IV

Conclusion

In summary, it is our opinion that:

1. Recordings of calls to 911 Emergency Telephone System centers are "public records" under the PIA.

2. The portion of any recording that contains medical or psychological information about an individual may not be disclosed.

3. Recordings of calls for police assistance may be withheld from disclosure, but only if disclosure would be contrary to the public interest.

4. All other recordings must be disclosed upon request, except in the extraordinary situation in which a court is asked to withhold otherwise available information.

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PUBLIC INFORMATION—"MEDICAL OR PSYCHOLOGICAL INFORMATION"—"PERSON OF INTEREST"—TAPE RECORDING OF INVOLUNTARY ADMISSION HEARING MAY BE DISCLOSED ONLY TO PATIENT OR AUTHORIZED REPRESENTATIVE.

May 12, 1986

Arthur Cohen, J.D., M.P.H.
Acting Chief Hearing Examiner
Office of Hearings
Department of Health and Mental Hygiene

You have requested our opinion concerning access to a tape recording of a hearing for the involuntary admission of a patient to a mental health facility. Specifically, you ask whether a hospital whose professional staff had participated at the hearing may be granted access to the taped record of that hearing.

For the reasons stated below, we conclude that the tape recording of an involuntary admission hearing may be disclosed only to the patient or his or her representative. It may not be disclosed to any other requester, including participants in the hearing, without the consent of the patient.[1]

I

Involuntary Admission Hearings

A. *Purpose*

The Mental Hygiene Law affords to "any individual proposed for involuntary admission" to a public or private mental health facility a right to "a hearing to determine whether the individual is to be admitted to a facility as an involuntary patient or released without being admitted." §10-632(a) of the Health-General Article ("HG" Article).[2] The hearing, conducted by an impartial hearing officer, is intended to develop a record upon which the hearing officer may make the required determination:

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[1] A narrow exception to this general conclusion is discussed in note 9 below.

[2] "Except as otherwise provided in [the Mental Hygiene Law], 'facility' means any public or private clinic, hospital, or other institution that provides or purports to

"The hearing officer shall:

(1) Consider all the evidence and testimony of record; and

(2) Order the release of the individual from the facility unless the record demonstrates by clear and convincing evidence that at the time of the hearing each of the following elements exist as to the individual whose involuntary admission is sought:

(i) The individual has a mental disorder;

(ii) The individual needs in-patient care or treatment;

(iii) The individual presents a danger to the life or safety of the individual or of others;

(iv) The individual is unable or unwilling to be voluntarily admitted to the facility;

(v) There is no available less restrictive form of intervention that is consistent with the welfare and safety of the individual; and

(vi) If the individual is 65 years old or older and is to be admitted to a State facility, the individual has been evaluated by a geriatric evaluation team and no less restrictive form of care or treatment was determined by the team to be appropriate." HG §10-632(e).

Thus, the focus of the hearing is on the mental condition of the patient whose involuntary admission is sought. Much of the testimony would normally be presented by psychiatrists or other mental health professionals. Any lay testimony about the patient can be viewed in this context as a report of the patient's behavioral symptoms. In short, the hearing consists largely of a presentation of medically relevant information about the mental condition of the patient.

B. *Record of Hearing*

Under the pertinent regulations of the Department of Health and Mental Hygiene, hearing testimony is taped:

provide treatment or other services for individuals who have mental disorders." HG §10-101(e)(1).

"The hearing officer shall maintain a record of the hearing which shall include all the physical evidence submitted by the parties and the mechanical recording of the oral proceedings before the hearing officer. The mechanical recording need not be transcribed unless an appropriate appeal is taken by the patient or upon payment of costs for the transcription by the involuntary patient or other person entitled to access to the transcript. The Department shall pay the costs of transcription if the patient is indigent. Upon request, a patient, his counsel, or other authorized representative of the patient shall be allowed to listen to any mechanical recording of the original proceeding in which the patient is a party." COMAR 10.21.01.07E.

This regulation expressly grants access to the recording only to "a patient, his counsel, or other authorized representative of the patient." This limited grant of access would be meaningless if it were not predicated upon the assumption that the taped record is otherwise confidential. Hence, if the regulation may be given effect, no participant in a hearing other than the patient or the patient's representative would be able to gain access to the tape, unless the patient consented.[3]

However, the validity of the implied restriction in the regulation turns on the status of the record under the Maryland Public Information Act ("PIA") and other statutes governing access to records. If the PIA or other law were to mandate disclosure to persons other than the patient, the tighter restriction in the regulation could not be given effect.

"Can a state agency regulation or county ordinance having the force and effect of law make a class of records confidential? The probable answer is no. Such an interpretation would allow state agencies and local entities at their election to totally undermine the overall purposes of the

[3]As we read it, the regulation applies the same restriction to transcripts of recordings. A hearing transcript is made only if an appeal "is taken by the patient or upon payment of costs for the transcript by the involuntary patient or other person entitled to access to the transcript." COMAR 10.21.01.07E. In context, "other person entitled to access" means the patient's "counsel or other authorized representative"—i.e., the same persons who are entitled to access to the tape recording. It would be anomalous if the regulation were read to grant broader access to sensitive medical information merely because the information is transcribed. In any event, as discussed in Part II C below, the Public Information Act restricts disclosure of medical information, whatever its format.

[PIA]." Attorney General's Office, *Public Information Act Manual* 14 (4th ed. 1985).

Thus, we turn to the requirements of the PIA.

II

Statutory Restrictions on Access

A. *Nature of Record*

The tape recording of an involuntary admission hearing is unquestionably a "public record," for purposes of the PIA. §10-611(f) of the State Government Article ("SG" Article). *See* 71 *Opinions of the Attorney General* 288, 290 (1986). Therefore, it would be subject to disclosure upon request unless the PIA requires or permits withholding. SG §10-613(a).[4]

B. *Effect of Other Law*

The PIA generally requires the denial of a request for access to a public record if that record, or any part of it, is "privileged or confidential" by law or if "inspection would be contrary to ... a State statute." SG §10-615(1) and (2)(i).[5] Hence, we must first look to provisions of law outside the PIA to determine if any of them directly precludes access to the hearing record. In our view, none does.

Under §9-109(b) of the Courts Article ("CJ" Article), "communications [to a psychiatrist or psychologist] relating to diagnosis or treatment of the patient's mental or emotional disorder" are generally privileged. However, "[t]here is no privilege if ... [a] disclosure is necessary for the purposes of placing the patient in a facility for mental illness." CJ §9-109(d)(1). Accordingly, the disclosures made by psychiatrists or psychologists at an involuntary admission hearing are not "privileged ... by law," within the meaning of SG §10-615(1).

Moreover, although the Health-General Article is replete with provisions intended to assure the confidentiality of records containing medical information, none of these applies to the recording of an involuntary admission hearing. *See* HG §§4-301 (medical records in the custody of a provider of medical care);[6] 4-302 (medical records of hospitals or related institutions); 7-612 (records kept by facilities for the treatment of mentally retarded individuals); 10-701(d) (records of individuals in a mental health facility); and 10-713(c) (records kept by a mental health facility on individuals admitted to the facility). Thus, any restriction on the disclosure of the recording is to be found only in the PIA.

C. *Required Denial Under the PIA*

The PIA generally requires the custodian of a record to "deny inspection of the part of a public record that contains medical or psychological information about an individual, other than an autopsy report of a medical examiner." SG §10-617(b)(1).[7] The tape recording of an involuntary admission hearing consists largely, if not exclusively, of such "medical or psychological information." *See* Part I A above.[8]

The only exception to this requirement is that the custodian "shall permit the person in interest to inspect the public record to the extent permitted under §4-302(b) of the Health-General Arti-

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[4]Ordinarily, the PIA "shall be construed in favor of permitting inspection of a public record." SG §10-612(b). However, this general construction is inapplicable if, as here, "an unwarranted invasion of privacy of a person in interest would result" from disclosure. *Id. See* 71 *Opinions of the Attorney General* at 291.

[5]SG §10-615 also requires withholding if inspection would be contrary to "a federal statute or regulation ...[,] the rules adopted by the Court of Appeals ... [,or] an order of a court of record."

[6]In 63 *Opinions of the Attorney General* 453 (1978), this office concluded that the Legislative Auditor was authorized to examine the medical records of the Department of Health and Mental Hygiene, so long as the Legislative Auditor maintained the confi-dentiality of the records. The opinion assumed, for purposes of the specific question addressed by it, that the term "providers of medical care" in the predecessor of HG §4-301 "includes the Department of Health and Mental Hygiene." 63 *Opinions of the Attorney General* at 459. While we do not disagree with this assumption, nevertheless we think that HG §4-301 does not apply to medical records held by the Department in a capacity other than as a "provider of medical care"—here, in its capacity as adjudicator.

[7]The "custodian" of a record is the person who has "physical custody and control" of it. SG §10-611(c)(2).

[8]To the extent that a recording contains material other than "medical or psychological information," those portions—if "reasonably severable"—must be made available upon request (unless exempt from disclosure for some other reason). SG §10-614(b)(3)(iii).

cle." SG §10-617(b)(2). The term "person in interest" is defined, for purposes of the PIA, as follows:

> " 'Person in interest' means:
>
> (1) A person or governmental unit that is the subject of a public record or a designee of the person or governmental unit; or
>
> (2) If the person has a legal disability, the parent or legal representative of the person." SG §10-611(e).

In our view, only the patient is "the subject of" a hearing, the sole purpose of which is to determine whether that patient's condition requires involuntary admission to a mental health facility. Correspondingly, only the patient is "the subject of" the recording of that hearing. Although persons other than the patient certainly contribute to the record through their testimony, none of them can fairly be regarded as "the subject of" that record.

This construction is reinforced by the separate definition of "person in interest" for purposes of HG §4-302(b), which governs disclosure of hospital records to the patient and which SG §10-617(b)(2) expressly incorporates as the basis of disclosure to the "person in interest":

> " 'Person in interest' means:
>
> (i) As to a minor on whom a medical record is kept, a parent of the minor; and
>
> (ii) As to an adult on whom a medical record is kept:
>
> 1. The adult;
>
> 2. A designee of the adult; or
>
> 3. If the adult has been adjudicated a disabled person, the spouse or a legal representative of the adult." HG §4-302(a)(4).

Thus, only the patient (or, as appropriate, the patient's representative), and no one else, is to be regarded as "the person in interest" of a public record that contains medical and psychological information about that patient.

Accordingly, we conclude that SG §10-617(b) prohibits the disclosure of the tape recording of an involuntary commitment hearing to anyone other than the patient, those authorized by law to represent the patient's interests, and those who seek access with the patient's or authorized representative's consent. The Department's regulation, which permits only "a patient, his counsel, or other authorized representative of the patient" to listen to the recording, correctly implements the statutory requirement. Thus, a hospital whose staff members have testified at a hearing may generally not be permitted access to the recording of the hearing.[9]

III

Conclusion

In summary, it is our opinion that the tape recording of an involuntary admission hearing may be disclosed only to the patient or his or her representative, unless the patient consents to other disclosure. It may not be disclosed without consent to any other requester, including participants in the hearing.[10] We recognize that this restriction might, for example, prevent the treating facility from gaining access to a record that would be useful in its treatment of the patient. However, such a basis for disclosure would require a statutory amendment, perhaps along the lines of HG §4-301(c)(8) (A provider of medical care who has custody of medical records may provide information "requested by another provider of medical care for the sole purpose of treating the individual on whom the record is kept".).[11]

STEPHEN H. SACHS
Attorney General

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[9]An exception would potentially arise if an involuntarily admitted patient sought access to the record. Under SG §10-617(b)(2), that access is to be granted "to the extent permitted under [HG] §4-302(b)." Under HG §4-302(b)(2), disclosure in full of a medical record relating to a "psychiatric or psychological problem" may be denied if "the attending physician believes disclosure of the medical record to be medically contraindicated." In order to make that judgment in some cases, the attending physician would have to have access to the record—i.e., the tape recording. SG §10-617(b) necessarily permits disclosure in that situation.

[10]*But see* note 9 above.

[11]*See also* COMAR 10.21.01.04B (records of persons in observation period status).

In a recent report to the Governor, we recommended an effort to reform the current welter of overlapping and confusing provisions concerning access to mental health records. Attorney General's Office, Report to the Governor on the Confidentiality of Mental Health Records 9-10 (Jan. 1986). The issues raised by your inquiry should be examined as part of this effort.

JACK SCHWARTZ
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Opinions and Advice

PUBLIC INFORMATION ACT—DISCLOSURE PRINCIPLES—LICENSING RECORDS—INVESTIGATORY RECORDS—COMPLAINTS ABOUT MORTGAGE BANKERS AND MORTGAGE BROKERS ARE AVAILABLE TO THE PUBLIC.

September 9, 1986

Margie H. Muller
Bank Commissioner

You have requested advice concerning the status of complaints under the Maryland Public Information Act ("PIA" or "Act"), codified at §§10-611 through 10-628 of the State Government Article ("SG" Article). Specifically, you have asked if the number of complaints filed with your office against a company licensed as a mortgage banker and mortgage broker (under Title 12, Subtitle 5 of the Financial Institutions Article ("FI" Article)) may be disclosed under the PIA.

For the reasons stated below, we conclude that such information is available to the public under the Act. We have attached to our advice a sample format for releasing this information to insure that any disclosure is accomplished in a meaningful and fair manner.

I

Factual Background

On August 8, 1986, the Baltimore *Sun* published an article concerning the large number of complaints lodged against mortgage licensees for failing to meet the terms of lending commitments given to borrowers in purchase money and refinancing mortgage transactions.[1] This article prompted a real estate brokerage firm to file a written request for the following information:

> "Therefore, we request that your office provide us, by name and number of complaints, those mortgage companies referenced in the enclosed article, plus any other banking consumer oriented information available to you

[1] The headline stated that "Md. bank regulator says lenders " 'drag their feet' " on mortgages."