



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 24, 2007

FILE NO: 07-002

PUBLIC RECORDS AND INFORMATION:
Public Access to Search Warrant Information
Prior to the Final Disposition of a Case

The Honorable John Schmidt
State's Attorney, Sangamon County
200 South Ninth Street
Room 402 County Complex
Springfield, Illinois 62701

Dear Mr. Schmidt:

I have your letter regarding the public's right to access records relating to the issuance of search warrants. Specifically, you have inquired whether the complaint for a search warrant, any accompanying affidavits or other evidence in support thereof, and the warrant itself are subject to public inspection or dissemination prior to the final disposition of any resulting case. For the reasons stated below, it is my opinion that once the search warrant has been returned to the court, these records are open to public inspection or dissemination unless the court enters an order specifically providing otherwise.

BACKGROUND

According to the information that you have provided, the way in which counties file complaints for search warrants and the warrants themselves varies. Circuit court clerks in some Illinois counties file a complaint for a search warrant and the accompanying records in a Miscellaneous Remedies (MR) file, which is generally open to public inspection pursuant to the Clerks of Courts Act (the CoC Act) (705 ILCS 105/0.01 *et seq.* (West 2006)). In other counties, the circuit clerks file the records in the corresponding criminal case file, but they are withheld from public inspection. In Sangamon County, the circuit clerk files the documents "separately," so that they are not made part of the court file or assigned an MR number, and withholds those records from public inspection. Your inquiry arises out of this apparent lack of uniformity in the procedures followed in the various counties.

ANALYSIS

Section 108-4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/108-4 (West 2006), as amended by Public Act 95-331, effective August 21, 2007) governs the issuance of search warrants:

(a) All warrants upon written complaint shall state the time and date of issuance and be the warrants of the judge issuing the same and not the warrants of the court in which he is then sitting and such warrants need not bear the seal of the court or clerk thereof. *The complaint on which the warrant is issued need not be filed with the clerk of the court nor with the court if there is no clerk until the warrant has been executed or has been returned "not executed"*. (Emphasis added.)

Pursuant to section 108-4, a complaint for a search warrant, together with probable cause affidavits (if attached to or otherwise filed with the complaint or warrant)¹ and the search warrant itself, must be filed with the court once the warrant has been executed or returned "not executed." See generally *People v. Stansberry*, 47 Ill. 2d 541, 545-46 (1971), cert. denied, 404 U.S. 873, 92 S. Ct. 121 (1971) (acknowledging that warrants are not filed until after execution or attempted execution); see also *People v. Price*, 46 Ill. 2d 209, 212 (1970), appeal dismissed, cert. denied, 402 U.S. 902, 91 S. Ct. 1389 (1971)). Illinois law requires that the circuit clerk keep and preserve all court files and papers and maintain complete records of all proceedings and determinations of the circuit court. 705 ILCS 105/13 (West 2006). Thus, it is the duty of the circuit clerk to hold and preserve these documents subject to the orders of the court.

Circuit clerks are non-judicial officers of the judicial branch of State government. Ill. Const. 1970, art. VI, §18(b); *Drury v. County of McLean*, 89 Ill. 2d 417, 424 (1982). Their duties are ministerial in nature, as prescribed by statute, Illinois Supreme Court rule, and local court rules. *Harms v. Bierman*, 361 Ill. App. 3d 250, 255 (2005). With respect to the public's right to access records in the custody of a circuit clerk, section 16 of the CoC Act provides, in pertinent part:

¹The fourth amendment to the United States Constitution and article I, section 6, of the Illinois Constitution of 1970 provide that a search warrant may not be issued without probable cause. A probable cause determination must be made from sworn testimony or affidavits presented to a neutral and detached judicial officer. *People v. Greer*, 87 Ill. 2d 89, 92 (1981). Because affidavits are an integral part of a probable cause determination, they are commonly attached to the warrant and are therefore included in the court file so that the record can be preserved for a potential appeal. See *Groh v. Ramirez*, 540 U.S. 551, 557-58, 124 S. Ct. 1284, 1290 (2004) (the validity of search warrants may be construed with reference to supporting affidavits only if the warrant uses appropriate words of incorporation and if the supporting document accompanies the warrant).

All records, dockets and books required by law to be kept by such clerks shall be deemed public records, and shall at all times be open to inspection without fee or reward, and all persons shall have free access for inspection and examination to such records, docket and books, and also to all papers on file in the different clerks' offices and shall have the right to take memoranda and abstracts thereto. (Emphasis added.) 705 ILCS 105/16(6) (West 2006).

Courts have long recognized the public's right to review judicial records, even in the absence of a specific statute such as section 16 of the CoC Act. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 1312 (1978) (acknowledging the existence of a common law presumption that allows the public to "inspect and copy public records and documents, including judicial records and documents"); *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 230 (2000) (noting that "[t]he common law right of access to court records is essential to the proper functioning of a democracy * * * [and that] the availability of court files for public scrutiny is essential to the public's right to 'monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system'"). This right is not absolute, however. Courts retain the discretion to order that certain records be filed under seal. *Skolnick*, 191 Ill. 2d at 231. I will assume for the purpose of your inquiry that your question pertains only to search warrants and related documents that have not been filed under seal pursuant to court order.²

On May 20, 1968, the Illinois Supreme Court adopted the "General Administrative Order on Recordkeeping in the Circuit Courts" (the Order). The Order establishes a recordkeeping system for all Illinois circuit courts. *See generally People v.*

²No Illinois statute or Illinois Supreme Court rule authorizes circuit clerks to seal court records without a court order so directing. In fact, some local court rules specifically provide that a circuit clerk may not impound or seal any part of a file without a written court order. *See* 17th Judicial Cir. Ct. R. 16.01 (as amended September 18, 2003); 3rd Judicial Cir. Ct. R. 3.01 (as amended May 24, 2006).

Cuadrado, 341 Ill. App. 3d 703, 705 n.1 (2003), *aff'd*, 214 Ill. 2d 79 (2005); *Morus v. Kapusta*, 339 Ill. App. 3d 483, 485 n.1 (2003); *see In re J.D.*, 317 Ill. App. 3d 419, 427 (2000), *appeal denied*, 194 Ill. 2d 568 (2001), *and cert. denied*, 535 U.S. 932, 122 S. Ct. 1308 (2002). Under the Order, the Director of the Administrative Office of the Illinois Courts "shall prescribe the forms to be used for all records and * * * shall establish a program of supervision to assure that the minimum standards provided by this order are correctly and uniformly employed in each county and shall notify the chief judge of the circuit of any unauthorized deviations."

Administrative Office of the Illinois Courts, General Administrative Order on Recordkeeping in the Circuit Courts, adopted by the Supreme Court of Illinois on May 20, 1968, as amended.

In this regard, the Administrative Office of the Illinois Courts compiled the *Manual On Recordkeeping* for the guidance of the circuit courts and their clerks.³ The manual directs that search warrants relating to a pending criminal case be filed in the corresponding case file, while search warrants not relating to a pending criminal case be assigned an MR number. Administrative Office of the Illinois Courts, Manual on Recordkeeping, Part 1, Section B(5), at 9 (2d ed. 1996, rev. November 15, 2006). The manual also provides that a search warrant filed *prior* to its return to the court must be impounded until the return is filed. Administrative Office of the Illinois Courts, Manual on Recordkeeping, Part 1, Section L(1)(c), at 3 (2d ed. 1996, rev. November 15, 2006). The direction to circuit clerks to impound warrants filed in an MR file or a corresponding case file *until* they have been returned to the court necessarily implies that search

³The Administrative Office of the Illinois Courts first produced the *Manual On Recordkeeping* in 1971. A second edition of the *Manual On Recordkeeping* was effective January 1, 1996, and was revised November 15, 2006. We have reviewed the revised second edition in responding to your inquiry.

warrants and supporting documents are to be available to the public after the return has been made, unless a court otherwise orders. This interpretation is consistent with the public access provisions of section 16 of the CoC Act. Accordingly, it is my opinion that complaints for search warrants, affidavits or other evidence attached to the complaint or warrant or otherwise filed with the warrant, and the warrants themselves are subject to public inspection pursuant to section 16 of the CoC Act once the warrants have been returned to the court.

Applicability of the Freedom of Information Act

You have also inquired whether the inspection of search warrants and associated documents in the custody of the circuit clerk is governed by the Freedom of Information Act (5 ILCS 140/1 *et seq.* (West 2006)).

In *Copley Press, Inc. v. Administrative Office of the Courts*, 271 Ill. App. 3d 548 (1995), *appeal denied*, 163 Ill. 2d 551 (1995), the appellate court concluded that "[t]he lack of any reference to the courts or judiciary [in the Freedom of Information Act] must be taken as an intent to exclude the judiciary from the disclosure requirements of the Act." *Copley*, 271 Ill. App. 3d at 553. It then held that because a pretrial services agency performed a clearly judicial function, its records were not subject to disclosure under the Freedom of Information Act. Based on the court's reasoning in *Copley*, it is clear that the judicial branch is not subject to the provisions of the Freedom of Information Act.⁴ See Ill. Att'y Gen. Op. No. 99-005, issued March 15, 1999.

⁴The CoC Act is expressly made subject to the Local Records Act. 705 ILCS 105/16 (West 2006). The Local Records Act in turn provides that "[r]ecords and reports prepared or received on or after July 1, 1984, shall be covered under the provisions of 'The Freedom of Information Act[.]'" 50 ILCS 205/15 (West 2006). However, because the Freedom of Information Act specifically excludes the judiciary from its definition of "public agency," records maintained by the judiciary are not subject to that Act's provisions.

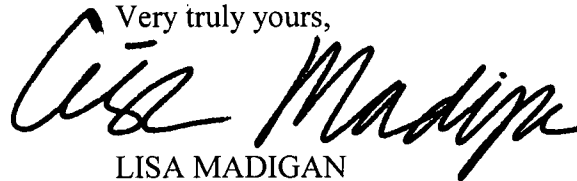
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As previously noted, circuit clerks are non-judicial officers of the judicial branch of State government. Therefore, it is my opinion that the inspection of search warrants and associated documents in the custody of the circuit clerk is not governed by the provisions of the Freedom of Information Act.

CONCLUSION

Complaints for search warrants, affidavits or other documents attached to the complaint or warrant or otherwise filed with the warrant, and the warrants themselves are subject to public inspection pursuant to section 16 of the Clerks of Courts Act once the warrants have been returned to the court. There is no statutory or other authority for a circuit clerk to unilaterally seal or impound files containing complaints for search warrants, associated affidavits, and the search warrants themselves. Of course, a prosecutor may seek a court order sealing or impounding these documents and a court may enter such an order. Absent a court order otherwise providing, however, it is my opinion that circuit clerks must make these documents available to the public.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan". The signature is written in a cursive, flowing style.

LISA MADIGAN
ATTORNEY GENERAL