PUBLIC INFORMATION

POLICE REPORT – STATE'S ATTORNEY MAY NOT DISCLOSE REPORT USED FOR GRAND JURY PROCEEDING – POLICE DEPARTMENT MUST DISCLOSE REPORT TO EXTENT THAT DISCLOSURE NOT "CONTRARY TO THE PUBLIC INTEREST".

April 26, 1979

The Honorable William R. Hymes,
State's Attorney for Howard County

You have asked for our opinion as to whether you, as the State's Attorney for Howard County, or the Howard County Police Department are required or authorized to permit members of the press to inspect a certain police investigative report, either in its entirety or edited to delete the names of certain individuals or to delete personal identifying information.

For the reasons given below, we conclude that: (1) you are neither required nor authorized to disclose this report or any part of it; and (2) the Police Department must disclose this report, or a severable part of it, unless disclosure would be contrary to the public interest.

You have provided us with the following facts. The investigative report at issue here concerns an incident that occurred in Columbia, Maryland, on February 24, 1979. An individual, who held several persons hostage at gunpoint for over 21 hours, was fatally shot by a police officer during the course of attempted apprehension. The Police Department, after making an extensive investigation of the incident, sent its report to your office for review. It was the opinion of both the Police Department and your office, after reviewing the Police Department's report, that the actions of the police officers involved in the incident, including the police officer who fired the fatal shot, were justified. However, it is now the policy of your office that, when a homicide occurs involving a police officer, the information is reviewed by the Howard County Grand Jury. For this reason, the case was presented to the Grand Jury on Tuesday, April 10, 1979. After reviewing the

evidence (including photographs), hearing the testimony from several witnesses who read from and testified about the report of the Police Department, and hearing a recorded statement given by a witness, the Grand Jury refused to return an indictment against the officer who fired the fatal shot. Moreover, the Grand Jury was of the opinion that neither the police investigative report nor the name of the officer should be released to the press.

Your question is whether Maryland's Public Information Act, Article 76A of the Maryland Code, requires or authorizes disclosure of this report.

I

In enacting the Public Information Act, the General Assembly explicitly recognized the right of "all persons" to obtain "information regarding the official acts of those who represent them as public officials and employees". Article 76A, §1A. Thus, it provided that, but for certain carefully stated exceptions, "[a]ll public records shall be open for inspection by any person at reasonable times". Article 76A, §2(a).

"Public records" is defined in Article 76A, §1(b) as follows:

> " *'Public records'* when not otherwise specified shall include any paper, correspondence, form, book, photograph, photostat, film, microfilm, sound recording, map, drawing, or other written document, regardless of physical form or characteristics, and including all copies thereof, that have been made by any branch of the State government, including the legislative, judicial, and executive branches, 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. The term 'public records' also includes the salaries of all employees of the State, of a political subdivision, and any agency or instrumentality thereof, both in classified and nonclassified service."

In our opinion, it is clear that the police investigative report in question here is a "public record". *See Superintend[illegible] Md.*

State Police v. Henschen, 279 Md. 468 (1977); 58 *Opinions of the Attorney General* 563 (1973). Moreover, it is beyond question that a member of the press qualifies as a "person" eligible to inspect public records; Article 76A, §1(h) broadly defines "person" to include "any natural person", which, of course, includes all members of the general public. *See* 58 *Opinions of the Attorney General* 53, 60 (1973).

Thus, the police report requested here is a public record and, as such, is subject to disclosure to the press or any other person, unless refusal to disclose it is mandated or permitted by one of the statutory exceptions to the Public Information Act or otherwise by law. In this regard, the provisions of Article 76A, §3 are of principal relevance.

First, §3(a) generally provides that the "custodian"[1] of a public record "shall allow" a person the right to inspect public records, except on one or more specified grounds. Thus:

> "(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:
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> (i) Such inspection would be contrary to any State statute;
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> (ii) Such inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law;
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> (iii) Such inspection is prohibited by rules promulgated by the Court of Appeals, or by the order of any court of record; or
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> (iv) Such public records are privileged or confidential by law."

Section 3(b), in turn, provides that the custodian "may deny" a person the right to inspect certain specified records if disclosure to the applicant "would be contrary to the public interest". As to certain of these otherwise excepted records, however, a special caveat provides that a "person in interest", who is given greater statutory status than just any applicant,[2] may be denied the right of inspection only on certain enumerated grounds. Thus, in relevant part:

> "(b) The custodian may deny the right of inspection of the following records or appropriate portions thereof, unless otherwise provided by law, if disclosure to the applicant would be contrary to the public interest:
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> (i) Records of investigations conducted by, or of intelligence information or security procedures of, any sheriff, county attorney, city attorney, State's attorney, the Attorney General, police department, or any investigatory files compiled for any other law-enforcement, judicial, correctional, or prosecution purposes, but the right of a person in interest to inspect the records may be denied only to the extent that the production of them would (A) interfere with valid and proper law-enforcement proceedings, (B) deprive another person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, (E) disclose investigative techniques and procedures, (F) prejudice any investigation, or (G) endanger the life or physical safety of any person. . . ."

Finally, we note that §3(c) provides that the custodian "shall deny" a person the right to inspect certain enumerated records. However, none of the records described in that provision are of relevance to the report at issue here.

With this background in mind, we will separately address the differing disclosure obligations of your office and of the Police Department.

II

We turn first to the question of whether you, as State's Attorney, are required or authorized by the Public Information Act to disclose the report or any part of it.

As noted above, Article 76A, §3(a) does not contemplate the right of any person to inspect public records that are "privileged or confidential by law". Article 76A, §3(a)(iv). We believe that this exception is applicable here and, because of the common law doctrine of grand jury secrecy, you are barred from disclosing the report.

The report was obtained by you solely for a grand jury investigation. You, in turn, presented the report to the Grand Jury, and it was one of the principal pieces of evidence considered by the Grand Jury in reaching its decision not to indict. In such a context, the doctrine of grand jury secrecy has long been recognized and applied in this State. *See, e.g., Silbert v. State,* 12 Md. App. 516 (1971), *cert. denied* 263 Md. 720 (1971); *Presley v. State,* 6 Md. App. 418 (1967); *Coblentz v. State,* 164 Md. 558 (1933).[3] *Cf.,* Rule 6(e) of the Federal Rules of Civil Procedure (codifying the federal doctrine of grand jury secrecy), most recently discussed in *Douglas Oil Co. of California v. Petrol Stops Northwest,* U.S. , 99 S.Ct. 1667 (1979).

Accordingly, it is our view that the common law doctrine of grand jury secrecy makes the report "privileged and confidential by law", and bars you, the prosecutor who presented this report to the Grand Jury, from disclosing the report or any part of it. In this regard, we would remind you that, on refusal to disclose a public record under the Public Information Act, the custodian must furnish the person requesting access to it a written statement of the grounds for denial. Article 76A, §3(d). This statement must be furnished "within ten working days of denial"; and it must cite "the law or regulation under which access is denied and all remedies for review of this denial available under" the Act. *Id.*

III

The question of whether the Police Department is required or authorized to disclose the report or a part of it raises more complex problems. We note at the outset that the Police Department prepared and now holds the report for its own purposes. It did not prepare the report at the request of either you or the Grand Jury. Therefore, the common law doctrine of grand jury secrecy does not absolutely bar the release of the report by the Police Department.

However, we view one of the other statutory exceptions to the Public Information Act as potentially applicable to the Howard County Police Department. As previously noted, Article 76A, §3(b) provides that a custodian may deny inspection of certain records if disclosure to the applicant "would be contrary to th ublic interest". Among the records that are

subject to this standard are "[r]ecords of investigations conducted by . . . any . . . police department". Article 76A, §3(b)(i). Because the report at issue here is the record of an investigation conducted by the Howard County Police Department, it is within the scope of §3(b)(i)[4] and, therefore, may be withheld "if disclosure to the applicant would be contrary to the public interest".

As we noted in an earlier Opinion of this office, the determination of whether disclosure of a record would be "contrary to the public interest" is in the custodian's "sound discretion", to be exercised "only after careful consideration is given to the public interest involved". 58 *Opinions of the Attorney General* 563, 566 (1973).[5]

We have found no explicit guidelines, either in the Public Information Act itself or in relevant case law, as to how precisely this determination is to be made. However, we believe that the last clause of §3(b)(i), which sets forth the factors that must be demonstrated to deny disclosure to a "person in interest"—even where the disclosure otherwise would be "contrary to the public interest"[6]—offers a convenient listing of possible reasons for secrecy. Section 3(b)(i) provides that the superior right of a "person in interest" to inspect records may be denied only if the disclosure would:

> "(A) interfere with valid and proper law-enforcement proceedings, (B) deprive another person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, (E) disclose investigative techniques and procedures, (F) prejudice any investigation, *or* (G) endanger the life or physical safety or any person." (Emphasis added.)

Before discussing the possible use of these factors as guides in determining what is meant by "contrary to the public interest", we hasten to add that we are not suggesting that a custodian *must* find that any of these consequences will result from disclosure in order for disclosure to be "contrary to the public interest". Such a construction of Article 76A, §3 would put "persons"—here, members of the press—in the same favored status as a "person in interest", a status to which they are clearly not entitled.[7] Rather, we are suggesti that,

f a custodian *does* determine that disclosure will have one of hese consequences, he may reasonably conclude, that, *a fortiori,* it is "contrary to the public interest".

In determining whether, in an individual case, disclosure would result in one of the consequences listed in §3(b)(i)(A) hrough (G)—or some other consequence that would make a lisclosure contrary to the public interest—the custodian cannot simply state that this is so. Rather, he must carefully consider whether that consequence is likely or possible and, then, bjectively balance that possibility (and the conclusion that he disclosure would be contrary to the public interest) gainst the asserted public interest in favor of disclosure—ere, the public's "right to know".

We have not seen the report in question and have no pecific knowledge of its contents. Thus, it is impossible for us to know which, if any, of the consequences listed in 3(b)(i)(A) through (G) might arguably result from its lisclosure. Nor can we guess at other possible consequences f disclosure that might make disclosure "contrary to the ublic interest." The objective balancing of competing interests is a task for the custodian of the report, a person who s familiar with the reasons justifying disclosure or nonlisclosure.

However, we do note the existence of an analogue that night be a useful guide to the Police Department in making ts decision: this, in the reasons underlying the doctrine of rand jury secrecy. The Court of Special Appeals recently eiterated the reasons for this doctrine, while reaffirming a 927 holding that a grand jury cannot publicly report nonriminal misconduct of public officials. In *In re Report of rand Jury,* 39 Md. App. 472 (1978), *cert. denied* 283 Md. 34 (1978), the Court reaffirmed the holding in *In re Report f Grand Jury,* 152 Md. 616 (1927), with the following xplanation:

> "The function of the grand jury is to investigate violations of the criminal law, and in performing this function their inquisitorial powers are unlimited. If, however, having exercised these powers in any given case, there is lacking sufficient evidence to indict, their duty in that particular case ceases, and, under their oath, *nothing transpiring within their body should be made public. It is apparent that this should be so, for the protection of the good name and reputation of the people, otherwise a condition would exist which the establishment and zealous maintenance of the grand jury was intended to prevent, namely, that of having an individual publicly charged with misconduct without probable cause." Id.* 39 Md. App. at 475 (Emphasis added).

Undoubtedly, it was considerations of this kind that prompted the Howard County Grand Jury to recommend against the release of the report that is the subject of this Opinion.

All of the considerations discussed here should be weighed by the appropriate official of the Police Department in determining whether access to the investigative police report is warranted. If, after weighing these considerations, the Police Department determines that disclosure of the report or some part of it would be contrary to the public interest, then, in our view, Article 76A, §3(b)(i) permits the Police Department to deny inspection by the public, including members of the press, of all or any part of it. Conversely, if the Police Department determines that disclosure of the entire report would not be contrary to the public interest, then the custodian must release the report in its entirety. Finally, if it is determined that disclosure of a portion or portions of the report (e.g., the report without names or other personal identifying information) is not contrary to the public interest, then the custodian must provide to any person requesting it a "reasonably severable portion of [the] record . . . after deletion of those portions." Article 76A, §3(d).

Again, as discussed above, if the Police Department decides to deny inspection of the report or any part of it, the custodian must advise the applicant, within ten working days, of the reason for the denial and of the applicant's remedies for review. *See* Article 76A, §3(d).

IV

In summary, it is our opinion that: (1) the police report at issue here is a "public record" that is subject to disclosure to "any person," including members of the press, under the

Public Information Act, unless refusal to disclose it is mandated or permitted by one of the statutory exceptions to the Act or otherwise by law; (2) you, as the State's Attorney, are barred by the common law doctrine of grand jury secrecy from disclosing this report; (3) the Howard County Police Department is not barred from disclosing the report by this doctrine, but it is permitted by a statutory exception to the Public Information Act to withhold the report or a part of it if it determines that disclosure would be "contrary to the public interest"; and (4) the determination of whether disclosure is contrary to the public interest is within the discretion of the custodian of the report, although, in making this determination, the custodian must carefully weigh the asserted secrecy interest against the asserted public interest.

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[1] Article 76A, §1(g) defines "custodian" as "the official custodian or any authorized person having personal custody and control of the public records in question".

[2] Article 76A, §1(i) defines "person in interest" as "the person who is the subject of a record [,] . . . any representative designated by said person [,or,] if the subject of the record is under legal disability, . . . the parent or duly appointed legal representative". Thus, a "person in interest" is more than just any interested person; he or she is more nearly a "person aggrieved". *See Superintendent v. Henschen,* 279 Md. 468, 561 (1977).

The distinction made in §3(b) between a "person", who may be barred from general access to public records by certain express exceptions, and a "person in interest", who has special rights permitting access in spite of the express exceptions, is seen elsewhere in the Public Information Act. *See, e.g.,* Article 76A, §3(c)(iii) and (viii). *See also Superintendent v. Henschen, supra,* at 561, n. 2. The only persons who would qualify as "persons in interest" for the purpose of requesting access to the investigative report in question here are the policemen or other persons who were the actual subject of the report, or their representatives. Since there has been no request for the report from these persons, their rights need not be examined here.

[3] From the cases it is clear that, as a general matter, disclosure of a grand jury proceeding is permitted in but four circumstances: (1) to government attorneys or personnel for use in the performance of their duties; (2) to a defendant who determines that it is necessary for his or her defense; (3) in connection with or preliminary to a judicial proceeding; and (4) pursuant to a court order.

[4] An investigatory record falls within the scope of §3(b)(i) even though the record might not have been compiled for "law enforcement or prosecution purposes". *Superintendent v. Henschen,* 279 Md. 468, 475 (1977). This is so because "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". *Cf.* the Federal Freedom of Information Act, 5 U.S.C. §552(b)(7), which provides an exemption from discovery only for investigatory files that have been "compiled for law enforcement purposes".

[5] At the time of that Opinion, Article 76A, §3(b) provided:

> "The custodian may deny the right of inspection . . . *on the ground that* disclosure to the applicant would be contrary to public interest." (Emphasis added.)

This language subsequently was amended in 1978 to read:

> "The custodian may deny the right of inspection . . . *if* disclosure to the applicant would be contrary to public interest." (Emphasis added.)

This amendment might be read to reflect the General Assembly's intention that a public record not be withheld unless the custodian makes the sort of "careful consideration" of the public interest that we recommended in our 1973 Opinion.

[6] *See* note 2 above, and accompanying text.

[7] *See* note 2 above.