

# Legal Notes

/From the DOCJT Legal Section

## Open Records

In recent years, agencies that hold records of emergency 911 calls from citizens and dispatch calls regularly have denied access to that information in Open Records requests. In a recent decision, the attorney general has concluded that such blanket denials are not within the law. Previous decisions had approved partial redactions from such material, such as specific information on injuries and medical conditions, and also had upheld the denial of a recording that involved specific threats. *Bowling v. Brandenburg*, 37 S.W.3d 785 (Ky. App. 2000), which often is cited to support such blanket denials of records, the Court upheld an earlier decision of the attorney general approving the denial. Under the facts of the specific case, the caller may have been put in actual danger by the release of the audio recording of the call. However, later decisions have clarified that *Bowling* does not authorize blanket denials, but that each denial of such records must specifically be justified, in detail. Most recently, in a matter involving the Whitley County 911 Dispatch, 09-ORD-164, the decision noted that there was no legal authority to exempt such recordings from Open Records, but that in each case, the agency that denies must specifically and in detail satisfy the burden of proof that the "privacy interests are superior to the public's interest in nondisclosure."



Further information on Open Records may be found on the department's Web site, at <http://docjt.ky.gov/legal/>.

## GINA ADA

Recently, Congress has enacted several federal laws that may affect law enforcement agency personnel decisions. The Genetic Information Nondiscrimination Act of 2008, Pub.L. 110-233, prohibits an employer (or their insurance company) from denying or altering coverage to a healthy individual based upon a genetic predisposition to develop a disease in the future. The law also bans the use of this information in making employment decisions, such as hiring, firing, job placement or promotions.

In addition, the Americans with Disabilities Act of 2008, Pub.L. 110-325, extends protection under the original ADA by broadening the definition of a disability. (Court decisions had dramatically limited the definition of the term, thus limiting the legal rights of persons with disabilities.) The amended law (called the ADA AAA) requires that interpreting courts focus more on whether the entity has discriminated and less on whether the impairment fits the technical description of a disability.

For further information on any of the above issues, please contact your local legal advisor or the Legal Section. In the case of specific election law questions, please contact your county Board of Elections.

## CONSANGUINITY AND AFFINITY

A question that often arises under domestic violence is how to calculate if two individuals are in the proper degree relationship under consanguinity (blood) or affinity (marriage). KRS 431.005 permits a warrantless arrest under the misdemeanor offense of fourth-degree assault, (KRS 508.030), for individuals who fall within the second degree of relationship, but does not explain, specifically, how that relationship is to be calculated.

There actually are two systems for how to calculate – the civil law system and the common/canon law system. Kentucky law does not specify which system should be used. However, in *Kirby v. Com.*, 132 S.W.3d 233 (Ky.App. 2004), the Kentucky Court of Appeals was called upon to decide the meaning of KRS 403.720, which mirrors KRS 431.005(2)(b)) and its use of the term "related by consanguinity or affinity within the second degree. In *Kirby*, the accused was convicted of manslaughter in the death of his first cousin. *Kirby* argued that certain penalties should not be applied to him, as he was a victim of domestic violence – the cousin allegedly had attacked and choked Kirby's mother previously. To decide the case, the Court was required to decide if Johnson (the deceased) and Kirby's mother were within the statutory definition of family members. The Court reviewed the two systems.

The civil law systems requires a computation – starting with the person in question and counting the steps up to the common ancestor that both parties share (such as a

shared grandparent) and then counting steps down to the other party. The number of total steps indicates the degree to which the two parties are related. In the common/canon law system, the starting point is the common ancestor and count down to each party – the degree would be the higher of the two. Since the actual statute was ambiguous and did not specify how it should be computed, the Court was required to resolve the matter in the defendant's favor. This forced the Court to select the common law method of computing the degree of relationship, and thus extends the protection under Kentucky law out as far as first cousins, as a rule. That applied the method to both statutes as the statutes logically would be expected to use the same computation, although the case did not mention KRS 431.005(2)(b).

One element of confusion is that degrees of relationship have nothing to do with degrees of cousinship – a first cousin is actually in the fourth degree of relationship under the civil law system. It would be necessary to count up two steps to the common ancestor and then count down two steps to the other party. But in the second degree relationship under the common law system, first cousins would share a common grandparent, the starting point. In that system, there would be two steps down from that common ancestor.

Finally, the spouse (in affinity) would hold the same degree as the primary relative, so a first cousin and the first cousin's spouse is the same degree of relationship.

## ELECTIONS

After a year without elections, Kentucky once again will have a primary and general election in 2010. Law enforcement agencies with responsibilities to enforce the law on election day are advised to review the law with local election officials and prosecutors. Kentucky law, under KRS 117, regulates the process of elections, and dictates, for example, who is permitted to be in the voting room and the distance those engaging in electioneering must remain away from the polling location. KRS 119 establishes offenses for wrongful registration, interfering with voter registration and removing or destroying election materials, false voting and vote-buying and disobeying the lawful command of an election officer.