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STANDING COMMITTEE ON GOVERNMENT LAWYERS

The newsletter of the ISBA's Standing Committee on Government Lawyers

Closed sessions "wholly dedicated" to discussion of leasing property allowed under the Open Meetings Act

By James W. Chipman*

On July 18, 2007, the second district appellate court held that two meetings closed to the public for the purpose of discussing the lease of property owned by a public body did not violate the Open Meetings Act.[1] Thus, the trial court erred when it required public officials to disclose minutes and tapes of the meetings that news organizations claimed were illegally closed to the public.

In *Galena Gazette Publications, Inc. v. County of Jo Daviess*, 375 Ill. App. 3d 338, 872 N.E.2d 1049, 313 Ill. Dec. 660 (2007), the Jo Daviess County Board, the Jo Daviess Planning and Development Committee, and the Galena City Council, all public bodies, held two meetings to discuss issues relating to a property known as the "Old Train Depot," which the City of Galena owns. Public officials convened a special meeting on April 7, 2005, and met in "executive session" to discuss a variety of topics relating to the subject property, including a prospective arrangement for racking informational brochures and tourism materials. Four days later, a second closed meeting was held at which time the participants continued their previous discussion. After the county board refused to disclose the tapes and minutes of the two meetings, the plaintiffs filed suit seeking relief. They asked the court to order the defendants to release the records in question and to enjoin the defendants permanently from further statutory violations.

The defendants acknowledged that they were public bodies but claimed they had not violated the Act. Following discovery, both parties moved for summary judgment. The plaintiffs relied on section 2 of the Act,[2] which provides that closed meetings by public bodies are permissible only to consider the purchase, sale, or lease of real property. The plaintiffs argued that none of the Act's exceptions applied to the defendants' activities and that the public could not be legally excluded from routine business discussions about the train depot, such as the racking of promotional materials. The defendants countered that the statute protected the discussions held behind closed doors because they dealt entirely with the potential lease and sublease of the subject property and not just with the "day-to-day operations of the Train Depot."[3]

The circuit court granted the plaintiffs' motion for summary judgment holding that the discussions at the two meetings were not exempt under the Act. On appeal, the defendants claimed that summary judgment was proper for them because the records sought by the plaintiffs related entirely to exempt matters.

The second district appellate court reversed and entered summary judgment in favor of the defendants. The court said there was no real dispute that the closed meetings were held "at least in part"[4] to consider the lease of the subject property for the use of a public body. Presiding Justice Grometer, writing for a unanimous court, found that the meetings were dedicated at least "in large measure"[5] to the consideration of matters that were within the plain meaning of the law.

The court, however, cautioned that if

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the meetings were also held to consider subjects beyond any statutory exemption, then the meetings were improperly closed and disclosure of the records to the plaintiffs would be required. At this point in the opinion, the court stated that it had read the minutes of the two sessions and was convinced that "[m]ost of what was said at the first meeting, and all of what was said at the second meeting, was straightforwardly directed toward whether and on what terms"[6] a sublease of the property could be negotiated. Thus, the second district concluded that the closed sessions were "wholly dedicated"[7] to the discussion of the lease of the subject property for the use of Jo Daviess County. "Even when the participants discussed the racking of promotional brochures at the Old Train Depot—past, present, or future—they did so only because it was pertinent to the terms, effects, or desirability of the proposed subleasing arrangement."[8]

In the final analysis, it seems that the courts will not get involved in matters involving closed meetings of public bodies where a discussion relates to a real estate transaction. The courts need not consider such questions on a case by case basis.

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*The author is the Assistant General Counsel of the Illinois Department of Revenue and a member of the Standing Committee on Government Lawyers. The opinions expressed herein are solely his and not those of the Department.

1. 5 ILCS 120/1 et seq. (West 2004).
2. 5 ILCS 120/2 (West 2004).
3. *Galena Gazette*, 375 Ill. App. 3d at 342, 872 N.E.2d at 1052, 313 Ill. Dec. at 663.
4. *Galena Gazette*, 375 Ill. App. 3d at 343, 872 N.E.2d at 1053, 313 Ill. Dec. at 664.
5. *Galena Gazette*, 375 Ill. App. 3d at 343, 872 N.E.2d at 1053, 313 Ill. Dec. at 665.
6. *Galena Gazette*, 375 Ill. App. 3d at 343, 872 N.E.2d at 1054, 313 Ill. Dec. at 664.
7. *Galena Gazette*, 375 Ill. App. 3d at 344, 872 N.E.2d at 1054, 313 Ill. Dec. at 665.
8. *Galena Gazette*, 375 Ill. App. 3d at 344, 872 N.E.2d at 1054, 313 Ill. Dec. at 665.

Attorney General issues opinions

By Lynn Patton

Under section 4 of the Attorney General Act (15 ILCS 205/4 (West 2006)), the Attorney General is authorized, upon request, to furnish written legal opinions to State officers and State's Attorneys on matters relating to their official duties. The following is a summary of informal opinions I-07-026 through I-07-050 that may be of interest to the government bar.

Copies of an opinion may be requested by contacting the Opinions Bureau in the Attorney General's Springfield office at (217) 782-9070. Copies of official opinions may also be found on the internet at <http://www.illinoisattorneygeneral.gov/opinions/index.html>.

Informal Opinion No. I-07-026
Issued May 17, 2007

Requiring Plat Act Affidavit for the Recording of Deeds

A county recorder cannot, as a matter of routine practice, require that a Plat Act affidavit be provided with every deed presented for recording, including those to which, on their face, the Plat Act does not apply. The affidavit can be required only where doubt as to Plat Act compliance is based upon the content of the document. A county board is without authority to alter the recorder's duty to file documents by requiring an affidavit as a prerequisite to filing. In those instances when such an affidavit may be required, the affidavit may be filed with the instrument to which if refers, and fees may be charged accordingly. 55 ILCS 5/3-5018 (West 2005 Supp.); 765 ILCS 205/5a (West 2004).

Informal Opinion No. I-07-027
Issued May 24, 2007

Admissibility of Recorded Law Enforcement Interviews Stored in the Digital Versatile Disc (DVD) Format

Assuming the proper foundation, interviews stored in the DVD format may be admissible as evidence in criminal proceedings to the same extent as the more commonly encountered video home system (VHS) format. 705 ILCS 405/5-401.5 (West 2006); 720 ILCS 5/14-2 (West 2006); 720 ILCS 5/14-3 (West 2006); 725 ILCS 5/103-2.1 (West 2006); 725 ILCS 5/108A (West 2006).

Informal Opinion No. I-07-028
Issued May 24, 2007

Formation and Participation in Multi-Jurisdictional Drug Task Force

(1) The general statutory authority conferred on municipalities and counties is sufficient to authorize the creation of a multi-jurisdictional drug task force by intergovernmental agreement. (2) An intergovernmental agreement between a county and municipalities must be approved by the county board and the corporate authorities of each municipality. (3) The extra-territorial authority of peace officers participating in a multi-jurisdictional drug task force is generally limited to the statutory exceptions to the common law rule that police officers have no authority to arrest a defendant outside their jurisdiction. A county sheriff, however, may appoint members of a drug task force to serve as his or her deputies providing them with peace officer authority within the geographic boundaries of the county. (4) The peace officer status of probation officers is limited to the context of their statutory duties which do not authorize a probation officer to perform the general peace officer activities likely to be necessary for full participation in a multi-jurisdictional drug task force. (5) A probation officer may not share probation records with drug task force members without a court order authorizing such disclosure. 5 ILCS 220/2, 3, 5 (West 2006); 30 ILCS 715/1

et seq. (West 2006); 55 ILCS 5/3-6008, 3-6021 (West 2006); 65 ILCS 5/7-4-7, 7-4-8, 11-1-2.1 (West 2006); 725 ILCS 5/107-3 (West 2006); 725 ILCS 5/107-4 (West 2006); 730 ILCS 110/12(4) (West 2006); 730 ILCS 110/15(12) (West 2006); Ill. Const. 1970, art. VII, §10.

Informal Opinion No. I-07-029 Issued May 24, 2007

Applicability of Lobbyist Registration Act to Members of the Illinois Laboratory Advisory Committee

Illinois Laboratory Advisory Committee members do not, solely by their membership on the Committee, undertake to influence executive, legislative, or administrative action within the purview of the Lobbyist Registration Act and the administrative rules promulgated thereunder. 20 ILCS 3981/1 et seq. (West 2006); 25 ILCS 170/3, 4 (West 2006); 2 Ill. Adm. Code §§560.200, 560.210 (Conway Greene CD-ROM June 2003).

Informal Opinion No. I-07-030 Issued May 24, 2007

Applicability of the State Officers and Employees Money Disposition Act to the Illinois State Board of Investment

The State Board of Investment (Board) is an entity in the executive branch of State government. The Board's duties are not judicial or legislative in nature; rather, the Board's duties are administrative involving the execution of State law. The Board is not included among the various exceptions contained within the State Officers and Employees Money Disposition Act (the Act). Consequently, the Board constitutes a "board[ ] * * * of the Executive Department of the State government" for purposes of the Act. As such, it is subject to the provisions of the Act. 20 ILCS 230/1, 2c (West 2006).

Informal Opinion No. I-07-031 Issued May 25, 2007

Executive Ethics Commissioners – Holding Over in Office

Under the common law, a public official ordinarily holds over in office until a successor is selected and qualified, regardless of whether the General Assembly has expressly so provided. Consequently, if no reappointment or succeeding appointment is made prior to the expiration of the terms of office, the commissioners of the Executive Ethics Commission will continue to serve as de facto commissioners. 5 ILCS 430/20-5 (West 2006).

Informal Opinion No. I-07-032 Issued May 31, 2007

County Engineer's Authority Over Roads Not Within County Unit Road District System

Roads located within a county unit road district that are: (1) not under the exclusive jurisdiction of a State entity other than IDOT or a municipal corporation other than a city, village, or incorporated town; (2) laid out pursuant to statute, established by dedication, or established by prescription; and (3) part of the county unit road district system are subject to the Highway Code and therefore under the jurisdiction of the county unit road district until they are vacated pursuant to statute or abandoned. The county engineer has jurisdiction over such roads until they are vacated pursuant to section 6-303 of the Highway Code or abandoned. 605 ILCS 5/2-202 (West 2006); 605 ILCS 5/6-125 (West 2006); 605 ILCS 5/6-303 (West 2006).

Informal Opinion No. I-07-033 Issued June 15, 2007

County Board Authority Over County Engineer

The county board maintains supervisory authority over the county engineer. The county board may require the county engineer to seek specific approval to use county highway budgetary funds and also may designate the highway projects to be undertaken and control the development of these projects. The county board must permit the county engineer to use his or her expertise and discretion in fulfilling the position's statutorily-mandated duties. 605 ILCS 5/5-202, 5-205 (West 2006).

Informal Opinion No. I-07-034 Issued June 15, 2007

Circuit Court Clerk's Liability for Deputy Clerk's Failure to Present Draft Orders to a Judge

The powers of a deputy clerk are derivative of his or her principal, the circuit clerk. Circuit clerks may only be held liable for the failure to perform a duty imposed by statute, the Illinois Supreme Court, or local rule. No stat-

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ute or Supreme Court rule authorizes circuit clerks to submit draft orders to judges. It is thus within the purview of each circuit court to adopt local rules or orders imposing such a duty. In the absence of such rule or order, circuit clerks cannot be held liable for their deputy clerks' failure to present draft orders to a judge. 705 ILCS 105/13 (West 2006).

Informal Opinion No. I-07-035
Issued June 15, 2007

Remittance of Money under the Clerks of Courts Act for the Illinois Animal Abuse Fund

Subsections 27.5(b) and 27.6(d) of the Clerks of Courts Act require that a percentage of amounts collected by the clerk of the court for certain violations of the Humane Care for Animals Act be deposited in the Illinois Animal Abuse Fund. However, counties with populations of less than 2,000,000 may, by ordinance, opt out of the application of sections 27.5 and 27.6, thereby exempting them from remitting monies to the State Treasurer for deposit into the Fund. 705 ILCS 105/27.5(b), 27.6(d) (West 2006).

Informal Opinion No. I-07-036
Issued June 21, 2007

Discussion of Performance and Compensation of Community College President in Closed Meeting

A community college board's prior practice of considering the performance and compensation of the president in closed meetings is permitted under subsection 2(c)(1) of the Open Meetings Act (OMA), provided that all final action was taken in an open meeting and was preceded by a public recital of information that was sufficient to inform the public of the nature of the matters being considered. A proposed procedure for adopting the president's employment contract and any amendments thereto in open meetings generally appears to comply with the OMA's requirement that final action be taken in open meetings. 5 ILCS 120/2 (West 2006).

Informal Opinion No. I-07-037
Issued June 21, 2007

Nursing Home Care Act and Health Care Arbitration Agreements

Any waiver of a right to sue contained in a health care arbitration agreement between a nursing home and a resident thereof is void with respect to any action which the resident might bring pursuant to the Nursing Home Care Act. Such an agreement may be valid, however, as to causes of action which may arise from sources other than the Nursing Home Care Act. 210 ILCS 45/3-606 (West 2006); 710 ILCS 15/2 (West 2006).

Informal Opinion No. I-07-038
Issued June 21, 2007

Collection of Judgments for Fines, Fees, and Costs of Prosecution

Pursuant to the Code of Civil Procedure, subject to certain exceptions, judgments must be enforced within seven years after they are rendered, unless they are revived. Petitions for revival must be filed between seven and 20 years after a judgment is rendered. These civil procedural time limitations apply to the collection of fines, cost assessments, fees, and restitution in criminal and traffic cases, except that orders of restitution are tolled during periods of incarceration. A partial payment of a sum due and owing under a judgment does not automatically revive the judgment. There is no statutory mechanism by which courts can declare judgments in criminal cases to be uncollectible. 725 ILCS 5/12-108 (West 2006); 725 ILCS 5/124A-10 (West 2006); 730 ILCS 5/5-5-6 (West 2006); 735 ILCS 5/2-1602 (West 2006); 735 ILCS 5/12-101 (West 2006).

Informal Opinion No. I-07-039
Issued June 28, 2007

Applicability of Property Tax Extension Limitation Law to Multi-Township Assessment Districts

Multi-township assessment districts are "special districts" pursuant to article VII, section 1, of the Illinois Constitution of 1970 and, as such, are considered "units of local government." Accordingly, multi-township assessment districts constitute "taxing districts" for purposes of the Property Tax Extension Limitation Law (PTELL) and, thus, are subject to PTELL's provisions. Further, both newly organized and reorganized multi-township assessment districts are exempted by section 18-215 of PTELL from compliance with the referendum requirements for establishing the district's tax rate otherwise imposed by section 18-190 of PTELL. 35 ILCS 200/1-150, 2-20, 18-185, 18-190, 18-195, 18-210, 18-215 (West 2006); 60 ILCS 1/80-55 (West 2006); Ill. Const. 1970, art. VII, §1.

Informal Opinion No. I-07-040
Issued July 12, 2007

Applicability of the Property Tax Extension Limitation Law to the Local Governmental and Governmental Employees Tort Immunity Levy

Tax levies authorized by section 9-107 of the Local Governmental and Governmental Employees Tort Immunity Act are subject to the limitations and referendum requirements of the Property Tax Extension Limitation Law. 35 ILCS 200/18-210 (West 2006); 745 ILCS 10/9-107 (West 2006).

Informal Opinion No. I-07-041
Issued August 2, 2007

County Board's Authority to Limit Sheriff's Use of Credit Card

The sheriff's internal control over the operations of the sheriff's office precludes the county board from prohibiting the sheriff's use of a county credit card to incur expenses necessary for the operation of the office, if the expenses are within amounts appropriated for the sheriff's office. 55 ILCS 5/3-6018 (West 2006).

Informal Opinion No. I-07-042
Issued August 2, 2007

Applicability of a County Ethics Ordinance to Circuit Clerks, State's Attorneys, and Their Employees

The State Officials and Employees Ethics Act (the Ethics Act) does not apply to circuit clerks, State's Attorneys, or their employees. The Ethics Act requires counties to adopt an ordinance to regulate the conduct of their officers and employees. Because circuit clerks, State's Attorneys, and their employees are not county officers or employees, those officers and their employees are not subject to the county ethics ordinances adopted pursuant to section 70-5 of the Ethics Act. State's Attorneys and their assistants, as licensed attorneys, are obligated to comply with the extensive ethical mandates found in the Illinois Rules of Professional Conduct, and State's Attorneys are authorized to establish ethical standards for their

employees. Additionally, the Illinois Supreme Court may adopt statewide rules governing the ethical conduct of the circuit clerks' offices, and the chief judge may impose requirements for the ethical conduct of the circuit clerk and the circuit clerk's employees. 5 ILCS 430/70-5 (West 2006).

Informal Opinion No. I-07-043
Issued August 2, 2007

Use of Public Facilities for Political Activities under the State Officers and Employees Ethics Act

The Model Ethics Ordinance, drafted by the Office of the Attorney General pursuant to the requirements of the State Officers and Employees Ethics Act, prohibits officers and employees of governmental entities from participating in prohibited political activities. Assuming that a governmental entity has the authority to permit its property to be used for political functions and applies content neutral policies that do not favor one candidate or political organization over another, the Ordinance does not prohibit a public officer or employee from merely facilitating the use of such public property for a political function. 5 ILCS 430/1-5, 20-5, 70-5 (West 2006).

Informal Opinion No. I-07-044
Issued August 9, 2007

Municipal Civil Service Commission Consideration of Training Time in Calculating Requisite Active Military Service for Veterans' Preference

In municipalities that have adopted civil service under article 10, division 1, of the Illinois Municipal Code (the Municipal Code), a person must have, among other things, engaged in active military or naval service of the United States for at least one year in order to receive the veterans' preferences points provided in section 10-1-16 of the Municipal Code. Because the Federal definition of "active duty" includes: full-time training duty; annual training duty; and attendance at a properly designated service school while in the active military service, a civil service commission should consider the time an applicant for a civil service position spent in training that constitutes Federal active duty training within the provisions of 10 U.S.C. §101(22), when determining whether the applicant has engaged in the requisite amount of active military or naval service of the United States to qualify for veterans' preference points under section 10-1-16 of the Municipal Code. 65 ILCS 5/10-1-16 (West 2006).

Informal Opinion No. I-07-045
Issued August 20, 2007

Political Affiliation of Members of Board of Review

The office of regional superintendent of schools is not a county office for purposes of section 6-15 of the Property Tax Code. Therefore, the results of a race for regional superintendent of schools cannot be used to determine the political composition of the board of review. Under section 6-15 of the Code, a county board member is generally a county officer. However, the political composition of the board of review may be determined from the results of a vote for county board member only in a contested race subject to a countywide vote. 35 ILCS 200/6-5, 6-15 (West 2006).

Informal Opinion No. I-07-046
Issued September 6, 2007

Children's Advocacy Center as a Local Anti-Crime Program Eligible for Fine Proceeds Disbursed as Part of Sentencing Disposition

Subsections 5-6-3(b)(13) and 5-6-3.1(c)(13) of the Unified Code of Corrections authorize a sentencing court to require the reimbursement of and contributions to "local anti-crime programs" in connection with orders of probation and court supervision. A children's advocacy center may meet the statutory definition of "local anti-crime program" within the Anti-Crime Advisory Council Act, depending on the protocols adopted and the programs offered as reviewed on a case-by-case basis. 55 ILCS 80/4(a), (c) (West 2006); 730 ILCS 5/5-6-3(b), 5/5-6-3.1(c) (West 2006), as amended by Public Act 95-331, effective August 21, 2007.

Informal Opinion No. I-07-047
Issued September 13, 2007

Powers of Emergency Telephone System Board

A county emergency telephone system board (ETS Board) has the sole authority for the planning, coordination, and supervision of the county emergency telephone system (ETS), as well as for the disbursement of funds from the Emergency Telephone System Fund, including determining how those funds are expended. The ETS Board may enter into contracts for the purposes enumerated in section 15.4 of the Emergency Telephone System Act and may lease buildings or other structures necessary for the operation of the ETS. The ETS Board may not sue or be sued, and may not purchase real property. 50 ILCS 750/15.4 (West 2006).

Informal Opinion No. I-07-048
Issued September 21, 2007

Use of Proceeds from the Special County Retailers' Occupation Tax for Public Safety or Transportation

Proceeds of the Special County Retailers' Occupation Tax For Public Safety or Transportation may be used to pay for existing "public safety" costs, such as salaries of deputy sheriffs, notwithstanding whether such costs were previously paid from other county funds. Public Safety Tax proceeds may not generally be used to purchase fire fighting equipment to assist local fire protection districts. If a county operates a radio broadcasting station under section 5-1046 of the Counties Code, the proceeds of the Public Safety Tax may be used to pay for acquiring and furnishing radio receiving sets and other such equipment to fire protection officers and employees in the county for fire protection purposes. Proceeds of the Public Safety Tax may not be donated to a school, but may be used to provide school security measures in school facilities in the county in the circumstances described. 55 ILCS 5/5-1006.5 (West 2006); 55 ILCS 5/5-1046 (West 2006).

Informal Opinion No. I-07-049
Issued September 27, 2007

Compatibility of Offices--Township Assessor and Fire Protection District Trustee

Because of a potential conflict of duties, the offices of township assessor and fire protection district trustee are incompatible. 35 ILCS 200/15-60, 15-80 (West 2006).

Informal Opinion No. I-07-050
Issued October 4, 2007

Conflict of Interest--Employment of Spouse of Regional Superintendent of Schools by Regional Office of Education

The existence of a marital relation-

ship between a regional superintendent of schools and his spouse who is employed by the regional office of education does not constitute a per se violation of section 3 of the Public Officer Prohibited Activities Act. However, the employment of the superintendent's spouse may result in a common law conflict of interest. Thus, the superintendent should not act on matters related to the employment of his spouse. 50 ILCS 105/3 (West 2006).

Reppert v. Southern Illinois University—employment contracts and the Freedom of Information Act

*By Lisle A. Stalter**

There are surprisingly few cases discussing the Freedom of Information Act[1] and its exceptions—particularly when it comes to personnel files. On July 31, 2007, however, a new opinion was issued by the Fourth District Appellate Court that provides some guidance in this area.

Background

In *Reppert v. Southern Illinois University*,[2] Jerry Reppert and the Gazette Democrat submitted a Freedom of Information Act (FOIA or the Act) request to Southern Illinois University (SIU) for two sets of documents: (1) employment contracts for SIU President Poshard, former SIU President Wendler, and SIU employees Jackson and Lawrence covering the time period January 1, 2000, to the time of the request; and (2) independent contractor contracts covering January 1, 2000, to the time of the request for SIU employees Jackson and Lawrence. The request was denied. Plaintiffs appealed the denial, which was denied by Wendler.

In August 2006, plaintiffs filed a complaint asserting three separate bases under which the requested documents should be disclosed, one of which was the FOIA.[3]

SIU filed a motion for summary judgment on Count II, asserting that the FOIA exempted these documents from disclosure. The crux of the motion was that the employment contracts were part of employee personnel files and as such are exempt from the FOIA disclosure requirements. The argument was based on subsection 7(1)(b)(ii) of the FOIA[4] and SIU argued that the application of this exemption made the documents per se exempt from disclosure.

The circuit court granted the motion for summary judgment finding that the employee contracts were exempt from disclosure under the personnel-file exemption.[5]

The Freedom of Information Act

Any case that addresses the FOIA includes a discussion of the purpose of the Act—that governmental records should be open to the light of public scrutiny. This discussion was included in the *Reppert* case. The benefit of including this is that it provides the necessary basis for reviewing the lower court's decision in the context intended by the General Assembly when the Act was first passed.

Accordingly, with this purpose in mind, the presumption exists that public records are to be open and accessible.[6] The appellate court also noted that the Act is subject to liberal construction and the exceptions to disclosure are to be read narrowly "so as not to defeat the FOIA's intended purpose."[7]

As is usually the case, the definitions included in a public act shed some light on the analysis. In this case, the Act specifically defines "public records" to include "(vii) all information in any * * * contract dealing with the receipt or expenditure of public or other funds of public bodies; [and] (viii) the names, salaries, titles, and dates of employment of all employees and officers of public bodies * * *."[8] The court recognized that the definition of public records is written broadly (to "include, but is expressly not limited to * * * ").[9] The emphasized language has not been fully analyzed in the FOIA context. At a minimum, however, it is one way to emphasize the breadth of the definition.

Section 7 of the Act[10] sets out those records that are exempt from inspection and copying. Included in this list is information that "would constitute a clearly unwarranted invasion of personal privacy * * * The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy."[11] And, subsection 7(1)(b) then goes on to provide that this information includes but is not limited to "personnel files and personal information maintained with respect to employees * * * of any public body."[12] Section 8 of the Act[13] also provides that if material contained within an exempt public record is not exempt, such record shall be disclosed with the exempt information deleted.

The *Reppert* Opinion

The appellate court found that the grant of summary judgment in favor of SIU on the FOIA count was in error. Specifically, the court recognized that the statutory definition of "public record" included information contained in the employment contracts that were sought by the *Reppert* request. And, maybe this was a key factor, at oral argument, counsel for SIU agreed that the information contained in the employment contracts was not confidential.

Further, the court expanded its discussion and concluded that the narrow reading of the section 7(b)(1) exemption regarding the individual contracts constituted "information that bears on the public duties of public employees and officials."[14] Continuing, the court then noted that the disclosure of the contracts is not considered an invasion

of personal privacy and, as a matter of law, is not exempt under section 7.

The court specifically pointed out that although personnel files are per se exempt from disclosure, individual contracts that are kept within the personnel files are not also per se exempt. Explaining its position, the court stated that section 8 of the Act explicitly permits disclosure of non-exempt documents which are contained within exempt public records.

The *Copley Press* case

In supporting its conclusion, the appellate court distinguished the SIU case from *Copley Press, Inc. v. Board of Education for Peoria School Dist. No. 150*,[15] a 2005 case out of the Third District Appellate Court. In *Copley Press*, a FOIA request was submitted to a school district's board of education seeking two performance evaluations and a letter explaining the reasons for the dismissal of the school district's superintendent. The board of education denied the request based on the personnel file exemption of section 7(1)(b)(ii). The *Copley Press* court analyzed the disclosure of documents in a personnel file and found that "since the requested documents fit within the personnel file exemption under section 7[1](b)(ii), they are per se exempt, whether or not they constitute an invasion of [the superintendent's] personal privacy" and are thus exempt from disclosure.[16]

The *Copley Press* court also reviewed whether the documents were properly placed in the personnel file. Because "personnel file" is not defined in the Act, the court applied a legislative intent analysis focusing on the plain language of the statute. The *Copley Press* court further recognized that a "personnel file" can reasonably be expected to include certain documents and went on to specifically list them: resume or application, employment contract, emergency contact information, training records, performance evaluations, and disciplinary records.[17] The court then concluded that the performance evaluations sought in the FOIA request clearly belong in the personnel file.[18]

The *Copley Press* court did recognize that the mere act of putting a document into a personnel file did not make the document part of the personnel file.[19] But, the court went on to state that the documents sought are of the type that would be placed in a personnel file and are thus per se exempt from disclosure.

The *Copley Press* court also discussed the application of the FOIA in conjunction with the Open Meetings Act. The basis for this discussion was that because the FOIA and Open Meetings Act both ensure public access to information concerning the conduct of public bodies, except in limited circumstances, the two acts must be construed together.[20] The Open Meetings Act allows a public body to hold closed meetings to consider, among other issues, the discipline, performance, or dismissal of specific employees.[21] The court concluded that since the Open Meetings Act allows a public body to go into executive or closed session to discuss the superintendent's employment, to allow the disclosure of information under the FOIA would in effect nullify the exception in the Open Meetings Act.[22]

Conclusion—What does this mean?

Reading the *Reppert* and *Copley Press* cases together gives lawyers a better understanding regarding the extent of the personnel record exemption. Notably, the *Copley Press* case did not state that employment contracts were documents that clearly belong in a personnel file; this conclusion was specifically limited to performance evaluations.[23] The discussion of an employment contract was included in a general review of what may reasonably be found in a personnel file.[24] As such, the *Reppert* court treated the discussion as dicta.[25]

Lawyers should also keep in mind the *Copley Press* court's consideration of the Open Meetings Act's provisions in undertaking a FOIA analysis. This type of review did not occur in the *Reppert* case. Thus, to the extent that the information contained in the documents sought pursuant to the FOIA would qualify for a valid exemption under the Open Meetings Act, an argument can be made that to allow disclosure under the FOIA would circumvent the application of the Open Meetings Act. Typically, when it comes to contracts, those documents are subject to open disclosure in both the Open Meetings Act and the FOIA context.

The lesson learned here is that simply because a document is included in a personnel file does not mean that it per se exempt from disclosure under the FOIA.

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*Lisle A. Stalter is an Assistant State's Attorney in the Lake County State's Attorney's Office. Any opinions expressed in this article are solely those of the author and not those of the Lake County State's Attorney's Office.

1. 5 ILCS 140/1 et seq.
2. *Reppert v. Southern Illinois University*, 375 Ill. App. 3d 502, 874 N.E.2d 905, 314 Ill. Dec. 540 (4th Dist. 2007).
3. Count I alleged that the Illinois Constitution required disclosure of contracts obligating the expenditure of public funds, Count II was brought pursuant to the FOIA, and Count III alleged that Wendler has a ministerial duty to release the documents to the public.
4. 5 ILCS 140/7(1)(b)(ii) (West 2004).
5. The court also granted the motion to dismiss Counts I and III with prejudice. The opinion does not have a discussion of the dismissal of these two counts.
6. Citing *Bluestar Energy Srvcs. Inc. v. Illinois Commerce Comm'n*, 374 Ill. App. 3d 990, 871 N.E. 2d 880 (1st Dist. 2007).
7. *Reppert*, 375 Ill. App. 3d at 505, 874 N.E.2d at 907, 314 Ill. Dec. at 543, citing *Southern Illinoisian v. Illinois Department of Public Health*, 218 Ill. 2d 390, 416, 844 N.E.2d 1, 15 (2006).
8. Citing 5 ILCS 140/2(c) (vii) - (viii) (West 2004) (the case citations in *Reppert* are to the 2004 edition of the Illinois Compiled Statutes; consequently, the same citations are used here).
9. See 5 ILCS 140/2(c) (West 2004).
10. 5 ILCS 140/7 (West 2004).
11. 5 ILCS 140/7(1)(b) (West 2004).
12. 5 ILCS 140/7(1)(b) (West 2004).
13. 5 ILCS 140/8 (West 2004).
14. Quoting 5 ILCS 140/7(1)(b) (West 2004).
15. *Copley Press, Inc. v. Board of Education for Peoria School Dist. No. 150*, 359 Ill. App. 3d 321, 834 N.E.2d 558, 296 Ill. Dec. 1 (3d. Dist. 2005).
16. Id., 359 Ill. App. 3d at 324, 834 N.E.2d at 561, 834 Ill. Dec. at 4.
17. Id., 359 Ill. App. 3d at 324, 834 N.E.2d at 561, 834 Ill. Dec. at 4.
18. Id., 359 Ill. App. 3d at 325, 834 N.E.2d at 561-2, 834 Ill. Dec. at 4-5.
19. Id., 359 Ill. App. 3d at 325, 834 N.E.2d at 562, 834 Ill. Dec. at 5.
20. Id.
21. Id. citing 5 ILCS 120/2(c)(1) (West 2002).
22. See id.
23. See *Copley Press*, 359 Ill. App. 3d at 324, 834 N.E.2d at 561, 834 Ill. Dec. at 4.
24. See Id.
25. *Reppert*, 375 Ill. App. 3d at 507, 874 N.E.2d at 909, 314 Ill. Dec. at 544. Actually, the *Reppert* court referred to the discussion on employment contracts as personnel records in *Copley Press* as "broad dicta."

In-sites

Now that the age of Minimum Continuing Legal Education (MCLE) is upon us, the Committee on Government Lawyers shares with you some important MCLE Web sites. Remember, the first batch of attorneys (those with a last name beginning with the letters "A" through "M") must have their requirements fulfilled by June 30, 2008.

<http://www.mcleboard.org/> is the MCLE Board's own Web site. It has buttons about the rules, providers, fees, and forms. The site also has up-to-date information, such as the rule effective October, 2007, allowing an attorney to apply for credit for out-of-state CLE courses. Very helpful is a link to approved providers and courses.

The ISBA LAW ED center is one-stop shopping for CLE information. The Law Ed calendar provides monthly updates on upcoming seminars. Programs planned extend to September 2008 already! <http://www.illinoisbar.org/lawed/home.asp>.

The Chicago Bar Association provides information in their CLE Institute. <http://www.chicagobar.org/public/attorney/cleinstitute/mcle.htm>. The site provides information about upcoming seminars as well as information about DVDs and books. If you miss a seminar, there is still a way to view the seminar and obtain credit subject to certain rules.

The ABA Center for Continuing Legal Education specifically provides a form for Illinois MCLE credit for ABA seminars. <http://www.abanet.org/cle/home.html>. Many programs are webcast or teleconference for great convenience.

As always, IICLE provides many seminars and opportunities for MCLE credit. <http://www.iicle.com/>.

By planning ahead, you can attend MCLE seminars in your area of interest at the lowest rate. Don't be caught on the last day trying to register for a seminar about which you have no interest simply to fulfill your MCLE obligation.

2007 legislative summary

*By James W. Chipman**

The 2007 spring legislative session convened on January 10. After the new members were installed, the 95th General Assembly wasted no time in introducing an assortment of new legislation. The following is a summary of some of the more controversial bills and public acts affecting government lawyers as of print time. Thus, the list is not all-inclusive, nor is it a roster of bills favored or opposed by our Standing Committee, but is intended to alert Committee members and other readers of the newsletter to legislation that may be of particular interest to them.

For those bills that the Governor has signed into law when this edition went to print, public act numbers are provided. The governor has 60 days upon receipt of a bill to veto, amendatorily veto, or sign it into law. Signed laws become law on the effective date of the legislation. Bills that were vetoed or amendatorily vetoed were considered in the fall legislative session, which this year took place on October 2-4 and 10-12.

Office of Administrative Hearings

Although this proposal is considered dead, it is worthy of mention since it has been around the Statehouse in some form or another for over 10 years. Moreover, if the legislation is ever enacted, it will affect a large number of State government lawyers. Senate Bill 58 (Harmon, D-Oak Park) would have created the Office of Administrative Hearings. The panel would conduct hearings for all agencies under the jurisdiction of the Governor, except for 10 specialized boards and commissions. The proposal has always generated a spirited debate among legislators and our own Committee members. Several years ago, the measure cleared the Senate but died in the House Rules Committee. Look for yet another version of the bill to appear next January.

For those wanting to know more about the history and advantages of centralizing the State's hearing function, I would direct you to the March 1999 (Vol. 28, No. 4) issue of Administrative Law, the newsletter of the ISBA's Administrative Law Section Council. The entire edition was devoted to an analysis of the topic. It provides a list of the other states that have a central hearings panel and a bibliography of other articles on the subject. Contact the ISBA offices, if you would like to review the newsletter.

Open Meetings

What legislative session would be complete without a controversial proposal or two to the Open Meetings Act? This year, several key amendments to the law were proposed, but only one of any significance became law. Among the proposals was House Bill 210 (Sacia, R-Pecatonica). It would have prohibited a public body from voting on an item that was not included on the meeting agenda that was posted for that meeting. At first glance, the bill appeared to codify the Rice v. Board of Trustees of Adams County, 326 Ill. App. 3d 1120, 762 N.E.2d 1205, 261 Ill. Dec. 278 (2002), decision where the court held that under the Act the consideration of an item not specifically set forth on the meeting agenda may include discussion of and deliberation of an item, but does not include

voting or taking other action. The measure was assigned to the House State Government Administration Committee and re-referred to the House Rules Committee.

Other bills attempted to limit or even eliminate the compensation of members who attend meetings by “electronic means.” A perfect example was House Bill 183 (Dunn, R-Naperville). Two years ago, the General Assembly passed Senate Bill 585, enacted as Public Act 94-1058, which allows members of public bodies to attend meetings by electronic means under certain circumstances. This new proposal would have added “vacation” to the list of reasons why a public body could permit a member to attend by means other than physical presence. But the bill went one step further and provided that a member attending by other means due to vacation is not eligible to receive pay or compensation based on that electronic attendance. This proposal was assigned to the House Executive Committee and re-referred to the House Rules Committee.

A more far-reaching piece of legislation (Hultgren, R-Wheaton) was Senate Bill 420. It would have prohibited per diem payments to members of a public body with statewide jurisdiction who attend meetings but are not physically present. The Hultgren proposal also provided that e-mail distribution of material to the members of a public body for individual use would not have been a violation of the Act. E-mail communications among members of a public body and when they trigger the requirements of the Act are a hot topic and the subject of many legal writings. This bill passed the Senate 58-0, was assigned to the House Executive Committee, and re-referred to the House Rules Committee.

Finally, House Bill 1670 (Pritchard, R-Sycamore) addressed the quorum requirement for a five-member public body. Before the legislation, under the Act, the definition of a “meeting” contained four important elements: (1) a gathering; (2) in person or by other means of contemporaneous interactive communication; (3) of a majority of a quorum of the members of the public body that is; (4) held for the purpose of discussing public business. A quorum is a majority of a body’s members. Thus, in the case of a five-member panel, a majority of a quorum was just two members. This meant that two members could not legally discuss public business outside a meeting even if they saw one another casually on the street. The bill addressed this issue by providing that for a five-member public body, a meeting is a gathering of a quorum for the purpose of discussing public business, and three members constitute a quorum. The House and Senate both passed the bill unanimously which the Governor approved on August 17, 2007. Public Act 95-245 took effect the same day.

Freedom of Information

Another topic of interest to some government lawyers is the Freedom of Information Act. House Bill 511 (Joyce, D-Worth) would have amended the law by redefining the term “public records” to include a settlement agreement entered into by or on behalf of a public body. Although it would exempt personal identifying information and all other information excluded by section 7 of the Act, the identities of the parties to the settlement and the financial and material terms of the agreement would remain public. The proposal easily passed the House (100-15) but was never assigned out of the Senate Rules Committee.

Governmental ethics changes

Numerous bills were introduced to address what some perceived as loopholes in existing ethics and gift laws. Some of the more interesting proposals follow.

With respect to the disclosure of gifts in statements of economic interests, Senate Bill 36 (Dillard, R-Westmont) would have required that: (i) gifts given to the spouse of the person making the statement and to immediate family members living in the same household be considered gifts to the person making the statement; (ii) gifts from persons and entities be disclosed; and (iii) the nature and value of each gift be specified. The bill was never assigned out of the Senate Rules Committee.

House Bill 3478 (Crespo, D-Streamwood) would have required (i) each officer, member, and State employee who receives a gift excepted from the gift ban as an educational mission or as travel expenses for a meeting to discuss State business and (ii) each officer and employee of a governmental entity who receives a gift excepted from the provisions of an ordinance or resolution that are equivalent to the State exceptions, to submit certain information about the travel to the Secretary of State within 30 days after returning from the trip. The measure was assigned to the House State Government Administration Committee and re-referred to the House Rules Committee.

Senator Dillard also sponsored Senate Bill 742 which would have prohibited an officer, member, or State employee, for one year after most recently commencing State service, from knowingly participating in procurement, regulatory, or licensing decisions directly related to a person or entity that employed or compensated that person, or his or her spouse or certain family members, during the year before State employment began. The bill was never assigned out of the Senate Rules Committee.

Whistleblower Act

The 2004 Whistleblower Act provides that an employer, other than a governmental entity, could not make, adopt, or enforce a law, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency if the employee had reasonable cause to believe that the information discloses a violation of State or federal law. Similarly, the employer can not retaliate against an employee for disclosing the information or refusing to participate in an activity that violates any law.

A violation of the law is a Class A misdemeanor. An aggrieved employee may bring a civil action against the employer for any and all relief including reinstatement, back pay with interest, and compensation for any damages sustained as a result of the violation.

House Bill 742 (Fritchey, D-Chicago) amended the current Act to provide that the term “employer” includes the State or any political subdivision of the State, and a unit of local government, school district, or authority including a department, division, bureau, board, commission, or other agency of these entities, and any person acting within the scope of his or her authority, whether express or implied, on behalf of those entities in dealing with its employees. The bill provides for the preemption of home rule authority and makes it unlawful for an employer to knowingly take an adverse action against an employee

for disclosing information in a court or administrative hearing, legislative proceeding, or other type of proceeding if the employee has reasonable cause to believe the information discloses a violation of State or federal law or regulation.

The bill won unanimous support in both legislative chambers. The Governor signed the bill on August 13, 2007. Public Act 95-128 becomes effective on January 1, 2008.

Identity Protection

House Bill 573 (Munson, R-Elgin) would have established the Identity Protection Act. The proposal prohibited a State or local government agency from using an individual's social security number in certain ways, subject to various exceptions. Each State or local government agency was required to develop and implement an identity protection plan. It provided that any employee of a State or local government agency who intentionally violated the Act was guilty of a misdemeanor. The measure preempted home rule authority. The bill sailed through the House (113-0), was assigned to the Senate Executive Committee, and re-referred to the Senate Rules Committee.

You can track the status of any legislative proposal by accessing the General Assembly homepage at www.ilga.gov and clicking on "Bills and Resolutions" and then the specific bill number. Or, the General Assembly has a free service to track legislation called "My Legislation." Go to the homepage, click on "My Legislation," and follow the directions.

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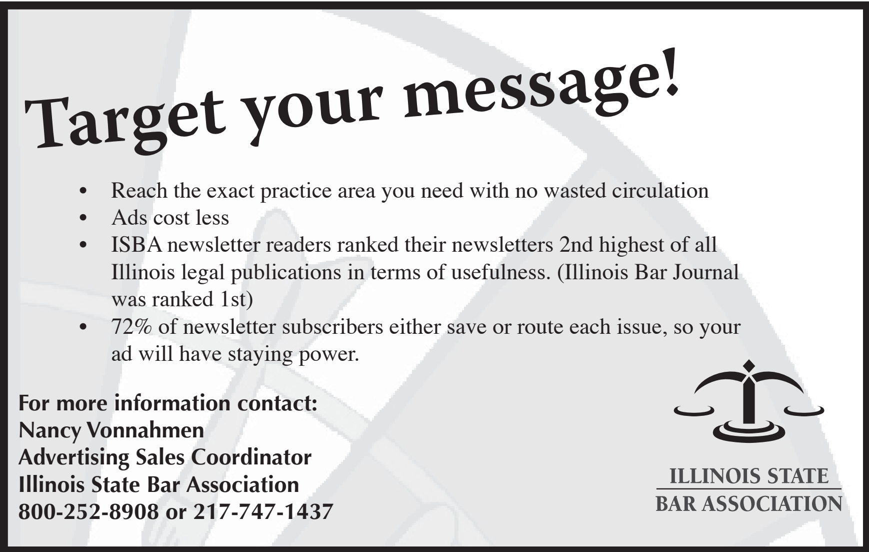
*The author is Assistant General Counsel of the Illinois Department of Revenue. He is currently a member of the Standing Committee on Government Lawyers and serves as its Legislative Subcommittee Chair.



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5/07

Don't Miss the Boat!

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