

December 1, 1975

John J. Corbley, Esquire  
Executive Director  
Maryland Automobile Insurance  
Fund  
1750 Forest Drive  
Annapolis, Maryland 21401

RE: Public Inspection of MAIF Advisory  
Board Sub-Committee Report under  
Maryland Public Information Act

Dear Mr. Corbley:

You have inquired as to the accessibility to public inspection under the Public Information Act, Article 76A, §§1 to 5, Code 1957 (1975 Repl. Vol.), of a written report of a sub-committee of the Advisory Board to the Maryland Automobile Insurance Fund ("MAIF"). The report was prepared by three members of the Advisory Board who were constituted as a sub-committee to identify, and to recommend ways of correcting, problems caused by conflicts between state statutes governing MAIF's operation and MAIF's goal of functioning comparably to a private insurance carrier. The report was accepted by the Advisory Board on October 23, 1975. Thereafter, it was transmitted to the Board of Trustees of MAIF, which considered it an executive session on November 5, 1975, but took no further action at that time. Since then, there has been an expression of newspaper interest in the report, and the possibility that it may be demanded, for inspection, as a public record under the Public Information Act.

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The Public Information Act generally mandates that "[a]ll public records shall be open for inspection by any person at reasonable times, . . .". Article 76A, §2(a). The category of documents classifiable as "public records" is broadly defined under §1(a) of Article 76A, which states in part:

"(a) Public records - Defined - The term 'public records' when not otherwise specified shall include 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. . . ." (Emphasis added)

This office previously has advised you that MAIF must be regarded as a State agency for the purposes of the Act.

There are a number of exceptions recognized in §3 of the Act to the otherwise broadly stated requirement that public records be available for public inspection. One exception of immediate importance is found in §3(b)(v), and permits the custodian to deny the right of inspection of "[i]nteragency or interagency memorandums or letters which would not be available by law to a private party in litigation with the agency." This statutory exception is identical to a provision of the Freedom of Information Act, specifically 5 U.S.C. §552(b)(5); the federal law has served as a model for comparable State legislation.

The exception contained in §552(b)(5) of the federal Freedom of Information Act has been judicially interpreted to authorize non-disclosure of internal agency documents which reflect policy discussions or recommendation, and opinions, as opposed to purely factual matters. Wellford v. Hardin, 330 F. Supp. 915 (D. Md. 1971); see generally: Annotation, 7 ALR Fed.

855 (1971). The rationale underlying the statutory exception, and the cases construing it, is that an unqualified right of public inspection would inhibit the free exchange of ideas within a governmental agency, deemed necessary to effective policy formulation. As Chief Judge Northrop wrote in Wellford v. Hardin, supra, 330 F.Supp. at 918:

"... this court feels that they are documents which should not be subjected to the scrutiny of this court, but rather, reflect inter-agency matters which are certainly of the opinion and formative nature, and thus fall within the purview of the exemption granted by Congress.

A close perusal of the Congressional intent in the enactment of this legislation indicates that Congress did not wish to put any more blocks in the way of inter-agency communication and further slow down the already snail pace of policymaking in the departments which ultimately go into the making of the policy decisions and resolutions would be impeded if there were public disclosure.

A Government agency, like any corporation, promulgates resolutions, or regulations in these instances, after a great deal of inter-agency work. Certainly, to force disclosure of staff memoranda in which opinion and facts are mixed would effectively nullify the process of deliberation and ultimate resolution upon which such an agency must act."

Wellford v. Hardin, supra, is a particularly pertinent case, since the District Court was persuaded that a document known as the Minutes of the National Food Inspection Advisory Committee was not subject to public inspection. The Court provided a brief description of the Advisory Committee minutes.

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"These Minutes, according to the affidavit, are records of the deliberation of this Committee and contain opinions, conclusions and recommendations of the Committee." (330 F.Supp. at 917).

The Wellford v. Hardin case is a closely analogous situation to that presented by the question of disclosure of the sub-committee report of the MAIF Advisory Board. The exception in the Maryland Public Information Act, Article 76A, §3(b)(v), has not received the extensive judicial gloss which has been added to the corresponding section of the Freedom of Information Act, 5 U.S.C. §552(b)(5), but a Maryland appellate court undoubtedly would regard the federal decisions as highly persuasive of the State statute's correct meaning and application. Other federal courts have followed the same reasoning as exemplified in Wellford v. Hardin, supra. See, again: Annotation, 7 ALR Fed. 855 (1971).

The conclusion, therefore, is that the report of the MAIF Advisory Board subcommittee may be withheld from public inspection, in the discretion of the executive director and the Board of Trustees of MAIF. Care should be taken in the handling of this report, and similar ones, however, so as to preserve its confidential character. Specifically, it should be labeled as a "confidential internal memorandum" and should not be incorporated into the minutes of the Board of Trustees, or otherwise treated as a public document.

This letter confirms advice given to you previously, in informal conversations.

Very truly yours,

Ransom J. Davis  
Assistant Attorney General

RJD:cab

cc: Deputy Attorney General Lord

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