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## COUNCIL OF SUPERIOR COURT CLERKS OF GEORGIA

### ADVISORY NOTICE

June 15, 2015

All Clerks,

The following pages reflect the best effort of the Council and Authority to provide you with guidelines as you implement the changes required under SB 135 (Custodianship).

While it may not cover every scenario, I can only suggest a plain reading of the legislation when in doubt.

Thanks to John Earle, Andy Wightwick and Tara Johnson for their assistance in preparing this document. They, and I, stand ready to further assist you as we work to make Superior Court Clerks the most technologically advanced elected officials in Georgia.

Sincerely,

A handwritten signature in black ink that reads "Michael Holiman". The signature is written in a cursive style.

Mike Holiman

Executive Director

# Backup Requirements relating to SB135

Effective July 1, 2015

## Overview

SB135 was passed by the legislature in part to reassert that the Clerk is sole custodian of the records they maintain (see Appendix A). The bill also modernizes certain aspects of record preservation and business continuity by imposing new requirements for electronic backups of records (see Appendix B).

Along with this change, the bill defines what records must be protected by electronic backups, how the backups must be performed, the number of separate backups, and the frequency in which the backups must occur.

## Sole Custodian of Records

Regardless of how or where clerk records are stored or maintained, SB135 is extremely clear that the clerk is the sole custodian of such records and is to be in control of those records. This means that the clerk has full oversight with regard to the ownership of that data even if it is maintained on a county or third party server.

Decisions regarding the handling and treatment of such data, including how the data is stored and backed up are subject to the discretion of the clerk and by the provisions of SB135.

One powerful way in which SB135 asserts clerk ownership of the data is in the provision that requires relinquishment of clerk data by third parties upon the clerk's request: *"Any person or entity or any governmental department, agency, authority, or entity that provides storage or archiving services for records for which the clerk of superior court is custodian shall relinquish possession of all such records and any copies thereof and return such records and copies to the clerk upon request of the clerk."* (see Appendix A).

## What Data Must be Backed Up

SB135 requires multiple electronic backups of ANY record of which the clerk is custodian. This includes, but is not limited to, Real Estate Filings, UCC documents, Notary Commissions, civil and criminal files, accounting and receipting data, etc. Essentially, any record that exists electronically and is under the custodianship of the clerk should be backed up according to the provisions of the bill.

## Backup Requirements

SB135 requires that backups be performed in AT LEAST two "specific" ways (see Appendix B). A clerk may elect to implement as many additional backups as they see fit, but the following two types of backups must be satisfied in order to comply with the law:

- **Backup #1** – a permanent backup that resides on the clerks file server.

This first backup is a clerk maintained and controlled backup of their data. The language used in the bill seems to suggest that the backup be a "local" backup on Clerk owned equipment, but this is not necessarily true. The server that maintains this first backup may or may not reside in the clerk's physical office, and the clerk may or may not actually "own" the server on which the backup resides.

The key point here is that the backup is controlled by the clerk even if it is operated and maintained by a third party vendor or service provider. In such cases where a third party is providing the backup, it is necessary that the clerk seek a contractual agreement with the third party to assert control of the backup. Under the terms of any such contract, it is the clerk who directs what data is backed up, how that data gets backed up, ultimately approves the process used, and that the backup is for the sole benefit of the clerk.

- **Backup #2** – submission to the GSCCCA of any electronic record that the clerk maintains. This second backup is an offsite backup to the GSCCCA and must be in a format approved by the GSCCCA. The GSCCCA will publish official guidance regarding this second backup, though in general terms the GSCCCA will seek to leverage its existing “MyVault” service to accommodate the backup.

For counties that are unwilling or unable to participate in MyVault, the GSCCCA will provide additional options and publish an accommodating file specification for the county to use. The data must be sent to the GSCCCA at least monthly by the 15<sup>th</sup> of the following month, however, the GSCCCA encourages backups to be transmitted as often as possible. Clerks that participate in MyVault generally benefit from nightly offsite backups.

### **Clerk Control and Contractual Requirements**

As previously stated, an important consideration is that the bill enables the clerk to be in control of their own data backups, regardless of the entity that may maintain or host the data. The clerk should be enabled to approve the method and format of the first backup, how it is maintained, and who can access it.

If the first backup is operated or maintained by a third party, it is necessary to have a MOU or contract in effect for the specific purpose of backups, which may or may not be a part of existing vendor contracts.

### **FAQ Regarding Backups**

1. *QUESTION:* I have a local server and my vendor provides nightly backups for me and the backups stay on my server. Does this satisfy the requirements of the “first” backup?

*ANSWER:* Yes, assuming the backup is authorized and approved by the clerk, and there is a contract in place that provides for backups.

2. *QUESTION:* I use a third party cloud based backup company to provide backups for my server. The data is not on my server but I have access to it through the service provider. Does this satisfy the “first” backup?

*ANSWER:* Very likely. Generally speaking, cloud based backup companies store your backup data in a partitioned way such that your data is not comingled with other data. You have access to the data and have authorized the service through your agreement with the company so they are facilitating the backup on your behalf via contract.

3. *QUESTION:* My data is hosted by a vendor outside my courthouse and I do NOT maintain the data locally. However, the vendor performs routine backups of the data. Do these backups satisfy the first level backup?

*ANSWER:* Maybe. The concern here is that it is not likely that the clerk will have any oversight regarding the backup of the data. Also, it is likely that the data hosted by the vendor is being backed up as a whole and that your data is potentially comingled with other customers. This may or may not create a conflict in the law which specifies that the backup is for the exclusive benefit of the clerk. If this is the situation you are currently operating in, it is suggested that you discuss the matter with your vendor and address any concerns with a contract or MOU. Having a contract or MOU in place asserts that you are directing and approving how the backup is performed.

4. *QUESTION:* My vendor, county, or service provider is not willing, or asserts they are unable, to accommodate the provisions of the statute. What are my options?

*ANSWER:* The legislature recognized that backup of the clerk's data is critical and enacted this language to ensure compliance. When the provisions of the statute are not met, the law is being violated. If the reasons for non-compliance are resource related (time, money, etc) then it is recommended that you update your future budget requests to provide for the necessary resources. If the budget request is not granted and the provisions of the law are still not met, it is your duty to do whatever is necessary to compel compliance with the law including filing a mandamus to compel the county to act.

5. *QUESTION:* My county does routine backups of my data and they also store my data at an offsite location, therefore I am already compliant with the law, right?

*ANSWER:* No. The services provided by the county may satisfy the requirements of the "first" backup providing certain requirements are met (see previous questions), but the requirement to send the data to the GSCCCA is not met in this case.

6. *QUESTION:* My vendor does local backups of my data for my benefit and there is a contract in place that addresses backups. I also participate in the GSCCCA MyVault program. Am I in compliance with the full scope law?

*ANSWER:* Probably, but you will want to verify that you are including all the necessary data as part of your backups. Per the law you must backup any record for which you are the custodian.

7. *QUESTION:* Can I perform additional backups.

*ANSWER:* Absolutely. The more backups of your data that you have, the better positioned you will be should you encounter a data loss or disaster.

## **Appendix A**

### **"15-6-60.1.**

**(effective July 1, 2015)**

(a) As the county constitutional officer elected by citizens of his or her county to protect and preserve their court and land records, the clerk of superior court is the sole custodian of all original filed records that the clerk is required by law to retain in his or her office or permitted to store and archive in another location as provided by Code Section 15-6-86.

(b) Regardless of the methodology, system, or location used by the clerk of superior court for filing, recording, archiving, and storing records, any request for access to or copies of records, including requests made pursuant to Article 4 of Chapter 18 of Title 50 for access to or copies of any record filed, recorded, or retained by a clerk of superior court, shall be made to the clerk of superior court.

(c) The clerk of superior court may contract with any person or entity or any governmental department, agency, authority, or entity for the purpose of archiving or storing electronic records of the clerk's office. When the clerk executes a contract for such purpose, such service provider shall not provide access to or copies of any records without the express written approval of the clerk of superior court.

(d) Any person or entity or any governmental department, agency, authority, or entity that provides storage or archiving services for records for which the clerk of superior court is custodian shall relinquish possession of all such records and any copies thereof and return such records and copies to the clerk upon request of the clerk. This subsection shall not apply to records provided by the clerk of the superior court to the Georgia Superior Court Clerks' Cooperative Authority pursuant to laws requiring transmittal of records of the clerk's office to such authority.

(e) Records that the clerk of superior court is required by law or rules and regulations to provide to other governmental departments, agencies, authorities, and entities to enable such departments, agencies, authorities, and entities to perform their duties or to support the functions assigned to such departments, agencies, authorities, and entities shall not be used for any purpose other than the performance of such duties or functions.

(f) Records provided by the clerk of superior court to the Georgia Superior Court Clerks' Cooperative Authority shall be used by the authority only for the performance of its statutory duties, including providing online access to such records.

(g) Nothing in this Code section shall be construed to require or otherwise affect the appropriation of public funds by a local governing authority to a clerk of superior court."

## **Appendix B**

**"15-6-62.1.**

**(effective July 1, 2015)**

(a) As used in this Code section, the term:

(1) 'Authority' means the Georgia Superior Court Clerks' Cooperative Authority.

(2) 'Back-up record' means an electronic copy of any record that a clerk of superior court is required to create pursuant to Code Sections 15-6-61 and 15-6-62.

(b) A clerk of a superior court electing to record in digital format any record of which he or she is the custodian shall maintain a back-up record in at least two ways:

(1) By the clerk permanently retaining the back-up record on the clerk's secure file server, either controlled and operated by the clerk or personnel employed by the clerk or provided for the exclusive benefit of the clerk's office through a contractual relationship between the clerk and a public or private entity for such purpose; and

(2) By the clerk submitting all digitally formatted records that the clerk is statutorily authorized and required to archive with the authority for permanent archiving, as set forth in subsection (c) of this Code section.