



LEGISLATIVE AUDITOR - PUBLIC
 INFORMATION - LEGISLATIVE AUDITOR'S
 RIGHT OF ACCESS TO INSURANCE DIVISION'S
 REPORT OF EXAMINATION OF MAIF -
 INAPPLICABILITY OF PUBLIC INFORMATION
 ACT EXEMPTIONS

THE ATTORNEY GENERAL

ONE SOUTH CALVERT STREET

4TH FLOOR

BALTIMORE, MARYLAND 21202

301-383-3737

June 21, 1978

The Honorable Edward J. Birrane, Jr.
 Insurance Commissioner
 One South Calvert Building
 Baltimore, Maryland 21202

Dear Commissioner Birrane:

You have requested our opinion on a series of questions on the Legislative Auditor's right of access to the Insurance Division's report of examination of the Maryland Automobile Insurance Fund (MAIF) and the work papers generated by Division examiners during the audit.

Pursuant to Maryland Code (1972 Repl. Vol.), Article 48A, Section 30, examiners of the Insurance Division have conducted and completed an examination of the Uninsured Division of MAIF. In accordance with Section 34(3) of Article 48A, a copy of the proposed examination report was given to MAIF and the latter declined to request a hearing with respect to the report. Section 34(5) provides that the Insurance Commissioner "may withhold from public inspection any examination or investigation report for so long as he deems the withholding to be necessary for the protection of the person examined against unwarranted injury or to be in the public interest."¹ And in reliance upon this authority, the Commissioner has declined to make the MAIF examination report public.

In January 1978, the Legislative Auditor, pursuant to Maryland Code (1978 Repl. Vol.) Article 40, Section 61B and Maryland Code (1972 Repl. Vol., 1977 Cum. Supp.), Article 48A, Section 243(f), began an audit of MAIF which included a financial

¹However, Section 34(6) authorizes the Commissioner "[I]f he deems it to be in the public interest" to "publish an examination report or a summary of it in one or more newspapers in this State."

audit of the Uninsured Division. Subsequently, and in connection with his audit of MAIF, the Legislative Auditor requested that the Insurance Commissioner make available the Insurance Division's examination report on MAIF and related audit work papers. Access to this data was denied by the Insurance Commissioner purportedly under Article 48A, Section 34(5) "until after the State Auditors have completed their audit [of MAIF]." A request to MAIF by the Legislative Auditor for the Insurance Division report was denied by MAIF for the same reason.

Your opinion request raises the following questions:

(1) Is the Legislative Auditor authorized by law to obtain access to the examination report on MAIF and related work papers of the Insurance Division?

(2) Would release of the report to the Legislative Auditor violate the terms of Article 48A, Section 34(5)?

(3) If the report is released to the Legislative Auditor for use in its audit of MAIF, does the document then become a public record available to anyone?

(4) Is the Legislative Auditor obligated by law to prevent disclosure to the public of the contents of an examination report protected by Article 48A, Section 34(5)?

There are two sources of statutory authority for the audit of MAIF by the Legislative Auditor. Under Section 61B(a) of Article 40, the Division of Audits headed by the Legislative Auditor at least every two years:

"Shall examine and report on the books and accounts of every department, board, bureau, commission, or other agency of the State government, under the general direction of the Joint Committee on Budget and Audit. From time to time, as required by the joint committees, the Division shall ascertain or verify matters of information or procedure concerning these agencies."

Also, Article 48A, Section 243(f) provides for the Legislative Auditor to have discretion to conduct an annual audit of MAIF's affairs in addition to and not in substitution of the Insurance Commissioner's audit. Section 61B(e) of Article 40 authorizes the Legislative Auditor in his audit reports "to make suggestions as appropriate for changes in the conduct of the offices, departments, boards, commissions, institutions and agencies, and in the method of keeping the books and accounts of such agencies." Under Section 61C, the Legislative Auditor, backed by criminal penalties:

"... may require the production before him of the books and accounts of any office or officer which he is authorized to examine. He may examine any such officer under oath touching the affairs of his office, or he may examine under oath any other person as a witness if he is advised that the person has important information concerning the conduct of the office."

In our opinion, in light of the broad statutory powers to compel the production of records and audit jurisdiction of the Legislative Auditor, as well as the specific authority provided in Article 48, Section 243(f) to conduct fiscal and compliance audits of MAIF's accounts and transactions, the report of examination of the Insurance Division and related work papers, unless otherwise placed by law beyond his reach, are included with "the books and accounts" subject to examination by the Legislative Auditor. We agree with the liberal view of "books and accounts" in Article 40 as taken by the Supreme Court of Oregon in interpreting the words "books and records of account" in a State stockholder inspection statute. Meyer v. Ford Institution, Inc., 538 P. 2d 353 (Ore. 1975). The Court noted that these terms could not "be limited to 'books and records of account' in any 'ordinary', literal or otherwise limited senses, but to be the subject of a broad and liberal construction so as to extend to all records, contracts, papers and correspondence" Id. at 358. In light of the Legislative Auditor's statutory power to examine the books and accounts of "every" agency (§ 61B) or any "office or officer", he appears to be authorized in the course of his audit of the agency, to examine any relevant or useful records of another agency. Accordingly, insofar as any records or data of the Insurance Commissioner would be relevant or useful in an audit of MAIF, the Legislative Auditor may require their production for the purpose of his audit unless they are subject to being withheld under some other provision of law. Cf. 34 Opinions of the United States Attorney General 446 (1925), where the Justice Department advised the Secretary of War that the Comptroller General was authorized to obtain certain information relating to the War Department's contracts:

"It will be observed that this requirement is made necessary in order that a satisfactory audit may be made. What papers or data he should have to make such an audit would seem to be a matter solely for his determination."

Having decided that the Legislative Auditor is authorized to call upon the Insurance Commissioner for the records of his examination of MAIF, including the report and work papers, under his authority

as provided in Article 40, Section 61B and Section 61C, we now must decide whether Article 48A, Section 34(5) or any other statute restricts the Legislative Auditor from obtaining access to them. Section 34(5) authorizes but does not require the Insurance Commissioner to withhold an examination report from "public" inspection. "The term public inspection necessarily implies general, nonselective disclosure." Black Panther Party v. Kehoe, 117 Cal. Rptr. 106, 113 (1974). In our opinion, the principle of confidentiality upon which Section 34(5) rests and the express language of the provision do not bar the Legislative Auditor from obtaining access to the MAIF examination report and work papers. In short, disclosure of these materials to the Legislative Auditor for the limited purpose of facilitating his inquiry into the operation of MAIF in compliance with his statutory duties with respect to audits is not "public" disclosure under Section 34(5).

In addition, in our opinion, the State Public Information Law (Article 76A) provides no basis or authority for the Insurance Commissioner to withhold the records in question from the Legislative Auditor. In 60 Opinions of the Attorney General 559, 561 (1975), we stated that Article 76A would not permit the Department of Health and Mental Hygiene to deny access to the Legislative Auditor to personnel records which are generally restricted from public disclosure. In so concluding, we noted that the Maryland Public Information law "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," Id. at 561,² and observed that the custodian of the records could not deny access to them "when their inspection is otherwise provided by law," as is the case here. Although we conclude that the Legislative Auditor may not be denied access to the MAIF examiner's report and related work papers, such access does not open these materials to public disclosure. Nor is the Legislative Auditor thereby authorized to make "public" disclosure of the contents of the report and work papers where the Insurance Commissioner has declined to make them generally available under Section 34 of Article 48A. See United States v. Sapp, 371 F. Supp. 532 (D. Fla. 1974). (mere fact that

² Under present law a "person" for whom records are open to inspection under Article 76A and against whom the Act's exemption can be applied does not expressly include a governmental agency. See Harden v. MTA, 277 Md. 399 (the term "person" in a statute is generally regarded as not including a state agency). H.B. 1326, which takes effect July 1, 1978, redefines the term "person" under the Act to include a government agency.

June 21, 1978

tax returns protected from disclosure by statute are turned over to the Department of Justice for use in preparation for grand jury or trial proceedings does not mean that the Department may publicly disclose the returns in connection with any other matter.) furthermore, in our opinion, when the Insurance Commissioner has expressed an objection to the immediate release of an audit report and has said that public disclosure would not be in the public interest until a later date, as apparently he has done here in the exercise of his discretionary authority, the Legislative Auditor is duty bound to preserve the confidentiality of the information while extracting its usefulness for the purpose of his audit, and has the further duty not to identify the source of the information or connect it to the Insurance Division in any report of the results of his audit. Thus, while enjoying the use of the Insurance Commissioner's report and work papers to facilitate his own audit of MAIF, the Legislative Auditor's report to the joint committee which he is required by Article 40, Section 61B(d) to make, would reflect all sources of investigation but would not breach confidentiality established by the Insurance Commissioner whose discretion in the premises must be respected.

In summary, it is our opinion (1) that neither the Insurance Commissioner nor MAIF may deny the Legislative Auditor access to the report of examination of MAIF's Uninsured Division and the related work papers, (2) that the production of those records and their inspection by the Legislative Auditor does not constitute a public disclosure of the information they contain and (3) that the Legislative Auditor is restricted to the use of the report and work papers for the purpose of his own audit and no other purpose, and he is duty bound to preserve both their anonymity and confidentiality when he prepares his audit report and otherwise, unless identification of the information or public disclosure is authorized by the Insurance Commissioner in the exercise of his discretion under Article 48A, Section 34.

Very truly yours,

Francis Bill Burch
Attorney General

By: Robert A. Zarnoch
Robert A. Zarnoch
Assistant Attorney General

RAZ:ipb