OFFICE OF THE COUNTY ATTORNEY

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MEMORANDUM

TO: Odessa Shannon
Executive Director
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VIA: Charles W. Thompson, Jr.
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Marc Hansen, Chief
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FROM: Robert G. Schoshinski
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DATE: June 12, 2000

RE: Disclosure of Information Gathered in Commission Investigations of Employment Discrimination Claims

This memorandum deals with your question of whether the staff of the Human Relations Commission (HRC) can release information gathered from an employer in an investigation of an employment discrimination claim to the complainant. The answer to the question depends on the nature of the information gathered by the HRC and the stage of the proceedings at which the request for disclosure is made. Depending on these factors, State and County law may: (1) require that the HRC disclose the information, (2) allow the HRC to disclose the information at its discretion, or (3) forbid the HRC to disclose the information.

I. Law Applicable to the Question.

A. County Law and Regulations.

Montgomery County Code Section 27-7(c) governs investigations conducted by the HRC as the result of a complaint alleging discrimination. It states, in pertinent part:

> "Any and all statements, matters or materials gathered during the investigation, including the identity of the complainant and the respondent, shall be held

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confidential until certified to the panel for hearing by the executive director, except that:

(1) Any information may be released at any time if the release has been agreed to in writing by both the complainant and the respondent;

(2) The identity of the complainant may be disclosed to the respondent at any time;

(3) The identity of the complainant and respondent may be made public after the parties have been notified that a hearing on their case has been scheduled, whether the hearing is public or private;

(4) Upon certification of a case for hearing, documents or materials gathered during the investigation and intended for use at hearing shall be available to the parties before the commission under the provisions of the county administrative procedures act although any investigatory materials which the commission or staff determines to be of a privileged or confidential nature and which are not to be presented or used at the hearing shall not be released to any party."

Under Section 27-7(b), therefore, the question of whether information and documents may be released is determined by the nature of the information to be released and the stage in the HRC hearing procedure during which the information is to be released.

Before the case is certified to a panel by the Director, the HRC may release the following information: (1) any information that the complainant and respondent consent to release in writing; and (2) the identity of the complainant to the respondent.

Once the Director has certified the case for hearing, the HRC can release the identities of the complainant and the respondent to the public. At this point the HRC can also release all documents or materials that are gathered during the investigation and intended for use at the hearing to the parties under the provisions of the County's Administrative Procedures Act (APA). The HRC must not release any investigatory materials which the HRC or its staff determines are privileged or confidential in nature and are not to be presented or used at the hearing.

The Regulations of the County Commission on Human Relations (Appendix K of the County Code) implement Chapter 27 of the Code. Regulation 9.3 states: "At any time prior to the hearing, the complainant and the respondent, or their designated representatives, at the discretion of the executive secretary, may be allowed to review the commission's investigatory file compiled on the complaint." The HRC may allow, at its discretion, the parties and their representatives to review the investigatory file. Because this regulation implements and is subordinate to the Code, the ability of a party to review the file is subject to the time and content restraints contained in Section 27-7(b).

Regulation 9.7 sets up a procedure through which a party or an interested person who believes that information involved in the complaint concerns personal or private matters can request that the HRC designate the information as confidential. (9.7(a)). If the HRC designates materials as confidential, the materials must not be made public or part of the record of the case. (9.7(c)). If the HRC deems the materials to be relevant and necessary to the proceedings, it must make them available in synopsis form with the confidential portions deleted. (9.7(d)).

B. State Law.

The primary Maryland law addressing the question of release of records and materials kept by governmental entities is Part III of the Public Information Act (PIA) which is found at the State Government Title of the Annotated Code of Maryland at Section 10-611 *et seq.* Section 10-611(g) defines a public record as "the original or any copy of any documentary material that . . . is made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business. . . ." The law goes on then to classify public records into categories: (1) those that the custodian must not allow the public to inspect (Sections 10-615 to 10-617), (2) those that the custodian may at its discretion allow the public to inspect (Section 10-618), and (3) all others which the custodian must allow the public to inspect (Section 10-613).

Section 10-613 of the PIA states that a custodian of a public record must permit any person to inspect any public record at any reasonable time, unless the law provides otherwise. Section 10-615 states that a custodian must deny the inspection of a public record or part of a public record if by law the record is privileged or confidential or if the inspection would be contrary to a State law, a federal law or regulation, a rule adopted by the Maryland Court of Appeals, or an order on a court.

Employment records are generally not protected by a legal privilege. Smith v. B. & O. R. R. Co., 473 F. Supp., 572, 585 (D. Md. 1979); 80 *Opinions of the Attorney General*, June 2, 1995, Opinion 95-019. Portions of employment records, however, may be covered by some other privilege. For instance, the federal Americans with Disabilities Act (ADA) requires that employers keep any information received about an employee or applicant as the result of a medical examination confidential. 42 U.S.C. Section 12112 (d)(2), (d)(3) & (d)(4). The privileges recognized by Maryland law, such as the psychiatrist-patient privilege, might also apply to portions of employment records. If the record does not fall within any privilege, the custodian must next determine whether it falls into either the category of records that the public must not inspect or the category of records that a custodian may, in her or his discretion, allow the public to inspect.

Section 10-616 of the PIA lists categories of specific records for which the custodian must deny inspection. Three of these categories are relevant to the issue of disclosure of

employment records. The first is Section 10-616(d) which requires a custodian to deny inspection of a letter of reference. The second is Section 10-616(g) which requires, with specific exceptions, that a custodian deny inspection of retirement records.

Section 10-616(i) requires that a custodian deny inspection of "a personnel record of an individual, including an application, performance rating, or scholastic achievement information." The custodian must permit the person in interest or her or his supervisor to inspect such records, however. The primary focus of this exemption is personnel files of government employees, but the language of the statute is broad enough to include personnel files of persons other than government employees that become public records. 79 *Opinions of the Attorney General* (1994), Opinion No. 94-026 (May 9, 1994) ("As elected or appointed public officials, judges may not be 'employees' in the conventional sense, but they are surely 'individuals' about whom personal information of the kind commonly found in a 'personnel record' is maintained.").

Section 10-617 lists categories of portions of public records for which the custodian must deny inspection. Three of these categories are relevant to the issue of disclosure of employment records. Section 10-617(b) requires a custodian to deny inspection of any portion of a public record that contains medical or psychological information about an individual. Section 10-617(e) requires a custodian to deny inspection of any portion of a public record that contains the home address or telephone number of a public employee. Section 10-617(f) requires a custodian to deny inspection of any portion of a public record that contains information about the finances of an individual.

Section 10-618 addresses categories of parts of public records for which the custodian may allow or disallow public inspection. In order to deny public inspection of records within these categories, the custodian must make a determination that the release of the part in question would be contrary to the public interest. The category which is relevant to the release of employment records is Section 10-618(f) which addresses records of governmental investigations. Section 10-618(f) states that:

"a custodian may deny inspection of:

(i) records of investigations conducted by the Attorney General, a State's Attorney, a city or county attorney, a police department, or a sheriff;

(ii) an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or

(iii) records that contain intelligence information or security procedures of the Attorney General, a State's Attorney, a city or county attorney, a police department, a State or local correctional facility, or a sheriff."

Records compiled by the HRC in an investigation of employment discrimination are not covered by either subsection (i) or (iii), but are covered by subsection (ii). Equitable Trust Co. v. State Commission on Human Relations, 399 A. 2d 908, 921 (Md.App. 1979), rev'd on other grounds, 411 A.2d 86 (Md. 1980) ("where files are prepared in connection with related government

litigation and adjudicative proceedings currently under way or contemplated, they are compiled for law enforcement purposes . . . "). The custodian of such records may, therefore, deny inspection of them if he or she believes that it would be contrary to the public interest.

If the person requesting inspection is a "person in interest,"[1] the custodian may deny the inspection only to the extent that the inspection would:

"(i) interfere with a valid and proper law enforcement proceeding;
(ii) deprive another person of a right to a fair trial or an impartial adjudication;
(iii) constitute an unwarranted invasion of personal privacy;
(iv) disclose the identity of a confidential source;
(v) disclose an investigative technique or procedure;
(vi) prejudice an investigation; or
(vii) endanger the life or physical safety of an individual." 10-618(f)(2).

Even if the PIA authorizes inspection of a public record, the custodian may still deny inspection temporarily if he or she believes that disclosure would cause substantial injury to the public interest. Section 10-619. If the custodian temporarily denies inspection on the grounds that it would be contrary to the public interest, he or she must, within ten days, petition the circuit court to order the continued denial of inspection and serve a copy of the petition on the person seeking inspection. The custodian has the burden of justifying the non-disclosure of the record. Cranford v. Montgomery County, 481 A.2d 221, 227 (Md.1984). The custodian cannot simply assert that disclosure is contrary to the public interest, but must also carefully balance the likelihood of harm to the public interest against the public's "right to know." 64 *Opinion of the Attorney General* 236, 242 (1979).

II. Opinion.

A. Requests Made Prior to Certification for Hearing.

During the investigatory stage of the complaint, Code Section 27-7(c) requires that the HRC staff not release any information gathered from the respondent in the investigation, except information that the respondent agrees to release, to the complainant. This requirement is consistent with the State's PIA as long as the HRC makes a "public interest" determination as required by S.G. Section 10-618. That means that, where the complainant is the subject of the record sought, the HRC must first determine that the release of the record would result in one of the harms listed in Section 10-618(f)(2), such as interference with a law enforcement proceeding or prejudice to an investigation before deciding not to release the record. Where the complainant is not the subject of the record sought, the HRC must determine that the release of the record

[1] Defined as "a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit . . . ." State Government Section 10-611(e)(1).

would be contrary to the public interest before deciding not to release the record.

B. Requests Made After Certification for Hearing.

Once a complaint has been certified for hearing, the HRC must make all materials and documents gathered in the investigation that are intended for use at the hearing available to the complainant. If, however, the HRC determines that certain materials gathered during the investigation are privileged or confidential and will not be used at the hearing, it must not release those materials to the complainant under Code Section 27-7(b). The HRC should make a series of determinations to determine whether requested materials should be released.

i. Is the Material Relevant to the Issues Raised in the Complaint?

The first determination that the HRC must make, therefore, is whether the particular material or document is relevant to the issues raised by the complaint. If it is relevant, it is information that can be used at the hearing and must be provided to the complainant. The HRC is not required to release those materials considered irrelevant to the complainant, and should consider returning the irrelevant materials to their source so that the HRC is no longer a custodian of those records under the State PIA.

ii. Is the Material Covered by a Legal Privilege?

The next determination that the HRC must make is whether any part of the materials sought are subject to some legal privilege recognized by State or federal law. These privileges include the attorney-client, psychiatrist-patient and clergy-penitent privileges recognized by State law and the medical examination privilege recognized by the federal ADA. The attorney-client privilege, for instance, would cover communications between the HRC and the Office of the County Attorney as well as any advice given over the course of an investigation. As noted above, employment records are generally not privileged. Any materials which contain privileged information should be redacted to remove the information before they are released to the complainant. The HRC will not need to do this, of course, where the person seeking release of the materials is the person protected by the privilege. A party will usually waive any privilege covering a document by disclosing it to a third party.

iii. Is the Material Confidential?

The HRC must next determine whether any of the material sought is confidential. If the HRC determines that a document or some portion of a document is confidential in nature, but relevant to the complaint, it may release a written synopsis of those confidential portions or delete names or other identifying information from the record to protect the identity of its

subject.[2]

iv. Is Disclosure of the Material Barred by a Section of the PIA?

The HRC should next determine whether public inspection of any of the investigatory materials would be barred by the State Public Information Act. As discussed above, Sections 10-616 and 10-617 of the PIA bar public inspection of certain documents and portions of documents, such as personnel files and medical information. The HRC should redact those portions or put them in synopsis form to comply with the PIA.

v. Restrictions on Disclosure Versus Party's Due Process Rights.

Where certain documents or portions of documents are relevant to the hearing of a complaint, Constitutional due process may require that they be provided to the complainant even though the PIA bars their public inspection. The determination of whether a party's due process rights to view these documents outweigh the prohibitions of the PIA is a legally complex decision. The HRC may wish to use a policy of providing the party a detailed list of the documents that are barred from inspection by the PIA rather than the documents themselves. Such a list is known in public information law as a "Vaughn" index[3] and the Maryland Court of Appeals has approved its use.[4] The list would contain the date, author, general subject matter and the provision of the PIA which bars disclosure of each document not disclosed. The party or her or his attorney could then use the "Vaughn" index to decide whether to challenge the denial of inspection on due process grounds. Where a party makes such a challenge, her or his due process claim can then be evaluated by the HRC and the Office of the County Attorney and might ultimately be decided by the courts.

A potential tool for providing confidential documents while protecting their confidentiality is the use of a device like the protective order used by courts in such situations. The courts use a protective order when disclosing sensitive documents to a party. The order requires that the parties not reveal the subject information to anyone but the parties and their

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[2] Regulation 9.7(d) of the County Commission on Human Relations.

[3] Named for the case in which its use was first articulated: Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), cert. denied, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

[4] Office of the State Prosecutor v. Judicial Watch, Inc., 737 A.2d 592 (Md. 1999); Cranford v. Montgomery County, supra at 230.

attorneys. The use of a protective order by Maryland Courts is authorized by State law.[5] The HRC, however, has not been authorized to make such orders. Absent authorization, the HRC could try to provide similar protection when releasing confidential documents to parties by, before releasing the documents, requiring the parties to sign an agreement that they will not disclose or publish the contents of the documents. The weakness of such an agreement, however, is the lack of any real penalty to impose on a party who breaches it, especially after the case has been resolved. Consideration should be given to amending Code Chapter 27 to authorize the HRC to issue a protective order when releasing confidential documents to parties in a complaint hearing and to provide a penalty for the violation of a protective order.

Given the restrictions discussed above, there is no legal reason why the HRC should not release any relevant materials gathered from the respondent during the investigatory stage to the complainant once the case has been certified for hearing. Safeguards such as redaction of names and identifying information, use of synopses and use of "Vaughn" indices can fulfill the need to protect confidential information from public review. In using these safeguards when releasing investigatory materials to the complainant, the HRC will comply with County and State law.

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[5] Maryland Rule 2-403 provides for the use of protective orders to control discovery in Circuit Court actions.