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MISSION

*It is the purpose of the **Illinois Local Government Lawyers Association** to coordinate and promote professional education, information exchange and interaction among local government attorneys in Illinois in order to ensure the highest level of professional representation to units of local government.*

BARBARA A. ADAMS, ESQ., EDITOR

Illinois Local Government Lawyers Association
Center for Governmental Studies
Northern Illinois University
DeKalb, IL 60115
Phone: (815) 753-5333
Email: ilgl@niu.edu www.ilgl.us

Affiliated with the Illinois State Bar Association

DIRECTOR'S COLUMN

Report on the ILGL Annual Conference

By: James A. Rhodes, ILGL Director
Klein, Thorpe & Jenkins, Ltd.

On February 19, 2024, the Association held its 31st Annual Conference and for the first time in 31 years I was unable to attend the conference due to another first. I tested positive for Covid for the first time, despite the fact that I am fully vaccinated and boostered. While I patted myself on the back and proclaimed my self-diagnosed immunity to the Covid bullet, the Fates stepped in and put me in my place. Each year my Director's Column has provided highlights from the ILGL Conference. My thanks to those colleagues who provided their notes from the conference so that I could continue my tradition.

Jill O'Brien of Laner Muchin and Benjamin Gehrt of Clark, Baird and Smith discussed current trends in labor negotiations and the Paid Leave for Workers Act. Ben reviewed the latest wage arbitration awards. The major influence in arbitration awards has shifted to inflation, and arbitrators have given determinative weight to the CPI in wage awards. Municipalities should be aware of this trend. Jill analyzed the effects of the Paid Leave for All Workers Act on local governments, and discussed amendments to pre-existing policies, leave accrual, usage increments and notice limitations.

Matthew Rose of Donahue and Rose led a panel of Brooke Lenneman of Elrod Friedman, Sergio Acosta of Akerman, LLP, and Jonas Harger of the Illinois Attorney General's office in a discussion regarding internal investigations and various scenarios raising important issues to consider in connection with investigations. Discussed were general considerations when preparing for an internal investigation, state and federal statutes to be reviewed prior to conducting an internal investigation, and recommendations for organizing, conducting, and reporting the results of the investigation.

Mike Bersani and David Mathues of Hervas, Condon & Bersani examined the latest federal civil rights and Illinois tort immunity decisions. U.S. Supreme Court decisions included *Counterman v. Colorado* examining when 1st Amendment speech ends and stalking begins, finding that in order to establish stalking, the prosecution must show that the speaker was at least reckless towards the threatening

nature of the statement made; and *Tyler v Hennepin County* which held that the county's keeping the surplus on a home sold to satisfy a tax debt constituted a Fifth Amendment taking. Also examined were a number of 7th Circuit decisions regarding 4th and 14th Amendment claims.

Keri-Lyn Krafthefer of Ancel Glink moderated a round table discussion with Matt Rose of Donahue and Rose, and Paul Stephanides, Village Attorney of Oak Park, on accommodation of migrant populations. Their discussion included the TRUST Act, local sanctuary legislation, Texas Operation Lone Star and the transportation of migrants to sanctuary cities. Also discussed were Chicago and other local governments' attempts to regulate unscheduled buses through ordinances banning unscheduled bus arrivals, requiring licenses or permits, or establishing migrant plans. Also discussed were the legal implications of each regulation.

Crossing the Divide to Accommodate Transgender Populations was the subject of ILGL's professional responsibility presentation. Keri-Lyn Krafthefer discussed state and local laws establishing transgender rights and compliance with transgender protections, legal issues that transgender individual encounter, and workplace issued to consider and address.

Thank you to all of the speakers who provided their valuable time and efforts, to the ILGL Professional Development Committee who put a great deal of effort into the creation of the conference program and to all of our members who attended the conference.

During the Association's annual meeting, ILGL presented the following annual awards:

The *Robert J. Mangler Distinguished Service Award* is the Association's highest award and recognizes distinguished service to local government law over a legal career. This year's award was presented to the Patricia (Pat) Johnson Lord for her contributions to local government and her distinguished legal career.

The *ILGL Litigation Award* recognizes those attorneys who have established a favorable legal precedent for local governments during the past year. This year's Litigation Award went to Michael J. Smoron and Jennifer Gibson for their success in *Village of Kirkland v. Kirkland Properties Holdings Company LLC 1*, 2023 IL 128612.

The *Listserver of the Year Award* was presented to Julie Tappendorf. Julie is a frequent contributor to the Listserv and this award recognizes the quality of her contributions and continued support of the Listserv.

In 2017, the Illinois Local Government Lawyers Association established its Franklin W. Klein Law Student Writing Competition. This writing competition honors the memory of the founding member of the law firm of Klein, Thorpe & Jenkins, Ltd. This year's winners were:

1st Place: *A Better Way to Watch: Streaming Giants Bypass Local Municipal Cable Franchise Fees*, by Michael Lathwell, University of Illinois Law School.

2nd Place: *Existential Blue: Police and Municipal Duty, Liability and Recommendations for Suicide Prevention*, by Bobby Mannis and Morgan Knight, University of Illinois Law School.

Each of these articles will be published in future editions of the ILGL *Journal*.

If you were unable to attend this year's conference, all written materials are available for purchase through the Association by contacting Alli Hoebing at (815) 753-5333. Next year's conference will be held on February 17, 2025. Please mark your calendars. We look forward to seeing you next year.

Finally, please assist us in growing our organization by speaking to your colleagues about the benefits of being a member of the Illinois Local Government Lawyers Association.

jarhodes@ktjlaw.com

GENERAL COUNSEL'S COLUMN

Muldrow v. City of St. Louis: SCOTUS Rules on Title VII Standard

By: Barbara A. Adams
Donahue & Rose, P.C.

In the November/December 2023 issue of the *Journal*, this column reported on activities before the United States Supreme Court in connection with the appeal from the opinion of the Eighth Circuit in *Muldrow v. City of St. Louis*, Case No. 22-193, 30 F.4th 680 (8th Cir. 2022), *on appeal* No. 22-193 (U.S. Supreme Court). In early December, the Supreme Court heard oral arguments in this case. The Local Government Legal Center ("LGLC") filed an *amicus* brief in support of the City of St. Louis in this Title VII case involving a female police sergeant who alleged she was the subject of gender discrimination as well as

retaliation for reporting acts of gender discrimination under Title VII.

The Supreme Court released its opinion on April 17, 2024, vacating the decision of the Eighth Circuit and remanding the case for further proceedings. In addition to the majority opinion, three separate concurring opinions were filed by Justices Thomas, Alito and Kavanaugh.

The Facts: The Supreme Court opinion contains this abbreviated version of the facts; the Eighth Circuit opinion contains more detail.

Sergeant Jatonya Muldrow was a patrol detective in the St. Louis Police Department's Intelligence Division from 2009 through 2017, working at various times on public corruption and human trafficking cases, serving as head of the Gun Crimes Intelligence Unit and overseeing the Gang Unit. She maintained a traditional work hours schedule (8 a.m. – 4 p.m. or 9 a.m. – 5 p.m.). While in the Intelligence Division, she was deputized by the Federal Bureau of Investigation ("FBI") as a Task Force Officer for its Human Trafficking Unit. During that time, she had the same privileges as an FBI agent, including access to field offices/databases, wearing plain clothes, access to an unmarked FBI vehicle, authority to conduct human-trafficking investigations outside of St. Louis city limits, and the opportunity to earn up to $17,500 in overtime pay. Slip op. at 1-2.

In 2017, the commander of the Intelligence Division was replaced and the new commander request that she be transferred out of the unit; she was replaced by a male officer. Sgt. Muldrow was transferred to a uniformed position in the Fifth District. Her duties there included responsibility for administrative upkeep and supervision of officers on patrol, reviewing reports, approving arrests, and performed some patrol duties herself. *Id.* at 2-3.

The Litigation: Sgt. Muldrow filed suit under Title VII to challenge her transfer, alleging the transfer was made because of her sex. The District Court granted summary judgment for the City of St. Louis, concluding that Muldrow had not shown the necessary "significant" change in working conditions that resulted in a "material employment disadvantage." *Id. at 3-4.*

The Eighth Circuit affirmed, concluding that Muldrow had to show a "material employment disadvantage" but had not done so. Instead, the Eighth Circuit concluded that she had experienced "only minor changes in working conditions." The Supreme Court granted *certiorari* to "resolve a Circuit split over whether an employee challenging a transfer under Title VII must meet a heightened threshold of harm–be it dubbed significant, serious or something similar." *Id.* at 4-5.

The Supreme Court concluded that to demonstrate a Title VII claim, the plaintiff subjected to a job transfer need not show a harm that was "significant." To require a significant harm would read words into the language of Title VII that are not there. *Id.* at 6. Instead, the Court concluded that "Muldrow need show only some injury respecting her employment terms or conditions" and vacated the Eighth Circuit's decision with an order to conduct further proceedings consistent with that standard. *Id.* at 9.

Three opinions were issued concurring in the Court's judgment, but for different reasons. Justice Thomas concluded that the opinion of the Court read into the Eighth Circuit's opinion a heightened standard of proof that really wasn't in that opinion. *Id.* at 2-3. Justice Alito opined that he did not understand the distinction the Court's opinion made between a harm or injury and one that is significant or substantial, concluding that the lower courts will continue to do what they have done for years, perhaps being a bit more "mindful" about their choice of language. *Id.* at 1-2. Justice Kavanaugh described the opinion of the Court as establishing a new "some harm" requirement that must be shown, and noted that the Court's opinion will not lead to any significant change in how these cases are handled or evaluated. *Id.* at 2-3.

It remains to be seen what the Eighth Circuit will do with this case when it is returned there. The Court's opinion notes that other issues in the case remain, such as whether certain arguments had been forfeited by the plaintiff or whether there was sufficient evidence proving some of her allegations. *Id.* at 11.

* * *

This issue contains lots of information that you can use, including analyses of the U.S. Supreme Court's decision in the social media case of *Lindke v. Freed*, an Illinois Appellate opinion involving discretionary immunity from tort claims, a primer on common environmental law issues involving contaminated sites, concerns to consider in the use of automatic license plate readers, updates on recent ILGL awards and activities, and more!

Have you written something on a current topic or case that could be of interest to ILGL members? The *Journal* is an option for publishing your original works. Feel free to contact me at

badams@drlawpc.com or (312) 541-1077 or Alli Hoebing at ilgl@niu.edu or (815) 753-5333.

SOMETHING TO THINK ABOUT

Automatic License Plate Readers ("ALPR") and the Concerns They Raise

By: Jeffrey Stein, ILGL Director
Assistant Village Manager/Corporation Counsel, Village of Wilmette

The use of cameras to catch traffic scofflaws is not a new concept in this state. Many municipalities installed red-light cameras to curtail traffic scofflaws and promote safety. This use of technology has been offered up again and again as a way to make streets safer. Such a purpose is a noble venture worthy of funding and care. However, one just needs to pick up a newspaper or google red light cameras and you will read of all the problems and alleged corruption associated with the purchasing and use of red-light cameras. Corruption charges against both municipal officials and private entrepreneurs, neighboring municipalities suing each other over the use of these cameras, and improper following of procedures when prosecuting violators, have all been headlines in local Chicago newspapers.

Because of the past issues with cameras being used for purposes of safety and enforcement, especially used in relation to vehicles, there may be an initial reluctance to utilize automatic license plate readers ("ALPRs"), with privacy concerns being at the top of the list. First, this article is not intended to advocate for your community to install and utilize ALPRs. However, should a decision be made to do so, like it is being done in many other communities, hopefully this article will help you to be able to address some of the common-themes of concerns about ALPR use as well as provide some practice tips when doing so.

What Are Automatic License Plate Readers And What Do They Do?

It is without a doubt that when ALPRs came along, there were some concerns about the use of another camera-based tool to help curtail crime and promote safety. However, ALPRs provide a significantly different service, one that does not necessarily generate revenue like red-light cameras do, to assist police at all levels in actually curtailing crime and promoting safety.

What is an ALPR and what does it do? An ALPR is a camera that captures computer readable images of license plates and a small portion of the vehicle to which the plate is affixed. These cameras can be affixed to street or light poles in the right-of-way or other property as well as used in police vehicles. The data collected by cameras that are either stationary or mobile, can contain the date, time, and location of the license plate that is in the image. That license plate is then read by a computer and the data is then cross-referenced to a statewide (and local[1]) database that contains the license plates of vehicles that are associated with certain crimes as well as missing or endangered person alerts.

One purpose of collecting and using this data is so the police can get real time information and automatic alerts of a vehicle associated with certain crimes or endangered persons, immediately upon the vehicle passing by an ALPR. As the databases are also searchable, another purpose is to allow users of the ALPR systems to conduct investigative searches into the comings and goings of specific vehicles (assuming that the license plate is still affixed to that vehicle) for at least 30 days. Such information can be used to determine the whereabouts of a specific vehicle not only immediately, but by searching the database as well. This tool has been shown to be effective to determine the whereabouts of individuals accused of criminal activity that is either happening in real time or after the fact.

As important as it is to know what an ALPR is supposed to do, it is equally important to know what it is not supposed to do. It is not a camera and program that uses facial recognition, nor does it capture images of anything or anyone inside a vehicle. The camera (think of scanning a document) only scans a license plate and converts the style and letters on the plate to a readable and searchable computer file. While ALPRs are limited in their scope and ability to obtain images beyond a license plate, there are some obvious privacy concerns that will be discussed further below.

Concerns to Be Addressed When Utilizing ALPRs

What are the concerns with ALPRs? ALPRs are not red-light cameras and will not generate revenue the same way other traffic cameras do for many municipalities. ALPRs do not have the capability, by design, to capture vehicles going through red lights, as

[1] Many communities have engaged the same third-party vendor that not only installs the ALPRs but also stores the data obtained from the cameras and can allow other police departments to access the local data.

the image does not show the traffic light, only the very narrow image of the license plate and the back (or front) of the vehicle as it passed by the camera. While the red-light camera and the video taken is the sole evidence of a violation, ALPRs are essentially an investigative tool that may result in one component of evidence needed for a much more complex and serious crime.

However, that does not mean there are no concerns at all. What is prevalent is the potential abuse of privacy of individuals because their information is captured and then stored in the database. A concern was that those with the ability to access the data could use it for their own personal gain or to keep tabs on specific people. The scenario that came up was a person with access to the data keeping tabs on their significant other.

Public Act 103-0540 (limitations on use and FOIA)

Before we discuss that specific privacy concern and how to address it, there have been some recent statutes enacted that directly address ALPR and the data obtained for its use. This new law helped resolve some of the major concerns of the collection and use of the data when ALPRs were initially implemented. Public Act 103-0540 ("Act") was adopted on August 11, 2023 which amended the Freedom of Information Act ("FOIA") and the Illinois Vehicle Code.

Section 2-130 of the Vehicle Code added definitions for ALPRs, ALPR information, ALPR systems, ALPR user and law enforcement agency (*see* 625 ILCS 5/2-130). The Act also placed limitations on the sale or sharing of the data and information gathered from ALPRs. Significantly, all ALPR information is deemed confidential pursuant to the Act. In addition to the amendments to the Vehicle Code, FOIA was amended to capture this confidentiality provision so that the information gathered or records created from the use of ALPRs is *per se* exempt (*see* 5 ILCS 140/7(1)(d-7)).

The Act provides for limited prohibitions on the actual use of the ALPR information. The Act prohibits ALPR information from being used to investigate or enforce a law regarding reproductive health care services or from being used regarding detention or investigation of a person's immigration status. A municipality may not share any data obtained with another state unless that state also agrees to prohibit the use of the data for the two reasons mentioned above. There is no other provision in the Act that dictates or limits for what purposes the ALPR information may be used, except for the two limited aforementioned restrictions. If your community is interested in the use of ALPRs but does have concerns with sharing the data with other communities (either by granting direct access or through responses to requests), consideration can be given to restricting or limiting data sharing directly with other police agencies that are neighboring or within the same county, among other types of geographical limitations.

The Act did remove one significant concern – individuals attempting to use FOIA to obtain the data for any reason, including the movement of specific individuals. The denial of ALPR information would have been reviewable by the courts or the Public Access Counselor, leaving the disclosure of such information to be adjudicated on a case-by-case basis. However, now that such information is confidential and not subject to disclosure under FOIA, that concern has been resolved and the denial is required under this new Act.

Another concern that was addressed by making the ALPR data confidential is the sale of the data to third-parties, especially to parties that are not related to law enforcement. It is important to ensure that any contract you have with an ALPR company addresses the sale of or use of the data for any other purpose with any party other than for the stated primary function of being an investigative tool. Having this restriction not only sets the standard required by the new statutory confidentiality provision, but also manages the expectations of the company as well as ensures that the privacy of individuals not alleged to be part of a crime is not at risk of being improperly used.

Policy to address access and use of ALPR information

Since the general public is not entitled to the information obtained from an ALPR, what remains are the potential bad acts of those that have access to the information. Such restrictions are left to the employer of those who have been given access to the information. Accordingly, a policy is warranted addressing not only who has access to the information, but for what reasons, as well as operational requirements. Also, the use of the system gets even more complicated, as there is the ability to allow other law enforcement agencies to directly access the information from the local database. Hence, a well-written and complete policy should be created. A policy should include the following:

- Who is responsible for the overall operation of the ALPR system;
- How is the information accessed

    - use of an individualized log in/password system
    - requirement that an active case file number be entered
- Why the information can be accessed
    - Criminal activity/investigation
    - Internal employment-related investigations
    - Prohibition on any other use of the information
- Data collection and retention
    - Data shall not be distributed to any third-party that is not another law enforcement agency
    - Data shall only be distributed to third-party law enforcement agencies that have agreed to comply with the internal policy
    - Access data retention and audit requirements/options
- The municipal manager/administrator should be able to perform an audit on the use of ALPR system.

Finally, any violation of the policy should result in the removal of access to the ALPR information and be cause for disciplinary action as well.

Conclusion

As ALPRs continue to be utilized throughout the State, if your community has not already done so, your Police Department may request the use of this technology in the near future. So far, ALPRs have proven to be a helpful tool to help investigate and prosecute criminal activity, as well as to assist in finding lost children and adults. As this technology is likely to be around for years to come, having an amendable policy and keeping up with the changing laws will be key to its successful and effective use.

steinj@wilmette.com

CHAVEZ V. VILLAGE OF KIRKLAND, 2023 IL APP (2D) 230009-U: A friendly and helpful reminder that your part-time public employee need not hold a position of power to make policy, and may in fact be the exact kind of public official the legislature intended to bestow discretionary immunity

By: Frederick W. Keck, ILGL Director
Weilmuenster, Keck & Brown, P.C.

To start, and as an aside (and a thank you), if you have attended ILGL's Annual Conference, you know that Mike Bersani always does a spectacular job of providing us with the most recent version of the Illinois tort immunity case law update. One immunity on your available "checklist of immunities" (as Mike would call them) in defense of claims for damages against your public body is the discretionary immunity for employees found in Section 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/2-201, which states as follows:

> Sec. 2-201. Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

Every public body operates with its own unique style. I think it's fair to say, however, that lawyers who represent public bodies generally deal with the same cast of usual characters on a regular basis. As legal counsel for several non-home rule communities, I find myself most often interacting with the Village/City Administrator. They run and manage the day-to-day operations of the municipality, and are, in my experience, the most likely employee to encounter decisions that require legal advice. Albeit less frequently, I also speak regularly with department heads (like the Police Chief or the Public Works Director) about specific questions that pertain to their specific supervisory responsibilities, process(es) or procedures.

To be honest, though, unless I am actively engaged in labor negotiations with employees on a collective bargaining team, I do not regularly interact

with many municipal employees that do not serve in some type of supervisory role at all. And even more so when it comes to part-timers. I may not even recognize their name.

But, as the Court recently reminded us in *Chavez v. Village of Kirkland*, 2023 IL App (2d) 230009-U, just because an employee is employed on a part-time basis, doesn't mean that they aren't the exact kind of public official upon which the legislature intended to bestow discretionary immunity under 745 ILCS 10/2-201.

Facts of Chavez

Plaintiff, Joseph Chavez ("Plaintiff"), filed a civil action against the Village of Kirkland ("Kirkland") for injuries he sustained during a TASER training conducted by part-time Kirkland police officer Andrew Holmes ("Holmes"). Plaintiff's complaint alleged that Kirkland was negligent in numerous ways while conducting the TASER training and, as a result, he was injured.

Plaintiff later filed an amended complaint adding Holmes as a defendant. Specifically, the amended complaint alleged that Holmes was negligent in the following ways: (1) by failing to conduct TASER training in a reasonably safe manner and comply with normative rules for safety that consider its participants' health and well-being; (2) by failing to supervise, monitor, and catch Plaintiff after being shot with the TASER so that he would not collapse onto the solid ground beneath him; (3) by failing to place mats or other soft surfaces around Plaintiff so that any fall would be protected by a soft, padded surface rather than a solid surface; and (4) by failing to conduct TASER training in a reasonably safe manner in consideration for its participants' safety.

It should be noted that throughout the pendency of the case, the trial court denied several motions attempting to dispose of all issues based on discretionary immunity and other statutory immunities, and the matter proceeded to a jury trial.

Plaintiff called various witnesses to testify, including but not limited to Kirkland Police Chief Paul Lindstrom ("Lindstrom"). Lindstrom testified that he was the Chief of Police for Kirkland, and that in his role as Chief, he sent Holmes to be certified to instruct TASER training for his department. Lindstrom further testified that it was his understanding that a TASER instructor would need to follow TASER corporation's guidelines.

Additionally, Lindstrom testified that he required the officers in attendance to be tased, as he "[thought] it [was] important for them to experience what it is." (Reason enough for this author not to apply for the next Kirkland police officer opening) He also testified that he was presented with potential dates for the training and approved opening the training to other police departments. Chief Lindstrom testified that he did not control the specifics of the class. Rather, Sergeant Parker, the head of training at Kirkland, would handle the specifics, in accordance with the TASER guidelines.

Chief Lindstrom further testified that although Holmes did not determine police department policies or procedures, he would determine what equipment was needed for training, how to obtain the equipment, where the training was going to take place, how the training would be conducted, and whether an attendee passed or failed the training. Holmes also helped develop Kirkland's TASER policies by relaying information he received during his TASER instructor training.

At the close of Plaintiff's case-in-chief, all Defendants moved for a directed verdict. In support of their motion, the Defendants again argued amongst other items that Defendants were entitled to discretionary immunity pursuant to Section 2-201. The trial court took the motion under advisement and the Defendants proceeded with their case-in-chief.

Defendants called various witnesses to testify, including but not limited to Holmes. Holmes testified that he worked as a part-time police officer with Kirkland and served as their TASER instructor. He testified that Kirkland sent him to a TASER instructor certification course to become certified. In his capacity as Kirkland's TASER instructor, Holmes was responsible for reviewing Kirkland's written policies regarding TASER use and for organizing and implementing the TASER training program. This included determining a location for TASER training that had appropriate classroom space, had the proper presentation equipment for the classroom portion of the session, and sufficient safe space to conduct exposures and discharges.

Holmes further testified that he determined that the fire department had all the capabilities necessary to conduct the TASER training. He also testified that he chose to use alligator clips on Plaintiff for exposure. Holmes testified that he placed the alligator clips on the back of Plaintiff's shoulder and just below the waistline. He further testified that as the TASER instructor for Kirkland, he has discretion to deviate

from TASER guidelines when reasonable. He routinely made discretionary decisions within the TASER guidelines, such as how many exposures to give, how the exposures would be given (alligator clips or probes), where on the body to place those exposures, and whether the exposures would be given while the trainee was standing or kneeling. After Holmes' testimony, Defendants then rested.

At the close of evidence, all Defendants filed yet another motion for directed verdict. This second motion was the same as the first. The trial court heard arguments from both parties and ultimately held that Defendants, as a matter of law, were not entitled to discretionary immunity pursuant to Section 2-201. The jury returned a verdict for Plaintiff, and the trial court subsequently entered judgment. All Defendants filed a timely notice of appeal.

On appeal, the Appellate Court was left to decide whether the trial court correctly entered judgment in favor of Plaintiff and against all Defendants on their affirmative defense of discretionary immunity. In doing so, the Court set forth the well-recognized standard that for Section 2-201 immunity to attach, two (2) requirements must be met. First, a defendant must prove that the employee held either a position involving the determination of policy or the exercise of discretion. And second, that the act or omission giving rise to the injury must result from both a determination of policy and an exercise of discretion. (Citations Omitted).

First Requirement : The employee held either a position involving the determination of policy or the exercise of discretion

The Court turned to the first requirement — whether Holmes' position with Kirkland determined policy or exercised discretion. Despite the fact that Holmes was only a part-time Kirkland police officer, the Court found that his position as Kirkland's only TASER training instructor involved the exercise of discretion, as Holmes had to exercise personal deliberation and judgment in organizing, implementing, and running the TASER training class. During trial, both Holmes and Chief Lindstrom testified that Holmes was Kirkland's only TASER training instructor. Holmes further testified that as the only TASER training instructor with the Kirkland Police Department, he was entirely responsible for organizing and implementing the TASER training program.

Chief Lindstrom also testified that he deferred to Holmes in how the TASER training class was going to be run, as Holmes was in charge of the class. As part of Holmes' responsibility in organizing, implementing, and running the TASER training class, Holmes had to exercise personal deliberation in determining an appropriate location to conduct the TASER training, how many exposures to give, how the exposures would be given (alligator clips or probes), where on the body to place those exposures, and whether the exposures would be given while standing or kneeling. These were all discretionary decisions made by Holmes in his capacity as Kirkland's only TASER training instructor.

Second Requirement : The act giving rise to Plaintiff's injuries was *both* a determination of policy and an exercise of discretion

Having determined that Holmes' position involved the exercise of discretion, the Court then turned to the second requirement — that the act giving rise to Plaintiff's injuries was *both* a determination of policy and an exercise of discretion. Plaintiff, in his complaint, alleged three (3) acts that gave rise to his injury: the conducting of the TASER training generally, the supervision or monitoring of Plaintiff after he had been tased, and the failure to place mats around Plaintiff while he was being tased.

In addressing Holmes' conducting of the TASER training generally, the Court noted that Holmes made many discretionary decisions in his capacity as Kirkland's only TASER training instructor. The Court further held that his decisions also constituted policy determinations, as he had to weigh various interests and determine what course of action best served those interests. For example, in determining a location for the TASER training, the Court held that Holmes weighed competing interests (e.g., safety and convenience) and made a determination that the fire department would be the safest and most convenient place to hold the training due to the availability of both a classroom area and a carpeted area to conduct exposures. The Court noted that he also took into consideration the immediate availability of emergency medical technicians at the fire department, should anything go awry during the exposures.

Additionally, the Court held that Holmes made policy determinations when he chose where to place the alligator clips on Plaintiff. He weighed various interests, such as safety of Plaintiff, learning objectives of the training, and convenience. The Court reasoned that because Holmes made policy determinations in conducting TASER training, he was entitled to discretionary immunity.

In addressing Holmes' failure to supervise or monitor Plaintiff after he had been tased, the Court found that the video evidence showed that Plaintiff received TASER exposure via alligator clips. These clips were placed by Holmes onto Plaintiff. When Plaintiff was tased, one of the spotters also received exposure and fell to the ground, unable to support Plaintiff. The Court held that Holmes used his judgment, informed by his training, to make a conscious decision where to place the alligator clips on Plaintiff. The Court noted that he may have been negligent in making that decision, but that it was still a conscious decision where Holmes weighed various competing interests (such as safety and educational objectives) and reached a conclusion as to what placement best served those interests. Therefore, the Court similarly held that Holmes' supervision and monitoring of Plaintiff after he had been tased constituted both an exercise of discretion and a policy determination.

In addressing Plaintiff's final assertion, the Court held that by choosing to not place mats, Holmes had to balance competing interests, such as safety, convenience, and cost. There were no mats available from either the police or fire departments, and to obtain them, would have been potentially inconvenient and costly. In deciding not to place mats, the Court held that Holmes weighed competing interests and made a judgment call, and therefore his decision not to place mats was a policy determination. The Court held that it was also an exercise of discretion, as he personally deliberated and used his own personal judgment in making the decision not to use mats.

Specifically pertinent to this article is the fact that the Court further rejected and overruled the trial court's finding that because Holmes was not the Kirkland president, chief-of-police, or a fire marshal, that his acts could not constitute policy determinations. The Court held that it was clear from both the plain language of Section 2-201 and existing precedent (notably *Richter v. College of Du Page*, 2013 IL App (2d) 130095 (wherein the Appellate Court found that a building-and-grounds manager and his employee were both determining policy in their handling of a sidewalk deviation when they weighed competing interests and made a judgment call as to the handling of each sidewalk deviation) that Holmes was entitled to discretionary immunity.

The Court concluded its remarks by going even further, stating that:

> Holmes is the exact sort of public official the legislature had in mind when it enacted Section 2-201. He exercised his judgment in organizing, implementing, and running the TASER training class and is therefore immune from plaintiff's negligence suit.

As such, the Court reversed the trial court's judgment entering the jury's verdict for Plaintiff, and reversed the trial court's judgment on the motion for directed verdict on the issue of discretionary immunity for all Defendants.

This case is a particularly good reminder that just because an employee is not wearing a Village President cap, or a Public Works Director shirt, does not mean that they simply are not entitled to discretionary immunity. To the contrary, they may be the exact employee upon which the legislature intended to bestow discretionary immunity.

COMMON ENVIRONMENTAL- RELATED REQUESTS MADE TO MUNICIPALITIES

By: Dennis Walsh
Klein, Thorpe & Jenkins, Ltd.

All municipal attorneys should acquaint themselves with various common environmental requests from polluters seeking a No Further Remediation letter (NFR) from the Illinois Environmental Protection Agency (IEPA) for a contaminated site using the Tiered Approach to Cleanup Objectives (TACO) cleanup program administered by the IEPA (35 Ill. Admin. Code Part 742). It is incumbent upon the attorney to inform decision-makers about requests for subsurface investigations linked to pollution incidents, as well as requests for two specific types of institutional controls – highway authority agreements and groundwater ordinances requiring local government approval. Institutional controls are legal mechanisms for imposing restrictions and conditions on land use. Land use restrictions and conditions are essential when post-remediation contaminants still pose a threat to human health or the environment. Institutional controls serve as safeguards against potential harm by limiting exposure to contaminants that remain *in situ*. The attorney's responsibility includes explaining the purpose of these controls, delineating their potential benefits or drawbacks for the community, and ensuring that the municipality avoids any additional financial loss or liability.

Highway Authority Agreements. Occasionally, a municipality is asked to enter into what is commonly referred to as a Highway Authority Agreement (HAA) when contamination has migrated off private property (such as a gas station or dry cleaner site) and under a municipal highway, alleyway or road. Since roadways can be acceptable engineered barriers, a site owner can enter into an agreement with the highway authority (state, county or municipality) for the purpose of developing remediation objectives, and the HAA then serves as an institutional control. The HAA is used to allow potential contamination to remain in place under the right-of-way of the agency having authority over the highway and to prevent the use of groundwater as a potable water source from under the highway.

The Illinois Department of Trans-portation has its own HAA form, but an amendment to the IEPA's TACO regulations now requires that municipal HAAs submitted to the IEPA match the form and contain the same substance as the document in 35 Ill. Adm. Code 742. Appendix D.

The challenge with the required IEPA form HAA lies in the fact that municipalities were not consulted for input, and the form itself poses several issues. For instance, the form lacks crucial provisions, such as indemnity and reimbursement clauses, vital for the interests of municipalities. To address these gaps and better safeguard the municipality's interests, it is recommended that if the municipality considers agreeing to the HAA, that it also enter into a supplemental Environmental Indemnity Agreement. This additional agreement should be designed to compel the requester to, among other things:

a) Indemnify, hold harmless and defend the municipality against future claims;

b) Release the municipality from liability; and

c) Reimburse the municipality for its future costs in dealing with contamination should the municipality excavate through contaminated soil in the right-of-way.

Some municipalities opt to enter into HAAs when it aligns with technical considerations including such factors as the level of contamination and the presence or absence of utilities and/or telecommunication lines in the proposed HAA area. Combined with the use of an Environmental Indemnity Agreement, this approach legally resolves liability and damage issues without resorting to the expensive and uncertain route of litigating against an alleged polluter. In fact, through this process, the municipality will likely get more protection against future third party claims than in a cost recovery action. The recovery of costs for pollution in a right-of-way was notably challenging before the introduction of HAAs, as proving the origin of that contamination was expensive and uncertain.

Groundwater Ordinance Requests. Local ordinances prohibiting the use of groundwater for potable purposes or prohibiting the installation and use of new potable water supply wells is another type of institutional control that may serve in lieu of cleaning up contaminated groundwater. The IPEA recognizes that where there are no existing wells and where future new potable uses of groundwater are prohibited, it is unnecessary to remediate contamination to potable levels. The purpose of a groundwater ordinance is to cut off the groundwater pathway so that the public cannot come into contact with the contaminated groundwater. Simply put, no existing pathway – no exposure to humans.

The use of a groundwater ordinance by itself as an institutional control is specifically limited to ordinances that effectively prohibit the installation and use of all new potable water supply wells. An ordinance prohibiting the installation of all potable water supplies and the use of such wells that does not expressly prohibit the installation of all new potable water supply wells (including community supply wells of the municipality) may be acceptable as an institutional control, but only if a Memorandum of Understanding (MOU) is entered into between the municipality and IEPA. In the MOU, the municipality agrees to assume responsibility for tracking sites and undertaking monitoring activities. If the municipality were inclined to adopt an ordinance to be used as an institutional control, it has the following two options:

Alternative 1: Adopt an ordinance that prohibits the use of groundwater as a potable water supply within the corporate limits of the municipality or in a discrete area of a community by the installation or drilling of new wells by all parties, including the municipality itself. IEPA regulations do not call for the municipality to take any further action under this alternative, but rather place the burden under this alternative on the owner or successor in interest for monitoring the municipality's activities with respect to the ordinance. However, given the possibility that new wells may need to be developed within the municipality's boundaries in the future, a complete municipal-wide ban does not appear to be a realistic option for a number of municipalities. In that case, another option that IEPA has allowed and that has been commonly used is a complete ban but only in certain identified areas within a municipality's corporate boundaries. The municipality adopts an ordinance that bans the use of groundwater as a

potable water supply for a certain designated plume area in and around the contaminated site. The ordinance prohibits the use of groundwater within the designated plume area as determined by mathematical modeling under the regulations (for example, a 2,000-foot radius around the site). This option has been used by many municipalities on a site-by-site basis. It is usually the best alternative for the municipality rather than a municipal-wide ordinance.

Alternative 2: Where an ordinance prohibits the use of groundwater for potable purposes or the installation of new potable water supply wells by only private parties while continuing to allow such activities by the municipality (either expressly or by remaining silent on the issue), the ordinance will not stand alone as an environmental institutional control. In that case, perfecting the use of the ordinance as an institutional control requires the municipality to both adopt the ordinance and enter into a MOU with the IEPA requiring the municipality to track sites and undertake the record keeping and notification requirements under the regulations. The MOU requires the municipality to make the following commitments:

i. A commitment by the municipality to notify IEPA of any variance requests or proposed ordinance changes at least 30 days prior to the date the municipality is scheduled to take action on the request or proposed change.

ii. A commitment by the municipality to maintain a registry of all sites within its boundaries that have received "No Further Remediation" determinations under IEPA programs in reliance on the ordinance and to review the registry of sites prior to siting public potable water supply wells within the area covered by the ordinance.

iii. A commitment to determine whether the potential source of potable water may be or has been affected by contamination left in place at the sites tracked and reviewed.

iv. A commitment to take action as necessary to ensure that the potential source of potable water is protected from the contamination or treated before it is used as a potable water supply. In this case, the commitment is to take the appropriate protective measures if wells are sited on or near the sites on the registry. Thus, under this alternative, in addition to record keeping, a municipality may be required to undertake tasks that could involve the expenditure of municipal funds for environmental sampling if a future municipal water well was to be located on or near a site identified on the registry.

When a request for a groundwater ordinance is made, it is prudent to consider exploring the option of implementing a site-specific ban on the installation of new potable wells in and around the specific property in question. This approach meets the requirements of the IEPA without necessitating the municipality to undertake the current record-keeping and notification responsibilities in an MOU, will not require the municipality to designate these assignments to a specific department, and ensures that the municipality's personnel are diligent in documenting all environmental sites in the municipal limits (both private and public) and corresponding with the IEPA regarding the same.

If the municipality was to adopt an ordinance that prohibits the use of groundwater as a potable water supply by the installation or drilling of new wells by all parties, including the municipality itself, the environmental regulations do not call for the municipality to take any further action but, rather, places the burden on the owner/operator for monitoring the municipality's activities with respect to the ordinance. The owners/operators are obligated to notify any property owners within the groundwater ordinance area of the existence of the ordinance, but the IEPA does not require the approval or involvement of these property owners.

If a municipality is contemplating the adoption of a groundwater ordinance, the party making the request should be required to furnish an Environmental Indemnity Agreement. Crafting this Agreement is of paramount importance in ensuring the municipality's protection and should be done with careful consideration and an understanding of the requester's capacity to fulfill its obligations under the Agreement.

Agreement to Reimburse Costs. Requests for a HAA and/or a groundwater ordinance primarily serve the interests of the owner/operator of the site that experienced a release under the TACO cleanup regulations. While a municipality may be able to provide some assistance to a requester in obtaining a No Further Remediation letter from the IEPA, it should not be obligated to use public funds for an environmental attorney and environmental consultant to review pertinent documentation and offer comprehensive advice. Before the municipality proceeds with such a request, it is strongly recommended that the requester commits in writing to reimbursing the municipality for all costs incurred during the preliminary determination and review of the request for an HAA and/or groundwater restriction. The reimbursement agreement requires the requester to submit an upfront prepayment fee and provide all

environmental records related to the municipal property and the site. This initial Agreement to Reimburse Costs should not require the municipality to adopt a HAA and/or groundwater ordinance or take any specific action beyond "considering" the request.

By choosing to assess requests for an HAA and/or a groundwater ordinance on a site-by-site basis, the municipality gains the advantage of obtaining environmental records connected to contamination, which may not be voluntarily provided otherwise. This allows the municipality, with guidance from its environmental attorney and consultants reviewing environmental documents, to make informed decisions on issues such as offsite impacts—all funded by the polluter. For example, an issue for municipal concern is what happens if there is residual contamination left in place, particularly where an HAA is involved. In this instance, the municipality will be required to undertake work in the impacted right-of-way. It is also vital for the municipality to be aware of safety concerns, including those for public works employees, related to the contamination and its location.

Ground Penetration Requests. Before or concurrently with seeking an institutional control, property owners often request municipalities to grant permission for environmental contractors to conduct soil and/or groundwater testing in right-of-ways or on other municipal properties. Allowing private entities onto municipal property for such work raises significant liability concerns, including responsibility for contamination spread. Each environmental site is unique, presenting distinct issues. Liability issues may be addressed by negotiating an access agreement, on a case-by-case basis. Ground Penetration Work Permits are also an alternative to address these types of requests.

Regardless of the approach, a municipality should obtain written assurances and commitments from the owner/operator of contaminated sites before allowing any environmental testing on municipal property. At a minimum, the requester should provide a scope of work indicating proposed locations and depths of soil borings and groundwater monitoring wells. The requester should assume sole responsibility for testing, storing, treating, and disposing of materials from the work, such as soil boring cuttings. It should be clear that the municipality will not be identified as the owner, generator, or transporter of materials at any time. Additionally, the requester should deliver all records, documents, or reports related to environmental matters and conditions associated with the municipality's property and the requester's site.

Conclusion. Recognizing the importance of institutional controls is crucial for resolving environmental incidents in Illinois. Municipal attorneys can offer more informed advice on requests involving these controls by understanding their essential roles in remediation efforts and potential impacts on the local government, its residents, and businesses.

dgwalsh@ktjlaw.com

WELCOME

NEW ILGL MEMBERS

March - April 2024

Justin Brunner
Attorney
Thomas Mamer LLP
jnb@thomasmamer.com

Michael Carroll
Attorney
Peterson, Johnson & Murray
mcarroll@pjmlaw.com

Tosha Childs
Attorney
Lewis, Brisbois, Bisgaard, and Smith, LLP
Tosha.childs@lewisbrisbois.com

Christi Coleman
Partner
Lewis, Brisbois, Bisgaard, and Smith, LLP
Christi.coleman@lewisbrisbois.com

Lauren Davalle
Attorney
Odelson, Murphy, Frazier, and McGrath, Ltd.
ldavalle@omfmlaw.com

Luanne Galovich
Attorney
Del Galdo Law Group, LLC
galovich@dlglawgroup.com

Morgan Knight
Student
University of Illinois College of Law
morganeveknight@gmail.com

Bobby Mannis
Student
University of Illinois College of Law
Bobby@bobbymannis.com

Eric Miller
Of Counsel
Sosnowski Szeto, LLP
eric@sosnowskiszeto.com

Christopher Regis
Attorney
City of Joliet
cregis@joliet.gov

Aaron Reynolds
Attorney
Lewis, Brisbois, Bisgaard, and Smith, LLP
Aaron.reynolds@lewisbrisbois.com

Monica Somerville
Senior Attorney
Forest Preserves of Cook County
Monica.somerville@cookcountyil.gov

Stephanie Weiner
Attorney
HeplerBroom LLC
stephanie.weiner@heplerbroom.com


NEW MEMBER
Spotlight
ILLINOIS LOCAL GOVERNMENT LAWYERS ASSOCIATION
How many years have you worked in local government law?
• Five months in current position (previously worked as a Public Defender for 1 ½ years).
Where are you from?
• Born in Georgia, raised mostly in Texas.
What is your educational background?
• Undergraduate: Honors BA Poly Sci at Baylor University
• Law School: Elon University School of Law
My hobbies include:
• Reading (mostly history and crime), bouldering, kayaking, and resting.
A little-known fact about me is:
• I am only seven years old (born on Leap Day).
I am currently reading:
• Crime and Punishment by Fyodor Dostoevsky.
ILLINOIS LOC
JOSEPH DEMOND
ASSISTANT CITY ATTORNEY
CITY OF CARBONDALE

ILGL ELECTS NEW OFFICERS

The ILGL held its Annual Meeting at its 31st Annual Conference on February 19, 2024, and the following individuals were elected to District Board positions:

James Rhodes	*First District*
Robert Long	*Second District*
Michael Santschi	*Third District*
Steve Mahrt	*Fourth District*
Frederick Keck	*Fifth District*

In addition, the following Board officers were elected:

Vice President: Brian Day
Corporation Counsel
Town of Normal

Treasurer: Michael Santschi
Attorney
Spesia and Taylor

Also at the Annual Meeting, Patricia Johnson Lord became President and Fred Stavins continues as Secretary.

IN THE COURTS

SOCIAL MEDIA AND THE FIRST AMENDMENT
Lindke v. Freed, 601 U.S. ___ (2024)

By: James A. Rhodes
and Kaylee M. Hartman
Klein, Thorpe & Jenkins, Ltd.

The line between professional and personal acts blur on the many social media platforms available today. With a few clicks, individuals can share their take on the latest news article, post photos of their child's birthday, or provide information about their jobs. For government officials, this blur of information has the potential to create liability for posts constituting state action. This was precisely the situation in which James Freed, City Manager of the City of Port Huron, Michigan, found himself.

Freed had maintained a Facebook page since his college days, posting information of a purely personal nature. In 2014, Freed became the City Manager of Port Huron and updated his Facebook page to reflect his new position and included his biography. He posted information about his family life, his role as the City Manager, and updates about the City in general. During the Covid-19 pandemic, in addition to personal information about his family, Freed posted case counts and hospitalizations, information about City hiring freezes, and a press release about relief packages he had prepared.

Kevin Lindke, a City resident and Facebook user, found Freed's Facebook page. Unhappy about the City's response to the pandemic, Lindke decided to post comments on Freed's page stating his displeasure with the City's response to the pandemic. Initially, Freed deleted Lindke's comments. Finally, Freed's frustration with the posts resulted in his blocking Lindke from making any further comments on Freed's Facebook page.

Lindke filed a §1983 action alleging that Freed had violated his First Amendment Rights. Lindke claimed that Freed's Facebook page constituted a public forum and that blocking him constituted viewpoint discrimination under the First Amendment. The District Court determined that Freed's Facebook page was managed in his private capacity and as a result, the §1983 claim failed. The Sixth Circuit affirmed, holding that a public official's activity constituted state action only if state law requires the official to maintain a social media account, the official uses state resources or government staff to run the

account, or the social media account belongs to the office rather than an individual officeholder.[1]

The U.S. Supreme Court granted *certiorari* to examine when social media conduct by public officials would constitute state action pursuant to §1983. Justice Barrett delivered the opinion for the unanimous court.

Justice Barrett's analysis began with a recognition that, while public officials can act on behalf of the State, they are also private citizens with their own constitutional right to speak. The First Amendment protects a public employee's right to speak on matters of public concern, including the ability to speak about information learned through public employment. In order to determine whether a public official's or employee's social media activity amounts to state action, the Supreme Court established a two-factor test.

Factor One: Actual State authority to act on behalf of the State.

Section 1983 protects individuals from constitutional deprivations attributable to the state. Public officials or public employees alleged to have deprived a person of a federal constitutional or statutory right must act under color of a statute, ordinance, regulation, custom or usage, in order to constitute state action. Thus, the first factor is whether that official possessed actual authority to speak on the State's behalf.

An act cannot constitute state action unless it is clearly traceable to the State's power or authority. While private action can look official, it cannot constitute state action without actual State authority. The first three sources of state authority, statutes, ordinances, and regulations are found in the written law where the law itself permits a public official to speak on its behalf. State authority can also come from "custom or usage" when the "persistent practices of state officials" are "so permanent and well settled" that they carry the force of law." *Freed,* 601 U.S., at 10 (quoting *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 146, 147, (1970)). "The inquiry is not whether making official announcements could fit within the job description; it is whether making the announcement is actually part of the job that the State entrusted the official to do." *Freed,* 601 U.S. at 12. Freed's conduct would not constitute state action unless he possessed actual authority to post city updates and register citizen concerns.

Factor Two: Use of the State Authority when taking the action.

If the State has granted the public official the authority to speak on its behalf, the next inquiry is whether the public official is using that authority when speaking. If an official's speech is not used in furtherance of their official responsibilities granted by the State, the speech is private in nature.

To illustrate when state authority is officially used, the Court provided two hypotheticals. First, a school board president announces at a school board meeting that the board has lifted pandemic-era restrictions for the public schools. Second, the same school board president makes the exact same announcement at a backyard barbeque with friends. In the former, the action is clearly made in the capacity of school board president. At the barbeque, the same statement is made, not as school board president, but as friend and neighbor. The statements, while made on a public matter, were made not with any intent to act in an official capacity, but for personal reasons.

Thus, the context in which the speech occurs is critical to this determination. Had Freed's Facebook page carried a disclaimer indicating that it was a personal page or that any views expressed were strictly his own, he would have been entitled to a heavy presumption that all posts were personal. On the other hand, where a social media account belongs to the government or is passed down to whomever holds a particular public office, it would be clear that the account was to be used for state action. *Freed,* 601 U.S. at 13. Since public officials have the right to speak about public affairs in a personal capacity, in order to impose liability, it must be shown that the official is purporting to use state authority in specific posts. Where the nature of the social media account is ambiguous, the post's content and function are the most important inquiries.

Lindke objected to the deletion of his comments and the blocking of his ability to comment at all. With respect to the deletions, the Court observed that the only posts relevant for examination were those where comments were removed. However, because Lindke was also blocked from commenting on any posts, the

[1] In contrast, the 9th Circuit held that state action should be based upon whether the state employee purports or pretends to act under color of law, the pretense of acting in the performance of state duties had the purpose and effect of influencing the behavior of others, and the harm inflicted relates in some meaningful way to either the person's governmental status or to the performance of their duties. *See, e.g., Garnier v. O'Conner-Ratcliff,* 41 F.4th 1158, 1170-1171(9th Cir. 2022).

examination must consider any post on which Lindke wished to comment after being blocked.

The Court found that this state-action doctrine requires Lindke to show that Freed had actual authority to speak on behalf of the City on a particular matter and purported to exercise that authority with respect to the relevant posts. With this new test in mind, the judgment of the Sixth Circuit was vacated and remanded for further proceedings consistent with the Supreme Court's opinion.[2]

jarhodes@ktjlaw.com

kahartman@ktjlaw.com

[2] … factor test to determine …ctors in managing their social media accounts. See O'Connor-Ratcliff v. Garnier, 601 U.S. ____ (2024). In that case, the Defendants created separate Facebook pages to promote their campaigns for the school board and, after winning the election, used those Facebook pages to post school-related content, including board meeting recaps, application solicitations for the school board, budget plans, public safety updates and to solicit feedback and communicate with constituents. Their Facebook pages each described them as Government Officials. At the same time, they each maintained separate personal Facebook pages that they shared with friends and family. The Plaintiffs posted lengthy and repetitive comments to social media posts on the Facebook pages which described them as Government Officials. As in Freed, the Defendants first deleted the comments before totally blocking the Plaintiffs from posting.

WRITE AN ARTICLE! REVIEW YOUR FAVORITE BOOK!

The ILGL is always looking for thoughtful, timely, and informative pieces to include in our *Journal*. We welcome members (and your colleagues!) to submit articles for consideration in our Journal; a great opportunity to produce a publishable piece of legal research.

Book reviews are also much appreciated and a nice way to bring to light the hard work of a colleague or favorite author. Book reviews are also a welcome distraction from the usual legal research and complicated documents local government attorneys are tasked with reading all day long.

Please submit any articles for consideration in Word format to Executive Director, Alli Hoebing, at ilgl@niu.edu.

ILGL PRESENTS
2024 ANNUAL AWARDS

At its 31st Annual Conference luncheon, the Illinois Local Government Lawyers Association (ILGL) presented its annual awards.

The *Robert J. Mangler Distinguished Service Award* is the Association's highest award and recognizes distinguished service to local government law over a legal career. This year's award was presented to Patricia "Pat" Lord for her contributions to local government and her distinguished legal career. Pat serves as a Senior Assistant City Attorney with the City of Naperville and became the new President of ILGL at the ILGL Annual Meeting held at the awards luncheon at the conference. Pat received the litigation award from ILGL in 2013, has presented many times at the ILGL conference, and is responsible for the creation of the FOIA/OMA Special Interest Group. The Nominating Committee found her to be an excellent choice for this award.

The *ILGL Litigation Award* recognizes those attorneys who have established a favorable legal precedent for local governments during the past year. This year's Litigation Award was presented to Michael J. Smoron and Jennifer J. Gibson for *The Village of Kirkland v. Kirkland Properties Holdings Company, LLC1, et al.*, 2023 IL 128612. While there were many cases considered this year, the Nominating Committee found the *Kirkland* case worthy of the Litigation Award. In the *Village of Kirkland* case, the Illinois Supreme Court held that transferee owners of a portion of annexed land were successors in interest and bound by the terms of the annexation agreement.

The *Listserver of the Year Award* was presented to Julie Tappendorf, Partner at Ancel Glink. Julie has been a frequent contributor to the Listserv and the quality of her responses to posted inquiries has always been excellent.

The Franklin Klein Law Student Writing Competition Award was presented to three students this year. First place went to Michael Lathwell, University of Illinois College of Law, who wrote the article: "A Better Way to Watch: Streaming Giants Bypass Local Municipal Cable Franchise Fees".

Second place for the *Franklin Klein Law Student Writing Competition* went to Bobby Mannis and Morgan Knight, University of Illinois College of Law, who co-wrote the article: "Existential Blue: Police and Municipal Duty, Liability, and Recommendations for Suicide Prevention".

Congratulations to all of our ILGL award recipients.

FOIA AND OMA
SPECIAL INTEREST GROUP

FEBRUARY 14, 2024
QUARTERLY WEBINAR

Moderated by Julie Tappendorf, Ancel Glink

The ILGL FOIA and OMA special interest group discussed a number of recent PAC opinions and cases, as well as a few bills introduced by the Illinois General Assembly that would modify FOIA and the OMA.

One of the bills would modify the OMA to allow public bodies to approve executive session minutes in executive session, which appeared to be a response to PAC Opinion 23-014 which found a public body in violation of the OMA when it voted on executive session minutes in executive session.

The group also discussed consent agendas and how various public bodies described the agenda items within a consent agenda. Some public bodies read off the entire list of agenda items and others simply refer to the agenda before voting on the consent agenda.

The group also discussed the government attorney's role in responding to PAC requests for review, with some public bodies relying on their attorneys to write the response letters and others handling them in house. The next meeting of the FOIA and OMA Special Interest Group is scheduled for May 15, 2024.


ILGL
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SEMINAR
VIRTUAL, VIA ZOOM
JUNE 12
AND
JUNE 13
REGISTRATION OPENS
SOON
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DATE

SEARCHING THE LISTSERV ARCHIVES

Did you know you can search the ILGL Listserv archives and locate all Listserv posts regarding a specific topic?

In order to access the Listserv Archives, you will need to set up a password. You may set up a password by taking the following steps:

- Go to https://listserv.municode.com/scripts/wa.exe?A0=ILGL-LIST
- If you have not done so already, you will need to set up a password to access the archives. Select the "Register Password" link under the Login button and follow the instructions to create a password.
- You will receive an email confirming that your password has been accepted. (It may take a few hours for your password to be accepted and the confirmation to be sent).
- When you receive the confirmation, click on the link in the email to acknowledge the acceptance of your password. You will then be taken to a screen that says your password has been accepted. Click the link that reads, "**LISTSERV.MUNICODE.COM**". You can now access the archives.

To search the Listserv Archives:

- Go to https://listserv.municode.com/scripts/wa.exe?A0=ILGL-LIST
- Log in with your email address and password.
- You will be taken to the **ILGL-LIST Archives** Home Page.
- There are three (3) search boxes which you can use to search by Subject, From, and Date.

NUTS 'N BOLTS WORKSHOP SUMMARY
JANUARY 19, 2024

MODERATOR: Paul Stephanides, ILGL Director, Village Attorney, Oak Park, Illinois (pstephanides@oak-park.us)

DISCUSSION ITEMS

I. FOIA and OMA – Public Access Counselor Opinions

Public Access Opinion 23-015 (Request for Review - 2023 PAC 77982): Oak Park Assistant Village Attorney Rasheda Jackson discussed this Public Access Counselor (PAC) binding opinion concerning a Freedom of Information Act (FOIA) request for a nondisclosure agreement (NDA) related to a development project in the City of DeKalb. The PAC determined that DeKalb failed to demonstrate that the disclosure of the NDA would cause competitive harm to the developer under section 7(1)(g) of the FOIA, 5 ILCS 140/7(1)(g). The NDA did not include any specific information about the developer's prices, expenditures, financial condition, or the status of the development project. The PAC found that the NDA primarily consisted of boilerplate language setting forth the parameters for confidentiality but did not reveal information about sensitive matters sufficient to satisfy the FOIA disclosure exemption.

Public Access Opinion 23-016 (Request for Review - 2023 PAC 78356): Moderator Stephanides led the discussion on this PAC opinion which involved a dispute over the removal of a book titled "Just Mercy" from a school district's curriculum. The school board had entered into a closed session to discuss a parent's complaint about the book, and the PAC found that the board's closed session discussion focused was on the appropriateness of the book, not on resolving a grievance against specific employees or discussing individual student matters. Thus, the PAC rejected the board's claim that section 2(c)(1) of the Open Meetings Act (OMA), 5 ILCS 120/2(c)(1), allowed the board to discuss the complaint in closed session. The PAC also rejected the board's claims that it properly held the closed session under sections 2(c)(4), 2(c)(10), and 2(c)(11) of the OMA.

II. Cases

Village of Arlington Heights v. City of Rolling Meadows, 2024 IL App (1st) 221729: Moderator Stephanides led a discussion on this case, which involved a claim by the Village of Arlington Heights that the City of Rolling Meadows was wrongfully paid 8 years of sales tax revenue by the Illinois Department of Revenue for a restaurant that was located in Arlington Heights. Hart Passman litigated the case on behalf of Arlington Heights and summarized the appellate court's holding in favor of Arlington Heights. The court found that Rolling Meadows was unjustly enriched in failing to turn over the payments to Artlington Heights.

Taylor v. City of Chicago, 2024 IL App (1st) 221232: Oak Park Assistant Village Attorney Rasheda Jackson presented this case, which involved a liability claim against the City of Chicago for a breach of duty in failing to protect the plaintiff under the Illinois Domestic Violence Act of 1986. The attorney for plaintiff Vanessa Taylor argued that the City failed to report the erratic and dangerous behavior of her live-in boyfriend James Thomas to medical doctors, failed to complete paperwork to have Thomas civilly committed, failed to arrest Thomas, failed to give plaintiff information regarding an order of protection and other social services and otherwise failed to protect plaintiff. A jury ruled in favor of the plaintiff and the appellate court held that the City was not entitled to a new trial as the court found that the jury could have reasonably concluded that, absent the officers' breach of their duties to the plaintiff, Thomas would not have murdered the plaintiff. In addition, admission of certain evidence and a limiting instruction given to the jury were deemed appropriate.

International Association of Firefighters Local 4646 v. Village of Oak Brook, 2024 IL App (3d) 220466: Moderator Stephanides discussed this OMA and FOIA case. The Village entered into closed session under the collective negotiating and pending litigation exceptions of the Open Meetings Act to discuss two budget proposals after the Union refused to enter into mid-year bargaining during the term of the current CBA. The Village sought to enter into bargaining due to the effects of COVID on the Village's finances in 2020. The Union filed suit against the

Village, alleging that the Village held a closed meeting in violation of the OMA and improperly denied its request for records under the FOIA related to that meeting. The appellate court found that the Village improperly entered into closed session and was obligated to provide records under the FOIA to the Union related to the meeting. The court, however, ruled that the Village was not required to disclose the entire closed session recording as certain portions of it could be protected under the attorney-client privilege.

III. Legislation

Public Act 103-0581: Illinois General Assembly - Full Text of Public Act 103-0581 (ilga.gov): Moderator Stephanides mentioned this new legislation which will require all passenger vehicles purchased or leased by a governmental unit to be either a manufactured zero emission vehicle or a converted zero emission vehicle beginning January 1, 2030. This requirement will only apply to passenger vehicles and will not apply to law enforcement vehicles.

Cook County Paid Leave Ordinance: 24-0583 Certified.pdf (cookcountyil.gov): There was a discussion about the Cook County paid leave ordinance, which was recently adopted and mandates all employers in Cook County to provide a minimum of 40 hours of paid leave annually. Jeff Stein explained that the ordinance might conflict with existing regulations and opt-out ordinances. The conversation also touched upon the implications of the ordinance, with Julie Tappendorf noting that her park district clients are interested in being exempted from the ordinance.

The group discussed the mechanics of opting out of the ordinance. Julie reported that Glenview had adopted an ordinance mirroring the state law to exempt its own employees from the Cook County ordinance. Jeff pointed out that the adoption of an ordinance opting out of the State law regarding leave prior to Cook County's adoption of its ordinance could also render the County ordinance inapplicable.

IV. Migrant Bus Ordinances

Moderator Stephanides led a discussion on the issue of ordinances regulating the drop-off of migrants by bus by various municipalities. It was noted that a Texas bus company has sued Chicago claiming the City's bus ordinance violates the Interstate Commerce Clause and various other constitutional provisions. The group discussed the effectiveness of the ordinances and the role of the State and federal governments in handling the current migrant emergency.

ILGL Nuts n' Bolts Telephone Workshop

Monthly roundtable discussions via "Zoom" access instructions are shown below:

Call: 312-626-6799
Meeting ID: 810 3032 8224
Password: 188448

- **No registration fee!**
- **Now available for one CLE credit**
- **Third Thursday of each month**
- Workshop will run from 12:00 p.m. to 1:00 p.m.
- Participate in the Workshop from the convenience of your office via Zoom.

Please take a minute to mark your calendars:

May 2024 — None (Spring Seminar)
June 20, 2024 — Fred Stavins
July 18, 2024 — Kathie Elliott

If you have issues for discussion for June, please submit those to the moderator Fred Stavins at stavinswork@gmail.com and for July, please submit to Kathie Elliott at kelliott@robbins-schwartz.com.

Contact Information for ILGL

Please send all correspondence for ILGL to:

Alli Hoebing
Executive Director, ILGL
CGS
NIU
DeKalb, IL 60115
Phone: 815-753-5333
Fax: 815-753-7278
E-mail: ahoebing1@niu.edu

THE ILGL JOURNAL IS PUBLISHED SIX TIMES PER YEAR FOR DISTRIBUTION TO ITS MEMBERS. MEMBERS ARE ENCOURAGED TO SUBMIT ARTICLES ON CURRENT TOPICS OF INTEREST FOR PUBLICATION IN THE *JOURNAL*. PLEASE DO SO – INFORMATION EXCHANGE IS OUR LIFEBLOOD.

About the Association...

The ***Illinois Local Government Lawyers Association*** is a membership association of attorneys who represent local governments throughout Illinois. It was formed in 1991 to coordinate and promote professional education, information exchange and interaction among local government attorneys in Illinois in order to ensure the highest level of professional representation to units of local government.

The **Association** is incorporated as a not-for-profit corporation under Illinois law. It is designed to serve the needs of the practicing local government attorney with membership open to attorneys licensed to practice law in Illinois and actively representing local government. The mission statement of the **Association** provides:

*"It is the purpose of the **Illinois Local Government Lawyers Association** to coordinate and promote professional education, information exchange and interaction among local government attorneys in Illinois in order to ensure the highest level of professional representation to units of local government."*

We seek your membership in and support for this organization. The ongoing purpose of the Association is to serve as a conduit for timely dissemination of information to the attorney who is practicing in active representation of local government. The Association is organized on a statewide basis and operated in such a manner that its benefits are efficiently and geographically available to members in each judicial circuit.

The Association provides a means of communicating current developments through its publications, but most importantly provides an open forum for exchange of ideas and "no holds barred" discussion of issues or problems that you may be dealing with on behalf of your client cities, villages, counties, townships and other units of government. We are confident you will find this to be a valuable resource to you in advising your local government clients.

ILGL Thanks All Our Corporate Sponsors!