

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



April – June 2009

OPINIONS

AGRICULTURE

PUBLIC ETHICS LAW – INTERPRETATION OF SPECIAL EXCEPTION TO SECONDARY EMPLOYMENT AND FINANCIAL INTEREST RESTRICTIONS OF PUBLIC ETHICS LAW FOR FARMERS EMPLOYED BY DEPARTMENT OF AGRICULTURE

A 2007 law created an exception to the secondary employment and financial interest restrictions of the Public Ethics Law and permits the Department of Agriculture (“Department”), in certain circumstances, to employ farmers who are subject to its regulatory authority.

Question: Does the exception apply to an employee who inherits or purchases a farm after becoming employed at the Department?

Answer: Yes, the exception relates to employment, not simply hiring.

Question: Does the exception allow employees who operate farms to participate in programs that are initiated after the employee was hired?

Answer: Yes, provided the employee does not exercise regulatory or supervisory authority over his or her farm and complies with all Department regulations.

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ELECTIONS

REFERENDA – WHETHER COUNTY’S FAILURE TO COMPLY FULLY WITH PRE-ELECTION NOTICE REQUIREMENTS AFFECTS ELECTION RESULTS CONCERNING TWO PROPOSED CHARTER AMENDMENTS

The State Constitution and Talbot County Charter require that notice of proposed charter amendments be published for *five successive weeks* preceding the vote on the proposed amendments. Instead, prior to the November 2008 elections, the County published the five required notices over a *three and one-half week* period.

Question: Are Talbot County’s November 2008 election results valid as to the referendum questions?

Answer: Yes, in light of the publicity that the referendum otherwise received, and the distinction made by voters in rejecting one of the proposed amendments and adopting the other by very different margins, a court would likely apply the more lenient standard of review that is used in some post-election challenges. Under that standard, a reviewing court would not disturb the results of the election.

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SHERIFFS

CONSTITUTIONAL LAW – FREE EXERCISE CLAUSE – WHETHER DEPUTY SHERIFFS MAY REQUIRE INDIVIDUALS ENTERING A COURTHOUSE TO REMOVE A RELIGIOUS FACE COVERING FOR SECURITY PURPOSES

Question 1: If an individual wearing a veil or mask or other face covering wishes to enter a courthouse, may a deputy sheriff assigned to court security require that individual to remove the covering momentarily at the security checkpoint at the entrance to the courthouse?

Answer: Yes, if the sheriff’s office has a neutral and generally applicable policy requiring the removal of face coverings for security purposes.

Question 2: Is the answer to the previous question different if the individual asserts a religious reason for remaining veiled or masked?

Answer: No.

Question 3: How should this security policy be implemented?

Answer: To minimize potential conflicts between the requirements of courthouse security and the religious practices of individuals entering the courthouse, it would be useful if security details were comprised of both male and female officers and if a private space were available at the entrance of the courthouse for those individuals whose religion discourages removal of a face covering in public.

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STATE'S ATTORNEYS

MEDICAL RECORDS – PROCESS BY WHICH A STATE'S ATTORNEY MAY OBTAIN MEDICAL RECORDS FOR CRIMINAL INVESTIGATION OR PROSECUTION IN COMPLIANCE WITH LAWS PROTECTING CONFIDENTIALITY OF HEALTH INFORMATION

State's Attorneys sometimes need to obtain medical records or information in connection with a criminal investigation or criminal case. Many of these records are confidential under the Maryland Confidentiality of Medical Records Act and federal regulations issued under the Health Insurance Portability and Accountability Act ("HIPAA").

Question 1: During a *criminal investigation*, what process may be used to obtain medical records or information?

Question 2: During a *pending criminal case*, what process may be used to obtain medical records or information?

Question 3: With respect to both scenarios, what, if any, *notice* must be provided to the subject of the records and what is the *appropriate standard* to be applied by a judge who may be called upon to approve a subpoena, warrant, or other order for medical records?

Answers: A State's Attorney who follows the analytical steps and procedures outlined in the Opinion should be able to obtain medical records for purposes of a criminal investigation or pending

criminal case in compliance with various State and federal confidentiality laws. The issues of notice, and standards for court-ordered production of medical information, raised in Question 3 are discussed in Part II of the Opinion. The type of compulsory process or other means chosen to obtain medical records or medical information often governs what notice is required to the patient or what assurances must be offered that a patient's rights will be protected.

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STATE DEPARTMENT OF EDUCATION

PERSONNEL – PUBLIC SCHOOLS – WHETHER THE DEPARTMENT MAY ENTER INTO "LOANED EDUCATOR" CONTRACTS WITH LOCAL SCHOOL SYSTEMS UNDER WHICH LOCAL SCHOOL PERSONNEL WORK AT THE DEPARTMENT

The Maryland State Department of Education ("MSDE" or "Department") has a longstanding practice to contract with local school systems to "borrow" employees of the local system to work at the Department.

Question: What is the legality of entering into these agreements, known as "loaned educator" contracts?

Answer: MSDE may enter into "loaned educator" contracts with local school systems to obtain the services of employees of those school systems on a temporary basis. If a loaned educator is to work for MSDE for more than a brief period of time, the individual should become a State employee in the State Personnel Management System.

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ADVICE LETTERS

COLLECTIVE BARGAINING – MdTA POLICE

Question: Are Maryland Transportation Authority (MdTA) Police included in collective bargaining under current law?

Answer: No. The Maryland Transportation Authority (MdTA) is a self-funded, non-budgeted agency with funds held in a trust account. It is not technically considered a unit in the Maryland Department of Transportation. MdTA police, then, are not covered under the collective bargaining provision of current law.

*Letter to
Delegate Adrienne A.W. Jones
April 1, 2009*

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ENVIRONMENTAL PROTECTION – LOCAL PERMITS REVIEW

Question: HB 1569 (Chapter 651, Laws of 2009) repeals certain provisions of the law relating to contested case hearings and establishes new provisions for judicial review of final decisions by the Maryland Department of the Environment regarding certain MDE licenses and permits. Does the bill impact local-government-issued permits and approvals?

Answer: With the exception of proceedings involving a variance to allow a development activity in the Chesapeake and Atlantic Coastal Bays Critical Area buffer, the bill does not affect local permitting and approval processes.

*Letter to
Delegate Maggie McIntosh
April 6, 2009*

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HEALTH COMMUNICABLE DISEASES – PUBLIC HEALTH

Chapter 213, Laws of Maryland 2007 (House Bill 1270) gives the Department of Health and Mental Hygiene (“DHMH”) the authority to require reporting of names with respect to individuals who tested positively for human immunodeficiency virus (“HIV”) prior to the effective date of that law.

Question: Did the Legislature intend that the law be applied retroactively? How would retroactive application affect the State’s share of federal funds for AIDS/HIV treatment services?

Answer: The legislative history confirms that the law was intended to apply retroactively. Federal funding in future years is based on names-based data of living cases. Therefore, unless the law is applied retroactively, the State share of such funds could be reduced.

*Letter to
Delegate James W. Hubbard
April 21, 2009*

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MARYLAND WIRETAP ACT – POLITICAL CLUB MEETINGS

The Maryland Wiretap Act, Courts and Judicial Proceedings (“CJ”) Article, §10-402(a) provides that it is unlawful for a person to willfully intercept an oral communication, to disclose the contents of an oral communication, or to use the contents of an oral communication unless the interception, disclosure or use fall within one of the exceptions to the Act.

Question: Would the surreptitious taping of a meeting of a Democratic Club violate Maryland’s Wiretap Act?

Answer: An oral communication is defined as “any conversation or words spoken to or by a person in private conversation” (CJ §10-401(2)(i)) and “in private conversation” has been interpreted to limit the protections of the statute to conversations in which the speaker has a “reasonable expectation of privacy.” While the answer to this question would depend on the facts of the individual case, if the Club’s meetings are generally open and no efforts are taken to keep meetings secret, speakers at such meetings would not ordinarily have a “reasonable expectation of privacy” and therefore taping the meeting would not violate the Act.

*Letter to
Senator Richard S. Madaleno, Jr.
May 12, 2009*

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WEB ADDRESSES – “CYBERSQUATTING”

The federal Anticybersquatting Consumer Protection Act (“ACPA”) creates civil liability for a person who, with bad faith intent to profit from the mark, registers, traffics in, or uses a domain name that is identical to or confusingly similar to a distinctive mark or that is identical or confusingly similar to or dilutive of, a famous mark. 15 U.S.C. §1125(d)(1)(A).

Question: May a person buy a domain name that reflects the name of another person, company, or business?

Answer: While there is nothing that prevents a person from purchasing any domain name, if done in violation of the ACPA the purchaser may face civil liability and loss of the domain name.

*Letter to
Delegate Richard A. Sossi
May 13, 2009*

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The Opinions, Advice and Legislative Quarterly News summarizes formal opinions of the Attorney General. Also included are letters of advice by Assistant Attorneys General that have been issued on the understanding that they may be made public. (Other advice provided by the OAG may be confidential under the attorney-client privilege.)

Copies of opinions may be obtained from the Attorney General’s website at www.oag.state.md.us/opinions/index.htm. There is a direct link to each advice letter at the end of its description in the electronic version of this newsletter.

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