

LEGISLATIVE UPDATE: OPEN MEETINGS ACT & MORE

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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The 100th Illinois General Assembly was inaugurated in January 2017. Since that time, state senators have introduced over 2,100 bills, while their counterparts in the Illinois House have over 4,000 bills under consideration.

Obviously, not all of these will become law, and our firm carefully tracks those which may impact units of government, especially those passed by both chambers and sent to the Governor for his consideration. However, at this time, of greater importance are those bills which were signed into law (and therefore, official Public Acts) during the 99th General Assembly, which adjourned in late 2016. These “new(er)” laws and their impact on local governments should not go overlooked.

By no means is this an all-inclusive list of new laws that impact public bodies. Indeed, it is simply a snapshot to give the public official and claims professional an idea of recent changes that could impact both litigation and general governance.

I. LEGISLATIVE CHANGES

A. Public Act 99-0577: Abandoned Public Personal Property

Most public bodies are fully aware of the personal property under its control. However, that is not always the case, and there are instances where valuable property may be unknowingly owned by a public body (e.g., loaned equipment that is never returned) that ends up being declared abandoned. Public Act 99-0577 amends the Uniform Disposition of Unclaimed Property Act to reduce the deadline by which property is presumed to be abandoned. While formerly seven years, it now only takes five years for that presumption to kick in, leaving the public body with the responsibility to somehow overcome the presumption that it did not intend to abandon the property at issue.

B. Public Act 99-0586: Noncompliance with FOIA Binding Opinions

For years, various groups have opined that Illinois’ Open Meetings and Freedom of Information Acts have too many loopholes. Public Act 99-0586 seems to add some teeth to those units of government who (in the past) did not feel the need to follow binding opinions issued by the Attorney General’s Office of the Public Access Counselor (the PAC). A new Section 11.6 and related amendments to existing sections also create a (rebuttable) presumption against public bodies.

Under 11.6:

(a) The requester may file an action under Section 11 and there shall be a rebuttable presumption that the public body willfully and intentionally failed to comply with this Act for purposes of subsection (j) of Section 11 if:

- (1) the Attorney General issues a binding opinion pursuant to Section 9.5;
- (2) the public body does not file for administrative review of the binding opinion within 35 days after the binding opinion is served on the public body; and
- (3) the public body does not comply with the binding opinion within 35 days after the binding opinion is served on the public body.

For purposes of this subsection (a), service of the binding opinion shall be by personal delivery or by depositing the opinion in the United States mail as provided in Section 3-103 of the Code of Civil Procedure.

(b) The presumption in subsection (a) may be rebutted by the public body showing that it is making a good faith effort to comply with the binding opinion, but compliance was not possible within the 35-day time frame.

(c) This Section applies to binding opinions of the Attorney General requested or issued on or after the effective date of this amendatory Act of the 99th General Assembly.

5 ILCS 140/11.6.

C. Public Act 99-0610: Accessing Employee Social Media Accounts

The social media activities of employees and even prospective employees are increasingly protected under state and federal law. Public Act 99-0610 further extends those protections by amending the Freedom From Location Surveillance Act and Right to Privacy in the Workplace Act.

Now, it is unlawful for employers (or prospective employers) to:

- (A) request, require, or coerce any employee or prospective employee to provide a user name and password or any password or other related account information in order to gain access to the employee's or prospective employee's personal online account or to demand access in any manner to an employee's or prospective employee's personal online account;
- (B) request, require, or coerce an employee or applicant to authenticate or access a personal online account in the presence of the employer;
- (C) require or coerce an employee or applicant to invite the employer to join a group affiliated with any personal online account of the employee or applicant;

(D) require or coerce an employee or applicant to join an online account established by the employer or add the employer or an employment agency to the employee's or applicant's list of contacts that enable the contacts to access the employee or applicant's personal online account;

(E) discharge, discipline, discriminate against, retaliate against, or otherwise penalize an employee for (i) refusing or declining to provide the employer with a user name and password, password, or any other authentication means for accessing his or her personal online account, (ii) refusing or declining to authenticate or access a personal online account in the presence of the employer, (iii) refusing to invite the employer to join a group affiliated with any personal online account of the employee, (iv) refusing to join an online account established by the employer, or (v) filing or causing to be filed any complaint, whether orally or in writing, with a public or private body or court concerning the employer's violation of this subsection; or

(F) fail or refuse to hire an applicant as a result of his or her refusal to (i) provide the employer with a user name and password, password, or any other authentication means for accessing a personal online account, (ii) authenticate or access a personal online account in the presence of the employer, or (iii) invite the employer to join a group affiliated with a personal online account of the applicant.

820 ILCS 55/10.

However, certain protections remain. Specifically, nothing shall limit an employer's right to:

(A) promulgate and maintain lawful workplace policies governing the use of the employer's electronic equipment, including policies regarding Internet use, social networking site use, and electronic mail use; or

(B) monitor usage of the employer's electronic equipment and the employer's electronic mail without requesting or using any employee or prospective employee to provide any password or other related account information in order to gain access to the employee's or prospective employee's personal online account

820 ILCS 55/10(b)(2).

Further,

(3) Nothing in this subsection shall prohibit an employer from:

(A) obtaining about a prospective employee or an employee information that is in the public domain or that is otherwise obtained in compliance with this amendatory Act of the 97th General Assembly;

(B) complying with State and federal laws, rules, and regulations and the rules of self-regulatory organizations created pursuant to federal or State law when applicable;

(C) requesting or requiring an employee or applicant to share specific content that has been reported to the employer, without requesting or requiring an employee or applicant to provide a user name and password, password, or other means of authentication that provides access to an employee's or applicant's personal online account, for the purpose of:

(i) ensuring compliance with applicable laws or regulatory requirements;

(ii) investigating an allegation, based on receipt of specific information, of the unauthorized transfer of an employer's proprietary or confidential information or financial data to an employee or applicant's personal account;

(iii) investigating an allegation, based on receipt of specific information, of a violation of applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct;

(iv) prohibiting an employee from using a personal online account for business purposes; or

(v) prohibiting an employee or applicant from accessing or operating a personal online account during business hours, while on business property, while using an electronic communication device supplied by, or paid for by, the employer, or while using the employer's network or resources, to the extent permissible under applicable laws.

820 ILCS 55/10(b)(3).

D. Public Act 99-0646: Local Government Wage Increase Transparency Act

This new law requires the disclosure of certain payments to select employees who participate in the Illinois Municipal Retirement Fund (IMRF). What constitutes a "disclosable payment" is important, as these monies cannot be paid until the terms are discussed at a meeting of the public body. In fact, P.A. 99-0646 also amended OMA, by stating the consideration of a "disclosable payment" is not an appropriate reason to enter closed session under the general "personnel" provision of 5 ILCS 120/2(c)(1).

Specifically, a "disclosable payment" means a:

payment, whether in the form of an increase in the rate of earnings or a lump-sum payment, that:

(1) would be made by a participating employer to a participating employee after the employee has expressed to the employer his or her intent to retire or withdraw from service;

- (2) would have the effect of increasing the employee's reportable monthly earnings from that employer by more than 6% compared to the previous month; and
- (3) would be made between 12 months and 90 days prior to the employee's expected termination of service.

However, "disclosable payment" does not include a refund of contributions or any payment required to be paid by State or federal law.

50 ILCS 155/5(b).

E. Public Act 99-0714: New Deadline to File Claims Under Open Meetings Act

Section 3 of the Open Meetings Act sets forth the deadlines by which someone can bring a claim against a public body for violating the law. Prior to 2016, a private person could only bring a claim within 60 days of the meeting where the alleged noncompliance occurred (reserving a longer deadline for a state's attorney). However, Public Act 99-0714 presumably protects those who opted to bring a claim to the Public Access Counselor versus the courthouse, as it now allows a timely claim:

... if the person timely files a request for review under Section 3.5, within 60 days of the decision by the Attorney General to resolve a request for review by a means other than the issuance of a binding opinion under subsection (e) of Section 3.5.

5 ILCS 120/3(a).

F. Public Act 99-0730: Amendment to Counties Code Authorizing Private/ Public Contracts for Health

Units of government are under ever-increasing scrutiny to consolidate and/or provide more services, while being ever-more diligent in the expenditure of tax dollars. Public Act 99-0730 helps that effort, as the Counties Code was amended to offer extended contractual powers of a County Board of Health. Specifically, 55 ILCS 5/5-25013 now authorizes the Board of Health to:

Enter into contracts with municipal health departments, county health departments, other boards of health, private or public hospitals, and not for profit entities to provide public health services outside of a board of health's own jurisdiction in order to protect the public health in an effective manner.

55 ILCS 5/5-25013(B)(8).

G. Public Act 99-0837: Protecting Fire Districts from Automatically Inheriting Municipal Departments

While consolidation and efficiency are important, the General Assembly and Governor also realized the problem in forcing certain functions on to other units of government. Public Act 99-0837 addresses those concerns of fire districts when a municipal fire department is discontinued or dissolved. 70 ILCS 705/11 now states:

(b) Notwithstanding subsection (a) of this Section, no fire protection district adjacent to any city, village, or incorporated town will be required to assume responsibility for fire protection or other emergency services to such city, village, or incorporated town which discontinues its municipal fire department under Section 15b of this Act unless the Board of Trustees of the adjacent fire protection district has by resolution, ordinance, or intergovernmental agreement, agreed to provide such services.

70 ILCS 705/11b(b).

H. Public Act 99-0841: Creation of Employee Sick Leave Act

We encourage public bodies to have personnel manuals covering the rights and responsibilities of their employees, especially when they are not subject to collective bargaining. With that in mind, Public Act 99-0841 could impact a public body's personnel manual regarding its sick leave policy. This new law created the Employee Sick Leave Act, which, in Section 10 of the new law, states in pertinent part:

(a) An employee may use personal sick leave benefits provided by the employer for absences due to an illness, injury, or medical appointment of the employee's child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent, for reasonable periods of time as the employee's attendance may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee's own illness or injury.

(b) An employer may limit the use of personal sick leave benefits provided by the employer for absences due to an illness, injury, or medical appointment of the employee's child, spouse, domestic partner, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent, or stepparent to an amount not less than the personal sick leave that would be accrued during 6 months at the employee's then current rate of entitlement.

(c) An employer who has a paid time off policy that would otherwise provide benefits as required under subsections (a) and (b) shall not be required to modify such policy.

820 ILCS 191/10.

II. "QUASI-LEGISLATIVE" CHANGES

While a "legislative update" implies we are only talking about actions of the General Assembly and Governor, it is easy to overlook another office within Illinois government that can influence how public bodies act: the Attorney General's Office of the Public Access Counselor (the PAC) mentioned above, that oversees compliance with Illinois' transparency laws – the Open Meetings Act (OMA) and the Freedom of Information Act (FOIA).

Some decisions of note, available at <http://foia.ilattorneygeneral.net/bindingopinions.aspx>, are only binding on the unit of government at issue, but still serve as a good guide on what the PAC would likely decide in similar circumstances for your government:

Opinion 17-001: Basis for Withholding Police Investigatory Records

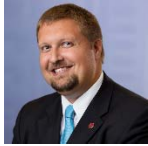
Opinion 16-015: Taking Final Action on Matter Not on the Agenda

Opinion 16-014: Right to Record an Open Meeting

Opinion 16-013: Improper Discussion of Salary Increases for Employees in a Closed Meeting

Opinion 16-008: Improper Denial of Request for Records as Unduly Burdensome

Opinion 16-006: Disclosure of E-Mails from Public Employees' Personal E-Mail Account



John M. Redlingshafer

- Partner

John is chair of the firm's Governmental Practice and a member of the Business & Commercial Litigation Practice. In the area of governmental law, he represents numerous townships, villages, fire districts, road districts, and other governmental entities in a broad range of areas, including litigation, negotiations on intergovernmental agreements, compliance with statutory regulations, and consultation on infrastructure and construction projects (including project financing and debt management). He also works with governmental bodies and private developers/corporations in various aspects of zoning, annexation, and eminent domain law. In addition, John represents general corporate and agribusiness clients in litigation, real estate transactions, and corporate compliance issues. John also serves as an Administrative Adjudication Hearing Officer for municipal ordinance violations involving alleged violations of ordinances related to real and personal property.

John is a frequent statewide speaker on government-related issues at both conventions and educational seminars. He was a contributing author and General Editor for a publication related to special district law for the Illinois Institute for Continuing Legal Education, and also wrote for the Institute on publications regarding the Illinois Open Meetings Act, Freedom of Information Act, and municipal contracts in the Institute's "Illinois Municipal Law" series. He has also been a regular, contributing author to the official publication of the Township Officials of Illinois, the *Perspective*, and the Illinois Township Attorneys Association newsletter.

John is a past President of the Illinois Township Attorneys Association, and previously served as the Editor of its newsletter, the *Talk of the Township*. He has also served on the Board of Directors for the Peoria County Bar Association, and currently serves as a member of the Illinois State Bar Association's Local Government Law Section Council. In 2013, 2014, 2015, 2016, and 2017 he was named to the Illinois Super Lawyers Rising Stars list. Only 2.5 percent of Illinois lawyers who are 40 years old or younger, or who have been practicing 10 years or less, earn this designation.

John currently serves on the Tazewell County Board, and was appointed to its Land Use, Finance, and

Human Resources Committees. He also chairs the Board's Recodification Committee. John continues to serve his community on the East Peoria Fire and Police Commission, having been appointed by the Mayor, with the consent of the East Peoria City Council. He has spent his entire legal career with Heyl Royster, beginning in 2004 in the Peoria office.

Transactions

- Represents governmental entities and developers in significant zoning changes.
 - Represented township government in objecting to proposed mineral extraction facility.
 - Assisted agricultural cooperative in obtaining special use (including related court trial) authorizing construction of grain storage facility.
- Drafts resolutions and ordinances for governmental entities.
- Represents landowners in eminent domain proceedings.
 - Negotiated resolution for agricultural cooperative in eminent domain cases brought by state agency.
 - Litigated quick take proceedings on behalf of private corporations contesting eminent domain offers.
- Represents governmental entities in property purchases and construction projects.
 - Assisted numerous townships and road districts in real estate contracts with cities, park districts, and other governments.
 - Negotiated agreement between fire protection district and private corporation for real estate to host new central station.

Publications

- "Warranties, Disclaimers, and Limitations" chapter in *Contract Law*, Illinois Institute for Continuing Legal Education (2016)
- "Introduction to the Open Meetings Act," chapter in *Illinois Sunshine Laws*, Illinois Institute for Continuing Legal Education (2016)
- "Contracts" chapter in *Municipal Law: Contracts, Litigation and Home Rule*, Illinois Institute for Continuing Legal Education (2012, 2015)

Public Speaking

- *"Updates on Freedom of Information and Open Meetings Acts"*
Illinois Association of Park Districts Annual Conference (2017)
- *"Employee Policies and Related Issues"*
Illinois Association of County Clerks and Records Regional Meeting (2017)
- *"Regulation of the Public Way: The Aftermath of Reed v. Town of Gilbert"*
Illinois Institute for Continuing Legal Education, Chicago Land Use Seminar (2017)
- *"The Local Government Travel Expense Control Act"*
Heyl Royster Governmental Seminar (2016)
- *"Case Law Update"*
Heyl Royster Governmental Seminar (2016)
- *"Freedom of Information Laws for Employers"*
Heyl Royster Employers' Day Seminar (2016)
- *"Managing Waiting Lists, Tenant Screenings, Information Hearings and How to Prepare for Evictions"*
National Association of Housing Redevelopment Officials Annual Conference (2016)
- *"Update On First Amendment Cases and Their Impact On Local Government Ordinances"*
Heyl Royster's 31st Annual Claims Handling Seminar (2016)
- *"Public Duty Rule Panel/Tort Immunity"*
Heyl Royster's 31st Annual Claims Handling Seminar (2016)
- *"WC Claims Handling Liability, Including Legal Holds & Spoliation"*
Heyl Royster's 31st Annual Claims Handling Seminar (2016)
- *"Agri-Finance and the Uniform Commercial Code"*
GROWMARK Agri-Finance and Credit Managers Meeting (2016)
- *"Bidding Requirements and Related Funding Concerns/Tax Levies"*
Northwest Illinois Highway Commissioner Summer Seminar (2016)
- *"Considerations in Purchase of Real Property"*
Illinois Association of Park Districts Annual Seminar (2016)

Professional Recognition

- Named to Law Bulletin Publishing Company's 2015 and 2016 list of Illinois *Emerging Lawyers*. Only two percent of Illinois lawyers under the age of 40 or who have been licensed to practice for 10 years or less earn this distinction.
- Named to the Illinois *Super Lawyers Rising Stars* list (2013-2017). The *Super Lawyers Rising Stars* selection process is based on peer recognition and professional achievement. Only 2.5 percent of Illinois lawyers under the age of 40 or who have been practicing 10 years or less earn this designation.
- J. Bruce Scidmore Award, Township Attorney of the Year (2011)

Professional Associations

- Illinois Township Attorneys Association (Vice President 2007-09; President 2009-2011)
- Illinois State Bar Association (Local Government Law Section Council, 2011-Present)
- Peoria County Bar Association (Chair, Communications & Technology Committee, 2009-2012)

Court Admissions

- State Courts of Illinois
- United States District Court, Central and Northern Districts of Illinois (Trial Bar)

Education

- Juris Doctor, DePaul University College of Law, 2004
- Bachelor of Arts-International Relations (*magna cum laude*), Bradley University, 2001