III

Conclusion

In summary, it is our opinion that:

1. "Psychotherapist" and "therapist," unlike "physician" and "psychologist," are not protected titles under Maryland law. Nonetheless, the use of such titles might be evidence that a person is engaged in the unauthorized practice of medicine or psychology, depending on the nature of the services provided.

2. The terms "psychotherapist," "therapist," "consultant," and "personal consultant" are not defined by statute. Although these terms are used in a number of health-related regulations, the terms are not defined nor is their use expressly prohibited. However, the use of these terms in a misleading or deceptive manner would be unlawful.

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LEGISLATIVE AUDITOR

PUBLIC INFORMATION ACT — EXECUTIVE PRIVILEGE — PROCEDURES APPLICABLE TO AUDITOR'S REQUESTS FOR RECORDS AND INFORMATION

March 18, 1991

The Honorable William Donald Schaefer
Governor

You have requested our opinion on the procedures to be followed by the Legislative Auditor during an audit of an Executive Branch agency. Specifically, you pose the following questions:

1. May the agency require the Legislative Auditor to identify in advance the documents that the Auditor wishes to examine?

2. May the agency require the Legislative Auditor to submit a written application, pursuant to the Maryland Public Information Act ("PIA"), for access to documents?

3. May the agency require the Legislative Auditor to submit in advance questions that the Auditor wishes to pose to the agency's staff?

4. May the agency restrict the Legislative Auditor's access to files to the normal business hours of the agency?

5. Is the Legislative Auditor required to notify the agency if the Auditor seeks information about an agency employee from a different agency or other source?

For the reasons stated below, we conclude as follows:

1. An executive branch agency may require the Legislative Auditor to provide advance indication of the categories of records that the Legislative Auditor intends to examine. This advance notice would permit the agency to determine whether any of the records are subject to a claim of executive privilege under the Maryland Constitution.

If the Legislative Auditor identifies a category of records that the agency knows cannot contain material subject to executive privilege — for example, purely factual records like time sheets or invoices — the agency must make those records available without delay. If the Legislative Auditor identifies a category of records that the agency reasonably believes might contain material subject to executive privilege, the agency may decline to permit the Legislative Auditor access to those records until the agency reviews the records and, if necessary, consults with the Governor about the invocation of executive privilege.

2. The agency may not require the Legislative Auditor to submit a written application for records pursuant to the PIA. The PIA does not apply to the exercise of the Legislative Auditor's statutory powers in the course of an audit.

3. The agency may not require the Legislative Auditor to submit in advance questions to be answered by the agency's staff. However, if a staff member is asked for information that might reasonably be encompassed by executive privilege, the staff member may decline to respond until the issue of the privilege is resolved.

4. The agency may require the Legislative Auditor to conduct a review of records during the agency's regular business hours only.

5. The Legislative Auditor is not required to notify the agency of requests for information from other sources (for example, other agencies). However, nothing prevents an agency that receives the request from notifying the agency that is the subject of the audit. Moreover, if an employee of the Legislative Auditor requests information from another agency without stating an organizational affiliation and without invoking the powers granted under the audit statute, the agency that receives the inquiry should treat it as a request subject to all of the procedures of the PIA, including the requirement of a written application.

I

Procedures for Access to Documents

A. Introduction

On March 8, 1991, you instructed your cabinet secretaries to prohibit the Legislative Auditor from obtaining access to agency records unless the Auditor had first submitted a "written, detailed description" of the records for which access was sought. Your directive followed a disagreement between the Secretary of State and the Legislative Auditor over access to certain files at a time when no agency employee was present.[1]

Your directive cited the PIA as a basis for the requirement of a written application. And, indeed, §10-614(a)(1) of the State Government Article ("SG" Article) provides as follows: "A person or governmental unit that wishes to inspect a public record shall submit a written application to the custodian." Moreover, in your letter of the same date requesting this opinion, you pointed to the doctrine of executive privilege as another basis for the requirement of an advance request for access.

In Part IB below, we consider the relationship between the right of access in the statute specifically governing the Legislative Auditor and the procedural mechanisms of the PIA. We conclude that the PIA does not govern access to an agency's records in the course of an audit, and we disapprove statements in two prior opinions of the Attorney General suggesting otherwise.

In Part IC, we consider the procedural implications of the doctrine of executive privilege, and we conclude that the doctrine itself leads to a requirement of advance notice when the Legislative Auditor intends to inspect the records of an Executive Branch agency.

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[1] Your letter requesting this opinion cited this and other incidents giving rise to your concerns about the current practices of the Legislative Auditor. Not surprisingly, the Auditor takes a different view of the facts of these incidents. An Attorney General's opinion cannot attempt to reconcile differing versions of events. In any case, the legal guidance provided in this opinion does not depend on the particular facts about these incidents.

B. Relationship of Audit Statute and PIA

Audits are conducted by the staff of the Division of Audits, part of the Department of Fiscal Services and therefore within the Legislative Branch of State government. *See* SG §2-1204.

The jurisdiction of the Division of Audits is broad: every audit includes "an examination of financial transactions and records" and "an evaluation of compliance with applicable laws and orders"; many audits also include "a review of the efficiency and economy with which resources are used" and "a review to determine whether desired program results are achieved effectively." SG §2-1216(a)(1) and (2) and (b). As Attorney General Burch observed, when discussing the audit statute prior to its recodification, "the general auditing authority of the Legislative Auditor is not to be narrowly construed .... [I]n general terms the Legislative Auditor has broad authority to inquire into the performance of State agencies and to examine their records in making an assessment of their performance." 63 *Opinions of the Attorney General* 453, 455 (1978).[2]

Under SG §2-1218(a), those conducting an audit are afforded a comparably broad right of access to records:

> Except as prohibited by the federal Internal Revenue Code, during an audit, the employees of the Division of Audits shall have access to and may inspect the records, including those that are confidential by law, of any unit of the State government or of a person or other body receiving State funds, with respect to any matter under the jurisdiction of the Division of Audits.

SG §2-1218(b) goes on to impose the following duty on agency staff: "Each officer or employer of the unit or body that is subject to audit shall provide any information that the Legislative Auditor finds to

[2] Although the jurisdiction of the Legislative Auditor is broad, it is not limitless. An audit may not be conducted solely for the purpose of determining the criminal culpability of particular individuals. *Cf. Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975). The audit statute itself contemplates that criminal matters will be referred by the Legislative Auditor to the Attorney General and the State's Attorneys. SG §2-1220(b).

be needed for the audit, including information that otherwise would be confidential under any provision of law." The Legislative Auditor may issue process to an official who refuses "to produce a record that is needed for the audit." SG §2-1219(c)(1). A person who fails to comply with process is guilty of a misdemeanor and is subject to a fine. SG §2-1222. Audits are to take place where the agency's records would ordinarily be found — "at the offices of the State unit ... that is subject to audit." SG §2-1217.

The audit statute also contains its own mandate for confidentiality, generally prohibiting disclosure by employees of the Division of Audits of "[i]nformation ... obtain[ed] during an audit." SG §2-1221(a).[3] A breach of this confidentiality stricture is a criminal offense. SG §2-1222(2).

On their face, these provisions of the audit statute look like a self-contained mechanism for access by the Legislative Auditor to agency records. They do not incorporate, either expressly or by reasonable inference, the quite separate mechanism for access set out in the PIA. Moreover, the history of the two statutes suggests that the two are not linked.

In 1902, the General Assembly created the office of State Auditor, whose responsibility was to audit the accounts of certain fee-generating State officers as well as other officers at the direction of the Board of Public Works. Chapter 257, Laws of Maryland 1902. The State Auditor's authority to examine records was broad: "The State Auditor is hereby authorized and empowered to require the production before him of the books and accounts of said officers and to examine upon oath any officer whose office he is hereby authorized to examine touching the affairs thereof, or to examine upon oath any other person as a witness who he may be advised has important information in regard to the conduct of such office.... [T]he examination of the books shall be made in the offices of the different officers whose books are to be examined."

[3] Under current law, disclosure is permitted only to "another employee of the Division." SG §2-1221(a)(2). Senate Bill 133, as adopted by the Senate, would also permit disclosure to "[f]ederal, State, or local officials or their auditors who provide evidence to the Legislative Auditor that they are performing investigations, studies, or audits related to that same audit and who provide justification for the specific information requested." Proposed SG §2-1221(b)(2).

The statute also provided a criminal penalty for an officer's refusal to permit access to the books and accounts. Former Article 19, §32.

When the position of State Auditor was abolished and that of Legislative Auditor created in 1968, the same language was carried forward. Chapter 456, Laws of Maryland 1968. *See* former Article 40, §61C.

In 1968, the Public Information Act had not been enacted. Hence, at that time, no one would have supposed that the Legislative Auditor was subject to a statutory requirement of a written application for access to an agency's records. Nor did the PIA itself contain such a requirement when it was enacted in 1970. *See* Chapter 698, Laws of Maryland 1970.

In 1975, the Attorney General first considered the audit statute and its relationship to the PIA. The particular issue was "whether the Legislative Auditor in the performance of his State duties should be allowed to review employee personnel folders." 60 *Opinions of the Attorney General* 554 (1975). Without significant analysis, the opinion merely stated as a premise "that the restrictions against disclosure in [the PIA] would apply to investigators for a State agency to the same extent as members of the general public." 60 *Opinions of the Attorney General* at 555.[4] The opinion did not discuss the applicability of the PIA's procedural requirements (at the time, minimal) to the Legislative Auditor.[5]

In 1978, the General Assembly enacted a major overhaul of the PIA. Chapter 1006, Laws of Maryland 1978. In particular, the 1978

[4] The 1975 opinion relied for this proposition on an earlier opinion, 58 *Opinions of the Attorney General* 53 (1953), that applied the PIA to a request for records by an individual member of the General Assembly. The 1973 opinion concluded correctly that the member stood in no different position than any other member of the public. 58 *Opinions of the Attorney General* at 60. The 1975 opinion, however, ignored the salient difference between an individual member acting on his or her own behalf, on the one hand, and an official acting under statute on behalf of the General Assembly as a whole.

[5] The opinion concluded correctly that the audit statute afforded access to records that would otherwise be confidential under the PIA itself. 60 *Opinions of the Attorney General* at 556-57.

amendments made it clear that a government agency's access to the records of another agency was subject to the PIA's confidentiality provisions. In addition, the 1978 amendments added the requirement now found in SG §10-614(a)(1) of a "written application," itself made expressly applicable to government agencies as well as other requesters.

Later that year, the Attorney General revisited the issue of the Legislative Auditor's access to records treated as confidential by the PIA itself. Relying on the 1975 opinion and, more importantly, on the then-recent amendments to the PIA, the Attorney General stated that the PIA "regulates access by the Legislative Auditor to medical records of the Department of Health and Mental Hygiene." 63 *Opinions of the Attorney General* 453, 458 (1978). However, once again the opinion did not discuss the procedural aspects of the PIA and their potential effect on the access provisions of the audit statute. Rather, the opinion analyzed only the issue of confidentiality — whether a type of record subject to the PIA's prohibition on disclosure might nonetheless be disclosed to the Legislative Auditor, given the breadth of the access right in the audit statute. The opinion quite convincingly demonstrated that the PIA was not a barrier to disclosure.[6]

Then, in 1980, the General Assembly returned to the audit statute, amending it in part in order to "specif[y] the manner of access to records to be audited ... [and] the duties of persons and agencies being audited ...." Chapter 604, Laws of Maryland 1980 (bill title). The General Assembly repealed the old provisions on access to records and information and enacted in their place what is now SG §2-1218(a) and (b). The legislation was introduced at the request of the Department of Fiscal Services to "clarif[y] the authority of the Legislative Auditor with regard to access to records ...." Letter to Delegate John R. Hargreaves, Chairman of the House Appropriations Committee, from William S. Ratchford, Director of Fiscal Services (January 31, 1980).

Nothing in the 1980 legislation or its legislative history suggests that the two Attorney General opinions had been understood to authorize

[6] As in the 1975 opinion, the Attorney General concluded that the audit statute was "other law" authorizing access to records categorized as confidential by the PIA: "[T]he PIA itself does not limit the Legislative Auditor's otherwise broad authority to gain access to these records for the purpose of performing his lawful duties." 63 *Opinions of the Attorney General* at 459.

imposition of the procedural requirements of the PIA on the Legislative Auditor. Had agencies sought to do so, surely this legislation would have dealt with the subject, for there can be no doubt whatever that the procedures of the PIA are in most respects altogether incompatible with the efficient conduct of an audit. For example, the access right granted by the audit statute would be severely compromised if an agency were permitted to delay its response to the Legislative Auditor's request for access for up to 30 days. *See* SG §10-614(b)(1). It is likewise impossible to imagine that the General Assembly intended to allow an agency to delay an audit indefinitely by invoking the temporary denial authority in SG §10-619 or meant to authorize the agency to impose search fees under SG §10-621.

As we see it, the General Assembly intended its audit function to be an independent exercise of its constitutional prerogative to engage in oversight of Executive Branch agencies, concerning both their handling of funds and their performance. *See* 63 *Opinions of the Attorney General* at 453-54. And, as the 1980 amendments to the audit statute made clear, the General Assembly has unmistakably imposed a duty on Executive Branch officials to provide the information necessary to the conduct of an audit by the Legislative Auditor.

It would be wholly at odds with that legislative objective for us to conclude that the General Assembly, when it expanded the PIA in 1978 to encompass governmental agency requests, intended to impose significant procedural barriers to the prompt completion of an audit. Accordingly, we conclude that the PIA, including its "written application" requirement, does not apply to the Legislative Auditor's conduct of an audit. Although we do not overrule 60 *Opinions of the Attorney General* 554 and 63 *Opinions of the Attorney General* 453, because both opinions correctly treated the questions actually presented in them, we disapprove the statements in those opinions suggesting that the PIA does apply to records access during an audit by the Legislative Auditor.

C. *Notice Requirement As A Function of Executive Privilege*

Our conclusion that the PIA does not require a "written application" when the Legislative Auditor wants to examine agency records as part of an audit does not end the analysis, however. In our view, an Executive Branch agency may insist on advance notice of the Legislative Auditor's intention to examine a group of records in order to permit the

agency to consider whether disclosure to the Auditor would breach executive privilege.

We recognize that, by statute, the Legislative Auditor is in essence authorized to examine any record pertinent to the agency's performance — in practice, then, any agency record. But the statute cannot give the Legislative Auditor power in excess of that allocated to the General Assembly under the Constitution.

In *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (1980), the Court of Appeals held that the Governor had the prerogative to assert executive privilege over certain advisory documents. The Governor's prerogative is not merely a matter of common law; executive privilege is grounded in part on the separation of powers principle expressed in Article 8 of the Declaration of Rights. 287 Md. at 562.[7] Although *Verdow* dealt with discovery in litigation, this office later opined that "there can be no doubt that the privilege also applies, for the same reasons, to disclosures to or on demand of the Legislative Branch." 66 *Opinions of the Attorney General* 98, 101 (1981).

The prerogative to assert executive privilege would be meaningless if an official of the Legislative Branch were free to examine records of an Executive Branch agency without affording an opportunity for the agency to ascertain whether any of the records were subject to a claim of executive privilege.[8] To be sure, very often an agency will be able to conclude immediately that the category of records in question does not contain any document for which executive privilege might be asserted. No tenable claim of executive privilege could be made about

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[7] Article 8 provides as follows: "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

[8] This opinion is not the occasion for a detailed examination of the scope of the privilege. In one passage in *Hamilton v. Verdow*, the Court of Appeals described the privilege as potentially applicable to "confidential communications of the chief executive, or confidential communications of other governmental officials of an advisory or deliberative nature." 287 Md. at 563. By contrast, "purely factual material," divorced from any deliberative context, is outside the privilege. *Laws v. Thompson*, 78 Md. App. 665, 693, 554 A.2d 1264 (1989). *See also* 66 *Opinions of the Attorney General* at 100 and 102.

time or leave records, details of purchases, or other similar documents simply reciting the facts about transactions. Because no constitutionally grounded privilege could be claimed for those types of records and because SG §2-1218 wipes away any confidentiality requirement arising from statute or common law, an agency must honor the Legislative Auditor's request for access in these instances without delay.

In other instances, however, the agency might need time to determine whether privileged documents exist within the category of records sought by the Legislative Auditor. The agency must be afforded the opportunity to make that judgment and, if documents seemingly meeting the criteria for executive privilege are sought by the Legislative Auditor, to consult with the Governor about the potential assertion of the privilege. The audit statute may not be construed to foreclose reasonable agency efforts to protect documents within the scope of executive privilege.

D. Summary

An Executive Branch agency may require the Legislative Auditor to identify in advance the categories of records that the Auditor wishes to examine. As a practical matter, this requirement should not be an impediment to the Legislative Auditor, because the Auditor's Policy and Procedure Manual already instructs the staff of the Division of Audits to "[r]equest permission before utilizing agency records." Section 20.05.01, at 6.

If the agency is aware that a given category of records identified as needed for the audit contains no material for which executive privilege might be asserted, the agency should promptly grant the Legislative Auditor unrestricted access to those records. If the agency concludes that certain records might be subject to executive privilege, it may temporarily deny the Legislative Auditor access to those records while the Governor decides whether to assert executive privilege. If the Governor does not do so, the records should be made available immediately.

Should the Governor assert executive privilege, the agency must deny the Legislative Auditor access to those records. At that point, the Legislative Auditor would be free to issue process for the records, and the matter would then be resolved by the courts.

II

Procedures for Obtaining Nondocumentary Information

SG §2-1218(b) imposes a duty on the agency being audited to "provide any information that the Legislative Auditor finds to be needed for the audit, including information that otherwise would be confidential ...." Nothing in the statute imposes a duty on the Auditor to submit questions in advance, and such a requirement would seriously impede the audit process. Most requests for information are entirely routine and are part of the day-to-day dialogue between agency staff and auditors.

At the same time, an employee of an agency may decline to respond immediately to a question calling for disclosure of matter seemingly within the scope of executive privilege. As with documents, the agency may withhold the requested information while a decision is made about assertion of the privilege.

III

Time of Conduct of Audit

SG §2-1217 provides that an audit is to take place "at the offices of the State unit ... that is subject to audit." Although the statute does not address the timing of the audit, the reference to the unit's "offices" implies that the agency's staff ordinarily would be present during the audit.[9] From an auditor's point of view, moreover, they would need to be present to respond to questions. Therefore, we conclude that an audit is to be conducted during the ordinary business hours of the agency under audit, unless the agency permits a different arrangement.

Our understanding is confirmed by the Auditor's Policy and Procedure Manual, which provides that auditors generally are to work the same hours as the agency. Exceptions are to be approved by the agency: "The auditee may object to auditors working with their records

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[9] In 1980, when the audit statute was significantly amended, the General Assembly rejected a proposed amendment that would have required the presence of agency staff during an auditor's review of certain medical records.

when the office is not officially open; therefore, we must obtain the auditee's concurrence prior to implementing ... alternative work schedules." Section 20.01.01, at 1.

IV

Information Requests to Other Agencies

The audit statute is not entirely consistent about the Legislative Auditor's authority with respect to agencies other than the one being audited. On the one hand, SG §2-1218(a) authorizes access to the *records* "of any unit of the State government ...." This language is certainly broad enough to give the Auditor the right to obtain records from one agency related to the audit of another. This provision is entirely logical, for an audit of an agency's financial transactions, for example, would be incomplete without routine verification of certain matters in the records of the Comptroller, the Treasurer, or the Department of Budget and Fiscal Planning.

On the other hand, SG §2-1218(b) imposes a duty to provide *information* only on the staff "of the unit or body that is subject to audit ...."[10] Thus, employees of an agency other than the one under audit are under no legal duty to respond to questions (as distinct from requests to examine records) from the Auditor.[11]

Nothing in the audit statute or any other applicable law requires notice to the audited agency of efforts to gain information from other sources. Although such notice might often be courteous and conducive to good working relations, it is not legally required.

Finally, we note that if a staff member of the Division of Audits were to request access to records without laying claim to the authority granted by SG §2-1218(a), that person would be subject to the PIA in

[10] The phrase "that is subject to audit" means the agency actually being audited, not merely any that could be audited. *See* SG §2-1217.

[11] Of course, nothing precludes an agency from responding to requests from the Legislative Auditor for generally available information.

every respect, including its procedural requirements. An agency should not respond to anonymous oral requests.

V

Conclusion

In this opinion, we have sought to give full effect to the objectives of the General Assembly in enacting the audit statute, while at the same time preserving a privilege of the Governor derived from the Constitution itself. We hope that this discussion clarifies the matter for all concerned and that the vital audit function can continue in an atmosphere of cooperation between the branches.

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Editor's Note:

Senate Bill 133, referred to in note 3, was enacted as Chapter 474 of the Laws of Maryland 1991.