



**Board E-mails May Violate the *Open Meetings Act* and the *Freedom of Information Act***

The Illinois Attorney General’s Public Access Division has issued an opinion regarding whether e-mails between and among board members constitute a “meeting,” thus triggering the requirements of the *Open Meetings Act* (“OMA”), and whether e-mails between board members’ personal accounts are subject to disclosure under the *Freedom of Information Act* (“FOIA”).

The opinion resulted from a complaint about the actions of a suburban school board. Specifically, certain members of the board used e-mail to discuss whether they needed to meet in closed session to discuss the hiring of a forensic document examiner. One board member e-mailed the others to inform them that a closed session would not be necessary, because she had already garnered the necessary majority approval. The board ultimately approved the payment of the document examiner’s invoice, without ever having discussed it in either open or closed session. A community member then filed a FOIA request regarding this decision but was denied certain documents on the grounds that personal e-mails (*i.e.*, e-mails not sent through the district’s system) were not public records sub-

ject to disclosure under the FOIA.

The Attorney General’s opinion affirmed the common understanding that a public business-related e-mail between at least three board members – a majority of a quorum – does constitute a “meeting” under the OMA. In this case, where at least three board members deliberated via e-mail whether and how to discuss the hiring of the document examiner, the OMA re-

quirement that meetings be open to the public was clearly violated.

Furthermore, the Attorney General clarified that, although board members’ personal e-mail accounts are ordinarily not within the scope of FOIA requests, those private accounts may not be used to circumvent the requirements of the OMA and FOIA. Where, as in this case, it appears personal accounts have been used as a loophole to avoid disclosure under FOIA, e-mails from those accounts “more than likely would be subject to discovery.”

***Please contact Cindi DeCola or Jeff Goelitz for further information on this opinion.***

***A public business-related e-mail between at least three board members – a majority of a quorum – does constitute a “meeting” under the OMA.***

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## Illinois Appellate Court Holds Employment Contracts Are Not Exempt under FOIA

The Fourth District Illinois Appellate Court has held that the employment contracts of the president and other employees of Southern Illinois University (SIU) are not exempt under the *Freedom of Information Act* (FOIA) and has ordered their release to a newspaper. SIU has indicated that they will *not* seek to appeal this decision to the Illinois Supreme Court.

In *Reppert v. Southern Illinois University*, No. 4-06-1014 (Ill. App. Ct., Aug. 15, 2007), the court considered whether SIU had properly denied access to the contracts under FOIA's personnel-file exemption or whether the contracts were public records that had to be released.

The court decided the employment contracts were not exempt. It reasoned that because the contracts contained information bearing on the employees' public duties, the release of the contracts could not be considered an invasion of privacy, since FOIA provides, "information that bears on the public duties of public employees and offi-

cial shall not be considered an invasion of personal privacy." The court noted that none of the information contained in the contracts was confidential, but all such information fell under the definition of "public records" under Section 2(c) of the FOIA. Thus, the contracts had to be released.

The *Reppert* court expressly declined to follow the Third District Appellate Court's reasoning in *Copley Press, Inc. v. Peoria School District No. 50* and lower court decisions which have applied the *Copley* case to employment contracts (see *Stern v. Wheaton Warrenville Community Unit School District 200*). In *Copley* and its progeny, employment contracts were previously considered exempt if they were maintained in personnel files, which are *per se* exempt under FOIA.

***For further information or to request a copy of this decision, please contact Steve Richart.***

## Park Districts and Other Local Public Entities Are Immune from Retaliatory Discharge Claims by Former Employees

The Illinois Appellate Court for the Second District affirmed the dismissal of a claim for retaliatory discharge against an Illinois park district, holding that, under the *Local Governmental and Governmental Employees Tort Immunity Act* ("Act"), 745 ILCS 10/1-101 et seq., park districts, and other local public entities, have complete immunity from actions seeking damages for retaliatory discharge. The case arose when a park maintenance employee for the Waukegan Park District was fired by the superintendent of parks after he returned to work from a workers' compensation injury and refused to submit to a drug/alcohol test. The former employee filed suit claiming he was asked to take the drug test in retaliation for the filing of his workers' compensation claim. The park district raised an af-

***Park districts, and other local public entities, have complete immunity from actions seeking damages for retaliatory discharge.***

firmative defense to the charge under Sections 2-201 and 2-109 of the Act. Section 2-201 of the Act states that, "[a] public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." Section 2-109 of the Act states that a local public entity is "[n]ot liable for an injury resulting from an act or omission of its employee where the employee is not liable." After a detailed examination of the parties' assertions, the appellate court affirmed the trial court's earlier dismissal of the claim. The appellate court noted that the full extent of a public entity's immunity to a claim of retaliatory discharge under the Act had previously

been undecided. Moreover, the court departed from an earlier decision by the Appellate Court for the First District which had limited immunity to actions resulting from an employee's discretionary exercise of policy, as opposed to mere ministerial acts. The court found such distinctions irrelevant in view of an Illinois Supreme Court opinion which held that no employee can be subject to liability for retaliatory dis-

charge. Most importantly, the court's decision serves as a reminder that a local public entity can waive its immunity if it does not affirmatively cite to the Act as a defense to a retaliatory discharge claim. This case has since been appealed to the Illinois Supreme Court. *Smith v. Waukegan*, 373 Ill.App.3d 626, 869 N.E.2d 1093 (Ill.App. 2 Dist., June 6, 2007).

### Random Drug Testing of Heavy Machine Operator Upheld

Under the Fourth Amendment, public employees cannot be required to undergo random, suspicionless drug testing unless the testing "serves special governmental needs" that outweigh the employee's reasonable expectation of privacy. In *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007), the federal Seventh Circuit Court of Appeals found that a city's special needs were sufficient to warrant random drug testing.

In the case, a municipal employee who operated dump trucks, end loaders, and backhoes, despite not holding a commercial driver's license, was fired for refusing to submit to a random drug test. In weighing the employee's constitutional claim, the court first concluded that the drug testing did serve a "special governmental need," because the employee held a "safety sensitive" position in which "even a momentary lapse of attention could have disastrous consequences."

The court then analyzed whether the city's special need outweighed the employee's privacy interest. Noting that the employee had previously submitted to a drug test, the court found that the employee had a

diminished expectation of privacy. Moreover, the drug test was administered randomly and evenhandedly to all employees, in accordance with city policy. As a result, the court held that the city's need to ensure its heavy machine operators were not using drugs outweighed any privacy interest held by the employee.

In addition to his Fourth Amendment claim, the employee brought a second constitutional claim, alleging that he was fired without due process of law. The employee lost that argument as well because at-will employees do not have any due process rights. Although the employee in *Krieg* correctly noted that he was covered by a collective bargaining agreement ("CBA"), the court stated that "a collective bargaining agreement does not create an employment contract except in rare cases." Because the CBA at issue in *Krieg* did not state that the city could only discharge the employee for just cause, the employee was not entitled to any due process.

***Please contact Cindi DeCola or Jeff Goelitz with any questions about this case.***

### "No-Match" Letter Rule on Immigration Enjoined

The [Department of Homeland Security](#) (DHS) recently issued a [final rule](#) describing the legal obligations of employers (including park districts) that receive either a "no-match" letter from the Social Security Administration (SSA) or an employment verification letter from the DHS.

Although this rule was to take effect on September 14, 2007, a federal judge issued a preliminary injunction preventing its implementation. At the DHS's request, the judge has since placed the proceeding on hold until March so the DHS can have time to re-write the rule.

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