OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

March 15, 1999

Jim Ryan
ATTORNEY GENERAL

FILE NO. 99-005

JUDICIAL SYSTEM:
Illinois Courts Commission -
Applicability of Administrative
Procedure Act, Open Meetings Act
and Freedom of Information Act

-

The Honorable Mary Ann G. McMorrow
Illinois Supreme Court Justice
160 North LaSalle Street
Chicago, Illinois 60601

Dear Justice McMorrow:

I have your letter wherein you inquire whether the Illinois Courts Commission is subject to the provisions of: (1) the Illinois Administrative Procedure Act (5 ILCS 100/1-1 et seq. (West 1996)); (2) the Freedom of Information Act (5 ILCS 140/1 et seq. (West 1996)); or (3) the Open Meetings Act (5 ILCS 120/1 et seq. (West 1996)). For the reasons hereinafter stated, it is my opinion that the Illinois Courts Commission is not subject to the requirements of the Illinois Administrative Procedure Act. Furthermore, it is my opinion that the Illinois Courts Commission, being an adjudicatory body of the judicial branch of

500 South Second Street, Springfield, Illinois 62706 (217) 782-1090 • TTY: (217) 785-2771 • FAX: (217) 782-7046
100 West Randolph Street, Chicago, Illinois 60601 (312) 814-3000 • TTY: (312) 814-3374 • FAX: (312) 814-3806
1001 East Main, Carbondale, Illinois 62901 (618) 457-3505 • TTY: (618) 457-4421 • FAX: (618) 457-5509

government, is not subject to the Freedom of Information Act or the Open Meetings Act.

In responding to your inquiry, it is helpful to review the origins and the purpose of the Illinois Courts Commission as summarized by the Illinois Supreme Court in People ex rel. Harrod v. Illinois Courts Comm'n (1977), 69 Ill. 2d 445. Under the Illinois Constitution of 1870, there were two seldom-used methods for removing judges from office during their term, impeachment (Ill. Const. 1870, art. IV, sec. 24 and art. V, sec. 15) and concurrent resolution of both chambers of the General Assembly. (Ill. Const. 1870, art. VI, sec. 30.) Due to the inadequacy of these two methods, provisions for the establishment of a judicial disciplinary commission were included in the 1962 amendments to the judicial article of the 1870 Constitution (effective January 1, 1964). (Ill. Const. 1870, art. VI (1964), sec. 18.) The commission was subject to the rules of procedure promulgated by the Illinois Supreme Court and was to be convened only by the chief justice upon order of the supreme court or at the request of the Senate. (Ill. Const. 1870, art. VI (1964), sec. 18.) Pursuant to section 18 of the 1962 judicial article, the supreme court promulgated Rule 51 (36 Ill. 2d R.51), which established the Illinois Courts Commission and prescribed the procedure by which the Commission was to receive and hear complaints. At that

time, the Illinois Supreme Court exercised complete dominion and control over the Illinois Courts Commission. People ex rel. Harrod v. Illinois Courts Comm'n (1977), 69 Ill. 2d at 464.

Within a few years, however, it had become clear that the constitutional provisions were inadequate because "* * * the [C]ommission had no authority or continuity of existence, and it lacked the administrative, investigative and enforcement staff necessary for its efficient operation". (People ex rel. Harrod v. Illinois Courts Comm'n (1977), 69 Ill. 2d at 464.) Thus, a special joint committee of the Illinois State Bar Association and the Chicago Bar Association recommended revisions to Rule 51. (Braithwaite, Judicial Misconduct and the Evolution of the Illinois Courts Commission 1964-1970, 1969 U. Ill. L.F. 442, 457.) The revised Rule 51 (43 Ill. 2d R. 51) provided that the Courts Commission was to be convened on a permanent basis. It designated the Director of the Administrative Office of the Illinois Courts as "permanent secretary" of the Commission with specified powers to receive and investigate charges, authorized the Director to file complaints at the direction of the Commission and established procedures for hearing charges. The Commission, however, was still subject to the supreme court's supervision by virtue of the rulemaking authority of the court.

With these perceived shortcomings in mind, the 1970 Constitutional Convention's Committee on Judiciary considered the future interrelationship of the judicial disciplinary system and the supreme court's authority to determine the rules of judicial conduct. Recognizing the need to maintain an independent judiciary, the Committee on Judiciary recommended that the Illinois Supreme Court, through its rulemaking authority, continue to have the power to promulgate the rules of conduct by which all judges would be guided. (6 Record of Proceedings, Sixth Illinois Constitutional Convention 830-33.) With respect to the judicial disciplinary system's investigative, prosecutorial and adjudicative functions, however, the Committee on Judiciary and the Convention delegates clearly stated that the supreme court was to have no direct involvement. Two Committee proposals dealing with the judicial disciplinary system were submitted to the delegates. (6 Record of Proceedings, Sixth Illinois Constitutional Convention 849.) The majority proposal, which, with minor revisions, became section 15 of article VI of the Illinois Constitution of 1970, took the position that, unlike the pre-1970 Courts Commission, an effective disciplinary system required that the prosecutorial and investigative functions be separate from the adjudicative function. (6 Record of Proceedings, Sixth Illinois Constitutional Convention 872-73.) Under the majority

proposal, the present Illinois Courts Commission was designed to perform the adjudicative function, while the Judicial Inquiry Board was to perform the investigatory and prosecutorial functions. Although it was initially recommended that the supreme court prescribe the rules of procedure under which the Commission would operate, that recommendation was rejected by the delegates, and it was determined that the Courts Commission should be vested with the authority to determine its own rules of procedure. (2 Record of Proceedings, Sixth Illinois Constitutional Convention 1189-90.)

Article VI, section 15 of the Illinois Constitution of 1970 remained unchanged until the general election of November 3, 1998, at which time section 15 was amended, inter alia, to add two citizens appointed by the Governor to the Courts Commission; to clarify that the Commission is "[a]n independent Courts Commission"; to provide for the appointment of alternate members to the Courts Commission; to specify filing requirements for the Commission's rules; and to establish constitutional standards under which members of the Commission are required to disqualify themselves or be disqualified. None of these changes, however, could be construed to alter the fundamental nature of the Commission. Currently, article VI, section 15 of the Illinois Constitution of 1970 provides, in pertinent part:

" * * *

(e) An independent Courts Commission is created consisting of one Supreme Court Judge selected by that Court as a member and one as an alternate, two Appellate Court Judges selected by that Court as members and three as alternates, two Circuit Judges selected by the Supreme Court as members and three as alternates, and two citizens selected by the Governor as members and two as alternates. Members and alternates who are Appellate Court Judges must each be from a different Judicial District. Members and alternates who are Circuit Judges must each be from a different Judicial District.

Members and alternates of the Commission shall not be members of the Judicial Inquiry Board. The members of the Commission shall select a chairperson to serve a two-year term.

The Commission shall be convened permanently to hear complaints filed by the Judicial Inquiry Board. The Commission shall have authority after notice and public hearing, (1) to remove from office, suspend without pay, censure or reprimand a Judge or Associate Judge for willful misconduct in office, persistent failure to perform his or her duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute, or (2) to suspend, with or without pay, or retire a Judge or Associate Judge who is physically or mentally unable to perform his or her duties.

(f) The concurrence of four members of the Commission shall be necessary for a decision. The decision of the Commission shall be final.

> (g) The Commission shall adopt comprehensive rules to ensure that its procedures are fair and appropriate. These rules and any amendments shall be public and filed with the Secretary of State at least 30 days before becoming effective.
>
> * * * "
>
> (Emphasis added.)

You have inquired, firstly, whether the Illinois Courts Commission, when promulgating its rules of procedure, is subject to the provisions of the Illinois Administrative Procedure Act. Initially, I note that since its adoption, article VI, section 15 of the Illinois Constitution of 1970 has provided that the Illinois Courts Commission possesses the authority to "adopt rules governing its procedures". (See Ill. Const. 1970, art. VI, sec. 15(g).) Apparently, at no time since the Illinois Administrative Procedure Act was adopted in 1975 (see Public Act 79-1083, effective September 22, 1975) has the Illinois Supreme Court or any of the other adjudicatory bodies created by the judicial article adopted rules pursuant to the Act. Moreover, nothing in the published explanation or arguments for and against the adoption of the 1998 amendment to article VI, section 15 of the Constitution suggests any intent to require the Commission to comply with the provisions of the Administrative Procedure Act. To the contrary, by including in the amendment to article VI, section 15 a requirement that the rules of the Courts Commission

be "* * * filed with the Secretary of State at least 30 days before becoming effective", there is a strong indication that the General Assembly, which drafted the amendment (see Senate Joint Resolution Constitutional Amendment 52), did not consider the Illinois Courts Commission to be subject to the Act's provisions and intended to create a system of public notice for the rules adopted by the Commission.

Turning to the provisions of the Administrative Procedure Act, section 1-5 of the Illinois Administrative Procedure Act (5 ILCS 100/1-5 (West 1997 Supp.), as amended by Public Act 90-655, effective July 30, 1998) provides that "* * * [t]his Act applies to every agency as defined in this Act. * * *" Moreover, article 5 of the Administrative Procedure Act (5 ILCS 100/5-5 et seq. (West 1996)), which contains the Act's rulemaking provisions, requires that "[a]ll rules of agencies shall be adopted in accordance with the Article". (5 ILCS 100/5-5 (West 1996).) As used in the Act, the term "agency" is defined to include:

> "* * * each officer, board, commission, and agency created by the Constitution, whether in the executive, legislative, or judicial branch of State government, but other than the circuit court; each officer, department, board, commission, agency, institution, authority, university, and body politic and corporate of the State; each administrative unit or corporate outgrowth of the

> State government that is created by or pursuant to statute, other than units of local government and their officers, school districts, and boards of election commissioners; and each administrative unit or corporate outgrowth of the above and as may be created by executive order of the Governor. 'Agency', however, does not include the following:
>
> * * *
>
> (3) The justices and judges of the Supreme and Appellate Courts." (Emphasis added.) (5 ILCS 100/1-20 (West 1996).)

Under the broad language of section 1-20 of the Administrative Procedure Act, a commission created by the Constitution in the judicial branch of State government would appear to fall within the plain language of the definition of "agency" for purposes of the Act. Further, the exemptions for the courts would not appear to apply to the Courts Commission. The 1970 Illinois Constitution, however, provides that "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." (Ill. Const. 1970, art. II, sec. 1.) "[I]f a 'power is judicial in character, the legislature is expressly prohibited from exercising it.' [Citations.]" (Emphasis in original.) People v. Joseph (1986), 113 Ill. 2d 36, 41.

The Constitution vests the authority to adopt rules of conduct for judges and associate judges in the supreme court.

(Ill. Const. 1970, art. VI, sec. 13(a).) The Illinois Courts Commission has been created as the adjudicatory arm of the constitutionally established judicial discipline system with the exclusive responsibility for applying the rules of judicial conduct to a particular case. This "* * * constitutional authority to hear and determine disciplinary cases necessarily includes the power to interpret the rules it applies * * *" (People ex rel. Judicial Inquiry Bd. v. Courts Comm'n (1982), 91 Ill. 2d 130, 134) and the procedures it will follow in deciding cases before it. Clearly, these acts fall within the scope of the Courts Commission's and the judicial branch's inherent "judicial power". To require the Courts Commission to submit to the rulemaking procedure contained in the Administrative Procedure Act, which contemplates rules review by the Joint Committee on Administrative Rules, an agency of the General Assembly (5 ILCS 100/5-90, 100 and 115 (West 1996)), and, ultimately, the General Assembly itself (5 ILCS 100/5-115, 125 (West 1996)), would jeopardize the principle of judicial self-regulation considered essential to the integrity and independence of the judiciary (6 Record of Proceedings, Sixth Illinois Constitutional Convention 830-33) and would be an unconstitutional intrusion into the judicial branch's exercise of its judicial power. Consequently, it is my opinion that the Illinois Courts Commission cannot be

required to comply with the provisions of the Administrative Procedure Act.

Secondly, you have inquired whether the Illinois Courts Commission is subject to the provisions of the Freedom of Information Act. The principal mandate of the Freedom of Information Act is found in subsection 3(a) of the Act (5 ILCS 140/3(a) (West 1997 Supp.)), which provides that "* * * [e]ach public body shall make available to any person for inspection or copying all public records * * *". As used in the Freedom of Information Act, the term "public body" means:

> " * * *
>
> * * * any legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue. * * *
>
> * * * "
>
> (Emphasis added.) (5 ILCS 140/2 (West 1997 Supp.), as amended by Public Act 90-670, effective July 31, 1998.)

In Copley Press, Inc. v. Administrative Office of the Courts (1995), 271 Ill. App. 3d 548, appeal denied, 163 Ill. 2d 551, the appellate court was asked to determine whether the

Administrative Office of the Courts, the Nineteenth Judicial Circuit Court and the Lake County Department of Court Services were subject to the disclosure requirements of the Freedom of Information Act. The court reviewed the definition of the phrase "public body" and concluded that the General Assembly had "* * * specifically listed the legislative and executive branches of government without listing the judicial branch. The lack of any reference to the courts or judiciary must be taken as an intent to exclude the judiciary from the disclosure requirements of the Act." (271 Ill. App. 3d at 553.) As previously noted, the Illinois Courts Commission is an adjudicatory body of the judicial branch of government. Consequently, based upon the court's reasoning in Copley Press, Inc. v. Administrative Office of the Courts, it is my opinion that the Illinois Courts Commission is not subject to the provisions of the Freedom of Information Act.

Lastly, you inquire whether the Illinois Courts Commission is subject to the provisions of the Open Meetings Act. Section 2 of the Open Meetings Act (5 ILCS 120/2 (West 1997 Supp.)) provides that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a". As used in the Open Meetings Act, the phrase "public body" is defined to include:

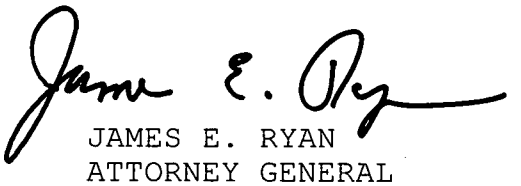
" * * *

> * * * all legislative, executive, administrative or advisory bodies of the state, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, except the General Assembly and committees or commissions thereof. * * *" (Emphasis added.) (5 ILCS 120/1.02 (West 1997 Supp.), as amended by Public Act 90-737, effective January 1, 1999.)

The definition of "public body" in section 1.02 of the Open Meetings Act is essentially identical to that which was construed by the court in Copley Press, Inc. v. Administrative Office of the Courts, except for the express exemption of the General Assembly and its committees and commissions. As previously discussed, in that case the court held that the General Assembly's failure to refer to the judicial branch of government in the definition of "public body", while specifically listing the legislative and executive branches, indicated an intent on the part of the General Assembly to exclude the judicial branch from the Act's application. The General Assembly's failure to include any reference to the courts or the judiciary in the definition of "public body" in the Open Meetings Act is likewise indicative of an intent to exclude the judicial branch from the

requirements of that Act. Consequently, it is my opinion that the Illinois Courts Commission is not subject to the provisions of the Open Meetings Act.

Sincerely,



JAMES E. RYAN
ATTORNEY GENERAL