



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

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FILE NO. 07-003

PUBLIC RECORDS AND INFORMATION:

Applicability of the Local Records
Act to the Records of County
Election Commissions

The Honorable Joseph E. Birkett
State's Attorney, DuPage County
503 North County Farm Road
Wheaton, Illinois 60187

Mr. John Curtin
Chairman
Local Records Commission
Illinois State Archives
Margaret Cross Norton Building
Springfield, Illinois 62756

Dear Mr. Birkett and Mr. Curtin:

I have your letters inquiring whether the Local Records Act (the Records Act) (50 ILCS 205/1 *et seq.* (West 2006)) is applicable generally to local election commissions, including the DuPage County Election Commission (the Election Commission), and, if so, whether the provisions of the Illinois Election Code (10 ILCS 5/1-1 *et seq.* (West 2006)) or Federal election laws exclude certain election materials from the Records Act's provisions. For the reasons set

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out below, it is my opinion that local election commissions are subject to and must comply with the Records Act when destroying or otherwise disposing of the public records in their custody. Nothing in the State or Federal election laws exempts local election commissions from satisfying the Records Act's requirements with regard to public records, including election materials, in their possession.

BACKGROUND

The Local Records Act

The purpose of the Records Act is to establish a program for the management of local public records to facilitate and expedite governmental operations and to insure that public records are only destroyed in accordance with the law. 50 ILCS 205/2 (West 2006); *Lopez v. Fitzgerald*, 76 Ill. 2d 107, 114-16 (1979). Under the Records Act, agencies that wish to dispose of public records generally must comply with the rules and procedures promulgated by the appropriate local records commission.¹ 50 ILCS 205/4 (West 2006).

Pursuant to the rules of the Local Records Commission, an agency must ordinarily satisfy two procedures before disposing of its public records. First, the head of the agency must "*submit to the Local Records Commission lists^[2] or schedules^[3] of public records in his custody*

¹Section 6 of the Records Act (50 ILCS 205/6 (West 2006)) provides for the establishment of two local records commissions: one for counties with 3,000,000 or more inhabitants, officially known as the Local Records Commission of Cook County; and another for the remainder of the State, officially known as the Local Records Commission. Based on 2000 Federal census figures, DuPage County's population is 904,161. Illinois Blue Book 419 (2003-2004). Therefore, DuPage County falls under the jurisdiction of the Local Records Commission.

²A "list" is defined as an application "for authority to destroy records that have accumulated." 44 Ill. Adm. Code §4000.30(a)(1) (Conway Greene CD-ROM June 2003).

³A "schedule" is an application "for continuing authority to destroy records after specified periods of time or the occurrence of specified events." 44 Ill. Adm. Code §4000.30(a)(2) (Conway Greene CD-ROM June 2003).

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that are not needed in the transaction of current business and that do not have sufficient administrative, legal, or fiscal value to warrant their further preservation." (Italics in original.)

44 Ill. Adm. Code §4000.30(a) (Conway Greene CD-ROM June 2003); *see also* 50 ILCS 205/10 (West 2006). Second, after receiving approval from the Local Records Commission and at least sixty days before disposing of public records, the agency chief must file a "Records Disposal Certificate" with the Local Records Commission. This certificate must be signed by an officer with jurisdiction over the records and must include both the date on which the records are to be destroyed and the number of the application approved by the Local Records Commission authorizing the disposition. 44 Ill. Adm. Code §4000.40(b) (Conway Greene CD-ROM June 2003). The agency must then retain the pertinent records until an approved certificate is returned by the Local Records Commission. *See* 50 ILCS 205/7 (West 2006); 44 Ill. Adm. Code §§4000.10(e), 4000.40(a) (Conway Greene CD-ROM June 2003); Local Records Commission "Records Disposal Certificate"⁴.

DuPage County

Pursuant to article 6A of the Election Code (10 ILCS 5/6A-1 *et seq.* (West 2006)), DuPage County created an independent, bipartisan, countywide election commission and charged the Election Commission with conducting all Federal, State, county, and local elections occurring in the county. By virtue of its functions, the Election Commission possesses, among other

⁴*See* Jesse White, Illinois Secretary of State, CyberDriveIllinois, Illinois State Archives, State and Local Records Management, Local Records Management Services, Local Records Disposal Certificate, http://www.cyberdriveillinois.com/departments/archives/records_management/lrmdisp.html (last visited December 26, 2007).

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things, election records related to the Federal, State, county, and local elections conducted in DuPage County.

According to the information you have provided, the Election Commission filed an "Application for Authority to Dispose of Local Records" on July 17, 1985. That application included a listing of ninety-nine public records or record series in the possession of the Election Commission. The application also contained a determination of whether the records should be retained or destroyed; the dates, volume, annual accumulation, arrangement, and location of those records; and the Local Records Commission's field representative's recommendation as to the length of time that each public record or record series warrants retention. The Local Records Commission approved the application on December 3, 1985. *See* Application No. 85:621, approved December 3, 1985. According to the Local Records Commission, the Election Commission has not filed a Records Disposal Certificate requesting permission to destroy any of the election records in its possession.

ANALYSIS

Application of the Local Records Act to the Election Commission

You have first inquired whether the Election Commission is subject to the Records Act. Section 7 of the Records Act (50 ILCS 205/7 (West 2006)) states that "[e]xcept as otherwise provided by law, no public record shall be disposed of by any officer or agency unless the written approval of the appropriate Local Records Commission is first obtained." As used in the Records Act, the term "officer" refers to "any * * * appointed official of a * * * county" and

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the term "agency" includes "*all* parts, boards, departments, bureaus and *commissions of any county*, municipal corporation or political subdivision." (Emphasis added.) 50 ILCS 205/3 (West 2006).

As previously noted, the Election Commission is a county board of election commissioners, created pursuant to article 6A of the Election Code, which has been delegated the authority to conduct all Federal, State, county, and local elections occurring within DuPage County. The chairman of the county board appoints the commissioners of the Election Commission and the county compensates them. 10 ILCS 5/6A-3, 6A-5 (West 2006). Clearly, the Election Commission is a commission of the county and its commissioners are appointed officials of the county for purposes of the Records Act. As such, the Election Commission is an "agency" subject to the Records Act and the commissioners of the Election Commission are "officers" within the Act's provisions.⁵ Consequently, the Election Commission must obtain the approval of the Local Records Commission before disposing of its public records.

Destruction of Election Records

State Election Code

With respect to whether laws other than the Records Act may govern the disposal of Election Commission records, you have specifically asked if State or Federal election laws supersede the Records Act. Several provisions of the Illinois Election Code reference the

⁵Based on information provided to this office by legal counsel for the Election Commission, the Election Commission does not dispute that it is generally subject to the Records Act. See Letter from Keith E. Letsche of Bond, Dickson & Associates, P.C., to Michael J. Luke, Chief of the Public Access and Opinions Division, Office of the Illinois Attorney General (September 6, 2006) ("we wish to unequivocally state that the Election Commission has never deemed or represented to the Local Records Commission that the Election Commission, as a public body, or its records are exempt from general application of the requirements of the Local Records Act").

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destruction of certain, specified election records. *See, e.g.*, 10 ILCS 5/4-5.01 (West 2006) ("Immediately following the last day of precinct re-registration in 1970, all permanent registration records compiled before November 21, 1969, shall be destroyed if no election contest is pending in which such records are material"); 10 ILCS 5/5-6 (West 2006) ("Immediately following the first day of precinct re-registration in 1961, all permanent registration records compiled prior to September 15, 1961, shall be destroyed if no election contest is pending in which such records are material"); 10 ILCS 5/17-20 (West 2006) ("Upon receiving the ballots so returned, the election authority shall carefully preserve the ballots for 2 months[.] * * * At the expiration of that time such election authority shall remove the same from [the] original package and shall destroy the same, together with all unused ballots returned from the polling places"); *see also* 10 ILCS 5/17-22 (West 2006) ("The poll book and tally list filed with the county clerk shall be kept one year"). Although these provisions generally permit the destruction of certain election records after the passage of the statutorily prescribed retention periods,⁶ they do not discuss the procedures to be followed in doing so.

The Records Act does not specify which records should be retained or destroyed, but rather focuses on procedures for determining which public records should be retained and for authorizing the destruction of those records that may properly be disposed. If the General Assembly has fixed a retention period by statute or has commanded that certain records be

⁶Sections 17-20 and 17-22 of the Election Code also require the preservation of ballots, ballot box tapes, and poll signature cards following an election. *See Kibort v. Westrom*, 371 Ill. App. 3d 247, 253 (2007), *appeal denied*, 224 Ill. 2d 576 (2007).

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destroyed, then it is the function of the Local Records Commission to ensure that its schedules and authorization for destruction comply with the legislative directive. *See generally* 50 ILCS 205/7 (West 2006); 1983 Ill. Att'y Gen. Op. 60 (local records commission must recognize and give effect to the statutory time periods governing the maintenance of student records under the Illinois School Student Records Act (Ill. Rev. Stat. 1981, ch. 122, par. 50-1 *et seq.*)).

When interpreting the Election Code and the Records Act, I am guided by the principle that, if possible, statutes relating to the same subject must be construed with reference to each other so that effect may be given to all of the provisions of each. *Knolls Condominium Ass'n v. Harms*, 202 Ill. 2d 450, 458-9 (2002). Applying this principle, it is possible to construe the Election Code and the Records Act harmoniously. To the extent that the Election Code fixes retention periods for or requires the destruction of certain election records, the Local Records Commission must recognize and give effect to these provisions when approving the Election Commission's retention schedules or authorizing the destruction of records. Conversely, when preparing to dispose of election records pursuant to statutory directives, the Election Commission must comply with the procedural requirements of the Records Act. Thus, it is my opinion that the two statutes do not conflict with each other, and the provisions of the Election Code do not supercede those of the Records Act.

Federal Election Law

The Federal Civil Rights Act of 1960 (42 U.S.C. §1974 (2000)) addresses, among other things, the retention and preservation of election records and provides:

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*Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, [or] Member of the House of Representatives * * * are voted for, all records and papers which come into his possession relating to any application, registration, * * * or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State * * * designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both. (Emphasis added.)*

The purpose of §1974 is to protect the right to vote (*State of Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848, 853 (M.D. Ala. 1960), *aff'd*, 285 F.2d 430 (1961), *cert. denied*, 366 U.S. 913, 81 S. Ct. 1085 (1961), and *cert. denied*, 366 U.S. 913, 81 S. Ct. 1086 (1961)) and to facilitate the investigation of voting records before suit is filed (*United States v. Association of Citizens Councils of Louisiana*, 187 F. Supp. 846, 847 (W.D. La. 1960)). Accordingly, §1974 sets a minimum retention period of twenty-two months for specified Federal election records. Nothing in §1974, however, requires the destruction of the specified election records after the twenty-two month retention period or establishes a procedure for such destruction. Beyond fixing a minimum retention schedule, §1974 does not purport to supersede State law regarding the disposal of records. Rather, §1974 specifically contemplates that the states, in the appropriate circumstances, may assume custody of election records. Further, the

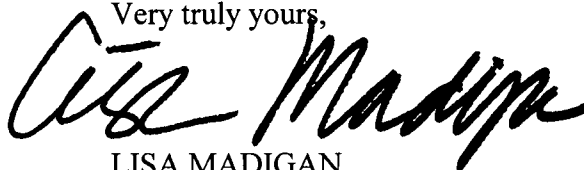
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minimum retention period fixed by Federal law does not conflict with the procedural requirements of the Records Act. Therefore, when disposing of election records retained pursuant to §1974, the Election Commission must comply with the procedural requirements of the Records Act.

CONCLUSION

The DuPage County Election Commission must obtain the approval of the Local Records Commission before disposing of any public records in its possession. Although the Election Code and the Federal laws addressing the preservation of election records establish minimum retention periods for some election records, it is my opinion that these laws do not supersede or conflict with the procedural requirements of the Local Records Act.

Very truly yours,

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

LISA MADIGAN
ATTORNEY GENERAL