Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

OFFICE OF THE COUNTY ATTORNEY

OPINION

TO: Kathleen Boucher, Assistant Chief Administrative Officer

THROUGH: Leon Rodriguez, County Attorney
Marc P. Hansen, Deputy County Attorney

FROM: Kathryn Lloyd, Assistant County Attorney

DATE: March 12, 2009

RE: The Inspector General's Ability to Investigate a Personnel Matter and to Access Personnel Records, Including Medical Data

You have asked this Office whether the Inspector General (IG) has the authority to investigate a matter that is currently, or had been, an investigation conducted by an employee's department to determine if discipline should be imposed against the employee (personnel investigation). You have also asked, if the IG has the authority to conduct an investigation that overlaps with a personnel investigation, whether the IG may inspect certain medical and personnel records compiled about an employee in the course of the personnel investigation.

SUMMARY OF OPINION

The IG may investigate, subject to one limitation, a personnel investigation as part of the IG's mission to detect and deter fraud, waste and abuse in government activities, and may require the department to disclose information already developed by the department, even if the personnel investigation has not been concluded.. Because of the separation of powers established in the County Charter, the IG cannot, however, under color of investigating fraud, waste, or abuse, engage in activity that would interfere with the ability of a department to carry out a personnel investigation. For example, the IG must not interview witnesses or secure records ahead of the department because that activity could preclude the department from conducting an effective investigation.

In order to avoid interfering with a department's ability to supervise and discipline its employees, the IG must, before conducting an investigation that overlaps with a matter that is or might be the subject of a personnel investigation: 1) contact the appropriate department to determine if a personnel investigation has been concluded, is on-going, or will be initiated; 2) if

a personnel investigation is on-going or the department indicates that it intends to begin a personnel investigation within the time frames established by law or contract, coordinate the IG's investigation in a manner so as not to impede the department's personnel investigation. We recommend that the IG and the Chief Administrative Officer (CAO) enter into a memorandum of understanding establishing the process to be followed when an IG investigation overlaps a matter that may be subject to a personnel investigation.

Further, although not free from doubt, we continue to conclude that the IG may access personnel records, including medical information embedded in personnel records, if access is required in order for the IG to execute the IG's mission. But given the uncertainty surrounding the IG's authority to access employee records, we recommend that State legislative authority be sought to explicitly empower the County's IG to obtain access to records that are protected from disclosure under State law.

ANALYSIS

I. The IG's Authority To Investigate A Matter That Overlaps With A Personnel Investigation.

A. The Investigation Of A Personnel Investigation, Whether Ongoing Or Concluded, Is Within The IG's Jurisdiction To Prevent Fraud, Waste and Abuse.

The Montgomery County Code charges the IG with, among other things, preventing and detecting fraud, waste and abuse in government activities.[1] In order to achieve this goal, the IG is given certain powers. These powers include the ability to "conduct investigations, budgetary analyses, and financial, management or performance audits and similar reviews."[2]

When construing a statute, language is generally given its ordinary and natural meaning.[3] Shortly after the IG's Office was established, the IG adopted a work plan dated September 9, 1998, as required under § 2-151(i) of the County Code. In this work plan, the IG defined fraud, waste, and abuse in terms consistent with their ordinary and natural meaning.[4] The IG defined "fraud" as "intentionally deceiving or misleading someone to part with valuable County resources;" "waste" as "carelessly spending, using, or squandering valuable County resources;" and "abuse" as "putting valuable County resources to a wrong or improper use." A review of the legislative history creating the IG did not uncover any indication that the Council intended to adopt a different meaning to the terms fraud, waste, or abuse, nor to exempt matters that overlap with a personnel investigation from the IG's purview.[5]

---

[1] MONTGOMERY COUNTY, MD., CODE § 2-151(a)(2) (2008).
[2] *Id.* at § 2-151(h).
[3] *Retting v. State of Maryland*, 334 Md. 419, 423 (1994).
[4] An administrative interpretation of a statute is persuasive, particularly when the interpretation is established at the time the provision is enacted by the entity responsible for implementing the statute. *Falik v. Prince George's Hospital and Medical Center*, 322 Md. 409, 416 (1991).
[5] *See generally* Bill File, Bill 38-96, 1996 Montgomery County Council.

The IG's mission of preventing fraud, waste, and abuse may, as a practical matter, involve the IG in an investigation that overlaps with a matter that may be the subject of a personnel investigation. For example, an IG investigation of credit card abuse by County employees could involve a matter that would overlap with a personnel investigation. Thus, the IG is authorized by statute to investigate a matter that overlaps with a personnel investigation.

B. The County Code Does Not Prohibit The IG From Duplicating An Investigation Conducted By Another Department.

The Montgomery County Code provides that:

> [t]he Inspector General *should* consult with the Director of the Office of Legislative Oversight to assure that the work of the Inspector General complements but does not duplicate the work assigned by the Council to the Office of Legislative Oversight, as well as audits and other evaluations conducted by other departments and agencies. The Inspector General may review any audit or other program evaluation performed by any County department or agency, and may seek comments from the same or any other department or agency.[6] (Emphasis added)

The use of the directory term "should" indicates that the Council intended to suggest that the IG ought not to duplicate investigations conducted by other departments, but does not mandate that the IG not duplicate these evaluations.[7] Nothing in the legislative history leading to the establishment of the IG provides any indication that the Council intended that the use of the term "should" must be given a meaning different from its usual denotation to prohibit the IG from investigating another investigation.[8] Presumably, the IG would have some reason related to fraud, waste, or abuse to elect to investigate a matter that had already been the subject of a personnel investigation.

C. The IG May Conduct An Investigation On A Matter That Is Or Could Be The Subject Of A Personnel Investigation So Long As The IG Does Not Interfere With The Employee's Department's Authority to Discipline the Employee.

The Montgomery County Charter vests the legislative authority of the County in the County Council and the County's executive power in the County Executive.[9] This separation of powers was recognized and applied by the Court of Appeals as early as 1971. In *Eggert v. Gleason*,[10] the Court found that the Montgomery County Charter "expressly provide[s] for the separation of the legislative and executive powers of the County government."

---

[6] MONTGOMERY COUNTY, MD., CODE § 2-151(j).
[7] *See Montgomery County Plain Language Drafting Manual*, p. 40 (Resolution 10-1182, February 26, 1985).
[8] *See generally* Bill File, Bill 38-96, 1996 Montgomery County Council.
[9] MONTGOMERY COUNTY, MD., CHARTER §§ 101 and 201.
[10] 263 Md. 243, 260 (1971).

The Charter charges the CAO with the responsibility, under the direction of the County Executive, of supervising all departments, offices, and agencies of the Executive Branch of the County government.[11] Consistent with this Charter provision, the Charter provides that "[t]he County Executive shall be responsible for adopting personnel regulations for the administration and implementation of the merit system law" and that "[t]he Chief Administrative Officer, under the direction of the County Executive and subject to merit system laws and regulations, shall be responsible for administering the County's merit system."[12] With the authority to supervise all departments of the Executive Branch comes the concomitant authority to discipline employees. [13]

The processes Executive Branch departments must follow to discipline employees all reflect the Charter's vesting of supervisory authority over Executive Branch departments and agencies in the Executive. The process for imposing and contesting the imposition of discipline varies depending on the status of the employee, but in all cases of employee discipline, the head of the employee's department is vested with the authority to initiate and conduct the personnel investigation and to impose discipline.[14] For example, the disciplinary process for merit system employees is governed by the merit system law and implementing regulations, and under these laws the Executive Branch department head is responsible for employee discipline.[15] The disciplinary process for members of a collective bargaining unit is governed by County law and the implementing collective bargaining agreements;[16] and the authority of department heads to impose discipline is recoginzed. The discipline of a police officer is governed by the Law Enforcement Officers' Bill of Rights (LEOBR), a State law.[17] Although the LEOBR operates outside the parameters of the Charter, the Chief of Police remains responsible for investigating police officer wrong doing and imposing discipline subject to the limitations of the LEOBR and the collective bargaining agreement.

When an Executive Branch department initiates a personnel investigation, that department must be the one to carry out the investigative aspects of that investigation. The IG is part of the Legislative, not the Executive, branch of the County government.[18] Moreover, a legislative branch official, like the IG, cannot intrude into the functions of the executive branch.[19] To allow the IG to engage in a proactive personnel investigation by, for example, interviewing witnesses or gathering information, prior to the department that is conducting the personnel investigation,

---

[11] *Id.* at § 211.
[12] MONTGOMERY COUNTY, MD., CHARTER § 401.
[13] *Myers v. United States*, 272 U.S. 52 (1926). Reliance on federal cases construing the US Constitution is appropriate because the County's Executive Branch of government is modeled, in part, on the executive power granted to the President under the Federal Constitution. *See* Commentary Under Proposed Charter, Montgomery County, Maryland (July 10, 1968).
[14] The department heads are, of course, subject to the supervisory oversight of the CAO and the County Executive. *See* MONTGOMERY COUNTY, MD., CHARTER §211.
[15] *See generally* Chapter 33, Article II of the Montgomery County Code and Section 33 of the Personnel Regulations.
[16] *See* Montgomery County Code §§ 33-75, *et. seq.*; 33-147, *et. seq.*; and 33-101, *et. seq.*
[17] MD. CODE ANN., PUB. SAFETY § 3-101, *et. seq.* (2008).
[18] MONTGOMERY COUNTY, MD., CODE §1A-203.
[19] *Bowsher v. Synar*, 478 U.S. 714 (1986).

would permit the IG to interfere with the Executive's authority to administer the merit system and supervise all departments of the Executive Branch. Such action by the IG would be inconsistent with the intent of the Charter to separate the legislative and executive functions of County government.

But this limitation relating to non-interference with an Executive Branch function does not prevent the IG from investigating a matter that overlaps with a personnel investigation (potential, ongoing, or concluded) if the IG's investigation does not interfere with or inhibit the ability of an Executive Branch agency to investigate potential misconduct by an employee. For example, the IG could investigate a matter that overlaps with an ongoing personnel investigation and obtain information already developed by the investigating department. Further, nothing would prevent the IG from conducting a further investigation into a personnel investigation that a department has concluded or elected not to pursue.[20]

II. State Law Permits the IG to Review Medical and Personnel Records.

A. The Maryland Confidentiality of Medical Records Act.

The Maryland Confidentiality of Medical Records Act (CMRA) is codified in the Annotated Code of Maryland, Health-General Article, §§ 4-301, *et. seq*. The statute requires that health care providers keep patient medical records confidential and disclose them only in accordance with the dictates of the subtitle or as otherwise provided by law. In order to determine whether information is protected from disclosure under CMRA, we must determine whether a health care provider is the one who obtained the information and, if so, whether the information obtained is considered a medical record. In this case, the information we are considering is a drug test administered to a MCFRS employee by the County's Occupational and Medical Section (OMS) following an accident in a county-issued vehicle.

CMRA defines a health care provider as "[a] person who is licensed, certified, or otherwise authorized under the Health Occupations Article or § 13-516 of the Education Article to provide health care in the ordinary course of business or practice of a profession or in an approved education or training program" or as "[a] facility where health care is provided to patients or recipients, including a facility as defined in § 10-101(e) of this article, a hospital as defined in § 19-301(g) of this article, a related institution as defined in § 19-301(o) of this article, a health maintenance organization as defined in § 19-701(g) of this article, an outpatient clinic, and a medical laboratory."[21] CMRA defines "health care" as "any care, treatment, or procedure by a health care provider to diagnose, evaluate, rehabilitate, manage, treat, or maintain the physical or mental condition of a patient or recipient; or that affects the structure or any function of the human body."[22] Finally, CMRA defines "medical record" as "any oral, written, or other

---

[20] Generally, the investigating department must initiate the disciplinary process promptly. *See, e.g.*, § 33-2, Montgomery County Personnel Regulations; Article 28.1, MCGEO Collective Bargaining Agreement; Section 30.2(b), IAFF Collective Bargaining Agreement; MD. CODE ANN., PUB. SAFETY § 3-106 (2008).

[21] MD. CODE ANN., HEALTH-GEN. I § 4-301(g) (2008).

[22] *Id.* at § 4-301(f)

transmission in any form or medium of information that is entered into the record of a patient or recipient, identifies or can readily be associated with the identity of a patient or recipient, and relates to the health care of a patient."[23]

In order to determine whether the drug test would constitute a medical record obtained by a health care provider, we must examine the parameters in which the drug test was administered. The Policies and Procedures of the MCFRS for Substance Abuse Testing and Rehabilitation outline the procedures the department must follow when an employee is involved in an accident.[24] Section 4.11 explains that urine and/or blood samples for post-accident testing must be collected prior to the end of the employee's shift. Section 4.12 further explains that such tests will be collected by an off-site collection point designated by OMS. Finally, Section 4.13 states that tests will be conducted by an independent laboratory, certified by the State and the Department of Health and Human Services (DHHS) to conduct work-related drug screening.[25]

Though no Maryland court has considered whether a drug screening test is considered confidential information under CMRA, the Court of Appeals of Washington has held the results of such testing are not protected under Washington's Health Care Disclosure Act (HCDA).[26] In *Hines v. Todd Pacific Shipyards Corporation*, Washington's Court of Appeals considered whether an employer violated HCDA when the employer disclosed that an employee tested positive for cocaine after submitting to a drug and alcohol screening test when he was injured on the job.[27] The Court determined that the HCDA did not apply because the employer was not a "health care provider," the results of a drug screening test are not "health care information," and the employee was not a "patient" when subject to the drug screening test.[28] The HCDA defines "health care provider", "health care", and "health care information" (used in place of the term "medical record" used in CMRA) almost identically to CMRA.[29] The Court explained that the purpose of the drug test was not health care or medical treatment; it was a condition of employment required after the employee was injured on the job.[30]

Like the employee in *Hines*, here the MCFRS employee was given a drug test as a condition of his employment following an accident in a county vehicle. The test was administered by

---

[23] *Id.* at § 4-301(h)

[24] Policies and Procedures of the Montgomery County Fire and Rescue Services, Substance Abuse Testing and Rehabilitation, No. 809, May 8, 1994.

[25] *Id.*

[26] *Hines v. Todd Pacific Shipyards Corporation*, 112 P.3d 522 (Wash. Ct. App. 2005).

[27] *Id.*

[28] *Id.* at 527-58-67.

[29] *See* WASH. REV. CODE §§ 70.02.010(5), (7), and (9) (2008) (defining "health care" as "any care, service, or procedure provided by a health care provider to diagnose, treat, or maintain a patient's physical or mental condition or that affects the structure or any function of the human body"; "health care information" as "any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care, including a patient's deoxyribonucleic acid and identified sequence of chemical base pairs. The term includes any required accounting of disclosures of health care information"; and "health care provider" as "a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession."

[30] *Hines*, 112 P.3d. at 528.

OMS, which would not fall under the definition of a health care provider under CMRA, and the purpose of the test was not to administer health care or to provide medical treatment. Finally, the employee would not be considered a patient whose medical records would be subject to confidentiality under CMRA. Therefore, the results of drug testing as part of an employment condition are not protected from disclosure to the IG under CMRA.

B. The Health Insurance Portability and Accountability Act of 1996.

Even though the results of employer-related drug testing are not protected from disclosure under the State's health laws, we must also consider whether they are protected under federal law and, if so, whether federal law preempts State law. The Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) governs federal medical privacy regulations.[31] The HIPAA Privacy Rule sets national standards for the protection of health information and requires health plans, health care clearinghouses, and certain health care providers (those who transmit health information in electronic form) to abide by certain standards to protect health information.[32]

Under HIPAA, a health plan is defined as "an individual or group plan that provides, or pays the cost of, medical care."[33] As previously discussed, under MCFRS' Policies and Procedures, the Montgomery County OMS administers the drug testing for MCFRS employees following an accident. The tests are conducted by an independent laboratory contracted by the County.[34] OMS would not constitute an individual or group plan under HIPAA. Further, OMS is not providing medical care, defined under HIPAA as "the diagnosis, cure, mitigation, treatment, or prevention of disease, or amounts paid for the purpose of affecting any structure or function of the body."[35]

A health care clearinghouse is defined under HIPAA as a public or private entity that processes or facilitates the processing of health information.[36] Health information is defined as information that "relates to the past, present, or future physical or mental health or condition."[37] Drug testing does relate to a physical condition so OMS could constitute a health care clearinghouse under HIPAA. Finally, health care providers that transmit health information electronically are covered entities;[38] OMS is not a health care provider.

Even if OMS is considered a health care clearinghouse, a covered entity, under HIPAA, the

---

[31] 45 C.F.R. Parts 160, 162, and 164 (2008).
[32] 45 C.F.R. 160.103 (defining covered entity as a health plan, a health care clearinghouse, and a health care provider).
[33] *Id.*
[34] Policies and Procedures of the Montgomery County Fire and Rescue Services, Substance Abuse Testing and Rehabilitation, No. 809, May 8, 1994, § 4.13
[35] 45 C.F.R. 160.103 (defining health plan and explaining that medical care means as defined in section 2791(a)(2) of the PHS Act, found at 42 U.S.C. 300gg-91(a)(2)).
[36] *Id.*
[37] *Id.*
[38] *Id.*

definition of "protected health information" specifically excludes individually identifiable health information in "employment records held by a covered entity in its role as employer."[39] Thus, even arguing that the County is a covered entity for purposes of HIPAA, any information contained in personnel files of MCFRS employees would not be considered protected health information subject to the privacy regulations of HIPAA. Since HIPAA does not protect the results of employee drug testing, there is no need to consider whether HIPAA preempts State law, and such results can be made available to the IG unless their release is protected under the Maryland Public Information Act (MPIA).

C. The Maryland Public Information Act.

The MPIA provides a process for persons and government units, such as the IG, to access public records, and favors permitting access to public records.[40] The MPIA is codified in the Annotated Code of Maryland, State Government Article, §§ 10-611 through 10-630. The MPIA defines a public record as "the original or any copy of any documentary material that is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business."[41] The results of drug testing administered on a County employee by the County, as well as personnel records maintained for County employees, would fall under this definition of a public record.

§ 10-615 of the MPIA governs required denials of public records in general, and provides that the custodian of such records shall deny their inspection if the record is privileged or confidential or inspection is prohibited by State statute, federal statute or regulation, the rules adopted by the Court of Appeals, or an order of a court of record. In this case, State and federal health laws do not prohibit the inspection of the results of drug testing,[42] and no other statutes, regulations, or rules appear to prohibit the inspection of drug testing or personnel records. Therefore, we must then turn to the required denials specifically outlined in the MPIA to determine whether inspection of medical and/or personnel records by the Inspector General is authorized under the MPIA.

i. Inspection of Medical Records.

Section 10-617 of the MPIA governs denials of specific information and, with respect to medical records, provides that, unless otherwise provided by law, a custodian "shall" deny inspection of "medical or psychological information about an individual, other than an autopsy report of a medical examiner."[43] Accordingly, if the results of drug testing performed on MCFRS personnel following an accident are considered medical information under the MPIA, the custodian of the results must deny their inspection to the IG unless inspection is "otherwise

---

[39] *Id.*
[40] MD. CODE ANN., STATE GOV'T, § 10-612 (2008). "Applicant" under the PIA is defined as "a person or governmental unit that asks to inspect a public record." § 10-611(b).
[41] *Id.* at § 10-611(g).
[42] *See supra* notes 28 through 46 and accompanying text (outlining that the Health-General Article and HIPAA do not prohibit the inspection of drug testing).
[43] MD. CODE ANN., STATE GOV'T, § 10-617(b)

provided by law."

In an opinion concerning the legality of drug testing of State employees, the Maryland Attorney General explained that the results of drug testing constitute medical data about an individual and that these results are protected from disclosure under the § 10-617(b) of the MPIA.[44] Further, the United States Court of Appeals for the 3rd Circuit has explained that a breathalyzer and urine test involve "the collection of medical information."[45] Other jurisdictions have also classified drug testing as medical information.[46] Unlike CMRA, the MPIA does not restrict medical information to that obtained by a health care provider. Based on the broad definition of medical information outlined in the MPIA, the Maryland Attorney General's definition, and other jurisdictional guidance, drug testing is considered medical information under the MPIA.

ii. Inspection of Personnel Records.

Like medical records, personnel records are exempt from disclosure under the MPIA. Specifically, 10-616(a) declares: "[u]nless otherwise provided by law, a custodian shall deny inspection of a public record, as provided in this section." And subsection (i) provides: "(1) Subject to paragraph (2) of this subsection [, which permits disclosure to the person in interest, i.e., the employee, or an elected or appointed official who supervises the employee's work], a custodian shall deny inspection of a personnel record of an individual, including an application, performance rating, or scholastic achievement information." The purpose of treating personnel records as confidential is "'to preserve the privacy of personal information about a public employee that is accumulated during his or her employment.'"[47]

The phrase "personnel record" is not itself defined in the MPIA. The Maryland Court of Appeals has said, however, that "the language of subsection (i) [of sec 10-616] discloses what type of documents the Legislature considered to be personnel records."[48] And, "although this list was probably not intended to be exhaustive, it does reflect a legislative intent that 'personnel records' mean those documents that directly pertain to employment and an employee's ability to perform a job."[49] The Maryland Court of Special Appeals has further found that the Baltimore City Police Department's Internal Affairs Division's records concerning an investigation into allegations of dishonesty on the part of a police detective constituted personnel records under the

[44] 71 Op. Att'y Gen. Md. 58 (1986).
[45] *Shoemaker v. Handel*, 795 F.2d 1136, 1144 (3rd Cir. 1986).
[46] *See, eg., Shioleno Industries, Inc. v. Columbia Medical Center*, 2007 Tex. App. LEXIS 2087 (Tex. Ct. App. 2007) (explaining that a medical records authorization is recorded for release of drug test results); *In re Alexander C.*, 1999 Conn. Super. LEXIS 1186 (Conn. Super. Ct. 1999) (stating that respondent did not introduce any additional evidence, "such as drug test results or other medical records"); *Lewis v. State Farm Mutual Automobile Insurance Company*, 927 So. 2d 546 (La. Ct. App. 2006) (finding that the plaintiff was impeached with medical records containing his drug testing results); *Bolton v. B E & K Construction*, 822 So. 2d 29 (La. Ct. App. 2002) (explaining that certified medical records contained drug test results).
[47] 78 Op. Att'y Gen. Md. 291, 293 (1993)
[48] *Kirwan v. The Diamondback*, 352 Md. 74 (1998).
[49] *Id.* at 82-83.

MPIA.[50] Thus, the investigation into an employee's actions would constitute part of his personnel file under the MPIA. And, as with medical records under the MPIA, the IG may not access personnel records of a County employee, because they are not the one who supervises the employees work, unless access is authorized as "otherwise permitted by law."

iii. Otherwise Permitted by Law.

The County Code provides that the IG "is legally entitled to any document or other information concerning a department or agency's operations, budget, or programs" and requires that the IG then "comply with any restrictions on public disclosure of the document or information that are required by federal or state law."[51] So the County Code authorizes the departments to disclose to the IG any documents or other information, without regard to the mandatory exemptions for, for example, medical and personnel records provided in the MPIA, and then requires the IG to abide by the MPIA and any other federal or State law prohibiting further disclosure. Because the County Code authorizes disclosure of the medical and personnel information to the IG, we must turn to the difficult question of whether the Montgomery County Code, a local law, is able to authorize disclosure of information that is a mandatory exception otherwise prohibited from disclosure under the MPIA.

On January 16, 2002, the Montgomery County Attorney's Office issued an opinion regarding the IG's ability to access personnel records. (see attached Exhibit 1) In that opinion, the County Attorney's Office examined the "otherwise provided by law" portion of the MPIA and concluded that the IG could access personnel records, provided that the IG had a valid statutory duty, such as conducting an audit or an investigation, which could not be effectively executed without that access.[52] The basis of the County Attorney's opinion was that the Maryland Attorney General had outlined a "statutory duties" test to determine whether a law could enable access to documents otherwise excluded under the MPIA; that is, if the law requires access to the documents in order for the agency obtaining access to perform their statutory duties.[53] The County Attorney opined that this reasoning would apply to the County's IG law because the IG law "clearly and carefully authorizes the IG to access all county records in the course of performing the IG's statutory duties, and it underscores the importance of such access by granting the IG traditional investigative administrative subpoena authority, if necessary."[54]

The County Attorney further opined that the IG could access personnel records despite the fact that the Maryland Attorney General had stated that "if disclosure of a particular record is forbidden by the PIA, its disclosure would not be "otherwise provided by law" simply because the [local] ordinance authorized the disclosure. Most of the mandatory exemptions in the PIA appear designed to vindicate privacy or other interests deemed worthy of protection by the General Assembly. If a local ordinance by itself constituted other "law" authorizing disclosure,

---

[50] *Baltimore City Police Department v. State of Maryland*, 158 Md. App. 274, 282-83 (2004).
[51] MONTGOMERY COUNTY, MD., CODE § 2-151(l).
[52] Opinion of the Office of the County Attorney, January 16, 2002.
[53] *Id.* at pp. 9-14.
[54] *Id.* at p. 14.

it could thwart the sometimes delicate balance of interests struck by the legislature."[55] The County Attorney opined that the MPIA's "otherwise provided by law" exception should not be read so narrowly so as to exclude all county laws or ordinances *per se* if the local law or ordinance does not conflict with the balance of privacy and rights to access found within the MPIA.[56] Because the County Attorney found that the duties of the State's Legislative Auditor, whom the Attorney General had determined could access personal records in the course of their duties, were "strikingly similar" to those of the County IG, "the Legislature did not intend to inhibit the ability of a county auditor or IG to access the personnel records of a county official or employee when a county-law duty that is substantially the same as a duty of the Legislative Auditor cannot be effectively executed without that access."[57]

Following the County Attorney's opinion, the Maryland Court of Appeals has on two occasions examined the interplay between a county law and the MPIA. First, in *Caffrey v. Department of Liquor Control,* the Court considered whether Montgomery County's charter could create narrower exemptions to disclosure than provided for in the MPIA, thereby waiving the broader, permissible exemptions allowed under the MPIA.[58] The Court explained that a county charter is subordinate to the public general laws of the State of Maryland, such as those contained in the MPIA; therefore, a local government ordinance that conflicts with a public general law is preempted and invalid.[59] Thus, if the MPIA explicitly prohibited releasing certain documents, such as personnel or medical records, the County's charter could not permit their release.[60]

Next, in *Police Patrol Security Systems, Inc. v. Prince George's County*,[61] the Court of Appeals explained that, pursuant to *Caffrey* "[e]ach of the mandatory denial provisions of the MPIA requires a custodian of records to refuse inspection of certain records. Thus, a county ordinance or charter that requires a custodian to act differently is preempted."[62] The Court of Appeals went on to outline that "[i]n *Caffrey*, this meant that the Montgomery County Charter, even if construed as granting greater accessibility to information than the MPIA, could not require County officials to disclose information that the MPIA's mandatory denial provisions required them to withhold. Under such circumstances, the Charter is preempted. In other words, home rule counties may not waive the duty to deny MPIA requests imposed on their officials by the mandatory provisions of the MPIA."[63]

Following the *Caffrey* and *Police Patrol Security Systems* decisions, the Maryland Attorney General once again examined whether a local law could prohibit the release of a public record if the MPIA would allow the record's disclosure. The Attorney General considered whether the

---

[55] 2001 Md. AG LEXIS 7 (2001).
[56] Opinion of the Office of the County Attorney, January 16, 2002, p. 15.
[57] *Id.* at p. 17.
[58] *Caffrey v. Department of Liquor Control*, 370 Md. 272, 283 (2002).
[59] *Id.* at 302.
[60] *Id.*
[61] 378 Md. 702 (2003).
[62] *Id.* at 712.
[63] *Id.*

City of Bowie's Public Ethics Ordinance could create an exception to the general rules of disclosure under the MPIA and withhold the identity of the subject of an advisory opinion when the opinion is released.[64] The Attorney General explained that the city ordinance, which the Maryland Public Ethics Law required the city to adopt, which was based on a model provided by the State, and which was in fact required to be similar to the State statute, could deviate from the MPIA and exempt the information from disclosure because State law also exempted the information.[65] The Attorney General found that, because the Legislature required the State Ethics Commission to maintain the confidentiality of the subject of a State ethics advisory opinion, contrary to the MPIA, so too could the city ordinance refuse to permit disclosure of the subject of an investigation.[66] Thus, even following *Caffrey* and *Police Patrol Security Systems*, the Attorney General has found that a local law could deviate from the MPIA if it were patterned after a federal or State law that did the same.

Notwithstanding the Court of Appeals decisions in *Caffrey* and *Police Patrol Security Systems*, it remains our opinion that the County's IG may inspect personnel and medical records pursuant to authorization granted under the Montgomery County Code.[67] The Court of Appeals has clarified that a local law may not, on its own, deviate from the mandatory denial requirements of the MPIA to provide a basis of "other law" and permit the disclosure of documents otherwise exempt from disclosure. However, in this case, as thoroughly examined in the attached County Attorney opinion, the IG's duties are substantially similar to those of the State's Legislative Auditor.[68] The Attorney General's 2007 opinion permitting deviation from the MPIA for a city ordinance modeled on a State law underscores our position that a local office or officer who is given the same investigative duties under local law as a State office or officer is given under State law may access personnel and medical records as required to fulfill the requirements of their position in the same manner as the State agent is authorized to access such

---

[64] 92 Op. Att'y Gen. Md. 12 (2007).

[65] 92 Op. Att'y Gen. Md. 12 (2007).

[66] Maryland Public Information Act Manual (11th ed., October 2008).

[67] In addition to the MPIA, releasing the drug test results will not violate the confidentiality provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 to 12213. Those provisions apply to information concerning the medical condition or history of an employee obtained by the employer during (1) an employment entrance exam, (2) a voluntary medical exam which is part of an employee health program and, most importantly for our purposes, (3) an inquiry into an employee's ability to perform job-related functions. §§ 12112(d)(3) & (d)(4)(C). The confidentiality provisions are not limited to individuals with disabilities under the ADA. *Giaccio v. New York City*, 2005 U.S. Dist. LEXIS 642, *9 (S.D.N.Y. 2005). Moreover, although a drug and alcohol test is not a "medical examination" under the ADA, it is still an inquiry into an employee's ability to perform job-related functions and therefore subject to the confidentiality provisions. *Id.* at *10-15.

The confidentiality provisions provide that an employer must collect and maintain information concerning the medical condition or history of an employee on separate forms and in separate medical files and treat it as a confidential medical record, except that the employer may provide that information to supervisors, managers, safety personnel and government officials, among others, under specified circumstances. § 12112(d)(3)(B). *See also* 29 C.F.R. §§ 1630.14(c) & (d). Like the mandatory exemptions in the MPIA, the ADA's confidentiality provisions do not create a privilege for purposes of civil discovery. *Compare Boyd v. Gullett*, 64 F.R.D. 169, 177-78 (D. Md. 1974) (MPIA) *with Scott v. Leavenworth Unified Sch. Dist. No. 453*, 190 F.R.D. 583, 586-87 (D. Kan. 1999) (ADA). Thus, as with the MPIA, we conclude that the ADA does not preclude a custodian from releasing drug test results to the IG if such results are required in order for the IG to conduct an investigation.

[68] Opinion of the Office of the County Attorney, January 16, 2002, pp. 15-18.

records. Of course, the County IG is then prohibited from further disclosing this information, pursuant to the County Code, which mandates that "[t]he Inspector General must comply with any restrictions on public disclosure of the document or information that are required by federal or state law."[69]

CONCLUSION

For the foregoing reasons, the IG may investigate an ongoing personnel matter as part of the IG's goal to detect and deter fraud, waste and abuse in government activities, but must not interfere with another department's ability to conduct a personnel investigation. In addition, under State law, the IG is permitted to access medical and personnel records in the course of their investigation, provided that such access is required in order for the IG to execute the IG's investigation. The IG must then comply with federal and State law to ensure there is no further disclosure of protected information.

Our conclusion that the IG may have access to personnel and medical information of a County employee in order to carry out an investigation of specific allegations of fraud, waste, and abuse is not free from doubt. We strongly recommend, therefore, that the County seek State legislation allowing the IG to obtain information protected under the MPIA.

cc: Tom Dagley
Tim Firestine
Mike Faden
Melanie Wenger

[69] MONTGOMERY COUNTY, MD., CODE § 2-151(l).