820103

STATE OF MARYLAND
EXECUTIVE DEPARTMENT
GOVERNOR'S INFORMATION PRACTICES COMMISSION

HARRY HUGHES
GOVERNOR

ARTHUR S. DREA, JR.
CHAIRMAN

OFFICIAL MINUTES

GOVERNOR'S INFORMATION PRACTICES COMMISSION APRIL 27, 1981

The April 27, 1981 meeting of the Governor's Information Practices Commission was devoted to an examination of the federal Privacy Act of 1974 (Public Law 93-579). Members of the Commission in attendance were: Mr. Arthur S. Drea, Jr., Mr. Albert J. Gardner, Jr., The Hon. Timothy R. Hickman, Mr. Donald Tynes, Sr., Mr. Robin Zee, Mr. E. Roy Shawn, and Mr. John Clinton.

It should be noted that PL 93-579 is much more explicit than current Maryland statutes in the area of confidentiality of personal records in the possession of government agencies. As a consequence, the Commission was anxious to assess the effectiveness of the Privacy Act. With this in mind, the Commission heard testimony from Ms. Cecilia Wirtz, Assistant General Counsel for the Office of Management and Budget (OMB) and Mr. Robert Veeder, Office of Information and Regulatory Affairs, OMB.

Ms. Wirtz began by outlining some of the materials which OMB had submitted to the Commission staff. She then explained that OMB has the responsibility to give oversight and guidance in the area of privacy and has the authority to issue regulations and guidelines. Mr. Veeder stated that an OMB Guideline (dated July 1, 1975) goes through the act point by point, attempting to describe the kinds of situations that were anticipated to occur under each section. OMB Circular A-108, he added, delineates the responsibilities of federal agencies in complying

with PL 93-579.

Ms. Wirtz and Mr. Veeder explained that the Privacy Act defines a record as a single item of information. They defined a system of records as a collection of these records - retrieved by reference to a personal identifier. Records not retrieved in this manner, they noted, are not covered by the Act. Before an agency can collect and use information, notice must be published in the Federal Register describing systems of records, giving uses of information, safeguards, and so forth. Agencies are also required to submit a report to OMB and Congress on other aspects of information collection.

Ms. Wirtz added that publication in the Federal Register is public notice, and that there is nothing in the Privacy Act giving an individual a legal right to stop an agency action. Ms. Wirtz cited a case two years ago involving the Department of Health, Education, and Welfare (HEW) when it ran a program on welfare recipients on the federal payroll-both civilian and military-to see who was defrauding the government. The American Civil Liberties Union objected and the Department of Defense (DOD) stopped the process. However, OMB maintained that the process was legal so long as DOD published a notice in the Federal Register identifying the fact that it was going to release this information to another agency for this purpose.

Ms. Wirtz observed that an agency must notify an individual when information is collected (through a Privacy Act notice on every form) of the purpose of collection, routine uses of the information, and whether disclosure of the information is mandatory or voluntary. If a use of the information falls within the category of "routine use"-defined as a use compatible with the purpose for which the information was originally obtained-the agency can create routine uses subsequent to collecting the information. As long as this is published in the Federal Register, it permits dissemination both within and outside of the Federal government. Ms. Wirtz stated that this is the main tool for disseminating information without the individual's permission. In addition, she noted that Subsection B of the Privacy

Act governs third party access and lists 11 circumstances where the agency does not need the permission of the individual. In these cases, disclosure is at the discretion of the custodian of the record.

Ms. Wirtz explained further that the agency head determines whether a subsequent use is a "compatible use" and there has been no case where the compatibility standard had been challenged in federal courts. She asserted that the Privacy Protection Study Commission had identified the "routine use" section as one of the most abused sections of the Privacy Act. Ms. Wirtz added that the Act also allows the individual the right of access and provides for quality control (in terms of records management-what agencies should keep, how long, accuracy, etc.).

There has been some conflict, Ms. Wirtz stated, over the fact that the Privacy Act only deals with information pertaining to an individual (defined to be a citizen or legal alien). It deals neither with businesses nor to an individual operating in his business capacity. Mr. Veeder added that correspondence filed by date (if an agency is only interested in when someone wrote, not who wrote), is not considered a record system unless it is changed and information is retrieved by a personal identifier.

Senator Hickman asked if information that is not considered to be in a record system under the Privacy Act could be disseminated to someone who then established and maintained the information in a retrievable system. Ms. Wirtz replied that the second person would create a record system if he used a name or identifier to retrieve the information. It became apparent in further discussion, that a system of records covered by the Privacy Act could be excluded from the provisions of the Act if the system were no longer retrieved by name or personal identifier. The agency would then be able to disclose the information to someone outside the federal agency who could reestablish the system using identifiers.

Another point brought up by Ms. Wirtz was the fact that OMB rarely receives questions regarding individual access. Most inquiries concern such things as whether or not systems exist and whether information can be disseminated.

In response to a question from Mr. Drea, Ms. Wirtz discussed the meshing of the Privacy Act and the Freedom of Information Act (FOIA). She said that the Privacy Act has its own definition of a record while FOIA does not. In addition, Ms. Wirtz asserted that the Privacy Act has two provisions referring to FOIA. One (the B2 provision) states that an agency may release information without the individual's permission if it would be required to be released under FOIA as public information. The second provision (Subsection Q) states that an agency may not use the specified exemptions of FOIA to deny records to an individual which he would otherwise be able to receive.

Under FOIA, Ms. Wirtz explained, a typical B-5 denial is the intra-agency memorandum exemption. Agency memos in an individual's file (if the file is in a record system) cannot be witheld if he requests access under the Privacy Act because there is no comparable exemption under the Privacy Act. If he requested access under the FOIA, however, these memos could be witheld.

Under the Privacy Act, the individual has the right to obtain all of his records with three exceptions:

1) D5-records compiled in reasonable anticipation of civil action or proceeding

2) J exemptions-CIA/law enforcement records

3) K exemptions-general exemptions covering the rest of the agencies

Under a J and K exemption, the individual gets everything except information which would give or lead to the identity of a confidential source.

The problem, Ms. Wirtz stated, is that there exists a large area that is unclear. For example, what does the agency do if the individual requests records under the Privacy Act versus FOIA or FOIA versus the Privacy Act since they have different provisions and treatment? A request under one Act may be denied while under the other, the information could be released.

Ms. Wirtz added that there is a provision under FOIA-the B3 exemption-that states that if there is another federal statute that limits access to certain records-the agency can deny access to those records. Based on this, there are three

circuit court opinions asserting that an agency may withold information if the request was made under FOIA and if under the Privacy Act the agency would have been able to deny access. This has led, Ms. Wirtz explained, to controversy over the fact that an agency can deny a request from an individual under FOIA by reading the Privacy Act into the situation but at the same time can't deny the information to a third party. Ms. Wirtz offered to send copies of these court opinions to the Commission.

Mr. Drea asked if there had been much litigation on the issue of routine use. Ms. Wirtz responded negatively.

Mr. Zee asked if the National Archives and Records Service had a different definition of a record. Mr. Veeder responded that the Records Service was more concerned with a record as a physical entity while the Privacy Act focused on the informational content of a record.

In response to a question from Mr. Zee, Mr. Veeder replied that the National Archives and the Records Service has record schedules for disposition. He noted that under the Paper Reduction Act, OMB was charged with records management and was attempting to mesh the different concepts.

Ms. Wirtz added that there is only one provision of the Privacy Act that deals with the length of time a record should be kept, and it deals with the accounting of disclosures, not the record itself. This accounting is kept for the life of the record or five years, whichever is longer.

Mr. Veeder stressed two provisions of the Privacy Act:

1) the requirement to give public notice of a system of records

2) an accounting of what was done with the information

Mr. Veeder said that 6-7,000 notices are published each year with an approximate cost of over one million dollars. In six years of overseeing the Act, OMB averaged only 7 comments a year. No one ever asks to see the accounting logs, he added, which also cost a great deal to set up and operate. Mr. Veeder noted that the Reagan administration is looking for ways to cut back and new ways to accomplish the goals

of the Privacy Act. In addition, Ms. Wirtz stated, there are provisions for correction of records. The agency is required to go back and inform previous recipients of records of any corrections that have been made.

In response to a question from Mr. Zee as to whether there had been any thought of combining FOIA and the Privacy Act, Ms. Wirtz discussed the history of the two Acts. Mr. Veeder mentioned that there had been some talk about taking the access provisions out of the Privacy Act and putting them into FOIA.

Ms. Wirtz added that the Privacy Act will be amended by the Debt Collection Act of 1981. Discussion ensued on the differences between the last administration and the present. She noted that this administration is emphasizing efficiency-meaning data and data sharing. The pending amendment creates a new exemption to permit the release of bad debt information to credit reporting bureaus.

Senator Hickman asked about the status of guidelines issued by the Federal Privacy Protection Commission for state and local governments and the private sector. Ms. Wirtz replied that the Commission made recommendations in such areas as Medical Records and that these recommendations were adopted as legislative proposals by the Carter administration. She noted that these proposals did not get very far.

Mr. Hanratty asked if there was a section of the Privacy Act that could be eliminated in order to minimize costs without jeopardizing the spirit of the Act. Mr. Veeder and Ms. Wirtz mentioned the publication requirement of the systems of records as being one area where savings could be made.

Discussion followed on the need for training of federal employees in the Privacy Act. Ms. Wirtz stated there is not enough awareness of the mechanisms of the Act. Ms. Wirtz said that a number of legislative proposals in the last two months advocate things that are already permitted by the Privacy Act; however, many people are not aware of the various provisions of the Act.

Ms. Wirtz and Mr. Veeder added that some agencies which receive more requests are more familiar with the Act and that larger agencies often have one individual handling privacy issues. They also noted that gathering record systems has led to identification of duplication, which has been beneficial.

In response to a question from Senator Hickman as to whether there had been any documentation of the savings caused by the Privacy Act, Mr. Veeder responded negatively. The cost estimates have been done only on start up and operating costs; however, he noted that these are very hard to isolate.

Senator Hickman asked if actual publishing and dissemination costs could be distinguished from the cost of putting information into a certain form. Mr. Veeder replied that the million dollar figure referred to earlier only covers the cost of publication in the Federal Register.

In the discussion that followed, Mr. Veeder stated that (before the Privacy Act required it) most agencies did not have a listing of their record systems. The agencies with good records management programs had files identified for disposition purposes and could translate that into a record system.

Mr. Veeder noted that most individuals making Privacy Act requests ask for all information pertaining to them and do not ask for access to a specific record system. Thus, it would appear that the record systems statements appearing in the Federal Register are not extensively used by individuals.

Ms. Wirtz mentioned that some agencies have tried to deny access because the individual cannot identify the exact system of records. She also noted that under FOIA, the agency can collect search and reproduction costs but that agencies can only collect reproduction costs under the Privacy Act. The assumption is that agencies are aware of the personal record systems in their possession.

Senator Hickman asked about the number of persons requesting to examine personnel documents. Ms. Wirtz replied that most requests are in the personnel area with the number depending on the agency. She noted that these requests are not on the volume of FOIA requests.

In response to Senator Hickman, Ms. Wirtz stated that FOIA provides the right of access to government records in general, there being no requirement to identify systems. Senator Hickman wondered how an agency can disseminate information under FOIA if it doesn't have a catalog of records. Ms. Wirtz replied that FOIA deals with everything and not just information concerning individuals.

Mr. Gardner asked if there were any figures on the number of agencies that identify one or more individuals specifically charged with privacy functions. Mr. Veeder replied that 15 agencies had at least one person in this area and that perhaps a total of 30 persons spend most of their time on privacy. He noted that there are simply not that many requests for information. Mr. Veeder added that it is difficult to determine what are actual privacy requests. Many Privacy Act requests are actually information requests that would have been honored previous to PL 93-579.

Mr. Clinton asked if any agencies had resisted complying with the requirements of the Privacy Act. Ms. Wirtz and Mr. Veeder replied that this was not the case although some agencies have taken a long time to publish their systems of records. However, both felt that this was an internal administrative problem rather than an effort to resist the mandates of the Act.

Ms. Wirtz described another area which had been a source of problems: Subsection M (The Contractor Provision). This is the only provision that goes into the private sector. (Subsection M reads as follows: "When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.")

Ms. Wirtz illustrated the complexity of this section by pointing to the case of a private company conducting survey research for the federal government. Even if the company only releases non-identifiable statistics to the government, it might

have collected personally identifiable information in the course of conducting its research. The question then becomes: does the Privacy Act still apply if the agency had access rights to personally identifiable data but only asks for the non-identifiable data? The interpretation of OMB was that the provisions of the Act still applied.

However, in a similar case, the Supreme Court ruled that the provisions of FOIA did not apply if an agency had access rights to information developed by a contractor but did not request the data.

Mr. Drea asked why the definition of records under the Privacy Act didn't preclude the information itself since it was not identifiable information. Ms. Wirtz replied that if the agency caused the contractor to collect the information, then the provisions of the Act applied. Mr. Veeder added that the agency is responsible for the information collected and it cannot escape this requirement just by contracting it away.

However, Mr. Veeder explained that if the contractor opted on his own to collect personally identifiable information (i.e. there were other ways in which the terms of the contract could have been fulfilled), then the Privacy Act did not apply. If the government agency left the decision to the contractor as to whether or not personally identifiable data would be collected, then the information does not fall within the context of the Privacy Act. If, however, the contractor had to collect identifiable data as the only way to fulfill the contract, then the agency is not released from the provisions of the Act.

Ms. Wirtz highlighted another section of the Act-The Remedies Provision. Under the Privacy Act, the individual has causes of action to enforce his right of access, right of correction and to force agencies to comply with the statute. There is, however, no injunctive relief to prevent the agency from releasing information in violation of this law.

Mr. Drea asked if injunctive relief was not inherent in the courts. Ms. Wirtz responded that it was not, in the view of the 9th Circuit Court. In contrast, under

FOIA, injunctive relief has always existed.

In response to Mr. Zee, Ms. Wirtz and Mr. Veeder replied that some legislators had originally objected to the Privacy Act because of fear of curtailment of law enforcement activities and investigatory agencies. They noted that legitimate access to law enforcement is provided in the Act. In addition, use of social security numbers and fear of increased computerization were issues that surfaced at the time that the Act was being considered by the Congress.

Ms. Wirtz mentioned that use of the Social Security number is not forbidden; an agency just may not preface a right, benefit or privelege upon the supplying of that number. In addition, the courts have concluded that a subpoena is not an order of a court of competent jurisdiction.

Mr. Clinton noticed that according to the Privacy Act, mailing lists cannot be sold or rented unless such action is specifically authorized by law. Ms. Wirtz noted that under FOIA an individual can ask for all kinds of information and construct a list. One problem is that there is no definition of "sale or rent".

Ms. Wirtz described a case that involved an individual who obtained information from personnel files regarding who had not bought savings bonds. He then contacted the persons and urged them to buy bonds. The courts ruled that the persons contacted had a right to sue and that emotional harm can be recovered under the Privacy Act.

Ms. Wirtz provided an example of another case where the Courts found the Privacy Act to be inapplicable. There is a provision in the Act dealing with information relating to an individual's qualifications for federal employment. It states that the agency can withold information on the identity of a confidential source. One person wanted to challenge information that turned up in a review of her qualifications. The agency wouldn't release the name of the source and the source would not volunteer his name. The person sued and the court held that the constitutional right to confront witnesses prevailed unless the agency wanted to change the information. Ms. Wirtz maintained that these cases place a standard on the agencies in

terms of their records management.

Mr. Hanratty described three types of oversight of privacy legislation which he has encountered in other states: 1) no oversight established by statute; 2) oversight placed with an existing agency; 3) an independent entity is established to provide oversight. Mr. Hanratty asked Ms. Wirtz or Mr. Veeder for recommendations regarding which path should be followed by the Information Practices Commission, if the Commission determines the need for such legislation.

In the discussion that followed, Ms. Wirtz and Mr. Veeder stated that they had found the greatest need for oversight in the area of formulating major policy issues. Ms. Wirtz said that if there is a state body already performing this function, it might work out. However, she prefered oversight of privacy legislation not going to an agency with other responsibilities. Mr. Veeder added that if an independent agency were established, it was important to staff it sufficiently, with enough breadth and with enough authority.

Mr. Drea asked if Ms. Wirtz or Mr. Veeder saw any problems with the Attorney General's Office overseeing any privacy legislation in addition to the Public Information Statute. Ms. Wirtz responded negatively.

Mr. Drea asked if Ms. Wirtz or Mr. Veeder were to draft a state privacy act, would they limit it to records dealing with personal information, or broaden its scope? Ms. Wirtz replied that she would maintain the distinction. Mr. Veeder added that he would make any Act as simple as possible.

Mr. Drea asked a final question as to the meaning of exemption D5-reasonable anticipation of civil action. Ms. Wirtz replied that usually an agency has a procedure where it eventually gets into court or can have the right to go to court. Ms. Wirtz added that this exemption is infrequently used.

The meeting adjourned at that point with the next meeting being scheduled for May 11, 1981.