



OFFICE OF THE COUNTY ATTORNEY

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To: Julie Dellinger, Executive Director
Board of Investment Trustees
Montgomery County Employees'
Retirement System

Via: Marc P. Hansen, Chief *MPH*
Division of General Counsel

From: Judson P. Garrett, Jr., Chief *JPG*
Opinions & Advice

Re: Providing Employee Indicative Data To Fidelity

I am responding to your request that I review and comment on a proposed confidentiality agreement between the Board of Investment Trustees (the "Board") and Fidelity Investments Sector Services Company ("FISSC" or "Fidelity") under which the Board would provide FISSC with certain employee "indicative" data (name, Social Security number, address and birth date) from Board records for use in connection with the administration of plan enrollments and contribution changes in the County's Deferred Compensation Plan ("457 Plan"). The threshold question presented by your request is whether the Board may provide such information to FISSC. You also have sought my comments on the specific agreement suggested by FISSC.

I advise that, in order to permit county employees who desire to do so to enroll in the Plan by telephone and, from time to time as they see fit, make contribution changes by telephone, the Board may share with a plan servicing agent the name, Social Security number, address, date of birth, date of hire, department and "related information" of every county employee eligible to participate in the plan so long as that information is to be used: (1) solely within the scope of the plan servicing agent's Recordkeeping Agreement with the Board; and (2) only in response to *employee-initiated* requests for plan information or action.

I also agree that it is prudent to enter into an appropriate confidentiality provision regarding the sharing of such information, and I have some suggestions regarding the draft submitted by Fidelity.

My advice is founded on the following understanding of the pertinent facts and applicable law.

PERTINENT FACTS

Montgomery County has established for its employees a Deferred Compensation Plan (the "Plan") under Section 457(b) of the Internal Revenue Code. Montgomery County Code, §33-142 (a). Any employee may participate in the plan. §33-142 (b). The Chief Administrative Officer of Montgomery County ("CAO") administers the Plan. §33-144. "Except for the powers of the Board, the Chief Administrative Officer must take all actions and make all decisions to administer the deferred compensation Plan," including, *inter alia*, actions and decisions regarding "keeping records," "consulting with the Board regarding the selection of a recordkeeper for the Plan," and "delegating any power or duty" of the CAO. §33-144 (a) (4), (5) and (8).

After consulting with the Chief Administrative Officer, the Board must, among other things, develop record keeping procedures to maintain and report on participant account balances, §33-145 (b) (1), and invest each participant's account in the manner directed by the participant, §33-145 (c) (1). The Board is required to keep "accurate and detailed accounts of all investments, receipts, disbursements, and other transactions, including any specific records that are required by law and any additional records it considers necessary." § 33-61B. "All accounts, books and records are subject to state law on public records." *Id.* The Board is authorized to retain agents to perform any of the Board's duties under the Plan. §33-145 (d). Exercising this authority, the Board has retained Fidelity Investments Institutional Operations Company ("FIIOC"), a division of FMR Corp., as a plan servicing agent, and has entered into a Recordkeeping Agreement with FIIOC, dated July 14, 1995.

According to your request:

The Board office is seeking ways to simplify the processing of 457 plan enrollments and contribution changes. The current process is very labor intensive for both the County and the two service providers. As an initial step towards automating 457 plan enrollments, we would like to pursue a plan to enable Fidelity to enroll employees by telephone. To do so, we must provide Fidelity with "indicative" data on all eligible employees. Fidelity would use this information to respond to employee-initiated telephone inquiries and enrollment requests.

Given our concern about privacy issues, Fidelity has proposed that we enter into a confidentiality agreement that would limit the use of personnel data by Fidelity. Attached is a draft . . . similar to one developed for another public fund client with similar privacy issues

We request your review and comments on a proposed agreement that would

permit the County to supply certain personnel data to Fidelity and specify the limited use of the data by Fidelity. As a service provider for the 457 plan, Fidelity already maintains certain personnel data on participants that have chosen to invest through Fidelity. At issue is whether we can provide information on potential participants so that Fidelity can handle the enrollment process for the county, and only in cases of participant-initiated requests. Following is additional information to assist you in your review and analysis.

- Data to be provided to Fidelity - Name, Social Security number, address and birth date for employees eligible to participate in the County's 457 plan (approximately 7,500 employees).
- Limited use of data by Fidelity - Fidelity will maintain data on confidential file for the sole purpose of responding to participant-initiated telephone requests for plan information, particularly as it pertains to enrollment-by-telephone.
- Purpose of arrangement - To minimize County administration involvement in providing materials related to provider services, and potentially outsource additional County plan communications and enrollment activities to each of the providers.

APPLICABLE LAW

The basis for our legal concerns about privacy issues arises primarily from the Maryland Public Information Act, which is codified at Md. Code, State Government Article, §§ 10-611 - 10-628.¹ Unlike the federal Freedom of Information Act ("FOIA"), Maryland's Public Information Act ("PIA") is both a disclosure statute and a privacy act. It grants the public a broad right of access to public records in general, but it also prohibits the disclosure of certain kinds of records and certain kinds of information. *Public Information Act Manual*, Office of the Attorney General (7th Ed., January, 1997) p. 27.² In pertinent part, the PIA generally prohibits the disclosure of retirement records and personnel records. §§ 10-616(g) and (i). It also specifically prohibits the disclosure of

¹ The use of a Social Security Number also is restricted by federal law. *See, e.g.*, the Federal Privacy Act, P.L. 93-579, § 7, 5 USC §552a. However, a number may be required from persons who have income which is reported to the Internal Revenue Service. Social Security Administration, Program Operations Manual System, § RM 00201.005(B)(3).

² *See*, §§ 10-612 (a) ("All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees"); 10-612(b) ("unless an unwarranted invasion of the privacy of a person in interest would result, this [Act] shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection"); and 10-613 ("Except as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time").

the addresses and telephone numbers of employees regardless of the kind of record in which they are kept, viz.:

Subject to §21-504 of the State Personnel and Pensions Article, a custodian shall deny inspection of the part of a public record that contains the home address or telephone number of an employee of a unit or instrumentality of the State or a political subdivision unless:

- (1) the employee gives permission for the inspection; or
- (2) the unit or instrumentality that employs the individual determines that inspection is needed to protect the public interest.

§10-617 (e).³

Violations of the PIA are subject to both civil and criminal sanctions. § 10-626 authorizes an award of actual and punitive damages, attorneys fees and litigation costs against a person, including an officer or employee of a governmental unit, who willfully and knowingly permits the inspection or use of a public record in violation of the Act if the record names or, with reasonable certainty, otherwise identifies an individual by an identifying factor such as an address.⁴ § 10-627 provides criminal sanctions in the form of a fine not exceeding \$1,000 for wilfully or knowingly violating any of provision of the Act.⁵

³ §21-504 of the State Personnel and Pensions Article permits the disclosure of some names and addresses to a *public employee organization*. However, not every organization that serves public employees is a *public service organization* for the purposes of this statute. Rather, a *public employee organization* is limited to a collective bargaining unit. Moreover, §21-504 applies only to certain *state* pension and retirement systems, *i.e.*, the State Employees' Pension System, the State Employees' Retirement System, the State Teachers' Pension System, and the State Teachers' Retirement System. It is not applicable to the records of Montgomery County employees who do not participate in one of the specified state retirement and pension systems, and there is no comparable provision of law applicable to those employees.

⁴These sanctions were added at the recommendation of the Governor's Information Practices Commission which "asserted that individual privacy is of such importance that criminal and civil penalties should be established as a deterrent to the unlawful access, disclosure and use of personally identifiable data." *Public Information Act Manual*, p. 37, quoting *Final Report, Governor's Information Practices Commission* (1982), p. 549.

⁵ "This section applies to any person, not just to custodians or agency employees. For example, it could apply to a private citizen [or entity] who intentionally obtains a record from a custodian that is exempt from disclosure." *Public Information Act Manual*, p. 36.

ANALYSIS

Your request presents a question of first impression in Maryland. There is no reported decision in which a Maryland Court (or, for that matter, any other court) has addressed the question of whether a public information statute that prohibits government agencies from granting access to personal information such as the home addresses or telephone numbers of government employees applies to the disclosure of such information to a government contractor, *i.e.*, to an individual or business entity that provides services to the agency under a contract with the agency. Neither has the Attorney General of Maryland had occasion to opine on this question. Nevertheless, for the following reasons, I advise that the Maryland PIA does not prohibit a county agency from providing such information to a contractor if the purpose of the disclosure is to enable the contractor to administer or assist the agency in administering an agency program within the scope of its contract.

The PIA regulates the public's access to state and local government records. In general, the Act grants a right of access to public records. However, in certain instances it authorizes custodians, in their discretion, to grant or deny access; in other instances, it protects the privacy of certain kinds of records or information by prohibiting access by the public. The PIA also has been construed to regulate the access of one governmental agency to the records of another. *See* Public Information Act Manual, p. 5.⁶

However, the privacy provisions of PIA have never been understood to regulate the access of information by an agency's own employees or officials for use in the administration of an agency program, unless a particular provision of the Act or another provision of law limits the use of the information to a particular program or purpose.⁷ Furthermore, as the Federal Privacy Act demonstrates, there is no policy reason why a government contractor and its affiliates or employees should, for privacy law purposes, be treated any differently from the agency's own employees as long as they are administering or assisting the agency in administering an agency program and acting within the scope of their contract. Thus, "[a government] contractor and an employee of such a contractor is considered to be an employee of an agency for the purpose of the subsection of the Federal Privacy Act which prescribes criminal penalties for certain willful violations of the Act." 37A Am. Jur. 2d, Freedom of Information § 376, citing 5 USCS § 552a(i).

Accordingly, I advise that, in order to permit county employees who desire to do so to enroll in the County's Deferred Compensation Plan by telephone and, from time to time as individual

⁶ "A governmental unit is specifically given the right to inspect public records in §§10-612, 10-613, and 10-614 and is given the right to appeal a denial of inspection by §§10-622 and 10-623. Thus, when a request for inspection of records is made to a State agency by another State agency, a federal agency, or a local governmental entity, the custodian should consider the effect of the PIA. *See Prince George's County v. Maryland Comm'n on Human Relations*, 40 Md. App. 473, 485, 392 A.2d 105, 113 (1978), *vacated on other grounds*, 285 Md. 205, 401 A.2d 661; 81 *Opinions of the Attorney General* (1966) [Opinion No. 96-019 (May 23, 1996)]."

⁷ Income tax laws and public assistance laws typically contain such restrictions.

employees see fit, to make contribution changes by telephone, the Board may share with a plan servicing agent such as Fidelity the name, Social Security number, address, date of birth, date of hire, department and "related information" of every county employee eligible to participate in the Plan so long as that information is to be used: (1) solely within the scope of the plan servicing agent's Recordkeeping Agreement with the Board; and (2) only in response to *employee-initiated* requests for Plan information or action.

Nevertheless, it would be prudent to provide in writing for the specific, limited use of such information, and to that end I offer the following comments regarding the draft suggested by Fidelity.

1. Although the Recordkeeping Agreement, which is the sole basis for "Fidelity's" use of this information, is between the Board and Fidelity Investments Institutional Operations Company ("FIIOC"), the proposed confidentiality agreement is drafted to be between the Board and Fidelity Investments Public Sector Services Company ("FIPSSCo"). This is acceptable only if FIPSSCo is the successor to or assignee of FIIOC for purposes of the Recordkeeping Agreement, in which event FIPSSCo should be expressly identified as such in any Confidentiality Agreement. If FIPSSCo is neither the successor to nor the assignee of FIIOC for the purposes of the Recordkeeping Agreement, the Confidentiality Agreement must be with FIIOC, not FIPSSCo, because it is the performance of Fidelity's obligations and duties under the Recordkeeping Agreement that constitutes the sole basis for "Fidelity's" access and use of the "confidential" information.

2. I recommend that the "Confidentiality" provision be structured as an addendum to the Recordkeeping Agreement, not as a separate agreement. This would strengthen the context and scope of the "confidentiality" provision and the limited use that may be made of the information furnished under that provision. It also would insure that a breach of the confidentiality provision is a breach of the Recordkeeping Agreement.

3. The unnumbered first paragraph of the draft agreement states, "The data relates to current employee's social security numbers, addresses, date of birth, dates of hire, department and related information." I recommend that "related information" either be defined accordingly or deleted in favor of a statement of the specific kinds of information covered by the confidentiality provision.

4. Paragraphs 2 and 3 of the draft Confidentiality Agreement seem to anticipate that there will be circumstances under which Fidelity will initiate contact with employees who are enrolled in the Plan. This is contrary to your position that use of the data will be limited to participant-initiated telephone requests and The use of this information to market Fidelity products might constitute a violation of the Maryland Public Information Act, unless the employees who are market have given prior consent to the use of this information for that purpose. Therefore, I recommend that paragraph 2 be changed to:

FIPSSCO shall not use confidential data to initiate contact with any employee, whether or not enrolled in the Plan.

If there any circumstances under which Fidelity, within the scope of its recordkeeping contract, should be permitted to contact any employees directly, I recommend that those circumstances: (a) be spelled out in the agreement; (b) expressly exclude the marketing of products; and (c) instead of simply requiring that Fidelity give the Board two weeks notice, prohibit Fidelity from initiating a contact until it receives the express written approval of the Board or the appropriate official or employee of the Board.

5. I recommend the inclusion of the following paragraphs:

Fidelity expressly acknowledges that release of the information contrary to the provisions of the Maryland Public Information Act is a breach of this confidentiality addendum, a material breach of the Recordkeeping Agreement, and may subject Fidelity, its offending officers and employees to civil and criminal sanctions under the Maryland Public Information Act.

Fidelity agrees to notify the Board immediately upon discovery of any breach of this confidentiality addendum and to do so by means of a written memorandum that fully sets forth all facts regarding the breach, including, but not limited to, the name and address of each Fidelity official or employee who participated in the breach.

I trust that this memorandum is fully responsive to your request and of assistance. If I may be of further assistance in this regard, please let me know.