OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
*County Executive*

Charles W. Thompson, Jr.
*County Attorney*

MEMORANDUM
**Privileged and Confidential**
**Attorney-Client Communication—Attorney Work Product**

June 19, 2000

TO: Mike Faden, Senior Legislative Attorney

FROM: Marc Hansen, Chief, General Counsel Division
Office of the County Attorney

RE: Charter Sections 505 and 109—Are Amendments Needed?

**Problem**

*Charter Section 505*

Charter Section 505 provides that any person shall have the right to inspect any document except police records, personnel records, or records of a "confidential private nature as defined by law." A review of the history of Section 505 indicates that a court may narrowly construe this provision. A narrow construction would eliminate the authority of county officials to utilize the "permissible denials" under the Public Information Act.

Under the Public Information Act (PIA), a custodian may deny inspection of a public record if the custodian concludes that disclosure would be contrary to the public interest. Categories of material subject to this "permissible denial" are:

1. Interagency and intra-agency documents. As you know, this category relates to documents containing pre-decisional opinions and recommendations of staff and consultants.
2. Examinations, including scoring keys, relating to the administration of licenses, employment and academic matters;
3. Research projects conducted by the government;
4. Appraisals of real property;
5. Investigations conducted by law enforcement agencies such as the County Attorney's Office, Department of Environmental Protection, Ethics Commission, *etc.*; and

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6. Other records that the custodian concludes would cause substantial injury to the public if disclosed. As you know this last category requires the custodian to seek judicial approval of the denial. This denial is known under the PIA as a temporary denial, but for purposes of this memorandum I will treat it as a permissible denial. Inspector General investigation records may be protected from release under this provision.

*Charter Section 109*

As you know under the Open Meetings Act, the Council must transact public business in meetings open to the public. But the Open Meetings Act permits the Council to close meetings for certain purposes. These purposes include: discussion of personnel matters; consultation with legal counsel; consultation with staff and counsel regarding pending or potential litigation; acquisition of property; proposal of a business to locate, expand or remain in the state; consideration of matters relating to collective bargaining negotiations, *etc.*

Charter Section 109 provides—with regard to counsel sessions—that, "No business shall be transacted or any appointments made, or nominations confirmed, except in public session." This charter provision—if interpreted literally—means that the counsel does not have the authority to utilize the provisions of the Open Meetings Act to conduct closed sessions.

**Proposed Solution**

Charter Sections 505 and 109 should be modernized to conform with state law. In both cases the charter provisions preceded the enactment of the state Public Information Act and Open Meetings Act. I recommend consideration be given to amending:

Charter Section 505 to read, "Any person shall have the right to inspect any public record as authorized under State law."

Last sentence of Charter Section 109 to read, "Except as permitted by law, no business shall be transacted, or any appointments made, or nominations confirmed except in public session."

**Discussion**

The phrase "confidential private" is curious. Unless one construes the phrase as a redundant couplet, it may lead a court to conclude that the term "private" limits the exception to confidential information to information about an individual.

Charter Section 505 has been in the Charter in its current form since 1968. The 1968 charter review commission report states, "Additional language has been added to make it clear that the right to information does not extend to personnel records or the records of a confidential, private nature as may be defined by law. An example of information in the latter category would be individual income tax returns." A copy is attached.

According to the 1968 charter review commission report, Section 505 was intended to continue the previous charter's policy concerning public access to government records (Article VIII, Section 3). Section 3 provided in pertinent part:

> All books, accounts, and papers of any department, except police records and papers in individual case records, shall at all times be open to the inspection of any tax payer, subject to such reasonable rules and regulations in regard to the time and manner of such inspection of the county manager with the approval of the County Council in executive session may make. . . . This section shall not apply to any papers prepared by or for counsel for use in actions or proceedings to which the county is a party or for use in any investigation authorized by or under this Charter.

This provision appeared in the County's first charter in 1948. As can be seen, the exceptions to disclosure are narrow: police records and papers regarding individuals; attorney work product; and investigations authorized under the charter.

Accordingly, the legislative history of Charter Section of 505 would support a court construing the phase "confidential private nature" as being limited to private information about an individual.

In 1980, County Attorney Paul McGuckian also appears to have concluded that Charter Section 505 requires disclosure of materials covered by the permissible denials under the Public Information Act. See Pages 3-4 of County Attorney Opinion 80.004, attached. But the opinion concludes that until the council adopts regulations regarding non-disclosure of public documents, the permissible denials set out in the Public Information Act are available to county custodians. This conclusion, however, relies on the doctrine of superior authority to conclude that State law prevails. When the Court of Appeals construed the Open Meetings Act, the court concluded that the local law was more stringent and hence prevailed.[1] The Court may reach a similar result if called upon to determine if the General Assembly intended that the Public Information Act should advance openness in government under similar circumstances. The conclusion does not take into account the legislative history of Charter Section 505. Nor does it take into account the

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[1] *See City of College Park v. Cotter*, below.

language of Section 10-618 of the Public Information Act which provides that a custodian may deny inspection of certain records "unless otherwise provided by law."

A court could reasonably conclude that the county charter qualifies as a law that prohibits county custodians from exercising their discretion under the PIA to deny inspection of public records that fall within the ambit of the permissible denial provisions of the PIA.[2] A court could reason that Charter Section 505 waives the County's right to maintain confidentiality of records covered under the permissible denial provisions of the Public Information Act.

The impact of finding that Section 505 constituted a waiver of confidentiality would be significant. As indicated the category of permissible denials under the PIA include interagency and intra-agency memorandum. The 1980 County Attorney opinion points out that the public purpose is advanced by permitting a custodian to treat recommendations and opinions of staff as confidential. To expose staff to the prospect that their opinions may appear on the front page of a newspaper would have a significant chilling affect on the willingness of staff to engage in creative thinking and to provide decision makers with candid opinions. Although not cited in the 1980 County Attorney opinion, another reason for protecting the confidentially of staff opinions is to prevent public confusion over the actual reason used by a decision maker when adopting an official position.

Another troublesome area involves disclosing investigatory records. A requirement to disclose investigation records would significantly impact many agencies, including the Inspector General, the County Attorney, the Ethics Commission, and the Department of Environmental Protection. This could be especially problematic with respect to revealing the identity of confidential informants—unless, of course, one reads the phase "confidential private" in Charter Section 505 as covering the identity of an informant.

Another area of concern is communications covered by the attorney-client privilege. As you know the attorney-client privilege can be waived by the client. Arguably, Charter Section 505 does exactly that. Accordingly, legal opinions to decision makers may be disclosable under Charter Section 505.

Certainly an argument can be made that the phrase "confidential private" is board enough to include intra-agency memorandum, attorney-client communications, and records of an investigation. But the weight of Section 505's legislative history coupled with the public policy of the Public Information Act favoring disclosure (except with regard to private information

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[2]The 1980 County Attorney opinion is, in my view, correct in concluding that the mandatory denials under the state Public Information Act override Charter Section 505. Accordingly, a county custodian is not authorized to disclose records that the state Public Information Act indicates must be kept confidential.

about an individual) could well lead a court to conclude that Charter Section 505 prevents county custodians from utilizing the permissible denials under the Public Information Act, including the attorney-client privilege.

**Charter Section 109**

The exact scope of the last sentence in Charter Section 109 regarding the prohibition against the council transacting business in closed sessions is not clear. The 1968 charter review commission report, a copy of which is attached, references the existing charter provisions regarding requirements that legislative sessions of the council be open but that executive sessions were allowed to be opened or closed as the council determined. There is no indication in the charter report that there was an intention to alter that arrangement.

But the unqualified nature of the last sentence ("No business shall be transacted....except in public session") is not entirely consistent with this legislative history. Moreover, this sentence appears in a section of the charter that deals with both legislative and non-legislative sessions of the Council.

Section 10-504 of the Open Meetings Act provides, "Whenever this subtitle and another law that relates to meetings of public bodies conflict, this subtitle applies unless the other law is more stringent." In *City of College Park v. Cotter*, 309 Md 573 (1987), the Court of Appeals construed a provision of the charter of College Park that required "All meetings of the mayor and council herein provided for, shall be opened to the citizens of the city." The Court concluded that this provision prohibited the city council from utilizing the provisions of Section 10-508 of the state Open Meeting Act to close meetings. According to the Court the city charter waived the city council's attorney-client privilege, and so the council could not consult in a closed session with its attorney to obtain legal advice.

Given the clearness of the language of Charter Section 109 and Section 109's less than clear legislative history, a court might reasonably conclude that the County Council, like the city council of College Park, must conduct all of it sessions in public.

cc: Chuck Thompson
Jerry Pasternak
Jud Garrett
Ed Lattner
Richard Melnick
Charles Frederick

MPH:ppb
I:\GJ\HANSEM\amendments=m=charter section 505 & 109.wpd

Section 503 - Annual Compilation of Laws

This section, requiring an annual compilation of law, is substantially the same as Article VIII, Section 6a in the present charter. The August 1 date in the present charter was changed to June 30 in order to insure that the compilation will be prepared by the earliest practical date. Provision was also made for the inclusion of rules and regulations issued by the County Executive with the authorization of the County Council.

Section 504 - County Code

This section, requiring a publication of an annotated code every five years, is similar to Article VIII, Section 6b of the present charter. A provision was made that the compilation shall be made under the direction of the County Attorney. This is in conformity with present procedures.

Section 505 - Right to Information

This section is similar to Article VIII, Section 3 of the present charter. The limitation to taxpayers of the right to inspect has been eliminated. Additional language has been added to make it clear that the right to information does not extend to personnel records or the records of a confidential, private nature as may be defined by law. An example of information in the latter category would be individual income tax returns. The description in the present charter of the procedure to be followed in obtaining a court order for the inspection of books was not considered necessary and has been eliminated. However, it is intended that normal judicial process would be available to enforce rights granted under this section.

THE
COUNTY ATTORNEY
FOR
MONTGOMERY COUNTY, MARYLAND

Opinion No. 80.004

Date February 7, 1980

Robert W. Wilson
Chief Administrative Officer

FROM: Paul A. McGuckian
County Attorney

RE: Types of County Executive's Correspondence Subject to Public Disclosure

You have requested guidance from this office regarding the types of County Executive's mail which a newspaper reporter is entitled to see on request. Upon review of applicable law, we have determined that the reporter is entitled to see all correspondence except that which falls within specific exempt categories. Examples of such correspondence which would be exempt from disclosure include personal mail, inter and intra office/agency correspondence relating to policy formulation, correspondence in connection with past or present investigations, legal opinions and other "work product" of the County Attorney's office and mail relating to County Personnel.

THE LAW

As a political subdivision of the State, Montgomery County Government is subject to the operation of State Law. The Maryland General Assembly has enacted a "Public Information" Act (hereinafter, the "Act") as Article 76A of the Annotated Code of Maryland, recently amended in 1978, which mandates disclosure of nearly all public records. "Public Records" as defined in the Act includes "any paper, correspondence...or other written document...made by any instrumentality of the State or a political subdivision, or received by them in connection with the transaction of public business...." The Act is similar in many respects to the Federal Freedom of Information Act, interpretations of which provide valid guidance to the meaning of the Maryland Law.

Mechanically, the Act is composed of six sections, with separate sections 1 and 1A counting as two. Section 2 of the Act provides the general rule as to disclosure:

> "All public records shall be open for inspection by any person at reasonable times, except as provided in this article or as otherwise provided by law."

Thus, unless specifically covered by an exemption to the general rule of disclosure, the County Executive's correspondence must be made available for inspection.

The exceptions to disclosure are contained in Section 3 of the Act. From the point of view of screening the County Executive's mail for public inspection purposes, this is the most important section of the Act. These exceptions to disclosure, discussed in more detail below, fall into two general categories:

1. Mandatory refusal of inspection;

2. Discretionary refusal of inspection, if contrary to the public interest.

Subsections (a) and (c) of Section 3 of the Act are mandatory non-disclosure provisions; subsection (b) material falls within the discretionary inspection category. In addition, the Act permits in Section 3 (c) a temporary refusal of disclosure of any material if in the opinion of the custodian the disclosure "would do substantial injury to the public interest." This safety valve provision permits permanent non-disclosure by order of the Circuit Court upon application by the custodian.

The Act also specifies duties of the custodian with respect to response to requests for inspection and access procedures. The custodian's responsibilities will be discussed below.

It should be noted that the Montgomery County Charter also addresses the issue of public access to information. To the extent that the Charter is in conflict with State law, State law controls; however, where the Charter provides disclosure policy supplemental to the State's pronouncements, these County level provisions are to be followed. Particularly germane are Charter provisions addressing discretionary disclosures under Subsection (b) of Section 3 of the State Act, guiding the

custodian's decision as to the public interest and policy with respect to disclosure of these often sensitive documents.

The Charter is clear as to disclosure of fiscal documents required by the Charter. Section 316 of the Charter provides:

> "All fiscal documents required by this Charter shall be public records, and copies shall be made available to the public. Any estimates, reports, or justifications on which they are based shall be open to public inspection subject to reasonable regulations."

Although many of these documents are required to be disclosed under existing State law, this Charter provision further emphasizes the requirement of their disclosure. Thus, documents falling within this fiscal document category, i.e., documents relating to finances as defined in Article 3 of the Charter, shall be disclosed. This Charter provision is not in conflict with State law and to the extent the specified documents might fall within the discretionary disclosure section of the State Act, Section 3(b), the County Charter clearly announces the public policy of disclosure with respect to them.

The Charter also broadly addresses disclosure of information to the public in Section 505, which states:

> "Any person shall have the right to inspect any document, except confidential police records, personnel records, or records of a confidential private nature as defined by law. The Council may adopt reasonable regulations for such inspection. A certified copy of any such document shall be furnished upon payment of a reasonable fee established by such regulations. This section shall not apply to a document or other material obtained or prepared in anticipation of litigation or for use in legal proceedings to which the County is a party."

This provision is unchanged from the original version of the present Charter ratified by the voters in 1968. It was derived from Article VIII, Section 3 of the earlier County-Manager Charter which had permitted inspection of all records of the County by any taxpayer, except police records and individual case records, litigation materials and investigatory papers.

The application of this latter Charter provision is unclear. As discussed above, State law controls to the extent that it speaks to the subject. Thus, only discretionary disclosures under Section 3(b) of the State Act appear open to County level policy; mandatory disclosures and non-disclosures are conclusive at the State level. Moreover, Section 505 contains broad exceptions to disclosure, including "records of a confidential private nature as defined by law." Until the County Council provides further guidance through law specifying documents to be open to public inspection and documents to be maintained as confidential and adopts regulations for inspection as provided in the Charter, we must look to State law to define the perimeters of disclosure. It should be understood, however, that there is potential for refinement of County disclosure policy with respect to discretionary disclosures of the State Act under Section 505 of the Charter.

## THE EXCEPTIONS TO DISCLOSURE

As stated above, all correspondence to the County Executive must be disclosed except correspondence falling within the exceptions contained in Section 3 of the Act. This Section is crucial to the custodian's decision whether to disclose and open to inspection the records requested. It should be consulted frequently and, because it covers a myriad of exceptions and circumstances too numerous to discuss here, it is attached hereto as Exhibit "A" and incorporated herein. Rather then attempt to discuss the endless interpretations of these exceptions as they apply to specific correspondence sent to the County Executive, this memorandum will address only certain categories of the exceptions expected to be most often encountered. The custodian should review carefully each piece of correspondence against the exemption section of the Act in making a decision whether it should be disclosed or not; if the custodian is in doubt, this Office should be consulted for a case-by-case interpretation.

### A. Personal Mail.

The County Executive's personal mail need not be disclosed to the public, and in the interest of privacy, should not be. By definition, such correspondence is not a public record subject to inspection under the law. See Art. 76A, Sec. 1 (b), Ann. Code of Md. (1978 Cum. Supp.), defining public records as correspondence "in connection with the transaction of public business." Thus, the County Executive's private mail unrelated to the public business of the County should be segregated from other correspondence prior to inspection by the public.

B. Inter and Intra Office/Agency Correspondence.

This correspondence falls within the discretionary exemption category of the law, subsection (b). Id., at Sec. 3 (b) (v). Specifically, this exemption provides that the custodian may deny the right of inspection, if disclosure would be contrary to the public interest, of "interagency or intraagency memorandums or letters which would not be available by law to a private party in litigation with the agency." This exception is borrowed almost word for word from the federal Freedom of Information Act which has been interpreted in several Court decisions.

It has been stated with respect to this exemption in the federal statute that this inter/intra agency exception was intended to encourage and protect the free expression of ideas within government during the process of deliberation and policymaking. 66 Am.Jur.2d Sec. 40 (1973); American Mail Line, Ltd. vs. Gulick, 411 F. 2d 696 (D. C. Cir. 1969); Bristol-Myers Co. vs. Federal Trade Comm., 424 F. 2d 935 (D. C. Cir. 1970); 7 ALR. Fed. "Freedom of Information Act - Exceptions" 855 (1971). It was felt by those who passed the federal law that a full and frank exchange of opinions within an agency would be impossible if all internal communication were made public, that a government should not be required "to operate in a fishbowl." American Mail Line, Ltd. vs. Gulick, supra; 7 ALR. Fed. supra at 862. However, government may not throw a protective blanket over all information by casting it in the form of a memorandum, and, at the bottom line, the applicability of this exception must be determined by balancing the applicant's need with the government's right of priviledge. Bristol-Myers Co. vs. Federal Trade Comm., supra.

From interpretations of the federal Act, several principles can be distilled with respect to this exemption in the State Act:

1. Purely factual material, as opposed to deliberative or advisory opinions, must be disclosed, unless it is inextricably intertwined with policy-making processes. See 7 ALR. Fed., supra at Sec. 4 [a].

2. Memoranda representing law which the agency or government has actually adopted, even if deliberative rather than factual, if it

represents final policies, statements or interpretations which government has actually adopted or will follow in the future, must be disclosed. Davis, "Administrative Law of the 1970's" (Supplementing Administrative Law Treatise) Sec. 3A. 21-4 (1976); Schwartz vs. IRS, 511 F. 2d 1303 (D. C. Cir. 1975); Sterling Drug Inc. vs. FTC, 450 F. 2d 698, 708 (D. C. Cir. 1971) ("...the policy of promoting the free flow of ideas within the agency does not apply here, for private transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into making the law, they are the law itself" (emphasis added).). Mere advisory opinions, however, need not be disclosed. International Paper Company vs. FPC, 430 F. 2d 1349 (2d Cir. 1971); Washington Research Project, Inc. vs. HEW, 504 F. 2d 238 (D. C. Cir. 1974), cert. den. 421 U.S. 963 (1975).

3. If government rules or acts relying exclusively on a memorandum and giving no other basis for its action, the memorandum loses its exempt status and becomes a public record required to be disclosed. 66 Am.Jur.2d, supra; American Mail Line, Ltd. vs. Gulick, supra.

All other inter and intra agency/office correspondence may be refused disclosure, if disclosure is contrary to the public interest in the opinion of the custodian. Thus, adopting federal decisional law as a proper interpretation of the scope of the Maryland Act exemption, disclosure of inter and intra agency/office mail should be made only if such mail falls within the above three exceptions, or disclosure is otherwise warranted in the public interest.

C. Investigatory Correspondence.

This correspondence also falls within the discretionary disclosure subsection of the Act. As with office/agency correspondence, the custodian may deny the right of inspection of investigatory correspondence if disclosure would be contrary to the public interest. But in addition, such material may be denied a "person in interest" (a person directly affected) only under conditions specified in the Act. Since a reporter is not such a person in interest, we will not discuss this caveat to this particular type of correspondence.

This correspondence comprises two categories: (1) investigations or intelligence information or security procedures of any Sheriff, County Attorney, State's Attorney, Police Department and other specific law enforcement bodies listed in the Act, and (2) investigations and intelligence information compiled for any other law enforcement purposes, such as county agency enforcement of local laws. The second category requires an additional showing of a law enforcement purpose, while this purpose is automatically assumed for the first category of specified law enforcement bodies. Superintendent, Maryland Police vs. Henschen, 279 Md. 468, 369 A. 2d 558 (1977). Examples of correspondence which should not be disclosed under this exemption are complaint letters which would be directed to the Department of Environmental Protection for possible investigation, letters replying to requests for information in an investigation by a county agency and copies of correspondence sent to the County Attorney with respect to any pending case or investigation. Past, as well as present investigations, are included within the umbrella of this exemption. See 17 ALR. Fed. "Federal Administrative Records - Exempt Files" Sec. 4 [a](1973).

In addition, there may be other laws prohibiting disclosure of investigatory information which may reach the County Executive's Office. For instance, confidentiality of complainants and respondents, and the fact that a charge has been filed, in Human Relation's Commission proceedings is required by federal law as well as the State Public Information Act. Also, Article 49B Section 13, of the Annotated Code of Maryland (1979 Repl. Vol.), specifically requires all matters pertaining to such investigations be maintained strictly confidential upon penalty of fine and imprisonment. See attached copy of County Attorney Opinion 75.066, dated July 15, 1975, marked as Exhibit "B". This disclosure is obviously not discretionary and each such investigatory correspondence must be reviewed carefully prior to disclosure.

D. County Attorney Correspondence.

Correspondence from the County Attorney is exempt from disclosure since it is privileged by law to the extent that it represents correspondence within the attorney-client relationship or is attorney work product. Art. 76A, Sec. 3 (a) (iv), Ann. Code of Md. (1978 Cum. Supp.). Work product includes all writings which reflect an attorney's mental impressions,

conclusions, opinions or legal theories. See Rule 400 (d), Maryland Rules of Procedure. Also, within this exemption and the investigatory matters exemption, correspondence pertaining to documents prepared in anticipation of litigation or for trial should not be disclosed. This would include real estate appraisals, specifically mentioned in the discretionary section of the Maryland Public Information Act. Art. 76A, supra at Sec. 3 (b) (iv). Of course, published opinions of the County Attorney and legal documents, such as suit papers, are a matter of public record.

E. Personnel Matters.

Both by Charter and the State Public Information Act, disclosure of personnel matters is forbidden. Sec. 505, Charter of Montgomery County, Maryland; Art. 76A, Sec. 3 (c) (iii), Ann. Code of Md. (1978 Cum. Supp.). In addition, common law rights of privacy mandate non-disclosure of personnel and medical files. 66 Am.Jur.2d, Sec. 40 (1973). In a related mandatory exception to disclosure in the State Act, letters of reference sent to the County Executive may not be disclosed. Art. 76A, supra at Sec. 3 (c) (iv). Therefore, any correspondence relating to past or current employees of Montgomery County, or letters of reference for an applicant for employment with Montgomery County, should be denied disclosure.

The above exempt categories are far from complete. The custodian should review carefully all of the exceptions to disclosure contained in Section 3 of the Act and apply them to the County Executive's correspondence. Mail outside of the exemptions discussed above and others contained in Section 3 of the Public Information Act must be made available for public inspection by reporters and other private individuals.

THE DUTIES OF THE CUSTODIAN

The custodian of the County Executive's correspondence to whom requests for inspection are directed is given certain discretionary powers and subject to certain duties under the Maryland Public Information Act. Under Section 2 of the Act, he may make inspection and production of the requested correspondence subject to such rules and regulations as are reasonably necessary to (1) protect the record or correspondence and (2) prevent unnecessary interference with the regular discharge of the duties of the custodian,

or his office. Under Section 4 of the Public Information Act, the custodian has the right to set a reasonable fee for copies of requested materials. The person requesting inspection has a general right under Section 4 to be furnished copies of the correspondence, or facilities and/or access for the purpose of producing such copies.

In accordance with the Memorandum of the Chief Administrative Officer, dated October 25, 1977, we would recommend a uniform charge of $.10 per page for copies of requested materials, except for police and accident reports which are $1.00 per report. A copy of this memorandum is attached as Exhibit "C" for convenient reference.

Under the Act, the custodian is subject to certain strict time limits in which he must reply to requests for inspection. This duty to reply appears to be triggered only in the case of written requests for inspection. For instance, if requested records are not in his possession, section 2 (b) of the Act requires the custodian to inform the applicant for inspection of that fact within ten working days of receipt of the request. The custodian must also, if known, inform the applicant for inspection of the location of the requested material and the custodian thereof. Likewise, under Section 2 (c) of the Act, if public records requested are not immediately available, the custodian, within ten working days, must notify the applicant for inspection of that fact and specify a date and hour within a reasonable time when the record will be available for inspection. Also, such notifications by the custodian, as a practical matter, should be in writing.

Whenever the custodian denies a written request for access to any public record under a Section 3 exception, discussed above, the custodian must provide a written statement to the applicant, within ten working days of the request. This statement must set forth grounds for denial, including a citation to the law permitting such non-disclosure, and a statement of remedies for review of the denial. The latter requirement can be accomplished by attaching a copy of Section 5 of the Act. In addition, in cases where the material is not otherwise exempt, but the custodian feels disclosure would do substantial harm to the public interest, the custodian may temporarily deny access; however, he must apply to the Circuit Court within ten working days of the request for access for an order permitting permanent denial of access. Art. 76A, Section 3 (e), Ann. Code of Md. (1978 Cum. Supp.).

THE IMPLEMENTATION

We recommend that the County Executive's mail be reviewed by a member of the Executive's staff after receipt and processing by Ann Riley of Correspondence Control. Copies should be made of correspondence required to be disclosed and maintained in a separate file available to the public. Arrangements should be made for photocopying of material in this file, as requested.

After review for disclosure purposes, the staff member should forward correspondence to appropriate parties, according to present practice.

Our office is available to the staff member for a case-by-case determination as to the disclosure status of any particular correspondence.

PAM:CHS:jm

Enclosures

EXHIBIT A



Maryland may not unilaterally subject the Washington Metropolitan Area Transit Authority to the provisions of this article. C.T. Hellmuth & Assocs. v. Washington Metropolitan Area Transit Auth., 414 F. Supp. 408 (D. Md. 1976).

**Inspection of marriage records.** — The Act does not in general authorize a clerk of court to deny public inspection of marriage records, no matter what their intended use. 61 Op. Att'y Gen. 702 (1976).

**Monthly mileage records filed in vehicle office of local health department** are available to the public under the Act. 60 Op. Att'y Gen. 498 (1975).

Cited in Green v. State, 25 Md. App. 679, 337 A.2d 729 (1975).

## § 3. Custodian to allow inspection of public records; exceptions; denial of right of inspection of certain records; court order restricting disclosure of records ordinarily open to inspection.

(a) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (b) or (c) of this section:

(i) Such inspection would be contrary to any State statute;

(ii) Such inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law;

(iii) Such inspection is prohibited by rules promulgated by the Court of Appeals, or by the order of any court of record; or

(iv) Such public records are privileged or confidential by law.

(b) The custodian may deny the right of inspection of the following records or appropriate portions thereof, unless otherwise provided by law, if disclosure to the applicant would be contrary to the public interest:

(i) Records of investigations conducted by, or of intelligence information or security procedures of, any sheriff, county attorney, city attorney, State's attorney, the Attorney General, police department, or any investigatory files compiled for any other law-enforcement, judicial, correctional, or prosecution purposes, but the right of a person in interest to inspect the records may be denied only to the extent that the production of them would (A) interfere with valid and proper law-enforcement proceedings, (B) deprive another person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, (E) disclose investigative techniques and procedures, (F) prejudice any investigation, or (G) endanger the life or physical safety of any person;

(ii) Test questions, scoring keys, and other examination data pertaining to administration of licenses or employment or academic examinations; except that written promotional examinations and the scores or results thereof shall be available for inspection, but not copying or reproduction, by the person in interest after the conducting and grading of any such examination;

(iii) The specific details of bona fide research projects being conducted by an institution of the State or a political subdivision, except that the name, title, expenditures, and the time when the final project summary shall be available;

(iv) The contents of real estate appraisals made for the State or a political subdivision thereof, relative to the acquisition of property or any interest in property for public use, until such time as title of the property or property

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interest has passed to the State or political subdivision, except that the contents of such appraisal shall be available to the owner of the property at any time, and except as provided by statute.

(b) Interagency or intraagency memorandums or letters which would not be available by law to a private party in litigation with the agency.

(c) The custodian shall deny the right of inspection of the following records or any portion thereof, unless otherwise provided by law:

(i) Medical, psychological, and sociological data on individual persons, exclusive of coroners' autopsy reports;

(ii) Adoption records or welfare records on individual persons;

(iii) Personnel files except that such files shall be available to the person in interest, and the duly elected and appointed officials who supervise the work of the person in interest. Applications, performance ratings and scholastic achievement data shall be available only to the person in interest and to the duly elected and appointed officials who supervise his work;

(iv) Letters of reference;

(v) Trade secrets, information privileged by law, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person;

(vi) Library, archives, and museum material contributed by private persons, to the extent of any limitations placed thereon as conditions of such contribution;

(vii) Hospital records relating to medical administration, medical staff, personnel, medical care, and other medical information, whether on individual persons or groups, or whether of a general or specific classification;

(viii) School district records containing information relating to the biography, family, physiology, religion, academic achievement, and physical or mental ability of any student except to the person in interest or to the officials duly elected and appointed to supervise him; and

(ix) Circulation records maintained by public libraries showing personal transactions by those borrowing from them.

(d) Whenever the custodian denies a written request for access to any public record or any portion thereof under this section, the custodian shall provide the applicant with a written statement of the grounds for the denial, which statement shall cite the law or regulation under which access is denied and all remedies for review of this denial available under this article. The statement shall be furnished to the applicant within ten working days of denial. In addition, any reasonably severable portion of a record shall be provided to any person requesting such record after deletion of those portions which may be withheld from disclosure.

(e) If, in the opinion of the official custodian of any public record which is otherwise required to be disclosed under this article, disclosure of the contents of said record would do substantial injury to the public interest, the official custodian may temporarily deny disclosure pending a court determination of whether disclosure would do substantial injury to the public interest provided that, within ten working days of the denial the official custodian applies to the circuit court of the county where the record is located or where he maintains his principal office for an order permitting him to continue to deny or restrict such

disclosure. The failure of the official custodian to apply for a court determination following a temporary denial of inspection will result in his becoming subject to the sanctions provided in this article for failure to disclose authorized public records required to be disclosed. After hearing, the court may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. The person seeking permission to examine the record shall have notice of the application sent to the circuit court served upon him in the manner provided for service of process by the Maryland Rules of Procedure and shall have the right to appear and be heard. (1970, ch. 698; 1971, chs. 421, 611; 1972, ch. 24; 1974, ch. 216; ch. 683, § 5; 1978, ch. 1006.)

**Effect of amendments.**

The 1978 amendment, effective July 1, 1978, in subsection (a), deleted "or" at the end of paragraph (ii), added "or" at the end of paragraph (iii) and added paragraph (iv), in subsection (b), inserted "or appropriate portions thereof" and substituted "if" for "on the ground that" and a colon for a semicolon in the introductory paragraph, rewrote paragraph (i), substituted "licenses or" for "a licensing examination, for" and "examinations" for "examination" in paragraph (ii) and substituted "an" for "a State" and added "of the State or a political subdivision, except that the name, title, expenditures, and the time when the final project summary shall be available" in paragraph (iii), in subsection (c), inserted "or any portion thereof" in the introductory paragraph and "person in interest, and the" in paragraph (iii), substituted "information privileged by law" for "privileged information" in paragraph (v), deleted "and" at the end of paragraph (vi) and added "and" at the end of paragraph (viii), rewrote subsection (d), deleted former subsection (e) and redesignated former subsection (f) as present subsection (e) and rewrote that subsection.

**General right of inspection under subsection (a) of this section is not limited to a "person aggrieved" or "person in interest."** Superintendent, Md. State Police v. Henschen, 279 Md. 468, 369 A.2d 558 (1977).

**Due process considerations regarding availability of document.** — A particular document may not be available to "any person" under this section in light of the exceptions, but procedural due process requirements may yet make that same document available to a party, or unavailable for use against a party, in an administrative or judicial proceeding. Superintendent, Md. State Police v. Henschen, 279 Md. 468, 369 A.2d 558 (1977).

**Exemptions in this section do not create privileges for purposes of discovery.** Boyd v. Gullett, 64 F.R.D. 169 (D. Md. 1974).

**Purposes of investigatory records in subsection (b) (i) distinguished.** — The language of subsection (b) (i) of this section, and particularly the use of the word "other" before "law-enforcement," suggests that the legislature believed that investigatory records of one of the enumerated law-enforcement agencies were presumptively for law-enforcement or prosecution purposes, but that investigatory records compiled by other agencies might or might not be for such purposes. Superintendent, Md. State Police v. Henschen, 279 Md. 468, 369 A.2d 558 (1977).

**Showing regarding investigatory records making exception applicable.** — When the documents in question constitute records of an investigation by a police department, sheriff's office or any of the other law-enforcement agencies specifically listed in subsection (b) (i) of this section, there need not be an actual showing that the records were compiled for law-enforcement or prosecution purposes for the exception to be applicable. Superintendent, Md. State Police v. Henschen, 279 Md. 468, 369 A.2d 558 (1977).

**Inspection by Legislative Auditor of personnel files.** — If the Legislative Auditor requires access to personnel files in order to effectively perform the duties imposed upon him by article 40, §§ 61B and 61D, he is entitled to knowledge of their contents in view of the mandate of subsection (c) of this section that the custodian of personnel records shall not deny access to them when their inspection is otherwise provided by law. 60 Op. Att'y Gen. 554 (1975).

**Where an employee of the Department of Health and Mental Hygiene has filed a claim for workmen's compensation with the State Accident Fund,** it would not be a violation of the provisions of this article by providing its investigators with access to information concerning the claimant, or otherwise pertinent to the claim, contained in the Department's personnel files. 60 Op. Att'y Gen. 559 (1975).

**Dissemination of degree and credit information on teachers in specific school systems** is not authorized by the Maryland Public Information Act. 60 Op. Att'y Gen. 600 (1975).

a majority of the members of the Charter Revision Commission
Council annually, but ~~most commission members considered it desirable~~ expressed the opinion that, although the practice should not be prohibited, it should ~~that this practice not be continued~~. not be continued.

Section 109 - Sessions

Insert D → This section requires that all sessions at which business is transacted, appointments made, and nominations confirmed be public. The present charter provides in Article II, Section 5a that legislative sessions of the County Council be open to the public. In Article III, Section 2 of the present charter, executive sessions are allowed to be open or closed to the public as the Council may determine.

Insert E → 111
Section ~~110~~ - Enactment of Legislation

This section introduces a distinction between emergency legislation and other legislation. As stated in Sections ~~111~~, ~~112~~ and 112, 113 and 115 of the proposed charter the enactment of emergency legislation has the following three consequences:

(1) Such legislation takes effect on the date on which it becomes law. ~~is signed or the date on which a veto is overridden rather than forty-five (45) days following such date.~~ Insert F

(2) It is not required that a summary of such legislation be published prior to its becoming effective. Rather, the summary must be published promptly after the effective date.

(3) If emergency legislation is petitioned to referendum, it remains in force pending the referendum and until thirty ~~(30)~~ days thereafter if rejected by the voters.

Legislation is treated as emergency legislation if it is adopted by the Council with the affirmative vote of five ~~(5)~~ members of the Council and if it contains a declaration of emergency and a section

Insert D

This section designates the first three Tuesdays of each month as days when legislation may be enacted. The present charter in Article II, Section 3 designates the period from the 5th day of January through the 3rd day of February as the regular session for enactment of legislation. The provision for legislative sessions throughout the year is intended to allow a more orderly consideration of legislation as the need arises. Under both the present charter and the proposed revision, additional days for enactment of legislation may be designated, but, because of a limitation in the State Constitution, in no event may the Council sit for more than forty-five days in each year for the purpose of enacting legislation.

Hearings upon proposed legislation and other preparation for enactment would be allowed on days other than those designated for the enactment of legislation. Also in non-legislative sessions, the Council would be able to adopt rules and regulations implementing existing legislation.

Insert E

Section 110 - Exercise of Zoning, Planning & Other Powers

As stated, this section provides that in the exercise of powers authorized by any act of the General Assembly or the Constitution of Maryland, other than the lawmaking power vested in it by Article XI-A of the Constitution and the grant of express powers in Article 25A, Annotated Code of Maryland, 1957, the Council shall follow the procedure set forth in such law or section of the Constitution.

The section also provides that zoning, planning and subdividing actions of the Council shall be exempt from veto by the County Executive.