

inspect himself and such agreement may well have been given as part of the contract of insurance or as a prerequisite to employment. In such case we can observe no objection to permitting the State Accident Fund investigator access to the released portion of the employee's personnel records. In the absence of such specific permission to inspect, we find no provision under the law applicable to the Public Information Act which would make the employee's personnel records available generally to the Fund or its investigator. The only statutory duty of inspection is found in Code Article 101, Section 76(a) which directs you as the employer to make available to the Fund the payroll records maintained by you. We would assume that such payroll records are physically maintained by the State Payroll Department and are available there for the required inspection. Thus we find that while inspection by the State Accident Fund investigators is not mandated under the Public Information Act, you may permit such inspection if specifically authorized to do so by the employee-claimant, to the extent that the employee is entitled to inspect such records himself.

You have also asked us for general guidance as to who may or may not be permitted to review personnel records. It should be apparent from the foregoing discussion that we cannot give specific direction without examination of the pertinent law under which a particular agency operates. As a general rule, we would advise that in any situation where you are doubtful of the right of an investigator to examine your files, you may request the agency which employs him to supply you with the legal basis for its authority. If the requesting agency has statutory duties which demonstrably cannot be effectively executed without access to personnel files, the inspection of records which you would otherwise have an obligation to deny, is authorized within the meaning and intent of Article 76A Section 3(c).

FRANCIS B. BURCH, *Attorney General*.

CAROL S. SUGAR, *Assistant Attorney General*.

PERSONNEL FILES — DEPARTMENT OF HEALTH AND MENTAL HYGIENE — INSPECTION BY VARIOUS STATE AGENCIES — PUBLIC INFORMATION ACT REQUIRES CUSTODIAN TO DENY ACCESS TO PERSONNEL FILES EXCEPT WHERE INSPECTION IS AUTHORIZED BY LAW — LEGISLATIVE AUDITOR, DIVISION OF FISCAL RESEARCH AND STATE ACCIDENT FUND HAVE LEGAL AUTHORITY.

July 18, 1975.

Mr. P. J. Possident,
Chief, Personnel Services,
Department of Health and
Mental Hygiene.

This opinion is intended to supersede and replace much of 60 Opinions of the Attorney General 554 (1975), as relates to the question of the right of access of the State Accident Fund to personnel records. The question has been reviewed and reconsidered and we have concluded that that portion of 60 Opinions of the Attorney General 554 (1975), beginning on page 554, thereof should be modified and amended. Our opinion read in part as follows:

"You have asked whether the Division of Personnel Management of the Department of Health and Mental Hygiene may permit investigative authorities representing other State agencies to examine and review the contents of the Department's personnel files. You have explained that the Division of Personnel Management is the custodian of all personnel data for the Department. Specifically, you wish to know (1) whether the Legislative Auditor in the performance of his State duties should be allowed to review employee personnel folders; and (2) whether an investigator representing the State Accident Fund should be given access to said records. Additionally, you have asked for guidance on the overall question as to who may and who may not be permitted to review personnel records.

"Article 76A of the Annotated Code of Maryland

(1974 Cumulative Supplement), title 'Public Information,' hereinafter called the Act, provides for the right to inspect and copy public records as set forth therein. The Act makes the custodian of public records responsible for permitting their inspection and copying when authorized and also requires him to deny the right of inspection of certain defined categories of public records. Willful and knowing violations of the Act are made punishable by a fine not to exceed \$100.00. Since violations may result from improper disclosure as well as from improper nondisclosure, we can understand your need as custodian for clarification of your responsibilities under the Act.

"In 58 Opinions of the Attorney General 53 (1973), we concluded in part that a State Senator could claim no greater right to examine restricted records than a member of the general public because 'the Act applies to all members of the general public and does not make exception for any segment thereof.' Based upon this rationale, we begin with understanding that the restrictions against disclosure in Article 76A would apply to investigators for a State agency to the same extent as to members of the general public. The pertinent provisions dealing with personnel records are contained in Article 76A, Section 3(c) (iii), which provides:

" (c) The custodian shall deny the right of inspection of the following records, *unless otherwise provided by law*. (Emphasis supplied).

* * *

" (iii) Personnel files, except that such files shall be available to the duly elected and appointed officials who supervise the work of the person in interest. Applications, performance ratings and scholastic achievement data shall

be available only to the person in interest and to the duly elected and appointed officials who supervise his work; . . .

"We have found no Maryland cases which have construed this or any other section of Article 76A. Ordinarily we would turn to the large body of case law construing the federal Freedom of Information Act (5 U.S.C. Section 552) for guidance. However, in this instance the federal law substantially differs from our State law by *requiring* disclosure of personnel files unless the disclosure would constitute a clearly unwarranted invasion of privacy. Because the thrust of federal law apparently favors disclosure of personnel files, while the applicable section of Maryland law generally prohibits such disclosure, we can find nothing in the federal cases which would aid us in construing our local provisions.

"It seems clear that the investigators in question are not the duly elected and appointed officials who supervise the work of the subject of the personnel file. It follows therefore that the provisions of Section 3(c) (iii), *supra*, would require your Division to deny the right of inspection of personnel files unless the right were otherwise provided by law. In order to decide whether such right exists, it is necessary to examine the laws under which each of the agencies in question operate in order to decide whether they either explicitly or impliedly grant authority to inspect the files in question. It is pertinent at this point to note that the purpose of the federal Freedom of Information Act was to make it easier for private citizens to secure government information. *Epstein v. Resor*, 421 F. 2d 930 (9th Cir. 1970), *cert. den.* 398 U.S. 965 (1970). We similarly believe that the Maryland Act was designed to assist private citizens and was not intended to impede State agencies in attaining information reasonably necessary to the performance of their official duties.

"The duties of the Legislative Auditor are set forth in Article 40 Sections 61A to 61E (1971 Replacement Volume and 1974 Cumulative Supplement). Said sections create the Division of Audits within the Department of Fiscal Services. The Legislative Auditor is the executive officer of the Division of Audits. Section 61B requires the Division of Audits to examine and report on 'books and accounts of every agency of the State government under the general direction of the joint committee on budget and audit.' The same section provides for the Division of Audits to verify matters of agency information or procedure as required by the joint committee. Section 61D provides that the joint committee, upon request of the State Comptroller, may direct the Legislative Auditor to investigate, check, itemize and audit claims, vouchers and statements of expenditures presented to the Comptroller for payment. Whether an examination of particular personnel files would be helpful in an investigation of this nature we do not know, but if the Legislative Auditor requires access to personnel files in order to effectively perform the duties imposed upon him by Article 40 Sections 61B and 61D, he is entitled to knowledge of their contents in view of the mandate of Article 76A Section 3 (c) that the custodian of personnel records shall not deny access to them when their inspection is otherwise provided by law.

"In addition to the Division of Audits, we note that the Division of Fiscal Research, another section of the Department of Fiscal Services, by Article 40 Section 61 (d) is authorized to 'make continuing studies of the operation, administration, personnel and physical plants of all departments, boards, bureaus, commissions, institutions and other agencies of state government . . . as directed by the General Assembly, the Legislative Council, or the Joint Committee on Budget and Audit'. It

seems clear that the Division of Fiscal Research also has been given broad authority to investigate State agencies. In view of this fact it is our opinion that you would not violate the provisions of Article 76A by making personnel files available to investigators representing the Division of Fiscal Research for purposes connected with the performance of the Division's statutory duties.

"Your second question asks whether an investigator representing the State Accident Fund should be given access to personnel records. Article 101 Section 70 makes the Fund a part of the Department of Personnel and states that its purpose is to insure employers (defined in Section 21 (a) (2) to include the State of Maryland) against liability under the Workmen's Compensation Act. In effect, therefore, the State Accident Fund is an insurer of your Department, as well as of all other departments of the State, and also of many private employers. As an insurer, the Fund obviously has a duty to investigate the claims it is called upon to pay and it follows that it should be entitled to full cooperation from all employers on whose behalf it may be required to pay compensation. . . ."

A careful reading of Article 101, the Workmen's Compensation Act, together with case law which has construed it, has convinced us that the State and its agencies as "employer" and the State Accident Fund as "insurer" are intended to be treated as a single entity with respect to their relationship *vis-a-vis* claimants.

The Court of Appeals of Maryland in *Flood v. Merchants Mutual Insurance Company*, 230 Md. 373 (1963), has stated at p. 377:

" . . . It goes without saying that when the Legislature by statute authorized employers to contract with insurance companies in order to cover possible claims under Article 101 it intended the insurance carrier to stand in the position of the employer. . . ." (Emphasis added).

The Court additionally stated at p. 378 that:

" . . . Considering the employer and insurer to be one and the same as far as the exclusiveness of the remedy is concerned, the appellant [claimant] is precluded from maintaining his action under this section, since the insurer-appellee is not a third party as contemplated by § 58 [of Article 101]."

To the same effect, see *Mustapha v. Liberty Mutual Insurance Company*, 260 F. Supp. 890 (D.R.I. 1967); *Modjeski v. Atwell, Vogel & Sterling, Inc.*, 309 F. Supp. 119 (D. Minn. 1969). Since the "insurer" is not a third party under the Workmen's Compensation Act of Maryland but instead assumes the identity of the "employer" with respect to the claimant, it follows that where an employee of the State files a Workmen's Compensation claim, the State Accident Fund, as its Workmen's Compensation insurance carrier, acquires the same rights to investigate the claim as the agency itself possesses. Such rights would necessarily include the right to examine and review personnel files to the same extent as the agency may examine its own files. We find this right to be implicit in the statute and "otherwise provided by law" by Maryland case law. To hold otherwise, aside from *Flood*, would result in precluding the State Accident Fund from effectively and adequately representing and defending the State and its agencies when claims are filed against them.

It is our conclusion, therefore, that where an employee of your Department has filed a claim for Workmen's Compensation with the State Accident Fund you would not be violating the provisions of Article 76A by providing its investigators with access to information concerning the claimant, or otherwise pertinent to the claim, contained in your Department's personnel files.

60 Opinions of the Attorney General 554(1975) concluded as follows:

"You have also asked us for general guidance as to who may or may not be permitted to review personnel records. It should be apparent from the fore-

going discussion that we cannot give specific direction without examination of the pertinent law under which a particular agency operates. As a general rule, we would advise that in any situation where you are doubtful of the right of an investigator to examine your files, you may request the agency which employs him to supply you with the legal basis for its authority. If the requesting agency has statutory duties which demonstrably cannot be effectively executed without access to personnel files, the inspection of records which you would otherwise have an obligation to deny, is authorized within the meaning and intent of Article 76A Section 3(e)."

Except as noted above, we reaffirm our April 1, 1975 opinion in all other respects.

FRANCIS B. BURCH, *Attorney General*.

CAROL S. SUGAR, *Assistant Attorney General*.