

# LEGALINSIGHTS

FOR FIRE PROTECTION DISTRICTS

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

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## Federal Trade Commission "Red Flag Rules" to be implemented August 1, 2009

by Matthew R. Roeschley

Recent regulations enacted by the Federal Trade Commission ("FTC") under the Fair and Accurate Credit Transactions Act ("FACTA") (15 U.S.C. §1681 *et seq.*) will affect some fire departments and fire protection districts. The red flag rules require financial institutions and creditors that maintain covered accounts to develop and implement a program designed to detect, prevent, and mitigate identity theft in new and existing accounts. While these rules were to be effective November 1, 2008, their implementation and enforcement was originally delayed until May 1, 2009. Recently the FTC announced that implementation has been delayed again until August 1, 2009.

Because the term creditor is defined broadly under the red flag rules, the new requirements extend to local governments, as well as private creditors and financial institutions. Under FACTA, a creditor includes "any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit." (15 U.S.C. §1691a(e)) FACTA defines person to include a "government or governmental subdivision or agency." (15 U.S.C. §1691a(f)) Moreover, according to an FTC publication issued in July 2008, "where non-profit and government entities defer payments for goods or ser-

vices, they...are to be considered creditors."

According to the FTC, covered accounts are accounts "used mostly for personal, family, or household purposes...that involve[] multiple payments or transactions." Covered accounts include credit card accounts, mortgage loans, automobile loans, margin accounts, cell phone accounts, utility accounts, checking accounts, and savings accounts, or any account with a foreseeable risk of identity theft, such as small business or sole proprietorship accounts.

The language of FACTA and the guidance provided by the FTC clearly state that when a fire protection district handles its own billing for services where payment is deferred until after the service is rendered it is considered a creditor maintaining a covered account and must comply with the new red flag rules. For example, fire protection districts that maintain accounts and bill for fire alarm monitoring services are subject to the new rules. Moreover, fire protection districts that manage their own billing for ambulance services would be required to comply with the rules. Essentially, if a fire protection district handles its own billing for services where payment is deferred, it must institute a written program to detect, prevent, and mitigate identity theft. For fire protection districts utiliz-

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## Guidelines for releasing protected medical records

by Thomas J. Gilbert

A fire protection district has the responsibility of maintaining and preserving the confidentiality of medical records protected under both Federal and State laws. While HIPAA (Health Insurance Portability and Accountability Act of 1986) is the Federal mandate prescribing the manner and mode of protecting medical records, the Illinois statutes establish the basic confidentiality standards for releasing medical records. The Illinois Compiled Statutes (735 ILCS 5/8-802) "prohibits any physician or surgeon from disclosing any information he or she may have acquired in attending any patient in a professional character necessary to enable him or her professionally to serve the patient except under certain circumstances." Illinois case law holds that an emergency service provider giving medical treatment must adhere to those same standards regarding confidentiality of medical records and information obtained while treating an emergency services patient.

Subject to very limited exceptions, Illinois health care providers are prohibited from disclosing any information acquired while rendering medical treatment to a patient. If a request for records does not have a valid authorization signed by the patient, parent or legal guardian, you must determine if the request falls within the confidentiality law exceptions.

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## Red Flag Rules to be implemented August 1, 2009

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ing third-party billing services, the responsibility for ensuring compliance with the red flag rules rests with the billing company maintaining the account information.

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### ***Fire protection districts that manage their own billing must comply with the red flag rules.***

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According to the FTC, a written program that complies with the red flag rules should allow a creditor to do the following:

1. Identify relevant patterns, practices, and specific forms of activity that are “red flags” signaling possible identity theft, and incorporate those red flags into the program;
2. Detect red flags that have been incorporated into the program;
3. Respond appropriately to any red flags that are detected to prevent and mitigate identity theft; and
4. Ensure the program is updated periodically to reflect changes in risks from identity theft.

Further, the rules contain helpful guidelines and identify specific categories of potential red flags, including alerts, notifications, or warnings from a consumer reporting agency, suspicious documents, and the unusual use of a covered account, among others. (16 C.F.R. §681, Appendix A (II)(c))

If your fire protection district handles its own billing for fire alarm monitoring, ambulance or other services and requires assistance with the development of a written identity theft prevention program that fully complies with the FTC’s new rules, please contact one of our attorneys. ■

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## Protected medical records

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There are currently twelve exceptions to the confidentiality principles recited in the statute; however, the most commonly applied are: (1) any action in which the person whose records are being sought has filed a claim for personal injury which would put his or her medical condition or records at issue; and (2) any case involving a charge of driving under the influence with regard to the records of the person charged. Generally, the two most common requests for information are from parties to a lawsuit involving an individual’s personal injury claim or from a state’s attorney’s office prosecuting a driving under the influence charge.

Even a subpoena requesting medical records does not necessarily exempt the records from the confidentiality privilege. For example, if a state’s attorney, attorney general, or U.S. district attorney subpoenas the medical records of a victim or a defendant in a non-DUI related criminal case, those records are still confidential and should not be released without authorization or consent. Likewise

the medical records subpoenaed in a civil case relating to someone other than the individual claiming damages for personal injuries fall under the medical confidentiality privilege.

Nonetheless, you are by law required to respond to a subpoena, and you may not ignore it. If you believe the requested records are confidential and should not be released, you are required to file an appropriate response stating your objection and the basis for it. If the subpoena is issued out of a court case, you or your legal representative are required to appear in court and object to the disclosure of the information based upon confidentiality. If the judge orders the fire protection district or department to release the protected information, you must release the records and will be absolved of any liability for releasing the records. In a growing number of cases, a copy of a court order authorizing the release of the protected medical information often accompanies the subpoena. Be sure to maintain a copy of the court order in the district files.

Unfortunately, it is often difficult to determine if the request falls within the exemptions to the confidentiality principle. For example, a subpoena usually contains the caption of the case and does not reference any statutory exceptions that may apply. Frequently, you may be able to obtain a copy of the criminal or civil complaint to determine if any confidentiality exemptions pertain to the request for medical records.

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### ***You must respond to a subpoena.***

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A fire protection district or department is obligated by law to protect the confidentiality of medical records. This article merely provides guidelines to the principles of protecting confidential records. In the event you have a question as to the propriety of releasing any confidential information, please contact one of our attorneys. ■

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## Mobile home park water and hydrant adequacy

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by Brian J. O'Connor

On June 1, 2007, Section 9.15 of the Illinois Mobile Home Park Act (210 ILCS 115/9.15), required mobile home parks to maintain their private water supply systems and hydrants for fire suppression in operable condition and good repair. This original provision also required mobile home parks that do not have a private water supply system and hydrants to provide an adequate, reliable water supply for fire mitigation purposes through an agreement with their local fire protection district or department. The Office of the State Fire Marshal ("OSFM") or the mobile home park licensing agency (the Illinois Department of Public Health ("IDPH")), working "in consultation with the municipal fire department or the local fire protection district," were to approve this agreement. Signature on or certification of the agreement by the local fire chief was not required.

### *Amendment and the Imminent Challenges*

Effective January 1, 2009, an amendment to Section 9.15 requires that the agreement and a certification page signed by the local fire chief and the mobile home park owner be submitted with the mobile home park's license application or annual renewal to IDPH. Some licenses are set for renewal as early as May 1, 2009.

Unfortunately, at this time the IDPH and the OSFM have not established standards to measure the adequacy of private water supply systems and hydrants necessary for fire mitigation in a mobile home park. Several informational manuals and pamphlets have been published including the U.S. Fire Administration's October 2008 multi-part pamphlet (Volume I: Water Supply System Concepts and Volume II: Water Supply Evaluation Methods) and the American Water Works Associa-

tion's Manual 31 Fourth Edition (Distribution System Requirements for Fire Protection). A uniform system defining adequacy standards has not been published; however, recent communications indicate the OSFM is preparing proposed rules on this issue.

Section 9.15 provides that if a mobile home park does not have a private water supply system, the adequacy standards contained in an agreement may be established by home rule units of government through an existing or proposed standards ordinance adopted by a fire protection district or municipality with jurisdiction over the mobile home park. However, for non-home rule units of government, or if a fire protection standards ordinance does not exist, the adequacy standards utilized are "the rules adopted by the Office of the State Fire Marshal for fire safety in mobile home parks."

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### *Fire suppression requirements must be determined prior to entering into an agreement.*

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Nevertheless, the mobile home park owner is still obliged to file the agreement and certification with their annual IDPH re-licensing application. Until standards are established by the OSFM or the IDPH, the fire protection district is without an adequacy standard on which to fully assess, approve, and certify the agreement with the IDPH. Certification of the agreement by the fire protection district raises questions of potential liability, especially with the absence of a uniform assessment standard. Additionally, as part of the agreement and certification, the fire protection district argua-

bly must maintain and fund the equipment and resources required to service the mobile home park.

### *Considerations for Adequacy Standards in Agreements*

When entering into an agreement, the fire protection district must first determine the fire suppression requirements of the mobile home park. If the mobile home park has a municipal water system, the Section 9.15 requirements do not apply. However, the fire protection district must still investigate and determine the adequacy of the mobile home park's municipal water system. If the mobile home park has a private water supply system, the agreement and certification requirements of Section 9.15 do not apply, but the question of adequacy standards for the existing private water supply system remains. Conversely, if the mobile home park has no water supply system, the agreement and certification requirements under Section 9.15 would apply.

Pending published guidance by OSFM or IDPH, the fire protection district and mobile home park owner should consult USFA or AWWA publications for guidance prior to drafting an agreement. Additionally, applicable municipal or county building, fire, or safety codes should provide insight regarding uniform standards to include in the agreement.

### *Recourse Considerations*

Entering into a certified agreement with a mobile home park owner will impact a fire protection district's budget. Some equipment is unique to the fire suppression requirements of mobile home parks including the purchase and/or maintenance expense of tanker truck(s), brush truck(s), portable drop ladder(s), and atypically sized fire hoses. In view of this

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## Mobile home parks

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additional financial burden, the fire protection district should consider requesting a financial donation from the mobile home park owner to offset the cost of maintaining fire suppression equipment specific to the mobile home park.

### Conclusion

The rules and standards established by OSFM should address the uniform adequacy standards for mobile home park water supply systems that have private water supply systems or are without a water supply system. Fire protection districts will be challenged to create and maintain adequate staffing and equipment to comply with the agreement. More importantly, the responsibility of protecting the lives and property of the fire protection district's residents continues, even though funding challenges loom on the horizon.

Fire protection districts are urged to share information on current and proposed OSFM adequacy standards in order to reach agreements with owners of mobile home parks located within their boundaries. Districts are encouraged to use caution when entering into and certifying agreements as required by Section 9.15. ■

## Attorney Notes

■ Two OBKC&G, Ltd. attorneys, **Karl Ottosen** and **Shawn Flaherty**, have been selected as instructors for the Advanced Trustee Training Sessions organized pursuant to Public Act 95-0799 under direction of the Office of the State Fire Marshal. **Shawn Flaherty** served on the Illinois Association of Fire Protection District's curriculum committee and helped develop the curriculum that has served as the basis for the twelve-hour ATT educational program. Both the IAFPD and the Northern Illinois Alliance of Fire Protection Districts have offered the ATT program at various locations throughout the state.

■ For the fourth consecutive year, *Illinois Super Lawyers Magazine* has recognized **Karl Ottosen** as a 2009 Illinois Super Lawyer in the areas of Government / Cities / Municipalities. *Law & Politics* conducts a rigorous review, research, and selection process of nominated attorneys. For the second consecutive year *Illinois Super Lawyers* has designated **Shawn Flaherty** as a "Rising Star" in the areas of Government / Cities / Municipalities. This distinction is awarded to the top 2.5% of Illinois attorneys who are under the age of 40 or have been practicing ten years or less.

■ On March 23, 24, and 25, 2009, **Stephen DiNolfo** conducted a three-day training session on EMS report writing at the Combined Area Fire Training Facility through the Lincolnshire-Riverwoods Fire Protection District. Topics covered in this training session included: proper documentation techniques, deposition testimony and general liability issues for EMS providers.

■ In January 2009, **John Kelly** spent a week in New Orleans, Louisiana, building and renovating homes for families still recovering from the devastation of Hurricane Katrina as a volunteer for Camp Restore, a ministry of the Southern District Lutheran Church - Missouri Synod. This was John's third trip to New Orleans as part of Camp Restore's ongoing efforts to assist the victims of Hurricane Katrina.

■ **Karl Ottosen**, for the fourth consecutive year, is listed as a leading lawyer in the areas of Governmental, Municipal, Lobbying & Administrative Law in the January 2009 business edition of *Leading Lawyers Network Magazine*. Karl was selected by his peers in a statewide survey and through a four-phase research process as being among the top attorneys in Illinois. ■

Ottosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, *Legal Insights for Fire Protection Districts*, is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

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