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COLLISION COURSE OF LEGAL OBLIGATIONS:
FOIA, COLLECTIVE BARGAINING AND PRIVACY
CONSIDERATIONS
By, Jeffrey M. Brown

Table of Contents
I. Introduction ...........................................................4

II. Background: The FOIA, IPRLA, and Collective Bargaining ......................................6

A. FOIA: An Overview of the Illinois Transparency Law ...............................................6
   1. Exemptions From Disclosure Under FOIA .........................................................7
   2. The Public Records Definition ...........................................................................8
   3. Pertinent PAC Opinions Concerning Privacy .....................................................9
B. The Illinois Public Labor Relations Act ................................................................10
C. Collective Bargaining Agreements And Privacy Protections ................................11

III. Cases Impacting Privacy For Public Sector Employers ....14

A. City of Champaign v. Madigan: FOIA Requests For Private Emails ..................14
B. Police Benevolent & Protective Ass’n Unit 5 v. City of Springfield: FOIA Requests for Internal Affairs Files .................................................................14
C. Kalven v. City of Chicago: FOIA Requests For Misconduct Complaints ..........15
D. Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago: FOIA Requests for Police Officer Complaints ..................................................16
   1. Background ........................................................................................................16
   2. The Litigation ....................................................................................................17
      a. The Preliminary Injunction ............................................................................17
      b. The FOP Arbitration ....................................................................................18
      c. The PBPA Arbitration ................................................................................19
      d. The First District Appellate Court Decision .............................................20
E. City of Chicago v. CNN and Chicago Tribune v. City of Chicago: FOIA Requests For Police Officers’ Private Emails ................................................................................................................. 20

F. PBPA v. City of Springfield: FOIA For Police Officer Misconduct Complaints ...... 22

G. City of San Jose v. Superior Court: FOIA Request For Employees Private Emails, Text Messages And Voicemails ......................................................................................... 23

H. Cooper v. Glenn Ellyn School District 41: FOIA Requests For Teachers Union Emails ................................................................................................................................. 24

I. City of Ontario v. Quon: Private Messages Made on Employer-Issued Devices .... 24

J. Additional Lower Court Cases Impacting Employee Privacy ................................ 26

IV. The Collision Between Transparency and Collective Bargaining Obligations: Takeaways From The Reported Cases And Arbitration Awards ................................................................................................................. 28

A. Arbitration Awards Favor Disclosure Over Privacy Protections Within Collective Bargaining Agreements .......................................................................................................................... 28

B. Public Policy Favors Disclosure Over Collective Bargaining Obligations .............. 29

C. FOIA Will Supersede the IPLRA ............................................................................. 29

D. Only Heads of Public Bodies Will be Compelled to Turn Over Personal Emails Issued from Private Accounts and/or Devices .................................................................................. 30

E. Disclosure of Personal Emails from Private Accounts May be Barred by Federal Law and the Fourth Amendment ........................................................................................................... 30

1. The Stored Communication Act ............................................................................. 30

2. The Fourth Amendment ......................................................................................... 31

F. Invoking the Unwarranted Invasion of Privacy Exemption in FOIA is Generally Inapplicable When the Information Sought Pertains to Employment Duties ................. 32

G. Proposal to Make Private Emails Subject to Disclosure Under FOIA ................. 33

V. Conclusion: Best Practices For Moving Forward ............................................. 34
RECENT DEVELOPMENTS
By, Student Editorial Board
Ning Ding, Yuting Li, and Naomi Bensdorf Frisch

I. IELRA Developments ................................................................. 53
   A. Interference with Protected Activity ................................. 53
   B. Strikes and Strike Injunctions ......................................... 54

II. IPLRA Developments .............................................................. 55
    A. Covered Employees ...................................................... 55
    B. Duty to Bargain .......................................................... 56

III. First Amendment Developments ........................................ 57
     A. Fair Share Fees .......................................................... 57
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I. INTRODUCTION

The proliferation of freedom of information requests that seek information
concerning virtually every aspect of governmental affairs, including
information about employees, has significantly altered the notion of privacy
in the workplace. Almost every facet of the day-to-day operations for public
sector employers and employees is subject to examination by way of
freedom of information requests.[1] From Vermont[2] to Chicago to
have faced scores of requests for information from the media and citizens
that have sought, among other things, employee emails and text messages –
both private and personal – that may shed light on the inner workings of
government as well as how government-specific events unfold.[5] For
example, the LaQuan McDonald shooting sparked public outrage but also
scores of FOIA requests from media who were investigating the incident to
learn more about how the events unfolded and what actions public officials
and police officers took in response to the shooting. Such FOIA requests
focused on private emails sent and received by Chicago police officers
regarding the shooting, and information about those police officers,
including their disciplinary history.
Indeed, the purpose of the Illinois Freedom of Information Act (“FOIA”) is to ensure an informed citizenry by providing the public the right to access government documents and records. FOIA serves as a proverbial “check and balance” and permits the public to investigate and often scrutinize government affairs. But for public sector employers, FOIA can have the unintended consequence of diminishing an employee’s privacy interest in information conveyed via employer-issued or personal technology. Despite numerous express exemptions in FOIA, public sector employers have been forced to reveal information, including among other things, disciplinary history, employee work product communications made over personal and private devices, even employee schedules, in order to comply with requests for information, sometimes at the expense of privacy, thereby blurring the boundaries between personal and workplace communications. While public sector employees generally have little to no expectation of privacy in communications or work product created on employer-issued technology and equipment, employees cannot use private devices to circumvent transparency and the disclosure obligations required by FOIA. But personal privacy appears to be up for grabs and now within the reach of FOIA given a developing precedent in case law and administrative law that hold private communications subject to disclosure under FOIA.

FOIA’s objective to foster greater transparency in governmental affairs often conflicts with core requirements of collective bargaining agreements that, in some instances, set forth broad protections for represented employees, including preserving their privacy. Unions have negotiated privacy provisions within collective bargaining agreements in an attempt to protect and preserve the privacy of their membership. When these privacy protections in collective bargaining agreements intersect with FOIA, however, the privacy lines are blurred even more. In particular, the interplay between FOIA and collective bargaining agreements presents challenging legal issues concerning FOIA’s foundational purpose of shining light on government activity, and potential conflicts with collective bargaining agreements and other laws. There can be no dispute that FOIA requires disclosure of records in the possession of a public body at the time of the request. A privacy protection embedded in a collective bargaining agreement that renders a public record private is contrary to the public policy expressed in Section 1 of FOIA as well as disclosure obligations placed on public bodies. It is likely that an arbitrator would not have
authority to uphold such a privacy protection because doing so would conflict with FOIA’s broad purpose to enlarge transparency in the public sector[10].

This article will provide an overview of FOIA and the collision course it has inadvertently manufactured with obligations under collective bargaining agreements, as well as employee privacy interests. It will offer suggestions for how public sector employers can best supervise, control, and operate an efficient workplace complying with FOIA without unreasonably invading employee privacy.

II. BACKGROUND: THE FOIA, IPRLA, AND COLLECTIVE BARGAINING

A. FOIA: An Overview of the Illinois Transparency Law

FOIA is a state statute that provides the public the right to access government documents and records including information about employees.[11] FOIA contains neither an exemption for, nor any reference to, collective bargaining agreements that obligate parties to keep employee information private. But FOIA does broadly provide that the disclosure of public records is in the public interest and a tool for the public to learn more about the activities and inner workings of government. The preamble of FOIA establishes the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and polices of public officials and public employees, and that, therefore, public records are to be accessible to the citizens of the State, unless access is specifically exempted under the terms of FOIA.[12] Section 1 of FOIA sets forth the public policy and clearly favors disclosure in public records, stating in relevant part:

Restraints on access to information, to the extent permitted by this Act, are limited exceptions to the principle that the people of this State have a right to full disclosure of information relating to the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people.[13]

FOIA is further grounded in the principle that the public should be able to access public records and information about the workings of their
Specifically, FOIA provides that a person may ask a public body for a copy of its records on a specific subject and the public body must provide those records, unless there is an exemption in the statute that protects those records from disclosure (for example, records containing information concerning trade secrets or personal privacy). Under FOIA, “[a]ll records in the custody or possession of a public body are presumed to be open to inspection or copying,” and “[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of th[e] Act.”

1. Exemptions From Disclosure Under FOIA

Not all information is subject to the disclosure obligations under FOIA. Accordingly, a public body “must comply with a valid request for information unless one of the narrow statutory exemptions set forth in section 7 of FOIA applies.” Section 7 lists classes and subclasses exempt from inspection and copying. Section 7.5 sets forth a list of exemptions derived from other Illinois statutes. Among the FOIA exemptions of most interest to public sector employees and public sector employers are the following:

- Private information, which is defined as “unique identifiers, including a person’s Social Security number, driver’s license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal e-mail addresses.” Under FOIA, “private information also includes home addresses and personal license plate numbers, except as otherwise provided by law or when compiled without possibility of attribution to any person.”

- Personal information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the person who is the subject of the information. Under FOIA, the “unwarranted invasion of personal privacy” means the “disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject’s right to privacy outweighs any legitimate public interest in obtaining the information.” Disclosing information that relates to the public duties of public employees is not considered an invasion of personal privacy.
• Law enforcement records that, if disclosed, would interfere with a pending or reasonably contemplated proceeding or that would disclose the identity of a confidential source.[22]
• Information that, if disclosed, might endanger anyone’s life or physical safety.[23]
• Preliminary drafts or notes in which opinions are expressed or policies are formulated, unless the record is publicly cited and identified by the head of the public body.[24]
• Business trade secrets or commercial or financial information that is proprietary, privileged or confidential and disclosure would cause a competitive harm to the person or business.[25]
• Requests that are “unduly burdensome.”[26]

The exemptions enumerated in Section 7 establish a framework for assessing and balancing various interests, including personal privacy, against the public’s interest in disclosure. Although each exemption is subject to interpretation, no specific exemption exists for collective bargaining obligations that may exist between a union and public sector employer. At the same time, parties are not free to bargain around FOIA by negotiating and thereby creating exemptions.

2. The Public Records Definition

FOIA broadly defines what constitutes a public record. “Public records,” a term of art used throughout FOIA, is broadly defined in Section 2(c), which sets forth a definition containing a multitude of synonyms:

all records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, recordings, electronic data processing records, electronic communications, recorded information and all other documentary materials.[27]

This list is not exhaustive and subject to broad interpretation. For example, “writings” broadly interpreted could certainly encompass email messages, text messages, or social media posts issued on employer-issued computers, requiring a public body to disclose such documents. The same can be said
about “reports” “papers” or “recorded information” which are all subject to a broad interpretation.

Particularly illustrative of FOIA’s reach into emails and text messages is that the term “public records” now includes as part of its definition “electronic communications.” Again, the interpretation is quite broad but shows anything is within FOIA’s grasp. The question of whether this extends to emails from a personal or private account, or whether it includes only emails on public computers or through public accounts remains unsettled and is also the subject of two FOIA lawsuits pending in the Circuit Court of Cook County.[28]

3. Pertinent PAC Opinions Concerning Privacy

While the debate continues, the Illinois Attorney General Public Access Counselor’s (“PAC”)[29] position on the issue is crystal clear – public officials and employees’ private email or text messages created in furtherance of government business constitute public records subject to disclosure under FOIA.[30] In early decisions on requests to review, the PAC has affirmatively held that emails are subject to FOIA even if they are on a public official’s personal device, account or computer.[31]

In PAC Opinion 11-006 involving the City of Champaign and its City Council, for example, the PAC issued its first binding opinion regarding the denial of a reporter’s FOIA request for text messages, emails, and other electronic records on public officials’ personal cell phones and other devices.[32] The City of Campaign had argued that the records were not “public records” subject to release because they were issued on private devices, but the PAC disagreed and determined that the City of Champaign violated FOIA when it failed to disclose the emails and text messages sent by City Council members.[33] According to the PAC opinion, the key determinant is whether the emails related to public business.[34] Because the City Council members were using private devices to conduct city business, public records were created thereby triggering an obligation under FOIA to disclose. PAC Opinion 11-006 was appealed to the circuit court, and then the Fourth District Appellate Court which upheld the PAC opinion that the text messages were releasable, but on more limited grounds than expressed by the PAC. [35] This decision was the first instance
in Illinois where private emails were found to be subject to disclosure under FOIA.

The PAC recently revisited the issue as to whether private emails are subject to disclosure under FOIA in a case involving the Chicago Police Department and CNN. In that case, CNN requested private emails of police officers who were involved in the Laquan McDonald shooting. In PAC Opinion 16-006, the PAC found the Chicago Police Department in violation of FOIA when it failed to provide copies of emails sent or received by Chicago police officers on their private accounts that related to the Laquan McDonald shooting. The City had provided the requester with emails that were sent or received on the officers' official City email accounts or were found on the City server. The City did not provide any emails on the officers' personal email accounts on the grounds that the emails were not public records because the City did not have any control over the officers' personal devices, and the emails were not used by, received by, in the possession of, or under the control of a public body. The PAC ruled against the City, finding that “communications pertaining to the transaction of public business that were sent or received on the Chicago Police Department employees' personal e-mail accounts are 'public records' under the definition of that term in section 2(c) of FOIA." The PAC noted that any other interpretation would be "contrary to the General Assembly's intent of ensuring public access to full and complete information regarding the affairs of government."[39]

B. The Illinois Public Labor Relations Act

The Illinois Public Labor Relations Act ("IPLRA") contains numerous protections for employees. However, it does not explicitly reference how it may square conflicts with FOIA should the two statutes interact and potentially create a conflict. Instead, the IPLRA explicitly provides a broad remedy for conflicts with other laws impacting wages, hours and working conditions as well as conflicts between collective bargaining agreements and other laws.[41]

Where a conflict exists between a local ordinance or law and a public employer collective bargaining agreement, Illinois statute and case law provide that the IPLRA or collective bargaining agreement will take precedence.[42] According to Section 15 (a):
In case of any conflict between the provisions of this Act and any other law (other than Section 5 of the State Employees Group Insurance Act of 1971 and other than the changes made to the Illinois Pension Code by Public Act 96-889 and other than as provided in Section 7.5), executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control.[43]

Section 15 (b) of the IPLRA provides:

[A]ny collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents.[44]

Section 15 clearly gives precedence to the IPLRA or a collective bargaining agreement only if there is a “conflict” pertaining to wages, hours and working conditions between the IPLRA and the other statute, or if the other statute is “contrary” to a collective bargaining agreement.[45] In other words, Illinois law declares that a collective bargaining agreement supersedes any conflicting statute or ordinance relating to wages, hours and working conditions.[46] Despite the absence of any reference to FOIA, Section 15 is the vehicle that unions may be able to rely upon when challenging disclosure that conflicts with privacy provisions within a collective bargaining agreement.

C. Collective Bargaining Agreements And Privacy Protections

Without question, unions have negotiated not only traditional issues such as higher wages and better working conditions, but also widespread protections that relate to employee privacy. Unions have historically negotiated provisions aimed at increasing employee privacy, particularly in the use of employee records, primarily disciplinary records, as well as privacy provisions related to substance abuse and employee assistance programs. Recognizing the increased demands placed on public sector employers, unions now negotiate broader privacy protections for their membership, including confidentiality of information in connection with investigation and processing of employee grievances, confidentiality of
medical records, employer surveillance, including telephonic and GPS monitoring, and electronic monitoring of communications.

Both the Fraternal Order of Police Chicago Lodge No. 7 (“FOP”)\[^{[47]}\] and Police Benevolent Protective Association - Chicago (“PBPA”) have negotiated several provisions in their collective bargaining agreements with the City of Chicago aimed at protecting the privacy of police officers by curbing the release of Complaint Register (CR) files which are generated whenever a citizen files a complaint against a police officer. For example, Section 8.4 of the FOP collective bargaining agreement with the City provides the following regarding CR files:

All disciplinary investigation files, disciplinary history card entries, Independent Police Review Authority and Internal Affairs Division disciplinary records, and any other disciplinary record or summary of such record other than records related to Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, except that not sustained files alleging criminal conduct or excessive force shall be retained for a period of seven (7) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, and thereafter, cannot be used against the officer in any future proceedings in any other forum, except as specified below, unless the investigation relates to a matter which has been subject to either civil or criminal court litigation or arbitration prior to the expiration of the five (5) year period. In such instances, the Complaint Register case files normally will be destroyed immediately after the date of the final arbitration award or the final court adjudication, unless a pattern of sustained infractions exists.\[^{[48]}\]

Section 8.4 of the PBPA collective bargaining agreement with the City of Chicago is almost identical:

All Disciplinary Investigative Files, Disciplinary History Card Entries, Office of Professional Standard or Independent Police Review Authority disciplinary records, and any other disciplinary record or summary of such record other than Police Board cases, will be purged from the online file system five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, and therefore, will not be used against the Sergeant in any future disciplinary proceedings, unless the investigation relates to a matter which has been subject to either civil or criminal court litigation or arbitration prior to the expiration of the five (5) year period. In such instances, the Complaint
Register case files will be purged from the online file system five (5) years after the date of the final arbitration award or the final court adjudication, unless a pattern of sustained infractions exists.[49]

The FOP has obtained additional terms that protect police officer private information. Article 6 of the collective bargaining agreement sets forth an officer’s Bill of Rights, and expressly provides in Section 6.8:

An Officer shall not be required to disclose any item of his or her property, income, assets, source of income, debts, or personal or domestic expenditures (including those of any member of his or her family or household) unless such information is reasonably necessary to monitor the performance of the Officer's job, violations of reasonable Employer rules, statutes, ordinances, or this Agreement. In the administration of fringe benefits applicable to all employees of the Employer, Officers covered by this Agreement may be required to disclose any coverage they (including any member of their families or households) may have under health or medical insurance and the name and appropriate identification of the carrier and coverage. The parties agree that the disclosure of such personal information shall not be made available for public inspection or copying because such would be an unwarranted invasion of personal privacy of the Officer, and/or is intended to otherwise be exempt from any state or local freedom of information statute, ordinance or executive order.[50]

Other unions also have negotiated privacy protections for their membership. For example, “the Teamsters and UPS, and the City of Orlando and its police union, have negotiated about employer use of GPS technology.”[51] Other unions have negotiated privacy protections for members who use personal devices (e.g., cell phones or laptops),[52] while other unions have negotiated side agreements pertaining to the use of surveillance cameras in the workplace.[53] In addition, “[t]he California State Employees Association has negotiated with the state about electronic entry and exit monitoring systems in correctional facilities, one using fingerprints.”[54]
III. CASES IMPACTING PRIVACY FOR PUBLIC SECTOR EMPLOYERS

A. City of Champaign v. Madigan: FOIA Requests For Private Emails

The first court decision on whether private emails are subject to FOIA was an appeal of PAC Opinion 11-006 as noted above. In City of Champaign v. Madigan, the Illinois Appellate Court for the Fourth District upheld the PAC’s opinion that the City of Springfield’s communications on privately owned devices are subject to release under FOIA. The Fourth District held that text messages sent on private devices are releasable under certain limited circumstances: (1) if forwarded to an official account; (2) if sent during a meeting; or (3) if sent to a majority of the public body members.[55] As the Fourth District acknowledged, FOIA does not expressly provide that communications on private devices are subject to FOIA. The court observed:

If the General Assembly intends for communications pertaining to city business to and from an individual city council member’s personal electronic device to be subject to FOIA in every case, it should expressly so state. It is not this court’s function to legislate. Indeed, such issues are legislative matters best left to resolution by the General Assembly.[56]

In other words, messages sent on private devices are only considered "public records" that might be subject to FOIA when the official sending or receiving the message is acting as a public body. The court’s rationale is that the public body is not in control or possession of messages of government officials when sent on the officials’ private devices except in certain limited circumstances.

B. Police Benevolent & Protective Ass’n Unit 5 v. City of Springfield: FOIA Requests for Internal Affairs Files

In 2013, several news organizations filed a FOIA request with the City of Springfield seeking internal affairs files for certain police officers[57]. The collective bargaining agreement between the City of Springfield and PBPA No. 5 contained a provision that mandated destruction of internal affairs files related to police officers that were more than five years old (similar to the provisions contained in the collective bargaining agreements between
both the FOP and PBPA and City of Chicago)[58]. However, the City of Springfield did not destroy the internal affairs files older than five years as required by the collective bargaining agreement.[59] To stop the release of the internal affairs files pursuant to the FOIA request, the PBPA No. 5 sought emergency injunctive relief claiming that (1) the collective bargaining agreements destruction provision operated as a de facto protective shield that prohibited release of the requested files; and (2) the collective bargaining agreements destruction requirement trumped FOIA.[60]

Finding these arguments unpersuasive, in Police Benevolent & Protective Ass’n Unit No. 5 v. City of Springfield, the Circuit Court of Sangamon County denied the PBPA No. 5’s motion for a preliminary injunction, holding that the City of Springfield’s failure to destroy internal affairs files older than five years as required by the collective bargaining agreement “has no effect on whether or not they are subject to the Freedom of Information Act.”[61] In balancing the conflict clause set forth in Section 15 of the Illinois Public Labor Relations Act against the transparency requirements under FOIA, the circuit court found in favor of FOIA, holding that “when these two provisions of the same act are read together it is clear the legislature did not intend for a collective bargaining agreement to supersede an existing state statute.”[62] The Circuit Court also reasoned that to accept the PBPA No. 5’s argument would permit the “parties of a collective bargaining agreement the luxury of contracting away any state law they deemed offensive.”[63] Nothing in the Public Labor Relations Act can be read to suggest the legislature intended to permit this absurd result.”[64] Put another way, no part of FOIA exempts from disclosure records that should have been destroyed by contract, and therefore, disclosure was required because the internal affairs files were in the City of Springfield’s possession.

C. Kalven v. City of Chicago: FOIA Requests For Misconduct Complaints

In a case concerning citizen complaints lodged against Chicago police officers, the plaintiff in Kalven v. City of Chicago, sought disclosure of certain documents related to complaints of police misconduct within the Chicago Police Department in the form of Complaint Registers (CR) and
Repeater Lists (RL).[65] The issue on appeal was whether the CRs and RLs were “adjudicatory” and exempt under Section 7(1)(n) of FOIA.

When responding to FOIA requests for CRs, the Chicago Police Department traditionally withheld them, arguing that they were exempt under various subsections of FOIA Section 7. In Kalven, however, the Illinois Appellate Court rejected this argument, which the court described as being “at odds with the purpose of FOIA, which is ‘to open public records to the light of public scrutiny.’”[66] The First District held that both CRs and RLs must be disclosed and are not exempt under Section 7(1)(n) because they were not part of any adjudication.[67] The First District recognized that it was possible that another FOIA exemption may apply to the CRs and RLs, e.g., the deliberative process exemption.[68] However, whether the deliberative process exemption applied would be resolved after an “in camera” (private) inspection by the trial court judge after the case was remanded for further proceedings.[69] The appellate court also held that lists of officers who accumulated the most CRs between 2001 and 2006, which were produced in response to court-ordered civil discovery in other cases, were not exempt under FOIA.[70] And although there was a protective order governing disclosure of the lists in the underlying civil cases, the appellate court held that the protective order did not have “any bearing on [Chicago Police Department’s] duty to disclose the [lists] pursuant to a FOIA request.”[71] In light of Kalven, the Chicago Police Department notified all police officers members on October 23, 2014, that it planned to release the lists on October 31, 2014. The Chicago Police Department provided copies of the lists to the plaintiff, as well as other unions representing Chicago Police Department employees.

D. Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago: FOIA Requests for Police Officer Complaints

1. Background

The Independent Police Review Authority ("IPRA") and Chicago Police Department’s Bureau of Internal Affairs are agencies that have authority to investigate complaints against Chicago Police Department personnel[72], and to recommend discipline to the Superintendent for violations of
department rules and regulations.[73] Documents generated by these investigations are commonly referred to as complaint register files or CR files.[74] In August 2014, the Chicago Tribune and the Chicago Sun-Times submitted FOIA requests for lists of all complaints filed against Chicago police officers. “Upon receiving a citizen complaint, the Chicago Police Department generally creates records cataloging the investigation into any officer’s alleged misconduct. The CR files consist of the complaint itself and documents created during the investigation of the complaint.”[75] The Tribune and the Sun-Times requested that the lists include the name of each officer against whom one or more CRs was filed, as well as the officer’s date of appointment, the complaint category, the complaint number, the incident date, the date of the complaint, the date the complaint was closed, the final finding of the investigation, and any action taken.

2. The Litigation

a. The Preliminary Injunction

The FOP filed suit to enjoin the release of the requested information. One of the counts alleged that the release of the requested information would interfere with FOP’s ability to seek redress in a pending arbitration regarding the City’s alleged breach of section 8.4 of the collective bargaining agreement which, FOP alleged, requires destruction of records of alleged misconduct that are more than five years old or, in cases involving allegations of criminal conduct or excessive force, more than seven years old. The union also asserted that defendants violated the IPLRA by unilaterally changing the terms of the collective bargaining agreement. The circuit court allowed the unions representing higher-ranking Chicago Police Department members (Chicago Police Sergeants Association, PBPA Unit 156A; Chicago Police Lieutenants Association, PBPA Unit 156B; and Chicago Police Captains Association, PBPA Unit 156C) to intervene as plaintiffs. The City, joined by the Chicago Tribune, moved to dismiss the complaint arguing that FOP was not entitled to injunctive relief because it had no likelihood of success on the merits. The court denied the motion to dismiss and granted preliminary injunctive relief on those claims pending the arbitration. The City, Chicago Police Department, and the Tribune appealed from the entry of the preliminary injunction.
b. The FOP Arbitration

In addition to the injunction it filed in the Circuit Court of Cook County, the FOP filed two grievances claiming that the City had violated the collective bargaining agreement by releasing disciplinary records that should have been destroyed after five years pursuant to Section 8.4 of the collective bargaining agreement.[76] On its face, Section 8.4 is the direct opposite of transparency because it provides for the destruction of documents related to the investigation and discipline of police officers, including the investigation of complaints involving their use of excessive and/or deadly force against citizens of the City. Complaints against a police officer are virtually obscured from the public which is contrary to the transparency goals embedded in FOIA.

These grievances were submitted to Arbitrator George Roumell, who presided over the arbitration, and issued four awards[77] on these grievances, beginning in January 2016, with his interim award sustaining the grievances and directing the parties to negotiate a timeline for destruction of the documents older than five years old.[78] Pursuant to the terms of the interim award, the City and the FOP met but were unable to identify records[79] to be destroyed or agree upon a timeline.[80]

Prior to the issuance of the final award, the City informed Arbitrator Roumell that the U.S. Department of Justice (“DOJ”) had initiated an investigation of the Chicago Police Department and that the DOJ requested that all relevant documents, including disciplinary and investigative records, be preserved.[81] The City also informed Arbitrator Roumell that a different arbitrator, Arbitrator Jules Crystal, had issued a final award in an arbitration regarding a similar provision in the contract involving Chicago Police Sergeants, and had found the provision to be a violation of public policy.[82]

On April 28, 2016, Arbitrator Roumell issued a Final Award regarding the grievances and found that state law did not warrant voiding the document destruction provision, but did note that the DOJ request constituted a sufficient public policy exception to preserve the documents for the time being until the investigation and all resultant intervention and litigation was concluded.[83] Arbitrator Roumell clarified this award on June 21, 2016, by stating that “the destruction of records pursuant to the language of
Section 8.4 is there to be read and applied once the public policy exception brought by the Department of Justice investigation and its possible consequences no longer exists.”[84]

c. The PBPA Arbitration

Similar to the grievances filed by the FOP, the PBPA (representing in three separate collective bargaining units sergeants, lieutenants and captains in the Chicago Police Department) filed several grievances as well on the grounds that Section 8.4 of the parties’ collective bargaining agreement was violated because the City failed to destroy the disciplinary histories and complaint histories of every sergeant, lieutenant and captain. As Arbitrator Crystal recited in his award, “The City - relying on the same contract provision, together with the parties’ bargaining history, its legal obligation requiring that it comply with external law and court orders, the Union’s acquiescence to the Department’s practice, and the Association’s failure to show that its actions has harmed any of its members -- contended that the Grievance was without merit and should be dismissed in its entirety.”[85]

Following the submission of briefs, Arbitrator Crystal issued his award and determined that the City violated the parties’ collective bargaining agreement when it failed to purge CR and disciplinary records from its online file system.[86] However, unlike the broad remedy sought by the Union, i.e., the destruction of the records, Arbitrator Crystal directed that the City comply with the express terms and conditions (and exception) set forth in Section 8.4, i.e. removal of the records from the City’s on-line file system.[87] Shortly after the issuance of the award, the City filed a request for clarification of the award with Arbitrator Crystal, explaining that recent developments since the issuance of the award required a re-assessment of the remedy.[88]

Arbitrator Crystal issued a new award and wrote that the provision in the sergeants’ contract was in “direct contravention of what has become a clear and predominant public policy – a public policy that has been embraced by recent judicial pronouncements and mirrored in the language of existing legislation. With respect to the latter, the language of FOIA, the Public Records Act and the Local Records Act supports the trend towards disclosure.”[89]
d. The First District Appellate Court Decision

On appeal, The First District Appellate Court vacated the preliminary injunction that the Circuit Court of Cook County had entered to preserve the status quo to allow the arbitrators to determine if the City breached section 8.4 of the collective bargaining agreements by continuing to retain CR files and disclose them pursuant to FOIA. The First District held that the remedy the FOP sought - to have the arbitrators order the City to “comply with Section 8.4 by destroying records more than five years old forthwith” – was not enforceable because it precluded the City from complying with pending FOIA requests. The First District explained that enforcement of an arbitration award requiring destruction of the requested records would violate FOIA as well as the public policy underlying the General Assembly’s adoption of the Act.

With respect to collective bargaining obligations, the First District stated:

In light of these public policy considerations and the purpose of the FOIA to open governmental records to the light of public scrutiny, an award in the pending arbitration proceedings would be unenforceable if it circumvented the City’s required compliance with the FOIA requests at issue. Although arbitration is a favored method of dispute resolution in both Illinois and federal courts, an arbitration award may not stand if it results in the contravention of paramount considerations of public policy.

Because the circuit court identified no exemption that would permit denial of the FOIA requests at issue, the First District found there was no breach of a collective bargaining agreement and that no such exemption exists. The First District concluded that there was no legal basis for the circuit court to enjoin the City from releasing the requested records to allow FOP to pursue a legally unenforceable remedy at arbitration.

E. City of Chicago v. CNN and Chicago Tribune v. City of Chicago: FOIA Requests For Police Officers’ Private Emails

Last January, a CNN producer filed a request for information with the Chicago Police Department that sought “all emails related to Laquan
McDonald from Police Department email accounts and personal email accounts where business was discussed” for twelve Chicago police officers.[96] Similarly, the Chicago Tribune filed a lawsuit making parallel allegations that the Chicago Police Department violated FOIA by failing to produce requested emails relating to the Laquan McDonald shooting.[97] CNN filed a request for review with the PAC, which in Opinion 16-006, ruled in favor of disclosure.

The City filed a petition for administrative review of PAC Opinion 16-006 alleging that the opinion was erroneous as a matter of law regarding the City's FOIA obligations with respect to emails of individual officer employees contained on their privately-owned, personal email accounts.[98] The City maintained that the opinion incorrectly construed the definition of "public records" in section 2(c) of FOIA and incorrectly applied that definition in concluding that the emails sought on individual officer employees' privately-owned, personal email accounts are "public records."[99]

The City argued that the PAC Opinion “incorrectly equates an individual officer employee with a ‘public body subject to the requirements of FOIA,’ ... . . . and incorrectly concludes that individual officer employees communicating on private email accounts are transacting business as a ‘public body,’ as defined in section 2(a) of FOIA.”[100]

The City also alleged that the PAC Opinion was contrary to FOIA in three other areas. First, the PAC Opinion was overly broad in a practical sense because it sought to impose on the City a requirement to search not just the personal emails of all City employees but also personal devices of all City employees.[101] Second, the PAC Opinion wrongly interfered with FOIA’s personal privacy protections because it impermissibly required the City to search private emails.[102] And third, compliance with the PAC Opinion would enlarge the scope of FOIA and diminish the intent of the General Assembly’s construction of FOIA.[103]

The PAC Opinion, the City maintained, was also contrary to law because it imposed an obligation on the City—to search for records on privately-owned, personal email accounts not under the City’s control—that FOIA does not impose. This obligation is also incompatible with the structure of FOIA, which contains no mechanism by which a public body can force its
employees to grant it access to their personal email accounts at all, much less within the five-business-day period in which public bodies must respond to a FOIA request.[104] The Chicago Tribune also filed a lawsuit alleging that its FOIA request for emails related to the LaQuan McDonald shooting was improperly denied.[105] The City had responded to the Tribune’s FOIA request that the request was unduly burdensome.[106] The Tribune alleged that on March 22, 2016, the Chicago Police Department promised to produce emails, but failed to do so.[107] The complaint further alleged that the denial was retaliatory against the Tribune reporter who submitted the request as she had previously been involved in a separate lawsuit by the Tribune against the Chicago Police Department.[108] The case is currently pending in the Circuit Court of Cook County.

F.  PBPA v. City of Springfield: FOIA For Police Officer Misconduct Complaints

Similar to the FOP and PBPA cases involving the City of Chicago’s obligation to destroy files pursuant to collective bargaining agreements, in Police Benevolent & Protective Ass’n Unit No. 5 v. City of Springfield, the Circuit Court of Sangamon County held that the City of Springfield’s failure to destroy closed internal affairs files, as allegedly was required by a collective bargaining agreement between Springfield and its police union, “has no effect on whether or not they are subject to the Freedom of Information Act.”[109] Despite the union’s insistence that the collective bargaining agreement superseded FOIA, the court confirmed that that parties are not permitted to circumvent state law by negotiating around it.[110] To do so is contrary to both Section 15 of the IPLRA and Section 1 of FOIA.[111] In other words, Police Benevolent & Protective Ass’n Unit No. 5 holds that parties may not bargain away FOIA’s disclosure requirements.[112] Moreover, the court reasoned, any claim that privacy is implicated by disclosure is controverted by the provision within FOIA that permits redaction of certain information. Police Benevolent & Protective Ass’n Unit No. 5 correctly notes that FOIA includes protections which prevent potential irreparable harm by the release of CR files, including the deletion of all personal and private information, such as addresses and Social Security numbers.[113]
G. *City of San Jose v. Superior Court: FOIA Request For Employees Private Emails, Text Messages And Voicemails*

Although not an Illinois decision, the California Supreme Court’s recent ruling about private emails in furtherance of public business is instructive. In *City of San Jose v. Superior Court of Santa Clara County*, the state's high court considered whether records concerning the conduct of public business were beyond the reach of the California Public Records Act merely because they were sent or received using a nongovernmental account.[114] The case arose when an individual sought records from the City of San Jose's redevelopment agency, the agency’s executive director and certain elected officials.[115] The City produced the documents from official phone numbers and email accounts, but did not provide information stored on the officials' personal accounts.[116] Considering the statute's language and the public policy interests it serves, the court concluded that communications about public business may be subject to the California Public Records Act (“CPRA”) regardless of the account used in their preparation or transmission.[117] The California Supreme Court reversed the California Court of Appeal which had held that:

> the language of the CPRA does not afford a construction that imposes on the City an affirmative duty to produce messages stored on personal electronic devices and accounts that are inaccessible to the agency, or to search those devices and accounts of its employees and officials upon a CPRA request for messages relating to City business. Whether such a duty better serves public policy is a matter for the Legislature, not the courts, to decide.[118]

The California Supreme Court analyzed the four elements of a public record. The California Public Records Act defines a public record as: “(1) a writing, (2) with content relating to the conduct of the public's business, which is (3) prepared by, or (4) owned, used, or retained by any state or local agency.”[119] The court confirmed that emails, text messages, and other electronic platforms are "writings" under the California Public Records Act.[120] As to the second element, the court concluded that "a writing must relate in some substantive way to the conduct of the public's business."[121] In evaluating the third and fourth elements, which require that a writing be "prepared, owned, used, or retained by any state or local agency," the court focused on the term "or."[122] The court noted that
agencies operate through officers and employees who "prepare" records relating to official business. As such, records prepared by officers and employees are public if they are in the "agency's actual or constructive possession." [123]

H. Cooper v. Glenn Ellyn School District 41: FOIA Requests For Teachers Union Emails

In October 2016, FOIA litigation involving Glen Ellyn School District 41 concluded when a Du Page County Circuit Court judge ordered the District to turn over certain emails generated by members of the Glen Ellyn Education Association ("GEEA") that related to GEEA’s efforts to form “an informal committee comprised of teachers from various schools in the District, who screen, vet, and recommend candidates for the District’s School Board.”[124]

I. City of Ontario v. Quon: Private Messages Made on Employer-Issued Devices

In the face of continuous technological change over the past two-plus decades, the Supreme Court revisited employee workplace privacy issues in its 2010 decision, City of Ontario v. Quon.[125] At issue in Quon was the City of Ontario Police Department’s search of its employee’s text messages on his employer-issued pager.[126] Quon had been warned that the City had a policy under which it reserved the right to monitor and log all network activity, including text messages, email and internet use, with or without notice to employees.[127] The policy further stated that “users should have no expectation of privacy or confidentiality when using these resources.”[128]

After Quon exceeded his set monthly text allowance multiple times, his supervisor requested transcripts of the texts to determine whether the overages were occurring as a result of Quon’s personal use of the pager, as opposed to proper work-related use.[129] The resulting search revealed personal messages to Quon’s wife and an alleged mistress. [130]
After learning that the city had searched his text messages, Quon sued the City of Ontario, alleging that the search violated his Fourth Amendment rights, the Stored Communications Act, and other state laws.[131] A federal district court determined that while Quon had a reasonable expectation of privacy in the content of his text messages, the City of Ontario had a legitimate purpose for undertaking the search.[132] The Ninth Circuit reversed, reasoning that even if the search was conducted for a legitimate reason, it was unreasonable in scope because the City of Ontario failed to use less intrusive means.[133]

The Supreme Court unanimously reversed the Ninth Circuit’s decision and found that the scope of the City’s search was indeed reasonable.[134] In so finding, the Court noted as a preliminary matter that employers are not required to use the “least intrusive search practicable” under the Fourth Amendment.[135] Next, the Court found that the scope of the search was reasonable because, among other things, the employer limited the search to two months of text messages and excluded from the search any text messages sent outside work hours, demonstrating that the employer was trying not to intrude on Quon’s personal privacy. [136]

Just as important as what the Court ruled upon, however, was what the Court specifically declined to address. The Court declined to address the first of the principles it had established in O’Connor v. Ortega,[137] i.e. whether Quon had a reasonable expectation of privacy in his text messages.[138] Because the Court found that the second prong of O’Connor was satisfied (the purpose of the search was legitimate at its inception, and the scope was reasonably related to the employer’s objectives), the search was valid regardless of whether Quon had a reasonable expectation of privacy in his texts.[139] The Court explained its hesitation to create a firm rule regarding an employee’s expectation of privacy in text messages:

The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. . . . Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. . . . At present, it is uncertain how workplace norms, and the law’s treatment of them, will evolve. . . . A broad holding concerning employees’ privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted.[140]
With that, the Supreme Court effectively confirmed that a public employee’s expectation of privacy in communications on employer-issued technology will depend in large part upon employer policies and practices and regulation for legitimate purposes.

**J. Additional Lower Court Cases Impacting Employee Privacy**

While public employees’ expectations of privacy can be diminished or expanded by “the operational realities of the workplace,”[141] lower courts have often been divided with respect to what privacy, if any, a public employee can expect in the workplace. For example, in *Leventhal v. Knapek*, the Second Circuit found that a public employee had a reasonable expectation of privacy in his work computer and matters contained therein despite the employer’s official policy prohibiting the use of state equipment for personal business.[142] The court noted that the employee did not share his computer with anyone, there was no general practice of the public employer to routinely search employee computers, and the employer had not made clear that employees lacked privacy rights in what was stored in the computers.[143] Importantly, the court’s decision emphasized that the employer’s practice was determinative.[144]

In *Stengart v. Loving Care Agency, Inc.*, the New Jersey Supreme Court held that an employee has a reasonable expectation of privacy in communications with her lawyer via a personal, password-protected email account, even if accessed on an employer-issued computer.[145] In addition to preserving the sanctity of the attorney-client privilege, the court found that Stengart had a subjective expectation of privacy because she took steps to protect her emails, sending them from her personal, password-protected account and not saving her password to the employer-issued computer.[146] Also importantly, the court concluded that the employer’s email policy was unclear and permitted “occasional personal use,” thereby creating ambiguity as to whether personal email was employer or private property.[147] In holding that Stengart had a reasonable expectation of privacy, the New Jersey Supreme Court recognized the employer’s practice as a proxy for an explicit policy.[148]

By contrast, where there are clear, explicit, and reasonable policies, some courts have declined to recognize a reasonable expectation of privacy in
employee emails and other documents and records created on employer-issued technology. For instance, the Fourth Circuit held in United States v. Simmons[149] that a government employee lacked a legitimate expectation of privacy in the files he downloaded from the Internet because of a workplace policy. In a routine security check of the workplace firewall protection, the employer discovered Simmons had downloaded material unrelated to government business despite an explicit policy stating the employer would audit or monitor “all file transfers, all websites visited, and all e-mail messages.”[150]

In Biby v. Board of Regents of the University of Nebraska,[151] the Eighth Circuit reviewed a case in which the public university employer had a policy informing computer users “not to expect privacy if the university has a legitimate reason to conduct a search,” specifically including searches “responding to a discovery request in the course of litigation.”[152] The University sought to produce files from Biby’s computer in response to a discovery request, and Biby claimed the search violated his Fourth Amendment rights. [153] In light of the policy, the court found that Biby failed to show he had a reasonable expectation of privacy in his computer files.[154] The lesson of Biby is that a well-balanced policy provides an employer with greater leverage to conduct a search, especially in the context of litigation.

The Tenth Circuit held in United States v. Angevine, that a public university professor had no legitimate expectation of privacy in pornographic files stored on his computer.[155] The university’s computer policy stated, “The contents of all storage media owned or stored on University computing facilities are the property of [the] University,” and noted that “the University reserves the right to view or scan any file or software stored on the computer or passing through the network, and will do so periodically . . . to audit the use of University resources.”[156]

In short, and irrespective of the technology, these decisions confirm that where there is an explicit policy setting forth terms under which technology and facilities are monitored, the balancing of privacy interests weighs heavily in favor of the employer.
IV. THE COLLISION BETWEEN TRANSPARENCY AND COLLECTIVE BARGAINING OBLIGATIONS: TAKEAWAYS FROM THE REPORTED CASES AND ARBITRATION AWARDS

The confluence of FOIA requests and media scrutiny in all aspects of government affairs focused heavily on employee information renders the importance of workplace privacy even more timely. While there is a high value placed on privacy, actual protection in the workplace is limited. Legitimate employer interests and rigid transparency laws generally justify intrusions on employee privacy. Public employee laptops, smart phones, and mobile devices – employer-issued or personal – allow employees to work from the road or from home, creating confusion and uncertainty about the scope of privacy related to both personal and workplace communications. This new reality makes it more challenging to determine the scope of privacy in the workplace. Despite the legitimacy of employer motives[157] and mandate to comply with FOIA, however, employer practices can certainly intrude on employee privacy interests, especially when it comes to private email and text messages. Public sector employees have an interest in protecting and controlling the use of personal information about them.

These privacy interests clash with legitimate employer interests to comply with FOIA. In wake of the above-discussed case law and arbitration awards, the following are takeaways for employers and employees when it comes to disclosure requirements under FOIA that conflict with collective bargaining obligations and employee privacy interests.

A. Arbitration Awards Favor Disclosure Over Privacy Protections Within Collective Bargaining Agreements

In light of the follow-up arbitration awards issued by Arbitrators Roumell and Crystal, it is likely that FOIA will generally trump any collective bargaining provision aimed at protecting employee privacy. It is now settled that CR files and complaint register histories generally are not exempt from disclosure under FOIA’s Section 7. Moreover, those cases made clear that FOIA contains no exemption for documents that should have been destroyed (whether by operation of law or contract) but were not. Nor does FOIA exempt records that are subject to the terms of a
collective bargaining agreement. Thus, even if the Chicago Police Department was required under section 8.4 of the collective bargaining agreement to destroy the CRs, the Chicago Police Department was required to produce them because they existed at the time the FOIA requests were submitted and there is no exception barring their production.

B. Public Policy Favors Disclosure Over Collective Bargaining Obligations

Section 1 of FOIA declares it to be the “public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act.”[158] To that end, any agreement to exempt information from the ambit of disclosure under FOIA would not be binding. A contract provision that violates public policy as expressed in a statute is unenforceable.[159] Thus, interpretations of collective bargaining provisions that would permit a public sector employer to circumvent the public policy effectuated by FOIA would be unenforceable.

C. FOIA Will Supersede the IPLRA

Moreover, FOIA is a state statute; therefore, the parties may not contractually agree to remove any documents from the ambit of disclosure under FOIA. FOIA does not provide that it is subordinate to the terms of a collective bargaining agreement or any other contract. Section 15(b) of the IPLRA provides, in pertinent part, that “any collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents.”[160] Thus, although a collective bargaining agreement can trump certain laws, it takes precedence only over a law that is adopted by the public employer itself.[161] In other words, because FOIA is a state law that generally does not trigger issues related to unionized employees’ wages, hours, or working conditions, collective bargaining agreements will not supplant FOIA’s transparency aim.
D. Only Heads of Public Bodies Will be Compelled to Turn Over Personal Emails Issued from Private Accounts and/or Devices

Most recently, Mayor Rahm Emanuel has been sued by the Better Government Association over emails maintained on a personal server as well as by the Chicago Tribune for refusing to release emails and text messages about city business conducted using his personal devices.[162] Mayor Emanuel resolved the case involving the Better Government Association, agreeing to turn over roughly 2,700 emails regarding City business on his personal email account. In doing so, Mayor Emanuel was able to pick and choose what emails he would disclose and avoid having the judge compel him to turn over all of his personal emails.[163]

But individual employees who use private devices to conduct government business are unlikely to be sued or even compelled to disclose private emails or text messages. Given the structure of FOIA, if public officials conduct government business using private devices or private email accounts, they are likely to have to turn over emails pursuant to a FOIA request. That is because the general perception of a public employee does not fit into the definition of “public body” as defined by Section 2(a) of FOIA.[164] In fact, FOIA defines “Head of the public body” as “the president, mayor, chairman, presiding officer, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body, or such person's duly authorized designee.”[165] It seems when the air is finally cleared in the litigation, employees will not be compelled[166] to turn over private emails or text message issued on private devices because they do not constitute the “head of the public body.”

E. Disclosure of Personal Emails from Private Accounts May be Barred by Federal Law and the Fourth Amendment

1. The Stored Communication Act

The Stored Communications Act (“SCA”), a federal statute may also prohibit disclosure of an employee’s personal emails issued from private devices. The SCA is a federal statute with two principle aims: (1) it protects personal information stored by electronic communication service providers
from disclosing a person’s electronic communications;[167] and (2) it sets forth the procedures by which law enforcement can compel electronic communications service providers to disclose such personal electronic communications.[168] Because FOIA requests for employee’s personal emails are generally stored by electronic communication service providers, unless the employee voluntarily agrees, employers will be hard-pressed to compel disclosure due to the constraints posed by the SCA.

Indeed, if a FOIA request seeks government emails that are maintained by an electronic communication service provider, the SCA does not necessarily prohibit disclosure. In *Flagg v. City of Detroit*[169] a wrongful death lawsuit brought against the Mayor of the City of Detroit, his chief of staff, and other city officials, the plaintiff’s sought in discovery City of Detroit text messages that were stored by SkyTel, a non-party electronic service provider. The City objected to the discovery request on the basis that (1) the text messages were private; and (2) the SCA prohibits disclosure of the requested text messages in civil litigation because they were stored by a non-party service provider.[170] The court rejected the City’s objection reasoning that the City itself had control of the text messages stating, “If the City can block the disclosure of SkyTel messages by withholding its consent, it surely follows that it can permit the disclosure of these communications by granting its consent. This acknowledged power readily qualifies as a ‘legal right to obtain’ the messages held by SkyTel, and hence constitutes ‘control’ within the meaning of Rule 34(a)(1).”[171] The court further rejected the City’s privacy arguments because the Mayor signed off on a city policy that put employees on notice that text messages and emails were the property of the City and could be subject to disclosure[172].

Unlike *Flagg v. City of Detroit*, neither CNN nor the Chicago Tribune are likely to be able to obtain disclosure of the personal emails of Chicago police officers issued on private accounts because they are not within the control of the City. It is also unlikely that the electronic communication service providers could be compelled to turn over those emails due to the protections detailed in the SCA.

2. The Fourth Amendment

In addition to the SCA, FOIA requests for personal emails issued on private accounts will certainly press the question of whether the Fourth
Amendment protects against employer-acquisition of such electronic information. Private devices have become “such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”[173] The U.S. Supreme Court made clear in Riley v. California that private devices contain a treasure trove of personal information particularly the “sum of an individual’s private life” that there must be a reasonable expectation of privacy.[174] Public sector employees who use private devices to send personal emails or text messages certainly would enjoy that same expectation of privacy.[175] In determining whether an individual has an expectation of privacy in information held by a third party, such as an electronic communications provider, factors generally considered are whether the information was “voluntarily conveyed” and what privacy interest a person has in the information[176].

The conclusion that public sector employees enjoy a reasonable expectation of privacy in personal emails issued on private devices is likely given the other contexts in which a privacy interest has been found. In addition, while a public sector employee may have voluntarily conveyed information, e.g., an email on Google Mail, there is a certain privacy interest in that information. For example, an email or text to a significant other may reveal intimate details always intended to be private. In another way, an email about a family issue or medical condition would certainly entail sensitive information that is exceedingly private. FOIA requests for personal emails are surely going to implicate the expectation of privacy in information. FOIA was never intended to enlarge its reach in such a way, and therefore, the privacy interests are likely to outweigh the need for transparency.

F. Invoking the Unwarranted Invasion of Privacy Exemption in FOIA is Generally Inapplicable When the Information Sought Pertains to Employment Duties

While society generally places a high value on privacy, actual protection in the workplace is limited. Legitimate employer interests generally justify intrusions on employee privacy.[177] A FOIA request could be construed as such a legitimate intrusion. Notwithstanding, FOIA does contain an exemption for records that, if disclosed, would result in a “clearly unwarranted invasion of personal privacy.”[178] Section 7(c) provides that
an “[u]nwarounded invasion of personal privacy’ means the “disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject’s right to privacy outweighs any legitimate public interest in obtaining the information.”[179] The same section further provides that “[t]he disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.”[180] Even if the information within a public record may be highly personal and embarrassing, as long as it relates to the public duties of an employee or official, use of this exemption will not be allowed.

G. Proposal to Make Private Emails Subject to Disclosure Under FOIA

As a reaction to the ambiguity of FOIA as applied to private devices, the Fourth District in City of Champaign v. Madigan strongly emphasized the need for legislative action regarding electronic communications and public record laws.[181] The Fourth District stated that it “[encouraged] local municipalities to consider promulgating their own rules prohibiting city council members from using their personal electronic devices during city council meetings.”[182] Several years after the Fourth District’s proclamation, Senate Bill 1977 has been introduced to amend FOIA to modify the definition of “public records.”[183] The change is:

(c) “Public records” means all … electronic communications, recorded information and all other documentary materials pertaining to the transaction of public business, regardless of physical form or characteristics, having been prepared by or for the public body, or having been or being used by, received by, in the possession of, or under the control of any public body. [184]

This new legislative proposal appears to be an immediate reaction to avoid the uncertainty of FOIA as it relates to private email and text messages, but also a measure to bring clarity in light of Champaign v. Madigan and PAC Opinions 11-006 and 16-006. There is one glaring problem with the proposed legislation. If the public body has never received the particular record, complying with a FOIA request for that record could be difficult. In the same way the Chicago Police Department was challenged by the request from the Chicago Tribune and CNN, emails or text messages on a public
official or employee’s private device are not readily available to the public body, making it difficult, if not impossible to comply with a FOIA request.

In addition, House Bill 2385 would amend the Local Records Act to expressly provide that all emails sent or received by a government agency, officer, employee, or contractor are public records "regardless of whether the email is sent or received on a personal or agency-provided email address." [185] The bill also includes the following requirements:

- Agencies must provide official email addresses to all officers of the agency if employees are provided with an official email address.

- All officers, employees, and contractors are required to use the official email address “for all communications in connection with the transaction of public business.”

- All officers, employees, and contractors must forward any email sent or received on their personal email addresses to their agency-provided email if it relates to agency business or, if the agency does not have an official email account, then provide a copy of the email to the agency.

The proposed legislation only amends the Local Records Act and does not address whether these records are subject to FOIA, which has a different definition of “public record.” [186] House Bill 2385 is also problematic because it relates only to emails and does not include text messages. The continued confusion makes clear that new legislation is needed to put not only public officials on notice as to what, if any, information procured on a personal device is subject to disclosure, but also public sector employees. Until the General Assembly addresses all forms of electronic communication – emails, text messages, messages sent using social media or other applications – confusion will continue and public sector employers and employees will not know whether communications on their private devices are fair game for FOIA disclosure.

V. CONCLUSION: BEST PRACTICES FOR MOVING FORWARD

The intermingling of public duties on private devices or accounts, together with shifting notions of personal privacy, have generated considerable
attention about the boundaries of the law. What is clear is that despite these technological challenges, it is the public body’s obligation to abide by the express terms of FOIA. This new reality makes it more challenging to determine the scope of privacy in the workplace. The following constitute a snapshot of best practices to employ in order to avoid blurring privacy lines even more.

It is a bad practice for public sector employers to permit officials and employees to use private devices or private accounts to conduct public business. In the event of a FOIA request, it will be necessary to cull through all such private devices or accounts to retrieve responsive communications. Use of private devices or private accounts is likely to make retrieval cumbersome and time consuming. Emails, text messages and other electronic communications sent to or from a public official’s or employee’s private account, or on a privately-owned device, will be subject to disclosure under FOIA depending on the content or context of the communication. If the public body receives a FOIA request asking for private device or account information, the involved public official or employee will be subject to a search of the account or device. Should litigation arise over questions regarding whether the FOIA request was thoroughly responded to, it is possible that a court could require an actual search of the device or account by a third party. In the wake of these issues, PAC opinions, and court decisions, the likely consequence is that public sector employers will create policies that mandate public officials and employees use their official agency accounts for all business related communications.

To the extent that public officials or employees continue to maintain private accounts or use private devices in the conduct of public business, it would be good practice to forward all business-related texts or emails to recognized public employer accounts for ease of search or access in the event of a FOIA request. Texts sent or received on a private device during the course of a public meeting which involve public business would be subject to disclosure if a FOIA request were made, unless the communication is otherwise exempt from disclosure under FOIA.

In the case of a communication involving both public business and private matters, it would be permissible to redact the private portions of the
communication before producing the public portions. If a communication maintained on a private device or in a private account involves public business it is likely that a court would rule that it must be disclosed unless an exception already recognized under the law exists (e.g., attorney-client communication).

In sum, the case law, PAC opinions, and FOIA establish that privacy expectations in the workplace are no longer secure and vary in significant ways depending on whether public business was transacted. It is incumbent upon public sector employers to establish policies prohibiting public officials and employees from using private devices to conduct public business in order to make certain government communications will be preserved and accessible while also protecting privacy public officials may have in the communications made on private devices.

[2] In Toensing v. Attorney General of Vermont, the Vermont Supreme Court heard oral arguments in a legal battle over how — and when — the state Public Records Act applies to personal emails, text messages or other forms of communication. The case originated when in June 2016, the Vermont Republican Party vice chair sued the then-attorney general, a Democrat, after he refused to search for and turn over public records stored on his personal accounts that might be pertinent to the records request. Citing privacy concerns, the Vermont Superior Court sided with the Attorney General’s Office, Toensing v. Attorney Gen’l of Vt., Docket No. 500-6-16 Cncv, slip. op. at 3 (Vt. Super. Ct. Feb. 8, 2017), available at https://assets.documentcloud.org/documents/3673980/Printed-Case-Toensing-v-OAG-Optimized.pdf, but also raised the "seriously, and, frankly, disturbing concern" that the ruling would allow public officials to circumvent the public records act by doing government business through personal accounts. Id. at 7. That decision was appealed, and the Vermont Supreme Court held oral arguments June 7, 2017. Vt. Sup. Ct., Hearing Calendar, June Term 2017, https://www.vermontjudiciary.org/sites/default/files/documents/Jun%202017%20Term.Public.Rev_-%20June%2005_0.pdf.

[3] In West v. Vermillion, 384 P.3d 634 (Wash. App. 2016), rev. denied, 390 P.3d 339 (Wash. 2016), cert. filed No. 17-15 (June 6, 2017), Vermillion set up his own personal website and email address to use in conjunction with his state congressional run. He later used the website and email account in connection with a successful campaign for a seat on the Puyallup City Council. West submitted a public records act request for, among other things, emails on Vermillion’s private account pertaining to Puyallup city business. The Washington Court of Appeals ruled that (1) the Fourth Amendment’s protections against search and seizure were not implicated because the City Councilman had no reasonable expectation of privacy in communications “related to the public’s business”; (2) the privacy protections under article I, section 7 of the Washington Constitution did not apply because West was not seeking private information; (3) the First Amendment was not implicated because West was not asking for political activity records; (4) Vermillion was not subject to the City’s policy prohibiting City employees and volunteers from performing city business on personal or third-party “technology resource[s],” which include electronic or digital communications and commingling of City and non-City data files; and (5) the public has a right to inspect public records located on a personal computer unless the records are “highly offensive to a reasonable person and are not of legitimate public concern.” Id. at 635-36. The superior court then ordered Vermillion “under penalty
of perjury [to] produce records that are within the scope of [p]laintiff’s records request.” *Id.*


[8] Following a series of FOIA requests, investigative reporters for the Chicago Tribune discovered City of Chicago Water Department employees had sent volumes of derogatory and racist emails using the City’s email account. These emails are obviously fair game and subject to disclosure under FOIA. Those emails also revealed that an employee with the State of Illinois Workers’ Compensation Commission was also a party to the racist, derogatory email exchanges. However, the State of Illinois employee used a private email account to send and respond to the emails. The Chicago Tribune reported that “Even though [the State of Illinois employee] didn’t use his government email address, Chad Fornoff, executive director of the state Executive Ethics Commission, said that this type of matter should be referred to the executive inspector general for investigation into whether any violations of state law, rules or policies have occurred, including conduct unbecoming a state employee.” *See* Ray Long & Todd Lighty, *Racist Emails Scandal Moves Beyond Chicago As Illinois Opens Investigation Into State Employee’s Role*, CHI. TRIB., July 24, 2017, http://www.chicagotribune.com/news/local/politics/ct-chicago-water-department-emails-capuzi-20170724-story.html.
SUMMER 2017 ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT  39


[10] See Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago, 2016 Ill. App. (1st) 143884, ¶ 32, 59 N.E.3d 96, 04 (“Enforcement of an arbitration award requiring destruction of the requested records on the ground that the City breached section 8.4 of the CBA would violate the FOIA as well as the public policy underlying the General Assembly’s adoption of the Act.”).


[12] Id. at 140/1.

[13] Id.


[15] 5 ILCS140/1.2.

[16] Id. at 140/3(a).


[18] 5 ILCS 140/7.

[19] Id. at 140/7.5.

[20] 5 ILCS 140/7(1)(a). Disclosure Prohibited by Other Laws, Section 7(1)(a) of the Act exempts information specifically prohibited from disclosure by federal or state law or resolution. For example, certain student records are confidential under the Illinois School Student Records Act. See 105 ILCS 10/6. A FOIA request for these confidential student records can be denied under Section 7(1)(a), with a reference to the School Student Records Act.

[21] 5 ILCS 140/7(1)(b). Some documents in the possession of a public body may contain personal information that is not appropriate for public purview. Under the new provisions of FOIA, this information may be treated either as private information or personal information. (1) Private Information Section 7(1)(b) exempts “private
information” unless disclosure is required by another provision of FOIA, a state or federal law or a court order. Private information is defined as: “[U]nique identifiers, including a person’s social security number, driver’s license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person.” 5 ILCS 140/2(c-5). If information within a document subject to a FOIA request meets the definition of “private information,” the public body may redact the information utilizing this exemption.

[22] Id. at 140/7(1)(d). The exemption in Section 7(l)(d) provides protection against the disclosure of investigatory records compiled for ordinance or administrative enforcement and law enforcement purposes where the disclosure would interfere with ongoing investigations, unavoidably disclose the identity of an informant, disclose specialized investigative techniques, or cause other itemized harms.

[23] Id.

[24] Id. at 140/7(1)(f). Section 7(l)(f) exempts “preliminary drafts, notes, recommendations, memoranda and other records” in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion thereof shall not be exempt when the record is publicly cited and identified by the head of the public body. The head of a public body is defined in Section 2(e) as various individuals with primary executive and administrative authority for the public body. Thus, unless the head of the governmental body, as previously defined, publicly identifies and cites the preliminary material, it will not need to be made available for inspection. The exemption is intended to protect and permit the free expression of ideas in all sorts of reports prepared at all levels of local government. The pre-approval requirement in the 2010 statute was repealed in 2011 and is no longer required. It should still be noted, however, that simply referring to a record as a “draft,” or a “recommendation,” is an insufficient basis to use this exception. If a record held out as a preliminary draft is, in fact, part of a final document, it is subject to disclosure.

[25] Id. at 140/7(1)(g), 7(l)(h), 7(l)(i), 7(l)(k), 7(l)(p), 7(l)(r), and 7(l)(t). The exemptions in Sections 7(l)(g), 7(l)(h), 7(l)(i), 7(l)(k), 7(l)(p), 7(l)(r), and 7(l)(t) all relate to quasi-commercial, trade, technical or financial items, including documents pertaining to real estate purchase negotiations. A public body is able to keep from the public certain matters that would prevent them from effectively operating as a buyer or seller or user of services in the marketplace where a trade partner or adversary is not required to make such disclosure.
[26] 5 ILCS 140/3.6(c).

[27] 5 ILCS 140/2(c).


[29] The Public Access Counselor (“PAC”) is an attorney in the Attorney General’s office whose responsibility it is to ensure that public bodies comply with the FOIA and the Open Meetings Act (“OMA”), 5 ILCS 120/1 et seq. The PAC works under the direction and supervision of the Attorney General and oversees the Public Access Bureau in the Attorney General’s office. 15 ILCS 205/7 Under both the FOIA and OMA, the Attorney General, through the PAC, has several responsibilities, including: (1) to provide electronic training to all FOIA officers and all persons designated by public bodies to receive OMA training and to provide model policies to public bodies; (2) to provide educational materials to the public and to respond to informal inquiries; (3) to issue advisory opinions on FOIA and OMA in response to requests by public bodies; (4) to work to resolve or mediate disputes between members of the public and public bodies over FOIA and OMA; and (5) to investigate and issue opinions in response to Requests for Review submitted by members of the public when a FOIA request has been denied by a public body, 5 ILCS 140/9.5, or when it is alleged that a public body violated the OMA. 5 ILCS 120/3.5.


[31] Id. at 5-6

[32] Id.

[33] Id. at 5, 7.

[34] Id. at 5.


[37] Id. at 5.

[38] Id. at 10.
[39] Id. at 9.
[40] 5 ILCS 315.
[41] 5 ILCS 315/15.
[42] Id.
[43] Id. at 315/15(a).
[44] Id. at 315/15(b).
Teamsters have also barred use of GPS technology to study efficiency or set time standards. *Id.*

[52] *Id.* at 167; *see also* City of Chicago and Unit II (SEIU Local 73 and IBEW Local 21) Collective Bargaining Agreement, Jan. 1, 2011- June 30, 2016.

[53] Hodges, *supra* note 51, at 166; *see also* City of Chicago and Public Safety Employees Unit II (SEIU Local 73 and IBEW Local 21) Collective Bargaining Agreement, Jan. 1, 2011- June 30, 2016.

[54] Hodges, *supra* note 51 at 169 (citing California *State Employees Ass’n v. California Youth Authority*, 23 PERC (LRP) ¶ 30114 (Cal. PERB ALJ 1999)).


[56] *Id.* ¶ 44, 992 N.E.2d at 640.

[57] *Police Benevolent & Protective Ass’n Unit No. 5 v. City of Springfield*, No. 13-CH-904 (Cir. Ct. Sangamon County Oct. 21, 2013).

[58] *Id.* at 1-2.

[59] *Id.*

[60] *Id.* at 2.

[61] *Id.* at 3.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] 2014 IL App (1st) 121846, 7 N.E.3d 741. RLs were documents about officers who amassed the most misconduct complaints. CRs were related to the Chicago Police Department’s completed investigations into allegations of police misconduct.


[67] *Id.* at ¶ 29, 7 N.E.2d at 749.
[68] Id. at ¶ 25, 7 N.E.3d at 748.

[69] Id. at ¶ 24, 7 N.E.3d at 748.

[70] Id. at ¶ 4, 7 N.E.3d at 743.

[71] Id. at ¶ 30, 7 N.E.2d at 749.


[75] Id. at ¶ 3, 7 N.E.3d at 743.


[81] Id.

[82] Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago II.

[83] Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago III.


[86] Id. at 3-4.

[87] Id.

[88] Id. at 4-5.

[89] Id. at 16.


[91] Id. at ¶ 31, 59 N.E.3d at 104.

[92] Id. at ¶ 32, 59 N.E.3d at 104.

[93] Id. at ¶ 33, 59 N.E.3d at 104 citing Day v. City of Chicago, 388 Ill.App. 3d 70, 73, 902 N.E.2d 1144, 1147 (1st Dist. 2009) (“Public records are presumed to be open and accessible.”) and Watkins, 2012 IL App (1st) 100632, ¶ 13, 980 N.E.2d 733, 739 (“[T]he purpose of the FOIA is ‘to open governmental records to the light of public scrutiny.’”) quoting Bowie v. Evanston Community Consolidated School District No. 65, 128 Ill. 2d 373, 378, 538 N.E.2d 557, 559 (1989) and Gekas v. Williamson, 393 Ill. App. 3d 573, 580, 912 N.E.2d 347, 354 (4th Dist. 2009)(The FOIA is given a liberal construction in furtherance of the legislative objective of providing easy public access to governmental information. The public policy underlying the General Assembly’s adoption of the FOIA is stated in section 1 of the act, which provides in relevant part: “Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their
duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.)


[95] Id. at ¶ 36, 59 N.E.3d at 105; see also AFSCME v. Dept. of Central Mgmt. Servs., 173 Ill. 2d 299, 318, 871 N.E.2d 668, 679 (1996)(“[a]s with any contract, a court may not enforce a collective-bargaining agreement in a manner that is contrary to public policy.”) It is also undisputed that CR files and related information are subject to disclosure under the FOIA in the absence of an applicable exemption. Watkins, 2012 IL App (1st) 100632, at ¶ 13, 980 N.E.2d at 739; Kalven, 2014 IL App (1st) 121846 at ¶ 32, 7 N.E.3d at 749. “A public body must comply with a valid request for information unless one of the narrow statutory exemptions set forth in section 7 of the FOIA applies.” Watkins, 2012 IL App (1st) 100632 at ¶ 13, 980 N.E.2d at 739.


[99] Id. at ¶ 23.

[100] Id. at ¶ 24.

[101] Id. at ¶ 25.

[102] Id. at ¶ 25-26.

[103] Id. at ¶ 27.

[104] Id. at ¶ 25; See 5 ILCS § 140/3(d).

[105] Complaint at ¶ 1, Chicago Tribune Co. v. City of Chicago Police Dept. (Circuit Court of Cook Cty. Dec. 5, 2016), No. 16-CH-15731.

[106] Id. at ¶ 12.

[107] Id. at ¶ 2.
[108] Id. at ¶ 26.


[110] Id.

[111] Id. at 3-4; see also 5 ILCS 315/15(a); 5 ILCS 140/1.


[113] City of Springfield at 4 n. 3; 5 ILCS § 140/7(1) (“When a request is made to inspect or copy a public record that contains information that is exempt from disclosure under this Section, but also contains information that is not exempt from disclosure, the public body may elect to redact the information that is exempt.”).


[115] Id. at 851.

[116] Id.

[117] Id. at 858.


[119] 389 P.3d at 853 (emphasis in original).

[120] Id.

[121] Id.

[122] Id. at 855.

[123] Id. at 857.


[126] Id. at 750.

[127] Id. at 751.

[128] Id.

[129] Id. at 752.

[130] Id. at 753.

[131] Id.

[132] Id. at 754

[133] Id. at 754-55.

[134] Id. at 761.

[135] Id. at 763-64.

[136] Id. at 761.


[139] Id. at 761.

[140] Id. at 759.

[141] O’Connor, 480 U.S. at 717.

[142] 266 F.3d 64, 73 (2d Cir. 2001).

[143] Id.

[144] Id. at 74.

[146] Id. at 563.

[147] Id.

[148] See id. at 663-65.


[150] Id. at 398.

[151] 419 F.3d 845 (8th Cir. 2005).

[152] Id. at 850.

[153] Id. at 848-49.

[154] Id. at 851.

[155] 281 F.3d 1130, 1135 (10th Cir. 2002).

[156] Id. at 1137.


[158] 5 ILCS 140/1.


[160] Id. 315/15(b) (emphasis added).

[161] Id.

Moreover, compelled disclosure seems unlikely because a public sector employer must abide by federal laws protecting employee privacy in the workplace. Most applicable to employer-issued technology would be the Electronic Communications Privacy Act of 1986 ("ECPA") and one of its subparts, the Stored Communications Act. See 18 U.S.C. §§ 2510-22; 2701. The ECPA prohibits the unauthorized interception, acquisition, disclosure, or use of the contents of any oral, wire, or electronic communications. To that end, federal law may prohibit employers from attempting to obtain personal emails or text messages issued using private devices.

[167] Id. § 2702.

[168] Id. § 2703.


[170] Id.

[171] Id. at 355.

[172] Id. at 364-66.


[174] Id. at 2489.

[175] It is not unrealistic to conclude that public sector employees have a reasonable expectation of privacy in personal emails issued via private devices. That is because courts have found persons enjoy a reasonable expectation of privacy in a variety of contexts. See e.g., Florida v. Jardines, 133 S. Ct. 1409, 1418–19 (2013) (Kagan, concurring) (expectation of privacy in odors detectable by a police dog that emanate from a home); United States v. Jones, 565 U.S. 400, 430-31 (2012) (Alito, J., concurring) (expectation of privacy in information supplied by GPS about location); United States v. Kyllo, 533 U.S. 27 (2013) (thermal imaging scanners that record heat emanating from a home protected privacy right under the Fourth Amendment); Bond v. United States, 529 U.S. 334 (2000)(privacy in luggage placed on a luggage rack of bus protectable); United States v. Jacobsen, 466 U.S. 109, 115 (1984)(reasonable expectation of privacy in letters and sealed packages entrusted to private freight


[177] The Court’s plurality decision in *O’Connor v. Ortega*, 480 U.S. 709 (1987), was its first attempt to reconcile privacy rights with workplace searches and has served as the seminal workplace privacy case for over 20 years. In reviewing a public employer’s search of an employee’s office and file cabinets, the Court first recognized that there exists a valid “societal expectation[] of privacy in one’s place of work.” *Id.* at 717 (noting the Supreme Court’s historical recognition of “societal expectations of privacy in one’s place of work”). But the Court also noted that public employers may need to make reasonable work-related intrusions and conduct investigations into possible work-related misconduct, in order to ensure an effective and efficient workplace. *Id.* at 719-20. Thus, in determining what workplace searches would be considered “reasonable,” the Court set forth two enduring principles. First, the court must determine whether an employee had a legitimate expectation of privacy to begin with. This is because “some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable.” *Id.* at 717. Thus, a court must consider the “operational realities of the workplace,” and whether the employee’s privacy expectation is diminished “by virtue of actual office practices and procedures, or by legitimate regulation.” *Id.* at 717. In *O’Connor*, the Court found that the employee did have a reasonable expectation of privacy in his desk and file cabinets, as he did not share them, all files related to other employees were kept outside of his office, and he had occupied the same office for 17 years. *Id.* at 718-19. Second, the Court held that even if a reasonable expectation of privacy exists, an employer may still conduct the search as long as the purpose of the search is legitimate at its inception and the scope of the search is reasonably related to the employer’s objectives. *Id.* at 730. Although the Court declined to make these determinations, instead remanding the case for further consideration, *O’Connor* established an analytical framework that courts still use today.

[178] 5 ILCS 140/7(1)(c).

[179] *Id.*

[180] *Id.* at 140/7(1c) (emphasis added).


[182] *Id.*

[183] See 5 ILCS 140/1.2.


Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes, and the First Amendment.

I. IELRA DEVELOPMENTS

A. Interference with Protected Activity

In James Gibson, and Cairo School District No.1, 33 PERI ¶ 123 (IELRB May 18, 2017) the IELRB upheld the Executive Director’s dismissal of Gibson’s unfair labor practice charges. Gibson alleged violations of section 10(a)(1), (3), (4) and (5) of the IELRA stemming from disputes he had with his principal concerning student discipline and the employer’s response to Gibson’s request for a medical leave of absence asking Gibson to provide medical documentation. With respect to the 10(a)(5) charge alleging a failure to bargain in good faith, the IELRB followed its decision in Thornton Community Unit School District No. 4, 4 PERI 1010 (IELRB 1987) and ruled that Section 14 (a)(5) involves the rights of the exclusive representative under the Act, and therefore, Gibson did not have standing to bring Section 14 (a)(5) of Act violations.

The IELRB dismissed the 10(a)(1), (3) and (4) charges as well. The IELRB reasoned that to establish a prima facie case, Gibson had to prove that he engaged in protected concerted activity, that the employer knew of that activity, and that the employer took adverse action against him because of such activity. The IELRB emphasized that “[i]n order to violate any of the above Sections of the Act, an employer’s conduct toward the employee must constitute an adverse action. In order to constitute an adverse action, an employer’s conduct must change the employee’s terms and conditions of employment.”
In Gibson’s case, IELRB held that the different opinions regarding student discipline did not fundamentally alter the terms or conditions of Gibson’s employment, and thus such differences did not amount to an adverse action. As for the medical leave, IELRB held that handling of the leave request had no substantial effect on the terms and conditions of Gibson’s employment and therefore was not an adverse action.

B. Strikes and Strike Injunctions

In Chicago Board of Education and Teachers Union, Local No.1, AFT 33, PERI ¶ 124 (2017), the IELRB granted Chicago Board of Education’s request for injunctive relief against what the IELRB found was a planned illegal strike.

On April 5, 2017, the union’s House of Delegates adopted a resolution that union members would report for work on May 1, 2017, but would also participate in labor and community actions and city-wide demonstrations and would teach lessons emphasizing the role of labor and immigrant labor in establishing and protecting human rights and a resolution encouraging members to use personal business days to participate in labor and immigrants’ rights marches on May 1. The union posted on its website a list of May 1 activities scheduled throughout the day and a statement that it vigorously defended the rights of members to use personal business or unpaid “0” days to attend. It stated it would fund busses for 25 or more persons from a school to go to the activities, but it later changed that by limiting the funding to transportation for after school activities.

There was no dispute that the union had not complied with the IELRA’s requirements for a lawful strike. The critical issue was whether the union’s actions constituted a strike. The IELRB held that a strike was a concerted failure to report for work. In this case, the IELRB concluded, the union’s website reflected that the union was orchestrating a concerted failure by teachers to report for work on May 1, which constituted a strike.

ILERB Member Sered dissented. She cited Chicago Transit Auth. v. ILRB, 386 Ill. App. 3d 556, 898 N.E.2d 176 (1st Dist. 2008) for the proposition that making plans for an illegal strike did not constitute an unfair labor practice. She further argued that the union’s encouraging members to use
personal business days to take May 1 off and engage in marches and other activities did not constitute a strike. Rather, she criticized the majority for finding illegal the use of earned benefit time to engage in protected concerted activities. She maintained that the employer’s remedy was for principals to deny personal leave requests once they exceeded the number of teachers in a given school allowed to be off on personal business in a single day, insist that the other teachers report to school on May 1 and discipline those who did not.

II. IPLRA DEVELOPMENTS

A. Covered Employees

In *SEIU Local 73 v. ILRLB.*, 2017 IL App (4th) 160347 (June 27, 2017), the Illinois Appellate Court for the Fourth District upheld the ILRB State Panel’s determination that certain employees of the Secretary of State are not “public employees” under the meaning of section 3(n) of the Act. Therefore, these employees cannot be included in a bargaining unit.

In 2012, the union filed a unit clarification petition to include these employees, who were all then unrepresented Executive I and Executive II titled positions within the Secretary of State’s office. The Board granted the union’s petition, but while the Secretary’s appeal was pending, the Illinois legislature amended the IPLRA to specifically exclude “position classification[s] of Executive I or higher” in the Secretary of State’s office from the definition of “public employee.” As a result, this petition was reconsidered. The Secretary also sought unit clarification, and exclusion from the bargaining unit, for employees classified as DFM I and DFM II.

Based on the new definition and witnesses’ testimony that the job duties of DFM I and DFM II are more or less identical to that of Executive I and Executive II, the State Panel found all four positions excluded from the definition of “public employee” and therefore from the bargaining unit. On appeal, the court upheld the ILRB’s interpretation of the language of the amendment and its decision. Because Executive I and II positions are expressly excluded from the definition of “public employee,” there was no error of fact or law in finding they were excluded from the unit. After re-examining the facts, the court found that the board did not err in finding
that the DFM I and DFM II positions “authorize, either directly or indirectly, meaningful input into government decision-making on issues where there is room for principled disagreement on goals or their implementation.” It further found that the ILRB correctly interpreted the language of the Act which also excludes Secretary of State employees who meet the aforementioned definition from the definition of “public employee” under the Act. The Court upheld the exclusion of the Executive I and II and DFM I and II positions in the Secretary of State’s office from the bargaining unit.

B. Duty to Bargain

In International Association of Firefighters, Local 413 v. City of Rockford, Case No. S-CA-15-030 (ILRB State Panel Apr. 11, 2017), the State Panel rejected the ALJ’s finding that the city had committed an unfair labor practice by failing to include tentatively agreed-upon language in the final collective bargaining agreement. Under Article 13, Section 1 of the 2009-2012 contract, the employer created policies and procedures regarding medical certifications for sick leaves. This section allowed the employer to issue rules and regulations as long as the union was provided with advance notice and an opportunity to grieve. A new process for getting medical certification for sick leave, promulgated under this section, was grieved in August, 2011. The parties agreed to discuss the terms of the leave policy during bargaining for the successor agreement. The parties did eventually reach a tentative agreement on the terms of a new medical certification process for sick leave. However, it did not appear in the successor agreement at the conclusion of bargaining. The union filed an unfair labor practice charge under Section 10(a)(4) of the IPLRA, claiming that this failure to include the medical certification language was a repudiation of the collective bargaining process. The ALJ agreed with the union, finding that the evidence showed that the parties reached a “meeting of the minds” with regards to the medical certification language.

On appeal, the State Panel rejected the ALJ’s finding, because both parties had different, but reasonable interpretations of where the new language would appear. The union reasonably believed the language would appear in the collective bargaining agreement, but the employer reasonably believed that the parties had agreed on language of a new rule promulgated under
Article 13, Section 1. Since the parties did not agree on where the language would appear, there was no violation of Section 10(a)(4). The Panel urged the parties to be more specific in their next round of negotiations.

III. FIRST AMENDMENT DEVELOPMENTS

A. Fair Share Fees

In Janus v. AFSCME, 851 F.3d 746 (7th Cir. 2017), two public employees brought a First Amendment challenge to the collection by their unions of “fair share” fees. State employees who object to a union’s political activities may pay only their “fair share,” or a fee which covers just the representational activities of the union. Mark Janus and Brian Trygg were allowed to intervene in Governor Rauner’s 2015 suit which claimed that even fair share fees are unconstitutional as a tacit approval of the union. Mr. Rauner, suffering no harm by the collection of such fees, lacked standing to bring his suit, but the court allowed these plaintiffs to intervene. Practically, the court found no real substantive difference between (1) dismissing Governor Rauner’s suit and letting Janus and Trygg start over and (2) allowing Janus and Trygg to intervene and continue the case through the appeals process. Given the precedent set in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), that fair share fees are constitutional, the plaintiffs were bound to lose. The dismissal of the Seventh Circuit was necessary for the plaintiffs to appeal to the Supreme Court and attempt to overrule Abood.

However, the court made one important distinction between the dismissals of each plaintiff’s case. Mark Janus’ case was dismissed for failing to state a claim under the law. However, Brian Trygg had previously challenged his fair share obligations at the labor board. Mr. Trygg based his original claim on a provision in the Illinois Labor Relations Act, 5 ILCS § 315-6(g), which allows employees who object to fair share fees on religious grounds to instead donate the amount to the charity of their choice. After lengthy litigation, the Board granted Trygg the relief he sought. The Seventh Circuit held that this earlier litigation prevented Trygg from being a party to the current claim. While the Board’s decision was pending appeal in the Illinois courts, he could have raised but failed to raise the First Amendment issue; therefore he had a full and fair opportunity to litigate the current issue.
Trygg’s suit was dismissed under the doctrine of claim preclusion. Only Janus is left standing as a plaintiff on the petition for writ of certiorari, filed June 6, 2017. If the Supreme Court grants certiorari, a full panel will have a chance to reconsider the issue of fair share fees, the constitutionality of which was upheld by a 4-4 Court in *Friedrichs v. California Teachers Ass’n*, 136 S.Ct. 1083 (2016).