

LEGALINSIGHTS

FOR FIRE PROTECTION DISTRICTS

OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.

Volume 16, No. 3 -- Fall 2009

Freedom of Information Act Reform

by Matthew R. Roeschley

On August 17, 2009, Governor Pat Quinn signed into law Public Act 96-0542, a comprehensive overhaul of the Illinois Freedom of Information Act (5 ILCS 140/1 *et seq.*) (the "Act" or "FOIA"). The new law, which takes effect January 1, 2010, attempts to foster greater transparency by creating a presumption that all records are public, endowing the Office of the Illinois Attorney General with new oversight and enforcement powers, and outlining a clearer process for FOIA requests. However, the legislation also creates additional burdens and responsibilities for fire protection districts. This article will focus on the changes in the law that promise to impact fire protection districts most significantly.

Public Access Counselor

Foremost among the many new amendments to the Act is the creation of a Public Access Counselor ("PAC") position in the Office of the Illinois Attorney General. The PAC is charged with the power to review and determine whether a fire protection district's denial of a FOIA request was proper under the Act. The PAC will also have subpoena power and the authority to issue advisory opinions to public bodies. Moreover, the PAC's decisions in particular disputes will be binding and reviewable under the Illinois Administrative Review Law (735 ILCS 5/3-101 *et seq.*). Previously, the process for review of a dispute regarding a FOIA request included an appeal to the head

of the public body." No such process exists under the new law, as appeals now will be submitted directly to the PAC.

Training / FOIA Officers

Another important change is that all fire protection districts must designate employees, officers, or members to receive required annual training on compliance with the new Act. The trainings will be developed and administered by the PAC.

Moreover, each fire protection district is required to designate one or more official or employee to act as its Freedom of Information officer(s). The Freedom of Information officer(s) will be responsible for accepting requests under the Act, ensuring that the fire protection district responds in a timely manner to such requests, and issuing responses to requests. The Freedom of Information officer(s) will also be responsible for keeping records of all requests.

Exemptions

While the personal privacy exemption still exists under the new law, it is no longer a "per se" exemption. Instead, the Act now exempts a narrow, clearly defined category of "private information" (e.g., social security numbers, driver's license numbers, medical or financial records, personal telephone

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Foreign fire insurance boards - Public Act 96-0505

by David T. Zafiratos

Effective August 14, 2009, Public Act 96-0505 added Section 11i to the Illinois Fire Protection District Act (70 ILCS 705/11i) requiring certain fire protection districts to form foreign fire insurance boards ("FFIBs"). The FFIB's role will be to allocate foreign fire insurance tax revenue "for the maintenance, use, and benefit of the department." Prior to Public Act 96-0505, Illinois law required foreign fire insurance boards only for municipal fire departments. Fire protection districts not required to form FFIBs were permitted to spend these funds through their boards of trustees. (65 ILCS 5/11-10-2)

Since municipalities often have several different departments with varying responsibilities, requiring a FFIB in a municipal fire department helped alleviate any real or perceived misappropriation of foreign fire insurance funds. It was previously believed that a FFIB was unwarranted in fire protection districts, which necessarily appropriate all their funds "for the maintenance, use, and benefit of the department." Now, however, under Section 11i of the Fire Protection District Act, a FFIB will be required in each fire protection district that (1) employs full time firefighters and (2) is subject to a collective bargaining agreement.

The purpose of a FFIB is to spend

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Foreign fire insurance boards

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foreign fire insurance tax revenue that is paid by out-of-state insurance companies selling fire insurance in Illinois. The funds are received by the fire protection district's secretary and annually appropriated to the FFIB. The initial appropriation of funds to new FFIBs likely will not occur until next year, as most fire protection districts have probably appropriated this year's foreign fire insurance funds.

Each FFIB will consist of up to seven members. The fire chief will automatically fill one seat, and up to six members will be elected from among the sworn members of the district. The statute provides that if there are an insufficient number of candidates to fill all six elected positions, the number may be reduced to a minimum of three.

Each FFIB must annually elect a

chairperson and a treasurer, who must be bonded to the district's board of trustees. The treasurer's duties will include receiving funds appropriated by the district board and disbursing the funds as determined by the FFIB. FFIB funds must be part of the fire protection district's annual audit, and the auditor must verify that the funds are spent only for permissible expenditures.

Section 11i requires each FFIB to develop rules regulating the FFIB and the management of its funds. As subsidiary bodies of fire protection districts, FFIBs must comply with all applicable state and federal laws, including the Illinois Open Meetings Act (5 ILCS 120/1, *et seq.*); the Illinois Freedom of Information Act (5 ILCS 140/1, *et seq.*); the Local Records Act (50 ILCS 205/1, *et seq.*); and the State Officials and Employees Ethics Act (5 ILCS 430/1-1, *et seq.*), as

well as any other applicable laws. As part of its rulemaking process, a FFIB should establish rules that include the applicable state and federal laws.

Section 11i also requires the FFIB to develop and maintain a list of appropriate expenditures, which should be provided to the district's board of trustees for approval to ensure that any item purchased by the FFIB will be authorized for use by the district. Although Section 11i allows the FFIB to expend funds, it does not limit a fire district's right to allow or disallow the use of any item purchased by the FFIB. District approval of the expenditure list will help prevent a FFIB from purchasing items the district may disallow later. Communication and cooperation between the district's board of trustees and the FFIB will ensure that FFIB funds are expended for the maintenance, use, and benefit of the department. ■

New training requirements for pension fund trustees

by Brian J. O'Connor

On August 13, 2009, Governor Quinn signed Senate Bill 1974 into law as Public Act 96-0429. This new law changes the provisions of the Article 4 (Downstate Firefighter) Pension Code by creating new professional education requirements and adding to the existing requirements for pension board trustees.

Training for New Trustees

Educational requirements for pension fund trustees appointed or elected after August 13, 2009 are considerable. New Section 1-109.3 requires newly installed pension fund trustees to participate in 32-hours of certified training that must be conducted at a certified college or university training facility accredited and affiliated with the State of Illinois. Certification will include, but is not limited to, the following topics:

- Duties and liabilities of a fiduciary under Article 1 of the Illinois Pension Code
- Adjudication of pension claims
- Basic accounting and actuarial training
- Trustee ethics
- The Illinois Open Meetings Act
- The Illinois Freedom of Information Act

The new law requires that a trustee complete the certification requirements within the first year of his or her election or appointment. Additionally, the District must provide unpaid time for elected active members of the pension fund to complete their certification requirements.

Training for Current Trustees

Trustees who were elected or appointed prior to August 13, 2009, are exempt from the 32-hour certification requirement noted above. However, the new law provides that all pension fund trustees, elected or appointed, are required to participate in a minimum of 16-hours of con-

A trustee must complete certification requirements within the first year of election or appointment.

tinuing trustee education each year thereafter. The new law does not specify topics for continuing education, however, rele-

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New training requirements

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vant topics such as investment strategies and trustee ethics training would be appropriate.

Pending guidance from the Department of Insurance, trustees can receive training credit toward the 16-hour annual total requirement during board meetings from appropriate instructors or presenters such as financial advisors or attorneys. If this method is chosen, details of the training session, including the name of the instructor, topic covered, and length of the session should be noted on the meeting agenda and in the minutes of the meeting. Although not specifically defined in the new law, it appears the new 16-hour trustee annual education requirement runs concurrently with the previously required annual 8-hour ethics training.

Training Deficiency

A trustee who fails to complete the initial certification or the annual continuing education training requirement

has an additional six months to complete the training after which he or she is no longer eligible to serve as a trustee. In the event a trustee is ineligible due to failure to complete the required training, the new law provides that a successor be appointed or elected for the former trustee's unexpired term.

Impact on Firefighter Pension Funds

Pension funds must plan for trustee training including allocating for out-of-district education time for initial certification. In addition, the pension fund is responsible for the cost associated with training required by the new law and must establish policies to reimburse trustees for certification and/or continuing education.

While the new law identifies these training requirements, other matters such as alternate training sources require clarification by the Department of Insurance. Identification of accredited facilities affiliated with a State of Illinois

certified college or university and locally conducted conferences authorized to provide the certification training must be clarified as well as reimbursable training costs and related travel expenses.

Additional Required Training

The new training requirements discussed above are not the only educational requirements applicable to pension fund trustees. Public Act 96-0542 dramatically changes the Freedom of Information Act, amends the Open Meetings Act, and requires the identification of separate officials who will have to complete a certification program created by the Illinois Attorney General's Public Access Counselor. The requirements established under P.A. 96-0542 to the Freedom of Information Act and the Open Meetings Act are not effective until January 1, 2010. However, pension funds and their underlying municipality or fire protection district should begin establishing policies to comply with the new laws prior to January 1, 2010. ■

Attorney Notes

■ **OBKC&G, Ltd.** is pleased to announce that **W. Anthony Andrews** has joined the firm as a partner. Tony will primarily represent business owners, local governments, and EMS providers in tort liability actions and employment law matters from the firm's Naperville office.

■ **Stephen H. DiNolfo's** article entitled "Risky Business" appeared in the July 2009 issue of *Fire Chief Magazine*. Steve's article addressed the laws affecting fire service training and examples of training issues that have led to fire department liability.

■ **Robert Britz** received accreditation from the United States Department of Veterans Affairs. The purpose of the VA's accreditation program is to ensure that claimants for VA benefits receive qualified assistance in preparing and presenting their claims. Only attorneys accredited by the VA may represent claimants.

■ The Illinois Fire Service Administrative Professionals organization invited **Carolyn Welch Clifford** to speak at their Fall Educational Seminar on Wednesday, September 16, 2009 at the Itasca Country Club.

■ **Karl Ottosen** participated in the 25th Annual Chicago-Kent College of Law Illinois Public Sector Labor Relations Law Conference held on Friday, November 13, 2009 in Chicago. Mr. Ottosen was a member of the Police & Firefighter Forum workshop.

■ **Robert Britz** recently became a member of the National Academy of Elder Law Attorneys, Inc. The NAELA is a professional association of attorneys who are dedicated to improving the quality of legal services provided to senior citizens and people with special needs. ■

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numbers, etc.) that is exempt from disclosure, as well as the disclosure of personal information that would result in a "clearly unwarranted invasion of personal privacy."

Additionally, if a fire protection district wishes to assert either the personal privacy exemption or the preliminary draft exemption under the new law as a basis for denying a FOIA request, it must notify the PAC, who will review the claimed exemption to determine its applicability.

Responding to Requests

Another change under the new law is that the time for responding to most FOIA requests has been condensed from 7 to 5 business days. The time of an extension for responding, if granted, is also now 5 additional business days instead of the previous 7 additional days.

Moreover, fire protection districts must now respond to all FOIA requests within the prescribed time frame or waive their right to assert exemptions like the personal privacy or preliminary draft exemption. Also, a fire protection district may no longer charge copying fees if it responds late to a FOIA request.

Copying Charges Now Limited

The new law further provides that copying charges imposed by fire protection districts shall be limited to 15 cents per page for black and white copies, and that the first 50 pages in black and white are free, as long as they are letter- or legal-sized copies. For color copies or for a size other than letter or legal, a fire protection district may not charge more than its actual cost. Actual costs shall not include personnel costs incurred in searching for and reproducing the requested records.

Expanded Definition of "Public Records"

Under the new changes, "public records" now include electronic communications.

Civil Penalties / Attorneys' Fees

The new legislation also provides that, where a person denied access to copy or inspect records files suit for injunctive or declaratory relief, courts may impose civil fines of \$2,500 to \$5,000 upon fire protection districts if it is determined that they have willfully and intentionally failed to comply with the law or

have otherwise acted in bad faith.

In addition, courts are now required to award attorneys' fees to members of the public who are forced to resort to a lawsuit in order to access public records and who prevail in such litigation.

The sweeping changes to the Illinois Freedom of Information Act will most certainly necessitate a substantial overhaul of the Freedom of Information policies maintained by fire protection districts. However, because the new law is not set to take effect until January 1, 2010, fire protection district employees and officials will have a brief window of time to become familiar with the FOIA changes, any additional duties and responsibilities arising under it, and to work with their attorneys to revise policies and procedures accordingly.

While this article addresses many of the most important changes in the law, it is not exhaustive. Consequently, if additional questions should arise about any aspect of the new legislation, do not hesitate to contact your OBKC&G attorney for further guidance. ■

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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