

HEYL ROYSTER

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WELCOME LETTER

Dear Friends:

Business enterprises are made or lost by the quality of their employees. No matter how good an idea, no matter how good a product, if the people standing behind the business are not of substantial quality, the business will fail.

The same is true, of course, with governmental bodies. Indeed, one could argue that this rule is even more true in the case of local governmental bodies.

Governments are in the “people” business. Understanding people and dealing with people is a key to a local government’s success. While interactions with the public are at the core of a public official’s job, this is also true for any public employee. How effectively and attentively public employees do their jobs reflects directly upon the governmental entity and its elected officials.

This quarter’s newsletter examines several issues in the employment relationship between local governmental units and their employees. It has become very common over the last two decades for local governmental units to adopt and maintain employment manuals addressing responsibilities and expectations of employees. Numerous questions arise. Should there be separate employment manuals for the township and the road district, for the supervisor and assessor, and clerk? How specific should the manual be? What are essential items for the manual? Are there statutorily required items which should be discussed in the manual? What are the appropriate procedures for implementing and maintaining the manual?

This quarter’s newsletter also addresses the handling of employee personnel records. Illinois statutory law establishes certain do’s and don’t’s for these records, including specific notice requirements for when such records are subpoenaed. This law does not apply only in the private employment scenario. As our article describes, it also applies in the public setting.

Finally, we address a hot current topic – social networking. Social networking sites – such as Facebook – present a number of challenges to local governmental units. These

include privacy issues as well as concerns about employee efficiency. What rules can – and should – a local governmental unit adopt with respect to social networking by employees?

We look forward to an exciting 2011 and the opportunity of continuing to work with our clients in providing strong and effective governmental services for your citizens.



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EMPLOYEE MANUALS: MANAGING EXPECTATIONS / COMPLYING WITH THE LAW

By Keith E. Fruehling

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Generally speaking, an employee manual is a handbook that sets forth an organization's major human resources, explains employee policies and procedures, and describes employee benefits. If the manual is well prepared, it should communicate both the employer's policies efficiently, effectively and uniformly and ensure the same policies and procedures comply with relevant employment and labor laws.

Possessing an employee manual that includes the foregoing allows an employer to treat each of its employees fairly with a consistent application of the policies. All employees can be judged against the standards established in the manual to determine whether any given employee's behavior met the expectations defined in the written manual. At the same time, it allows an employee the comfort of being able to call upon the organization to provide the resources set forth in the manual. Many times an organization can minimize the potential for employment litigation by acting consistent with a well-drafted employee manual.

The introduction of even a well-drafted employment manual is not without its own potential pitfalls. By introducing specific policies and procedures, your organization establishes standards by which it can be judged. If your organization's management fails to adhere to the policies and procedures the organization itself established in the written employee manual, it can create problems because the employees may have a basis for feeling that their expectations have not been met. At the very least, these unmet expectations can lead employees to develop feelings of frustration and workplace dissatisfaction. In the worst case scenario, they can lead directly to unwanted employment litigation. Thus, it is important that any organization contemplating the introduction of an employee manual do so with a comprehensive plan for explaining the significance of complying with the policies for both management and the labor force.

Given the foregoing, the substance of an employment manual must not be taken lightly. While there are more than a few form books available that provide examples of

employee manuals, there are many factors that can and should be taken into consideration that will impact what is or is not included. As is often the case, the devil is in the details. It is important to use clear, easily understood language in the manual. The information should be presented in a manner that is consistent with your organization's culture.

Whether an organization is introducing an employee manual for the first time or whether it already has one and needs to update it, the most important information that should be conveyed are the applicable Federal, State and Local laws. A good place to reference when starting to identify which laws must and/or should be included in the manual is the United States Department of Labor's website (www.dol.gov). The Department provides specific information for employers about federal laws that impact workplace issues. The Illinois Department of Labor has a similar site for Illinois-based employers (www.state.il.us/agency/idol).

There are a number of laws that should be included in any employee manual. Some of these areas are as follows:

- Wage and hour law, including, but not limited to: exempt v. non-exempt status, regular rate of pay, workweek and workday, overtime, meal periods and rest periods, payday requirements, and lawful vacation
- The "At-Will" Rule and exceptions
- Americans with Disabilities Act
- Anti-Discrimination Laws
- Anti-Harassment Laws
- Family Medical Leave Act
- Wrongful Termination Laws
- Labor relations under federal laws, including the right to organize and to engage in "protected concerted activity"
- Privacy Laws as it pertains to employee use of property, tools and equipment, including computers and the Internet, and monitoring, either by telephone or audio-video surveillance
- Defamation Law as it Pertains to Employee References
- Workplace Safety/Violence
- Drug Free Workplace
- Alcohol and Drug Testing
- Intellectual Property laws, including law of Trade Secrets and Confidentiality Agreements

- Unfair Competition law
- Lawful and Enforceable Arbitration Agreements
- Employment Eligibility
- Worker's Compensation laws
- Employee Records

In addition to policies tied to specific laws, the manual should also include other important company policies, such as:

- Employment Classifications
- Performance Evaluations
- Wage and Salary Administration
- Insurance Benefits
- Holidays and Closings, Personal or Sick Leave and other Leaves of Absence
- Personal Appearance and Demeanor
- Other Uses of Organizational Equipment
- Solicitation
- Smoking

Once implemented, it will be extremely important for your organization to monitor the federal, state and local laws to identify whether any of the existing laws have changed. Moreover, you will need to monitor whether any new laws have been passed that may impact existing laws and will create the need for you to update the manual. In addition to updating the manual with new laws, it will be important for your organization to update the manual as necessary to keep pace with new business practices, customs and/or policies.

One of the important procedures that you will want to include is a fair and impartial process for the employee to complain about harassment, discrimination or any other very serious issues. There must be a reasonable forum that allows them to voice their grievances. It is also very important that unless you intend for the employee manual to be an employment contract that you include some form of disclaimer or reservation language in the employee manual (or as an addendum) that makes it clear that the employee manual is not a written employment contract. Finally, once you've developed your manual, you should have each employee that receives it execute a written acknowledgement form to document the receipt of the manual and an understanding of its policies.

Given the many laws, involved coupled with the fact that an employee manual will impact the legal landscape

of your organization, it is good advice to retain the services of an attorney that can assist you in the development of a legally-sound employee manual. In addition to keeping abreast of the various changes to the law, an attorney can help you to avoid using ambiguous policy and/or procedural language that an employee might try and use against you later should they become disgruntled. An attorney well-versed in labor, employment and local governmental law can and will be an invaluable resource for you and your organization as you undertake the development of a manual.

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WHAT DO YOU DO WHEN A FREEDOM OF INFORMATION ACT REQUEST SEEKS PERSONNEL RECORDS?

By **John M. Redlingshafer**
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Every unit of local government has or will receive a request for public records under Illinois' Freedom of Information Act (FOIA). We always recommend you contact your lawyer when you receive such an FOIA request, and that is especially true when personnel records or other employee-related documents are requested, as FOIA is not the only statute that applies. If the request seeks information about your employees, the Personnel Record Review Act is also at issue.

Overview of the Personnel Record Review Act

The Illinois Personnel Record Review Act (PRRA), found at 820 ILCS 40/0.01, *et seq.*, governs employee access to his or her personnel file. PRRA requires employers to permit an employee, upon request, to inspect any personnel documents which are, have been or are intended to

be used in determining that employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action. PRRA applies to current employees, as well as former employees who have terminated service within the past year. Covered employers are those having five or more employees, exclusive of the employer's immediate family, and could include certain units of government.

PRRA allows each employee two inspections per year. The employer shall grant the inspection within seven working days after the request; or, if the employer can reasonably show the deadline cannot be met, the employer shall have an additional seven days to comply. Unless otherwise agreed to by the employee, the inspection shall take place at a location at or reasonably near the employee's place of employment and during normal working hours. Following the inspection, an employee may obtain a copy of one or more of the personnel documents, at his cost, which must be limited to the actual cost of duplicating the document. An employee also has the right to file a written statement in the personnel file if he disagrees with the information included therein.

The right of an employee to inspect his personnel records is subject to exceptions enumerated in Section 10 of PRRA. In particular, the employee does not have a right to inspect letters of reference, any portion of a test document, materials relating to the employer's staff planning, information about another person the disclosure of which would constitute a clearly unwarranted invasion of privacy, records relevant to any other pending claim with the employee which can be discovered in a judicial proceeding, and investigative or security records to investigate the employee (unless and until employer takes adverse action based on information).

The employer is likewise prohibited from maintaining certain records. An employer generally shall not keep records of an employee's associations, political activities, publications, communications or non-employment activities. An employer also shall not keep records identifying an employee as the subject of a DCFS investigation if the investigation resulted in an unfounded report under the Abused and Neglected Child Reporting Act.

Personnel information which should have been, but was not, included in the personnel record shall not be used by an employer in a judicial or quasi-judicial proceeding.

If, however, a judge or hearing officer determines the document was not intentionally excluded, such document may be used in a proceeding if the employee agrees or has been given a reasonable time to review the information.

An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party without written notice. No such notice is required if (1) the employee has waived written notice as part of a written signed employment application with another employer; (2) the disclosure is ordered to a party in a legal action or arbitration; or (3) information is requested by a government agency as a result of a claim or complaint by an employee, or as a result of a criminal investigation by such agency. Before releasing any employee's personnel record to a third party, an employer must also review the record and delete disciplinary reports, letters of reprimand or other records of disciplinary action that are more than four years old, except when the release is ordered to a party in a legal action or arbitration.

The Director of Labor shall administer and enforce PRRA. An employee who contends there is a violation of PRRA may file a complaint with the Department of Labor, which will investigate the complaint. If the Department finds a violation, it may commence an action in circuit court. PRRA also provides that an employee may commence an action in circuit court to enforce PRRA where efforts to resolve the employee's complaint before the Department of Labor have failed and the Department has not commenced an action in circuit court. Failure to comply with a court order may be punished by contempt. A prevailing employee may be awarded actual damages plus costs and, if the violation is willful and knowing, \$200 plus costs and reasonable attorney's fees.

Freedom of Information Act and Personnel Records, Generally

PRRA is largely directed toward an employee's right to review a company's records related to his own employment. FOIA, on the other hand, concerns itself with the notion that all persons are entitled to full and complete information regarding the affairs of government. However, the question becomes whether an employee has a right to protect their employment file (which they undoubtedly feel is private) from anyone who requests it pursuant to FOIA,

as the public as a whole arguably has a right to review what could also be seen as a public record.

The Illinois General Assembly has attempted to address this inherent conflict. For one, Section 7 of FOIA (which deals with exemptions to compliance with an FOIA request), states that the following “shall be exempt from inspection and copying:” information “specifically prohibited from disclosure by federal or State law...” (Section 7(1)(a)) and personal information contained in public records which would constitute an “unwarranted invasion of personal privacy” (7(1)(c)).

Further, the General Assembly created a list of “statutory exemptions” in what are now Public Acts 96-542, 96-1331, and later re-affirmed with 96-1235, which became effective on January 1, 2011. Under P.A. 96-1235, which is 5 ILCS 140/7.5 of FOIA, the following documents (among others) are exempt from inspection and copying “[to] the extent provided for by the statutes referenced ... (q) Information prohibited from being disclosed by the Personnel Records Review Act.”

These FOIA protections should bring to mind the prior analysis wherein we discussed PRRA’s prohibition about disclosure of disciplinary reports without prior approval. Are those reports arguably now exempt from FOIA? It is hard to predict how that issue would be decided, and the General Assembly has been silent as to what exactly under PRRA is now exempted except for one issue: performance evaluations.

In late 2010, the General Assembly also passed what is now Public Act 96-1483. This Public Act was the subject of many articles in the media, as its aim was to amend PRRA to provide that the disclosure of performance evaluations under FOIA would be prohibited. Governor Quinn vetoed the bill and stated it should only exempt the performance evaluations of state and local peace officers (instead of all personnel) under FOIA. Governor Quinn’s veto was overridden, and therefore, new 820 ILCS 40/11 reads: PRRA “shall not be construed to diminish a right of access to

records already otherwise provided by law, provided that disclosure of performance evaluations under the Freedom of Information Act shall be prohibited.”

Case Law on Employee-Related Documents

Illinois Courts have weighed in on employee-related issues and FOIA, but please bear in mind that these cases were decided before the statutory changes noted above. However, it is possible these cases could still be used as guidance in certain aspects.

Employment Contracts

In *Stern v. Wheaton-Warrenville Community Unit School Dist.* 200, 233 Ill. 2d 396, 910 N.E.2d 85 (2009), the plaintiff, a resident of Wheaton, Illinois, submitted an FOIA request to the defendant school district requesting a copy of the employment contract of the school district’s superintendent. The school district denied the request, stating that because the contract was contained in the superintendent’s personnel file, it was exempt from disclosure. The plaintiff filed a complaint for injunctive relief, which made its way up to the Supreme Court of Illinois.

The Supreme Court noted that the purpose of FOIA is to open governmental records to the light of public scrutiny. Pursuant to FOIA, public records are thus presumed to be open and accessible. The school district was therefore obligated to disclose the employment contract, which was a public record, except as otherwise provided in the exemptions to FOIA. The Court held that the contract did not fall within the “invasion of personal privacy” exemption because, as a whole, it constituted information that bore on the superintendent’s public duties. Furthermore, the Court held that the fact that the contract was maintained within the superintendent’s personnel file was insufficient to insulate it from disclosure under FOIA’s exemption for personnel files. In other words, the mere commingling of

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exempt and nonexempt material does not prevent a public body from disclosing the nonexempt portion of the record.

Copies of Tests and Scores

In *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 919 N.E.2d 76 (1st Dist. 2009), a firefighter sought, among other things, copies of testing criteria and scoring standards associated with a physical abilities test that he failed. His FOIA request for such records was denied, and the issue worked its way up to the First District Appellate Court. The court noted the FOIA exemption in 7(1)(a) exempts “[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law.” Pursuant to the Illinois Personnel Record Review Act, the right of the employee to inspect his personnel records does not apply to any portion of a test document, except the cumulative test score. Accordingly, FOIA recognizes the exemption set forth in the Personnel Record Review Act, and thus does not require the disclosure of the criteria and standards used to evaluate the test at issue. The defendant City therefore properly complied by providing the firefighter with only his cumulative test score.

Conclusions

The General Assembly continues its efforts to balance the privacy of individual citizens with the right of the public to access of records of public bodies. Maintaining that balance is very tricky, and that is why we maintain our position that any time you receive a FOIA request (whether for personnel records or not) you contact your attorney for assistance.

Employee-related matters are especially tricky – one must recall that FOIA requires you to produce any record responsive to the request, and redact those portions to which the exemption applies. Therefore, even if you had portions of a personnel file that were exempt, it would not seemingly take care of an entire personnel file. Instead, it would address things such as social security numbers, home telephone numbers, performance evaluations, etc. Also, one should remember that under FOIA’s new regulations, certain exemptions (including 7(1)(c)), require prior approval from the Illinois Attorney General’s Public Access Counselor before it can be used as a reason to deny a request in whole or in part. Further still, there are many

other exemptions under FOIA that were not discussed in this article, but could be at issue, depending on the facts in a given situation.

You must also be warned that the General Assembly makes many amendments to FOIA and other statutes dealing with public personnel on a fairly regular basis. Therefore, it is very important that we all continue to monitor statutory changes, as what you read today may already be outdated.

Bottom line - if you are presented with an employee-related FOIA request in any way, you must be prepared to report this information immediately to not only your attorney, but also be prepared to work with the Public Access Counselor to make sure you can appropriately deny at least part of the records you maintain.

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SOCIAL MEDIA FOR PUBLIC EMPLOYEES By Stacie Linder Hansen *shansen@heyloyroyster.com*

Social media websites, such as Facebook, YouTube, and Twitter, are quickly changing and expanding the way people communicate. As technology advances and more individuals begin using social media websites to communicate, public officials have jumped on the bandwagon to use these forums to access their constituents. There are dangers every publicly elected official needs to be aware of, even if you are only using these sites for personal purposes. Even if personal participation in a social networking site is not for you, all officials must realize the exposure to potential dangers from employees. This article will provide some insight to how these sites may affect you professionally and offer some recommendations on how to protect yourself from potential issues.

Social networking sites like Facebook, YouTube and Twitter are quickly changing the way society communicates. Many public officials have flocked to these sites during elections to publicize their opinions and communicate with supporters. After being elected, some officials have decided to continue using social networking sites to communicate with their constituents. Although communication on these forums can be quick and simple, it can create legal implications that could easily be avoided. The Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq.*, and the Illinois Open Meetings Act, 5 ILCS 120/1 *et seq.*, are just two applicable acts that can create problems for public officials maintaining an electronic profile on a social media site.

Under the Illinois Open Meetings Act, a meeting consists of the following elements: (1) a gathering; (2) of a majority of a quorum; and (3) with the purpose of discussing public business. See 5 ILCS 120/1.02. It is important to understand that Illinois expressly defines a gathering to include electronic communications like e-mail and electronic chat. This means that conversations among a quorum of public officials on a social media website, such as on a Facebook wall or through Facebook chat, are subject to the Open Meetings Act. Under Illinois law, officials subject to the Open Meetings Act should not deliberate nor discuss public matters at an unannounced meeting held in private. Thus, caution must be taken when using social networking sites.

Under the Freedom of Information Act, public records are presumed to be open and accessible. *Illinois Educ. Ass'n v. Illinois State Bd. of Educ.*, 204 Ill. 2d 456, 791 N.E. 2d 522 (2003). The principal mandate of the Act is found in subsection 3(a), which provides that “[e]ach public body shall make available to any person for inspection or copying all public records.” 5 ILCS 140/3. If public officials communicate with each other on social networking sites, those conversations, e-mails, posts, tweets, etc., regardless of whether they are on a private profile or not, are likely subject to Freedom of Information requests because the public has a right to inspect or copy many government records, including e-mail and other electronic postings.

Due to this potential exposure, public officials may choose to refrain from using these communication devices. However, officials may still be exposed to problems due to their employees use of these websites. Facebook and other social networking sites are changing the ways and types

of information people communicate. It is not unusual for individuals to share information on these sites that they would not typically share with people in typical everyday conversation. Some individuals document the daily activities of their lives with little regard for whether it is appropriate to share such information. Public officials need to take measures to ensure that they and their employees are not sharing information which should be kept confidential.

One of the easiest methods to provide protection from potential problems caused by using these sites is to develop a social media policy. These policies are specifically tailored to meet the needs of an organization, thus each organization’s policy should be developed to meet its needs. Some areas that are most likely to be included in social media policies for government officials include: use of confidential and proprietary information; a designation of how sites can be used for agency, professional and personal use; productivity and use of sites during business hours; limits on actions that may be taken on social networking sites; and retention policies for communication. Heyl Royster would be happy to assist you in developing a social media policy which will fit your needs to ensure that you and your employees do not violate Illinois law. Additionally, Heyl Royster would be happy to speak with you about any specific concerns or questions you have about your use or your employees’ use of these sites. Please don’t hesitate to contact us with any questions.

Stacie Linder Hansen is an associate in our Peoria office. She has experience in a wide variety of litigation matters, workers’ compensation defense, and real estate and business transactions. Stacie has worked on files involving will contests, workers’ compensation arbitrations, real estate transactions, and automobile accidents.



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