

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. Holliday,
State's Attorney for Washington County.*

In your recent letter and subsequent conversation with us you have requested our opinion concerning proceedings 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. Higginbotham*, 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 distinct

remedies. The statute neither expressly nor by implication suggests that these two proceedings are in any way dependent upon one another.

Our interpretation of the statute is strongly supported by the analogous situation presented by the criminal and civil law of assault. If for example, an individual is assaulted by another, a prosecutor could initiate criminal prosecution against the assailant even though the person assaulted fails to file a civil suit for assault seeking to recover monetary damages. Similarly, the General Assembly intended the state's attorney to function independently of the person aggrieved under the statute to allow him to exercise his discretionary power to prosecute offenses under the statute. *State v. Hunter*, 10 Md. App. 300 (1970); *Sinclair v. State*, 27 Md. App. 207 (1975).

We have previously considered this issue in a similar situation where we interpreted the Motor Fuel Inspection Law, Article 56, Sections 157 et seq. of the Maryland Code. There, in addition to criminal prosecution for violation of the statute, the law granted the Attorney General authority to apply for an injunction to prevent the continuance of violations. 57 Opinions of the Attorney General 396 (1972). On page 398 we said:

"We believe that Section 157K is, by its terms, unambiguous and comprehensive in providing that 'Any person . . . who shall violate any provision of this subtitle . . . is guilty of a criminal offense. The provisions of Section 157B (b) relating to injunctive relief in no way indicate that this remedy is intended to be exclusive, and we believe that the proper construction of the statute is to give effect to the remedies in both sections and hold that conduct amounting to a violation of Section 157B (b) may be the subject of both criminal and injunctive action."

Likewise in the present case, the statute is clear, unambiguous and comprehensive with respect to the criminal pen-

alty. Moreover, there is nothing to indicate that either remedy is to be sought to the exclusion of the other, or that one remedy is to be first sought before the other may be considered. Hence a person who violates the Public Information Statute may be subject to either or both criminal and civil action.

In conclusion, we believe that it is clearly within your authority to prosecute such offenses occurring within your jurisdiction. We further believe that the authority granted to the aggrieved party to seek a show cause order in the circuit court is in no way intended to derogate from your normal authority to prosecute criminal offenses under the Statute.

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