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THE ATTORNEY GENERAL OF MARYLAND

March 4, 1998

The Honorable David R. Craig
408 James Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Craig:

This is in response to your request for advice of counsel on a request under the Public Information Act for copies of various records of a county council member which relate to legislation he has sponsored. To the extent that these records are part of the process of gathering and considering information in connection with the enactment of legislation, they would be privileged from being disclosed.

In your letter, you state that a member of the Harford County Council successfully sponsored a piece of controversial legislation. Recently, an attorney representing a firm which opposed the legislation submitted to the council member a request under the Public Information Act for notes, letters, correspondence, or e-mail which may relate to this legislation. You have asked for advice which you could pass along to the council member and the county attorney. As I am not familiar with the particular matter, my advice is limited to describing the applicable principles of law. It would be a matter for the county attorney to advise the council member on how they would apply to the records which have been requested.

The Public Information Act, Md. Code, State Government Article, §§10-611 through 10-628 broadly defines a "public record" as the original or copy of any documentary material which is made or received by any unit of the State or a political subdivision in the transaction of public business. It includes computerized records. §10-611(g). Although the Act establishes a right of public access to these records, §§10-612 and 10-613, this right is subject to various mandatory and discretionary exclusions. These include a mandatory

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exclusion for public records which are privileged or confidential by law. §10-615(1). Citing *Moberly v. Herboldsheimer*, 276 Md. 211, 226 (1975), Attorney General Sachs concluded that this provision of law incorporates as exclusions under the Act privileges which are otherwise recognized in a judicial proceeding. Letter of February 11, 1980 from Attorney General Stephen H. Sachs to F. Carvel Payne, Director of the Department of Legislative Reference. This includes the constitutionally recognized speech and debate privilege for members of the General Assembly. *Ibid.* This privilege, which is found in Article 10 of the Declaration of Right and §18 of Art. III of the State Constitution has been held to be in *pari materia* with the equivalent clause in the Federal Constitution, Art. I, Sec. 6, Cl. 1, for Congress. *Blondes v. State*, 10 Md. App. 165, 175 (1972). It was Attorney General Sach's view that the privilege could be waived.

Although the Speech and Debate Clauses of the State and Federal Constitutions have no application to members of county and municipal governing bodies, the Court of Special Appeals has ruled that they enjoy a common law privilege when acting in a legislative capacity. *Montgomery County v. Schooley*, 97 Md. App. 107, 114-115 (1993) and *Manders v. Brown*, 101 Md. App. 191, 205 (1994). The immunity conferred by the privilege is understood to be co-extensive in scope with the Constitutional immunity enjoyed by members of Congress and the Maryland General Assembly. *Schooley*, 97 Md. App. at 115 and *Manders*, 101 Md. App. at 205. Thus, interpretations of the Federal Speech and Debate Clause with respect to members of Congress are considered authoritative in construing the common law privilege for local legislators. *Manders*, 101 Md. App. at 205. In addition to State court recognition of a legislative privilege for members of local governing bodies, the Federal Courts have also recognized such a privilege. In a case decided yesterday, the Supreme Court ruled that local legislators are absolutely immune from civil liability for their legislative acts. *See Bogan v. Scott-Harris*, Case No. 96-1569 and *see also Racine v. Cecil County*, 843 F. Supp. 53, 54-55 (D.Md. 1994) and *Ligon v. State of Maryland*, 448 F. Supp. 935, 947-948 (D.Md. 1977).

In interpreting the Speech and Debate Clause in the Federal Constitution, the Supreme Court has said that it protects members of Congress against criminal or civil liability for conduct within the sphere of legitimate legislative activity. *Gravel v. United States*, 408 U.S. 606, 624 (1972). Thus, it encompasses not only actual speech and debate but any matter that is an integral part of the deliberative and communicative processes by which the members consider legislation or exercise other constitutionally prescribed powers. *Id.* at 625. It has been understood that this privilege extends to the burden of defending litigation or even

testifying. *Dombrowski v. Eastland*, 387 U.S. 82, 85 and *Gravel*, 408 U.S. at 616 and 628. Moreover, it extends to a member's aides. *Gravel*, 408 U.S. at 618. Thus, the Speech and Debate Privilege has been broadly construed to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary. *Gravel*, 408 U.S. at 617 and 624.

One of the activities which is considered within the legitimate sphere of legislative activities is information gathering about legislative matters. This includes not only formal information gathering through a committee investigation and issuance of a subpoena but also gathering information by informal means. *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 504-505 (1975), *McSurley v. McClellan*, 553 F. 2d 1277, 1286-1287 (D.D.C. 1976), *cert. dismissed* 438 U.S. 189, *United Transportation Union v. Springfield Terminal Railway*, 132 F.R.D. 4, 6 (D. Me. 1990), and *Benford v. American Broadcasting Companies, Inc.*, 102 F.R.D. 208, 210 (D. Md. 1984). In gathering and analyzing information, communications among members, between a member and his staff, and with outsiders are all privileged. *Ray v. Proxmire*, 581 F. 2d 998, 1000 (D.C. Cir. 1978); *United Transportation Union*, 132 F.D.R. at 6 and *Tavoulareas V. Piro*, 527 F. Supp. 676, 679-680 (D.D.C. 1981). Although it has been understood that information gathering must be initiated by a member or his staff, it has been recognized that information gathered by a volunteer on behalf of a member is privileged. *Tavoulareas*, 527 F. Supp. at 680 and *Benford*, 102 F.R.D. at 210.

In the case of *Bruce v. Riddle*, 631 F. 2d 272, 279-280 (4th Cir. 1980), it was recognized that the legislative privilege which protects members of local governing bodies likewise includes information gathering and communicating with constituents about legislative matters. The rational for extending the protections of legislative privilege to members of local governing bodies was explained in the case of *Ligon v. State of Maryland*, 445 F. Supp. 935, 947 (D. Md. 1977), in which the Federal District Court for Maryland said:

> Because municipal legislators are closer to their constituents than either their state or federal counterparts, they are, perhaps, the most vulnerable to and least able to defend lawsuits caused by the passage of legislation. Particularly in the area of land use, where decisions may have an immediate quantifiable impact on both the value and development of property, local legislators should be free to act solely for the public good

> without the specter of personal liability with the passage of each zoning ordinance. Persons aggrieved by zoning legislation may avoid its effects by challenging its validity on direct appeal, by seeking a special exception, or by raising the confiscatory taking question. Collateral litigation of the Council's motives, such as the trustees' attempt here, would subordinate the role of the legislative branch in contravention of our scheme of government.

In responding to the request under the Public Information Act, the council member may refuse to disclose public records which relate to activities within the legitimate sphere of his legislative activities. This would include information gathered in the course of developing and considering legislation, whether in the form of communications with staff or parties outside the council. The decision on whether a particular record is privileged is a matter to be decided after consultation with the county attorney.

Sincerely,

Richard E. Israel

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