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ILLINOIS STATE BAR ASSOCIATION

STANDING COMMITTEE ON GOVERNMENT LAWYERS

The newsletter of the ISBA's Standing Committee on Government Lawyers

Student loan repayment assistance legislation moves forward in Congress

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Senate Bill 442, the "John R. Justice Prosecutors and Defenders Incentive Act" sponsored by Illinois Senator Richard Durbin amends the Omnibus Crime Control and Safe Streets Act of 1968 to direct the Attorney General of the United States to assume the obligation to repay student loans for borrowers who agree to remain employed, for at least three years, as either state or local criminal prosecutors or state, local, or federal public defenders in criminal cases.

The Act would allow a borrower and the Attorney General to enter into an additional loan repayment agreement, after the initial required three-year period, for a successive period of service which may be less than three years. The Act limits the amount paid under such program on behalf of any borrower to $10,000 per calendar year and $60,000 lifetime.

The Act was introduced by Senator Durbin on January 31, 2007. The legislation was referred to the Senate Judiciary Committee and a hearing was held on February 27, 2007. Two of the four witnesses at that hearing were from Illinois. Paul A. Logli, State's Attorney of Winnebago County and Chairman of the Board of the National District Attorneys Association, testified as did Jessica Bergeman, who serves as an Assistant State's Attorney in Cook County. Logli testified as to the problems that both prosecutors and public defenders are having in recruiting and retaining lawyers who are coming out of law schools with mortgage-size student loan debts. Ms. Bergeman testified as to her own experience of trying to balance her desire to work in public service, accept the lower pay associated with public service, and manage her substantial student loans.

Senator Durbin has introduced similar legislation in the last several years, but this year it appears that the Act is actually moving toward a floor vote in both Houses of Congress. On March 1, 2007, the Senate bill was passed out of the Judiciary Committee by voice vote. There were several amendments adopted during the markup, but none of them negatively impact the basic core of the legislation.

Very similar bills, H.R. 893 and H.R. 916, have been introduced in the House. H.R. 893 is sponsored by Representative Ted Poe a Republican of Texas, while H.R. 916 is sponsored by Representative David Scott, Democrat of Georgia. The House had its own hearing on April 24 and testifying on behalf of government lawyers and specifically prosecutors was District Attorney Kamala Harris of San Francisco, California, who serves on the Board of the National District Attorneys Association. Ms. Harris testified before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. The full House Judiciary Committee held its own markup session on H.R. 916, which is nearly identical to the Senate bill. That bill passed out

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of the House Judiciary Committee on May 2, 2007, and is now headed to the House floor. One of the significant changes made to the bill in the House Judiciary Committee was that the bill would actually authorize funding in the amount of $25 million per fiscal year for fiscal years 2008-2013 at which time the program will sunset.

Unlike previous years, both bills have now passed out of respective House and Senate committees and hopefully will be headed towards consideration and passage before both Houses of Congress. Senator Durbin has had significant influence in drafting and sponsoring this important legislation, which has been the top legislative priority of the National District Attorneys Association. Both Durbin and the National District Attorneys Association have promoted student loan assistance for the last several years. It appears that Illinois Senator Barack Obama is also supportive of the Act. Illinois government lawyers should consider writing letters of encouragement and support to all members of the Illinois congressional delegation regarding the pending bills.

Editors' note: On May 15, 2007, the House of Representatives passed H.R. 916 by a vote of 341-73. The Illinois State Bar Association has also been a long-time supporter of such legislative proposals.

Does a public employee have a right to closed meeting minutes of the discussion of her employment? A case review of Wisconsin Appellate Court case *Sands v. Whitnall School District*

By Lisle A. Stalter[1]

Although we do not typically see a discussion of cases from other states in the Government Lawyers' newsletter, a recent decision from Wisconsin raises an interesting question. In *Sands v. Whitnall School District*, 728 N.W.2d 15 (Wis. App. 2006), the Wisconsin Court of Appeals, First District addressed whether a public employee has a right to obtain copies of minutes of a closed session discussing her employment.

The Facts

Barbara Sands, the Plaintiff, was hired by the Whitnall School District as the supervisor/facilitator of the District's Gifted and Talented Education Program. She had a one-year contract with the District, which was not renewed. Prior to informing Sands of its decision not to renew her contract, the school board met in closed session twice and discussed Sands' employment with the District. Subsequently, the board met in an open session and voted not to offer Sands a contract for the next school year. (These meetings were procedurally compliant with the open meeting requirements—this was not a question before the court.)

About two years after Sands was informed that her contract would not be renewed, she filed suit against the District alleging that the District failed to comply with Wisconsin's statute requiring notice of the decision not to renew certain types of contracts. As part of the litigation, discovery was undertaken and Sands' discovery requests included interrogatories seeking the identity of the individuals at the closed session meeting where Sands' contract was reviewed and: (1) the substance of each person's knowledge of the decision not to renew her contract; (2) the identity of each person who spoke during the deliberations that resulted in the board's decision not to renew the contract; and (3) the substance of what each person said about renewing Sands' contract. The District's response to the interrogatories stated that the deliberations regarding Sands occurred in closed session, were privileged, and were not subject to discovery pursuant to the exemptions in Wisconsin's open meetings statutes. See Wis. Stat. §19.85(a)(c) (2001-02).

Sands' motion to compel answers to these interrogatories was granted. The District appealed the ruling. The issue on appeal was "whether Sands is entitled to the content of the closed sessions" in response to discovery request.

The Court's Opinion[2]

The Wisconsin Appellate Court concluded that Sands was not entitled to the disclosure of the substance of the discussions held in closed session. Based on Section 19.85 of the Wisconsin Statutes, the court determined that the legislature intended for the substance of closed session discussions to remain protected from public disclosure. Accordingly, the discussions held in the closed sessions were not discoverable.

Section 19.85 provides, in pertinent part:

> Exemptions. (1) Any meeting of a government body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section . . . . A closed session may be held for any of the following purposes:
>
> * * *
>
> (c) Considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.

The court recognized that the plain language of the statute contemplates

that certain discussions of a public body are to be "shielded from the public." Specifically, the statute contained no exceptions to the non-disclosure principle, including no exception for "litigation or any other circumstance."

In supporting its decision, the court recognized that one policy reason for allowing closed sessions to discuss certain matters is to allow candid discussion by the members without concern that their discussions will be disclosed. Such candid discussion is a necessary part of the decision making process of governmental agencies. The court also noted that to require disclosure of closed session minutes for litigation could render the exception meaningless with the filing of a lawsuit, the result of which would be to defeat the purpose of the law enacted by the legislature.

Sands countered that Section 19.85(1)(b), which also allows closed sessions for the consideration of the dismissal of a public employee, required notice to the employee prior to dismissal so that an evidentiary hearing could be held, upon the request of the employee, in open session. The court rejected this argument, mainly upon the determination that the closed session was held pursuant to subsection (c), not (b), and that subsection (b) only applies if the government conducts an evidentiary hearing; no evidentiary hearing was held with respect to Sands' employment with the District. The court dismissed this argument summarily stating that because no evidentiary hearing was conducted, Sands did not have a right to request that the board conduct the sessions openly.

Finally, the court rejected Sands' request to create a limited exception to the open meetings law when the subject of the discussion files a lawsuit alleging wrongdoing on the part of the District. The court simply stated that it is not in a position to make such an exception, that this is the province of the legislature.

Discussion and a Look at Illinois Law Considerations

The *Sands* case raises an interesting question about an employee's right to obtain closed session minutes through discovery. To this author's knowledge, the issue has not been addressed by the Illinois courts. Although this section will discuss Illinois law in the context of the *Sands* scenario, as any attorney will understand, it is never possible to predict how an Illinois court might rule on a similar issue. It is the intent of this section of the article to raise some points for consideration, not necessarily to answer them, but to identify potential issues and arguments.

One of the primary concerns of the Sands court was protecting the discussions held in the closed session. The court specifically stated "The legislature recognized that a governmental body's right to meet in closed session and maintain the confidentiality of its discussions on certain matters was paramount." The court further discussed the policy reasons behind supporting a closed session to discuss personnel matters. Specifically, the court noted that the exception allowed the board members to conduct a candid discussion without concern that their discussions would be disclosed. The court agreed with the District's argument that if disclosure were allowed, it would vitiate the need for the closed session at all. In this line of discussion, the *Sands* court relied on the United States Supreme Court case, *N.L.R.B. v. Sears Roebuck & Co.,* 421 U.S. 132 (1975). Interestingly, the *N.L.R.B*. case involves information sought pursuant to a request under the Freedom of Information Act, not the Open Meetings Act, and a person's attempt to obtain interagency documents. See, *N.L.R.B. v. Sears Roebuck & Co*., 421 U.S. 132. The discussion centered on the meaning of "finality," which would make an agency decision disclosable if it was final, and not disclosable if it was not, as it would reflect the thinking processes. See Id.[3]

The heavy reliance on the *N.L.R.B*. case is problematic in the open meetings context, as the available exemptions are different and the rationale for them is distinct. Even though both statutes recognize the protection of an employee's privacy in their own way, under Illinois law there is no specific exemption under the Open Meetings Act protecting the deliberative process of the public body as is found in the Freedom of Information Act. The same is true of the Wisconsin statute upon which the *Sands* court based its decision. This is not to say that the *Sands* decision was improper, actually in this author's opinion, it was properly decided and some of the court's rationale

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would be applicable in Illinois as well.

The primary focus is, simply put, that a public body's discussion of a specific employee is exempt from the Open Meetings Act and that there are no exceptions to this exemption. Specifically, the Illinois Open Meetings Act provides that the public body can hold a closed session to consider "appointment, employment, compensation, discipline, performance or dismissal of specific employees of the public body." 5 ILCS 120/2(c)(1). Illinois courts have held that an employment discussion that is closed is not a violation of the Act. See *Verticchio v. Divernon Community School Dist. No. 13*, 198 Ill. App. 3d 202 (4th Dist. 1990).

It is important to keep in mind that section 2(c)(1) of the Illinois Open Meetings Act does not require a session to be closed; it gives the public body the ability to hold such discussion behind closed doors. But, the decision is left to the public body. Nowhere in the Open Meetings Act is there a basis to go into closed session to protect the public body's deliberative process. But, there is no rationale given in the Act for the various exceptions. We can make certain assumptions based on the specific exemption. For example, in real estate purchases and sales, the presumption is that the public body should not be at a disadvantage in negotiating because it is required to discuss the public body's position on what it is willing to pay or sell property for in an open meeting; in litigation discussions, the public body should not be placed at a disadvantage at trial by discussing trial strategy or settlement figures in an open meeting. Similarly, when it comes to discussion of employees, there is the presumption that simply because someone is a public employee it should not mean that the discussion of his or her job performance needs to be public knowledge. But, simply because this is the presumed exemption does not mean that the court cannot also recognize that as an employer a public body will more freely discuss a personnel issue if it knows that the discussion will be kept behind closed doors.

One Illinois case that discusses the interplay of the Open Meetings Act and the Freedom of Information Act is *Copley Press v. Board of Education of Peoria School Dist. No. 150*, 359 Ill. App. 3d 321 (3d Dist. 2005). In *Copley Press*, the newspaper submitted a Freedom of Information Act request for the personnel file of the school superintendent who was put on administrative leave and eventually terminated through a contract buy out. The personnel file contained the letter sent to the superintendent explaining the reasons for dismissal and the superintendent's performance evaluations. The appellate court held that the documents were exempt from the Freedom of Information Act as part of the personnel file. The court also noted the interplay of the Freedom of Information Act and the Open Meetings Act, finding that the two statutes should be construed together. In so holding, the court concluded that a closed session was properly held to discuss the employment of the school superintendent and when such was put into writing and placed in the employee's personnel file, it was not intended to waive the exemption under the Open Meetings Act. The court recognized that to hold otherwise, and allow minutes from the closed session to be subject to the Freedom of Information Act, would essentially nullify the exception to the Open Meetings Act. The court further indicated that the statutes should not be read so as to be inconsistent with each other, but rather the Open Meetings Act and the Freedom of Information Act should be read "consistently and harmoniously." Id. at 325.

There is no discussion in Illinois case law regarding who can and who cannot obtain closed session minutes. Rather, the cases center on whether the closed session was appropriate. If the closed session was appropriate and the need for confidentiality exits, then the minutes should not be subject to public inspection. Further, as discussed in the *Sands* case, there is no specific provision allowing closed session minutes to be made public for litigation or at the employee's request. As a result, it is the public body that determines whether the minutes should remain closed. Finally, the Illinois Freedom of Information Act may affect this analysis, as under that Act an employee can waive the privacy exception by consenting to disclosure in writing. See 5 ILCS 140/7(b). No similar language is found in the Open Meetings Act. However, I would proceed with caution, as a court reading the *Copley Press* case could impute this exception waiver from the Freedom of Information Act into the Open Meetings Act in order to read the two statutes "consistently and harmoniously."

One final thought on relevance in the discovery context: When determining whether to terminate certain employees, the public body, as a whole, makes the decision. In such cases, the thoughts or statements of one particular board member may not be relevant to litigation challenging a decision to terminate, as it was not the decision of that particular board member alone, but the decision of the "public body" that resulted in the termination.

In sum, as this section was prefaced, there is no way to foresee how an Illinois court might rule on a discovery request for closed session minutes. At a minimum, hopefully this article provided a little food for thought.

Conclusion

An employee's right to obtain closed session meeting minutes discussing his or her employment is not a question that has been fully analyzed in Illinois case law. However, if a public body properly goes into closed session, there is an argument to be made that the minutes of such session should remain closed, even if it is the terminated employee who is seeking to obtain a copy of the closed session minutes.

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1. Lisle A. Stalter is an Assistant State's Attorney in the Lake County State's Attorney's Office, Waukegan, Illinois. She is a member of the ISBA Assembly, Government Lawyers Committee and Vice Chair of the Environmental Law Section Council. The opinions expressed herein are solely those of the author and are not those of the Lake County State's Attorney's Office.

2. This discussion is limited to the majority's opinion. One justice concurred in part and dissented in part. Justice Keller declined to join the majority's discussion on whether an employee of a public body would be prohibited from obtaining relevant evidence of a public body's deliberations in order to prove prohibited conduct by the body directed specifically at the employee.

3. Illinois actually has a similar exemption under the Freedom of Information Act, exempting from disclosure, among other things, documents that are recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated. 5 ILCS 140/7(f).

Public sector discipline: Two Illinois public sector attorneys disciplined during March term of court for criminal conduct

By Rosalyn Kaplan

In re Arrigo, Commission No. 06 CH 45, S. Ct. No. M.R. 21373 (March 19, 2007). John Arrigo was an officer in the United States Air Force and, as such, was subject to annual written evaluations of his job performance. The evaluations were prepared by his superior officers and were a factor used in granting promotions. At a time when he was being considered for a promotion to Brigadier General, Arrigo attempted to have his superiors consider an inflated performance evaluation, by preparing a performance report related to his own job performance and signing a colonel's name to it. When he was initially questioned about the purported signature of the colonel, he denied knowing who signed the report. The following day, Arrigo admitted the forgery, but he was reprimanded by the Air Force for violations of the Uniform Code of Military Justice and the Air Force Rules of Professional Conduct. The Illinois Supreme Court allowed the Administrator's petition to impose discipline on consent and suspended Arrigo for one year and until further order of the Court.

In re Juliano, Commission No. 07 DC 1001, S. Ct. No. M.R. 21467 (March 19, 2007). Richard Juliano, who was an employee of then-Secretary of State George Ryan, pleaded guilty to participating in a fraudulent scheme to perform campaign-related work for the Ryan gubernatorial campaign while receiving a salary from the Secretary of State. He also fraudulently assisted in the diversion of the services of other Secretary of State employees and in the diversion of government resources and property, and he participated in the falsification of Secretary of State records to conceal this conduct. Juliano was sentenced to serve three months of confinement in a work release program and four years on probation, ordered to perform 350 hours of community service, and fined $10,000. The Illinois Supreme Court allowed Juliano's motion for disbarment on consent, following the Administrator's submission of a statement of charges against him, and his filing of an affidavit admitting that his conviction would constitute conclusive evidence of his guilt of criminal conduct for disciplinary purposes.

The full texts of the *Arrigo* consent petition and the *Juliano* statement of charges, as well as the Supreme Court's final orders, may be accessed through the Attorney Registration and Disciplinary Commission's web site at www.iardc.org, by selecting "Rules and Decisions."

The Freedom of Information Act and electronic calendars examined in *Consumer Federation of America v. Department of Agriculture**

By Patricia M. Fallon

In 2001, the United States Department of Agriculture (USDA) published notice of a proposed rule regulating exposure to a dangerous bacterium found in certain meats and poultry called Listeria. In 2003, an interim final rule was issued by the USDA on this subject. The Consumer Federation of America (CFA) was unhappy because the final rule was considerably weaker than the initial proposed rule.

CFA believed that during ex parte meetings with USDA officials, the industry representatives had pressured the officials to issue the weaker interim final rule. In order to validate their suspicions and determine whether USDA officials had met exclusively with the industry representatives, CFA filed a Federal Freedom of Information Act (FOIA), 5 U.S.C. §552(a)(4)(B), request for access to the electronic calendars of six senior officials including information regarding all meetings with non-government individuals and the subject of those meetings. USDA claimed the electronic calendars were personal records and not "agency records" subject to disclosure under FOIA. Nonetheless, the USDA released the calendars of the six officials, with appropriate redactions, for the period requested. The redactions were extensive and as a result, entire months were not produced.

The CFA filed suit in district court to compel production of the entire electronic appointment calendars. The district court entered summary judgment in favor of USDA and held that the six electronic calendars at issue were not "agency records" and that none of the calendars were subject to production under FOIA. The United States Court of Appeals for the District of Columbia reversed the district court with respect to five of the six calendars and affirmed

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the district court with respect to the sixth calendar. The Court of Appeals relied on a 22-year-old case in issuing its decision.

The Supreme Court has repeatedly stated that in enacting FOIA, "Congress sought to open agency action to the light of public scrutiny." *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989). Under FOIA, the district court is granted jurisdiction to "enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. §552(a)(4)(B). Therefore, the only issue on appeal was the validity of the district court's finding that the USDA electronic calendars were not "agency records."

In reaching its conclusion, the Court of Appeals relied on the factors set out in *Bureau of National Affairs v. United States Department of Justice*, 742 F.2d 1484 (D.C.Cir. 1984), a case involving paper documents as opposed to electronically stored information. This is compelling for a number of reasons. Both USDA and CFA agreed that *Bureau of Nat'l Affairs* was the case most nearly on point with the circumstances under review. The technological advancements of recent years have radically changed the capability for storing information as well as the rules of discovery. The issue of production of electronic appointment calendars is extremely important due to the increased use and access of electronic information and materials, especially when those materials are maintained on an agency's internal computer system.

In *Bureau of Nat'l Affairs*, the D.C. Circuit noted that while FOIA does not provide an actual definition of agency records, "records are presumptively disclosable unless the government can show that one of the enumerated exemptions applies." *Bureau of Nat'l Affairs*, 742 F.2d at 1494. The court adopted a "totality of the circumstances" test, which was outlined in *Bureau of Nat'l Affairs*, to distinguish "agency records" from personal records. The test considers several factors involving the creation, possession, control and use of a document by an agency. Id. at 1490. The D.C. Circuit noted that there was no precedent of recent years in which the court had applied this test to facts directly paralleling those in the instant case.

Bureau of Nat'l Affairs involved two types of documents: paper daily agendas and paper desk appointment calendars, both used by Assistant Attorney General William Baxter. In analyzing these documents under the "totality of the circumstances" test, the court in *Bureau of Nat'l Affairs* found that both documents were created by agency employees and both documents were located within the Justice Department.

However, the court went on to observe that neither document was placed in agency files and that the Justice Department did not require the creation or the retention of either document. Id. at 1486-1496. Therefore, the distinguishing factor in determining whether these two documents qualified as "agency records" was how they were "used within the agency." Id. at 1495. This use included the purpose of the documents and who the documents were distributed to within the agency. The court found that because the paper desk calendars were maintained solely for the purpose of the individual official and only his top assistants had occasional access to this document, the paper desk calendar was personal rather than an "agency record." Id. at 1496-1497. In contrast, *Bureau of Nat'l Affairs* held that because the daily agendas informed staff of Mr. Baxter's availability, facilitated day-to-day operations of the division and were distributed to top staff so that they would know Mr. Baxter's whereabouts on any given day, the daily agendas were in fact "agency records." Id. at 1495-96. "Where, as here, a document is created by an agency employee, consideration of whether and to what extent that employee used the document to conduct agency business is highly relevant for determining whether that document is an 'agency record' within the meaning of FOIA." Id. at 1490-1491.

The Court of Appeals applied those factors of the "totality of the circumstances" test from *Bureau of Nat'l Affairs* to the instant case. The court found that much like the daily agendas and desk calendars in *Bureau of Nat'l Affairs*, the USDA electronic appointment calendars at issue were created by agency employees and located within the agency. However, the court also noted that creation, possession, and control alone cannot determine if a document is an "agency record." The court used the factual situation from *Bureau of Nat'l Affairs* and found that while the paper desk appointment calendars from that case were distinguishable, the use characteristics of the paper daily agendas from that case were extremely similar to those found in the electronic appointment calendars of the instant case.

In *CFA v USDA*, there were six USDA officials' electronic calendars at issue and all six submitted affidavits to describe how and when their electronic appointment calendars were used. This "use" included a distribution list detailing which other employees received the electronic appointment calendars. The main distinction involved the sixth and least senior USDA official, Assistant Food Safety and Inspection Service (FSIS) Administrator Philip Derfler, who distributed his electronic appointment calendar only to his secretary while all other officials involved had a lengthy agency distribution list.

The Court of Appeals found that the electronic appointment calendars of the five most senior USDA officials were distributed to a specific list of individuals in order to inform staff of their whereabouts and availability. Further, the electronic appointment calendar included information regarding when an individual was traveling or when an official was scheduled to meet with a colleague and/or an agency representative. This was very similar to the information contained in Mr. Baxter's paper daily agendas in *Bureau of Nat'l Affairs* as well as the way his agendas were distributed in order to communicate the same characteristics or information to his staff. The paper daily agendas in that case and the electronic appointment calendars of the instant case were not maintained solely for the use of the individual official. The Court of Appeals noted that there did not appear to be any practical distinction between the former practice of distributing information in paper format or in hard copy versus the modern practice of allowing access to electronically stored information through an internal network. The court also found that the five USDA calendars at issue were relied on by both their authors and various colleagues in order to facilitate day-to-day operations of the agency.

The Court of Appeals made a clear distinction between the distribution of Assistant FSIS Administrator Derfler's calendar versus the distribution and use of the calendars of the five more senior USDA officials. Derfler's electronic calendar was distributed only to his secretary and any temporary secretaries that might fill in for his permanent secretary. Derfler's calendar was not

made available or distributed to any of his colleagues for the purpose of communicating his availability or whereabouts. The court likened this practice to the use of Mr. Baxter's paper desk appointment calendars in *Bureau of Nat'l Affairs*. The court noted that the use of documents by employees other than the actual author of the document is an important characteristic in determining whether that document is an "agency record." Therefore, the court affirmed the district court's decision that Derfler's electronic appointment calendar was not an "agency record" under FOIA. However, the court reversed the district court's ruling that the electronic appointment calendars of the other five more senior USDA officials were not "agency records."

**Consumer Federation of America v. Department of Agriculture*, No. 05-5360 (D.C. Cir. 2006).

Attorney General issues opinions

By Lynn Patton

Under section 4 of the Attorney General Act (15 ILCS 205/4 (West 2005 Supp.)), the Attorney General is authorized, upon request, to furnish written legal opinions to State officers and State's Attorneys on matters relating to their official duties. The following is a summary of informal opinions I-07-001 through I-07-025 that may be of interest to the government bar.

Copies of an opinion may be requested by contacting the Opinions Bureau in the Attorney General's Springfield office at (217) 782-9070. Copies of official opinions may also be found on the internet at <http://www.illinoisattorneygeneral.gov/opinions/index.html>.

Informal No. 07-001
Issued January 4, 2007

Disposition of Surplus Moneys in the County Home Nursing Services Fund

Money held in a county health department's home nursing services fund pursuant to section 5-25013 of the Counties Code must remain in the county health fund. Such moneys may not be transferred to the county's general corporate fund unless the county health department is discontinued and its obligations satisfied pursuant to section 5-25017 of the Code. 55 ILCS 5/5-25017 (West 2004); 55 ILCS 5/5-25013 (West 2004).

Informal Opinion No. I-07-002
Issued January 11, 2007

Applicability of the County Ethics Ordinance to County Mental Health Board Employees

A county mental health board is a county agency created to administer the Community Mental Health Act. Thus, employees of a mental health board are considered employees of the county and are subject to the provisions of the county's ethics ordinance. The ethics ordinance's requirement that the county direct and control the material details of how an employee's work is to be performed is intended to distinguish an employee from an independent contractor. 5 ILCS 430/70-5 (West 2004); 405 ILCS 20/2, 3a, 3b, 3c, 3e (West 2004).

Informal Opinion No. I-07-003
Issued February 8, 2007

Disposition of Local Registrar's Fees under Vital Records Act

Because article VII, section 9(a), of the Illinois Constitution of 1970 prohibits payment of compensation to county officers from fees collected, the fee proceeds received by the county clerk as local registrar under sections 9 and 10 of the Vital Records Act do not constitute personal compensation and must be remitted to the county treasurer for deposit into the county treasury. Further, the fees collected pursuant to the Act do not constitute stipends, and, therefore, taxes need not be withheld. 50 ILCS 145/2, 315/1, 2 (West 2004); 55 ILCS 5/3-2003.4 (West 2004); 410 ILCS 535/7, 9, 10 (West 2004); Ill. Const. 1970, art. VII, §9.

Informal Opinion No. I-07-004
Issued March 1, 2007

Game Breeding and Hunting Preserve as an "Agricultural Purpose"

Property that is licensed as a game breeding and hunting preserve by the Department of Natural Resources may constitute an "agricultural purpose" as that term is defined in section 5-12001 of the Code, if "animal [or] poultry husbandry" is "the principal activity on the land." Whether animal or poultry husbandry is the principal activity on the land will be a factual determination based on the specific circumstances involved. 55 ILCS 5/5-12001 (West 2005 Supp.).

Informal Opinion No. I-07-006
Issued March 2, 2007

Compatibility of Offices–Village Commissioner and County Sheriff

The offices of village commissioner and county sheriff are incompatible because of a conflict in duties. 55 ILCS 5/5-1103.1 (West 2004).

Informal Opinion No. I-07-007
Issued March 8, 2007

Preservation of Evidence for Post-Conviction DNA Testing

A county may establish uniform procedures for preserving, tracking, and disposing of evidence that are consistent with the requirements of section 116-4 of the Code of Criminal Procedure of 1963 and any other applicable statutory provisions. 725 ILCS 5/116-4 (West 2004).

Informal Opinion No. I-07-008
Issued March 15, 2007

Composition of Emergency Telephone System Boards

(1) No more than one public member and one county board member may serve simultaneously on a five-member county emergency telephone system board in counties with a population of less than 100,000. (2) A second county board member may not be appointed to serve on a five-member emergency telephone system board in the capacity of "elected official." (3) More than one public member, but only one county board member, may serve on an emergency telephone system board, if the total number of members on the board exceeds five. (4) A county board member may not serve on an emergency telephone system board in counties with a population of 100,000 or more. 50 ILCS 750/15.4(a) (West 2004).

Informal Opinion No. I-07-009 Issued March 16, 2007

Animal Control Act and Breed-Specific Bans

In the appropriate circumstances, a home rule unit is not prohibited, as an exercise of its home rule powers, from regulating or banning the keeping of specific breeds of animals, the language of section 24 of the Animal Control Act notwithstanding. 510 ILCS 5/24 (West 2004); Ill. Const. 1970, art. VII, §6(i).

Informal Opinion No. I-07-010 Issued March 21, 2007

Repayment of Lump Sum Distribution of Accrued Vacation and Sick Leave Time

A person who resigned as an employee of the Department of Nuclear Safety, and two days later became director of that department, could retain the lump sum distribution of accrued vacation and qualifying sick leave credits that he received upon his resignation from his first position. 30 ILCS 105/14a(c), (d) (West 2002).

Informal Opinion No. I-07-010 Issued March 21, 2007

State Officer's Eligibility for Retirement Annuity and State Salary Paid Simultaneously

A person appointed as Director of Nuclear Safety by the Governor, with the advice and consent of the Senate, and who elected not to participate in the State Employees' Retirement System, was eligible for the receipt of a retirement annuity and salary after the Governor made the Director of Nuclear Safety the Assistant Director of the Illinois Emergency Management Agency. 40 ILCS 5/14-103.05(b)(3), 14-103.09, 14-111 (West 2002); 20 ILCS 3310/45 (West 2004); Executive Order No. 2003-12, effective July 1, 2003.

Informal Opinion No. I-07-011 Issued March 22, 2007

Scope of Self Evaluation Exception to the Open Meetings Act

Subsection 2(c)(16) of the Open Meetings Act permits a public body to hold a closed meeting for purposes of self evaluation only when the body is meeting with "a representative of a statewide association of which the public body is a member." Therefore, the self evaluation exception is necessarily limited to those public bodies that are members of such an association and applicable only when the body is meeting with a representative of that organization for the limited purposes of self evaluation. "Self evaluation" may include a variety of topics intended to assess or improve the performance of the public body, but does not include substantive business. 5 ILCS 120/2 (West 2004).

Informal Opinion No. I-07-012 Issued March 22, 2007

Award of City Contract to City Alderman's Family Member

A city is not prohibited from awarding a contract to the son of a city alderman, provided the alderman has no financial interest in the contracting business of the son. Whether the son may rent equipment owned by the alderman to complete the project without creating a prohibited financial interest in the contract on the part of the alderman is a question of fact that must be determined from the surrounding circumstances. 50 ILCS 105/3 (West 2004); 65 ILCS 5/3.1-55- 10 (West 2004).

Informal Opinion No. I-07-013 Issued March 29, 2007

Community and Residential Services Authority Employment Policies

While the Community and Residential Services Authority (CRSA) is authorized to select and fix the compensation of those employees whom it deems necessary to carry out its powers and duties, for most purposes those individuals are employed under the auspices of the Illinois State Board of Education (ISBE). As ISBE employees, they are exempt from civil service coverage under the Personnel Code. To the extent that personnel policy issues are not controlled by ISBE rule or statutes applicable to all State employees (e.g., 30 ILCS 105/30c (West 2004) (deferred compensation agreements); 5 ILCS 400/1 et seq. (West 2004) (sick leave bank participation)), the CRSA may establish personnel policies related to compensation such as work hours, attendance, job classification, and leave time. 105 ILCS 5/14-15.01 (West 2004).

Informal Opinion No. I-07-015 Issued April 2, 2007

Eavesdropping - Police Use of Audio-Video Feature on Taser Stun Guns

A taser equipped with audio and video recording capabilities is an eavesdropping device. Consequently, its use is prohibited in the absence of consent by all parties to the recorded conversation or an applicable statutory exception. 720 ILCS 5/14-1 (West 2004); 720 ILCS 5/14-2, 14-3 (West 2005 Supp.).

Informal Opinion No. I-07-016 Issued April 3, 2007

Audit of State University Foundations, Alumni Associations, and Athletic Associations

Although university foundations, athletic associations, and alumni associations are "State agencies" for purposes of the Illinois State Auditing Act, the private, non-public funds of those organizations are not "public funds of the State" for purposes of that Act. As a result, those funds are not subject to audit by the Auditor General. However, because the Accountability for the Investment of Public Funds Act includes a more expansive definition of "public funds," those organizations are subject to the Internet disclosure requirements of that statute. 30 ILCS 5/1-7, 1-18 (West 2004); 30 ILCS 237/5 (West 2004); Ill. Const. 1970, art. VIII, §3.

Informal Opinion No. I-07-017 Issued April 4, 2007

Change in Number and Manner of Selection of County Commissioners

Pursuant to section 2-4006.5 of the Code, a county may not submit a referendum to change the membership of the county board in a commission county or their method of selection subsequent to August 31, 2001. Because the referendum submitted to the voters of Johnson County on March 21, 2006, was not authorized by statute, a proposition to reestablish the election of three county commissioners at-large is unnecessary. 10 ILCS 5/28-7 (West 2004); 55 ILCS 5/2-4006.5 (West 2004).

Informal Opinion No. I-07-018 Issued April 12, 2007

State's Attorney Authority to Advise Local Emergency Planning Committees

(1) The State's Attorney has no general duty to advise a Local Emergency Planning Committee (LEPC) and its members. (2) Because the State's Attorney is a State officer, the representation and indemnification of the State's Attorney is governed by the Indemnification Act, not the Tort Immunity Act. Whether the State's Attorney qualifies for representation and indemnification will depend on the specific facts of the case. 42 U.S.C. §11001 et seq. (2000); 5 ILCS 350/1(West 2004); 55 ILCS 5/3-9005 (West 2004); 430 ILCS 100/1 et seq. (West 2004); 745 ILCS 10/1-206 (West 2004).

Informal Opinion No. I-07-019 Issued April 19, 2007

Authority of Circuit Clerk to Assess the Arrestee's Medical Costs Fund Charge

The circuit clerk is authorized to assess the Arrestee's Medical Costs Fund charge against a qualifying criminal defendant only pursuant to a court order. The nature and contents of that order are within the discretion of the court. 730 ILCS 125/17 (West 2005 Supp.), as amended by Public Act 94-962, effective January 1, 2007.

Informal Opinion No. I-07-020 Issued May 3, 2007

State Officials and Employees Ethics Act and Whistle Blower's Belief in Truth of Information Reported

In order to benefit from the whistle blower protections in section 15-10(1) of the State Officials and Employees Ethics Act, one who threatens to disclose or discloses an activity, policy or practice which is a violation of the Act must reasonably believe the truth of the information disclosed. 5 ILCS 430/15-5, 50-5 (West 2004); 720 ILCS 5/26-1 (West 2004).

Informal Opinion No. I-07-021 Issued May 3, 2007

Expenditure of County Funds for Materials Bearing Name of County Sheriff

Fingerprint identification card kits purchased by the county sheriff in order to provide the information required by section 3 of the Minor Identification and Protection Act constitute materials necessary for the sheriff to perform his or her official duties. As such, they may be purchased using county funds. The presence of the sheriff's name on the kits without more does not constitute election interference as that term is used in Illinois law. Accordingly, county funds may be expended for the purchase of those materials necessary to provide fingerprint identification cards to parents who request the fingerprinting of their children, which would include fingerprint identification card kits containing the county sheriff's name. 10 ILCS 5/9-25.1 (West 2004); 55 ILCS 5/3-6032 (West 2004); 325 ILCS 45/3 (West 2004).

Informal Opinion No. I-07-022 Issued May 3, 2007

Freedom of Information Act and HIPAA

It is possible for a public body that is a covered entity for HIPAA purposes to comply with both the Freedom of Information Act (FOIA) and the HIPAA Privacy Rule. Each request for a public record that includes protected health information must be analyzed on a case by case basis to determine which FOIA exemptions may apply and whether disclosure is authorized under the HIPAA Privacy Rule. 42 U.S.C.A. §1320d et seq. (West 2003); 5 ILCS 140/3 (West 2005 Supp.), as amended by Public Acts 94-931, effective June 26, 2006; 94-953, effective June 27, 2006; 94-1055, effective January 1, 2007); 45 C.F.R. pts. 160, 164 (2006).

Informal Opinion No. I-07-023 Issued May 10, 2007

Illinois Conservation Foundation as a "State Agency"

The Illinois Conservation Foundation is a "State agency" as that term is defined in the State Auditing Act, the State Officers and Employees Ethics Act and the State Comptroller Act. Further, it is a "board * * * authorized or created by State law" for purposes of the Ethics Act. 5 ILCS 430/1-5, 5-55 (West 2004); 15 ILCS 405/7 (West 2004); 20 ILCS 880/1 et seq. (West 2004); 30 ILCS 5/1-7 (West 2004).

Informal Opinion No. I-07-024 Issued May 10, 2007

County Board Control of Supervisor of Assessments

(1) The county board can impose additional duties and powers on the supervisor of assessments by ordinance and subsequently alter these duties and powers. (2) The county board cannot divest the supervisor of assessments of the duties and functions vested in him by law such that the county board controls the day to day operations of the supervisor's office. (3) Once the budget and appropriation ordinance for the office of the supervisor of assessments has been adopted, the county board cannot change that budget in order to control the supervisor's performance of his duties. 35 ILCS 200/3-10, 3-30, 3-40, 9-15, 9-35 (West 2004); 55 ILCS 5/5-1016, 5-1087, 5/1106, 6-1001, 6-1002, 6-1003 (West 2004); Ill. Const. 1970, art. VII, §4(d).

Informal Opinion No. I-07-025 Issued May 10, 2007

Expenditure of Public Funds to Build a Community College Campus

Non-home-rule counties are not authorized to make an outright gift of public funds to a local group for the construction of a community college campus. Ill. Const. 1970, art. VII, §1.

Informal Opinion No. I-07-025 Issued May 10, 2007

County Fair Board as a Public Agency under the Intergovernmental Cooperation Act

A not-for-profit corporation, such as the Fayette County Fair Association, is not a "public agency" under the Intergovernmental Cooperation Act. 5 ILCS 220/2 (West 2004).

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1. Full Name of Senior Government Lawyer_____
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The undersigned hereby certifies that the foregoing information is true and correct, and that the above-named individual meets the criteria for recognition as a Senior Government Lawyer.

Signature_____ **Dated**_____

Return form no later than September 1, 2007 to: Janet Sosin, Director of Bar Services, Illinois State Bar Association, 20 S. Clark St., Suite 900, Chicago, Illinois 60603, Fax-312-726-9071 or e-mail: jsosin@isba.org.

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