

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

PUBLIC INFORMATION ACT—DISCLOSURE PRINCIPLES—LICENSING RECORDS—INVESTIGATORY RECORDS—COMPLAINTS ABOUT MORTGAGE BANKERS AND MORTGAGE BROKERS ARE AVAILABLE TO THE PUBLIC.

September 9, 1986

Margie H. Muller
Bank Commissioner

You have requested advice concerning the status of complaints under the Maryland Public Information Act ("PIA" or "Act"), codified at §§10-611 through 10-628 of the State Government Article ("SG" Article). Specifically, you have asked if the number of complaints filed with your office against a company licensed as a mortgage banker and mortgage broker (under Title 12, Subtitle 5 of the Financial Institutions Article ("FI" Article)) may be disclosed under the PIA.

For the reasons stated below, we conclude that such information is available to the public under the Act. We have attached to our advice a sample format for releasing this information to insure that any disclosure is accomplished in a meaningful and fair manner.

I

Factual Background

On August 8, 1986, the Baltimore *Sun* published an article concerning the large number of complaints lodged against mortgage licensees for failing to meet the terms of lending commitments given to borrowers in purchase money and refinancing mortgage transactions.¹ This article prompted a real estate brokerage firm to file a written request for the following information:

"Therefore, we request that your office provide us, by name and number of complaints, those mortgage companies referenced in the enclosed article, plus any other banking consumer oriented information available to you

¹ The headline stated that "Md. bank regulator says lenders "drag their feet" on mortgages."

related to these mortgage companies." Letter dated August 12, 1986, from Merrill Lynch Realty to Bank Commissioner.

The requester concluded by asserting that realtors "have an obligation to disclose to our consumers any mortgage banking information which might adversely affect them and our clients." *Id.*

A review of the procedures established by your office and the Department of Licensing and Regulation reveals two separate sources that contain the information requested.

Chapter 302 of the Acts of 1984 legislated a complaint procedure for the Mortgage Bankers and Mortgage Brokers Subtitle. Codified at FI 512-507.1, this enactment imposes the following duty on the Bank Commissioner:

"Any person aggrieved by the conduct of a licensee under [the Mortgage Bankers and Mortgage Brokers] Subtitle in connection with a consumer loan may file a written complaint with the Bank Commissioner who shall investigate the complaint." FI 512-507.1(a).

Under this section, the Bank Commissioner is given specific authority to investigate for violations of the Mortgage Bankers and Mortgage Brokers Subtitle and its Code of Conduct (COMAR 09.03.05). FI 512-507.1(b). Incidental powers of enforcement, including the authority to subpoena witnesses and compel the production of documents, are also provided. FI 512-507.1(e).

You have advised that upon receipt of a written complaint a file is opened and a copy of the complaint is forwarded to the licensee for a response. Complaints that cannot be resolved are placed under active investigation, a process that routinely results in obtaining a copy of the complainant's complete loan file from the licensee. The file may also contain the results of an independent investigation or analysis by examiners. If appropriate, this file becomes the basis for preparing a formal administrative proceeding against the licensee.

Departmental procedures could also provide another source of this information. Chapter 6 of the Acts of 1980 required all units of the Executive Branch to adopt procedures for handling complaints from members of the public.² The Department received ap-

²Units were required to file a Citizen Response Plan with the Administrative, Executive and Legislative Review Committee for approval. The General Revisor's Note

proval of its Citizen Response Plan as required by Chapter 6 on December 18, 1980. The portion of the Plan dealing with written complaints provides as follows:

"All written communications requiring a response should be recorded in a log or record indicating the date of receipt, the name of the correspondent, and the date of completion, unless, in the opinion of the unit head, the maintenance of such a log or record would impose an extraordinary burden."

Past experience with these logs has demonstrated that the identity of the particular licensee subject to the complaint is routinely recorded because this licensee status often provides the basis for retrieving these complaints.

II

PIA—Right to Disclosure

A. General Principles

Our office has recently reiterated the philosophy embodied by the PIA. In addressing the disclosure of recorded calls to 911 Emergency Telephone System centers, we advised that in light of the Act's "broad scope", documents subject to the PIA "must be made available to anyone who requests them" unless the documents "are specifically exempted from the PIA's disclosure requirements". 71 *Opinions of the Attorney General* 288, 290 (1986). We further noted in this Opinion that "[t]hose exceptions should, as a general matter, be construed narrowly, to promote public access to information about governmental activities". *Id.* Required disclosure is not, under the PIA, inhibited by the intended use of the information by the applicant. See 61 *Opinions of the Attorney General* 702, 705 (1976), concluding that a clerk of court may not deny access to marriage records, regardless of their intended use by the person seeking inspection.

These principles favoring public disclosure are mandated by the plain language of the statute. SG 510-612(a) specifies that the purpose of the Act is to afford the public a general right of "access

to Title 2 of the SG Article explains that this Act, formerly codified in Article 41, §14-1, was "deleted as obsolete since the units that were subject to this section have complied."

to information about the affairs of government and the official acts of public officials and employees." To that end, the PIA requires that, "[e]xcept as otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time." SG §10-613(a).³

At the same time, the PIA recognizes that the public's right to information is counterbalanced by the right to privacy of a person who is the subject of governmental records. While SG §10-612(b) provides that the PIA "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," this rule of construction is qualified by a determination that the inspection would not result in "an unwarranted invasion of the privacy of a person in interest."⁴

B. *Unwarranted Invasion of Privacy*

We have concluded as a threshold inquiry that the disclosure sought in this request does not subject the licensee to the unwarranted invasion of privacy sought to be prevented by the PIA. Separate considerations—statutory and practical—support this conclusion.

In distinct instances, the General Assembly has made known its firm determination that agencies of State government respond to complaints from members of the public. Chapter 6, enacted in 1980 by overriding the Governor's 1979 veto, required all executive units to formulate and submit for approval by a joint legislative committee a Citizen Response Plan. In 1984, the General Assembly specifically directed the Bank Commissioner to investigate all written complaints concerning Mortgage Bankers and Mortgage Brokers by enacting Chapter 302. These requirements for the creation and maintenance of public records were imposed by the General Assembly within an existing, well-established legal framework that favored public disclosure.

³There can be little debate that the sources of information used in responding to this request constitute "public records." SG §10-611(f)(1)(g) defines "public record" as 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."

⁴"Person in interest" is defined as "a person or governmental unit that is the subject of a public record . . ." SG §10-611(e)(1). "'Person' means an individual . . . and an ownership, firm, association, corporation, or other entity." SG §1-101(d).

The philosophical underpinnings for public access to information on an agency's response to consumer complaints were recently stated in the context of public disclosure of governmental response in a case of alleged child abuse:

"Thus, we believe that the pertinent statutes and regulations can and should be construed to permit the fullest possible disclosure regarding agency performance, consistent with the legally mandated preservation of personal privacy. 71 *Opinions of the Attorney General* 368 (1986)

The alternative to this approach "would accomplish nothing more than to deny public access to information concerning the quality of agency performance". *Id.*, p.375.

We find these considerations equally applicable to your inquiry. The public has a right to evaluate the performance of the Bank Commissioner in responding to systemic problems within the mortgage lending industry. Overall statistics do not provide sufficient information to make an informed evaluation. By disclosing the identity of the licensee and the complaint history of that licensee, the public is able to assess the effectiveness of your office within a specific context. If this assessment demonstrates a failure in a specific instance or an uneven treatment among licensees, such a result provides the legitimate basis for further public inquiry into the performance of its government. This type of inquiry can be easily thwarted by simply releasing cumulative numbers.

Our conclusion on the invasion-of-privacy issue is equally compelled by the current Departmental practice of disclosing pending complaints against licensees holding individual license from boards and commissions within Licensing and Regulation.⁵ Under COMAR 09.01.04.13, a person who has entered or contemplates entering a contract with an individual licensee may contact the licensing agency and discover the total number of complaints filed against the licensee, the number of complaints (closed as well as pending), and the nature of any formal disciplinary action taken against the licensee. When proposing this regulation, the Department explained the balancing process between the right to access

⁵The current practice of licensure under the Mortgage Bankers and Mortgage Brokers Subtitle permits the issuance of a license to a corporation or other business entity. We understand that all pending complaints are against such license holders. The legal effect under the PIA of this kind of licensure—as opposed to the licensing of individuals—is discussed in Part II D of this opinion.

of information by the public and the privacy rights of individual licensees as follows:

"These proposed amendments grow out of extenuating circumstances identified by the Department after nearly 2 years of administering requests under [the PLA]. In each instance, the proposed change allows disclosure of information concerning one of the basic responsibilities of the Department to the public. As amended, Regulation .13 insures that the public will be better informed in selecting the services of a licensee" 11 *Md.R.* 1748 (September 28, 1984).

In our view, there is no principle—either within the PLA or the realm of common sense—that would provide a corporate or company licensee with greater privacy rights than the rights afforded an individual licensee.⁶

C. *Privileged or Confidential Records*

Public records must be withheld from disclosure to the extent that (i) the information they contain is made "privileged or confidential" by law, or (ii) inspection of a particular record would be contrary to State or federal law. SG §10-615. Information concerning "banking institutions" obtained by the Bank Commissioner is generally deemed to be confidential under FI §5-209. "Banking institution" is defined, however, as "an institution that is incorporated under the laws of this State as a State bank, trust company, or savings bank." Accordingly, this section imposes no privilege or confidentiality on the records of mortgage licensees sought to be disclosed.

D. *Licensing Records—SG §10-617(h)*

Licensing records constitute the great majority of records maintained by the Department, and disclosure of information contained in these records is generally governed under SG §10-617(h). Stated

⁶We caution, however, that our resolution of this issue should not be expanded beyond the context of the relatively narrow pending request. Complete disclosure of all documents generated by the complaint process would be governed by other considerations. For example, complaints may contain personal financial information that would be protected from disclosure under SG §10-617(F). Responses from licensees could likewise contain confidential commercial or financial information under SG §10-617(7) and (3).

in terms of a general prohibition against public inspection, SG §10-617(h)(2) contains a laundry list of exceptions to the otherwise mandatory duty not to disclose. Pertinent to this inquiry is the permitted disclosure in SG §10-617(h)(2)(v) of "any orders and findings that result from formal disciplinary actions." By implication, any form of disciplinary action that has not culminated in a formal order or finding by the agency cannot be disclosed unless authorized by regulation after the custodian has found a compelling public purpose. SG §10-617(h)(3). As we have previously discussed, COMAR 09.01.04.13 permits expanded discovery under SG §10-617(h) if the requester has entered or contemplates entering into a contract with a licensee.

The request considered in this advice does not on its face meet the standards set forth in Regulation .13. Accordingly, if SG §10-617(h) and its implementing regulations control the resolution of your request, the applicant must further allege a present or future contractual relationship. For the reasons stated below, we conclude that this section does not apply to requests for information from Departmental records unless the records are for individual licensees. The applicant need not, therefore, proffer any existing or contemplated contractual relationship to receive complaint information on licensed mortgage companies.

The predecessor section to SG §10-617(h) was enacted by Chapter 431 of the Acts of 1982. It governed the disclosure of "occupational and professional licensing records on *individual persons* ..." (emphasis added) Former Article 76A, §3(c)(xii). This section was revised in 1984 to its present formulation in SG §10-617(h)(1) as follows: "A custodian shall deny inspection in SG §10-617(h)(1) as follows: "A custodian shall deny inspection of the part of a public record that contains information about the *licensing of an individual* in an occupation or profession." (Emphasis added.) In either format, we consider the inclusion of the term "individual" to express a deliberate legislative determination that the privacy rights granted to licensees under this section were only intended to be enjoyed by individuals—not business entities.

The enumerated exceptions to the general prohibition stated in SG §10-617(h)(1) support this reading of legislative intent. Almost all the categories listed in SG §10-617(h)(2) describe circumstances that are peculiar to individual licensees. Some examples are as follows: the permitted disclosure of a home address if the business address is not available (SG §10-617(h)(2)(ii)); the educational and occupational background of the licensee (SG §10-617(h)(2)(iv)); and the professional qualifications of the licensee (SG §10-617(h)(2)(v)).

Further support for limiting the purview of SG §10-617(h) to individual licensees is contained in its legislative history. This section was proposed as part of an overall legislative reform of the PLA by the Governor's Information Practices Commission. Appointed in 1980 by Executive Order 01.01.1980.11, this Commission surveyed the record-keeping functions and procedures of the major units of State government, specifically including the divisions within the Department of Licensing and Regulation. See Final Report of the Commission 201—46 (1982). Although the Commission was well aware that different entities were subject to licensing by agencies within the Department, it nevertheless chose to propose legislation—enacted by Chapter 431 with some amendment—that limited the scope of former Article 76A, §3(c)(xii) (presently codified at SG §10-617(h)) to an individual licensee.⁷ The nature of this limitation as a deliberate policy consideration is reflected in the Commission's explanation of the privacy interest to be protected by its proposal:

"The Commission does not believe that the release of other personally identifiable information pertinent to licensees would serve the public interest. Instead, disclosure of other information would constitute an unreasonable invasion of the privacy rights of licensees. In order to assess the competency of licensees, the public does not need to know licensee's race, social security number, place of birth, and so forth." Final Report of the Commission, p. 537.

We recognize as a conceptual matter that, in the area of disciplinary action, the policy considerations for complementary treatment of individual licensees and licensed business entities may be equally applicable.⁸ The present structure of the PLA—and particularly SG §10-617(h)—does not permit this result through the office of statutory interpretation. Legislative amendment would, therefore, be appropriate and necessary to accomplish this goal.

⁷Amendments to this section evidenced an intent to provide greater protections for subject licenses against disclosure. As originally proposed, "nonpending complaints" constituted a category of exceptions to the general prohibition against disclosure. This category was stricken by amendment, and the current "orders and findings that result from formal disciplinary actions" was substituted. See Chapter 431 of the Laws of Maryland 1982.

⁸As we have previously discussed in this opinion the only inequity presented by our advice is the release of the requested information without the necessity of alleging an existing or contemplated contractual relationship.

E. *Records of Investigation—SG §10-618*

1. *Introduction*

In addition to the provisions of SG §10-617(h) that prevent disclosure of individual licensing records except under specified circumstances, the PLA also permits a custodian discretion in denying inspection of particular parts of certain designated records if inspection by the applicant "would be contrary to the public interest." SG §10-618(a). Included within the records specified in the discretionary provisions of SG §10-618(a) is "an investigatory file compiled for any other law enforcement ... purpose." SG §10-618(f)(1)(ii). Where files are prepared in connection with government litigation and adjudicative proceedings are currently underway or contemplated, they are compiled for a "law enforcement purpose." *Equitable Trust Co. v. State Human Relations Comm'n*, 42 Md. App. 53, *rev'd on other grounds* 287 Md. 80 (1980); Attorney General's Office, *Public Information Act Manual* 27 (4th ed. 1985).

As detailed below, we conclude that a log maintained in compliance with the Citizen Response Plan is not an "investigatory file" under the provisions of SG §10-618(f)(1)(ii). Files containing the details of an investigation into a complaint would, of course, fall squarely within this provision.

2. *Citizen Response Plan Log*

Ideally, a log maintained under the Citizen Response Plan for written complaints would contain the following information: the date the complaint was received, the name of the complainant, the licensee subject to the complaint, the date of the agency response, and the status of the complaint (under consideration or closed). Such a log would not, in our view, constitute an investigatory file under SG §10-618(f)(1)(ii).

In 63 *Opinions of the Attorney General* 543 (1978), this office concluded that "arrest logs" (containing the date, suspect's name, address, age, race, arresting officer, desk officer, charge and case number) were not "investigatory files" within the meaning of the PLA. The opinion noted at 547:

"These 'arrest logs' merely reflect the end result of a po-

lice investigation. They contain no information whatever concerning the actual investigation."⁹

In addition to lacking fruits of an investigation, a response log is not prepared for a "law enforcement purpose". Indeed, its entire function is to comply with a departmentally-imposed plan of tracking agency responses to citizen complaints.

3. *Investigatory Files*

The files that contain the details of an investigated complaint for the purpose of determining the appropriateness of administrative charges are clearly governed by SG §10-618(F)(1)(ii). The rules for applying these provisions to "investigatory files" were recently stated in the opinion on the 911 Emergency Telephone System as follows:

"However, the conclusion that 911 calls for police assistance are an 'investigatory file compiled for [a] law enforcement purpose' does not by itself mean that the recordings may be withheld ... Moreover, any other person is entitled to access unless the custodian has reason to conclude that inspection of the record 'would be contrary to the public interest.' SG §10-618(a). In considering 'the public interest,' the custodian should also take account of the harms specified in SG §10-618(F)(2). [citation omitted]. In particular, the custodian should consider whether the information on the recording is such that disclosure would 'constitute an unwarranted invasion of personal privacy.'" *71 Opinions of the Attorney General* at 295 (1986).

We have previously analyzed the issue of an unwarranted invasion of privacy raised by this PIA request in Part II B. Furthermore, a consideration of the factors enumerated in SG §10-618(F)(2), as suggested in our opinion and the *Public Information Act Manual*, does not produce a conflict with the principles of the PIA favoring public disclosure.¹⁰ Accordingly, we cannot identify

⁹The conclusion was not, however, categorical. The opinion further stated: "[w]e caution, however, that should such records contain such investigatory material, they may very well be subject to" the PIA. *Id.* We likewise add the same qualifier concerning the response log.

¹⁰Under SG §10-618(a), a custodian may conclude that disclosure was contrary to the "public interest" if it produced one of the enumerated harms in SG §10-618(F)(2). The harms include: interference with a law enforcement proceeding; deprivation

a governing principle under the PIA that would preclude disclosure of the information sought in this request.¹¹

III

Conclusion

In summary, we conclude that the PIA authorizes the disclosure of the number of complaints against specific companies licensed as Mortgage Bankers and Mortgage Brokers, the number of complaints that are still open, the number of complaints that have been closed, and the nature of any formal administrative action. We have included a proposed format to convey this information in a balanced manner.

STEPHEN H. SACHS
Attorney General

ROBERT DEY. FRIERSON
Assistant Attorney General

JACK SCHWARTZ
Chief Counsel
Opinions and Advice

Editor's Note: The preceding opinion was originally issued as a letter of advice. The *Public Information Act Manual* referred to in the opinion was reissued in 1987 in a revised edition.

¹¹of an impractical adjudication; disclosure of a confidential source or investigative technique; prejudice to an investigation; and endangering the life or physical safety of an individual. We find none of these results would inure if the proposed disclosure were made.

¹¹A custodian is not required to find one of the harms specified in SG §10-618(F)(2) before the custodian can conclude that disclosure is contrary to the "public interest". *64 Opinions of the Attorney General* 236 (1979). However, having concluded that disclosure would not constitute an unwarranted invasion of privacy, we are unable to identify any additional "public interest" considerations in the mortgage lending field that would result in a denial of this request.

COMPLAINT INFORMATION FOR CALENDAR YEAR 1988

TO: [name of requester]
 RE: [name of licensee]
 DATE: [date of response]

You have requested complaint information on the above-referenced company currently licensed as a [type of license] by this office. Under the Maryland Public Information Act, you are entitled to receive the information contained in this response.

When considering this information, you should recognize that raw statistics may not provide definitive information and, at times, may distort the public's experience with a particular licensee. For example, licensees engaging in extensive business activities run a higher risk of accumulating a greater number of complaints than a licensee with modest business activities. As with any business decision, you should thoroughly consider all aspects of a transaction before engaging the services of a licensee.

To assist you in evaluating the numbers below, the following is an explanation of the various categories:

- (1) "Total complaints" include the total number of written complaints received that comment adversely on the performance of the licensee. This category does not mean the number of complaints where it has been determined that the licensee has violated the law.
- (2) "Open complaints" include complaints that have not been resolved by the licensee or dismissed by this agency as failing to allege a violation of the law. Complaints in this category are under investigation by this agency.
- (3) "Closed complaints" include complaints that have been resolved by the licensee or complaints that this agency has determined do not constitute a violation of the law.
- (4) "Pending charges" include formal administrative charges that have been instituted by this agency for *alleged* violations of the law. Any licensee so charged has the right to a hearing before an impartial decision-maker with the State having the burden of proving its charges.
- (5) "Disciplinary action" includes the result of any order or findings that result from formal disciplinary action.

Total complaints.....[number]

Open complaints.....[number]
 Closed complaints.....[number]
 Pending charges.....[charges filed and brief description]
 Disciplinary action....[whether licensee has been subject to a reprimand, suspension, revocation, or fine]

PREPARER _____