

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.¹

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.

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.