suffer harm as a result of improper disclosure.¹⁷² Second, the Illinois FOIA does not include an avenue of recourse for parties whose interests have suffered.¹⁷³ Third, the risk posed by the lack of procedural

¹⁶⁶. See supra notes 94–96 and accompanying text.
¹⁶⁷. See supra notes 94–96 and accompanying text.
¹⁶⁹. See Baudin v. City of Crystal Lake, 548 N.E.2d 1110, 1113 (Ill. App. Ct. 1989). In describing the government’s ability to utilize exemptions, the court stated, “Under the Information Act, the burden of proof is on the City to establish that the material in question is exempt from disclosure; however, governmental agencies cannot clothe material regarding the affairs of government with an exemption from public disclosure by ipse dixit statements that the material is exempt.” Id.
¹⁷⁰. See 5 ILL. COMP. STAT. 140/3.
¹⁷¹. See infra notes 206–211 and accompanying text.
¹⁷². See infra notes 175–205 and accompanying text.
¹⁷³. See infra notes 206–211 and accompanying text.
safeguards may ultimately limit the free flow of information by discouraging private parties from submitting important information to the government.174

I. Illinois FOIA Fails to Provide Notice to Submitters of Information

As one observer noted, "The dual concepts of open government and responsible government collide when the government requires the submission of sensitive information."175 The Illinois FOIA fails to provide a submitter of information with procedural safeguards similar to those it provides for requestors of information.176 Perhaps the most blatant example of the Illinois FOIA's failure to provide procedural safeguards is the absence of notice.177 While the statute outlines a notification procedure for requestors of information, it does not demand that private parties receive notice when a government agency decides to disclose the party's confidential information.178

Generally, notice ensures that individuals whose rights may be affected by government action receive an opportunity to have their case heard by a court of law.179 Even though a party who submits confidential or privileged information to the government has a vested interest in protecting that information, FOIA laws do not command government agencies to provide notice in cases of disclosure.180

On an individual level, the lack of notice can have dangerous effects when disclosed information threatens to injure a third party.181 Where a party provides the government with information regarding another party's criminal activity, the disclosure of that information poses a real danger to the providing party.182 That danger is magnified when the government discloses the information, but fails to notify the providing party.183 For example, Sterling had no reason or opportunity to suspect that his cooperation created a significant danger until he began receiving death threats from his former cellmate.184 Thus, after the disclosure but before the death threats, Sterling lived in the

174. See infra notes 212–235 and accompanying text.
177. See id.
178. See id.
179. 16B AM. JUR. 2D Constitutional Law § 931 (2007).
180. See 5 ILL. COMP. STAT. 140/3.
182. See id.
183. See id.
184. Id.
vulnerable position of being oblivious prey to a dangerous predator. Moreover, under the Illinois FOIA, Sterling’s former cellmate would have enjoyed a statutory right to receive notification regarding the status of his request.

Sterling’s case reflects an imbalance in federal and state FOIAs’ protection of rights. The federal FOIA provided extensive procedural safeguards for Sterling’s former cellmate, who had a diminutive stake in the disclosure, but the law completely ignored Sterling’s stake, which involved his personal safety and well-being. If the Illinois FOIA provides notice to parties with very little interest in disclosure, it should certainly provide notice to those whose interest are seriously affected by government disclosure.

While this potential danger may itself provide a sufficient cause to reexamine the Illinois FOIA, dangers posed to businesses also deserve consideration. Certain federal agencies have recognized the need to notify businesses when a third party requests information that may deserve confidential treatment. For example, the Securities and Exchange Commission (SEC) has implemented a procedure to prevent disclosure of potentially damaging information without first notifying the submitting party. Pursuant to this procedure, a person submitting information to the SEC may make a claim of confidentiality. If the SEC decides to disclose that information in response to a FOIA request, it will notify the business before disclosure.

In addition to the SEC’s procedure, Executive Order 12,600 demands that executive agencies provide notice to “submitters of records containing confidential commercial information . . . when those records are requested under the Freedom of Information Act.” While a record submitter’s petition for confidentiality may force an agency to wade through thousands of documents in an effort to determine the scope of the confidentiality as applied to the information at issue, it ultimately ensures that an agency recognizes the interests of those submitters. Thus, the Executive Order forces a

185. Id.
186. 5 ILL. COMP. STAT. 140/3(d)(v) (2006).
188. See Lewis, supra note 159.
190. Id. (citing 17 C.F.R. § 200.83 (2007)).
191. 17 C.F.R. § 200.83(c).
government agency to determine which information falls within an exemption to FOIA and then to notify the business if it decides to release information. In contrast, the government may refuse to carefully examine the confidentiality of the information that falls outside the Executive Order's protection because FOIA, by itself, does not serve to restrict an agency's decision to release information.

As an alternative to relying on a government agency's internal rules, corporations often create their own safeguards by negotiating the terms of disclosure with the government agency. These agreements often include provisions demanding that the government agency treat information as confidential and refuse to disclose it. Some lawyers argue that "[a]t the very least, the agreement should provide that, if the agency is required to comply with a FOIA request for the documents, the agency will provide advance notice to the corporation."

In Illinois, companies have also recognized this danger with regard to trade secrets and have petitioned a state agency to protect this type of information. While state agencies are required to evaluate these petitions, the Illinois FOIA creates no obligation to do so. Moreover, the process of negotiating a specific agreement with a government agency requires resources not readily available for many small businesses and private individuals.

Although the Illinois legislature created the state FOIA with the hope that its federal counterpart would guide the state's interpretation of the law, courts have failed to follow the lead of the federal government with regard to notification. Certainly, both federal and state FOIA laws create a dilemma for government agencies when they en-

195. See id. at 498.
196. See Chrysler Corp. v. Brown, 441 U.S. 281, 294 (1979). However, government agencies are still subject to penalties for improper disclosure.
198. See id. at 1027.
199. Id. at 1027-28 (noting that the Department of Defense's rules require prior notice even in the absence of an agreement); see 32 C.F.R. § 286.27(h)(1) (1988).
201. See 5 ILL. COMP. STAT. 140/3 (2006).
202. See Porter, supra note 197, at 1007.
203. See H.R., TRANSCRIPTS OF DEBATE, 83D GEN. ASSEMBLY, at 184 (III. May 25, 1983) (statement of Rep. Currie). In describing the statute's application to trade secrets, Representative Currie stated that "when there is some close parallel between our language and language in the Federal Freedom of Information Act, it is our intention that case law interpretations under
counter potentially confidential information, but these agencies still have the opportunity to balance both the submitter's and the requester's interests.204 "Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."205 The Illinois FOIA does not utilize this successful formula because it fails to balance and protect the interests of submitters of information by providing them with notice.

2. Illinois FOIA Fails to Provide an Avenue of Recourse for Parties Affected

In Chrysler Corp., the United States Supreme Court held that while the federal FOIA did not create a private right of action to prevent government disclosure of information, the APA did provide for judicial review of any agency action that harmed a person.206 The federal APA, however, is much broader in application than its Illinois counterpart.207 In Illinois, only a state agency's final decision is subject to judicial review,208 but the Illinois FOIA does not address the decision to disclose in relation to a submitter of information.209 As a result, a state agency's decision to disclose information may not constitute a final agency decision in regard to that private party.210

Although Chrysler provides Illinois with a strong precedent for allowing a submitter of information to seek judicial review of an agency's decision to disclose, it is unclear whether Illinois courts will follow the U.S. Supreme Court's approach.211 This leaves information submitters certain that they currently have no guarantees that a court will hear a case regarding a government agency's decision to disclose.

federal FOIA should guide individuals in the courts in Illinois in interpreting the provisions of House Bill 234." Id.


205. Id.

206. Id. at 294, 317.

207. See id. at 317. The APA allows for review of any agency "action," while the Illinois FOIA only allows for review of an agency's final decision, which terminates all proceedings before a state agency. See 735 ILL. COMP. STAT. 5/3-101 to -102 (2006).

208. See 735 ILL. COMP. STAT. 5/3-102.


211. See Chrysler Corp., 441 U.S. at 293.
3. Uncertainty Created by the Illinois FOIA May Reduce the Free Flow of Information

It would be easy to include the FOIA’s exemptions for privileged information among examples of government secrecy. In fact, privileges create a paradox: they serve to decrease the disclosure of information for the purpose of encouraging parties to increase the amount of information that they share.\textsuperscript{212} The law’s oldest testimonial privilege, the attorney-client privilege, ensures the free flow of information between an attorney and his client by preventing the disclosure of that information.\textsuperscript{213} The law has embraced a general belief in the necessity of privileges, and recent studies support that generally held belief.\textsuperscript{214}

In 1999, the Institute of Medicine released a study that lambasted the state of healthcare in the United States.\textsuperscript{215} After noting the propensity for preventable medical errors, the study proposed a solution that involved the increase of information sharing within hospitals.\textsuperscript{216} The study argued that medical providers should acquire accurate information regarding mistakes in medical care in order to prevent them from occurring in the future.\textsuperscript{217} Along with the United States Congress, many state legislatures have created medical peer review privileges, which generally protect information gathered by health care providers in an effort to examine past failures and prevent future ones.\textsuperscript{218}

The MSA, discussed in Part II.B, is Illinois’s answer to the dangerous state of healthcare.\textsuperscript{219} In its most general terms, the MSA protects information that is gathered for the purpose of improving health-

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  \item \textsuperscript{212} See Nicolas P. Terry, An eHealth Diptych: The Impact of Privacy Regulation on Medical Error and Malpractice Litigation, 27 AM. J.L. & MED. 361, 362 (2001). While referring to the privacy issues in the medical industry, Terry states, “At first glance, protecting privacy and improving quality seem to implicate diametrically opposed operational imperatives. The protection of privacy suggests a need to decrease the flow of patient-related information, whereas maximizing information and minimizing information costs are key strategies aimed at improving the quality of care.” \textit{Id.}
  \item \textsuperscript{213} See Fisher v. United States, 425 U.S. 391, 403 (1976).
  \item \textsuperscript{214} See, \textit{e.g.}, To ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM (Linda T. Kohn et al. eds., 2000) [hereinafter To ERR IS HUMAN] (study evaluating and reporting on the state of the American health care system in 1999).
  \item \textsuperscript{215} \textit{Id.}
  \item \textsuperscript{216} Ronald G. Spaeth et al., Quality Assurance and Hospital Structure: How the Physician-Hospital Relationship Affects Quality Measures, 12 ANNALS HEALTH L. 235, 235 (2003) (citing To ERR IS HUMAN, supra note 214).
  \item \textsuperscript{218} Spaeth et al., supra note 216, at 237.
  \item \textsuperscript{219} See supra notes 62–66 and accompanying text.
\end{itemize}
At the core of this protection is the principle that underlies nearly all privileges: in order to ensure accurate and full disclosure of information, the law must prevent disclosure of that information. Because the outcome of litigation may hang upon the discoverability of privileged information, the Illinois courts have developed a rather intricate method of determining the scope and applicability of the privilege. While courts may recognize that the MSA prevents a party from using privileged information in litigation, the Illinois FOIA allows an administrative agency to disregard the privilege altogether because an agency has the ability to determine whether such information is privileged and therefore subject to a FOIA exemption.

Although disclosure under the Illinois FOIA does not necessarily mean that the information is subject to discovery, disclosure poses other dangers. For example, a doctor may offer information to a peer-review board that would be damaging both to the healthcare provider’s liability and reputation. If either of these parties were involved in subsequent litigation relating to that information, a court would likely protect that information from discovery or admission as evidence. Here, the court’s ruling would reflect the MSA’s premise that where full and frank disclosure is necessary for public safety, a party’s disclosure should not create negative repercussions for her.

In this sense, the effectiveness of privileges depends upon the predictability of their application. For a privilege to be effective, a party needs to know not only that a privilege exists that can protect her frank disclosure, but also that it will protect her disclosure. Admittedly, the problem of unpredictability already exists as a result of varying judicial interpretations, but the Illinois FOIA unnecessarily adds uncertainty because it allows state agencies to determine the applicability of a privilege in response to a FOIA request.

In contrast to a court, an administrative agency, under the Illinois FOIA, is not required to weigh the advantages and disadvantages of a privilege’s applicability in response to a FOIA request or contemplate

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220. See supra notes 62-66 and accompanying text.
221. See supra notes 62-66 and accompanying text.
225. See id.
227. See id. at 642–43 (noting that because the laws regarding a journalist’s privilege are subject to ad hoc judicial interpretation, journalists have a very difficult time believing that the privilege will protect an interviewee’s statements).
228. See supra notes 78–83 and accompanying text.
the repercussions of disclosure upon an interested party. Furthermore, courts generally urge government agencies to examine FOIA requests in favor of disclosure. While some government agencies may be familiar with the nature of certain submitter’s information and may be able to determine which information should be subject to an exemption, most agencies are not equipped with the expertise necessary to make an accurate determination of a privilege’s applicability.

Although a court may later decide that information previously released by a state agency is privileged, it cannot eradicate the effects of disclosure. A submitting party may effectively prevent the use of its privileged information in litigation, but it will not be able to prevent a requesting party from using the information in other damaging or menacing ways. Ultimately, this creates the fear that privileged information may still be used against a submitting party. When a party is uncertain whether information will be used against her, she is less likely to disclose that information. This uncertainty will “chill socially desirable communications,” and will transform the Illinois FOIA into a deterrent to the free flow of information.

IV. IMPACT

The most important and universal impact of the Illinois FOIA’s lack of procedural safeguards and guarantees of confidentiality is the loss of access to information. Confidential or privileged information often is important to society as a whole. It is difficult to accurately define

229. See supra notes 78–83 and accompanying text.
230. Patricia L. Andel, Inapplicability of the Self-Critical Analysis Privilege to the Drug and Medical Device Industry, 34 SAN DIEGO L. REV. 93, 130 (1997) (stating that FOIA mandates courts “to tilt the balance in favor of disclosure” (citing Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971))).
231. Nick, supra note 12, at 1321 (citing Kathryn M. Braeman, Overview of FOIA Administration in Government, 34 ADMIN. L. REV. 111, 112 (1982)).
232. While courts are free to ignore an agency’s disclosure of information as an indicator of the applicability of a privilege, some courts have ruled quite the opposite. Federal district courts have held that “information obtainable by a member of the public under the [FOIA] is not privileged.” See Andel, supra note 230, at 132 (quoting United States v. AT&T, 86 F.R.D. 603, 635 (D.D.C. 1979)).
233. See Lewis, supra note 159. Scooter Libby’s case is a prime example of how disclosing information can serve as a powerful weapon, even when not used in the course of litigation.
235. Id. at 63.
236. PAUL F. ROTHSTEIN & SUSAN W. CRUMP, FEDERAL TESTIMONIAL PRIVILEGES: EVIDEN-
TIAL PRIVILEGES RELATING TO WITNESSES AND DOCUMENTS IN FEDERAL-LAW CASES §1:1 (2d ed. 2007) (citing Univ. of Pa. v. EEOC, 493 U.S. 182 (1990)).
the ramifications of the Illinois FOIA's lack of procedural safeguards because information submitters may never become aware of the government's disclosure. However, legal scholars have observed the impact of other states' laws that are similar to that of FOIA.237 Section A illustrates that the current state of the Illinois FOIA threatens to undermine the safety of the general public.238 Section B demonstrates that the lack of procedural safeguards for those submitting information to the government may hinder Illinois's economic growth.239

A. The Illinois FOIA's Lack of Procedural Safeguards Threatens to Undermine the Safety of the General Public

While examples of FOIA failures may not affect the general populous in the same manner as it did Sterling,240 the general public still has a strong interest in implementing procedural safeguards. The MSA provides a prime example of the potential impact of FOIA's lack of procedural safeguards.241 The MSA's premise is that the improvement of the quality healthcare depends upon full and frank evaluations of healthcare providers' performance.242 Furthermore, it rests on the belief that full and frank evaluation will likely not occur if such information will later cause harm to those supplying it.243 Although information provided to peer-review boards in the midst of an investigation may find protection under the MSA in theory, its full protection depends upon the determination of a state agency or court.244

The current Illinois FOIA potentially allows a government agency to refuse to exempt information that may fall within the MSA privilege.245 Because the state agency may be free to ignore an exemption without providing submitters of information any procedure by which they may challenge disclosure, submitters of information are more

237. See infra note 254 and accompanying text.
238. See infra notes 240–248 and accompanying text.
239. See infra notes 249–257 and accompanying text.
240. See supra notes 4–11 and accompanying text.
242. Id.; see also George E. Newton II, Commentary, Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection, 52 Ala. L. Rev. 723, 723 (2001) (stating that "practicing physicians are in the best position to determine the competence of other practicing physicians as they regularly observe one another's work and have the expertise to effectively evaluate that work").
245. See Twin-Cities Broad. Corp. v. Reynard, 661 N.E.2d 401, 404 (Ill. App. Ct. 1996). The MSA provides that any person disclosing privileged information under the statute will face criminal prosecution. This outcome is unlikely, however, because determining whether information falls within the privilege is extremely difficult and often involves an intensive fact-dependent analysis of the circumstances in which the information was acquired.
likely to believe that their disclosures will cause problems in the future. Consequently, they may be less likely to produce information that is necessary to providing effective medical care.\textsuperscript{246} This could drastically undermine both the work of healthcare providers and the state agencies that evaluate them.\textsuperscript{247} In particular, if healthcare providers fear that a state agency will improperly disclose information under FOIA, IDPH may not receive the information it needs to investigate disease outbreaks, general hospital care, and licensing.\textsuperscript{248}

\hspace{1cm} \textbf{B. The Illinois FOIA's Lack of Procedural Safeguards Threatens to Undermine the State's Economic Growth}

The federal government has expressly recognized the need to notify parties who believed that the information they submitted was covered by an exemption when a person requested it under FOIA, but Illinois has not followed suit.\textsuperscript{249} Although the Illinois FOIA does exempt trade secrets and other financial information, it should also provide businesses with a method of ensuring that trade secrets or confidential financial information remain secret and confidential.\textsuperscript{250}

State governments acquire confidential business information in a number of ways, including licensing procedures, joint projects, and general investigations. In particular, joint projects allow a state government to work alongside private industry in an effort to create a mutually beneficial relationship in which a private company can help a state agency that serves the public, while the company also utilizes valuable government resources.\textsuperscript{251}

The recent explosion of bioscience firms has created a new avenue for state universities to acquire the outside expertise, resources, and

\textsuperscript{246} See Roach, 623 N.E.2d at 251. Although some legal scholars argue that the government does not need to protect information to ensure full disclosure, the MSA is based on the principle that submitters of information need this protection in order to fully disclose necessary information. Thus, regardless of whether the protection is effective, FOIA could eradicate the intended effect of the MSA. See Margaret Witherup Tindall, Comment, \textit{Breast Implant Information as Trade Secrets: Another Look at FOIA's Fourth Exemption}, 7 ADMIN. L.J. AM. U. 213, 229–30 (1993).

\textsuperscript{247} See Newton, supra note 242, at 723–24.

\textsuperscript{248} See Illinois Department of Health, supra note 78.

\textsuperscript{249} See supra notes 175–205 and accompanying text.

\textsuperscript{250} The Illinois FOIA exempts “[t]rade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information may cause competitive harm.” 5 ILL. COMP. STAT. 140/7(g) (2006).

technologies that a privately held company can bring to the table.\textsuperscript{252} In fact, Illinois is home to the third-highest number of cutting-edge bioscience researchers, behind California and Massachusetts.\textsuperscript{253} While the explosion of new bioscience firms provides a new opportunity for economic growth for the state of Illinois, it also exposes the necessity of FOIA reform.\textsuperscript{254} Bioscience companies need a state government to provide a "stable and supportive public policy structure."\textsuperscript{255} Where state government cannot guarantee the confidentiality of information that is shared between a private company and a university, a company is less likely to engage in such a relationship.\textsuperscript{256} Disclosure of such information may place the company at a competitive disadvantage or prevent the company from receiving patents.\textsuperscript{257} Such impediments to business at the corporate level may result in impediments at the state level.

V. CONCLUSION

The Illinois FOIA is akin to a leaky boat. In theory, it should float by keeping confidential and exempt information from getting wet and becoming part of the larger sea that is public information. In reality, the confidential information is leaking through the cracks and threatening the survival of the entire ship. Making matters worse, Illinois has not recognized the importance of repairing the leaks. In its current state, the Illinois FOIA allows state agencies to distribute confidential and exempt information to the general public without providing notice to affected parties or facing recourse for improper disclosure.\textsuperscript{258} In this sense, the Illinois FOIA treats information submitters and information requestors unequally.\textsuperscript{259} Persons requesting

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{252} Id.
\item \textsuperscript{253} Id. \textsection 2 (citing BIOTECHNOLOGY INDUSTRY ORGANIZATION, LABORATORIES OF INNOVATION: STATE BIOSCIENCE INITIATIVES 5 (2004), http://www.bio.org/local/battelle2004/main_report.pdf).
\item \textsuperscript{254} The author acknowledges a lack of empirical evidence showing that Illinois FOIA laws restrict economic growth; however, other industry leaders and legal scholars have articulated a similar argument in relations to other states. See supra notes 251–253 and accompanying text.
\item \textsuperscript{255} Mousavi & Kleiman, supra note 251, \textsection 3 (quoting INT’L BUS. DEV. SECTION, CANADIAN EMBASSY, BIOTECHNOLOGY MARKET STUDY FOR THE MID- ATLANTIC STATES (2002), http://ainrie.ca/us/3729_e.htm).
\item \textsuperscript{256} Id. \textsection 6. In reference to the California version of FOIA, which, like the Illinois statute, fails to provide protection for submitters of information, the authors state “counsel for the sponsors should consider advising their clients not to enter such agreements with California’s public universities where the risks of the potential disclosure of its sensitive information outweigh the benefits of the research.” Id.
\item \textsuperscript{257} Id. \textsection 1.
\item \textsuperscript{258} See supra note 90 and accompanying text.
\item \textsuperscript{259} See 5 ILL. COMP. STAT. 140/11 (2006).
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\end{footnotesize}
information under FOIA receive notice of the status of their request and have a statutory right to seek judicial review of an agency’s decision not to disclose information.\textsuperscript{260} In contrast, information submitters neither receive notice of a government agency’s decision to disclose their exempt or confidential information, nor do they currently have the assurance of their ability to seek judicial review of an agency’s improper decision to disclose information.\textsuperscript{261} Ultimately, this may lead to a reduction in the flow of information necessary to ensure the public’s safety and the state’s economic growth.\textsuperscript{262}

Illinois legislators have three options in their approach to this FOIA problem. First, they could simply ignore the problem and hope that the courts will resolve it. Second, they could copy the federal government’s approach and demand that certain agencies provide safeguards to private parties submitting confidential or privileged information to those agencies. Third, they could acknowledge that parties submitting confidential or privileged information should enjoy procedural safeguards regardless of the type of agency or sophistication of the submitting party. While this third option would likely require an amendment to the Illinois FOIA, it would be in tune with many federal agencies’ recognition that private parties are entitled to such procedural safeguards.\textsuperscript{263}

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\textsuperscript{260} See 5 ILL. COMP. STAT. 140/11(a).
\textsuperscript{261} See supra notes 90 and 94 and accompanying text.
\textsuperscript{262} See supra notes 78–82 and 250 and accompanying text.
\textsuperscript{263} See Porter, supra note 197, at 1028 (noting that a district court in the District of Columbia held that confidential information submitted to the Department of Defense should be exempt from disclosure under FOIA).

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