



Don't Rely on "Confidentiality" of Closed Meeting Discussions

By Kevin B. Gordon

The *Open Meetings Act* specifically allows a public body to refuse to disclose a verbatim record of a closed meeting in any administrative or judicial proceeding, other than one to enforce the Act. However, the U.S. Court of Appeals for the 7th Circuit (IL) recently relied on such a verbatim record in reversing a trial court's dismissal of a lawsuit.

Although the appellate court in *Kodish v. Oakbrook Terrace Fire Protection District* never specifically addressed the *Open Meetings Act* privilege against disclosure of closed meeting transcripts, it considered such evidence based upon the trial court's previous ruling that the privilege did not apply in suits asserting federal claims. Kodish, a firefighter, resigned under pressure his employment with the Oakbrook Terrace Fire Protection District. He later filed a lawsuit in federal court claiming that he resigned only in the face of imminent termination, the Fire Protection District deprived him of his employment without due process of law, and it wrongfully terminated him based on his pro-union activities. During the course of the litigation, Kodish's attorneys sought disclosure of the closed meeting verbatim record at which the Fire Protection Board discussed Kodish's employment. The Fire Protection Board objected based on the privilege against disclosure contained in the *Open Meetings Act*.

The trial court ruled that federal law, not State law, governs matters of asserted privilege when the primary claim in the lawsuit is based on federal law. It further observed that the federal law does not recognize a privilege against disclosure of closed meeting communications. The court went on to rule that the interest in maintaining the confidentiality of closed meeting communications does not outweigh the need for disclosure of such relevant evidence. In this case the court found that the discussions evidenced by the meeting

transcripts were relevant to the Fire Protection Board's motivation in terminating Kodish's employment, and that disclosure was necessary in a claim based on a law meant to protect citizens from unconstitutional state action.

After reviewing the transcripts, the appellate court found that the closed meeting discussions were subject to differing interpretations, either supporting Kodish's claims or the Fire Protection District's defenses. As a result, it was not proper for the trial court to dismiss the case, and the case was returned to the trial court for a jury trial.

Of significance, the trial court did uphold the assertion of the attorney-client communication privilege, and redacted portions of the closed meeting transcripts. In doing so, the court observed that the mere presence of an attorney at the meeting did not cloak the entire meeting with the privilege. Rather only those portions of the transcript containing communications between the board and the board's attorney for purposes of seeking or providing legal advice were redacted. The appellate court did not disturb this ruling.

The moral of the story is that administrators and board members should not assume that everything they say during a closed meeting is protected from disclosure. While the *Open Meetings Act* privilege is still likely to prevail in state court, federal courts will not recognize the privilege, especially when a claim depends on the board's motivation for its actions. Board members are best advised to make sure that their discussions and deliberations are conducted in a professional and respectful manner. Additionally, board members should make it clear for the verbatim record when they are communicating with the board's attorney for the purpose of receiving legal advice.

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Required and Optional In-service Training Programs

By Trisha A. Olson

ILLINOIS INSERVICE REQUIREMENTS

Despite the growing number of inservices that are required or recommended for school district personnel, the ISBE does not maintain a comprehensive list of such inservices. For additional information on inservice requirements and recommendations for Illinois school district personnel, please visit www.edlawyer.com/news.php. ISBE developed certain guidelines for assisting school districts in planning inservice programs. That guidance is available at www.isbe.state.il.us and incorporates general reminders for school districts, including:

- School districts should be aware that they must keep accurate, written and dated records of all trainings provided.
- School districts must plan inservices so that teachers and other staff members play a prominent role in planning and developing inservices.
- The inservice programming must include activities which relate to the fulfillment of the program objectives.

ISBE guidance suggests that, in addition to required and recommended

inservices, school districts provide trainings for school district personnel on sexual harassment and discrimination to ensure that personnel understand the school district policy and how to prevent sexual harassment and discrimination in the workplace.

RECENT CHANGES TO INSERVICE TRAINING REQUIREMENTS

Governor Pat Quinn recently signed into law Public Act 96-0431, which amends certain inservice requirements for school personnel under the School Code. Section 10-22.39 of the School Code requires school districts to provide inservice training programs regarding the warning signs of suicidal behavior in adolescents and teens.

The recent amendment clarifies that school guidance counselors, teachers, social workers and other school personnel who work with pupils in grades seven through 12 be trained regarding various intervention and referral techniques for students who are identified as presenting warning signs of suicidal behavior. The amendment also clarifies that the inservice need not be presented as a separate professional development activity, and may be incorporated into existing training programs offered by the School District.

Multi-Year Superintendent Contracts - Goals and Indicators of Student Performance

By A. Lynn Himes and Darcee C. Williams

Under the School Code, employment contracts between boards of education and superintendents (and other administrators) may range in duration from one to five years. Under one year contracts, superintendents gain and retain their tenure rights and are not subject to performance-based contract extension requirements. Under multi-year contracts, which are the focus of this article, superintendents will not advance to tenure and, if they already have tenure, they waive all tenure rights for the duration of the multi-year contract. Moreover, pursuant to Section 23.8 of the School Code, multi-year contracts must be performance based and linked to student performance and academic achievement. Accordingly, multi-year contracts must contain performance goals and indicators.

Because Section 23.8 of the School Code does not identify standards for setting performance goals or measuring their achievement, boards have wide discretion in developing performance-based, multi-year contracts for superintendents and other administrators. In the recent case of *Board of Education of Proviso Township High School District 209 v. Jackson*, the Appellate Court interpreted the language of section 23.8 of the School Code to be clear and unambiguous. The formulation of goals, indicators of academic improvement, and the manner in which these objectives are to be measured, are explicitly and exclusively reserved to the local school board's determination.

In *Jackson*, the board nullified an amendment to the superintendent's contract and terminated the superintendent, reasoning that: the amendment was void and unenforceable because it did not contain adequate performance and academic achievement goals as required by

Section 23.8 of the School Code (although the board had developed those goals and indicators which were attached to the amendment). The board also determined that the superintendent failed to meet the performance goals during the previous contract term (despite a previous finding by the board that the performance goals had been met). The appellate court concluded that the board properly enumerated goals that measured the superintendent's performance in conformance with section 23.8 of the School Code and that the goals set by the board were satisfied by the superintendent. Therefore, the superintendent was entitled to compensation under the amendment.

It is best practice for a local school board to develop and implement goals and indicators prior to entering into employment contracts with superintendents or other administrators. If this cannot be accomplished before entering into an initial employment contract, the contract should provide that the goals and indicators will be developed by some future date and will be appended to the contract. Although the statute states only that the board should develop the goals and indicators, in practice most contracts state that the goals and indicators will be developed cooperatively by the board and superintendent. In that instance, the board and superintendent should be diligent in developing and implementing the goals and indicators as soon as possible after entering into the employment contract so that the board can measure the superintendent's performance in conformance with those goals and indicators.

If you have any questions regarding superintendent or administrator contracts, please do not hesitate to call Scariano, Himes and Petrarca.

The Identity Protection Act: Securing Social Security Numbers

By James A. Petrungaro



Sweeping Illinois legislation took effect this summer that will undoubtedly change the way your school district handles records containing social security numbers (SSN). The Identity Protection Act, 5 ILCS 179/1 et seq., limits school district (and many other public bodies') usage of social security numbers and requires the development and implementation of a policy that protects the confidentiality of social security numbers.

PROHIBITED ACTIVITIES

Beginning July 1, public bodies may not:

- (1) Publicly post or display a SSN;
- (2) Print a SSN on identification cards;
- (3) Require the transmission of a SSN over the Internet, unless the connection is secure or the SSN is encrypted;
- (4) Print a SSN on any mailings, unless required by law and secured in an envelope;
- (5) Collect, use or disclose a SSN unless required by law, court order or subpoena, unless: (a) the collection, usage or disclosure of the SSN is necessary for the performance of the public body's duties and responsibilities; (b) the necessity and purpose for the SSN is documented before the collection of the SSN; (c) the SSN is relevant to the documented necessity; and, (d) the SSN is used only for the documented purpose;
- (6) Require the disclosure of a SSN to access a website;
- (7) Embed or encode a SSN in or on a card, bar code, chip, magnetic strip, RFID technology or other technology in place of removing the SSN as required by the Act.

These prohibitions, however, do not prohibit the collection, use or disclosure of a SSN for internal verification or administrative purposes.

IMPACT ON PUBLIC DOCUMENT REQUESTS

The new Act requires that public bodies redact SSNs from documents before allowing public inspection or copying pursuant to FOIA and other public access laws/policies.

REQUIRED POLICY

By June 1, 2011, public bodies must approve an identity-protection policy that: identifies the existence of the Act; requires all employees having access to SSNs in the course of performing their duties to be trained on the confidentiality of SSNs, including the proper handling of information containing SSNs; prohibits non-necessary employees from accessing SSNs maintained by the public body; requires that SSNs requested from an individual be provided in a manner that makes the SSN easily redacted if subject to a public records request; and, requires that a statement of the purposes for which the agency is collecting and using the SSN be given to any individual whose SSN is collected.

The policy must be filed with ISBE (or other governing board) within 30 days after its approval by the board of education. Each public body must advise its employees of the policy and make a copy of the policy available to each employee and the public upon request. Once approved, any amendments to the policy must be filed with ISBE and communicated to all employees. Finally, each public body must implement the components of its identity-protection policy within 12 months of its approval.

We understand that the use of SSNs in the school setting is widespread – from employee applications to student records. Scariano, Himes and Petrarca, Chtd. is happy to assist your district with crafting and implementing an identity-protection policy to meet your districts needs and ensure compliance with this new law.

JOIN US

at our hospitality suite during the IASB/IASA/IASBO
2010 Joint Annual Conference on Friday November 19, 2010
from 5:00 p.m. to 7:00 p.m. at the MidAmerica Club
located in the AON Center,
200 East Randolph, 80th Floor, Chicago, Illinois



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Scariano, Himes and Petrarca, Chtd. October 2010 Newsletter

Managing Editor: Kevin B. Gordon
 Senior Editor: Darcee C. Williams
 Editors: James A. Petrungaro
 Trisha A. Olson
 Newsletter Coordinator: Ellen McNulty

We welcome your suggestions and comments for article topics

Please contact us by phone at (312) 565-3100, ext. 272 or 247,
 or e-mail kgordon@edlawyer.com or dwilliams@edlawyer.com

CONTACT US

CHICAGO OFFICE

Two Prudential Plaza
 180 North Stetson, Suite 3100
 Chicago, Illinois 60601-6702
 Phone 312.565.3100 Fax 312.565.0000
www.edlawyer.com

CHICAGO HEIGHTS OFFICE

1450 Aberdeen
 Chicago Heights, Illinois 60411
 Phone 708.755.1900 Fax 708.755.0000
www.edlawyer.com

Attorney	Email Address	Ext.
Bargnes, Jessica M.	jbargnes@edlawyer.com	254
Ciastko, Paul J.	pciastko@edlawyer.com	248
Dauksas, Adam	adauksas@edlawyer.com	237
Fester, John E.	jfester@edlawyer.com	239
Gordon, Kevin B.	kgordon@edlawyer.com	272
Himes, A. Lynn	ahimes@edlawyer.com	233
Lalich, George S.	glalich@edlawyer.com	225
Litra, Jacqueline M.	jlitra@edlawyer.com	249
Mullins, Alan M.	amullins@edlawyer.com	236
Murphy, John J.	jmurphy@edlawyer.com	228
Olson, Trisha	tolson@edlawyer.com	232
Petrarca, Justino D.	jpetrarca@edlawyer.com	234
Petretti, Paulette A.	ppetretti@edlawyer.com	245
Petrungaro, James A.	jpetrungaro@edlawyer.com	257
Scariano, Anthony G.	ascariano@edlawyer.com	231
Williams, Darcee C.	dwilliams@edlawyer.com	247

Attorney	Email Address	Ext.
Payne, Kimberly	kpayne@edlawyer.com	224
Scariano, Anthony G.	ascariano@edlawyer.com	231

WAUKEGAN OFFICE

209 West Madison
 Waukegan, Illinois 60085
 Phone 847.662.5800
 Fax 847.662.6813

Attorney	Email Address
Field, Daniel P.	dpfield1@gmail.com

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