

accidents, without allowing them an opportunity to know the requirements of the law and to conform their conduct to it. So construed, the statute would attach a new disability to transactions or retroactive or retro- already past—precisely within the definition of a retroactive or retro-pective law. *State ex rel Sweezer v. Green, supra*; *State of Maryland Commission on Human Relations v. Amecorn Division of Litton Systems, Inc., supra*.”

Here no new burden or disability is attached to past transactions, nor are any vested rights acquired under existing law impaired or divested, by according eligibility for standard rates to insureds of MAIF who, upon the effective date of the statute, have had three years continuous coverage with MAIF and satisfy the other statutory criteria. Again, predating eligibility for the benefits conferred by the statute upon an individual's meeting certain qualifications at the time the statute becomes effective, even though the facts establishing those qualifications occurred earlier, is not generally considered impermissible retroactivity. *Greigman v. City of Pittsburgh, supra*, and other cases cited. Or, to the extent that this implementation is necessary to fulfill the statutory purpose, *State of Maryland Commission on Human Relations v. Amecorn Division of Litton Systems, Inc., supra*, 278 Md. at 126-127.

* Our previous opinion answering several questions posed by you about the correct manner of implementation of Article 48A, § 243D(e) Annotated Code of Maryland 1957 (1972 Repl. Vol. — 1976 Cum. Supp.) reached an identical conclusion with respect to the meaning of the term “insured” in that statutory provision. Specifically, the other cases cited. Or, to the extent that this implementation is necessary to fulfill the statutory purpose, *State of Maryland Commission on Human Relations v. Amecorn Division of Litton Systems, Inc., supra*, 278 Md. at 126-127.

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MARYLAND AUTOMOBILE INSURANCE FUND—DISCLOSURE OF FEES PAID TO INDIVIDUAL DEFENSE COUNSEL ENGAGED TO REPRESENT MAIF OR ITS INSUREDS — ARTICLE 76A, SECTIONS 1-5 — PUBLIC INFORMATION ACT.

August 22, 1977.

John J. Corbley, Esquire,
Executive Director,
Maryland Automobile Insurance Fund.

An inquiry by a newspaper reporter as to the amount of the fees paid by the Maryland Automobile Insurance Fund (“MAIF”) to individual defense counsel engaged to represent MAIF or its insureds has prompted your request for legal advice. Specifically, you ask whether the information sought by the reporter must be divulged under the provisions of the Public Information Act, Article 76A, Sections 1 to 5, Annotated Code of Maryland 1957 (1975 Repl. Vol. — 1976 Cum. Supp.). You draw attention to the fact that MAIF stands in a somewhat unique relationship to the State of Maryland, particularly since the revenues utilized to sustain its operations are not derived from appropriated funds; you question therefore whether MAIF is classifiable as a State agency within the meaning of the Act. You also inquire whether information as to the specific amounts of the fees paid by MAIF to defense counsel may be protected from disclosure by the category of information listed in the wise exempted from the various exceptions listed in the Act. Although you personally acknowledge no reticence about divulging the information the reporter seeks, you feel the need for authoritative guidance as to the actual requirements of the Act before proceeding to do so.

The starting point of analysis must be the definition of “public records” contained in the Public Information Act; it is, indeed, broad and all encompassing. The statutory definition includes, among other things, any writing of any

kind made or received by an agency of the State "in connection with the transaction of public business, except those privileged or confidential by law." Article 76A, Section 1 (a) provides as follows:

(a) Public records—Defined.—The term "public records" when not otherwise specified shall include any paper, correspondence, form, book, photograph, photostat, film, microfilm, sound recording, map drawing, or other document, regardless of physical form or characteristics, and including all copies thereof, that have been made by the State and any counties, municipalities and political subdivisions thereof and by any agencies of the State, counties, municipalities, and political subdivisions thereof, or received by them in connection with the transaction of public business, except those privileged or confidential by law. The term "public records" also includes the salaries of all State employees, both in the classified and nonclassified service, and all county and municipal employees, whether in a classified or nonclassified service.

The Act then mandates that "[a]ll public records shall be open for inspection by any person at reasonable times" (Article 76A, Section 2(a)), subject only to the exceptions from the general requirement of disclosure specifically enumerated in the statute. See: Article 76A, Section 3(a) (i) to (iii), and Section 3(b) and (c). A knowing and willful violation of the Act is punishable as a misdemeanor. Article 76A, Section 5.

Three readily identifiable issues are raised which demand resolution in order to determine whether the information sought from MAIF must be disclosed under the Act, two of which already have been suggested by you. The first issue is whether MAIF is an agency of the State to which the statute applies. A second issue is whether the payment of fees to defense counsel retained by it occurs "in connection with the transaction of public business." The third issue is whether information as to the legal fees paid by MAIF is

exempted from disclosure because it is "privileged or confidential by law," as, for example, by virtue of the attorney-client privilege, or because it is subject to one of the statutory exceptions.

We previously have had occasion to consider MAIF's relationship to the State, and after an evaluation of the point, have concluded that MAIF satisfies the essential prerequisites for classification as a State agency. 61 Opinions of the Attorney General 567, 572 (1976). A portion of the discussion in our prior opinion may be quoted here.

The twin criteria which sharply distinguish a State agency or instrumentality from a private entity are: first, that the State has control over all aspects of its operations and indeed over its continued existence and, second, that its chief function and raison d'être is to serve a public purpose or need. MAIF, despite some novel attributes which make it dissimilar from other State agencies and instrumentalities in several respects, satisfies these controlling tests. It is a creation of the General Assembly of Maryland, borne of legislative determination that the previous scheme of assuring the provision of automobile liability insurance to Maryland motorists under the Assigned Risks Plan, Article 48A, § 243 Annotated Code of Maryland 1957 (1972 Repl. Vol.) has proven inadequate. It is dependent for its continued existence upon the legislative will; unlike a private corporation, MAIF has no life independent of its statutory origin. Corporations and Associations Article § 2-103(1) Annotated Code of Maryland. During its existence, the Legislature retains the power to regulate, by statute, every aspect of MAIF's operation, and if it chooses, to restructure, alter or abolish it.

MAIF of course is closely tied to the State in other ways. As a matter of hierarchical classification, it is a unit within the Executive Branch of

State government, and to an important degree is subject to direction and control by the Governor. Under Article 48A, §§ 243(b) and (c) in their pre-amended versions, the Governor appointed the executive director of MAIF, as well as the board of trustees, all of whom served at his pleasure. The amendments effected by House Bill 1822 accord MAIF a greater degree of independence from gubernatorial control, but the Governor continues to have the right to designate five members of the board of trustees, and to appoint the next executive director, if the ten members of the board authorized to elect the successor to the current executive director are unable to agree. Article 48A, §§ 243(b) and (c), as amended by House Bill 1822. And, regardless of the measure of autonomy granted MAIF as a result of the enactment of House Bill 1822, the entire organizational structure of MAIF may again be changed at any ensuing session of the General Assembly.

The statutory provision made for the financing of MAIF's operations by means other than State appropriated funds, which is continued and amplified by the provision in House Bill 1822 for supplementing MAIF's annual operating deficiencies by assessment of private insurance companies, nonetheless does not detract from the conclusion that it is a State agency or instrumentality. There are, in fact, other State agencies which obtain their funding from sources other than State appropriated funds. Reliance has been placed upon the fact that MAIF's revenues are not State funds, 58 Opinions of the Attorney General 88 (1973); 58 Opinions of the Attorney General 417 (1973), to discern a legislative intent that MAIF should be excluded from the budgetary processes and fiscal management controls applicable to other State agencies. This reasoning underlies the conclusion recently announced that MAIF is not subject to the super-

visory authority of the Department of Budget & Fiscal Planning under Article 15A, § 23B, Annotated Code of Maryland 1957 (1976 Repl. Vol.) for planning and controlling data processing in the several departments and agencies of the State. 61 Opinions of the Attorney General 548 (1976). But this office has been careful to indicate that MAIF is treatable as an ordinary State agency for purposes of other than statutory limitations upon the use of State funds.

The public purpose fulfilled by MAIF is readily apparent. MAIF has been created concurrently with the advent of compulsory automobile liability insurance in Maryland, both coming into being by the enactment of Chapter 73, Laws of Maryland 1972. It exists to serve as the insurer of those Maryland residents owning a motor vehicle registered in this State or licensed to operate a motor vehicle by the Motor Vehicle Administration who are unable to obtain the necessary insurance from a private company. Article 48A, § 243B(a). It also has absorbed the functions of the former Unsatisfied Claim and Judgment Fund, formerly existing under Article 66½, §§ 7-601 to 7-635, Annotated Code of Maryland 1957 (1970 Repl. Vol.), and thereby affords a means of obtaining compensation for their losses to persons who sustain personal injuries and/or property damages as a result of accidents involving unidentified, absconding, or uninsured motorists. Article 48A, §§ 243B to 243J. MAIF thus in an integral part of the statutory plan conceived by the Legislature to assure the financial responsibility of motorists using the State's highways and to make available monetary redress, through insurance, to the victims of motor vehicle accidents.

MAIF must be considered an agency of the State within the meaning of the Public Information Act, for the identical

reasons expressed in our earlier opinion. This conclusion, in fact, is consistent with advice given to you informally on two occasions. (See: Letters dated December 18, 1974, and December 1, 1975.) The only situation which may justify treatment of MAIF differently than other, more traditionally structured State agencies is with regard to statutory requirements, which if applied, would impinge upon the fiscal autonomy legislatively granted to MAIF under its organic law. Article 48A, § 243A(d) Annotated Code of Maryland 1957 (1972 Repl. Vol.—1976 Cum. Supp.). We do not perceive any impairment of MAIF's fiscal independence resulting from its being compelled to submit to public scrutiny of its operations, within the limits authorized by the Public Information Act.

The second issue—whether the payment of legal fees by MAIF to its defense counsel occurs “in connection with the transaction of public business,” as required by Article 76A Section 1(a) to constitute a “public record”—presents a problem of analysis not totally dissimilar from the first issue. Arguably, the defense of a particular tort action commenced against an insured of MAIF or alternatively, the defense of a given uninsured motorist claim asserted against MAIF as the successor to the Unsatisfied Claim and Judgment Fund, and the amount of the remuneration paid by MAIF to counsel undertaking these defense assignments, do not amount to the “transaction of public business.” But this viewpoint construes the phrase too narrowly, and ignores the larger public purpose served by MAIF. Again, as we stated earlier in 61 Opinions of the Attorney General 567, 575 (1976),

MAIF . . . [exists] as an integral part of the statutory plan conceived by the Legislature to assure the financial responsibility of motorists using the State's highways and to make available monetary redress, through insurance, to the victims of motor vehicle accidents.

The defense of particular claims made against MAIF on its insureds is but one facet of the overall scheme, in whose

workings the public is vitally interested and which therefore constitutes “public business.”

There is another reason why the general public in Maryland has an immediate tangible interest in knowing the amounts of money expended by MAIF to obtain private legal representation. Under the provisions of Article 48A, Section 243A(c), as amended during the 1976 Session of the General Assembly, the estimated insufficiency in the monies expected to be needed by MAIF to carry out its functions and meet its obligations during the ensuing calendar year may be assessed against private automobile insurance companies licensed in the State. These companies, collectively comprising the Industry Automobile Insurance Association, in turn may pass along the amounts of their individual assessments to their policyholders, in the form of increased premiums. Article 48A, § 243M(e). Thus, every owner or operator of a motor vehicle in Maryland, who may be surcharged under his automobile liability insurance policy to help sustain MAIF's operations, has an identifiable interest in MAIF's efficient use of its funds. This interest is sufficient to justify imposition of a requirement of disclosure under the Public Information Act, butressing the conclusion that the particular subject matter here involved is “public business” under Article 76A, Section 1(a).

The third issue is whether information as to the legal fees paid by MAIF is “privileged or confidential by law,” as for example, because it is encompassed within the attorney-client privilege, or because it falls under one of the various exceptions enumerated in the Act. As to the former ground of non-disclosure, the established rule is that the privilege does not extend to fees paid by the client to this attorney for professional services. The Maryland Court of Appeals recently ruled on this specific point in an action commenced under the Public Information Act, *Moberly v. Herboldshemer*, 276 Md. 211 (1975). There the Court wrote:

Nor does the Court agree with the contention that the fee paid to its attorney by the hospital is a privileged transaction because it is a confidential matter, under the attorney-client relationship.

M.I.E. 23, Witnesses, Sec. 53 (1962) says, "Confidential communications, communicated in the course of professional employment between an attorney and his client, may not, without the consent of his client, be divulged by the attorney. The privilege is that of a client and not of the attorney and is designed to secure the client's confidence in the secrecy of his communication."

The communication by the client to the attorney is privileged, not the fee which the lawyer charges the client. [276 Md. at 226.]

See also: National Labor Relations Board v. Hawley, 349 F.2d 900, 904-905 (4th Cir. 1965); 97 CJS *Witnesses*, Section 283 (f) (1957); 81 Am. Jur. 2d *Witnesses*, Section 215 (1976). Whether in this instance MAIF as the insurer is correctly regarded as the client, or whether the insured of MAIF is denominated the client, is an extraneous issue, since the entire subject of fees is outside the ambit of the attorney-client privilege.

Review of the several exceptions from the requirement of disclosure recognized by the Public Information Act does not reveal any which have direct application in this circumstance. The one statutory exception most nearly relevant is that which requires the custodian of public records to deny inspection of "confidential commercial [and] financial . . . data furnished by or obtained from any person." Article 76A, § 3(c) (IV). Based upon the Court of Appeals' holding in *Moberly v. Herboldsheimer, supra*, legal fees paid by a public agency to its retained counsel cannot be deemed to be "confidential" under the statute, however.

CONCLUSION

For these reasons, we conclude that information relating to legal fees paid by MAIF to individual defense counsel engaged to represent the agency or its insureds must be divulged, upon demand, under the provisions of the Public Information Act.

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