

printed locally), were State officers subject to the State Code of Ethics for Executive Branch officers and employees. 64 *Opinions of the Attorney General* 151 (1979). However, for all of the reasons stated above, we believe that that Opinion is distinguishable and inapposite to our analysis here of the applicability of Article 40A to local boards of education.

⁵ It has been suggested that members of county boards of education might not be either State (i.e., "public") or local officials for purposes of the Public Ethics Law. We do not believe the General Assembly intended to permit such a gap. The overall scheme of the Public Ethics Law clearly was designed to cover all officials, such as these, who exercise important governmental functions—either by including these officials within the State law itself or, at least, by providing for their coverage under local regulation.

⁶ Title 6 generally requires that, by December 31, 1980, "each county of the State, the City of Baltimore, and each of the incorporated municipalities" shall enact provisions, applicable to "local officials", covering conflicts of interest [§6-101] and financial disclosure [§6-201], as well as lobbying disclosure provisions [§6-301].

⁷ An apparent exception to this statement is contained in §6-202, which states that, with regard to those persons to be covered by the local financial disclosure requirements of Baltimore County, the members of the Board of Education of Baltimore County and the Superintendent of Schools of Baltimore County "shall be treated as local officials". In the overall context of Article 40A, we believe that §6-202 is, in effect, a limitation on the broad discretionary authority otherwise granted by §1-202(f).

⁸ We recognize that, with respect to the former Financial Disclosure Act [former Article 33, §29-1 *et seq.*], this Office gave somewhat conflicting advice regarding the status of county boards of education. *Compare* 58 *Opinions of the Attorney General* 343 (1973) (members of the Montgomery County Board of Education are "local officials" under then Article 33, §29-10) *with* Letter from George A. Nilson, Assistant Attorney General, to the Honorable J. Hugh Nichols, State Delegate (January 22, 1976) (members of the Howard County Board of Education might not be "local officials" under then Article 33, §29-10). In any event, we believe that this prior advice is inapposite and, therefore, inapplicable to our analysis here of the new and different statutory scheme established by Article 40A.

⁹ We are mindful of the statement in §4-102(a)(3) of the Education Article that "[a] County Superintendent is not a public officer under the Constitution or the laws of this State". This provision serves, *inter alia*, to deprive a superintendent of the limited protection of governmental immunity that is enjoyed by public "officers" but not by public "employees." *Berry v. Merricks*, 20 Md. App. 666, 679-80 (1974). Nevertheless, for the purposes of Article 40A, §1-201(t), it is enough to find that the superintendent—even if not an "officer"—is an "employee" of the board.

PUBLIC INFORMATION

PERSONNEL RECORDS—ACCESS BY "DULY ELECTED AND APPOINTED OFFICIALS" WHO "SUPERVISE" WORK OF EMPLOYEE—DUTIES OF "CUSTODIAN"—APPLICABILITY TO DE FACTO CUSTODIAN.

June 20, 1980*

Bernard P. Kole,
Director, Major Frauds Unit,
State's Attorney's Office of Baltimore City

You have requested our opinion on three specific questions concerning possible violations of the State Public Information Act by Mr. Hyman Pressman, the Comptroller of Baltimore City. The questions arise from a complaint filed with your office on November 8, 1979, by the Reverend St. George Crosse, who at the time was a rival candidate for the office of City Comptroller. According to your letter, the allegations by Reverend Crosse are as follows:

"Mr. Pressman entered the offices of the Urban Services Agency, an agency of Baltimore City. Mr. Pressman requested the personnel file of Reverend Crosse, a former employee of the agency. Mr. Pressman submitted a request slip for the file stating 'qualifications of employee' as the reason for inspecting the file. Upon receipt of the file Mr. Pressman disseminated information contained in the file to members of the press present at the time."

For purposes of this Opinion, we shall assume these facts and will base our conclusions on the assumption that these facts can be demonstrated by sufficient proof.

The specific questions you have raised are the following:

(1) Does Mr. Pressman, as City Comptroller and as a member of the City Board of Estimates, fall within the statutory exception of Article 76A, §3(c)(iii) for "duly elected and appointed officials who supervise the work of the person in interest", thus allowing him to obtain access to that person's personnel file?

* Issued June 20, 1980, on confidential basis; released from identical status October 14, 1980, by Major Frauds Unit.

(2) If, by virtue of his office, Mr. Pressman had authority to receive the personnel file, what restrictions applied to his use and further dissemination of the information in the file?

(3) If Mr. Pressman was not authorized to receive the personnel file, does the statute make any provision for the criminal prosecution of: (a) an unauthorized custodian disseminating information contained in a personnel file; and (b) a person receiving restricted information?

For the reasons stated below, we do not believe that it would be appropriate for this Office to resolve the issue of whether Mr. Pressman, as Baltimore City Comptroller and a member of the City Board of Estimates, had actual authority to inspect Reverend Crosse's personnel file. However, we do conclude that, when Mr. Pressman used his public office to obtain the personnel file, he became a "custodian" of that file, subject to the statutory obligation imposed on a custodian to deny access to the file by unauthorized persons. As a custodian, he is subject to the criminal penalties applicable to violations of the statute.

I

The Public Information Act

The Public Information Act, Article 76A, §§1 through 5 of the Maryland Code, establishes a general right of public access to public records. Section 1(b) defines "public records" to include any records "made by any branch of the State government, . . . by any branch of a political subdivision, and by any agency or instrumentality of the State or a political subdivision, or received by them in connection with the transaction of public business". Clearly, Reverend Crosse's personnel file is a "public record" within the meaning of the Act, since all records in the file would have either been made or received by the Urban Services Agency, a Baltimore City agency, in connection with the transaction of public business.

Personnel records, however, are exempt from general disclosure under §3(c)(iii), which provides:

"(c) The custodian shall deny the right of inspection of the following records or any portion thereof, unless otherwise provided by law:

(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[.]"

Under this provision, records in personnel files may be released only to the persons specified in §3(c)(iii), unless some other law allows a person access to the personnel files. The obvious purpose of this section is to preserve the privacy of personal information about a public employee that is accumulated during his or her employment. Opinion of the Attorney General No. 77-006, p. 4 (January 13, 1977) (unpublished).

The Act contains a criminal penalty provision, §5(d), which provides:

"Any person who willfully 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 \$100."

It is against this background that we consider the specific questions you raised.

II

Does Mr. Pressman, as City Comptroller and as a member of the City Board of Estimates, fall within the statutory exception of Article 76A, §3(c)(iii) for "duly elected and appointed officials who supervise the work of the person in interest", thus allowing him to obtain access to that person's personnel file?

Under Article 76A, §3(c)(iii), "duly elected and appointed officials who supervise the work of the person in interest" may inspect the personnel file, at least in connection with the need for supervision of the employee. Whether in this case Mr. Pressman is such a "duly elected and appointed official" requires an analysis of the scope and limits of his office as Comptroller and member of the Board of Estimates, which analysis, in turn, depends on interpretations of the Baltimore City Charter and other local laws pertaining to Baltimore City.

We believe that issues such as this, involving the interpretation and application of the charter and local laws of a locality, are more appropriately within the purview of that locality's attorney — in this case, the Baltimore City Solicitor.

While we therefore will defer to the Baltimore City Solicitor on this issue, we set forth below several considerations that may be relevant to a consideration of this matter.

In our previous Opinions, we have advised that the words “duly elected and appointed officials”, as used in §3(c)(iii), should be given a relatively narrow construction. For example, in 60 *Opinions of the Attorney General* 554 (1975), we concluded that the State's Legislative Auditor, who had broad audit responsibilities for State agencies, could not be viewed, within the meaning of §3(c)(iii), as an official who supervised the work of State agency employees. To the extent that Mr. Pressman's duties as City Comptroller or member of the Board of Estimates, as set forth in Articles V (Comptroller) and VI (Board of Estimates) of the Baltimore City Charter, are similar to the oversight responsibility of the State Legislative Auditor, we believe a similar conclusion would be appropriate here.

In our opinion, §3(c)(iii) was intended to give personnel file access only to the person who is the subject of the file or to those persons who actually supervise or are directly responsible for the supervision of the person who is the subject of the file. We do not believe that §3(c)(iii) was intended to establish access to the file for all elected or appointed officials of a public body. The word “supervise” in §3(c)(iii) is crucial. We thus believe that some concrete nexus of real or potential “supervision” must exist between the official and the employee before the exception in §3(c)(iii) can be triggered.

III

If, by virtue of his office, Mr. Pressman had authority to receive the personnel file, what restrictions applied to his use and further dissemination of the information in the file?

Although we have declined to render an opinion on the issue raised by your first question, it is appropriate for us to address this question. We believe that, once Mr. Pressman obtained the records through the use of his offices as Comp-

troller and a member of the Board of Estimates, he became a “custodian” within the meaning of §1(g), regardless of whether he can be considered an official who supervised Reverend Crosse's work.

Under §1(g), a “custodian” is either “the official custodian” or “any authorized person having personal custody and control of the public records in question”. It is obvious that Mr. Pressman was not the “official custodian”, as defined in §1(f).¹ However, it is also obvious that, under the assumed facts, Mr. Pressman did have “personal custody and control” of the records in question before releasing them to members of the press. The crucial issue, therefore, is whether Mr. Pressman was an “authorized person” within the meaning of §1(g). We believe that he was, either because he had actual authority under the Baltimore City Charter or other local law or ordinance to obtain and possess the records or because he at least had apparent authority to obtain and possess the records.

As we have noted above, we decline to render our opinion on the scope of Mr. Pressman's actual authority as a Baltimore City official since this is a matter of Baltimore City law. However, even if such an inquiry leads to the conclusion that Mr. Pressman did not have actual authority to possess the records, we nevertheless believe that, by virtue of his office, he had at least apparent authority to obtain the records and that, therefore, he became, *de facto*, a “custodian” within the meaning of §1(g). In other words, we believe that Mr. Pressman became, at least, a “*de facto*” custodian in much the same way that a person without legal right to an office can be considered a “*de facto*” officer as a matter of public necessity.

A “*de facto*” officer is defined as one who is in actual possession of an office under some colorable or apparent authority and who exercises the duties of that office under such circumstances of reputation and acquiescence by the public authorities and the public as is calculated to induce people, without inquiry, to submit to or invoke his or her official action. *See, e.g., Kone v. Baltimore County*, 231 Md. 466, 471 (1963); *Grooms v. LaYale Zoning Board*, 27 Md. App. 266, 272-73 (1975). When exercising such colorable or apparent authority, a “*de facto*” officer is subject to the same criminal liability for his or her acts as is a “*de jure*” officer. *See, e.g., Adamson v. State*, 171 S.W. 2d 121 (Tex. Crim. A. 1943);

State v. London, 78 P.2d 548 (Wash. 1938); 4 E. McQuillin, *Municipal Corporations*, §12.228 (3rd ed. 1979).

In the same fashion, Mr. Pressman received custody of the records under colorable or apparent authority as Baltimore City Comptroller and member of the Board of Estimates—that is, in a manner that was calculated to induce individuals, including the person in actual custody of the personnel records, to believe that he had legal authority to possess the records. In our view, Mr. Pressman then became, at least, a “de facto” custodian and was bound to observe the statutory limitations on the dissemination of the records that are imposed on a custodian by §3(c).²

Under §3(c)(iii), Mr. Pressman, as a custodian, was obligated to “deny the . . . inspection of . . . [p]ersonnel files” by unauthorized persons—that is, to prevent unauthorized disclosure of the contents of a personnel file in his possession. While in possession of the file, Mr. Pressman could not lawfully allow an unauthorized person to inspect Reverend Crosse’s personnel file. Clearly, the members of the press to whom he allegedly conveyed information from the file are neither “the person in interest” nor “duly elected and appointed officials”, as specified in §3(c)(iii). Thus, as a custodian, Mr. Pressman violated §3(c)(iii) if he intentionally released prohibited information from Reverend Crosse’s personnel file to members of the press.

IV

If Mr. Pressman was not authorized to receive the personnel file, does the statute make any provision for the criminal prosecution of: (a) an unauthorized custodian disseminating information contained in a personnel file; and (b) a person receiving restricted information?

Since we conclude that Mr. Pressman was “authorized” to receive the personnel file of Reverend Crosse—at least in the sense that he had apparent authority to obtain the file and thus become its de facto custodian—the issues raised by this final question are moot. However, to provide guidance to you should you later conclude that Mr. Pressman was not a “custodian” as defined by the Act, we point out that the crimi-

nal provisions of the Act, §5(d), are not limited to violations by “custodians” but, instead, refer expressly to “any person”.

While a noncustodian cannot directly violate the provisions of §3(c), since the duty to allow or deny inspection is imposed only on a custodian, a noncustodian may, in fact, violate this provision as a principal in the second degree, as an accessory, or as an aider or abettor in connection with the unlawful acts of another “custodian” or “official custodian”. See generally, *Seward v. State*, 208 Md. 341 (1955); *Watson v. State*, 208 Md. 210 (1955). See also, G. Williams, *Criminal Law*, §129 (2nd ed. 1961).

V

Conclusion

In summary, we do not believe that it would be appropriate for this Office to resolve the issue of Mr. Pressman’s actual authority, as Baltimore City Comptroller and a member of the Board of Estimates, to inspect Reverend Crosse’s personnel file. However, we do conclude that Mr. Pressman, when he used his public office to obtain the personnel file, became a custodian of that file, subject to the obligations imposed by Article 76A, §3(c) on a custodian to deny access by unauthorized persons. Since Mr. Pressman became a custodian, he is subject to the criminal penalties contained in Article 76A, §5(d), for any violations of §3(c).

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AVERY AISENSTARK
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Editor’s Note: On October 22, 1980, Mr. Hyman Pressman was charged with a violation of Article 76A, §3(c)(iii). The case was tried in the District Court of Maryland for Baltimore City on November 25, 1980, before Judge Robert Lueke. At the conclusion of the trial, the defendant was found not guilty.

¹ Under §1(f) the "official custodian" is the "officer or employee of the State or any agency, institution, or political subdivision thereof, who is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual personal custody and control".

² We thus believe that the statutory reference in §1(g) (defining "custodian") to "any authorized person" having custody of the records was intended to cover both actual and apparent authorization -- to refer to both a "de jure" custodian and a "de facto" custodian. If this were not the case, we would be left with an illogical -- and, we therefore believe, unintended -- gap in the protections proposed by §3(c): a "de facto" custodian of personnel records, once having obtained unrestricted access to those records under colorable or apparent legal authority, would be able to possess and do with them as he or she pleases, free of the express statutory responsibility, imposed by §3(c) on a "custodian", to deny access to the records by unauthorized persons. We do not believe such a result was intended by the General Assembly.

PUBLIC OFFICERS

STATE'S ATTORNEYS - SALARIES - ARTICLE III, §35 BARS IN-TERM PAY INCREASES BASED ON INCREASES IN JUDGES' SALARIES.

July 15, 1980

The Honorable Charles S. Blumenthal
Maryland House of Delegates

You have requested our opinion on whether those state's attorneys who are authorized by statute to receive the same salary as circuit court judges may, during their terms, receive the same pay increases, if any, that are afforded these judges by the General Assembly. For the reasons given below, it is our opinion that they may not.

Article III, §35 of the Maryland Constitution provides, in relevant part, that "the salary or compensation of any public officer [may not] be increased or diminished during his term of office [unless his] full term of office is fixed by law in excess of 4 years". This constitutional provision does not bar in-term increases in the salary of circuit court judges because: (i) in-term increases would be permitted under Article IV, §§24 and 31 of the Constitution;¹ and (ii) these judges serve for terms that are "fixed by law in excess of 4 years".² Judges are thus entitled to receive -- and they regularly do receive -- pay increases as a result of the annual salary review, the general pay increase for State employees, or both, as approved by the General Assembly. On the other hand, state's attorneys are public officers whose terms are fixed by Article V, §7 of the Constitution at four years and who are not otherwise exempted from the operation of Article III, §35. 48 *Opinions of the Attorney General* 323, 325 (1963); 24 *Opinions of the Attorney General* 612 (1939); 11 *Opinions of the Attorney General* 238 (1926).

By statute, the General Assembly has provided that the salary of three state's attorneys "shall be equal to" the salary of a circuit court judge. Article 10, §40(c)(1) (Anne Arundel County); §40(d)(1) (Baltimore County); and §40(g)(1) (Prince George's County). When it first enacted these provisions, the General Assembly expressly stated in each instance that the