

The Public Servant

The newsletter of the Illinois State Bar Association's Committee on Government Lawyers

A Data Breach: Now What?

BY JENIFER L. JOHNSON

From licensing applications and registration files to water service customer accounts and parking ticket payments, government agencies gather and maintain a plethora of personal information. Web-based applications and online payment options have made the process of collecting the information needed to conduct government business easy. However, with all that information in the hands of governmental entities, government lawyers must know the

appropriate legal steps to take in the event of a data breach.

The Personal Information Protection Act¹ ("Act") sets forth the notification requirements that data collectors must undertake following a breach of system data. The Act specifically includes government agencies in the definition of data collector.² Although the Act does not contemplate a private cause of action for the breach itself, the Act does require

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FOIA: 'Deliberative Process Exception' Claimed by Cook County Assessor on Property Assessment Data

BY PATRICK DRISCOLL JR.

The Chicago Tribune Company ("Tribune") as part of an investigative series on the Cook County Assessor's Office ("Assessor") requested records under the Illinois Freedom of Information Act ("FOIA"), 5ILCS 140/1.1 et seq. (2016). The Tribune's FOIA request sought assessment data and records on commercial, industrial and residential properties for the years 2002 to 2015. The Assessor denied the Tribune's FOIA request. The Tribune filed suit in the circuit court which ruled in favor of the

Tribune including the award of attorney's fees. The appellate court affirmed the circuit court's grant of summary judgment in favor of the Tribune.¹

The circuit court had ruled in favor of the Tribune's FOIA request for documentation and data showing valuation of properties for real estate taxation. The Assessor denied the Tribune's request claiming the request sought "employee thought processes."²

After the denial of the FOIA request

the Tribune filed suit in the circuit court. On cross motions for summary judgment, after production of documents and two depositions, that court granted summary judgment in favor of the Tribune. The court held that none of the records contained information that supported refusal to produce pursuant to the deliberative process exemption found in FOIA.³ The deliberative process exemption is also referred to as the preliminary records exemption.⁴

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the data collector to provide timely notice of a security breach to all impacted Illinois residents.³ The driving policy behind the notice requirements is that residents must be notified at no charge in the most expedient time possible that a government agency's system data has been breached.⁴

The notice to each impacted resident can be provided electronically so long as the electronic notice is consistent with federal requirements as set forth in the Act, or it can be sent in writing via traditional delivery methods. If the cost of providing notice would exceed \$250,000 or there are more than 500,000 people affected, the Act provides alternative means of notification.⁵

The contents of the required notice vary depending on the type of data that was breached. If the personal information breach includes (1) an individual's name AND (2) social security number, driver's license number, state ID number, account number, credit or debit card number, medical or health insurance information, or unique biometric data, then the contents of the notification must include, at a minimum:

- The toll-free numbers and addresses for consumer reporting agencies;
- The toll-free number, address, and website address for the Federal Trade Commission; and
- A statement that the individual can obtain information from these sources about fraud alerts and security freezes.⁶

Alternatively, if the personal information breach includes an unencrypted user name or email address in combination with an unencrypted password or security question that would permit access to an online account, then the government agency must send an electronic message prompting impacted residents to change their user name, password and security question and answer.⁷

Although expediency is paramount, notification can be delayed due to an active

criminal investigation if the appropriate law enforcement agency requests the delay in writing.⁸ Also, a government agency that maintains its own notification procedures in the event of a data breach is deemed in compliance with the Act if it conducts timely notifications in accordance with its own policies.⁹

State agencies have additional notification requirements under the Act. If a State agency is required to notify more than 1,000 people of a data breach, the agency must also notify all national consumer reporting agencies.¹⁰ Notification to the Attorney General is required if more than 250 Illinois residents are impacted.¹¹ Additionally, a State agency must send a report to the General Assembly within five business days listing the breaches and outlining any corrective measures, as well as the identity of the actor who perpetrated the breach if known.¹² A State agency under the purview of the Governor must also notify the Department of Innovation and Technology within 72 hours.¹³ ■

Jenifer L. Johnson serves as the chief administrative officer for the Illinois Department of Innovation & Technology.

1. 815 ILCS 530/1 *et seq.*
2. 815 ILCS 530/5.
3. See *Cooney v. Chicago Pub. Sch.*, 407 Ill. App. 3d 358, 362 (1st Dist. 2010).
4. 815 ILCS 530/10(a), 12(a).
5. 815 ILCS 530/10(c), 12(b).
6. 815 ILCS 530/10(a)(1), 12(a)(1).
7. 815 ILCS 530/10(a)(2), 12(a)(2).
8. 815 ILCS 530/10(b-5), 12(a-5).
9. 815 ILCS 530/10(d), 12(c).
10. 815 ILCS 530/12(d).
11. 815 ILCS 530/12(e), 12(g).
12. 815 ILCS 530/12(f); 815 ILCS 530/25.
13. 815 ILCS 530/12(g).

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FOIA: 'Deliberative Process Exception' Claimed by Cook County Assessor on Property Assessment Data

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The appellate court analyzed the deliberative process exemption found in FOIA. The deliberative process exemption protects the communications process in government agencies before a final decision is made by an agency. Any such exemption claimed must be shown by clear and convincing evidence.⁵

The records sought by the Tribune contained the results of computerized analysis of sales and many other characteristics such as size of the property and types of improvements. The totality of the information is used to arrive at the final property assessed valuation.⁶ The circuit court held that the documents did not contain the "subjective personal position" of any Assessor employee and did not reveal any "debate" or "deliberation" from the Assessor's office.⁷

In offering the circuit court the appellate court reviewed the similarities found in the federal FOIA statute (5 U.S.C. §552) to that in Illinois, citing *Dumke v. City of Chicago*, 2013 IL App. (1st) 121668, ¶ 14-15.

The deliberative process exemption encourages candid debates within agencies which protects the process leading up to the final decision. It doesn't protect the final reports of the agencies.⁸ Here the records sought certain data that was not part of the procedural deliberative process of the agency. The data that is the result of the process and pre-decisions made by the agency. The records sought did not contain the Assessor's internal evaluation or why the pre-decisions made by the Assessor were made, but only sought the results of the process.⁹

The records sought are final and the valuations are not subject to change by the Assessor. The data is contained the final results of the property and analysis. The data did not contain any pre-decisional deliberations which would be considered "preliminary."¹⁰

The Assessor, like all public bodies claiming a FOIA exemption, has the burden of proving that exemption is appealable by clear and convincing evidence.¹¹

The public policy of FOIA is to "open

government records to the light of public scrutiny."¹² Public records are presumed to be "open and accessible."¹³ The Tribune's request sought disclosure of final documents, which include the "results" of a deliberative process. The court held that the deliberative process exemption did not warrant withholding factual material or documents showing final policy decisions.¹⁴

The court noted that property valuation results in the direct taxation of citizens, and is a "critical government purpose" and that the citizens have a right to review to assert that the taxation process is "uniform and fair."¹⁵ FOIA presumes that all public records are open and subject to public review. Here the Assessor did not prove by clear and convincing evidence that any deliberative process exemption was applicable. The evidence affectively showed that the data and reports we're subject to disclosure under FOIA.¹⁶

The award of attorney fees sought by the Tribune as the prevailing party under FOIA was proper. The award of attorney fees will not be distributed in the absence of an abuse of discretion.¹⁷ Here the Tribune's attorney's submitted proof that 40.4 hours of time was spent on the case. The circuit court found that was reasonable. The Assessor did not prove that the award of attorney fees was reasonable in an "important case with the difficult issues" litigated by the parties.¹⁸ ■

1. *Chicago Tribune Company v. Cook County Assessor's Office*, 2018 IL App (1st) 170455 (June 29, 2018).

2. *Id.* ¶ 6.

3. 5ILCS 140/7 (2016).

4. See *Harwood v. McDonough*, 344 Ill. App. 3d. 242, 247 (2003).

5. *Chicago Tribune Company*, *supra* note 1 at ¶ 22, citing 5ILCS 140/11 (f) (2016).

6. *Id.* ¶¶ 7-8.

7. *Id.* ¶ 13.

8. *Id.* ¶ 29.

9. *Id.* ¶ 30.

10. *Id.* ¶ 31.

11. *Id.* ¶ 22, citing 5ILCS 140/11 (f) (2016).

12. *Id.* ¶ 21, citing, *Day v City of Chicago*, 388 Ill. App. 3d. 70, 73 (2009).

13. *Id.* ¶ 21.

14. *Id.* ¶ 35.

15. *Id.* ¶ 38.

16. *Id.* ¶ 39.

17. *Id.* ¶¶ 46-47.

18. *Id.* ¶ 47.

Legislator Pay Freezes Ruled Unconstitutional

BY ROBERT P. OSGOOD

From July of 2009 through June of 2018 the General Assembly passed bills to forego taking their annual cost-of-living raises, and voted to take unpaid furlough days.¹ In 2017, Senator Michael Noland filed suit against the comptroller challenging these furloughs and COLA bills, and seeking backpay.² His complaint argued that Art. IV, Sec. 11 of the Illinois Constitution “prohibits [the] midterm manipulation of state legislators’ salaries.”³ He sought a declaratory judgment and a writ of mandamus requiring the comptroller to pay Sen. Noland and all others affected the “salaries to which they are entitled.”⁴

In a July 2nd decision by Cook County Circuit Court Judge Franklin Valderrama, the court found the practice of prohibiting COLAs and imposing furloughs violated the Illinois Constitution.⁵ The court found that the Constitution was unambiguous about prohibiting lawmakers from changing their pay during their current terms.⁶ “It is undisputed that the effect of the statutes was to alter or change the salaries of members of the General Assembly during their term in office.”⁷ The court dismissed the Comptroller’s argument that the statutes were constitutional since they decreased, rather than increased, their pay.⁸ That argument was also made, to no avail, when Gov. Quinn line-item vetoed lawmakers’ salaries from the budget in 2013.⁹ The comptroller attempted to distinguish that precedent because the governor was affecting a different branch of government, rather than the General Assembly reducing its own pay.¹⁰ The court stated that the “prohibition is not based on which branch of government seeks to change the salary, but rather prohibits any change to a legislator’s salary.”¹¹

The court stopped short of ordering the comptroller to issue backpay, however,

the option to take further action in that regard remains open.¹² In addition to other lawmakers taking advantage of the decision, the COLA legislation also effected the State’s constitutional executives and agency directors.¹³

Legislators began receiving their first COLAs in over a decade this July.¹⁴

A status hearing is set for August 7th. ■

The author is senior counsel and ethics officer for the Illinois Department of Central Management Services.

1. P.A. 96-0045, 96-0800, 96-0958, 97-0071, 97-0718, 98-0030, 98-0682, 98-0030, 99-0355, 99-0523, 100-0025. Excerpted language from P.A. 96-0800: (25 ILCS 120/3.1 new)

Sec. 3.1. FY10 furlough days. During the fiscal year beginning on July 1, 2009, every member of the General Assembly is mandatorily required to forfeit 4 days of compensation. The State Comptroller shall deduct the equivalent of 1/365th of the annual salary of each member from the compensation of that member in each of the first 4 months of the fiscal year.

(25 ILCS 120/5.6 new)

Sec. 5.6. FY10 COLA’s prohibited. Notwithstanding any former or current provision of this Act, any other law, any report of the Compensation Review Board, or any resolution of the General Assembly to the contrary, members of the General Assembly, State’s attorneys, other than the county supplement, the elected constitutional officers of State government, and certain appointed officers of State government, including members of State departments, agencies, boards, and commissions whose annual compensation was recommended or determined by the Compensation Review Board, are prohibited from receiving and shall not receive any increase in compensation that would otherwise apply based on a cost of living adjustment, as authorized by Senate Joint Resolution 192 of the 86th General Assembly, for or during the fiscal year beginning July 1, 2009. That cost of living adjustment shall apply again in the fiscal year beginning July 1, 2010 and thereafter.

2. 17 CH 7762, Cook County Circuit Court, June 1, 2017. Because Sen. Noland was no longer a member of the General Assembly at the time of filing, the Comptroller’s motion to dismiss for lack of standing was granted. It was then that Sen. James Clayborne, Jr. joined as a plaintiff. The Court also granted a motion to dismiss as to Sen. Clayborne, since he did not seek reelection, however the Court allowed him to sue in his individual capacity.

3. Complaint at 1. Art. VI, Sec. 11 of the Illinois Consti-

tution states:

Section 11. Compensation and Allowances

A member shall receive a salary and allowances as provided by law, but changes in the salary of a member shall not take effect during the term for which he has been elected.

4. Complaint at 2.

5. Dan Petrella, *Judge Rules State Legislators Violated Illinois Constitution by Voting to Freeze their Pay*, Chicago Tribune, July 3, 2019.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Cullerton v. Quinn*, 13 CH 17921, Memorandum Opinion and Order at 7.

10. *Judge Finds IL Lawmakers Can’t Vote to Decrease their own Pay, Could Order Back Pay for Legislators*, Scott Holland, Cook County Record, July 3, 2019.

11. *Id.*

12. Rebecca Anzel, *Illinois Lawmakers who Voted to Reject Pay Raises Violated Law, Judge Rules*, Northwest Herald, July 13, 2019.

13. *Supra* note 1.

14. P.A. 101-0007, Art. 50, Sec. 25.