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# STANDING COMMITTEE ON GOVERNMENT LAWYERS

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

## To delete or not to delete: State Records Act implications for integrated justice systems

By Kathleen deGrasse and Wil Nagel<sup>1</sup>

Criminal justice agencies' reliance on electronic records management systems has drastically reduced the amount of paper-based data maintained by the justice system. Because agencies are being encouraged to enhance the electronic collection, analysis, and storage of justice information, and because there is a great deal of public accountability in the administration of justice, it is important to assess how Illinois' State Records

Act<sup>2</sup> and Local Records Act<sup>3</sup> ("Records Acts") may impact the development and operation of these new information systems throughout the state. The purpose of this article is to raise awareness of these issues, which have not yet been subject to significant enforcement efforts or legal review. The following discussion is focused on how the Records Acts might apply to data that is in a state administered data warehouse. To address these concerns, this article concludes that: (1) participating agencies should enter into memoranda of understanding with system administrators; and (2) State and Local Records Commissions as well as the General Assembly should examine these issues in light of advancing information technologies.

The Records Acts establish a comprehensive scheme for agency internal records retention. One element of this scheme is an administrative process for regulating and enforcing records disposal standards. Specifically, the Acts require an agency to obtain the approval of the appropriate records commission before it may dispose of a

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record. A "record" is broadly defined in the State Records Act as "all books, papers, digitized electronic material, maps, photographs, databases, or other official documentary materials, regardless of physical form or characteristics, made, produced, executed or received by any agency in the State in pursuance of state law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its successor as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the State or of the State Government, or because of the informational data contained therein \* \* \*."<sup>4</sup> The definition of "record" in the Local Records Act<sup>5</sup> parallels that found in the State Records Act. The following discussion is focused on how the Records Acts might apply to local data that is submitted to a state administered data warehouse.

Although there are several different types of integrated justice information systems, a common approach being pursued on both the federal and state levels is the development of a central-

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ized data warehouse. These systems enhance the sharing of information by aggregating local agency information and making it accessible across jurisdictions. In the criminal justice context, integrated information systems frequently contain data from the records management systems of local participating agencies. Because timely, accurate, and current information is necessary for the effective investigation of all types of crimes, it is necessary to ensure that data contained in a centralized data warehouse is up to date. To do this, some data warehouses take periodic "snapshots" of local agency data systems. These snapshots include any new information gathered by the local agency since the last update, but will also reflect any changes or deletions. Data warehouses are designed to reflect whatever data is contained in the source systems and historical data will be overwritten with each subsequent snapshot. A threshold issue that system administrators and their legal counsel must confront is whether the overwritten data is a record under the Records Acts.

Resolving this issue is significant to ensuring that the data warehouse is administered in compliance with the State Records Act. It also may become necessary or desirable to re-create, at a later date, the results of a previous inquiry to the data warehouse. This can be important when determining whether investigative leads have been exhausted. For example, a search result for information concerning Winston Smith on December 1, 2006, may contain different information than a subsequent inquiry about Winston Smith on January 1, 2008. In the interim, Smith could have had a record expunged or conversely could have committed additional criminal acts that might lead investigators to consider him a suspect. This issue of whether it is sound policy to retain historic snapshots is outside the scope of this article. The focus of this discussion is whether the snapshot is a record under the Records Acts that can only be overwritten with approval from the State Records Commission.

A cursory examination of the Records Acts suggests to some that the snapshot constitutes digitized electronic material and arguably falls under the definition of a record. If this is the case, then each individual snapshot could not lawfully be destroyed without prop-

er authorization from the appropriate records commission.

A more in-depth review of the statutes, however, reveals that if the data is either: (1) not appropriate for preservation by that agency; or (2) merely an extra copy created for convenience of reference, it is considered "non-record material" and may be destroyed at the agency's discretion. The first category of non-record material, the appropriateness of preservation, requires a review of the snapshot's characteristics and how the preservation furthers or hinders the purposes of the centralized data warehouse.

The data warehouse's purpose is to make more convenient the sharing of local and state police incident information and to identify cross-jurisdictional crime trends and series. This role requires that a centralized data warehouse contain current data rather than outdated copies of data in order to effectively investigate crimes. Redundantly preserving the vast amount of data contained in obsolete snapshots may undermine the goals of a centralized data warehouse by slowing down system operations; returning outdated information in response to a query; and utilizing storage space that could otherwise be used to house more valuable information. The comprehensive administrative scheme created by the Records Acts suggests that this determination is a decision for the Records Commissions rather than the administering agency.

The second category of non-record material, extra copies created for convenience of reference, may be the most appropriate classification of a snapshot. The source systems, which send copies of data to the centralized data warehouse, will preserve the original data in accordance with retention policies that are established to comply with the Records Acts. The centralized data warehouse is a data-sharing tool that assists investigators by providing ready access to police reports from across the state. It functions through the storage and use of copied source information. This interaction between the data warehouse and the source systems supports the proposition that the snapshots are merely extra copies maintained for convenience of reference and may be destroyed at the administering agency's discretion.

As this area has not yet been subject

to significant enforcement efforts or legal review, there is little precedent upon which to rely in making decisions and formulating policy and procedure. There is no court case or administrative hearing in which a party has challenged whether a snapshot of a source system meets the Records Acts' definitions of a record. Further, the addition of "digitized electronic material" and "databases" to the definition of a state record is a recent one.<sup>6</sup> The time is ripe for either the General Assembly or the Records Commissions to more directly address the retention and preservation of electronic information. Specifically: (1) the Records Commissions could publish the guidance they utilize when determining to preserve electronic materials; (2) the General Assembly might consider narrowing the scope of the terms "database" or "digitized electronic information"; or (3) both entities might clarify those types of electronic data that are considered to be copies maintained for convenience of reference.

We will next discuss the interplay that occurs between state and local agencies and their joint control of electronic information. The State Records Act currently addresses the issue of destruction where a local record becomes a state record; i.e., it cannot be destroyed without the permission of the State Records Commission. More uncertainty is involved where the state may deny a local agency's request to destroy non-record material. For example, a local law enforcement agency has participated in the state centralized data warehouse for five years. Due to budget constraints or a change in leadership, the local agency has decided to withdraw its participation and requests that all data that it had previously submitted to the centralized data warehouse be deleted from the warehouse's records management system. Must the warehouse administrator comply, or have the local records become state records, thereby requiring approval from the State Records Commission prior to destruction?

Losing control over its information may be a powerful disincentive to local agencies considering whether to participate in a state system designed to share police incident report information. Some steps can be taken to reduce the uncertainty surrounding the retention and destruction of justice information. Until such time as the Records Acts are

amended to address these advancing information technologies, agencies should enter into memoranda of understanding that address these issues. The memoranda should set forth the basic principles and guidelines that agencies will abide by when working together to achieve a common goal. Such memoranda typically address, among other issues, costs associated with participation and how agencies will resolve unanticipated disputes. In order to ensure that the parties' control over the information in an integrated justice system is clearly expressed, the memoranda should also include a provision that copies of local records submitted to a centralized data warehouse are considered non-record material under the control of the system administrator.

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2. 5 ILCS 160/1 et seq.
3. 50 ILCS 205/1 et seq.
4. 5 ILCS 160/2.
5. 50 ILCS 205/3.

6. See Public Act 92-866, effective March 1, 2003; House Bill No. 4938, 92nd Gen. Assembly (Ill. 2003).

## Former Assistant Public Defender Suspended Until Further Order

By Rosalyn Kaplan

***In re Baldwin, Commission No. 05 SH 41, S. Ct. No. M.R. 21132 (Supreme Court order entered November 17, 2006).***

In September 2003, Julie Baldwin entered into a contract to serve as a part-time assistant public defender in Peoria County, where she was assigned to represent indigent parents in cases in which her clients faced the possibility of termination of their parental rights. In six appeals brought on behalf of parents in the Appellate Court for the Third Judicial District, Baldwin failed to file timely docketing statements and/or briefs and failed to file timely motions to extend the time for these obligations. On two occasions, she was ordered to appear personally before the Appellate Court to show cause why she should not be held in contempt, and on each occasion she was found to be in contempt. On the second occasion, in April 2005, the Appellate Court barred her from appearing in any future termination of parental rights appeals. The Clerk of

the Court testified that Baldwin was the only attorney ever to have been brought before the Court on two contempt proceedings and that she was the only attorney who had been barred from representing clients in that Court. She was terminated from her employment with the Public Defender in July 2005.

As explanations for her conduct, Baldwin cited difficulties with her case load; surgery on a finger of her right hand; advice by other attorneys that the Appellate Court's due dates were not "written in stone"; and various family issues that, she said, caused her to experience emotional distress. The Hearing Board of the ARDC found that these explanations "demonstrated a lack of concern for her client[s]' cases, a lack of respect for the courts, and a lack of understanding of her duties as an attorney."

Noting that Baldwin had engaged in a pattern of neglecting appeals, as well as a pattern of disobeying court orders, and taking into account her additional neglect of two matters for private clients and her failure to comply with rules

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of the ARDC during the course of the disciplinary proceeding, the Hearing Board recommended that she be suspended for two years and until further order. This recommended sanction would require her to apply for reinstatement and prove her fitness to practice after serving the two-year suspension, a requirement that the Hearing Board suggested because it found "no reason

to believe that [Baldwin] understands her ethical duties as an attorney or that she is willing or able to represent clients in a diligent and proper manner, comply with court orders, and otherwise practice law in an ethical manner." The Illinois Supreme Court approved and confirmed the Hearing Board's report and recommendation, and it ordered Baldwin suspended from the practice of

law for two years and until further order of the Court.

The full text of the report of the Hearing Board, as well as the Supreme Court's final order, may be accessed through the Attorney Registration and Disciplinary Commission's Web site at <[www.iardc.org](http://www.iardc.org)>, by selecting "Rule and Decisions."

## In-sites

There are many sites that can assist you in finding public records. We focus here on free sites, but acknowledge that there are many services that will conduct background checks and similar acts for a fee. Many of the sites will lead you to the same information, but sometimes research via different sites can produce additional information. Here are just a few to get you started.

<<http://www.searchsystems.net/list.php?nid=93>>

This Web site allows users to search public records and governmental Web sites in any state by city name. It boasts that it is a "resource of business information, corporate filings, property records, deeds, mortgages, criminal and civil court filings, inmates, offenders, births, deaths, marriages, unclaimed property, professional licenses, and much more." It has more than 25,000 public records links. Access to portions of the Web site require the payment of a fee.

<<http://www.retrieve.com/>>

Retrieve.com is a public records search engine that allows you to search across categories, a great help if you are looking for a broad range of information, not just financials for example.

<<http://www.libraryspot.com/publicrecords.htm>>

LibrarySpot lists many public records sites. Additionally, it has a box listing links to many libraries and another box called "reference desk," with such diverse topics as dictionaries, genealogy, and acronyms.

<[http://howtoinvestigate.com/public\\_records/](http://howtoinvestigate.com/public_records/)>

How to Investigate helps you, well, investigate! With some narrative suggestions, it outlines credit reports, state records, government agencies, and open records.

<<http://www.crimcheck.com/freerecords.htm>>

This Web site provides something for everyone. It lists state, city, county, and federal criminal court directories. Additionally, this site provides links to Social Security death matches, criminal most-wanted sites, and sex offender lists.

<<http://publicrecords.onlinesearches.com/>>

Here you can search public records by state.

<[http://www.netforlawyers.com/article\\_public\\_records.htm](http://www.netforlawyers.com/article_public_records.htm)>

Internet For Lawyers is an interesting site from the State Bar of California. There are links to many kinds of public records, including medical and attorney licenses. Additionally, there is a cyberspace law librarian and many articles on legislative research.

<<http://www.usa.gov/>>

This federal government Web site is a treasure trove of information on every topic under the sun. You can search by level of government (local, state, federal), you can access laws and regulations, information on science and technology, and contact information for government offices. This one-stop-shopping approach to governmental public records is a great place to start.

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## News you can use

The American Bar Association's Government and Public Sector Lawyers Division is accepting nominations for its three national awards.

The **Dorsey Award** honors an outstanding public defender or legal aid lawyer. Eligible recipients are lawyers who serve indigent persons, in the employ of legal aid bureaus, indigent defense, or legal services corporations serving the disadvantaged. Eligible nominees must be employed by an entity that receives government funding.

The **Hodson Award** recognizes sus-

tained outstanding service or a specific extraordinary accomplishment by a government or public sector law office. Eligible nominees include all government (federal, state, local, and military) or public sector law offices (e.g., legal aid bureaus, public defender offices). To be eligible nominees must receive funding from a government entity. Departments or units within offices are also eligible.

The **Nelson Award** honors outstanding contributions to the ABA by an individual government or public sector lawyer. All government and public sector lawyers are eligible and the division

will consider an individual's specific extraordinary accomplishments as well as sustained superior contributions to the ABA over a number of years.

These awards offer a rare opportunity to recognize the outstanding work accomplished in the public sector. They also serve to inform the general community about the exceptional work of the nation's public sector lawyers.

Nominations must be received by April 17, 2007. All nomination information can be found on the Division's Web page at: <<http://www.abanet.org/govpub/annual.html>>.

## 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 official opinions 06-004 through 06-006 and informal opinions I-06-041 through I-06-052 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>>.

### **Opinion No. 06-004 Issued December 29, 2006**

#### **Provision of Field Notes to the Prosecuting Authority in Non-Homicide Felony Investigations**

The specific statutory reference to disclosure of "field notes" in homicide

felony investigations, and the concomitant exclusion of that term from the parallel non-homicide felony investigations provision, compels the conclusion that it was the intent of the General Assembly to require disclosure of field notes in the first instance but not in the second. 725 ILCS 5/114-13 (West 2004).

### **Opinion No. 06-005 Issued December 29, 2006**

#### **Residency Requirements for Sub-Circuit Judges After Circuit-wide Retention Election**

The Illinois Constitution requires only that a judge be a resident of the unit that elects him or her. Resident and subcircuit judges may be required by statute initially to reside in and be elected from their sub-unit. However, pursuant to the Constitution, all circuit judges are retained by election of the greater circuit. Therefore, all circuit judges after retention may reside anywhere in the circuit. Ill. Const. 1970, art. VI, sec. 11; Ill. Const. 1970, art. VI, sec. 12; 705 ILCS 35/1f(e) (West 2004).

### **Informal Opinion No. I-06-043 Issued December 11, 2006**

#### **Registration of Dogs and Cats Under the Animal Control Act**

The plain language of section 3 of the Animal Control Act provides that counties are authorized, but not required, to mandate the registration of dogs and cats. Therefore, counties may opt not to impose mandatory registration requirements. 510 ILCS 5/3 (West 2005 Supp.).

### **Informal Opinion No. I-06-045 Issued December 29, 2006**

#### **Signing Multiple Nominating Petitions for Different Candidates for a Single Elective Office from the Same Political Party**

A registered voter may sign more than one candidate's nominating petition for a single elective office, if the voter and candidates are from the same political party. 10 ILCS 5/7-10 (West 2004), as amended by Public Act 94-645, effective August 22, 2005.

**Informal Opinion No. I-06-046**

**Issued December 29, 2006**

**Life Insurance Benefit Proceeds as Unclaimed Property**

Provisions in the bylaws of fraternal benefit societies that attempt to create a default beneficiary for the proceeds of a society's life insurance contract conflict with the provisions of the Uniform Disposition of Unclaimed Property Act and are invalid as against public policy. 765 ILCS 1025/3 (West 2004).

**Informal Opinion No. I-06-047**

**Issued December 29, 2006**

**Validity of Contract of Circuit Clerk to Collect Delinquent Fines**

The circuit clerk has no authority to enter into a collection agreement with a private collection agency for the collection of delinquent fines. Rather, the authority to enter into such an agreement lies with the State's Attorney. 55 ILCS 5/3-9005 (West 2004); 705 ILCS 105/27.3b (West 2004); 725 ILCS 5/124A-10 (West 2004); 730 ILCS 5/5-9-3 (West 2004).

**Informal Opinion No. I-06-048**

**Issued December 29, 2006**

**Custody of Persons Arrested on Warrants in Municipal Ordinance Violation Cases**

The sheriff has a nondiscretionary, statutory duty to execute all warrants and writs issued by the court, including warrants issued for the arrest of persons who have been charged with municipal ordinance violations. Therefore, the sheriff cannot refuse to accept custody of a person arrested on a warrant in an ordinance violation case. Pursuant to the language of section 5 of the County Jail Act, the county is responsible for the costs associated with incarcerating the individual while he or she is held on a warrant issued for the failure to appear in a municipal ordinance case. 65 ILCS 5/11-3-2 (West 2004); 730 ILCS 125/4 (West 2004); 730 ILCS 125/5 (West 2005 Supp.).

**Informal Opinion No. I-06-049**

**Issued December 29, 2006**

**Use of Non-Certified Interpreters for the Deaf by Applicants for Driver's Licenses**

Neither the American with Disabilities Act nor the Illinois Interpreters for the Deaf Act (the Act)

requires the office of the Secretary of State (SOS) to adopt a blanket policy that always prohibits a friend or family member from interpreting for a deaf and hearing impaired individual when applying for or renewing a driver's license. However, if the SOS determines that it is inappropriate for a particular customer to use a friend or family member as an interpreter in a specific situation because of impartiality, confidentiality, or competency issues, then the SOS must provide its deaf or hearing impaired customer with a qualified interpreter. Further, a friend or family member's simple act of assisting a deaf or hearing impaired person to communicate with others, standing alone, does not necessarily result in the friend or family member "represent[ing] himself or herself as an interpreter for the deaf" in violation of the Act. Rather, whether a person "represent[s] himself or herself as an interpreter for the deaf" in violation of the Act is a question of fact that depends on the surrounding circumstances, but necessarily requires holding oneself out as an interpreter. 225 ILCS 442/5 (West 2004); 42 U.S.C. §12132 (2000); 28 C.F.R. §35.160 (2005).

**Informal Opinion No. I-06-050**

**Issued December 29, 2006**

**Illinois Procurement Code Prohibits Solicitations that Contain Requests for Cash Incentives**

Section 20-50 of the Illinois Procurement Code prohibits solicitations or specifications that contain provisions inviting bidders to include in bid proposals cash incentives. 30 ILCS 500/20-50 (West 2004).

**Informal Opinion No. I-06-051**

**Issued December 29, 2006**

**Appearance in Illinois Administrative Hearings of Attorneys Licensed in Other States**

Attorneys licensed in other states but not in Illinois may only be authorized to practice law in Illinois by the courts. Neither legislative authorization nor administrative rules are sufficient to allow administrative agencies to permit out-of-State attorneys to participate in administrative proceedings. 220 ILCS 5/10-101 (West 2004); 705 ILCS 205/1 (West 2004).

**Informal Opinion No. I-06-052**

**Issued December 29, 2006**

**Liability and Immunity for Volunteers**

Volunteers organized and supervised by units of local government may have the protection from liability afforded by a number of Illinois laws (e.g., Local Governmental and Governmental Employees Tort Immunity Act, Illinois Emergency Management Agency Act, Good Samaritan Act, Illinois Oil Spill Responders Liability Act, the Line of Duty Compensation Act, and State Employees Indemnification Act). Whether a particular law applies will depend on the facts and circumstances unique to each situation. 5 ILCS 350/1 et seq. (West 2004); 820 ILCS 315/1 et seq. (West 2004); 745 ILCS 10/1-202, 2-201, 2-203, 6-106 (West 2004); 20 ILCS 3305/15, 21 (West 2004); 745 ILCS 49/1 et seq. (West 2004); 740 ILCS 113/1 et seq. (West 2004); 42 U.S.C.A. §9601 et seq. (West 2005); 42 U.S.C.A. §14501 et seq. (West 2005); 45 ILCS 151/1 et seq. (West 2004); 820 ILCS 315/2(g) (West 2004), as amended by Public Act 94-696, effective June 1, 2006.

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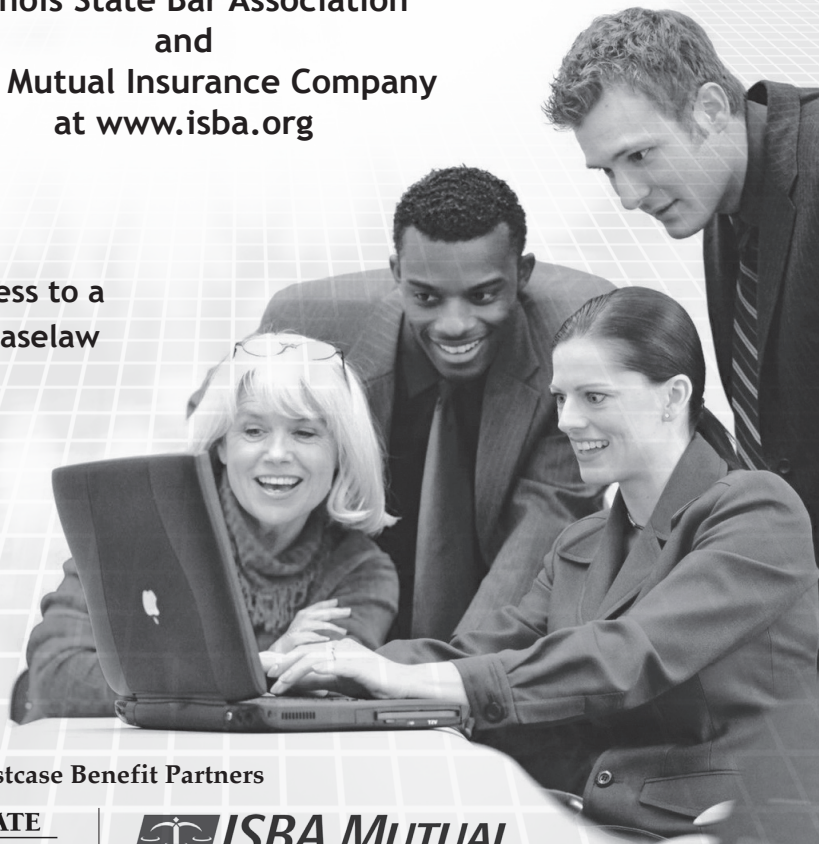
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