We hope that our response will be of assistance to you in advising local jurisdictions of their powers and responsibilities in the zoning field.

FRANCIS B. BURCH, *Attorney General.*
JUDITH A. ARMOLD, *Assistant Attorney General Counsel, Department of State Planning.*

[1] Article 66B applies generally to the counties and municipal corporations of the State, with the exception of chartered counties and in the Maryland-Washington Regional District. Article 66B, §§ 3.01, 7.02, 7.03. Only §§ 2.01 to 2.12 of the Article apply in Baltimore City, and those sections apply only in the City.

[2] A somewhat similar case was presented in Equitable Trust Co. v. Towson Manor Ass'n, Inc., 27 Md. App. 420 (1975). There, the corporate property owner agreed with a neighborhood group protesting the classification of its property as commercial to bind itself by deed to certain development restrictions; the agreement was entered into to induce the group to withdraw its objections to the commercial classification. The Court of Appeals affirmed a lower court judgment upholding the agreement, noting no objection to it as a form of conditional zoning.

[3] Other earlier cases were Rohde v. County Board of Appeals, 234 Md. 259 (1964), in which the Court of Appeals upheld a reclassification that it suggested might be an invalid "reclassification upon conditions" because there was no challenge on that ground, and Hyson v. Montgomery County, 242 Md. 55, 70 (1966), in which the Court observed that all parties had realized that the County Council could not grant "conditional rezoning."

[4] Appellees placed this argument under the heading, "Illegal use of Floating Zones." They contended that the optional method of development involved the imposition of zoning conditions via the use of floating zones. However, the Court concluded that Montgomery County's several Central Business District zones were standard Euclidean zones with the optional method of development built into the zones. It said that the optional method was not either a floating zone or a special exception, although it might have some of their characteristics.

The prohibition against attaching conditions to a zoning reclassification has not applied to prevent the attachment of conditions or restrictions when a special exception is granted. Baylis v. Baltimore, *supra*, 219 Md. at 168. And a floating zone has been held to be much like a special exception, since in both cases, there has been a prior legislative determination, as part of a comprehensive plan, that the use which the administrative body permits is prima facie proper in the environment in which it is permitted. Huff v. Board of Zoning Appeals, 214 Md. 48, 62 (1957). Thus, both the special exception and floating zone devices have permitted zoning authorities flexibility within legislatively established limits. The problem with conditional zoning is that there are no such pre-established limits.

[5] As previously indicated, Greenbelt v. Bresler and Funger v. Somerset, *supra*, involved contracts between property owners and their municipal governments in which the owners made promises in return for favorable recommendations to county authorities on their rezoning petitions. These contracts were ruled not to be examples of contract or conditional zoning.

POLICE

POLICE—PUBLIC INFORMATION ACT—AVAILABILITY OF "ARREST DOCKETS" AND "ARREST LOGS" FOR ACCESS AND REVIEW BY MEDIA—EXCEPTIONS TO RIGHT OF REVIEW UNDER ARTICLE 76A.

June 6, 1978.

Honorable John L. Sanford, Jr.
State's Attorney for Worcester County.

You have asked our opinion as to whether or not certain records maintained by local police departments in the various towns of Worcester County are public records and open to inspection and, whether or not a local police department has the right to deny access to such information to members of the media. You have advised that the specific type of records in question are what are commonly referred to as "arrest logs". You have advised that these logs are docket-type books containing the date of arrest, the name of the suspect arrested, the address, age, and race of the suspect, the name of the arresting officer, and the criminal charge and appropriate case number. You have further advised that these logs contain no detailed information concerning the subject matter of the charge, complaint or arrest nor do they contain any information concerning any action taken by the police, other than the fact of the arrest.

We first consider whether or not such logs are "public records." Maryland Code, Article 76A, Section1(a) (The Public Information Act) defines public records for purposes of the statute as follows:

> The term "public records" when not otherwise specified shall include any *paper*, correspondence, *form, book*, photograph, photostat, film, microfilm, sound recording, map, drawing, *or other document, regardless of physical form or characteristics*, and including all copies thereof, that have been made by the State and *any counties, municipalities, and political subdivisions thereof* and by any agencies of the State, counties, municipalities, and political subdivisions thereof, or received by them in connection with the transaction of public business, except those

privileged or confidential by law. . . .

(Emphasis supplied)

Applying this definition of "public records" to the information you have supplied to us, there can be no question that the records you have described are in fact public records within the purview of Maryland Code, Article 76A, (The Public Information Act). In 58 Opinions of the Attorney General 563 (1973) we reached a similar conclusion in finding that arrest records maintained by the Baltimore City Police Department were also public records as defined by the statute.

Other jurisdictions having statutes similar to Article 76A have reached similar conclusions. For example, in construing Section 44:1, *Louisiana Statutes Annotated* (a Louisiana statute similar to the Maryland statute defining public records), the Court of Appeals of Louisiana reached a similar result in *Francois v. Capital City Press, et. al.*, 166 So.2d 84 (La. 1964) in holding that "log book" entries maintained by the Louisiana State Police similar in nature to the arrest logs here at issue were in fact public records.

Having determined that the records involved herein are public in nature, we then must determine whether or not there exists some privilege or basis upon which the custodian of the records might deny access. Article 76A, Section 2(a) provides that all public records shall be open for inspection by any person at reasonable times subject to any statutory exception or as may otherwise be provided by law. Section 3 of Article 76A sets forth in detail the exceptions to the general rule providing for public inspection of such records. While there are many exceptions contained in Section 3 of Article 76A, we shall consider only those exceptions which might arguably apply to the type of records described in your inquiry.

1. *Such inspection would be contrary to any State statute (Article 76A, Section 3(a)(i))*

We know of no State statute which makes such records confidential as a matter of law. The only State statute (other than Article 76A) which deals with the subject matter is Maryland Code, Article 27, Sections 742-755 (Criminal Justice Information Systems Act of 1976). This Act provides a uniform statutory scheme for the collection, dissemination, use

and challenge of criminal history record information. Section 743(e)(3), however, specifically *excludes* from the Act's coverage "police blotter entries." The term "police blotter," in the vernacular of the police profession, is simply another term sometimes used to describe the records which are the subject of your inquiry.

2. *Such inspection would be contrary to any federal statute or regulation (Article 76A, Section 3(a)(ii))*

We know of no federal statute or regulation having the force of law which requires such information to be withheld from public inspection. The Federal Freedom of Information Act, 5 U.S.C. 552 *et seq.*, does not apply to State and local governments. Similarly, the provisions of the *Code of Federal Regulations*, Title 28, Part 20, Criminal Justice Information Systems, excludes from coverage the type of information which is the subject of your inquiry. Specifically, Section 20.20(b) of said regulations provides in pertinent part:

> The regulations in this sub-part shall not apply to criminal history record information contained in: . . . (2) Original records of entry such as police blotters maintained by criminal justice agencies, compiled chronologically and required by law or long standing custom to be made public, if such records are organized on a chronological basis. . .

There are therefore no federal statutes or regulations having the force and effect of law which would require such records to be exempt from public inspection.

3. *Article 76A, Section 3(b) provides:*

> The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest; (i) Records of investigations conducted by, or of intelligence information or security procedures of, any sheriff, county attorney, city attorney, the Attorney General, police department or any investigatory files compiled for any other law enforcement for prosecution purposes. . .

The controlling case law with regard to the interpretation

of this exception is *Superintendent, Maryland State Police v. Henschen*, 279 Md. 468 (1977). In your correspondence, you have advised:

> [T]he arrest log contains only the date, suspect's name, address, age, race, arresting officer, desk officer, charge and case number . . . The logs are docket-type books and contain no detailed information on the complaint or the arrest nor any action taken by police.

In *Henschen, supra*, the Court of Appeals stated:

> The relevant language of the § 3(b)(i) exception is: "Records of investigations conducted by . . . any sheriff, . . . police department or any investigatory files compiled for any other law enforcement or prosecution purposes. . . ." As previously mentioned, the Circuit Court held that the records in this case were not within the exception, because, in the court's view, they were not compiled for "law-enforcement or prosecution purposes." However, as we read the statute, when the documents in question constitute records of an investigation by a police department or a sheriff's office or any of the other law enforcement agencies specifically listed in § 3(b)(i), there need not be an actual showing that the records were compiled for law enforcement or prosecution purposes for the exception to be applicable.
>
> Section 3(b)(i) is in the disjunctive, excepting records of investigations by the enumerated types of law enforcement agencies *or* investigatory files compiled for any other law enforcement or prosecution purposes. The statutory provision exempts from the mandatory disclosure requirement two categories of documents: (1) Investigatory records of certain named law enforcement agencies; (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, particularly the use of the word *other* before the phrase "law-enforcement or prosecution purpose," suggests that the Legislature believed that investigatory records of one of the enumerated law enforcement agencies were presumptively for law enforcement or prosecution purposes, but that investigatory records compiled by other agencies might or might not be for such purposes.
>
> Since it is undisputed that the documents sought in this case are records of an investigation conducted by a police department, they fall within the 3 (b)(i) exception. There was no necessity for the Superintendent to have demonstrated in court that the records were compiled for law enforcement or prosecution purposes.

Since the records which are the subject of your inquiry are *not* "records of investigation" or "investigatory files," it is our opinion that the exemption contained in Section 3(b)(i) of Article 76A as interpreted by the Court of Appeals in *Henschen, supra*, does not apply. These "arrest logs" merely reflect the end result of a police investigation. They contain no information whatever concerning the actual investigation. We caution however that should such records contain such investigatory material, they may very well be subject to the 3(b)(i) exception as discussed in *Henschen, supra*. *See also* 58 Opinions of the Attorney General 353 (1971). In any event, disclosure or non-disclosure of what may otherwise be public records is discretionary on the part of the custodian under the exemption contained in Section 3(b)(i).

4. *Article 76A, Section 3(f) provides:*

> If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection, he may apply to the Circuit Court of the county where the record is located for an order permitting him to restrict such disclosure. After hearing, the court may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. . .

Notwithstanding the other relevant portions of the statute, it is our opinion that the custodian of the records which are the subject of your inquiry may, in accordance with Section 3(f) of Article 76A, apply to a Circuit Court for permission to restrict disclosure of a record which is otherwise public under the statute. The judicial test of whether or not such an order would be issued would appear to require the Circuit Court to make "a finding that disclosure would cause substantial injury to the public interest."

We would finally make two additional observations. (1) It is our opinion that *Whittle v. Munshower*, 221 Md. 258 (1959), *cert. denied*, 362 U.S. 981, may no longer be relied on to deny public access to all types of police records since it has almost totally been superseded by the enactment of Article 76A (Chapter 698, Laws of Maryland, 1970). (2) The information contained in the "arrest logs" may also be obtained from court records when an individual has been formally charged with a criminal offense since such court records are public in nature.

In summary, the only grounds for denying public access to the public records which are the subject matter of your inquiry would be pursuant to Section 3(f) of Article 76 A upon a showing to the satisfaction of a court of competent jurisdiction that disclosure of the contents of said record would do substantial injury to the public interest notwithstanding the fact that the records are otherwise available for public inspection.

FRANCIS B. BURCH, *Attorney General.*

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

PUBLIC SCHOOL CONSTRUCTION

PUBLIC SCHOOL CONSTRUCTION PROGRAM—APPLICABILITY OF COMPETITIVE BIDDING REQUIREMENTS TO SELECTION OF CONSTRUCTION MANAGER.

January 27, 1978.

Honorable Edward J. Mason,
Senate of Maryland.

Mr. Leo J. Ritter, Executive Director,
Public School Construction Program.

Each of you has inquired concerning the propriety of procedures employed to select a contractor to furnish construction management services for a public school construction project and whether it is permissible to provide in the construction manager's contract for a "not to exceed" or maximum price for the project to be guaranteed by the construction manager. The contemplated contract, which apparently has been submitted to the Interagency Committee on School Construction for approval by the Board of Public Works under Article 77, Section 130A, Annotated Code of Maryland, is between the Board of Education of Allegany County and Construction Cost Consultants, a construction management firm.[1]

Traditionally, construction of school buildings is undertaken by contracting for the entire construction project with a general contractor who is responsible for completion of the building. Actual construction may be done by the general contractor or under subcontracts to other firms as the general contractor sees fit. In accordance with the public policy preference for competitive bidding enunciated in Article 77, Section 123, Annotated Code of Maryland, selection of the general contractor is by advertised solicitation for sealed bids, with award to the lowest responsible bidder whose bid conforms to the specifications.

Under the proposed construction management concept, the Allegany County Board of Education would, in effect, become its own general contractor, with actual construction work being accomplished through contracts between the Board of Education and various building trades contractors. The management functions necessary to supervise the project are to