



THE ATTORNEY GENERAL

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BALTIMORE, MARYLAND 21202

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August 12, 1976

Anthony M. Carey, Esquire
Maryland State Board of Ethics
301 West Preston Street
Baltimore, Maryland 21201

Dear Mr. Carey:

You have requested our opinion concerning a request under the Public Information Act, Article 76A of the Maryland Annotated Code (1975 Repl. Vol.) for access to a letter received by the Maryland State Board of Ethics advising that certain State employees were engaged in part-time employment in the private sector in situations which conflicted with their official duties. The letter's author requested that his name be kept confidential in order to prevent recrimination. The Board advised the Department head of the employees of the conflict and, subsequently, a directive was promulgated prohibiting outside employment with a concern which was subject to the Department's regulation. The Board has been requested to provide a copy of the letter it received and the author's name.

"Public records" are defined as follows:

"Section 1 (a) - 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 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..."

Op # 76-142

The Public Information Act requires that public records be open for inspection as follows:

"Section 2 (a) - All public records shall be open for inspection by any person at reasonable times, except as provided in this Article or as otherwise provided by law, but the official custodian of any public records may make such rules and regulations with reference to the inspection of such records as shall be reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office."

The Board of Ethics was created by Executive Order of the Governor dated September 4, 1969, to conduct investigations and hearings, and render advisory opinions with respect to the application of the Code of Ethics. An opinion or report of the Board may be utilized as the basis for appropriate administrative action but the Board is under no circumstances empowered to take administrative action itself. The Board's functions are solely advisory and investigatory.

In the situation you have described, the Board was not requested pursuant to Article IV of the Code of Ethics, to render an advisory opinion or conduct an investigation. However, the Board received the letter in its official capacity and took action upon it. In our opinion, the letter received by the Board is clearly a "paper" or "correspondence" received by a State agency in connection with the transaction of public business. Presumably, the author's name appears on the letter. Therefore, the letter and identity of the author comprise a public record under Section 1 (a) of Article 76A and must be made available for inspection unless an exception in the Act to the requirement of disclosure is applicable.

Various exceptions to the requirement of disclosure are contained in Section 3 of Article 76A. On three occasions, we have rendered opinions that access to public records may be denied pursuant to one or more of the enumerated exceptions. 58 Opinions of the Attorney General 563 (1973) (access to arrest reports may be denied under Section 3 (b) (i) as "records of investigations conducted by ... the Police Department"); 58 Opinions of the Attorney General 53 (1973) (access to a consultant report may be denied under Section 3 (b) (iii) and (v) when that report was prepared for a defense of claims against the State and contains the details of a bona fide research project and comprises an intra-agency memorandum); 58 Opinions of the Attorney General 14 (1973) (access to assessment

work cards may be denied to persons other than the property owner under Section 3 (a) (i) as contrary to a State statute). We have additionally stated that the identity of an employment or promotional examiner is not a public record under Article 76A, Section 1 (a) and hence is not subject to disclosure upon request. 57 Opinions of the Attorney General 500 (1972).

None of the exceptions referred to above are directly applicable to the letter received by the Board of Ethics. Although the Board may have received the letter in the exercise of its investigatory powers, investigations by the Board are not "for law enforcement or prosecution purposes" since the Board is limited to an advisory role and since Board investigations and opinions are a basis for administrative rather than law enforcement action. In 58 Opinions of the Attorney General 53, at 59-60, however, we suggested that the consultant's report might also be withheld from public inspection as "privileged information and confidential data" under Section 3 (c) (v), which states as follows:

"Trade secrets, privileged information and confidential commercial, financial, geological or geophysical data forwarded by or obtained from any person;"

We noted that the Maryland statute differs in one respect from a related provision in the Federal Freedom of Information Act (5 U.S.C. Section 552B (4)). The federal statute refers only to such privileged or confidential information as is related to trade secrets, or commercial or financial information. Rabbit v. Department of the Air Force, 383 F.Supp. 1065 (S.D. N.Y. 1974). The different wording of Article 76A, Section 3 (c) (v) may be susceptible to the interpretation that "privileged information", whether or not related to trade secrets, commercial, financial, geological or geophysical data, may be withheld from access. In our opinion, however, the language of the exception must be read with reference to its context, and thus, the privileged information must be related to trade secrets, commercial, financial, geological or geophysical data.* Wilson v. State, 21 Md. App. 557, 568 (1974). Consequently, we do not believe that Section 3 (c) (v) is applicable to the letter or the author's name which is in the possession of the Board.

* Note that Article 76A, Section 3 (a) (i) prohibits the inspection of public records when such inspection would be contrary to any State statute. This prohibition effectively precludes inspection of information which is privileged by law since most privileges in Maryland have statutory recognition. See Courts and Judicial Proceedings, Section 9-105, 9-108, 9-109, 9-110, 9-111 and 9-112.

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Additionally, we do not believe that the letter or identity of the author could be considered privileged information even if we were to interpret Section 3 (c) (v) as not requiring such privileged information to be related to commercial or financial data. Maryland has recognized by statute the privilege of a journalist not to disclose the identity of his news sources, Courts and Judicial Proceedings, Section 9-112 and Maryland case law has recognized the privilege of a police officer not to disclose the identity of an informant in some circumstances. Gulick v. State, 252 Md. 548 (1969). However, we cannot find support in either of these privileges for considering a letter to an administrative body providing information upon which that body may act as privileged within the meaning of Article 76A.

Finally, as you have pointed out, the Public Information Act provides a mechanism by which certain information may be protected from disclosure even though it is not included within the enumerated exceptions. Article 76A, Section 3 (f) provides as follows:

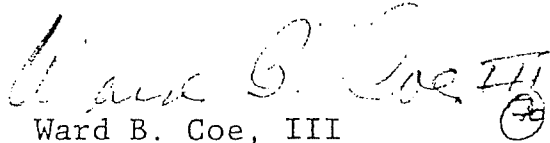
"If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection, he may apply to the circuit court of the county where the record is located for an order permitting him to restrict such disclosure. After hearing, the Court may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. The person seeking permission to examine the record shall have notice of said hearing served upon him in the manner provided for service of process by the rules of procedure and shall have the right to appear and be heard."

In our opinion, the Public Information Act was designed to provide maximum disclosure of public records except where specific exceptions apply. Since no specific exception applies here, however, and it is the Board's position that substantial injury to the public interest may occur from disclosure of the letter and author's name, the situation appears to be that type of situation for which Section 3 (f) was designed.

Anthony M. Carey, Esquire

In accordance with the request of the Board of Ethics in your letter, we will institute in the court having jurisdiction a proceeding for an order of court to authorize the custodian to deny access to the letter in question, including the identity of its author, on the ground that disclosure would do substantial injury to the public interest. If we require any information that we do not now have for the purpose of filing suit, we will contact you promptly.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Ward B. Coe, III". The signature is written in dark ink and is positioned above the typed name. There is a small circular mark or stamp at the end of the signature.

Ward B. Coe, III
Assistant Attorney General

WBC, III:mpk