OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

June 14, 2019

Via electronic mail
Mr. Jeff Ward
189 Abbey Lane
Geneva, Illinois 60134
jeffnward@comcast.net

Via electronic mail
Mr. Joseph F. Lulves
Assistant State's Attorney, FOIA Officer
Kane County State's Attorney's Office
Kane County Courthouse
100 South Third Street, 4th Floor
Geneva, Illinois 60134
saofoia@co.kane.il.us

RE: FOIA Request for Review – 2018 PAC 55350; SAO FOIA #18-053

Dear Mr. Ward and Mr. Lulves:

This determination letter is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)). For the reasons that follow, the Public Access Bureau concludes that the Kane County State's Attorney's Office (State's Attorney's Office) improperly withheld certain information responsive to Mr. Jeff Ward's October 11, 2018, FOIA request.

On that date, Mr. Ward submitted a FOIA request to the State's Attorney's Office seeking copies of: (1) all sexual harassment complaints against a former prosecutor, Alex Bederka, (2) any responses and dispositions of those complaints, and (3) an explanation and/or records "detailing why Mr. Bederaka continued to be paid by the [State's Attorney's Office] for up to 10 weeks after he was fired."[1] On October 11, 2018, the State's Attorney's Office denied the first two items of the request pursuant to section 7(1)(a) of FOIA (5 ILCS 140/7(1)(a) (West

[1]E-mail from Jeff Ward to [Joseph] Lulves (October 11, 2018).

2017 Supp.), as amended by Public Act 100-732, effective August 3, 2018) and section 7.5 of FOIA (5 ILCS 140/7.5 (West 2017 Supp.), as amended by Public Acts 100-646, effective July 27, 2018; 100-863, effective August 14, 2018; 100-887, effective August 14, 2018). In connection with section 7(1)(a), the State's Attorney's Office cited section 70-5(a)(ii) of the State Officials and Employees Ethics Act (SOEEA) (5 ILCS 430/70-5(a)(ii) (West 2017 Supp.)). The State's Attorney's Office asserted that it did not have records responsive to the third portion of the request.

On October 18, 2018, this office received Mr. Ward's Request for Review disputing the denial of the first two items of his request. He contended that the SOEEA does not state that all sexual harassment claims must be kept confidential, but rather requires governmental entities to provide for confidential reporting. He further stated that he did not seek the names of any people who were harassed but rather "the complaints and the documentation of how those complaints were handled * * *. The public has a right to know if taxpayer funded offices are resolving sexual harassment complaints in an appropriate manner."[2]

On October 26, 2108, this office forwarded a copy of the Request for Review to the State's Attorney's Office and asked it to provide copies of the records that it withheld for this office's confidential review, together with a detailed explanation of the legal and factual basis for the asserted exemptions. On November 6, 2018, the State's Attorney's Office provided the requested response and records, as well as additional materials for this office's review. On November 13, 2018, this office forwarded a copy of the State's Attorney's written response to Mr. Ward; he replied on November 14, 2018.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2016); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that withholds records "has the burden of proving by clear and convincing evidence" that the records are exempt from disclosure. 5 ILCS 140/1.2 (West 2016). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

[2]Letter from Jeff Ward to Sarah Pratt, Public Access Counselor, Office of the Attorney General (October 15, 2018).

Section 7(1)(a) of FOIA

Section 7(1)(a) of FOIA exempts from disclosure "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." As noted above, the State's Attorney's Office cited section 70-5(a)(ii) of the SOEEA.[3] Section 70-5(a) of that Act (5 ILCS 430/70-5(a) (West 2017 Supp.)) requires each "governmental entity," defined as "a unit of local government (including a community college district) or a school district but not a State agency or a Regional Transit Board,"[4] to adopt an ordinance or resolution regulating the ethical conduct of its officers and employees. Section 70-5(a) of the SOEEA further provides, in pertinent part:

> No later than 60 days after the effective date of this amendatory Act of the 100th General Assembly, each governmental unit shall adopt an ordinance or resolution establishing a policy to prohibit sexual harassment. The policy shall include, at a minimum: (i) a prohibition on sexual harassment; (ii) details on how an individual can report an allegation of sexual harassment, including options for making a confidential report to a supervisor, ethics officer, Inspector General, or the Department of Human Rights; (iii) a prohibition on retaliation for reporting sexual harassment allegations, including availability of whistleblower protections under this Act, the Whistleblower Act, and the Illinois Human Rights Act; and (iv) the consequences of a violation of the prohibition on sexual harassment and the consequences for knowingly making a false report.

In its response to this office, the State's Attorney maintained that it properly denied Mr. Ward's request pursuant to section 70-5(a)(ii) of the SOEEA. The State's Attorney's Office provided this office with a copy of its sexual harassment policy and contended:

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[3]In its response to this office, the State's Attorney Office first stated that Mr. Ward had previously submitted a FOIA request for the records at issue and that it had provided him with certain responsive information. This office's review showed that although the State's Attorney's Office disclosed a discrete portion of a June 5, 2017, letter from State's Attorney Joseph H. McMahon to Mr. Bederka concerning certain allegations, it withheld a memorandum (with attachments) concerning the complaints and investigation.

[4]5 ILCS 430/1-5 (West 2016).

> The State legislature by enacting this statutory authorization on confidentiality acknowledged the fact the first time these types of documents are released publicly will be the last time an employee brings a complaint on sexual harassment to the public body. Further, we suggest this confidentiality is also intended to protect the reputations and privacy of all those involved, including the respondent and any persons interviewed in the process. Given the close proximity of the working environment in the State's Attorney's Office, redaction of names alone is an insufficient guarantee of confidentiality.[5]

In reply to that answer, Mr. Ward argued that the State's Attorney's Office's sexual harassment policy "[i]s just that – policy[,]" and that if policies could be considered law, the State's Attorney's Office "could implement a series of 'policies' that would essentially render them FOIA-proof."[6]

The Office of the Attorney General has previously issued an opinion letter concluding that state's attorneys' offices are not subject to county ethics ordinances adopted pursuant to section 70-5(a) of the SOEEA because state's attorneys are State officials or employees rather than county employees. Ill. Att'y Gen. Inf. Op. No. I-07-042, issued August 2, 2007, at 6. A copy of that opinion is attached. Because state's attorneys' offices are not "governmental entities" within the scope of section 70-5(a) of the SOEEA, the State's Attorney's Office is not specifically prohibited from disclosing any records pursuant to that provision. Further, to the extent the State's Attorney's Office bases its assertion of section 7(1)(a) on its own sexual harassment policy, it is clear that even a home rule ordinance cannot exempt any public records from disclosure under FOIA because prescribing conditions for accessing public records is an exclusive State prerogative. Ill. Att'y Gen. Pub. Acc. Op. No. 15-002, issued January 23, 2015, at 9-10 (home rule ordinance purporting to allow village to withhold financial information related to entertainment events was not a valid exercise of home rule power). Therefore, this office concludes that the State's Attorney's Office did not sustain its burden of demonstrating by clear and convincing evidence that any records are exempt from disclosure under section 7(1)(a) of FOIA.

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[5]Letter from Joseph F. Lulves, Assistant State's Attorney, Office of the Kane County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (November 6, 2018).

[6]Letter from Jeffrey Ward to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (November 14, 2018).

The State's Attorney's Office also stated that it "[does] not waive the privileged work product nature of documents created by attorneys in the State's Attorney's Office in reviewing and investigating any such referrals," referencing its partial denial of Mr. Ward's previous request under section 7(1)(m) of FOIA (5 ILCS 140/7(1)(a) (West 2017 Supp.), as amended by Public Act 100-732, effective August 3, 2018) based on the work product doctrine.[7] Section 7(1)(m) of FOIA exempts from disclosure, in relevant part:

> Communications between a public body and an attorney * * * representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body[.]

The work-product doctrine as set out in Illinois Supreme Court Rule 201(b)(2) provides that "[m]aterial prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." A public body asserting that records are attorney work-product must demonstrate that the records "'reveal the shaping process by which the attorney has arranged the available evidence for use in trial as dictated by his training and experience[.]' [Citation.]" *Monier v. Chamberlain*, 35 Ill. 2d 351, 359 (1966).

There is no indication that the records at issue were prepared for trial or prepared or compiled by or for a public body in anticipation of a criminal, civil, or administrative proceeding upon the request of an attorney advising the public body. Therefore, the State's Attorney's Office did not sustain its burden of demonstrating that any records it withheld are protected by the work product doctrine. Thus, the records are not exempt under section 7(1)(m).

Lastly, although the State's Attorney's Office did not expressly cite section 7(1)(c) of FOIA (5 ILCS 140/7(1)(c) (West 2017 Supp.), as amended by Public Act 100-732, effective August 3, 2018), that provision is relevant to this matter because the State's Attorney's Office asserted that confidentiality was also necessary to protect the reputations and privacy of the individuals who were involved in the investigation, including the respondent and persons who were interviewed in the process.

Section 7(1)(c) of FOIA exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted

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[7]Letter from Joseph F. Lulves, Assistant State's Attorney, Office of the Kane County State's Attorney, to Teresa Lim, Assistant Attorney General, Public Access Bureau, Illinois Attorney General's Office (November 6, 2018).

invasion of personal privacy." Section 7(1)(c) defines "unwarranted invasion of personal privacy" as "the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information." Additionally, section 7(1)(c) provides that "[t]he disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy." Illinois courts consider the following factors in determining whether disclosure of information would constitute an unwarranted invasion of personal privacy: "(1) the plaintiff's interest in disclosure, (2) the public interest in disclosure, (3) the degree of invasion of personal privacy, and (4) the availability of alternative means of obtaining the requested information." *National Ass'n of Criminal Defense Lawyers v. Chicago Police Department*, 399 Ill. App. 3d 1, 13 (1st Dist. 2010).

In 2018 PAC 52303, this office reviewed a FOIA request to the Madison County State's Attorney's Office that sought records pertaining to complaints of sexual harassment or other harassment against members of that office. The Madison County State's Attorney's Office denied that request pursuant to section 7(1)(c) of FOIA. Ill. Att'y Gen. PAC Req. Rev. Ltr. 52303, issued October 16, 2018, at 1. As in this matter, the Madison County State's Attorney's Office argued that disclosure of any portion of the responsive records would identify the individuals involved in the investigation, given the personal and specific nature of the circumstances described in the records. Ill. Att'y Gen. PAC Req. Rev. Ltr. 52303, at 4. The Madison County State's Attorney's Office also raised concerns about the chilling effect that could potentially result from release of the records with regard to individuals coming forward with future claims. Ill. Att'y Gen. PAC Req. Rev. Ltr. 52303, at 4-5. Under the four-factor test set forth in *National Ass'n of Criminal Defense Lawyers*, this office determined that the Madison State's Attorney's Office "did not demonstrate that disclosing general information concerning [the alleged victim's] allegations would substantially invade her personal privacy under these circumstances." Ill. Att'y Gen. PAC Req. Rev. Ltr. 52303, at 6. This office determined that "[r]edacting the relatively minimal content that could be characterized as salacious and disclosing the remaining information concerning the alleged misconduct would strike the appropriate balance between the public interest and the complainant's privacy interest." Ill. Att'y Gen. PAC Req. Rev. Ltr. 52303, at 6. Additionally, this office determined that "[r]edacting the personally-identifying information from [the interviewees'] statements * * * would greatly reduce the impact on their personal privacy." Ill. Att'y Gen. PAC Req. Rev. Ltr. 52303, at 7. This office concluded that the Madison County State's Attorney's Office had not demonstrated that the investigation report at issue was exempt from disclosure in its entirety under section 7(1)(c). Ill. Att'y Gen. PAC Req. Rev. Ltr. 52303, at 7; *see also* Ill. Att'y Gen. PAC Req. Rev. Ltr. 31045, issued April 13, 2015 (concluding that Jo Daviess County State's Attorney's Office had not demonstrated by clear and convincing evidence that records pertaining to a sexual harassment complaint were exempt from disclosure in their entireties under section 7(1)(c)).

This office has reviewed the records at issue and determined that the records reflect the State's Attorney's Office's investigation into the alleged misconduct of Mr. Bederka in connection with his public duties. In *Gekas v. Williamson*, 393 Ill. App. 3d 573, 574 (4th Dist. 2009), the Illinois Appellate Court considered whether citizen complaints and records related to citizen complaints against a deputy sheriff were exempt from disclosure under a prior version of section 7(1)(c), which also expressly excluded from its scope information that bears on the public duties of public employees.[8] The trial court ruled that files concerning unfounded complaints could be withheld "in order to protect the deputy's privacy." *Gekas*, 393 Ill. App. 3d at 578. The appellate court reversed, holding that records concerning alleged wrongdoing in the course of the deputy's public duties were subject to disclosure regardless of whether the underlying allegations had merit:

> Complaints, founded or unfounded, that he committed misconduct in his capacity as a deputy sheriff are "information that bears on [his] public duties," and the disclosure of such information "shall not be considered an invasion of personal privacy." [Citation.] Insomuch as these materials, true or false, founded or unfounded, bear on his duties as a police officer, the disclosure of these materials would not invade his personal privacy, and, thus, we do not reach the question of whether their disclosure would be a "clearly unwarranted invasion of [his] personal privacy." [Citation.] *Gekas*, 393 Ill. App. 3d at 586.

See also Ill. Att'y Gen. Pub. Acc. Op. No. 18-018, issued December 31, 2018, at 6 (two complaints against police officer not exempt from disclosure under section 7(1)(c) even though one complaint was unsubstantiated and the other complaint involved conduct by the officer that was deemed to be appropriate).

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[8]Section 7(1)(b)(ii) of FOIA (5 ILCS 140/7(1)(b)(ii) (West 2006)) provided:

> (b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. **The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy**. Information exempted under this subsection (b) shall include but is not limited to:
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> * * *
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> (ii) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions[.] (Emphasis added.)

Likewise, because the records bear on Mr. Bederka's public duties, their disclosure would not constitute an unwarranted invasion of his personal privacy. There is a legitimate public interest in information concerning the claims against him and how the State's Attorney's Office addressed the matter. While the records contain some details concerning the alleged sexual harassment that could be characterized as salacious, a partial redaction of the records would strike an appropriate balance between the public interest in information concerning the alleged misconduct and investigation and the privacy interests of any complainants or witnesses who were interviewed during the investigation. In addition to salacious details, the State's Attorney's Office may properly redact names and other information, such as medical conditions, office locations, and pre-employment background, from which the identities of any complainant or complainants could be discerned. Ill. Att'y Gen. Pub. Acc. Op. No. 18-018, issued December 31, 2018, at 6 (disclosure of information identifying individuals who filed complaints against police officer would constitute an unwarranted invasion of personal privacy). Records concerning the substance of the allegations and how they were investigated, however, bear directly on the public duties of a public employee and therefore are not exempt from disclosure in their entireties pursuant to section 7(1)(c) of FOIA.

In accordance with the conclusions expressed in this determination, this office requests that the State's Attorney's Office provide Mr. Ward with copies of the records, subject to limited redactions under section 7(1)(c) of FOIA. Specifically, the State's Attorney's Office may redact information identifying any individuals who were not accused of misconduct and the discrete portions of the records that specifically describe the alleged conduct/comments of a sexual nature.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,

TERESA LIM
Assistant Attorney General
Public Access Bureau

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Enclosure

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 2, 2007

I - 07-042

GOVERNMENTAL ETHICS AND CONFLICT OF INTEREST: Applicability of a County Ethics Ordinance to Circuit Clerks, State's Attorneys, and Their Employees

The Honorable David N. Stanton
State's Attorney, Perry County
Perry County Courthouse
One Public Square
Pinckneyville, Illinois 62274

Dear Mr. Stanton:

I have your letter inquiring whether the clerk of the circuit court, the State's Attorney, and the employees of those officers are subject to an ethics ordinance adopted by a non-home-rule county pursuant to subsection 70-5(a) of the State Officials and Employees Ethics Act (the Ethics Act) (5 ILCS 430/70-5(a) (West 2006)). For the reasons stated below, circuit clerks, State's Attorneys, and their employees are generally not subject to a county ordinance adopted pursuant to section 70-5 of the Ethics Act, and counties may not regulate their conduct under that provision.

BACKGROUND

The Ethics Act comprehensively regulates ethical conduct, political activities, and the making and acceptance of gifts by executive branch constitutional officers, legislative branch constitutional officers, General Assembly members, and State employees. *See generally* 5 ILCS 430/1-1 *et seq.*, 5-5 *et seq.*, 10-10 *et seq.* (West 2006). Although the Ethics Act does not apply directly to officers and employees of units of local government or school districts, section 70-5 of

the Ethics Act requires all "governmental entities," a term defined to include units of local government such as counties (Ill. Const. 1970, art. VII, §1), to adopt comparable ethics ordinances or resolutions:

> (a) Within 6 months after the effective date of this Act, *each governmental entity shall adopt an ordinance* or resolution *that regulates*, in a manner no less restrictive than Section 5-15 and Article 10 of this Act, (i) *the political activities of officers and employees of the governmental entity* and (ii) the soliciting and accepting of gifts by and the offering and making of gifts to officers and employees of the governmental entity. (Emphasis added.) 5 ILCS 430/70-5 (West 2006).

Counties, therefore, have a duty to adopt ordinances or resolutions regulating the conduct of their officers and employees. You have asked whether such county ordinances are applicable to circuit clerks, State's Attorneys, and their employees.

ANALYSIS

It is well established that non-home-rule counties possess only those powers that are expressly granted to them by the Constitution or by statute, together with those powers which are necessarily implied therefrom to effectuate those expressly granted. Ill. Const. 1970, art. VII, §7; *Redmond v. Novak*, 86 Ill. 2d 374, 382 (1981). Because section 70-5 of the Ethics Act authorizes counties to regulate only the ethical conduct of their own officers or employees, the threshold issue is whether circuit clerks, State's Attorneys, and their personnel are county officers and employees.

Circuit Clerk's Office

The Illinois Constitution of 1870 categorized circuit clerks as elected county officers. Ill. Const. 1870, art. X, §8. However, the new judicial article of the 1870 Constitution adopted in 1962, effective January 1, 1964, provided that the General Assembly "shall provide by law for the selection by the judges or election, terms of office, removal for cause and salaries of clerks and other non-judicial officers of the various courts[.]" Ill. Const. 1870, art. VI (1964), §20. Article VI, section 18(b), of the Illinois Constitution of 1970 now provides:

> The General Assembly shall provide by law for the election, or for the appointment by Circuit Judges, *of clerks and other non-judicial officers of the Circuit Courts* and for their terms of office and removal for cause. (Emphasis added.)

The status of circuit clerks was addressed in *Drury v. County of McLean*, 89 Ill. 2d 417 (1982), arising out of a suit filed against McLean County seeking reimbursement of fine money and costs paid to the circuit clerk upon plaintiffs' conviction under a statute later held unconstitutional. In reaching its conclusion that the plaintiffs were entitled to the return of their court costs attributable to the convictions from the county, the Illinois Supreme Court addressed whether circuit clerks are county officials. After noting that the Sixth Illinois Constitutional Convention rejected amendments attempting to include references to the circuit clerk in the local government article, as opposed to the judicial article, of the Constitution, the Court held that the drafters intended the circuit clerk to be a nonjudicial member of the judicial branch of State government. *Drury*, 89 Ill. 2d at 423. The Court acknowledged that counties are required by law to pay the salary of their circuit clerks (705 ILCS 105/27.3(a) (West 2006)), but determined that "[t]he fact that counties pay the salaries and expenses of circuit court clerks does not make the office of circuit court clerk a county office." *Drury*, 89 Ill. 2d at 425.

Based on the holding in *Drury*, circuit clerks are not county officers but State officers. Therefore, because section 70-5 of the Ethics Act authorizes counties to regulate the conduct of only county officers and employees, an ordinance adopted pursuant to section 70-5 is not applicable to the circuit clerk.

With respect to the status of employees of the circuit clerk, in *Orenic v. Illinois State Labor Relations Board*, 127 Ill. 2d 453 (1989), the Illinois Supreme Court addressed whether counties and the State, through the chief judge of each circuit, are joint employers of judicial branch employees for the purpose of negotiating collective bargaining agreements. After discussing *Drury*, the Court concluded that:

> the fact that a county pays the salaries of other nonjudicial employees in the judicial branch, or even administers personnel policies covering them by agreement with the judicial branch, does not in constitutional or statutory terms make the county their employer. Rather, *the State, personified by the chief judge of each circuit, is their employer*. (Emphasis added.) *Orenic*, 127 Ill. 2d at 476.

The Court further stated:

> not only are nonjudicial employees of a court the employees of a State agency rather than of a county, but even the counties' salary-setting and facilities-providing function is subject to the courts' own ultimate power to ensure reasonable adequacy. Except for setting and paying salaries and providing facilities subject to

> ultimate court power, the counties are entitled to no other role in regard to the courts' nonjudicial employees that might arguably be considered the role of a joint employer. * * *
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> * * * If the [Illinois State Labor Relations] Board were allowed to compel chief judges to share their collective-bargaining authority with counties, and if counties' assertion of funding authority then impeded or frustrated the chief judges' efforts to bargain, *the "whole power" of the chief judges in the vital administrative area of employment relations would be effectively lodged in the counties' hands. This would be far more than a "peripheral effect" on judicial administration; it would be an evisceration of the courts as free and independent employers of their own employees*, since authority over compensation is central to employer status. (Emphasis added.) *Orenic*, 127 Ill. 2d at 480-81.

Orenic clarifies that the State, through the chief judge of each circuit, is the sole employer of judicial branch employees, and a county may not infringe on the chief judge's right to control the operations of the circuit court.[1] Therefore, pursuant to *Orenic*, employees in the circuit clerk's office are not county employees who are subject to a county ordinance adopted pursuant to section 70-5 of the Ethics Act.

Although the circuit clerk and the employees of that office are not subject to a county ordinance adopted under the Ethics Act, I do not discount the possibility that policies may be put into place to regulate the conduct of the circuit clerks and their staff. The Illinois Supreme Court may adopt statewide rules governing the ethical conduct of the circuit clerks and their employees. Ill. Const. 1970, art. VI, §16 ("[g]eneral administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules"). Additionally, the chief judge may impose requirements governing the ethical conduct of the circuit clerk and the circuit clerk's employees. Ill. Const. 1970, art. VI, §7(c) ("[s]ubject to the authority of the Supreme Court, the Chief Judge shall have general administrative authority over his court"); 134 Ill. 2d R. 21(b) ("[t]he chief judge of each circuit may enter general orders in the exercise of his general administrative authority").

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[1]*See also Baker v. DuPage County*, 703 F. Supp. 735 (N.D. Ill. 1989) (holding that both a legal secretary hired by the circuit court and the court administrator who fired her were not county employees; therefore, the secretary did not have a property interest in continued employment with the county and the court administrator was not obligated to comply with the termination procedures outlined in the county's policy manual).

State's Attorney's Office

You have also inquired whether the State's Attorney and his or her employees are subject to a county ethics ordinance. The Office of State's Attorney is also provided for in the judicial article of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VI, §19), although the salary for such office is paid through the county (55 ILCS 5/3-9012, 4-2005 (West 2006); Ill. Const. 1970, art. VI, §19 (providing that a State's Attorney's salary "shall be provided by law")).

With regard to the status of State's Attorneys, in *Hoyne v. Danisch*, 264 Ill. 467 (1914), decided under the Illinois Constitution of 1870, the Illinois Supreme Court held that State's Attorneys were State officers. The Illinois Supreme Court has subsequently reaffirmed this conclusion under the Illinois Constitution of 1970, noting that "[t]he debates of the Sixth Illinois Constitutional Convention of 1969-70 indicate that the drafters of our present constitution agreed with the decision in *Hoyne* that State's Attorneys should be classified as State, rather than county, officials." *Ingemunson v. Hedges*, 133 Ill. 2d 364, 369 (1990). Cases decided under the current Constitution have held that State's Attorneys are either State officers or State employees. *See County of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 475 (2005) (State officers); *Price v. State*, 354 Ill. App. 3d 90, 93 (2004) (the State's Attorney is a State employee for purposes of section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2002)) and the Court of Claims Act (705 ILCS 505/8(d) (West 1994))); *Sneed v. Howell*, 306 Ill. App. 3d 1149, 1155 (1999), *appeal denied*, 187 Ill. 2d 591 (2000) (the State's Attorney is a State employee for purposes of section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 1994)) and the Court of Claims Act (705 ILCS 505/8(d) (West 1994))).[2] Based on *Hoyne* and *Ingemunson*, therefore, a State's Attorney is not a county officer subject to a county ethics ordinance adopted under section 70-5 of the Ethics Act.

Pursuant to section 3-9006 of the Counties Code (55 ILCS 5/3-9006 (West 2006)), the State's Attorney controls the internal operations of his or her office, including procuring the necessary services to perform the duties of the office. 55 ILCS 5/3-9006 (West 2006). The State's Attorney's position with respect to his or her employees is, therefore, analogous to that of a chief judge and the circuit court's employees. Based on the reasoning of the *Orenic* Court, the State's Attorney, not the county, has the sole right to control the conduct of

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[2]Moreover, the Illinois Appellate Court, relying in part on *Hoyne* and *Ingemunson*, held that Assistant State's Attorneys are State officers for purposes of negligence actions brought under the *respondeat superior* doctrine. *Biggerstaff v. Moran*, 284 Ill. App. 3d 196, 200 (1996); *see also Stokes v. City of Chicago*, 660 F. Supp. 1459, 1463 (N.D. Ill. 1987) (noting that the State status granted Assistant State's Attorneys is analogous to the State status afforded circuit judges and clerks for purposes of suit brought pursuant to 42 U.S.C. §1983); *People ex rel. Landers v. Toledo, St. Louis & Western R. R. Co.*, 267 Ill. 142, 145-46 (1915) (Assistant State's Attorneys are officers, not employee-agents, for purposes of tax levies to pay county officers' salaries).

his or her employees. Accordingly, employees within the State's Attorney's office are not county employees subject to the county ethics ordinance adopted pursuant to section 70-5 of the Ethics Act.

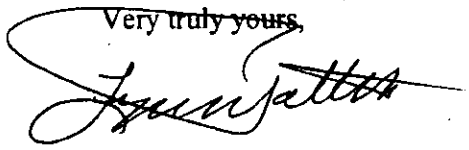
Although the State's Attorney's office is not subject to the county ethics ordinances, State's Attorneys and their assistants, as licensed attorneys, are obligated to comply with the extensive ethical mandates found in the Illinois Rules of Professional Conduct (134 Ill. 2d R. 1.1 *et seq.*). *See, e.g.*, 210 Ill. 2d R. 8.4(c) ("[a] lawyer who holds public office may accept political campaign contributions as permitted by law"). Additionally, the statutory authority to control the internal operations of their office (55 ILCS 5/3-9006 (West 2006)) permits State's Attorneys to establish ethical standards for their employees, which may include implementing the provisions of the county's ethics ordinance adopted pursuant to section 70-5 of the Ethics Act.

CONCLUSION

Section 70-5 of the State Officials and Employees Ethics Act requires governmental entities, such as counties, to adopt an ordinance regulating the conduct of their officers and employees. Because circuit clerks, State's Attorneys, and their employees are not county officers or employees, those officers and their employees are not subject to the county ethics ordinances adopted pursuant to section 70-5 of the Ethics Act.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,



LYNN E. PATTON
Senior Assistant Attorney General
Chief, Opinions Bureau

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