

We observe that in the usual case, clauses authorizing the entry of a judgment by confession are found in promissory notes securing money loaned to the maker and which authorize the entry of the judgment upon the maker's default in periodic repayments or upon demand. Such notes are usually drawn with requisite specificity to enable a determination of the balance due at default and thereby entitling the plaintiff to a claim for liquidated damages.

² *Qualified Builders v. Equitable Trust Co.*, 273 Md. 579 (1975) is a case dealing with the circumstances under which a clerk of court is authorized to enter a judgment by confession against a defendant. In that case, the cognovit clause was contained in a promissory note and specifically authorized "any attorney designated by the holder to appear" for the obligor and confess judgment against him. (Emphasis added). The opinion reveals that the plaintiff merely filed his declaration and instructed the Clerk to enter the judgment; no attorney entering his appearance for defendant. Stating that the Clerk acquired "no prerogative either from the note or from any other legal source to enter the in personam judgment" (at 585-586) the court held that the judgment when entered was null and void. We perceive this opinion as being one in a line of opinions holding that a judgment when confessed must be in strict conformance with the terms of the consent. Since the consent specifically authorized an attorney to appear, the Clerk was without authority to enter the judgment where no such appearance was made a part of the proceedings. See also *International Harvester Company v. Neuhouser*, 128 Md. 173 (1916).

³ You have not inquired and we do not therefore address the related issue of the validity, *vel non*, of cognovit clauses contained in commercial leases. We wish to note, however, that, by definition, subtitle 2 of Title 8 of the Real Property Article, of which § 8-208 is clearly a part, is "applicable only to residential leases. . . ." Real Property Article § 8-201. Arguably, it may be inferred that the Legislature in so limiting the application of the section intended that it not apply to commercial lease, thereby making the confessed judgment procedure an available remedy in the commercial lease situation. While we do not wish to be understood as ruling on this issue, preferring to defer our opinion until the question is squarely presented to us, we note that some authority appears to exist in support of cognovit clauses in leases, a lease being clearly a "written instrument" and, in fact, nothing more than a contract for possession of land or space. *Progressive Friendship Savings & Loan Ass'n v. Rose*, 235 Md. 169 (1964). See generally *ally*, 52 C.J.S. § 567 n. 73; 80 A.L.R. 2d 1380 § 8; 49 Am. Jur. 2d 1641.

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LEGISLATIVE AUDITOR

LEGISLATIVE AUDITOR—AUTHORITY TO EXAMINE RECORDS OF STATE AGENCIES—MAY EXAMINE MEDICAL RECORDS OF DEPARTMENT OF HEALTH AND MENTAL HYGIENE SO LONG AS CONFIDENTIAL CHARACTER IS MAINTAINED.

December 13, 1978.

Mr. Eugene J. Gerzack,
Legislative Auditor,
Division of Audits.

This is in response to your request for our opinion on the following question. "Are employees of the Legislative Auditor's Office authorized to have access to all medical records of the Department of Health and Mental Hygiene?" Our analysis of this question is in terms, first, of the general authority of the Legislative Auditor to examine records of State agencies and, second, the limits the Legislature may have imposed on the exercise of this authority with respect to the examination of medical records of the Department.

I.

LEGISLATIVE AUDITOR'S GENERAL AUTHORITY TO EXAMINE RECORDS OF STATE AGENCIES

The general authority of the Legislative Auditor to examine records of State agencies is to be understood in the context of the Legislative Auditor's general authority under the direction of the Joint Committee on Budget and Audit to audit the various agencies and in the context of the General Assembly's broad investigative power.

The investigative power of the General Assembly is both inherent in nature and provided for by the State Constitution. It is well established that the power to investigate is an inherent attribute of a legislative body. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 (1975), *Watkins v. United States*, 354, U.S. 178, 187 (1957), and *McGrain v. Deagher*, 273 U.S. 135, 175 (1927). This power is broad and includes the power to inquire into the administration of existing laws and the operation of government departments. *Watkins* at 178. While there is no general power to inquire into private affairs there is power to inquire into not only public

but also private affairs so long as the inquiry relates to a legislative objective. *Eastland* at 504, fn. 15, *Watkins* at 200, *Sinclair v. United States*, 279 U.S. 263, 291-292 (1929), *Daugherty* at 173-174. The power to investigate also includes the power to compel the production of information, *Daugherty* at 174-175, and may be exercised by a legislative committee, *Watkins* at 200-201.¹ In addition to this inherent power to investigate, the Constitution confers on the House of Delegates broad power to act as the grand inquest of the State and to conduct investigations² and directs the General Assembly to create a joint standing committee to examine all expenditures in the various public offices.³ In exercising these powers, the House of Delegates and the Committee have the power to call for all public or official papers and records, and send for persons. Art. III, § 24.

It is in the context of the General Assembly's broad power to investigate, which is both inherent and provided for by the Constitution, that the Legislature has created the Joint Budget and Audit Committee.⁴ *Md. Ann. Code*, art. 40, §§ 54-56B. Among its duties, the Committee is responsible for the legislative post-audit function and the study of the operations and efficiency of the various departments of the State government.⁵ To assist the Committee and the Legislature generally in fiscal matters, the General Assembly also has created a Department of Fiscal Services which is composed of three divisions, including a Division of Audits headed by the Legislative Auditor. *Md. Ann. Code*, art. 40, §§ 57-61E. Prior to the creation of the Department in 1968, the State Auditor, an official appointed by the Governor and assigned to the Comptroller's office, had the responsibility of auditing the books and accounts of various State and local offices and agencies. *Md. Ann. Code*, art. 19, §§ 29-34 (1966 Repl. Vol.).⁶ The provisions of the 1968 statute and its legislative history make it clear that the Legislature wished to make two basic changes in the auditing function. First, it wished to shift responsibility for this function from an executive office to the legislative branch. Second, it wished to broaden this function from an inquiry into purely financial matters to include general performance considerations.⁷

The 1968 statute, the substantive provisions of which have remained unchanged, requires the Division of Audits, under the general direction of the Joint Committee on Budget and

Audit, to examine the books and accounts of the various agencies of the State government.⁸ As required by the Joint Committee, the Division is to ascertain and verify information concerning these agencies. *Md. Ann. Code*, art. 40, § 61B(a) (1). All audits conducted by the Division are to be "post audits of a compliance or performance nature or a combination of the two." *Md. Ann. Code*, art. 40, § 61B(c). In performing this function, the Legislative Auditor may require the production of the "books and accounts of any office or officer which he is authorized to examine."⁹ He may also examine such officers and other witnesses under oath on the affairs of their offices and may issue process to compel their attendance. Sec. 61C(a). A refusal to comply and, in the case of witnesses served with process, a refusal or neglect to appear is a misdemeanor.¹⁰ Information obtained by employees of the Division is to be reported only to the Legislative Auditor and to no one else, except by his written authority. At the conclusion of each audit, the Legislative Auditor is to make a full and detailed written report to the Joint Committee and the Director of Fiscal Services on the results of his examination of the books and accounts in question. Sec. 61B(d). As part of his report, the Legislative Auditor is to "make suggestions as appropriate for changes in the conduct of the offices, departments, boards, commissions, institutions, and agencies." Sec. 61B(e). In its discretion, the Joint Committee may release the reports to the public. Sec. 61B(d).

While the Legislative Auditor statute, art. 40, §§ 61A-61E, refers to an examination of "books and accounts" of State agencies and to the production of "books and accounts," we conclude that the general auditing authority of the Legislative Auditor is not to be narrowly construed. The statute itself provides that the audits are to be "post audits of a compliance or performance nature" and the legislative history of this statute clearly indicates an intent that the Legislative Auditor's inquiry extend beyond purely financial matters into general performance considerations. Moreover, the work of the Legislative Auditor is to be performed under the direction of the Joint Budget and Audit Committee and on behalf of the General Assembly which has broad and inherent power to investigate. Accordingly, we conclude that in general terms the Legislative Auditor has broad authority to inquire into the performance of State agencies and to examine their records in making an assessment of their performance. How-

ever, with reference to access to particular records, including medical records of the Department of Health and Mental Hygiene, this general authority is subject to such limitations as the General Assembly or, within the scope of its delegated powers, the Congress may have enacted or authorized by statute.¹¹

II.

LIMITATIONS ON LEGISLATIVE AUDITORS AUTHORITY TO EXAMINE MEDICAL RECORDS OF STATE AGENCIES

In determining what statutory limitations there may be on the general authority of the Legislative Auditor to examine medical records of the Department of Health and Mental Hygiene, the Freedom of Information Act, the Medical Records Act, and various specific confidentiality provisions must be examined.

A. Freedom of Information Act

The Freedom of Information Act, *Md. Ann. Code*, art. 76A, §§ 1-5, which was first enacted in 1970, Ch. 696, *Laws of Maryland, 1970*, and was most recently revised in the 1978 Session of the General Assembly, Ch. 1006, *Laws of Maryland, 1978*, provides all persons with a broad right of access to public records of State and local agencies, "except as provided in this article or as otherwise provided by law." Sec. 2(a) (emphasis supplied).

Among the provisions of Section 3, relating to exceptions to the disclosure requirement, are the following:

- (a) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (b) or (c) of this section:

(i) Such inspection would be contrary to any State statute;

* * *

(iv) Such public records are privileged or confidential by law.

* * *

(c) The custodian shall deny the right of inspection

of the following records or any portion thereof, *unless otherwise provided by law*: [Emphasis supplied.]

(i) Medical, psychological, and sociological data on individual persons, exclusive of coroners' autopsy reports;

* * *

(iii) Personnel files except that such files shall be available to the person in interest, and the duly elected and appointed officials who supervise the work of the person in interest. Applications, performance ratings and scholastic achievement data shall be available only to the person in interest and to the duly elected and appointed officials who supervise his work;

* * *

(vi) Hospital records relating to medical administration, medical staff, personnel, medical care, and other medical information, whether on individual persons or groups, or whether of a general or specific classification;

The Act thus recognizes, both with respect to provisions on disclosure and the denial of access, that other provisions of law may govern. Moreover, subsection (e) provides that if, in the opinion of the custodian, the disclosure of "any record which is otherwise required to be disclosed *under this article*" would cause substantial injury to the public interest, he may, with judicial approval, refuse to disclose it.

Under the most recent revision of the Act, the term "person" was redefined to include "government agency." The result is that the Act clearly regulates not only access to public records by private parties but also by public parties, as well. Moreover, in the recent case of *Prince George's County v. State of Maryland Commission on Human Relations*, 40 Md. App. 473 (No. 264, Oct. 16, 1978), which was decided on the basis of the unrevised Act, the Court of Special Appeals applied the Act to a request of the State Human Relations Commission. Even prior to this revision we had concluded in an opinion concerning access to personnel records of the Department of Health and Mental Hygiene that the Act regulates access by investigators for State agencies, including the Legislative Auditor, in the same way as it regulates access by members of the general public. 60 Opinions of the Attorney

General 554-555 (1975).¹² However, in our opinion we noted that the Act "was designed to assist private citizens and was not intended to impede State agencies in attaining information reasonably necessary to the performance of their official duties." *Id.*, 556. Thus, although personnel records are subject to the above-noted mandatory exception to the disclosure requirement, Sec. 3(c)(iii), we concluded that this exception was inapplicable to the request by the Legislative Auditor inasmuch as Sec. 3(c) provides that the custodian shall deny access to the records, "unless otherwise provided by law."¹³ It was our view that the above-discussed broad Legislative Auditor statute provided otherwise by law. *Id.* at 555-557. Thus, although we concluded that access by the Legislative Auditor to public records is regulated by the Freedom of Information Act and that there is a mandatory exception for personnel records, we expressed the view that the Act recognizes the broad statutory power of the Legislative Auditor and that he may exercise the power to gain access to the personnel records of the Department of Health and Mental Hygiene in order to effectively perform his lawful duties. *Id.*

Thus, on the basis of our previous opinion and particularly in light of the recent revision incorporating the term "government agency" into the definition of "person," we conclude that the Freedom of Information Act regulates access by the Legislative Auditor to medical records of the Department of Health and Mental Hygiene.¹⁴ Furthermore, although medical records as well as hospital records are subject to a mandatory exception to the general disclosure requirement, Sec. 3(c)(i) and (vii), we again conclude that these provisions are inapplicable to the request of the Legislative Auditor whose authority is "otherwise provided by law" and thus is recognized by the Act. Sec. 3(c). However, there remain the questions of whether access might be denied under Secs. 2(a), 3(a) and 3(e).

As noted, Sec. 2(a) provides for disclosure "unless otherwise provided by law" and Sec. 3(a) provides for disclosure unless, in part, such disclosure is contrary to a State statute or the records are privileged or confidential by law. These qualifications to the general disclosure rule simply recognize that the matter may be governed by some other provision of law, and we shall consider them at length below.¹⁵ Finally,

with respect to Sec. 3(e), the substantial public injury exception, its language clearly states that it is available as a basis for denying access to public records only if disclosure is required by the article, i.e., Art. 76A. As any disclosure here would be pursuant to the Legislative Auditor statute which is found in Art. 40, not Art. 76A, Sec. 3(e) cannot be available to deny disclosure to the Legislative Auditor. Thus, although some other provision of law may make the medical records of the Department of Health and Mental Hygiene confidential or privileged, the Freedom of Information Act itself does not limit the Legislative Auditor's otherwise broad authority to gain access to these records for the purpose of performing his lawful duties.

B. Medical Records Act

The recently enacted Medical Records Act, Ch. 728, *Laws of Maryland, 1978*, codified as *Md. Ann. Code*, art. 43, § 54L, and art. 48A, §§ 354-O and 490E, provides a general confidentiality rule for medical records in the custody of providers of medical care, non-profit health service plans, and insurance companies. While the term "providers of medical care" is not defined, for purposes of this opinion, we assume that it includes the Department of Health and Mental Hygiene. However, Sec. 54L, concerning the confidentiality of medical records in the custody of such providers, states that the section does not apply to providers "when providing information to government agencies in the performance of their lawful duties as authorized by an act of the General Assembly or United States Congress." In requesting such records, the Legislative Auditor is, of course, acting pursuant to such a statute, i.e., the above-discussed Legislative Auditor statute, *Md. Ann. Code*, art. 40, §§ 61A-61E. Accordingly, we advise that the Medical Records Act does not limit the Legislative Auditor's otherwise broad authority to gain access to medical records of the Department of Health and Mental Hygiene for the purpose of performing his lawful duties.

C. Other Confidentiality Provisions

There are various other confidentiality provisions which apply to medical records of the Department of Health and Mental Hygiene, e.g., records assembled by the Department for research purposes which identify particular persons, *Md. Ann. Code*, art. 43, § 1-I; vital records, §§ 25 and 27; notices of laboratory reports on venereal disease, tuberculosis,

typhoid and certain other diseases, § 31A; tuberculosis; register, § 95; information covered by physician-patient privilege and identity of patients in hospital abortion reports, § 137(c); information on individuals acquired by Commission on Hereditary Disorders, § 820(f); records assembled by Drug Abuse Administration for research purposes which identify particular persons, art. 43B, § 22; records of public and private facilities on mental patients, art. 59, § 19; and records of public and private facilities on individuals who are mentally retarded, art. 59A, § 17(d).¹⁶ While some of these provisions explicitly permit disclosure to agencies or officials, see art. 43, § 25, disclosure of vital records data to federal, State and local agencies for statistical purposes,¹⁷ and § 95, disclosure of tuberculosis register to officials as authorized by law, only one of these provisions expressly recognizes the authority of the Legislative Auditor to examine these records. As revised by Ch. 315, *Laws of Maryland, 1978* and effective Jan. 1, 1979, art. 59A, § 17(d), permits public and private facilities to release records on mentally retarded individuals to certain specified parties, including "[a]uditors of the Legislative Auditor's office in the Department of Fiscal Services."

There is, with one exception, an apparent conflict between the confidentiality provisions which apply to medical records of the Department of Health and Mental Hygiene and the general authority of the Legislative Auditor to examine the records of State agencies in assessing their performance.¹⁸ We recognize the difficulty the parties may have in reconciling these statutes in particular cases. In these circumstances, our obligation is to construe them together so as to give effect to each if this is a reasonable construction. *Montgomery County v. Bigelow*, 196 Md. 413, 423 (1950). Clearly, the purpose of permitting the Legislative Auditor to examine the records of State agencies, including their medical records, is to permit him to assess the performance of the agencies. Clearly, the purpose of the various confidentiality provisions is to protect the privacy of the subjects of the records. Both of these purposes can be served by permitting the Legislative Auditor to exercise his general authority to examine medical records of the Department of Health and Mental Hygiene in order to assess the performance of the Department so long as both parties take the necessary measures to preserve the confidentiality of the records. However, we must emphasize that it can only be done in the strictest confidence. The

Legislative Auditor statute itself contemplates certain measures, i.e., examination on the custodian's premises, art. 40, § 61C(e), and reporting only to the Legislative Auditor, art. 40, § 61B(d), which assist in realizing this objective. Accordingly, we conclude that the various confidentiality provisions which apply to the medical records of the Department of Health and Mental Hygiene do not limit the otherwise broad authority of the Legislative Auditor to gain access to these records in performing his lawful duties so long as the confidentiality of the records is preserved. As a result of his examination of these records, the Legislative Auditor may not disclose to others information which would reveal the identity of any subject of these records, notwithstanding the general authority to report and disclose publicly the results of audits conducted by the Legislative Auditor, art. 40, § 61B(d).

III.

CONCLUSION

In conclusion, it is our opinion that the Legislative Auditor has broad statutory authority to examine records of State agencies, including medical records of the Department of Health and Mental Hygiene, in assessing the performance of the Department. This authority is to be understood in the context of the broad mandate which the legislative history of the statute indicates is conferred on the Legislative Auditor and in the context of the broad and inherent power of the General Assembly to investigate. We have found neither constitutional nor statutory limits on this basic authority of the Legislative Auditor, although there are limits on the way in which this authority can be exercised. While the Freedom of Information Act regulates access by State agencies, including the Division of Audits, to public records, we conclude that neither this Act itself nor the Medical Records Act limit the otherwise broad authority of the Legislative Auditor to examine medical records of the Department of Health and Mental Hygiene. Moreover, although there are various confidentiality provisions which may apply to the medical records of the Department of Health and Mental Hygiene, we think that these provisions can be reconciled with those of the Legislative Auditor statute by permitting the Legislative Auditor to examine these records in assessing the performance of the Department so long as the necessary steps are

taken to preserve the ultimate confidentiality of the personally identifiable records.

Nevertheless, as you have indicated a willingness to seek legislative clarification of the relevant statutes, we would encourage you to do so. We suggest that the following questions should be considered in any legislative review of this matter.

1. While the Legislative Auditor has broad statutory responsibility to assess the performance of State agencies, should the references to the examination of "books and accounts" in *Md. Ann. Code*, art. 40, § 61B(a), and to the production of "books and accounts" in Sec. 61C(a) be clarified?
2. Is it the Legislature's intent that the Freedom of Information Act regulate access by one public agency to the public records of another agency?
3. Is it the Legislature's intent that the Legislative Auditor have authority to examine, in the course of discharging his lawful duties, records which are confidential? If so, should this intent be reflected in the Legislative Auditor statute? Should it be reflected in the confidentiality provisions? Should the Legislative Auditor have complete discretion in examining such records? What measures, if any, should the Legislature enact or require to preserve the confidentiality of such records?

We trust the foregoing is fully responsive to your request and of assistance.

FRANCIS B. BURCH, *Attorney General*.

RICHARD E. ISRAEL, *Assistant Attorney General*.

APPENDIX

SELECTED CONFIDENTIALITY PROVISIONS FOR MEDICAL RECORDS OF THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Art. 43, Sec. 1-I.

(a) All records, reports, statements, notes, and other information which have been assembled or procured by the State Board of Health and Mental Hygiene for purposes of research and study and which name or otherwise identify any person or persons are confidential records within the custody and control of the Board and its authorized agents and employees, and may be used only for the purposes of research and study for which assembled or procured.

(b) It is unlawful for any person to give away or otherwise to disclose to a person or persons not engaged in such research and study for the Board, any of such records, reports, statements, notes, or other information which name or otherwise identify any person or persons. Any person who violates any provision of this subtitle is guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars (\$50).

(c) Access to and use of any such records, reports, statements, notes, or other information also are protected and regulated by the provisions of § 5-302 and § 10-205(a) of the Courts Article of the Code.

(d) Nothing in this section applies to or restricts the use or publicizing of statistics, data, other material which summarize or refer to any such records, reports, statements, notes, or other information in the aggregate and without referring to or disclosing the identity of any individual person or persons.

Art. 59, Sec. 19 (Mental Hygiene Law)

Each facility which has, as patients, any persons admitted under the provisions of this subtitle, shall make and retain in a separate and secure area of the facility, complete records of each such patient. Such records shall contain copies of all data required by this article, and such additional information as may be required by the Department. Such records shall be open for inspection by persons designated by the Commis-