AN ILLINOIS LAW FIRM

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

 May 2013

WELCOME LETTER

Friends:

Another election cycle has ended, but not the need to stay informed on the many aspects of law which impact governmental duties. The goal of our quarterly newsletter is to keep our clients and friends informed on both existing and new changes to those laws and regulations which impact what they do.

This issue looks at legislation which has modified or threatens to modify requirements under several statutes which you deal with on a regular basis – such as the Open Meetings Act and the Freedom of Information Act. "Transparency" has become a buzzword which drives much of the statutory change for local governments.

A second article describes what to do with leftover campaign contributions. It raises thoughtful points about issues that are not often considered – such as leftover contributions that are not "funds." Our third article addresses what should not be a use of leftover funds – video gaming. Illinois has a several years old law in this area that is now taking effect and knowing where and how this law applies is of importance to local units of government.

Finally, we have a special announcement for both new and "old" officials. In early June, we will be sponsoring a seminar geared for both new (and returning) governmental officers. Our intent is to provide a one afternoon overview of the essential knowledge areas of local government, with topics including finance, transparency, contracts, immunities, and conflicts of interest. A notice with dates and locations appears in this newsletter. We are truly excited by this program and hope that you will be able to attend.

Upcoming Seminar
Government Official Essentials

Heyl Royster is hosting a series of seminars for local government officials, newly elected and incumbent, in three locations around the state. Each seminar will feature an afternoon of presentations on essential knowledge areas of local government, including finance, transparency, contracts, immunities, and conflicts of interest.

Please plan to join us at the location closest to you:
Tuesday, June 4, 2013 – Peoria, IL
(Also available as a webinar on this date only)

Heyl Royster Offices
Chase Bank Building
124 S.W. Adams St., Ste. 600

Wednesday, June 5, 2013 – Urbana, IL
ILEAS (Illinois Law Enforcement Alarm System) Center
1701 E. Main St.

Thursday, June 6, 2013 – Rockford, IL
Northern Illinois University Rockford Campus
8500 E. State Street, Room 200

All of the seminars are from 2:00-5:00 p.m. with a reception to follow.

Please RSVP to Rachel Ford at 309.676.0400, ext 214 or at rford@heylroyster.com.

Timothy L. Bertschy is a partner with Heyl Royster. 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.

SPOTLIGHT ON OMA, FOIA AND OTHER LEGISLATION

By: Keith Fruehling
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New Changes to the Open Meetings Act (OMA) for 2013:

Resolutions and Ordinances

One change requires that posted agendas for meetings at which final action will be taken on any resolution or ordinance must include "the general subject matter" of the resolution or ordinance. The intent of the agenda is to advise the public of the intended business of the public body. Both Attorney General rulings and decisions by Illinois courts have determined that an agenda description such as "discuss/pass ordinance" is insufficient and must be made more descriptive. This change codifies those rulings into the Act. (5 ILCS 120/2.02(c))

Notice / Agenda Availability

Another amendment requires that the notice and agenda of a public meeting must be continuously available for the public to review for the 48-hour period preceding the meeting. There have been reports in which a public body has skirted this issue by posting the notice and agenda where it is not readily viewable by the public. For example, they posted the notice and agenda on a Friday evening in the interior of the building for a meeting scheduled for the following Monday evening. Compliance may be accomplished, for example, by posting the notice and agenda on the interior window of the building's entry doorway or alternately in an externally mounted bulletin board that is publicly accessible. (5 ILCS 120/2.02(c))

Website Postings

The amendment also establishes that posting of the notice and agenda on a website maintained by the public body for the 48-hour pre-meeting period satisfies this second requirement. It is important, however, that one distinguishes the above-posting option from the requirement of the public body to post minutes on a website where that website is maintained by a full-time staff member. (5 ILCS 120/2.02(c) and 2.06(b))

Effect of Failure to Comply

A failure to comply with the new amendment that the notice and agenda of a public meeting is continuously available for the public to review for the 48-hour period preceding the meeting may result in invalidation of any meeting or action taken at that meeting, unless the non-compliance is due to actions outside of the control of the public body.

For those staff members and trustees who are responsible for the preparation and posting of notices and agendas for public meetings, beginning January 1, 2013, there will be two more requirements with which to comply.

In short, make sure that the notice and agenda for public meetings are:

- Complete, accurate and descriptive;
- Posted not less than 48-hours before the meeting; and
- Posted at the public body's corporate offices and the location of the meeting in a place that is accessible to the public for not less than the 48-hour period before the meeting.

In addition to becoming familiar with the new Open Meetings Act requirements effective January 1, 2013, this is a good time for public bodies to refresh their knowledge on a couple of the more recent changes under the Open Meetings Act.

Other OMA Related Reminders

OMA Training

Sections 1.05(a) and 1.05(b) of the act require completion of the on-line Public Access Counselor's certification for Open Meetings Act designees (5 ILCS 120/1.05(a)) and elected/appointed members (5 ILCS 120/1.05(b)).

Section 1.05(a) mandates annual continuing education for Open Meetings Act designees. However, it does

not set forth the details of the annual training on the act. In other words, there are no details regarding the "how, when, where or how much" annual training is required. All designees attending professional conferences and seminars should obtain certifications or written proof of Open Meetings Act training, and file copies with their governmental body.

New Office Holders

Section 1.05(b) added by (P.A. 97-0504 which became effective January 1, 2012), requires that members holding office/position on any public body complete the Public Access Counselor's Open Meetings Act online curriculum during calendar year 2012. Any new members elected or appointed on/after January 1, 2012, have 90 days to complete the same training.

This training is a one-time requirement. Copies of certificates of completion must be filed with the local government.

Note that a "public body" subject to OMA is broadly defined in Section 1.02, to include "all legislative, executive, administrative or advisory bodies of… counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus,… and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue[.]" [emphasis added] (5 ILCS 120/1.02)

Timeline on minutes

Section 2.06(b) of the act mandates that a public body approve the minutes of its open meetings within 30 days after that meeting or at the public body's second subsequent regular meeting, whichever is later. This requirement was added by P.A. 96-1473 which became effective January 1, 2011. That change also required that minutes of meetings open to the public be available for public inspection within 10 days after the approval of the minutes by the public body. (5 ILCS 120/2.06 (b))

Public Comment

Finally, P.A. 96-1473 also added Section 2.06(g) to the act which requires any person be permitted an opportunity to address public officials at their open meetings under the rules established and recorded by the public body. (5 ILCS 120/2.06(g))

Legislation to Keep Your Eye On

Freedom of Information Act – FOIA

Three bills remain alive in the Illinois legislature at this time. Each of those bills – whether in the House or the Senate – are set forth below. The two bills that remain alive in the House are focused on establishing mandates on local governmental entities to provide responses to FOIA requests via e-mail as opposed to the US Mail.

The sole matter that remains alive in the Senate is SB 1514 and is focused on adding circumstances that would qualify governmental entities subject to the act to pay penalties for lack of compliance.

HB 2747 - (Still alive in the House) (Conroy) amends FOIA to require any public body that has more than five employees to respond to FOIA requests via email.

HB 2930 - (Still alive in the House) (Unes) amends FOIA to authorizes and, in some circumstances requires, a public body to respond by electronic mail to requests for public records that it has received by electronic mail.

SB 1514, Amendment No. 1 - (Still alive in the Senate) (Biss) amends FOIA to expand the situations in which a public body would be liable to pay attorneys' fees.

Other Legislation Making Its Way Through the Illinois House

House Bill 1555 - (Passed the House) (Dillard) - The bill as amended essentially requires the Illinois Transparency & Accountability Portal to provide direct access to documents many local governments already compile and forward to state officials such as the Comptroller and the Treasurer. It also includes reports relating to pension data that is typically compiled by local police and fire pension

boards or others. The language of the bill does not address whether it is State officials' office, pension boards or the unit of local of government that will be required to provide the required information to ITAP.

House Bill 1562 – (Passed the House) – (Demmer) The purpose of this Bill is to require counties and municipalities to establish a local finance & audit committee. This committee may be comprised of members of the corporate authorities or other officials or members of the public. Counties and municipalities may establish a new committee, use an existing committee or establish a committee of the whole to meet this requirement. The committee shall be required to review and inspect the treasurer's books, bank accounts and any other financial transactions. In addition, the committee shall review the audit and management letter. The intention of this legislation is to add an additional safeguard in an attempt to prevent government fraud. The bill legislation passed the House unanimously and now goes to the Senate for their consideration.

Keith E. Fruehling is a partner in the firm's Urbana office. He concentrates his practice in civil litigation, including the defense of complex asbestos, employment and civil rights, professional malpractice, local governmental and products liability litigation. He has represented Fortune 500 corporations, universities, state and local governmental units, professionals, and local businesses. He also sits on the Illinois State Bar Association Board of Governors.

The Election Is Over – What Do I Do With My Campaign Funds?

By: John Redlingshafer
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As I can relate, an election season can be very exciting but also very stressful. This year, I have heard many say "I cannot wait until April 10" (the day after the election). However, while the end is upon us, please understand that in addition to your public responsibilities, you may still have other obligations, too.

For the purposes of this article, I am speaking about those of you who have raised money to campaign for elected office. While it is quite possible you are not raising hundreds of thousands or millions of dollars for your local municipal election, you may still have reporting obligations under the Illinois Election Code.[1] This article does not touch on all of the requirements that may or may not apply to you, but this is at least an opportunity to remind you of some of them.

Under the Illinois Campaign Disclosure Act (found at 10 ILCS 5/9-1, *et seq.*), you are required to report to the Illinois State Board of Elections if you have accepted contributions or made expenditures in excess of $3,000 within a 12 month period or have made independent expenditures in excess of that same amount within a year.

Please remember a contribution is not just cash. For example, you might receive services or loans that go toward that $3,000 amount. In any event, once you reach that level, you have triggered a responsibility to form a committee and file reports with the Illinois State Board of Elections. The committee must have both a chairman and a treasurer, but nothing prohibits the candidate from being either one of those officers.

Even though the municipal elections conclude on April 9, nothing relieves you of your reporting obligations. Most notably, you will have quarterly responsibilities to report income and expenditures from the campaign. Even if you are not actively spending or fund-raising, reporting obligations continue and your failure to do so can lead to monetary penalties.

Rather than have continued reporting obligations, some will cease their committee's operation after an election and then reactivate it before the next one. This is permissible under the law, but you must submit a final report, in which you certify you have a $0.00 balance and have disposed of all assets. The State Board of Elections advises there are three ways of disposing of any remaining funds: 1) return funds to contributors in an amount not to exceed their contribution; 2) transfer funds to another political committee; or 3) donate funds to a charitable organization of the committee's choice.

You should also think about recent or upcoming correspondence with your supporters. For example, if you send thank you notes after the election, you should use the language mandated for communications seeking solicitations, because it is quite possible that someone may send (or you might even be asking for) funds to help cover any remaining debts or loans from the campaign. As a reminder, this language is currently "a copy of our report filed with the State Board of Elections is (or will be) available on the Board's official website (www.elections.il.gov) or for purchase from the State Board of Elections, Springfield, Illinois."

As I said at the beginning of this article, running for office is a very exciting time. However, the possibility of scrutiny for failing to follow disclosure laws both during (and especially after) a campaign can add stress to what should otherwise be a time to relax and re-energize after what I hope was a successful election for you.

If you ever have any questions related to filings with the State Board of Elections or other questions on election law, please do not hesitate to contact our offices.

[1] Please note, however, that those running for federal office would not be governed solely by the Illinois' Election Code or its State Board of Elections. Instead, they would have responsibilities under federal law, such as requirements from the Federal Elections Commission.

John M. Redlingshafer is an associate with Heyl Royster. He concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities. John is the past President of the Illinois Township Attorneys' Association.

An Update on the Illinois Video Gaming Act

By: Stacy Crabtree
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Although the Video Gaming Act, 230 ILCS 40/1, *et seq.,* (the "Act") was signed into law in 2009, Illinois did not see the contemplated video gaming terminals become operational until the last half of 2012. The Peoria Journal Star reported on March 15, 2013, that an estimated $458.3 million was wagered by users through video gaming terminals in Illinois in just the first six months of operations. This revenue comes from an estimated 4,400 terminals, which is a number likely to continue to rise as more establishments file for licenses. This article serves as a summary of the changes which have been the focus of our legislators and the Illinois Gaming Board since legalized video gaming commenced operating, as well as some considerations for municipalities and counties going forward.

As the regulatory body of video gaming in Illinois, the Illinois Gaming Board has already amended the regulations to include section 1800.1510 which addresses non-payment of taxes by terminal operators. This section became effective April 1, 2013, and allows for the Gaming Board to disable video gaming terminals at a specific location if the terminal operator is more than 48 hours past due in remitting taxes. The Gaming Board has also amended the regulations to include new section 1800.590 which provides that licenses are not transferrable and cease upon the death of the licensee. An exception exists for executors or administrators of an estate which can continue the video gaming operations with appropriate Court Order and approval of the Administrator of the Gaming Board, but only for six months. In the event of a change in ownership of a video gaming location, section 1800.590 also requires the Gaming Board be notified prior to the sale or transfer of the video gaming location.

Certain pending legislation looks to give more businesses the opportunity to become licensed owners of video gaming terminals. Currently, section 25 of the Act states "[a] person may not own, maintain, or place a video

gaming terminal unless he has a valid terminal operator's license issued under this Act. A terminal operator may only place video gaming terminals for use in Illinois in licensed establishments, licensed truck stop establishments, licensed fraternal establishments, and licensed veterans establishments." In summary, these licensed establishments generally are liquor establishments including truck stops, fraternal clubs, and veterans' clubs. In January of this year, the Illinois Gaming Board ruled that private social clubs do not fall under the definition of a licensed establishment thereby preventing private social clubs from securing a license to own or maintain terminals in their place of business. In response, HB2311 has been introduced so that social clubs could become licensed under the Act. The bill defines a licensed social club as "a non-profit location, operating in accordance with and under the tax-exempt status of subdivision 501(c)(4), 501(c)(7) or 501(c)(8) of the Internal Revenue Code, where alcoholic liquor is drawn, poured, mixed, or otherwise served for consumption on the premises."

While HB2311 extends the potential locations for video gaming terminals, SB1755 looks to limit the potential locations by limiting the amount of waivers the Illinois Gaming Board can grant for licenses near an inter-track wagering location licensee (as defined under the Illinois Horse Racing Act of 1975). SB1755 is currently pending in the Senate.

The Illinois Gaming Board has also proposed an amendment to the Illinois Administrative Code which would further limit the potential locations for terminals. Currently locations licensed to house video gaming terminals must be at least 150 feet away from "a place of worship under the Religious Corporation Act" according to section 25(h) of the Act. As the Illinois Gaming Board has pointed out, however, many religious entities are not incorporated under the Religious Corporation Act. Consequently, the Board's proposed amendment includes a definition for "place of worship under the Religious Corporation Act" and it is as follows:

> A structure belonging to, or operated by, a church, congregation, or society formed for the purpose of religious worship and eligible for incorporation under the Religious Corporation Act [805 ILCS 110], provided that the structure is used primarily for purposes of religious worship and related activities.

With this amended language, more businesses will be within 150 feet of "place[s] of worship under the Religious Corporation Act" and therefore unable to become a licensed establishment.

Some other proposed changes by the Gaming Board include a requirement that only licensed technicians and licensed terminal handlers be allowed to service, repair, and maintain the terminals and a grant of right for the Gaming Board to reject applications for licenses where an applicant or affiliated person has enrolled in the Self-Exclusion Program. The Self-Exclusion Program allows problem gamblers to put themselves on a list to exclude themselves from access to Illinois casinos. The above mentioned regulatory changes proposed by the Gaming Board are set to go to the Joint Committee on Administrative Rules ("JCAR"), if not already there, for an additional 45-day notice period. If no objections or recommendations from JCAR, the Gaming Board's changes will likely go into effect shortly thereafter.

Aside from legislative and regulatory amendments, in January 2013, the Gaming Board adopted an Inducement Policy in support of section 25(c) of the Act which states "[n]o terminal operator may give anything of value, including but not limited to a loan or financing arrangement, to a licensed establishment, licensed truck stop establishment, licensed fraternal establishment, or a licensed veterans establishment as any incentive or inducement to locate video terminals in that establishment." In the Inducement Policy, the Gaming Board

offers clarification on what is and is not considered an inducement. Notably, items not considered an inducement include the video gaming terminals themselves and related items necessary to make the terminals operable, wireless internet or other costs associated with communicating with the central communication system, software upgrades, chair and/or stools associated with the terminals, onsite signage and marketing materials related to the video gaming, ATM fees from a patrons use of a dual function ATM/ticket payout device, and advertisement expenditures. Any other payment of cash, goods, or services by a terminal operator to a licensed establishment or third party on behalf of a licensed establishment may be considered an inducement and in violation of the Act.

By now, most municipalities and counties have addressed whether or not they will prohibit video gaming in their jurisdictions. Where video gaming is not prohibited, it is important that the relevant local unit of government review its ordinances to ensure consistency with the Act and to address any additional requirements desired. These local units of government should specifically mind section 1800.220 of the regulations which requires licensees, applicants for licensure under the Act, and persons with significant influence and control to report to the Administrator of the Gaming Board any:

a. violation of the Act or regulations or any illegal conduct including the possession, maintenance, facilitation, or use of any illegal gaming device,
b. any fact or event that may affect the conduct of video gaming or the business and financial arrangements incidental to video gaming including any change in persons identified as having significant influence or control,
c. any arrest or charge for criminal offense excluding minor traffic violations, and
d. any adverse action taken or non-renewal relative to a liquor license.

Those local government officials who are in charge of video gaming licenses and enforcement (often the same individuals responsible for the liquor commission) arguably qualify as a person with significant influence and control, and therefore should take caution of their duty to report under section 1800.220.

Regardless of whether your jurisdiction allows for video gaming, take note of section 1800.1110 "State Local Relations." Subsection (b) states that "any municipality, county, or law enforcement agency that takes action relating to the operation or use of a video gaming terminal, whether licensed or unlicensed, shall notify the [Gaming] Board and specify the extent of the action taken and the reasons for the action. . . . Any law enforcement agency that confiscates video gaming terminals or terminal income shall, as soon as practicable under the circumstances, turn over the video gaming terminals and terminal income to the [Gaming] Board unless otherwise ordered by a court of competent jurisdiction."

As Illinois continues to explore this uncharted path of legalized video gaming, new obligations and questions may arise for local units of government and new. We are here to answer any of your questions related to the Act, its regulations, and your local ordinances.

Stacy E. Crabtree is an associate with Heyl Royster. She concentrates her practice on governmental affairs as well as tort litigation and representation of corporate and individual clients in the areas of commercial and contract law.

Electronic Newsletters

In keeping with our firm's Green Initiative – *Practicing Green* – we are attempting to support the green effort. As a part of this endeavor, we are making our newsletter available electronically. If you would like to receive our newsletter via e-mail, please send your request to newsletters@heylroyster.com.

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