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EDUCATION

Inspection of College Student Records by Official of State Department of Education.

February 24, 1976.

Dr. Andrew Billingsley, President,
Morgan State University.

In your recent letter, you have asked our opinion whether it is permissible for a representative of the Maryland State Department of Education to examine the academic records of certain students at Morgan State University. The representative in question acts as the State's certifying agent on matters relating to institutional eligibility to participate in Federal Veterans' Administration educational programs. He has indicated that his duties require that he review the academic records of students receiving educational aid from the Veterans' Administration. For the reasons given hereinafter, we are of the opinion that State and Federal law permit him access to the records in question.

20 U.S.C. Section 1232g (the so-called "Buckley Amendment") substantially limits disclosure of information from the records of students at institutions receiving Federal financial assistance. As part of the protection against unwarranted disclosure, the statute affords access to such records without student authorization only to specific classes of persons. One such class is established by Sub-section (b) (1) (C), which provides in pertinent part that educational records may be released without the consent of the student to ". . . State educational authorities, under the conditions set forth in Paragraph (3) of this Sub-section . . .". Paragraph (3) referred to above, provides as follows:

> "Nothing contained in this section shall preclude authorized representatives of . . . (D) State educational authorities from having access to students or other records which may be necessary in connection with the audit and evaluation of Federally-supported education program, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements." 20 U.S.C., Section 1232g (b) (3).

Based on your statement of the function of the representative of the State Department of Education and the purposes for which he seeks access to student records, he would seem to fall within the exception to the general prohibition against access to student records. Accordingly, he should be allowed such access, but he should be cautioned as to the limited use he may make of the information he obtains, as set forth in the proviso to Paragraph (3) noted above. Furthermore, under Sub-section (b) (4) (A), the University is required to maintain a record, to be kept with the educational records of each student, which will indicate who has requested access to the records and will specify the legitimate interest which such person has in obtaining the information. Access by the representative of the State Department of Education, and the particular purpose of such access, must be noted on such record. Our conclusions with respect to Federal law are based on the statutes themselves. Although the Secretary of the United States Department of Health, Education and Welfare is required to adopt regulations implementing 20 U.S.C. Section 1232g, no such regulations have been adopted. However, our opinion is consistent with the proposed regulations promulgated in January, 1975.

In connection with your opinion request, we have also examined the provisions of Article 76A of the Annotated

Code of Maryland (1975 Replacement Volume, 1975 Cumulative Supplement), the State Public Information Act. The pertinent parts of Article 76A generally deny access to educational records "unless otherwise provided by law." Maryland Annotated Code, Article 76A, Section 3(c)(viii). Assuming (as your letter assumes) that the representative of the State Department of Education is required by Federal law and/or regulation to monitor the educational progress of veterans, we are of the opinion that Article 76A does not bar him access to relevant student records.

FRANCIS B. BURCH, *Attorney General.*

WALTER G. LOHR, JR., *Assistant Attorney General.*

EDUCATION — HIGHER EDUCATION — BOARD OF PUBLIC WORKS AND MARYLAND COUNCIL FOR HIGHER EDUCATION HAVE DISCRETION IN CERTAIN COMPUTATION OF ANNUAL AMOUNT OF STATE AID TO NON-PUBLIC INSTITUTIONS OF HIGHER EDUCATION — LEVEL OF STATE SUPPORT TO UNIVERSITY OF BALTIMORE MAY NOT BE INCLUDED IN COMPUTATION.

March 17, 1976.

Dr. Sheldon H. Knorr,
Executive Director,
Maryland Council for Higher Education.

In your recent letter you have raised a question concerning implementation of Sections 65 through 69 of Article 77A of the Annotated Code of Maryland (1975 Replacement Volume, 1975 Cumulative Supplement), subtitled "Aid to Non-public Institutions of Higher Education." Pursuant to those sections of the Code, the Board of Public Works is authorized to make payments in aid of private institutions of higher education which meet certain statutory requirements. The amount of the aid payments for each fiscal year is to be determined by a formula set forth in Section 67 and depends in part upon the level of State support to the "four year public colleges in Maryland for the preceding fiscal year." Specifically, you have sought our opinion as to which of the various four year public institutions of higher education in the State are to be considered in the application of the formula set forth in Section 67. Your letter informed us that in applying the formula in previous years the Board of Public Works and the Maryland Council for Higher Education have considered the level of State support to Morgan State University, the University of Baltimore (excluding the Law School program), and certain programs at certain campuses of the University of Maryland, as well as the four year public institutions having the word "college" as part of their official names. We are also aware that the State Department of Budget and Fiscal Planning is concerned that only those institutions

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PUBLIC INFORMATION ACT

PUBLIC INFORMATION STATUTE — CRIMINAL PENALTY SECTION AND SECTION WHICH COMPELS PRODUCTION OF RECORD MAY BE ENFORCED SEPARATELY AND NEITHER REMEDY NEED BE SOUGHT TO THE EXCLUSION OF THE OTHER.

January 29, 1976.

Honorable John S. Hollyday,
State's Attorney for Washington County.

In your recent letter and subsequent conversation with us you have requested our opinion concerning procedures under the Public Information Statute, Article 76A of the Annotated Code of Maryland. You have asked us whether criminal prosecution can be initiated under Section 5 for violation of the statute even though prior thereto a person aggrieved under the statute has not sought relief pursuant to Section 3 (e). The issue as we see it then is whether civil proceedings under the Public Information Act must be attempted or exhausted before criminal proceedings may be instituted.

The relevant provisions of the Public Information Statute under Section 3 (e) and Section 5 respectively state:

> "Any person denied the right to inspect any record covered by this article may apply to the circuit court of the county where the record is found for any order directing the custodian of such record to show cause why he should not permit the inspection of such record."

* * *

Section 5 provides:

> "Any person who wilfully and knowingly violates the provisions of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars ($100.00)."

Where a statute is both penal and remedial as when it is penal in one part and remedial in another part, it should be considered as a penal statute when it is sought to enforce the penalty, and as a remedial statute when it is sought to enforce the remedy and construed accordingly. *Fisher v. Bethesda Discount Corporation*, 221 Md. 271 (1960); *Smith v. Higinbothom*, 187 Md. 115 (1946); 3 Sutherland, *Statutory Construction* (3rd Rev. Ed.), Section 60.04. It is clear that since the statute in the instant case provides both a criminal penalty and civil remedy it is both penal and remedial in nature and hence is to be construed accordingly.

Subject to various exceptions, the Public Information Statute was designed to afford persons the right to inspect public records. Article 76A, Sections 2 and 3. If a person is denied inspection of a public record, he then may apply to the circuit court of the county where the record is found for an order directing the custodian of such record to show cause why he should not permit the inspection of such record. This cause of action is solely designed to redress the grievance of a private person denied access to the public record.

Under the criminal penalty provision, Section 5 of Article 76A, if the state's attorney of the county, a police officer or private individual involved has reason to believe that failure to disclose the record to that same individual is in violation of the statute and the non-disclosure was wilful and knowing, an application for a summons should then be addressed to the District Court of Maryland. That court possesses exclusive original jurisdiction over any offense described in Section 5 pursuant to Section 4-301 of the Courts and Judicial Proceedings Article of the Maryland Code. The crime described is a statutory misdemeanor punishable by a fine not to exceed $100 and is therefore "a petty offense" as defined in Rule 702 (h) of the Maryland District Rules.

Although with the exception of criminal intent, the legal and factual issues will be identical in both instances, we believe that the General Assembly clearly intended that the civil remedy and criminal penalty be separate and distinc