

**COMMONWEALTH OF PENNSYLVANIA**

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**OPINIONS**

**OF THE**

**ATTORNEY GENERAL**

**OF**

**PENNSYLVANIA**

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**1984-1988**

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**LEROY S. ZIMMERMAN**  
**ATTORNEY GENERAL**

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## **BIOGRAPHY OF LEROY S. ZIMMERMAN**

LeRoy S. Zimmerman was born in Harrisburg on December 22, 1934 and took office in Harrisburg as Pennsylvania's first elected attorney general on January 20, 1981. It was more than coincidence that both events occurred in Pennsylvania's capital; in the intervening 47 years, Harrisburg and its environs had constantly shaped and influenced his career.

Mr. Zimmerman grew up in Downtown Harrisburg, living with his mother on the second floor of the family's corner grocery. He attended Catholic schools in the city, graduating in 1952 from Bishop McDevitt High School. He earned his bachelor's degree in economics from Villanova University, graduating in 1956.

Accepted at both Georgetown University Law School in Washington D.C. and at Dickinson School of Law in Carlisle, near Harrisburg, he chose the latter, in part because his home town provided better job opportunities while he was in law school.

Graduating from Dickinson in 1959, he entered the private practice of law in Harrisburg. In May, 1963 he was appointed as an assistant district attorney of Dauphin County. The county courthouse is just two blocks from his childhood home. Two years after Mr. Zimmerman became an assistant district attorney, the incumbent district attorney died and Mr. Zimmerman was propelled, by court appointment, into the position. He was, at 30, one of the youngest district attorneys in Pennsylvania history.

He won election as district attorney in three successive elections, in the latter two running unopposed with the support of both parties. His ability to generate bipartisan support would stand him in good stead in his campaigns for Attorney General, as well.

While serving as district attorney, he developed a reputation as a vigorous but fair prosecutor and as a leader of numerous professional, civic and charitable organizations.

Since Pennsylvania's attorney general at the time was an appointee without prosecutorial powers, Mr. Zimmerman, as the district attorney for the capital county, was responsible for prosecuting cases involving public corruption by state officials.

That, combined with his leadership among district attorneys and his insight as a member of the Criminal Procedural Rules Committee of Supreme Court (a position he held from 1971 through 1986), led naturally to his appointment in 1977 to the Advisory Committee to the Joint State Government Commission Task Force on the Office of Elected Attorney General.

His involvement in advising the task force on how the new, independent elective office should be structured stimulated Mr. Zimmerman's interest in seeking the job himself.

He left office as district attorney in 1980, upon completion of his third

term, and launched his campaign for attorney general. Building upon his base of bipartisan support and popularity in the Midstate, and his by-then statewide network of friends and acquaintances from organizations as diverse as the Sons of Italy and the Pennsylvania District Attorneys Association, he captured the Republican nomination and in the fall won the general election. The office he won is housed on the 16th floor of a building in Downtown Harrisburg, three blocks from his childhood home.

He was re-elected in 1984 for his second term, expiring on Jan. 16, 1989. The state constitution limits the Attorney General to two consecutive terms.

Soon after assuming office as Pennsylvania's chief legal and law-enforcement officer, Mr. Zimmerman was named a member of the Executive Working Group for Federal-State-Local Prosecutorial Relations, which he later chaired. He also chaired the Criminal Law and Law Enforcement Committee of the National Association of Attorneys General and, by appointment of President Reagan, was a member of the White House Conference for a Drug Free America.

He is a member of the Board of Trustees of the Dickinson School of Law and a member of the Villanova University Development Council.

He is admitted to practice law before the Dauphin County Court of Common Pleas and the three statewide appellate courts and before the United States District Court for the Middle District of Pennsylvania, the United States Third Circuit Court of Appeals and the United States Supreme Court. Mr. Zimmerman has personally appeared before the United States Supreme Court on two occasions, representing the Commonwealth.

His legal professional associations and activities include active memberships in the American, Pennsylvania and Dauphin County Bar Associations, the American Judicature Society and Phi Alpha Delta International Law Fraternity.

Mr. Zimmerman has received numerous awards, including law-enforcement achievement awards from the Federal Bureau of Investigation, the Dauphin County Chiefs of Police Association, the Fraternal Order of Police Lodge 5 (Philadelphia), the County and State Detectives Association of Pennsylvania, the Police Chiefs Association of Southeastern Pennsylvania, the Pennsylvania Chiefs of Police Association, the National College of District Attorneys and the National District Attorneys Association.

He is a long-time member of numerous Harrisburg area civic organizations, many of which also have honored him for his work on their behalf.

Mr. Zimmerman served in the U.S. Air Force Reserve with the Pennsylvania Air National Guard from 1959 to 1965, receiving an honorable discharge as an airman second class.

He and his wife, Mary, live in the Harrisburg suburb of Susquehanna Township, Dauphin County. They have three children, Susan, Mark and Amy.

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## THE OFFICE OF ATTORNEY GENERAL IN PENNSYLVANIA

The Office of Attorney General of the Commonwealth of Pennsylvania was created in 1643, before the arrival of English Common Law, in what was then known as New Sweden. The Office owes its earliest loyalty to the King of Sweden, whose authority preceded that of the Dutch and the English.

The heritage of the Office is over three centuries of the life of the Commonwealth and thus it is one of the oldest offices of public trust in the United States of America.

The Office is marked by several significant periods in its history—1643-1681: Attorneys General before William Penn; 1686-1710: the era of David Lloyd; 1717-1776: proprietary Attorneys General; 1776-1838: early Constitutional era; 1838-1915: nineteenth century Attorneys General; 1915-1981: modern Attorneys General; and from 1981: the advent of the elected Attorney General.

The arrival of William Penn in 1681 as Proprietor of Pennsylvania began the period of domination of the Office by David Lloyd. Lloyd, who served from 1686 to 1699 was a champion of the Quakers, and the designer of Pennsylvania's first judicial system.

Andrew Hamilton, who served as Attorney General from 1717 to 1726, helped define the early role of the Office by making significant changes from European systems of justice. Hamilton later defended printer John Peter Zenger in a case that became the foundation for the concept of freedom of the press.

The "proprietary" Attorney General existed until 1776 when the Attorney General first became a constitutional officer of the democratic Commonwealth. The first Attorney General appointed under that Constitution was John Morris.

The new constitutional office continued to grow in importance into the nineteenth century until 1840 when it suffered a period of regression. Various Attorneys General and Governors during this period defined the duties of the Office in different and contradictory ways. By the year 1850, through misdrafted legislation, the Office was stripped of authority at the county level, and was rendered almost powerless in state government.

With the turn of the century and the industrialization of Pennsylvania, the General Assembly established new powers and duties in the Office. In 1915, the legislature approved the appointment of more deputies. Beginning in 1923, the Administrative Code, as enacted and modified by the legislature, made the Attorney General the administrator of the Department of Justice. It also reestablished the Attorney General's right to appoint deputies for any city or county and gave the Office power to supersede any District Attorney.

At the primary election in May of 1978, the voters of Pennsylvania approved a constitutional amendment providing for the election of an

Attorney General, effective with the general election of 1980.

Article IV, Section 4.1, of the Constitution of the Commonwealth of Pennsylvania was amended to provide “An Attorney General shall be chosen by the qualified electors of the Commonwealth on the day the general election is held for the Auditor General and State Treasurer. He shall hold his office during four years from the third Tuesday of January next ensuing his election and shall not be eligible to serve continuously for more than two successive terms. . . .”

The Constitution further provided that “he shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law.”

This established the Office of Attorney General as an independent office of state government headed by the Attorney General. The constitutional amendment was implemented by a statute called the Commonwealth Attorneys Act of 1980 (Act No. 1980-164), which defined the duties and powers of the Attorney General.

### **Attorney General**

LeRoy S. Zimmerman was administered the oath of office on January 20, 1981 as the first elected Attorney General of the Commonwealth of Pennsylvania, following the general election held on November 4, 1980. He was reelected as Attorney General of the Commonwealth of Pennsylvania on November 6, 1984 and was administered the oath of office for his second term on January 15, 1985.

The Commonwealth Attorneys Act directs the Attorney General to appoint a First Deputy Attorney General; a Director of the Bureau of Consumer Protection; a Consumer Advocate, whose appointment is subject to approval by a Senate majority; and such other deputies, officers and employees as necessary to perform the duties prescribed by the Attorney General.

The Attorney General may also establish such bureaus or divisions as may be required for the conduct of the Office, including a criminal investigation bureau.

The fundamental duties of the Attorney General’s Office, as provided by the Commonwealth Attorneys Act, are:

To furnish upon request legal advice concerning any matter or issue arising in connection with the exercise of the official powers or performance of the official duties of the Governor or the head of any Commonwealth agency.

To represent the Commonwealth and all Commonwealth agencies and upon request the Auditor General, State Treasurer and Public Utility Commission in any action brought by or against the Commonwealth or its agencies.

To represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth.

To collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth, which shall be referred to and placed with the Attorney General.

To administer the provisions relating to consumer protection as well as appoint the Advisory Committee.

To review for form and legality all proposed rules and regulations of Commonwealth agencies.

To review for form and legality all Commonwealth deeds, leases and contracts to be executed by Commonwealth agencies.

To be the Commonwealth's chief law enforcement officer charged with the responsibility for the prosecution of organized crime and public corruption. This law enforcement effort includes a criminal investigation unit and drug law enforcement program as well as direction of statewide and multi-county investigating grand juries and a Medicaid Fraud Control Section.

The Attorney General, in addition, serves as a member of the Board of Pardons, the Joint Committee on Documents, the Board of Finance and Revenue, the Pennsylvania Commission on Crime and Delinquency, the Pennsylvania Emergency Management Agency, the Civil Disorder Authority, and the Municipal Police Officers Education and Training Commission.

The personnel complement of the Office consists of attorneys, paralegals, legal interns, investigators, management personnel and support staff.

The Office, at this time, is divided into:

Executive Office

Attorney General

First Deputy Attorney General

Office of Press Secretary

Office of Legislative Affairs

Office of Public Affairs

Special Initiatives

Criminal Law Division

Civil Law Division

Public Protection Division

Office of Management Services

### **First Deputy Attorney General**

The First Deputy Attorney General serves as the principal advisor to the Attorney General on all legal and administrative matters.

Under the direction of the Attorney General, the First Deputy oversees the development and implementation of policy and serves as liaison between the Attorney General and all deputies and program officials.

In the absence of the Attorney General, the First Deputy heads the Office of Attorney General.

### **Press Office**

The Press Office speaks for the Attorney General and the Divisions, Bureaus, and Sections of the Office of Attorney General.

The Press Secretary/Director of Communications initiates and coordinates news coverage by newspapers and radio and television stations on subjects of direct and indirect interest to the Office of Attorney General. The Press Secretary works closely with the Office of Public Affairs to assure that the Attorney General's policies are accurately portrayed in all other forms of public communication including speeches and legislative testimony.

### **Office of Legislative Affairs**

The Office of Legislative Affairs reviews and interprets for the Office of Attorney General activity of the General Assembly, acting as liaison to members of the state legislature and their staffs.

The Office reports to the First Deputy and works closely with the Attorney General to prepare legislative initiatives that address the mandate of the Office of Attorney General.

In addition the Office may research and draft testimony for the Attorney General as necessary to comment on pending legislation at both the state and federal level.

### **Office of Public Affairs**

The Office of Public Affairs prepares the executive schedule of the Attorney General, including public appearances outside the Office as well as inter-office appointments and meetings.

The Public Affairs Office researches and writes speeches for the Attorney General as required, delivers speeches and/or makes public appearances to special groups, and handles special correspondence ranging from a letter from an upset citizen to a formal petition from a statewide organization.

In addition, the Office has the responsibility of organizing meetings for specialized groups.

## **Special Initiatives**

The Attorney General has established special initiatives for the purposes of evaluating specific problem areas in the criminal justice system and recommending solutions.

The Family Violence Task Force studies the problems of child, elderly, and spousal abuse from a law enforcement perspective and makes recommendations to enhance the capability of the criminal justice system to respond effectively to incidents of family violence.

The Drug Abuse Awareness and Prevention Initiative mobilizes and coordinates, on a statewide basis, law enforcement drug prevention activities to fight drug abuse in communities, schools and work places.

## **CRIMINAL LAW DIVISION**

The Commonwealth Attorneys Act provides extensive powers of prosecution to the Attorney General. This prosecution power rests within the Criminal Law Division.

It includes the power to investigate and prosecute criminal matters relating to the public duties of state officials and employees; corrupt organizations; charges referred by a Commonwealth agency; presentments returned by an investigating grand jury and matters arising out of the Medicaid Fraud Control Section.

In addition, the Division may supersede a district attorney under certain circumstances; may prosecute upon request of a district attorney; may concurrently prosecute with a district attorney and may handle criminal appeals as the law provides.

The Division is responsible for all matters before the statewide investigating grand jury, controls the electronic surveillance equipment of the Office of Attorney General and is responsible for the use of this equipment.

The Division comprises:

Prosecutions Section

Organized Crime Unit

Child Abuse Prosecution Assistance Unit

Drug Prosecution Section

Toxic Waste Investigation and Prosecution Section

Appeals and Legal Services Section

Bureau of Criminal Investigation

Technical Services Unit

Bureau of Narcotics Investigation and Drug Control

Medicaid Fraud Control Section

The Criminal Law Division is headed by an Executive Deputy Attorney General who is the Director and has the overall responsibility for seeing that the functions of the Division are properly administered. The Director reports

to the First Deputy Attorney General and through him to the Attorney General.

The Division has regional offices for certain of its Sections located throughout the Commonwealth, specified in the following Section descriptions.

Attorneys in this Division appear before the Common Pleas Courts of the Commonwealth, the Pennsylvania Superior Court and the Pennsylvania Supreme Court. Practice may on occasion extend into the federal court system.

### **Prosecutions Section**

The Prosecutions Section is responsible for all criminal matters involving public corruption of state officials or employees and criminal charges involving corrupt organizations as described in the Corrupt Organizations Act of 1972.

In addition, the Section is responsible for the criminal prosecutions of those persons/companies determined to be delinquent in the payment of their taxes due the Commonwealth, for criminal matters referred by other state agencies, and for criminal matters which are accepted from the offices of the various district attorneys on the basis of conflict of interest or lack of resources. It serves as liaison to district attorneys and provides information and advice where appropriate, as well as is involved in matters in which it has been determined that the necessary statutory basis exists to supersede a district attorney.

In the investigation and prosecution of public corruption, close liaison is maintained with other Commonwealth, local and federal law enforcement agencies and the State Ethics Commission to ensure the appropriate exchange of information and the proper exercise of jurisdiction by the respective offices. Cooperation also is offered to those federal agencies having the responsibility to investigate and prosecute organized crime. The Section makes extensive use of the statewide investigating grand juries.

The Section reviews investigative reports, renders prosecutive opinions and prosecutes criminal cases in the trial courts of the Commonwealth. The section is headquartered in Harrisburg with regional offices in Norristown and Pittsburgh.

In addition to the above responsibilities, the Prosecutions Section supervises the activities of the Organized Crime Unit and the Child Abuse Prosecution Assistance Unit.

### **Organized Crime Unit**

The Organized Crime Unit consolidates the existing OAG investigative and prosecutorial functions concerning organized criminal groups.

These activities have traditionally been performed by the OAG through its various Sections, Bureaus, and Units. The Unit works jointly with police and prosecutors at the federal, state, and local levels. Additionally, the focus of the Unit in its development of corrupt organization cases is not restricted to traditional organized criminal groups.

### **Child Abuse Prosecution Assistance Unit**

The Child Abuse Prosecution Assistance Unit gives guidance to local police and prosecutors statewide in investigating and prosecuting child abuse cases.

### **Drug Prosecution Section**

The Drug Prosecution Section is responsible for the criminal prosecution of complex, multi-county drug cases.

In addition, the Section is responsible for providing technical assistance concerning complex drug prosecution techniques to local prosecutors and handles all the legal aspects of drug asset forfeiture cases pursuant to the Controlled Substance, Drug, Device and Cosmetic Act. In the investigative stages, the Drug Prosecution Section provides direct legal support to the Attorney General's Bureau of Narcotics Investigation and Drug Control and the Pennsylvania State Police Drug Law Enforcement Division and assistance with wiretapping and electronic surveillance and access to statewide investigating grand juries.

The Drug Prosecution Section also coordinates and supervises all state-level clandestine laboratory investigations in coordination with the Attorney General's Bureau of Narcotics Investigation and Drug Control, the Pennsylvania State Police Drug Law Enforcement Division and Pennsylvania State Police Laboratory Division. The Drug Prosecution Section is based in Harrisburg, with regional offices in Pittsburgh and Norristown.

### **Toxic Waste Investigation and Prosecution Section**

The Toxic Waste Investigation and Prosecution Section (TWIP) is a program administered jointly by the Office of Attorney General and the Pennsylvania Department of Environmental Resources. The Section's function is to investigate and prosecute violations of the Commonwealth's environmental and criminal statutes pertaining to the generation, transportation, storage or disposal of municipal, residual, industrial and other types of hazardous waste. The employees of the Section, (lawyers, investigators and environmental specialists) bring their disparate knowledge of criminal investigative techniques and environmental analysis abilities into one organization. TWIP has regional offices located in Pittsburgh, Harrisburg and Norristown with satellite offices in Scranton, Wilkes-Barre and Newtown.

## **Appeals and Legal Services Section**

The Appeals and Legal Services Section is responsible for representing the Commonwealth in all appeals in criminal matters in which the Office of Attorney General is involved. The Section's attorneys brief and argue appeals in the state's appellate courts as well as the federal courts. The Section also is responsible for advocating the position of the Attorney General on important issues in criminal cases prosecuted by the local district attorneys.

In addition to its responsibilities in appellate matters, the Section provides general legal and research support to the Criminal Law Division. In this regard, the Section is responsible for the preparation and distribution of the *Prosecutor's Update*, a compendium of recent appellate decisions of interest to the state's prosecutors.

The Appeals and Legal Services Section is responsible for coordinating and scheduling all matters to be brought before the statewide investigating grand juries empanelled from time to time at the Attorney General's request. The Section is responsible for all administrative aspects of the grand juries as well as the preparation of appropriate responses to legal issues raised in the context of grand jury proceedings.

The Section supervises the use and application of the Wiretapping and Electronic Surveillance Control Act and provides technical assistance to district attorneys in carrying out their responsibilities under the Act. In addition, the Section is responsible for the preparation of annual reports required by the Act.

## **Bureau of Criminal Investigation**

The Bureau of Criminal Investigation has the responsibility of investigating all criminal offenses within the jurisdiction of the Office of Attorney General other than narcotics and Medicaid fraud offenses, as defined in Sections 205 and 206 of the Commonwealth Attorneys Act.

BCI supports grand jury investigations and conducts other criminal investigations as directed by the Attorney General or the Director of the Criminal Law Division. The Bureau provides, where possible, aid and support, including material and technical assistance, to other state and local investigative agencies. The Bureau also assumes investigative responsibility in instances in which the Office of Attorney General supersedes a district attorney.

In addition to its central office in Harrisburg, the Bureau maintains offices in Norristown, Scranton, Erie, and Greensburg.

## **Technical Services Unit**

The Technical Services Unit has been established within the Bureau of Criminal Investigation as the central repository for the Commonwealth's

electronic surveillance and wiretap equipment. The Unit is responsible for conducting both consensual and non-consensual wire interceptions as approved by the Attorney General or the Pennsylvania Superior Court.

The Technical Services Unit also provides audio, photographic and video surveillance in support of investigative activity of the Criminal Law Division.

### **Bureau of Narcotics Investigation and Drug Control**

In response to the growing availability and abuse of dangerous drugs throughout the Commonwealth, a separate and specialized program whose only mission is the enforcement of drug law was created in 1973 and placed under the direction of the Attorney General.

Pennsylvania's drug law enforcement effort is carried out by the Attorney General's Narcotics Strike Forces, comprising agents from the Attorney General's Bureau of Narcotics Investigation and officers from the Pennsylvania State Police Drug Law Enforcement Division.

The goals of the Strike Forces are to immobilize drug traffickers and to reduce the availability of illicit drugs in an attempt to curtail drug abuse in Pennsylvania.

The Strike Forces operational activities can be categorized into two functions: 1) to enforce the Controlled Substance, Drug, Device and Cosmetic Act and other drug-related laws through the in-depth investigation and successful prosecution of criminal violations involving controlled substances; and 2) to assure compliance with the drug laws through regulatory inspections of the legitimate handlers of controlled substances (pharmacies, hospitals, and medical practitioners).

In addition to its central office in Harrisburg, the Strike Forces have eight regional offices located in Allentown, Erie, Greensburg, Wilkes-Barre, Harrisburg, Reading, State College and Zelenople.

### **Medicaid Fraud Control Section**

This Section has the responsibility of investigating and prosecuting providers who participate in the medical assistance program and have committed fraud upon the program. Its function is to insure that money allocated to provide medical assistance services to the needy is properly expended.

Specifically, this Section is responsible for the investigation and prosecution, where appropriate, of nursing homes, hospitals, medical supply vendors, and professional personnel (physicians, dentists, pharmacists, etc.).

In addition to its Harrisburg Office, the Section has an Eastern Regional Office in Norristown and a Western Regional Office in Greensburg.

## **CIVIL LAW DIVISION**

The Civil Law Division has five main functions:

1. To conduct litigation brought by and against the Commonwealth;
2. To review with the Attorney General, where appropriate, and approve or disapprove proposed settlements of financial claims by and against the Commonwealth;
3. To review and approve for form and legality all Commonwealth contracts, deeds and other documents and, where appropriate, to develop standardized forms of such documents;
4. To review and approve or disapprove proposed regulations; and
5. To assist the Attorney General in the preparation of formal and informal opinions giving requested advice to the Governor and to Commonwealth agencies.

The Division comprises:

Litigation Section  
 Review and Advice Section  
 Tax and Finance Section  
     Tax Litigation Unit  
     Collections Unit  
 Torts Litigation Section  
 Eastern Regional Office  
 Western Regional Office

The Civil Law Division is headed by an Executive Deputy Attorney General who is Director and has the overall responsibility for seeing that the functions of the Division are properly administered. The Director reports to the First Deputy Attorney General and through him to the Attorney General.

The Division has, in addition to its Harrisburg Office, an Eastern Regional Office in Philadelphia and a Western Regional Office in Pittsburgh, as well as regional offices for certain of its Sections located through the Commonwealth, specified in the following Section descriptions. Both the Eastern and Western Regional Offices have a Regional Chief who reports to the Executive Deputy Attorney General.

Attorneys in this Division appear before the Courts of Common Pleas throughout Pennsylvania, Commonwealth Court, Pennsylvania Superior and Supreme Courts, and the federal courts including, on occasion, the United States Supreme Court.

### **Litigation Section**

The Litigation Section is responsible for all litigation involving the Commonwealth, its agencies, its officials and employees, except litigation by the Torts Section, Tax Litigation Unit, Collections Unit, and Antitrust Section.

Generally, the cases handled by this Section involve: (1) constitution; '

issues, (2) issues of statewide importance, (3) cases involving large amounts of money, (4) cases involving cabinet level officials, and/or (5) complicated procedural issues.

### **Review and Advice Section**

Section 204(c) of the Commonwealth Attorneys Act imposes on the Attorney General certain responsibilities for reviewing documents and giving legal advice. These responsibilities are carried out primarily through this Section. Its specific duties and functions are as follows:

1. **Opinions and Advice**—Receives and answers requests for legal advice and opinions and, where appropriate, in conjunction with the Attorney General, prepares legal opinions, either formal or informal. Under the Commonwealth Attorneys Act, formal opinions may be given only to the Governor and to Commonwealth agencies and such opinions are legally binding on the requesting parties.

2. **Contracts**—Reviews for form and legality all Commonwealth contracts, is responsible for the drafting and approval of form contracts, and renders assistance to Commonwealth agencies in the drafting of contracts. Recently, its functions have expanded to include the conduct of affirmative litigation in cases involving Commonwealth agencies contracts.

3. **Regulations**—Reviews for form and legality all of the regulations of Commonwealth agencies.

4. **Legislation**—Reviews bills introduced into the General Assembly which impact upon the authority and responsibilities of the Office of Attorney General and, where appropriate, assists the Office of Legislative Affairs in preparing legislative initiatives.

The Section also conducts research and analysis for the Office of Attorney General with respect to any issue of special concern.

### **Tax and Finance Section**

This Section supervises and coordinates the activities of the Tax Litigation and Collections Units. In addition, it is responsible for reviewing, approving and completing the documents associated with the issuance of General Obligation Bonds, Tax Anticipation Notes of the Commonwealth, as well as bonds and notes issued by other state agencies, and for reviewing proposed tax regulations promulgated by the Department of Revenue.

### **Tax Litigation Unit**

The Tax Litigation Unit is responsible for the trial and appellate stages of all lawsuits involving any Pennsylvania tax.

### **Collections Unit**

The Collections Unit receives delinquent accounts from approximately 100 agencies of state government pursuant to the Commonwealth Attorneys Act. The types of claims referred include: unpaid taxes to the Revenue Department, money owed to the Welfare Department for maintenance of patients in mental hospitals, claims for damage to state property, tuition owed to state universities and defaults under the Department of Environmental Resources Reclamation Bonds.

### **Torts Litigation Section**

This Section is responsible for all personal injury actions in which the Commonwealth is a defendant. In 1978 the General Assembly of Pennsylvania reaffirmed the doctrine of sovereign immunity but established eight specific exceptions whereby the Commonwealth can now be sued.

The Torts Litigation Section also is responsible for any pre-litigation settlements of tort claims against the Commonwealth.

Regional offices are located in Harrisburg, Philadelphia, Pittsburgh, Norristown and Allentown.

### **Eastern and Western Regional Offices**

The Eastern Regional Office is located in Philadelphia in the State Office Building, and the Western Regional Office is located in Pittsburgh in the Manor Building. Attorneys are assigned to the Torts Litigation Section, Collections Unit, Tax Litigation Unit, and the Litigation Section.

The attorneys' work is assigned by their Section Chiefs in Harrisburg, but day-to-day assistance is given by the Regional Chief in coordination with the Executive Deputy Attorney General and Section Chiefs in Harrisburg.

The Regional Chiefs also act as the Attorney General's representatives in Eastern and Western Pennsylvania and coordinate the operation of the regional offices.

## **PUBLIC PROTECTION DIVISION**

The Public Protection Division's primary responsibility is to see that the commercial and personal rights of the citizens of the Commonwealth of Pennsylvania are protected and the public interest served.

The Division comprises:

Bureau of Consumer Protection

Antitrust Section

Charitable Trusts and Organizations Section

Civil Rights Task Force

Office of Consumer Advocate

The Public Protection Division is headed by an Executive Deputy Attorney General who is the Director and has the overall responsibility for seeing that the functions of the Division are properly administered. The Director reports to the First Deputy Attorney General and through him to the Attorney General.

The Division has regional offices for certain of its Sections located throughout the Commonwealth, specified in the following Section descriptions.

Attorneys in this Division appear before the Courts of Common Pleas, including Orphans' Court Divisions, Commonwealth Court, Pennsylvania Appellate Courts and federal courts.

### **Bureau of Consumer Protection**

The Commonwealth Attorneys Act requires the Attorney General to administer a Bureau of Consumer Protection. The duties of this Bureau are to:

1. Investigate commercial and trade practices in the distribution, financing and furnishing of goods and services for the use of consumers.
2. Conduct studies, investigations and research in matters affecting consumer interests and make information available to the public.
3. Advise the executive and legislative branches on matters affecting consumer interests, including the development of executive policies and the proposal of legislative programs to protect consumers.
4. Investigate fraud and deception in the sale, servicing and financing of consumer goods and products, and strive to eliminate the illegal actions.
5. Promote consumer education and publicize matters relating to consumer fraud, deception and misrepresentation.

To carry out its responsibility, the Bureau of Consumer Protection has, in addition to its central office in Harrisburg, seven regional offices located in Philadelphia, Allentown, Scranton, Harrisburg, Erie, Pittsburgh, and Ebensburg.

### **Antitrust Section**

The Antitrust Section acts to protect the free enterprise system by protecting competition and challenging anticompetitive conduct. The Section's goals are to permit commerce to be engaged as free of restraints on trade as possible, with corresponding benefits to quality and prices of goods and services resulting from open competition in the market place.

The Section takes legal action to recover losses to the Commonwealth, its residents and its governmental units resulting from anticompetitive conduct.

The Section is an advocate for competition and, where appropriate, it works with other departments and agencies to eliminate unnecessary anticompetitive restraints in statutes and regulations.

The Antitrust Section seeks to educate the public in antitrust issues and in the economic rights of businessmen and consumers, in an effort to maintain a free market system within a competitive economy.

### **Charitable Trusts and Organizations Section**

The Charitable Trusts and Organizations Section is responsible for reviewing charitable trusts and organizations to ensure that they are being properly implemented for the benefit of the public.

Pennsylvania Orphans' Court Rules as well as the Attorney General's common law "parens patriae" authority over charitable trusts require that the Section review all estates and trusts in which there is a charitable interest, as well as any periodic accounting filed by a fiduciary in the Orphans' Court in which such an interest exists.

The Section receives, reviews and maintains federal tax forms which must be filed by private and public foundations with the Attorney General of the state in which the foundation operates.

Pursuant to the Not-For-Profit Corporation Act, the Charitable Trusts and Organizations Section may become involved in the dissolution or diversion of charitable assets from non-profit corporations.

In the course of its duties, the Section files objections to, or petitions in support of, a charitable trust, gift or corporation in various courts of Pennsylvania.

The Section maintains headquarters in Harrisburg with regional offices in Philadelphia and Pittsburgh.

### **Civil Rights Task Force**

The Civil Rights Task Force is designed to assume a leadership and coordination role in action arising from allegations and complaints of civil rights violations. The structure of the Civil Rights Task Force is as follows:

The Chairman of the Civil Rights Task Force is the Director of the Public Protection Division, located in Harrisburg, with the Regional Chiefs of both the Eastern and Western Regional Offices serving as Task Force members.

Complaints filed before the Task Force are reviewed to determine appropriate action, which may include contact with local law enforcement authorities in the case of a violation of criminal law. The Task Force serves as liaison to the Pennsylvania Human Relations Commission to ensure referral of appropriate cases and/or action.

The Civil Rights Task Force also is represented, by the Chairman or his designee, at meetings of the Inter-Agency Task Force on Civil Tension.

### **Office of Consumer Advocate**

The Office of Consumer Advocate within the Office of Attorney General

was established by Act 161 of 1976. As the first Commonwealth agency to come under sunset legislation, it was slated to go out of existence on June 30, 1979, but was extended for five more years to June 30, 1984. By Act 25 of July 20, 1983, the Office of Consumer Advocate was extended for another five years to December 31, 1989.

The Commonwealth Attorneys Act directs the Attorney General to appoint a Consumer Advocate subject to approval by the Senate. Funding of the Office comes not from the state but from assessments on the utility companies which are regulated by the Public Utility Commission, through a formula similar to the process for funding of the Public Utility Commission.

The Office represents residential or small utility consumers who have neither the technical knowledge nor the financial resources available to the large industrial and commercial classes of utility consumers.

Attorneys practice before the Public Utility Commission, Nuclear Regulatory Commission, Federal Energy Regulatory Commission, Commonwealth Court, Superior Court and Supreme Court of Pennsylvania, and when appropriate, various federal courts.

## **OFFICE OF MANAGEMENT SERVICES**

The Office of Management Services is responsible for the administrative affairs of the Office of Attorney General.

The Office comprises:

- Financial Management Unit
- Comptroller Section
- Personnel Section
- Affirmative Action Unit
- Office Services Section
- Law Library Section
- Data Processing Section
- Security Section

The Office of Management Services is headed by a Director who has the overall responsibility for seeing that the functions of the Office are properly administered. The Director reports to the First Deputy Attorney General and through him to the Attorney General.

### **Financial Management Unit**

The Financial Management Unit is responsible for the development, administration and implementation of the Office of Attorney General budget. These responsibilities include development of the budget request to the Governor's Budget Office and the presentation to the legislative Appropriations Committee. At the beginning of each fiscal year the Unit develops a budget plan for the utilization of all funds available to the Office of Attorney

General and monitors revenue and expenditures throughout the year, recommending budget changes if appropriate.

### **Comptroller Section**

The Comptroller Section is responsible for the proper accounting of all fiscal transactions executed by the Office of Attorney General and the development, administration and implementation of fiscal policy. These responsibilities include the processing of invoices and payrolls for payment, the receipt of all revenues, the management of all field advancement accounts, the review of all contracts and the fiscal auditing of all functions within the Office of Attorney General.

### **Personnel Section**

The Personnel Section plans, develops and administers the human resource program for the Office.

The Personnel Section has the responsibility to provide advice to managers and supervisors in the areas of recruitment, compensation, motivation, development, discipline, and utilization of employees.

The Personnel Section also supervises the activities of the Affirmative Action Unit.

### **Affirmative Action Unit**

The Affirmative Action Unit develops and promotes programs to ensure compliance with the policy of the Office of Attorney General to grant equal employment opportunities to all qualified individuals without regard to sex, race, color, religion, age, handicap, union membership, political affiliation, or national or ethnic origin. It develops, updates, and administers the Office of Attorney General affirmative action plan.

### **Office Services Section**

The Office Services Section manages the support functions of word processing, mail and messenger services, purchasing, graphics, printing and duplicating services, space and facilities management, telecommunications, and the automotive fleet for the Office of Attorney General. The Office Services Section is divided functionally into five areas:

1. Purchasing—Develops policy and procedures, within the laws and regulations of the Commonwealth, for purchasing of goods and services required in the operation of the Office of Attorney General; develops, issues and controls purchasing documents, and manages the OAG stockroom.
2. Word processing—Supervises a statewide word processing system and communications network between OAG regional offices and certain service

bureaus such as news wire services, rating agencies, law firms, and federal and other state agencies.

5. **Graphics**—Provides graphic design and high volume document printing and reproduction through the use of in-house equipment or the acquisition of outside vendor services. Also provides mail and messenger services to all OAG offices through one of the following methods: U.S. mail, inter-/intra-office mail, bonded couriers, messengers, facsimile equipment and common carriers.

**Space and Facilities/Telecommunications**—Handles OAG employees' physical office needs through the development of space studies, administration of leases, coordination of renovations and administration of telephone systems.

**Automotive**—Manages and monitors the assignment, usage, maintenance, repair and replacement of OAG vehicles.

### **Law Library Section**

The Law Library Section is operated and maintained to provide legal reference and research information necessary for the proper functioning of the Office of Attorney General. The library staff provides this information from print and computer-based resources within the library and from other libraries and sources when necessary.

The library staff also maintains individual office collections and provides advice and aid to the regional and field offices.

The library computer resources consist of LEXIS (full text court decisions from federal and state appellate courts), Shepard's Citations, Auto-Cite (citation verification), and NEXIS (full text library of news, general and business information from newspapers, magazines, newsletters and wire services).

The library print collection includes federal laws and case reports (Statutes at Large, U.S. Code and Congressional Administrative News, U.S. Code Annotated, U.S. Code Service, Code of Federal Regulations, Federal Register, Supreme Court Reports, Federal Reporter, Federal Supplement, digests), other state references (National Reporter System, Shepard's Citations, American Law Reports) and Pennsylvania statutes, case reports and other relevant legal information (appellate court reporters, side reports, Attorney General opinions, treatises, Purdons Statutes, Pa. Code). Also included are encyclopedias (Corpus Juris Secundum, AmJur 2d, Words and Phrases), legal newspapers, law reviews, legal periodicals and loose-leaf services (CCH and BNA).

### **Data Processing Section**

The Data Processing Section designs, develops and implements automated

information processing systems to assist management, legal and support personnel in the performance of their day-to-day activities.

Data processing staff train the users of these computer applications in the use of video display terminals to input, retrieve, update and manipulate information stored in the computer.

Computer support is provided by a Unisys 1100/72 computer located in Strawberry Square, Harrisburg. More than 200 terminals (located in 16 regional offices, 4 Commonwealth agencies and Strawberry Square) are linked to the computer by a statewide data communications network. Of these 200 terminals more than 50 provide both word and data processing capability.

The records management office develops and maintains automated and manual systems to facilitate access to open and closed case information.

### **Security Section**

The Security Section provides security service for the Office of Attorney General through the use of security devices for offices and file rooms.

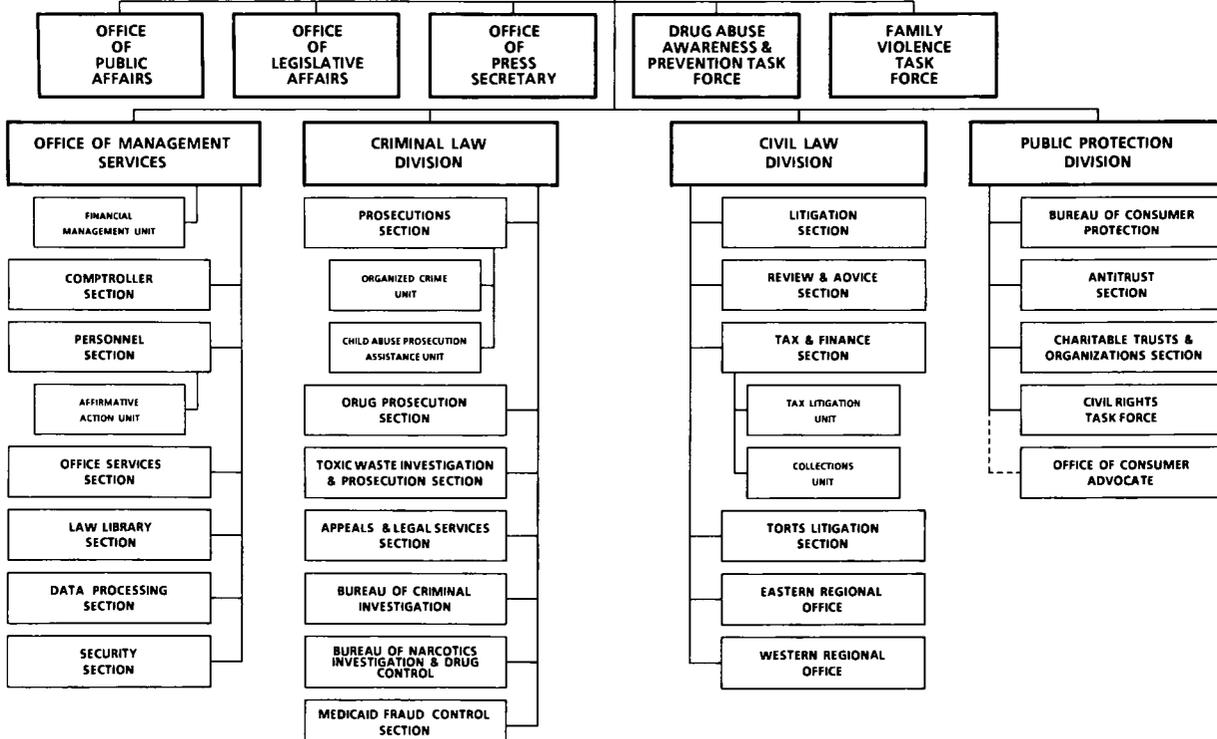
The Section supervises the preparation and issuance of photograph identification cards and credentials, and controls the issuance of badges to designated Office of Attorney General personnel.

The Security Section conducts and/or supervises background investigations of prospective employees, and maintains a close association with police departments, law enforcement agencies and staff in an effort to provide effective security for the Office of Attorney General and its employees.

# OFFICE OF ATTORNEY GENERAL

ATTORNEY GENERAL  
LeROY S. ZIMMERMAN

FIRST DEPUTY ATTORNEY GENERAL  
PAUL M. YATRON





## OFFICIAL OPINION NO. 84-3

*Governor—Sunset Review Resolutions Under Act of December 22, 1981, P.L. 508, No. 142, as amended—Gubernatorial Action Required Under Article III, § 9 of the Pennsylvania Constitution.*

1. Sunset Review Resolutions passed by the General Assembly pursuant to the provisions of § 7(b) of the Sunset Act of 1981 and presented to the Governor should be approved or disapproved by the Governor.
2. Resolutions passed by the House of Representatives and the Senate pursuant to § 7(b) of the Sunset Act of 1981 are resolutions “to which the concurrence of both Houses may be necessary” within the meaning of Article III, § 9 of the Pennsylvania Constitution.
3. The provisions of Article III, § 9 of the Constitution attach only to such resolutions as are legislative in character.
4. Sunset Review Resolutions are legislative in character in that they commit the Commonwealth to both the continued existence of the agencies and the continued performance of their functions and duties.

December 28, 1984

The Honorable Dick Thornburgh  
Governor  
Commonwealth of Pennsylvania  
225 Main Capitol Building  
Harrisburg, PA 17120

Dear Governor Thornburgh:

You have asked my opinion regarding what action, if any, should be taken on six Sunset Review Resolutions adopted by the General Assembly on November 28 and 29, 1984, pursuant to Section 7(b) of the Sunset Act of 1981, Act of December 22, 1981, P.L. 508, No. 142, *as amended*, 71 P.S. § 1795.7(b). Sunset Review Resolution No. 14 (S.R.R. 14) continues in existence the Citizens Advisory Council (DER), S.R.R. 15 continues the Environmental Quality Board, S.R.R. 17 continues the Labor Relations Board, S.R.R. 18 continues the Securities Commission, S.R.R. 19 continues the Board of Private Trade Schools and S.R.R. 21 continues in existence the State Workmen’s Insurance Board.

Specifically, you have requested that I advise you whether these resolutions, having been presented to you, require action by you pursuant to Article III, § 9 of the Constitution of Pennsylvania.

It is my opinion and you are hereby advised that you must take action to approve or disapprove these resolutions pursuant to the Pennsylvania Constitution.

The Sunset Act, Act of December 22, 1981, P.L. 508, No. 142, *as amended*, 71 P.S. § 1795.1 *et seq.* is a validly enacted statute. Section 7 of the statute provides in pertinent part that:

(a) Any agency scheduled for termination under this act, may be reestablished by the General Assembly by legislation . . .

and

(b) Unless legislation is enacted prior to November 1 reestablishing an agency as provided in subsection (a), the presiding officer of each House shall cause to be placed on their respective calendars for the first legislative day in November, the question, in the form of a resolution, of whether an agency scheduled for termination on December 31 of that year shall be continued. If a majority of the members elected to each House approve such a resolution prior to the scheduled termination date of December 31, the agency shall be continued until the next review and termination cycle scheduled for said agency.

The statute thus provides alternate methods for the reestablishing or continuation of an agency scheduled for demise in December of any given year.

1. By legislation, in which case the normal requisites of legislation, contained in Article III of the Constitution, including *inter alia*, referral to committee, printing, consideration of bills, concurring in amendments, signing, and submission to the governor for approval or veto, would apply, or
2. By each house voting upon resolutions which the presiding officer of each House is obliged to place on their respective calendars for the first legislative day in November. If a majority of the members elected to each house approves such resolutions prior to December 31, the agency (by the terms of the statute) shall be continued.

Article III, § 9 of the Pennsylvania Constitution reads as follows:

Every order, resolution or vote, *to which the concurrence of both Houses may be necessary*, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be re-passed by two-

thirds of both Houses according to the rules and limitations prescribed in case of a bill (emphasis added).

This constitutional requirement would not appear to apply to a Section 7(b) continuation resolution unless that resolution is one “to which the concurrence of both Houses may be necessary.” *Black’s Law Dictionary* 263 (Revised 5th Ed. 1981) defines the term “concurrent” to mean:

Running together; having the same authority; acting in conjunction; agreeing in the same act or opinion; pursuit of the same course; contributing to the same event; contemporaneous.

Based on the definition of the term “concurrent,” the actions of House and Senate in adopting Sunset Resolutions clearly “run together” and are based upon “the same authority.” They are taken “in conjunction,” result in agreement “in the same act or opinion,” contribute to “the same event” and are “contemporaneous.” Under the provisions of Section 7(b), the passage of any of these resolutions by either the Senate or the House is of no legal effect absent passage by the other body.

Finally, in order to determine whether these resolutions are required to be presented to the Governor for approval or disapproval, the nature of the subject resolutions must be reviewed. Under the case law of this Commonwealth, the requirements of Article III, § 9 of the Pennsylvania Constitution attach only to resolutions which are legislative in character.

The earliest Pennsylvania case addressing the problem of whether an action is legislative is *Commonwealth ex rel. v. Griest*, 196 Pa. 396, 46 A. 505 (1900). The *Griest* case arose when the Governor attempted to veto proposed constitutional amendments providing for voter registration. The Secretary of the Commonwealth, W. W. Griest, refused to certify the proposed amendment for printing as part of the 1900 General Election ballot. The Supreme Court concluded that the constitutional provision which requires the Governor to approve concurrent resolutions “is confined exclusively to the subject of legislation” and does not control “over the subject of ‘future amendments’,” *Griest*, 196 Pa. at 408, 46 A. at 507. The Court stated that the language applies only to “orders, resolutions and votes . . . such as relate to and are a part of the business of legislation,” *Griest*, 196 Pa. at 409, 46 A. at 508.

The question of the appropriate scope of the Governor’s review authority over legislative resolutions was later discussed in *Russ v. Commonwealth*, 210 Pa. 544, 60 A. 169 (1905). This case involved a concurrent resolution which was approved by a two-thirds vote in the legislature after a veto by the

Governor. The resolution provided that both Houses of the General Assembly would attend the dedication in New York City of a monument erected in memory of General U. S. Grant and that the Committees on Military Affairs in the House and Senate would be responsible for “all matters pertaining to such attendance.” Pursuant to this resolution the committees entered into a contract with a caterer in New York. Russ, the caterer, sued for nonpayment of the contract. The Dauphin County Court of Common Pleas denied the claim because the resolution did not confer upon the committee the power to enter into the contract. The Pennsylvania Supreme Court reversed the lower court in part because the resolution was “sent to the governor for his approval, because it must have been regarded by those who passed it as committing the state to it, and, if so, it was a matter in the nature of legislation.” *Russ*, 210 Pa. at 551, 60 A. at 171. The Supreme Court held that legislative resolutions require executive approval but that resolutions dealing only with internal legislative matters do not require such approval. The resolution was held to be legislative in nature because it authorized “special committees . . . to act on behalf of the state” and was approved by both Houses. *Id.*

The *Griest* and *Russ* decisions were interpreted by Attorney General Francis Brown for Governor Martin Brumbaugh in 1915 (Op. Atty. Gen., June 9, 1915, p. 2). The Attorney General reviewed eighteen concurrent and joint resolutions and concluded that “not all joint or concurrent resolutions . . . must be submitted to the Governor for his approval, but only such as make legislation or have the effect of legislating, i.e., enacting, repealing or amending laws or statutes or which have the effect of committing the State to a certain action . . .”

In *Fabrizio v. Koprivier*, 73 Dauph. 345 (1959), the Dauphin County Court sitting as Commonwealth Court defined the type of resolutions requiring submission under Article III, § 9. The Court stated that the “term ‘resolution’ as used in Article III, § 26 [now § 9], contemplates legislative action which commits the Commonwealth.” The Court continued:

In other words, a resolution which is in the nature of legislative action committing the State comes within the contemplation of Article III, § 26, because the Governor must give his approval to any such commitment. However, if the resolution amounts to nothing more than a formal expression of an opinion and concerns itself with the transaction of the business of the General Assembly, and does not commit the State to any affirmative action, then such a resolution would not be within the purview of Article III, § 26.

The subject resolutions commit the Commonwealth to a specific course of action. Section 6(a) of the Sunset Act provides that the agencies scheduled for termination, together with their corresponding statutory functions and duties, shall terminate all activities and go out of existence upon their sunset date. The effect of the resolutions is thus to commit the Commonwealth to continue not only the agencies scheduled for termination, but also to continue the performance of the functions and duties which those agencies carry out on behalf of the Commonwealth. The resolutions are express substitutes for the passage of a new act. They extend for up to ten years the existence of an agency and the performance of its functions.

For the reasons stated above, it is my opinion and you are hereby advised that the subject resolutions must be approved or disapproved by you pursuant to Article III, § 9 of the Constitution.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

### OFFICIAL OPINION NO. 85-1

*Liquor Control Board—Enforcement Officers—Use and Possession of Blackjacks—Crimes Code § 908—Act 78 of 1983.*

1. Clause 5 of § 908(d) of the Crimes Code, added by Act 78 of 1983, exempts from the prohibition on use or possession of blackjacks only police officers employed by the Commonwealth who have satisfactorily met the requirements of the Municipal Police Education and Training Law.
2. Liquor Control Board enforcement officers are not required to complete training under the Municipal Police Education and Training Act.
3. Liquor Control Board enforcement officers are “peace officers” with limited police power and not “police officers” with general power of arrest.
4. Liquor Control Board enforcement officers are not authorized to use or carry blackjacks under the provisions of § 908(d)(5) of the Crimes Code.

January 31, 1985

Daniel W. Pennick, Chairman  
Liquor Control Board  
Northwest Office Building  
Harrisburg, PA 17124

Dear Mr. Pennick:

You have requested through your Chief Counsel an opinion from the Office of Attorney General advising the Liquor Control Board whether Liquor Control Board enforcement officers may carry and use blackjacks in the performance of their official duties pursuant to the amendments to § 908 of the Crimes Code, 18 Pa. C.S. § 908, made by Act 78 of 1983.

Section 908 of the Crimes Code prohibits, *inter alia*, the possession or use of certain offensive weapons which include, as defined in § 908(c), "blackjacks." Act 78 of 1983 amended § 908 to exempt from the provisions of the section "the use and possession of blackjacks" by five enumerated categories of police officers and sheriffs. As it is clear that liquor enforcement officers would not fall into any of the first four exemptions, i.e., municipal police officers, Philadelphia police, Pennsylvania State Police or various sheriffs and deputy sheriffs, we shall confine our discussion to the provisions of Clause 5 of § 908(d) which exempts:

- (5) Police officers employed by the Commonwealth who have satisfactorily met the requirements of the Municipal Police Education and Training Law.

Clearly, therefore, if the above exemption were to apply to your enforcement officers at all, it would be applicable only to those personnel who had satisfactorily completed the training required pursuant to the Municipal Police Education and Training Act. This training is not a requisite of employment as a liquor enforcement officer. Even if some of your enforcement officers have satisfactorily completed such training, however, they would not fall within the above exemption unless Liquor Control Board enforcement officers are "police officers" within the meaning of § 908(d)(5). We conclude that they are not.

As we pointed out to you in our Official Opinion No. 6 of 1983, the police powers of your enforcement officers are narrowly limited in scope. They are "peace officers" with limited police power and *not* "police officers" with general power of arrest. This distinction has been recognized by the Supreme Court in *McNitt v. Philadelphia*, 325 Pa. 73, 76, 189 A. 300, 301 (1937), as follows:

Fire marshals, mine inspectors, factory inspectors, boiler inspectors and milk inspectors are all charged with law-enforcing duties, but they help enforce laws affecting only *special* subjects, while a policeman's duty is the enforcement of *all laws* whose violation affects the peace and good order of the community.

This distinction has been reaffirmed by the Supreme Court in *Commonwealth of Pennsylvania, Human Relations Commission v. Beaver Falls City Council*, 469 Pa. 522, 366 A.2d 911 (1976).

It is my opinion and you are so advised that the enforcement officers employed by the Liquor Control Board are not authorized to possess or use blackjacks in the course of their official duties.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

#### OFFICIAL OPINION NO. 85-2

*Liquor Control Board—Implementation of Act of February 28, 1985, P.L. 1, No. 1*

In order to implement the provisions of Act No. 1 of 1985 the Liquor Control Board is advised to reissue regulations relating to restrictions on contests which are the same or substantially similar to the provisions of 40 Pa. Code § 5.32(g) as it existed prior to the amendments promulgated in the *Pennsylvania Bulletin* of October 13, 1984, 14 Pa. B. 3758.

May 7, 1985

Daniel W. Pennick, Chairman  
Liquor Control Board  
Northwest Office Building  
Harrisburg, PA 17124

Dear Chairman Pennick:

You have asked for my opinion concerning the implementation of the Act of February 28, 1985, P.L. 1, No. 1, which, among the provisions, repealed Section 476 of the Liquor Code. It is clear that the intent of the General

Assembly was to repeal that part of the Liquor Code which authorized the holding of card tournaments and other contests on licensed premises. In order to give effect to the intention of the General Assembly and to protect the constitutionality of the statute, I hereby advise the Liquor Control Board to reissue, pursuant to the Commonwealth Documents Law, regulations relating to restrictions on contests held on licensed premises, which regulations shall be the same as, or substantially similar to, 40 Pa. Code § 5.32(g) as it existed prior to the amendments promulgated in the *Pennsylvania Bulletin* of October 13, 1984, 14 Pa. B. 3758.

Section 5.32(g) of the Liquor Board regulations, when reissued pursuant to the Commonwealth Documents Law, will apply to any licensee or other person to whom it was applicable before the regulation was changed.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice of this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

#### OFFICIAL OPINION NO. 85-3

*Pennsylvania School Employees—Recovery of F.I.C.A. Taxes Paid in 1979, 1980 and 1981—Payments to Employees on Account of Sickness—Public School Code of 1949—Acts No. 197 of 1980 and No. 38 of 1984—Public Employee Relations Act of 1970.*

1. Pennsylvania school districts and other entities were legally authorized to make payments to employees during 1979, 1980 and 1981. Pursuant to sick leave plans providing payments on account of sickness, such payments being specifically authorized by Section 1153 of the Public School Code of 1949, Act of March 20, 1949, P.L. 30, Article XI, § 1153, 24 P.S. § 11-1153.
2. The power to establish sick leave plans and make payments is inherent in the general powers and duties of school districts contained in Sections 211 and 1106 of the School Code, 24 P.S. §§ 2-211 and 11-1106.
3. Section 1154 of the Public School Code, 24 P.S. § 11-1154 merely provides for certain minimum provisions required of school districts in the establishment of sick leave plans under Section 1153.
4. The exact nature of payments made under sick leave plans for the purposes of recovery of F.I.C.A. taxes should be determined by the provisions of the collective bargaining agreements between the districts and their employees made pursuant to the Public Employee

Relations Act of 1970, Act of July 23, 1970, P.L. 563, No. 195, 43 P.S. § 1101.101 *et seq.* or other employee contracts.

5. Act 197 of 1980 and Act 38 of 1984, 24 P.S. § 11-1154.1 were merely intended to prevent the misinterpretation of Section 1154 of the School Code.

May 8, 1985

Honorable James W. Knepper, Jr.  
Secretary  
Department of Labor and Industry  
1700 Labor and Industry Building  
Harrisburg, PA 17120

Dear Secretary Knepper:

You have requested my advice concerning the recovery of F.I.C.A. taxes on behalf of Pennsylvania school employees and, specifically, whether there is legal authority under Pennsylvania state law in 1979, 1980 and 1981 for school districts and entities to pay employees "on account of sickness" as compared to simply continuing the employees' salaries while absent from work. Also, if the authority did not exist, you have asked whether such authority was validly provided under Act 197 of 1980, reenacted and amended by Act 38 of 1984, 24 P.S. § 11-1154.1.

It is my opinion and you are so advised that during the years 1979, 1980 and 1981, the school districts and other entities were legally authorized to establish and make payments under sick leave plans which provided for payments on account of sickness. I arrive at this conclusion without reliance upon Acts No. 197 of 1980 or No. 38 of 1984.

It appears from your inquiry that questions have arisen regarding the districts' authority because of the erroneous conclusion that the statutory authority to provide for sick leave is derived from Section 1154 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, Article XI, § 1154, *as amended*, 24 P.S. § 11-1154. In fact, the authority to provide for sick leave and for other unavoidable circumstances is specifically granted to the school districts by Section 1153 of the School Code, 24 P.S. § 11-1153, paragraph 2, the first sentence of which reads as follows:

Whenever a teacher is prevented by sickness or some other unavoidable circumstance from following his or her occupation, the school district may, at the discretion of the directors, make such payments of compensation during the period of absence from duty as the *exigencies* of the case may seem to warrant.

Section 1154 of the School Code merely provides certain minimum provisions which the school districts are required to meet in the exercise of their discretion granted under Section 1153.

Even without the specific authorization of Section 1153, the power to establish salaries, hours and conditions of employment is inherent in the authorization to employ personnel and is embodied not only in Section 211 of the School Code, 24 P.S. § 2-211, which vests in the districts “all necessary power to enable them to carry out the provisions of this act” but also in Section 1106, 24 P.S. § 11-1106, which mandates the employment of the necessary qualified personnel.

The importance of Section 1154 and other provisions of the School Code was reduced with the enactment of the Public Employe Relations Act of 1970, Act of July 23, 1970, P.L. 563, No. 195, 43 P.S. § 1101.101 *et seq.*, which authorized collective bargaining with respect to wages, hours, and other terms and conditions of employment. (Section 701, 43 P.S. § 1101.701). To the extent that sick leave payments were made to school employees in 1979, 1980 and 1981 under collective bargaining agreements, the precise nature of those payments should be determined by the language of the contracts and not by the provisions of Section 1154 of the School Code. Except for the fact that those contracts cannot provide for fewer benefits than those provided in Section 1154, that section would have no application to the negotiated contracts. The mere fact that a particular subject matter may be covered by legislation does not remove it from collective bargaining under Section 701 if it bears on the question of wages, hours, and conditions of employment. *Pa. Labor Relations Board v. State College Area School District*, 461 Pa. 494, 337 A.2d 262 (1975).

Because school districts were authorized in 1979, 1980 and 1981 to pay employees “on account of sickness” and were so authorized without reference to Acts No. 197 of 1980 or No. 38 of 1984, we will not discuss your second inquiry at length. Presumably, the relevant provisions of those two Acts were enacted in an effort to prevent the misinterpretation of Section 1154 which seems to have occurred.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

## OFFICIAL OPINION NO. 85-4

*Department of Banking—Interest on Loans made by ERISA Pension and Profit Sharing Plans—29 U.S.C. § 1001 et seq.—Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101 et seq.*

1. Loans made by pension and profit sharing plans administered under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, as amended, (ERISA) are not subject to the usury restrictions of the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101 *et seq.* (Act 6).
2. ERISA loans are required to meet a standard of a “reasonable rate of interest.”
3. Neither Act 6 nor ERISA would negate the applicability of other state criminal usury statutes.

November 18, 1985

Honorable Ben McEnteer  
Secretary  
Department of Banking  
1651 Harristown 2  
333 Market Street  
Harrisburg, PA 17101

Dear Secretary McEnteer:

You have requested advice as to whether pension and profit sharing plans administered under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, as amended, (ERISA) may make loans to plan participants and beneficiaries without being subject either to the usury restrictions or the criminal and civil penalties prescribed by the Pennsylvania Loan Interest and Protection Law, 41 P.S. § 101 *et seq.*, hereinafter referred to as Act 6. It is my opinion and you are hereby advised that the restrictions on interest rates and the remedies under Act 6 do not apply to loan transactions made and administered by trustees of ERISA pension and profit sharing plans in compliance with ERISA requirements.

You have indicated that many Pennsylvania chartered financial institutions serve as trustees to ERISA pension and profit sharing plans. These pension and profit sharing plans are tax-qualified under the Internal Revenue Code of 1954 (the Code) and contain specific provisions under which participating employees may borrow against their vested interests in such plans.

ERISA specifically authorizes a pension or profit sharing plan to include a loan program for its participants and beneficiaries and specifies standards by which a plan fiduciary or trustee may make such loans without engaging

in a “prohibited transaction.” These standards include the requirement that any loan bear a “reasonable rate of interest.” 29 U.S.C. § 1108(b)(1). Similar requirements may be found at Section 4975 of the Code. If these requirements are not met, such plans may lose their tax-qualified status and expose the plan fiduciary/trustee to the imposition of excise or penalty taxes as well as civil and criminal sanctions under ERISA.

The United States Department of Labor is primarily responsible for enforcement of the ERISA provisions, but no regulations which define the reasonable rate of interest standard as set forth under the law have been promulgated. The Department of Labor has, however, issued letter opinions on this subject. In a letter to Robert Georgine, dated January 15, 1981, the Department cited the ERISA conference report as providing guidance:

Under the Internal Revenue Code, qualified retirement plans must be for the exclusive benefit of the employees and their beneficiaries. Following this requirement, the Internal Revenue Service has developed general rules that govern the investment of plan assets including a requirement . . . that *there must be a fair return commensurate with the prevailing rate*, sufficient liquidity must be maintained to permit distributions, and the safeguards and diversity that a prudent investor would adhere to must be present. ERISA Conference Report, H.R. Report #93-1280, 93rd Cong., 2nd Sess. 1974, at 302 (emphasis added).

That same letter opinion defined the prevailing rate of interest as follows:

. . . the Department does not view the “prevailing rate of interest” as a single number, or view the prevailing rate standard as unduly rigid. To the contrary, we believe the prevailing rate standard is flexible, because it is a concept based on the composite of what persons and institutions in the business of pending money would obtain as compensation for the use of the money which they lend under similar circumstances. Department of Labor Opinion 81-12-A, 1981.

Likewise, the Internal Revenue Service has approved of plan loans which are comparable to transactions negotiated at arm’s length between independent parties. The Service has, in fact, approved plans which allow for interest “at a rate which is not less than the ‘prime rate’ then prevailing or the rate prevailing for similar loans extended by other financial institutions.” See IRS PLR 8038054 (June 25, 1980).

You have indicated that a potential conflict exists between these federal

requirements and the maximum lawful interest rate set forth in Act 6. I hereby advise you that I see no conflict.

Section 201 of Act 6 provides as follows:

Except as provided in Article III of this Act (relating to residential mortgage interest rates), the maximum lawful rate of interest for the loan or use of money in an amount of fifty thousand dollars (\$50,000) or less in all cases where no express contract shall have been made for a less rate shall be six percent per annum. 41 P.S. § 201.

Notwithstanding this limitation, it is clear that the legislature anticipated that there would be situations in which the limitation might not apply. Specifically, Section 604 of Act 6 provides:

If any maximum lawful rate of interest provided for in this act is inconsistent with the provision of *any other act* establishing, permitting or removing a maximum interest rate . . . then the provision of such other act shall prevail. 41 P.S. § 604 (emphasis added).

It is consistent with the legislative intent of the statutes to construe Section 1108(b)(1) of ERISA as another act establishing a maximum interest rate.

From a policy perspective, the purpose sought by the enactment of Act 6 would not be frustrated by an ERISA plan loan program. Both ERISA and the Code contain sufficient safeguards to prevent the imposition of unreasonably high rates of interest upon plan participants. By virtue of these safeguards, a plan fiduciary responsible for making loans has an obligation to insure that the loan provisions, including the interest rate charged, are reasonable. This will prevent the imposition of either an unreasonably high rate of interest or an unreasonably low rate of interest, which, in either case, would be a prohibited transaction.

This interpretation of Act 6 does not negate the general applicability of other state criminal usury statutes. Act 6 itself does not repeal or otherwise affect the remedies and penalties provided by the criminal statutes. 41 P.S. § 507. Neither do the ERISA requirements specifically preempt any generally applicable criminal law of a state. 29 U.S.C. § 1144(b). Accordingly, with respect solely to the application of the restrictions on interest rates in Section 201 and the remedies available under Act 6, it is my opinion and you are hereby advised that such provisions do not apply to loan programs established and operated by ERISA pension and profit sharing plans in compliance with ERISA requirements.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

### OFFICIAL OPINION NO. 86-1

*Pennsylvania State Public School Building Authority—Power to Finance Office Space and Warehouse Facilities for Intermediate Units in Pennsylvania.*

1. The Pennsylvania State Public School Building Authority has the statutory power to finance office space and warehouse facilities for intermediate units pursuant to Section 4 of the Act of July 5, 1947, P.L. 1217, No. 48, *as amended*, 24 P.S. § 791.4.
2. Intermediate units are a part of the public school system of the Commonwealth under the jurisdiction of the Department of Education under the Public School Code of 1949, P.L. 30, Article IX-A, added by Act. No. 102 of 1970, 24 P.S. § 9-951.
3. Act No. 117 of July 10, 1986, P.L. 1270, authorizes intermediate units to purchase and own office space and warehouse facilities.

December 3, 1986

Honorable Robert K. Bloom  
Executive Director  
State Public School Building Authority  
101 South 25th Street  
Harrisburg, PA 17105

Dear Mr. Bloom:

You have requested through your counsel my opinion about the power of the State Public School Building Authority (the Authority) to finance certain capital improvements for intermediate units throughout the Commonwealth. Specifically, you inquire whether there is authority for this purpose under Section 4 of the Authority's enabling statute, Act of July 5, 1947, P.L. 1217, No. 48, *as amended*, 24 P.S. § 791.4. It is my opinion and you are so advised that the Authority has the statutory power to finance office space and warehouse facilities for intermediate units in Pennsylvania.

Section 4 of the Authority's enabling legislation provides, in pertinent part, that

The Authority is created for the purpose of acquiring, financing, refinancing, constructing, improving, furnishing, equipping, maintaining and operating buildings for public school and educational broadcasting facilities for use as a part of the public school system of the Commonwealth of Pennsylvania under the jurisdiction of the Department of Education.

24 P.S. § 791.4

Among the specific powers given to the Authority, “including but without limiting the generality” of the powers enumerated above, are the following powers:

(d)(1) To finance projects by making loans to any eligible school district or board of trustees of a community college, which loans may be evidenced by and secured as may be provided in loan agreements, mortgages, security agreements or any other contracts, instruments or agreements, which may contain such provisions as the Authority shall determine necessary or desirable for the security or protection of the Authority or its bondholders . . .

(e) To acquire by purchase, lease or otherwise, and to construct, improve, maintain, repair and operate projects;

(n) To do all acts and things necessary or convenient to carry out the powers granted to it by this act or any other acts.

24 P.S. § 791.4

Intermediate units have been part of the public school system of the Commonwealth of Pennsylvania under the jurisdiction of the Department of Education since their establishment on July 1, 1971, pursuant to Act No. 102 of 1970, which added Article IX-A to the Public School Code of 1949, Act of March 10, 1949, P.L. 30, 24 P.S. § 9-951 *et seq.* Section 1 of Act 102 provides that “[i]ntermediate units shall be part of the public school system of this Commonwealth.” 24 P.S. § 9-951. Until passage of the Act of July 10, 1986, P.L. 1270, No. 117 (Act 117), intermediate units were authorized to lease buildings or real estate but had no power to purchase or own these premises. Under the provisions of Act 117, the intermediate units are now authorized to own office space and warehouse facilities. 24 P.S. § 9-964(11). It is my opinion and you are hereby advised that the Authority is authorized under Section 4 of its enabling act to finance office space and warehouse facilities for intermediate units as part of the public school system of Pennsylvania.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

OFFICIAL OPINION NO. 87-1

*Liquor Control Board—Newly Created Municipality—Retail Liquor Licenses*

1. The Liquor Control Board may grant a license to a qualified applicant for the sale of liquor or malt and brewed beverages in a new municipality created in whole or in part from a municipality which had previously voted against granting such licenses.
2. Under the Borough Code, the incorporation of a borough creates a new municipality.
3. The electors of a newly created municipality may avail themselves of the local option provisions of the Liquor Code to change the status of the municipality under the Code.

February 10, 1987

Honorable Daniel E. Pennick  
Chairman  
Liquor Control Board  
Northwest Office Building  
Harrisburg, PA 17124

Dear Chairman Pennick:

You have requested my opinion on the status under the Liquor Code of a municipality which has been newly created from a municipality which had previously voted against the granting of licenses for the sale of liquor or malt and brewed beverages under the local option law. You are advised that the Liquor Control Board may grant a license to a qualified applicant within the newly created municipality unless or until the electors of the new municipality vote against the granting of such licenses as provided by law.

In the examples cited in your letter, boroughs have been created from townships which had previously elected to be "dry" under the local option law; that is, the electors had voted not to permit the sale of liquor or malt and brewed beverages. 47 P.S. § 4-472. Under the Act of February 1, 1966, P.L. (1965) 1656, No. 581, known as the Borough Code, the incorporation of a

borough creates a new municipality. 53 P.S. § 45201. *In re Incorporation of the Borough of New Stanton, Westmoreland County*, No. 6, July Term, 1965, Westmoreland County Court of Common Pleas, *decided December 9, 1968, affirmed per curiam*, 218 Pa. Super. Ct. 742, 272 A.2d 207 (1970); *Carroll Valley Borough Incorporation*, 60 Pa. D. & C.2d 536 (1972).

In enacting the present Liquor Code, the General Assembly has chosen to provide for the allocation and issuance of retail licenses by municipality rather than by geographic territory as it had previously done in the Act of April 3, 1872, P.L. 804, No. 766, which created local option districts. The Liquor Code provides that “at least one such license may be granted in each municipality . . . except in municipalities where the electors have voted against the granting of any retail licenses.” 47 P.S. § 4-461. A newly created municipality is no longer in or a part of a municipality “where the electors have voted against the granting of any retail license.” If the electors of a new municipality wish to prohibit the issuance of retail licenses, the provisions of local option law are available for the purpose.

In reaching this conclusion, I specifically reject the conclusion of the Snyder County Court in *Nine Four Two Home Association Appeal*, 42 Pa. D. & C.2d 73 (1967). The court in this case held that a local option status, once adopted under the statute, attaches to the geographic territory originally bound by the vote and that the status remains until a subsequent vote. The court based its decision on the proposition that the “electors of a . . . political subdivision have the right to determine their status” under the local option, a principle with which I agree. In the application of this principle, however, the court has reached the wrong conclusion. When a new municipality is established, the electors of that political subdivision have not previously determined their status under the local option statute. The status was determined by the electors of another municipality, that is, the previous political subdivision. The Liquor Code provides the only method by which the electors of the new municipality can determine their status and that procedure may be invoked.

I believe that the conclusion reached on this general question answers the remaining issues presented in your correspondence.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

## OFFICIAL OPINION NO. 87-2

*Pennsylvania Board of Pardons—Applicability of Sunshine Act of 1986—Pennsylvania Constitution, Article IV, § 9—Powers, Duties and Procedures of the Board—Doctrine of Separation of Powers—Agencies Covered by 1986 Sunshine Law—“Official action” Under Sunshine Law.*

1. The proceedings of the Pennsylvania Board of Pardons are governed by the Pennsylvania Constitution, Article IV, § 9 and the provisions of the Sunshine Act, Act of July 3, 1986, P.L. 388, No. 84, 65 P.S. § 271 *et seq.* are not applicable to the Board.
2. The Board of Pardons is a constitutionally established advisory board whose only power is to recommend to the Governor the grant or denial of clemency.
3. The power of clemency is beyond the jurisdiction of the judiciary and it is also beyond the power of the Legislative Branch.
4. When specific powers and duties are singularly and exclusively vested by the Constitution in a co-equal branch of government, the General Assembly may not legislate the procedure by which they are executed except to the extent that the Constitution provides for them to be exercised as provided by law.
5. The Pennsylvania Board of Pardons is not an “agency” within the definition in Section 3 of the Sunshine Law.
6. The recommendations of the Board of Pardons are not “official action” within the definition of the Sunshine Law since they are made pursuant to the Constitution and not “pursuant to statute, ordinance or executive orders.”

April 21, 1987

The Honorable Mark S. Singel  
 Lieutenant Governor of Pennsylvania  
 200 Main Capitol Building  
 Harrisburg, PA 17120

Dear Governor Singel:

You have requested my opinion concerning the application, if any, of the new Sunshine Act, Act of July 3, 1986, P.L. 388, No. 84, 65 P.S. § 271 *et seq.* to the proceedings of the Pennsylvania Board of Pardons. It is my opinion and you are hereby advised that the proceedings and actions of the Board are governed by the Pennsylvania Constitution and that the provisions of the Sunshine Act are not applicable to the Board.

In determining the effect of this act upon the Board of Pardons, it is necessary to consider both the creation and function of the Board. It was established by and its role is defined in Article IV, § 9 of the Pennsylvania Constitution, as follows:

Section 9. (a) In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant Governor in a docket kept for that purpose.

(b) The Board of Pardons shall consist of the Lieutenant Governor who shall be chairman, the Attorney General and three members appointed by the Governor with the consent of two-thirds or a majority of the members elected to the Senate as is specified by law for terms of six years. The three members appointed by the Governor shall be residents of Pennsylvania and shall be recognized leaders in their fields; one shall be a member of the bar, one a penologist, and the third a doctor of medicine, psychiatrist or psychologist. The board shall keep records of its actions, which shall at all times be open for public inspection.

Subsection (a) empowers the Governor to remit fines and forfeitures, grant reprieves, commute sentences and grant pardons, subject to two limitations. First, these powers do not extend to impeachments which are exclusively the prerogative of the legislative branch. Second, the Governor is empowered to grant a commutation or a pardon only on the recommendation of a majority of the members of the Board of Pardons. The subsection also provides the procedure and form to be followed by the Board. The recommendation to the Governor shall be in writing, "after full hearing in open session, upon due public notice." The recommendation, with the reasons therefore, must be delivered to the Governor and a copy filed and docketed in the office of the Lieutenant Governor.

Subsection (b) establishes the membership of the Board and requires the Board to keep records of its actions, which must be open to public inspection.

The powers granted by Article IV, § 9 are granted to the Governor, and, even when empowered to exercise them, he is under no obligation to do so. The Board of Pardons is, therefore, a constitutionally established advisory board. Its only power is to recommend to the Governor the grant or denial of clemency. *Com. ex rel. Cater v. Myers*, 412 Pa. 67, 194 A.2d 185 (1963). Furthermore, the jurisdiction of the executive branch in showing clemency is exclusive, *Com. ex rel. Banks v. Cain*, 345 Pa. 581, 585, 28 A.2d 897, 900 (1942). As the Supreme Court held in *Com. ex rel. Cater v. Myers, supra*:

Action by the Board of Pardons is in accordance with constitutional provisions and in no way comes under the aegis of the courts. Indeed, were a court to review the conduct of a hearing before the Board of Pardons it would be a clear invasion by judicial direction of the immunity granted the executive branch of our government. Such is not consonant with our constitutional doctrine of separation of powers. 412 Pa. 67, at 71.

The power of clemency is beyond the jurisdiction of the judiciary, and it is also beyond the power of the legislative branch. *Com. v. Sutley*, 474 Pa. 256, 378 A.2d 780 (1977). As stated by the Supreme Court in *Sutley*, “a power does not inhere to the legislature if it has specifically been withheld or entrusted to another co-equal branch of government.” 474 Pa. at 273.

The drafters of Article IV, § 9 and the amendments thereto enacted since the Constitution of 1874 were aware of the principle of the separation of powers. They specifically excluded from the Governor’s powers of clemency matters of impeachment, which are given exclusively to the General Assembly under Sections 4, 5 and 6 of Article VI, and they authorized the General Assembly to provide by law for confirmation of the Governor’s appointments to the Board by either a majority or two-thirds vote of the Senate.

When, as in the instant case, specific powers and duties are singularly and exclusively vested by the Constitution in a co-equal branch of government, the General Assembly may not legislate the procedure by which those powers and duties are executed except to the extent that the Constitution provides for the powers and duties to be exercised as provided by law. There is no such provision attached to the powers and duties of the Board of Pardons.

In enacting the 1978 Open Meeting Law, the General Assembly attempted to make the rulemaking functions of the judicial branch subject to the law’s requirements. The power to prescribe the rules of court is specifically granted to the Supreme Court by Article V, § 10 of the Pennsylvania Constitution. The Supreme Court subsequently held that such an intrusion by the General Assembly into the procedural method of exercising constitutional powers was invalid. *In re 42 Pa. C.S. Section 1703*, 482 Pa. 522, 394 A.2d 444 (1978).

The application of *In re 42 Pa. C.S. Section 1703* to the Board is particularly relevant because of the specificity with which the procedures of the Board are delineated in Article IV, § 9. The recommendation must be in writing, it must be approved by a majority, after full hearing in open session and upon due public notice. Copies of the recommendations must be filed and docketed

in the Lieutenant Governor's office. Records of the Board's action must be kept and be open at all times for public inspection. The validity of these procedures, which have remained basically unchanged since the Constitution of 1874, was specifically endorsed by the Pennsylvania Supreme Court in an opinion written by Chief Justice Bell, who had himself been a member of the Board of Pardons for four years as Lieutenant Governor:

The Board of Pardons is a board of clemency which is constitutionally ordained to *recommend* to the Governor of Pennsylvania the grant or denial of clemency, i.e., commutation of sentence or pardon of persons who have been convicted of and sentenced for crime. In the 89 years in which the Board has functioned, a full hearing of all petitions has been held after due public notice and in open session, although the hearings have always been informal; the Board has not restricted the hearings to formal rules or principles of law, but on the contrary has received and considered all facts and circumstances which have any bearing on the subject of clemency, and all letters and pleas for clemency on behalf of the relator, as well as the recommendation (if any) of the trial Judge and of the District Attorney. Counsel for relator would have us change this long and established salutary practice and procedure, and in the myriad petitions which are presented for clemency substitute the rigid requirements of a Court trial boundarized by formal Court rules and principles and constitutional provisions relating to the basic rights of an accused to a fair trial. We find no merit in this contention, and no denial of due process or other infringement of any of relator's constitutional rights. 412 Pa. 67, at 71, 72.

A careful reading of the new Sunshine Act indicates that the General Assembly thoroughly considered both the deficiencies of the 1974 act and the various court decisions which interpreted that act. The new act excludes from its provisions those agencies and actions which it could not constitutionally regulate under the rule established by the decision in *In re 42 Pa. C.S. Section 1703, supra*.

Agencies to which the new act applies are defined in Section 3 of the act to include the General Assembly and the various Executive Branch agencies and local and state agencies "created by or pursuant to a statute . . ." and which take "official action" within the meaning of the Act. The Board of Pardons is created, not by statute, but by Article IV, § 9 of the Constitution. The sole function of the Board of Pardons under Article IV, § 9 is to make recommendations to the Governor. The only recommendations included in the Sunshine Act, Section 3 definition of "official action," however, are "(1)

Recommendations made by an agency pursuant to statute, ordinance or executive orders.” Since the Board’s recommendations are made pursuant to Article IV, § 9(a) of the Constitution, they are not “official action” under the Sunshine Act.<sup>1</sup>

It is my opinion and you are hereby advised that the proceedings and actions of the Board of Pardons are governed by the provisions of Article IV, § 9 of the Constitution and that the provisions of the Sunshine Act, Act of July 3, 1986, P.L. 388, No. 84 are not applicable thereto.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

### OFFICIAL OPINION NO. 87-3

*Pennsylvania State Police—Criminal History Record Information Act—Extraction of Certain Information—Expungement of Information.*

1. Under the Criminal History Record Information Act, Act of July 16, 1979, P.L. 116, No. 47, *as amended*, 18 Pa. C.S. § 9101 *et seq.*, all notations of arrests, indictments or other information relating to initiations of criminal charges must be extracted from the record if three years have elapsed from the date of arrest, no conviction has occurred and no proceedings seeking a conviction are pending before any such record is disseminated to an individual or noncriminal justice agency.
2. If an individual is arrested on a felony or misdemeanor charge and is convicted of a lesser included offense, the information on the original charge must be extracted before dissemination.

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1. Although Section 909 of the Administrative Code, Act of April 9, 1929, P.L. 177, No. 175, Article IX, *as amended*, 71 P.S. § 299, does statutorily authorize the Board of Pardons to hear applications for the remission of fines and forfeitures and the granting of reprieves and to make recommendations to the Governor thereon, (*See* 1984 Op. Atty. Gen. No. 1), the Board has elected to limit its considerations to applications for pardons and commutations as authorized by Article IV, § 9 of the Constitution, 37 Pa. Code § 81.11.

3. Criminal history record information must be expunged if no disposition has been received or recorded within eighteen (18) months of arrest and the court has certified that no disposition is available and no action pending or upon receipt of a court order ordering expungement.

April 21, 1987

Honorable Morey M. Myers  
General Counsel  
Office of General Counsel  
238A Main Capitol Building  
Harrisburg, PA 17120

Dear Mr. Myers:

On behalf of the Pennsylvania State Police, you have asked for my opinion concerning both the extraction of certain information before dissemination and the expungement of information under the provisions of the Criminal History Record Information Act, the Act of July 16, 1979, P.L. 116, No. 47, *as amended*, 18 Pa. C.S. § 9101 *et seq.* (the Act). It is my opinion and you are hereby advised that on the particular facts set forth below, information on an original charge must be deleted from a rap sheet before dissemination to a noncriminal justice agency when no conviction has occurred on the original charge. You are further advised that the State Police may not refuse the valid order of a court in Pennsylvania to expunge arrest data from a record but may take its remedy to challenge the order pursuant to law.

You have requested an interpretation of Section 9121(b)(2)(ii) of the Act for the following specific situation. Subject "A" is arrested on a misdemeanor or felony. "A" pleads guilty to a lesser charge. The rap sheet contains the original charge in the charge column and the notation of the conviction on the lesser charge in the disposition column. The question is what information can be disseminated to a noncriminal justice agency under the Act. Section 9121(b)(2) of the Act provides that:

Before a State or local police department disseminates criminal history record information to an individual or noncriminal justice agency, it shall extract from the record all notations of arrests, indictments or other information relating to the initiation of criminal proceedings where:

- (i) three years have elapsed from the date of arrest;

- (ii) no conviction has occurred; and
- (iii) no proceedings are pending seeking a conviction.

18 Pa. C.S. § 9121(b)(2)

In the event that the elements stated in subparagraphs (i) and (iii) above are present, then, in the example given for Subject “A,” the information on the original charge must be extracted from the rap sheet before dissemination to a noncriminal justice agency because no conviction has occurred on the original charge. Under Section 109 of the Crimes Code, the Act of December 6, 1972, P.L. 1482, No. 334, *as amended*, 18 Pa. C.S. § 109, a finding of guilty of a lesser included offense constitutes an acquittal of the greater inclusive offense, and, as a result, for the example given, no conviction has occurred on the original charge. The reason for there being no conviction and the relationship between the original charge and the conviction on the lesser charge are not relevant for the purpose of dissemination to a noncriminal justice agency.

You have also asked whether the Department has the authority to refuse to expunge original misdemeanor or felony arrest data when that arrest data has resulted in a conviction, although a conviction on a summary charge. Under the Act, criminal history record information is required to be expunged if no disposition has been received or recorded within eighteen (18) months after the date of arrest and the court of proper jurisdiction has certified that no disposition is available and no action pending. Nonconviction data is also required to be expunged upon an order from a court. 18 Pa. C.S. § 9122(a). Criminal history record information may be expunged when the individual reaches seventy (70) years of age and has been free of arrest or prosecution for ten (10) years following final release from confinement or supervision, or the individual has been dead for three (3) years. 18 Pa. C.S. § 9122(b).

The courts of Pennsylvania also recognize the right of an individual to make application to a court to expunge an arrest record. *Commonwealth v. Armstrong*, 495 Pa. 506, 434 A.2d 1205 (1981); *Commonwealth v. Wexler*, 494 Pa. 325, 431 A.2d 877 (1981); *Commonwealth v. Malone*, 244 Pa. Super. Ct. 62, 366 A.2d 584 (1976). The Supreme Court specifically noted in *Armstrong* that affording the right to apply for expungement was in accord with the provisions of the Criminal History Record Information Act, 495 Pa. 506, at 513 n. 8; 434 A.2d 1205, at 1209 n. 8.

Upon the filing of an application to expunge a record, the Commonwealth, through the District Attorney who has received notice of the application

pursuant to Section 9122(f) of the Act, may assert its opposition through the procedures afforded by law. Upon the entry of the final order of the court that a record be expunged, however, the Pennsylvania State Police must follow the order.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

#### OFFICIAL OPINION NO. 88-1

*Pennsylvania Department of Transportation—Registration of Law Enforcement Vehicles—  
Fictitious Registration.*

1. The Vehicle Code, 75 Pa. C.S. § 1301 *et seq.*, requires that all vehicles, including those operated by law enforcement agencies, be registered with the Department.
2. An application for vehicle registration must contain the full name and address of the owner and the make, model, year and identification number of the vehicle. 75 Pa. C.S. § 1305.
3. The Department's Form MV-152, Request for Fictitious Registration And/Or Driver's License, meets the requirements of § 1305 and if all of the information is provided, the Department should issue the registration.

May 31, 1988

Honorable Howard Yerusolim  
Secretary  
Pennsylvania Department of Transportation  
1200 Transportation and Safety Building  
Harrisburg, PA 17120

Dear Secretary Yerusolim:

You have requested, through the Office of General Counsel, my opinion regarding your department's authority to issue vehicle registrations based on fictitious information to law enforcement agencies engaged in investigations. It is my opinion and you are so advised that the Department of Transportation is permitted to continue its current practice of issuing these registrations to law enforcement agencies.

The Vehicle Code establishes the comprehensive authority of the Department of Transportation over the registration of motor vehicles in Pennsylvania. Act of June 17, 1976, P.L. 162, No. 81, 75 Pa. C.S. § 101 *et seq.* All vehicles operated upon any highway in the Commonwealth, including vehicles operated by the employees of law enforcement agencies, must be properly registered with the Department pursuant to the requirements of the Vehicle Code. 75 Pa. C.S. § 1301 *et seq.* Law enforcement vehicles are not specifically excepted from registration requirements. 75 Pa. C.S. § 1302.

The Department has the duty to prescribe and provide suitable application forms for certificates of title and registration and has the duty to review all application forms to determine their genuineness, regularity and the truth of any statement contained in the application. 75 Pa. C.S. § 6104(a) and (b). In order to administer the registration system, the Department must have accurate information about all motor vehicles and their owners. The Code further provides that an application for registration must contain the full name and address of the owner and the make, model, year and vehicle identification number of the vehicle. 75 Pa. C.S. § 1305.

The Department has met the requirements of the Vehicle Code by prescribing the use of Form MV-152, Request for Fictitious Registration And/ Or Driver's License. A law enforcement agency must file this application form to obtain a fictitious registration. The form requires the agency to declare its ownership of the vehicle and all the other information about the vehicle required in Section 1305 of the Code. 75 Pa. C.S. § 1305.

There is no restriction on the Department that proscribes the issuance of fictitious registrations. The Vehicle Code provides that the Department shall refuse registration if, *inter alia*, "the applicant has at registration or titling neglected or refused to furnish the department with the information required on the appropriate official form" or "the application contains false or fraudulent information . . ." 75 Pa. C.S. § 1306. If the law enforcement agency has declared all the information required on the form, including the fictitious information necessary for the registration certificate and card, then the requirements of the statute have been fulfilled and there are no grounds for the Department to refuse the registration. The law enforcement agency must fulfill all the other requirements of the Code and the Department's regulations in order for the registration to be issued, e.g., payment of fees.

Under the Administrative Code, Act of April 9, 1929, P.L. 177, No. 175, the Department of Transportation has the general duty to cooperate and coordinate work, 71 P.S. § 181, and the specific responsibility to coordinate the activities of the Department with those of other public agencies and

authorities, 71 P.S. § 512(a)(6). The issuance of fictitious vehicle registration is an example of cooperation among public agencies which facilitates the administration of the criminal justice system.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

### OFFICIAL OPINION NO. 88-2

*Department of Education—Section 754 of the Public School Code, 24 P.S. § 7-754—Resident-Hiring Preferences.*

1. Resident-hiring preferences similar to those contained in Section 754 of the Public School Code may be held to violate the Privileges and Immunities Clause of the United States Constitution but such preferences are not unconstitutional *per se*.
2. No court has had occasion to consider the justification for Section 754 nor has any court with jurisdiction over this Commonwealth had occasion to consider a similar requirement in the context of public works employment.
3. In the absence of a controlling decision by a court of competent jurisdiction, the Attorney General is compelled by Section 204(a)(3) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(3), to respect the presumptive constitutionality of Section 754 of the Public School Code.

June 15, 1988

Honorable Thomas K. Gilhool  
Secretary  
Pennsylvania Department of Education  
333 Market Street  
Harrisburg, PA 17126

Dear Secretary Gilhool:

By letter from your Chief Counsel, the Department of Education has requested my opinion on the constitutionality of Section 754 of the Public School Code, 24 P.S. § 7-754, which provides, in pertinent part, that school district construction contracts shall contain the provision that laborers and

mechanics employed on school district projects shall have been residents of the Commonwealth for at least ninety (90) days prior to their employment. It is my opinion and you are hereby advised that this statute is constitutional and must be enforced by the Department.

In responding to your request, I am bound by Section 204(a)(3) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(3), which requires the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction. Section 754 of the Public School Code has not been invalidated by a controlling decision of a court of competent jurisdiction.

While resident-hiring preferences similar to Section 754 have been held to violate the Privileges and Immunities Clause of the United States Constitution, *see e.g., Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), the courts have not held such preferences unconstitutional *per se*. If there is a “substantial reason” for the preference and if the degree of discrimination bears a close relation to that reason, the preference will be upheld. *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984).

In the *Camden* case, the city cited grave economic and social ills as justification for its ordinance preferring the employment of city residents on city construction projects. Of particular significance to our consideration of Section 754 is the Court’s refusal to evaluate the city’s justification absent findings of fact. “It would not be appropriate for this Court either to make factual determinations as an initial matter or to take judicial notice of Camden’s decay.” *Id.* at 223, 104 S.Ct. at 1030, 79 L.Ed.2d at 262. The Court remanded the case for such findings.

No court has had occasion to hear or consider the Commonwealth’s justification for Section 754. It would be wholly inconsistent with Section 204 of the Commonwealth Attorneys Act for me to undertake the judicial fact-finding necessary to that inquiry in the setting of an Attorney General’s opinion.

Similarly, although durational residency requirements have been held in various contexts to violate the Equal Protection Clause of the United States Constitution, *see, e.g., Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), the courts have not held such requirements unconstitutional *per se*. Further, no court with jurisdiction over

the Commonwealth has had occasion to consider such a requirement in the context of public works employment.

In deciding whether a durational residency requirement violates equal protection, a court must balance the nature of the benefit withheld, the length of the waiting period, and the state interest served by the requirement. Compare *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (holding a one-year state and three-month county residency requirement for voting unconstitutional) with *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) (upholding a one-year residency requirement for divorce petitions) and *Starns v. Malkerson*, 326 F.Supp. 234 (Minn. 1970), *aff'd*, 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971) (upholding a one-year residency requirement for reduced tuition at state universities).

No court has had occasion to consider the balance of benefit, burden and state interest with respect to Section 754. Again, it would be wholly inconsistent with Section 204 of the Commonwealth Attorneys Act for me to undertake that judicial assessment in the setting of an Attorney General's opinion.

In summary, I am compelled to respect the presumptive constitutionality of Section 754 of the Public School Code, and you are advised accordingly that the Department of Education has the duty to enforce it.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

### OFFICIAL OPINION NO. 88-3

*Board of Finance and Revenue—Review and Refund Dockets of the Board—Public Inspection of Dockets.*

1. The dockets of the Board of Finance and Revenue may be open for public scrutiny only to ascertain refunds or credits above certain limits.
2. All other information is protected from public review by Section 731 of The Fiscal Code.
3. Opinion No. 30 of 1957 erroneously concluded that the complete dockets of the Board must be open to public inspection.

November 15, 1988

Honorable L. J. Wendekier  
Acting Secretary  
Board of Finance and Revenue  
132 Finance Building  
Harrisburg, PA 17120

Dear Mr. Wendekier:

You have requested my opinion on behalf of the Board of Finance and Revenue (hereinafter Board) as to the correctness of Attorney General Opinion No. 30 of 1957 which advised that the contents of the review and the refund dockets of the Board are available for public inspection.

It is my opinion and you are hereby advised that the dockets of the Board may be made available for public scrutiny only to ascertain final amounts of refunds or credits in excess of \$5,000 granted for corporation taxes or refunds and credits in excess of \$200 granted to any individuals.

The Act of April 9, 1929, P.L. 343, Art. VII, § 731; 72 P.S. § 731, permits the disclosure of confidential tax information for "official purposes" only. Specifically, the statute provides: "Any information gained by any administrative department, board, or commission, as a result of any returns, investigations, hearings or verifications required or authorized under the statutes of the Commonwealth imposing taxes or bonus for State purposes, or providing for the collection of the same, shall be confidential except for official purposes . . ."<sup>1</sup>

This section of the statute concludes with language added by a 1956 amendment, which states that, "... information regarding refunds or credits and the names of the persons or corporations entitled thereto, which is available for public inspection under the provisions of this Act, shall not be deemed confidential."<sup>2</sup> This amendatory language was the subject of Attorney General Opinion No. 30.

A corresponding provision, Section 503(a) of The Fiscal Code, Act of April 9, 1929, P.L. 343, Art. V, § 503, *as amended*, 72 P.S. § 503(a), states:

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1. Information may be provided to other states or the federal government in limited circumstances.
  2. The Act is defined as Title 72 of Purdon's Statutes, Taxation and Fiscal Affairs, known as The Fiscal Code.

... A list of the final amounts of any such refunds or credits in excess of five thousand dollars (\$5,000.00) hereafter granted for corporation taxes, the names of the corporations entitled thereto, and a brief summary of the reasons therefor, and a list of the names and final amounts of any such refunds or credits in excess of two hundred dollars (\$200.00) hereafter granted to any persons or corporations shall be available for public inspection . . .

With the exception of the publication of statistics permitted by the Tax Reform Code under the Act of March 4, 1971, P.L. 6, No. 2, Art. III, § 353, 72 P.S. § 7353(g), there are no other sections in Title 72 making refund or credit information available for public inspection.

Opinion No. 30 cites the Right to Know Law, the Act of June 21, 1957, P.L. 390, No. 212, 65 P.S. §§ 66.1 *et seq.*, as the basis for the public availability of the information. That statute provides that, "Every public record of an agency shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth of Pennsylvania." 65 P.S. § 66.2. However, Opinion No. 30 overlooks the Right to Know Law's definition of "public record" which specifically excludes "... any record, document . . . , report, . . . or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute . . ." 65 P.S. § 66.1(2).

The Board's record system contains tax and other information which pertains not only to corporate and personal income tax refunds, for which the general rule of confidentiality has been modified, but also to assessment and refund information on all types of taxpayer entities and on all categories of Pennsylvania taxes.

Opinion No. 30 of 1957 erroneously concludes that information removed from the protection of confidentiality "is precisely that information which appears in the review and refund dockets of the board." The opinion's premise is based on an erroneous perception which equates a petition for review of taxes with a petition for refund of taxes. The opinion states that, "The administrative action of the Board which is recorded in the review and refund dockets may, and often does, result in a reduction of a taxpayer's liability; and in those cases where tax payments have been made in excess of the adjusted tax liability refunds are authorized." This is not correct. Petitions for refund and petitions for review have always been, and remain, distinct and different procedures, which independently invoke separate and various administrative and substantive procedures.

Having erroneously equated petitions for review with petitions for refund, the opinion incorrectly determined that the 1956 amendment removed both

the review and refund docket information from confidentiality protection. It is clear that review petitions never generate refunds and, obviously, should not have been included with refund petitions. The information on the Board's dockets discloses much more information than the information which has been removed from the protection of confidentiality by the 1956 amendment to The Fiscal Code.

In conclusion, and based upon the foregoing, it is my opinion, and you are hereby advised, that the dockets of the Board should be made available for public scrutiny only to ascertain final amounts of refunds or credits in excess of \$5,000 granted for corporation taxes or refunds and credits in excess of \$200 granted to any individuals. All other information in the dockets is protected from public review under Section 731 of The Fiscal Code, which requires that the information be kept confidential and provides for penalties if the information is disclosed.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

#### OFFICIAL OPINION NO. 88-4

*Pennsylvania State Police—Board of Pardons—Criminal Records—Effect of Pardon on Records.*

1. The Pennsylvania Supreme Court has held that a person who has been pardoned is entitled to expungement of the criminal record.
2. Duty to expunge arises upon presentation to the agency holding the records of an order of expungement from a court having jurisdiction.
3. The decision in *Commonwealth v. C.S.* is to be given prospective application by the State Police.

November 15, 1988

The Honorable Mark S. Singel  
Chairman, Board of Pardons  
9th Floor, Harrisstown 2  
Harrisburg, PA 17120

Colonel Ronald M. Sharpe  
Commissioner  
Pennsylvania State Police  
1800 Elmerton Avenue  
Harrisburg, PA 17110

Dear Gentlemen:

The Office of General Counsel has requested my opinion on your behalf concerning compliance with the decision of the Pennsylvania Supreme Court in *Commonwealth v. C.S.*, 517 Pa. 89, 534 A.2d 1053 (1987), holding that a person who has been pardoned is entitled to have his or her criminal record expunged. The specific questions presented are:

- (1) Whether the criminal records of a person who has been pardoned but has not petitioned for and received an expungement order must be expunged.
- (2) Whether an order of expungement based on a pardon issued prior to *Commonwealth v. C.S.*, but not acted upon must now be carried out, and
- (3) Whether the Pennsylvania State Police must expunge the record of an individual who had received a pardon, sought expungement and was denied relief prior to *Commonwealth v. C.S.*

In *Commonwealth v. C.S.*, the Supreme Court ordered that the case be remanded to the Court of Common Pleas “for entry of an order expunging appellant’s criminal record.” The Supreme Court thereby established that the duty to expunge arises when a person obtains an order from a court directing that the expungement be carried out and that order is presented to the agency maintaining the records to be expunged. This procedure has been reinforced by the Commonwealth Court’s subsequent decision in *Rulli v. Dunn*, \_\_\_\_ Pa. Commonwealth Ct. \_\_\_\_, 544 A.2d 1094 (1988). In that case, the Court held that the State Police had no duty to expunge a pardoned person’s record where there was no duty under the case law or statutes to expunge and the expungement order was not directed to the State Police. Of course, after *Commonwealth v. C.S.*, there is now a duty to expunge, but the duty arises upon proper notification to the State Police and any other agencies having the records, and the best vehicle for that notification is the order of expungement issued by a court having jurisdiction. The notice procedure is also required for expungements under the Criminal History Record Information Act, 18 Pa. C.S. § 9122 (a) and (d). The answer

to the first question presented then is that the agency holding the records must be notified by such an order and shall expunge the record upon the authority of that order.

Your second question applies to the status of an order issued before the decision in *Commonwealth v. C.S.* The rule is the same in this situation. That is, expungement is based upon the Supreme Court decision and the prospective application of that decision. To the extent that a person is relying on *Commonwealth v. C.S.*, a new expungement order must be obtained.

My opinion on the first question also answers the third question. The person who has been pardoned but has not obtained an order of expungement may now go back to court and request such an order. A person who was previously denied relief does not have a current, valid order for expungement directed to the State Police and must obtain such an order. Upon receipt of that order, the State Police shall comply with the order and carry out the expungement.

You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be held liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN  
*Attorney General*

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