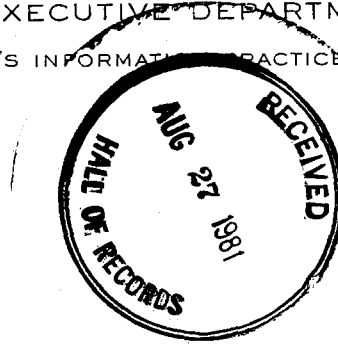


STATE OF MARYLAND
 EXECUTIVE DEPARTMENT
 GOVERNOR'S INFORMATION PRACTICES COMMISSION

HARRY HUGHES
 GOVERNOR

ARTHUR S. DREA, JR.
 CHAIRMAN



August 3, 1981

OFFICIAL

Minutes-Governor's Information Practices Commission Meeting-July 20, 1981

The meeting of the Governor's Information Practices Commission was held on July 20, 1981. Members in attendance were: Mr. Arthur S. Drea, Jr., Chairman; Mr. Robin J. Zee, Mr. Donald Tynes, Sr., Mr. John A. Clinton, Delegate Nancy Kopp, Mr. Albert J. Gardner, Mr. Wayne Heckrotte, Mr. Judson P. Garrett, and Mr. E. Roy Shawn.

The minutes from the June 8 and June 22 meetings were adopted by Commission members as final.

Mr. Dennis Hanratty brought Commission members up to date on the responses received by the staff. Agencies which still remain to be discussed include: Licensing and Regulation, Health and Mental Hygiene, the Central Collection Unit and the Office on Aging. Mr. Hanratty noted that 85% of the necessary data had been received from the Department of Public Safety and Correctional Services and that the response to an additional request for information from the State Police was the only item lacking.

Discussion followed on how to obtain cooperation from the Department of Health and Mental Hygiene, the largest agency which has not yet responded to the inquiries of the Commission. Commission members decided that, since the Secretary had been contacted by several Commission members concerning this problem, a letter would be sent to the Governor. This letter would state that the Commission would be unable to complete its work due to the lack of cooperation from Health and Mental Hygiene. A copy of the letter would also be sent to the Secretary.

The first report discussed concerned the Department of Agriculture. Ms. Thea Cunningham listed the general observations of the staff which were discussed in the report:

1. The amount of personal information collected by various sections of the Department varies considerably (i.e., some collect only name and address, while others collect more extensive personal information).
2. All sections of the Department permit the person in interest to access his records but he is not informed in any formal manner of this fact nor of the fact that information that he supplies is considered to be public information.
3. The records of the Department are disclosable under the Public Information Act. However, the Pesticide Applicator's Law Section stated that investigative reports are not disclosed. It is questionable whether this is a legitimate non-disclosure.
4. Should all other personally identifiable information collected by the Department continue to be considered disclosable under the Public Information Act?

Delegate Kopp questioned whether inquiries had been directed to the Secretary about the variety of information collected by the different sections. Ms. Cunningham replied negatively.

Mr. Garrett asked if there were copies of any divisional policies on disclosure. Ms. Cunningham replied that, although several sections had indicated that they adhered to departmental policy regarding disclosure, the liaison in the department stated that such a policy did not exist.

Mr. Tynes inquired as to whether the sections had indicated the typical recipients of disseminated information. Ms. Cunningham stated that most of the sections had said that they received few requests for information.

The second report discussed concerned the Public Information Act (PIA). Mr. Hanratty explained that he had based the report on:

1. Testimony from witnesses at the Commission's March 16 Public Hearing.
2. Supporting documents submitted to the Commission staff by these witnesses.
3. Responses from State executive branch agencies to questions regarding measures developed to respond to requests under the PIA.

Mr. Hanratty stated that he had found that the PIA works well. Although he found no evidence that State agencies were not complying with the provisions of the Act, he had encountered several problems with the Act.

The first problem, Mr. Hanratty explained, is that there is no definite time period by which the agency has to respond to a request for information under the PIA. Mr. Hanratty referred to the case of Mr. Lee David Hoshall. Mr. Hoshall had testified before the Commission that a records request he had submitted to the Baltimore City Government had been ignored for seven months. However, Mr. Hanratty stated, he found no evidence to suggest that State agencies are failing to comply in a timely fashion. He suggested that this may be a consequence of the fact that, unlike municipalities and counties, State agencies also operate under a Citizens Response Plan.

A second issue which Mr. Hanratty discussed was the cost charged the requestor to obtain copies of documents under the PIA. Mr. Hanratty explained that the Act is unclear as to what should be included in the charges: the copying fee, administrative costs to search for the material, costs involved in separating disclosable from non-disclosable information, and so forth. Mr. Hanratty cited an Attorney General's Opinion of 1974 which suggested that fees of various kinds involved in responding to requests under the PIA may be passed along to the requestor.

Mr. Hanratty stated he had found that most state agencies do not seem to typically pass along administrative fees to the requestor.

Mr. Hanratty noted three current agency practices which appeared to be inconsistent with the Public Information Act:

1. Requiring the requestor to justify a reason for the request.
2. Denying requests due to a lack of personnel.
3. Requiring the individual to produce information that was beyond his capacity to produce.

Another issue which needs clarification, Mr. Hanratty explained, is the expression "letter of reference". Letters of reference are not disclosable under the PIA. There is no definition of this term in the PIA but evidence had been submitted to the Commission indicating that some records custodians may deny unsolicited letters or comments.

In addition, Mr. Hanratty noted, the term "sociological data" needs clarification. Sociological data is prohibited from disclosure in the PIA along with medical and psychological data. Mr. Hanratty referred to a sheet from the Division of Parole and Probation which had been issued to the Commission members. On the sheet, sociological information was divided into that which is non-confidential and sociological data which is confidential. Mr. Hanratty felt that this was inconsistent with the PIA. He also felt that, ultimately, sociological data could encompass everything and theoretically invalidate the Public Information Act.

Mr. Garrett suggested that the same kind of problem exists with psychological data. He thought that unless psychological data is gathered by a psychologist, it is not psychological data for the purposes of the Act. Mr. Garrett asked how the Federal Privacy Act interpreted this term. Mr. Hanratty replied that he did not know

but would find out. Discussion followed and several Commission members expressed surprise that the Attorney General's Office had not been asked for clarification on this issue.

A final point brought up by Mr. Hanratty was the Open Meetings Act. Mr. Robert Colborn, Administrator of the Division of State Documents, had suggested to Mr. Hanratty that there were problems in this area. Under the Open Meetings Act, the agency is required to publish the date, time and place of any meeting. Mr. Colborn felt that this information should also include the subject matter with some specificity. Secondly, Mr. Colborn felt that the requirement that notification be given to the news media or that notice be posted at a convenient public location was not necessarily effective.

Mr. Drea replied that he felt this issue was not really within the scope of the Commission because it did not deal with Information Practices. Mr. Drea observed that this issue was extremely controversial when passed, and the requirement was essentially a compromise.

Delegate Kopp noted that the report on the PIA related to the adequacy of the Act in achieving the purposes of public information. She felt that another important issue involved was that of integrating privacy concerns with public information. Delegate Kopp noted that the Commission was concerned with the question of what is personal versus what is public and that this might affect the Act.

Mr. Hanratty noted that a number of agencies perceived that they had been adversely affected by the Act because there are no sections excluding personal data maintained by some programs from disclosure. Mr. Garrett added that in the process of identifying the information which an agency feels should be confidential, the agency should also consider whether the information should even be collected.

Another area where problems are developing, he noted, is "commercial espionage". Corporate clients access public files to get information on how a competitor does business. Mr. Sweeney, Mr. Garrett stated, was finding that the State is being sued for allegedly disclosing confidential information under the PIA.

Mr. Drea added Mr. William J. Rubin, Chairman of the State Bar Administrative Law Section, had pointed out that, presently in Maryland, the tax court can require people to leave the courtroom at the request of the taxpayer. The reason is that the information is of such a technically sensitive nature that the person does not want potential competitors to be aware of it.

Discussion then focused on the fees charged by agencies to copy documents requested under the PIA. Mr. Gardner suggested that agencies consider the principal purpose behind the record request. If the request is to serve a private rather than public purpose, appropriate fees should be charged. Mr. Drea added that another way would be to establish one charge structure for the person in interest and another for third parties. Mr. Zee noted that the Archives charge ancestor hunters but researchers are not charged because research is the purpose for which the Archives exist.

Mr. Zee asked if Mr. Hanratty felt that high fees were being used by agencies to discourage requests. Mr. Hanratty replied that he found that State agencies are trying to comply with the Act and in fact, most charge minimal fees to copy documents.

Delegate Kopp asked if the law provides for an appeal of the agency decision not to release a document under PIA. Mr. Hanratty replied that the only option available to the requestor would be to seek relief in court.

Discussion followed on the need for a time limit for the initial reply when a request is received. Mr. Garrett suggested that what other states have done could be reviewed. Delegate Kopp felt that a mediation board to handle extreme situations might be beneficial. Mr. Hanratty agreed. Mr. Garrett noted that there are punitive damages now except when the Attorney General's Office has advised the agency that the information is not disclosable. Mr. Drea suggested that the Commission might consider a decision time period of thirty days with the right to extend for an additional thirty days, with the permission of the requestor or for a valid reason.

The next report discussed was that concerning the Human Relations Commission. Mr. Drea indicated that responses were of such a high quality that Mr. Hanratty felt it would be sufficient to merely copy the reply of the Human Relations Commission. Mr. Garrett suggested that the quality of this response should be noted as an example in the letter to the Governor concerning the Department of Health and Mental Hygiene. Mr. Drea agreed.

The final report discussed was the Department of Economic and Community Development Report. Mr. Hanratty delineated the issues of concern to him. He noted that a common thread running through the report is the fact that the Department collects a great deal of financial data. Most components of the Department, Mr. Hanratty said, do not disclose financial and commercial data. Mr. Hanratty questioned, however, whether there is a statutory basis for such a policy. The position of the Department's counsel is that records of the Department are generally disclosable under the Public Information Act.

Mr. Hanratty cited Section 3(c)(v) which prevents the disclosure of confidential commercial or financial data. The custodian must decide: 1) Is the data commercial or financial? and 2) Is it confidential? He noted that though the Commission may be

able to benefit by examining the federal experience in this regard, as the financial and commercial section of the Federal Freedom of Information Act (FOIA) is quite similar to the PIA. Federal courts have interpreted commercial data to include rates and skills of supervisory personnel. Mr. Hanratty suggested that the most difficult issue involves determining what type of commercial and financial data is confidential. It would appear the records custodians must ask the following questions in determining whether or not to disclose such data: 1) Will disclosure adversely affect the Government's ability to collect similar information in the future? 2) Will disclosure cause substantial harm to the competitive position of the firm? and 3) What are the customary industry-wide practices regarding the handling of this type of data?

Mr. Hanratty stated that it is clear that some of the data in the Department, such as directory information about individuals participating in various programs, is disclosable. He noted, however, that even the Department is unclear about whether the commercial or financial data maintained by its various programs is confidential. Departmental officials are leaning towards adopting a policy that would distinguish between information pertaining to borrowers and that provided by lenders. Under this plan, lender information would be confidential, while borrower information would be disclosable.

Mr. Zee brought up the example of a small business trying to get established versus a large business which the state is trying to attract to Maryland. The State wants the latter and the firm may decide to relocate elsewhere if the State has a policy of disclosing commercial and financial data. Delegate Kopp noted that the same might apply to a small business.

Mr. Garrett stated that he felt that the Commission was getting too specific for a Public Information Act. He added that the Commission could not get so specific with the large number of agencies involved. The most that can be done in a

Public Information Act that applies to everyone, he asserted, would be develop certain general standards.

Discussion ensued on whether issues could be covered through legislation or rules and regulations. It was noted that the Commission had the option to decide whether to recommend an omnibus act or specific legislation. The point was made that if legislation was too specific, opposition might be greater.

Mr. Garrett noted that there is a provision in the PIA restricting the collection of information. Mr. Heckrötte added that the Legislative Auditors could examine the issue of data collection. Commission members discussed this issue. Mr. Drea stated that it could be tied in with the security risk analysis that the Commission would like to see done statewide. Mr. Hanratty felt, however, that every agency presently insists that all information it collects is relevant and necessary to perform assigned tasks. He was not sure what would be accomplished without explicit guidelines. It is difficult, he asserted, for the auditors to overrule psychologists, psychiatrists, etc., who might insist that certain pieces of sensitive data needed to be collected from recipients of government programs.

The meeting concluded and the next meeting was scheduled for August 3, 1981.