

# HEYL ROYSTER

## GOVERNMENTAL NEWSLETTER

April 2009

Dear Friends:

As I write this, we are near to completing a series of campaigns for national, state and local offices which began well over a year ago. Most recently, our friends and clients in townships, road districts, and villages have faced election and re-election contests. I have little doubt that all are pleased to see these contests come to an end.

However, election day does not bring the challenges to an end. In fact, the challenges of serving on local government continue to increase with each year. One example is the new emphasis which the Illinois Attorney General is placing on enforcement of the Illinois Prevailing Wage Act. The burdens placed upon local governments by this Act are severe, and a solid understanding of this Act is required.

Another example is the application of electronic communications to the Open Meetings Act ("OMA") and the Freedom of Information Act ("FOIA"). This past month, Mike Luke of the Illinois Attorney General's office spoke at our quarterly seminar on the issue. Difficult questions were raised over how and when e-mails, text messaging and instant messaging could be used by government officials. Similarly, clerks were encouraged to consider how to capture and keep records under FOIA and retention rules when those "records" were electronic communication in

the form of e-mails, text and instant messaging, whether originating from public officials, vendors, or private citizens. All officials were counseled to consider when such communications were "records" such that they must be preserved (not deleted) and given to the clerk.

A recent challenge is posed by the Illinois Municipal Retirement Fund ("IMRF"). The collapse of the stock market has resulted in a substantial drop in the value of IMRF assets. IMRF will likely seek substantial supplementary payments from IMRF participants. This poses the risk of a severe monetary burden being placed upon many of our clients already faced with financial problems in this economy.

These and the other challenges faced by local units of government are the topics of our next quarterly seminar. As all of you begin new terms, we thought that it would be helpful to do an overview of those issues facing local governmental officials - FOIA, budgeting, IMRF, prohibited transactions, and likely challenges for the coming term of office. Our next quarterly seminar will take place on Monday, May, 4, 2009, at the Chase Bank Building, Peoria, Illinois with Senator David Koehler, our guest speaker. We hope that you can join us.



**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. He has represented clients in the business, banking, real estate, stock brokerage, accounting, legal, insurance, governmental, and religious fields.



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## THE COURT'S TAKE ON CLOSED SESSIONS UNDER THE OPEN MEETINGS ACT: A CASE STUDY OF *WYMAN V. SCHWEIGHART AND THE CITY OF CHAMPAIGN*

By John Redlingshafer  
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### Introduction

I personally want to thank those of you who attended our latest seminar on the Open Meetings Act ("the Act"). We all can agree that a strong understanding of the Act (by both public officials and their attorneys alike) is critical in the administration of the people's business as well as a way to avoid litigation in the future. The City of Champaign recently faced a situation where its actions were challenged as being improper under the Act. This article takes a look at that case.

### Case Analysis

Ruth Wyman filed a lawsuit in her local court claiming the Champaign City Council violated the Open Meetings Act ("the Act"). Ms. Wyman argued the Council held a regularly-scheduled meeting on November 21, 2006, but its agenda for that meeting did not include anything related to holding a portion of the meeting in closed session. Council members and other individuals proceeded with what Ms. Wyman called a "secret meeting" at the conclusion of the open portion of that November gathering.

Wyman believed the secret meeting violated the Act in numerous ways: 1) non-Council members attended the meeting; 2) the Council did not disclose each member's vote to go into closed session; 3) a specific exemption under the Act was not cited for the reason to hold the closed session; 4) a joint motion was made for closed session despite two reasons given for holding the session ("land acquisition" and "litigation"); and 5) the Council failed to disclose the closed session on an agenda.

The City (on behalf of the Council) argued that no provision of the Act prohibits the attendance of non-Council members to closed session meetings, the voting procedure the Council followed to go into closed session was proper

(voice vote, with the vote of each member publicly disclosed), the reasons for the closed session were given ("land acquisition" and "litigation"), and that nothing was required to be posted on the agenda.

The local court granted the City's motion to have Ms. Wyman's case dismissed (via summary judgment), but she then appealed the decision to the Fourth District of the Illinois Appellate Court in Springfield.

The Appellate Court first reviewed Sections 2 and 2a of the Act, which state the reasons to hold a closed session and the procedure that must be followed to close a meeting, respectively. This review was followed by a separate opinion on each of Ms. Wyman's challenges.

The Court first looked at the "litigation" exemption cited by the Council. The City agreed that the Council member simply stated "litigation" in his motion for a closed session (versus "pending litigation" as noted in the Act) and that prior case law (*Henry v. Anderson*) said this was typically improper. However, the City argued that in this case, the Council showed a clear intent to go into closed session to discuss "pending litigation." The Court agreed. It noted a specific citation to the exemption is helpful but not required, as long as the body adequately identifies the reason for the closed session. The Henry case concluded the exemption on litigation (2(c)(11)) is a "forked path," as a decision to go into closed session is based on whether litigation is already pending (where that is all that needs to be said) versus where it is not pending (when the body then must determine that the litigation is "probable or imminent" AND must record/enter into the minutes that finding). In the Henry case, it was unclear if the litigation there was either filed and pending or probable or imminent. Here, the Court concluded that when the city manager reminded the Council during its meeting that "pending litigation" was to be discussed in a closed session, it took away any question as to what type of litigation would be discussed in that session.

As for the voice vote taken by the Council, the Court noted the city clerk offered testimony that a voice vote (unanimous) was taken during the open meeting and that the vote was recorded. Under the Act, "[t]he vote of each member... shall be publicly disclosed at the time of the vote and shall be recorded." 5 ILCS 120/2a. The Court concluded this statute does not require each member's vote be taken individually and recorded individually, and that as long as the public is informed of each member's vote, the require-

ment of the statute is met.

The Court then quickly dismissed any argument that the Council incorrectly invoked the “property acquisition” exemption under the Act. Ms. Wyman felt that either the 2(c)(5) exemption (acquire property for body’s own use) OR the 2(c)(6) exemption (sell or lease body’s property) could have applied, and the failure to cite which one was at issue was a violation of the Act. The Court determined that the Council disclosing “land acquisition” as a reason for closed session was a clear invocation of the 2(c)(5) exemption.

The Court next addressed Ms. Wyman’s argument that the closed session should have appeared on the agenda. Under Section 2a of the Act, a public body is entitled to decide the need to go into a closed session without any additional notice (assuming the meeting being held where the decision to go into closed session was itself properly noticed). As this regular meeting of the Council was properly noticed, the Court held there was no requirement for the closed session to appear on the agenda.

The Court finally reviewed Ms. Wyman’s argument that nonmembers were not entitled to attend the closed session. Both the trial court and the Appellate Court agreed the Act is silent as to who can attend closed meetings. This, coupled with the fact that the Act also does not specifically prohibit a public body from inviting nonmembers into a closed session, meant no violation of the Act could be found in this case.

When all was said and done, the Appellate Court affirmed the ruling of the trial court, and found no violation of the Act by the City Council.

### Practical Application

The Act has numerous technical requirements that must be followed. In theory, the *Wyman* case allows a public body some leeway in conducting its meetings, but we feel that all of you should err on the side of over-inclusion of the Act’s requirements.

For example, if you do not have a list of the Section 2 exemptions that allow for closed session (which we recommend you have), make sure that you are as specific as possible as to the reasons you wish to go into such a session. The more specifics you provide, the less likely someone can argue that you did not properly advise the public of the reason for having a closed session.

We also would advise you to err on the side of taking

a roll call vote (versus a voice vote), as there could then be no doubt as to which members were in favor (or opposed) to a closed session.

From a legal standpoint, we also want you to err on the side of caution because, again, this decision was made by the Fourth District of the Illinois Appellate Court. Many of you that receive this newsletter are situated in the boundaries of the Third District of the Illinois Appellate Court. While the *Wyman* decision is binding on those of you in the Fourth District, the argument exists that the *Wyman* decision is simply guidance and not binding (on those outside the District) unless and until either the Third District and/or the Illinois Supreme Court weighs in on similar issues.

In actuality, following every possible formality helps you try to avoid any future litigation (whether in or out of the Fourth District), because we cannot predict how another Court (Third District, different justices of the Fourth District, or the Supreme Court) may decide a case on similar facts in the future.

### Reference Section

Here are the relevant portions of Section 2 of the Act (including specific exemptions for going into closed session):

Sec. 2. Open meetings.

(a) Openness required. All meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a.

(b) Construction of exceptions. The exceptions contained in subsection (c) are in derogation of the requirement that public bodies meet in the open, and therefore, the exceptions are to be strictly construed, extending only to subjects clearly within their scope. The exceptions authorize but do not require the holding of a closed meeting to discuss a subject included within an enumerated exception.

(c) Exceptions. A public body may hold closed meetings to consider the following subjects:

(1) The appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity.

(2) Collective negotiating matters between the public body and its employees or their representatives, or delibera-

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tions concerning salary schedules for one or more classes of employees.

(3) The selection of a person to fill a public office, as defined in this Act, including a vacancy in a public office, when the public body is given power to appoint under law or ordinance, or the discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance.

(4) Evidence or testimony presented in open hearing, or in closed hearing where specifically authorized by law, to a quasi-adjudicative body, as defined in this Act, provided that the body prepares and makes available for public inspection a written decision setting forth its determinative reasoning.

(5) The purchase or lease of real property for the use of the public body, including meetings held for the purpose of discussing whether a particular parcel should be acquired.

(6) The setting of a price for sale or lease of property owned by the public body.

(7) The sale or purchase of securities, investments, or investment contracts.

(8) Security procedures and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably potential danger to the safety of employees, students, staff, the public, or public property.

(9) Student disciplinary cases.

(10) The placement of individual students in special education programs and other matters relating to individual students.

(11) Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.

(12) The establishment of reserves or settlement of claims as provided in the Local Governmental and Governmental Employees Tort Immunity Act, if otherwise the disposition of a claim or potential claim might be prejudiced, or the review or discussion of claims, loss or risk management information, records, data, advice or communications from or with respect to any insurer of the public body or any intergovernmental risk management association or self insurance pool of which the public body is a member.

(13) Conciliation of complaints of discrimination in the sale or rental of housing, when closed meetings are

authorized by the law or ordinance prescribing fair housing practices and creating a commission or administrative agency for their enforcement.

(14) Informant sources, the hiring or assignment of undercover personnel or equipment, or ongoing, prior or future criminal investigations, when discussed by a public body with criminal investigatory responsibilities.

(15) Professional ethics or performance when considered by an advisory body appointed to advise a licensing or regulatory agency on matters germane to the advisory body's field of competence.

(16) Self evaluation, practices and procedures or professional ethics, when meeting with a representative of a statewide association of which the public body is a member.

(17) The recruitment, credentialing, discipline or formal peer review of physicians or other health care professionals for a hospital, or other institution providing medical care, that is operated by the public body.

(18) Deliberations for decisions of the Prisoner Review Board.

(19) Review or discussion of applications received under the Experimental Organ Transplantation Procedures Act.

(20) The classification and discussion of matters classified as confidential or continued confidential by the State Government Suggestion Award Board.

(21) Discussion of minutes of meetings lawfully closed under this Act, whether for purposes of approval by the body of the minutes or semi-annual review of the minutes as mandated by Section 2.06.

(22) Deliberations for decisions of the State Emergency Medical Services Disciplinary Review Board.

(23) The operation by a municipality of a municipal utility or the operation of a municipal power agency or municipal natural gas agency when the discussion involves (i) contracts relating to the purchase, sale, or delivery of electricity or natural gas or (ii) the results or conclusions of load forecast studies.

(24) Meetings of a residential health care facility resident sexual assault and death review team or the Executive Council under the Abuse Prevention Review Team Act.

Here is Section 2a of the Act in its entirety:

Sec. 2a. A public body may hold a meeting closed to the public, or close a portion of a meeting to the public, upon a majority vote of a quorum present, taken at a meeting open

to the public for which notice has been given as required by this Act. A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, provided each meeting in such series involves the same particular matters and is scheduled to be held within no more than 3 months of the vote. The vote of each member on the question of holding a meeting closed to the public and a citation to the specific exception contained in Section 2 of this Act which authorizes the closing of the meeting to the public shall be publicly disclosed at the time of the vote and shall be recorded and entered into the minutes of the meeting. Nothing in this Section or this Act shall be construed to require that any meeting be closed to the public.

At any open meeting of a public body for which proper notice under this Act has been given, the body may, without additional notice under Section 2.02, hold a closed meeting in accordance with this Act. Only topics specified in the vote to close under this Section may be considered during the closed meeting.

The Act is available (in its entirety) on the website of the Illinois General Assembly, at [www.ilga.gov](http://www.ilga.gov). Please note these statutes are accurate as of the time of publication, but always subject to amendment by the General Assembly or invalidation by a Court.

We welcome any further questions you may have regarding the Act.

**John M. Redlingshafer** is an associate with Heyl, Royster, Voelker & Allen. He concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities. Currently, John is Vice President of the Illinois Township Attorneys' Association, and serves as the Editor of the ITAA's newsletter, the *Talk of the Township*.



## OPEN BURNING

By Andy Keyt

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People, for whatever reason, just cannot resist the urge to burn stuff. It really doesn't matter what it is, but if people want to rid their yard of old debris, they burn it. Favorite items to burn are leaves, grass, hillsides, tree branches, stumps, tires, old oil cans, garbage, plastic bottles, etc. This is particularly prevalent in rural areas and small towns. As soon as the temperature starts warming, you start to see smoke coming from every other yard in town, and particularly in those rural areas. This continues through the summer, and then fall comes and every resident is compelled to burn any leaf that fell in their yard. They'll even go over to their neighbor's yard, pick up their leaves and burn them just to experience the apparent glee that comes with burning something. So, what can you do about it?

First, we need to know what is being burned. Illinois' Environmental Protection Act, and portions of its related administrative code, requires a permit for the burning of nearly all materials but agricultural waste and landscape waste. Agricultural waste includes materials generated on a farm or ranch by crops, livestock production or crop residues (excepted are garbage and dead livestock). Landscape waste includes trees, tree trimmings, branches, stumps, brush, weeds, leaves, grass, shrubbery and yard trimmings. Any burnings beyond agricultural and landscape waste will normally require a permit from the Illinois Environmental Protection Agency (IEPA). If you have someone burning items beyond landscape and agricultural waste, we suggest you first call the IEPA and allow them to investigate. If it poses an immediate danger to life or property, the Fire Department can extinguish the fire. Otherwise, there is no problem in allowing the IEPA to investigate and handle accordingly. Your local State's Attorney may also be interested if the problem is a persistent one. Asking the IEPA or your local State's Attorney's office to handle egregious problems relieves the stress from your back, puts the issues squarely into the hands of those experienced in handling these matters, and usually results in swifter action and stiffer penalties. Remember, these resources should only be called upon in egregious scenarios, and not for the person who occasionally burns leaves in the yard.

The real question for local governments is how to

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effectively regulate the burning of landscape waste. To answer this question, we need to determine who is doing the regulating. We need to know if you are a Fire District or Municipality. This determines the extent to which you can regulate burning.

## Fire Protection Districts

Let's start with the Fire Protection District. The answer is a fairly simple one since the only regulation a Fire District can do in relation to open burning is to require notification prior to open burning taking place. A Fire Protection District cannot require a permit to be issued prior to allowing someone to perform an open burn. Arguably, they cannot require a permit fee either. In addition, a Fire Protection District cannot unreasonably interfere with permitted and legal open burning. Someone setting an open burn on agricultural land of 50 acres or more, can only be asked to voluntarily comply with an ordinance requiring notification prior to the burn. 70 ILCS 705/8.20.

What can a Fire Protection District do? They can extinguish a fire that presents a clear, present, and unreasonable danger to persons or adjacent property. Of course, determining what constitutes an "unreasonable risk" or danger is open to interpretation. Factors in determining whether a fire presents an unreasonable danger include: the height of the flames, wind, creation of hazardous fumes, an unattended fire, types of combustibles used and the weather. 70 ILCS 705/ 8.20.

## Municipalities

Municipalities have broader authority in the regulation of open burning. 65 ILCS 5/11-19.1-11. However, the hurdle here is what is being burned. Municipalities may regulate air emissions, including smoke. 65 ILCS 5/11-19.1-11. The key for the municipality are well crafted ordinances (fee and permit requirements) and whether there will be penalties (fines) for violation. A local government can limit the hours, burning under certain weather conditions, the types of materials to be burned and whether open burning is allowed for certain types of materials (though it cannot allow for the burning of material that is prohibited by the IEPA). Most municipalities prefer to allow limited burning of landscape waste, so the key becomes a well crafted ordinance, permit system and enforcement structure.

There is currently an open question as to whether pre-

scribed burns can be entirely prohibited by a municipality. Prescribed burns are the "planned application of fire to naturally occurring" vegetation. 525 ILCS 37/5. This is different from burning landscape waste. Prescribed burns are commonly used to aid in vegetative re-growth and to help prevent wildfires. These are the types of fires you see when a hillside is being burned to allow for new growth. The Prescribed Burning Act declares it the public policy of Illinois to promote these types of controlled fires and declares them to be in the public interest, and "a property right of the owner." So, whether prescribed burning can be banned by a municipality is an unresolved question.

One thing to keep in mind is that the Fire Department always has the right to extinguish a fire that threatens life or property.

In the event you suspect someone is burning banned materials (such as toxic materials) without a permit or there is a habitual offender who burns materials without the appropriate IEPA permit, you can contact the Peoria, Illinois, field office of the IEPA at the address and phone number listed below:

IEPA (Bureau of Air, Water)  
5415 North University  
Peoria, IL 61614  
309-693-5463

NOTE: The Peoria field office also has a Bureau of Land Department which is housed at a separate facility.

If you have an emergency situation which involves an environmental hazard, contact your local fire department and call the IEPA at 217-782-2113, or 217-524-0636.

## QUESTION AND ANSWER SECTION

By Andy Keyt

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### Question: You've received a Freedom of Information Act (FOIA) request. What do you do?

I'll answer that question shortly, but first here are some general considerations to keep in mind. First, do not panic and immediately comply with the request with records that should not be produced. We see this on occasion, and the end

result is difficult to cure and can lead to unwanted publicity, bad feelings, and worst of all open you up to potential liability. While you certainly do not want to panic at the sight of a FOIA request, you do want to take them seriously and handle them professionally and efficiently.

The Freedom of Information Act is designed to provide “full and complete information” to citizens about the actions of government. It is designed to provide citizens access to records while protecting individual privacy and sensitive material. So, while there is a vast array of documents that require disclosure, a good many local government records will also be protected from disclosure. The FOIA is the subject of numerous dissertations and to fully explore all potential requests and materials exempt from disclosure is impossible in the space available for this article. The purpose of this article to give you a framework for the procedure for responding to and dealing with FOIA requests.

Below are the steps you should follow whenever you receive a FOIA request.

**Step 1:** Reply to the requestor of the records with a short and concise letter indicating their request is being considered. Do not indicate that you will supply them with the requested records in this initial letter. We can supply you with a standard letter that can be easily tailored to fit the situation.

**Step 2:** Contact your legal counsel. Keep in mind these are time sensitive requests and require a timely response in order to comply with the requirements of FOIA.

**Step 3:** Immediately, pull those materials that you believe will be responsive to the request. Remember that many types of records are exempt from disclosure, such as: those that would constitute a clear and unwarranted invasion of privacy (revelation of social security numbers of employees, for example), information revealing the identity of persons who file complaints with law enforcement, library circulation and order records identifying library users with specific materials. Know that this is by no means a comprehensive list; in fact, it is a sliver of the number of exemptions written into the FOIA.

**Step 4:** Determine what materials will be produced (we suggest the use of legal counsel in making these determinations) and how the materials will be produced.

**Step 5:** Document what was produced and how it was produced in a letter to the recipient. Make sure to keep a copy of the records produced, along with the cover letter

to the recipient.

**Step 6:** Keep track of the subject matter of the FOIA requests received, the date they were received and whether any records were produced. If you receive a large number of requests over the year, you should consider assigning each request a tracking number. This information is easily maintained on an Excel spreadsheet.

**Andrew J. Keyt** is an associate with the firm of Heyl, Royster, Voelker & Allen. He concentrates his practice on both governmental affairs and in the defense of asbestos and toxic tort claims arising from environmental and occupational exposures, including products and premises liability claims. Andy represents and assists in the representation of public entities as their counsel. As counsel for local public entities, Andy attends all monthly meetings, board meetings and provides counsel on all legal issues.



## NEWSLETTER AVAILABLE VIA E-MAIL

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## MAY “NUTS & BOLTS OF GOVERNMENT” SEMINAR

Heyl Royster’s next quarterly seminar will take place on **Monday, May, 4, 2009**.

**Senator David Koehler** will be our guest speaker at the Chase Bank Building in Peoria, Illinois. We hope that you can join us.

Those interested in attending should contact Sheri Kyle at (309) 677-9548 or [skyle@heyloyster.com](mailto:skyle@heyloyster.com) to reserve a spot.

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## FOR MORE INFORMATION

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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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