AN ILLINOIS LAW FIRM

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

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WELCOME LETTER

Dear Friends:

We enter a new year of significant challenges for our governmental clients. Statutes adopted in the past year have significantly modified the Freedom of Information Act ("FOIA"), the Open Meetings Act ("OMA"), and the Prevailing Wage Act, among others. While we have previously discussed this change in law, significant developments continue to occur in implementation of the Acts and in case law interpreting this legislation.

Most noteworthy, the Illinois Attorney General's office has opened electronic training for each public body's designated OMA and FOIA officers. Statutory changes last year required governmental bodies to designate the officers that will be their point persons under these statutes. These designated employees must complete an electronic training class by July 1, 2010. Additional training is required on an annual basis. New requirements also exist with respect to postings, and the FOIA production.

We have also found that legislation passed in one context can conflict with legislation passed in another context. One good example is the Illinois Personnel Records Review Act and its application versus the Freedom of Information Act, mentioned by Jesse Placher in an article below. Unfortunately, the legislature sometimes does not recognize the conflicts which are created from two different pieces of legislation and thereby creates difficult situations for the officials called upon to enforce both Acts.

The purpose of this newsletter and the seminars our firm sponsors on a quarterly basis is to keep you, our clients and friends, knowledgeable as to the law (and changes to the law) which apply to governmental units. We find this work both challenging and enjoyable. We have been fortunate in that our work has continued to grow with the addition of new clients. We have now added to our resources two lawyers from our firm's Urbana office, Ed Wagner and Keith Fruehling. Ed is our managing partner in Urbana and has an extensive background in civil litigation. Keith, also a partner in Urbana, primarily practices in the civil litigation area and has invaluable experience in working with governmental units. You will note that Keith and John Redlingshafer have teamed up in the lead article for this month's newsletter and that Ed and Andy Keyt have co-written an article on the Freedom of Information Act later in the newsletter. We welcome both of them to our governmental group.

As always, if you have any questions or comments, we would be anxious to hear them. Please feel free to contact me at (309) 676-0400 or at tbertschy@heylroyster.com.

Tim

Timothy L. Bertschy is a partner with Heyl, Royster, Voelker & Allen. He concentrates his practice in the areas of complex commercial litigation, employment, and local governmental law. He has litigated cases involving contractual breaches, business torts, partnership and corporate break-ups, stockholder disputes, ERISA, unfair competition, intellectual property, covenants not to compete, lender liability, fraud and misrepresentation, eminent domain (condemnation), computer and software problems, privacy, real estate disputes, zoning issues, and business losses. Tim has represented clients in the business, banking, real estate, stock brokerage, accounting, legal, insurance, governmental, and religious fields.

A NEW COURT OPINION ON THE OPEN MEETINGS ACT: IS YOUR NOTICE, AGENDA, AND MEETING SITE GOOD ENOUGH FOR A SPECIAL MEETING?

By Keith Fruehling, Urbana
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The Illinois Attorney General recently announced training for a public body's Open Meetings Act officer(s) begin on February 1, 2010. Please make sure your officer(s) complete training by the July 1, 2010 deadline required by the new changes to the Act. Training will likely include questions related to what constitutes appropriate notice, agenda postings, and if a particular meeting site is appropriate. Interestingly enough, a recent decision of the Illinois Appellate Court gave us an inside look as to how a Court could rule on those topics if your actions are ever challenged.

Alert:

Public Act 096-0650 establishes new requirements for certain townships and municipalities in regard to the Americans with Disabilities Act. This Act was effective January 1, 2010. Please contact your attorney for guidance on meeting your old and new ADA responsibilities.

The Illinois Appellate Court Weighs In on Open Meetings Act

In re Petition to Disconnect Certain Territory commonly Known as the Foxfield Subdivision and Adjoining Properties from the Village of Campton Hills is a very lengthy title of a decision recently issued by the Second District of the Illinois Appellate Court. This was an appeal from the trial (circuit) court of Kane County, a suburban "collar county" of Chicago.

The Village of Campton Hills is a new municipality incorporated on April 17, 2007. A unique feature under Illinois law (specifically, 65 ILCS 5/7-3-1 of the Municipal Code) is that property owners can file a petition to disconnect their property from a new municipality within one year of that formation unless disconnecting that area causes any portion of the municipality to be isolated from the remainder.

A day before the one-year anniversary of incorporation (April 16, 2008), owners of the Foxfield Subdivision petitioned the Court to disconnect from Campton Hills. In a creative way to block this effort, Campton Hills held a special Village board meeting on December 16, 2008 (before the petition was ruled upon by a Court), and decided to annex a parcel on the other side of the Foxfield Subdivision (known as the "Koutsky parcel"). At that point, the Village filed a motion with that Court stating the disconnection petition must be dismissed (because the newly-acquired parcel would be separated from the rest of Campton Hills if Foxfield was allowed to separate from the Village, which is improper under 65 ILCS 5/7-3-1).

The Kane County Circuit Court agreed with the Village and dismissed the Foxfield petition to disconnect. However, the subdivision owners appealed that decision, alleging the Village did not comply with the Open Meetings Act in several ways related to its special board meeting on December 16, 2008. Specifically, the petitioners alleged the Village failed to:

1) specify the annexation of the Koutsky parcel in its agenda for the meeting;

2) post the agenda in an appropriate place where it could be viewed at all times; and

3) hold the meeting at a convenient time and place.

The Court looked at each of these arguments in detail, and utilized the language of sections 2.01 and 2.02 of the Open Meetings Act (5 ILCS 120/2.01 and 2.02) to assist in its ruling. Those sections of the Act appear at the end of this Article for your quick reference. Here is a brief review of how the Court ruled on each argument.

Posting Notice of Meeting and Agenda

Petitioners felt the Village violated section 2.02 of the Open Meetings Act by not posting the agenda for the special meeting where it could be viewed at all times. The Village made the agenda available for public review for a total of fourteen hours – during business hours at the Village Hall before the night of the special meeting.

The Court noted that sections 2.02(a) and (b) require an agenda be posted at least 48 hours in advance of the meeting at "the principal office of the body holding the meeting" or, if no office exists, at "the building in which the meeting is to be held." Based on its plain reading of the Illinois Open Meetings Act, the Court felt it clear the General Assembly did not require an agenda be posted in a specific place so that it is "publicly accessible for 48 continuous hours before the meeting." In its opinion, the Court felt the facts here were allowed under the Act – the notice and agenda were posted and accessible to members of the public at the Village Hall (and also at the site of the meeting) 48 hours before the meeting.

Agenda Requirements

The agenda for the special board meeting had twenty-four items. The one at issue in this case was Item XXIII: "Discussion and Consideration of potential annexation of property." It was under that action the board voted to annex the Koutsky parcel. The petitioners argued the agenda was not specific enough to notify the public of the private interests/parcel at issue - most notably, that they had no meaningful chance to lobby Village trustees before hand or rally public support against the annexation of this particular parcel as they did not know which one was at issue.

The Court noted section 2.02(a) also requires an agenda be posted with any notice, but the validity of any action taken by a public body that is "germane" to a subject on the agenda will not be affected by "other errors or omissions in the agenda." Focusing on the idea that this was a "special" meeting, the Court looked at prior rulings in similar circumstances that discussed the appropriate definition of "germane" as "in close relationship, appropriate, relative, pertinent" was also appropriate in this case. The Court concluded the Open Meetings Act does not require an agenda to be specifically detailed or be tailored to the particular individuals "whose private interests are most likely to be affected by the actions of the public body." It further noted that the Act only requires the action taken at a special meeting be "germane" to the agenda, and in this case, annexing the Koutsky parcel was "closely related or germane to the agenda."

Sufficiency of Meeting Site

Lastly, the petitioners felt that the meeting site (the Village Community Center) was inconvenient and inaccessible in violation of section 2.01 of the Open Meetings Act. (Section 2.01

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states that "[a]ll meetings required by this Act to be public shall be held at specific times and places which are convenient and open to the public.") They felt it was inconvenient as the public was forced to leave the building during a closed session of the meeting and made to wait in the parking lot in the cold (recall it was the middle of December) until the Board reopened the meeting at 1:15 a.m. to discuss and consider the annexation of the Koutsky parcel.

The Court, in analyzing the language of 2.01, noted the General Assembly does not specify how far a public body has to go in accommodating the public who wish to attend its meetings. In the Court's opinion, one problem with the petitioners' arguments is that it would be "unreasonable to conceive that the legislature intended...that public bodies hold their open meetings only during good weather." In conclusion, the Court felt the Open Meetings Act does not provide a closed meeting should be held at a particular time or that a public body must make adequate provision for the public when the meeting is properly closed.

Prior Agendas as Evidence?

As a side note, the Court also mentioned the petitioners' efforts to introduce prior agendas as proof that the Village board was more specific in agendas during past meetings. It did not take too kindly to this attempt to show the "customary practice" of the board. The Court felt these prior agendas were irrelevant, as past agendas do not mean a less-specific agenda violates the Open Meetings Act. The only, relevant agenda when assessing a violation of the Act is the agenda at issue.

Final Considerations in Light of the Appellate Court's Decision

The Village of Campton Hills' actions were deemed suitable under the Open Meetings Act, and this decision should put the collective minds of public officials at ease. However, you all know that it is never that easy. For example, this decision was from the Second District of the Illinois Appellate Court, and therefore, is not binding law on many of you on our mailing list. While this is certainly strong guidance for your own actions, we caution you to be very careful in the way you prepare for special meetings (and obviously, regular meetings require their own level of caution, too).

First and foremost, make sure that you not only post your agendas as soon as possible, but certain public bodies are required to publish any special or emergency meeting in addition to the requirements under the Open Meetings Act. Be sure to consult with your attorney(s) on how to proceed in each situation.

Also, be very careful with your wording on your agenda(s). We oftentimes recommend that you not only "consider" and "discuss" a particular issue, but that you also include the word "vote" on that consideration and discussion. After all, failing to leave out that word leaves you vulnerable to an argument that you were not going to make a decision on that particular issue.

As for a meeting site and/or going into closed session, it never hurts to go above and beyond for the public's safety and comfort. For one, you are less likely to draw the public's ire if you make them comfortable while they wait (which could help you during the next election cycle), but you also could avoid any worst-case scenarios in which the public was waiting in a parking lot, and someone is injured as they wait (perhaps a sliding car, etc.).

We hope that no one ever faces these problems, but as attorneys, we have no choice but to consider what may happen and help you plan a way to avoid them. We are happy to talk with you about the Open Meetings Act, the penalties in place for violating its requirements, and how best to follow the Act so you can avoid those penalties.

As noted above, here are sections 2.01 and 2.02 of the Open Meetings Act. These sections were accurate as of the date this article was written, but may have changed since that time. Please consult with your attorney for a potential update and/or change in these portions.

> Sec. 2.01. All meetings required by this Act to be public shall be held at specified times and places which are convenient and open to the public. No meeting required by this Act to be public shall be held on a legal holiday unless the regular meeting day falls on that holiday.
>
> A quorum of members of a public body must be physically present at the location of an open meeting. If, however, an open meeting of a public body (i) with statewide jurisdiction or (ii) that is an Illinois library system with jurisdiction over a specific geographic area of more than 4,500 square miles is held simultaneously at one of its offices and one or more other locations in a public building, which may include other of its offices, through an interactive video conference and the public body provides public notice and public access as required under this Act for all locations, then members physically present in those locations all count towards determining a quorum. "Public building", as used in this Section, means any building or portion thereof owned or leased by any public body. The requirement that a quorum be physically present at the location of an open meeting shall not apply, however, to State advisory boards or bodies that do not have authority to make binding recommendations or determinations

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or to take any other substantive action.

A quorum of members of a public body that is not (i) a public body with statewide jurisdiction or (ii) a public body that is an Illinois library system with jurisdiction over a specific geographic area of more than 4,500 square miles must be physically present at the location of a closed meeting. Other members who are not physically present at a closed meeting of such a public body may participate in the meeting by means of a video or audio conference.
(Source: P.A. 96 664, eff. 8 25 09.)

Sec. 2.02. Public notice of all meetings, whether open or closed to the public, shall be given as follows:

(a) Every public body shall give public notice of the schedule of regular meetings at the beginning of each calendar or fiscal year and shall state the regular dates, times, and places of such meetings. An agenda for each regular meeting shall be posted at the principal office of the public body and at the location where the meeting is to be held at least 48 hours in advance of the holding of the meeting. A public body that has a website that the full time staff of the public body maintains shall also post on its website the agenda of any regular meetings of the governing body of that public body. Any agenda of a regular meeting that is posted on a public body's website shall remain posted on the website until the regular meeting is concluded. The requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda. Public notice of any special meeting except a meeting held in the event of a bona fide emergency, or of any rescheduled regular meeting, or of any reconvened meeting, shall be given at least 48 hours before such meeting, which notice shall also include the agenda for the special, rescheduled, or reconvened meeting, but the validity of any action taken by the public body which is germane to a subject on the agenda shall not be affected by other errors or omissions in the agenda. The requirement of public notice of reconvened meetings does not apply to any case where the meeting was open to the public and (1) it is to be reconvened within 24 hours, or (2) an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda. Notice of an emergency meeting shall be given as soon as practicable, but in any event prior to the holding of such meeting, to any news medium which has filed an annual request for notice under subsection (b) of this Section.

(b) Public notice shall be given by posting a copy of the notice at the principal office of the body holding the meeting or, if no such office exists, at the building in which the meeting is to be held. In addition, a public body that has a website that the full time staff of the public body maintains shall post notice on its website of all meetings of the governing body of the public body. Any notice of an annual schedule of meetings shall remain on the website until a new public notice of the schedule of regular meetings is approved. Any notice of a regular meeting that is posted on a public body's website shall remain posted on the website until the regular meeting is concluded. The body shall supply copies of the notice of its regular meetings, and of the notice of any special, emergency, rescheduled or reconvened meeting, to any news medium that has filed an annual request for such notice. Any such news medium shall also be given the same notice of all special, emergency, rescheduled or reconvened meetings in the same manner as is given to members of the body provided such news medium has given the public body an address or telephone number within the territorial jurisdiction of the public body at which such notice may be given. The failure of a public body to post on its website notice of any meeting or the agenda of any meeting shall not invalidate any meeting or any actions taken at a meeting.
(Source: P.A. 94 28, eff. 1 1 06.)

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The Freedom of Information Act: Change Is Here

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The Freedom of Information Act ("FOIA") (5 ILCS 140/1 *et seq*.) increases the challenges local governments face in responding to, and even preparing for FOIA requests.

The purpose of this article is to get your district thinking about how to best address these changes. While there are other pending changes to FOIA, this article is intended to discuss the current major amendments that took effect January 1, 2010. In particular, your district needs to be aware of the shortened time frame for responses, and the need to designate a FOIA officer(s) to oversee the handling of requests.

THE MAJOR CHANGES

The Policy Statement

The Legislature has added to the policy statement emphasizing the importance they are placing on these new changes. The policy statement states that compliance with FOIA is a primary duty of public bodies, regardless of other obligations or fiscal constraints.

The Shortened Response Time

The revisions to the Act shorten the time frame for response from 7 days, to 5 days. The public body must respond within 5 business days of receipt of the request, and may obtain one five-day extension (assuming one of the enumerated reasons for an extension of time exists). The reasons for extensions of time are basically the same as in the past.

There are some exceptions to the 5 day rule. Specific information from arrest reports must be disclosed within 72 hours. However, information sought solely for a commercial purpose has a lengthened response time of 21 days. Examples of commercial purposes include personal injury attorneys or auto body shops that send advertisements to persons involved in auto accidents.

The Public Bodies, Designation of a FOIA Officer

FOIA requires each public body to make a list of the employees (or officers) that will handle FOIA requests and submit the list to the Illinois Attorney General's Public Access Counselor (see below). By July 1, 2010, the designated employees must complete an electronic training class with additional training annually. This training can be completed at the Illinois Attorney General's website at http://www.illinoisattorneygeneral.gov/. Any new designees must complete the training within 30 days of the designation of the employee as a FOIA contact. In addition, the contact information for the FOIA officer will need to be posted along with your other standard postings. We suggest designating 2 or more experienced people to handle the requests. Your department will be highly dependent on who you designate to handle these requests, so make sure to give this careful consideration.

The Clear and Convincing Evidence Standard

All records are presumed to be open, and a public body claiming an exemption after January 1, 2010 must show by "clear and convincing evidence" that the claimed exemption applies. Some say this standard is to convince the trier of fact (the court) that the proposition is substantially likely to be true. In other words, the records are substantially likely to be exempt from disclosure. To be sure, this standard is a fuzzy concept even for the most experienced attorneys. The bottom line is that if it is a close call, the court will likely decide in favor of the individual requesting the records.

The Public Access Counselor ("PAC")

The FOIA changes require the Attorney General to create a position known as the Public Access Counselor. The Public Access Counselor (PAC) will have two main roles: (1) resolving disputes and (2) educating the public (including public bodies) regarding FOIA's requirements. Long time Assistant Attorney General Cara Smith has been designated as the Public Access Counselor.

The PAC's Role as Overseer of the Act

Anyone that believes a public body has violated FOIA, may make a "request for review" to the PAC. The typical scenario will involve a requester of records who has been denied access to records under a claimed exemption. The PAC has several options in handling a request for review. The PAC may (1) find that the alleged violation is unfounded, or (2) proceed with investigating the alleged violation. If the latter path is chosen, the process works very similar to an administrative court. The public body is allowed to respond to the allegations, and the PAC has the ability to issue subpoenas for information, and require the records that would be responsive (whether exempt or not) be

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delivered for inspection to the PAC. From there, the PAC may take any number of steps, whether issuing a binding decision, a non-binding opinion or even mediating the dispute. The PAC may even choose to take no action. If the PAC issues a binding opinion indicating a violation has occurred, the public body must comply with the directives of the opinion, take corrective action (if necessary) OR initiate an administrative review action under the Administrative Review Law (735 ILCS 5/3-101 *et seq*.) (filing a court action seeking review).

The PAC may also issue advisory opinions to public bodies. If advisory opinions are issued, and the public body follows the advice of the PAC, the public body cannot be liable for fines or penalties should it be found in violation of FOIA by a court (assuming it followed the advice of the PAC).

The PAC's Role as Educator

The other major facet of the PAC's role is to educate public bodies and the public as to FOIA and its extensive requirements. Included within that charge is developing and administering an educational program for the designees of public bodies (the individuals the public bodies will choose as the FOIA officer). Each public body's FOIA designee will need to attend training on FOIA. This training is available through the Illinois Attorney General's website at http://www.illinoisattorneygeneral.gov/.

THE HIGHLIGHTS OF THE MINOR CHANGES

There are numerous other changes to FOIA, but below are the most relevant for local governmental entities.

Advisory Opinions are Available – The PAC may issue advisory opinions. We highly suggest using this method to obtain opinions because if the opinions are followed, the public body cannot be held liable for fines associated with violations.

The Internal Appeals Process is Abolished – Under the former version of FOIA, a requester who had been denied access to records needed to exhaust his or her internal remedies (appealing to the head of the public body) before filing a claim in circuit court. Once a requester had been denied access to records by the head of the public body, they could file an action in circuit court in the county in which the public body resides. Now, the process is more direct, and abolishes the necessity of appealing to the head of the public body before pursuing a court's opinion or review by the PAC. The end result is a possible dual review process. An aggrieved requester can seek a request to review from the PAC and file an action in court. If both are filed, the PAC must refrain from taking action, deferring instead to the higher power of the circuit court. Keep in mind as well that if court review of a PAC action is sought, it must be filed in either Cook County or Sangamon County, Illinois.

Forms of Requests – While a public body can require a request be in writing, it cannot require a specific form.

Agreed Upon Extensions of Time – The requester and the public body may mutually agree to extend the deadlines for a response. Any agreement must be memorialized in writing.

Charges – No charge will be allowed for the first 50 pages of black and white copies, and only 15 cents per page thereafter. If color copies are provided, the public body can only charge the actual reproduction costs.

Standard to Adjudge Private Information – Whether information is private or not is to be adjudged by the "reasonable person" standard, unless the information is specifically delineated as exempted within in FOIA.

Private Contractors that Perform a Government Function – If a private entity contracts with a public body to provide a government function (for example, EMS services; security functions in public places) then the records relating to that government service are considered government records even if the records are in the possession of the private entity.

Factual Basis for Exemptions – If a public body denies a request, the public body must provide a detailed factual basis for the application of any exemption and citation to any supporting legal authority. Any denial, as before, must be in writing. The public body must also inform the requester of the name and address of the PAC.

Denials Due to Personal Information and Preliminary Draft Exemptions – If a public body is going to deny a request pursuant to 1(c) (personal information exemption) or 1(f) (preliminary draft exemption) of Section 7, then the public body has to provide written notice to the PAC and the requester of the intent to deny the request. The notice must include (1) a copy of the request, (2) the proposed response, and (3) a detailed summary of the basis of the denial. The notice of intent to deny must be sent within 5 business days of receipt of the request.

Fines and Penalties – If a court finds that a public body willfully and intentionally violated FOIA, it may impose fines of $2,500 to $5,000, and award attorney fees.

CONCLUSION

The FOIA revisions went into effect on January 1, 2010. If you have yet to do so, you need to take immediate action to be in compliance. First, make sure to give careful consideration to who will be designated FOIA officers. Next, consult with your legal counsel to update your FOIA forms and postings so that

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they will be in compliance with the changes. Currently, the Illinois Attorney General's website has an informative section on the FOIA.

The contact information for the Illinois Attorney General's FOIA Division is:

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Personnel Records Review Act

By Jesse Placher
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While the Personnel Record Review Act, 820 ILCS 40/0.01 *et seq*., is largely directed toward an employee's right to review a company's records related to his or her employment, a portion of the Act forbids employers (including government employers) and former employers from divulging disciplinary reports, letters of reprimand, or other disciplinary actions to a third party, a party who is not a part of the employer's organization, or a party who is not a part of a labor organization representing the employee, without giving written notice to the employee. 820 ILCS 40/7(1).

The written notice to the employee must be by first-class mail to the employee's last known address and must be mailed on or before the day the information is divulged, unless:

1) The employee waives written notice as part of a written, signed employment application with another employer;

2) The disclosure is ordered to a party in a legal action or arbitration; or

3) Information is requested by a government agency as a result of a claim or complaint by an employee, or as a result of a criminal investigation by such agency. 820 ILCS 40/7(2), (3).

Furthermore, the employer must review the personnel documents to delete disciplinary reports, letters of reprimand, or other records of disciplinary action which are more than four (4) years old before releasing the information to a third party, except when the release is ordered to a party in a legal action.

So what does all of this mean? Before disclosing employee records, one must first review those documents to black out ("redact") or remove certain documents from the production, when certain privacy concerns are at issue, etc. Then, you must give notice to the employee on or before the day of the disclosure. The penalties for failing to follow the Act are serious and include fines, fees, and costs, plus being found guilty of a petty offense.

An interesting side note is that the Personnel Record Review Act and Freedom of Information Act ("FOIA") seem to conflict, particularly as FOIA deems "[p]ersonnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions" exempt from inspection and copying. 5 ILCS 140/7(1)(b)(ii). However, one must keep in mind that the Record Review Act is largely directed towards an employee's right to review a company's records related to his or her own employment. FOIA, on the other hand, concerns itself with the principle that all persons are entitled to full and complete information regarding the affairs of government. As a result, a public body must pay particular attention to FOIA when addressing a request for an employee's personnel file.

The bottom line is that when either Act is at issue, do not hesitate to consult with your attorney.

In our next newsletter, we will discuss the personnel records exemption pursuant to FOIA, particularly in light of the Illinois Supreme Court holding in *Stern v. Wheaton-Warrenville Community Unit School Dist. 200*, 233 Ill. 2d 396, 910 N.E.2d 85 (2009).

Jesse A. Placher is an associate in the Peoria office of Heyl Royster. He concentrates his practice in governmental law, commercial litigation, and insurance defense. Jesse represents municipalities, townships, and other governmental agencies. He focuses primarily on liquor hearings and appeals.

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The statutes and other materials presented here are in summary form. To be certain of their applicability and use for specific situations, we recommend an attorney be consulted.
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