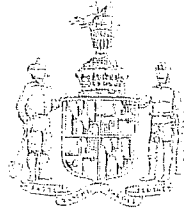


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THE ATTORNEY GENERAL OF MARYLAND  
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

August 3, 2006

The Honorable Kevin Kelly  
201 Washington Street  
Cumberland, Maryland 21502

Dear Delegate Kelly:

You have asked for advice concerning the applicability of the Maryland Public Information Act ("MPIA") to the LaVale Volunteer Fire Department, Inc. Although the matter is not free from doubt, it is my view that the LaVale Volunteer Fire Department, Inc. is not subject to the MPIA.

The LaVale Volunteer Fire Department is a privately incorporated § 501(c)(3) corporation. It is eligible to receive funding from the County Fire and Rescue Board under Allegany County Code § 42-3. It also receives funding from an assessment on real property in the LaVale Fire Area, which is created by § 42-5 of the County Code. The assessment is based on the amount determined to be necessary to operate the Fire Department in the ensuing year, less any funds received from other sources. § 42-6A(1). The Code further requires that the Fire Department submit an annual budget to the County Commissioners for any year in which special tax moneys are levied, collected, received or requested and that it submit an accounting of all expenditures made by it in each fiscal year. § 42-7.

The Fire Department has received a request under the MPIA for information regarding a truck fire on April 24, 2006, and has asked for advice as to whether they must comply.

The MPIA generally provides that a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time. State Government Article § 10-613(a)(1). A "public record" is defined as one that is "made by a unit or instrumentality of State government or of a political subdivision in connection with the transaction of public business." SG § 10-611(g)(1)(i).

The Maryland courts have on several occasions analyzed the circumstances under which an entity claiming to be "private" might be an "instrumentality of the State or of a political subdivision" subject to the MPIA. In *Moberly v. Herboldsheimer*, 276 Md. 211 (1976), a newspaper columnist sought information with respect to the salary of the Director of the Memorial Hospital of Cumberland and the amount of legal fees paid to the attorney for the Hospital. The Hospital was created by an Act of the General Assembly, for the purpose of operating a public hospital, and the

The Honorable Kevin Kelly  
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Court concluded that it was an agency of the City of Cumberland and subject to the MPIA.

*A.S. Abell Publishing Company v. Mezzanote*, 297 Md. 26 (1983) involved whether the Maryland Insurance Guaranty Fund (“MIGA”) fell under the MPIA. MIGA, like the hospital in the *Moberly* case, was created by an Act of the General Assembly, and its existence was subject to legislative control, in that the Board was not self-perpetuating. *Id.* at 37. The Court also noted that it was established for a public purpose, that it was not authorized to manage its affairs independent of governmental control, and that it had statutory benefits such as freedom from taxation and from liability that are traditionally granted to governmental agencies.

Finally, *Andy's Ice Cream v. Salisbury*, 125 Md.App. 125 (1999) involved a public information request made against the Salisbury Zoo Commission, Inc., a nonprofit corporation that was created by the City Solicitor for the City of Salisbury to assist in the operation, management and promotion of the City Zoo. While not created by legislation as was the case in *Moberly* and *Abell*, the Commission was created by the City for municipal purposes, and could be dissolved by the City. Members of the Board were appointed by the Mayor and City Council and certain public employees were *ex officio* members. Like MIGA, the Commission was not authorized to manage its affairs independent of government control, in that its budget had to be submitted to the Mayor and City Council and departures from the budget had to be approved by the Mayor and City Council. In addition, its plan of operation was subject to approval and its bylaws could be changed unilaterally by the Mayor and City Council while changes by the Commission were subject to approval.

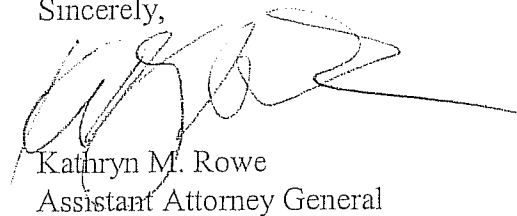
The LaVale Volunteer Fire Department was not created by statute, nor, in my understanding, was it created by any public entity. It was incorporated in 1933, and so far as I have been able to ascertain, its choice of officers is not subject to the control of any public body or official. While it serves a public purpose, and has a duty to do so as long as it accepts public funds for that purpose, its bylaws and operation are not controlled by any public body or official. Moreover, while it is subject to a certain level of review and accounting with respect to its finances so long as it accepts public funds, it could avoid this review, continue in existence, and control all of its operations and budget, in any year that it does not receive public financing. Finally, while Maryland law does place certain requirements on, and provide certain benefits for all fire departments, this regulation does not, in my view, suffice to make all fire departments public instrumentalities subject to the MPIA. Thus, while the matter is not free from doubt, it is my view that the balance of all of these factors would support the conclusion that the Fire Department is not a unit or instrumentality of the State or local government and is not subject to the MPIA.<sup>1</sup>

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<sup>1</sup> In *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 339-340 (4<sup>th</sup> Cir. 2000), the Fourth Circuit held that volunteer fire departments in Maryland are State actors for purposes of liability under 42 U.S.C. § 1983. The Court based this conclusion on the fact that fire departments perform traditional governmental functions, receive substantial state assistance, are subject to extensive state regulation, and, in the courts view, was considered a State actor by the State itself. While this test does look

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Sincerely,

A handwritten signature in black ink, appearing to read 'Kathryn M. Rowe', with a long horizontal line extending to the right.

Kathryn M. Rowe  
Assistant Attorney General

KMR/kmr  
kkelly13.wpd

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to similar factors as are in play in the MPIA cases, a finding of state action for § 1983 purposes can be made with respect to entirely private entities. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Thus, it is my view that a finding that an entity is a state actor for purposes of § 1983 liability does not foreclose a finding that it is not a unit or instrumentality of state or local government under the MPIA.

