LIBRARIES: Sex Offender Exclusion Zones. Iowa Code § 692A.113. Iowa Code section 692A.113(1)(f) prohibits sex offenders who have been convicted of a sex offense involving a minor child from being present on the real property of a public library without the written permission of the library administrator. A library administrator should exercise such discretion through a deliberation of competing considerations although such decision making could be exercised in broad categories. (Oetker to Wolf, Clinton County Attorney, 7-8-11) #11-7-1

July 8, 2011

Mr. Michael Wolf
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Dear Mr. Wolf:

You have requested an opinion from this office regarding application of the sex offender exclusion zones codified in Iowa Code section 692A.113 to the real property of a public library. In relevant part, section 692A.113 excludes sex offenders who have been convicted of a sex offense against a minor from the real property of a public library without the permission of the library administrator. You ask whether a library administrator may adopt a blanket policy refusing to grant such written permission under any and all circumstances or whether a library administrator is required to exercise such decision-making authority on a case-by-case basis.

To place this issue within the proper context, it is perhaps beneficial to examine the history of Iowa's residency restrictions and exclusionary zones made applicable to sex offenders. In early 2002, the Iowa legislature enacted certain sex offender residency restrictions, which became effective on July 1, 2002. 2002 Iowa Acts ch. 1157. See also Michael J. Duster, Note, Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders, 53 Drake L. Rev. 711, 720-21 (2005) (discussing progression of Iowa's sex offender residency restriction legislation). The legislation was made applicable to all persons who have "committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor" and precluded such persons from residing "within two thousand feet of the real property comprising a

public or nonpublic elementary or secondary school or a child care facility." Iowa Code §§ 692A.2A(1) & (2) (2003).

Following the State's adoption of the sex offender residency restrictions, Iowa cities sought to impose their own residency restrictions under their broad home rule powers. See Iowa Const. art. III, § 38A (providing that "[m]unicipal corporations are granted home rule power and authority, not inconsistent with the laws of the General Assembly"); Iowa Code § 364.1 (providing that a "city may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents"). As this office observed in responding to the question of whether a city could expand the residency restrictions beyond the real property identified within the state statute, "[i]n light of the high recidivism threat posed by sex offenders and the desire to protect children from this risk, some small towns have enacted residency restrictions" to other locations, including public parks, libraries, and campgrounds. Iowa Att'y Gen. Op. #08-9-2, 2008 WL 6690123, at *5. This office opined not only that a "city's home rule authority to exercise police power encompasses the imposition of residency restrictions upon convicted sex offenders," but also, that a court would likely reject the contention that the State's residency restriction statute either expressly or implicitly preempted local legislation on the subject. Id. at * 3, 4. See e.g., Formaro v. Polk County, 773 N.W.2d 834, 844 (Iowa 2009) (noting that cities and counties had begun adopting ordinances further restricting the residency zones for sex offenders).

As local communities began adopting their own ordinances, rules, and regulations expanding the restrictions beyond the real property identified within the state statute, the area of the state in which sex offenders could reside diminished. In Formaro, the Court observed that evidence presented tended to substantiate the offender's claim "that almost ninety percent of the state falls within the exclusion zones . . . ." Id.

"During the 2009 legislative session, the Iowa General Assembly enacted a comprehensive revision of the sex offender . . . laws in Chapter 692A." State v. Adams, No. 09-1499, 2010 WL 3894440, at *1 n.2 (Iowa Ct. App. Oct. 6, 2010) (citing 2009 Iowa Acts ch. 119). The legislature repealed Iowa's prior statutes

governing the registry and residency of sex offenders, see 2009 Iowa Acts ch. 119, § 31, and enacted new registry and residency restrictions. Iowa Code §§ 692A.101 through 692A.130. Additionally, the legislature added sex offender exclusionary zones and prohibitions on certain employment-related activities. Id. at § 692A.113. Finally, the legislature expressly preempted local action on the subject matter through section 692A.127, which provides:

> [a] political subdivision of the state shall not adopt any motion, resolution, or ordinance regulating the residency location of a sex offender or any motion, resolution, or ordinance regulating the exclusion of a sex offender from certain real property. A motion, resolution, or ordinance adopted by a political subdivision of the state in violation of this section is void and unenforceable and any enforcement activity conducted in violation of this section is void.

Your question focuses squarely on the statutory exclusionary zones, which provide:

> *A sex offender who has been convicted of a sex offense against a minor or a person required to register as a sex offender in another jurisdiction for an offense involving a minor shall not do any of the following*:
>
> a. Be present upon the real property of a public or nonpublic elementary or secondary school without the written permission of the school administrator or school administrator's designee, unless enrolled as a student at the school.
>
> b. Loiter within three hundred feet of the real property boundary of a public or nonpublic elementary or secondary school, unless enrolled as a student at the school.
>
> c. Be present on or in any vehicle or other conveyance owned, leased, or contracted by a public or nonpublic elementary or secondary school without the written permission of the school administrator or school administrator's designee when the vehicle is in use to transport students to or from a school or school-related activities, unless enrolled as a student at the school or unless the

vehicle is simultaneously made available to the public as a form of public transportation.

d. Be present upon the real property of a child care facility without the written permission of the child care facility administrator.

e. Loiter within three hundred feet of the real property boundary of a child care facility.

f. Be present upon the real property of a public library[1] without the written permission of the library administrator.

g. Loiter within three hundred feet of the real property boundary of a public library.

h. Loiter on or within three hundred feet of the premises of any place intended primarily for the use of minors including but not limited to a playground available to the public, a children's play area available to the public, a recreational or sport-related activity area when in use by a minor, a swimming or wading pool available to the public when in use by a minor, or a beach available to the public when in use by a minor.

Iowa Code § 692A.113(1) (emphasis added). A sex offender who violates these provisions commits an aggravated misdemeanor for the first offense and a class "D" felony for each subsequent offense. Id. at § 692A.111(1). Additionally, a sex offender convicted of an aggravated offense against a minor, a sex offense against a minor, or a sexually violent offense while in violation of section 692A.113 is guilty of a class "C" felony in addition to any other penalty provided by law. Id.

Section 692A.113(1)(f) prohibits a sex offender convicted of a sex offense against a minor from being present on the real property of a public library unless

[1] A "public library" is defined to mean "any library that receives financial support from a city or county pursuant to section 256.69." Iowa Code § 692A.101(22) (Supp. 2009).

the library administrator provides written permission.[2] The legislature clearly delegated the discretion to the library administrator to make admission determinations but failed to specify when a library administrator may affirmatively adopt a blanket policy that applicable sex offenders will never be admitted or whether a library administrator is obligated to exercise such discretion on a case-by-case basis.

In 1976 Iowa Op. Att'y Gen. 767, this office examined a statute that vested county sheriffs with the discretion to issue a permit to carry a concealed weapon. In discussing what constitutes a valid exercise of that discretion, this office noted:

> "Discretion may be defined, when applied to public functionaries, *as the power or right conferred upon them by law of acting officially under certain circumstances*, according to the dictates of their own judgment and conscience, and not controlled by judgment or conscience of others."
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> This concept of judgment or discretion implies an "acting" or decision making process between competing consideration. It also connotes a process that is reasonable and unarbitrary, and is not exercised merely by denying or granting the request of a party.

Id. at 768 (emphasis in original). In further analyzing whether the exercise of discretion requires an "act" or decision-making process, this office further stated:

> If for example, a sheriff would categorically refuse or deny the issuance of any permits whatsoever, the discretionary or decision-making power vested in him by the legislature would be rendered a nullity and the responsibility conferred under the language of the statute to render a judgment would be abrogated. This a sheriff cannot do. The legislature has not said that *no* person may carry a

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[2] Sections 692A.113(2)(b) and (c) do allow applicable sex offenders to be present on the real property of a library "during the period of time reasonably necessary to transport the offender's own minor child or ward" to and from a public library and "for the period of time reasonably necessary to exercise the right to vote in a public election if the polling location of the offender is located" in a public library.

> concealed weapon, but rather citizens may be so armed if the sheriff in his judgment finds it to be warranted. . . .
>
> We believe that the discretionary or judgment exercise of a sheriff cannot be accomplished by any hard and fast rule and that judgment on the circumstances must be exercised on each and every application.

Id. (emphasis in original) (internal citations omitted). See Iowa Op. Att'y Gen. #01-10-1 (2001 WL 1651437) (reaffirming principle that when the legislature vests discretion in a governmental actor, the governmental actor may not categorically refuse to exercise the decision-making authority as to do so would render the legislative delegation a nullity).

This principle finds further support from Iowa adjudicatory law. In IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 630 (Iowa 2000), for example, the Iowa Supreme Court reviewed the exercise of discretion in the context of admission of evidence during a workers compensation contested case hearing. Id. As relevant to this issue, the agency possessed a blanket policy excluding all psychologists' testimony in contested case hearings on the issue of causation between a work injury and a mental condition on the basis that psychologists are not physicians under Iowa law. Id. In reversing, the Court found that while the agency possessed the discretion to admit or not admit specific testimony, the agency's blanket exclusion of all such evidence did not constitute proper exercise of such discretion. Id. at 631. The Al-Gharib Court, like the prior opinion of this office discussed above, concluded that discretion requires a decision-making process between competing considerations. The creation of a blanket policy does not encompass the weighing of considerations under the circumstances presented to constitute the valid exercise of discretion.

Finally, it is worth noting that the Iowa legislature differentiated between sex offender exclusions over which a library administrator possesses discretion and those over which a library administrator possesses no discretion. While section 692A.113(1)(f) states that a library administrator may provide written approval for a relevant sex offender to be present on the real property of a library, section 692A.113(1)(g) omits any such approval language that would allow a sex offender

to "[l]oiter[3] within three hundred feet of the real property boundary of a public library." See Greenwood Manor v. Iowa Dep't of Public Health, 641 N.W.2d 823, 835 (Iowa 2002) (holding the legislature's use of different language in separate sections reflects a deliberate differentiating between the two situations).

In light of the aforementioned reasoning, we believe that because the legislature vested library administrators with the authority to provide a sex offender written permission to enter on the real property of a public library, library administrators must exercise such decision-making power. Furthermore, we do not believe that a library administrator's blanket exclusion of all such sex offenders in all circumstances constitutes a valid exercise of this decision-making power. Rather, we believe a library administrator should exercise such discretion through deliberation of the competing considerations. See e.g., Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1255 (3rd Cir. 1992) (recognizing that First Amendment jurisprudence "includes the right to *some level of access* to a public library, the quintessential locus of the receipt of information") (emphasis added).

We do not wish to imply, however, that a library administrator could not exercise such discretion in broad categories. See e.g., Lenning v. Iowa Dep't of Trans., 368 N.W.2d 98, 102 (Iowa 1985) (holding that delegated decision-making discretion does not necessarily require an agency to exercise independent discretion in each individual case where such discretion could be exercised in other manners, such as through rule making). For example, a library administrator may wish to broadly consider and treat admission requests to attend a governmental body's public meeting under Iowa Code chapter 21 differently than admission requests that lack any identifiable purpose or that seek unfettered access to the internet through a public library's computer terminals. Furthermore, even in those situations in which permission to enter is granted, a library administrator could impose reasonable conditions on the individual's presence (*e.g.*, to only certain areas of the public library, to only certain times during the day), the violation of which could give rise to permission revocation. See e.g., Neinast v. Board of

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[3] For purposes of Chapter 692A, "loiter" is defined to mean "remaining in a place or circulating around a place under circumstances that would warrant a reasonable person to believe that the purpose or effect of the behavior is to enable a sex offender to become familiar with a location where a potential victim may be found, or to satisfy an unlawful sexual desire, or to locate, lure, or harass a potential victim."

Trustees of the Columbus Metropolitan Library, 346 F.3d 585, 591-95 (6th Cir. 2003) (finding library policy that excluded entry to individuals not wearing shoes survived First Amendment scrutiny because library policy furthered legitimate governmental interest of protecting public health and safety). Alternatively, a library administrator may wish to adopt policies that would allow access to information and material contained within the public library while limiting or even eliminating the offender's physical presence in the public library.

In sum, section 692A.113(1)(f) vests library administrators with the discretion to allow sex offenders on the real property of a public library. It is our opinion that such discretion should be exercised through a decision-making process under which the competing interests are considered. Additionally, we would recommend library administrators create policies that detail any broad category determinations as well as outlining the application and review process. Naturally, a library may wish to utilize the application process to acquire sufficient information from which the library administrator may make an informed decision.

Sincerely,

Matthew T. Oetker
Assistant Attorney General