

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



April through June 2007

OPINIONS

ARREST – CRIMINAL RECORDS – PUBLIC INFORMATION ACT – MUG SHOT IN POSSESSION OF POLICE DEPARTMENT IS NOT “CRIMINAL HISTORY RECORD INFORMATION” BUT SHOULD BE TREATED AS INVESTIGATORY RECORD SUBJECT TO INSPECTION UNDER THE PUBLIC INFORMATION ACT

Question: Must a police department disclose a mug shot in response to a request under the Public Information Act? Or do the laws governing “criminal history record information” preclude the police department from disclosing the photograph?

Answer: A mug shot in the possession of a police department is not subject to the restrictions placed on “criminal history record information” by State and federal law. Rather, a mug shot should be treated as an investigatory record of the police department. Thus, it should be disclosed in response to a Public Information Act request unless the department determines that disclosure would be contrary to the public interest.

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CRIMINAL PROCEDURE – PAROLE AND PROBATION – AUTHORITY OF THE PAROLE COMMISSION TO RESTRICT AN OFFENDER’S CONTACT WITH THE OFFENDER’S OWN CHILD

Question: Does the Maryland Parole Commission (“Commission”) have the authority to impose a special condition of parole or mandatory supervision release prohibiting contact between an offender and his or her child, and if so, may the

Commission legally enforce the condition if the offender brings a visitation or custody action?

Answer: The Commission may not impose a special condition prohibiting contact between an offender and his or her own children unless a court has already done so. However, where a child of the offender was the victim of his or her offense, the Commission may require that any contact by the offender with that child be supervised. If the offender brings a visitation or custody action, the Commission should defer to the court with jurisdiction over the action.

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CRIMINAL PROCEDURE – TRANSPORTATION AUTHORITY – EXECUTIVE ORDER – TRANSPORTATION AUTHORITY POLICE MAY PATROL MARC RAILROAD TRAINS AND STATIONS

Question: May the Maryland Transportation Authority Police be assigned to patrol MARC railroad trains and stations, including Amtrak stations?

Answer: State law allows for the jurisdiction of the Transportation Authority Police to be extended by order of the Governor. A 2004 executive order directed the Transportation Authority Police to exercise police powers to protect publicly owned and common carrier “transportation assets” – a phrase that includes MARC trains and stations served by MARC trains. Transportation Authority police officers may be assigned to patrol MARC trains and stations in Maryland, including Amtrak stations served by MARC trains. The Transportation Authority Police may enter into agreements with other law enforcement agencies that also have jurisdiction

over those locations, including the Amtrak Police Department, to coordinate their efforts.

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**ENVIRONMENT – FEES – REAL PROPERTY –
WHETHER UNPAID BAY RESTORATION FEE
CONSTITUTES A LIEN ON REAL PROPERTY**

Question: Does the statute establishing the Bay Restoration Fee create a lien on real property for unpaid charges that may be collected through the tax sale process?

Answer: No. An unpaid tax or fee does not constitute a lien on real property unless the lien is expressly provided by law. The statute establishing the Bay Restoration Fee does not itself create a statutory lien. Rather, that statute authorizes local governments and other “billing authorities” to use their existing procedures for collecting water and sewer bills to collect the Bay Restoration Fee records. In some jurisdictions, current law may provide for a lien that would encompass other charges that may appear on a water or sewer bill, such as the Bay Restoration Fee. However, a local law simply making unpaid water or sewerage charges a lien would be insufficient to create a lien for other unpaid charges. Absent a statutory lien, an unpaid charge may not be collected through the tax sale process.

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**PUBLIC ETHICS LAW – PUBLIC INFORMATION
ACT – MUNICIPALITIES – BOWIE PUBLIC
ETHICS ORDINANCE IS CONSISTENT WITH
STATE PUBLIC ETHICS LAW – EXEMPTIONS
FROM DISCLOSURE IN ORDINANCE ARE
CONSISTENT WITH PUBLIC INFORMATION ACT**

The following questions concern the application of the Public Information Act (“PIA”) to certain records of the City Ethics Commission of the City of Bowie.

Question 1: Are the provisions of the City’s Public Ethics Ordinance concerning the disclosure of advisory opinions of the City Ethics Commission and the disclosure of records related to complaints filed with that commission consistent with the Maryland Public Ethics Law?

Answer: The part of the City ordinance concerning disclosure of advisory opinions of the City Ethics Commission is virtually identical to the model ethics law for local governments developed by the State Ethics Commission pursuant to the Public Ethics Law. Similarly, the part of the City ordinance concerning disclosure of records relating to complaints filed with the City Ethics Commission is nearly identical to the State Ethics Commission’s model ordinance. Accordingly, these provisions are consistent with the Maryland Public Ethics Law.

Question 2: Is an advisory opinion of the City Ethics Commission exempt from disclosure under the PIA?

Answer: The City Public Ethics Ordinance provides that advisory opinions of the City Ethics Commission are to be “published and otherwise made available to the public” except that the identity of the subject, *i.e.*, the person who is the subject of the advisory opinion, is to be deleted. While a municipal ordinance cannot ordinarily create an exception to the general rule of disclosure under the PIA, this particular provision derives from the model local ordinance promulgated by the State Ethics Commission pursuant to a statute that requires local governments to enact ethics laws similar to the Maryland Public Ethics Law. The confidentiality provision in the City ordinance is similar to a parallel confidentiality provision in the law that governs advisory opinions of the State Ethics Commission. The PIA defers to other State statutes that make particular records or particular information confidential. Thus, the identity of the subject of a City Ethics Commission advisory opinion should not be disclosed in response to a PIA request.

Question 3: Are records related to a complaint filed with the City Ethics Commission exempt from disclosure under the PIA?

Answer: The City Public Ethics Ordinance provides that all actions of the City Ethics Commission on a complaint are to be treated as confidential “until a final determination by the Commission.” This provision is also based on the model ordinance developed by the State Ethics Commission pursuant to State law. Accordingly, records related to a complaint filed with the City Ethics Commission may not be disclosed in response to a PIA request until the Commission has made a final determination. It is also possible that other exceptions in the PIA may apply to particular records related to a complaint.

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ADVICE LETTERS

BOARD OF PUBLIC WORKS – DEVELOPMENT RIGHTS AND RESPONSIBILITIES AGREEMENTS – ZONING AND PLANNING

The Board of Public Works posed several questions relating to an application for a State wetlands license that is pending before the Board. The following paragraph is an excerpt from a settlement between the developer applying for the license and the County Commissioners of Queen Anne’s County:

The Commissioners acknowledge and agree that they shall not directly or indirectly oppose or interfere with any approvals for the development of Four Seasons in accordance with the Developer’s Rights and Responsibilities Agreement (“DRRA”).

Question 1: Is it legally permissible for a local government body to agree to withhold opposition or interference?

Answer: Yes, with qualifications. However, a local government body may not bargain away its police power except to the extent authorized by law.

Question 2: Does this agreement entered into by a prior Board of County Commissioners bind subsequent Boards of County Commissioners?

Answer 2: The Four Seasons DRRA and the surviving provisions of the settlement agreement are binding on subsequent boards of county commissioners. However, a subsequent Board of County Commissioners could suspend or terminate the Four Seasons under the DRRA Law and related provisions of the Settlement Agreement if the Board made certain findings in accordance with the DRRA Law after following the procedures required by the circuit court in a related judgment.

Questions 3: Does this Agreement apply only to the County Commissioners acting as a government entity or does it also apply to Commissioners acting individually?

Answer: Paragraph 3 of the Settlement Agreement applies only to the Board of County Commissioners acting as a government entity.

Question 4: Is this paragraph a “gag order,” *i.e.*, does this Agreement prohibit County Commissioners from speaking to other elected officials concerning their views on the Four Seasons development? In the context of Board of Public Works review of the wetlands license application, would individual Commissioners violate the Settlement Agreement by responding to questions from Board of Public Works members?

Answer: If Paragraph 3 of the Settlement Agreement is interpreted to apply only to the Commissioners’ official actions, it is not a “gag order.” However, if construed to apply to statements of individual Commissioners with respect to a State wetlands license application, it would be equivalent to a gag order. Such a provision would be of doubtful legality.

Letter to
Sheila McDonald
Executive Secretary, Board of Public Works
May 21, 2007

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**COUNTY SCHOOL BOARDS –
LEASE OF SCHOOL PROPERTY**

Question: Does the Baltimore County Board of Education have the authority to lease school property to a phone company to construct a cell tower? Would legislation to reverse a decision by the Board raise preemption or constitutional problems?

Answer: As amended in 2004, §4-114 of the Education Article provides that “[a] private entity may hold title to property used for a particular public school or local school system if the private entity is contractually obligated to transfer title to the appropriate county board on a specified date.” This provision would appear to provide the Board with the authority to lease school property to a phone company. Legislation to reverse such a decision by the Board, however, could raise a federal preemption as well as other constitutional issues with respect to contract impairment and the taking of property.

*Letter to
Senator Robert A. Zirkin
May 30, 2007*

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EMERGENCY BILLS – EFFECTIVE DATE

Question: HB 1429 (Reforestation - Replacing Trees Destroyed by Pest Treatments), titled an “Emergency Bill” was signed on April 24, 2007. What is the bill’s effective date?

Answer: Under Article XVI, §2 of the Maryland Constitution, a three-fifths vote in both houses is needed to pass an emergency bill. Although HB 1429 is labeled an “Emergency Bill,” it did not receive a three-fifths vote in both houses. Thus, the bill will take effect on June 1, 2007 rather than on the day the bill was signed.

*Letter to
Joseph Bryce
Office of the Governor
April 27, 2007*

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**FIRST AMENDMENT – FREE SPEECH – USE OF
NAMES AND IMAGES WITHOUT CONSENT**

Question: May the Maryland General Assembly regulate the sale of T-shirts with the names of soldiers who have died in Iraq where the seller refuses to remove the names on request of the soldiers’ families?

Answer: The First Amendment protects the sale of a T-shirt listing the names of soldiers who have died in Iraq. This protection is not diminished by the facts that the communication appears on a T-shirt, instead of in a book or pamphlet, and that the shirts are sold for a profit.

The T-shirts are not commercial speech, which is entitled to a lesser level of protection under the First Amendment. Commercial speech advertises a product or service for business purposes. The T-shirts do not advertise a product for a business purpose; they convey a political message. Thus, they are not commercial speech and are entitled to the full measure of First Amendment protection.

The State can regulate the sale of these T-shirts to the same extent that liability can be imposed with respect to libel, invasion of privacy, and rights of publication as a result of use of a person’s name or image. As a practical matter, however, the General Assembly will only be able to regulate the narrow situation of commercial speech designed to gain a commercial advantage, because the First Amendment substantially limits the authority to recover damages for these torts. The T-shirts contain factual assertions that soldiers have died in Iraq and cannot be considered defamatory of them. Moreover, in publicizing the names of soldiers, the T-shirts rely on information that is publicly available, making difficult an action for invasion of privacy. Finally, the tort of right of publicity has been limited by the Maryland courts to the situation where a person’s name or likeness has commercial value. This does not cover the case of the name of person on a T-shirt.

*Letter to
Delegate Nicholas R. Kipke
June 8, 2007*

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FIRST AMENDMENT – SMOKING ADVERTISING

Question: Legislation is being considered to require a movie theater to show a 30 second anti-smoking public service announcement prior to a movie depicting smoking. Would this requirement violate the First Amendment or be preempted by federal law?

Answer: A movie that depicts smoking is protected expression under the First Amendment. A theater that chooses to display such a movie cannot be required to air a public service announcement without violating the First Amendment. It is much less clear whether the proposed legislation would be preempted by federal law concerning the advertising of cigarettes.

*Letter to
Delegate Saqib Ali
April 11, 2007*

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GENERAL ASSEMBLY – BILL ENACTMENT RULES

Question: Under the rules of statutory construction, “when the respective houses of the legislature pass what purports to be the same bill but the contents differ substantially, the enrollment of the bill as finally passed is not conclusive, and the bill is not law.” Following amendments made to Senate Bill 361 (Cigarette Fire Safety Performance Standard and Firefighter Protection Act) in both houses, were the final versions identical, allowing the bill to be deemed to have passed both houses of the General Assembly and become law?

Answer: The amendment made by the House to the Senate bill was a technical, nonsubstantive one that did not detract from the House’s approval of the substance of the legislation both in SB 361 and its companion legislation. As both versions are considered identical, SB 351 validly passed both houses.

*Letter to
Senator Mike Lenett
April 25, 2007*

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HEALTH INSURANCE - “DOMESTIC PARTNER”

House Bill 1057, “Health Insurance – Family Coverage Expansion Act” requires, among other things, insurance policies or contracts to provide that the same health insurance benefits and eligibility guidelines that apply to covered dependants are available, at the request of specified persons, to specified partners and child dependents of domestic partners of the insured. (Note: House Bill 1057 was enacted as Chapter 639, Laws of Maryland 2007.)

Question 1: Do Maryland statutes currently contain any provisions that define “domestic partner,” “life partner,” or similar designation? If so, does the definition of “domestic partner” in HB 1057 differ from the language in other definitions?

Answer: No provision in Maryland law currently defines, or uses, the term “domestic partner,” or “life partner.” Although the term “domestic partnership” in the Corporations and Associations Article refers to business partnerships, there is no meaningful comparison between the definitions relating to domestic business partnerships and domestic partners as defined in HB 1057.

Question 2: What is the implication of the reference in the bill to “civil union” with respect to recognition of other state’s laws that allow civil unions or marriage between people of the same gender?

Answer: There is no implication that House Bill 1057 recognizes civil unions or marriages.

Question 3: In light of the current case pending in the Court of Appeals, *Conaway v. Deane*, addressing constitutional issues concerning domestic partnerships, does House Bill 1057 raise questions of legislative interference with a pending court proceeding?

Answer: No. Because *Conaway v. Deane* does not involve domestic partnerships, HB 1057 does not address, nor would it resolve any issue in a pending case.

*Letter to
Senator Alex X. Mooney
April 6, 2007*

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MUNICIPALITIES - SPEED MONITORING SYSTEMS

Question: Do municipalities in Montgomery County have the authority to use speed cameras? May a municipality without a police force enter into an agreement with a neighboring jurisdiction to issue citations based on speed cameras?

Answer: Transportation (“TR”) Article §21-809 authorizes a municipal police department in Montgomery County to use a speed monitoring system within the highways under its jurisdiction. Also, Criminal Procedure (“CP”) Article §2-105 authorizes municipalities to enter into mutual aid agreements with other counties or municipalities. So long as the speed cameras comply with the requirements set out in TR §21-809 and the agreement complies with CP §2-105, municipalities in Montgomery County may use speed cameras and a municipality may enter into an agreement with another municipality to issue the authorized citations in its jurisdiction.

*Letter to
Senator Robert J. Garagiola
April 11, 2007*

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PUBLIC INFORMATION ACT - DOCUMENT REQUESTS - LIMITATIONS

Question: The Carroll County Times has made a public information request for “all correspondence with members of the Carroll

County Board of Commissioners.” Does the Public Information Act (“PIA”) require that the request be more specific?

Answer: As a matter of policy, under the PIA “all persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.” While the PIA does not place express limits on the breadth of requests for documents, it is possible that Maryland courts, like the federal courts, would recognize that it is too burdensome to comply with some requests. Therefore, while the PIA would not require the Carroll County Times to narrow its request, it is appropriate to ask the newspaper about narrowing the request before responding.

*Letter to
Senator Allan H. Kittleman
April 3, 2007*

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STATE REAL PROPERTY TAX / DEBT SERVICE

Question: Would the imposition of a new tax on real property such as that proposed by HB 486, “Maryland Affordable Housing Investment Fund” violate the Maryland Constitution?

Answer: House Bill 486 would have established the Maryland Affordable Housing Investment Fund Board and the Maryland Affordable Housing Investment Fund. As long as the proposed new tax is clearly separate from the State property tax imposed to fund State debt service, the tax would not be unconstitutional.

Note: House Bill 486 did not pass.

*Letter to
Mr. Warren Deschenaux,
Director, Office of Policy Analysis
June 21, 2007*

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