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June 29, 1993

William S. Ratchford, II, Director
Department of Fiscal Services
200 Legislative Services Building
90 State Circle
Annapolis, Maryland 21401-1991

Dear Mr. Ratchford:

This is in response to your request for advice of counsel concerning a request under the Public Information Act for various documents relating to audits and contracts. Although there is no doubt that these documents are public records, at least some of these records may not be disclosed as they are subject to mandatory exclusions under the Act. Those records obtained during the course of an audit, those constituting the work papers of the audit, and those of a deliberative nature may not be disclosed.

In a letter dated and received June 14, 1993 from Philip M. Andrews, an attorney in Baltimore, there is a request under the Public Information Act for various documents which relate to an audit by the Department of Fiscal Services of the Maryland Division of Correction's Inmate Health Care Services. There is also a request for documents related to one of the Division's contractors and to audits of various contracts with this party. The letter is addressed to you as the director and custodian of records of the Department in which the Legislative Auditor is located. You have asked for guidance of this office in responding to this request.

The Public Information Act establishes a broad right of access to records, i.e. documents, made or received by public

agencies. Md. Code, State Government Article, §§10-611(f), 10-612, and 10-613. However, this right is qualified. Under the Act, a custodian must deny access to certain kinds of records, §§10-615, 10-616, and 10-617, and may deny access to certain other kinds of records, §10-618. A custodian has 30 days from the receipt of a request to grant or deny an application. In denying an application, a custodian must, within 10 days, provide a written statement of the reasons for the denial, the legal authority, and the remedy. If only part of a request is subject to an exclusion, the remainder must be disclosed if it is severable. Sec. 10-614. As agencies of the Legislative Branch are not subject to the Administrative Procedure Act, the remedy is judicial review. See §§2-1204, 2-1212, 10-203(a)(1) (as amended by Chapter 59, Laws of Maryland, 1993), 10-622, and 10-623.

Under the Act, a custodian must deny access to a public record, or part of a public record, if it is privileged or confidential by law. Also, there must be a denial of access if inspection would be contrary to a State statute. With respect to records of the Legislative Auditor, there is a statutory as well as constitutionally prescribed privilege which is applicable. Under the law governing the work of the Auditor, information obtained during the course of an audit is confidential and may only be disclosed to certain governmental personnel. §2-1221. Only the audit report may be disclosed under the Public Information Act. §2-1219(d). Although a document which is in the custody of the agency which is being audited may be accessible under the Public Information Act from that agency, the broad sweep of the confidentiality provision of §2-1221 suggests that if the Auditor has obtained a copy the Auditor may not disclose it. However, in these circumstances, it would be appropriate to direct a requestor to the agency which was the subject of the audit.

In addition to the exclusion based on the statutory confidentiality provisions for the Auditor, there is an exclusion based on the constitutionally prescribed Speech and Debate Privilege of legislators. Md. Const., Decl. of Rts., Art. 10, and Art. III, §18. In construing the Speech and Debate Clauses of the Maryland Constitution, the Court of Special Appeals has said that they are in pari materia with the equivalent clause of the federal Constitution, Art. I, §6, cl. 3. Blondes v. State, 18 Md.App. 165, 175 (1972). The purpose of the federal clause is to "protect the integrity of the legislative process by insuring the independence of individual legislators." United States v. Brewster, 408 U.S. 501, 507 (1972). It is to be broadly interpreted to effectuate its purpose, Brewster at 516, and it is to be understood in the context of the separation of powers and as reinforcing this fundamental principle of American government. United States v. Johnson, 383 U.S. 169, 178 (1966). Referring to the limits on judicial power in proceedings and inquiries concerning legislative acts, the Supreme Court has said that

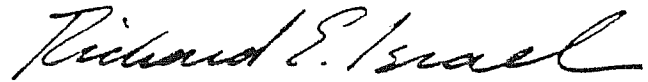
"[o]nce it is determined that Members are acting within the 'legitimate legislative sphere', the Speech or Debate Clause is an absolute bar to interference." Eastland v. United States Servicemen's Fund, 423 U.S. 491, 503 (1975). See also, McMillan v. Doe, 412 U.S. 306, 312 (1979), and Gravel v. United States, 408 U.S. 606, 624 (1972). To be within this sphere, a matter must be an integral part of the deliberative and communicative process by which members participate in the consideration of legislation and in other legislative matters. Gravel at 625. In addition to protecting legislators, the privilege also protects aides who perform legislative acts on their behalf, Gravel at 618, and this protection extends to communications between legislators and their aides concerning legislative acts. Gravel at 629.

The issue of the application of the federal clause to the General Accounting Office (GAO), the investigative agency of Congress, was considered in the case of Chapman v. Space Qualified Systems Corp., 647 F.Supp. 551 (N.D. Fla. 1986). In that case, a party to a lawsuit attempted to subpoena a GAO investigator and all of the working documents related to an investigation. Id. at 552. In granting a motion to quash the subpoena, the Court concluded that conducting an investigation was within the sphere of legitimate legislative activity. Moreover, in exercising this power on behalf of Congress, the GAO and the investigator were protected by the Speech and Debate Clause. Id. at 553-554. As the Legislative Auditor is an agent of the Legislative Branch, §§2-1204 and 2-1212, it has been recognized that the Speech and Debate Clause precludes the questioning of the Auditor's employees and the review of the records of their work in any judicial proceeding. See Memorandum and Order, Drolsum v. Shilling, Circuit Court for Howard County, Case No. 87-CA-5344. Although the scope of the privilege is not entirely clear in this context, ^{1/} at the very least you may not disclose any document which was obtained during the course of an audit which constitutes part of the work papers of the audit or any communication of a deliberative nature, including those between the Auditor and members of the General Assembly.

In addition to the mandatory exclusions, there is a permissive exclusion for inter-agency and intra-agency records which are not subject to discovery in litigation. §10-618(b). Should you wish to invoke this exclusion, this office can provide further guidance concerning the nature of this exclusion. Otherwise, except to the extent that a requested record is subject to the confidentiality law for the Auditor or the Speech and Debate Privilege, you are obliged to disclose it under the Act.

¹ In Marylanders for Fair Representation v. Schaefer, 144 F.R.D. 292, 302, n. 20 (D. Md. 1992), the Court held that the privilege does not extend to all documents.

Sincerely,

A handwritten signature in cursive script that reads "Richard E. Israel". The signature is written in dark ink and is positioned above the typed name.

Richard E. Israel
Assistant Attorney General