AN ILLINOIS LAW FIRM

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

 February 2015

WELCOME LETTER

Friends:

Happy New Year! It is my pleasure to welcome you to this edition of our group's quarterly newsletter. This edition will undoubtedly apply to your local body, as it focuses on further guidance from the courts and the Attorney General's Public Access Counselor on Illinois' Freedom of Information Act and Open Meetings Act.

I am pleased to announce that in 2015 our firm will continue to offer you monthly articles and any "breaking news" by e-mail, in addition to our regular quarterly newsletters and seminars. All of these are free, and we encourage you to share them with other members of your board and outside colleagues. Past material is posted to our website (www.heylroyster.com) under the "Resources" tab, where we also provide you an opportunity to sign up for our publications and offer additional content.

Our group values your comments and concerns on growing trends you are facing in your area. For example, our "iGovern" seminar this past December focused on the use of modern technology in government. If you missed that event, we are planning a live, "webinar" version of the event on February 23 allowing you a chance to participate from home or the office. Going forward, we anticipate a regularly occurring "iGovern" seminar on legal issues related to technological developments once a year. However, we are also actively preparing for upcoming events on workers' compensation and public finance, as you have told us you want to learn more on these topics. If there are other pressing issues that you would like us to consider, please let me know.

I want to conclude my welcome letter with a brief note of appreciation. Not only does our group continue to appreciate your support of our publications and seminars, but we also want to express our personal appreciation for our group's past practice chair, Tim Bertschy. Tim is now the managing partner of our firm, and I am pleased to announce that he will remain an active part of our group. Under Tim's leadership, our group developed into what you see now – an amazing collection of very talented lawyers committed to helping public bodies serve their constituents. To paraphrase Sir Isaac Newton, our group firmly stands on the shoulders of what Tim has built, and we are excited to see what the future holds.

John M. Redlingshafer
Governmental Practice Group

IN THIS ISSUE

PUBLIC BODIES PROHIBITED FROM REQUIRING COMMUNITY MEMBERS TO DISCLOSE ADDRESS BEFORE PUBLIC COMMENT

By: Melissa Schoenbein & Emily Perkins
mschoenbein@heylroyster.com and eperkins@heylroyster.com

Public Access Opinion 14-009 recently established that a public body cannot require a person to disclose his or her address during the public comment portion of an open meeting. This binding opinion, published on September 4, 2014, serves as a warning to public bodies that their actions will be carefully examined for violating the Open Meetings Act (OMA), 5 ILCS 120/3.5 (West 2012).

On April 14, 2014, Janet Hughes (Hughes) attended a Lemont Village Board (Board) meeting. During the audience participation period, Mayor Brian Reaves (Mayor Reaves) solicited comments from the audience. Hughes gave her name and stated that she was a taxpayer from Lemont. Mayor Reaves interrupted Hughes and requested that she state her address. Hughes provided her street name and continued speaking. Mayor Reaves interrupted Hughes again and stated that he needed her complete home address before she could continue commenting. Hughes replied that she was not comfortable providing her home address. At that point, Mayor Reeves asked the village attorney, Jeff Stein (Stein), whether her full address was required before commenting. Stein told Hughes she could continue without providing her address, but that it would be "helpful" to have it. Hughes ultimately disclosed her home address before making her comments to the public.

Hughes submitted a Request for Review to the Public Access Counselor (PAC) where she alleged that Mayor Reaves and Stein "pressured" and "forced" her to disclose her home address before she could continue her comments during the Board meeting. The PAC interpreted the OMA and issued a binding opinion.

In the opinion, the PAC explained that Section 2.06(g) requires all public entities subject to the OMA to provide an opportunity for members of the public to speak at open meetings. Section 2.06(g) provides: "Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." 5 ILCS 120/2.06 (g).

An individual's right to address public officials at open meetings can be subject to limitation. Public entities have rules to maintain decorum and to ensure that meetings are conducted efficiently. The plain language of section 2.06(g) states that individuals can address a public body subject only to a public body's established and recorded rules. However, public bodies may promulgate reasonable "time, place and manner" regulations to further a significant governmental interest. For example, a public entity may create a time limit for public comment to ensure a variety of individuals have the opportunity to speak.

In this case, the Board's established and recorded rules governing public comment did not require a person to publicly state his or her home address as a prerequisite to speaking. Instead, the Board asked for residents' addresses because it was a "longstanding custom and practice." The Board asserted that having individuals' home addresses allowed the Board to keep accurate meeting minutes, determine if comments were raised by residents, and respond to their concerns.

The PAC considered the Board's arguments and stated "in considering whether it is good policy to ask members of the public to provide their addresses when making public comments, there are reasonable arguments on both sides." Public Access Opinion 14.009, p. 6, Sept. 4, 2014. However, the PAC concluded the Board violated the OMA during the public comment portion of its open meeting by requiring Hughes to provide her full address in order to speak.

Melissa N. Schoenbein concentrates her practice on governmental affairs and school districts as well as tort litigation and representation of clients in the areas of commercial and contract law.

Emily J. Perkins concentrates her practice in governmental law as well as employment law and tort litigation.

The PAC explained that providing a home address is not reasonably related to promoting decorum or ensuring that others have an opportunity to comment. Nothing prohibits a speaker from providing his or her address voluntarily, but section 2.06(g) does not support a requirement that a person must state his or her home address prior to being allowed to speak. The PAC expanded its holding when it stated that requiring the public to provide a complete home address before commenting at a public meeting would have a "chilling effect" on individuals who wish to speak at public meetings. Therefore, the PAC concluded that a rule which requires speakers to state their home addresses violates section 2.06(g) of the OMA, even if such a rule is established and recorded by the public body.

Opinion 14-009 has been criticized by commentators since its release. In addition to the PAC's conclusion that the Board violated section 2.06(g) of the OMA, the PAC bolstered the opinion when it concluded that establishing such a rule would have exceeded the scope of the Board's authority. Critics argue that this issue is related to an individual's right to the freedom of speech rather than a statutory right under the OMA. Critics contend, therefore, that the PAC's public comment opinions appear to be outside of the PAC's jurisdiction.

Regardless, public bodies subject to the OMA should closely examine their established policies to guide their official conduct in open meetings. Any policy that requires the public to disclose a home address is a violation of the OMA and should be revised. Furthermore, it is important to recognize that actions by public bodies pursuant to the OMA will be highly scrutinized.

iGovern Webinar

Technology Use in the Public Sector

February 23, 2015
12:00 - 1:30 p.m.

Attendees will learn:

- How to comply with the Freedom of Information Act and Open Meetings Act in the digital age.
- Required website postings.
- The pros and cons of using social media to communicate with your constituents.
- How to properly regulate technology within your organization with email retention and technology use policies.

This seminar will also cover the public comments requirements of the Open Meetings Act and the Illinois Attorney General's opinions narrowing the public body's ability to regulate comments. Finally, the presenters will discuss what to do when technology goes awry and networks are hacked, and what protection cyber liability insurance may provide.

Please register for this seminar at www.heylroyster.com/igovern.

ILLINOIS APPELLATE COURT REMINDS BUSINESSES OF POTENTIAL LIMITATIONS IN PUBLIC CONTRACTS

By: John Redlingshafer
jredlingshafer@heylroyster.com

Earlier this year, an Illinois court ruled on the validity of a contract between the City of Chicago and a private company regarding the operation of the city's metered parking system. In the case of *Independent Voters v. Ahmad, Comptroller of the City of Chicago*, 2014 IL App (1st) 123629, the Illinois Appellate Court upheld the contract (valued at over $1 billion), but the case serves as a reminder for potential reasons why a contract between a private contractor and public body may be improper.

Taxpayers against the contract argued that a provision forced the city to enforce its parking rules but the money paid for parking went to the private company. To them, this arrangement violated the "public purpose provision" of the Illinois Constitution, which states "[p]ublic funds, property or credit shall be used only for public purposes." The court did not agree, for two main reasons: the city council's ordinance authorizing the contract stated the agreement was "in the best interests of the residents of the City," and the contract still provided numerous public benefits, including the fact that the fines for parking violations would still go to the city.

Extending this reasoning, the court upheld the contract in its entirety because whether or not the agreement truly was in the "best interests of the residents" is a policy argument left for the Council to decide and not the courts.

The taxpayers also argued the duration of the contract (75 years) was inappropriate, because it binds future city councils to its terms. The court disagreed, saying the Chicago City Council was a "continuing body" that does not end, even when its membership changes.

While it is unlikely we will see many private-public contracts worth over $1 billion and lasting 75 years, if you wish to contract with a public body, make sure you give some consideration to the issues raised by the taxpayers in this case:

1. What are the "public purposes" of the contract? In many cases, this will be easy (e.g., a new building), but what if you are asked to take over a service a public body ordinarily provides?
2. Was there an ordinance authorizing the contract? What did it say?
3. How long does the contract last? The City of Chicago (and other bodies) have special "home rule" powers under the Illinois Constitution, but a majority of governments in the state do not. Even if they do, contracts which last past the term of an existing council or board may not be valid under Illinois law, depending on the subject matter.

John M. Redlingshafer is chair of the firm's Governmental Practice. He concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities. John currently serves on the Tazewell County Board and is a past President of the Illinois Township Attorneys' Association.

Shooting Ranges Permissible Under Definition of Private Recreation in Zoning Code

By: Emily Perkins
eperkins@heylroyster.com

In *Platform I Shore, LLC v. Village of Lincolnwood*, 2014 IL App (1st) 133923, the First District Appellate Court held that a shooting range was a permitted use under the plain and unambiguous language of the Village's zoning ordinance. This case illustrates that regardless of whether a particular activity is unpopular, zoning officials must act in a reasonable and non-arbitrary manner when ruling upon zoning applications.

Platform I Shore, LLC leased the second floor of a commercial building with the intent to operate a shooting range above an existing firearms dealership. The plaintiff's property was located in the B-2 zoning district. One of the permitted uses of a B-2 zone property was for a "health club or private recreation facility." Article 2.02 of the Lincolnwood Zoning Ordinance further defined the phrase "health club or private recreation" to include a building designed for sports, exercise, leisure time activities, or other customary and usual recreational activities.

Shooting ranges for rifle shooting and target practice have been held to constitute a recreational activity.

The Zoning Officer denied the plaintiff's application for the operation of a firearms shooting range, contending that a shooting range did not fall within the "health club or private recreation" permitted use. The zoning officer further concluded that the zoning ordinance had been amended since the application to address shooting ranges. On appeal, the plaintiffs argued that the zoning ordinance in effect at the time of their application unambiguously provided that a shooting range was permissible under the "health club or private recreation" permitted-use provision.

The First District Appellate Court held that the plain language of the Lincolnwood Zoning Ordinance was unambiguous. The court noted that it was undisputed that the plaintiff's property was located in the B-2 zoning district and that a proposed shooting range fell within the broad language used in the ordinance, namely "recreation." Shooting ranges for rifle shooting and target practice have been held to constitute a recreational activity. Furthermore, target shooting is considered a sport because it is an Olympic sporting event and a recognized sporting activity within the national college associations.

Send Us Your Email

If you would like to receive our newsletter via e-mail, please send your request to newsletters@heylroyster.com.

PUBLIC BODIES AND UNION CONTRACTS: HOLDING UP YOUR END OF THE BARGAIN

By: Chrissie Peterson and Melissa Schoenbein
cpeterson@heylroyster.com and mschoenbein@heylroyster.com

On September 30, 2014, the Illinois First District Appellate Court held in *State of Illinois v. AFSCME*, 2014 IL App (1st) 130262 that an arbitrator's award stemming from an arbitration agreement aligned with Illinois public policy that favors the enforceability of contracts between the state and unions of public employees. While the court found public policy in favor of enforcing the contracts…it leaves many to wonder…how do public bodies hold up their end of the bargain when the financial situation has changed?

In the *AFSCME* case, the State of Illinois had agreed to a four-year collective bargaining agreement (CBA) with the American Federation of State, County and Municipal Employees (AFSCME) and later negotiated Cost Savings Agreements (CSA's) regarding delays in wage increases. When the wage increases were not paid, even under the delayed terms of the CSA's, the union filed a grievance demanding their pay increases.

At arbitration, the State argued that the General Assembly had failed to appropriate funds in a sufficient amount to pay the wage increase and that Illinois Public Labor Relations Act, 5 ILCS 315/1 et seq. (West 2008), prohibited the State from paying the wage increases until the General Assembly appropriate sufficient funds that would cover the wage increases. The arbitrator found the State breached the CBA and the CSAs when it failed to pay the agreed wages to employees and ordered the State to pay the agreed wages, including the 2% wage increase for fiscal year 2012 that was at issue.

The court reasoned the State's interpretation of public policy conflicted with the Illinois Public Labor Relations Act, which expressly provides the State and its' agencies with the ability to "negotiate multi-year collective bargaining agreements" with unions of state employees. 5 ILCS 315/21. Under the State's interpretation of the policy, the State and its agencies could not promise unions anything that required funding for future years. The State's interpretation of public policy would make multi-year contracts impossible to enforce.

The court held the agencies negotiating with unions commit the State to pay parties who enter into contracts with the State, even before the General Assembly has appropriated funds for the contract. In addition, the court held the arbitrator's award aligned with the overriding public policy of permitting the State to negotiate enforceable multi-year CBAs with unions of state employees.

Many public entities have faced wage increases, pension increases and retirement incentives from collective bargaining agreements where the provisions have been awarded by an arbitrator or even inherited from prior administrations. More than ever, the demand of increasing pension and health insurance costs require the attorneys bargaining on your behalf to have substantial experience in labor negotiations and the overall operations, budget and management of the public corporation.

Chrissie L. Peterson practices in all aspects of Municipal law. Prior to joining Heyl Royster, Chrissie served as the City Attorney for Canton, Illinois, where she provided guidance on the Freedom of Information and Open Meetings Acts, construction contracts, franchise agreements and utility infrastructure. She was also responsible for drafting all resolutions, ordinances, policy updates and managing all legal aspects of economic development including zoning and land use.

Conviction Reversed for DUI Offense Outside the Corporate Limits

By: Emily Perkins
eperkins@heylroyster.com

The Second District Appellate Court in *Village of Bull Valley v. Zeinz*, 2014 IL App (2d) 140053, recently reversed a DUI conviction prosecuted locally because a village failed to establish that the offense was committed within its corporate limits.

Daniel Zeinz was arrested and later convicted for driving under the influence of alcohol and improper lane usage. At trial, the Village of Bull Valley Officer James Page testified that while on duty, he observed a white Pontiac cross over the white fog line and drive partly on the shoulder of the road in Wonder Lake, IL. Officer Page testified that the driver of the Pontiac exited the Village of Bull Valley and proceeded to drift left and cross over the yellow center line. Officer Page stopped the vehicle and arrested Zeinz after he failed several field sobriety tests. Officer Page admitted that he did not see Zeinz commit the offenses while driving within the Village, although he did observe Zeinz exiting the Village. The trial court found Zeinz guilty of the offenses and Zeinz appealed.

Section 16-102(c) of the Illinois Vehicle Code (625 ILCS 5/16-102(c)), forbids a municipality from prosecuting a violation unless: (1) the violation occurs within the municipality's corporate limits and (2) the State's Attorney has provided written permission. Otherwise, the State's Attorney "shall prosecute all violations."

In this case, the Village of Bull Valley corporate limits did not include the jurisdiction west of Ridge Road on Route 120, where Zeinz was detained and arrested by Officer Page. For that reason, Zeinz argued that section 16-102(c) did not authorize the Village to bring the case against him because his offenses occurred outside the jurisdiction. Zeinz argued that there was no evidence that he violated any law within the Village's limits because Officer Page only saw him drive in Wonder Lake, not in the Village of Bull Valley.

The Second District concluded that the trial court erred when it found that Zeinz committed the offenses within the Village limits. The fact that Officer Page observed Zeinz exit the Village was a guess rather than a conclusion. The court noted that when the Village decided to prosecute the case, it had burden to prove that Zeinz committed his offenses within the Village limits. The Village failed to meet that burden, and the judgment was reversed.

More municipalities are adopting provisions of the Illinois Vehicle Code, such as DUI, for local prosecution or administrative adjudication. In this case, the Second District concluded that traffic offenders can only be prosecuted within the jurisdiction where the offense occurred. While this case may raise the question of what constitutes pursuit and what constitutes normal patrol routes, it is a firm reminder that officers should be aware of the boundary limitations between the Illinois Vehicle Code and local ordinances.

Proposed Law Would Allow For Municipal Bankruptcy

On January 26, 2015, Representative Ron Sandack (R-Downer's Grove) filed HB 298 that would amend the Illinois Municipal Code to allow a city, village or incorporated town to file a petition and exercise power pursuant to federal bankruptcy law. (HB 298)

Mark McClenathan previously analyzed the availability of bankruptcy for Illinois municipalities and concluded that the U.S. Bankruptcy Code only allows a municipality to reorganize its debts under Chapter 9 of the Code when specifically authorized by state law. (Municipal Bankruptcy - Can an Illinois Municipality File for Bankruptcy Protection?). It would appear that HB 298 provides statutory authorization for a city, village or incorporated town to file for bankruptcy protection.

Heyl Royster will continue to track and report on the status of this bill. If your municipality has questions about the potential affect that HB 298 may have on current financing or contractual requirements, please contact any of the attorneys in our Governmental Practice.

FREEDOM OF INFORMATION ACT

By: Chrissie Peterson, Emily Perkins, Melissa Schoenbein

Employee Resumes and Applications Subject to Release under FOIA

In a binding decision, PAC 14-015, published on November 25, 2014, the Public Access Counselor (PAC) found the Village of Winnetka in violation of FOIA after the Village denied a request that asked for a copy of a Village employee's employment application and resume. The Village denied the request and cited FOIA exemptions, including under section 7(1)(c) of the Act. It is important for public bodies to be aware that the personal privacy exemption under section 7(1)(c) requires the balancing of four factors to determine whether an individual's privacy interests outweigh the interests of the public in disclosure.

William Buell submitted a FOIA request to the Village seeking "a copy of the completed employment application and resume for James Bernahl for the position of Assistant Director of Public Works and Engineering." The Village denied Buell's FOIA request and cited FOIA exemptions, including section 7(1)(c). Buell filed a Request for Review with the Public Access Bureau that expressed concern that Bernahl's hiring may have been in violation of Illinois law.

Under section 7(1)(c), the Village argued that Bernahl's employment application and resume were exempt because the employment history and other information in the resume and employment application did not pertain to the public duties of public employees. The Village cited several cases in its argument, but those cases interpreted an earlier version of the personal privacy exemption. Prior to January 1, 2010, the personal privacy exemption was found in section 7(1)(b) of FOIA and exempted the disclosure information that would be considered an invasion of personal privacy. However, the Illinois General Assembly enacted Public Act 96-542, effective January 1, 2010, that replaced former section 7(1)(b) with the current section 7(1)(c).

Under section 7(1)(c), records are no longer considered exempt simply because they are maintained in a personnel file. A public body must release records containing personal information regarding its officers and employees unless it determines that "the subject's right to privacy outweighs any legitimate public interest in obtaining the information." There is a balancing test that requires public bodies to balance the privacy rights of an employee and the interests of the public in obtaining information concerning an employee. Public bodies must consider four factors before releasing information concerning an employee and the PAC analyzed each factor.

1. Requester's Interest in Disclosure

Buell requested the employment application and resume to determine whether Bernahl's hiring complied with State laws that require municipal managers to make appointments based on "merit and fitness" and that give preference to veterans.

2. Public Interest in Disclosure

The PAC reasoned the general public has an interest in accessing information that demonstrates that the hiring of public employees complies with State law. Furthermore, there is a compelling public interest in disclosure of a public employee's credentials to enable the public to assess the employee's qualifications to perform his or her public duties.

3. Degree of Invasion of Personal Privacy

The PAC stated the employment application and resume contained personal information concerning Bernahl's education, training, skills, certifications, and employment history. The information was favorable and not embarrassing or potentially damaging to Bernahl's reputation. Moreover, salary information in the employment application reflected payments of public funds that Bernahl received for employment in the public sector. This information would be subject to disclosure.

4. Availability of Alternative Way to Obtain Requested Information

As to the fourth factor, the PAC stated it was unclear whether some or all of the information could be obtained from other sources. To obtain the information, Buell would have needed to contact several sources. It appeared that the information Bernahl supplied to the Village was the most complete and up to date source.

Taking all four factors into account, the PAC found that the public interest in disclosure of Bernahl's resume and employment application outweighed his privacy interests.

In addition to 7(1)(c), the Village also argued that the employment application and resume were exempt under section 7(1)(f), as "inter- and intra-agency predecisional and deliberative material" because the Village used the documents to consider which employee to hire for the position. This exemption was designed to protect the communications process and encourage open discussion among agency employees before a final decision is made. The exemption does not typically justify withholding purely factual information. The PAC found that this exemption did not apply because the employment application and resume contained exclusively factual information concerning Bernahl's background and qualifications for employment.

The exemption under section 7(1)(c) is available only if the individual's privacy interests outweigh the interests of the public in disclosure.

Lastly, the Village argued that the documents contained certain personal information, such as Bernahl's home address, home phone number, e-mail address, and signature, that fell within the "private information" exemption under 7(1)(b) of FOIA. The PAC agreed and said before the employment application and resume could be released, the Village should redact Bernahl's private information and signature.

It is important for public bodies to be aware that the personal privacy exemption under section 7(1)(c) requires the balancing of the public's interest in disclosure of specific information against the individual's interest in privacy. The exemption under section 7(1)(c) is available only if the individual's privacy interests outweigh the interests of the public in disclosure. A public body should balance the four factors to determine whether an individual's privacy interests outweigh the interests of the public in disclosure. Before releasing an employment application or resume, public bodies should redact private information, such as home addresses, phone numbers, e-mail addresses, and signatures.

Amendments to the Freedom of Information Act for Voluminous Requests and Online Postings

HB 3796 (PA-98-1129) will help ease the burden on public bodies when responding to large Freedom of Information Act (FOIA) requests and will allow requesters to be directed to websites for information already posted online.

Originally introduced in January of 2014, House Bill 3796 (Rep. Currie/Sen. Hastings) amends FOIA by establishing a definition of a "voluminous request" and allowing a public body to respond to a voluminous request in the same manner as when responding to a recurrent requester. The bill states that a public body is not required to copy and make available for public inspection a public record that is published on the public body's website, unless the requester does not have reasonable electronic access.

In June, the bill was vetoed by the Governor. However, the House overrode the veto with a vote of 76-36 on November 19, 2014 and the Senate followed suit on December 3, 2014 with a vote of 39-13.

The bill defines voluminous request as a request that:

> (i) includes more than 5 individual requests for more than 5 different categories of records or a combination of individual requests that total requests for more than 5 different categories of records in a period of 20 business days; or (ii) requires the compilation of more than 500 letter or legal-sized pages of public records unless a single requested record exceeds 500

pages. "Single requested record" may include, but is not limited to, one report, form, e-mail, letter, memorandum, book, map, microfilm, tape, or recording. 5 ILCS 140/2(h)

Other important provisions amend the traditional response time that a public body has to respond to a voluminous request. A public body shall respond to a voluminous request within 5 days after receipt. A public body shall provide a person making a voluminous request 10 business days from the date the public body's response is sent to amend the request in such a way that the public body will no longer treat the request as voluminous. If the request continues to be voluminous or the requester fails to respond, the public body shall respond within the earlier of 5 business days after it receives the response or 5 business days after the final day for the requester to respond to the public body's notification. 5 ILCS 140/3.6(a)-(d). The requester has a right to file an appeal to the PAC if they believe the request was wrongfully classified as a voluminous request. 5 ILCS 140/9.5(b-5).

The bill also allows the public body to charge certain fees when responding to a voluminous request. When a person requests a copy of a record maintained in an electronic format, the public body shall furnish it in the electronic format specified by the requester if feasible. If the records are not in a portable document format (PDF) the public body can charge up to between $20.00 and $100.00 depending upon the megabytes of data required. If the public body imposes a fee, it must provide the requester with an accounting of all fees, costs and personnel hours in connection with the request for public records. 5 ILCS 140/6(a-5).

The bill also allows the public body to charge certain fees when responding to a voluminous request.

If the records cannot be produced in an electronic format, the public body may only charge the requester for the actual cost of purchasing the recording medium.

A public body may also charge up to $10 for each hour spent by personnel in searching for and retrieving a requested record or examining the record for necessary redactions. 5 ILCS 140/6(f).

Prior to HB 3796, if a requester asked for information that was posted online (budgets and ordinances, for example) the public body was still obligated to provide copies in order to satisfy the FOIA request. Now, for information posted online, the public body can direct the requester to the website where the records can be viewed. 5 ILCS 140/8.5(a). If the requester does not have reasonable access to the online record, then the request can be re-submitted asking for inspections or copies of the records. 5 ILCS 140/8.5(b).

Our attorneys frequently work with their clients to review and respond to FOIA requests. If you would like additional information on FOIA policies or procedures, contact any of the attorneys in Heyl Royster's Governmental Practice.

"LEADS" Information Exempt From Disclosure Under FOIA

The possibility of sensitive information being disclosed to a sheriff's teenage son became a highly controversial issue in DuPage County in the case of *Better Government Association v. Zaruba*, 2014 IL App (2d) 140071. In that case, the Better Government Association (BGA) requested records that would disclose the vehicles and persons who were subject to the Law Enforcement Agencies Data System (LEADS) inquiries allegedly conducted by the DuPage County Sheriff's son. At age 17, Patrick Zaruba was given access to LEADS, which could have allowed him to view information about licensed drivers in Illinois as well as sensitive information about crime related matters, including gang activity and stolen vehicles. For a number of reasons outlined below, the Second District Appellate Court held that Sheriff Zaruba did not have to comply with the requests.

The BGA sought copies of documents relating to Patrick Zaruba's access to LEADS, copies of documents that showed the names of persons who were certified to access the LEADS system, and copies of documents that showed all written communication between the Illinois State Police and

the DuPage County Sheriff's office relating to LEADS and/or Patrick Zaruba.

Sheriff Zaruba responded that he was unable to supply any information that would be responsive to the FOIA request because LEADS is controlled by the Illinois State Police. The Sheriff's office did supply copies of an agreement between the Illinois Department of State Police and the DuPage County Sheriff's office regarding LEADS access and Patrick's certificate of completion for a course entitled "LEADS Less Than Full Access." The Sheriff insisted that he would breach the agreement with the Illinois State Police if he provided the requested records to BGA. In addition, the Sheriff claimed that he could not provide the requested information to BGA without intentionally violating the Illinois Administrative Code thereby subjecting himself to potential suspension of LEADS services. As a final point, Sheriff Zaruba contended that there was no evidence that Patrick used the LEADS system and that Patrick's access to the system was never restricted or suspended due to any violation. In his response, Sheriff relied exclusively on section 7(1)(a) of the FOIA, which exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a). The trial court dismissed the complaint, concluding that the information was exempt from disclosure under section 7(1)(a) of the FOIA, and that a FOIA response to BGA's inquires was not possible. The Second District agreed and held that the state regulations prohibit any disclosure of information relating to LEADS, including inquires performed by LEADS users.

While many FOIA exemptions are specifically stated in the Act, the exemptions that fall within 7(1)(A) require the responder to have an idea of what other federal or state laws provide for. Common scenarios where other laws exempt disclosure involve individuals under the age of 18 or medical information. If you have any questions regarding the interpretation of FOIA or how to respond to a FOIA request, contact any of Heyl Royster's Governmental Practice attorneys.

RECENT LEGAL DECISIONS

Please join us for this complimentary seminar/webinar.

There were a number of cases decided on the state and national levels in 2014 that could have a profound impact on your organization's operations in 2015. These cases cover a wide range of topics and have application to public bodies and private entities. Some of the topics to be covered include:

- Business Contracts
- Advertising and Publicity
- Website Liability
- Director & Officer Liability
- Employment Discrimination
- Sexual Harassment
- FMLA

Peoria (Also via webinar on this date)
Thursday, February 12, 2015, 12:00-1:00 p.m.
Heyl Royster, 124 S.W. Adams St., Ste. 600

Rockford
Friday, February 20, 2015, 12:00-1:00 p.m.
Northern Illinois University Rockford Campus, 8500 E. State St., Room 101

Registration
You can register for the seminar or webinar at www.heylroyster.com/seminar.

Questions? Contact Sandy Gullette at 309.676.0400, ext. 277.

CATASTROPHIC INJURY ACCORDING TO THE PSEBA

By: John O. Langfelder and Melissa N. Schoenbein
jlangfelder@heylroyster.com and mschoenbein@heylroyster.com

The Public Safety Employee Benefits Act (the Act), 820 ILCS 320 et seq., was designed to provide certain benefits to law enforcement personnel, their spouses, and children when employees are killed or catastrophically injured. The Act, however, leaves many questions unanswered. For example, the Act does not define "catastrophic injury." In addition, the Act does not provide guidance on the proper procedure for seeking benefits under Section 10. In recent years, a number of courts attempted to define "catastrophic injury" and clarify what triggers the requirement to pay health benefits.

Under the Act, full-time law enforcement, correctional officers, probation officers, firefighters, and their families are covered by the Act. 820 ILCS 320/10(a). In order to be eligible for benefits, the employee must suffer a catastrophic injury or be killed in the line of duty. The catastrophic injury or death must have occurred as the result of the officer's response to fresh pursuit, the officer or firefighter's response to what is reasonably believed to be an emergency, an unlawful act perpetrated by another, or during the investigation of a criminal act. If the employee suffered a catastrophic injury or was killed in the line of duty, the employer must pay the entire premium of the health insurance plan for the injured employee, the employee's spouse, and for each dependent child.

This article discusses several Illinois cases interpreting the Act and provides guidance for governmental employers and workers' compensation insurers.

Krohe v. City of Bloomington

The Supreme Court of Illinois addressed the definition of a "catastrophic injury" in *Krohe v. City of Bloomington*, 204 Ill. 2d 392 (2003). In this case, a firefighter (Krohe) sustained injuries that caused him to be permanently disabled. He received a line-of-duty disability pension pursuant to 40 ILCS 5/4-110.

Krohe filed a complaint against the City of Bloomington and argued the City was required pay health insurance premiums for him and his family. The City argued it would not pay for health insurance because Krohe's injuries did not rise to the level of "catastrophic." Krohe argued the phrase "catastrophic injury" was ambiguous and the court needed to look to the Act's legislative history to decipher its meaning.

The court held it was the legislature's intent that an injured employee and his or her family would receive health insurance benefits if the employee became disabled after being injured in the line of duty and received line-of-duty disability benefits. In other words, the court held a "catastrophic injury" was synonymous with an injury resulting in a line-of-duty pension.

Village of Vernon Hills v. Heelan

Although the holding in *Krohe* has been followed in subsequent decisions, the Village of Vernon Hills attempted to challenge an award of health benefits to an officer who was awarded a line-of-duty disability pension by asserting the officer had not suffered a catastrophic injury. In *Village of Vernon Hills v. Heelan*, 2014 IL App (2d) 130823, the Village attempted to assert *Krohe* was factually distinguishable. During the course of its appeal, the Village also made it clear on the record that it believed the ruling in *Krohe* was incorrect, that it was seeking to modify existing law, and that the legislative intent behind the Act was misinterpreted.

In the *Village of Vernon Hills* case, Officer Heelan responded to an alarm and observed an unknown person exiting a building. Heelan slipped on ice, fell onto a curb, and sustained a right hip injury. The medical evidence and testimony showed the incident aggravated an asymptomatic pre-existing osteoarthritic condition, which resulted in a right and left hip replacement. The medical examiners determined Heelan was disabled and could not perform his duties as a police officer.

After a hearing and consideration of the medical evidence, the Board determined Heelan qualified for a line-of-duty disability pension. In addition, Heelan sought payment of health insurance benefits. The Village filed a complaint seeking a declaratory judgment that Heelan was not eligible for health insurance benefits under the Act because he had not suffered a catastrophic injury pursuant to Section 10(a) of the Act. The trial court ruled in Heelan's favor, and the Village appealed.

At the appellate level, the Village argued *Krohe* and subsequent cases were not controlling because those decisions did

not address whether a municipality is prohibited from conducting discovery and presenting evidence to dispute the extent of the injury. The court disagreed with the Village and held the interpretation of "catastrophic injury" in *Krohe* was correct. The court stated if an officer or firefighter was awarded a line-of-duty disability pension, Section 10(a) was satisfied and there was no need for discovery or medical evidence regarding the injury. As a result, the nature and extent of Heelan's injuries were not relevant.

Richter v. Village of Oak Brook

In support of its decision in Village of Vernon Hills, the appellate court cited to its holding and analysis in *Richter v. Village of Oak Brook*, 2011 IL App (2d) 100114. In *Richter*, a firefighter (Richter) filed several workers' compensation claims involving various injuries and conditions, which were resolved by lump sum settlement agreements. Richter developed diesel-induced rhinitis from breathing diesel fumes in the firehouse and could not return to work in an environment where airborne irritants could exacerbate his symptoms. Richter also injured his shoulders, neck, and back. The shoulder injuries occurred during a response to a fire.

Although the initial shoulder injuries may have healed, Richter reinjured his shoulders by pulling out a drawer during a training exercise. He underwent surgery to each shoulder and could not return to his regular duties as a firefighter.

Unlike Heelan, Richter had been awarded a line-of-duty disability pension prior to his workers' compensation settlement. The Village of Oak Brook argued Richter's disabling injury was not the result of an emergency call or response because Richter re-aggravated his previous shoulder injury in non-emergency related work activities. In finding in favor of Richter, the court stated Richter could recover under the Act as long as the injury sustained during an emergency response was a contributing cause of the disability.

Nowak v. City of Country Club Hills

In *Nowak v. City of Country Club Hills*, 2011 IL 111838, the Supreme Court of Illinois affirmed its holding and interpretation of a "catastrophic injury." The City became statutorily obligated to pay the health insurance premium for a police officer, who suffered a catastrophic injury in the line of duty.

The court held the City should begin to pay the health insurance premium on the date the officer was deemed permanently disabled, rather than the date when the officer sustained the actual injury. If an individual is forced to take a line-of-duty disability due to injuries, his or her employment continues until the date the line-of-duty disability pension is awarded. Until that point, the employee is still employed and receiving work benefits.

This court's decision overturned an appellate court ruling that imposed the obligation as of the date of the injury. The court again revisited and analyzed the legislative intent of the Act and found the legislators intended anyone who was catastrophically injured in the line of duty to have continued benefits.

Conclusion

Courts continue to follow the holding in *Krohe* and the subsequent cases addressing the issue. An award of a line-of-duty disability pension satisfies Section 10(a), and the employee is found to have sustained a catastrophic injury.

In the event of a workers' compensation settlement where there are multiple injuries or accidents, and there is any dispute as to the nature, extent, or cause of any one of the injuries or accidents, careful consideration should be made to determine if any injury or accident should be excluded and handled separately.

Inclusion of all emergency and non-emergency injuries and accidents without distinction could result in the award of a line-of-duty disability pension and trigger the employer's obligation to pay the health insurance benefits for the injured employee and his or her family.

John O. Langfelder practices in the areas of personal injury and property loss defense, workers' compensation, and governmental law. He has defended clients in civil matters through trial and at mediations in Central Illinois and has defended employers in workers' compensation cases at the arbitration level and in appeals. Prior to becoming an attorney, John was a Liability Specialist with Country Companies Insurance where he handled claims of all types, making daily decisions on coverage issues, liability and comparative fault, and settlement value.

NEW IN 2015

1) Referendum Required to Close Fire Facility - HB 4418 amends the Illinois Municipal Code. Effective January 1, 2015, cities or villages are now prohibited from closing its fire department without referendum approval.

2) Dissolution and Consolidation of Fire Protection Districts - HB 5856 amends the Fire Protection District Act to provide that the voters of a fire protection district may vote to simultaneously dissolve and consolidate the district into an adjoining fire protection district. This amendment is effective January 1, 2015.

3) Local Government-Recycling Bins - SB 3294 is effective January 1, 2015 and provides that a household goods recycling bin shall have a permanent written or printed label affixed to the bin and prominently displayed. The bill also provides other label requirements.

4) Voluminous Requests - HB 3796 provides a definition for "voluminous request" and allows the public to respond to a voluminous request in the same manner as when responding to a recurrent requester under the current law. It provides that a public body is not required to provide a copy or allow the public inspection of a public record that is published on the public body's website unless the requester does not have reasonable electronic access.

5) Local Records Destruction Penalty - Effective January 1, 2015, HB 4216 adds language from the Criminal Code to the Local Records Act. A similar change was made to the State Records Act. The legislation does not impose any new penalty that does not already exist under current law.

6) Local Government Audit Reports - HB 5503 amends the Counties Code and the Illinois Municipal Code and is effective January 1, 2015. The amendment provides that within 60 days of the close of an audit of the county's funds and accounts each fiscal year, the auditor shall provide a copy of any management letter and a copy of any audited financial statements to each member of the county board. The auditor must also present the information from the audit to the county board either in person or by a live phone or web connection during the meeting. If the county maintains an internet website, the county board shall post the information contained in the management letter or financial statements to its website.

7) Real Estate-Valuation Waiver - HB 5709, effective January 1, 2015, reduces the cost of obtaining right-of-way or temporary easements by allowing properly trained municipal employees to complete federal valuation waivers for right-of-way or temporary easements if the value of the parcel or easement is under $10,000 without hiring a licensed appraiser.

8) Resale Dealers Act - SB 1778 creates the Resale Dealers Act. This act is effective January 1, 2015 and imposes regulations on resale dealers. It authorizes counties or municipalities to impose stricter regulations than provided under state law. Every resale dealer will deliver a legible and exact copy form the resale dear's record book that lists each item of personal property and any other valuable items purchased during the preceding day to the local law enforcement each day. These lists include the exact time when the personal property or valuable items were received or purchased and a description of the person or persons that sold or left the property items in pledge. Law enforcement agencies are permitted to place a hold order on property in the possession of a resale dealer under certain circumstances, and the resale dealer shall be required to turn the property over to law enforcement.

9) Administrative Appeals - Effective January 1, 2015, SB 2829 amends the Code of Civil Procedure to provide that in a successful appeal under the Administrative Review Law of an adverse decision by a unit of local government, the court shall award the plaintiff all reasonable costs, including court costs and attorney's fees associated with the appeal. The bill provides that if the court finds the decision by the unit of local government was clearly erroneous or that the plaintiff's right to due process were abridged, the court may award the plaintiff all reasonable costs associated with eth entire case dating back to the inception of the administrative proceeding.

10) E-Mail Addresses for Elected Officials - HB 5623 amends the Local Records Act to provide that each unit of local government or school district other than Chicago that maintains an internet website other than a social media or social networking website shall post to its website for the current calendar year a mechanism, such as a single uniform email address, for members of the public to electronically communicate with elected officials of that unit of local government or school district. The bill requires the information to be easily accessible from the unit of local government's or school district's home page through a hyperlink. The bill limits home rule powers and is effective January 1, 2015.

11) Vehicle Impound Release Procedures for Counties - HB 4743 amends the Illinois Vehicle Code to provide that counties may adopt administrative procedures for the release of impound vehicles. This amendment is effective January 1, 2015 despite the fact that municipalities already possess this authority. The bill also provides that counties and municipalities that do not wish to set up an administrative review of the hearing officer's decisions shall direct appeals to the circuit court which has jurisdiction over the county or municipality.

News & Notes

Redlingshafer Promoted to Partner and Governmental Practice Chair

We are proud to announce that at the beginning of the year, John Redlingshafer was promoted to partner, and he took on the role of Chair of the firm's Governmental Practice. John represents numerous governmental entities in a broad range of issues, including intergovernmental agreements, statutory regulations, and infrastructure and construction projects, as well as zoning, annexation, and eminent domain law. John is a past President of the Illinois Township Attorneys Association. He currently serves on the Tazewell County Board and its Land Use and Health Services Committees. He is also a member of the East Peoria Fire and Police Commission.

Beth Jensen Named a "Woman of Influence" by *InterBusiness Issues*

Beth Jensen was selected as a "Women of Influence" for 2014 by Central Illinois Business Publishers as one of the eight women in Central Illinois who made a difference in the Peoria area in 2014. Beth is featured in the December issue of *InterBusiness Issues* (iBi) magazine as "an advocate for the City of Peoria, the poor, and victims of sexual and domestic abuse."

Stacy Crabtree Named to *40 Leaders Under Forty* List

Stacy Crabtree was recently named to *InterBusiness Issues'* 2014 *40 Leaders Under Forty* list of young leaders in Central Illinois. Stacy joins eight other firm attorneys who have been named *40 Leaders Under Forty* honorees in the past.

IAPD/IPRA "Soaring to New Heights" Conference

The annual conference of the Illinois Association of Park Districts (IAPD) and Illinois Park and Recreation Association (IPRA) was held January 22-24 in Chicago. Mark McClenathan spoke on "Staying Out of Litigation: When to Require Liability Waivers," and Andy Keyt spoke on "Tort Immunity Act: Decisions and Developments."

Upcoming Seminars

The Illinois Rural Water Association Conference
February 17 and 18

The Illinois Rural Water Association is holding its 33rd Annual Technical Conference in Effingham, IL on February 17 and 18. Ann Barron will be speaking on "Records & Documentation," what records should be created and kept in the course of business, when responding to a violation notice from the IEPA and what records are subject to FOIA and what must be disclosed. Chrissie Peterson will be speaking on "Identity Theft and Local Utilities," guidelines for complying with federal and state regulations protecting customers' information from identity theft; training on the Fair and Accurate Credit Transactions Act and how to protect the confidential information that is necessary to recover unpaid bills. You can register online at www.ilrwa.org.

National Business Institute's Local Government Law Seminar in May

On May 7, Mike Schag will be speaking on public contracts and procurement; Andy Keyt will be speaking on tort immunity; and Chrissie Peterson will be speaking on open meetings and records, and taxes/revenue at the National Business Institute's Local Government Law seminar in Collinsville, IL. For more info or register go to http://www.nbi-sems.com.

Coming This Summer

Everything you need to know to effectively manage workers' compensation claims in the public sector.

Heyl, Royster, Voelker & Allen
Suite 600, Chase Building
124 S.W. Adams Street
PO Box 6199
Peoria, IL 61601

For More Information

If you have questions about this newsletter, please contact:

Peoria & Chicago

Timothy L. Bertschy
E-mail: tbertschy@heylroyster.com

Chrissie L. Peterson
E-mail: cpeterson@heylroyster.com

John M. Redlingshafer
E-mail: jredlingshafer@heylroyster.com

Peoria Phone: (309) 676-0400
Chicago Phone: (312) 853-8700

Springfield

John O. Langfelder
E-mail: jlangfelder@heylroyster.com

Phone: (217) 522-8822

Urbana

Keith E. Fruehling
E-mail: kfruehling@heylroyster.com

Phone: (217) 344-0060

Rockford

Mark J. McClenathan
E-mail: mmcclenathan@heylroyster.com

Phone: (815) 963-4454

Edwardsville

Michael D. Schag
E-mail: mschag@heylroyster.com

Phone: (618) 656-4646