

# LEGALINSIGHTS

FOR LOCAL GOVERNMENTS

OTTOSSEN BRITZ KELLY COOPER & GILBERT, LTD.

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## Pending changes to the Open Meetings Act

by Thomas J. Gilbert & Katherine Haskins Becker

The Open Meetings Act (5 ILCS 120) (the "Act") states that "public bodies exist to aid in the conduct of the people's business and that people have the right to be informed as to the conduct of their business." The Act provides that public business be conducted in public view as an attempt to balance the competitive interests of governing official's discussions with the public's right to be informed.

Additionally, the Act states, "In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." In order to further this purpose, the Act governs the conduct of public meetings. As a result, public bodies must adhere to specific requirements. The Act provides that all meetings, whether in person or by video or audio conference, telephone call, electronic means of any sort where a majority of a quorum of a public body (or three members for a five-member body) meets to discuss or act on business in any way, shall be open to the public except when the General Assembly determines the meeting closed.

House Bill 5483, which amends Section 2.06 of the Act and addresses both closed and open meeting minutes, became law, and will be effective January 1, 2011. (5 ILCS 120/2.06)

The amendments include language which requires public bodies to: (1) approve minutes of open meetings within 30 days after a meeting or at its second subsequent regularly scheduled meeting, whichever is later; (2) make minutes available for public inspection 10 days after approval of the minutes; and (3) provide members of the public an opportunity to address public officials under rules established and recorded by the public body. Rules for public comment can include reasonable time limitations.

Not changed by the new law are the requirements to keep minutes and record closed sessions, and the limitation on destroying closed session recordings. Specifically, Section 2.06(a) states, "all public bodies shall keep written minutes of all their meetings whether open or closed." Minutes must include, at a minimum:

- the date, time and place of the meeting;
- the members of the public body recorded as either present or absent and whether the members were physically present or present by means of video or audio conference; and
- a summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken.

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## Introducing the Illinois Identity Protection Act

by Shawn P. Flaherty

Effective July 1, 2010, virtually all governmental entities must take affirmative measures to restrict public access to social security numbers (SSNs) and limit the manners in which such entities may utilize social security numbers. Starting July 1, 2010, the Illinois Identity Protection Act provides that, no State or local government agency may: (1) publicly post or display in any manner an individual's SSN; (2) print a SSN on any card required for an individual to access products or services provided by the governmental body; (3) require any individual to transmit his or her SSN over the internet unless the connection is secure or the SSN is encrypted; or (4) print any SSN on any materials mailed, e-mailed or otherwise delivered to the individual, unless required by State or federal law. Notably, even SSN disclosures required by State or federal law must not be printed on a postcard or other mailer where the SSN is visible on an unopened envelope or mailer. The Act provides that any person who intentionally violates the listed prohibitions of the Act is guilty of a Class B misdemeanor.

State and local governmental agencies must redact SSNs from any information provided to the general public for inspection or copying. Governmental employees must ensure that SSNs cannot be obtained from public docu-

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## Are public display racks forums for free speech?

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by Ericka J. Thomas

**I**t is not uncommon to walk into a library, museum or other public building and see display racks overflowing with brochures and informational pamphlets. A private organization's ability to access public display racks to convey a message was recently decided in *Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources*, 584 F.3d 719 (7<sup>th</sup> Cir. 2009). The case raised the question of whether regulation of these display racks infringes on the First Amendment right to freedom of speech.

*Illinois Dunesland* centered on Illinois Beach State Park, which runs along

Lake Michigan in northeastern Illinois and is operated and controlled by the Illinois Department of Natural Resources ("IDNR"). The Illinois Dunesland Preservation Society, a non-profit corporation, helped create the park and continues to support it. The lawsuit arose when the IDNR refused to display, in various display racks around the park, a pamphlet prepared by the Preservation Society entitled "Tips for Avoiding Asbestos Contamination at Illinois Beach State Park." The pamphlet contains information about microscopic asbestos fibers that are intermingled in the beach sand and includes methods to minimize the effects of exposure after a day at the beach. Although

the beach sand does contain asbestos fibers, studies indicate that the levels are not sufficient to affect human health. The Preservation Society alleged that the IDNR's refusal to display its pamphlet violated its First Amendment right to free speech.

In considering the Preservation Society's claims, the Seventh Circuit Court of Appeals initially considered the type of "forum" that the display racks presented. The court noted that there are three categories of "forum:" (1) a traditional public forum is a "...street or a park or some other type of public property that...has been used for expressive activity, such as

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This section also requires that verbatim audio or video recordings be made of all closed meetings. Section 2.06(c) states that verbatim recordings of closed meetings may only be destroyed after 18 months if the public body approves the destruction and appropriate written minutes have been approved per the requirements of Section 2.06(a).

However, verbatim recordings of open meetings may be destroyed at any time, provided the written meeting minutes comply with the requirements of Section 2.06(a), and no Freedom of Information Act request has been received.

Effective January 1, 2010 sweeping changes were made to the Illinois Freedom of Information Act ("FOIA") creating a presumption that all records are public and establishing the position of Public Access Counselor ("PAC") in the Office of the Illinois Attorney General. Recently a PAC issued an opinion that may affect a public body's decision to tape record their open meeting sessions.

In this instance, a request was made for the tape of an open meeting. The public body sought to block release of the meeting tape under Section 7(1)(f) of the FOIA, which provides that preliminary drafts do not need to be released. The PAC denied the public body's re-

quest and ruled the tape must be released. The PAC did note that it was the practice of the public body to destroy recordings of open meetings, and it could still destroy the tapes. However, while the tape still exists, it is releasable under the FOIA. Unless the PAC's decision is appealed and overturned, we must presume that all tape recordings of all open meetings will be subject to release.

It is important to note that legislators have sponsored many other bills intended to amend the Open Meetings Act in some way. Continuing to stay apprised of changes in the law is not only prudent, but necessary.

Should you have any questions or require detailed information concerning the pending changes to the Open Meetings Act, please contact one of our municipal law attorneys at 630-682-0085. ■

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## Illinois Identity Protection Act

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ments. In a somewhat unique change, all responses to FOIA requests that contain SSNs must be redacted. Further, the Act prohibits governmental agencies from encoding or embedding a SSN in any magnetic strip, bar code, chip or other similar computer technology in lieu of removing the SSN as required under this Act. The Illinois General Assembly has allowed limited exceptions to the general rule of nondisclosure because they are apparently deemed necessary for the execution of public administration.

State and local agencies and their

employees may not collect, use or disclose any SSNs unless all of the following apply: (1) they are required to do so under any State or federal law, rules, or regulations, or the SSN is otherwise necessary for the performance of the agency's duties and responsibilities; (2) the need and purpose for the SSN is documented before collection of the SSN; and (3) the SSN collected is relevant to the documented need and purpose. Even if collection is permitted, State and local agencies and their employees may not require an individual to use his or her SSN to access the internet

or a website. Moreover, state and local agencies and their employees may not use a SSN for any purpose other than for the purpose for which it was collected.

### Listed Exceptions to Prohibitions

A number of exceptions to the Act are provided in the statute. The most notable exceptions are:

1. Entities may disclose SSNs to other governmental agencies or to its own

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## Forums for free speech

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marches or leafleting;" (2) a designated public forum is a facility that the government has created to be a site for expressive activity by private persons, such as a public theater; and (3) a "nonpublic forum," which consists of government-owned facilities that could be used for private expressive activities but are not primarily intended for such use, like the Justice Department's auditorium (i.e. the government can limit private expression in such a facility to expression that furthers the purpose for which the facility was created). Ultimately, the court determined that regardless of which "forum" the display racks presented, the facility's management had to decide what type of material to display in view of the park's limited display rack capacity. Therefore, the key issue confronting the court was not the type of forum, but whether the selection of pamphlets was being used as a weapon to stifle free speech.

The court noted that materials selected for the park display racks were designed to attract people to the park and other Illinois tourist facilities and

services. The Preservation Society's pamphlet, however, was very alarmist and contradicted the IDNR's message. The court observed that if the IDNR displayed the Preservation Society's pamphlet, it might legitimize the Society's asbestos exposure claims and undermine the park's claims of a healthy environment. The IDNR also believed the display racks would soon overflow with pamphlets from environmental activists containing opinions contrary to its message.

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**If public display racks had to exhibit all opinions presented, an agency's own message would be impossible to convey.**

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The court commented that if every display rack on public property or every governmental website had to exhibit all opinions presented to it, it would be impossible to effectively convey the agency's own message and would defeat the very

purpose of the display racks or website. Ultimately, the court concluded: (1) display racks were not the only avenue available to the Preservation Society to reach park patrons, and (2) park authorities had not imposed unreasonable barriers to using the park's open public space to convey an outside organization's ideas and opinions.

If a public agency has display racks on its premises, it must carefully consider a variety of issues in determining which pamphlets should be displayed. The public agency must initially determine what message and purpose it is attempting to convey through the materials placed in the display racks. After making that determination, the public agency must then consider whether the display racks present the only method for an outside organization to reach its patrons. If an outside organization is conveying a message contrary to the public agency's message and has other means by which to convey the message, the public agency can decline to display the outside organization's materials. It is advisable to contact one of our attorneys if you are in doubt. ■

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agents, employees, contractors and subcontractors if the disclosure is necessary in order for the entity to perform its duties and responsibilities. Note there is a special requirement that governmental contractors and subcontractors must first provide the governmental agency with a copy of their policy that includes a provision to protect the SSNs provided to them to perform their duties.

2. SSNs may be disclosed as part of documents requested pursuant to a valid court order, warrant or subpoena.
3. SSNs may be collected, used and disclosed to ensure the safety of State and local governmental employees, as well as prisoners, wards of the State and persons working in or visiting State or local governmental facilities.
4. State and local agencies may collect, use and disclose SSNs for internal verification or administrative purposes. This would appear to include any payroll and tax purposes.
5. SSNs may be collected and used to investigate or prevent fraud, to conduct background checks, to collect debts, to obtain credit reports from

consumer reporting agencies, to locate missing persons or lost relatives, or to locate persons who are due governmental benefits such as pension benefits.

## Identity Protection Policies

All local government agencies must adopt identity protection policies to comply with the Act. The policy must:

1. Specifically designate the Identity Protection Act;
2. Require all employees with access to SSNs in the course of their work duties to receive training on protecting the confidentiality of SSNs. Training must include instructions on properly handling information containing SSNs from the time of collection through the time of destruction;
3. Direct that only employees who are required to use or handle information or documents containing SSNs have access to such information or documents;
4. Require that SSNs requested from an individual be provided in a format that allows SSNs to be easily redacted if required to be released as part of a public records request; and

5. Require the governmental agency to set forth a statement of the purpose or purposes for which the agency is collecting and using the SSNs when collecting SSNs from individuals.

After adopting the policy, the agency must advise its employees of the existence of the policy. A copy of the policy must be made available to employees and the general public on request. Full implementation of the training aspects of the policy must occur no later than 12 months after approval of the identity protection policy.

Local governmental agencies must be aware of the restrictions and mandates imposed by the Identity Protection Act. Boards should timely adopt appropriate identity protection policies and provide the necessary training to administrative personnel. Most importantly, employees should have limited, if any, access to SSNs. The public should have virtually no access to SSNs unless an exception clearly applies. We trust this article is instructive in detailing the highlights of the new Act. Should you have any questions or require detailed information concerning this new legislation, please contact your municipal attorney. ■

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**OTTOSEN BRITZ KELLY COOPER & GILBERT, LTD.**

1804 North Naper Boulevard, Suite 350

Naperville, Illinois 60563

(630) 682-0085 [www.obkcg.com](http://www.obkcg.com) FAX (630) 682-0788

Donald L. Potts, Editor [dpotts@obkcg.com](mailto:dpotts@obkcg.com)

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