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August 8, 1985

Leon Johnson, Chairman
Governor's Commission on Migratory and
Seasonal Labor
1123 North Eutaw Street, Suite 310
Baltimore, Maryland 21201

Dear Mr. Johnson:

The Commission has asked for advice concerning the application of Maryland's Public Information Act to a proposal that the Commission has under consideration. As I understand the proposal, the Commission would authorize the taking of a census of all migrant workers in the State. The Commission would hire census takers who, on a single evening, would go to migrant camps and other locations where migrant workers would likely be found and request information from each migrant worker. I understand that the proposal contemplates conducting one census on the Eastern Shore in the summer during the height of the Shore's harvest, and sometime later in the fall on the Western Shore. Each migrant would be asked a series of questions designed to reveal the following information: name, home base state, current county and camp resident, sex, age, race, and relationship to the head of the household.

The information would be compiled by the Commission and provided to the Governor, the Legislature, and other interested persons without reference to the names of the individual

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migrants. For instance, the final tabulation would have details such as total number of migrants, total number under the age of two, total females, total males, total number with the home base state of Florida, number with the home base state of Texas, and the like. The only purpose, as I understand it, of asking for individuals' names is to make sure that the census is an unduplicated one. For example, the proposal contemplates asking those found at camps about family members who are not then present. Similarly, migrants found at evening educational programs will be asked about their family members. Without asking for names, it may be impossible to eliminate dual responses.

Several Commission members have raised concerns about whether the migrants' privacy can be protected by refusing to disclose to anyone the names collected by the census takers. For the reasons set forth below, I believe that the Commission may deny inspection of these names.

The first step in the analysis is to determine whether the data collected by the census takers would be public records within the meaning of the Maryland Public Information Act. Section 10-611(f) provides in relevant part that a "[p]ublic record" means the original or any copy of any documentary material that: (a) is made by a unit or instrumentality of the State government . . . in connection with the transaction of public business; and (ii) is in any form" Because the Commission on Migratory and Seasonal Farm Labor is an instrumentality of State government, created by Executive Order of the Governor of this State, the information collected by the census takers constitutes a public record within the meaning of Maryland's Public Information Act. As you know, the Act provides generally that all persons are entitled to inspect "any public record at any reasonable time." See §10-613 of State Government Article.

The Act provides, however, that a custodian of records shall deny inspection in certain circumstances. See §§10-615 and 10-616. I have reviewed these sections on mandatory denials of inspection and have concluded that none apply to the proposal before the Commission. In addition, §10-617 provides that a custodian of public records shall deny inspection of a part of a public record that contains medical and psychological information, sociological information, commercial information, and financial information and other information not pertinent to this inquiry. A review of the proposal suggests that some of the information -- for instance, the question on relationship to head of household -- could be considered to be sociological information and, thus, non-disclosable. However, in order for a custodian to deny inspection of a part of a record on this basis, the custodian must have adopted rules or regulations that define sociological information for the purposes of the subsection.

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Inasmuch as the Commission has not adopted such a rule or regulation, this exemption also is not available to the Commission.

Thus, I have concluded that none of the mandatory exemptions apply to your proposal. In contrast, I have concluded that the Commission may deny access under one of the "permissible denials".

Section 10-618 of the State Government Article sets forth under what circumstances a custodian may deny access to public records. In order to come under this exemption from disclosure, the custodian must believe "that inspection of part of a public record . . . would be contrary to the public interest" and be of the category of information listed in that subsection. One of the categories relates to research projects. That section, §10-618(d), provides in relevant part that the "custodian may deny inspection of a public record that contains specific details of a research project that an institution of the State . . . is conducting." Thus, in order for the Commission to deny inspection of the data collected by the census takers, the Commission would have to determine that (1) inspection of the data "would be contrary to the public interest"; and (2) the data is "specific details of a research project". In my view, the proposal before the Commission can be categorized as a research project. Therefore, the issue becomes "is inspection of the data contrary to the public interest".

Although there is no readily identifiable touchstone to determine this issue under Maryland law, there is a good analog in federal law, that is, the census laws. The laws relating to the federal census are set forth in 13 U.S.C.A. §1 et seq. Sections 8 and 9 of that law make confidential the information individuals provide the census takers. Specifically, §8 provides that the Secretary of Commerce may make data available for "genealogical and other proper purposes" and may "furnish transcripts or copies of tables and other census reports and make special statistical computations and surveys"; however, "[i]n no case shall information furnished under the authority of this section be used to the detriment of persons to whom such information relates." Section 9(a) sets forth the clear prohibition against disclosure and provides as follows:

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title--

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

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(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

It is evident from the adoption of §§8 and 9 that the United States Congress thought it an important public policy to protect from disclosure information concerning individuals who responded to the census takers. There would appear to be a two-fold reason: (1) protecting the privacy of the individual respondent; and (2) further insuring the accuracy of the data obtained. Undoubtedly, it would be reasonable for the Commission to conclude that the same or similar public policy reasons should preclude it from releasing data on individual migrants.

In sum, I have concluded that the Commission could deny access to information revealing individual migrants' names on the basis of the permissible denial for research projects provided in §10-618 of the State Government Article.

If the Commission were to get a request from a newspaper reporter, another State agency, or any other applicant to inspect the data, the Commission could deny inspection on the basis that the records are research records. However, the statistical computation and tables compiled from the raw data would be public information.

Although I am fairly confident that the Commission could successfully defend its action on this basis, the individual or entity denied access would have the right to seek judicial review of the Commission's action. See §10-263 of the State Government Article. In addition, it is much less certain that the Commission could successfully move to quash a subpoena issued for these records. For instance, if the Commission were to receive a subpoena issued by a federal district court upon the request of Immigration and Naturalization Service for these records in a pending case, the Commission could request the Office of the Attorney General to move to quash the subpoena. A motion to quash could be filed and arguments made as to why the records should not be disclosed. However, inasmuch as they are not confidential by law and no State law specifically precludes disclosure, I cannot say with confidence that the subpoena would be quashed.

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Thus, the Commission could not, in my view, represent to those being questioned by the census takers that the information they are providing would never be provided to anyone. However, that possibility could be significantly minimized, if the Commission were to destroy the raw data as soon as the process of eliminating duplicated responses was completed. For instance, if the census takers took this information on a single sheet, the names of those responding could be placed in the left hand column. Once the sheets had been compared and the duplications eliminated, the left hand column could be cut off from the rest of the data and be destroyed. Thereafter, all the other necessary tabulations could be made.

I trust this has been responsive to the Commission's inquiry. Please do not hesitate to contact me if you have any further questions concerning this matter.

Very truly yours,

Catherine M. Shultz
Catherine M. Shultz
Assistant Attorney General

CMS/jhh