

Kentucky Register of Births and Deaths (1911-1969)

By Jerry Long, Owensboro, KY, 1990

Jerry Long, of Owensboro, KY was responsible for alerting the public to the proposed destruction of the multi-volume set of books, Kentucky Register of Births and Deaths (1911-1969) and initiating efforts to save them. Robert N. Hurst, Kentucky State Registrar of Vital Records sent a directive on 4 September 1990 to the County Public Health Departments to destroy their set of these books. They had previously been an open record that could be used by the public in each of the County Public Health Departments. For about ten years I had frequently visited the Daviess County Public Health Department to use this resource for genealogical research. On one of these visits about a week prior to their ordered destruction I discovered that the books had been ordered to be boxed up to await a decision on whether they should be returned to Frankfort, transferred elsewhere or be destroyed. In the next few days I kept in close communication with the local registrar in hopes that the Kentucky Room at the Owensboro Library, where I was an employee, might be able to obtain a set of the books for our patrons.

In a phone call to our local registrar on September 4th I was informed that they had just received the final order to have the books destroyed by burning or shredding. I immediately called Mr. Hurst to plead against the decision. He refused to delay his order. At that point there had been no public announcement about the decision and the general public was totally unaware. Realizing that the books were soon to be no more I decided to do what I could to get the word out in hopes that a stay of execution could be obtained. I spent the next several days calling and writing government officials, libraries (Kentucky Archives, Kentucky Historical Society Library, Filson Club, Western Kentucky University), genealogical societies and numerous genealogical acquaintances, to ask for their help. None that I spoke to knew of the decision and most were concerned about it.

In a call on September 4th to Donald G. Dixon, Deputy Secretary of the Kentucky Department of Human Resources (of which the Vital Records office is a subsidiary of) he agreed to issue a temporary stay pending the reception of a letter from me presenting the arguments against the destruction of the records. In the following week the story of the ordered destruction of the books became widely publicized by the media. A letter I had drafted and mailed to the offices of US Senator Wendell H. Ford, the Kentucky Governor, Kentucky Attorney General, Kentucky State Archivist, Kentucky Speaker of the House, local State Senator and Representatives and Secretary of the Kentucky Department for Human Resources was used as the cornerstone of a subsequent trial initiated by the Kentucky Attorney General.

On 8 February 1991 the Kentucky Attorney General's office ruled that the Vital Records office had acted illegally in ordering the destruction of a public record; any such decision could be rendered only by the Kentucky State Archives. The books which had been returned to Frankfort were turned over to the Kentucky Department for Libraries & Archives, who subsequently released them to any county or city library across the state that requested a set for their county. In February 1992 the Kentucky Room of the Daviess County Library received their

set of the 130 volumes of the Kentucky Register of Births and Deaths. It has since been one of the most popular sources there.

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4 September 1990

Dr. Harry J. Cowherd, M.D.
Secretary of Kentucky Department of Human Resources
275 E. Main St.
Frankfort, KY 40621

Dear sir:

This letter is in regard to a recent directive issued by Mr. Robert N. Hurst, Kentucky State Registrar of Vital Records, Frankfort, Ky., concerning the Kentucky Register of Births & Deaths.

The Kentucky Register of Births & Deaths is a multivolume set of books that indexes the birth & death certificates filed in Kentucky between the years of 1911-1969. In cases of deaths, it lists: name of decedent, date of death, county of death, & death certificate file number; and in cases of births, it lists: name, date of birth, county of birth, name including maiden name of the individual's mother, & birth certificate file number. Prior to 1945 births & deaths were indexed jointly and afterwards in separate volumes. Most, if not all county Public Health Departments in Kentucky have a set of the indexes; twenty health departments in the western Kentucky area that I personally am familiar with have the books. These indexes have been available for public viewing since the first volumes were published circa 1917. These books are also available for public usage in several public & private libraries, both in Kentucky & outside of the state. I know of six libraries within Kentucky & one outside the state that have a partial or complete set of the books. I have personally used them at three of these: the Kentucky Library, at Western Kentucky University, Bowling Green, Ky., the Kentucky Historical Society Library, Frankfort., Ky., & the Louisville Public Library, Louisville, Ky.; at the other repositories I have only been told of their availability.

About a month ago the county health departments in Kentucky received an order, from the office of Robert N. Hurst, concerning the Kentucky Register of Births & Deaths. From conversations with several registrars of county health departments it was learned that since the indexes in cases of births contained information relevant to adoptions they were directed to remove the books from their shelves, they could either box them up & place them in storage or return them to Frankfort, where they would be disposed of.

I am employed at the Owensboro-Daviess County, Ky. Public Library and when we learned of this directive we wrote to Mr. Robert N. Hurst, requesting that in place of the destruction of the set at the Daviess County Health Department, our library be permitted to have the set. We requested this in lieu of the following facts: The Kentucky Register of Births & Deaths is a tremendously valuable research source for our patrons, in both their historical & genealogical research. I would estimate that every week we refer at the minimum three people to their local health department for reference to this source, which contains what they were inquiring about &

which we do not have. These records have been part of the Public Domain for some 70 years and are available in other public & private collections, in addition to the Kentucky Bureau of Vital Statistics. About two years ago, as a result of an enquiry addressed to the office of Kentucky Senator, Wendell H. Ford, approval was obtained for a transfer of a set of the books from the McLean County, Ky. Courthouse to the Livermore, Ky. Library, in the same county. Since the data is now available on microfilm & the books are no longer needed by the health departments, and seeing that the same data is available in other historical & genealogical collections, and in lieu of the destruction & waste of material, time & money needed to destroy the books, why could our library not be permitted to preserve this valuable & unique resource.

A reply from Mr. Hurst, dated 30 August 1990, was received at the Owensboro Library. He denied our request, saying in part: "The Office of Vital Statistics has reversed its decision to approve the transfer of these indexes to other agencies and is in the process of reclaiming these materials from those organizations mentioned in your August 10, 1990 letter. This action is necessary due to the sensitive information regarding adoptions which is contained in the directories." We have learned that the set of the directories previously permitted to be stored at the Livermore, Ky. Library, have been confiscated & reclaimed by Kentucky Bureau of Vital Statistics. And apparently Mr. Hurst intends to take steps to do likewise at the other libraries, which we inadvertently named in our letter.

On Tuesday, September 4th, a final order from Mr. Hurst was received at the Daviess County Public Health Department. The registrar was ordered to have the books destroyed, either by burning or shredding. On the same date in a phone conversation between Mr. Hurst & myself, he again reiterated that the reason for the decision was "the sensitive information regarding adoptions which is contained in the directories". I stated that this would be a rare & isolated instance for this to occur. An adoptee could only use the books to learn his parents only if he was privy to considerable information already. He would have to know his birth name & place of birth in order to connect himself to a listing in the directories, and in the majority of cases an adoptee would not know these facts. If an adoptee possessed this knowledge there are numerous other sources that could be checked to give him the same information contained in the directories. Mr. Hurst stated he was not responsible for how other records were misused, he was responsible for only those at the Bureau of Vital Statistics. Many are not of the opinion that this is a misuse of public records and also this scenario of so called misuse is a very rare occurrence. Mr. Hurst agreed that he knew of no legal action against the state because of information garnered from the Kentucky Register of Births & Deaths. I asked Mr. Hurst if he would allow some historical or genealogical group to volunteer their time & go to the Daviess County Health Department and under the supervision of the registrar (to guard against any birth records being copied) and go through the books prior to 1945 & mark out all "the sensitive information regarding adoptions" (probably only the mothers name in the case of births). Mr. Hurst said they could not consider this suggestion and that the books needed to be destroyed.

In conclusion I cordially invite your advice & knowledge concerning the legalities & ramifications of this directive to destroy the Kentucky Register of Births & Deaths. Is it legal to remove what has so long been part of the Public Domain? Can the taxpayers resources (material & monetary) be destroyed without proper prior notification of reasons for said actions? How can so many be deprived of the benefits of the books for what would be a very rare instance of

misuse? Can a stay of execution be obtained? Thank you for your time. Please help stop this waste!

Yours truly,
Jerry Long
1701 Alexander Avenue Owensboro, KY 42301.

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The preceding letter was also mailed to: Gerard Gerhard, Assistant Kentucky Attorney General; Frederic J. Cowan, Assistant Kentucky Attorney General; Richard Belding, Kentucky State Archivist; Wendell H. Ford, U.S. Senator; Wallace Wilkinson, Kentucky Governor; Delbert Murphy, Kentucky State Senator; Donald Blandford, Kentucky Speaker of the House; and Louis Johnson, Kentucky State Representative.

I also made phone calls to: Perry T. Ryan, Assistant Kentucky Attorney General; Robert N. Hurst, Kentucky Registrar of Vital Records; Robert Kenard, Director of the Kentucky Historical Society; Dr. Harry J. Cowherd, M.D., Secretary of Kentucky Department of Human Resources; Donald G. Dixon, Deputy Secretary of the Kentucky Department of Human Resources; Mrs. Delbert Murphy, secretary for Senator Wendell H. Ford; Richard Belding, State Archivist at Kentucky Department for Libraries & Archives; Ryan M. Holloran, Attorney for Kentucky Department of Human Resources; Pat Newton, Registrar at Daviess County Public Health Department; and Kenneth Thomson, volunteer at Kentucky Library, Western Kentucky University. I reimbursed the Owensboro-Daviess County Public Library \$43.09 for long distance phone calls made from the library.

By using the Kentucky Register of Births & Deaths, 1911-1969 the only method for adoptees to trace their original birth record listing their birth mother was by searching all birth records in their birth year for the certificate number given on their altered birth certificate showing their adoptive parents. The certificate numbers remained the same on both copies of their birth certificate. This method usually required a significant investment of time to search for their number. While working 27-years in the Kentucky Room of the Daviess County Public Library we had about three or four individuals who were successful in locating their original birth record.

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Bowling Green Daily News, Bowling Green, KY, Friday, 7 September 1990, p1A:

State birth records recall order has some up in arms

By Gene Cantrell, Jr., Daily News City Editor.

A state directive for county health departments to return all old birth records to Frankfort has some librarians and genealogy buffs up in arms.

An original order from Robert Hurst, registrar for the state's Bureau of Vital Statistics, was that records at county health departments were to be either shredded or burned.

That order was changed Aug. 31 to say that county maintained birth records should be returned to Frankfort.

Although not the case in the 10-county Barren River Area Development District, many health departments have turned old birth records over to libraries for storage and greater public access.

Health departments in recent weeks have been given the chore of retrieving those records.

The records, in printed form, are officially called the Black Index. The state published year from 1911 to 1969 which listed the name new births, the place of birth, the maiden name of the mother and other information from the birth certificate.

The records are of particular interest to those doing family research.

The state has justified the recall of the records, according to Dep. Of Health Services press aide Janet Hoover, to protect the rights of birth parents in adoption cases.

“Confidential birth information is out there in the public domain,” she said of the printed records.

The records violate court orders in adoption cases that legally seal birth information. Ms. Hoover said the state is attempting to get the records back to Frankfort where they can be controlled.

The original birth records will be maintained, she said.

The state goes to the point of even changing birth certificates of adopted children and listing the adoptive parents and their hometowns as the site of the birth to prevent children from tracing the birth parents, although the original records maintained by the state in the event the courts ultimately release the information, Ms. Hoover said.

In McLean County, the Livermore Community Library surrendered birth records to the county health departments last week, according to library board member K.J. Meyer.

“They just came and got them,” Meyer said.

They haven’t destroyed them, they’re still at the health department in Calhoun, I checked,” he said.

Some records in Warren County were destroyed before the agency changed its mind about the disposal of the records, according to Chuck Bunch, director of the Barren River District Health Department.

“We have truck loads of these records, it would have taken days to destroy all of them,” he said.

“As an amateur genealogist I was concerned about the loss of these records,” Bunch said.

“But we (health departments) by regulation have to do what they say.”

Only 42 of the 120 counties in the commonwealth have returned their records to the state, according to Ms. Hoover.

Copies of the same information is available through some church archives and in Bowling Green at the Kentucky Museum on the Western Kentucky University campus.

The Kentucky Museum will not surrender its records, according to Riley Handy, head of the library’s special collections department.

“Those records were given to the library by the state and are now the possession of Western Kentucky University,” he said.

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Messenger & Inquirer, Owensboro, KY, 9 September 1990:

Adoption group ired by recall of records

Associated Press

FRANKFORT - The president of a Louisville-based organization for adoptees says a state-ordered recall of book that have helped people find their birth parents sets a dangerous precedent.

Ann Hardy, president of Adoption Awareness, says the books should remain available.

"They (the books) were public record. They ought to remain public records," said Hardy, whose organization does not help people search for birth parents. "If they can take these records away, they can take all the records away."

State Registrar Robert N. Hurst first asked local health department officials to burn or shred the books because they contained confidential information on adoption cases and could not be made available to the public.

His order to destroy the books was suspended Tuesday after legal questions were raised, and local departments were asked to give them to state vital statistics officials for storage.

The books contain birth and death information for 1911 to 1969 and have been distributed to local health departments. An entire set has 142 volumes.

Other people agreed with Hardy, including Sen. Ed O'Daniel, a Springfield Democrat,

"If the records have been public since 1911, they're still public records and no edict from some bureaucrat can change that," he said.

O'Daniel sponsored legislation in 1986 that allows people who have been adopted to seek their parents through the Cabinet for Human Resources. If the birth parents are found, they are given the option of meeting their child.

However, Hardy said some adoptees want to continue searching for their parents if the cabinet cannot find them. And if the birth parents refuse to meet their children, the child may never learn the name, she said.

When someone is adopted, the original birth certificate is sealed and a new certificate is issued. However, the books had information that allowed a person to determine the identity of his or her birth mother, Hurst said,

"We're trying to collect those books that contain what is now confidential birth information," said Janet Hoover, a spokeswoman for the Cabinet for Human Resources, the agency responsible for vital statistics.

Legal questions were raised over who had authority to destroy the books. Hoover said, "The questions are still being studied, she said.

Hurst said a vital statistics law approved this year requires his agency to be accurate with the information and imposes penalties if confidential information is released. He said some of the information in the books is out of date,

The move is also meeting opposition from archivists and librarians.

Some records in Warren County were destroyed before the state agency changed its mind about the disposal of the records, according to Chuck Bunch, director of the Barren River District Health Department.

"In Warren County we moved very slowly, in hopes the state would change its mind," Bunch said. "We have truckloads of these records. It would have taken days to destroy all of them," he said.

"As an amateur genealogist I was concerned about the loss of these records" he said. "But we by regulation have to do what they say."

Only 42 of the 120 counties in the commonwealth have returned their records to the state, according to Hoover.

Copies of the same information is available through some church archives and in Bowling Green on the Kentucky Museum on the Western Kentucky University campus,

The Kentucky Museum will not surrender its records, according to Riley Handy, head of the library's special collections department,

"Those records were given to the library by the state and are now the possession of Western Kentucky University," he said.

The effort to retrieve the books has also caught the interest of the state Department of Libraries and Archives, which is responsible for preserving public records.

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Commonwealth of Kentucky, 13th District House of Representatives
LOUIS JOHNSON
State Representative
District Office
418 West Third Street
Owensboro, Kentucky 42301
Phone (502) 926-1717

September 10, 1990

Mr. Jerry Long
1701 Alexander Avenue
Owensboro, KY 42301

Dear Mr. Long:

This is to acknowledge receipt of your letter concerning the Kentucky Register of Births & Deaths. From my reading of the newspapers, apparently there have been several people in this area who are disturbed by this. I will forward your letter to Mr. Hurst and request a response.

Very truly yours,
Representative Louis Johnson

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The Secretary for Human Resources, Commonwealth of Kentucky, Frankfort 40621
WALLACE C. WILKINSON
GOVERNOR
HARRY J. COWHERD, M.D.
SECRETARY

September 12, 1990

Mr. Jerry Long
1701 Alexander Avenue
Owensboro, Kentucky 42301

Dear Mr. Long:

I have received your letter of September 4, 1990 expressing your concerns about the disposal of the Kentucky Register of Births and Deaths which is a multivolume set of books that indexes birth and death certificates filed in Kentucky for the period from 1911 to 1968. In response to your concern and the concerns of others, I have directed that none of the volumes comprising the Kentucky Register of Births and Deaths be disposed of until the issue is fully researched from a legal standpoint. I hope this situation will be resolved to the satisfaction of all concerned.

Yours very truly,
Harry J. Cowherd, M.D.
Secretary

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CABINET FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY
FRANKFORT 40621

September 20, 1990
Hon. Louis Johnson
State Representative
418 West Third Street
Owensboro, Kentucky 42301

Dear Representative Johnson:

Your correspondence to Robert Hurst has been referred to this office for reply.

The correspondence from Jerry Long which you have attached is similar to that received by the Registrar for Vital Statistics. As you may know, the entire question of what to do about the index of births and deaths has been referred to this office for review. I am advised by the Office of Attorney General that Mr. Long has written for an opinion from that office as well.

What has sparked the controversy is the realization that information on adopted children contained within the indexes (i.e. name of mother, date of birth, county of birth, etc.) is confidential by operation of KRS 199.570. When the Cabinet receives an order of adoption, the Registrar is directed by that statute to prepare a new certificate of birth. Any record of birth of an adopted child is then removed and the new certificate becomes that child's record of birth. All adoption records are then sealed and not made available to anyone except upon court order. It has been discovered that while the old certificates were removed and replaced by the new, the 142 volumes of index of births and deaths were not reviewed to eliminate the now confidential material. To allow this confidential information to remain in the public documents would violate the obligation of the Cabinet imposed by statute to keep it confidential. That is what prompted the request that all these volumes of index be returned to Frankfort.

I understand the concerns of your constituents over the question of availability of the records of vital statistics. My office is currently examining the question with particular attention

to the requirements of the newly enacted KRS Chapter 213, the provisions of KRS 199.570, and the record retention requirements of KRS Chapter 171.

Please assure your constituents who ask that the Cabinet does not seek to destroy or limit access to these records except in those rare instances involving adoption records. The indexes have been placed on microfiche and are updated every five years. The question appears to be how to deal with the inaccurate bound volumes containing confidential information.

I trust this explains what has happened and why. If I may be of further service, please let me know.

Sincerely,
Ryan 'M. Halloran
General Counsel

cc: Robert Hurst, Registrar Vital Statistics

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COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL
FREDERIC J. COWAN
ATTORNEY GENERAL
FRANKFORT 40601
February 8, 1991

Mr. Jerry Long
1701 Alexander Avenue
Owensboro, Kentucky 42301

Dear Mr. Long:

We have received your letter dated September 4, 1990, concerning the destruction of the Kentucky Register of Births and Deaths. Please find enclosed a copy of our recent opinion which should address the questions raised in your letter.

Yours very truly,
FREDERIC J. COWAN
ATTORNEY GENERAL
Perry T. Ryan
Assistant Attorney General

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COMMONWEALTH OF KENTUCKY
OPINION OF THE ATTORNEY GENERAL
STATE CAPITOL
FRANKFORT 40801
FREDERIC J. COWAN

ATTORNEY GENERAL

February 8, 1991

Mr. Richard N. Belding, State Archivist
Department for Libraries and Archives
P.O. Box 537, Coffee Tree Road
Frankfort, Kentucky 40602

Dear Mr. Belding:

You have written to this office for an Opinion of the Attorney General as to whether certain index books of birth and death records are public records within the meaning of Kentucky law. You also ask whether these records should be made available for public inspection. This is an advisory opinion issued pursuant to KRS 15.025. We do not exercise adjudicatory authority to determine rights of inspection of public records under KRS 61.880; however, this opinion may be utilized should a formal request for inspection of records be made at some future date.

We are of the opinion that the index books are public records and that they should be made available for public inspection. Although the state registrar may lawfully retrieve the books from local health departments and store them, he may not authorize their destruction without the approval of the Archives and Records Commission or authorize the transfer of the records to other agencies without the approval of the Department for Libraries and Archives .

Until recently, birth and death certificates maintained by the Vital Records office of the Cabinet for Human Resources have been considered public records which were open for public inspection under KRS 61.872. The Office of Vital Statistics has published a series of 142 index books known as the Kentucky Register of Births & Deaths, which alphabetically list the names of each person who either was born or died in the Commonwealth from 1911 until 1969. An aspect of the Register is that, since the names of newborn children would be listed alongside the full maiden name of the natural mother, children who were subsequently adopted might still be listed in the Register under their names at birth. In writing this opinion, we recognize that the confidentiality restrictions implicit in various state laws are designed to protect the interests of adopted children as well as their natural parents.

At least one copy of the Register series has been published and distributed to each of the various county health departments across the Commonwealth. Additionally, several sets of the Register, at one time or another, have been distributed to public libraries and other institutions. The Register has even been copied and microfilmed by private institutions, such as the Church of Jesus Christ of Latter Day Saints, which microfilmed the Register in 1970. Some of the microfilm copies have been distributed to various libraries across the country. In fact, the Latter Day Saints gave copies of their microfilm to some of the Kentucky university libraries, where the microfilm continues to be available for public inspection.

In the past, thousands of researchers have visited the Office of Vital Statistics in order to inspect various birth and death records stored there. Due to the overwhelming number of

requests, meeting the various requests, to inspect the birth and death records has sometimes presented a burden to the employees of the Office of Vital Statistics. Apparently in response to some of the problems incurred at the Office of Vital Statistics, the 1990 Kentucky General Assembly enacted H.B. 64, designated as "An Act relating to vital statistics," which made several changes to Kentucky laws relating to the maintenance of vital statistics. The new law also somewhat limited public access to vital records. The sponsors of the new law apparently intended to improve the accuracy and integrity of the records and to limit what the Cabinet for Human Resources perceived as an overwhelming burden in complying with various researchers' requests to inspect birth and death records.

At some point subsequent to the enactment of H.B. 64, the Cabinet decided to discard the sets of the Register and replace them with microfiche copies. Officials of the Cabinet believed this decision would solve several problems. Microfiche requires less space than the 142 volume set of the Register. Microfiche is also easier to update, and the state registrar can more conveniently delete entries of births in the microfiche in the event that at some subsequent date the entry became confidential due to adoption proceedings. When the decision to destroy the various sets of the Register was made, various concerned individuals requested that the sets of the Register be given to private libraries and other public institutions, since the Register was often utilized for research purposes. The idea to give away the old sets of the Register was apparently considered by the Cabinet and later rejected.

On August 31, 1990, a memorandum was mailed by the Cabinet to the local registrars which stated, "Upon receipt of this memo you are instructed to destroy all black indexes [the Register] in your possession." This decision created enormous public resistance, prompting various officials to reevaluate the decision to destroy. Five days later, on September 5, 1990, another memorandum was sent out by the Cabinet, requesting local registrars to ignore the August 31 memorandum which had directed the local registrars to destroy their sets of the Register.

We first address whether the copies of the Kentucky Register of Births & Deaths are public records and whether they are subject to public inspection under the Open Records Law. Under KRS 213.031(5) and 213.131(2), the state registrar is required to distribute copies of updated indexes of birth and death records to the local registrars. The microfiche index will be updated periodically, about once every five years, with confidential information relating to adoptions deleted from the microfiche with each update. Both the microfiche copies and the index books are nevertheless public records under KRS 61.870(2) and clearly are available for public inspection under KRS 61.872(1) and 213.131(2) and (3). KRS 446.080(3) states, "No statute shall be construed to be retroactive, unless expressly so declared." Since the Register has been available for public inspection for many years, we believe that the new legislation does not in any way make confidential records which have been open to the public for such a lengthy period of time.

KRS 213.031 designates the state registrar of Vital Statistics as the custodian of all of the index books which are presently in the possession of local registrars or in the possession of the Cabinet. KRS 213.031(1) grants the state registrar broad powers with regard to administering the objectives of the laws pertaining to vital statistics. We believe that these powers include the

power to retrieve and collect the sets of the Register from the local registrars and to properly store them in accordance with other regulations. Although the state registrar has the authority to retrieve the indexes, as noted, and to store them at a suitable location in his discretion, we are of the opinion that he does, not have the authority to discard or destroy them without the approval of the Archives and Records Commission, as will be discussed in greater detail in this opinion.

Next we discuss the extent to which the state registrar or the Cabinet for Human Resources would be held liable in a situation in which information relating to adoptions was divulged by the Cabinet. It is difficult to provide a definitive answer as to what the Kentucky Board of Claims might rule in proceedings which might be instituted by a party who felt aggrieved by a disclosure. We believe that the result will largely depend upon the facts and circumstances of an individual case. For this reason, we decline to speculate as to what the result would be in such a proceeding, but we will endeavor to provide a comprehensive summary of the law pertaining to the liabilities of the Cabinet should state employees make an unlawful disclosure of confidential birth records.

In general, the state, its departments, and agencies are immune from lawsuits under the doctrine of sovereign immunity, with certain limited exceptions specified in the statutes. See KRS 44.072. Claims for negligence on the part of the Commonwealth, its departments, agencies, officers, agents, or employees acting in their official capacities must be filed in the Kentucky Board of Claims, which has exclusive, jurisdiction of such matters under KRS 44.070 and 44.072. Thus, a party claiming to be aggrieved by the Cabinet's disclosure of information relating to an adoption would have, to prove that the Commonwealth or its agent was negligent. With regard to the particular question at hand, the elements of negligence include (1) an affirmative duty that the Cabinet not divulge the information at the moment the information was released; (2) breach of that duty; and (3) damages. We will discuss each of these elements with the question at hand.

With regard to proving breach of an affirmative duty, we believe that a complaining party would have to show that, at the moment the Cabinet released the information complained of, the Cabinet was legally prohibited from disclosing the information. The time at which the information was released is crucial because we perceive that there may be circumstances in which, at the moment the information was released, there was no statute which prohibited the Cabinet from releasing it. For example, if a child continued to live with his natural parents for a number of years before he was legally adopted, his original birth certificate is considered a public record under prior law until a court of competent jurisdiction had entered an order that the child had been legally adopted. If the Cabinet had released the child's birth certificate to some party sometime between the time of his birth and the date of his legal adoption, the Cabinet would have been within its statutory authority. In other words, the Cabinet had no affirmative duty to hold confidential the birth certificate of a child who had not been legally adopted. After the adoption was ordered by a court of competent jurisdiction, under prior law the child's original birth certificate then became a confidential record, and the Cabinet could no longer lawfully release a copy of the original birth certificate under KRS 199.570. Nevertheless, we note that under both prior law and under present law, there is no requirement that the Cabinet retrieve copies of birth certificates which were issued prior to an adoption taking effect, nor do we believe that the Cabinet, has an affirmative duty to locate and destroy information which has

been released to the public prior to the disposition of an adoption proceeding. Applying these principles to the facts at hand, we do not believe that the mere fact that sets of the Register are presently available for public inspection would violate any Kentucky statutes, simply because, at the time the Register was published, the information contained in the Register was not confidential and the Cabinet had no affirmative duty to restrict public access to the information.

With regard to proving neglect of duty, we believe that a complaining party would have to prove that on the date of release of the records, the Cabinet breached its duty to withhold the information. The complaining party would have to establish the date of the injury in order to avoid a time bar within the applicable statute of limitations. The most recent index book published by the Cabinet bears the date of 1969, some twenty-one years ago. Under the authority of KRS 44.110, we believe that an alleged injury resulting from the release of birth records would have occurred at the moment the record was released for public inspection. Under KRS 44.110(3), the applicable statute of limitations for negligence cases against the Commonwealth or its agents, an action for damages cannot be brought if more than two years has elapsed from the date of the alleged negligent act. In the case of the various sets of the Register, we believe that the statute of limitations has already expired since the information has been released more than two years ago. For this reason, we do not believe that the Cabinet is liable for divulging information that has been available for public inspection for at least twenty-one years.

Next, we address the question as to whether the Cabinet for Human Resources has the authority to retrieve the sets of the Register which have been given to various public and private libraries and other institutions. We believe that the sets of the Register are "property" within the legal definition of the term. We further believe that the answer to this question concerns the common law of property as it relates to gifts of personalty. Under the common law, two elements are necessary to establish that a gift has been made, i.e. donative intent and possession. We believe that private or public institutions which own copies of the Register are under no legal obligation to return this property to the Cabinet for Human Resources. We note however that if the institution is in possession of copies of the Register under a loan agreement with the Cabinet, the Cabinet as the owner might request that they be promptly returned depending upon the specifications of the loan agreement.

We now turn to the question as to whether the Department for Libraries and Archives must comply with a request from the Cabinet that copies of the index books stored at the archives be removed from public inspection. The statutes provide little direction as to who becomes the legal custodian of records which are transferred to the Kentucky Department for Libraries and Archives. KRS 61.870 defines "custodian" as "the official custodian or any authorized person having, personal custody and control of public records." (Emphasis added.) Under this statute, we believe that either the state archives or the official custodian of the agency might be legally deemed to be the custodian of the records. Since we believe that the copies of the Register are open to public inspection, we do not believe that the Department for Libraries and Archives need comply with the request of the Cabinet to restrict access to the records.

The Cabinet has requested that the Department for Libraries and Archives collect copies of the Register from the various libraries which possess copies under KRS 171.140. We have carefully examined KRS 171.140 and conclude that the Department for Libraries and Archives

does not have the power to retrieve the various copies of the Register from public libraries. KRS 171.140 empowers the Department to "give assistance and advice" to various local libraries with regard to "organizing such libraries or assist[ing] in the improvement of those already established," but the statute does not empower the Department to remove books or other research materials from public libraries in the Commonwealth. Our opinion here rests in part upon the fact that there are various ways in which public libraries are organized. Local public libraries are local agencies subject to the control of their local boards, as set forth in KRS 173. University libraries are subject to the control of the university's governing body and the hierarchy of university officers in charge. No statute gives such broad supervisory authority to the Department for Libraries and Archives.

Next, we address the issue as to whether state university libraries are required to remove their copies of the Register from public inspection or to tender their copies to the Cabinet. We believe that state university libraries are not legally required to tender their copies of the Register to the Cabinet. Our reasoning here is based upon several factors. According to the information which we have at hand, the copies of the Register now in possession of state university libraries are actually microfilm copies given to them by the Latter Day Saints, a private organization. There is no indication that the microfilm was unlawfully copied by the Latter Day Saints. As such, the university libraries are in possession of a private publication, similar in most respects to a privately published book, and we are aware of no state law which permits the removal of books or other materials from university libraries simply because they contain information which might be sensitive. Thus, the microfilm copies now in the possession of the university libraries are private publications, and the Cabinet has no legal authority to replevin these materials. The legislature could have enacted a law which would have required the state universities to tender their copies of the index books to the Cabinet, but the legislature chose not to do so.

Finally, we address the question as to whether the Cabinet might legally give the sets of the Register to various public institutions without incurring civil liability. We emphasize that the transfer of public records is within the authority of the Department for Libraries and Archives under KRS 171.560, 171.580. The destruction of public records is within the authority of the Archives and Records Commission under KRS 171.420; see also KRS 171.670. We believe that the Department for Libraries and Archives can lawfully authorize transfer of the records to suitable facilities, should it choose to do so. Since we do not believe that the Cabinet for Human Resources or the Department for Libraries and Archives will incur liability for the release of information in the records, we do not believe that there would be any liability to either state agency should a decision be made to transfer the copies of the Register to other agencies. Should the Department for Libraries and Archives elect to authorize the transfer of the copies of the Register to other agencies, we recommend that a disclaimer be placed inside each of the volumes of the Register which would indicate that the information contained in the Register may not be accurate and that the Register does not represent an update-to-date listing of Kentucky births and deaths.

We wish to admonish all state agencies that under present law, they should not destroy public records without the authority of the Archives and Records Commission, except under specific circumstances. Although the Cabinet for Human Resources has rescinded its memorandum which directed local registrars "to destroy all black indexes in your possession"

upon receipt of the memorandum, we note that the order was sent by the Cabinet without the approval of the Archives and Records Commission. KRS171.420 designates the Archives and Records Commission as the sole authority in the Commonwealth which may authorize the destruction of state or local public records. KRS 519.060 provides criminal penalties to a person who "Knowing he lacks authority, to do so, he intentionally destroys, mutilates, conceals, removes, or otherwise impairs the, availability of public records." (Emphasis added.)

After considering the various elements of law which are outlined above, we are of the opinion that the index books are public records and that they should be made available, for public inspection. Although the state registrar may lawfully retrieve the books from local health departments and store them, he may not authorize their destruction without the, approval of the Archives and Records Commission or authorize the transfer of the records to other agencies without the approval of the Department for Libraries and Archives.

We trust that this opinion will be of some assistance to you.

Yours very truly,
FREDERIC J. COWAN.
ATTORNEY GENERAL
Perry T. Ryan
Assistant Attorney General

Published in Kentucky Pioneer Genealogy and Records, Vol. 10, Society of Kentucky Pioneers (Utica, KY: McDowell Publications, 1989), 111-120. The Bulletin, Vol. 24 (Owensboro, KY: West-Central Kentucky Family Research Association, Summer 1991), 23-32.

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Courier-Journal, Louisville, KY, Tuesday, 12 February 1991, p2B:

**Registrar needs approval to destroy
birth and death indexes, opinion says**

By GIL LAWSON, Staff Writer

FRANKFORT, Ky. - Index books that contain birth and death information are public records and cannot be destroyed by the state registrar without approval from another state agency, according to an attorney general's opinion released yesterday.

The opinion was sought last year after a controversy erupted when state Registrar Robert N. Hurst directed local health departments to destroy the indexes because they contained confidential adoption information. Hurst rescinded his order but collected the indexes, which had been available to the public for many years.

The effort to collect the books raised concerns among archivists; genealogists and others over whether the indexes should be destroyed since they had previously been public records.

The opinion said Hurst can collect from health departments but cannot destroy them without permission of the Archives and Records Commission, which determines how long state must be retained. The registrar would not have any authority to retrieve copies of indexes kept by libraries, universities or other organizations, the opinion said.

State archivist Richard N. Belding, who sought the opinion, said it clears up some questions that had been raised and means the indexes can still be made available to the public.

"These were records that had been in the public domain for many years," Belding said.

The 142-volume indexes list names of people who were born and died in Kentucky between 1911 and 1969. Because the names of newborn infants were listed with the full maiden name of the mother, the indexes allowed adopted people to determine the identity of a parent.

This led to Hurst's effort to collect the books. He said last September that a 1990 law on vital statistics required that the information be kept confidential.

The state has placed the indexes on microfiche since 1969 and periodically updates them by removing the confidential information. The material in question involved the index books kept at local health departments.

Brad Hughes, a spokesman for the Cabinet for Human Resources, said it probably will request permission to destroy the indexes it has collected. Hughes, who had not read the opinion, said the agency may have a problem if it is required to make the indexes public, because it believes they contain information that state law requires to be kept confidential. However, that information is also available in places such as some libraries.

The opinion, written by Assistant Attorney General Perry Ryan, said state law prohibits records from being declared closed retroactively.

Since the indexes had been available for many years, "we believe the new legislation does not in any way make confidential records which have been open to the public for such a lengthy period of time," Ryan wrote.

The cabinet is not liable for divulging the information because it has been available to the public for at least 21 years, he added.

Ann Hardy, past president of Adoptee Awareness, a Louisville based organization for people who have been adopted, had protested the plan to destroy the books. She welcomed the opinion. "I'm thrilled; I'm delighted," she said yesterday.

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14 February 1991

To the members of West-Central Kentucky Family Research Association, Owensboro, KY and Society of Kentucky Pioneers, Utica, KY

On 31 August 1990 a directive from the office of Robert N. Hurst, State Registrar of Vital Records, Frankfort, KY, was sent out to the public health departments across Kentucky, ordering the local registrars to destroy their set of the Kentucky Register of Births and Deaths, a multivolume set of books that index the birth and death certificates of Kentucky for the years 1911-1969. Other state agencies, including the State Archives (presumably the caretaker of public records) and the general public was not informed of this decision. As a genealogist I had often used the books and on a visit to the local health department, a couple of weeks earlier, I had discovered that the books had been ordered to be boxed up, to await a decision on whether they should be returned to Frankfort or be destroyed. In the following days I kept in close

communication with the local registrar of vital records, in the hope that the Kentucky Room, at the Owensboro Library, of which I am an employee, might be able to obtain a set of the books for our patrons.

On 4 September 1990 I learned from the local registrar of the decision to have the books destroyed. I immediately called Mr. Hurst to plead against the destruction. He would not change his decision. I spent the next several hours calling several libraries and agencies across the state, informing them of the order - including: Richard H. Belding, State Archivist; Robert Kenard, Directory of the Kentucky Historical Society; Perry T. Ryan, Kentucky Attorney General's Office; and Kenneth Thomson, an associate of the Kentucky Library at Western Kentucky University. In a conversation with Donald G. Dixon, Deputy Secretary of the Department of Human Resources (of which the Vital Records office is a branch) I was able to obtain a temporary stay of execution on the order, pending the reception of a letter from me presenting arguments against the destruction. The same day a new order rescinding the previous order was issued.

The letter on the following page was addressed to the offices of: Secretary of the Department of Human Resources; Kentucky Attorney General; Gov. Wallace Wilkerson; Richard Belding, Kentucky State Archivist; Wendell H. Ford, U.S. Senator; Louis Johnson, Kentucky State Representative; Donald Blandford, Kentucky Speaker of the House; and Delbert Murphy, Kentucky State Senator. In the following week the story of the ordered destruction of the books was widely publicized in the press across the state. The Vital Records office, subsequently, ordered that all of the Kentucky Register of Births and Deaths stored at state offices were to be returned to Frankfort, where they are at present.

On 8 February 1991 the Kentucky Attorney General's office issued their opinion that the Vital Records office had acted illegally in ordering the destruction of the books, stating that any such decision would have to be approved by the State Archives.

I am of the opinion that these events illustrate that we the public need to be informed and concerned about the care and preservation of our public records. In the past many of our public records have been destroyed because of the decision of one or a few. To guard against this I believe public officials should have greater accountability and the public should be informed of any decisions affecting the accessibility or destruction of public records.

Jerry Long Vice-president
WCK : FRA Owensboro, KY

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Kentucky Department for libraries & Archives
MEMORANDUM
TO: Public and University Libraries
FROM: James A. Nelson
State Librarian & commissioner
RE: Birth/Death Indexes
1911 – 1969

DATE: January 14, 1992

I wanted to let you know that the Department for Libraries and Archives has acquired approximately thirty complete sets of the bound volumes of birth and death indexes which were created by the Office of Vital Statistics, Cabinet for Human Resources, for the period 1911 - 1969. Based on the authority of the department under the terms of KRS 171.560 and 171.580, I am offering these excess sets to other public repositories on a first come, first served basis. The number of volumes in each set total 130 and will require a minimum of 24 linear feet of shelf space to store.

The creation of the bound indexes was discontinued by the Office of Vital Statistics after 1969 and replaced with a comprehensive index in a microfiche format. This version of the index remained available for public inspection after the retrieval of the bound volumes by the Registrar of Vital Statistics from the local county health departments during the summer of 1990. As you may recall the retrieval of the bound volumes prompted numerous inquiries from the media, public and university libraries and interested citizens about the future status of the indexes, particularly whether they would subsequently be open to inspection and use by the general public.

To support our position that the bound indexes were public records which should remain open to public inspection, we requested an Opinion of the Attorney General. The Advisory Opinion (OAG 91-25), issued in February 1991, held that the indexes are public records which should be made available for public inspection and that neither the department nor the Cabinet for Human Resources would be liable for disclosure of information contained in them.

If you would like a complete set of the bound index volumes for your repository, please contact Ms. Diana Moses, Manager of our State Records Branch. Because of the number of volumes and current budget limitations, It will be necessary for you to make arrangements to have the set picked up, rather than shipped to you. Since the number of sets is limited, I would suggest that you contact Ms. Moses as soon as possible.

300 Coffee Tree
Road P.O. Box 537
Frankfort, Kentucky 40602-0537
(502) 875-7000

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Messenger-Inquirer , Owensboro, KY, 22 March 1992, p7C:

Library addition help trace roots

The Kentucky Room of the Owensboro-Daviess County Public Library has obtained two new research sources for people tracing genealogies or writing family histories.

Microfilms of the 1920 Kentucky census for all 120 counties in the state are now available, and the library also has received an index of all births and deaths in Kentucky covering the period from 1911 to 1969.

The census microfilms were purchased from the National Archives and the index of births and deaths was given to the library by the Kentucky Department of Libraries and Archives, according to Shelia Heflin, director of the Kentucky Room.

She said 30 sets of the 130-volume collection have been distributed to county libraries and archives in the state. Daviess, McLean and Hancock counties each have complete sets of the collection and Ohio County received a partial set.

The index lists the dates of all deaths during the 58-year period with certificate numbers and also provides the names of babies, their date of birth, county of birth, the birth certificate number and the name of the mother.

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The Bulletin, Vol. 25 (Owensboro, KY: West-Central Kentucky Family Research Association, Summer 1992), 13-14.

TWO VALUABLE ADDITIONS TO THE KENTUCKY ROOM

The Kentucky Room of the Owensboro-Daviess County Public Library has recently obtained two exceptional sources for Kentucky research. Microfilms of the 1920 Kentucky census for all 120 counties in the state are now available. And the Kentucky Register of Births and Deaths (1911-1969) has been obtained.

On Monday, March 2, 1992, the 1920 census was opened for viewing by the National Archives, and about a week later the Kentucky Room received it's order for the 1920 Kentucky census. The format and information in the 1920 census schedules closely resemble that of the 1910 census. The 1920, census, however, did not ask about service in the Union or Confederate army or navy. Unfortunately for the genealogist the 1910 questions about the number of children born to a couple and how long and how many times married were also omitted - these had been especially helpful in filling in data on families. The 1920 census included four new questions: one asking the year of naturalization and three about mother tongue. Unlike earlier censuses the 1920 census was not compiled in the spring/early summer months but was compiled in the weeks immediately following Jan. 1, 1920. An index (soundex system) was compiled for the 1920 census but because of its cost the Kentucky: Room has not (yet) been able to purchase it. Mrs. Elsie Thomas has volunteered to work on compiling a last name index to the 1920 Hancock County, KY census and Jerry Long is working on one for the 1920 Ohio County, KY census. It would be a tremendous service if others would volunteer to work on similar indexes for other local counties (please help). For more data about the 1920 census we suggest the following sources (both of which are in the Kentucky Room):

- The 1920 Federal Population Census: Catalog of National Archives Microfilm, National Archives Trust Fund Board, Washington, D.C.
- "The Fourteenth Numbering of the People: The 1920 Federal Census", Kellee Green, Prologue, Vol.23, No.2, Summer 1991, Quarterly of the National Archives, Washington, D.C., pp.131-47.

In February the Kentucky Register of Births and Deaths was given to the Kentucky Room by the Kentucky Department of Libraries and Archives. This 130 volume set indexes the official birth and death certificates of Kentucky for the years 1911-1969. We were very fortunate to

receive this great source, especially when one considers how close these books came to being destroyed (see The Bulletin, West Central Kentucky Family Research Association, Summer 1991, pp.23-32).

Until September 1990 the Kentucky Register of Births and Deaths had been available for public use in public health departments throughout Kentucky. On the day following Labor Day 1990 the local health department and others across the state were ordered to destroy the books by burning or shredding them. The public had not been informed of the decision. Fortunately in a phone call to our local registrar I learned of the order only a couple of hours after they had received the directive. After calls to other concerned individuals and agencies across Kentucky and several conversations with the Kentucky Department for Human Resources I succeeded in getting them to issue a temporary stay of execution at least until they received a letter from me presenting arguments for the preservation of the records. Subsequently the Kentucky Attorney General's office ruled that the Kentucky Bureau of Vital Statistics had acted illegally in attempting to have the books destroyed. The books were ordered to be turned over to the Kentucky State Archives. Earlier this year the Kentucky Department of Libraries and Archives decided to release the Kentucky Register of Births and Deaths to interested libraries in Kentucky. The Owensboro-Daviess County Public Library was among those who received a complete set. Thus my belief in the "system" has been restored. These events illustrate that an individual can make a difference. If I had not called when I did and refused to take "no" for an answer it may have been quite a different scenario.

Jerry Long
Kentucky Room
Owensboro Library