

LEGALINSIGHTS

FOR FIRE PROTECTION DISTRICTS

OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

Volume 18, No. 2 -- Spring 2011

Cameras on the Fireground

by Timothy J. Hoppa

A cursory search of YouTube reveals what many of us already knew: helmet cameras are in widespread use by members of the fire service around the country. Numerous videos show firefighters and paramedics engaged in heroic and dangerous activities. In one example from Birmingham, Alabama, firefighters are first seen carefully and methodically organizing their gear. Then the camera pans as the firefighter turns his head to reveal a home engulfed in flames. Dramatically, flames jut out from window after window. The video documents the destruction for quite some time, ending with a survey of the charred home. The video title contains the name of the fire department that responded to the fire, and specific individuals are easily recognizable in the firefighting scenes. Other videos posted on YouTube depict the rescue of persons trapped in blazing homes or the extraction of persons trapped after car accidents.

None of these videos were posted by the departments. Each video was presumably shot by a firefighter with a helmet camera. The firefighter, not the department, is posting these videos for the world to see. Because helmet cameras are becoming less expensive to purchase and are marketed directly toward firefighters, it is time for fire and EMS departments to be aware of the potential liability risks to the department when videos recorded by helmet cameras are posted on the internet.

Certainly, the videos of a successful

rescue or of a large building ablaze are captivating and offer the viewer a fascinating insight into an extremely dangerous and dramatic profession. Moreover, the filming of firefighting and rescue videos by authorized personnel can be useful tools in training exercises. Trainees are provided with constant feedback and the ability to stop the video at any critical moment to analyze tactics or response techniques. Used for training purposes, the helmet camera can be an invaluable tool. On actual calls, however, the situation is quite the opposite.

The use of cameras on actual calls presents serious legal risks to the department. Videos that could possibly identify EMS patients or arson victims run afoul of federal and state laws that protect the privacy of the medical patients and the crime victims. Since most of the videos posted on the internet clearly identify the departments responding to the call, most viewers would presume they have been sanctioned by the department. More importantly, when cameras depict anything other than textbook accurate firefighting, the video may become a key exhibit to be used against a fire department in liability suits. Because virtually no call is ever textbook perfect, videos recorded by helmet cameras can provide compelling evidence in a suit against the department. Further, deletion of the video is not enough; in fact, the deletion of the video may subject

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Bankruptcy and the fire department creditor

by Brian J. O'Connor

Unfortunately, with the current financial climate, bankruptcy is occurring with greater frequency. Regrettably, fire protection districts, as service providers to members of the community, are not immune to receiving notices of bankruptcy when an individual or business is no longer able to meet its financial responsibilities. Fire protection districts should consider the following points when responding to a notice of bankruptcy:

First, one must understand that bankruptcy is governed by federal law not state law. Bankruptcy cases are filed and heard in federal bankruptcy courts - not in county circuit courts. There are three bankruptcy court districts with seven different locations in Illinois. Fire protection district trustees and administrators should be aware that any court action, such as hearings and document filings, will occur at one of these seven locations. Occasionally, the court will require the presence of a district representative or legal counsel at a hearing or other court appearance.

Second, the district must determine the amount owed and confirm that it is included as a debt in the notice of bankruptcy. Recovery of the debt should be evaluated in view of the district's anticipated time commitment and expenses, including reimbursable

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expenses, court fees, legal fees, and staff time. The costs tied to the task of gathering documentation of the debt may make recovery of the debt prohibitive.

Third, the district should be aware that there may not be sufficient funds available to pay the debt. A debtor generally files bankruptcy because his or her total financial liabilities exceed total assets. Federal bankruptcy laws provide a sequence to prioritize payments from remaining available assets. Court costs and past due taxes enjoy a high priority, followed by secured creditors such as the bank that holds a mortgage on the debtor's home or business properties. Usually, a debt to the district is not a secured debt, and would not be considered for payment unless sufficient assets remain after paying court costs, taxes, and secured creditors. Oftentimes the assets are insufficient to pay the first two cate-

gories of creditors, leaving nothing or very little for unsecured creditors, such as a fire district. In that case, the bankruptcy court "discharges the debt," and the fire district, as well as other unsecured creditors, receives no payment.

The district staff and board of trustees should analyze each bankruptcy debt on a case-by-case, cost-benefit basis. It is possible that responding to a bankruptcy filing will cost the district more than the amount due. The following are two typical bankruptcy scenarios:

In scenario one, an individual owes the district \$500.00 for BLS medical treatment rendered. The district bills the individual and follows-up with two additional statements when the original bill is not paid. Then the district receives notice of the individual's bankruptcy filing from the bankruptcy court. The in-

dividual or business is now referred to as a bankruptcy debtor. After reviewing the bankruptcy notice, the district may seek assistance from legal counsel. The district's attorney reviews the notice and documents to confirm that the district is listed as a bankruptcy creditor and the bankruptcy petition lists the correct amount due to the district. Up to this point, the district and staff have followed a generally standard procedure. Now, the district should conduct a cost analysis to determine if the expenses will exceed the recovery amount.

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Reminder: IPA Policy Adoption Deadline Looms

by Shawn P. Flaherty

All local governmental entities, including fire protection districts, are legally required to adopt an identity protection policy by **June 1, 2011** to comply with the requirements imposed by the Illinois Identity Protection Act, 5 ILCS 179/35.

**An Identity Protection Policy
must be adopted by
June 1, 2011.**

The policy must meet certain standards set forth in Section 35 of the Act

including provisions for training on maintaining confidentiality in record-keeping and providing a statement of the purpose or purposes for which the entity is collecting and utilizing social security numbers in its records. While there is no criminal or other penalty imposed upon governmental units that fail to comply, active disregard of the policy requirement could impose undue liability on the public entity that neglects or refuses to adopt the mandatory IPA policy.

Accordingly, we recommend that all public bodies that have not already adopted an appropriate IPA policy take action to do so as soon as possible. ■

Attorney Notes

Ottosen Britz attorneys will participate in the Illinois Association of Fire Protection Districts Annual Conference, June 9-12, 2011 as follows:

Bob Britz - "Having It Your Way: Board Meetings & the Open Meetings Act Today." **Karl Ottosen** - "Different Strokes for Different Folks: A Labor & Management Dialogue." **John Kelly** - moderator for this program. **Steve DiNolfo** - "Social Media, Smartphones, PDAs & the Fire Protection District." **Tom Gilbert** - "Fire Protection District Consolidation: Is It a Merger, Acquisition, or Takeover?" **Joe Miller & Tony Andrews** - "The Judge Said What?! Annual Legal Update." **Shawn Flaherty & David Zafiratos** - "Current Issues Facing Illinois Firefighter Pension Funds." **Shawn Flaherty** - "Advanced Trustee Training Part 3 Personnel & Human Resources." **Carolyn Clifford, Shawn Flaherty & Ericka Thomas** - "Disability Determinations: A Live Demonstration." **Carolyn Clifford** - "Administering the Smaller Pension Fund" and "Due Diligence for Pension Fund Trustees." **Brian O'Connor** - moderator "Assessing Pension Fund Liabilities & Insuring Proper Funding." ■

Employers must affirmatively protect employee genetic information

by Maureen Anichini Lemon

Under new regulations effective January 10, 2011, employers that require post-offer or fitness-for-duty physical and mental examinations must expressly request that an individual's family medical history or any other genetic information be *excluded* from the exam. The Genetic Information Nondiscrimination Act ("GINA") is designed to prevent the misuse of certain genetic information for employment purposes and employment discrimination based on genetic information. The United States Equal Employment Opportunity Commission ("EEOC") promulgated the new regulations which impact employers' post-offer or fitness-for-duty examinations.

Genetic information, as defined by the EEOC, includes information about (1) an individual's genetic tests; (2) genetic tests of an individual's family; (3) the manifestation of a disease or disorder in an individual's family member (family medical history); (4) an individual's request for, or receipt of, genetic services; (5) an individual's participation in a clinical research program or study that includes genetic services by the individual or a family member; and (6) the genetic information of a fetus that is carried by an individual / pregnant woman who is a family member of an employee and the genetic information of an embryo that is legally held by the individual or family member by the use of assisted reproductive technology.

The EEOC defines "requests for medical information" broadly; i.e., searching the internet in a manner that would allow an employer to uncover genetic information, listening to third party conversations, searching an individual's current health status in a way that may result in the discovery of ge-

netic information. In general, no genetic information may be used by a health care provider or employer to determine an individual's ability to perform a job. The EEOC recommends that the following GINA notice paragraph be added to all forms submitted by employers to health care providers who conduct the post-offer or fitness-for-duty examinations:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic Information" as defined by GINA includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that the individual or family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assisted reproductive services.

An employer who affirmatively uses this notice to inform health care providers that they should not violate GINA's requirements falls into a 'safe harbor' that will protect the employer from a claim of violating GINA. Yet,

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Assuming the district's board of trustees decides to respond to the bankruptcy filing, minimally, the district would complete and file with the court a Proof of Claim form. Copies of relevant documents should be included as exhibits to the Proof of Claim form. Completing the one-page form requires a degree of legal sophistication, experience with bankruptcy proceedings, and knowledge of federal bankruptcy provisions and laws.

Based on the complexity of the claim, a quick analysis would reveal costs as follows: One hour to assess the original notice of filing, two hours to complete the Proof of Claim form including exhibits, and legal fees for attorney review of the completed claim form. In this scenario, it is highly likely that expenses will exceed any recovered amount.

In scenario two, a failing local business which had a fire alarm monitoring contract with the district files for bankruptcy. The business was billed \$1,500 per month for monitoring services but has missed several payments, and is now \$4,500 in arrears. The monitoring contract provides that the district is entitled to recover interest, court costs, and attorneys' fees if the contract needs to be enforced. A cursory review of the facts in this case suggests a very different response than in the previous example. Based on the projected recovery amount and the fact that a contract exists providing for payment of interest, court costs, and attorneys' fee, it most probably would be worthwhile for the district to pursue filing a claim against the bankruptcy debtor.

Remember, if your district receives a notice of bankruptcy, you should confirm the obligation, and then evaluate if the related expenses will exceed the amount to be recovered. You may wish to contact your legal counsel to advise you in determining whether participating in the bankruptcy proceeding is a financially astute decision. ■

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the fire department to claims of spoliation of evidence.

To protect against the perils of videos recorded with helmet cameras, fire departments have several options. The best option, which is exercised by many fire departments across the country, is to completely ban the use of any type of camera on any type of emergency call. Without cameras on the scene, the risk of compromising the privacy rights of patients is minimized. Similarly, the risk of broadcasting firefighting and rescue blunders on the internet for the world to see and attorneys to utilize is eliminated. Fire departments should implement specific policies to prohibit the use of helmet cameras, cell phone cameras, and other cameras on calls.

Additionally, fire departments should strongly consider adopting policies which prohibit its members from using the department name and logos in personal videos and photographs. Such a policy minimizes the risk that videos or photographs will be considered an official message of the department. Enacting a policy against the videotaping and airing of emergency calls will help to prevent your fire district from facing embarrassment and potential financial liability for the call that goes wrong. ■

Employee genetic information

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in addition to this notice, employers must take all reasonable measures within their control to correct or prevent a GINA violation if one does occur. We believe it prudent to communicate with your pre-employment physical medical provider to determine whether the provider is aware of and is prepared to be compliant with GINA. The federal regulations provide that employers should take reasonable measures to no longer use a health care provider that requests or requires genetic information.

Several specific and narrow exceptions exist to the general rule that employers may not acquire an employee's genetic information for any reason. Exceptions to the new regulations include an employer's lawful request for medical information under federal and state laws such as the ADA and FMLA. For example, family medical history needs to be released in order to certify the serious health condition of an employee's family member under the FMLA. Forms provided by employers to a health care provider should state that the health care provider may request family medical history to the extent it is necessary to certify the serious health condition of an employee's family member, and that such limited request does not violate GINA. Another exception to the general rule against the acquisition of genetic

information is the inadvertent acquisition of such information; i.e., when an employer overhears an employee openly discussing his genetic information or family medical history with other employees around the water cooler. Even in these lawful circumstances, employers are obliged to keep confidential any genetic information they receive.

Employers should take the following steps to make sure they are in compliance with GINA and the new regulations. First, they should add the notice/safe harbor paragraph contained in this article to all forms that request medical information and adjust the language as needed to reflect any applicable exceptions to GINA. Second, the employer should notify health care providers, especially those that perform post-offer and fitness-for-duty examinations, of the GINA regulations and require that providers not collect genetic information from their employees. Lastly, employers should educate supervising employees and Human Resource personnel about GINA regulations to ensure that their internal policies and personnel comply with the new regulations.

If you have any questions regarding your obligations under GINA, please contact us at (630) 682-0085. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, 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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