

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



October - December 2004

OPINIONS

CRIMINAL PROCEDURE – DNA DATA BASE MATCH MAY BE USED TO ESTABLISH PROBABLE CAUSE FOR ARREST

Question: May a match between DNA recovered at a crime scene and an entry in the State's DNA data base be used as probable cause to arrest the individual identified based on the data base sample?

Answer: A data base match may be used to establish probable cause to charge and arrest an individual, as well as to obtain a DNA sample from that individual. The data base match would be inadmissible at trial, unless a confirmatory sample obtained from the individual also matched the crime scene DNA.

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MUNICIPALITIES – MAY IMPACT FEES BE USED TO DEFRAY THE COST OF POLICE AND FIRE PROTECTION SERVICES?

Question 1: May a municipal corporation impose an impact fee on residents of new developments within the municipality to fund additional police and fire protection services?

Answer: Not if the ordinance creating the fee is primarily a revenue measure and the impact fee is therefore a tax. In that case, enabling legislation by the General Assembly would be necessary. However, under existing statutory authority, a municipality may impose an impact fee as part of a regulatory measure, as long as there is an adequate nexus between the charge imposed and the cost of services provided to the property assessed, and as long as the revenue is appropriately earmarked for

the benefit of that property. A fee related to the provision of police and fire protection services would not likely be a regulatory fee.

Question 2: May the municipality impose such a fee for additional fire protection services if the fire department is not a municipal department, but a local volunteer fire department to which the municipality contributes funding?

Answer: The requirements for a valid regulatory fee are particularly unlikely to be met if the municipality's contributions to a volunteer fire department are voluntary.

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PREEMPTION – COUNTY ORDINANCE THAT RESTRICTS TRAPPING OF ANIMALS IS PARTIALLY PREEMPTED BY STATE LAW

Question: Does State law preempt §17.307(e) in Howard County Bill 51-2004, which would restrict the use of traps to capture animals?

Answer: While some portions of Bill 51-2004 are consistent with State law (e.g., allowing the use of traps to catch rats and mice, prohibiting certain traps within 150 feet of another's residence), other portions of the ordinance are inconsistent with State law (e.g., prohibition of leg-hold traps, intervals at which traps must be checked, requirement that DNR agents notify county official before setting traps). To the extent that §17.307(e) conflicts with State law, the County ordinance is preempted.

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**PROCUREMENT OF ARCHITECTURAL AND
ENGINEERING SERVICES – MAY GENERAL
PROFESSIONAL SERVICES SELECTION BOARD
CONSIDER PRICE PROPOSALS FROM MORE
THAN ONE FIRM AT A TIME?**

Question: Do the procedures that govern the State’s procurement of architectural and engineering services allow the General Professional Services Selection Board (General Selection Board) to request price proposals from more than one firm at a time when it negotiates a contract for these services?

Answer: The General Selection Board must follow a specific process set forth in the State procurement law to negotiate a contract for architectural and engineering services. With one exception related to indefinite quantity contracts, that process does not permit the General Selection Board to consider more than one price proposal at a time. The General Selection Board must first evaluate technical proposals and qualifications of competing firms. Once it has ranked the firms on that basis, the Board must obtain a price proposal from the top-ranked firm and attempt to negotiate a contract. If the negotiations do not result in a contract, the Board must obtain a price proposal and attempt to negotiate a contract with the second-ranked firm, proceeding through all the competing firms, one at a time, in the order in which they are ranked. It would be inconsistent with the procurement law for the General Selection Board to obtain price proposals from more than one firm at a time or to obtain a price proposal from a firm at a time when the law does not permit it to negotiate with that firm.

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**REGIONAL DEVELOPMENT AGENCIES –
SHOULD STATUTORY PROVISIONS
CONCERNING DISSOLUTION BE REPEALED
AS PART OF CODE REVISION?**

The statutes governing several regional development agencies each provide that, upon

“dissolution” of the agency, its assets are to be distributed to organizations exempt from federal taxation under §501(c)(3) of the Internal Revenue Code, and that any assets not so distributed are to be disposed of by the circuit court. Prior bill review letters concluded that the requirement that a court dispose of the assets of a dissolved agency assigns a nonjudicial duty to a court, in violation of Article 8 of the Maryland Declaration of Rights.

Question 1: May a regional development agency dissolve without legislation to repeal its statutory charter?

Answer: No.

Question 2: If the answer to Question 1 is “no,” how could the provision requiring disposition of agency assets to a §501(c)(3) organization take effect? And, if it cannot take effect, may the entire dissolution provision properly be repealed in a nonsubstantive revision of the agency’s statute?

Answer: The provision requiring disposition of agency assets to §501(c)(3) organizations could be given effect if the Legislature amended the agency’s enabling law to set a termination date for the agency, but otherwise left that law, including the provision concerning disposition of agency assets, in effect. Of course, as part of its decision to terminate the agency, the General Assembly could also choose to dispose of the agency’s assets in some other way. In our opinion, the provision concerning disposition of assets to §501(c)(3) organizations should not be repealed in a nonsubstantive revision of the Code.

Question 3: Because of constitutional issues surrounding the assignment of a nonjudicial duty to a court, may the provisions assigning to a court the duty to distribute certain assets of a dissolved regional development agency properly be repealed in a nonsubstantive revision?

Answer: Although that part of the existing law that assigns to the circuit court the duty to distribute assets of a terminated agency raises a constitutional issue, the law can be construed in a constitutional manner, if the court’s jurisdiction to distribute assets is invoked through an

interpleader or other appropriate action. Accordingly, that provision should not be repealed in a nonsubstantive revision of the Code.

Question 4: Are moneys of a regional development agency “State funds,” so that disposition of assets under the enabling laws of the agency would result in a conflict with State Finance & Procurement Article, §7-302 or other relevant provisions?

Answer: While SFP §7-302 states a general rule that unspent agency appropriations revert to the State’s general fund, the General Assembly may, by statute, specify other dispositions of State funds. The disposition of some funds held by a regional development agency may also be subject to conditions set by a grantor, such as the federal government.

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**UNEMPLOYMENT INSURANCE –
APPROPRIATE USE OF
SPECIAL ADMINISTRATIVE EXPENSE FUND**

Question: Would it be appropriate for the Department of Labor, Licensing, and Regulation to use the Special Administrative Expense Fund (SAEF), a special fund it administers, to supplement federal funds received for the administration of the Maryland Unemployment Insurance Law, to pay expenses related to the occupancy, maintenance, and improvement of space used for the administration of that law, and to pay for “substituted operational costs incurred as a result of consolidation of leased space”?

Answer: SAEF moneys may be used for the various administrative purposes set forth in the SAEF statute. Neither the budget bill nor a budget amendment may expand those purposes. Among the purposes listed in the statute is the *acquisition* of space for the administration of the Unemployment Insurance Law. While there is no specific provision in the statute allowing for payment from the Fund of costs related to occupancy, such as utilities, maintenance, and security, in some circumstances

these costs may be considered part of the cost of acquisition. Money in the SAEF may not be devoted to a use not allowed by the SAEF statute, such as operational expenses, unless the General Assembly passes a law permitting that use.

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ADVICE LETTERS

**CLERGY – DISCRETION TO REFUSE
TO MARRY ANY COUPLE**

Question: Would members of the clergy be required to perform same sex marriages if such marriages were to become legal in Maryland?

Answer: No; a member of the clergy is not required to perform a marriage for any specific couple, but is free to agree or refuse to marry couples based on his or her own reservations and the tenets of his or her religion.

Letter to
Delegate Richard S. Madaleno, Jr.
December 15, 2004

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**CONDOMINIUM ASSOCIATION ANNUAL
MEETING – CANNOT BE CONDUCTED
BY E-MAIL**

Question: Do provisions of Title 11 of the Real Property Article, including §§11-139.1 and 11-139.2, authorize a condominium association to hold its annual meeting entirely by e-mail?

Answer: No; there is no clear authority for such a meeting.

Letter to
Senator Leo Green
December 13, 2004

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**CRIMINAL BACKGROUND CHECKS –
INDIVIDUALS WHO PROVIDE CARE FOR
CHILDREN OR DEPENDENT ADULTS**

Question 1: Do Family Law Article, §5-560 *et seq.*, and Health - General Article, § 19-1901 *et seq.*, which require criminal background checks (CBC) for certain individuals who work with children at county recreation programs or day camps, or with dependent adults in certain types of programs, apply to employees and independent contractors who do not work directly with children or dependent adults, but merely work at a government facility where a care program is offered?

Answer: No; an individual who works at a county recreation program or day camp must apply for a CBC as a condition of employment only if the employee cares for, supervises, or has access to children in the program. This condition applies regardless of whether the individual is employed directly by the county or by a county contractor. An employee who has no responsibility for the care or supervision of children in a program has “access” if, due to the nature of his or her duties, the individual would ordinarily be expected to have some contact with the children in the course of that employment. An employee who would not have such “access” would not be required to apply for a CBC. The statute governing adult dependent programs establishes similar requirements for employees of those programs.

Question 2: Can an employee subject to the requirement begin work before the criminal background check is completed?

Answer: Yes.

*Letter to
[Pamela R. Lucas, Esquire](#)
Calvert County Attorney's Office
December 1, 2004*

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LEGISLATIVE RECESS – VOTE REQUIRED

Question: At a special session of the General Assembly, would a recess by both houses for more

than 3 days require the concurrent vote of 2/3 of the members present?

Answer: No; text, history, and purpose indicate that the 2/3 vote requirement in Article III, §25 of the Maryland Constitution applies only to the “relocation” clause of that section, and not to the adjournment clause.

*Letter to
[Speaker Michael E. Busch](#)
December 23, 2004*

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**MEDICAL MALPRACTICE REFORM BILL –
PRE-JUNE 1 EFFECTIVE DATE**

Question: May proposed legislation on medical malpractice reform be enacted with a pre-June 1 effective date, without passing as emergency legislation?

Answer: Yes; the effective date of the bill is governed by Article III, §31 of the State Constitution. The revenue-raising/spending component of the legislation makes the bill exempt from referendum, and thus from the June 1 effective date specified by Article XVI, §2 of the Constitution.

*Letter to
[Speaker Michael E. Busch](#)
December 27, 2004*

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**MUNICIPALITIES – REQUIRING
SUPERMAJORITY VOTE OF COUNCIL TO
INITIATE CHARTER AMENDMENT**

Question: Can a municipal charter be amended to require a supermajority vote of the council to approve any charter amendment?

Answer: No.

*Letters to
[Delegate George C. Edwards](#)
October 4, 2004
Senator John J. Hafer
September 27, 2004*

**NEPOTISM – EMPLOYEE TEMPORARILY IN
CHARGE OF ELECTION OFFICE**

Question: Would it violate the anti-nepotism provision of the State Personnel Law (State Personnel & Pensions Article, §2-307(a)) for an election office employee to be placed temporarily “in charge” of the office, while the director and deputy director are absent, if that employee’s spouse is also an employee of the office?

Answer: The answer depends on the duties and responsibilities of the employee while “in charge” of the office. If the employee functions more as a “lead worker” than as a “supervisor,” and if the situation only rarely arises, the arrangement would not violate the statute.

*Letter to
[Guy L. Harriman, President](#)
Howard County Board of Elections
October 1, 2004*

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**NOT-FOR-PROFIT CORPORATION AS
MINORITY BUSINESS ENTERPRISE OR AS
EXEMPT FROM MBE REQUIREMENTS –
MISCELLANEOUS QUESTIONS**

Question 1: Could the General Assembly constitutionally amend the definition of “minority business enterprise” (MBE) to include a not-for-profit, nonstock corporation organized to promote the interests of socially and economically disadvantaged individuals?

Answer: Such a race-based classification would be subject to strict constitutional scrutiny and is probably not supported by any existing study. Moreover, a requirement that State agencies contract with such organizations when contracting with not-for-profit entities could interfere with non-discrimination laws and regulations.

Question 2: Does State Finance & Procurement Article, §14-301(f)(2), which includes within the term “minority business enterprise” a not-for-profit entity organized to promote the interests of physically or mentally disabled individuals, violate the Equal Protection Clause?

Answer: Classifications based on handicap are subject to rational basis scrutiny, and §14-301(f)(2), if challenged, would likely be upheld, since it is not clearly arbitrary.

Question 3: Would it be constitutional to exempt not-for-profit entities from the statutory goal of 25% MBE participation?

Answer: Yes; such a general exemption would not be based on any suspect classification.

Question 4: Would an exemption applicable only to not-for-profit entities of which at least 51% of the directors are socially or economically challenged be constitutional?

Answer: Probably not; such an exemption would be race-based and subject to strict scrutiny. We are aware of no study that would support the classification. Moreover, the benefits of a race-based affirmative action program must be focused on genuinely disadvantaged persons. Thus, any exemption of this type should be limited to organizations controlled by individuals who are both socially and economically disadvantaged.

Question 5: Have other states exempted not-for-profit entities from their MBE procurement requirements?

Answer: We are aware of none.

Question 6: Have other states defined not-for-profit entities under an MBE statutory scheme so that courts have applied a rational basis standard?

Answer: No; Connecticut and Massachusetts schemes that may be considered similar would be subject to strict scrutiny.

*Letter to
[Delegate Samuel I. Rosenberg](#)
October 26, 2004*

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**OVERRIDE OF GOVERNOR’S VETO – EFFECT
ON DATES IN BILL**

House Bill (HB) 1188 (2004), entitled “Higher Education Affordability and Access Act of 2004 – Supplementary Appropriation,” was

vetoed by the Governor. The bill would have required tuition caps at certain State institutions of higher education in the academic years beginning in the fall of 2004, 2005, and 2006. It would have financed the expense of these caps with a supplementary appropriation in Fiscal Year 2005, and mandated appropriations in Fiscal Years 2006 and 2007. The supplementary appropriation was supported by a surcharge on the corporate income tax rate for taxable years beginning after December 31, 2003 but before January 1, 2007.

Question: If the General Assembly overrides the Governor's veto of a bill at the next session, how does this affect dates within the bill that have already passed?

Answer: Because any ordinary bill taking effect because of a veto override would take effect 30 days after the override, time periods within the bill might have to be adjusted to give full effect to the intention of the Legislature. If those periods corresponded, as they do in HB 1188, to a fiscal or academic year, the date should ordinarily be moved to correspond to the next such year. As to HB 1188, the tuition caps, the supplementary appropriation, and the mandated appropriations would all be moved back a year, but the corporate tax rate increase could take effect as specified in the bill.

*Letter to
Delegate Adrienne A. Jones
December 13, 2004*

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**PHYSICIANS – FORMATION OF NONPROFIT
ORGANIZATION TO OBTAIN CHARITABLE
IMMUNITY**

Question: Could a group of physicians form a nonprofit organization to take advantage of the charitable immunity enjoyed by nonprofit hospitals?

Answer: It is unlikely that a medical practice could meet the requirements for charitable immunity under Maryland law. Moreover, even if a practice could meet those requirements, the immunity would protect only the practice itself, and not any negligent practitioner.

*Letter to
Delegate Michael D. Smigiel, Sr.
November 24, 2004*

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**SPECIAL SESSION – AUTHORITY
OF GOVERNOR TO ADJOURN**

Question: Can the Governor adjourn a special session of the General Assembly?

Answer: No; only the General Assembly itself has authority to determine the date of adjournment, within the maximum limit established for the length of a special session by the State Constitution.

*Letter to
Senator Brian E. Frosh
December 21, 2004*

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**SPECIAL SESSION –
MISCELLANEOUS QUESTIONS**

Question 1: When a special session is called, can the General Assembly by special order delay consideration of gubernatorial vetoes until the regular session?

Answer: No.

Question 2: Can the General Assembly pass legislation at a special session and then delay consideration of vetoed bills by recessing the special session until a future date?

Answer: Yes, as long as the vetoes are taken up before the conclusion of the special session and both houses concur in the recess.

Question 3: Can a special session called within 30 days before the scheduled beginning of the regular session continue past the beginning of the regular session?

Answer: No; the special session must terminate before the scheduled beginning of the regular session. Any vetoes not considered by the time of termination would be automatically sustained.

Question 4: At a special session called for a particular reason, can legislation be introduced on another subject?

Answer: Yes. However, it has been recent practice to refer legislation on other matters to the Rules Committee of each house, where the legislation has died.

Question 5: Can the Governor decline to return a vetoed bill?

Answer: No.

Question 6: Can a standing committee consider and approve legislation before the start of a special session?

Answer: Yes.

Question 7: Can the Governor force members of the General Assembly to attend a special session?

Answer: No; each house has the sole power to compel members to attend sessions and to punish members for unexcused absences.

Question 8: Is campaign fundraising prohibited during a special session?

Answer: No; Election Law Article, §13-235 applies by its terms only to a regular session.

Question 9: Is the Senate required to take up recess appointments during a special session?

Answer: No; they may be taken up only at a regular session.

Question 10: If the Governor vetoes a bill passed at a special session, what can the General Assembly do?

Answer: The General Assembly's options are generally the same as those available during a regular session. The General Assembly could pass the bill and, without adjourning, present the bill to the Governor, who would have 6 days to sign, veto, or allow the bill to become law without his signature. If the bill were vetoed, the General Assembly could vote to override at that time. This option would not be available if the General Assembly adjourned, or if presentment occurred after the 24th day of a 30-day special session. If the General Assembly adjourned before a veto, the

Governor would have to return the bill at the beginning of the next regular session.

*Letter to
President Thomas V. (Mike) Miller and
Speaker Michael E. Busch
December 23, 2004*

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VEHICLE LAWS – USE OF CAMERAS FOR SPEED MONITORING

Question: Does Transportation Article, §21-1414, the legal authority that would support the use of cameras to enforce electronic toll collection in “HOT/Lexus lanes” on highways and at the Chesapeake Bay Bridge toll lanes, also support the use of radar cameras for speed monitoring?

Answer: No; the statute expressly permits video-monitoring to enforce the collection of electronic tolls, but not for speed limit enforcement.

*Letter to
Senator Jennie M. Forehand
October 29, 2004*

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