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STATE OF MARYLAND
EXECUTIVE DEPARTMENT
GOVERNOR'S INFORMATION PRACTICES COMMISSION

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OFFICIAL

Governor's Information Practices Commission - Minutes
Meeting of October 19, 1981.

The Information Practices Commission held a meeting on October 19, 1981. Members in attendance were: Mr. Arthur S. Drea, Jr., Chairman; Mr. John Clinton, Mr. Albert Gardner, Mr. Judson Garrett, Senator Timothy Hickman, Delegate Nancy Kopp, Mr. Dennis Sweeney, Mr. Donald Tynes and Mr. Robin Zee.

The Commission welcomed Delegate Helen Koss, Chairman of the House Constitutional and Administrative Law Committee, and Delegate Donald Robertson, House Majority Leader, who were attending the meeting as observers.

The purpose of the Commission's meeting was to receive an explanation of the Uniform Information Practices Code, as developed by the National Conference of Commissioners on Uniform State Laws. Representing the National Commissioners was Mr. Ronald Plesser, a Washington attorney and a co-reporter for the Uniform Information Practices Code. Mr. Plesser informed the Commission that in addition to his participation in the development of the Uniform Code, he served in 1975 as General Counsel to the Federal Privacy Commission.

Mr. Gardner asked Mr. Plesser if any states had adopted the Uniform Information Practices Code. Mr. Plesser indicated that it had been introduced in a number of state legislatures, but as of yet, had not been enacted into law in any state. Mr. Plesser stated that the Code had passed the Illinois House, but had not survived in the Senate.

Mr. Drea informed Mr. Plesser that the Commission had been engaged in an extensive examination of the record-keeping practices of State agencies. He indicated that the Commission had studied approximately thirty to forty reports on agency policies in the area of information practices. However, the Commission had not considered information practices in the private sector. Senator Hickman told Mr. Plesser that the Commission was attempting to decide whether it should support the adoption of an omnibus privacy and public information statute, or whether it should recommend changes on an agency by agency approach.

Mr. Plesser began his discussion of the Uniform Code by stating that there were certain record systems that were not well-suited to a uniform approach. He cited criminal records as being one area that should be handled separately. Citing his experience with the Federal Privacy Act, Mr. Plesser observed that the Act worked well with a surprisingly small amount of litigation. In Mr. Plesser's opinion, the Federal Privacy Act functioned as an effective management tool. This was due in considerable part to the support functions performed by the Office of Management and Budget. Mr. Drea informed Mr. Plesser that the Commission had received testimony pertinent to the Privacy Act from two representatives of the Office of Management and Budget; while their opinion of the Act was favorable, it was not as favorable as Mr. Plesser's.

Mr. Plesser stated that the Uniform Code represented an attempt to set basic State agency information practices standards. The National Conference of Commissioners supported standards rather than prohibitions regarding particular record systems in part because of the experience of the Minnesota privacy statute. The Minnesota legislature had attempted to establish hard and fast rules of disclosure; in the view of the National Commissioners, however, that approach had proven to be too inflexible. Mr. Plesser observed that there has been a continual need to amend Minnesota's Act because of its inflexibility.

Mr. Drea asked Mr. Plesser to take Commission members through the Uniform Code and also suggested that members ask questions as Mr. Plesser proceeded. Mr. Plesser briefly noted the definitions of the Code as found in Article 1 and observed that the Act does not apply to records of the legislature or the judiciary. He also pointed out that the term "accessible record" applies not only to those personally identifiable records maintained according to an established retrieval scheme but also to otherwise retrievable records which can be located without unreasonable agency expenditures.

Mr. Plesser then proceeded to discuss Article 2, the Freedom of Information part of the Uniform Code. He noted, first of all, that Article 2, Section 2-101(1) would permit public inspection of opinions and judicial order. Mr. Garrett asserted, however, that Section 2-101(1) would be invalid in Maryland unless it was adopted as a rule. Mr. Plesser observed that Article 2, Section 2-102(a) requires agencies to permit public access to "government records", a term which was purposefully defined in a very broad manner. However, Section 2-102(b) only requires public inspection of data which is readily retrievable. Thus, an agency is not required to create a new record system in order to fulfill a Freedom of Information request.

Mr. Plesser noted that within a period of seven days after receiving a written request for access to a government record, an agency must either make the record available to the requester, inform the requester that unusual circumstances have delayed inspection for an additional period of time, not to exceed twenty-one (21) days after receipt of the request, inform the requester that the agency does not possess the requested record, or deny the request. Thus, an agency does not have to obtain a record from another agency on behalf of the requested. Mr. Sweeney felt that the language pertaining to the number of days by which a record should be made available is somewhat confusing. Mr. Garrett and Mr. Drea agreed with the observation.

Mr. Gardner asked Mr. Plesser if the time period still applied if the agency had to go through a document and determine which portions could be released. Mr. Plesser commented that, in his opinion, the information would still have to be made "readily accessible". Mr. Plesser felt that the time period could be changed to satisfy the concerns of the Commission.

Mr. Sweeney called the Commission's attention to the importance of the word "unusual" in Article 2, Section 2-102(d)(2). Mr. Zee asked whether seven days referred to calendar days or working days. Mr. Plesser indicated that it referred to calendar days.

Mr. Garrett expressed the view that Article 2, Section 2-102 (d) does not take into account Article 2, Section 2-103(b), which requires that in certain circumstances, an agency "... shall make reasonable efforts to notify the person to whom the record relates and provide him an opportunity to object to disclosure of the record." Mr. Plesser agreed that this was a good observation and an area that perhaps needed some adjustment.

Discussion then ensued over the issues of charges for copying government records. Mr. Plesser pointed out that this was a controversial portion of the Code. The drafters of the Code felt that an agency should only charge for the actual expenses associated with using a copier, and should not assess search charges or other administrative expenses. Mr. Plesser thought that agencies should waive charges under twenty-five dollars.

Mr. Garrett noted that part of Article 2, Section 2-102(e) which states that agencies "...may charge the currently prevailing commercial rate for copying." In his opinion, this language established a profit for agencies that should not exist. Mr. Plesser responded that in his opinion, the commercial rate was usually less than the rate charged by government agencies. Mr. Sweeney agreed with this position.

Mr. Plesser briefly discussed Article 2, Section 2-103(a) which delineates certain types of government records that are not subject to mandatory public inspection. He noted in particular Article 2, Section 2-103(a)(12) which does not require disclosure of "...an individually identifiable record not disclosable under Article 3."

At this point, Mr. Drea felt that the Commission's time would be better spent if Mr Plesser went directly to Article 3, Disclosure of Personal Records. Mr. Drea felt that this was a part of the Uniform Code that was of particular importance to the Commission, since it represented a distinct approach to the subject of records disclosure.

Mr. Drea informed Mr. Plesser that Mr. Dennis Hanratty had examined this part of the Code and had found certain inconsistencies. Mr. Drea noted, first of all, that there appeared to be some tension between Article 3, Section 3-101(1), which permits inspection of such things as education and training background and previous work experience of government employees, and Article 3, Section 3-102 (b)(4), which states that personnel file data constitutes an example of information in which the individual has a significant privacy interest. Mr. Plesser responded that he did not believe that these two sections were in conflict, since the personnel file statement was meant to protect data which was more sensitive than educational background or previous work experience. Mr. Hanratty stated that his concern was based on the fact that these items are presently considered to be nondisclosable in Maryland. Thus, adoption of the Uniform Code would result in more information released about government employees than is presently the case.

Delegate Kopp observed that, in her opinion, there was a conflict between Article 3, Section 3-101(1), and Article 3, Section 3-102 (b)(5). The latter section states that "...information relating to an individuals's nongovernmental

employment history" is data in which the individual has a significant privacy interest. Mr. Plesser responded that Article 3, Section 3-101(1) was intended to apply to governmental work experience, as opposed to nongovernmental employment, but acknowledged that there was some confusion in the Code.

Mr. Hanratty then pursued the issue of disclosure of licensee data. Mr. Hanratty asked Mr. Plesser if he saw any tension between Article 3, Section 3-101 (3), which authorized disclosure of "...information collected and maintained for the purpose of making information available to the general public", and Article 3, Section 3-102(8), which identifies "...information complied as part of an inquiry into an individual's fitness to be granted or to retain a license. . .", as data in which the individual has a significant privacy interest. Mr. Hanratty pointed out that license application forms typically request such things as name, address, race, sex, marital status, income, arrest and conviction details and so forth. Which of these data elements, Mr. Hanratty inquired, would be available for public inspection? Mr. Plesser responded at first that, Article 3, Section 3-101(3) was meant to cover deeds and land records, and not individual licensees. However, after it was noted that the comments on page 27 clearly indicate that the subsection was meant to cover business and professional licensee information, Mr. Plesser stated that the intent of the Code was to permit requesters to contact a State agency to find out if a particular professional had a license and was in good standing, but it would not allow disclosure of other personally identifiable data about that professional. Mr. Hanratty informed Mr. Plesser that such a position would be a radical departure from current policy in Maryland, since virtually all licensee information is available for public inspection.

Mr. Garrett expressed concern regarding Article 3, Section 3-101(6) which authorized disclosure of personally identifiable information"pursuant to a showing of compelling circumstances affecting the health or safety of any individual, in which case the agency shall make reasonable efforts to notify

the individual to whom the record refers." Mr. Garrett felt that inclusion of this subsection could place in jeopardy an on-going investigation. Mr. Garrett also objected to Article 3, Section 3-101 (7) which authorizes disclosure of personally identifiable data "pursuant to an order of a court in which case the agency shall notify the individual to whom the record refers by mailing a copy of the order to his last known address." In Mr. Garrett's view, if a court decided to release a record and did not believe it to be necessary to notify the subject of a record, why should the legislature require it?

Mr. Plesser pointed out Article 3, Section 3-101(10), which authorizes disclosure of personally identifiable data " in any other case, not a clearly unwarranted invasion of personal privacy." This subsection, Mr. Plesser indicated, led directly into Article 3, Section 3-102(a) which states the following: "Disclosure of an individually identifiable record does not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual." Mr. Plesser stated that the intent in this section was to develop a standard by which to weigh the public interest and the privacy interest of the subject of the record. Again, he referred to the Minnesota experience as one where rigid statements proved unworkable.

Delegate Kopp suggested that a general standard could be adopted, while at the same time specific prohibitions could be added for particular record systems. She cited as one example library circulation records, which she felt should be protected. Mr. Plesser stressed that the Code would not permit disclosure of any particular record which the legislative had determined to be confidential. Mr. Hanratty observed, however, that many of the most important prohibitions on record disclosure can be found in the Public Information Act. If the Public Information Act was repealed, as would be necessary if the Uniform Code was adopted,

these prohibitions would also be repealed. He noted that this would be the case for the prohibition against disclosure of library circulation records.

Mr. Drea asked Mr. Plesser if the Office of Information Practices, an optional feature of the Uniform Code, was in fact a critical feature of the Code. Mr. Plesser responded that while the Office would be a very useful entity, the Code could operate without it.

Mr. Plesser suggested that the scope of the disclosure standard will ultimately only be determined as a consequence of judicial decisions. Mr. Garrett expressed some concern about this point. He observed that he could foresee a patchwork of decisions, depending on which judge heard the case. Furthermore, he noted that the State currently has explicit prohibitions rather than standards, and that the prohibitions appear to work very wel. Mr. Garrett noted that there has been very little litigation.

Mr. Drea noted Article 3, Section 3-102(b)(3) which identifies "information relating to eligibility for social services or welfare benefits or to the determination of benefit levels" as being data in which the individual has a significant privacy interest. Mr. Drea stressed that, in his opinion, all personally identifiable data regarding welfare recipients should remain confidential. However, to the extent that there was a minimal public purpose to be served by permitting public inspection of welfare data, Mr. Drea stated, it would be in the area of eligibility. Mr. Drea felt that there was no public purpose in allowing such things as the publication of lists of welfare recipients. Yet, the Uniform Code states that eligibility data falls in the area of information in which the individual has a significant privacy interest, while other types of welfare data are not mentioned.

Delegate Kopp pointed out that data regarding nominations for government positions was regarded under Article 3, Section 3-102(b)(4), as information in which the individual has a significant privacy interest. She asked Mr.

Plesser if much discussion was given to this subsection. Mr. Plesser stated that everything in the Code was discussed.

Mr. Clinton noted Article 3, Section 3-102(b)(6), which states that "information in an income or other tax return measured by items of income or gathered by an agency for the purpose of administering the tax" constitutes data in which the individual has a significant privacy interest. He asked if the phrase "other tax return" included such things as gift or sales tax data, or was it meant to be restricted to income tax information. Mr. Plesser felt that the phrase was meant to encompass all types of tax returns.

Mr. Clinton pointed to Article 3, Section 3-102(b)(9), which states that "information comprising a personal recommendation or evaluation" is data in which the individual has a significant privacy interest. Mr. Clinton asked if this statement included unsolicited letters of comment. Mr. Plesser did not directly respond to this question but expressed his own personal feeling that subsection nine should not have been included.

Commission members turned their attention to Article 3, Section 3-103, Disclosure to Agencies of Government. Mr. Plesser pointed in particular to subsection (a)(1)(ii), which permits disclosure of personally identifiable records from one agency to another if disclosure is "compatible with the purpose for which the information in the record was originally collected." Mr. Plesser noted that "compatible with the purpose"was language very similar to that found in the Federal Privacy Act; he did not believe, however, that this was a very strong provision. Mr. Plesser stated that the purpose of this section was to permit the flow of personally identifiable data from one agency to another. In his opinion, the section created a mechanism so that transfers of data could be considered and allowed. Mr. Plesser felt that this was a very broad section.

Mr. Drea asked Mr. Plesser if the Internal Revenue Service (IRS) had taken

a look at this part of the Uniform Code. Mr. Drea commented that the IRS obtains a considerable amount of personally identifiable data from records of the Motor Vehicle Administration. IRS is anxious to continue to receive this information, Mr. Drea noted, but would not be able to qualify under the Uniform Code since disclosure would not be compatible with the purpose for which the information was originally collected. Mr. Plesser responded that IRS would probably qualify under Article 3, Section 3-103 (a)(3)(i), which permits disclosure to federal agencies "for the purpose of a civil or criminal law enforcement investigation." Mr. Plesser also noted that if Motor Vehicle Administration records were disclosable by statute, then examination of those records by IRS would not constitute a clearly unwarranted invasion of privacy.

Mr. Garrett objected to the language appearing in Article 3, Section 3-103(a) (3)(ii) and (iii). Mr. Sweeney also expressed concern regarding Article 3, Section 3-103(b) which places the same restrictions on disclosure on those agencies receiving data as the originating agency. He did not believe that the State had the authority to impose such restrictions of the federal government.

Mr. Plesser then proceeded to discuss Article 3, Section 3-105 and 3-106, which authorize access to records by the record subject and place limitations on individual access. Mr. Plesser noted that these sections recognize that the subject of the record has a greater right to access information pertaining to him than would be the case for third parties. In his opinion, probably the most significant limitation imposed on the subject of the record by the Uniform Code concerned his inability to examine investigatory records. Mr. Hanratty asked if these sections would permit the person in interest to examine psychological records pertaining to him. Mr. Plesser though that this was a moral and ethical issue that the Commission would have to decide for itself, but he also felt that access would be permitted under the Uniform Code.

Mr. Plesser stressed the importance of the disclosure log provision found in Article 3, Section 3-108(a)(2). Mr. Plesser felt that logs are important since they make it possible to amend incorrect data and notify recipients of any inaccuracies. Logs also help, Mr. Plesser stated, as a tool to keep track of the location of sensitive information. In response to a question from Mr. Garrett, Mr. Plesser stated every disclosure had to be logged. Mr. Drea noted that under article 3, Section 3-105(2), the person in interest must be informed upon request "...of all disclosures of the record outside the agency as required in subsection 3-108(a)(2)."

Discussion ensued about the cost of implementing disclosure logs. Mr. Plesser observed that logs could be expensive. Mr. Hanratty asked Mr. Plesser if, in his opinion, disclosure logs represented the most expensive single item in the Code. Mr. Plesser responded that he did not know if this was so. He noted that in the early days of the Federal Privacy Act, agencies were making disclosure log notations for each record that was released. Such a procedure, Mr. Plesser observed, was very expensive. However, he suggested that such an a approach was not really necessary. Any mechanism would suffice, Mr. Plesser noted, as long as it would be possible to go back and determine where a particular record was sent.

Mr. Drea asked a series of questions regarding Article 3, Section 3-106, Limitations on Individual Access. He noted, first of all, that subsection (a)(2), which does not require an agency to disclose "information collected and used solely to evaluate the character and fitness of persons, but only to the extent that disclosure would identify the source of the information", was awkwardly worded. In Mr. Drea's opinion, this subsection did not really address the issue. He also questioned the need for subsection (b) which states: "This section does not abridge any statute that authorizes an agency to withhold information from the parent or legal guardian of a child." In Mr. Drea's view, such a subsection was unnecessary in the light of Article 3, Section 3-104.

Finally, Mr. Drea asked if the word "segregable", as contained in Article 3, Section 3-106(c) was included in other sections of the Uniform Code. Mr. Plesser indicated that it was included.

Mr. Plesser stressed the significance of Article 3, Section 3-107, which permits the person in interest to seek correction and amendment of records pertaining to him. The position of the drafters of the Uniform Code was that if a person can examine his record, he should have the right to seek a correction of that record.

Mr. Plesser indicated that Article 3, Section 3-108 places agencies under certain limitations regarding the types of personally identifiable data to be collected and maintained. Mr. Garrett felt that subsection (a)(1), which requires agencies to "collect or maintain only information about individuals necessary to accomplish its purposes as authorized by federal law or executive order, state statute or executive order, or local ordinance of resolution", would be a difficult standard for agencies to meet. Mr. Hanratty suggested that the language was similar to that which exists in the Public Information Act. Mr. Plesser felt that this section served as a good management tool for agencies.

Brief discussion ensued over Article 3, Section 3-109, Disclosure of Individually Identifiable Records for Research Purposes. Mr. Clinton asked if the agency that is the custodian of the research material, could fulfill its responsibilities under the Uniform Code without disclosure of a person's name. Mr. Plesser thought that data could be released under a coded system.

A number of conerns were raised by members regarding Article 3, Section 3-115 (1) which requires agencies to "issue instructions and guidelines necessary to effectuate this Article...". Senator Hickman noted that each agency would have to issue rules and regulations, to be followed by litigation challenging such rules and regulations. Delegate Koss thought that this subsection gave a considerable amount of discretion to agencies. Mr. Garrett felt that it would be

more preferable to have one body apply standards to some of the statutes. Mr Sweeney commented that no time would be saved if responsibility was given to the agencies before giving it to a board or the courts.

Mr. Plesser briefly discussed the Office Of Information Practices described in Article 4 of the Uniform Code. Again, Mr. Plesser noted that the Office was an optional feature of the Code but that the Office could perform some useful functions, such as monitoring agency compliance, advising agencies about their responsibilities, and informing the public of its rights.

The Commission adjourned, with the next meeting scheduled for October 26, 1981.