ROLAND W. BURRIS
ATTORNEY GENERAL
STATE OF ILLINOIS

October 25, 1994

FILE NO. 94-025

MENTAL HEALTH:
Confidentiality of Identity of
Recipients of Mental Health Services

Honorable William R. Haine
State's Attorney, Madison County
Madison County Administration Building
157 North Main Street, Suite 402
Edwardsville, Illinois 62025-1969

Dear Mr. Haine:

I have your letter wherein you inquire whether a provider of mental health services may inquire into the possible criminal background of service recipients if doing so may raise an inference that the persons may be or are receiving mental health services from the agency. For the reasons hereinafter stated, it is my opinion that a mental health agency may not identify persons to whom it is providing mental health services, or who have applied for or been referred to the agency for such services, to law enforcement agencies for the purpose of inquiring as to the background of those persons, unless it has the consent of the person or unless one of the exceptions to the consent requirement set forth in the Mental Health and Develop-

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mental Disabilities Confidentiality Act (740 ILCS 110/1 et seq. (West 1992)) is applicable.

Your question concerns an agency in Madison County which counsels and evaluates persons with mental disabilities. In the course of their work, employees of the agency believe that it would be desirable, for their own safety and that of others, to inquire of local police agencies, probation officers, parole officials or other law enforcement personnel regarding whether there are any outstanding warrants, hold orders, informations or other criminal process with respect to the recipients of services. As you have suggested, by its very nature, such an inquiry by the agency will necessarily raise a reasonable inference that the person is a recipient of mental health services.

Subsection 3(a) of the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/3(a) (West 1992)) provides:

> "(a) All records and communications shall be confidential and shall not be disclosed except as provided in this Act.
>
> * * * "

Section 2 of the Mental Health and Developmental Disabilities Confidentiality Act (740 ILCS 110/2 (West 1992)) provides, in part:

> "
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> * * *
>
> (1) 'Confidential communication' or 'communication' means any communication made

> by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health or developmental disability services to a recipient. Communication includes information which indicates that a person is a recipient.
>
> * * *
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> (3) 'Mental health or developmental disabilities services' or 'services' includes but is not limited to examination, diagnosis, evaluation, treatment, training, pharmaceuticals, aftercare, habilitation or rehabilitation.
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> * * *
>
> (6) 'Recipient' means a person who is receiving or has received mental health or developmental disabilities services.
>
> * * * "

(Emphasis added.)

Sections 4 and 5 of the Act (740 ILCS 110/4, 110/5 (West 1992)) provide for access to a recipient's record by the recipient and his or her parent or guardian, and for the disclosure of records to other persons with the written consent of the recipient. Sections 6 through 12.2 of the Act (740 ILCS 110/6 - 110/12.2 (West 1992)) set forth exceptions to the consent requirement.

Several exceptions pertain specifically to the disclosure of information to law enforcement authorities. Subsection 10(a)(9) of the Act (740 ILCS 110/10(a)(9) (West 1992)) permits the disclosure of records and communications in investigations of

homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide. Section 11 of the Act (740 ILCS 110/11 (West 1992)) permits disclosures made in accordance with child abuse and neglect laws, disclosures necessary to protect the recipient or another person against a clear, imminent risk of serious injury, and disclosures necessary to warn or protect a specific individual against whom the recipient has made a specific threat of violence. Section 12 of the Act (740 ILCS 110/12 (West 1992)) permits disclosures, upon the request of certain law enforcement officers, relating to the protection of public officials and to the administration of the Firearm Owners Identification Card Act (430 ILCS 65/1 et seq. (West 1992)). A mental health facility director is required to provide information in connection with a crime occurring within the facility (740 ILCS 110/12.1 (West 1992)), and concerning patients who have been admitted by court order and who are absent from the facility without permission (740 ILCS 110/12.2 (West 1992)). No provision of the Act expressly permits the disclosure of identifying information to law enforcement authorities for the purpose of informing therapists or other employees of a mental health services provider of the possible criminal background or propensities of the recipient.

The policy of the Act, and the construction to be accorded to its provisions, was discussed by the appellate court

in People v. Doe (1982), 103 Ill. App. 3d 56, 58-59, wherein it was stated:

" * * *

> As we pointed out in Laurent v. Brelji (1979), 74 Ill. App. 3d 214, 392 N.E.2d 929, the [Mental Health and Developmental Disabilities Confidentiality] Act was adopted as an attempt to encourage and protect certain types of confidential relationships by making certain information obtained through them confidential and privileged against disclosure. The legislature recognized that suppression of this information could operate as a substantial detriment to law enforcement and the protection of the citizenry, and attempted to provide for a privilege only when the benefits outweighed the detriments. Much of the State's argument in its brief focuses upon the damage the exercise of the privilege imposes upon law enforcement and contends some exceptions should be implied from the legislation. The State does not argue that the instant situation involves any express exceptions to the Act. However, as we stated in Laurent, section 3(a) of the Act indicates that the only exceptions are those expressly provided for in the Act.
>
> The legislative history of provisions for privilege from disclosure by persons working with mental patients also negates the theory that there are implied exceptions with reference to furnishing information to law enforcement personnel. Section 12-3(a) of the Mental Health Code of 1967 (Ill. Rev. Stat. 1977, ch. 91 1/2, par. 12-3(a)) provided for a privilege with reference to the records of patients in public and private mental hospitals but excepted from coverage inquiries by certain persons, including the State's attorney of the county from which the patient came, the county of the patient's residence, or the county in which the hospital was located. Upon the repeal of the foregoing, no such provision was placed in

> the Mental Health Developmental and Disabilities Confidentiality Act.
>
> * * * "

In that case, a nurse had been ordered to respond to a grand jury inquiry concerning the identity of a particular patient whom she had seen, but not treated, at a hospital psychiatric ward. The court reasoned that, under the circumstances there present, naming the person in question would not have identified him as a recipient, nor was there evidence that the nurse had obtained the information from a "record" or by way of communication with the recipient. The circumstances here, however, are distinguishable. The agents and employees of the mental health agency propose to seek background information about certain recipients or potential recipients, thus disclosing identifying information obtained from those persons or others associated with them. Their only apparent reason for desiring such background information is that the subject of the inquiry is or may become a recipient of mental health services.

The circumstances that you have described are analogous to those at issue in another case, People v. Doe (1991), 211 Ill. App. 3d 962. In that case, a grand jury subpoena sought identifying information regarding all residents of a facility for mentally ill patients. Based upon the language in section 2 of the Act, the court held that information to be privileged. The proposal of the mental health agency in this case would effec-

tively provide similar information even without a request made by law enforcement authorities. If such information is deemed to be privileged against disclosure to a grand jury which is investigating a homicide, it must certainly also be privileged from disclosure for purposes of background checks by mental health workers.

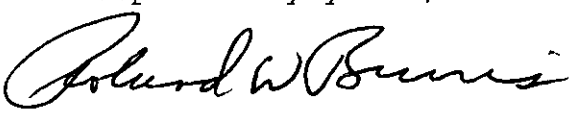
Moreover, I do not believe that there is any basis for distinguishing between persons who are currently receiving services, and those who are applying for services from the mental health agency. Subsection 2(1) of the Act includes, within the definition of "confidential communication", communications made by persons other than a recipient in connection with providing mental health services to a recipient. I believe that this language would encompass information received from an applicant for services or another on his or her behalf concerning the services to be rendered if he or she becomes a recipient of services.

It has been suggested that the inability of mental health service providers to obtain background information of this sort creates a dangerous situation for the employees of the agency, as well as the public. I note that the policy of the State, with respect to the balancing of privacy interests against the interests of law enforcement, is a matter to be determined by the General Assembly, subject only to constitutional limitations.

Questions concerning the wisdom of the balance which has been struck may therefore be addressed only by that body.

In summary, it is my opinion that a provider of mental health services cannot disclose information which would identify service recipients or potential service recipients to law enforcement personnel for purposes of background checks without the consent of the subject, because doing so would violate the provisions of the Mental Health and Developmental Disabilities Confidentiality Act.

Respectfully yours,



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