PAROLE AND PROBATION, DIVISION OF

DIVISION OF PAROLE AND PROBATION—PEACE OFFICER STATUS OF AGENTS—REQUIREMENT TO OBTAIN HANDGUN PERMIT—SEARCHES OF PERSONS AND PROPERTY BY AGENTS—RECORDS MAINTAINED BY DIVISION—APPLICABILITY OF FEDERAL AND STATE LAWS AND REGULATIONS ON DISSEMINATION—USE OF SUCH RECORDS.

August 3, 1978.

Honorable Robert J. Lally,
Secretary,
Department of Public Safety
and Correctional Services.

You have requested the opinion of this office on a series of legal questions pertaining to the operations of the Division of Parole and Probation, a constituent agency of the Department of Public Safety and Correctional Services. The questions raised deal generally with maintenance and dissemination of records and the status of Parole and Probation Agents as law enforcement officers. We will respond to the questions asked as presented in your letter. In some cases, we have rearranged the order in which the questions have been presented for ease of response.

The first series of questions deals with the status of parole and probation agents as law enforcement officers.

1. *"Who has the authority to authorize peace officer status to our Parole and Probation Agents?"*

The Division of Parole and Probation was created as a constituent agency of the Department of Public Safety and Correctional Services pursuant to Maryland Code, Article 41, Section 117A. The duties of Parole and Probation Agents within the Division are: To supervise the conduct of parolees and their activities (Article 41, Section 117A(b)); To recommend and issue warrants for the retaking of parolees charged with the violation of parole (Article 41, Section 117A(b)); To retake parole violators (Article 41, Section 117B); To make investigations as to the advisibility of parole and visit institutions of confinement for this purpose (Sections 121 and 122); And to conduct investigations, make pre-sentence reports, and supervise suspended sentences (Section 124).

Black's Law Dictionary (Fourth Edition) defines peace officers as:

> "This term is variously defined by statute in the different states; but generally it includes sheriffs and their deputies, constables, marshals, members of the police force of cities, and other officers whose duty is to enforce and preserve the public peace (citations omitted)."

Article 41, Section 70A of the Code defines police officers as:

> "A member of a police force, sheriff's office, or other law enforcement organization of State, county or municipal government who has the authority or is responsible for the prevention and detection of crime and the enforcement of the laws of the State as defined in Section 70A(a)(4) of this act. . ."

Section 70A(a)(4) defines law enforcement unit as:

> "Any governmental police force, sheriff's department, security force or law enforcement organization of the State, county or municipality which *has by statute, ordinance, or common law, the authority or the responsibility of detecting crime or enforcing the general criminal laws of this State.*" (Emphasis supplied)

The status therefore of the employees depends on their statutory duties. By way of example, Maryland Code, Article 88B, Section 3 details the responsibilities of the Maryland State Police as:

> "The Department shall have the general duty to safeguard the lives and safety of all persons within the State, to protect property, and to assist in securing to all persons the equal protection of the laws. Specifically, this duty includes the responsibilities: to preserve the public peace; to detect and prevent the commission of crime; to enforce the laws and ordinances of the State and local subdivisions; to apprehend and arrest criminals and those who violate or are lawfully accused of violating such laws and ordinances; to preserve order at public places; to maintain the safe and orderly flow of traffic on public streets and highways; to cooperate with and assist law enforcement agencies in carrying out their --

spective duties; and to discharge its duties and responsibilities with the dignity and manner which will inspire public confidence and respect."

Similar legislative statements of duties and responsibilities may be found in: Maryland Code, Natural Resources Article, Subtitle II (Natural Resources Police); Maryland Code, Transportation Article, Subtitle VI (Maryland Port Administration Police); Maryland Code, Transportation Article, Subtitle VII (Mass Transit Police); Maryland Code, Article 77A, Section 13K (Towson State College Police); and Maryland Code, Article 77A, Section 82A (Morgan State University Police).

The only law enforcement authority of members of the Division of Parole and Probation is that found in Maryland Code, Article 41, Section 117B which allows any Parole Agent *or sheriff or police officer* to execute warrants for the retaking of parole violators. The limited authority to retake parole violators upon warrants does not constitute employees of the Division of Parole and Probation as peace or law enforcement officers. Members of the Division of Parole and Probation have no statutory authority to enforce and preserve the public peace, detect and prevent the commission of crime, or to enforce the criminal laws and ordinances of this State, nor to apprehend and arrest criminals. Members of the Division of Parole and Probation are therefore not "peace officers." Peace or police officer status may be obtained by agents of the Division of Parole and Probation therefore only by legislative enactment of the Maryland General Assembly pursuant to Maryland Constitution, Article III.

2. *"Must our professional staff, based on designated functions which involve the execution of warrants, transfer of alleged parole violators, etc. obtain handgun permits?"*

Article 27, Sections 36B through 36F govern the wearing, carrying, and transporting of handguns within this State. The only persons who may wear, carry or transport a handgun in this State without the possession of a handgun permit are those individuals specifically mentioned in Subsection (c) of Section 36B of Article 27. They include law enforcement personnel of the State or any city or county of this State; members of the armed forces while on duty; law enforcement personnel of some other state or political subdivision temporarily in this State on official business; sheriffs and their

deputies; and jailers, prison guards, wardens, or guards or keepers at any penal correctional or detention institution in this State. In response to the previous question, we have already determined that agents of the Division of Parole and Probation are not "law enforcement personnel" or "peace officers." Agents of the Division of Parole and Probation, lacking status as "law enforcement" or "peace officers," also do not fall within any of the statutory exemptions in Subsection (c) of Section 36B of Article 27. It is therefore our opinion that any agent of the Division of Parole and Probation who wishes to carry, wear or transport a handgun, no matter what the purpose, must obtain a handgun permit in accordance with Section 36E of Article 27. *See* 57 Opinions of the Attorney General 502 (1972), and 57 Opinions of the Attorney General 606 (1972).

3. *"Can the agency (Parole and Probation Agent) search the person and/or living quarters of a parolee or probationer without a warrant on the mere suspicion that something may be amiss?"*

The Constitutions of Maryland (Maryland Constitution, Declaration of Rights, Article 26) and the United States (United States Constitution, Fourth Amendment) contain prohibitions against unreasonable searches and seizures and guarantee to citizens the right to be secure in their persons, houses, property and effects against unreasonable searches and seizures. It is a well settled principle of criminal law that a search may never be conducted without a warrant and only on "mere suspicion." *See Scott v. State*, 4 Md. App. 482 (1967), and *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

Our answer to this direct question is therefore that a parole and/or probation agent may never search the person and/or living quarters of a parolee or probationer without a warrant and only on the "mere suspicion" that something may be amiss.

Having responded to the precise question you have asked, we feel it important to briefly discuss the broader question of searches by parole and probation agents under any circumstances. We know of no Maryland cases directly dealing with the question of lawfulness of a search of any kind by a parole or probation agent with or without a search warrant. Maryland Code, Article 27, Section 551 provides for the is-

suance of search warrants by judicial officers of this State to "any duly constituted policeman, or police officer authorizing him to search. . . ." We have opined herein, *supra*, that parole and probation agents of the State of Maryland lack law enforcement or peace officer status. Under the existing law of the State of Maryland therefore we do not believe that a search warrant may be validly issued to a parole or probation agent for purposes of conducting any kind of search. We do, however, believe that it would be permissible for a parole or probation agent to accompany a duly constituted law enforcement officer who is executing a lawfully issued search warrant. *See Buckner v. State*, 11 Md. App. 55 (1971) where the Court of Special Appeals held that as long as the search was under the personal and immediate direction of a duly constituted police officer, the presence during the search, of an Assistant State's Attorney who assisted in the search did not invalidate the search warrant or any subsequent seizure made thereunder. We believe this would also be true with regard to any warrantless search carried out by a law enforcement officer pursuant to any of the exceptions recognized by Maryland to the warrant requirement, viz: (a) incident to a lawful arrest, (b) search of an automobile, (c) hot pursuit, (d) plain view doctrine, (e) stop and frisk, and (f) consent.

There is no constitutional right to parole or probation. *See Dennis* v. *Warden, Maryland House of Correction*, 12 Md. App. 512 (1971). Parole is a benefit accorded where release is deemed advantageous to both the State and the individual. Reasonable restrictions for the protection of the public and the rehabilitation of the individual parolee or probationer are generally lawful. Some states have seen fit to impose on parolees or probationers, as a precondition of release, a requirement to submit to a warrantless search of their person or dwelling by a law enforcement officer. This "consent" to be searched, obtained as a condition of release, must be viewed in the light of whether or not parolees and probationers are accorded full constitutional protection against unlawful searches and seizures. Federal courts have held that such *unrestricted* searches, as a condition of parole or probation, violate the parolee's fourth amendment protection. *See United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975); and *United States v. Smith*, 359 F. Supp. 1155 (W.D. N.Y. 1975). Some state courts, however, have held that such

searches do not offend traditional fourth amendment guarantees. *See People v. Mason*, 488 P.2d 630 (Cal. 1971), *cert. denied*, 405 U.S. 1016 (1972); and *State v. Slosser*, 202 N.W.2d 136 (N.D. 1972). In all of these cases, however, parole and probation agents have had the status of law enforcement officers which they do not have in this State. In those instances where such searches have been permitted, courts have held that the search (1) must be carefully limited to the purposes of parole and probation supervision and (2) must be based on facts amounting to a reasonable belief (probable cause) that a violation of parole and probation has occurred or is occurring. *See Latta v. Fitzharris*, 521 F.2d 246 (9th Cir. 1975), *cert. denied*, 423 U.S. 897 (1975); *United States v. Smith, supra*. In allowing the search by a parole agent in *United States v. Smith, supra*, the court held that it would allow the search because (1) the parole officer had police officer status and (2) the warrantless search of a parolee or probationer was subject to *the same requirements of probable cause* as any other warrantless search by a police or law enforcement officer. We are therefore of the opinion that a parole or probation agent of your Division may not, on his own and without consent, search either the person or premises of a parolee or probationer.

The second series of questions presented in your recent correspondence all have to do with various aspects of the records maintained by the Division of Parole and Probation on individual parolees or probationers and to whom and under what circumstances these records are available for inspection and review. The maintenance of records on citizens at all levels of government has been the subject of a great deal of attention in recent years and has led to the enactment of legislation and the adoption of administrative regulations at both the State and federal level. The series of questions which you have presented to us involve the application, in many cases, of both federal and State law to the particular types of records maintained by the Division of Parole and Probation. For clarity of response, we have placed the questions you have raised in a different sequence than in your correspondence.

1. *"On a need to know basis, can juvenile records be released to the Division of Parole and Probation by the various custodians of juvenile records without a court order?"*

Article 41 gives to the Division of Parole and Probatio[illegible]he

responsibility for many kinds of investigatory activities. Some of these duties and responsibilities are, inter alia, recommending the issuance of and actually issuing warrants for parole violations; visiting institutions of confinement and conducting hearings and interviews related to the suitability of an individual for parole and probation (Section 121); making investigations and recommendations to determine whether or not an individual should in fact be paroled (Section122); supervising persons under suspended sentences, preparing pre-sentence reports and investigations, and generally supervising parolees and probationers, all under the direction of courts of competent jurisdiction (Section 124); and obtaining from the various State's Attorneys resumés of the facts and evidence in each criminal case where a verdict of guilty was found so that the Division might have such a resumé available in case of an application for parole by any such person (Section 125). The custodian of juvenile records would be either (a) a law enforcement agency, (b) a court of competent jurisdiction or (c) the Juvenile Services Administration. Rule 921, Maryland Rules, provides as follows:

> Files and records of the court in juvenile proceedings, including the docket entries and indices, are confidential and shall not be open to inspection except by order of the court. On termination of the court's juvenile jurisdiction, the files and records shall be sealed pursuant to Section 3-828 (c) of the Courts Article, and all index references shall be marked "sealed."
>
> Sealed files and records of the court in juvenile proceedings may be unsealed and inspected only by order of the court.

Section 3-828 of the Courts Article, Subsection (b) provides as follows:

> A juvenile court record pertaining to a child is confidential and it's contents may not be divulged, by subpoena or otherwise, except by order of the court upon good cause shown. This Subsection does not prohibit access to and the use of the court record in a proceeding in the court involving the child, by personnel of the court, the State's Attorney, counsel for the child, or authorized personnel of the Juvenile S[illegible]ices Administration.

In light of the above captioned rule and statute, court records pertaining to juveniles are to be maintained in a confidential manner as a general rule. It is our opinion, however, that, pursuant to the language contained in Section 3-828(b) of the Courts Article, *supra*, agents of the Division may have access to such records when they are carrying out, *at the direction of a court of competent jurisdiction*, any of the Division's statutory duties. We reached a similar conclusion in 55 Opinions of the Attorney General 320 (1970) in interpreting similar provisions of former Article 26 of the Maryland Code.

Section 3-828 of the Courts Article, *supra*, contains a similar provision requiring police records on a juvenile to be maintained in a confidential status separate and apart from those of adults and prohibiting the divulgence of such records to anyone by a subpoena or otherwise except by order of the court. Our opinion with regard to police records of juveniles being available to agents of the Division would be the same as indicated above with reference to court records. *When acting under the direction of a court of competent jurisdiction*, and carrying out any of it's statutory duties, we believe that police records of juveniles can be made available to agents of the Division. By way of example, the presence or absence of a juvenile record may be of importance in preparing a pre-sentence investigation at the direction of a judge pursuant to Section 124 of Article 41. In *Wentworth v. State*, 33 Md. App. 242 (1976), the Court of Special Appeals held that the consideration of the presence or absence of a juvenile record *after* a criminal conviction was for the "edification" and the information of the trial judge so that the trial judge may make a proper disposition. In *Wentworth*, however, the court also pointed out that a juvenile record is per se not admissible in any criminal case *prior* to conviction. We reached a similar conclusion in 55 Opinions of the Attorney General 320 (1970) *supra*, in construing the provisions of former Article 26, Section 70-23, the forerunner of present Section 3-828 of the Courts Article.

While we believe that agents of the Division may have access to juvenile records as discussed herein, in carrying out any of their statutory responsibilities, we believe that the *better* practice would be to obtain an order of the court pursuant to Section 3-828 of the Courts Article or pursuant to Maryland Rule 921. If, for example, an agent of the Division is preparing a pre-sentence report pursuant to Sect[illegible] 124 of

Article 41, at the *direction of the court,* we believe all doubt as to access to such records would be removed by requesting the court to issue an order allowing access to such juvenile records by the Division or the particular agent.

2. *"Is information pertaining to equity cases, which may be listed in our information systems, covered by LEAA guidelines or by legislation regarding privacy and security of (sic.) freedom of information?"*

You have advised us that the particular types of equity cases in question are cases involving support payments pursuant to appropriate orders of courts of equity in this State where the payments are to be made through the Division of Parole and Probation.[1] You have additionally advised that the information maintained in these cases by the Division would include the court reference, copies of appropriate pleadings and orders, the terms and conditions of payment, and background and/or investigatory material dealing with such matters as the present residence and employment of those individuals under court order to make such payments.

In our opinion, such civil equity matters are not within the purview of Title 28, *Code of Federal Regulations,* Chapter 1, Part 20—Criminal Justice Information Systems. Section 20.3(b) of said regulations defines criminal history record information for purposes of the regulation as:

> "Information collected by criminal justice agencies or individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, . . . "

Civil non-support matters do not fall within said definitions and therefore the federal regulations do not apply. Likewise, such matters are not reportable events pursuant to Section 747 of Article 27 of the Maryland Code and, since such matters are not "reportable events" they do not constitute criminal history record information as defined in Section 743 of Article 27 of the Code. The provisions of the Criminal Justice Information Systems Act of 1976 (Article 27, Sections 742-755) are not applicable to such civil proceedings.

The availability of such information pertaining to civil equity cases is therefore governed by the provisions of the Public Information Act (Article 76A, Maryland Code). The

contents of the files maintained by the Division in such equity cases itemized herein constitute "paper," "correspondence," "documents," "writings," or "other documents regardless of physical form or characteristics." They have additionally been made by an agency of this State and thus, are by definition public records pursuant to Section 1 of Article 76A. Since they are in fact public records, they fall within the provisions of Section 2 of Article 76A which provides:

> "All public records shall be open for inspection by any person at reasonable times, except as provided in this Article or as otherwise provided by law, but the official custodian of any public records may make such rules and regulations with reference to the inspection of such records as shall be reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office."

Since such records are in fact public and, since they are by statute to be generally available for inspection by any person at reasonable times, we must then determine whether there exists any State or federal statute, rule or regulation having the effect of law which would prohibit such inspection or give the custodian of such records discretion to deny said access. Prior to consideration of whether or not there exists a statute, rule or regulation which would mandate or allow nondisclosure, we point out that certain of the contents of these equity files are not subject to any privilege against disclosure. These portions of your equity files would be the pleadings and other court papers which are a part of the equity court's file. The contents of court records and files in this State are open to public examination unless sealed by the court or confidential by statute (such as juvenile proceedings). We therefore limit our consideration to those portions of your equity files which are not also part of the official court records. You have advised us that this material generally consists of information as to the residence, employment, and other relevant data compiled by agents of the Division for purposes of insuring that individuals subject to such equity orders stay in compliance. Article 76A, Section 3(c) provides that the custodian of such records *shall* deny the right of inspection of the classes of records enumerated therein. Pursuant to s[illegible] Sec-

tion, the Division should deny access to those portions of your equity files which fall into the following categories:

(i) Medical, psychological or sociological data

(ii) Adoption or welfare records

(iii) Letters of reference

(iv) Hospital records relating to medical care

(v) School records

Sections 3(a) and 3(b) respectively of Article 76A contain additional grounds upon which the custodian of what would otherwise be public records may deny access. It is our opinion that none of the provisions of Section 3(a) apply as we know of no State or federal statute or rule or regulation having the effect of law which would prohibit such inspection.

As indicated above, the contents of these equity files are, by definition, public records. Under Article 76A, Section 3(f) the custodian of such public records may apply to the Circuit Court of the county where the record is located for an order permitting the custodian to restrict disclosure if, in the opinion of the custodian of such records, disclosure of the contents of the records would do substantial injury to the public interest. If after hearing, the court finds that disclosure of such a record, which is otherwise public, would in fact cause substantial injury to the public interest, the court may issue an order denying such disclosure. *See Moberly v. Herboldsheimer,* 276 Md. 211 (1975).

The only other available grounds for nondisclosure of the equity information would be if, pursuant to Section 3(b)(i) of Article 76A, the records could be considered as "investigatory files compiled for any *other* law enforcement or prosecution purpose." (Emphasis supplied) In *Superintendent, Maryland State Police v. Henschen,* 279 Md. 468 (1977), the Court of Appeals held that under the 3(b)(i) exemption:

> ". . . the statutory provision exempts from the mandatory disclosure requirement two categories of documents: . . . (2) investigatory records of other governmental agencies which were compiled for law enforcement or prosecution purposes. It is only with respect to the second category that there is an express requirement that the records be compiled for law enforcement or prosecution purposes. The statutory language, and particularly the use of the word other before the phrase 'law enforcement or prosecution purposes', suggests that the legislature believed . . . that investigatory records compiled by *other* agencies might or might not be for such purposes."

In our opinion, if the Division can establish that a particular record was compiled for a law enforcement or prosecution purpose, the Division may deny disclosure under the 3(b)(i) exemption. We caution however that such a determination would have to be made on a case by case basis. It would be impossible to attempt to delineate all of the *possible* law enforcement and/or prosecution purposes for which such records may be compiled given the many statutory responsibilities of the Division.

3. *"Must this agency on request confirm the existence of a criminal history record to the public or private sectors and to the public in general?"*

The collection, dissemination and access of criminal history record information is governed by Maryland Code, Article 27, Sections 742 through 755 which implement the provisions of Title 28, Chapter 1, Part 20, Criminal Justice Information Systems, *Code of Federal Regulations.*

Article 27, Section 743(e) defines criminal history record information as:

> "Data initiated or collected by a criminal justice agency on a person pertaining to a reportable event. The term does not include; . . . (6) presentence investigation and other reports prepared by a probation department for use by a court in the exercise of criminal jurisdiction or by the Governor in the exercise of his power of pardon, reprieve, commutation, or nolle prosequi; or (7) data contained in current case-in-progress sytems or records pertinent to public judicial proceedings which are reasonably contemporaneous to the event to which the information relates."

Section 747 of Article 27 delineates some nineteen (19) steps in the criminal justice process which are considered to

be reportable events under the definition in Section 743(e). Our response therefore addresses only reportable events constituting a criminal history record otherwise known as a "rap sheet" in light of the exclusion from the definition of criminal history record information of pre-sentence investigation and other reports prepared by the Division.

Section 749 of Article 27 provides that a criminal justice agency may not disseminate criminal history record information except in accordance with applicable federal laws and regulations. The Division of Parole and Probation is in fact a criminal justice agency pursuant to Section 743(f) of Article 27 in that the Division is a governmental agency of the State of Maryland which is authorized by law to exercise correctional supervision, or supervise the rehabilitation or release of persons convicted of crimes and allocates a substantial portion of it's annual budget to these functions.

The Division may therefore only disseminate criminal history record information, pursuant to Section 749 of Article 27, in accordance with applicable federal law and/or regulations.

Pursuant to 42 U.S.C. 3701, 28 U.S.C. 509, and 5 U.S.C. 301, the United States Department of Justice adopted rules and regulations dealing with the maintenance, access and use of criminal history record information. These regulations may be found by reference to Title 28, Chapter 1, Part 20 of the *Code of Federal Regulations*. As originally enacted, these regulations imposed stringent limitations on the dissemination of criminal history record information, both conviction and non-conviction data, providing that such information could be disseminated only to agencies directly involved in the administration of criminal justice; other individuals and agencies needing such information to implement a statute or executive order; other individuals and agencies pursuant to specific agreements with criminal justice agencies; and individuals and agencies for statistical research. After public hearings and reconsideration, the regulations above referred to were amended in 1976 to remove any and all restrictions on the dissemination of *conviction* data. Since federal regulations place no restrictions on the dissemination of conviction data, we are of the opinion that the Division may, in it's discretion, confirm the existence of a *conviction* criminal history record. We point out however that prior to any such

dissemination, the Division should make an inquiry of the Criminal Record Central Repository to insure that the most up-to-date disposition information is being utilized pursuant to Section 20.21 of the federal regulations, discussed *supra*.

The same federal regulations discussed herein do, however, contain limitations on the dissemination of non-conviction data. The regulations limit the dissemination of non-conviction criminal history record information only to (1) other criminal justice agencies for purposes of the administration of criminal justice and/or criminal justice employment; (2) individuals and agencies for any purpose authorized by any statute ordinance, executive order, court rule, decision or order; (3) other individuals and agencies pursuant to a specific agreement with the criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement and to other individuals and agencies for the *express* purpose of research, evaluation or statistical compilations.

While the State has formally adopted administrative regulations to implement the criminal justice information system and the right of an individual to review and challenge entries on his or her criminal record (*see COMAR*, Title 12, Public Safety and Correctional Services, Section 12.06.08 and 12.06.09) the State has not as yet adopted regulations dealing with the dissemination of criminal history record information, both conviction and non-conviction, although such regulations have been proposed. The proposed regulations on dissemination of criminal history record information may be found by reference to the *Maryland Register*, Volume 4, Issue 25, December 2, 1977. These regulations have not as yet been finally adopted. We note however that the proposed regulations would seem to indicate the intended scope of the dissemination and use of both conviction and non-conviction criminal history record information. It is therefore our opinion that, subject to the adoption of the proposed State regulations referred to herein, the Division, *may at the present time* confirm the existence of a conviction criminal history record upon request but may not confirm the existence of a non-conviction criminal history record unless it falls within one of the specified exemptions in Section 20.21(b) of Title 28, Chapter 1, Part 20, *Code of Federal Regulations*.[2]

4. *"Should this agency release criminal history record information to employers of parolees or probationers?"*

In our response to the preceding question herein, we have discussed the *present* state of the law as it relates to both conviction and non-conviction criminal history record information. The instant question is a matter of policy determination for the Division and it's parent, the Department of Public Safety and Correctional Services within the legal parameters of our response to the preceding question.

We note however that under certain circumstances, the disclosure of a criminal conviction record to an employer or prospective employer of a parolee or probationer may be indicated. For example, in situations involving significant contact with the public at large by employees of the prospective employer where such contacts *could* result in potential liability on the part of the employer under the doctrine of *respondeat superior*, the potential employer of a parolee or probationer should be entitled to know of the existence of a criminal conviction which might indicate any potential for exposure to such liability. (For example, if a potential parolee or probationer was going to be employed in the delivery business where the parolee or probationer may come in contact with women who are home alone, it may be very relevant for the potential employer to know if that individual has been convicted of rape, assault with intent to rape, or perverted practices).

5. *"Is this agency authorized to release criminal history record information during the course of making information contacts in investigatory matters and also while supervising its clients?"*

Since we have already advised you of the circumstances under which particular types of criminal history record information may be disseminated and to whom, we need not answer this question separately as it has already been discussed in our answers to the previous questions. We simply restate that the Division is *authorized* to disseminate conviction and non-conviction criminal history record information within the guidelines we have stated herein.

6. *"Can this agency release criminal history record information to attorneys or other individuals as it relates to legal proceedings—criminal or civil—wherein the defendant or plaintiff may have been, or is, on parole or probation?"*

We have already discussed in this opinion, in answer to the preceding question, the circumstances under which criminal history record information may be released, to whom it may be released, the types of information that may be released, and the laws and regulations governing same. In light of our answers to the previous questions, there is no need to respond separately to this question as it is repetitive of the previous ones.

7. *"What are the security requirements of this agency for keeping criminal history record information both in regular cases and expunged cases?"*

The provisions of Section 20.21(f) of Title 28, Chapter 1, Part 20, of the *Code of Federal Regulations* set forth in detail the security requirements applicable to your Division for the storage and maintenance of criminal history record information. Although not yet formally adopted, the State has proposed administrative regulations pursuant to Article 27, Sections 742 through 755 of the Code for security of criminal history record information. The proposed regulations (*see Maryland Register*, Volume 4, No. 25, December 2, 1977) adopt, in toto, federal regulations dealing with security in 28 *CFR* Part 20, *supra*. You should be guided by such requirements for the purpose of security of criminal history record information in the possession of your Division.

With regard to records which have been ordered expunged by a court of competent jurisdiction, Article 27, Section 735 defines expungement as:

> ". . . The effective removal of these records from public inspection, (1) by obliteration; or (2) by removal to a separate secure area to which the public and other persons having no legitimate reason for being there are denied access; or (3) if effective access to a record can be obtained only by reference to other records, by the expungement of the other records, or the part of them providing the access."

Likewise, Rule EX 1, *Maryland Rules of Procedure*, provides that expungement is to be accomplished by obliteration of the record or by removing the record to a separate secure area to which access is denied.

Under both the statute and the rule therefore the Division

has the option of handling expunged records by either (a) obliteration, (b) destruction, or (c) removal to a separate secure area. *See also* 58 Opinions of the Attorney General 340 (1973) and 57 Opinions of the Attorney General 518 (1972).

FRANCIS B. BURCH, *Attorney General.*

EMORY A. PLITT, JR., *Assistant Attorney General Counsel, Maryland State Police.*

---

[1]We note that effective January 1, 1979, the responsibility for collection and enforcement of such equity support orders will become the responsibility of the Bureau of Support Enforcement of the Department of Human Resources or an agency of a sub-division pursuant to Chapter 885, Laws of Maryland 1978 (House Bill 607).

[2] In relation to this question and the three following questions, we believe that if the proposed regulations are adopted, the Division should enter into a "user" agreement with the Criminal Records Central Repository. This "user" agreement could provide for dissemination by the Division to non-criminal justice agencies, or individuals, etc. pursuant to Section 12.06.08.11 (I) of the proposed regulations.

PERSONNEL, DEPARTMENT OF

DEPARTMENT OF PERSONNEL-DIVISION OF EMPLOYER-EMPLOYER-EMPLOYEE RELATIONS—EFFECT OF RECENT DECISION OF COURT OF SPECIAL APPEALS—AWARDS OF BACK PAY FOR OVERTIME TO STATE EMPLOYEES ARE BARRED BY SOVEREIGN IMMUNITY.

April 4, 1978.

Mr. P. J. Possident,
Chief of Personnel Services,
Department of Health & Mental Hygiene.

You have asked whether a decision rendered by the Secretary of Personnel's Employer-Employee Relations Division on September 19, 1977 as a result of a grievance heard at Step 5 of the State Grievance Procedure runs counter to the decision and opinion of the Court of Special Appeals in *Frosburg, et al. v. Department of Personnel*, 37 Md. App. 18, decided July 11, 1977. In *Frosburg*, it was decided that claims against the State for back pay resulting from job misclassification could not be entertained because of the doctrine of sovereign immunity. Since the hearing officer in the instant case decided that claims against the State for overtime back pay were not barred by the doctrine of sovereign immunity, you have questioned the soundness of his decision.

The grievance was one involving two employees of the Department of Health and Mental Hygiene who sought additional compensation for all periods of overtime worked dating back, in one case, to 1970 and in the other, to 1974. No claim was filed until the employees came into contact with a memorandum dated May 18, 1976 directed to all the departments and providing instructions for handling shift changes in order to avoid overtime. Since previous shift changes had not provided the 16 hour break prescribed in the memorandum, they claimed entitlement to back pay for overtime for which they had not been compensated. Lack of knowledge of a right to overtime compensation was their defense to filing a claim beyond the thirty day limit prescribed in the grievance procedure.