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Mr. William Braybrook
Systems Consultant
Arizona State Justice Planning Agency
Continental Plaza Building, Suite M
5119 North 19th Avenue
Phoenix, Arizona 85015

Dear Mr. Braybrook:

On January 12, 1976 you requested our opinion on the following questions:

1. Does a federal regulation, to wit: §20.21(b)(2) of the Department of Justice Rules found at 28 C.F.R. part 20, override an existing State law, specifically Arizona Revised Statutes §41-1750?
2. In A.R.S. §41-1750.G, can the use of the word "employment" be interpreted to mean the "employees of licensees"? Employees of non-law enforcement agencies of the State or its political subdivisions appear to be covered under §41-1750 B7.
3. Does §20.20 (b)(3) of the Department of Justice Rules, found at 28 C.F.R. part 20, which excludes from regulation "criminal history record information" found in "court records of public judicial proceedings compiled chronologically," apply to Superior Court records?

1. A valid federal regulation does take precedence over an inconsistent State law, but here there is no direct conflict between the federal regulation and the State statute.

In pertinent part, Article VI of the United States Constitution states:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . Shall be the



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Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding. [This provision is generally known as the "Supremacy Clause."]

In an historic opinion interpreting that language, the Supreme Court in McCullock v. Maryland, 4 L.Ed. 579, 606 (1819), stated:

It is of the very essence of [federal] government supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.

Federal regulations properly promulgated to carry out statutory provisions do have the force of federal law, Public Utilities Comm. v. United States, 355 U.S. 534 (1958). Thus, a proper federal regulation takes precedence over a contrary State Statute. See Meisser v. Zeiller, 373 F. Supp. 1198 (D.N.H. 1974) ("[A] State Statute, if inconsistent with . . . federal regulations must, of course, fall under the Supremacy Clause."); City of Los Angeles v. United States, 355 F. Supp. 461 (C.D. Cal. 1972) ("A State Statute becomes unconstitutional when applied so as to impede or condition the operation of federal programs and policies").

28 C.F.R. Part 20, §20.21, requires that each state submit a plan containing operational procedures to . . .

* * *

(b) . . . Insure that dissemination of criminal history record information has been limited, whether directly or through any intermediary only to:

* * *

(2) Such other individuals and agencies which required criminal history record information to implement a statute or executive order that expressly refers to criminal conduct and contains requirements and for exclusions expressly based upon such conduct [Emphasis added.]

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To the extent that A.R.S. §41-1750 does not specifically contain "requirements and/or exclusions expressly based upon criminal conduct," the statute does not meet the requirements of §20. 21(b)(2) above. The result is not actually the invalidation of the statute, since it does not directly violate the regulation. Rather, use of the statute in the required plan could be rejected by federal officials. The regulation does not, per se, invalidate the statute, since the regulation does not say what activities are forbidden; instead, it sets out criteria for components of the required plan.

2. A.R.S. §41-1750 G creates authority for non-law enforcement agencies of the state or its political subdivisions to establish rules expressing the need for fingerprint or background investigations "for purposes of employment or licensing." The two purposes are discrete. The disjunctive "or" and either purpose can be deleted without rendering the sentence grammatically unsound. The only realistic interpretation is that the named agencies can seek fingerprint and background material for licensing purposes, and also can seek such material for employment purposes. Statutes are construed as a whole, with effect given where possible to all their provisions. City of Phoenix v. Kelly, 90 Ariz. 116 (1961). Thus, when the subparts of part B of this statute are examined, subpart (7) refers to the providing of information to non-law enforcement agencies "for the purpose of evaluating the fitness of prospective employees of such agencies." Subpart (8) refers to the providing of materials to "licensing and regulatory agencies . . . for the purpose of evaluating the fitness of prospective licensees." Part G correlates with subparts B(7) and B(8), thereby making manifest the intention that the term "employment" in part G refer to employment within or by the applicable non-law enforcement agency--and not to refer to employment by licensees. It is improper to inflate, expand, stretch or extend a statute to cover matters not falling within the express provisions thereof. City of Phoenix v. Donofrio, 99 Ariz. 130 (1965).

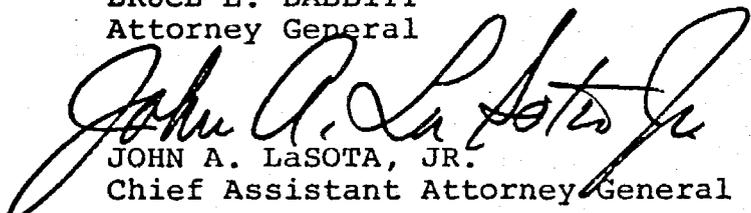
3. Neither the statutes setting forth the duties of the Clerk of Superior Court (Title 11, Ch. 3, Art. 8, A.R.S.), nor the Rules of Civil Procedure applicable to filing pleadings and other papers [Rule 5(h)] discuss the mechanics of a recordkeeping system. However, it is likely that all such records are compiled in a manner that is chronological in two phases: First, the number identifying the file is given a number in chronological order; second, materials are filed under the number based on the chronological sequence of the filing. Thus, all "compiling" is chronological. The number of a particular proceeding can be ascertained by tediously searching an alphabetical index main-

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tained in dockets on a year-by-year basis; but this does not in any way detract from the conclusion that Superior Court records are "court records of public judicial proceedings compiled chronologically", for the purpose of §20.20(b)(3) of the regulations of 28 C.F.R. Part 20.

Sincerely,

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JOHN A. LASOTA, JR.
Chief Assistant Attorney General

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