action to protect the health or welfare of the community, and a determination based on such showing. We are advised that your constituents wish to create a moratorium in order to alleviate the overcrowding of schools. In *Molino v. Mayor & Council of the Borough of Glossboro*, 381 A 2d 401 (N.J., 1972), it was held that a zoning provision designed to keep children out of the community because more children require more schools and result in higher taxes is unconstitutional.

We are therefore brought to the conclusion that no municipality, be it home rule city, fourth class city, general act village, home rule village, charter township, or general township, can be said to have authority to prohibit "any and all" residential buildings within the territorial limits of said municipality for such purpose. Individual permits may be withheld upon reasonable showing of health or welfare hazard, but this does not include overcrowding of schools.

FRANK J. KELLEY,
Attorney General.

720405.1

LIBRARIES: Circulation Records.

PUBLIC RECORDS: Inspection of.

COUNTIES: Library Board.

Authority of county library board to adopt policy protecting library circulation records from public access or from investigative agents of federal or other public agencies except pursuant to subpoena.

No. 4742

April 5, 1972.

Honorable Joseph M. Snyder
State Representative
The Capitol
Lansing, Michigan

You ask whether the Macomb Public Library may adopt a policy recommended by the Council of the American Library Association, recognizing circulation and other records which identify library users by name and by specific materials to be confidential in nature, and providing that such records not be released except pursuant to subpoena issued by a court or other authority upon good cause shown in connection with administrative, legislative or judicial discovery procedures. You refer to section 492 of the criminal code, providing in pertinent part as follows:

> "Any officer having the custody of any county, city or township records in this state who shall when requested fail or neglect to furnish proper and reasonable facilities for the inspection and examination of the records and files in his office and for making memoranda of transcripts therefrom during the usual business hours, . . . to any person having occasion to make examination of them for any lawful purpose shall be guilty of a misdemeanor. . . . The custodian

> of said records and files may make reasonable rules with reference to the inspection and examination of them as shall be necessary for the protection of said records and files, and to prevent interference with the regular discharge of the duties of such officer. . . . No books, records and files shall be removed from the office of the custodian thereof, except by the order of the judge of any court of competent jurisdiction, or in response to a subpoena duces tecum issued therefrom, . . ." M.C.L.A. 750.492; M.S.A. 28.760.

Your constituent states that the Macomb County Library, established and operated under 1917 P.A. 138, being M.C.L.A. 397.301 et seq.; M.S.A. 15.1702 et seq., by the Macomb County Library Board, wishes to adopt such a policy.

It does not appear that circulation records of a county library operated by its own board of trustees are included in "county public records" as defined in the statute quoted above. It is my conclusion that no criminal liability would be incurred by any officer or agent of a county library under this statute, were the library board to adopt the protective policy referred to.

Consideration should also be given, however, to the fact that there are public records other than those defined in the above-quoted statute. It has been said that the elements essential to constitute a public record are that it be a written memorial, that it be made by a public officer, and that the officer be authorized by law to make it. *Aitcheson v. Huebner,* 90 Mich. 643 (1892).

There can be no question that records kept by a county public library are "public records" in the sense that they are made, arranged and kept by a public agency carrying out a statutory public function, which records belong to the public.

Although citizens have no statutory right to inspect public records, they do have a common law right to do so where they can show special interest entitling them to inspection. The leading case is *Nowack v. Fuller,* 243 Mich. 200 (1928), in which the Michigan Supreme Court adopted the rule that a newspaper editor desiring material for publication regarding expenditure of public funds by the auditor general in connection with a conference of governors has shown special interest entitling him to enforce the right to inspect public records in a suit in his own name. It was similarly held in *Booth Newspapers, Inc. v. Muskegon Probate Judge,* 15 Mich. App. 203 (1968). At page 207 of the *Booth* case, the court says in part:

> "First, the legislature, for its own reasons, may specifically define and limit 'persons interested' to a certain class, also intending that such definition be uniform throughout the code. It may also foresee certain governmental burdens and so restrict access by providing definitions of 'public' as opposed to 'private' records. Finally, the courts may determine that the legislature intended to restrict access in cases where harm to the public interest may be said to outweigh the right of members of the public to have access, or where the purpose for which the information will be used is stated to be unlawful, or where reputations may be harmed, or for pastime, whim or fancy. In such cases, a balancing of the public interest with the right of

access must be made. The only harm to the public interest which could occur here would be if we would deny access to the newspaper."

In the *Booth* case, the newspaper sought to compel a probate judge to afford access to a last will and testament.

There is no legislative enactment either requiring libraries to maintain circulation records after books are returned, or providing that such records, if kept, be confidential.

In the *Booth* case, cited *supra*, the court recognized at page 207 that courts may determine to restrict access where reputations may be harmed, or for pastime, whim or fancy. In such cases, a balancing of the public interest with the right of access must be made. From the context, it is clear that the balancing is to be done by a court.

In the present subject area, there is concern for invasion of the right of privacy of library users, even of character assassination by witch hunting.

In the circumstances, and having in mind the lack of clear legislative guidance, I advise you that the protective policy may be adopted. But, I caution that in carrying out the policy, no court-issued subpoena may be disregarded. In case of any doubt, your constituent should seek immediate counsel and have counsel request the court for a protective order.

FRANK J. KELLEY,
Attorney General.

720421.1

ADMINISTRATIVE LAW: Legislative standards.

NURSING STATE BOARD OF: Power to reinstate lapsed license.

Provision of statute conferring upon the state board of nursing the power to reinstate a lapsed license upon satisfactory explanation for the failure to renew without prescribed standards for guidance of the state board of nursing is constitutionally invalid.

No. 4745

April 21, 1972.

Alice C. Dorian, R.N.
Administrative Secretary
Board of Nursing
1033 South Washington Avenue
Lansing, Michigan

You have requested my opinion on the constitutionality of certain language appearing in Section 18(3) of the nursing practice act of 1967.[1] Section 18(1) of the act provides for annual licensure and subparagraph (3) thereof further provides as follows:

"A licensee shall show his license when requested. A licensee who allows his license to lapse by failing to renew it may be reinstated

[1] 1967 P.A. 149; M.C.L.A. 338.1168(3); M.S.A. 14.694(18).