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SPRINGFIELD

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FILE NO. 82-029

SCHOOLS AND SCHOOL DISTRICTS:
Payment of Necessary Costs of
Election and Confidentiality of
Names on Petitions Filed Thereunder

Honorable J. William Roberts
State's Attorney, Sangamon County
Room 404 County Building
Springfield, Illinois 62701

Dear Mr. Roberts:

I have your letter wherein you raise the following questions with reference to the duties of a regional superintendent pursuant to section 3-14.24 of The School Code (Ill. Rev. Stat. 1981, ch. 122, par. 3-14.24):

> "1. Who is responsible for bearing the notice, printing, personnel, and other necessary costs of such an election?
>
> 2. Should the names appearing on petitions seeking recognition be kept confidential by the Regional Superintendent?"

For the reasons hereinafter stated, it is my opinion that the costs of an election conducted pursuant to section 3-14.24 of The School Code are to be borne by the regional superintendent who is charged with conducting the election. Further, it is my opinion that the names appearing on such petitions may be kept confidential by the regional superintendent.

As you are aware, section 3-14.24 provides a statutory mechanism whereby an exclusive bargaining representative may be recognized by a public school employer. When a question of representation is found to exist, the regional superintendent is charged with the responsibility of administering the petition and election procedures. Section 3-14.24 provides in pertinent part that:

> " * * *
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> * * * Petitions requesting an election may be filed with the regional superintendent:
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> The regional superintendent shall investigate the petition and if he has reasonable cause to suspect that a question of representation exists, he shall give notice and conduct a hearing. If he finds upon the record of the hearing that a question of representation exists, he shall direct an election. * * *
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> Elections shall be by secret ballot. The regional superintendent may establish rules and regulations for the conduct of elections. * * *
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> * * * The regional superintendent shall certify the results of the election within 5 working days

> after the final tally of votes unless a charge is filed by a party that improper conduct occurred which affected the outcome of the election. * * * If he determines, after hearing, that the outcome of the election was affected by improper conduct, he shall order a new election. If he determines upon investigation or after hearing that the alleged improper conduct did not take place or that it did not affect the results of the election, he shall immediately certify the election results.
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According to information received from your office:

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> The Illinois State Board of Education, although apparently not claiming to have jurisdiction to promulgate enforceable rules and regulations, has issued a set of guidelines relative to P.A. 82-107 [section 3-14.24] which is entitled 'General Rules'. These documents have been, or will be, sent to the various regional superintendents with the expectation that each superintendent will 'adopt' the substantive provisions. * * *
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> * * * "

Rules 14 and 15 of those proposed General Rules provide that:

> "13. The Petitioner(s) must bear the costs of notice and election including the printing of ballots, however, the content of ballots and other material prepared by the Petitioner(s) must be approved by the regional superintendent prior to distribution or use.
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> 14. The regional superintendent may determine that he cannot conduct the election without the use of agents. If the regional superintendent makes such a determination, the costs of agents shall be paid by Petitioner(s). Agents shall be impartial third parties named by the regional superintendent."

As indicated above, section 3-14.24 specifically provides that "The regional superintendent may establish rules

and regulations for the conduct of elections". Therefore, the regional superintendent is clearly authorized to promulgate certain rules and regulations "for the conduct of elections" (emphasis added). Section 3-14.24, however, does not provide that the costs of the election are to be assessed against the petitioners, and the question arises as to whether a rule requiring payment of costs by petitioners would be one made pursuant to the authority to promulgate rules and regulations for the actual conduct of the election itself. Because a statute may not be altered, extended or added to by the exercise of a power to promulgate rules and regulations thereunder (Northern Ill. Auto Workers v. Dixon (1979), 75 Ill. 2d 53, 60; Saxon-Western Corp. v. Mahin (1979), 78 Ill. App. 3d 125, 129), it is my opinion that the regional superintendent may not establish, by rule or regulation, a requirement that petitioners bear the costs of an election. Additionally, discussion in the Senate debates on House Bill 701 (which added section 3-14.24) concerning whether or not The State Mandates Act (Ill. Rev. Stat. 1981, ch. 85, par. 2201 et seq.) is applicable, indicates that the expenditure of public funds was anticipated. (June 24, 1981, Senate Debate on House Bill No. 701, at 40.) Senator Bruce, who sponsored House Bill 701 in the Senate, indicated, during committee testimony, that the requirements of section 3-14.24 were to be carried out at the

local level by existing staff at no appreciable net cost increase. Consequently, it is apparent that the costs of the election were expected to be absorbed on the local level by the offices of the regional superintendents. I have not, however, considered the application of The State Mandates Act to the situation at hand.

Secondly, you have inquired whether the names appearing on signature sheets which accompany petitions filed with the regional superintendent in accordance with section 3-14.24 should be kept confidential by the regional superintendent. Section 3-14.24 is silent as to whether the petitions are considered to be public records open to inspection or may be kept confidential by the regional superintendent.

To obtain information that is neither specifically made accessible nor specifically made inaccessible by statute, the public must look to the common law right to inspect public records. (People ex rel. Gibson v. Peller (1962), 34 Ill. App. 2d 372, 1976 Ill. Att'y Gen. Op. 356.) In People ex rel. Gibson v. Peller (1962), 34 Ill. App. 2d 372, 374-75, the court stated:

" * * *

> * * * Good public policy requires liberality in the right to examine public records. In 76 CJS, Records, p 133, the author states: 'The right of access to, and inspection of, public records is not entirely a matter of statute. The right exists at common law, and in the absence of a controlling

> statute, such right is still governed by the common law. . . . all authorities are agreed that at common law a person may inspect public records . . . or make copies or memoranda thereof.' * * *"

In discussing the common law right to inspect records, my predecessor, in opinion No. S-1191, issued December 3, 1976, stated:

> "Although it is to be liberally construed (Weinstein v. Rosenbloom, 59 Ill. 2d 475, 482), the right to inspect public records is not without qualification. There may be interests that justify withholding public records from public inspection. The court in People ex rel. Better Broadcasting Council, Inc. v. Keane, 17 Ill. App. 3d 1090, explained that interests such as confidentiality, privacy and the need to protect sources of information may qualify the public's right to know. The court stated at pages 1092-93:
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> ' * * *
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> The people's right to know, however, must be balanced by the practical necessities of governing. Public officials must be able to gather a maximum of information and discharge their official duties without infringing on rights of privacy. Certain information possessed by government is often supplied by individuals and enterprises that have no strict legal obligation to report but do so on a voluntary basis, with the understanding the information will be treated as confidential. Therefore, it is important to consider whether disclosure would constitute an invasion of privacy; whether there could be prejudice to private rights or given an unfair competitive advantage; whether it would prevent responsible business people from serving the public; whether it would discourage frankness; and whether it could cut off sources of information upon which a government relies.
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> * * * '
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> Public records may be withheld from public inspection for other reasons. There is no right to

> inspect a public record when inspection is sought for an unlawful purpose or when inspection can serve no useful purpose. (State ex rel. Charleston Mail Assoc. v. Kelly, 143 S.E.2d 136 (West Virginia, 1965).) It may also be proper to withhold information when public disclosure would jeopardize pending litigation. In any event, the right to inspect public records is subject to reasonable regulation which protects the functioning of government; reasonable rules regarding the time and manner of examination may be established. Chicago Title & Trust Co. v. Danforth, 236 Ill. 554.
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> * * * "

Consequently, in order to overcome the common law presumption in favor of public disclosure, there must be countervailing reasons for maintaining the confidentiality of the petitions with accompanying signature sheets.

As an initial matter, it must be recognized that section 3-14.24 is concerned solely with the area of collective bargaining. As pointed out in information provided by your office, the petition and signature sheets have certain similarities to the authorization cards utilized in the administration of the National Labor Relations Act. In Committee on Masonic Homes, Etc. v. NLRB (1977), 556 F.2d 214, 217-18, the court described authorization cards as follows:

> "* * * Union authorizatioa cards are cards signed by employees, authorizing a certain union to represent them, 'for all purposes of collective bargaining in respect to wages, hours and other conditions of employment'. See 29 U.S.C. § 159(a). During an organizational campaign, employees are asked to sign a card. The union collects them, and when thirty percent of the employees have signed, it may send those cards, together with a petition for a

representation election, to the regional director of the NLRB. See 29 U.S.C. § 159(c).

The director then reviews the petition, and, if satisfied by the showing of support, orders a hearing. At that hearing the employer can challenge such items as the appropriateness of the bargaining unit. The employer cannot, however, challenge the sufficiency of the employee showing of interest; that is an issue to be determined by the NLRB. Linden Lumber v. NLRB, 419 U.S. 301, 309, 95 S.Ct. 429, 42 L.Ed.2d 465 (1974).

If an election is then ordered, employees vote for or against the union by secret ballot. 29 U.S.C. § 159(c)(1). Thus, the employer is prevented from finding out, at any time, which employees have supported the union. Indeed, attempts to determine particular employee's union sentiments have often produced charges of unfair labor practices. E.g., NLRB v. Historic Smithville Inn, 414 F.2d 1358, 1362 (3d Cir. 1969), cert. denied, 397 U.S. 908, 90 S.Ct. 904, 25 L.Ed.2d 88 (1970). For this reason, an employer ordinarily cannot see the cards signed by its employees indicating their preference for the union. NLRB v. New Era Die Co., 118 F.2d 500 (3d Cir. 1941).

* * * "

(See also Pacific Molasses Co. v. NLRB, Etc. (1978), 577 F.2d 1172, 1177-78.)

Section 3-14.24 provides in pertinent part that:

" * * *

* * * Petitions requesting an election may be filed with the regional superintendent:

A. by an employee or group of employees or any labor organization acting on their behalf alleging and presenting evidence that 30% or more of the employees in a bargaining unit wish to be represented for collective bargaining or that the labor organization which has been acting as the exclusive bargaining representative is no longer representative of a majority of the employees in the unit; or

* * *

> The regional superintendent shall investigate the petition and if he has reasonable cause to suspect that a question of representation exists, he shall give notice and conduct a hearing. If he finds upon the record of the hearing that a question of representation exists, he shall direct an election. Nothing prohibits the waiving of hearings by the parties and the conduct of consent elections.
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> Elections shall be by secret ballot. The regional superintendent may establish rules and regulations for the conduct of elections. * * *
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> * * * "

It is apparent that, in the context of collective bargaining, employee petitions with accompanying signature sheets are analagous to and are used for a purpose similar to employee authorization cards under the National Labor Relations Act, as discussed above. In Committee on Masonic Homes, Etc. v. NLRB (1977), 556 F.2d 214, 218, the court determined that, under the subsection 5(b)(6) exemption to the Freedom of Information Act (5 U.S.C. § 552(b)(6), union authorization cards in possession of the NLRB, which had been submitted as the 30 percent showing in support of a petition for a representation election, are exempt from disclosure. Subsection 5(b)(6) provides an exemption for "personnel and medical files and similar files the disclosure of which would constitute a clear unwarranted invasion of personal privacy". (Emphasis added.) Although Illinois has no legislation similar to the

Federal Freedom of Information Act, nor are we dealing specifically with authorization cards under the National Labor Relations Act, the court's discussion of what consitutes an "unwarranted invasion of personal privacy" is relevant to the discussion of what records may be withheld from public inspection in accordance with the established common law principles discussed above.

According to the Masonic court at pages 219-221:

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> * * * The 1965 Senate Report describes 'a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.' 1965 Senate Report, supra at 9. The House Report also refers to a balancing policy: 'The limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual.' H.Rep.No. 1497, 89th Cong., 2d Sess. 11 (1966).
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> * * *
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> We begin here, then, by first considering whether disclosure of the cards would be an invasion of privacy. The answer is a simple yes. An employee who signed a card was entitled to a private choice, given the policies of the NLRA.
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> Next we ask what the public benefit would be from disclosure. Masonic Homes has asserted its benefit -- it wants to challenge the signatures and avoid an election. We are not interested in the employer's benefit, though. Rather we must consider the public benefit that would result from the disclosure, to an employer or to anyone, of union authorization cards submitted to support an election petition.

At oral argument, Masonic Homes suggested the public would benefit as taxpayers by saving the expense of conducting an election. If this is a benefit, we fear it would be easily off-set by the inevitable card challenge hearings and concommitant appeals.

If the basic thrust of the Act is to inform the electorate of the ways in which government agencies operate, the cards will disclose nothing. We will stop short of saying there is no public interest to be balanced here, though, because the presumption is in favor of disclosure.

* * * What the employer wants is the signatures, the exact elements that are clearly private.

So, all that remains is to weigh the seriousness of the invasion and the benefit of disclosure. The invasion is serious. Despite the district court's conclusion--'I see no reason why a person should be embarrassed or harmed should it come to the employer's or anyone else's attention that such person executed a union authorization card.' App. at 14--we do see such harm.

For instance, it is entirely plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed. If so, this is a harm that could not easily be corrected. To order disclosure here would effectively do away with union cards as they are used now. We need only consider whether employees would be as likely to sign a prominently displayed notice at work, 'Sign up for the union here. Organize for better working conditions and higher wages.' Solicitation of authorization cards plays a vital role in organizational campaigns, and we cannot envision a workable substitute.

Furthermore, union elections must be conducted by secret ballot. Whatever reasons and policies lie behind that would be directly undercut by forcing employees to acknowledge in public their support of the union, in order to be given the right to vote in secret for the union.

> Having found a serious violation of privacy and no significant public interest in disclosure, we conclude that the union authorization cards are exempt from disclosure, under section 552(b)(6) of the Freedom of Information Act, 5 U.S.C. § 552.
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In Pacific Molasses Co. v. NLRB, Etc. (1978), 577 F.2d 1172, the United States Court of Appeals, Fifth Circuit, upheld the ruling of the court in Masonic Homes on the issue of whether authorization cards submitted to the NLRB for the purpose of establishing the requisite 30 percent showing of interest in order to petition for an election under 29 U.S.C. § 159, and which were signed by employees designating their choice of a collective bargaining representative, were subject to disclosure under the Freedom of Information Act. In making this determination that disclosure would be a clear, unwarranted invasion of privacy, the court stated at pages 1181-1183 that:

> "* * * [I]t is necessary to balance those interests of an individual in having his private affairs protected from public scrutiny with the desire to preserve as best as possible the public's right to governmental information. See S.Rep. No. 813, p.9; Dept. of Air Force v. Rose, 425 U.S. 352, 372, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976). * * * We agree with the Third Circuit, and feel that the Freedom of Information Act does not compel disclosure of these cards. In so holding, we are recognizing that employees have a strong privacy interest in their personal sentiments regarding union representation, and that this right to privacy is a right necessary to full and free exercise of the organizational rights guaranteed by the National Labor Relations Act.

In this case, it is impossible to minimize the seriousness of the threatened invasion. We would be naive to disregard the abuse which could potentially occur if employers and other employees were armed with this information. The inevitable result of the availability of this information would be to chill the right of employees to express their favorable union sentiments. Such a chilling effect would undermine the rights guaranteed by the N.L.R.A., and, for all intents and purposes, would make meaningless those provisions of the N.L.R.A. which guarantee secrecy in union elections.

While it is clear that the disclosure of the authorization cards would be a serious invasion of the privacy of the card signers, it is equally apparent that the public benefit from disclosure would be minimal. The only public interest advanced by the plaintiffs is the need for public oversight of the Board's showing of interest determination. The thrust of this argument is that:

> [T]he public would have an opportunity to verify the signatures on the cards. This would assure the public of the necessity as well as the likelihood of a fairly conducted election. . . . Disclosure would also lead to an actual saving of tax monies, because in many instances the expense of conducting an election would be avoided.

Brief of Appellee at 24.

We cannot accept the plaintiff's argument, and we feel that there is little if any public benefit to be gained from disclosure. The N.L.R.B. has already set up procedures that can deal with any suspected fraud which might occur in the obtaining of the signature cards, and certainly the secret ballot election ultimately protects the employer from any threat of having to recognize a union that is not supported by 50% of the affected employees. We are also unable to see the possibility of any potential tax savings which would be so great as to justify the serious infringements on the employees' right to privacy. We hold, therefore, that disclosure of these cards would result in a serious invasion of the personal privacy of the affected employees with no counterbalancing benefit to be obtained for the public. As a result, these cards

> are exempted from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(6).
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> * * *

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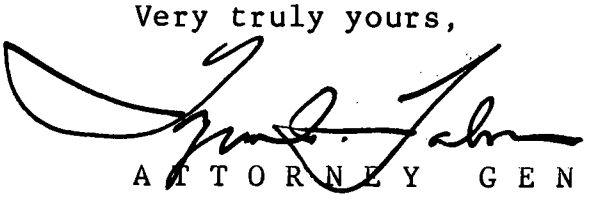
Because the use of signed authorization cards for the purpose of indicating sufficient interest to support a petition for a certification or decertification election for a collective bargaining representative is analogous to a signature sheet accompanying a petition for an election to select an exclusive collective bargaining representative, and because section 3-14.24, as is apparent from the above discussion, is similar in substance to certain provisions of the National Labor Relations Act, the reasoning of the above courts is highly persuasive on the question of whether signature sheets should, in order to protect individual privacy, be held confidential by the regional superintendent under section 3-14.24. Public disclosure of the signature sheets could, in fact, "chill" the right of employees to express union sentiments, and could effectively eliminate the privacy which is secured by the secret ballot. In accordance with section 3-14.24, the regional superintendent is charged with the statutory duty to investigate petitions requesting an election and to conduct a hearing if he believes that a question of representation exists. Therefore, an asserted interest in disclosing the signature sheet in order to ascertain whether

such petition and signature sheet are in proper order and form does not appear to justify the resulting invasion of privacy. Consequently, absent any compelling public interest in opening the petitions and signature sheets to public inspection, it is my opinion that the regional superintendent may consider the signature sheets confidential and withhold them from public inspection.

Very truly yours,



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