

HEYL ROYSTER

GOVERNMENTAL NEWSLETTER

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WELCOME LETTER

Friends:

As we constantly strive to be on top of current issues impacting or expected to impact public bodies, we are pleased to bring you what we consider to be timely articles in this edition of our Governmental Newsletter.

First, Chrissie Peterson writes on cyber liability concerns for public bodies, including the legal obligations of a public body with its constituents' personal information. In her article, Chrissie offers ways a public body can minimize potential liability when cyber information is compromised.

Second, John Redlingshafer looks at when a government body may expose itself to liability by reducing expenditures due to budgetary shortfalls. John specifically discusses recent cases in both the construction and employment contexts.

Last, Emily Perkins discusses law surrounding roads and right of ways, and what may constitute encroachment of a right of way. Emily addresses, in particular, issues that may arise related to crops and farming operations.

We were fortunate to present on some of these topics at our firm's Annual Claims Handling Seminar in May. Whether or not you attended, we are happy to present on any of these topics (or any other topic) that may be of particular interest at your upcoming events or meetings.

In closing, we continue to monitor the state's financial crisis and how it may impact units of government, whether it be through motor fuel tax payments, property tax freezes, or other revenue short falls. If you have any questions about your specific unit of government, please contact one of our team members.



Stacy Cräbtree
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CYBER LIABILITY FOR THE PUBLIC BODY

By: **Chrissie Peterson**
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Major security and data breaches have become more prevalent in the past decade. News headlines are dominated by stories of major corporations having networks hacked and subjecting employees' and customers' personal, financial and health information to cyber threats. Perhaps one of the following from 2014 will sound familiar:

- January: Snapchat had the names and phone numbers of 4.5 million users compromised
- February: Kickstarter had personal information from 5.6 million donors compromised
- May: Ebay's database of 145 million customers was compromised
- September: iCloud had celebrity photostreams hacked
- November: Sony Pictures had the highest profile hack of the year involving email accounts, video games and movie releases

I. A REAL RISK TO LOCAL GOVERNMENT

Private entities are not the only ones being attacked by "cybercriminals." On July 14, 2015, the Office of Personnel Management announced that personal data, including social security numbers and fingerprints, for approximately 21.5 million people had been stolen from the U.S. government's databases. While a breach of this size and scope has far reaching intelligence, financial and political implications, even data breaches for smaller units of government have long-lasting and sometimes irreparable effects.

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Consider the headlines:

- On March 10, 2015, a cyber attack on the Town Hall in Orange Park, Florida took nearly \$500,000 from the town's bank account, but the theft was caught in time for a wire transfer to be reversed. Jim Schoettler, *Computer hack at Orange Park Town Hall last month nearly cost \$500,000*, THE FLORIDA TIMES-UNION JACKSONVILLE.COM (March 10, 2015, 9:21 AM).¹
- On April 13, 2015 a group demanding the dash camera video of a shooting be released to the public anonymously hacked into the database of the Grapevine Police Department in Grapevine, Texas and posted a video demanding the release. Dianne Solis, *Anonymous hacker-group demands police video of shooting of Mexican immigrant by Grapevine cop*, THE DALLAS MORNING NEWS-THE SCOOP BLOG (Apr. 13, 2015, 2:34 PM).²
- On April 22, 2015 officials with the Wake County Public School System in Raleigh, North Carolina had to take dozens of school websites offline after a server was hit by hackers. Adam Owens, *Hackers hit Wake public schools server*, WRAL.COM (Apr. 22, 2015).³

Trends suggest that public bodies will continue to become the targets of data breaches. The smaller the unit of government, the less prepared they are to weather the cyberstorm.

II. WHAT HAPPENS/HOW IT HAPPENS

In 2014 and 2015, Verizon Enterprises published studies indicating that public bodies are among the top three industries where data breaches occur. 2015 Data Breach Investigations Report (DBIR).⁴ While data breaches can occur in many ways, and hackers find new methods to access information every day, data breaches at public bodies can generally be classified into one of three categories.

A. Miscellaneous Errors

The most common data breach for public bodies occurs when Miscellaneous Errors happen. These Miscellaneous Errors are described as any mistake that compromises security by posting private data to a public site accidentally, sending information to the wrong recipients or failing to dispose of documents or assets securely. 2015 DBIR, pg. 49.

The Illinois Freedom of Information Act (FOIA) declares that “[i]t is a fundamental obligation of government to operate openly and provide public records as expediently and efficiently as possible....” 5 ILCS 140/1. In other words, local governments are in the business of providing information and in doing so, unintentional errors occur. For example, consider a request under FOIA asking for all payroll information for the Public Works department for the month of January, 2015. In response, the FOIA officer provides a payroll report from the month of January, but accidentally forgets to redact the social security numbers of the employees listed.

B. Insider Misuse

The second most common data breach is classified as Insider Misuse, when employees or those with access to the information misuse it. 2015 DBIR, pg. 46. These are not situations where unintentional errors occur, but an employee or someone with access to the information intentionally accesses the data to use it for an unlawful purpose. For example, a disgruntled billing clerk in the utility department accesses customer information to obtain the name, date of birth and bank account information in order to fraudulently establish a credit card in that customer's name. Consider another scenario where a third party vendor, a benefits provider, for example, handles employee information. Once transmitted, the public body loses control over information security for that data. Savvy public bodies will make sure their contracts with vendors make the vendor responsible for any data breach that occurs during the engagement and that it will indemnify the public body for any actions arising from such a breach.

C. Theft

Finally, data breaches for public bodies can result from physical theft or loss of laptops, tablets, smart phones, USB drives or even printed documents. 2015 DBIR, pg. 45. For example, consider a scenario where the Human Resource director is heading to a conference and her laptop is stolen at the airport. The laptop is not encrypted or pass coded and the thief can access all the employee files the director keeps on her computer.

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BUDGETARY SHORTFALLS: CAN YOUR GOVERNMENT ENTITY BE LIABLE FOR DELAYING OR DECLINING A PROJECT BECAUSE OF BUDGETARY CONCERNS?

By: John Redlingshafer

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While we continue to hear of the financial peril facing the state of Illinois, we know it is not just the state that is trying to address increased operating expenses with diminished resources. Townships, cities, road districts, counties, and all other units of Illinois government continue to explore options in how to best handle and manage taxpayer dollars in a fiscally responsible manner. As a result, there are increased instances where decisions are being made to cut and/or eliminate projects, improvements, or services. As similar financial decisions are made in the future, one major consideration that must be reviewed is the potential increase of exposure to liability.

I. AREAS WHERE DIMINISHED OR ELIMINATED FUNDING COULD LEAD TO LIABILITY

The most obvious area where a public body may face liability for deciding against or failing to act relates to lawsuits filed under tort theories, such as negligence, but that is not the only action that could be at issue. Governing boards may need to consider whether or not they should continue to pay/act on contracts and may also face claims from employees who are dismissed under what employees call the cover or pretext of “budget constraints.”

A. Public Improvements

In *Nichols v. City of Chicago Heights*, a group of property owners claimed their homes were damaged during a large rainstorm, as “sewer water containing pollutants, feces, dirt, debris, and other noxious matter from the [City’s] sewerage system overflowed into plaintiffs’ homes.” *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, ¶¶ 1-2.

During the course of the litigation, the city provided evidence of efforts it was undertaking in the maintenance and operation of its sewer system. Numerous aspects were proposed to be completed as part of a multi-year program because of budget constraints. *Nichols*, 2015 IL App (1st) 122994-U, ¶ 8.

In finding for the City, the court (among other things) concluded that the city’s maintenance replacement plan for the system was a policy decision, and focused on correspondence from the Mayor to a local sanitary district which said the city was “trying to stretch the city’s dollars and use the city’s resources” to try and fix various issues with the sewage system, and “attempting to find a solution within its budgetary constraints.” *Nichols*, 2015 IL App (1st) 122994-U, ¶ 38. Using this and similar evidence, the court found these actions “fit precisely” in the definition of a policy determination (and therefore, the City was immune under the state’s Tort Immunity Act) because the city had “to balance competing interests and to make a judgment call as to what solution will best serve each of those interests.” *Id.* (quoting *Harinek v. 161 N. Clark St.*, 181 Ill. 2d 335, 342).

Does *Nichols* End the Analysis?

While the appellate court in *Nichols* held for the City, public bodies facing similar budget constraints may not see a similar result depending on the facts at issue. Countless lawsuits are filed against public bodies annually based on the state or condition of public property (e.g., streets, sidewalks, parks, etc.), and based on the actions (or inactions) of those governments (including snow/salt treatment). In these lawsuits, plaintiffs allege negligence, but can, and have regularly alleged “willful and wanton” behavior based on the theory that the public body had knowledge of a dangerous condition but did not do anything about it.

Therefore, even if a plaintiff’s claims for negligence are dismissed under a provision of the Tort Immunity Act, the willful and wanton counts could remain. The Illinois Supreme Court explains the difference between negligence and willful and wanton conduct as the latter “approach[ing] the degree of blame associated with intentional harm because the defendant *deliberately* inflicts a highly unreasonable risk of harm upon others in conscious disregard of that risk.” *Dunbar v. Latting*, 250 Ill. App. 3d 786, 792 (3d Dist. 1993) (quoting *Burke*

v. *12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 450 (1992). Illinois courts consistently hold that a plaintiff must show that after a public body knew of an impending danger or it “fail[ed] to discover the danger through recklessness, or carelessness when it could have been discovered.” *Lynch v. Bd. of Educ. of Collinsville Comm. Unit Dist. No. 10*, 82 Ill. 2d 415, 429 (1980).

For example, a plaintiff’s case will be allowed to proceed to trial where a public body takes no action to correct a condition even though it knew about the condition and knew others were injured and/or a public body intentionally removes a safety feature from recreational property. See *Straub v. City of Mt. Olive*, 240 Ill. App. 3d 967 (4th Dist. 1993); *Benhart v. Rockford Park Dist.*, 218 Ill. App. 3d 554 (2d Dist. 1991).

B. Employment

Another difficult decision in a tough budget cycle can include temporary or permanent lay offs. In *Cipolla v. Village of Oak Lawn*, the village advised an employee that her position was being eliminated as a result of a budget gap that totalled over \$1 million. *Cipolla v. Village of Oak Lawn*, 2015 IL App (1st) 132228.

The employee did not file a lawsuit related to the budget gap, however. Instead, she alleged that the actual decision was based on her age after learning, among other things, that someone in an executive session of the village board meeting called her “older.” *Cipolla*, 2015 IL App (1st) 132228, ¶ 6. She also noted the village hired a budget director and gave raises to finance department employees after she was laid off.

In reviewing the evidence, the court concluded the plaintiff’s arguments should fail. First, numerous village officials testified about the budget shortfall, which undercut the idea that the budget cuts were a “pretext” for terminating her. *Id.* Secondly, testimony conflicted about whether someone actually called her “older” during an executive/closed session village trustee meeting. *Id.* ¶ 62. Perhaps most importantly, the evidence demonstrated other employees lost their jobs as a result of the village’s effort to cut costs. *Id.*

Cipolla shows it will be very important for a public body to diligently review the needs for any reduction in workforce, and be prepared to back it up with evidence. Also, just because members of the public body may feel that they can say what they want in a closed session, the *Cipolla* decision and

the Open Meetings Act demonstrate that what is said could eventually come out and potentially expose other discussions. 5 ILCS 120/1 *et seq.* Governing board members who were in the session may be asked to testify about what was said. Also, the Open Meetings Act requires verbatim recordings of closed sessions. Nothing precludes a plaintiff asking a court for access to the recordings, even if only for an *in camera* inspection, especially if there is an additional allegation that the public body failed to follow the appropriate procedures under the Open Meetings Act. See, e.g., 5 ILCS 120/2.06.

II. CONCLUSION

We commend those public officials who are faced with making tough decisions in an effort to save taxpayer funds while still trying to provide essential services. This decision making process will continue to get tougher before the economy gets better. It is imperative that no decision be made without an analysis about whether it could expose the public body to liability.

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



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WHOSE RIGHT OF WAY IS IT ANYWAY?

By: Emily Perkins

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A road's right of way is something often taken for granted, but is more important than one might think. A typical person may recognize a right of way as the driving lanes, shoulders, ditches, and slight corners at intersections. In fact, a right of way is defined by the Illinois Department of Transportation as "the land, or interest therein, acquired for or devoted to a highway," and the Illinois Highway Code's definition of "highway" is even broader, including land bordering the road surface (e.g., ditches, drainage structures, etc.).

In all likelihood, a township doesn't own the land on both sides of the highway, but rather has an easement or a right to use the land for highway purposes. That easement is a public right of way. Often times the Road Commissioner has the responsibility to maintain, regulate and control the activities on a public right of way to provide efficient operation of the county road system. This includes the power to cut down or plant trees, expand portions of the road, and add gravel or pave the road without having to ask a specific resident's permission. The Road District may also permit others, such as utility providers, to use the right of way or easement itself for sewer or water lines.

So why should anyone other than the Road Commissioner care about the right of way? Well, it could have an impact on your safety as a driver, pedestrian or resident of the county. Encroachment onto a public road's right of way can be a safety hazard. For example, planting crops within the right of way might obstruct a drivers' view of traffic signs or other vehicles at a rural intersection. In addition, crop encroachment into ditches can affect proper drainage, clog culverts or jeopardize the stability and integrity of the road itself. Interference with the utilities underneath the right of way can also expose residents to safety hazards. Public utility companies are permitted to use the right of way to install gas, power, and telephone lines, but the use of plows or other heavy farming machinery can damages these utility lines or create potentially dangerous situations for residents and utility workers.

Yet before determining whether the right of way has been encroached upon, it must first be determined how a right of way is created. A highway can be created in one of the three ways: (1) statute, (2) dedication or (3) prescription. 605 ILCS

5/2-202. A highway created by statute means that the Illinois statutes established the authority to create the various highway systems and provide the financial ability to fund their construction and/or purchase of the necessary right of way. A recorded plat is an example of a highway created by statute. A highway created by dedication occurs when a landowner donates or dedicates land for public use as a highway, and the public accepts the dedication. 605 ILCS 5/2-202. For example, a public body that maintains the road by plowing and salting the roadway, maintains the culverts, and mows the corresponding rights of way may be evidence of dedication and acceptance. Finally, a highway may be created by prescription by the continuous and uninterrupted use by the public for fifteen years, with the owner's knowledge but without the owner's consent. *Town of Deer Creek Road Dist. v. Hancock*, 198 Ill. App. 3d 567 (3d Dist. 1990). A large majority of rural roads are established by prescription.

So how does one know if they are encroaching on the right of way? Typically, the width of a right of way is 66 feet wide, which means the right of way is approximately 33 feet on both sides of the center of the road. However, the width of the right of way on a rural road or larger highways varies. Thus, it is often difficult to determine the width a right of way established by easement because there is no standard width. However, Illinois cases have given us some guidance. For example, in *Pilgrim v. Chamberlain*, 91 Ill. App. 2d 233 (3d Dist. 1968) the Third District determined that the width of a gravel road extended "fence to fence." In *Semmerling v. Hajek*, 258 Ill. App. 3d 180 (2d Dist. 1994) the Second District determined the width of the right of way was the width of the pavement, plus six feet on either side. Finally, in *Highland Park v. Driscoll*, 24 Ill. 2d 281 (1962) the Illinois Supreme Court held that the right of way in that case extended the width of the pavement, plus the drainage ditches. Street signs and utility poles often serve as good indicators of right of way limits because they are typically located on the outer edge of a road's right of way, but further research is always recommended to learn as much about a road as possible. Your county highway engineer and local IDOT district office may have additional records that help you learn more about both the existence of right of way and its width.

Counties and townships expend a great deal of public money to maintain and preserve the roadways and ensure its safe and efficient operation. Residents should be familiar with the property and recognize the hazards resulting from encroaching or utilizing the public's right of way. If you have any questions regarding a right of way or its applicability to a specific issue in your county, please do not hesitate to contact us.

Emily J. Perkins concentrates her practice in governmental law, where she represents townships, road districts and other governmental entities. She also practices in labor & employment, Section 1983 prisoner litigation, and railroad litigation.



LOOK FOR OUR ATTORNEYS

- **Saturday, September 19, 2015**
Illinois Municipal League Conference - Chicago
Chrissie Peterson and John Redlingshafer will be presenting on "Concealed Carry"
- **Thursday, September 24, 2015**
IL Assoc. of Museums Annual Conference – Springfield
Stacy Crabtree will be presenting "Liability as an Exhibitor and a Donee"
Deb Stegall will be presenting "Employment and Volunteer Issues"
- **Wednesday, October 28, 2015**
Illinois Rural Water Association – Rockford
Chrissie Peterson will be presenting "Identity Theft and Red Flag Rules for Rural Utilities"
- **Monday, November 9, 2015**
Township Officials of IL Conference - Springfield
John Redlingshafer and Chrissie Peterson will be presenting "IGovern – Technology in Township Government"
- **Tuesday, November 10, 2015**
Township Officials of IL Conference – Springfield
John Redlingshafer and Andy Keyt will be presenting "Making Prevailing Wage/Intergovernmental Agreements Work in Township Government"

"Cyber Liability" continued from Page 2

III. STATUTORY LIMITS & PROTECTIONS

At all levels of government, laws have been aimed at narrowing the information that can be collected initially by public bodies and with whom it can be shared, as well as mitigating the breach after it occurs.

In Illinois, the Identity Protection Act is intended to control the collection and use of Social Security Numbers by state and local government agencies. The Act specifically prohibits certain uses of social security numbers at public institutions and agencies and creates collection and protection requirements. 5 ILCS 179/1 *et. seq.* The Act recognizes, however, the business necessity of collecting and disclosing social security numbers in certain instances.

Public utility companies may have obligations to comply with the Federal Trade Commission's Red Flags Rule, meaning they must have developed and implemented identity-theft prevention procedures designed to detect "red flags" that suggest the potential for identity theft. While there remains a debate on the definition of "creditor" subject to the law, the Federal Trade Commission has interpreted the definition broadly to include utility companies, even publicly owned and operated utility companies. 16 CFR § 681 (2007); *See also* 15 U.S.C. § 1681a and § 1691a. As such, local utilities should continue to adopt and apply identify theft programs and comply with the Red Flag Rules.

Federal regulations like the Health Insurance Portability and Accountability Act (HIPAA) limits the collection and use of protected health information, and also has requirements for entities suffering a data breach, including customer notification and damage mitigation provisions, such as mandatory credit monitoring and fraud protection for affected customers.

The Personal Information Protect Act requires government agencies, corporations, universities, retail stores or other entities that handle nonpublic personal information to notify each Illinois resident who may be affected by a breach of data security. 815 ILCS 530 *et. seq.* Personal information is defined as: an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted or redacted:

1. Social security number
 2. Driver's license number or State identification card number
 3. Account number or credit card or debit card number, or an account number or credit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account.
- 815 ILCS 530/5.

The required notice to Illinois residents must include contact information for credit reporting agencies and the Federal Trade Commission, along with a statement that the individual can obtain information from those sources about fraud alerts and security freezes. 815 ILCS 530/10(a). If the data breached is data that the entity owns or licenses, the notice must be made without unreasonable delay. *Id.* If the data breached is data that the entity does not own or license, notice must be made immediately. 815 ILCS 530/10(b).

Failure to notify affected consumers is a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. 815 ILCS 530/20.

IV. RISK MANAGEMENT

Technology is everywhere. Smart phones, tablets, laptops, the internet, online bill payments and the like have changed the way public entities govern. A concerned citizen no longer needs to go to City Hall to receive services. County Board meetings are broadcast on the local public access channel. Permits can be downloaded and/or submitted online. Utility bills can be automatically debited from checking accounts. Even paper report cards are ceasing to exist in lieu of parents logging on to a school website to check their child's grades.

As you incorporate these practices into your governing structures, there are risk management tools that all public bodies should be aware of and using on a daily basis. Anti-virus software, passwords on all devices, frequent back up of data, and encryption for sensitive information transmitted electronically are just a few.

What if a governmental body takes all the steps necessary to reduce the risk of a data breach and it still occurs? There is a way to reduce damages and to shorten the recovery and restoration timeframes.

Cyber Liability insurance can protect public bodies from data breaches that result from malicious hacking or other non-malicious digital risks. This specific line of insurance was designed to insure consumers of technology services or products for liability and property losses that may result when a business engages in various electronic activities, such as selling on the internet or collecting data within its internal electronic network.

Most notably, cyber and privacy policies cover a public body's liability for data breaches in which the constituents' personal information (such as social security or credit card numbers) is exposed or stolen by a hacker. The cost of a data breach can be enormous and we have yet to see a public body budget a line item for "data breaches." Cyber liability insurance is one way to limit or minimize your total financial exposure in that situation.

Just as your organization works to maintain roads, water lines or school facilities, you must now work to maintain data privacy at all levels of your organization.

¹ <http://jacksonville.com/news/crime/2015-03-10/story/computer-hack-orange-park-town-hall-last-month-nearly-cost-500000>

² <http://thescoopblog.dallasnews.com/2015/04/anonymous-hacker-group-demands-police-video-of-shooting-of-mexican-immigrant-by-grapevine-cop.html/>

³ <http://www.wral.com/hackers-hit-wake-public-schools-server/14599060/>

⁴ <http://www.verizonenterprise.com/DBIR/2015/?&keyword=p6922139254&gclid=CNOK7pnm-cQCFUJrfgod2DcAUQ>

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



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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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